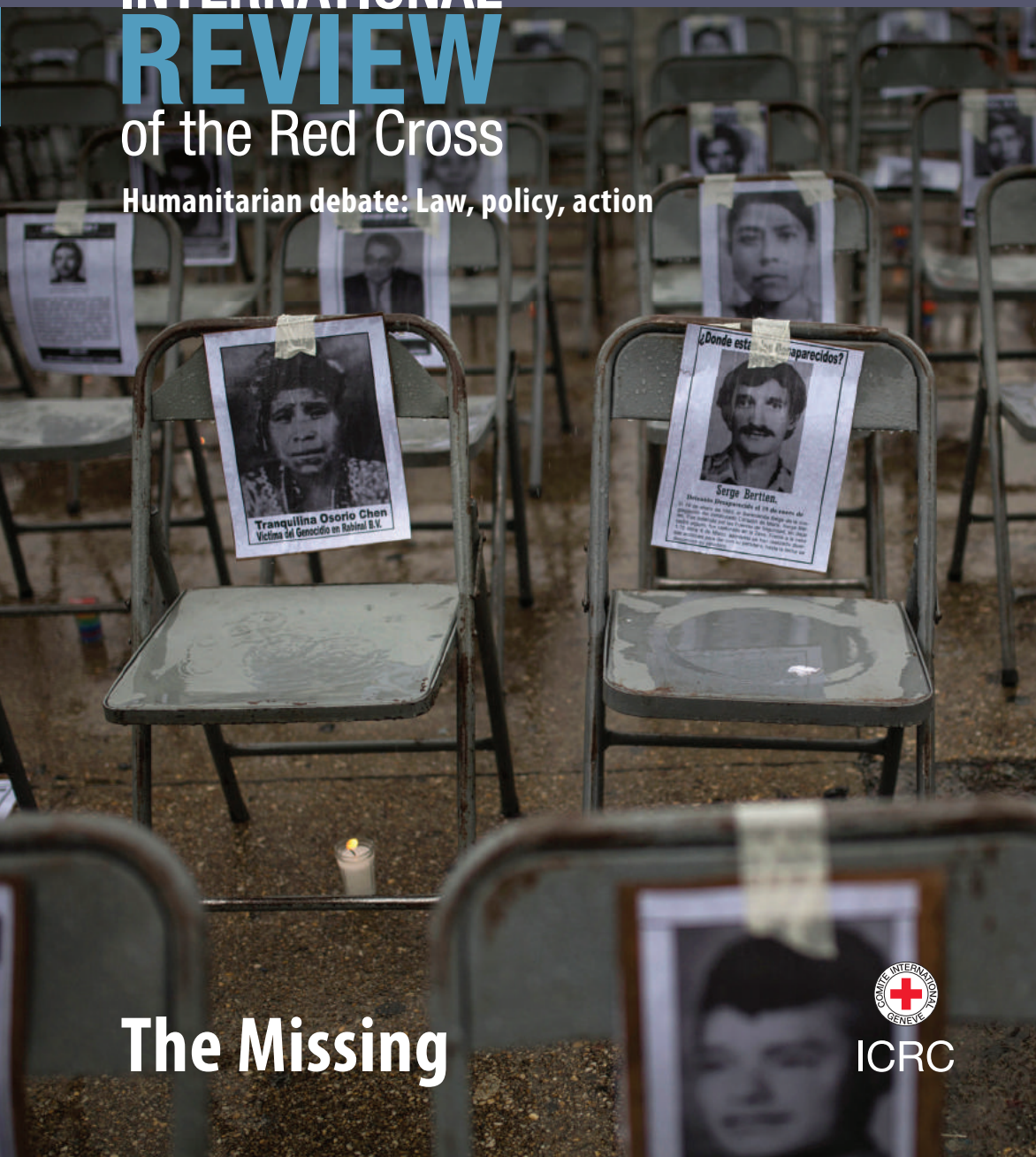


# INTERNATIONAL REVIEW

of the Red Cross

Humanitarian debate: Law, policy, action



Tranquilina Osorio Chen  
Víctima del Genocidio en Rabinal B.V.

¿Dónde está? ¿Dónde aparecidos?

Serge Bertien.

# The Missing



ICRC

### Aim and scope

Established in 1869, the *International Review of the Red Cross* is a peer-reviewed journal published by the ICRC and Cambridge University Press. Its aim is to promote reflection on humanitarian law, policy and action in armed conflict and other situations of collective armed violence. A specialized journal in humanitarian law, it endeavours to promote knowledge, critical analysis and development of the law, and contribute to the prevention of violations of rules protecting fundamental rights and values. The *Review* offers a forum for discussion on contemporary humanitarian action as well as analysis of the causes and characteristics of conflicts so as to give a clearer insight into the humanitarian problems they generate. Finally, the *Review* informs its readership on questions pertaining to the International Red Cross and Red Crescent Movement and in particular on the activities and policies of the ICRC.

### International Committee of the Red Cross

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and other situations of violence and to provide them with assistance. It directs and coordinates the international activities conducted by the International Red Cross and Red Crescent Movement in armed conflict and other situations of violence. It also endeavours to prevent suffering by promoting and strengthening international humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the Movement.

### Members of the Committee

President: Peter Maurer

Vice-President: Christine Beerli

Mauro Arrigoni  
Hugo Bänziger  
François Bugnion  
Gilles Carbonnier  
Jacques Chapuis  
Melchior de Muralto  
Maya Hertig Randall  
Alexis Keller  
Jürg Kesselring

Thierry Lombard  
Laura Sadis  
Doris Schopper  
Rolf Soiron  
Béatrice Speiser  
Bruno Staffelbach  
Heidi Tagliavini  
Barbara Wildhaber

### Editorial Team

Editor-in-Chief: Vincent Bernard  
Managing Editor: Ellen Policinski  
Thematic Editor: Audrey Mackay  
Editorial Assistant: Jovana Kuzmanovic,  
Kvitoslava Krotiuk and Saman Rejali  
Book review editor: Jamie A. Williamson

Special thanks: Frédérique Desgrais,  
Jill Stockwell, Helen Obregon, Ximena  
Londono and Alexandra Ortiz Signoret

International Review of the Red Cross  
19, Avenue de la Paix, CH 1202 Geneva  
CH - 1202 Geneva  
t +41 22 734 60 01  
e-mail: review@icrc.org

### Editorial Board

Annette Becker  
*Université de Paris-Ouest Nanterre La  
Défense, France*

Françoise Bouchet-Saulnier  
*Médecins sans Frontières, France*

Emiliano Buis  
*University of Buenos Aires, Argentina*

Hilary Charlesworth  
*Australian National University, Australia*

Sarah Cleveland  
*Columbia Law School, US*

Adama Dieng  
*UN Secretary-General's Special Adviser for  
the Prevention of Genocide, Senegal*

Emanuela-Chiara Gillard  
*Institute for Ethics, Law and Armed  
Conflict (ELAC), University of Oxford, UK*

Fyodor Lukyanov  
*Russia in Global Affairs Journal; Council  
on Foreign and Defense Policy, Russia*

Tasneem Meenai  
*Jamia Millia Islamia, India*

Sorcha O'Callaghan  
*British Red Cross, UK*

Emre Öktem  
*Galatasaray University, Turkey*

Marco Sassòli,  
*University of Geneva, Switzerland*

Michael N. Schmitt  
*US Naval War College, US*

Sun Shiyun  
*Chinese Academy of Social Sciences  
(CASS), China*

Andrew Thompson  
*University of Exeter, UK*

Cover Photo: Chairs bearing portraits of people who were disappeared during the 1980s sit empty in a ceremony marking the marking of the National Day for the Disappeared in Guatemala City, 21 June 2017. Credit: Moises Castillo/Keystone.

Volume 99 Number 905

**INTERNATIONAL**  
**REVIEW**  
of the Red Cross

**Humanitarian debate: Law, policy, action**

**The Missing**

## CONTENTS

### The missing

---

- 475 **Editorial: The disappeared and their families: When suffering is mixed with hope**  
Vincent Bernard, Editor-in-Chief
- 487 **Interview with Estela Barnes de Carlotto**  
President of the Grandmothers of the Plaza de Mayo

### The missing and their families

---

- 497 **Families of the missing in Sri Lanka: Psychosocial considerations in transitional justice mechanisms**  
Maleeka Salih and Gameela Samarasinghe
- 519 **Families of the missing: Psychosocial effects and therapeutic approaches**  
Pauline Boss
- 535 **Q&A: The ICRC's engagement on the missing and their families**
- 547 **Implementing international law: An avenue for preventing disappearances, resolving cases of missing persons and addressing the needs of their families**  
Ximena Londoño and Alexandra Ortiz Signoret
- 569 **Protection of migrants from enforced disappearance: A human rights perspective**  
Bernard Duhaime and Andréanne Thibault

Articles published by the Review reflect the views of the author alone and not necessarily those of the ICRC or of the Review. Only texts bearing an ICRC signature may be ascribed to the institution.

### Missing person mechanisms

---

- 589** **Establishing mechanisms to clarify the fate and whereabouts of missing persons: A proposed humanitarian approach**  
Monique Crettol, Lina Milner, Anne-Marie La Rosa and Jill Stockwell
- 619** **The Sri Lankan Office on Missing Persons: Truth and justice in tandem?**  
Isabelle Lassée
- 641** **The Office on Missing Persons in Sri Lanka: The importance of a primarily humanitarian mandate**  
Vishakha Wijenayake
- 663** **Determining the fate of missing persons: The importance of archives for “dealing with the past” mechanisms**  
Elisabeth Baumgartner and Lisa Ott

### Identifying the dead

---

- 689** **Using forensic science to care for the dead and search for the missing: In conversation with Dr Morris Tidball-Binz**
- 709** **Advances and progress in the obligation to return the remains of missing and forcibly disappeared persons**  
Dr Grażyna Baranowska
- 735** **The first attempts in Mexico and Central America to address the phenomenon of missing and disappeared migrants**  
Gabriella Citroni

Articles published by the Review reflect the views of the author alone and not necessarily those of the ICRC or of the Review. Only texts bearing an ICRC signature may be ascribed to the institution.

### Selected articles

---

- 759 Management of the dead from the Islamic law and international humanitarian law perspectives: Considerations for humanitarian forensics**  
Ahmed Al-Dawoody
- 785 Adoption of the Additional Protocols of 8 June 1977: A milestone in the development of international humanitarian law**  
François Bugnion
- 797 Strengthening resilience: The ICRC's community-based approach to ensuring the protection of education**  
Geoff Loane and Ricardo Fal-Dutra Santos

### Reports and documents

---

- 821 Announcement: Professors Emiliano Buis and Emanuela-Chiara Gillard join the Editorial Board of the *International Review of the Red Cross***
- 823 What's new in law and case law around the world?**  
Biannual update on national implementation of international humanitarian law July–December 2016

### Books and articles

---

- 841 New publication: The first two volumes of the updated Commentaries on the 1949 Geneva Conventions**
- 843 International Law and New Wars**  
Christine Chinkin and Mary Kaldor  
*Book review by Daniele Archibugi*

Articles published by the Review reflect the views of the author alone and not necessarily those of the ICRC or of the Review. Only texts bearing an ICRC signature may be ascribed to the institution.

**847 Prosecuting Conflict-Related Sexual Violence at the ICTY**

Serge Brammertz and Michelle Jarvis (eds)

*Book review by Silke Studzinsky*

**853 New publications in international humanitarian law and on the International Committee of the Red Cross**





## EDITORIAL

# THE DISAPPEARED AND THEIR FAMILIES: WHEN SUFFERING IS MIXED WITH HOPE

**Vincent Bernard, Editor-in-Chief**

Every day, people go missing amidst conflict and violence, or on the paths of exile, displacement or migration. Meanwhile, those whose loved ones went missing in the past continue to live with their pain, unable to heal. Long after the wars or disasters are over, the wounded have been cared for and the new have been homes built upon the ruins of the old ones, the suffering of people whose loved ones are missing lingers on, the last open wound.

Where is my child? Is he a prisoner? Did she suffer when they killed her? Will she ever come back? Where are they buried? For those in the dark about what happened to a loved one, the hope that they will return, a sign of life or even a scrap of information can become an obsession – suffering that is both acute and haunting.

If answers never come, loved ones will carry the burden of their questions and grief throughout their lives and to their graves, often consoled only by the unshakeable faith that they will then be reunited with their son, daughter, parent or spouse.

Pauline Boss uses the term “ambiguous loss”<sup>1</sup> to describe the unique suffering of living in uncertainty about the fate of a loved one. In the words of one of the families of missing migrants in Zimbabwe published in the *Review*’s recent issue on migration and displacement: “The greatest source of pain is not knowing whether he is alive or not.”<sup>2</sup>

The psychological trauma is compounded by a series of pressing, multifaceted needs when it is the breadwinner who goes missing. Not only can the family find themselves unable to make ends meet, they are in legal limbo, unable to exercise their rights to inherit or sell property or even carry out basic administrative formalities.<sup>3</sup>

The suffering of those who do not know what happened to their loved ones remains one of the least visible humanitarian problems. Worse, these families’ needs are often ignored, exploited or even swept under the rug for political ends: whether the fate of the missing will be resolved is determined by those acting in the name of the “greater good” for reconciliation, or its opposite, becoming a pretext to fuel a climate of fear and revenge. Cases of missing persons may be denied to cover up a crime; they may also trigger, become the crux of, or perpetuate a conflict. For example, the disappearance of two Israeli soldiers on the border between Israel and Lebanon sparked the 2006 war, and the identification of their remains was a necessary precondition to the resolution of that conflict.<sup>4</sup>

Anthropologists consider that the appearance of funeral rites marks the transition to civilization for human communities. Although much of the focus in humanitarian action is put on the families who are searching for their loved ones, identifying human remains not only brings answers to families but also ensures that the humanity of the deceased is respected. As Morris Tidball-Binz, pioneer in humanitarian forensics, says in his interview for this issue of the *Review*, “by helping fulfil the obligations towards the dead, we reassert our own humanity”.<sup>5</sup>

Whether wounded, shipwrecked, detained in secret or unable to communicate for any number of other reasons, not all missing persons are dead, and their families, waiting for news, will continue to hope that their loved ones are among the living until they know for sure. Just as Penelope waited for Odysseus in *The Odyssey* – and others have done throughout history – those with missing loved ones are trapped in a state of eternal waiting and searching.

For centuries, the tragic fate of the missing and their families was considered inevitable. The remains of the victims of wars or disasters were rarely identified and returned to their families, whether out of vengeance, indifference or simply lack of means to do so.

Since the nineteenth century and the development of international humanitarian action, humanitarian organizations have been continually coming up with new solutions. In recent years, greater awareness of the scale of the problem, thanks to the efforts of the families, coupled with advances in forensic science, genetics, facial recognition, and means of communication and transport, have led to great strides forward. These advances could prevent people going missing in the first place or bring answers for the families of the missing.

In many contexts, however, the political will to devote the necessary means to prevent people from going missing, search for the missing and identify remains to help find answers is still lacking. And even when the political will is there, authorities too often do not know what measures to take to collect and share information about missing persons. Similarly, the authorities may not know how to address the families’ precarious circumstances and legal and administrative limbo.

In this issue on missing persons,<sup>6</sup> the *Review* takes stock of recent advances in the humanitarian sector with the aim of promoting best practices and mobilizing

- 1 See Pauline Boss, “Families of the Missing: Psychosocial Effects and Therapeutic Approaches”, in this issue of the *Review*.
- 2 “‘All I Want Is to Know’: Testimonies of the Families of Missing Migrants in Zimbabwe”, *International Review of the Red Cross*, Vol. 99, No. 904, 2018, p. 15.
- 3 On the needs of families, see, in particular, ICRC, *Accompanying the Families of Missing Persons: A Practical Handbook*, Geneva, 2013, available at: <https://shop.icrc.org/accompagner-les-familles-des-personnes-portees-disparues-2383.html> (all internet references were accessed in July 2018).
- 4 For more on this and other examples of how forensic work contributes to humanitarian action, see the “Using forensic science to care for the dead and search for the missing: In conversation with Morris Tidball-Binz” in this issue of the *Review*.
- 5 See also Oran Finegan, “Dignity in Death: Remembrance and the Voice of the Dead”, *Humanitarian Law and Policy* blog, ICRC, 1 November 2017, available at: <http://blogs.icrc.org/law-and-policy/2017/11/01/dignity-in-death-remembrance-and-the-voice-of-the-dead>.
- 6 The *Review* has previously run a themed issue on missing persons (Vol. 84, No. 848, 2002).

action to clarify the fate and whereabouts of missing persons and respond to the needs of their families.

## The missing in contemporary history

On the battlefields of North America and Europe, it was only in the nineteenth century, with the dawn of modern humanitarianism, that the response started to become organized. At the end of the American Civil War, the War Department – which had kept no record of the dead or the wounded during the war – struggled to cope with prisoner repatriation. Clara Barton, founder of the American Red Cross, published an appeal to “The friends of missing persons”:

Miss Clara Barton has kindly offered to search for the missing prisoners-of-war. Please address her at Annapolis, giving name, regiment, and company of any missing prisoner.<sup>7</sup>

Provided with a table and a tent by the army, she proceeded to set up a service to track down missing soldiers who had been prisoners of war. Around the same time, in addition to providing medical and material relief, Henry Dunant also wrote to the families of those dying after the Battle of Solferino, telling them of the fate of their loved ones. But the remains of thousands of soldiers were buried haphazardly during the Italian campaign and finally piled together in ossuaries, with no possibility of identifying them.

A few years later, when the Franco-Prussian War of 1870 broke out, the International Committee for Relief to the Wounded set up the Information Bureau of the International Relief Agency for Wounded and Sick Soldiers. This organization was the forerunner of today’s Central Tracing Agency,<sup>8</sup> a permanent structure within the International Committee of the Red Cross (ICRC) that is tasked with finding out what happened to missing, wounded and captured soldiers, informing their families, and putting them in contact wherever possible.<sup>9</sup>

The twentieth century was the century of people unaccounted for on a massive scale: the mass slaughter of industrial warfare and the genocides and massacres of civilians resulted in millions of people unaccounted for. On the battlefields of the First World War, the artillery churned up the earth, destroyed bodies, and buried soldiers alive or dead in their trenches. A British lieutenant wrote these lines in his journal on 1 July 1916, the first day of the Battle of the Somme:

7 Quoted in Caroline Moorehead, *Dunant’s Dream: War, Switzerland and the History of the Red Cross*, Caroll & Graf, New York, 1999, p. 89.

8 ICRC, “History of the Central Tracing Agency of the ICRC”, 2002, available at: [www.icrc.org/eng/resources/documents/misc/57jqj.htm](http://www.icrc.org/eng/resources/documents/misc/57jqj.htm)

9 More information about the Restoring Family Links network and the role of the Central Tracing Agency is available at: <https://familylinks.icrc.org/en/pages/home.aspx>.

I am back in Maricourt writing this: after writing my last we endured perfect hell for a couple of hours, shells landing within a few feet of us every seconds. Then three men came across from the opposite dugout to say it had been blown in and ten men lying buried in it. Not the slightest use trying to dig them out. It would be a day or more's job and they're already dead.<sup>10</sup>

Those ten men may still be there, somewhere in a field near Maricourt. The soldiers, dragged from civilian life, from their families, may have feared being forgotten more than death. In going to the front they knew that there was not only the risk of injury or death, but also the prospect of simply disappearing, engulfed by a storm of metal and fire.

In an effort to conjure that fear, Constantin Simonov wrote "Wait for Me" in 1941, one of the best-known Russian poems of the Second World War. Here is an excerpt:

*Wait when yesterdays are past,  
Others are forgot.  
Wait, when from that far-off place,  
Letters don't arrive.  
Wait, when those with whom you wait  
Doubt if I'm alive.  
Wait for me, and I'll come back!  
Wait in patience yet  
When they tell you off by heart  
That you should forget.<sup>11</sup>*

After the two World Wars, monuments, graves of unknown soldiers and ossuaries sprang up in many places. These sites allowed States to commemorate their dead and, incidentally, were also places where families could come to mourn when they had no individual grave to visit. Even today, mechanical diggers and farmers' tractors continue to unearth the remains of soldiers from the two World Wars along the areas where the front lines used to be. Some are still wearing their identification tags, which became widely used by armies at the beginning of the twentieth century.<sup>12</sup> It is those tags that make it possible to identify them and inform their families, even a century later. According to international humanitarian law (IHL), the task of collecting and identifying the soldiers' remains, informing their families and keeping their memory alive falls to the belligerents. But not all soldiers are equal in death, and some countries invest much more in remembering the fallen than others.

10 Lieutenant Russell-Jones, quoted in Anthony Richards, *The Somme: A Visual History*, Imperial War Museums, London, 2016, p. 89.

11 Translated from Russian, available at: [www.simonov.co.uk/waitforme.htm](http://www.simonov.co.uk/waitforme.htm).

12 The US Army first ordered the use of identification tags in War Department General Order No. 204 of 20 December 1906.

Mindsets are changing: in societies that have entered a “post-heroic” era, public opinion no longer finds military losses acceptable, and the death of soldiers is no longer seen as a necessary, glorious sacrifice. In contrast to the mass slaughter of the World Wars, some countries now take great care to ensure that their soldiers are not lost and to repatriate their remains when they die in combat. “Leave no man behind” has become the US military credo, popularized by cinema (e.g. *Black Hawk Down*) and equally applicable to both the living and the dead.

Victims of ideological, racial or religious repression have had their humanity denied even in death, leaving a daunting and perhaps insurmountable obstacle to restoring their identities and therefore their dignity after death. For example, the Nazis burnt and scattered the ashes of millions of Jews and other victims of their fanaticism in factories of death. The perpetrators of the Rwandan genocide did not bother to bury their victims’ bodies: the Rwandan Patriotic Front fighters who put an end to three months of genocide against the Tutsi found their remains left in the open across the country. Even today, the families of victims of these genocides search for answers.<sup>13</sup>

Not only those killed but also those detained are at risk of losing contact with their families. The number of prisoners of war shot up during the two World Wars. To keep them in touch with their families when the traditional communication channels between the belligerents were cut, the efforts of the ICRC as a neutral humanitarian intermediary intensified and proved their worth. Some of the millions of individual index cards, written by hand by ICRC staff during wartime to identify and specify the location of the prisoners and inform their families of their fate, are on display today at the International Red Cross and Red Crescent Museum in Geneva. These archives were included in the UNESCO Memory of the World Register in 2007.

The sheer number of cases of those missing or at risk of going missing can be daunting, but technology has always been harnessed for this humanitarian cause. In 1939 the firm IBM supplied the ICRC with punchcard machines – the first example of modern technology put to the service of tracing efforts.<sup>14</sup> These new punchcards were an improvement upon the system used during the First World War, and thanks to these machines, the ICRC was able to process the records of 50,300 French soldiers who went missing during the 1940 campaign.<sup>15</sup>

Since then, the tracing service has continually modernized and its expertise continues to be sought when mass tragedies occur. As a testament to those tragedies and the immense humanitarian work carried out in their wake, the International

13 See website of the International Tracing Service, an organization dedicated to tracing and documenting people who went missing during the Shoah, available at: [www.its-arolsen.org/en/](http://www.its-arolsen.org/en/); Erin Jessee, “Promoting reconciliation through identifying victims of the 1994 Rwandan genocide”, Centre for International Governance Innovation, Africa Initiative Discussion Paper Series, Vol. 4, 2012, available at: [https://strathprints.strath.ac.uk/48264/1/CIGI\\_AI\\_Discussion\\_Paper\\_4\\_Erin\\_Jessee.pdf](https://strathprints.strath.ac.uk/48264/1/CIGI_AI_Discussion_Paper_4_Erin_Jessee.pdf).

14 Monique Katz, “Quand des machines travaillaient pour la Croix-Rouge”, *International Review of the Red Cross*, Vol. 38, No. 453, 1956.

15 *L’activité du Service Watson*, 21 June 1946, ICRC Archives, C G2 WA 1994.042.0001, Service Watson, 1939–1945.

Red Cross and Red Crescent Museum in Geneva also has on display some of the thousands of photos of children who became separated from their families during the Rwandan genocide and subsequent conflicts in the region, as well as an exhibit dedicated to those who went missing during the conflict in the former Yugoslavia.

Families are not passive in their suffering, but play an active role in the search for their loved ones. For example, mothers and grandmothers whose loved ones went missing under the military dictatorship in Argentina from 1976 to 1983 raised awareness by protesting in the Plaza de Mayo in Buenos Aires to demand answers about what happened to their missing relatives. Their tireless efforts served as a catalyst for the development of humanitarian forensics, bringing about important advances in genetic testing, data collection and public campaigning. Genetic testing also made it possible to trace many children born in captivity and placed with other families after their parents were killed.

The struggle of the Plaza de Mayo mothers and grandmothers continues to this day. In this edition, the *Review* was privileged to interview Estela Barnes de Carlotto, president of the Grandmothers of the Plaza de Mayo association and one of the truly inspirational figures of our time. Having lost her daughter, who was killed in 1977, she discovered that she had a grandson who had been born in captivity and taken away. Decades later, the genetic data bank and the information campaigns that she herself had helped to set up in Argentina made it possible to find him, and they were reunited.

Today, people in places affected by conflict and other situations of violence continue to endure similar ordeals. This issue of the *Review* deals in particular with cases of disappearance during the conflict in Sri Lanka<sup>16</sup> and victims of criminal violence in Latin America.<sup>17</sup> But thousands also go missing among displaced people and migrants along their journey, and their fate concerns the countries of origin, transit and destination. The phenomenon of disappearance has therefore become both chronic in light of today's protracted conflicts and global in the context of displacement and migration.

## International law and humanitarian policy

The ICRC defines missing persons as those whose whereabouts are unknown to their relatives and/or who, on the basis of reliable information, have been reported missing in connection with an international or non-international armed conflict, other situation of violence, natural disaster or any other situation that

16 See Maleeka Salih and Gameela Samarasinghe, "Families of the Missing in Sri Lanka: Psychosocial Considerations in Transitional Justice Mechanisms"; Isabelle Lassée, "The Sri Lankan Office on Missing Persons: Truth and Justice in Tandem?"; and Vishakha Wijenayake, "The Office on Missing Persons in Sri Lanka: The Importance of a Primarily Humanitarian Mandate", in this issue of the *Review*.

17 See Gabriella Citroni, "The First Attempts in Mexico and Central America to Address the Phenomenon of Missing and Disappeared Migrants", in this issue of the *Review*.

might require action by a neutral and independent body, including in the context of migration.<sup>18</sup>

Governments, military authorities and armed groups have a duty to prevent disappearances. They also have a duty to provide information and participate in efforts to reunite families.

IHL stipulates that the right of families to know what happened to their loved ones who went missing in armed conflict must be upheld and safeguarded. They have the right to be reunited with them if they are still alive. If they are dead, the families have the right to mourn them with dignity and in accordance with their beliefs and traditions. Like many of the rules embodied in IHL, this is in line with the many older ethical, moral and religious norms. For example, Islamic law has similar provisions, and may even be more protective under certain circumstances.<sup>19</sup>

Experience has shown that in the event of legal proceedings against those accused of enforced disappearance, the authorities must also seek to clarify the fate of the missing and work in a complementary way with humanitarian organizations. The families of the missing and their specific needs must be recognized by the authorities, and must be involved in developing the policies that will concern them. The ICRC works diligently to ensure that the issue of missing persons is put on the agenda of transitional justice processes, and insists that the needs of victims and their families are taken seriously.

There has long been a false dichotomy drawn between families' right to know and criminal accountability for any crimes that led to the disappearance of their loved ones. However, clarifying the fate and whereabouts of missing persons is, in fact, a complementary objective to the pursuit of justice.<sup>20</sup>

International rules on handling human remains in the context of armed conflict and cases of enforced disappearance are set out in the 1949 Geneva Conventions and the International Convention for the Protection of All Persons from Enforced Disappearance,<sup>21</sup> which was adopted in 2007 and came into force in 2010. The obligation to return the remains of missing and forcibly disappeared persons to their families has gained acceptance and has been progressively developed over time by the international community, both at the international and domestic levels.<sup>22</sup>

18 ICRC, *The Domestic Implementation of International Humanitarian Law: A Manual*, Geneva, 2015, available at: <https://shop.icrc.org/la-mise-en-oeuvre-du-droit-humanitaire-manuel-version-cederom-2482.html>.

19 See Ahmed Al-Dawoody, "Management of the Dead from the Islamic law and International Humanitarian Law Perspectives: Considerations for Humanitarian Forensics", in this issue of the *Review*.

20 To read two perspectives on how a particular mechanism deals with the relationship between truth and justice, see the articles by Vishakha Wijenayake and Isabelle Lassée in this issue of the *Review*. To read about missing mechanisms more generally, see Monique Crettol, Lina Milner, Anne-Marie La Rosa and Jill Stockwell, "Establishing Mechanisms to Clarify the Fate and Whereabouts of Missing Persons: A Proposed Humanitarian Approach", also in this issue of the *Review*.

21 See: [www.ohchr.org/EN/ProfessionalInterest/Pages/IntConventionEnforcedDisappearance.aspx](http://www.ohchr.org/EN/ProfessionalInterest/Pages/IntConventionEnforcedDisappearance.aspx).

22 See Grazyna Baranowska, "Advances and Progress in the Obligation to Return the Remains of Missing and Forcibly Disappeared Persons", in this issue of the *Review*.

In 2017, the UN Working Group on Enforced or Involuntary Disappearances (WGEID), a Special Procedure of the Human Rights Council, submitted a report on enforced disappearances in the context of migration, signalling that the phenomenon of missing migrants had reached a scale that required a humanitarian response at the international level.<sup>23</sup> Cases of missing migrants require transnational, even global action involving many parties. It can seem an impossible task given the complexity of individual and mass migrations and the sheer number of routes taken by migrants, but there are nevertheless concrete measures that can be taken to prevent people from going missing, keep them in contact with their families, identify mortal remains and inform the families. For instance, helping migrants and their families stay in touch during their journey and once they arrive at their destination, if they wish, including in detention centres; standardizing the collection of data from migrants' families in their places of origin and protecting that data for use for humanitarian purposes only; and setting up national databases to standardize and centralize information on unidentified remains.

## The humanitarian work of the International Red Cross and Red Crescent Movement

The ICRC and its partners in the International Red Cross and Red Crescent Movement (the Movement) have developed a multidisciplinary approach to addressing humanitarian problems, including missing persons. This begins with prevention – for example, a series of training and awareness-raising measures, such as comic books and animated films on the issue of missing persons as a significant humanitarian challenge.<sup>24</sup>

The Movement has put in place a worldwide Restoring Family Links network, made up of National Red Cross and Red Crescent Societies (National Societies) and ICRC delegations, managed and coordinated by the Central Tracing Agency.<sup>25</sup> While for decades handwritten Red Cross messages on simple paper forms were the main way to exchange news between separated family members, in the era of social media and smart phones there is still a need for the

23 WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances on Enforced Disappearances in the Context of Migration*, UN Doc. A/HRC/36/39/Add.2, 28 July 2017. See also Bernard Duhaime and Andréanne Thibault, "Protection of Migrants from Enforced Disappearance: A Human Rights Perspective", in this issue of the *Review*.

24 See, for example, ICRC, "Drawn Together: The Plight of the Missing", 30 August 2016, available at: [www.icrc.org/en/document/drawn-together-plaint-missing](http://www.icrc.org/en/document/drawn-together-plaint-missing). To mark the International Day of the Disappeared on 30 August 2017, the ICRC's Central Tracing Agency and Protection Division and the *Review* organized a panel discussion entitled "Gone but not Forgotten" at the ICRC's Humanitarian conference centre, available at: [www.icrc.org/en/document/gone-not-forgotten-migrants-mothers-and-missing](http://www.icrc.org/en/document/gone-not-forgotten-migrants-mothers-and-missing).

25 See also the Restoring Family Links Strategy of the International Red Cross and Red Crescent Movement, approved at the 30th International Conference of the Red Cross and Red Crescent in 2007, available at: <https://shop.icrc.org/strategie-de-retablissement-des-liens-familiaux-y-compris-references-juridiques-2639.html>.



Agency's services. In fact, there are many people who do not have access to these technologies or are unable to use them, for example when they have been detained.

With its long experience in restoring family links, the ICRC began developing activities to support the families of missing persons in 1991.<sup>26</sup> The ICRC now works with such families in twenty countries, including Colombia, Lebanon, Mexico, Senegal, Sri Lanka and Ukraine.

The ICRC also supports States' efforts to ascertain the fate of missing persons through various means. This may take the form of assisting the establishment of coordination mechanisms between the former parties to a conflict or national mechanisms on missing persons, and providing technical advice, once these become active (e.g. in Colombia, Peru and Sri Lanka). The ICRC also participates in coordination mechanisms, sometimes chairing such mechanisms (e.g. the coordination mechanism concerning Georgia/Abkhazia/South Ossetia; the Tripartate Commission between Iraq, Kuwait and the 1990–1991 coalition; and the Kosovo Working Group on Missing Persons). Finally, the ICRC's Advisory Service on IHL provides legal and technical support to States seeking to enact legislation to implement their international obligations regarding missing persons and their families. To this end, it has come up with guiding principles and model laws,<sup>27</sup> as well as facilitating the sharing of laws and case law between States.<sup>28</sup>

In the early 2000s the ICRC began developing expertise in forensic science – uniquely, for humanitarian purposes, rather than for scientific, medical or legal purposes. When people die during war, disaster or migration, their remains must be handled with respect and dignity, and unidentified remains must be searched for, recovered and identified. Humanitarian forensics – derived from techniques originally developed to identify remains and determine the cause of death as part of criminal proceedings – offer new possibilities for achieving these aims.<sup>29</sup> Generally speaking, the ICRC helps to build local capacity (e.g. in South Africa, Mexico, the Philippines and Yemen),<sup>30</sup> but it also carries out exhumation and identification operations directly, in its capacity as an independent, neutral humanitarian organization. Argentina and the United Kingdom recently called upon the ICRC to identify the remains of soldiers killed

26 ICRC, above note 3.

27 See: [www.icrc.org/eng/resources/documents/misc/missing-model-law-010907.htm](http://www.icrc.org/eng/resources/documents/misc/missing-model-law-010907.htm).

28 See: <https://ihl-databases.icrc.org/ihl-nat>.

29 See, in particular: [www.icrc.org/en/what-we-do/forensic-science](http://www.icrc.org/en/what-we-do/forensic-science); ICRC, *Missing People: DNA Analysis and Identification of Human Remains: A Guide to Best Practice in Armed Conflicts and Other Situations of Violence*, Geneva, 2009, available at: <https://tinyurl.com/yarmwua0>.

30 ICRC, "South Africa: Using Forensics to Uncover the Fate of the Missing", 1 September 2016, available at: [www.icrc.org/en/document/south-africa-finding-answers-about-fate-missing](http://www.icrc.org/en/document/south-africa-finding-answers-about-fate-missing); ICRC, "Forensic Science and Humanitarian Action", 1 January 2017, available at: [www.icrc.org/en/document/forensic-science-and-humanitarian-action](http://www.icrc.org/en/document/forensic-science-and-humanitarian-action); ICRC, "Philippines: Helping Identify the Dead", 19 November 2013, available at: [www.icrc.org/eng/resources/documents/news-release/2013/11-19-philippines-dead-bodies-management.htm](http://www.icrc.org/eng/resources/documents/news-release/2013/11-19-philippines-dead-bodies-management.htm); Alex Emmons, "The Death Toll in Yemen is So High the Red Cross Has Started Donating Morgues to Hospitals", *The Intercept*, 25 August 2016, available at: <https://theintercept.com/2016/08/25/the-death-toll-in-yemen-is-so-high-the-red-cross-has-started-donating-morgues-to-hospitals/>.

during the war in the Falkland/Malvinas Islands, thirty-five years after the fighting ended. In this issue of the *Review*, Morris Tidball-Binz recounts this humanitarian operation and reflects on the development of this new area of work for the ICRC.

In 2002 the ICRC conducted an assessment of its activities for missing persons and their families, which resulted in new impetus being given to this area of work at the 28th International Conference of the Red Cross and Red Crescent in 2003.<sup>31</sup>

In relation to missing migrants, the ICRC has produced a series of recommendations for policy-makers based on its field experience.<sup>32</sup> To help efforts to identify the human remains found along the migration routes of West Africa, the ICRC has set up a regional pilot project in collaboration with the National Societies of Mali, Mauritania and Senegal. The Trace the Face service was set up in 2016 in the hope of reconnecting relatives who had become separated. National Societies publish photos of people looking for their missing relatives, online and on posters.<sup>33</sup> Facial recognition programmes are now being used to identify people's remains. As we have seen throughout history, this field is far from static, and humanitarians have always made use of the latest technology.<sup>34</sup>

The issue of missing persons requires a holistic response. Following a stocktaking exercise of missing-related activities in twenty-two of its operational delegations, in 2018 the ICRC launched a new Missing Persons Project aimed at developing international standards in this field.<sup>35</sup> By organizing a series of meetings of stakeholders in the coming years, the ICRC hopes to foster the development of standards on (1) collecting and protecting data on people most at risk of going missing, (2) dead body management and identification, (3) mechanisms to ascertain the fate of missing persons, (4) harnessing big data and digital technology in general, and finally, (5) support for families.

\*\*\*

When we are left in the dark about the fate of a loved one, unable to forget or move on, the suffering never ends and hope turns to despair. Yet the families affected refuse to give up, no matter the cost, and they have blazed a trail for the humanitarians, scientists and jurists who have in recent years come up with the solutions presented in this issue of the *Review*. What makes them keep going,

31 ICRC, *The Missing and Their Families: Summary of the Conclusions Arising from Events Held Prior to the International Conference of Governmental and Non-Governmental Experts (19–21 February 2003)*, Geneva, 2003, available at: [www.icrc.org/eng/resources/documents/report/5jahr8.htm](http://www.icrc.org/eng/resources/documents/report/5jahr8.htm). See also ICRC, *The Missing: ICRC Progress Report*, Geneva, 2006, available at: [www.icrc.org/eng/assets/files/other/icrc\\_002\\_0897.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0897.pdf).

32 See: [www.icrc.org/en/publication/missing-migrants-and-their-families-icrcs-recommendations-policy-makers](http://www.icrc.org/en/publication/missing-migrants-and-their-families-icrcs-recommendations-policy-makers).

33 See: [www.tracetheface.org](http://www.tracetheface.org).

34 See in particular, Olivier Dubois, Katharine Marshall and Siobhan Sparkes McNamara, "New Technologies and New Policies: The ICRC's Evolving Approach to Working with Separated Families", *International Review of the Red Cross*, Vol. 94, No. 888, 2012.

35 See "Q&A: The ICRC's Engagement on the Missing and Their Families", in this issue of the *Review*.

innovate and persevere? Estela Barnes de Carlotto closed the ICRC's 2017 "Gone but not Forgotten" conference in honor of the International Day of the Disappeared with these words:

We began our fight out of love. Love for a child, a grandchild, a husband or wife, a brother or sister. Our love is without end and without limits. We have carried out our struggle peacefully, without violence, hoping for occasions and opportunities to move forward under both the dictatorship and democracy. We are not full of hate or rancour. We have no desire for revenge. We want justice. And we are happy because clinging stubbornly to love has borne fruit.<sup>36</sup>

36 See: ICRC, "Gone but not forgotten", above note 24.





## Interview with Estela Barnes de Carlotto

President of the Grandmothers of the Plaza de Mayo\*

*Estela Barnes de Carlotto is an Argentinian human rights activist and president of the Grandmothers of the Plaza de Mayo. One of her daughters, Laura Estela Carlotto, was abducted while pregnant in Buenos Aires at the end of 1977. The Grandmothers of the Plaza de Mayo association was founded that same year, with the aim of recovering children kidnapped during the dictatorship, some of whom were born to abducted mothers. The Grandmothers seek both their grandchildren and their own children. They estimate that around 500 kidnapped grandchildren have been illegally adopted into other families.*

*This interview highlights the human cost of forced disappearance for the families left behind, who know neither the fate nor the whereabouts of their loved ones. Drawing on her vast experience of leading and advocating for these families, Estela gives us valuable insight into the role that relatives can play in developing mechanisms to trace missing people.*

⋮⋮⋮⋮⋮⋮

\* This interview was conducted on 30 August 2017 in Geneva, Switzerland, by Vincent Bernard, Editor-in-Chief of the *Review*, and Ximena Londoño, Legal Adviser at the International Committee of the Red Cross.

***You have been the president of the Grandmothers of the Plaza de Mayo – a group of women who joined forces in the 1970s to search for their missing grandchildren – for over twenty-five years. How did this association come about? What do the Grandmothers do nowadays?***

The Grandmothers of the Plaza de Mayo association was formed in response to the actions of the new civic–military dictatorship, established on 24 March 1976. I say “new” even though there had been dictatorships in Argentina since 1930, when I was born. Civilian and military groups had successively overthrown the constitutionally elected president and seized control of the country to impose their ideology and their plans, completely illegally. In 1976, however, it was different: the coup was part of a larger movement seeking independence and the construction of a great Latin American nation.

Our children – university students and even secondary-school pupils – were highly politicized and would often be demonstrating and forming groups. We mothers couldn’t understand why we had never done anything like that; we’d been passive, never showing any sign of discontent. Through their activism, our children opened our eyes to the reality of the situation. However, we soon realized that people who opposed the dictatorship – adults and children as young as 14 and 15 years old – were being kidnapped and killed. Our generation could no longer stand by and say nothing: we took to the streets. One by one, as we saw what was happening and reached the devastating conclusion that our children weren’t going to come home or get in touch, we realized we couldn’t remain passive any more. We began to take action. One day, for example, I said to my husband, “You stay home – I’m going out.” I went to speak to lawyers, politicians and soldiers, trying to find out where my daughter was. Nobody could tell me her whereabouts. I believed they had already killed her, but she was actually still alive. Later, we found out that she had been held for nine months.

By the time I began my search, there was already a group of grandmothers meeting in my hometown, La Plata. They had come together a few months earlier, following the disappearance of their loved ones. I approached them and was welcomed with open arms: “Great! A teacher!”, they said. I never looked back and we have been together ever since. The amazing thing is that we are such a diverse group of women. We didn’t join forces because we all think the same or because we wanted to create a club or play games. “What happened to you?”, asked one grandmother to another. “They kidnapped my son and he never came back”, came the reply. “Mine didn’t come back either, but my daughter...”, said another. “So what shall we do?”, they wondered aloud. “Right – tomorrow let’s go and speak to a judge. Let’s write a letter. Let’s put an announcement in the newspaper.” There were two of us, then three, then five. More and more of us found ourselves in the same position. And that’s how this association began. We founded it officially on 22 October 1977. So we’re just about to celebrate our 40th anniversary.

Of course, back then we didn't really know what we were doing. We were a group of housewives, teachers, dentists, psychologists, and so on – a real mix. And suddenly we had to become detectives, searching in the dark, banging on closed doors and taking great risks. That's how these walks around Plaza de Mayo square started. The dictatorship had declared a state of siege and outlawed gatherings of more than three people anywhere in the country. Well, we used to gather in the square to talk. So when they said to us, "You can't be here – move along, move along", we started to move and walk around the square. This became a historical act: that's how we began. We had been learning all we could, gathering information and using our common sense to help us keep moving forward. We were constantly moving forward.

***Your daughter, Laura, was about three months pregnant when she disappeared in 1977. You met your grandson for the first time in 2014. How did it feel to find out that you had a grandson? How has your life changed since meeting him?***

Being with other women in the same situation, facing the same pain and seeking the same answers, helped us all to feel supported, understood and like we weren't alone. We shared this huge burden of suffering and we wanted to tackle it not with tears and resignation but with healthy protest, motivated by this great love for the grandchildren we didn't know and the children who had never returned. From 1979 onwards, we started meeting some of the newly found grandchildren and even if they weren't your own, you would share in the joy this brought. We shared everything, we supported each other and we counselled each other; we became like a family, united around this difficult and desperate task of searching for our missing loved ones. Of course, we all dreamt of meeting our own grandchild and would try and gather any scrap of information we could about where they could be, near or far. Some of us even went to see fortune-tellers, just in case they could give us some kind of clue. We were at a loss as to what else we could do besides our everyday investigations.

Meanwhile, we set about formally establishing our association and young people started approaching us of their own accord, asking if they were perhaps one of the missing grandchildren we were looking for. By that point, the National Genetic Data Bank had been set up to identify people, along with our investigation teams. I kept searching for my grandson, together with the other women, and for all the other grandchildren who were still missing. Then I got a call on 5 August 2014 from a State judge who had already helped to return some of our grandchildren. It didn't occur to me that she was going to tell me she had found my grandchild. But she had: she had found him through the National Genetic Data Bank. I could not believe it. The judge was very careful in the way she delivered the news; it was powerful news, after all. She said, "Estela, I have some wonderful news for you: we have found your grandson, Guido." The director of the National Genetic Data Bank was also there to confirm this was

true. I was absolutely overjoyed. At the same time, it was as if they were telling me something too remote to even comprehend. I told my children, my family and my fellow grandmothers. It caused a lot of commotion, not only in our association but also throughout the city, even worldwide, because the news spread to many other countries. Guido had voluntarily come forward for identification, harbouring his own suspicions. When they told him that he was indeed the child of a mother who had disappeared and then told him that I was his grandmother – someone he had seen on the television, in the media – he immediately decided to come and meet me. That was when my life changed. Completely.

How did I feel in that moment? Meeting my grandson was like seeing my daughter Laura again: he had her DNA, her blood. He also had her tastes and her habits, but this was going to take him longer to discover because he had been brought up in the countryside, leading a very solitary life. But he was a musician, a talented musician. It was strange him wanting to be a musician when he had grown up in the countryside. He had no idea where this musical inclination came from. He didn't realize that it had actually come from his biological father and from other musical members of our family. It was amazing to finally meet him. I hugged him and told him, "I've been searching for you for so long." Of course, he didn't know me at all so I had to be patient. It's been three years since we first met; we celebrated the anniversary together. We're getting to know each other more and more, and although he lives quite far away, we can see each other as much as we like. My family is whole again and this brings me so much joy. It gives me the strength to keep searching for those grandchildren who remain missing, on behalf of all those grandmothers whose arms are still empty. Our endeavour has a life force of its own and the reason it lives on is because we know that those grandchildren are out there somewhere.

***You have done amazing work and it must be incredible to feel that your family is whole again. From the perspective of your grandson, and all the other grandchildren who have been found so far, this must be a very overwhelming experience: discovering for the first time, as an adult, that you have been living with a different identity all your life. What support have the Grandmothers of the Plaza de Mayo and the Argentinian government given to these grandchildren?***

Our grandchildren are already in their forties: men and women who have already started their own families. There are two ways in which they might discover their true identity: either they voluntarily come forward, motivated by their own doubts, to find out if they are children of parents who disappeared; or else someone in their local community suspects something and gets in touch with us and then our outreach teams go and investigate. In the latter case, we would invite the young person in question to come and find out if the suspicions are true. Sometimes that person turns our invitation down, because they don't want to know. They're afraid of finding out and so reject the notion outright. It's a



fear of the unknown. But because what happened was a crime against humanity – babies were stolen during a dictatorship – it is imperative to uncover the facts, to determine the victims and the perpetrators, regardless of whether or not this individual wants to find out. That's when the law gets involved: a judge summons the person in order to explain the situation and inform them that with a simple test, a drop of blood, we can clarify their origins and tell them whether or not the people who brought them up are, in fact, their biological parents. Of course, this route takes longer than the first. Sometimes, even when a person finds out that they are being searched for, they are resistant to the idea of meeting their biological family. A lot of psychological work needs to be done, both with the individual and with the biological family. There are different processes. There are similarities and differences in each case. We have a lot of experience in this area now, and we know how to proceed without causing any harm.

You asked what the government is doing too. Well, during the dictatorship, we faced the risk of being abducted ourselves. We were troublemakers, piercing through the cloak of impunity and secrecy surrounding the abduction of 30,000 young adults and around 500 children. Once democracy was reinstated, we maintained a constant dialogue with the constitutional government. Every time a new president took power, we asked to meet them to discuss the issue. We sought the cooperation of the State; according to the rule of law, it had an obligation to repair the damage done by a terrorist State. So we were heard and we were respected. Sometimes there were things that upset us, like the impunity law passed by the first constitutional government or the pardon granted to the perpetrators, which meant we were living alongside murderers and torturers as if nothing had happened. That pardoning was unbearable. But successive governments opened up dialogue, created new spaces and raised awareness of how the dictatorship had affected us all. With this came an understanding that we had to give these stolen children the right to live with their biological families, with those who had wanted to keep them.

***The Grandmothers of the Plaza de Mayo were pioneers in driving forward the development of genetic technology to trace missing people. How did you, and the community at large, discover the potential of such technology? What role did you play in developing these methods of analyzing DNA for identification purposes?***

Firstly, I just want to point out that when the first few of us grandmothers joined forces back in 1977–78 to search for our missing children and grandchildren – at a time when people were still going missing – we were completely clueless. I was a head teacher, and then there was another teacher, a worker and a housewife... there was another who hadn't even completed primary-level education. We were such a mixed crowd! But we kind of made it up as we went along, venturing into

this uncharted territory and breaking new ground as we figured out what we had to do to get answers and get our loved ones back.

One day, an announcement appeared in a local newspaper in La Plata about a father who refused to recognize his paternity of a child. With a sample of his blood, it had been proven that the child was in fact his. The word “blood” suddenly got me thinking: could we use *our* blood to help identify our grandchildren? We couldn’t use the parents’ blood, because they had disappeared. So we started travelling around the world, going to Spain, Italy, France and Sweden, to ask scientists if this was possible. The response was always “no”. Then, in 1982, we went to the United States and got in touch with an organization called the American Association for the Advancement of Science, and our hope was renewed. In 1983, they invited us to a large international conference; there were scientists there from all over the world, including experts in genetics and forensic anthropology. At this conference, we got the answer we were looking for: using histocompatibility testing, blood samples from the paternal and maternal lines could be used in place of the mother’s blood to determine biological ties.

Thankfully, in 1984, democracy was restored in Argentina. With the government’s support, we invited a group of experts to come and establish what was to become the National Genetic Data Bank. It was set up in a hospital that had a genetic laboratory fully equipped to carry out this work. A trial test was done with blood samples from a grandmother and granddaughter, who had never gone missing, and the results were brilliant. The experts recognized the potential that this discovery held and thanked us for helping to advance this field of genetic science.

The role I played was to be active and persistent, and to travel around the world discussing these issues and observing the work being carried out in laboratories. A dear friend of mine, Mary-Claire King, who lives in Seattle, showed us her way of obtaining data. Together, we’ve travelled to many places to collect and transport blood samples. Previously, it was difficult to transport blood from one country to another: you had to be quick or else the sample wouldn’t be viable. Today, one small drop of blood can be transported in a small container from Europe to Argentina and arrive in perfect condition, allowing us to identify a missing grandchild living abroad. Our task is to continue to raise awareness of this issue, of this project, and to do all we can to prevent this mass abduction of people from ever happening again. This can never happen again, in Argentina, in Latin America or anywhere else in the world. We have been in direct contact with people in Sri Lanka, Turkey, Greece, Italy – in so many places where this is still an issue and where a solution must be found. In Spain, for example, there are elderly people still searching for their missing children forty years on. I really hope they find them. We are giving these people advice and also helping the grandchildren of the victims of Francoism to recover the remains of their grandparents. In this way, we are standing in solidarity with others in the same way that people across the world stood in wonderful solidarity with us.

***Your association has also done a lot in terms of developing laws to respect people's right to identity. Can you explain what "right to identity" means and how you have managed to ensure that this right is protected in Argentina and internationally?***

Our work has three main cornerstones, which we combined into an innovative approach, since we were starting from scratch. First, there's the psychological angle. There were no psychologists or textbooks that could tell us how to help a person come to terms – at whatever age, adult or child – with having lived under a false identity for so many years. How could this person be supported psychologically to recover their true identity and live in freedom, without coming to harm or suffering along the way? This was one of our cornerstones.

Second, there's the legal angle. The lawyers in our association have done amazing work over the past forty years: they've achieved favourable rulings, showing incredible determination in reasoning with judges who simply did not understand – or didn't want to understand – that we were talking about a serious crime. Some judges compared our situation to a divorce: they believed that the murderer and the thief should have visiting rights, that they had the right to see this person whom they had illegitimately brought up. We had to fight to convince them that this was no divorce, that this was actually a crime and that these people were criminals and should be sent to prison. We succeeded in convincing them eventually. The third cornerstone is genetics, which we have already discussed.

Regarding the right to identity, we wanted to capture as far as possible our idea that everyone has the right to live with the family that lovingly brought them into the world, in a home where the mother wants to bring up her own children, to see them grow up and be happy – in short, to give them the best start in life. First of all, we worked with members of the constitutional government who had expert knowledge of the International Convention on the Rights of the Child, in order to introduce three articles into Argentinian legislation. We based these on Articles 7, 8 and 11 of the International Convention, which speak of the right of every child to live with their parents, ideally in their country of origin, and of the need to return the child to their country of origin if they have been taken abroad illicitly, through bilateral agreements between both countries. Apart from strengthening the right to identity, these efforts have also led to the right being incorporated into our Constitution, through acceptance of the International Convention. The government therefore has an obligation to respect it.

We have written a lot about this human right from a psychological point of view. We've discovered that there are even people who were adopted legally by married couples and were never told that they were not their biological parents; the adoptive parents hide the truth, lying by omission. That doesn't happen so much now, because these children start having their suspicions when they see differences between themselves and their adoptive parents. Psychologists say that claiming a child is yours when they aren't places a barrier between you and your

adopted child. It's important to be completely transparent so that these children, even those adopted legally, grow up to be happy and healthy. Our grandchildren grew up plagued by doubts and unknowns, like why they didn't look like their parents, why they had different tastes and different attitudes, why they were punished or mistreated. Some were kept like prisoners, locked up, with no social contact at all.

These children harboured such huge doubts that they came to the Grandmothers of the Plaza de Mayo to get some answers; it turned out that some of them were indeed the very grandchildren we were searching for. The right to identity is an ancestral right, not a modern-day invention. It's said that, within certain tribes, if a child is stolen then this doubt about one's origins haunts the family for generations and generations. That's what is written. I'm no expert, but psychologists and intellectuals have written a lot about the right to identity. We came at it from the perspective of wanting to recover the children of our missing daughters. It's a promise we made to them. When they killed my daughter, Laura, and I went to her grave, I promised her that before I died I would seek justice for everything that had happened to her and her friends, and that I would find her son. Thankfully, I have been able to fulfil that promise, which became a promise to every child to uphold their right to identity and their right to know that their family searched for them and loved them.

### ***Have you worked with other groups outside of Argentina?***

Yes, of course. In 1981, we travelled to Caracas, Venezuela, and met with representatives of all the family associations in Latin America looking for loved ones who had been abducted during the various dictatorships. We also met with an organization called the Latin American Federation of Associations of Relatives of Disappeared Detainees [FEDEFAM]. We were, and continue to be, in touch with every country that has struggled with this issue since then. Together with FEDEFAM, which has consultative status at the United Nations, we proposed a new convention to protect people from forced disappearance. Argentina and France were the first to sign it, and it came into force as the International Convention for the Protection of All Persons from Enforced Disappearance a few years ago. The Convention has its roots in FEDEFAM and in all of us who created it. I have personally travelled to Colombia, Guatemala, El Salvador, Peru and Brazil – countries where there have been and continue to be people searching for missing relatives.

We are in constant contact with people in Chile and in the Southern Cone, everywhere affected by Operation Condor, in order to keep seeking answers. Because in some countries, forced disappearance occurs even today. Here in Argentina, you will have seen on the news this month that a young man has gone missing. The case looks like a forced disappearance. In Mexico, in Colombia and elsewhere, we also continue to hear the sad news of people going missing. Just recently, there were reports of forty-three students disappearing in Mexico. I went

to Guadalajara and had the opportunity to meet the students' families, to counsel them on how to stay calm and patient in preparation for protest. We want to share the solidarity that we ourselves received with the rest of Latin America and also with Asia, Europe and other countries where this kind of thing is happening. We try to help whenever we are told about a situation like this and whenever our expertise is sought. What we can do will vary with each case, of course, but above all we can encourage people and give them something to hold onto besides their pain. We can help them to set about seeking answers in a way that is healthy and peaceful but also full of protest. These people have a right to protest about what happened to their relative who never returned.

***In 2017, you celebrated the 40th anniversary of the Grandmothers of the Plaza de Mayo. What lessons have you learned in the past four decades and what does the future hold for the Grandmothers?***

The Grandmothers of the Plaza de Mayo association was founded in 1977 by a group of women determined to search for their children and grandchildren, abducted during the civic–military dictatorship that seized power on 24 March 1976. We've been engaged in this painful endeavour for forty years now, and in that time we have learned never to give up, to remain determined. We have learned that every woman has an endless flow of courage to draw on in order to protest, to break new ground, to seize opportunities and to come up with creative strategies.

There are very few of us grandmothers left. Such is life; age catches up with us all. That's why we've invited our recovered grandchildren, as well as young people searching for missing siblings, to join our executive committee. In this way, we can pass on the baton and the search can continue for the 300 or more grandchildren who remain missing to this day.



# Families of the missing in Sri Lanka: Psychosocial considerations in transitional justice mechanisms

**Maleeka Salih and Gameela Samarasinghe**

Maleeka Salih is a researcher and trainer on psychosocial issues in conflict and post-conflict situations. She worked as a Senior Researcher for the Consultation Task Force on Reconciliation Mechanisms.

Gameela Samarasinghe is a Clinical Psychologist and Associate Professor at the Department of Sociology, Faculty of Arts, University of Colombo. She was a member of the Consultation Task Force on Reconciliation Mechanisms.

## **Abstract**

*In the last thirty years, tens of thousands of Sri Lankans have experienced enforced disappearances of family members. In 2016, many members of such families came before the Consultation Task Force on Reconciliation Mechanisms, which was mandated to gather views on how people thought the transitional justice mechanisms should be designed, how they should be established and how they should function. This process allowed the families to share their experiences and to outline what they saw as important in shaping the transitional justice mechanisms. This article surveys the complex nature of their distress and psychosocial needs, as expressed by them during the consultations. It proposes that transitional justice mechanisms should be designed to protect their psychosocial well-being, address their complex psychosocial needs, and provide them with support and protection before, during and after their engagement in the mechanisms.*

**Keywords:** transitional justice, enforced disappearances, missing persons, psychosocial needs, Sri Lanka.

⋮⋮⋮⋮⋮

Sri Lanka has a pronounced history of enforced disappearances in relation to political insurgency and violence. Whilst many hundreds of thousands of people have suffered in various ways as a result of violence and conflict in Sri Lanka in the past thirty to forty years, enforced disappearances have affected a significant proportion of different communities. Tens of thousands of people are estimated to have gone missing during the armed conflict between Tamil militants and the government of Sri Lanka, and also in relation to the southern youth insurrection.<sup>1</sup> Affected communities include those who experienced the war between 1983 and 2009 (particularly in the north and east of the country), families of servicemen missing in action, Sinhala fishermen who disappeared in waters in the north and east of Sri Lanka, disappearances attributed to the Liberation Tigers of Tamil Eelam (LTTE)<sup>2</sup> and other armed militant groups, and disappearances occurring in the context of the political violence related to the southern insurgency of 1987–91.

This article features the voices of Sri Lankan families who experienced disappearances of their loved ones, and the perspectives of local and international organizations working with those families. It is based on selected material from thousands of submissions made by families of the disappeared and others concerned with enforced disappearances to the independent Consultation Task Force on Reconciliation Mechanisms (CTF) during the government-commissioned public consultations held across the country in 2016. The consultation process is outlined below in greater detail. The article presents an outline of the complex emotional and psychosocial needs of the families and the psychosocial impacts described or stated in the submissions.

The consultations were intended to seek public opinion on how the transitional justice mechanisms should be established, and designate their function and design. Many of the families' submissions to the consultations implicitly or explicitly highlighted the need for psychosocial considerations in the transitional justice process. These considerations are presented in the article. The

1 In the absence of rigorous investigation, the exact number of enforced disappearances is not known. According to the Centre for Policy Alternatives (CPA), a total of 43,381 cases were reported to former commissions of inquiry in the late 1990s. A more recent commission of inquiry established in 2013 received around "18,099 civilian complaints and over 5000 cases of missing armed personnel": see CPA, *Certificates of Absence: A Practical Step to Address Challenges Faced by the Families of the Disappeared in Sri Lanka*, Discussion Paper, Colombo, 2015, p. 4.

2 The LTTE was the dominant militant group that emerged as the self-proclaimed representative of the aggrieved Tamil communities in Sri Lanka to fight a three-decade conflict with the government of Sri Lanka. Human Rights Watch (HRW) reports that a number of abductions and enforced disappearances were carried out by the LTTE, though the numbers are lower than those carried out by the State. The LTTE has also been implicated in the abduction of Sinhalese fishermen in the north and east coastal regions, and also of thousands of armed services personnel. See HRW, *Recurring Nightmare: State Responsibility for "Disappearances" and Abductions in Sri Lanka*, Human Rights Watch Series, Vol. 20, No. 2(C), 2008, p. 6.



authors emphasize the need to design psychosocially sensitive transitional justice mechanisms. The article concludes with a summary of findings on establishing psychosocially sensitive transitional justice mechanisms for the families of the disappeared, and highlights the main recommendations for psychosocial consideration from the CTF report.

## Public consultations of the Consultation Task Force on Reconciliation Mechanisms

*Over the past two decades, Sri Lanka has seen thousands of women and men come forward to participate in diverse commissions and State-run inquiries into violence associated with political and armed conflicts. For many, speaking before and participating in these processes has been both emotionally difficult and personally risky, but their motivation to seek truth and justice has overridden such concerns. The forthcoming reconciliation mechanisms will be no exception.*

Group of independent psychosocial practitioners, psychosocial sectoral consultation, Colombo<sup>3</sup>

In September 2015 the Sri Lankan government proposed the establishment of four transitional justice mechanisms at the 30th Session of the UN Human Rights Council, which were incorporated into a resolution on Sri Lanka.<sup>4</sup> The mechanisms included an Office on Missing Persons, an Office on Reparations, a Truth, Justice, Reconciliation and Non-Recurrence Commission, and a judicial mechanism comprising a Special Court and an Office of the Special Counsel. They were intended to address the legacy of human rights violations and atrocities that took place during the protracted conflict between 1983 and 2009. The CTF was established in late January 2016 and is comprised of eleven persons drawn from civil society and appointed by the prime minister of Sri Lanka.<sup>5</sup> The members of the CTF were tasked with carrying out public consultations to gather views of people from all districts in the country on how these mechanisms should be designed and established and how they should function. It was decided that the scope of the consultations would be expanded to include the armed

3 The psychosocial sectoral consultation was held on 13 August 2018 at the Sri Lankan Foundation Institute, where psychosocial practitioners and representatives of psychosocial organizations and groups were invited to make submissions to the CTF. All quotes in this article are directly taken from the content of submissions made to the CTF during the public consultations held between April and September 2016. Relevant quotes were translated from Sinhala or Tamil into English by members of the research team at the time of report-writing; submissions made in English did not require translation.

4 See UN Human Rights Council, 30th Session, Agenda Item 2, UN Doc. A/HRC/30/L.29, 29 September 2015.

5 For further information on the mandate of the CTF and an outline of its work, see [www.scrmm.gov.lk/consultations](http://www.scrmm.gov.lk/consultations) (all internet references were accessed in September 2018). For the Final Report of the CTF, see CTF, *Final Report of the Consultation Task Force on Reconciliation Mechanisms*, 2 vols, 17 November 2016 (CTF Final Report), available at: <http://war-victims-map.org/onsultation-task-force-on-reconciliation-mechanisms-final-report-volumes-i-and-ii/>.

insurrection of the south, as well as incidents of political and ethnic violence. Geographical units for consultations were identified as fifteen zones comprising the eight districts of the Northern and Eastern Provinces and the seven provinces of the rest of the country. Consultations at the zonal levels were carried out by Zonal Task Force (ZTF) members identified and recruited by the CTF.

The call for submissions<sup>6</sup> on 5 April 2016 invited members of the public, organizations, trade unions and political parties, as well as any other interested persons or groups to send in written submissions through the post, via the website of the Secretariat for Coordinating Reconciliation Mechanisms, and by hand delivery. The first call for written submissions was made in April 2016 and the deadline was extended several times, up to mid-September 2016. In addition, the CTF organized public hearings where any member of the public could register and make a statement to the ZTF. The public consultations took place over two or three days in each zone. All participants who wished to make a submission were given a hearing at the public consultations meetings.

The CTF also held sectoral consultations, at the national level, with vital groups, organizations and stakeholders, where representatives and practitioners could make submissions relevant to that sector. Where some issues were seen as vital for the respective zone and comprised sensitive issues that people may have found it difficult to present publicly, ZTFs were encouraged to conduct focus group discussions (FGDs). Finally, a small number of individual interviews on extremely sensitive experiences were carried out where requested, but this was not a widely used consultation method. The CTF conducted a sectoral consultation on families of the missing and disappeared on 5 July 2016 in order to interact directly with key affected groups.

The CTF engaged in a number of awareness-raising activities to ensure that the public was aware of the consultations and that information on the date, time and place for public consultations was locally known. Towards this end, the CTF issued public information material on the public consultations in all three official languages of Sri Lanka – Sinhala, Tamil and English – to be distributed in each zone, and utilized social media platforms to share the material and update the public on the status of the consultations. The consultations were held in July and August 2016; the FGDs were also held during this period. The Final Report, with a set of recommendations by the CTF, was completed in November 2016 and submitted to the government in early January 2017.<sup>7</sup> With the handover of the report, the CTF and ZTF mandate and tasks were concluded.

The submissions were comprised of written documents (personal statements, letters, and reports), transcripts of oral submissions made to the ZTF (all of which were recorded), and accompanying notes by trained note-takers, as well as notes taken during FGDs which were not recorded. Both written and oral

6 See CTF, “Press Statement: Call for Submissions”, 5 April 2016, available at: <https://tinyurl.com/y9p4w2el>.

7 CTF Final Report, above note 5.

submissions were received in Sinhala, Tamil and English. All submissions were read by at least one member of the research team in their original language, coded according to key issues,<sup>8</sup> and translated into English by the same team member for use by the broader team. The submissions were then analyzed in relation to each proposed mechanism, as well as for psychosocial issues, security and risk concerns, and governance or institutional reforms. These analyses were used in the preparation of the CTF Final Report. A total of 7,306 submissions were received by the CTF during the consultations process, comprising 1,048 written submissions, 4,872 oral submissions at the public consultations<sup>9</sup> and 1,386 submissions at FGDs.<sup>10</sup>

For this article, the authors considered the submissions used for the CTF Final Report and analyzed them for content relevant to psychosocial needs, issues and considerations in the transitional justice process for families of the disappeared. It was decided at the time of writing the Final Report that all submissions would be anonymized when used in the Report.<sup>11</sup> There were two main reasons for this. Firstly, it was done to ensure the safety and security of those who made submissions in the prevailing precarious security situation. A number of security incidents were reported during the consultations process, and there were reports of family members of the disappeared and witnesses to the incidents being threatened, harassed and intimidated. Secondly, some participants also requested confidentiality.

The decision to anonymize sources in the Final Report was also extended to organizations. The reasons for this were that those organizations working with families of the disappeared were few and well-known within their contexts, as were their representatives and staff. If organizations were mentioned by name, the individuals concerned could not be guaranteed protection. The CTF also believed that, in the highly politicized and polarized context of reconciliation and transitional justice issues, naming organizations tended to detract from the key messages presented by each organization.

Towards the end of the consultations process in November 2016, the CTF decided to archive the submissions both for reasons of posterity and to enable reconciliation mechanisms and other institutions to provide further assistance to affected persons. The archiving process began in February 2017 and was

8 The content was coded for mandate, membership of the commission, composition, staffing, powers, structures, functions, principles of operation, enabling conditions required for legislative measures, gendered aspects, relationship with other measures, relationship with other state agencies, international involvement, people's opinions and desired outcomes, and psychosocial and protection concerns.

9 There was a written record of participants in all zones except for Jaffna and the North Central Province. "The highest numbers of submissions were made at the consultations in Batticaloa, Ampara and the Southern Province respectively, averaging in excess of 500 in each zone. Consultations in the North Western and Western Provinces recorded the lowest number of submissions – below 250." *Ibid.*, Vol. 1, p. viii.

10 *Ibid.*, Vol. 1, pp. 22–28.

11 For this reason, the present authors, one of whom is a CTF member and the other a senior researcher for the team, have decided to abide by the CTF's rationale of anonymization and have not disclosed the names of individuals and organizations in this article.

completed in July 2018. The set of archives, in redacted form with identifying markers removed, is expected to be available to the public shortly.<sup>12</sup>

## **Psychosocial issues experienced by families affected by disappearances**

The term “psychosocial” refers to the perspectives, issues, impacts and considerations that relate to emotional, psychological, mental, social-relational and political processes and states at individual, family and community levels.<sup>13</sup> This definition draws on a broad understanding of the term as encompassing human capacity and resilience and acknowledging the role played by culture and society, material well-being and politics in the psychosocial state of a person, family and/or community.

The psychosocial impacts on victims and survivors of participating in transitional justice mechanisms have been explored in some detail in other post-conflict societies where attempts have been made to address past abuses, human rights violations and other atrocities.<sup>14</sup> Starting from recognition of the traumatizing impacts of retelling experiences of life-threatening and other distressing events, the understanding of adverse psychosocial consequences to

- 12 As of September 2018, all submissions to the CTF have been archived, although arrangements to enable public access are still under way. It is intended that two collections, one permanently closed and the other a redacted publicly accessible collection, will be located at the Department of National Archives in Sri Lanka. A redacted digitalized version will be shared with selected partners for easier public access and utilization as a reference in the reconciliation process. More information will be available in the near future at [www.ctfarchive.org](http://www.ctfarchive.org). Please contact Nigel Nugawela, Archiving Officer and Research Coordinator, at [nigelvnugawela@gmail.com](mailto:nigelvnugawela@gmail.com) to find out more about the digitalization process and accessing the archives. The archived submissions were categorized differently to the data storage systems used for the report, and therefore the two reference systems between the report and the archives do not tally with one another. Please contact the authors at [gameela2010@gmail.com](mailto:gameela2010@gmail.com) to identify specific quotations from the article.
- 13 Maleeka Salih and Gameela Samarasinghe, *Localizing Transitional Justice in the Context of Psychosocial Work in Sri Lanka*, Social Policy and Analysis Research Centre (SPARC), University of Colombo, 2006; Psychosocial Working Group, *Psychosocial Intervention in Complex Emergencies: A Conceptual Framework*, Working Paper, October 2003, available at: <https://tinyurl.com/y7fjtzor>. See also Ananda Galappatti, “What Is a Psychosocial Intervention? Mapping the Field in Sri Lanka”, *Intervention: International Journal of Mental Health, Psychosocial Work and Counselling in Areas of Armed Conflict*, Vol. 1, No. 2, 2003; Psychosocial Assessment of Development and Humanitarian Intervention, *A Tool, a Guide and a Framework: Introduction to a Psychosocial Approach to Development*, SPARC, University of Colombo, 2009.
- 14 See Brandon Hamber, *Transforming Societies after Political Violence: Truth, Reconciliation, and Mental Health*, Springer Science and Business Media, New York, 2009, pp. 65–70, 89–93. See also M. Salih and G. Samarasinghe, above note 13, where the authors’ monograph describes how participating in transitional justice mechanisms could lead to more pronounced or complex psychological difficulties for survivors and victims of violence. For example, accepting reparative measures on behalf of the disappeared requires also declaring or accepting the missing person as dead, which may cause crippling guilt and despair for the family members. Furthermore, retelling the story – perhaps after many years of having gained some distance to the experience and coping with it – may cause people to remember, re-experience and become re-traumatized by the distressing details. Similarly, sharing personal details of the violence experienced as part of testimony may result in public humiliation and/or being ostracized or stigmatized by those who find out about it (for instance, in the case of sexual violence).

transitional justice participation has grown to include the impacts of social isolation and stigmatization. In addition, the perceived security risks entailed in naming perpetrators could possibly further exacerbate the psychological vulnerabilities of affected persons and families.

The submissions received during the public consultations in Sri Lanka highlight similar mental health and psychosocial issues for families in the aftermath of enforced disappearance. The following sections describe the severe impacts of the event on the mental and emotional states of the families, the consequent feelings of loss, and the subsequent stigmatization and marginalization, as well as the continued harassment and exploitation, especially of female family members of the disappeared. The families' distress and grief are compounded by not knowing what has happened to their disappeared loved ones. A number of expert submissions warned of the anticipated emotional tensions associated with investigations and exhumations.

### Impact on families' mental and emotional states

During the 2016 public consultations conducted by the CTF, families of the disappeared were the most present of any of the affected groups. They spoke emotionally about family members who had gone missing, showing their photographs and newspaper clippings about the disappearances. They expressed their deep desire and yearning to find their loved ones or to know what happened to them.<sup>15</sup> They also shared their struggles in searching for their relatives and talked about the intimidation and humiliation they have had to endure in the process. They often spoke about the consequences of the enforced disappearance, such as the financial and emotional costs of the search, the subsequent economic difficulties of raising children as single parents or of not having adult children who could support parents in their old age, and the spread of suspicion and division amongst communities as a result of disappearances.<sup>16</sup>

When describing the impact of these experiences on their mental and emotional states, respondents spoke about intense suffering, pain, grief, anger, frustration and fear. Participants expressed the agony of losing family members to violent deaths and enforced disappearances, the horrors of seeing dead bodies and heavily injured people following bombings and massacres, the

15 As described by the participants during the consultations, families of the disappeared live in a psychologically unsettled state, unable to gain closure as a result of not knowing the fate of their loved ones. See also Eric Stover, William D. Haglund and Margaret Samuels, "Exhumations of Mass Graves in Iraq: Considerations for Forensic Investigations, Humanitarian Needs, and the Demands of Justice", *Journal of the American Medical Association*, Vol. 290, No. 5, 2003; Mary Ellen Keough, Tal Simmons and Margaret Samuels, "Missing Persons in Post-Conflict Settings: Best Practices for Integrating Psychosocial and Scientific Approaches", *Journal of the Royal Society for the Promotion of Health*, Vol. 124, No. 6, 2004; Margriet Blaauw, "'Denial and Silence' or 'Acknowledgment and Disclosure'", *International Review of the Red Cross*, Vol. 84, No. 848, 2002.

16 For more detailed descriptions of the psychosocial impacts on families of the disappeared, see CTF, above note 5, Vol. 1, Chaps IV, VII.

sorrow of lost educational opportunities for their children, and the fear and shame that follows traumatic experiences. Frequent references to “mental scars”, “scars in the mind”, “psychological harm”, “immense suffering” and “trauma”, and to being deeply emotionally and mentally affected, are found in the oral and written submissions to the CTF. Suffering was articulated not only in terms of war-related violence but also in relation to experiences of structural violence and the marginalization of certain communities based on socio-economic class, race or ethnicity.<sup>17</sup>

In many cases, including for families of the disappeared, the traumas and losses were not singular. Rather, suffering was cumulatively brought about and compounded by several violent events and experiences, such as enforced disappearances, displacement, forced child recruitment, bombings, massacres, and/or other atrocious acts of terror and violence. These experiences were then compounded by further acts of violence, subsequent loss of income, participants’ struggle to take care of and to educate their children, and the marginalization and stigmatization stemming from their status in society, as well as the increased vulnerability and resultant stresses that accompany these situations.

*After they shot my younger brother, when my husband went to buy a wreath, he was beaten so we did not go to collect the body. They took the body by tractor and buried the body. We stood by the roadside and cried. My mother is mentally ill and does not go anywhere now.*

Woman, FGD on disappearances, Mannar

Many families referred to the structural, economic and social conditions that contribute to the entrenchment and continuation of their distress and suffering.<sup>18</sup> Notably, decades of armed conflict and violence have also impacted severely on the social fabric of community life and have damaged relationships within and across communities.

*The conflict has left not only individuals but also families, communities and the nation as a whole with deep psychological and social scars, which have left a legacy of mutual mistrust, hostility, and have damaged the social fabric in ways that are not easily repaired.*

Non-governmental organization, written submission, Colombo

17 For example, participants referred to the disenfranchisement and marginalization of the indigenous communities who were the original inhabitants prior to the arrival of the Sinhalese in Sri Lanka, and to the marginalization of the Hill Country Tamils, who are descendants of Indian labour migrants brought to the plantations during the British colonial period. Suffering was also associated with violations of socio-economic rights, including through land grabs, forcible relocations due to development and other projects, and the issue of the right to use forests and other natural resources.

18 These include living in poverty, struggling to educate children, coping with inadequate food, water, health care and housing, and suffering impacts from the loss of land and other assets, both private and communal.

## Social stigmatization and marginalization as a cause of further distress and vulnerability

Many respondents stressed the difficulties they experienced as a result of social stigma and marginalization when widowed, disabled and/or displaced.<sup>19</sup> Acknowledging the problem of stigmatization, respondents stated baldly:

*Find my husband for me. He was abducted and disappeared five years ago. We have five daughters and everybody is looking in a derogatory manner at us.*

Woman, FGD on disappearances, Ampara

*It will be important to ensure that the participants who choose to take part in the process are not stigmatized further. For example, wives of missing persons can be seen as bringing bad luck.*

Non-governmental organization, written submission, Batticaloa

Some spoke about living in fear and shame and of being “marked” as a result of their identity and past experience. Submissions from some displaced persons, widows, wives of those who have been disappeared, ex-combatants, disabled people, and child soldiers shared similar concerns.

## Continued harassment and exploitation, especially of female family members of the disappeared

Women who were widowed, or whose husbands had disappeared or were missing, spoke bitterly and anxiously about continued harassment and intimidation, including sexual exploitation and abuse by members of their communities as well as by State service providers and security personnel. The violence that they had experienced appears to have heightened their vulnerability.

*If we go to the police station, they ask me to come alone later and meet them alone. They say, “Your husband is there, come without anyone knowing.” Tell me, can I go?*

Woman, FGD on disappearances, Ampara

## Not knowing what happened to their loved ones became an ongoing source of pain and grief to families

For many of those who made submissions, the key issue was their inability to know what had happened to family members who had disappeared and the subsequent

19 For similar experiences of stigmatization and loss of status for widows and women whose spouses have been disappeared, see Simon Robins, “Towards a Victim-Centred Transitional Justice: Understanding the Needs of Families of the Disappeared in Post-Conflict Nepal”, *International Journal of Transitional Justice*, Vol. 5, No. 1, 2011; Sasanka Perera, *Stories of Survivors: Socio-political Contexts of Female-Headed Households in Post-Terror Southern Sri Lanka*, Vol. 1, Women’s Education and Research Centre (WERC), Colombo, 1999; Selvy Thiruchandran, *The Other Victims of War: Emergence of Female Headed Households in Eastern Sri Lanka*, Vol. 2, WERC, Colombo, 1999.

dismissive, hostile and sometimes callous and cruel responses they had encountered from the State and State officials while searching for them. At public meetings and FGDs, families of the disappeared came in their hundreds from all over the country, as they wanted to know the fate of the missing members of their family. Their pain was evident in their submissions and was also expressed during the consultations.

*The tears we cried, we added them to the great ocean and made up our minds [to move on].*

Sinhalese wife of missing fisherman, FGD on missing persons, Trincomalee

*My sister's son went missing in 2007. The CID [Criminal Investigation Department] questioned him before he was abducted. Since her son went missing my sister did not eat properly and is unable to talk properly. I am the one who speaks on her behalf. If you can find whether our child is still there, that is enough. We give food for the orphanage on his birthday but we cannot give alms. Find her son for her.*

Relative of disappeared person, FGD in Colombo

*When you see us, you see us as people who are going about life, but we are living with extreme pain in our hearts, unable to cry in front of our children. We cry when we walk on the street.*

Tamil wife of surrendee, FGD on surrendeess, Mullaitivu

*There was war here since 1983. We lived in many refugee camps. Those were sad days in our lives. When we came back our houses were destroyed. So we collected what we [could] out of it and were living [there] when my husband went missing. In 1991 my husband, who was a fisherman, went missing while fishing. Forty-seven people from seven boats went missing on the same day, same time. Some were found, some were missing. The government said that these fisherman are not coming back, that they were caught by terrorism [i.e., by the LTTE].*

(Sinhalese woman, FGD on missing persons, Trincomalee)

Consultations and submissions identified the complex emotions and unanswered questions evoked by the issue of death certificates, and many emphasized that obtaining such a certificate was not an option for most of them:

*We asked, "Why should we take the death certificate? If so, show his body to us? Who killed my brother? Show them to us? Then we will decide about the death certificate." For that, they said, "The Navy will also come." I said, "Let them come and I will answer them." The CID only abducted him. He had done no wrong. If he had, then question him and punish him. Show us where our brother is. Our father died thinking of him. Mother has become sickly. Find our brother for us.*

Tamil woman, FGD on disappearances, Colombo

When asked what should be done for families of the disappeared who must have undergone a lot of difficulty, one of the participants responded:



*Firstly, you have to help them rebuild their minds. When we first came to Father X,<sup>20</sup> we came crying like mad people.*

Relative of missing person, FGD on missing persons, Central Province

During their submissions both at the public meetings and in the written record, a wide range of powerful emotions were observed on the part of those presenting their experiences of enforced disappearances, including anger and outrage, deep pain, scepticism, fear and despair, but also, overwhelmingly, enduring hope. They hoped, in spite of the repeated disappointments and frustrations they had experienced through the non-implementation of recommendations of past commissions,<sup>21</sup> that this time their voices and experiences would be heard and acknowledged and their views taken into consideration. Most strikingly, many hoped that such responses could lead to finally learning the truth about what had happened to their loved ones.<sup>22</sup> Such expectations and hope were strengthened during the course of the consultations when the government enacted the legislation for the establishment of an Office on Missing Persons (OMP).<sup>23</sup> The OMP was established and members appointed to the Office in March 2018. One of its first tasks has been to carry out regional consultative and awareness-raising activities in the different districts of Sri Lanka.

20 Father X's name has been anonymized to protect his identity.

21 Sri Lanka has a history of past commissions set up to investigate and report on various violent events, including specific ones on disappearances: the Special Presidential Commissions of Inquiry into Disappearances in three different geographical areas set up in 1994; the All Island Presidential Commission on Disappearances, which functioned from 1998 to 2000; and the Presidential Commission to Investigate into Complaints regarding Missing Persons, established in 2013.

The recommendations from these commissions have been implemented in a very limited manner, if at all. For further information, see M. C. M Iqbal, "Disappearances Commissions of Sri Lanka: A Commentary on Certain Aspects of Their Reports", *Voice*, October 2002; Amnesty International, *Twenty Years of Make Believe: Sri Lanka's Commissions of Inquiry*, London, 2009; Romesh Silva, Britto Fernando and Vasuki Nesiha, *Clarifying the Past and Commemorating Sri Lanka's Disappeared: A Descriptive Analysis of Enforced Disappearances Documented by Families of the Disappeared*, Families of the Disappeared, Human Rights Data Analysis Group, Benetech, and International Center for Transitional Justice, Colombo, 2007.

22 Such strong yearning for the truth regarding the fate of loved ones has also been noted in the Latin American context, where "survivors most often give precedence to the need for truth, social and psychological rehabilitation and acknowledgement before the need for compensation". See B. Hamber, above note 14, p. 49; see also David Mendeloff, "Trauma and Vengeance: Assessing the Psychological and Emotional Effects of Post-Conflict Justice", *Human Rights Quarterly*, Vol. 31, No. 3, 2009, with regard to victims' and survivors' preference for truth-seeking mechanisms and their belief that the truth will relieve their psychological and emotional suffering.

23 The new legislation, entitled the Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No 14 of 2016, called for the establishment of the OMP and was seen as a response to the stated distress of people affected by enforced disappearances. However, the legislation itself and the nature of its passage through Parliament was criticized heavily because many of the recommendations made by those affected and collected during the consultations were not included in the Act, thereby undermining confidence in the initiative. See CTF, *The Office on Missing Persons Bill and Issues Concerning the Missing, the Disappeared and the Surrendered*, Interim Report, August 2016, available at: <http://groundviews.org/wp-content/uploads/2016/08/CTF-Interim-Report.pdf>; Amnesty International, "Only Justice can Heal Our Wounds": *Listening to the Demands of the Families of the Disappeared in Sri Lanka*, Amnesty International, London, 2017, p. 8.

## Emotional tensions related to investigations and exhumations

A number of submissions to the CTF included considerations of psychosocial impacts on the well-being of families of the disappeared. These were especially relevant during forensic investigations as the families learned about the findings.

*The families may also need to come to grips with a complicated forensic investigative process, attempting to accrue evidence and establish accountability for the cause and manner of death of the victims. This type of investigation is often a slow and very lengthy process; although it may also strive to provide victim identification for those of the missing who are deceased and return their mortal remains to their families, the primary goal of the investigators is usually criminal prosecution. This, and many other factors, may result in the delay of the humanitarian goal of identification.*

Non-governmental organization, written submission, Colombo

*Sadly, insufficient recognition of the importance of ensuring proper management of the dead and of caring for the needs of the bereaved, coupled with the frequent collapse of forensic services in the aftermath of catastrophes, contributes to perpetuating the tragedy and trauma suffered by survivors forever unable properly to bury and mourn their dead.*

Individual practitioner, professional organizations sectoral consultation,  
Colombo

Many submissions to the CTF on this topic commented that the OMP must place psychosocial considerations at the centre of the process of preparation of families of the disappeared before any investigation takes place. They proposed that this can be done by maintaining communication with participants and accompanying them through this tedious and emotionally tense process.

*Depending on how they [investigations] are conducted, they can either provoke a re-victimization of the family members or they can have a reparatory effect. In some contexts, psychosocial work has minimized the negative impacts of the forensic process and fostered its reparatory nature. It is, therefore, essential that States work together with society, on the basis of the family's demands and needs, with a cross-cutting psychosocial perspective.*

Organization that works with families of the disappeared, written submission,  
Colombo

*Staff developed a community-based education programme designed to inform families of the expectations and limitations of the forensic and victim recovery process. There is an evident need to prepare to support people for failure of search, investigation and justice processes.*

Organization that works with families of the disappeared, written submission,  
Colombo

These statements pointed to the fact that in the event that the details of the loss remain ambiguous even after the OMP intervenes, it is important that the family is given psychosocial support to manage the emotional and social implications of this, so that they can continue living their lives as effectively as possible. One submission from a joint group of individuals and organizations working with families of the disappeared and missing also cautioned about the potential psychological consequences on victims that insensitive reportage can cause. For example, the statement notes how

*speculative pronouncements on the fate of victims, especially in relation to the families of the missing, can crush their hopes or revive great expectations without a solid basis.*

Group of independent psychosocial practitioners, written submission, psychosocial sectoral consultation, Colombo

Similar concerns have been noted in other contexts. Some of the practices for integrating psychosocial approaches within forensic investigations have been employed by the initiatives in Bosnia and Herzegovina and Kosovo.<sup>24</sup> Indeed, it has been argued that the lengthy, complicated and uncertain nature of forensic investigations can be distressing for families of the disappeared, and some make the case for a cooperative approach both for forensic investigations aimed at criminal prosecution and those aimed at fulfilling the families' right to know what has happened to their loved ones.<sup>25</sup> This view has been supported by a number of those working with families of the disappeared, particularly in the context of exhumations.<sup>26</sup>

## **Designing psychosocially sensitive transitional justice mechanisms**

*What needs to be stressed is that such a design includes due consideration for the psychological processes that promote individual, family and social healing, recovery and integration. It is important that programmes take into account the wishes of the local population concerned, that they are given active and deciding roles rather than dependent, "victim" roles, to promote full participation and thus their eventual psychological recovery. Emergent self-help groups and local leadership should be encouraged to resume traditional and habitual patterns of behaviour, and re-establish social networks and community functioning at the grass-roots level. Local skills and resources must be utilized so the community gains a sense of accomplishment and fulfilment in the recovery process.*

24 M. E. Keough, T. Simmons and M. Samuels, above note 15, p. 275.

25 Monique Crettol and Anne-Marie La Rosa, "The Missing and Transitional Justice: The Right to Know and the Fight against Impunity", *International Review of the Red Cross*, Vol. 88, No. 862, 2006.

26 Vasuki Nesiiah, "Overcoming Tensions between Family and Judicial Approaches", *International Review of the Red Cross*, Vol. 84, No. 848, 2002.

Individual practitioner, written submission, psychosocial sectoral consultation, Colombo

The broad understanding of psychosocial issues and impacts leads to a wide range of psychosocial interventions, mainly conceptualized and implemented as activities that promote and protect the psychosocial well-being of affected people. These may include counselling, safe social spaces, accompaniment, protecting informed consent, and promoting agency and control over processes by sharing information and advocating for victim and survivor participation and engagement. Similarly, interventions that have an impact on the psychosocial well-being of affected persons – for example, by providing relief from the worry and stress brought about by economic or material needs – are also recognized to be psychosocially beneficial, even though they are not psychosocial interventions *per se*.<sup>27</sup> There has also been some evidence of the cathartic and healing impacts for victims brought about by their forgiveness towards truly remorseful and regretful perpetrators of violence.<sup>28</sup>

The importance of considering psychosocial issues in transitional justice mechanisms has been raised by victims, survivors and practitioners who work closely with them.

### The need for a broad response that meets complex psychosocial needs

Many of the oral and written submissions referred to the resilience and strength shown by individuals, families and communities in the face of severe threat, violence and disruptions to life. In order to cope with their difficulties and continue with their lives, people reported having drawn on available internal resources such as their emotions of hope, determination and even anger; personal support networks comprising members of other families of the disappeared, as well as activists and personnel from organizations working on behalf of the disappeared; religious faith; love for their children; ideological frameworks; their principles and values; and kindness and help from others. Care must be taken not to undermine the coping mechanisms and resilience of affected families without putting in place appropriate alternative support as needed.

A few of the submissions made the case that all members of some specific groups, if not all people of Sri Lanka, have been psychosocially affected by the events and consequences of the past decades, though perhaps not to the same degree. The

27 Others have argued that having an explicit psychosocial purpose makes an intervention psychosocial regardless of its content and form. For a discussion on this, see A. Galappatti, above note 13.

28 Holly Guthrey investigates the potential for healing through commissions for truth and reconciliation and notes the influence of apology and other expectations on positive outcomes for these initiatives: see Holly L. Guthrey, *Victim Healing and Truth Commissions: Transforming Pain through Voice in Solomon Islands and Timor-Leste*, Springer, Cham, 2015, pp. 85, 161–169. See also Patrick Kanyangara, Bernard Rime, Dario Paez and Vincent Yzerbyt, “Trust, Individual Guilt, Collective Guilt and Dispositions toward Reconciliation among Rwandan Survivors and Prisoners Before and After Their Participation in Postgenocide Gacaca Courts in Rwanda”, *Journal of Social and Political Psychology*, Vol. 2, No. 1, 2014: basing their approach on the needs-based model of reconciliation, these authors’ investigation of post-participation shows an increase in negative emotions where perpetrators’ apologies were seen as insincere.

submissions suggest that everybody needs some form of healing from the past, and the opportunity to develop a different mentality.

*We feel it is important to have a process for healing of memories for everyone – not just trauma counselling. Trauma counselling is thinking of those who are affected. This is important for the entire nation, not just those directly affected when we look at things in our day-to-day life.*

Non-governmental organization, psychosocial sectoral consultation, Colombo

Several of the submissions called for psychosocial support for those who are suffering due to their experiences of the conflict and violence with the aim of mitigating against potential harmful psychosocial impacts of participation in the transitional justice process.<sup>29</sup> These include impacts such as re-traumatization resulting from the retelling of their stories, distress as a result of community reactions (such as suspicion, stigmatization or humiliation) if their stories become public, and fear and anxiety because of heightened security risks that may come from naming perpetrators or bearing witness. The submissions emphasized the need for provision of psychosocial support and the importance of psychosocially sensitive transitional justice mechanisms in order to protect and promote the psychosocial well-being of those who engage in the transitional justice process.

The importance of considering the psychosocial needs of children, women and men in each mechanism and in the process of seeking transitional justice was highlighted in various submissions. Some of these submissions acknowledged that the vast majority of those using the mechanisms, especially the OMP, are likely to be women. As indicated above, respondents also acknowledged that the war has burdened women disproportionately with economic, social and psychological consequences as they attempt to rebuild their own and their children's lives.

*Women are victims of all forms of violence and crimes, not solely sexual violence. Overemphasizing wartime sexual violence risks ignoring that women suffered mass atrocities (such as arbitrary execution and mass killings, detention and torture, disappearance, eviction, denial of medical treatment for war injury, starvation) apart from rape.*

Organization working with women, written submission, Batticaloa

<sup>29</sup> These concerns have also been noted in other contexts where individuals and families have experienced adverse psychosocial impacts from participating in transitional justice mechanisms. See for example, Yazir Henri, "Reconciling Reconciliation: A Personal and Public Journey of Testifying Before the South African Truth and Reconciliation Commission", in Paul Greedy (ed.), *Political Transition: Politics and Cultures*, Pluto Press, London, 2003; Karen Bronéus, "The Trauma of Truth Telling: Effects of Witnessing in the Rwandan Gacaca Courts on Psychological Health", *Journal of Conflict Resolution*, Vol. 54, No. 3, 2010; Catherine C. Byrne, "Benefit or Burden: Victims' Reflections on TRC Participation", *Peace and Conflict: Journal of Peace Psychology*, Vol. 10, No. 3, 2004. However, David Mendeloff, on review of the available literature, has concluded that evidence for the harm caused by participation in transitional justice mechanisms is mixed and inconclusive: see D. Mendeloff, above note 22. Jamie O'Connell notes the lack of research on the psychological effects of participating in trials of human rights violations and makes the case for greater examination in this area: see Jamie O'Connell, "Gambling with the Psyche: Does Prosecuting Human Rights Violators Console their Victims", *Harvard International Law Journal*, Vol. 46, No. 2, 2005, p. 340.

Many submissions emphasized the importance of preventing re-traumatization through repeated retelling of personal experiences.<sup>30</sup> This is one of the factors indicating the importance of designing transitional justice mechanisms that are supportive of the psychosocial needs of participants. At the same time, it seems that only a small percentage of those affected and accessing the mechanisms will need medical, psychiatric or psychological treatment, as noted in some of the submissions. The affected persons are not necessarily “traumatized” as in the clinical diagnosis for trauma, though they may be suffering and grieving. Many of them have coped for years by finding strength and resilience in their community.<sup>31</sup> It is necessary not to pathologize their issues but rather to ensure that their problems are redressed and their resilience and support mechanisms are not undermined.

*For reconciliation, it is necessary to think in a broader way, not focusing essentially on problems. [We must] not normalize problems [i.e., make people realize that psychosocial problems are normal reactions to grief and stress].*

Individual practitioner, psychosocial sectoral consultation, Colombo

The submissions outlined different stages of the process where psychosocial considerations could be protective of participants’ well-being. This includes the stages between the consultations process and the operationalization of mechanisms. Realistically, there will be a period of time that people will have to wait until their grievances are addressed. A few submissions noted that an unduly long time lag as well as silences about the progress of the mechanisms can only increase the disillusionment and sense of hopelessness and betrayal that many of those making submissions have stated they feel.

*I can’t take it anymore. I don’t know how much this will be dragged on.*

Tamil mother at Public Meeting, Mullaitivu

Some of the specific measures emphasized in the submissions were the establishment of psychosocial services and units within each mechanism and the creation of a psychosocial institute or authority for setting of standards of services, ensuring psychosocial sensitivity in design of mechanisms.

The activities noted in the submissions included the provision of counselling services and psychosocial rehabilitation services to those who are identified to be in need of such services or who would like to be referred to them. The training and capacity-building of staff was mentioned as it was deemed important that all psychosocial service providers become familiar with common

30 For example, see Victoria Sanford, “‘What is Written in Our Hearts’: Memory, Justice and the Healing of Fragmented Communities”, in Paul Gready (ed.), *Political Transition: Politics and Cultures*, Pluto Press, London, 2003; M. Brinton Lykes, Martin Terre de Blanche and Brandon Hamber, “Narrating Survival and Change in Guatemala and South Africa: The Politics of Representation and a Liberatory Community Psychology”, *American Journal of Community Psychology*, Vol. 31, No. 1/2, 2003.

31 A similar consideration about recognizing the resilience of individuals and communities was proposed in Eric Weibelhaus-Brahm, “After Shocks: Exploring the Relationships between Transitional Justice and Resilience in Post-Conflict Societies”, in Roger Duthie and Paul Seils (eds), *Justice Mosaics: How Context Shapes Transitional Justice in Fractured Societies*, International Center for Transitional Justice, New York, 2017.

psychosocial issues resulting from the transitional justice mechanisms. Participants also identified the need to work on reducing stigmatization and marginalization of some groups. A key suggestion was to build on the existing cultural and social resources that people use for their psychosocial well-being.<sup>32</sup>

### Continuation of psychosocial support following engagement in the transitional justice mechanism

*I feel that if you are looking at it from a long-term perspective, and certainly you have to for these kinds of mental health issues, you cannot take a short-term approach to it.*

Organizational representative, psychosocial sectoral consultation, Colombo

Many submissions noted that those affected by war and violence will continue to need psychosocial support services post-transitional justice and recommended that such services be made both available and sustainable.<sup>33</sup> Additionally, they recognized that reconciliation and transitional justice processes are prolonged affairs, taking years to reach conclusions in many cases. It was recognized that people will need support over this period of time, and some for the course of their whole lifetimes, or at different times in their lives. Some submissions underlined that the psychosocial sector must be prepared to deal with this longevity, both in terms of human resources and the structures for delivery of service. Some submissions mentioned that psychosocial needs will cross generations, as the children of those affected are also likely to continue to need psychosocial support at various points in their lives.

Other forms of follow-up activities that would protect the psychosocial well-being of participants were also recommended in some of the submissions. These included receiving updates and definitive information on the progress and outcomes of their case and having access to reports and other information related to the mechanism and its work. One submission, speaking of the role of such

32 Various studies have indeed noted the importance of cultural and social resources for both enhancing and maintaining psychosocial well-being. Such resources include a reliable helping network and social connectedness as well as religious faith and rituals, shared value systems and activities, and community facilities. See, for example, Rebecca Horn, *Exploring Psychosocial Well-being and Social Connectedness in Northern Uganda*, Working Paper No. 2, Logica, Washington, DC, 2013, pp. 14–15, in which Horn notes the positive correlation between the actual support received over the previous month and levels of psychosocial well-being. See also Martha Bragin, Karuna Onta, Taaka Janepher, Generose Nzeyimana and Tonka Eibs, “To Be Well at Heart: Women’s Perceptions of Psychosocial Wellbeing in Three Conflict-Affected Communities”, *Intervention Journal*, Vol. 12, No. 2, 2014, in which the authors and participants identify key domains related to social support and friendship networks as instrumental to women’s wellbeing.

33 Seils also notes that healing is a long-term process, combining psychological, social, cultural and political elements, that restores and strengthens individuals and communities. See Paul Seils, *The Place of Reconciliation in Transitional Justice: Conceptions and Misconceptions*, International Centre for Transitional Justice, New York, 2017, p10. In Wendy Lambourne, “Transitional Justice and Peacebuilding after Mass Violence”, *International Journal of Transitional Justice*, Vol. 3, No. 1, 2009, the author proposes a view of transitional justice as a longer, slower, more chaotic process that crosses beyond the time frame of particular mechanisms towards a social and relational transformation.”

information in the judicial mechanism with Special Counsel, highlighted the importance of participants not feeling abandoned.

*Witnesses who receive no post-trial follow-up or information often report feeling “abandoned” and have a more negative overall view of their testimony experience.*

Non-governmental organization, written submission, Colombo

## Sensitivities to the risks of participation in the transitional justice mechanism

Various submissions pointed to the risks of participation that may endanger the well-being of those who have come forward. Apart from the widely noted risks of re-traumatization, participation in transitional justice mechanisms has also been associated with social and security risks.<sup>34</sup>

Participants noted that because people are likely to face a wide variety of security risks at different points of their engagement in the transitional justice mechanisms, these complexities must be taken into consideration when designing psychosocial support services and security measures for the transitional justice mechanisms before, during and after participation.

*The ability of witnesses to come forward with information and to testify during trial is critical to the success of criminal trials. There is a need to promote the best interests of victims at every stage of the process and adopt a protection framework to facilitate witness participation without fear of intimidation or reprisals.*

Non-governmental organization, written submission, Colombo

*There must be psychosocial support and there must be security [in the transitional justice process]. Otherwise people cannot participate.*

Group of independent psychosocial practitioners, psychosocial sectoral consultation, Colombo

The participants in the consultations emphasized the need to ensure that the design of transitional justice mechanisms is protective of the security of the participants and their families, and that precautions must be taken to ensure the safety and security of participants in any interactions that take place at community level.<sup>35</sup> They recommended the establishment of security and protection units within each mechanism and within each regional office to ensure participation without the possibility of intimidation or reprisals. It was mentioned that gender-sensitivity must be considered a key safety measure and the protection of participants and their families' needs must continue beyond the duration of their engagement in the mechanisms.

34 See Jacobus Cilliers, Oeindrila Dube and Bilal Siddiqi, “Reconciling after Civil Conflict Increases Social Capital but Decreases Individual Wellbeing”, *Science*, Vol. 352, No. 6287, 2016.

35 For further discussion on these points, examples and the specific security risks faced by victims and survivors, see CTF, above note 5, Vol. 1, pp. 405–426.



The contributions from families of the disappeared present a remarkable account of the psychosocial needs and challenges they face in their daily lives. The recommendations made by the families on the design of the transitional justice mechanisms would allow for the creation of a psychosocially sensitive mechanism that provides comprehensive support to affected persons.

## Conclusion

Although the mandate of the CTF was to consult the public on how they wanted the transitional justice mechanisms to be designed and implemented, the consultations also provided an opportunity for families of the disappeared to share their experiences and express their psychosocial needs. Before outlining their views on the mechanisms, many people explained the frustrations they had encountered when speaking before numerous previous commissions and presented their experiences of disappearances. The distress and suffering brought about by the complex psychosocial issues consequent to the disappearances indicated an urgent need to develop guidelines on how to respond to them appropriately. At the same time, many submissions explicitly emphasized psychosocial issues and impacts, and expressly called for psychosocial services to be offered for those affected as part of the reconciliation and transitional justice process.

The following are the key findings pertaining to psychosocial support for affected persons derived from analyses of the relevant submissions:

- There is significant need for the provision of psychosocial support services to those affected. Such support is required prior to, during and after engagement in the reconciliation and transitional justice process. Such services need to be available both at the institutional and community levels.
- Closely linked to this, the submissions made it apparent that psychosocial services for those affected by enforced disappearances are required throughout the process, including initial engagement, investigations, prosecutions, exhumations, identification of remains and performing funerary rituals if the person was killed.
- In order to ensure effective and appropriate services, personnel working in the reconciliation and transitional justice mechanisms need to be trained to be sensitive to the particular psychosocial needs and well-being of those who use these services, including families of the disappeared. Similarly, the psychosocial sector and its practitioners require further capacity-building, including strong referral systems, cross-institutional collaboration and ensuring sustainability.
- The submissions indicate that labelling of victims and perpetrators is complex and counter-productive, and categories are not readily distinct. Psychosocial services must be available to all who require such assistance, irrespective of their status as victims, militants or State combatants, witnesses or perpetrators in the different conflict histories of Sri Lanka and the various periods of enforced disappearance.
- Submissions show that psychosocial impacts are evident not only at the individual level but also at the family and community levels. For example,

abductions and enforced disappearances have reconfigured entire families and changed relations between extended families and across generations, and have impacted on larger collectives such as neighbourhoods and villages. As such, psychosocial support programming should extend beyond the individual to include group and community services.

- Several submissions indicated that those who had experienced the enforced disappearance of loved ones had also experienced multiple cumulative losses and experiences of violence. As such there is a need for a broad range of holistic psychosocial support and services that can address multiple causes of suffering and grief for individuals, families and communities.
- Protection of psychosocial well-being is a key concern. For example, a number of submissions noted the need to avoid re-traumatization through the use of existing case documentation and taped videos to ensure that family members need not retell their stories multiple times, either at the OMP or at any of the other institutions. Being sensitive to how the coping mechanisms of individuals, families and communities may be challenged through the reconciliation and transitional justice process, and helping them to address these challenges, was also noted as being important.
- Incidents of intimidation by members of the State armed forces as well as harassment and exploitation were notably common experiences for families of the disappeared, especially for women and girls. Addressing security and safety concerns and ensuring the protection of those who come forward to use the mechanisms, either as a family member of the disappeared or as a witness, is an integral part of protecting psychosocial well-being.
- It is necessary to manage expectations about the psychosocial benefits that appear to be commonly associated with reconciliation and transitional justice. With no clear evidence for these assumed benefits, participants in the process must be made adequately aware of the potential psychosocial impacts and receive support in dealing with them.
- It is important to pay attention to the specifically gendered nature of the impacts of enforced disappearances: men and boys constituted the greater number of those who were disappeared, and women have disproportionately borne the burden of social, economic and psychosocial consequences of disappearances. Gendered considerations will be crucial to ensuring that both men and women feel safe, welcome and able to participate in the process without undue stress and difficulty. For example, offices must be administered and operationalized in a gender-sensitive manner, including having trained staff, gender-sensitive operational and case schedules, and childcare and breastfeeding facilities.

Consequently, the CTF report recognizes psychosocial considerations as an important overarching theme for the transitional justice and reconciliation process in Sri Lanka, and proposes a number of recommendations for the design and implementation of the psychosocially sensitive transitional justice and reconciliation mechanisms, including the OMP. These recommendations aim to ensure psychosocial support for and protection of victims and victims' families,

including the families of the disappeared, as well as others from the wider communities who may be affected.

Three explicit recommendations on psychosocial support were made by the CTF in its Final Report.<sup>36</sup> Recommendation 2.20 requires an independent body to be established for the purposes of advising, designing and coordinating services within each mechanism, including the setting up of a psychosocial unit within each mechanism and supporting the strengthening and extension of psychosocial services throughout the country. Recommendation 2.21 states that psychosocial services must be made available to those affected at the community level before, during and after their engagement with the transitional justice mechanisms. It goes on to state that the scope of existing services, provided by civil society organizations and State institutions, must be expanded, their capacities strengthened and services made sustainable. Recommendation 2.22 notes the potential for conflicts of interest in the direct provision of psychosocial and other services by the State, especially in cases where agents of the State may be responsible for human rights violations. While noting that the State should be responsible for ensuring the availability of psychosocial and other services, the recommendation calls for recognizing the necessity of involving civil society organizations in the delivery of services to ensure independence and neutrality of the psychosocial and other service providers. If implemented, these recommendations would provide a reasonable basis for the provision of psychosocial services to those affected, including families and communities affected by enforced disappearances.

The recently established OMP is considering these guidelines by recruiting psychosocial support personnel within the Office and seeking advice from professionals in the psychosocial sector while in the process of planning and implementing their activities. Similarly, there is growing commitment amongst a number of psychosocial practitioners to preparing and strengthening the sector for the provision of services required by the reconciliation and transitional justice process.

There will no doubt be challenges in implementing all the guidelines proposed in the CTF Final Report, given the dearth of psychosocial professionals in Sri Lanka (especially people trained to deal with the issues of violence, conflict and disappearances), the unsustainable psychosocial support services, and the country's struggling civil society sector. In addition, the general understanding of most mental health professionals and the public in Sri Lanka is that everyone who has suffered the consequences of conflict has been traumatized and needs counselling, and that establishing trauma centres is the solution for them.

This article, based on the submissions to the CTF, has outlined the psychosocial issues relevant to families of the disappeared and proposes a broad psychosocial approach to providing care and support to those families that would enable the design of a psychosocially sensitive transitional justice and reconciliation process.

36 *Ibid.*, Vol. 1, pp. 437–438.



# Families of the missing: Psychosocial effects and therapeutic approaches

**Pauline Boss**

Dr Pauline Boss is Professor Emeritus at the Department of Family Social Science, College of Education and Human Development, University of Minnesota.

## **Abstract**

*Families of the missing often have no facts to clarify whether their loved one is alive or dead, or if dead, where the remains are located. Such loss is called “ambiguous loss”, and those suffering from it will usually resist change and will continue to hope that the missing person will return. As this article will endeavour to explain, our goal as professionals working with the families of the missing is to help them shift to another way of thinking that allows them to live well despite ambiguous loss. To do this, we must acknowledge that the source of suffering – the ambiguity – lies outside the family. The article offers a psychosocial model with six guidelines focusing on meaning, mastery, identity, ambivalence, attachment, and finding new hope.*

**Keywords:** ambiguous loss, boundary ambiguity, resilience, the missing, family- and community-based interventions.

: : : : : :

## Introduction

Humanitarian workers today are using the ambiguous loss model and its guidelines for understanding and aiding families of the missing, wherever they may be. With cultural and religious differences in play, and where truth remains elusive about the fate of the disappeared, family- and community-based interventions are found to be most effective.<sup>1</sup> Simon Robins, a former worker and researcher for the International Committee of the Red Cross (ICRC), writes: “Therapeutic approaches have begun both to use the ambiguous loss model and to acknowledge that, where professional services are limited, community-based methodologies can be relevant.”<sup>2</sup> Such approaches are often more applicable than medical models because in many cases, the cause of symptoms emanates from the social context. In addition, many people across cultures are unaccustomed to individual therapy and prefer relational interventions at the family and community levels. As a result, this more systemic approach can be more effective (and less resisted) with families of the missing. Surprisingly, we are finding that family and community or peer-group approaches are increasingly a preference for families of the missing across cultures, individualistic and collective, though in patriarchal communities, peer groups may have to be split by gender.<sup>3</sup>

When objective truth remains unavailable about a loved one’s fate, interventions require a post-structuralist way of thinking.<sup>4</sup> In the absence of proof about the whereabouts of the missing person, families (and the professionals who work with them) must shift away from the secure knowledge of absolute thinking – i.e., “My husband is *either* dead or alive, absent or present.” Instead,

- 1 Pauline Boss, *Loss, Trauma, and Resilience: Therapeutic Work with Ambiguous Loss*, W. W. Norton, New York, 2006; Pauline Boss, “The Context and Process of Theory Development: The Story of Ambiguous Loss”, *Journal of Family Theory & Review*, Vol. 8, No. 3, 2016; Pauline Boss, Lorraine Beaulieu, Elizabeth Wieling, William Turner and Shulaika LaCruz, “Healing Loss, Ambiguity, and Trauma: A Community-Based Intervention with Families of Union Workers Missing after the 9/11 Attack in New York City”, *Journal of Marital & Family Therapy*, Vol. 29, No. 4, 2003; Theo Hollander, “Ambiguous Loss and Complicated Grief: Understanding the Grief of Parents of the Disappeared in Northern Uganda”, *Journal of Family Theory & Review*, Vol. 8, No. 3, 2016; Simon Robins, “Ambiguous Loss in a Non-Western Context: Families of the Disappeared in Postconflict Nepal”, *Family Relations*, Vol. 59, No. 3, 2010; Simon Robins, *Families of the Missing: A Test for Contemporary Approaches to Transitional Justice*, Routledge Glasshouse, New York and London, 2013; Simon Robins, “Constructing Meaning from Disappearance: Local Memorialisation of the Missing in Nepal”, *International Journal of Conflict and Violence*, Vol. 8, No. 1, 2014; Simon Robins, “Discursive Approaches to Ambiguous Loss: Theorizing Community-Based Therapy After Enforced Disappearance”, *Journal of Family Theory & Review*, Vol. 8, No. 3, 2016.
- 2 S. Robins, “Discursive Approaches to Ambiguous Loss”, above note 1, p. 322.
- 3 P. Boss, *Loss, Trauma and Resilience*, above note 1; P. Boss *et al.*, “Healing Loss, Ambiguity, and Trauma”, above note 1; Pauline Boss and Chikako Ishii, “Trauma and Ambiguous Loss: The Lingering Presence of the Physically Absent”, in Katie E. Cherry (ed.), *Traumatic Stress and Long-Term Recovery: Coping with Disasters and Other Negative Life Events*, Springer, New York, 2015; Judith Landau and Jack Saul, “Facilitating Family and Community Resilience in Response to Major Disaster”, in Froma Walsh and Monica McGoldrick (eds), *Living Beyond Loss*, 2nd ed., W. W. Norton, New York, 2004; T. Hollander, above note 1; S. Robins, “Ambiguous Loss in a Non-Western Context”, above note 1; S. Robins, *Families of the Missing*, above note 1; S. Robins, “Discursive Approaches to Ambiguous Loss”, above note 1.
- 4 S. Robins, “Discursive Approaches to Ambiguous Loss”, above note 1.

we encourage families to use a more paradoxical way of thinking – i.e., “My husband is *both* absent and present. He is probably dead, but maybe not.” Psychologically, in their hearts and minds, the missing person is physically gone but still here. The intervention goal then becomes one of finding the resilience to live with the mystery rather than finding a solution.<sup>5</sup>

Overall, the ambiguous loss framework focuses more on perceptions than objective truth, more on resilience than pathology, and more on family functioning and community support than on individual symptomatology. The cause of distress and trauma is the ambiguity surrounding the family’s loss and is thus externalized to the social context of war or terrorism. It is not attributed to personal or family deficits. From this view, family members are less likely to blame themselves for feeling anxious and confused; knowing it is not their fault, they are less resistant to intervention and the necessary changes that must occur for the family to function once again.<sup>6</sup>

## Definition of ambiguous loss

Ambiguous loss is an unclear loss with no official verification of life or death and thus, no closure. It occurs when a person is missing with no clarity about his or her absence or presence.<sup>7</sup> Ambiguous loss is the most stressful type of loss because there is no proof of finality.<sup>8</sup>

There are two types of ambiguous loss. The first type is *physical* ambiguous loss, the topic of this paper. Here, a person is physically absent, but kept psychologically present because their status as dead or alive remains unclear. Without proof of death, remaining family members are understandably confused and predictably disagree on the fate of their missing loved one. Some continue to hope for return; others perceive the lost person as clearly dead. Examples include

- 5 While DNA evidence may eventually help to clarify ambiguous losses, many families remain without such verification. For example, since the September 11 attack on New York’s World Trade Centre in 2001, almost half of the missing are *still* missing. There is no DNA evidence as yet for their families. This is the case, even with improved technology, for many families of the missing. For this reason, the author’s focus continues to be on increasing the resilience of the families of the still missing, for they may never know the fate of their loved ones.
- 6 P. Boss, *Loss, Trauma and Resilience*, above note 1; P. Boss, “The Context and Process of Theory Development”, above note 1; P. Boss *et al.*, “Healing Loss, Ambiguity, and Trauma”, above note 1; T. Hollander, above note 1; S. Robins, *Families of the Missing*, above note 1; S. Robins, “Discursive Approaches to Ambiguous Loss”, above note 1.
- 7 Pauline Boss, *Ambiguous Loss: Learning to Live with Unresolved Grief*, Harvard University Press, Cambridge, MA, 1999; P. Boss, *Loss, Trauma and Resilience*, above note 1; P. Boss, “The Context and Process of Theory Development”, above note 1.
- 8 The theoretical work about ambiguous loss grew out of the author’s original interest in family stress. See Pauline Boss, “Family Stress: Perception and Context”, in Marvin Sussman and Suzanne Steinmetz (eds), *Handbook of Marriage and the Family*, Plenum, New York, 1987; Pauline Boss, *Family Stress Management*, 2nd ed., Sage, Thousand Oaks, CA, 2002; Pauline Boss, “Family Stress”, in Alex C. Michalos (ed.), *Encyclopedia of Quality of Life and Well-Being Research*, Springer, Dordrecht, 2014, pp. 2202–2208; Pauline Boss, Chalandra Bryant and Jay Mancini, *Family Stress Management*, 3rd ed., Sage, Thousand Oaks, CA, 2016.

men, women and children who are kidnapped or disappeared due to war, terrorism or natural disasters such as tsunamis, floods or earthquakes. Without some physical proof – DNA evidence or a body to bury – the family’s loss becomes a story with no ending.

The second type of ambiguous loss is *psychological*; a person is physically present but absent psychologically due to some cognitive or emotional impairment. Examples of psychological ambiguous loss are dementia from disease or brain injury, addictions, chronic mental illness and frozen grief – a preoccupation with a lost person which is so strong that one is no longer available (cognitively and emotionally) to remaining family and friends.<sup>9</sup>

Examples of the two types of ambiguous loss are shown in [Figure 1](#).<sup>10</sup> Note that both types of ambiguous loss – the physical and the psychological – can occur for one person or one family at the same time. For example, after the September 11 attacks on New York’s World Trade Center in 2001, several families we worked with had fathers and mothers physically missing in the smoking rubble, while at the same time, an elder at home who was missing psychologically due to Alzheimer’s disease.<sup>11</sup> Simultaneously, experiencing both physical and psychological ambiguous losses creates a double ambiguous loss and causes even more distress. Assessments of a more psychosocial nature more easily reveal such a pile-up of stress.

## Difference between ambiguous loss and death

With death, there is legal and social clarity: a death certificate, rituals for mourning with others, and the opportunity to honour the lost person and dispose of their remains in one’s own way. With ambiguous loss, there is no proof of death and thus there are no markers of certainty about the fate of the lost person.

Adding to the trauma, the family’s grief is often disenfranchised<sup>12</sup> – that is, in the eyes of the law, religious institutions and the larger community, the family’s loss is often not considered “real” as it would be with a verifiable death. They are left to cope alone. Without proof of death, the family are forced to imagine their own ending to their loss. This is immensely challenging and is not required when there is evidence of death.

When a loved one is lost physically without verification of death or a body to bury, such loss becomes a “complicated loss” and thus leads to symptoms akin to

9 For more information on psychological ambiguous loss, see P. Boss, *Loss, Trauma and Resilience*, above note 1; Pauline Boss, *Loving Someone Who Has Dementia: How to Find Hope while Coping with Stress and Grief*, Jossey-Bass, San Francisco, CA, 2011.

10 Also see Pauline Boss, *Ambiguous Loss*, above note 7; Pauline Boss, “Ambiguous Loss Research, Theory, and Practice: Reflections after 9/11”, *Journal of Marriage & Family*, Vol. 66, No. 3, 2004; P. Boss, *Loss, Trauma and Resilience*, above note 1; P. Boss, “The Context and Process of Theory Development”, above note 1; P. Boss, C. Bryant and J. Mancini, above note 8.

11 P. Boss *et al.*, “Healing Loss, Ambiguity, and Trauma”, above note 1.

12 Kenneth J. Doka, *Disenfranchised Grief: Recognizing Hidden Sorrow*, Lexington Press, Lexington, MA, 1989.



Physically missing	Psychologically missing
Kidnapped, disappeared, abducted	Alzheimer's disease or other dementias
Vanished at sea or in missing airplane	Traumatic brain injury
No remains due to explosions or bombs	Addictions, obsessions
No remains due to natural disasters (tsunamis, mudslides, earthquakes, etc.)	Depression and chronic mental illnesses
Separation, desertion	Homesickness, frozen grief

Figure 1. Examples of the two types of ambiguous loss.

those of complicated grief.<sup>13</sup> Through no fault of family members, ambiguous loss understandably causes open-ended and long-term grief. It may resemble “malingering”, but it is important to note that because there is no possibility of resolution or closure, the cause of chronic sorrow and lingering grief lies in the *type* of loss experienced and not in the pathology of the individuals and families that are grieving.<sup>14</sup>

### Difference between ambiguous loss and ambivalence

To clarify, the words “ambiguous” and “ambivalent” are not synonymous. As used in ambiguous loss theory, the word “ambiguous” means “unclear”, while “ambivalent” means “conflicted”. For families of the missing, this means that the ambiguity surrounding their loss is the cause of their ambivalence. It is not a psychiatric problem. “Sociological ambivalence”, a term coined by sociologists Merton and Barber in 1963,<sup>15</sup> is relevant for normalizing the confusion and conflicted emotions experienced by families of the missing.

### Effects of ambiguous loss

For professionals trained in the medical model and researchers trained in positivism, the ambiguous loss approach requires a new way of thinking about increasing tolerance for unanswered questions.<sup>16</sup> Acknowledging differing perceptions

13 M. Katherine Shear, Naomi Simon, Melanie Wall *et al.*, “Complicated Grief and Related Bereavement Issues for DSM-5”, *Depression and Anxiety*, Vol. 28, No. 2, 2011.

14 P. Boss, *Ambiguous Loss*, above note 7; Pauline Boss, “Reflections after 9/11”, above note 10; P. Boss, *Loss, Trauma and Resilience*, above note 1.

15 Robert K. Merton and Elinor Barber, “Sociological Ambivalence”, in Edward Tiryakian (ed.), *Sociological Theory: Values and Sociocultural Change*, Free Press, New York, 1963.

16 P. Boss, *Ambiguous Loss*, above note 7; P. Boss, “Reflections after 9/11”, above note 10; P. Boss, *Loss, Trauma and Resilience*, above note 1; P. Boss, “The Context and Process of Theory Development”, above note 1; T. Hollander, above note 1, S. Robins, “Constructing Meaning from Disappearance”, above note 1; S. Robins, “Discursive Approaches to Ambiguous Loss”, above note 1.

among family and community members and the differentials in empowerment, we see the effects of ambiguous loss through a psychosocial lens.

*Psychologically*, cognition is blocked by the ambiguity and lack of information. Decisions are put on hold, and coping and grieving processes are frozen.<sup>17</sup> The ambiguous loss then complicates grief.<sup>18</sup> The ambiguity prevents the search for meaning that is so essential for resolution of loss. In addition, it blocks the processes of coping and adaptation which are essential for human resilience.<sup>19</sup>

*Sociologically*, ambiguous loss ruptures a family's structure and function. With a person missing, family members become confused about who is in or out, and who does what to make the family function in daily life. Who does the parenting after mother has vanished in the waters of a tsunami? Who earns the income now that father has been kidnapped? Am I still married? Am I a widow or widower now that my spouse has been missing for so long? Daily tasks remain undone, and roles are confused. Mates and children are neglected, and traditional family rituals and celebrations are cancelled even though they could be comforting. Because ambiguous loss immobilizes the necessary processes for individual and family coping, adaptation and change, families become brittle, with no resilience to withstand the long-term stress of ambiguous loss.

It is important to note that in most cases, the psychological and sociological effects merge. For example, when there is no body to bury, there appears to be a universal traumatizing effect. This has both psychological and sociological roots. First, when people are not able to see, with their own eyes, the physical transformation in a loved one's dead body, they are less likely to accept the loss as permanent. Second, without seeing the body or its remains, family members feel guilty about grieving, so the effect is immobilizing. Third, without being able to use their own volition to honour and dispose of the remains in their own cultural way, they feel helpless and betrayed.<sup>20</sup> Finally, without a body to bury, the community does not recognize their loss. There are therefore no social support structures to comfort families of the missing, nor can the usual cultural and religious rituals be performed. This is just one example of the merger of disciplines that may be necessary when working with ambiguous loss.

## The multiple levels of effects from ambiguous loss

Ambiguous loss is a stressor that affects individuals, families and their communities. As we assess the effects of ambiguous loss, we evaluate each of these levels.

17 P. Boss, *Ambiguous Loss*, above note 7; P. Boss, C. Bryant and J. Mancini, above note 8; P. Boss, "Reflections after 9/11", above note 10.

18 P. Boss, "The Trauma and Complicated Grief of Ambiguous Loss", *Pastoral Psychology*, Vol. 59, No. 2, 2010; T. Hollander, above note 1.

19 P. Boss, *Ambiguous Loss*, above note 7; P. Boss, *Loss, Trauma and Resilience*, above note 1; P. Boss, C. Bryant and J. Mancini, above note 8.

20 P. Boss, "Ambiguous Loss: Working with Families of the Missing", *Family Process*, Vol. 41, 2002; P. Boss, *Loss, Trauma and Resilience*, above note 1.

### *The individual level*

Individually, grief is frozen and thus is complicated; cognition remains confused, so coping and decision-making processes are blocked.<sup>21</sup> The ongoing ambiguity and lack of information may lead to chronic hyper-vigilance, sorrow, anxiety or depressive symptoms.<sup>22</sup> Individuals may manifest symptoms that need professional treatment – e.g. major depression, suicidal ideation, addiction or abuse – but such pathologies are largely caused by the immobilizing ambiguity from which the individual is suffering.<sup>23</sup> While full-blown depression needs medical care, the typical sadness from ambiguous loss is best eased by human connection, e.g. peer groups and social activities.

### *The family level*

For the family as a system, ambiguous loss ruptures relationships and thus impedes the family's systemic processes as well as its dynamics for everyday family life. The ambiguity confuses family membership and boundaries, and boundary ambiguity may result;<sup>24</sup> if it does, the family as a system becomes fragile. The ambiguity surrounding the family's loss typically becomes a trigger for family conflict, and without intervention, permanent family rifts may be created. If this occurs, the ambiguous loss has led to the disintegration of the family.<sup>25</sup>

In addition, the family often cancels holiday rituals, gatherings and celebrations, thinking that this is the proper thing to do. This causes families to become even more isolated and without the human connections that are essential to their resilience.

### *The community level*

Depending on culture and religion, the community determines the power structure in a community as well as its values and beliefs. Death in the family is a universal stressor recognized by communities, but with ambiguous loss this recognition may not be granted. Communities may not acknowledge it as a real loss; friends and neighbours may have no script to offer comfort, nor will they understand the continuing grief. Not knowing what to say or how to act, they may withdraw,

21 P. Boss, *Ambiguous Loss*, above note 7; P. Boss, *Loss, Trauma and Resilience*, above note 1.

22 Pauline Boss, Susan Roos and Darcy L. Harris, "Grief in the Midst of Uncertainty and Ambiguity", in Robert A. Neimeyer, Darcy L. Harris, Howard R. Winokuer and Gordon F. Thornton (eds), *Grief and Bereavement in Contemporary Society: Bridging Research and Practice*, Taylor and Francis, New York, 2011.

23 For details, see P. Boss, *Loss, Trauma and Resilience*, above note 1; P. Boss, C. Bryant and J. Mancini, above note 8; T. Hollander, above note 1.

24 For more on boundary ambiguity, see Pauline Boss, "Ambiguous Loss Theory: Challenges for Scholars and Practitioners", *Family Relations*, Vol. 56, No. 2, 2007; P. Boss *et al.*, "Healing Loss, Ambiguity, and Trauma", above note 1.

25 P. Boss, *Loss, Trauma and Resilience*, above note 1.

isolating the affected families of the missing even more and thus increasing their pain.

## Intervention

### Assumptions for ambiguous loss interventions

The goal of interventions for ambiguous loss, for both individuals and families, is to build resilience through increasing their tolerance for ambiguity. With this unique type of loss, which often has no solution, we do not recommend traditional grief or trauma therapies for loss from death. Instead, to build resilience for long-term unresolved loss, we use methods of narrative therapy for re-storying and externalizing blame<sup>26</sup> – that is, people tell their story willingly to peers who, as they say, have walked in their shoes. Also, with methods of psycho-education, we teach ways of thinking that de-emphasize binary thinking (dead or alive) and instead encourage “both-and” thinking.<sup>27</sup>

To prepare for ambiguous loss intervention, there are three assumptions that are essential to know and understand. They are (1) the assumption of a psychological family, (2) the need for “both-and” thinking, and (3) the need for family/community meetings as therapeutic.<sup>28</sup>

### *Psychological family*

The first core assumption upon which the theory of ambiguous loss is built is that a psychological family can exist in the human mind. Perceptions of the psychological family differ between families and often within families. This is important to know when shaping interventions because support is often drawn from one’s psychological family. Gender, age, culture, spiritual beliefs and values are among the many factors that influence who (or what deity) may be part of one’s psychological family.<sup>29</sup>

26 Michael White and David Epston, *Narrative Means to Therapeutic Ends*, W. W. Norton, New York, 1990.

27 Author’s note: My granddaughter, who studies physics at Stanford University, told me that such “both-and” thinking reminds her of the thought experiment known as Schrödinger’s cat. Hypothetically, the idea is that a cat is placed in a closed box containing a lethal substance that may or may not activate. Until the lid is opened, therefore, no one knows if the cat is alive or dead; that is to say, until observers can see the cat, it is simultaneously, for that time, both alive and dead (see John Gribbin, *In Search of Schrödinger’s Cat: Quantum Physics and Reality*, Bantam, Toronto, 1984). My granddaughter was right that a similar paradox exists between the simultaneous possibilities of both life and death. But aside from the actual reality of ambiguous loss versus this thought experiment, there is a major difference here: for families of the missing, the “box” often stays closed forever. The ambiguity continues, and the answer is never revealed. See P. Boss, “The Context and Process of Theory Development”, above note 1, p. 273.

28 For in-depth discussions, see P. Boss, “Reflections after 9/11”, above note 10; P. Boss, *Loss, Trauma and Resilience*, above note 1; P. Boss, “The Context and Process of Theory Development”, above note 1; P. Boss *et al.*, “Healing Loss, Ambiguity, and Trauma”, above note 1.

29 For a full discussion, see P. Boss, *Ambiguous Loss*, above note 7; P. Boss, *Loss, Trauma and Resilience*, above note 1; P. Boss, “The Context and Process of Theory Development”, above note 1, pp. 272–273.

We assume therefore that families can be both physical and psychological entities, and that both are sources of resilience. The family is comprised of people we lean on physically or symbolically in times of adversity or celebration. For example, a bride and groom might light a candle at their wedding to symbolize the presence of an absent family member. A child keeps her lost mother in mind even though she is being mothered now by her grandmother. A wife keeps her missing husband present psychologically to symbolically guide her as she is now the head of the family, a role she has never had to play before.<sup>30</sup> She imagines what he would have done, and then does it herself. In other cases, people take their strength from God to withstand the ongoing suffering. What strengthens people's resilience is often surprising and unlike what we, as professionals, may expect from our own cultural backgrounds. I recently learned that in the Fukushima area of Japan, where a tsunami killed 1,614 people,<sup>31</sup> many families believe that their ancestors are now caring for their missing loved ones.<sup>32</sup> That their psychological family calms and brings comfort to these individuals is critical to their strength and resilience to move forward with their lives. Through this form of psychological support, communities of like-minded people can gain stability despite massive ambiguous losses.<sup>33</sup>

### *"Both-and" thinking*

The second general prerequisite for interventions for ambiguous loss is "both-and" thinking. This means holding two opposing ideas in our minds at the same time: "Our missing son is both likely dead and maybe not dead", or "Our father is both gone and still here." Family members, individually and collectively, can learn to think in this way more easily if we who work with them can also do this. Professionals see this as the thesis and antithesis of dialectical thinking – or what the poet John Keats called "negative capability". Keats believed people were "capable of being in uncertainties, mysteries, doubts, without any irritable reaching after fact or reason".<sup>34</sup> For professionals, negative capability is the ability to recognize that we can't find a perfect solution for families of the missing. We must make our peace with this, without feeling guilty or professionally inept.<sup>35</sup> Not every question has an answer; not every problem has to be solved. This is our challenge, too.

30 P. Boss, *Ambiguous Loss*, above note 7; P. Boss, *Loss, Trauma and Resilience*, above note 1.

31 National Police Agency of Japan, "Damage Situation and Police Countermeasures Associated with 2011 Tohoku District", available at: [www.npa.go.jp/news/other/earthquake2011/pdf/higaijokyo\\_e.pdf](http://www.npa.go.jp/news/other/earthquake2011/pdf/higaijokyo_e.pdf) (accessed in May 2018). As of 9 March 2018, over seven years after the devastating Japanese earthquake and tsunami, the National Police Agency of Japan has confirmed a total of 15,895 deaths, 6,156 injured and 2,539 missing.

32 P. Boss and C. Ishii, above note 3.

33 P. Boss, *Loss, Trauma and Resilience*, above note 1.

34 Maurice Buxton Forman (ed.), *The Letters of John Keats*, 2nd ed., Oxford University Press, New York, 1935, p. 72.

35 P. Boss, *Loss, Trauma and Resilience*, above note 1.

Although more research is needed, it appears that both-and thinking can reduce some of the distress for individuals and families who must live with ambiguous loss; holding two opposing ideas is more calming than hanging on to absolutes. Rather, encouraging people to embrace conflicting thoughts – “He’s probably dead, but maybe not” – acknowledges the reality of ambiguity that remains for families of the missing.<sup>36</sup>

### *Family/community meetings*<sup>37</sup>

The first general requisite for interventions is to use a family and community approach. To implement an intervention for ambiguous loss, family meetings are recommended. Once basic needs are met, such meetings can be organized. They can involve one family with its multiple members, or multiple families within one community. They can include a psychological family such as friends, or they can be organized by gender or age. The meetings should occur in a safe and familiar place within the community, such as a school, community centre or religious centre. They should be organized to include some natural community leaders as para-professionals who first assist and later lead meetings on their own. While adjustments may need to be made for diversity in cultural, religious beliefs and power differentials between the genders and age groups, the following are recommendations to aid in organizing and implementing family meetings:

- Label the problem as ambiguous loss: “What you are experiencing is called ambiguous loss. It is the most stressful type of loss because there is no resolution or closure. What you are experiencing is not your fault.”
- Expect disagreement and perhaps conflict. Help families listen to each other’s perceptions. Normalize differing perceptions. To prevent family rifts, repeat this phrase as often as necessary: “It’s OK if you don’t all see it the same way now.”
- Discourage the tendency to cancel rituals and celebrations by helping the families to talk about and reconstruct them.
- Do not use the word “closure” with families of the missing; help them create ways to move forward without a clear ending to their story of loss. Help them reconstruct family roles, rules and rituals so that they can function despite the ambiguity.
- Check to see if there are family secrets. Have children been told why an aunt is now their mommy, or why their father is so silent? Can the family grieve openly together, if this is done in their culture?

36 P. Boss, *Ambiguous Loss*, above note 7; P. Boss, “Reflections after 9/11”, above note 10; P. Boss, *Loss, Trauma and Resilience*, above note 1; P. Boss, *Loving Someone Who Has Dementia*, above note 9.

37 The present author formulated the original guidelines for family meetings based on psychological ambiguous loss in families with a loved one who had Alzheimer’s disease (P. Boss, *Ambiguous Loss*, above note 7, pp. 109–132). In 2001, she adapted these family meeting guidelines after 9/11 for the situation of physical ambiguous loss.

The first meetings will tend to move slowly, but eventually family members will begin sharing their perceptions of what happened. Some will tell stories; others will listen. Both are valuable. Some think their loved one is alive somewhere or that they saw them on a busy street. In the absence of facts such as DNA evidence, we do not pathologize such reports. When families argue over whether the lost person is alive or dead, we continually repeat: “It’s all right if you don’t all see it the same way now.”

Ideally, family meetings should continue as long as there is interest. In New York after 9/11, family meetings were requested by the families of the missing (surprisingly, in preference to other offers of free therapy), first monthly, with intense meetings at the one-year anniversary; then bimonthly; and near the end of the second year, a picnic outing. By then, the families had become mutual support systems and needed our help no longer. At the picnic, which they organized, the families ceremoniously thanked us and said they did not need us anymore. Community para-professionals were now carrying on the meetings without us, and often, the gatherings were now recreational and no longer focused on ambiguous loss.

For professionals to no longer be needed because families have gained enough support and strength from their own communities to carry on and move forward with new plans for themselves and their children – that was our goal. This was a community of labour union workers who serviced the World Trade Center and worked in the top-floor restaurant, who babysat for each other so that the newly single parents could go to school to learn or improve their English and then study for degrees or training, which would lead to employment. They were actively moving forward by preparing themselves for their new role of family breadwinner. Their ingenuity in helping each other taught us, as professionals, that resilience indeed comes in surprising ways.<sup>38</sup> The capacity of these families to move forward in the fog of ambiguous loss allowed us to observe first-hand what is called the “ordinary magic of resilience”.<sup>39</sup>

## Six guidelines for interventions with families of the missing<sup>40</sup>

The following section describes six guidelines for interventions with families of the missing and those experiencing ambiguous loss. First, some essential clarifications: the six guidelines are indeed *guidelines*. They are not prescribed strategies, nor a linear model, nor rigid steps for what to do. The fluidity of what were

38 P. Boss, *Loss, Trauma and Resilience*, above note 1.

39 Ann Masten, “Ordinary Magic: Resilience Processes in Development”, *American Psychologist*, Vol. 56, 2001; Ann Masten, “Resilience in the Context of Ambiguous Loss: A Commentary”, *Journal of Family Theory & Review*, Vol. 8, No. 3, 2016.

40 The following guidelines are based on four decades of work with families of the missing (see [www.ambiguousloss.com](http://www.ambiguousloss.com)) and adapted from P. Boss, *Ambiguous Loss*, above note 7; P. Boss, *Loss, Trauma and Resilience*, above note 1; P. Boss *et al.*, “Healing Loss, Ambiguity, and Trauma”, above note 1; P. Boss and C. Ishii, above note 3; Pauline Boss and Carla M. Dahl, “Family Therapy for the Unresolved Grief of Ambiguous Loss”, in David W. Kissane and Francine Parnes (eds), *Bereavement Care for Families*, Routledge, New York, 2014.

intentionally labelled “guidelines”<sup>41</sup> is meant to allow for the vast diversity of families, as well as the need for neutrality in humanitarian interventions.

Second, the order in which guidelines are used is meant to fit the time and place of a particular intervention and the population involved. In [Figure 2](#), we link “Finding Meaning” in a circle to “Discovering New Hope”, echoing Viktor Frankl’s finding that there is no meaning without hope, nor hope without meaning;<sup>42</sup> the two curved arrows symbolize that the process of building resilience to live with the ambiguity of loss is neither linear or cyclical, but simply circular. Within this framework, however, the guidelines can be used in any order for an intervention process that is fluid and flexible, depending on the culture and power structure of the people involved.

Finally, while each guideline is summarized below, I strongly urge professionals to read the full discussions of each guideline, which appear in separate chapters in the present author’s book *Loss, Trauma, and Resilience*<sup>43</sup> or its German,<sup>44</sup> Japanese<sup>45</sup> or Georgian<sup>46</sup> translations.

### *Finding Meaning*

To find meaning in the experience of ambiguous loss is to be able understand it. To do this, we must first give the problem a name. We tell family members, individually as well as in groups: “What you are experiencing is ambiguous loss. It is one of the most difficult types of loss because there is no closure. It is not your fault.” Giving the problem a name (ambiguous loss) allows survivors to better understand the situation and thus ease their feelings of helplessness and of blame (toward themselves or others). Naming the stressor allows the coping process to begin. Talking with others who are experiencing the same type of loss helps people understand the dialectic of both-and thinking. That is, they slowly learn to embrace the paradox of ambiguous loss: “My child is both probably dead, and maybe not”; “He is both gone, and still here in my thoughts and dreams.” To find some measure of meaning in the meaninglessness and absurdity and irrationality of ambiguous loss, we give up on absolute thinking and accept the paradox – there may still be some meaning in meaninglessness. It may be found in spiritual resources and in the practice of family rituals and gatherings. Family- and community-based therapies serve as antidotes to isolation, secret-keeping and self-blame, which hinder the discovery of meaning. By naming and externalizing the cause, we normalize its effect so that families understand that it is not their

41 P. Boss, *Loss, Trauma and Resilience*, above note 1.

42 Viktor Frankl, *Man’s Search for Meaning*, Beacon Press, Boston, MA, 1963; see also P. Boss, C. Bryant and J. Mancini, above note 8.

43 P. Boss, *Loss, Trauma and Resilience*, above note 1.

44 P. Boss, *Verlust, Trauma und Resilienz*, Klett-Cotta, Stuttgart, Germany, 2008

45 P. Boss, *Aimaina soshitsu to torauma karano kaifuku: Kazoku to komyuniti no rejiriensu (Recovering From Ambiguous Loss and Trauma: Resilience of Family and Community)*, Seishin Shobo, Tokyo, 2015.

46 ICRC, Tbilisi, forthcoming.



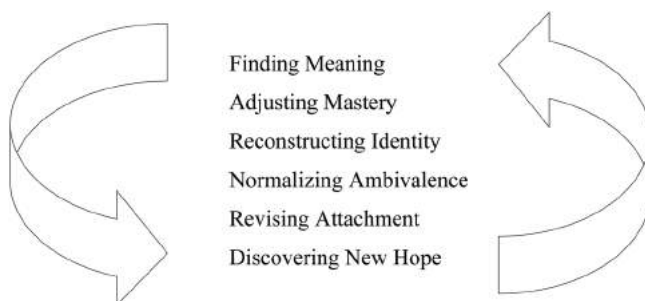


Figure 2. Six guidelines for increasing resilience to live without closure. Source: P. Boss, *Loss, Trauma and Resilience*, above note 1.

fault. With this new meaning, they are better able to begin the necessary process of change and adaptation.<sup>47</sup>

### *Adjusting Mastery*

Mastery is defined as the ability to have control over one's life. The extreme poles of mastery are perfectionism (believing one can control everything) and passivity (believing that one has no control). Neither extreme is recommended in everyday life, and certainly not with ambiguous loss. The overall assumption, however, is that having a mastery orientation, a sense that you can solve problems, is a consistent moderator of stress and trauma. While the original title for this guideline was "Tempering Mastery", Robins,<sup>48</sup> in his research on families of the missing in Nepal, found that sometimes a family member's sense of mastery needs to be increased, not tempered. For example, he found that in Nepal's patriarchal cultures, if a husband disappears, his wife no longer has any role or agency and thus is often neglected or abused by his family. Neither wife nor widow, with no power to master her own life, she needs *more* empowerment, not less.<sup>49</sup> To do this, an ICRC delegate organized the disenfranchised women into a group that met regularly in the community. Together, the women were empowered to live well despite a missing husband. While these women may still live with their missing husband's family, they now have a psychological family of peers to increase their sense of mastery and thus make their lives better.

Robins' finding adds a correction to this particular guideline. It is now retitled as "Adjusting Mastery" (up or down). If families of the missing are already highly competent and mastery-oriented, accustomed to solving problems, we may need to temper down their need for mastery. If people are not accustomed to being in charge of their lives, or for some reason are not culturally allowed to be, we increase their empowerment. If survivors feel helpless and

47 See P. Boss, *Loss, Trauma and Resilience*, above note 1, Ch. 4.

48 S. Robins, "Ambiguous Loss in a Non-Western Context", above note 1.

49 *Ibid.*; S. Robins, *Families of the Missing*, above note 1.

hopeless, we encourage them to begin mastering their *internal* selves through – depending on their culture and beliefs – meditation, prayer, mindfulness, physical activity, music, art and dance, among others. Mastering a musical instrument or a drawing or simply being in prayer are ways by which many have lessened their sense of helplessness and thus gained mastery and resilience.

In addition to cultural factors, we note that due to discrimination, poverty, stigma, imprisonment, illness, disability or age (too young or too old), there are many human beings who have no mastery or control over their lives. Again, this requires careful assessment and intervention to increase their mastery, not temper it.

### *Reconstructing Identity*

This guideline concerns the need to reconstruct one's identity in order to fill the roles vacated by the missing person. We encourage family members to reflect on who they are now that a spouse or child or sibling has disappeared: "Who am I now that my loved one is gone? Am I a wife or widow if my husband has been gone for years? Am I still a mother if my only child was kidnapped? What new roles must I now take on to make up for this person's absence?" We also encourage reflection about family membership: "Who do you see as your family now? Who is in and who is out? That is, have marital and family boundaries changed? If family members are non-supportive, have others become like family to you?" Together and individually, depending on culture and circumstance, we encourage people to reflect on these questions. Being able to shift who one is and what one does in the family now – and over the family life cycle – is essential for resilience. Human identity and performance are, after all, quite malleable over time, even apart from ambiguous loss.<sup>50</sup>

### *Normalizing Ambivalence*

Ambivalence means having mixed emotions or feelings about a person, e.g. love/hate, anger/sorrow. In families of the missing, such conflicting emotions often cause immobilizing guilt and anxiety, so it is necessary to talk with someone, perhaps a professional, to acknowledge and manage the negative side of the ambivalence. To prevent pathologizing this reaction to ambiguous loss, we need to know the difference between psychiatric and social ambivalence.<sup>51</sup> With ambiguous loss, the ambivalence is caused by an external social rupture; it is not a psychiatric problem. The pathology emerges from the ambiguity in the family's social environment and is a typical response to ambiguity. The resulting ambivalence is thus normalized. We also normalize what is the most guilt-producing response: wishing it were over, wishing the missing person's body would be found, wishing them dead because it would bring closure to the pain.

50 See P. Boss, *Loss, Trauma and Resilience*, above note 1, Ch. 6.

51 See Merton and Barber discussion at above note 15.

Once recognizing that the ambivalence is sociological and not psychiatric, the guilt and tension are more easily managed. Note, however, that although we normalize anger and guilt, we do not normalize harmful actions such as abusing oneself or others.

Social ambivalence may be an unfamiliar concept because it was not mentioned by early grief theorists and is thus rarely taught nowadays. While Bowlby<sup>52</sup> wrote about the intense pain of losing a loved one and the stress of ambivalence after loss that helps motivate letting go to lower this anxiety, he did not refer to losses that remain socially ambiguous; nor did Freud.<sup>53</sup>

### *Revising Attachment*

Family members of a missing person report confused attachment, as they no longer know how to relate to the lost person. Are they connected or not? Without reciprocity, spouses, parents and siblings of the missing say they no longer have the relationship they had emotionally, socially and cognitively. The attachment, as it was, is now gone. To understand the relationship with a missing person, one has to embrace the both-and paradox: “My loved one is both gone and still here.”

Revising attachment does not mean seeking closure. Rather, it means maintaining an ongoing internal relationship with the lost person while also investing emotional energy in finding new relationships and connections.<sup>54</sup> This means both letting go and remembering the lost person – grieve what was lost, but celebrate what you still have of that person. No family member is fully present all the time; nor are they fully gone, even after disappearance or death. Rather than severing your attachment to the missing person, let go of the idea of closure, and instead, remember and honour them while moving forward with life in a new way and with new attachments.

### *Discovering New Hope*

Due to the ongoing nature of ambiguous loss, it is essential that families of the missing discover some *new* hope – a new hope that does not focus on the missing person. Again, both-and thinking may help: “I both hope for my loved one’s return and am moving forward with new hopes and dreams.” Often, families of the missing hope to help prevent the kidnapping and disappearance of others by working to change laws or government policy; or they find new hope in raising their children well because that is what the missing person would have wanted, and because the next generation might make life better. Surviving families may move to a new place where life is safer. Some discover that working for justice embodies hope. Others find that renewing and deepening their spiritual resources

52 John Bowlby, *Loss: Sadness and Depression*, Vol. 3, Attachment and Loss Series, Basic Books, New York, 1980.

53 See P. Boss, *Loss, Trauma and Resilience*, above note 1, Ch. 7.

54 *Ibid.*, Ch. 8.

enables them to imagine and then implement new hopes. Understanding that hope does not end suffering, but enables forward movement despite the pain of ambiguity, becomes a valuable family resource. Something good can come of the suffering when some new hope is found.

These six guidelines, reviewed briefly here, embody the therapeutic core needed to restore meaning and hope in families of the missing. They are a map for building resilience.<sup>55</sup> With the ambiguous loss theory as a guiding map, we challenge the idea that unresolved grief and ambivalence are always pathological. As families of the missing meet together to discuss these guidelines, and hear from others who are also experiencing ambiguous loss, they realize they are not alone. They see that suffering can be eased by shifting perceptions and building resilience. We strongly recommend the ambiguous loss model as a map to guide interventions, wherever they take place.

## **Relevance for humanitarian workers: The need for professional self-reflection**

Those who work with ambiguous loss must recognize that we cannot bring the families that we work with farther than we ourselves can go in tolerating ambiguity. It is not just the surviving families who must grapple with the six issues presented above; those of us who work with them must do so as well. Elsewhere I have written specifically about how to care for oneself and regularly reflect on how to prevent burnout and fatigue.<sup>56</sup> As humanitarians, we all need to be aware of how we feel about doing this difficult and often dangerous work with the families of missing. Who am I as I do this work? What is my own level of tolerance for ambiguity? Do I feel like a professional failure if I cannot find a solution for the people I am aiding? How do I feel when I cannot find answers for the affected families and communities?

We must regularly reflect on our own losses if we are to understand the losses of others. We, too, must be mindful of the six guidelines – finding meaning in our losses, adjusting mastery over our lives personally and professionally, reconstructing our identities, normalizing the inevitable ambivalence, revising our attachments, and discovering new hopes and dreams as we move through life. If we are to be effective in aiding the families suffering with ambiguous loss, we must first recognize and reflect on our own. We all have some ambiguous losses, though rarely as extreme as those discussed here. It is from acknowledging our own needs and vulnerabilities that we become more resilient and effective in our humanitarian work. While we have been trained professionally to find answers, cure pain, solve problems and fix the broken, working with the families of the disappeared is indeed a unique challenge.

55 See *ibid.* for more details.

56 For more information on the self of the therapist, see *ibid.*, pp. 197–210.

## Q&A: The ICRC's engagement on the missing and their families

*The International Committee of the Red Cross (ICRC) has a long history of working with missing persons and their families. Based on its statutory mandate as enshrined in the 1949 Geneva Conventions, their 1977 Additional Protocols, the Statutes of the International Red Cross and Red Crescent Movement and resolutions of the International Conferences of the Red Cross and Red Crescent,<sup>1</sup> the ICRC has worked to prevent people from going missing and has facilitated family contact and reunification. It has also worked to clarify the fate and whereabouts of missing persons since 1870, during the Franco-Prussian War, when it pioneered the compilation of lists of prisoners of war and the introduction of “the wearing of a badge so that the dead could be identified”.<sup>2</sup>*

*The ICRC promoted and strengthened its engagement towards missing persons and their families when it organized the first ever International Conference of Governmental and Non-Governmental Experts on Missing Persons in 2003.<sup>3</sup> Today, the ICRC carries out activities in favour of missing persons and their families in around sixty countries worldwide. In 2018, it embarked on a new project setting technical standards in relation to missing persons and their families, together with expert partners and a global community of practitioners who have a shared objective – preventing people from going missing, providing answers on the fate and whereabouts of missing persons, and responding to the specific needs of their families.*

*This Q&A explores the ICRC's current work on the issue of the missing and will, in particular, explore the ways in which the ICRC's Missing Persons Project aims to position the missing and their families at the centre of the humanitarian agenda.*



## Who is a missing person?

While there is no legal definition of a missing person under international law, the ICRC understands missing persons as individuals of whom their families have no news and/or who, on the basis of reliable information, have been reported missing as a result of an armed conflict – international or non-international – or of other situations of violence or any other situation that might require action by a neutral and independent body.<sup>4</sup> This includes disasters and the context of migration.

The circumstances in which disappearances occur vary greatly. For instance, armed conflicts can cause mass displacements, which result in people going missing because they may lack adequate means of communication or they may become separated en route. Migrants may go missing when they are unable, or choose not to, establish contact with their families, including when they are detained. Members of State armed forces or non-State armed groups can go missing in action. Individuals whose bodies are abandoned, buried in haste or mismanaged, making identification difficult or impossible, may also be reported missing. So may people who are captured, arrested or abducted and held incommunicado or in a secret location.

The 2006 International Convention for the Protection of All Persons from Enforced Disappearance (ICCPED), the first universal treaty on that subject, uses the term “disappeared person”, which covers only disappearances due to 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 of the State 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 ICRC definition of missing persons also includes those considered to be disappeared persons according to the Convention. However, a broader

- 1 The Geneva Conventions of 1949, their Additional Protocols and customary international humanitarian law (IHL) rules, which are applicable in situations of armed conflict, contain legal obligations for States and parties to conflict in terms of both preventing individuals from going missing and their response in the event that they do. In discharging these obligations, parties to conflict are to be prompted mainly by the families’ right to know the fate of their relatives, and they must provide families with any information they have in this respect. International human rights law also recognizes the right to know the fate of a missing relative, and the correlative obligation of public authorities to carry out an effective investigation into the circumstances surrounding a disappearance. This is linked, in particular, to the protection of the right to life, the prohibition against torture and other forms of cruel, inhuman or degrading treatment, and the right to family life. For more information, see the ICRC factsheet “Missing Persons and Their Families”, available at: [www.icrc.org/en/document/missing-persons-and-their-families-factsheet](http://www.icrc.org/en/document/missing-persons-and-their-families-factsheet) (all internet references were accessed in September 2018).
- 2 See: [www.icrc.org/eng/resources/documents/misc/57jnvq.htm](http://www.icrc.org/eng/resources/documents/misc/57jnvq.htm).
- 3 See ICRC, *The Missing and Their Families: Summary of the Conclusions Arising from Events Held Prior to the International Conference of Governmental and Non-Governmental Experts (19–21 February 2003)*, Geneva, 2003, available at: [www.icrc.org/eng/resources/documents/report/5jahr8.htm](http://www.icrc.org/eng/resources/documents/report/5jahr8.htm); ICRC, *International Conference of Governmental and Non-Governmental Experts on the Missing Persons – Outcome (including Observations and Recommendations)*, available at: [www.icrc.org/eng/resources/documents/report/5jygc.htm](http://www.icrc.org/eng/resources/documents/report/5jygc.htm).
- 4 Definition based on ICRC, *Missing Persons: A Handbook for Parliamentarians*, Geneva, 2009, available at: [www.icrc.org/en/publication/1117-missing-persons-handbook-parliamentarians](http://www.icrc.org/en/publication/1117-missing-persons-handbook-parliamentarians).

description of missing persons is deliberately applied by the ICRC to ensure that all missing persons, including those not covered by the ICCPED, are included and that the families' needs, including their right to know the fate and whereabouts of their loved ones, are addressed.

There is no element of time and no presumption of death included in the ICRC's definition of a missing person. Hence, the ICRC considers persons to be missing from the moment their families report them missing, meaning there is no "waiting period" before considering a person missing. At the other end of the spectrum, a person is considered no longer missing when the family has received sufficient, reliable and credible information on the fate and whereabouts of their sought relative.

### *How widespread is the problem of missing persons?*

Hundreds of thousands of people are currently missing around the world in relation to past and present armed conflicts, other situations of violence, and disasters, or in the context of migration. Whether combatants missing in action, children separated from their families when they flee or are forced into armed groups, detainees unable to contact their families, or internally displaced people and migrants who have lost touch with their loved ones, many are at risk and disappear every year. The full scale of the problem is unknown and chronically unacknowledged.

The impact of such disappearances on individuals, families and communities at large is damaging and can be long-lasting. The sense of mounting anxiety experienced as a result of disappearance is best told in the words of one father of a missing person in the South Caucasus:

The most difficult thing to overcome is this constant state of nervousness that does not leave you, that any moment he could be knocking on the door. During the night, I listen intently and each time I hear a small noise, the first thing that comes to my mind is that my son is back.<sup>5</sup>

In the South Caucasus region, 7,538 people<sup>6</sup> have been reported missing in different armed conflicts.

The phenomenon of missing persons is widespread and touches all corners of the globe. In the Americas, for example, 20,329 people<sup>7</sup> are officially missing in Peru as a result of the conflict of 1980–2000, while 45,000 people<sup>8</sup> are estimated

5 ICRC, *International Day of the Disappeared: Why it Matters*, Geneva, August 2016, p. 19, available at: [www.icrc.org/en/document/missing-persons-international-day-of-the-disappeared-report-2016](http://www.icrc.org/en/document/missing-persons-international-day-of-the-disappeared-report-2016).

6 Council of Europe Commissioner for Human Rights, *Missing Persons and Victims of Enforced Disappearance in Europe*, Issue Paper, March 2016, available at: <https://rm.coe.int/missing-persons-and-victims-of-enforced-disappearance-in-europe-issue-16806daa1c>.

7 Public event hosted by the Peruvian Ministry of Justice and Human Rights, 20 April 2018. See: [www.gob.pe/institucion/minjus/noticias/4076-presentaran-el-listado-base-del-renade](http://www.gob.pe/institucion/minjus/noticias/4076-presentaran-el-listado-base-del-renade).

8 United Nations (UN) Working Group on Enforced and Involuntary Disappearances, *Report of the Working Group on Enforced or Involuntary Disappearances – Mission to Guatemala*, UN Doc. A/HRC/4/41/Add.1, 21 February 2007.

to be still missing in relation to the non-international armed conflict in Guatemala. In Asia, 1,333 individuals<sup>9</sup> remain unaccounted for after the non-international armed conflict in Nepal, which took place in the late 1990s and 2000s, while the ICRC has registered more than 16,000 people missing in Sri Lanka<sup>10</sup> as a result of the conflict between the Sri Lankan government and the Liberation Tigers of Tamil Eelam. Africa is also deeply affected by disappearance. The ICRC is searching for 3,020 missing persons in South Sudan, and there have been over 13,000 requests to the ICRC and the Nigerian Red Cross made by families in Nigeria looking for their missing relatives.<sup>11</sup> In North Africa and the Middle East, a number of countries have been touched by disappearance in relation to past armed conflicts. In Lebanon, for instance, 17,000 people<sup>12</sup> went missing between 1975 and 1990 according to the Lebanese government. As a result of the armed conflicts in the Western Balkans in the 1990s, more than 35,000 people went missing; 70% of these have since had their fate clarified, but there are still more than 8,000 missing persons in this region.<sup>13</sup>

As these examples show, today, cases of missing persons that occurred decades ago are still pending clarification in many countries. For families, this means that the waiting and anguish has spread over generations and has marked the history of entire communities. This and other unresolved consequences of crises that stretch over decades can hamper the prospects of peace in a country or region. This is worrisome for countries that are emerging from years of conflict and where thousands of families are already expecting answers.

There are also contexts where conflict has resurfaced and new cases of missing persons join countless others for whom no information has been found for years, even decades. In Iraq, for instance, external estimates range from 250,000 up to 1 million missing persons from past and current conflicts.<sup>14</sup>

The number of persons reported missing in current conflicts around the world is substantial. For example, more than 10,000 cases<sup>15</sup> of missing persons have been opened with the ICRC in relation to the Syrian conflict. As with many of the above countries, this number only reflects cases registered by families with the ICRC.

Disappearances are a daily and chronic phenomenon in some contexts affected by situations of violence other than armed conflict. People are going missing every day at the hands of gangs, authorities and other groups, or as a result of collusion between those involved in the violence. Disappearance may be

9 See ICRC, “Nepal: Families Have the Right to Know the Fate of Their Missing Loved Ones”, 28 August 2018, available at: [www.icrc.org/en/document/nepals-missing-families-have-right-know-fate-their-missing-loved-ones](http://www.icrc.org/en/document/nepals-missing-families-have-right-know-fate-their-missing-loved-ones).

10 ICRC, *Annual Report 2017*, Geneva, 2018, p. 347, available at: [www.icrc.org/en/document/annual-report-2017](http://www.icrc.org/en/document/annual-report-2017). These figures are from the end of the reporting period for 2017.

11 *Ibid.*, p. 184, 201.

12 See International Center for Transitional Justice, *Lebanon: Addressing the Legacy of Conflict in a Divided Society*, available at: <https://www.ictj.org/sites/default/files/subsites/lebanon-legacy-conflict/>.

13 ICRC, above note 10, p. 413.

14 UN Human Rights Council, *Joint Written Statement*, UN Doc. A/HRC/22/NGO/157, 25 February 2013.

15 ICRC, above note 10, p. 491.



a tactic used as retaliation, to instil fear in individuals and communities, to eliminate or intimidate witnesses of criminal activity, or in armed conflict. In situations of violence below the threshold of armed conflict, people also go missing in ways unrelated to violations of the law, such as when they die and their remains are not found or properly identified. Over the last ten years, official numbers in Brazil, for instance, indicate that more than 750,000 people<sup>16</sup> have been reported as missing to the authorities, while in Mexico over 37,000 people<sup>17</sup> have been officially reported missing.

Today, the issue of the missing has taken on an even more global dimension in its overlap with migration. A significant number of migrants go missing in a variety of circumstances along migratory routes around the world, including when they are unable or unwilling to establish contact with their families for different reasons, when they are deprived of freedom without access to means of communication, or when they perish along their journey or at their destination. Efforts to trace missing migrants are complicated by the large number of potential countries concerned; in cases where these migrants die, their bodies are often not found or not identified. The International Organisation for Migration (IOM) estimates that around the world, more than 22,000 migrants have died or gone missing in countries of transit and destination, or along migratory routes, between 2014 and mid-2017.<sup>18</sup> According to the IOM, the number of recorded deaths is most pronounced in the Mediterranean Sea.

For all the above situations contributing to people going missing, the long-standing and growing number of cases is often the result of factors including negligence, a lack of awareness, capacity and/or political will, or a failure in information-sharing between different repositories of data.

### ***What action does the ICRC take on behalf of the missing? How does the ICRC approach the issue of missing persons in its operations?***

The issue of missing persons is an integral part of the mandate of the ICRC and the role of the Central Tracing Agency, and has been defined as an institutional priority.<sup>19</sup> The ICRC undertakes a wide range of activities on behalf of the missing and their families through its humanitarian approach in nearly sixty contexts around the world as of 2018. The ICRC's humanitarian approach is centred on the needs of affected individuals, which includes the direct victims and their families. In conducting needs assessments with the families of missing

16 See Anuário Brasileiro de Segurança Pública, 2017, available at: [www.forumseguranca.org.br/publicacoes/110-anuario-brasileiro-de-seguranca-publica/](http://www.forumseguranca.org.br/publicacoes/110-anuario-brasileiro-de-seguranca-publica/); Anuário Brasileiro de Segurança Pública, 2018, available at: [www.forumseguranca.org.br/publicacoes/anuario-brasileiro-de-seguranca-publica-2018/](http://www.forumseguranca.org.br/publicacoes/anuario-brasileiro-de-seguranca-publica-2018/).

17 See Registro Nacional de Datos de Personas Extraviadas o Desaparecidas, Database, available at: <http://secretariadoejecutivo.gob.mx/rnped/consulta-publica.php>.

18 These are only the reported cases. See IOM, "Latest Global Figures", *Missing Migrants*, available at: <https://missingmigrants.iom.int/latest-global-figures>.

19 ICRC, *ICRC Institutional Strategy 2019–2022*, Geneva, available at: <https://www.icrc.org/en/publication/4354-icrc-strategy-2019-2022>.

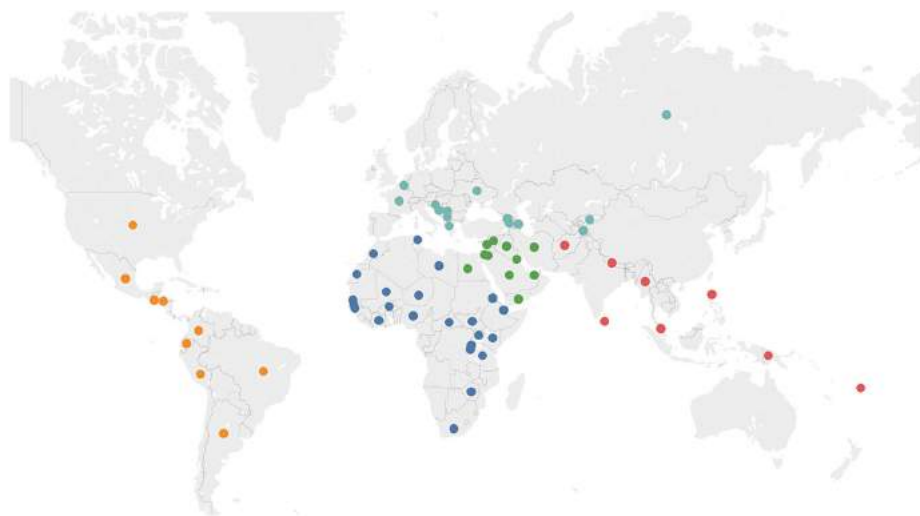


Figure 1. Map depicting the ICRC's missing-related activities in over sixty contexts. © ICRC/OSM, 2018. The boundaries, names and designations used in this map do not imply official endorsement, nor express a political opinion, and are without prejudice to claims of sovereignty over the territories depicted.

persons, these families tell us that their primary need is to know the fate and whereabouts of their missing relatives.

This means that the affected population's interests – namely, the search for the missing person and the response to his/her family's needs – are at the forefront at all times. The ICRC's humanitarian approach acknowledges that families may have an interest in, and right to, justice and accountability in addition to their other needs, and supports families so that their various needs are fully covered by the responsible authorities and/or other institutions. However, the ICRC's approach remains focused first and foremost on the humanitarian imperative to give an individualized response to the families' need to know the fate and whereabouts of their missing relatives as soon as possible. Affected persons should be recognized as rights holders, and their multifaceted needs – socio-economic, legal, administrative, psychological and psychosocial, as well as the need for recognition and acknowledgement of their suffering – should all be taken seriously.

The ICRC's activities seek to address the families' different needs through a variety of activities that include ensuring the environment is conducive to addressing the issue of the missing, preventive actions, activities to ensure protection for the missing and their families under the law, tracing activities, forensic activities and activities aimed at better understanding and addressing the needs of the families of missing persons.

The ICRC has carried out a number of such activities in support of missing persons, those at risk of going missing, and their families. To provide a snapshot, concrete examples of these include:

- Preventing the separation of families and the disappearance of individuals, and tracing missing persons, through the ICRC's Family Links network<sup>20</sup> and tools such as Trace the Face,<sup>21</sup> which trace those who go missing while migrating and help separated families restore contact. The ICRC engages in a protection dialogue, reminding and supporting authorities and parties to armed conflicts to fulfil their obligations under international law to prevent family separation, help separated persons restore family contact and register detainees and other vulnerable groups in order to prevent disappearances. The ICRC also keeps families in contact when it visits places of detention in the over ninety contexts where it is operational.
- Supporting efforts to clarify the fate and whereabouts of missing persons. The ICRC chairs coordination mechanisms designed to clarify the fate of the missing in relation to armed conflicts in Georgia, as well as the Tripartite Commissions between Iraq and Kuwait and between Iran and Iraq, and the Kosovo Working Group on Missing Persons. The ICRC has also advocated for the establishment of (and later supported) humanitarian mechanisms in contexts including Colombia, Peru and Sri Lanka.
- Assessing the needs of families of missing persons and implementing multidisciplinary responses which involve elements of psychological, psychosocial, economic and legal or administrative support. This is sometimes done through local support networks via an accompaniment program, which helps families of missing persons cope with the associated ambiguity of having a missing relative. Accompaniment programs are in place in twenty contexts, including Sri Lanka, Tajikistan, Lebanon, Colombia, Ukraine and Senegal.
- Providing legal and technical support to States for developing and enacting laws and regulatory frameworks to implement their international obligations. In order to do this, the ICRC has developed several tools, including guiding principles and a Model Law on the Missing,<sup>22</sup> as well as a Handbook for Parliamentarians,<sup>23</sup> to assist authorities in preventing people from going missing, establishing the fate of those who nevertheless do go missing and protecting the rights of missing persons and their families. Between 2003 and 2016, the ICRC supported twenty-one States, including Lebanon, Sri Lanka and Peru, in developing national laws and measures related to missing persons associated with armed conflicts and the families of the missing.<sup>24</sup>
- Supporting forensic activities. As the only international organization offering forensic support for purely humanitarian purposes, the ICRC supports national authorities in clarifying the identities of human remains, ensuring

20 The Family Links Network is composed of all Restoring Family Links services of National Red Cross and Red Crescent Societies and the Central Tracing Agency of the ICRC at its headquarters in Geneva, Switzerland. The Central Tracing Agency supports and coordinates the work of the Family Links Network. For more information, see: <https://familylinks.icrc.org/en/pages/home.aspx>.

21 Available at: <https://familylinks.icrc.org/europe/en/pages/home.aspx>.

22 Available at: [www.icrc.org/en/download/file/1066/model-law-missing-icrc-eng-.pdf](http://www.icrc.org/en/download/file/1066/model-law-missing-icrc-eng-.pdf).

23 ICRC, above note 4.

24 See the ICRC Database on National Implementation of IHL, available at: <https://ihl-databases.icrc.org/ihl-nat>.

the dignified handling of the dead, and building national forensic capacities through support to medico-legal systems – for example, in Yemen, South Africa, Mexico and the Philippines. Indeed, building well-trained, well-resourced and independent domestic forensic capacities is essential for ensuring credible investigations into cases of missing persons and thereby reducing the number of persons going missing and ensuring proper and dignified burial.

- Convening a Transregional Missing in Migration Pilot Programme in collaboration with National Societies in Senegal, Mali and Mauritania, to support identification efforts in countries where human remains are recovered.

***The ICRC recently undertook an internal stocktaking exercise into its activities on behalf of the missing between 2003 and 2016. What challenges did this exercise reveal for the ICRC in its work with the missing and their families?***

In April 2016, the ICRC undertook a stocktaking exercise on the missing in twenty-two of its operational contexts<sup>25</sup> in order to review how much progress had been made since 2003, when the ICRC organized an International Conference of Governmental and Non-Governmental Experts<sup>26</sup> on the topic and established its Internal Operational Guidelines on the Missing and Their Families. The Guidelines framed the institutional response and operational activities in favour of missing persons and their families, taking into account families' interconnected needs through long-term multidisciplinary responses.

The ICRC has developed strong expertise on the missing and the stocktaking exercise highlighted the organization's key strengths: its multidisciplinary, humanitarian approach based on solid expertise in prevention, protection, forensic science, mental health and psychosocial support, economic security, and legal support; its humanitarian forensic action; its trusted role as a neutral and independent intermediary; its close proximity to affected populations; and its influence, persuasion and dialogue in providing guidance and support to States and parties to armed conflicts, to help them adopt effective measures to prevent people from going missing and clarify the fate and whereabouts of those who do, as well as to assist their families.

However, the stocktaking exercise recognized other areas that required improvement with a view to increasing the rate and quality of responses, including on the fate and whereabouts of missing persons. For instance, the exercise underscored existing gaps in standards related to the timing of a missing response, such as the need for information on persons at risk of becoming missing and on missing persons to be collected as early as possible, and to be efficiently processed and transmitted. It also highlighted gaps in technical standards of support to families, including during the search process as well as during the identification

25 These twenty-two contexts were chosen on the basis of their relevance to the missing in terms of human and material resources used, and the longevity of their programmes (most started before or around 2003). Newer programmes were also chosen on the basis of their geographical or topical relevance – for instance, programmes in Africa or programmes related to missing migrants.

26 See ICRC, *The Missing and Their Families*, above note 3.

and return of human remains. Furthermore, the exercise identified a need to explore the access, use and management of big data and new technologies in the search for missing persons. Finally, the study reconfirmed the long-term investment required by the ICRC's work on the missing to bear fruit at the national level, and the need to make better use of partnerships, in line with the ICRC's working modalities and the Fundamental Principles of the International Red Cross and Red Crescent Movement, to set the basis for sustainability from the outset.

### ***Going forward, what developments are foreseen for the ICRC in its work with the missing and their families?***

After the stocktaking exercise, a number of initiatives were set in motion as part of a consolidated approach aimed at effectively preventing disappearances, promoting human dignity and ensuring respect for the families' right to know. These include multiyear operational strategies in contexts with active armed conflicts, long-term post-conflict settings and situations of violence not reaching the threshold of armed conflict, in regions such as North Africa, the Middle East and Europe; and concerted plans for global diplomatic engagement and public communications aimed at placing missing persons higher on the political agenda of States and raising the profile of the issue in the public arena. They also include a four-year project aimed at developing professional standards and creating a community of practice.

The Missing Persons Project, launched in 2018, will work to standardize and harmonize existing practices in the field of the missing so that practitioners worldwide can work more efficiently and effectively, and in a more coordinated manner, to provide an improved response to missing persons and their families. To do this, it will mobilize and coordinate all concerned stakeholders in order to build and strengthen the community of practitioners working on the missing. These include governmental and non-governmental bodies, local practitioners and renowned scientific experts, first responders and national societies, NGOs, academia, community-based associations (including family associations) and the private sector. Affected persons and their families will be actively engaged throughout the Project.

The Missing Persons Project will build on the conclusions and recommendations of the 2003 International Conference on the Missing, which are still important today. It will examine existing practices and review standards and guidelines currently in use, in order to identify gaps and needs for standardization. In conjunction with an ambitious communication campaign, the project will aim at putting the missing and their families at the centre of the humanitarian agenda.

### ***How will the specific concerns and situations covered by the Missing Persons Project be addressed?***

The technical standards envisioned by the Project will focus on five particular areas, or "pillars", which reach across different situations such as armed conflict, other situations of violence, disasters, post-conflict settings and migration.

The first pillar aims to improve the quality and timeliness of the **collection and processing of information** on persons at risk of becoming missing and on missing persons. Faster collection of, and access to, an improved data set could help to significantly reduce the number of missing persons or those at risk of going missing. This will require measures to ensure compatibility of data and centralizing data collection where possible, paying due attention to the need for quality control to ensure data reliability. Also, this pillar will explore standardized “stay safe” methods and tools for prospective migrants to stay in contact with their relatives, as well as methods for migrants to provide information that could be used to facilitate identification should they go missing.

The second pillar concerns practices, principles and standards aimed at **addressing the needs of families of the missing**, in terms of mental health and psychosocial assistance as well as legal, administrative and economic support. As such, the project will try to better address the unique short- and long-term challenges experienced by the families of missing persons. The methodology for assessing family needs will also be addressed with a view to improving current practice.

The third pillar concerns the role and use of **forensic science** in preventing and resolving cases of the missing. It aims to identify needs and develop the required standards for improved planning and implementation of forensic activities. This includes the various aspects related to the management and identification of the dead, as well as the search for and identification of the living; communication with the families; and the collection and management of forensic data sets. The active participation and contribution of the global community of forensic practitioners and institutions will be sought throughout the Project, including for empowering their role in preventing and resolving cases of the missing worldwide.

The fourth pillar will focus on **mechanisms to clarify the fate and whereabouts of the missing**. It will not only focus on a humanitarian approach to the missing, but will also seek to develop guidance on how to ensure complementarity with other (e.g., rule-of-law-based) approaches. This pillar will aim to develop indicators to measure the effectiveness of mechanisms and provide standards for locating and accessing information, including in archives, for humanitarian purposes. Sets of incentives to obtain the information – for example, from witnesses – will be proposed. Finally, this pillar will examine links to the standardization of data sets discussed in pillars 1 and 3 and the use of big data explored in pillar 5.

The fifth pillar will look at the **use of big data and information technology** in the search for missing persons, both in past and ongoing conflicts. The Project will explore the need for specific standards to access, use, manage and protect such information for humanitarian purposes. Data reliability and digitization of data for humanitarian purposes will also be addressed, as will issues such as data analytics, image extraction from big data sets and search algorithms.

### ***How does the ICRC intend to build external support and gather input for the Missing Persons Project?***

The Missing Persons Project is outward-looking and recognizes the critical importance of knowledge-sharing and management among stakeholders and affected persons. It will mobilize stakeholders around the world to develop and share a repertoire of resources: experiences, stories, tools, best practices and ways of addressing recurring problems and challenges. A number of events, such as conferences and workshops, will be organized to create and develop the dialogue and exchanges. An online platform will be created to sustain dialogue and share resources, data and information.

The process of creating standards, including identifying topics, work-streams, and drafting and validating of documents, will be participatory and inclusive to ensure their broadest possible acceptance and application. It should be evidence-based and incorporate practices that have a proven track record of efficiency. Once technically validated and published, standards will depend on political support and effective promotion to ensure their effective implementation. The Project will look at how to ensure this beyond the lifespan of the Project itself.

There are many ways to become involved – either in expert meetings or conferences where the ICRC will gather practitioners and experts on topics relating to the five thematic pillars, or in online platforms with an active community of practitioners. Alternatively, we welcome those who would like to engage in more focused aspects such as project funding, co-funding and the co-organization of events. The issue of missing persons is one of the most damaging and long-lasting humanitarian consequences of past and current armed conflicts and other situations of violence, as well as migration and natural disasters. For more information, and to find out how you can get involved now, please contact the ICRC delegation in your country or email: [missingpersonsproject@gva.org](mailto:missingpersonsproject@gva.org).





# Implementing international law: An avenue for preventing disappearances, resolving cases of missing persons and addressing the needs of their families

**Ximena Londoño and Alexandra Ortiz Signoret\***

Ximena Londoño is an ICRC Protection Delegate working on the issue of missing persons and their families in Sri Lanka.

Alexandra Ortiz is a Legal Adviser at the ICRC's Advisory Service on International Humanitarian Law.

## Abstract

*International humanitarian law and international human rights law seek to prevent people from going missing, and to clarify the fate and whereabouts of those who do go missing while upholding the right to know of their relatives. When implementing international law at the domestic level, national authorities should plan carefully before engaging in any policy or legal reform that will address the issue of missing persons and the response to the needs of their families. This article seeks to present a general overview of the provisions of international law that are relevant to understanding the role of national implementation vis-à-vis the clarification of the fate and whereabouts of missing persons and the response to the needs of their*

\* The views expressed here are those of the authors and do not necessarily reflect the position of the International Committee of the Red Cross. The authors would like to thank Cristina Pellandini and Helen Obregón for their valuable comments on earlier drafts of this article.

*relatives. It also presents the role that the ICRC has played in this regard and highlights three challenges that may arise at the national level when working on legal and policy reforms.*

**Keywords:** ICRC, missing persons, families, national implementation, legal status, missing persons' mechanisms, international humanitarian law, international human rights law.

.....

## Introduction

Every year thousands of persons go missing, notably as a result of armed conflicts, other situations of violence or disasters. The circumstances in which people go missing may vary: families are separated because of hostilities and violence, or when people flee their homes across international borders, which may result in the disruption of means of communication. On the battlefield, members of States' armed forces and non-State armed groups can go missing, and so can people who are detained, arrested or held incommunicado or in secret places of detention. If human remains are inappropriately handled, these persons can also become missing. Families suffer great anguish not knowing whether their relatives are alive or dead. They make despairing attempts to find them and live in limbo for many years, even decades. The uncertainty of not knowing what has happened to their relatives can generate important psychological and sociological consequences for them, such as difficulties in starting to cope with the grieving process, and can also rupture the family's structure and functioning.<sup>1</sup>

In situations of armed conflict, international humanitarian law (IHL) and, in both wartime and peacetime, international human rights law (IHRL) seek to prevent people from going missing and to clarify the fate and whereabouts of those who do. In this regard, it is of paramount importance to ensure that the rights and obligations derived from these bodies of international law are implemented at the national level through the adoption of the proper domestic laws and policies which include the establishment of relevant and well-coordinated structures, procedures or mechanisms. National implementation is only a first step; enforcing laws and policies is an essential next step to ensuring their effective application in favour of those who have gone missing and their families.

This article looks at the importance of implementing international law, in particular IHL, at the national level in order to prevent people from going missing and to clarify the fate and whereabouts of those unaccounted for, while upholding

1 To better understand the impact of disappearances on families, see ICRC, *Accompanying the Families of Missing Persons: A Practical Handbook*, 2015, available at: [www.icrc.org/en/publication/4110-accompanying-families-missing-persons-practical-handbook](http://www.icrc.org/en/publication/4110-accompanying-families-missing-persons-practical-handbook) (all internet references were accessed in October 2018); and see Pauline Boss, "Families of the Missing: Psychosocial Effects and Therapeutic Approaches", in this issue of the *Review*.

the rights and needs of their families. It will also look at the role of the International Committee of the Red Cross (ICRC) in supporting States' efforts to implement IHL at the domestic level, and will provide examples of domestic normative frameworks adopted in different regions of the world that seek to address the issue of missing persons and respond to the needs of their families. The article will also look at three challenges related to national implementation: (1) the definition of missing persons; (2) the recognition of the legal status of missing persons; and (3) the creation of appropriate mechanisms to search for the missing and respond to the needs of their relatives.

## The international legal framework

Before reflecting on national implementation, a brief overview of the main relevant international law provisions regarding the protection of missing persons is necessary. This part of the article does not seek to analyze in detail all the provisions of IHL and other branches of international law dealing with the prevention of disappearances and the clarification of the fate and whereabouts of missing persons, but rather aims to give readers the tools needed to understand the role of national implementation of international law in preventing disappearances, clarifying the fate and whereabouts of missing persons and addressing the rights and needs of their families.

The Geneva Conventions of 1949, their Additional Protocols of 1977 and customary IHL contain important rules, which are applicable in situations of armed conflict, to ensure that people do not go missing and to account for those who do. IHL also contains rules regulating the search for, collection, evacuation, identification and return of human remains, which play a central role in reducing the number of persons unaccounted for. In international armed conflicts, underlying the obligations relevant to missing persons is the right of families to know the fate and whereabouts of their missing relatives, which is enshrined in Article 32 of Additional Protocol I (AP I) as a general principle that shall prompt States parties, parties to armed conflict and humanitarian organizations to search for missing and dead persons.<sup>2</sup> Furthermore, under customary international law,

2 Helen Obregón Gieseken, "The Protection of Migrants under International Humanitarian Law", *International Review of the Red Cross*, Vol. 99, No. 904, 2017, pp. 149–150. Article 32 of AP I states: "In the implementation of this Section, the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of families to know the fate of their relatives."

The right of families to know the fate of their relatives is also supported by a number of resolutions adopted in multilateral fora. For example, in a resolution adopted in 1974, the United Nations (UN) General Assembly stated that "the desire to know the fate of loved ones lost in armed conflicts is a basic human need which should be satisfied to the greatest extent possible". UNGA Res. 3230 (XXIX), 6 November 1974, Preamble. Also, the former UN Commission on Human Rights affirmed in two resolutions in 2002 and 2004 "the right of families to know the fate of their relatives reported missing in connection with armed conflict". UN Commission on Human Rights, Res. 2002/60, 25 April 2002, para. 2, and Res. 2004/50, 20 April 2004, para. 3.

each party to both international and non-international armed conflicts “must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate”.<sup>3</sup> As noted in the ICRC’s Customary Law Study, “[p]ractice indicates that this rule is motivated by the right of families to know the fate of their missing relatives”.<sup>4</sup>

As seen above, parties to an armed conflict have obligations in terms of preventing disappearances and clarifying the fate and whereabouts of those unaccounted for. The following concrete examples illustrate what these two obligations entail: in terms of preventing people from going missing, States and parties to an armed conflict (1) should produce and provide means of identification for members of armed forces or groups, for instance by issuing identity cards and discs;<sup>5</sup> (2) must allow persons deprived of their liberty for reasons related to the armed conflict to correspond with their families, subject to reasonable conditions relating to frequency and the need for censorship by the authorities;<sup>6</sup> (3) must establish an official Graves Registration Service and/or National Information Bureau, as provided for in the Geneva Conventions;<sup>7</sup> and (4) must record all available information relating to the dead, deliver proper death certificates and ensure that the management of human remains is carried out in a proper and dignified manner.<sup>8</sup>

Once people have gone missing, the obligation to clarify their fate and whereabouts requires that States and parties to an armed conflict take all feasible measures to account for missing and dead persons<sup>9</sup> and all possible measures to search for, collect and evacuate the dead without adverse distinction, as well as to identify the dead.<sup>10</sup> Measures such as burying the dead in individual graves<sup>11</sup> and

Finally, the International Conference of the Red Cross and Red Crescent has adopted on various occasions resolutions stressing the right of families to be informed about the fate of their relatives. See in particular 25th International Conference of the Red Cross and Red Crescent, Res. XIII, October 1986; 26th International Conference of the Red Cross and Red Crescent, Res. II, December 1995.

3 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 117.

4 *Ibid.*, commentary on Rule 117.

5 Geneva Convention I (GC I), Art. 16(f); Geneva Convention II (GC II), Art. 19(f); Geneva Convention III (GC III), Art. 17.

6 GC III, Arts 70–71; Geneva Convention IV (GC IV), Arts 106–107; Additional Protocol II (AP II), Art. 5 (2)(b); ICRC Customary Law Study, above note 3, Rules 105, 125.

7 GC III, Arts 120, 122, 124; GC IV, Art. 136.

8 GC I, Art. 17; GC II, Art. 20; GC III, Art. 120; GC IV, Art. 130; AP I, Art. 34; AP II, Art. 8; ICRC Customary Law Study, above note 3, Rules 112–116.

9 ICRC Customary Law Study, above note 3, Rules 116, 117.

10 GC I, Arts 15–17; GC II, Arts 18–20; GC III, Arts 120, 122–124; GC IV, Arts 16, 136–141; AP I, Arts 32–34; AP II, Art. 8; ICRC Customary Law Study, above note 3, Rule 112.

11 In international armed conflicts, parties to the conflict shall ensure that burial or cremation of the dead is carried out individually as far as circumstances permit (GC I, Art. 17(1); GC II, Art. 20(1)). Deceased prisoners of war and internees must be buried in individual graves unless unavoidable circumstances require the use of collective graves (GC III, Art. 120; GC IV, Art. 130). See also ICRC Customary Law Study, above note 3, Rule 115 and commentary.

recording all available information prior to their disposal<sup>12</sup> can facilitate any identification process.

IHRL is also relevant for preventing and protecting persons against disappearances, especially against enforced disappearances. The 2006 International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) is the first universal treaty to regulate this issue and to include specific obligations for States Parties in terms of prevention, clarification and accountability.<sup>13</sup> Other regional human rights instruments also deal with the issue of enforced disappearances, for example the Inter-American Convention on Forced Disappearance of Persons.<sup>14</sup> IHRL obligations regarding the prevention and protection of persons against disappearances should also be implemented into domestic laws.

In order to ensure that IHL is fully applied and respected during armed conflicts, States have the responsibility to adopt the relevant measures at the domestic level, including in peacetime.<sup>15</sup> This responsibility is “prominently set forth in Article 1 common to the four Geneva Conventions, which requires States Parties to ‘respect and to ensure respect for the present Convention in all circumstances’”.<sup>16</sup> National implementation of this body of law is a permanent process which covers a wide range of measures<sup>17</sup> such as the adoption of laws, policies, administrative regulations and other measures, including practical ones. IHL rules themselves contain specific practical measures that States must adopt to give effect to the rules they contain, such as the obligation to disseminate IHL to the armed forces and civilian population and to provide instruction in IHL to armed forces.<sup>18</sup> These measures are also relevant when dealing with the issue of missing persons and their families. The collaboration of various entities,

12 See note 8 above for references concerning the obligations of parties to record all available information prior to disposal of the dead, including ICRC Customary Law Study, above note 3, Rule 116.

13 International Convention for the Protection of All Persons from Enforced Disappearance, 2716 UNTS 3, 20 December 2006 (entered into force 23 December 2010).

14 Organization of American States (OAS), Inter-American Convention on Forced Disappearance of Persons, 9 June 1994 (entered into force 28 March 1996), available at: <http://www.refworld.org/docid/3ae6b38ef.html>.

15 Toni Pfanner, “Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims”, *International Review of the Red Cross*, Vol. 91, No. 874, 2009, p. 282.

16 Cristina Pellandini, “Ensuring National Compliance with IHL: The Role and Impact of National IHL Committees”, *International Review of the Red Cross*, Vol. 96, No. 895–896, 2014, p. 1044. For more information on the obligation to respect and ensure respect in Article 1 common to the four Geneva Conventions, see Knut Dörmann and Jose Serralvo, “Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations”, *International Review of the Red Cross*, Vol. 96, No. 895–896, 2014; ICRC Customary Law Study, above note 3, Rules 139, 140, 144; ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016, Art. 1.

17 ICRC, “Implementing International Humanitarian Law: From Law to Action”, Advisory Service Factsheet, 2002, available at: [www.icrc.org/en/document/implementing-international-humanitarian-law-law-action](http://www.icrc.org/en/document/implementing-international-humanitarian-law-law-action).

18 GC I, Art. 47; GC II, Art. 48; GC III, Art. 127; GC IV, Art. 144; AP II, Art. 83; ICRC Customary Law Study, above note 3, Rules 142, 143.

ministries and/or other national authorities is key to ensuring the effectiveness of processes aimed at implementing IHL at the domestic level.

## **Implementing international obligations at the domestic level: The role of the ICRC**

Preventing people from going missing and restoring contact between families separated by armed conflicts, other situations of violence, disasters or other circumstances that might require action by a neutral and independent body has been at the core of the ICRC's mandate since the organization's inception. The Central Tracing Agency<sup>19</sup> was created with the main purpose of obtaining information on "prisoners of war and protected civilian persons, particularly those subject to internment", and "transmit[ing] it to their country of origin or of residence or to the Power on which they depend, except where such transmission might be detrimental to the persons whom the information concerns or to their relatives"<sup>20</sup>. In addition, the ICRC's work on the missing focused initially on traditional activities such as dissemination of IHL and bilateral interventions recalling States' obligations regarding missing persons and their families, detention visits, Restoring Family Links activities and processing tracing requests.<sup>21</sup> However, in the 1990s in the former Yugoslavia, the ICRC started expanding its activities on the issue of the missing and adopting a longer-term approach.<sup>22</sup> For instance, it started helping authorities to establish mechanisms between parties to exchange information in order to clarify the fate and whereabouts of missing persons, and to draft legal frameworks related to missing persons that also address the needs of the families.<sup>23</sup> It also implemented psychosocial programmes to support the families of missing persons and started increasing its expertise in forensic services.<sup>24</sup>

Given the expansion of ICRC activities on the issue of the missing and the need to ensure a more uniform and coordinated approach on this matter globally, in 2002 the ICRC launched a process aimed at addressing the plight of missing persons and their families. This process focused on reviewing methods for preventing persons from becoming unaccounted for and for responding to the needs of families of missing persons, with a view to agreeing on recommendations and operational practices to this end. The first phase consisted of a series of workshops and studies resulting in the elaboration of recommendations and best

19 For a brief overview of the Central Tracing Agency's work, see ICRC, "Central Tracing Agency", available at: <https://casebook.icrc.org/glossary/central-tracing-agency>.

20 *Ibid.*

21 Marco Sassòli and Marie-Louise Tougas, "The ICRC and the Missing", *International Review of the Red Cross*, Vol. 84, No. 848, 2002, pp. 733–736; Olivier Dubois, Katharine Marshall and Siobhan Sparkes McNamara, "New Technologies and New Policies: The ICRC's Evolving Approach to Working with Separated Families", *International Review of the Red Cross*, Vol. 94, No. 888, 2012, p. 1471.

22 O. Dubois, K. Marshall and S. S. McNamara, above note 21, p. 1472.

23 *Ibid.*, p. 1473.

24 *Ibid.*, p. 1473.

practices on each topic addressed.<sup>25</sup> For the second phase, the ICRC held an International Conference of Governmental and Non-Governmental Experts on the missing entitled “The Missing: Action to Resolve the Problem of People Unaccounted for as a Result of Armed Conflict or Internal Violence and to Assist their Families” in 2003. The Conference adopted observations and recommendations to strengthen the response to the issue of missing persons and their families. In particular, the observations and recommendations not only addressed the need to prevent people from going missing and to clarify their fate and whereabouts but also highlighted the importance of newer areas of support such as forensic services and support to families of missing persons.<sup>26</sup> Later that year, Resolution 1 of the 28th International Conference of the Red Cross and Red Crescent<sup>27</sup> adopted the Declaration and Agenda for Humanitarian Action. The Agenda for Humanitarian Action addressed four humanitarian concerns, including the issue of persons that have gone missing in connection with armed conflicts or other situations of violence. The resolution provided for different actions to achieve the following six goals relating to missing persons and their families:

1. prevent persons from becoming missing;
2. ascertain the fate and whereabouts of missing persons;
3. manage information and process files on missing persons;
4. manage human remains and information on the dead;
5. support families of missing persons; and
6. encourage non-State armed groups engaged in armed conflicts to resolve the problem of missing persons, assist their families and prevent others from becoming missing.<sup>28</sup>

This served as a basis for the ICRC to step up its efforts and develop a multidisciplinary and holistic approach to the issue of missing persons and the needs of their families, responding to this issue through different activities that are all essential for providing meaningful answers and support. It “was a significant step forward, not only for this particular area of the ICRC’s work but for the institution as a whole”.<sup>29</sup>

In order to assist States in their efforts towards ratification of relevant international treaties and the implementation of their international obligations at the domestic level, and based on Resolution 1 of the 26th International

25 *Ibid.*, p. 1473.

26 ICRC, “The Missing: Action to Resolve the Problem of People Unaccounted for as a Result of Armed Conflict or Internal Violence and to Assist Their Families”, *International Review of the Red Cross*, Vol. 85, No. 849, 2003.

27 “These new areas of emphasis took a more long-term view of, and arguably even post-conflict development-oriented approach to, the ICRC’s work on missing persons.” 28th International Conference of the Red Cross and Red Crescent, Res. 1, “Adoption of the Declaration and Agenda for Humanitarian Action”, 6 December 2003, p. 1474, available at: [www.icrc.org/eng/resources/documents/resolution/28-international-conference-resolution-1-2003.htm](http://www.icrc.org/eng/resources/documents/resolution/28-international-conference-resolution-1-2003.htm).

28 *Ibid.*

29 O. Dubois, K. Marshall and S. S. McNamara, above note 21.

Conference of the Red Cross and Red Crescent Movement,<sup>30</sup> which was adopted by consensus, in 1996 the ICRC established a specialized structure – the ICRC Advisory Service on IHL.<sup>31</sup> The Advisory Service provides guidance to national authorities on specific domestic implementation measures needed to meet their IHL obligations through a global network of legal advisers who facilitate the exchange of information regarding national measures of implementation and good practices.<sup>32</sup> Since its inception the Advisory Service has developed a series of tools and publications, the main purpose of which is to provide technical support and guidance on domestic normative frameworks, as well as perspectives on States’ practices, in order to address different issues related, for example, to the protection of victims of armed conflict and other situations of violence at the domestic level.<sup>33</sup> It also supports the work of National Committees on IHL, which are national bodies established to promote, advise on and coordinate IHL implementation domestically, usually through an inter-ministerial and multidisciplinary advisory group of experts.<sup>34</sup>

More particularly, with regards to the protection of missing persons and their families in 2007, the ICRC, through its Advisory Service on IHL, organized the Second Universal Meeting of National Committees on International Humanitarian Law, on the topic “Legal Measures and Mechanisms to Prevent Disappearances, to Establish the Fate of Missing Persons, and to Assist Their Families”.<sup>35</sup> One of the main objectives of this meeting was to increase the capacity of National Committees on IHL to work on preventing and resolving cases of missing persons as a result of armed conflict and other situations of violence while strengthening their actions and commitments in this regard. The meeting also aimed at providing a forum for discussion on means to assist

30 28th International Conference of the Red Cross and Red Crescent, above note 27. In this vein, since its creation, the ICRC Advisory Service on IHL has been working with a global network of legal advisers in “encouraging and supporting adherence to IHL and related instruments; providing specialist advice and technical assistance for the adoption of legal and administrative measures which States must take in order to comply with their obligations under IHL [and other relevant branches of international law]; and collecting and facilitating exchange of information between States on national IHL implementation laws and administrative measures adopted.”

31 Marion Harroff-Tavel, “The International Committee of the Red Cross and the Promotion of International Humanitarian Law: Looking Back, Looking Forward”, *International Review of the Red Cross*, Vol. 96, No. 895–896, 2014, pp. 844–845.

32 See: [www.icrc.org/en/document/icrc-advisory-services-international-humanitarian-law](http://www.icrc.org/en/document/icrc-advisory-services-international-humanitarian-law).

33 These are part of the ICRC publication *The Domestic Implementation of International Humanitarian Law: A Manual* (available at: [www.icrc.org/eng/resources/documents/publication/pdvd40.htm](http://www.icrc.org/eng/resources/documents/publication/pdvd40.htm)), which is a practical tool to assist policy-makers, legislators and other stakeholders worldwide in adhering to IHL instruments and implementing their obligations domestically, including those related to the repression of serious violations of IHL. For more information on the tools produced by the ICRC Advisory Service, see ICRC, “National Implementation of IHL: Documentation”, available at: [www.icrc.org/en/war-and-law/ihl-domestic-law/documentation](http://www.icrc.org/en/war-and-law/ihl-domestic-law/documentation); ICRC National Implementation of IHL Database, available at: <https://ihl-databases.icrc.org/ihl-nat>.

34 C. Pellandini, above note 16, pp. 1043–1048.

35 ICRC, *Report of the Second Universal Meeting of National Committees on International Humanitarian Law*, 31 March 2007, available at: [www.icrc.org/en/publication/0924-legal-measures-and-mechanisms-prevent-disappearances-establish-fate-missing-persons](http://www.icrc.org/en/publication/0924-legal-measures-and-mechanisms-prevent-disappearances-establish-fate-missing-persons).



National Committees in their efforts to include the issue of missing persons and their families in their plans of action and activities.

In 2008 the Advisory Service published a set of Guiding Principles/Model Law on the Missing.<sup>36</sup> This tool seeks to effectively support States in the adoption of national legislation and other measures to address, prevent and resolve the issue of missing persons while responding to the rights and needs of their families. As such, Dubois suggests that “[t]he creation of these resources represents something more than just the ICRC’s traditional promotion of IHL; they are also contributions to efforts to restore the rule of law and stability in a post-conflict society”.<sup>37</sup>

The ICRC Guiding Principles/Model Law served as a basis for the development of further tools, in particular a joint publication, with the Inter-Parliamentary Union, of a Handbook for Parliamentarians that stresses the role of parliamentarians in the prevention of disappearances and more particularly in addressing the rights and needs of missing persons and their families.<sup>38</sup> Notably, the Handbook highlights the role that parliamentarians can play in adopting the appropriate national legal and policy frameworks by proposing six avenues for action that could guarantee a holistic response to the issue of missing persons and their families at the national level.<sup>39</sup>

It is also worth mentioning that, during its 31st Plenary Session in November 2008, the Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States (CIS) adopted a regional Model Law on Missing Persons, based on the 2008 ICRC Guiding Principles/Model Law. Since the adoption of the regional Model Law the ICRC has promoted this instrument with CIS member States.<sup>40</sup>

In 2015, the Advisory Service on IHL published a fact sheet entitled “Missing Persons and Their Families” which summarizes States’ and parties to a conflict’s obligations on the matter under international law, in particular IHL.<sup>41</sup>

With regards to implementation of the law, the observations and recommendations adopted by consensus on 21 February 2003 by the International Conference of Governmental and Non-Governmental Experts highlight the importance of full implementation of IHL at the domestic level by States in order to prevent persons from becoming unaccounted for, and of the work of the ICRC in supporting States in fulfilling their responsibilities.<sup>42</sup> Thus,

36 ICRC, *Guiding Principles/Model Law on the Missing*, 2009, available at: [www.icrc.org/en/document/guiding-principles-model-law-missing-model-law](http://www.icrc.org/en/document/guiding-principles-model-law-missing-model-law).

37 O. Dubois, K. Marshall and S. S. McNamara, above note 21.

38 Inter-Parliamentary Union and ICRC, *Missing Persons: A Handbook for Parliamentarians*, 2009 (Handbook for Parliamentarians), available at: [www.icrc.org/en/publication/1117-missing-persons-handbook-parliamentarians](http://www.icrc.org/en/publication/1117-missing-persons-handbook-parliamentarians).

39 The six avenues for action are: (1) adopting international humanitarian law and human rights law treaties; (2) adopting national legislation on missing persons; (3) overseeing government action; (4) putting appropriate mechanisms in place to prevent, resolve and process disappearances; (5) mobilizing and sensitizing public opinion; and (6) establishing cooperation at the national and international levels.

40 CIS, Model Law on Missing Persons, 2008, available at: [http://iacis.ru/upload/iblock/410/ass\\_31\\_17a.pdf](http://iacis.ru/upload/iblock/410/ass_31_17a.pdf).

41 See: ICRC, Missing persons and their families- Factsheet, 31 December 2015, available at: <https://www.icrc.org/en/document/missing-persons-and-their-families-factsheet>.

42 ICRC, above note 26.

the work of the ICRC Advisory Service on IHL has been and remains essential in supporting States in the development of domestic normative and policy frameworks.

It is worth highlighting that the need to work on the adoption, implementation and enforcement of proper domestic legal frameworks to address the issue of missing persons and their families has been dealt with in different resolutions adopted at the universal and regional levels. For example, every two years since 2003, the United Nations (UN) General Assembly has adopted a resolution entitled “Missing Persons”<sup>43</sup> which deals with the issue of people who go missing during armed conflicts. In particular, in the preamble of Resolution 71/201, the UN General Assembly recognizes that “respect for and implementation of international humanitarian law can reduce the number of cases of missing persons in armed conflict”.<sup>44</sup> Furthermore, it calls upon States “to take measures to prevent persons from going missing in connection with armed conflict, including by fully implementing their obligations and commitments under relevant international law”.<sup>45</sup> At the regional level, the General Assembly of the Organization of American States (OAS) has regularly adopted since 2005 a resolution on disappeared persons and on the provision of assistance to their relatives.<sup>46</sup> It also mentions this topic in its resolution on the promotion and protection of human rights.<sup>47</sup> The OAS General Assembly has also recognized the importance of working on the adoption of domestic normative frameworks to respond to disappearances and has highlighted the usefulness of the tools produced by the ICRC.<sup>48</sup> As an example, the resolution adopted in 2013 urged States, in keeping with their obligations under IHL and IHRL,

to continue the progressive adoption of measures, including domestic regulatory and institutional provisions, to prevent the disappearance of persons in the context of armed conflict or other situations of armed violence, with particular focus on those related to vulnerable groups; clarify the fate and whereabouts of those who have disappeared; strengthen technical capacity and promote regional cooperation for forensic search, recovery, and use of forensic genetics for the identification of human remains including as regards the problem of migrants presumed to have disappeared; and attend to the needs of the family members, using as a reference, *inter alia*, the Guiding Principles/Model Law on the Missing prepared by the Advisory Service on IHL of the International Committee of the Red Cross.<sup>49</sup>

43 UNGA Res. 57/207, “Missing Persons”, UN Doc. A/RES/57/207, 14 February 2003.

44 UNGA Res. 71/201, “Missing Persons”, UN Doc. A/RES/71/201, 26 January 2017.

45 *Ibid.*

46 OAS, General Assembly Res. AG/RES 2134 (XXXV-O/05), “Persons Who Have Disappeared and Assistance to Members of Their Families”, 7 June 2005.

47 OAS, General Assembly Res. AG/RES 2928 (XLVIII-O/18), “Promotion and Protection of Human Rights”, 5 June 2018.

48 See, for instance, OAS, General Assembly Res. AG/RES 2794 (XLIII-O/13), “Persons Who Have Disappeared and Assistance to Members of Their Families”, 5 June 2013, *op. para. 2*.

49 *Ibid.*, *op. para. 2*.

With the development of these tools and the expertise available, the ICRC has provided legal and technical advice to national authorities in countries such as Colombia, Peru, Sri Lanka, Bosnia and Herzegovina, Kosovo, Georgia and Ukraine, with a view to strengthening the domestic legal and policy frameworks regulating the issue of missing persons and support to their families. Over the years, the ICRC has assisted twenty-two States in developing national laws and measures related to missing persons and their families. This work includes carrying out, or supporting States in carrying out, studies on the compatibility of domestic law with IHL and other international legal frameworks, such as IHRL, in order to identify the existing gaps or potential contradictions with international law in the domestic legal framework. It also includes promoting the adoption of laws and other regulations to create the appropriate mechanisms, structures, measures and procedures for the clarification of the fate and whereabouts of those who have gone missing in a specific context. Furthermore, this work allows authorities and other actors to respond to the various rights and needs of the families, be they administrative, psychological, psychosocial or legal, and enhances the medico-legal system. Finally, it helps to ensure that information pertaining to missing persons and their relatives is handled appropriately.<sup>50</sup>

## **Working on the development of domestic normative frameworks on the missing**

Regardless of the type of situation, be it to address cases of missing persons during armed conflicts, other situations of violence or disasters, or during a post-conflict or transitional justice process, it is evident that the clarification of the fate and whereabouts of those unaccounted for and the response to the rights and needs of their families requires a proper assessment of existing legal and policy frameworks and a subsequent regulation at the domestic level.

There is no one-size-fits-all approach to national implementation, which depends not only on the legal system of a State (e.g. monist or dualist, civil law or common law) but also on the particularities of the context and the laws, regulations or procedures that already exist at the domestic level. As a result, “careful planning and regular consultation with States are the keys to effective implementation”.<sup>51</sup> The ICRC has also identified a number of important elements that are the baseline of a comprehensive national legal and policy framework to address the issue of missing persons and to respond to the needs of their families. For example, a comprehensive national legal and policy framework should encompass measures to prevent disappearances, to clarify the fate and

50 For example, Crettol and La Rosa explain that there are different bodies that can be put in place to find out whether a person who has gone missing is dead or alive, while making the link with post-conflict and transitional justice processes. Monique Crettol and Anne-Marie La Rosa, “The Missing and Transitional Justice: The Right to Know and the Fight against Impunity”, *International Review of the Red Cross*, Vol. 88, No. 862, 2006, p. 357.

51 ICRC, *The Domestic Implementation of International Humanitarian Law*, above note 33, p. 25.

whereabouts of those who go missing, to ensure that the system or process that is put in place to search for the missing manages and processes information in a proper manner with due respect for the confidentiality of information and the protection of personal data in line with internationally recognized data protection rules and standards, to respect the human remains of those who have died, and last but not least, to ensure that families receive proper support and answers to their rights and needs.

To properly address the issue of missing persons and their families it is of paramount importance to carry out a preliminary assessment of existing domestic legal and policy frameworks, including practical measures. Some aspects related to the response to missing persons and their families may already be provided for in domestic regulations. For example, with a view to defining how the search, evacuation, recovery, treatment and identification of the dead are regulated in a particular country, it is important to understand which institution is, by law, in charge of the provision of forensic services and which legal and regulatory frameworks are in place to deal with the management of cemeteries, as well as the procedures regarding exhumation and identification. Another example relates to existing legal procedures that are in place to declare a person officially missing or dead *in absentia* and the legal effects these two situations may have. The existence of governmental services to address the various needs of the families of missing persons should also be understood. For example, social benefits and social assistance schemes should be looked into to determine if families of missing persons are entitled to access those services and schemes, or if there is a need to include them or to create new ones that will respond to the specific vulnerabilities of such families. Carrying out this analysis will allow a better understanding of the system in place and will allow those concerned to identify gaps and avenues for promoting legal and policy reforms.

In conclusion, to effectively respond to the issue of missing persons and the rights and needs of their families, the structures and procedures that are already in place or that will be put in place should have a clear mandate and should be equipped with the proper capacities in terms of information collection, processing and transfer, search and investigation, effective forensic capacities, and providing support for the families of those unaccounted for. Overall, adopting measures to prevent people from going missing requires careful planning. This would definitely set the framework for a comprehensive response to the issue of missing persons aimed at addressing what happened in the past and responding to, and solving, cases when they arise.

## Challenges

When promoting the adoption or reform of domestic legal and policy frameworks to address the issue of missing persons and respond to the rights and needs of their families, different challenges exist.

This section will focus on three specific challenges that arise when the decision to address the issue of missing persons and to respond to the needs and rights of their relatives is taken. Questions related to the following issues will be discussed: (1) definition of who is a missing person; (2) recognition of the legal status applicable to those unaccounted for; and (3) the creation of appropriate mechanisms to search for the missing, account for their fate and whereabouts and respond to the needs of their relatives.

## Defining who is a missing person

It is important to ensure that the rights of the missing and their relatives are properly addressed. As mentioned above, this starts with defining who is a missing person.

The notion of “missing person” is not defined under international law. However, the related notion of “disappeared person” is defined in different international law instruments<sup>52</sup> that were adopted as a response to the problem of enforced disappearances. Notably, Article 2 of the ICPPED refers to persons who go missing following

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>53</sup>

Furthermore, the Statute of the International Criminal Court provides a similar definition of enforced disappearance as a crime against humanity.<sup>54</sup>

In comparison, the ICRC defines missing persons as

individuals of whom their families have no news and/or who, on the basis of reliable information, have been reported missing as a result of an armed conflict – international or non-international – or of other situations of violence or any other situation that might require action by a neutral and independent body. This includes disasters and the context of migration.<sup>55</sup>

The ICRC’s definition of missing persons is broader in scope than the notion of disappeared persons as it includes other situations besides enforced

52 See ICPPED, Art. 2; Inter-American Convention on Forced Disappearance of Persons, Art. II; Rome Statute of the International Criminal Court (Rome Statute), Art. 7(2)(i).

53 ICPPED, Art. 2.

54 According to the Rome Statute of the International Criminal Court, “enforced disappearance of persons” as a crime against humanity means “the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time”. Rome Statute, Article 7(2)(i)

55 See “Q&A: The ICRC’s Engagement on the Missing and Their Families”, in this issue of the *Review*. It is important to note that this definition is based on the Handbook for Parliamentarians, above note 38.

disappearances where people might go missing. The definition takes into consideration three main elements: (1) the circumstances in which disappearances occur; (2) the element of uncertainty of the fate and whereabouts of the person for his/her relatives; and (3) the fact that a person is reported missing on the basis of reliable information in connection with a particular situation (e.g. armed conflicts, other situations of violence and disasters). The ICRC's definition also takes into consideration disappearances that do not take place at the hands of a State. This is particularly relevant in the context of non-international armed conflicts, where non-State armed groups can be perpetrators. The proposed definition is also wide in scope to ensure proper protection of the rights of the missing person and the needs of his/her relatives.<sup>56</sup>

In this vein, when adopting domestic legal and policy frameworks and putting in place the proper structures and procedures, the notion of missing persons should be interpreted as broadly as possible so that people do not fall outside the personal scope (*rationae personae*) of application of the laws, policies and procedures in question.<sup>57</sup> Additionally, if in a given context the State is party to the ICPPED or to other relevant instruments<sup>58</sup>, this should be reflected in the text of the law that defines who is considered a missing person by adopting provisions and procedures which implement the obligations of the Convention.<sup>59</sup>

It is also worth mentioning that practice has shown that in some cases, the law or procedures adopted at the domestic level to address the issue of missing persons have limited the temporal scope (*rationae temporis*) of application to a certain period or to specific situations. For example, in 2016 Peru adopted a new law on the search of persons who went missing during the period of violence between 1980 and 2000.<sup>60</sup> In Bosnia and Herzegovina, the law on missing persons of 2004 also refers to a specific period, “the armed conflict that happened on the territory of the former SFRY”, and limits its personal and temporal scope of application to those who went missing from 30 April 1991 to 14 February 1996.<sup>61</sup> In Kosovo, the law on missing persons circumscribes the temporal scope of the law to those “who were reported missing during the period 1 January 1998–31 December 2000, as a consequence of the war in Kosovo during 1998–1999”.<sup>62</sup>

56 Handbook for Parliamentarians, above note 38, p. 40.

57 ICRC, above note 36, p. 8.

58 For example, the Inter-American Convention on Forced Disappearance of Persons.

59 In Sri Lanka, for example, the law that created the Office on Missing Persons establishes that the Office will work on clarifying the fate and whereabouts of persons who are reasonably believed to be unaccounted for and missing “(i) in the course of, consequent to, or in connection with the conflict which took place in the Northern and Eastern Provinces and its aftermath, or [who are] member[s] of the armed forces or police who [are] identified as ‘missing in action’; or (ii) in connection with political unrest or civil disturbances; or (iii) as an enforced disappearance as defined in the ‘International Convention on Protection of All Persons from Enforced Disappearances’”. Sri Lanka, Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No. 14 of 2016, section 27.

60 Peru, Law No. 30470 on the Search for Missing Persons during the 1980–2000 Period of Violence, 2016, available at: <https://tinyurl.com/ybexc67p>.

61 Bosnia and Herzegovina, Law on Missing Persons, 2004, available at: <https://tinyurl.com/yd4l65dt>.

62 Kosovo, Law No. 04/L-023 on Missing Persons, 14 September 2011, available at: <https://tinyurl.com/ydhwtgw>.

These are just a few examples that corroborate that there is no one-size-fits-all approach to national implementation, and that defining who is a missing person at the domestic level is essential as it will allow authorities and other actors to determine, on the one hand, which missing persons the State is searching for and, on the other, which relatives are entitled to the protection of their rights and needs.

## Recognizing the legal status of the missing

In addition to defining who is a missing person, another important aspect in addressing the issue of missing persons and the needs of their families lies in providing a legal status to both the missing person and to their relatives. This is an issue that is not regulated under international law.<sup>63</sup> However, even if the recognition of a legal status for missing persons is not provided as such under international law, it is worth noting that the ICPPED recognizes under Article 24 (6) that States party to the Convention,

without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, ... shall take the appropriate steps with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights.

In fact, in some contexts the absence of a person is either not recognized as such under the law or is recognized only for a certain period, after which the person is declared to be presumed dead.<sup>64</sup> Not providing for the notion of “missing person” in the domestic legal civil system results in families of missing persons often being left without any means of support. Moreover, in the majority of cases “many of the missing persons are male, often the sole breadwinners and account or property holders. Their families are thus left without their source of income.”<sup>65</sup> Notably, the absence of a relative entails a series of legal and administrative obstacles in relation to the exercise of property and inheritance rights, social benefits and pension rights, the right to enter a new union and the exercise of parental rights. Where there is no legal status for the missing, relatives of missing persons either have to accept, request and initiate procedures to declare a person absent for a limited period of time, or initiate procedures for the

63 Citroni explains that “at the international level there is no instrument obliging states to codify the legal status of persons who were subjected to enforced disappearance without resorting to the declaration of death”. Gabriella Citroni, “The Pitfalls of Regulating the Legal Status of the Disappeared Persons through the Declaration of Death”, *Journal of International Criminal Justice*, Vol. 12, No. 4, 2014, p. 789. This is also relevant for all cases of missing persons and not only for those related to enforced disappearances.

64 “A person should not be declared dead without sufficient supporting evidence. It is therefore desirable, before a death certificate is issued, to provide for an interim period of ‘absence’ of a reasonable length so that the circumstances of that person’s disappearance can be investigated and his or her fate ascertained. If the person is found alive, the certificate of absence should be annulled and his or her legal status fully restored.” ICRC, above note 1, p. 20.

65 M. Crettol and A.-M. La Rosa, above note 50, p. 356.

recognition of a presumption of death or for a formal declaration of death.<sup>66</sup> As such, Citroni suggests that

this practice fails to adequately tackle the circumstances of enforced disappearance. It also causes additional anguish to the relatives of the disappeared, who are exposed to re-victimization when having to declare their loved ones dead, often having to randomly fix a date for their death, ignoring what their status actually is and the fact that they may still be alive somewhere.<sup>67</sup>

This is also valid for the relatives of all missing persons and not just to those that are victims of enforced disappearances. By recognizing a legal status, the rights of the sought person are preserved. As rightly mentioned in the ICRC handbook *Accompanying the Families of Missing Persons*, “the rights and interests of missing persons must be protected at all times until their fate has been ascertained. To this end, they must be granted a special legal status.”<sup>68</sup>

Indeed, practice has shown that different States where people have gone missing as a result of armed conflicts or other situations of violence have undertaken legal reforms to incorporate into their domestic legal systems a special status for these individuals, considering different effects that reflect the particularities of these situations.

In 2012, for example, Colombia adopted Law 1531, which creates the declaration of absence for reasons of enforced disappearance and other forms of involuntary disappearance. This law incorporates into the domestic legal system the notion of the legal personality of a missing person. It also assigns different civil effects to the declaration of absence, such as the guarantee of the continuation of the legal personality of the missing person, the preservation of parental rights, the protection of patrimony, and the protection of the rights of the family and minors.<sup>69</sup>

In Mexico, the Federal Law on the Special Declaration of Absence for Missing Persons adopted in 2018 seeks to respond to the needs and rights of the families of missing persons. For instance, the law recognizes in its first article that the main objective of the law is to “recognize, protect and guarantee the continuity of the legal personality and the rights of the missing person; to provide for the legal certainty to the representation of the interests and rights of the missing person[;] and to provide for the appropriate measures to ensure the widest

66 It is interesting to note that the Council of Europe, in an issue paper of 2016, highlights that “the regulation of the legal status of missing and disappeared persons while their fate and whereabouts are unknown is necessary to settle matters related in particular to inheritance, social welfare, family law and property rights. Most Council of Europe member states lack ad hoc legislation that takes into account the specificities of the phenomenon and apply provisions on presumptions of death or even make social assistance and compensation conditional on obtaining a declaration of death.” Council of Europe, Commissioner for Human Rights, *Missing Persons and Victims of Enforced Disappearances in Europe*, Issue Paper, March 2016, p. 46.

67 G. Citroni, above note 63, p. 2.

68 ICRC, above note 1, p. 19.

69 Colombia, Law 1531 on the Declaration of Absence of Missing Persons, 2012, Art. 7.



protection to their relatives”.<sup>70</sup> Article 21 describes the effects of the special declaration of absence.

These examples provide an overview of what recognizing the legal status of those who have gone missing entails, in particular regarding the legal effects of such a recognition vis-à-vis the rights of the missing and the relatives.

As mentioned in the introduction to this article, implementing and adopting domestic normative and policy frameworks is only one step, but it is a very important one. However, for these frameworks to fulfil their main objective, it is of paramount importance to ensure that they are effectively applied by ensuring, among other things, that the procedures are relatively simple, that the families of those unaccounted for understand them and have access to them, and that those who are called upon to determine the status of affected individuals are aware of the existence of such frameworks.

To conclude, the domestic legal and policy frameworks that are put in place should provide proper protection and guarantees for the rights of the sought person and of his/her relatives. In this regard, the main effects and consequences of declaring someone officially missing should be to fully guarantee and ensure the continuity of his/her legal personality and to protect his/her civil and family rights.

## Putting in place appropriate mechanisms to search for the missing and respond to the needs of their relatives

The ICRC’s experience<sup>71</sup> in working with national authorities around the world has shown that there is a minimum amount of engagement necessary to ensure an integral approach to the search for those unaccounted for and the response to the rights and needs of their relatives. As mentioned above, there is not a unique formula or a one-size-fits-all approach to finding those who have gone missing. However, in every process, be it in Africa, the Americas, Asia, Europe or the Middle East, it is important to ensure a series of institutional efforts that will serve the purposes of alleviating the suffering of the families while providing meaningful answers. Institutional responses need to satisfy the rights of the missing and their families, and in particular their right to know the fate and whereabouts of their missing relatives. In this regard, the mechanisms that are put in place to fulfil such purposes need to have a clear mandate and different powers and functions that will allow for a proper search process. These mechanisms should encompass the proper management and protection of information, the establishment of a sound forensic process and the proper

70 Mexico, Federal Law on the Special Declaration of Absence for Missing Persons, 22 June 2018, Art. 1, authors’ translation. Original in Spanish: “II. Reconocer, proteger y garantizar la continuidad de la personalidad jurídica y los derechos de la Persona Desaparecida; III. Brindar certeza jurídica a la representación de los intereses y derechos de la Persona Desaparecida, y IV. Otorgar las medidas apropiadas para asegurar la protección más amplia a los Familiares.”

71 In 2017, the ICRC conducted missing-related activities in over sixty contexts across all regions. These activities include the provision of legal and technical advice to national authorities working on the adoption of domestic legal and policy frameworks to address the issue of missing persons and the response to the needs of their relatives.

response to the different needs of the families, in line with international rules and standards, always putting at the centre of the process the missing person, their families, and the families' need to know the fate and whereabouts of their missing relatives. In this vein, different States have adopted national laws to create structures to search for those who went missing during a specific conflict or to respond to the needs of their families.

In Colombia, for example, in 2000, a National Search Commission for Disappeared Persons was created and was tasked with supporting and promoting the investigation of cases of enforced disappearance, determining the circumstances in which a person disappeared and establishing the identity of the presumed perpetrators.<sup>72</sup> One important aspect of the Commission is its multi-sectoral composition, which includes representatives from different ministries and entities, international organizations, civil society and families of the disappeared. Additionally, following the peace process and the peace agreement signed between the government of Colombia and the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia, FARC) in 2016, the search for missing persons in relation to the armed conflict was recognized as a priority.<sup>73</sup> In this regard, the law that created the transitional justice system in Colombia<sup>74</sup> also created the Missing Persons Search Unit. Unlike the scope of application of the National Search Commission of 2000, the definition of the personal scope of application of the new Unit was an important change as not only cases of enforced disappearance will be considered.<sup>75</sup> Following the law, a presidential decree was issued to organize the functioning of the Unit. The decree defines the fundamental pillars of the unit, its full independence and its autonomy (including financial), as well as all that is required to support its humanitarian mandate and extrajudicial character. Overall, the main objective of the Unit is to clarify what happened to those who went missing during the armed conflict while contributing to an effective response to the rights of the victims, to the truth and to reparations.<sup>76</sup>

In Peru, a law on the search for persons who went missing during the period of 1980 to 2000 was adopted in 2016.<sup>77</sup> Unlike the search scheme existing before 2016, which focuses on investigations and criminal proceedings aimed at

72 Colombia, Law 589, 7 July 2000, available at: <https://tinyurl.com/y7znz7e9d>.

73 Colombian Government and FARC-EP, Joint Communiqué No. 62, Havana, 17 October 2015, and Final Agreement, 24 August 2016, Chap. 5.

74 Following the peace agreement between the government of Colombia and the FARC, a law was adopted to incorporate into the Constitution different provisions related to end of the armed conflict and the building of a stable and long-lasting peace. Colombia, Acto Legislativo No. 1, 4 April 2017, available at: <https://tinyurl.com/ydyxhwp3>.

75 According to the law, "the Unit to search for persons who went missing in relation to and as a result of the armed conflict will have a humanitarian and extrajudicial character and will direct, coordinate and contribute to the implementation of humanitarian actions aimed at searching for and locating persons who went missing in relation to and as a result of the armed conflict that are alive, and in cases of death, when feasible, at the identification and dignified return of the human remains". Authors' translation.

76 Since the first decree in 2017, two decrees have been issued to define the specific structure and functions of the Unit: Decree 288 of 2018 and Decree 1393 of 2018.

determining responsibilities for the commission of a crime (e.g. gross human rights violations), the new process prioritizes the humanitarian search for missing persons and the clarification of the circumstances in which a person went missing, including their fate and whereabouts, and places the families at the centre of the process. The main issues considered in the 2016 law can be summarized as follows. First, the law defines the *humanitarian approach*. It emphasizes the importance of providing answers to family members regarding the circumstances of the death and the final location, as well as, if appropriate, the location of the human remains of their relatives for their respective return and proper burial. The same approach establishes that the entire search process should be carried out with the active participation of family members. Second, the law defines the competent authority in charge of the search, which is now the Ministry of Justice. It also creates a National Registry of Missing Persons and Burial Sites, regulates the forensic investigation process, establishes a psychosocial accompaniment component for families of the missing, and provides for logistic and material support to them. Finally, the information collected in the framework of the search mechanism will be protected according to the data protection law of Peru.

In Sri Lanka, as part of the implementation of the recommendations provided in UN Human Rights Council Resolution 30/1<sup>78</sup> to promote reconciliation, accountability and human rights in Sri Lanka, in 2016 the government adopted the Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No. 14.<sup>79</sup> The Act recognizes in its preamble that relatives of missing persons are entitled to know the circumstances in which a person went missing, including their fate and whereabouts. In this regard, the Office has a mandate to search for and trace missing persons, to identify the appropriate mechanisms to do so and to clarify the circumstances in which they went missing while providing assistance to their relatives.

In Mexico, the General Law on Missing Persons was adopted in 2017.<sup>80</sup> It defines the distribution of competencies between authorities and their system of coordination with regard to searching for missing persons and establishing what happened, as well as preventing and addressing enforced disappearance and disappearances committed by individuals not attributable to the State. The General Law also creates the National Search System for Missing Persons, the National Search Commission, the National Registry of Missing Persons and the National Registry of Unidentified Dead Bodies. It seeks to guarantee the protection of the rights of missing persons and their relatives and establishes the

77 Law No. 30470, above note 60. Since the adoption of the law, different decrees, resolutions and directives have been issued to regulate the functions of the directorate in charge of the search and different aspects of the humanitarian investigation. For more information, see: <https://tinyurl.com/y9kspoop>.

78 See: [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/RES/30/1](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/30/1).

79 Sri Lanka, Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No.14 of 2016, available at: <https://tinyurl.com/y96hf4z6>.

80 Mexico, General Law on Enforced Disappearance of Persons, Disappearances Committed by Individuals and the National Missing Persons Search System, 17 November 2017.

ways in which the families of missing persons can participate in the search process, including by receiving information.<sup>81</sup>

In Ukraine, the Law on the Legal Status of Missing Persons was adopted in 2018. It foresees the creation of a National Commission on Missing Persons and a Unified Register of Missing Persons for persons (military and civilian) missing under special circumstances such as armed conflict, internal riots and other emergency situations.<sup>82</sup> The National Commission will mainly aim at coordinating the work of the authorities responsible for the search for missing persons, with the objective of clarifying their fate and whereabouts.<sup>83</sup> It will include representatives of several State authorities as well as the ICRC and national and international NGOs.<sup>84</sup>

The above-mentioned examples illustrate how States can engage in legal reform to create structures that will support the search for those who have gone missing while providing meaningful answers to the families. As mentioned before, it is of paramount importance to ensure that these frameworks are not “empty shells”, as their proper practical application is essential to upholding the right to know and providing answers to the long-lasting suffering of the relatives of missing persons. It will also allow States to comply with their obligations under international law and to ensure that the primary responsibility to account for the fate and whereabouts of missing persons is not an illusion.

## Conclusion

International law protects people from going missing, upholds the right of families to know the fate and whereabouts of their missing relatives and protects the dignity of the dead. In order for international law to properly fulfil its purpose at the national level, national implementation of the relevant bodies of international law is essential in responding to the issue of missing persons because of armed conflicts, other situations of violence, disasters and other situations that might require action by a neutral and independent body. Notably, there is a need for parties to an armed conflict and national authorities to recognize the issue of missing persons and to politically support the established processes that aim at searching for missing persons and at providing a response to the rights and needs of their families.

As highlighted, over the years the ICRC has developed a unique expertise in responding to missing persons and their families. One important aspect of the ICRC’s work is the provision of legal and technical advice to national authorities, including through the development of different tools and approaches to ensure proper implementation of the law at the domestic level. In this regard, assessing

81 Mexico, General Law on Enforced Disappearance of Persons, Disappearances Committed by Individuals and the National Missing Persons Search System, 17 November 2017, Art. 2.

82 Ukraine, Law on the Legal Status of Missing Persons, 2 August 2018, Arts 10–16.

83 *Ibid.*, Arts 10, 11.

84 *Ibid.*, Art. 10.

the existing legal and policy framework of a particular State is an important first step, as it will enable a clear understanding of the existing (or lack of) response to the issue of missing persons and their families and will allow States and other actors to engage in concrete legal and policy reforms. National practice has shown that there are some challenges involved when working in promoting the adoption or reform of domestic legal and policy frameworks to address the issue of missing persons and respond to the rights and needs of their families. For example, defining who is a missing person and granting missing persons a legal status is essential as it is a way of recognizing that the missing person matters vis-à-vis the law, the policy and the State. Additionally, bearing in mind that processes aimed at searching for and identifying the missing and responding to the needs of their relatives are long-term processes, it is fundamental to ensure that any national structures which are created are equipped with proper technical and financial capacities so that they can fulfil their mandates, and that they are not simply “empty shells”.

As discussed in this article, there is no one-size-fits-all approach to national implementation of the response to the issue of missing persons and their families. Thus, it is important for authorities to ensure a series of institutional efforts that will serve the purposes of alleviating the suffering of the families while providing meaningful answers. Implementing States’ international obligations into their domestic law is just one of the avenues leading towards the prevention of missing persons cases, resolving cases where people do go missing, and addressing the needs of the families.



# Protection of migrants from enforced disappearance: A human rights perspective

**Bernard Duhaime and Andréanne Thibault**

Bernard Duhaime is a Professor at the Law Department of the Faculty of Political Science and Law, University of Quebec in Montreal (UQAM), Canada. He is also Chair-Rapporteur of the United Nations Working Group on Enforced or Involuntary Disappearances. The views expressed by the author in this article are his own and do not necessarily reflect the views of the Working Group.

Andréanne Thibault has an LLB (2017), a BA (University of Montreal, 2012) and an MA (UQAM, 2015) and was a Brian D. Tittmore Fellow (2014) at the Inter-American Commission on Human Rights.

## **Abstract**

*This article looks at the issue of enforced disappearances of migrants during their migratory journey or once they have reached their destination, a subject yet to be addressed in the literature. It examines how the legal and analytical framework provided by international human rights law and migration law applies to enforced disappearances of migrants. It then reviews the factors that contribute to this phenomenon in different contexts, including the disappearance of migrants for political reasons, those that take place in detention and deportation processes and those that take place within the context of migrant smuggling and trafficking.*

**Keywords:** international law, human rights, enforced or involuntary disappearances, migration, United Nations.

⋮⋮⋮⋮⋮

## Introduction

In April 2011, forty-seven clandestine graves were discovered in the municipality of San Fernando in Tamaulipas, Mexico. They contained the remains of 193 people, including many missing migrants.<sup>1</sup> Today, the families of these victims are still seeking truth and justice, and it has not yet been established who was responsible for this tragedy.

While the disappearance of migrants<sup>2</sup> is a phenomenon that is increasingly being documented by civil society, particularly the media and human rights organizations, it seems that the international community has so far failed to respond satisfactorily to this crisis. The Working Group on Enforced or Involuntary Disappearances (WGEID or the Working Group),<sup>3</sup> a Special Procedure of the United Nations (UN) Human Rights Council, submitted a thematic report to the Council on this subject in September 2017, in addition to its annual report.<sup>4</sup> The WGEID had previously addressed the issue briefly in 2016 in an interim report published in its annual report<sup>5</sup> and has had occasion, over the years, to deal with cases involving situations in which individuals had

- 1 Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc. 48/13, 30 December 2013, para. 23.
- 2 For the purposes of this article, the term “migrant” refers to any person outside the State of which he or she is a national, including refugees, asylum-seekers and people who migrate for economic or work- or climate-related reasons. On this subject, see Office of the United Nations High Commissioner for Refugees (UNHCR), “Mixed Migration”, available at: [www.unhcr.org/mixed-migration.html](http://www.unhcr.org/mixed-migration.html) (all internet references were accessed in October 2017). See also International Organization for Migration (IOM), “Glossary on Migration”, 2014, available at: [www.iomvienna.at/sites/default/files/IML\\_1\\_EN.pdf](http://www.iomvienna.at/sites/default/files/IML_1_EN.pdf).
- 3 See “Working Group on Enforced or Involuntary Disappearances”, available at: [www.ohchr.org/EN/Issues/Disappearances/Pages/DisappearancesIndex.aspx](http://www.ohchr.org/EN/Issues/Disappearances/Pages/DisappearancesIndex.aspx). See also *Enforced or Involuntary Disappearances*, Fact Sheet No. 6/Rev.3, July 2009, available at: [www.ohchr.org/Documents/Publications/FactSheet6Rev3.pdf](http://www.ohchr.org/Documents/Publications/FactSheet6Rev3.pdf).
- 4 The WGEID adopted a decision to conduct this study at its 105th Session in 2015. On this subject, see WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/30/38, 10 August 2015. The WGEID adopted its report at the beginning of 2017 and submitted it to the 36th Session of the Human Rights Council on 28 September 2017; see WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances on Enforced Disappearances in the Context of Migration*, UN Doc. A/HRC/36/39/Add.2, 28 July 2017.
- 5 WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/33/51, 28 July 2016, para. 46 ff.



emigrated from their country of origin to avoid becoming victims of enforced disappearance.<sup>6</sup>

This article, however, focuses specifically on enforced disappearances of migrants who go missing while in transit or once they have reached their destination, an issue yet to be explored in the literature. First, it examines how the legal and analytical framework provided by international human rights law, normally used to address “enforced disappearances”, applies to the situation of missing migrants. It then reviews the factors that contribute to enforced disappearances of migrants and, finally, looks at some of the different contexts in which they occur, including the abduction of migrants for political reasons, those that take place in detention and deportation processes and those that take place within the context of migrant smuggling and trafficking.

## International law and the disappearance of migrants

This article therefore addresses the question of enforced disappearances of migrants within the meaning of international human rights law. It should be noted that the legal concept of “enforced or involuntary disappearance” is distinct from that of “missing”, as defined in international humanitarian law (IHL).<sup>7</sup> Under IHL, a missing person is someone whose whereabouts are unknown as a result of armed conflict. In this regard, Additional Protocol I to the Geneva Conventions provides that the parties to an international armed conflict must facilitate the search for persons reported missing in this context, as soon as circumstances permit.<sup>8</sup> Enforced disappearances, on the other hand, are governed by international human rights law and consist of

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

- 6 See, for example, the reports of the WGEID: UN Doc. E/CN.4/1985/15, para. 135; UN Doc. E/CN.4/1992/18/Add.1, para. 188; UN Doc. E/CN.4/1984/21, para. 102. See also UN Doc. E/CN.4/1492, Annex VIII, paras 1, 2.1, and Annex IX, p. 5. Missing people’s families and loved ones might also emigrate for economic reasons (families often suffer socioeconomic hardships following a disappearance; see WGEID, *Study on Enforced or Involuntary Disappearances and Economic, Social and Cultural Rights*, UN Doc. A/HRC/30/38/Add.5, 2015) or to continue searching for their missing loved one in the country where he or she disappeared. See, for example, UN Doc. E/CN.4/1985/15, para. 135. See also UN Doc. A/HRC/30/38/Add.5, paras 33–41; IOM, *Fatal Journeys: Tracking Lives Lost during Migration*, Geneva, 2014, p. 36.
- 7 On this subject, see Monique Crettol, Lina Milner, Anne Marie La Rosa and Jill Stockwell, “Establishing Mechanisms to Clarify the Fate and Whereabouts of Missing Persons: A Proposed Humanitarian Approach”, and the Q&A on the missing, in this issue of the *Review*.
- 8 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 33. See also Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 117: “Each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate.”

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>9</sup>

There is no specific international instrument that deals with enforced disappearances of migrants. This question must therefore be examined in light of the various international legal instruments that cover enforced disappearances and those that govern the rights of migrants. At the universal level, the legal framework for enforced or involuntary disappearances is provided by two main instruments: the Declaration on the Protection of All Persons from Enforced Disappearance<sup>10</sup> (the Declaration) and the International Convention for the Protection of All Persons from Enforced Disappearance<sup>11</sup> (ICPPED or the Convention).

The Declaration, the first instrument dealing specifically with enforced disappearance, was adopted by the UN General Assembly in 1992. It defines enforced disappearance and sets out the duties of States in terms of prevention, sanction and compensation. It contains provisions concerning the detention and release of people deprived of their liberty, which can lead to enforced disappearances if not carried out in accordance with international law.

The Convention, adopted in 2006, “reiterates and in some respects improves and complements the principles set out in the Declaration in relation to the definition of disappearances, their criminalization at the national and international level and prevention, punishment and reparation”.<sup>12</sup> It makes protection against enforced disappearance a non-derogable right,<sup>13</sup> stipulating that “[n]o exceptional circumstances whatsoever ... may be invoked as a justification for enforced disappearance”.<sup>14</sup> Unlike the Declaration, the

9 International Convention for the Protection of All Persons from Enforced Disappearance, 2716 UNTS 3, 20 December 2006 (entered into force 23 December 2010) (ICPPED), Art. 2. See also the Preamble of the Declaration on the Protection of All Persons from Enforced Disappearance, UN Doc. A/RES/47/133, 18 December 1992. While the International Committee of the Red Cross (ICRC) has a mandate under AP I to assist in tracing people who have gone missing in the context of an international armed conflict (Art. 33, para. 3), it is the WGEID that performs this function in the UN in relation to victims of “enforced or involuntary disappearances”. See UN Commission on Human Rights, Resolution 20 (XXXVI), 29 February 1980. It is worth noting that, for a time, the WGEID excluded cases of disappearances occurring in the context of international armed conflicts from its mandate, but it later lifted this restriction on its methods of work and began to accept such cases. See Human Rights Council, UN Doc. A/HRC/WGEID/102/2, 7 February 2014, and Annex I to the report of the Economic and Social Council adopted on 14 November 2001, UN Doc. E/CN.4/2002/79. See also Federico Andreu-Guzman, “Le Groupe de travail sur les disparitions forcées des Nations Unies”, *International Review of the Red Cross*, Vol. 84, No. 848, 2002, p. 807; ICRC, *The Missing – Mechanisms to Solve Issues on People Unaccounted For*, Geneva, 19 December 2002, pp. 17, 155.

10 See above note 9.

11 See above note 9.

12 Olivier de Frouville, “La Convention des Nations Unies pour la protection de toutes les personnes contre les disparitions forcées: Les enjeux juridiques d’une négociation exemplaire”, *Droits Fondamentaux*, No. 6, 2006, p. 3 (*Review’s* translation).

13 *Ibid.*, p. 14. On the customary nature of the prohibition of enforced disappearance, see ICRC Customary Law Study, above note 8.

14 ICPPED, Art. 1(2).

Convention applies only to those countries that have ratified it, numbering fifty-eight to date.<sup>15</sup>

These two instruments make reference to the same concept of “enforced or involuntary disappearances” and concern (1) any person who has been abducted, arrested or detained (2) by agents of the State (or groups or individuals acting with the consent or acquiescence of the State), (3) with a refusal to acknowledge the deprivation of liberty of that person.

There are also other instruments that refer to the question of enforced disappearances, such as, at the regional level, the Inter-American Convention on Forced Disappearance of Persons,<sup>16</sup> and the Rome Statute in international criminal law.<sup>17</sup>

Migrants’ rights are guaranteed by numerous norms of international law, enshrined in international human rights law and international migration law as well as in specific conventions. The International Covenant on Civil and Political Rights (ICCPR) stipulates that everyone is free to leave any country, including his or her own,<sup>18</sup> and that an alien lawfully in the territory of a State party to the Covenant may only be expelled in pursuance of a decision reached in accordance with the law.<sup>19</sup> It also provides that “[e]ach State ... undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the ... Covenant, without distinction of any kind”.<sup>20</sup> This provision confirms the principle of non-discrimination and stipulates that migrants are entitled to have their rights respected by the host State despite not being citizens.<sup>21</sup> The Human Rights Committee has also stated that:

In general, the rights set forth in the [ICCPR] apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. Thus, the

15 See UN Treaty Collection, available at: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-16&chapter=4&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&clang=_en).

16 Inter-American Convention on Forced Disappearance of Persons, OASTS 60, 9 June 1994 (entered into force 28 March 1996). See also O. de Frouville, above note 12, p. 2. It should be noted, however, that even before the adoption of these instruments, the term “enforced disappearance” had been defined, for example, in the case of *Velásquez Rodríguez v. Honduras*, tried by the Inter-American Court of Human Rights (IACtHR) in 1988: IACtHR, *Case of Velásquez Rodríguez v. Honduras*, Series C, No. 4, Judgment, 29 July 1988. See also Ophelia Claude, “A Comparative Approach to Enforced Disappearances in the Inter-American Court of Human Rights and the European Court of Human Rights jurisprudence”, *Intercultural Human Rights Law Review*, Vol. 5, 2010, p. 415.

17 Rome Statute of the International Criminal Court, 2187 UNTS 3, 17 July 1998, Art. 7(1)(i).

18 International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entered into force 23 March 1976), Art. 12(2). Article 13(2) of the Universal Declaration of Human Rights also mentions this right.

19 ICCPR, Art. 13.

20 *Ibid.*, Art. 2(1).

21 With the exception of Article 25, which gives nationals the right to take part in the conduct of public affairs and to be elected. On this subject, see also Vincent Chetail, “The Transnational Movement of Persons under General International Law – Mapping the Customary Law Foundations of International Migration Law”, in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration*, Edward Elgar, Cheltenham, 2014, p. 66. See also IACtHR, *Case of Nadege Dorzema et al. v. Dominican Republic*, Judgment, 24 October 2012, para. 154; IACtHR, *Case of Vélez Loor v. Panama*, Series C, No. 218, Preliminary Objections, Merits, Reparations and Costs, Judgment, 23 November 2010.

general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.<sup>22</sup>

The Convention relating to the Status of Refugees<sup>23</sup> and the Protocol relating to the Status of Refugees<sup>24</sup> deal specifically with the rights of refugees. One of the former's key principles is enshrined in Article 33(1), which stipulates that “[n]o ... State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”. The corollary to this obligation is that States must accept individuals who would be in danger if they returned to their country of origin. This principle of *non-refoulement* is a rule of customary international law<sup>25</sup> that must be observed by all States.<sup>26</sup>

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted in December 1990, reaffirms that the human rights of migrants must be respected without discrimination, regardless of whether they have legal status or permanent residence in the country in which they are living. It also provides that all migrant workers have the right to leave any State, including their country of origin,<sup>27</sup> a right that is also guaranteed in the Convention on the Rights of the Child<sup>28</sup> and the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>29</sup> The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment<sup>30</sup> prohibits States from expelling, returning or extraditing a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.<sup>31</sup> Lastly, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime<sup>32</sup> (also known as the Palermo Protocol), aims to combat human trafficking, a crime that many migrants fall victim to.

22 Human Rights Committee, General Comment 15, “The Position of Aliens under the Covenant”, UN Doc. HRI/GEN/1/Rev.1, 1994, paras 1–2, available at: [www.refworld.org/docid/45139acfc.html](http://www.refworld.org/docid/45139acfc.html).

23 Convention relating to the Status of Refugees, 189 UNTS 137, 28 July 1951 (entered into force 22 April 1954).

24 Protocol relating to the Status of Refugees, 606 UNTS 267, 31 January 1967 (entered into force 4 October 1967).

25 UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, available at [www.refworld.org/cgi-bin/txis/vtx/rwmain?docid=45f17a1a4](http://www.refworld.org/cgi-bin/txis/vtx/rwmain?docid=45f17a1a4).

26 V. Chetail, above note 21, pp. 37–38.

27 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 2220 UNTS 3, 18 December 1990, Arts 7, 8.

28 Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989, Art. 10.

29 International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195, 7 March 1966, Art. 5(d)(ii).

30 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984.

31 *Ibid.*, Art. 3.

32 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, 2237 UNTS 319, 15 November 2000, Preamble.

Although these norms each deal with specific issues and have their own scope of application, their overlapping and intersection give rise to a body of law covering prevention, investigation, sanction and reparation for enforced disappearances of migrants, resulting in a series of obligations, which are discussed further below.

## Factors that contribute to enforced disappearances of migrants

A number of factors contribute to the occurrence of enforced disappearances of migrants. It is evident that migrants are generally exposed to situations that heighten their vulnerability.<sup>33</sup> They are often fleeing from armed conflicts or violence and suffer socioeconomic hardships and are frequently victims of discrimination.<sup>34</sup> The Working Group has repeatedly underlined the close relationship between these factors and enforced disappearances as a phenomenon.<sup>35</sup>

Another factor is that crimes against migrants often go unpunished, in many cases because the victims lack effective access to justice or because they are reluctant to report the perpetrators for fear of jeopardizing their own position.<sup>36</sup> Furthermore, the fact that migrants sometimes travel without valid documents makes them, in a sense, “invisible” to the authorities, hampering efforts to prevent and investigate disappearances. This difficulty is further compounded by the lack of reliable data and statistics on migration and the disappearance of migrants.

As discussed at greater length below, it goes without saying that the security and immigration policies adopted by some States,<sup>37</sup> the militarization of borders and the criminalization of irregular migration put migrants in greater danger, increasing their vulnerability.<sup>38</sup> Lastly, the language and discourse used by some State authorities when referring to migrants – associating them with security threats and criminality – only serve to exacerbate this trend, exposing victims to greater risks of suffering violations and discrimination.<sup>39</sup>

33 See IACtHR, *Vélez Loor*, above note 21. See also IACtHR, *Dorzema*, above note 21.

34 See IACtHR, *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, 17 September 2003.

35 See WGEID, *Study on Enforced or Involuntary Disappearances and Economic, Social and Cultural Rights*, UN Doc. A/HRC/30/38/Add.5, 9 July 2015. See also WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances: Mission to Mexico*, UN Doc. A/HRC/19/58/Add.2, 20 December 2011, para. 69. People living in poverty whose exercise of economic, social and cultural rights is curtailed are more likely to become victims of enforced disappearance.

36 See the references cited in note 35. See also IOM, above note 6.

37 See *Report of the Special Rapporteur on the Human Rights of Migrants*, UN Doc. A/65/222, 3 August 2010, para. 15. See also *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/71/384, 13 September 2016, para. 53.

38 *Report of the Special Rapporteur on the Human Rights of Migrants*, François Crépeau, UN Doc. A/HRC/20/24, 2 April 2012.

39 *Report of the Special Rapporteur on the Human Rights of Migrants*, above note 37, paras 19, 31. See also *Report of Special Rapporteur François Crépeau*, above note 38, paras 8, 13.

## Enforced disappearances of migrants for political reasons

Emigration can sometimes be a way for political opponents to flee repression in their country of origin.<sup>40</sup> In some cases, however, this self-imposed exile does not ensure their safety because the State of origin continues to pursue them beyond its borders, enlisting the help of the host State.

Many migrants have become victims, in the host country, of enforced disappearances with a transnational component. In some cases, they were captured by agents of the State of origin in the host country, often with the consent or complicity of the latter, while in others they were captured by agents of the host State at the request of the State of origin, often using intelligence provided by the latter to identify and locate them. Frequently, individuals were secretly detained and tortured in the host country before being handed over to the State of origin, never to be seen again. Cross-border operations of this kind have sometimes been carried out under bilateral or multilateral agreements, with varying degrees of formality and secrecy.

One example is the large number of political opponents and refugees (including politicians and members of guerrilla groups, but also teachers, students, trade union leaders, etc.) who disappeared as a result of such practices in the period from 1970 to 1980 in South America, mainly Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay, which were countries that had adopted very repressive national security policies during the Cold War. Although these operations were initially carried out under bilateral counter-insurgency agreements,<sup>41</sup> a multilateral agreement was signed in 1975 by these States under which they coordinated their actions in what has become known as Operation Condor.<sup>42</sup> In many cases, the final outcome of these secret abductions was enforced disappearance. The conduct of Operation Condor has been the subject of a number of reports and decisions of the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights (IACtHR)<sup>43</sup> and the UN Human Rights Committee.<sup>44</sup> The Working Group has also dealt with many cases of enforced disappearances perpetrated in the context of this operation, specifically targeting migrants who had fled to other countries to escape repression at home – for example, the numerous Uruguayan refugees captured in

40 Matthew E. Price, *Rethinking Asylum: History, Purpose, and Limits*, Cambridge University Press, Cambridge, 2009.

41 On the subject of bilateral cooperation between Argentina and Paraguay, see, for example: <http://nsarchive.gwu.edu/NSAEBB/NSAEBB514/docs/Doc%2001%20-%20r186f1573%20-%201580.pdf>.

42 Francesca Lessa, "Justice Beyond Borders: The Operation Condor Trial and Accountability for Transnational Crimes in South America", *International Journal of Transitional Justice*, Vol. 9, No. 3, 2015; John Dinges, *The Condor Years: How Pinochet and His Allies Brought Terrorism to Three Continents*, New Press, New York, 2004; J. Patrice McSherry, *Predatory States: Operation Condor and Covert War in Latin America*, Rowman & Littlefield, Lanham, MD, 2005.

43 IACtHR, *Case of Gelman v. Uruguay*, Series C, No. 221, Merits and Reparations, Judgment, 24 February 2011; IACtHR, *Case of Goiburú et al. v. Paraguay*, Series C, No. 153, Merits, Reparations and Costs, Judgment, 22 September 2006, paras 61.5–61.8.

44 See, for example, Human Rights Committee, *Case of Sergio Ruben Lopez Burgos v. Uruguay*, Communication No. R.12/52, UN Doc. A/36/40, 6 June 1979.

Argentina<sup>45</sup> and Paraguay<sup>46</sup> by the Uruguayan military authorities, by the local authorities or jointly by both. There was also the case of Argentine nationals captured in Peru by the Peruvian or Argentine military authorities.<sup>47</sup>

The Working Group has examined reports of cross-border abductions of migrants who had taken refuge in various countries. For example, Uzbek migrants who had fled to Kazakhstan were reported to have been captured by the Uzbekistan authorities,<sup>48</sup> and Afghan refugees in Pakistan were allegedly abducted by people acting on behalf of the Pakistani authorities.<sup>49</sup> More recently, the Working Group received allegations that nationals of the Democratic People's Republic of Korea who had crossed the border into China to avoid persecution had been captured by Chinese officials and repatriated, after which some of them were subjected to enforced disappearance.<sup>50</sup> This practice has also been described by the commission of inquiry on human rights in the Democratic People's Republic of Korea.<sup>51</sup>

It could also be argued that some of the bilateral and multilateral operations carried out today against migrants as part of measures to counter terrorism fit into this category.<sup>52</sup>

## Enforced disappearances following the arrest and detention of migrants

Although the administrative detention of migrants entering a country without valid documents should be a measure of last resort, given that deprivation of liberty can

45 See WGEID, *Annual Report*, UN Doc. E/CN.4/1435, 1980, para. 152; WGEID, *Annual Report*, UN Doc. E/CN.4/1492, 1981, Annex VIII, para. 10.2; WGEID, *Annual Report*, UN Doc. E/CN.4/1984/21, 1983, para. 102; WGEID, *Annual Report*, UN Doc. E/CN.4/1985/15, 1984, para. 236; WGEID, *Annual Report*, UN Doc. E/CN.4/2002/79, 2001, para. 42; *ibid.*, para. 328; WGEID, *Annual Report*, E/CN.4/2003/70, 2002, paras 30, 293; WGEID, *Annual Report*, UN Doc. E/CN.4/2004/58, 2003, para. 41; *ibid.*, para. 308; WGEID, *Annual Report*, UN Doc. E/CN.4/2005/65, 2004, para. 61.

46 See, for example, WGEID, *Annual Report*, UN Doc. E/CN.4/1983/14, 1982, paras 91 ff.; WGEID, *Annual Report*, UN Doc. E/CN.4/1435, 1980, paras 156, 173.

47 See WGEID, *Annual Report*, UN Doc. E/CN.4/1435, 1980, para. 166.

48 See WGEID, *Annual Report*, UN Doc. E/CN.4/1995/36, 1994, para. 249; WGEID, *Annual Report*, UN Doc. E/CN.4/1996/38 and Corr. 1, 1995, para. 280.

49 See WGEID, *Annual Report*, UN Doc. E/CN.4/2002/79, 2001, para. 246; WGEID, *Annual Report*, UN Doc. E/CN.4/2004/58, 2003, para. 230; WGEID, *Annual Report*, UN Doc. A/HRC/4/41, 2006, para. 318.

50 See WGEID, *107th Session (14–18 September 2015): Post-Sessional Report*, UN Doc. A/HRC/WGEID/107/1, 2015, para. 25.

51 For a general account, see *Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, UN Doc. A/HRC/25/63, 7 February 2014.

52 On this subject, see Human Rights Council, UN Doc. A/HRC/13/42, 19 February 2010. This report was a joint study on global practices in relation to secret detention in the context of countering terrorism, undertaken by the special rapporteurs on the promotion and protection of human rights and fundamental freedoms while countering terrorism and on torture and other cruel, inhuman or degrading treatment or punishment, and the Working Groups on Arbitrary Detention and Enforced and Involuntary Disappearances. For a more general discussion, see Brian R. Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross, *Foundations of International Migration Law*, Cambridge University Press, New York, 2012, p. 134.

seriously curtail the exercise of fundamental rights,<sup>53</sup> it is increasingly used by a great number of States<sup>54</sup> as a way of deterring irregular immigration and discouraging asylum-seekers.<sup>55</sup> There are national laws in place that explicitly provide for migrants entering the country in an undocumented manner to be arrested and detained, so that the authorities can identify them and take a decision on their immigration status.

Many international and non-governmental organizations have emphasized that entering a country irregularly does not, under any circumstances, constitute a crime and should certainly not be considered a valid ground for detention.<sup>56</sup> Criminalizing irregular entry into a country exceeds the legitimate interest of States to control and regulate irregular migration.<sup>57</sup> The IACtHR has stated on several occasions that immigration detention should never be used as a punitive measure; it should only be employed when strictly necessary and as a means of protecting against attacks on fundamental rights. Any other use would constitute an abuse of the State's punitive powers.<sup>58</sup> Although States have broad powers to determine who they allow inside their borders, those wishing to enter should only be detained as an exceptional measure when fundamental interests are violated.<sup>59</sup>

In addition to affecting migrants' right to freedom, immigration detention can also lead to disappearances. The lack of proper detention procedures or the failure to implement them can facilitate the commission of such crimes. The Office of the UN High Commissioner for Refugees (UNHCR) has observed that immigration detention is, in some countries, one of the most opaque areas of public administration, and few countries have established an independent monitoring mechanism for such detentions.<sup>60</sup> It has also been noted that some States do not collect disaggregated immigration detention data for certain groups, do not have statistics on the status of detained migrants or simply do not hold information on the number of asylum-seekers being held in detention.<sup>61</sup>

53 Inter-American Commission on Human Rights, OEA/Ser.L/V/II.Doc.46/15, 31 December 2015, p. 179. See also para. 383.

54 Office of the High Commissioner for Human Rights (OHCHR), UN Doc. A/HRC/33/67, 13 October 2016, para. 36; Inter-American Commission on Human Rights, OEA/Ser.L/V/II Doc 48/13, 30 December 2013, p. 179; UNHCR, Association for the Prevention of Torture (APT) and International Detention Coalition (IDC), *Monitoring Immigration Detention: Practical Manual*, 2014, pp. 5–20; UNHCR and Alice Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, April 2011, p. 1.

55 UNHCR and A. Edwards, above note 54, p. 1.

56 *Ibid.*; Inter-American Commission on Human Rights, OEA/Ser.L/V/II.Doc.46/15, 31 December 2015.

57 Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), "General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families", UN Doc. CMW/C/GC/2, 28 August 2013, para. 24; UNHCR and A. Edwards, above note 54, p. 3.

58 IACtHR, *Vélez Loor*, above note 21, para. 170.

59 Inter-American Commission on Human Rights, OEA/Ser.L/V/II.Doc.46/15, 31 December 2015, p. 179; see also para. 383.

60 UNHCR, APT and IDC, above note 54, p. 21.

61 Global Detention Project, *The Uncounted: Detention of Migrants and Asylum Seekers in Europe*, 17 December 2015, p. 18. See also Alice Edwards, "The Optional Protocol to the Convention Against Torture and the Detention of Refugees", *International and Comparative Law Quarterly*, Vol. 57, No. 4, 2008, p. 809; UNHCR and A. Edwards, above note 54, p. 41.



Furthermore, while some States do cooperate with UNHCR and grant access to asylum-seekers on a regular basis, others do not.<sup>62</sup> This lack of transparency can result in human rights violations, including enforced disappearances of migrants.

Opaque immigration detention procedures also make it difficult to obtain accurate data and document specific cases. In spite of this, various bodies have identified practices that can give rise to enforced disappearances. For example, civil society organizations have reported that Thailand does not have an adequate legal framework in place to deal with asylum cases, making the stay of refugees and asylum-seekers in the country uncertain.<sup>63</sup> Procedures seem to vary from one case to another, and this leaves detainees more vulnerable to human rights violations, including enforced disappearances. Similarly, in Russia, it has been reported that police carry out raids in places frequented by migrants, and that those arrested and detained typically have no access to legal counsel or translators and are not allowed to inform their families of their situation.<sup>64</sup> International organizations have also indicated that Libya has no framework to deal with asylum claims,<sup>65</sup> and that various actors are involved in detaining migrants there (coastguard, border officials, soldiers, police officers, smugglers, traffickers, etc.). State officials and non-State actors often take migrants to detention centres where there is no formal registration and no access to lawyers.<sup>66</sup>

These examples illustrate how immigration control measures can lead to the disappearance of migrants when they do not take into account the obligations that States have under the Declaration and the Convention, particularly the requirements to hold migrants deprived of their liberty in officially recognized places of detention, to formally register their detention and to ensure that they have access to justice.

While these immigration control practices do not always constitute an enforced disappearance *stricto sensu*, as defined in international law, they do make migrants more vulnerable to it and may trigger State responsibility. In this regard, it is worth noting that the drafters of the Convention included provisions aimed at preventing enforced disappearances that require the States Parties to keep an up-to-date official register of all persons detained and transferred, with details of the place of detention where they are being held.<sup>67</sup> It is also specified that “[all] persons deprived of liberty must be *released in a manner permitting reliable verification that they have actually been released* and, further, have been released in *conditions in which their physical integrity and ability fully to exercise*

62 UNHCR and A. Edwards, above note 54, p. 41.

63 Human Rights Watch, *Ad Hoc and Inadequate: Thailand’s Treatment of Refugees and Asylum Seekers*, September 2012, p. 1; Global Detention Project, “Thailand Immigration Detention Profile”, available at: [www.globaldetentionproject.org/countries/asia-pacific/thailand#\\_ftnref13](http://www.globaldetentionproject.org/countries/asia-pacific/thailand#_ftnref13).

64 Human Rights Watch, “Russia: Mass Detention of Migrants”, 8 August 2013, available at: [www.hrw.org/news/2013/08/08/russia-mass-detention-migrants](http://www.hrw.org/news/2013/08/08/russia-mass-detention-migrants).

65 IOM, above note 6, p. 113.

66 *Ibid.*, pp. 123–130; United Nations Support Mission in Libya (UNSMIL) and OHCHR, *Detained and Dehumanised: Report on Human Rights Abuses against Migrants in Libya*, 13 December 2016.

67 ICCPED, Art. 17(3).

*their rights are assured*”.<sup>68</sup> Detained migrants who have not been duly registered or are released without their safety being ensured or their rights guaranteed clearly run a greater risk of becoming a victim of enforced disappearance. Furthermore, the Convention provides that “[n]o one shall be held in secret detention”<sup>69</sup> and that places of detention must be officially recognized and supervised. Detainees must be allowed to communicate with their families and ensured access to legal remedies, which avoids migrants being placed outside the protection of the law. All these safeguards apply to the detention of migrants.

Compliance with these obligations is of paramount importance considering that the policies, laws and practices of States often do not recognize migrants as full rights holders (in spite of their international obligations under instruments such as the ICCPR), which makes migrants all the more vulnerable to human rights violations, including enforced disappearances.<sup>70</sup>

Lastly, many States have adopted increasingly restrictive immigration policies in recent years, forcing migrants without the proper documents to choose migration routes that are dangerous<sup>71</sup> because they are partly controlled by criminal gangs or trafficking networks.<sup>72</sup> As mentioned above, the restrictive policies introduced by States and the increased use of immigration detention heighten the fears of irregular migrants who, rather than risk arrest and detention, prefer to take their chances on clandestine routes – and these routes, while having the “advantage” of less State monitoring, tend to be controlled by criminal groups.

## **Enforced disappearances in the context of deportations and pushbacks**

Migrants can also be subjected to enforced disappearance once they have reached their destination or while they are in transit, particularly when the authorities decide to deport them to their country of origin or another country. Migrants are sometimes deported without the proper procedures and registration. In some cases, migrants intercepted by agents of the State are handed directly back to the authorities of the country of origin. The WGEID has come across cases of this kind over the years. In 1981, for example, it dealt with a case in which twenty-six nationals of El Salvador disappeared after being arrested by the Honduran security forces. Five of them were handed over directly to the authorities of El Salvador. Another, a Salvadorian refugee living in a refugee camp in Honduras,

68 Declaration on the Protection of All Persons from Enforced Disappearance, Art. 11 (emphasis added). See also ICPPED, Art. 17(3)(h).

69 ICPPED, Art. 17(1).

70 Inter-American Commission on Human Rights, OEA/Ser.L/V/II Doc 48/13, 30 December 2013, p. 13.

71 *Ibid.*, p. 207; UNHCR and A. Edwards, above note 54, p. 2.

72 WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/33/51, 28 July 2016, para. 67; Human Rights Council, *Situation of Migrants in Transit*, UN Doc. A/HRC/31/35, 27 January 2016, para. 64. See also UNHCR, *The Sea Route to Europe: The Mediterranean Passage in the Age of Refugees*, Geneva, 1 July 2015, p. 7; International Crisis Group, *Easy Prey: Criminal Violence and Central American Migration*, Latin America Report No. 57, 2016, p. 10.

was forcibly returned to El Salvador following a raid on the camp by the Salvadorian army.<sup>73</sup> Similarly, in 1996, the Working Group received a case in which an Ethiopian refugee had disappeared after being arrested at a camp in Djibouti by the Djiboutian police and handed over to the Ethiopian authorities.<sup>74</sup> The Working Group has also examined cases involving Algerian migrants, known as *harragas*, who reportedly disappeared in Tunisian territorial waters while attempting to reach Italy by boat in 2007. These alleged disappearances occurred in the context of incidents in which *harragas* had been captured by the Tunisian coastguard in similar circumstances.<sup>75</sup>

Other types of cases have also been documented by various civil society and international organizations. In southern Spain, for example, Spanish border officials have reportedly intercepted large numbers of migrants and handed them directly over to Moroccan border officials, without following the procedures required to ensure that their rights were respected.<sup>76</sup> A law was passed in 2014 to deal with “illegal immigration”, establishing a special regime for Ceuta and Melilla and authorizing summary expulsions in these territories.<sup>77</sup> Therefore, migrants attempting to scale the fences along Spain’s southern border can be arrested by the Spanish police and handed over to the Moroccan police without the Spanish authorities providing an effective asylum process.<sup>78</sup> It is important to note that the principle of *non-refoulement* prohibits States from returning migrants to their country of origin if they are likely to be exposed to the risk of human rights violations, including enforced disappearances. Any deportation must be the subject of an individual assessment in order to avoid such risks.<sup>79</sup> In connection with this issue, the Working Group expressed concern, following a visit to Spain in 2013, at claims that migrants had been expelled without formal procedures being followed, which prevented case-by-case consideration of whether they might have been at risk of enforced disappearance following deportation, as required by Article 8 of the Declaration.<sup>80</sup>

73 WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN.4/1492, 31 December 1981, para. 155.

74 WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN.4/2006/56, 27 December 2005, para. 232.

75 WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances*, Post-Sessional report, UN Doc. A/HRC/WGEID/112/1, 25 July 2017.

76 Comisión de Observación de Derechos Humanos (CODH), *Vulneraciones de derechos humanos en la frontera sur – Melilla*, July 2014, p. 15. See also IOM, above note 6, p. 130.

77 Global Detention Project, “Spain Immigration Detention Profile”, 2016, available at: [www.globaldetentionproject.org/countries/europe/spain](http://www.globaldetentionproject.org/countries/europe/spain).

78 European Centre for Constitutional and Human Rights, *Spanish-Moroccan Land Border in Melilla – a Lawless Zone of Automatic Expulsions*, 2015, p. 1; Commissioner for Human Rights, Council of Europe, *Third Party Intervention by the Council of Europe Commissioner for Human Rights*, CommDH (2015)26, 2015, para. 11, available at: <https://rm.coe.int/16806dac25>. See also IOM, above note 6, pp. 130–131.

79 European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, Case No. 27765/09, Judgment, 2012; Inter-American Commission on Human Rights, *The Haitian Centre for Human Rights et al. v. United States*, Case No. 51/96, 1996, paras 167–177.

80 WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances: Mission to Spain*, UN Doc. A/HRC/27/49/Add.1, 2 July 2014, para. 54.

Similar practices have also been documented by human rights organizations at the border between Morocco and Algeria. Migrants intercepted by immigration officials are reported to have been taken to remote desert areas, forced to cross the border and then left there to survive on their own without food or water.<sup>81</sup> Numerous other cases of this kind have been documented in different parts of the world, involving officials taking migrants to remote places and releasing them without ensuring their safety.<sup>82</sup>

These examples illustrate how practices of this kind might not comply with the *non-refoulement* obligation and the duty that States have to ensure the right of “[a]ll persons deprived of liberty [to] be released in a manner permitting reliable verification that they have actually been released and, further, have been released in conditions in which their physical integrity and ability fully to exercise their rights are assured”.<sup>83</sup>

Another measure that can lead to the disappearance of migrants is the widespread and well-documented practice of “pushbacks”.<sup>84</sup> This “technique”, which consists of preventing migrants from crossing a border by forcibly returning them, before they even reach their destination, to the previous country of transit or to the country of origin they are fleeing from, denies them the legal protection to which they are entitled under international human rights law, asylum law<sup>85</sup> and the principle of *non-refoulement*.<sup>86</sup>

Numerous cases of pushbacks have been documented by civil society organizations. For example, boatloads of migrants arriving at the sea border between Turkey and Greece have been intercepted by the coastguard and pushed back towards Turkey,<sup>87</sup> sometimes resulting in shipwreck.<sup>88</sup> Similarly, on the land border between Turkey and Bulgaria, migrants were reportedly intercepted, taken back across the border and released without food, while others intercepted after crossing the Bulgarian border were forced to head straight back to Turkey.<sup>89</sup> In the majority of cases, there were no registration procedures in place and migrants were denied the opportunity to make an asylum claim.<sup>90</sup>

81 Human Rights Watch, *Abused and Expelled: Ill-Treatment of Sub-Saharan African Migrants in Morocco*, February 2014, p. 26.

82 See, for example, American Civil Liberties Union of San Diego & Imperial Counties and Mexico’s National Commission of Human Rights (Maria Jimenez), *Humanitarian Crisis: Migrant Deaths at the US–Mexico Border*, 2009, p. 29. See also Human Rights Watch, *Containment Plan: Bulgaria’s Pushbacks and Detention of Syrian and Other Asylum Seekers and Migrants*, 28 April 2014, p. 17.

83 Declaration on the Protection of All Persons from Enforced Disappearance, Art. 11 (emphasis added). See also ICPPED, Art. 17(3)(h).

84 UN General Assembly, *Human Rights of Migrants*, UN Doc. A/71/285, 4 August 2016.

85 Oxfam, *A Dangerous Game: The Pushback of Migrants, including Refugees, at Europe’s Borders*, April 2017, p. 4.

86 European Court of Human Rights, *Jamaa*, above note 79, paras 77–134.

87 See European Union Agency for Fundamental Rights, *Annual Report 2014 – Fundamental Rights: Challenges and Achievements in 2014*, 2014, pp. 87–88; Amnesty International, *Greece: Frontier of Hope and Fear – Migrants and Refugees Pushed Back at Europe’s Border*, 2014; Pro Asyl, *Pushed Back: Systematic Human Rights Violations against Refugees in the Aegean Sea and at the Greek–Turkish Land Border*, 2014.

88 Pro Asyl, above note 87, pp. 27–28; Amnesty International, above note 87, p. 15.

89 Human Rights Watch, above note 82, pp. 2–17.

90 *Ibid.*, p. 3.

Following a visit to Turkey in 2016, the Working Group expressed concern about information it had received regarding the high number of mass returns of Syrian refugees by the Turkish State and the use of violence by border guards to prevent Syrian nationals from crossing the border into Turkey.<sup>91</sup> It observed that the Syrian situation increased the likelihood of enforced disappearances occurring and exposed the refugees who were returned to Syria to greater risk of suffering human rights violations.<sup>92</sup>

Although it may not be accurate to equate pushbacks with enforced disappearances *stricto sensu*, there is no question that this practice makes migrants vulnerable and more likely to become victims of enforced disappearances. Moreover, it could trigger the responsibility that States have under the Convention and the Declaration, which, it must be remembered, prohibit States from returning migrants to a country where there are substantial grounds for believing that they would be in danger of enforced disappearance, and require States to release them in a manner permitting reliable verification that they have actually been released and ensuring their physical safety and ability to fully exercise their rights.

## The problem of migrant smuggling and trafficking

It is important to recall that a significant proportion of migrant disappearances seem to be the result of migrant smuggling and trafficking operations carried out by private or non-State actors,<sup>93</sup> often as part of organized criminal

91 WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances on Its Mission to Turkey*, UN Doc. A/HRC/33/51/Add.1, 27 July 2016, para. 55.

92 *Ibid.*, para. 56. See also *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/24/46, 16 July 2013, paras 67–74.

93 It should be noted that “[s]muggling of migrants’ shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State ... of which the person is not a national or a permanent resident” for the purposes of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime, UNGA Res. 55/25, Annex III, UN General Assembly Official Records, 55th Session, Supp. No. 49, UN Doc. A/45/49, Vol. 1, 2001. The term “[t]rafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation”. See Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, UNGA Res. 25, Annex II, UN General Assembly Official Records, 55th Session, Supp. No. 49, UN Doc. A/45/49, Vol. 1, 2001, Art. 3(1). See also K. Kangaspunta and A. Guth, “Trafficking in Persons: Trends and Patterns”, in Organisation for Economic Cooperation and Development (OECD), *Illicit Trade: Converging Criminal Networks*, OECD Publishing, Paris, 2016. It should be noted that it is often the case that at some point along the way migrant smuggling turns into migrant trafficking: “What starts out as a simple transaction involving a person seeking the services of a smuggler may end up with the migrant being deceived, coerced or exploited somewhere along the line, given the often unequal power relationships between smugglers and migrants. Therefore a smuggled migrant may quickly and unwillingly become a trafficked person.” See IOM, *Migrant Smuggling Data and Research: A Global Review of the Emerging Evidence Base*, 2016, p. 6. See also Inter-American Convention on International Traffic in Minors, OEA/Ser.K/XXI.5, CIDIP-V/doc.36/94 rev. 5, 79 OASTS, 18 March 1994; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, UNGA Res. 54/263, Annex II, UN General Assembly Official Records, 54th Session, Supp. No. 49, UN Doc. A/54/49, Vol. 3, 2000.

activities.<sup>94</sup> In fact, more and more migrants are putting themselves in the hands of smugglers or taking more dangerous routes, which are often controlled by organized criminal gangs, to avoid the more restrictive controls established as a result of the harsher immigration policies adopted by States in recent years.<sup>95</sup> Although in some cases disappearances occurring as a result of smuggling or trafficking do not involve State actors – and do not therefore constitute enforced or involuntary disappearances in the strict sense of the term – in many others they are perpetrated with the *support (direct or indirect), consent or acquiescence* of agents of the State, rendering them “enforced disappearances” within the meaning of the Convention and Declaration.

Sometimes, agents of the State (such as border and immigration officials, police, port authorities, embassy and consulate employees or members of the armed forces) can be smugglers or traffickers themselves, organizing the smuggling or trafficking of migrants, facilitating undocumented migration or enabling the stay of irregular migrants.<sup>96</sup> At other times, they are indirectly involved in migrant smuggling and trafficking activities carried out by private actors, facilitating operations, allowing undocumented migrants to enter, providing fraudulent documents or simply turning a blind eye.<sup>97</sup> Migrant smuggling and trafficking activities are often carried out with the involvement or collaboration of corrupt State officials, and corruption and collusion are generally a critical part of such operations.<sup>98</sup> When migrants disappear either during their journey or at their destination as a result of being smuggled or trafficked, the direct or indirect involvement of government officials in these activities renders the incident an enforced disappearance within the meaning of the Convention and Declaration and can trigger the responsibility of the States concerned. It should also be noted that, in the vast majority of cases, corrupt officials are acting not in accordance with State policies or measures but in their own interests.

Various examples of this have been documented by international organizations and civil society. In Africa, networks have been detected that take migrants from Eritrea to Sudan, Ethiopia<sup>99</sup> and Egypt.<sup>100</sup> Likewise, in Libya, there have been reports of government officials being directly involved or collaborating in smuggling and trafficking operations that take migrants to Europe or Sudan.<sup>101</sup>

94 On this subject, see Christine Bruckert and Colette Parent, *Trafficking in Human Beings and Organized Crime: A Literature Review*, Community, Contract and Aboriginal Policing Services Directorate, Royal Canadian Mounted Police, 2002.

95 On this subject, see UNHCR, above note 72, p 7. See also WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/33/51, 28 July 2016, para. 67; Human Rights Council, above note 72; IOM, above note 93, p. 271.

96 On this subject, see UN Office on Drugs and Crime, *Issue Paper: Smuggling of Migrants by Sea*, Vienna, 2011, p. 20.

97 *Ibid.* See also IOM, above note 93, pp. 7, 62.

98 IOM, above note 93, pp. 7, 9, 271.

99 *Ibid.*, 2016, p. 63.

100 IOM, above note 6, p. 121.

101 See, for example, *ibid.*, p. 14; IOM, above note 93, pp. 63, 91; Human Rights Watch, *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, 2009, pp. 53, 70, 73; UNSMIL and OHCHR, above note 66, pp. 12, 19.

Similar claims have been made in relation to Niger and elsewhere in the northern part of the continent.<sup>102</sup> In the Americas, several instances of enforced disappearance have been reported in Mexico, when migrants have either been captured by municipal, state or federal police and then handed over to criminal organizations or abducted jointly by members of the police and criminal organizations.<sup>103</sup> In other instances, criminal organizations have reportedly captured migrants with the support, consent or acquiescence of government officials,<sup>104</sup> who provided assistance and protection for the operations.<sup>105</sup> In Asia, it has been reported that Rohingya and Bangladeshi migrants, who went missing in Thailand and Malaysia, were captured by criminal gangs with the complicity of the authorities.<sup>106</sup>

In addition to cases in which government officials are directly or indirectly involved in enforced disappearances of migrants, abductions originally carried out by private actors can be attributed to the State if government officials authorize or acquiesce to those actions *a posteriori*, even when a significant period of time has elapsed since the actual abduction.<sup>107</sup> Systematic situations of impunity in cases of missing migrants, owing to omissions by the State or the lack or inadequacy of investigations or legal proceedings, could also be considered a form of implicit authorization or acquiescence by the State within the meaning of the

102 See, for example, Tim Cocks and Edward McAllister, “Africa’s Population Boom Fuels ‘Unstoppable’ Migration to Europe”, *Reuters*, 13 October 2016, available at: [www.reuters.com/article/us-europe-migrants-africa-analysis-idUSKCN12D1PN](http://www.reuters.com/article/us-europe-migrants-africa-analysis-idUSKCN12D1PN). See also IOM, “IOM Learns of ‘Slave Market’ Conditions Endangering Migrants in North Africa”, 11 April 2017, available at: [www.iom.int/news/iom-learns-slave-market-conditions-endangering-migrants-north-africa](http://www.iom.int/news/iom-learns-slave-market-conditions-endangering-migrants-north-africa).

103 Comisión Nacional de los Derechos Humanos, *Informe de Actividades 2009, 2010*, pp. 14, 26, 30; Comisión Nacional de los Derechos Humanos, *Informe de Actividades 2011, 2012*, p. 28. See also CMW, *Consideration of Reports Submitted by States Parties under Article 74 of the Convention, Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families: Mexico*, UN Doc. CMW/C/MEX/CO/2, 2011, paras 29, 49.

104 See Comisión Nacional de los Derechos Humanos, *Informe de Actividades 2009, 2010*, pp. 15, 26, 30; Comisión Nacional de los Derechos Humanos, *Informe de Actividades 2011, 2012*, pp. 27–33. See also Foundation for Justice and the Rule of Law, *Disappeared Migrants: The Permanent Torture*, Mexico City, 2014, p. 7, available at: <http://fundacionjusticia.org/cms/wp-content/uploads/2014/09/Disappeared-migrants.pdf>.

105 These include the case of the migrants who went missing in San Fernando, Tamaulipas, in 2011, which received wide media coverage; see Foundation for Justice and the Rule of Law, above note 104, p. 5. See also Inter-American Commission on Human Rights, OEA/Ser.L/V/II Doc 48/13, 30 December 2013, p. 81; CMW, above note 103, para. 29; Comisión Nacional de los Derechos Humanos, *Informe especial sobre los casos de secuestro en contra de migrantes*, 2009, p. 14.

106 On this subject, see Fortify Rights, “Myanmar: Authorities Complicit in Rohingya Trafficking, Smuggling”, 2014, available at: [www.fortifyrights.org/publication-20141107.html](http://www.fortifyrights.org/publication-20141107.html). See also Kathleen Newland, “Irregular Maritime Migration in the Bay of Bengal: The Challenges of Protection, Management and Cooperation”, *Issue in Brief*, No. 13, IOM and Migration Policy Institute, 2015, available at: [http://publications.iom.int/system/files/pdf/mpi-iom\\_brief\\_no\\_13.pdf](http://publications.iom.int/system/files/pdf/mpi-iom_brief_no_13.pdf).

107 Enforced disappearance is a continuing crime that ends only when the disappearance itself is resolved – that is, when the victim is located or the State provides a satisfactory explanation as to his or her fate. On this subject, see WGEID, “General Comment on Enforced Disappearance as a Continuous Crime”, available at: [www.ohchr.org/Documents/Issues/Disappearances/GC-EDCC.pdf](http://www.ohchr.org/Documents/Issues/Disappearances/GC-EDCC.pdf).

Declaration and Convention.<sup>108</sup> Additionally, the failure to conduct investigations and adopt appropriate measures to identify the remains of migrants found in common graves or at sea, for example, contributes to impunity and in itself constitutes an obstacle to tracing migrants who are still missing.<sup>109</sup>

## Conclusion

Enforced or involuntary disappearances of migrants are sadly an increasingly common occurrence, and the international community has so far failed to deal with them satisfactorily. The thematic study conducted by the WGEID, submitted to the UN Human Rights Council in September 2017, will undoubtedly be of great interest to States and civil society, including the families of missing people and organizations that defend migrants' rights.<sup>110</sup>

In fulfilment of its mandate to assist States in meeting their obligations under the Declaration,<sup>111</sup> the Working Group report formulates specific recommendations on preventing and punishing enforced disappearances and ensuring adequate reparation, where appropriate. These recommendations take into account the transnational nature of the disappearance of migrants and the obstacles faced by the families of missing migrants in exercising their right to truth and justice.

When studying the phenomenon of enforced disappearances of migrants and seeking ways to prevent and combat it, States must look at the root causes of the problem. These include increasingly restrictive government policies and the progressive militarization of borders, which put migrants in vulnerable situations, exposing them to heightened risks of human rights violations, including enforced disappearances. States must also crack down on criminal organizations that carry out migrant smuggling and trafficking operations.

States must do more to prevent disappearances by increasing transparency in immigration detention and deportation procedures, guaranteeing respect for migrants' rights to legal safeguards and ensuring that migrants are never returned to countries where they would be in danger of human rights violations.

States must also deliver on ensuring more effective implementation of the rights of the families of missing migrants in their pursuit of truth and justice, which

108 On the subject of the impunity of those responsible for the disappearance of migrants in Mexico, for example, see WGEID, *Mission to Mexico*, above note 35, para. 69. See also CMW, above note 103, paras 29, 31. See also Foundation for Justice and the Rule of Law, above note 104, p. 6.

109 See, for example, IOM, *Fatal Journeys*, Vol. 2: *Identification and Tracing of Dead and Missing Migrants*, Geneva, 2016, pp. 20, 33, 36. See also CMW, above note 103, paras 29, 31.

110 Readers are invited to consult this report for further information on the conclusions and recommendations formulated by the WGEID; see WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances on Enforced Disappearances in the Context of Migration*, UN Doc. A/HRC/36/39/Add.2, 28 July 2017.

111 OHCHR, "Enforced or Involuntary Disappearances: Commission on Human Rights Resolution: 2004/40", 19 April 2004, available at: [www.ohchr.org/Documents/Issues/Disappearances/E-CN.4-RES-2004-40.pdf](http://www.ohchr.org/Documents/Issues/Disappearances/E-CN.4-RES-2004-40.pdf).



is hampered by distance, administrative complications and language barriers. Given the transnational nature of the crime of enforced disappearance of migrants, it is crucial for governments to enhance inter-State cooperation in the areas of prevention, investigation and punishment and in reparation processes for victims.<sup>112</sup>

It will be interesting to see whether, in the near future, other UN Special Procedures and international organizations will undertake studies similar to the one conducted by the WGEID in response to the migration crisis that has gripped different regions across the globe.<sup>113</sup>

112 Some civil society organizations and the Inter-American Commission on Human Rights have stressed the importance of inter-State cooperation in this area and have documented the obstacles facing migrants and their families in their pursuit of the truth. See Inter-American Commission on Human Rights, OEA/Ser.L/V/II Doc 48/13, 30 December 2013, pp. 75 ff. See also Foundation for Justice and the Rule of Law, above note 104, p. 19.

113 See, for example, Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions, *Unlawful Death of Refugees and Migrants*, UN Doc. A/72/335, 2017.



# Establishing mechanisms to clarify the fate and whereabouts of missing persons: A proposed humanitarian approach

**Monique Crettol, Lina Milner, Anne-Marie La Rosa and Jill Stockwell\***

Monique Crettol contributed to the International Conference on the Missing in 2003. She was an International Committee of the Red Cross (ICRC) Adviser and Coordinator promoting and supporting the implementation of its recommendations in ICRC operations for more than ten years. She is now leading the team in charge of protection data management at the ICRC.

Lina Milner is a Senior ICRC Adviser and has been serving as a Regional Coordinator for the Missing in Georgia and the Western Balkans for the last ten years.

Anne-Marie La Rosa, PhD, DES, LLB, is a former Senior Officer of the International Labour Organization and the ICRC. She teaches and has published extensively in international

\* The content of this article reflects the views of the authors and not necessarily those of the organizations with which they are or have been associated.

humanitarian law, international criminal law and transitional justice, including on processes related to the missing.

Jill Stockwell, PhD, is a social anthropologist and an Advisor on Missing Persons and their Families with the ICRC.

## Abstract

*This article examines the different types of mechanisms which can contribute to addressing the issue of the missing, including providing answers on the fate and whereabouts of missing persons. It looks in detail at one approach that the authors have observed in the field. It argues that an approach based on humanitarian objectives which does not look into who is responsible for the disappearance, with proper management of confidential information, could be a powerful instrument for searching for and collecting relevant information on the missing in certain contexts. The article also proposes avenues for further research, with a view to enhancing the global capacity to provide meaningful answers for the missing and their families.*

**Keywords:** the missing, missing persons, humanitarian approach, accountability, protection of personal data, humanitarian law, human rights law, transitional justice, participatory process, mechanism, truth commissions, confidentiality, right to know, right to justice, right to truth, Central Tracing Agency, national information bureaux.

: : : : : :

## Introduction

People have gone missing as long as humanity has been fighting wars or has been facing natural or man-made disasters. They might be captured or abducted and then held incommunicado in secret locations (enforced disappearance) or die in custody. They might be victims of executions, thrown into unmarked graves (summary executions). Sometimes they are civilians fleeing combat, children separated from their families, elderly people or persons with disabilities who are unable to flee and are left behind. Civilians and weapon bearers might be killed during fighting and their remains improperly managed or disposed of. A growing number of people feel forced to flee their homes because of violence, insecurity, destruction, endemic poverty, poor governance and changing climate conditions. And this is not likely to change. Today the phenomenon has taken on an even more global dimension in its overlap with migration. A significant number of migrants go missing along global migration routes; their locations are never traced and, if they have died, their bodies are never found. In all these situations, families are left in despair, not knowing the fate and whereabouts of their loved ones.

The trends are appalling. It has been conservatively estimated that more than a million people went missing in Iraq between 2003 and 2013,<sup>1</sup> and more than 10,000 are still missing in relation to the armed conflict that affected the Western Balkans in the 1990s and early 2000s.<sup>2</sup> Tens of thousands of persons have disappeared in current conflicts around the world, as well as in situations where there is a high level of violence and portions of States' territories are simply lawless and often left to the control of gangs and cartels. The number of missing migrants is even more difficult to assess. The International Organization for Migration (IOM) estimates that around the world, at least 7,760 migrants lost their lives in 2016, many of them unidentified.<sup>3</sup>

People who go missing remain one of the most damaging effects of past war, current armed conflicts or violence,<sup>4</sup> migration and natural disasters, adversely affecting the individuals who disappear, their families and the community at large. Today, layers of contemporary missing persons join others for whom no information has been found for years, even decades, leaving families in anguish and uncertainty and jeopardizing prospects for reconstructing the social fabric of affected communities and societies.

International law, in particular international humanitarian law and international human rights law, contains a significant number of rules and principles aimed at preventing, remedying and, where appropriate, punishing the disappearance of persons as a result of armed conflicts or violence. International law recognizes the right of the families of such persons to know their relatives' fate and whereabouts, which entails, *inter alia*, the correlative obligation of public authorities under human rights law to carry out an effective investigation into cases of disappearance in order to clarify the fate and whereabouts of persons unaccounted for, and to inform and assist the families accordingly, as well as to protect the dead and restore their identities. This article does not address the legal framework applicable to the missing in international humanitarian law and in human rights law or the applicable legal norms protecting the dead and restoring their identities.<sup>5</sup>

1 See, for instance, the International Commission on Missing Persons (ICMP) estimates available at: [www.icmp.int/where-we-work/middle-east-and-north-africa/iraq/](http://www.icmp.int/where-we-work/middle-east-and-north-africa/iraq/).

2 See International Committee of the Red Cross (ICRC), "Missing Persons in the Balkans", June 2015, available at: [www.icrc.org/en/document/missing-persons-western-balkans](http://www.icrc.org/en/document/missing-persons-western-balkans).

3 IOM, "Migrant Deaths and Disappearances Worldwide: 2016 Analysis", Data Briefing Series, No. 8, 2017, available at: <https://publications.iom.int/books/global-migration-data-analysis-centre-data-briefing-series-issue-no-8-march-2017>.

4 The term "armed conflict and other situations of violence" will be shortened in this document to "conflict and violence" for ease of reading, noting that "other situations of violence" (hereinafter "violence") is used to refer to situations of collective violence perpetrated by one or several groups, which do not reach the threshold of an armed conflict, but may have significant humanitarian consequences.

5 For more on the legal framework, see ICRC, *ICRC Report: The Missing and Their Families*, 2003, Annex A, "Legal References", Annex B, "Special Protection to which Children are Entitled: Legal References", and Annex C, "Legal Protection of Personal Data and Human Remains: Commonly Accepted Principles", available at: [www.icrc.org/eng/assets/files/other/icrc\\_themissing\\_012003\\_en\\_10.pdf](http://www.icrc.org/eng/assets/files/other/icrc_themissing_012003_en_10.pdf). For developments since 2003, see, for instance, International Convention for the Protection of All Persons from Enforced Disappearance, UN Doc. A/RES/61/177, 6 February 2007 (entered into force 23 December 2010) (ICPPED); Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International*

Over the last two decades, mechanisms and processes have been established after (or even during) armed conflicts and violence with a view to providing answers and assistance to the families of missing persons. Even though they took different forms and achieved variable results, such mechanisms and processes were often useful to ensure effective protection and assistance to the missing and their relatives in post-armed conflict or post-violence situations.

Based mainly on the experience that the International Committee of the Red Cross (ICRC) has developed since 2003 in the field of missing persons,<sup>6</sup> this article examines the different types of mechanisms which can contribute to addressing the issue of the missing, including providing answers on the fate and whereabouts of missing persons. It looks in detail at one mechanism with which the ICRC has experience in the field. It argues that an approach based on humanitarian objectives which does not look into who is responsible for the disappearance, with proper management of confidential information, could be a powerful instrument for searching for and collecting relevant information on the missing in certain contexts. This proves to be particularly true, for instance, in situations where relevant authorities<sup>7</sup> are identifiable, institutions are weak and information providers are not inclined to talk because of fear of reprisals or criminal prosecution.

The proposed approach is intended to be complementary to other mechanisms or processes that exist and that have proved efficient in the aftermath of armed conflict and widespread violence, including those that are contributing to the fight against impunity. For instance, tribute should be paid to the rich history and experience developed in Latin America, where family associations have struggled and managed to help establish mechanisms aimed at disclosing all information on missing persons and bringing to justice those responsible for causing the disappearance. The challenge lies in the identification of the conditions necessary to make these mechanisms function and in finding ways to strengthen all approaches, taking advantage of their complementary nature.

In the first section, this article examines certain preliminary requirements that need to be met to ensure an adequate and effective treatment of all questions relating to missing persons in post-conflict settings, including frozen conflicts or situations of violence. The second section describes various forms that mechanisms may take at the coordination and national levels, and provides

*Humanitarian Law*, Vol. 1: Rules, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study).

- 6 In 2003, the ICRC organized an international conference on missing persons, which was a unique opportunity to take stock of what had been accomplished by relevant stakeholders up to then and to establish guidelines for more effective action in this domain. See ICRC, *The Missing and their Families: Documents of Reference*, February 2004, available at: <https://shop.icrc.org/the-missing-and-their-families-documents-of-reference-2691.html>.
- 7 Throughout this document, the term “relevant authority/ies” is used to refer to those identifiable as being in power (*de facto* or *de jure*) and on whom the responsibility lies to take the necessary action to clarify the fate and whereabouts of missing persons. This might include organized armed groups in certain armed conflicts or other violence that does not reach the level of armed conflict. This article always expressly mentions when it is referring to national authority/ies.

details on their respective mandates, capacities and power. The third section proposes means to be taken to create incentives for a successful exchange of relevant information relating to the missing. The fourth section explains how a mechanism with a humanitarian mandate and proper management of confidential data can be efficient without being an impediment to justice.

This article does not pretend to be exhaustive, although it adheres to an evidence-based approach, using as many relevant examples from the field as possible. In doing so, it should contribute to positioning the issue of the missing at the centre of the humanitarian agenda, including in transitional processes put into place after periods of armed conflict and violence. It should also provide elements to help better apply and explain the humanitarian approach for mechanisms tasked with resolving the fate and whereabouts of the missing. Finally, this article focuses on post-violence and conflict settings, including frozen conflicts, and does not cover other situations in which people are going missing, such as natural disasters and migration, although ICRC experience shows that the needs of missing persons and the families' suffering from such circumstances, as well as the basis for responding for the most part, could be quite similar.<sup>8</sup>

## Preliminary considerations

The mechanisms and processes that are discussed in this article are often established in particularly difficult environments where the social fabric has been totally torn, where hatred of the past still affects the minds of the people and where institutions responsible for ensuring the rule of law are unable to do so. Relevant authorities may well express sincere political will, but the barriers can be so insurmountable that, without outside support, they are just not able to make the mechanisms progress towards providing meaningful answers to the families of the missing. Furthermore, the treatment of the missing raises particularly sensitive questions which might easily turn the mechanisms away from their humanitarian objectives and may bring with them serious problems of security for those that are working on the issue. These considerations should be kept in mind at all times, as should the importance of a long-term commitment to ensuring a sustainable environment in which the relevant authorities are vested with the capacity and willingness to adequately address the issue of the missing. When working on a missing person file, each environment should be considered as unique and evolving, where progress may be positively influenced by long-term support aiming at, *inter alia*, building autonomous and independent capacities.

It is necessary to recognize that certain preliminary requirements need to be met to ensure an adequate and effective treatment of all questions relating to missing persons in post-conflict or post-violence situations. First and foremost, there must

8 This article should be read together with Monique Crettol and Anne-Marie La Rosa, "The Missing and Transitional Justice: The Right to Know and the Fight Against Impunity", *International Review of the Red Cross*, Vol. 88, No. 862, 2006, in which the interaction between transitional justice processes and the missing persons issue is considered.

be political will. Secondly, the issue of missing persons cannot be dealt with in isolation: willing authorities need to make it part of a broader agenda in which a humanitarian, multidimensional and integrated approach is adhered to. Further, if it is highly recommended to look at similar experiences in other contexts, the model retained should be tailored to the context's own peculiarities. Finally, the participatory nature of the process is essential.

## Political will and external pressure

There is little hope of seeing the question of the missing properly addressed if no serious effort is made to build sustainable political will. In this regard, it is important to identify the internal and external factors which, within a given context, may influence decision-makers, with special attention given to those that might exert positive pressure on the relevant authorities.

There is always great interest from authorities in making known the actions and measures that they take to shed light on the fate and whereabouts of the missing when a link exists between implementing such measures and setting and achieving important political agendas and processes at the national, regional or international level. To name but a few cases where direct or indirect links were made between the missing and political processes led at the regional or United Nations (UN) level: Bosnia and Herzegovina, where the Dayton Agreements expressly refer to the Missing;<sup>9</sup> Kosovo and the recognition of its international status;<sup>10</sup> Iraq after the 1991 Gulf War;<sup>11</sup> the situation in Cyprus;<sup>12</sup> and the European Union's

9 See General Framework Agreement for Peace in Bosnia and Herzegovina, 1995, Annex 7, Article V, and Annex 1A, Article IX.

10 The Working Group on Missing Persons in Kosovo was set up in March 2004 as part of the Vienna Dialogue under the auspices of the Special Representative of the UN Secretary-General and in the context of UN Security Council Resolution 1244 (1999). The issue of the missing was explicitly included in the Comprehensive Proposal (Atthisaari Plan) that paved the way to Kosovo's independence.

11 The issue of prisoners of war (PoWs) and missing persons is explicitly mentioned in the Riyadh agreements (April 1991) and in several resolutions of the UN Security Council (UNSC Res. 687, §§ 30, 31; UNSC Res. 1284, §§ 13, 14). Compliance by Iraq with its obligations regarding the repatriation or return of all Kuwaiti and third-country nationals or their remains has been regularly examined by the Security Council on the basis of progress reports submitted to it by the Secretary-General. In 2009, this process was given a fresh impetus when the members of the Security Council supported a proposal for a "confidence and cooperation building period between Iraq and Kuwait" in order to further encourage the parties to achieve visible and significant progress, and in particular, to continue their efforts to conclusively determine the fate of the Kuwaiti missing persons and PoWs and other missing third-country nationals, as well as to bring about the return of the Kuwaiti national archives (UNSC S/2010/300). In 2013, the Security Council decided to remove Iraq from its obligations under Chapter VII of the UN Charter, unanimously adopting Resolution 2107, which called on the Iraqi government "to give the ICRC any information available on the Kuwaiti and third-country nationals, and to facilitate the ICRC's access to them and their remains, as well as the ICRC's search for missing persons and property, including Kuwait's national archives". See: [www.un.org/press/en/2013/sc11050.doc.htm](http://www.un.org/press/en/2013/sc11050.doc.htm).

12 The Committee on Missing Persons in Cyprus (CMP) was established in April 1981 by agreement between the communities concerned and under the auspices of the UN (UNGA Res. 36/164, 1981). There were years when the CMP was not able to solve any case of missing persons and was at a standstill. It was only in 2003, when Recep Erdogan became prime minister of Turkey and the Turkish authorities expressed their interest in acceding to the European Union (EU), that the situation began to change. Certain judgments of the European Court of Human Rights, in 2001, requiring Turkey to properly investigate



incorporation of the issue of the missing in the so-called “Chapter 23” (“Judiciary and Fundamental Rights”) on the conditions to be met by Croatia to access the Union.<sup>13</sup> The issue of the missing is also addressed within the peace negotiations between the FARC and the government of Columbia,<sup>14</sup> as well as the Geneva International Discussions between Abkhaz, Georgian, South Ossetian and Russian participants, where the European Union, the Organization for Security and Cooperation in Europe (OSCE) and the UN act as mediators.<sup>15</sup>

## A broader agenda for transition processes

The right of families to know the fate and whereabouts of their missing relatives is rarely sufficiently addressed during armed conflicts or other violence at the time when the disappearance occurs. This complex issue often remains unresolved even long after the conflict or violence has ended, creating a permanent source of anguish for affected families and posing an obstacle to any peace-building or consolidation process.

When the issue is addressed by the relevant authorities, it is most commonly included as part of a transitional process which takes the country from a state of armed conflict or violence to one of stability. Today, this transitional process is often tackled from the point of view of transitional justice. This model, which was initially forged for post-authoritarian transitions, is now extended to post-conflict transitions without modification.<sup>16</sup> It pursues a number of laudable goals, such as truth-seeking, justice, reparations and guarantees of non-recurrence.<sup>17</sup> The issue of the missing needs to be seen, interpreted and applied as part of this broader agenda, where its humanitarian nature is fully recognized and other important objectives such as the fight against impunity play a pre-eminent role.<sup>18</sup> Even more ambitiously, addressing the issue of the missing

instances of missing persons in Cyprus also had a decisive impact. They prompted the Turkish authorities to endorse and implement the initiative taken by the UN Secretary-General (the Annan Plan for Cyprus).

- 13 For more information on the steps towards joining the EU, see European Neighbourhood Policy and Enlargement Negotiations, “Steps towards Joining”, available at: [https://ec.europa.eu/neighbourhood-enlargement/policy/steps-towards-joining\\_en](https://ec.europa.eu/neighbourhood-enlargement/policy/steps-towards-joining_en).
- 14 See, e.g., Lisa Haugaard and Virginia M. Bouvier, “Colombia’s Peace Accord on the Missing”, USIP, 25 July 2016, available at: [www.usip.org/publications/2016/07/colombias-peace-accord-missing](http://www.usip.org/publications/2016/07/colombias-peace-accord-missing).
- 15 For more information on the Geneva International Discussions process, see Organization for Security and Cooperation in Europe (OSCE), press releases related to the Geneva International Discussions, available at: [www.osce.org/home/104211](http://www.osce.org/home/104211).
- 16 For a critical assessment of this extension, see the report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence presented at the 36th Session of the Human Rights Council, UN. Doc. A/HRC/36/50, 21 August 2017 (Report of the Special Rapporteur on Transitional Justice).
- 17 Transitional justice needs to be accompanied by institutional reforms, including vetting. For more information, see Anne-Marie La Rosa and Xavier Philippe, “Transitional Justice”, in Vincent Chetail (ed.), *Post-Conflict Peacebuilding: A Lexicon*, Oxford University Press, Oxford and New York, 2009.
- 18 Of the same opinion, see Report of the Special Rapporteur on Transitional Justice, above note 15, para. 82.

## Sri Lanka and the 2009 conflict

In October 2015, the Sri Lankan government embarked on an ambitious path of reform when it co-sponsored UN Human Rights Council Resolution 30/1. In this resolution, the government commits to taking a comprehensive approach to dealing with past violence, including persons who remain missing in relation to the most recent conflict in the north and east of the country, which ended in 2009. Of the more than 34,000 families who recorded information about their missing relatives with the ICRC, more than 16,600 remain without any news of their loved ones' fates and whereabouts, and also experience economic, administrative, legal and emotional difficulties as a result.

The Sri Lankan government's path to reform includes Parliament enacting a legal framework in September 2016 to create a "Certificate of Absence" which attests to the absence of missing persons and facilitates legal and administrative procedures for their families, including applications for State assistance.

Another significant reform was the government's decision to embark on a process of transitional justice to address past violence. An Office of Missing Persons (OMP) became operational on 15 September 2017, as one of four mechanisms prescribed by the government to deal with the consequences of past violence. The government has specifically provided the OMP with a mandate to search for missing persons, with the aim of clarifying the circumstances in which they went missing, and to identify and inform proper avenues of redress to which missing persons or their relatives may have recourse.

Other mechanisms within the transitional justice process include a truth and reconciliation commission, an office to deal with reparations, and a judicial mechanism (Special Court).

Source: ICRC, *Annual Report 2016*, Vol. 1, Geneva, 2017, available at: [www.icrc.org/data/files/annual-report-2016/ICRC-2016-annual-report.pdf](http://www.icrc.org/data/files/annual-report-2016/ICRC-2016-annual-report.pdf).

should be recognized as a fully fledged objective within any transitional justice process.<sup>19</sup> As two of the present authors have written before:

A multi-dimensional process of transitional justice aimed at taking stock of a violent past to open the way towards peace, democracy and respect for human rights should appropriately address the issue of missing persons with the community concerned, because violations of international humanitarian law and human rights account for most of such cases.<sup>20</sup>

19 For example, in October 2015, the government of Colombia and the Colombian Revolutionary Armed Forces concluded an agreement on the missing (Accord No. 62) which offers the chance to alleviate suffering and provide answers to families of the missing, thus making the latter a distinct objective of their peace discussions and transitional process.

20 M. Crettol and A.-M. La Rosa, above note 7, p. 356.

If not fully recognized as a distinct objective, the issue of the missing should at least fall within the purview of one of the more common core objectives of transitional justice, such as truth-seeking or reparation. As regards the former, the high prevalence and disastrous consequences attached to disappearances in post-conflict settings justify that truth-seeking processes focus as a matter of priority on finding answers on the missing.<sup>21</sup> As regards the latter, and because the relevant actors often lack the resources to put satisfactory reparation schemes into place, stronger links should be built between transitional justice processes and humanitarian programmes aimed at responding to the needs of the missing and their families, because “satisfying needs ... may be the first step in a process leading to a more complete realization of rights”.<sup>22</sup>

A lot remains to be done to better connect the missing to transitional justice processes. Today, the objectives usually associated with transitional justice have been too often understood and promoted from a perspective that is not broad enough to accommodate the issue of missing persons, particularly the necessity for families to receive a concrete individual answer on the fate and whereabouts of their missing relatives. These objectives are often limited to judicial remedies involving criminal investigations and prosecutions, do not take humanitarian objectives into consideration, do not include incentives for obtaining relevant information on the missing, and do not include follow-up processes able to tackle the issue of the missing on a long-term basis. The same can be said of processes established by relevant authorities to enable victims to assert their right to the truth.<sup>23</sup> Regrettably, these processes often do not effectively implement the victims’ right to know the fate and whereabouts of their relatives or their right to a remedy.<sup>24</sup> Fortunately there has been some openness shown in recent political discussions towards including the missing persons issue and tackling its multidimensional perspectives in transitional justice processes.

It is clear that seriously addressing the issue of the missing and trying to give answers to the families cannot be done in an isolated manner. The issue of the missing bears a different quality years after the society concerned has made progress towards rebuilding its institutions and social fabrics. As observed by the UN Secretary-General in his 2008 report on the missing to the 63rd General Assembly:

The issue of missing persons thus becomes part of the process of delivering good governance, including democratic governance, and of implementing

21 Of the same opinion, see the position expressed in the Report of the Special Rapporteur on Transitional Justice, above note 15. The Special Rapporteur further argues that “ensuring that truth commissions do a proper job on the issue of the missing and that they lay the foundation for continued work on it, including sound recommendations on the establishment of an effective national mechanism to resolve outstanding cases, would constitute a significant accomplishment” (para. 80).

22 *Ibid.*, para. 86.

23 Office of the United Nations High Commissioner for Human Rights, Study on the Right to the Truth, UN Doc. E/CN.4/2006/91, 8 February 2006.

24 See, in this regard, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res. A/RES/60/147, 21 March 2006 (Basic Principles and Guidelines on Reparation), available at: [http://legal.un.org/avl/pdf/ha/ga\\_60-147/ga\\_60-147\\_ph\\_e.pdf](http://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_ph_e.pdf).

the rule of law, including ending impunity. It is important that, as part of the process of ending suffering, the families of the missing receive answers. In the context of rebuilding societies affected by conflict, it is also important for such answers to be provided by the very institutions that will be protecting the rights of citizens in the future. By providing answers, law-based local institutions demonstrate that progress has been made and can contribute to rebuilding trust in public institutions. The missing are often victims of heinous crimes, and the location[s] from which their remains are recovered are often the sites of crimes. Beyond the criminal justice dimension, the families of the missing have entitlements under civil and public law, and society at large has an interest in establishing the truth of what happened and making use of its democratic, administrative and judicial institutions for that purpose. The families of the missing want their pain and anguish to be addressed by their Governments and legal institutions so that, eventually, a sense of justice can be delivered.<sup>25</sup>

The issue of the missing cannot be addressed in a short period of time or without setting priorities by which the most urgent needs of victims are responded to without delay. To do this, stakeholders should adopt a “sequencing approach” to show some responsiveness in terms of guaranteeing that the most pressing needs of the families are addressed and met. Such careful sequencing (or prioritization), where objectives are identified, prioritized and linked to a time frame and available resources, would ensure that the priority need often expressed by the families to know what happened to their loved ones and to retrieve the remains, if the person is dead, is rapidly addressed. And this would not be in conflict with the search for and sanction of those who are responsible for the disappearances.<sup>26</sup> Authorities should take advantage of recent advances in humanitarian forensics when setting their priorities, should ensure a proper system is in place to take care of the dead and identify human remains, and should not hesitate to seek technical assistance in order to move forward in their search for answers on the missing.<sup>27</sup>

## A contextualized approach that truly addresses the needs of the families

The effectiveness of any action or process undertaken by relevant authorities to address the question of missing persons is also directly affected by the extent to which the social, legal, economic and political specificities of the environment are

25 See Report of the Secretary General, *Missing Persons*, UN Doc. A/63/299, 18 August 2008, para. 40.

26 In Sri Lanka, there is debate among different interest groups, including some civil society members, about the merits or demerits of sequencing the four proposed transitional mechanisms. At the heart of the sequencing debate is a concern that an opportunity to address the most serious human rights abuses will be missed during the current window of political openness should a “truth first, justice later” approach be adopted. Some have argued that the Office of Missing Persons should have provided a “one-stop shop” for families, addressing both their need to know the fate and whereabouts of missing relatives and their need for justice at the same time. See South Asian Centre for Human Rights “The Politics of Sequencing: A Threat to Justice?”, 29 November 2016, available at: <http://sacls.org/resources/publications/reports/the-politics-of-sequencing-a-threat-to-justice-2>.

27 Report of the Special Rapporteur on Transitional Justice, above note 15, para. 105.

taken into account. It would be wrong to believe that one model can be used in all scenarios or that it can be replicated without paying strict attention to the context, including the nature of the conflict or the roots of the violence.<sup>28</sup>

To be truly contextualized, such actions or processes should address the diverse fundamental individual needs and expectations of the families of the missing. According to needs assessments conducted by the ICRC,<sup>29</sup> families of missing persons are usually seeking, as a priority, an individual response on the fate and whereabouts of their missing relative(s) and the retrieval of the remains if the person is dead, as well as responses to their economic problems, recognition of harm suffered and public memory. As time elapses, the need for accountability, through trials and prosecutions, can become stronger.<sup>30</sup>

### A participatory process

As already noted, the effectiveness of any action is largely dependent on the degree to which it is contextualized. To be properly contextualized, any process addressing the issue of missing persons must be participatory: the voices of all those concerned, particularly the families of the missing persons and their representatives, must be heard and taken into consideration.

A participatory process guarantees a real and visible engagement with victims and civil society. Civil society should be encouraged and supported in its efforts to create grass-roots associations, with a view to empowering and mobilizing the families of missing persons and the affected communities, as well as establishing a solidarity network. These associations should then be in a position to influence actions and processes and ensure sustainable responses to the needs of those affected. The positive impact of an organized civil society has been observed in cases such as Argentina,<sup>31</sup> the

28 Some economists and organizational sociologists call this “isomorphic mimicry”: the tendency to replicate institutional forms regardless of context and even of the specificities of the ends sought. See Lant Pritchett, Michael Woolcock and Matt Andrews, “Capability Traps? The Mechanisms of Persistent Implementation Failure”, Center for Global Development Working Paper No. 234, December 2010, available at: [www.cgdev.org/publication/capability-traps-mechanisms-persistent-implementation-failure-working-paper-234](http://www.cgdev.org/publication/capability-traps-mechanisms-persistent-implementation-failure-working-paper-234).

29 ICRC, *Families of Missing Persons in Nepal: A Study of Their Needs*, Kathmandu, 2009; ICRC, *Needs of the Families of the Missing in Timor Leste*, Dili/Djakarta, 2010. See also ICRC, *Living with Uncertainty: Needs of the Families of Missing Persons in Sri Lanka*, Colombo, 2016; ICRC, *No los olvidamos*, Bogotá, 2016.

30 Where incomes are higher and education greater, trials and criminal prosecution might well be one of the priorities of the families, besides the others mentioned above.

31 The Grandmothers of the Plaza de Mayo is a unique organization of Argentine women who have become human rights activists in order to fight for the right to know the fate and whereabouts of their children and grandchildren. The organization was formed by women who had met while trying to find their missing relatives abducted by agents of the Argentine military dictatorship during the years known as the Dirty War (1976–83). Through their political action (publications, demonstrations, marches, conferences, etc.) they forged their campaign to demand that the Argentine dictatorship account for the whereabouts of their disappeared children and grandchildren. Three decades since the return to democratic rule, they have managed to keep the memory and spirit of their disappeared relatives alive, and they continue large public campaigns to recover the identity of their missing grandchildren and to combat the silence and indifference of various government administrations. See Jill Stockwell, *Reframing the Transitional Justice Paradigm: Women’s Affective Memories in Post-Dictatorial*

Balkans<sup>32</sup> and Cyprus, in the latter case after many years of inaction.<sup>33</sup> More recently, in Georgia, committees of missing persons' families are striving to become more capable of helping their members support each other and of raising public awareness of their concerns.<sup>34</sup>

For a process to be truly participatory, the relevant authorities should keep the families and the communities concerned informed about their work, their constraints, their chances of success, and the probability of finding relatives alive or of identifying and recovering their remains. They should also keep the families and communities informed about their access to assistance and remedy, and the possibility of rendering those responsible for their relatives' disappearance accountable. It is important to make sure that when families take direct part in processes such as recovery of human remains or information-sharing, they do so in consonance with local customs and values. Relevant authorities should also, in all circumstances, be careful not to unnecessarily prolong the families' suffering or to give them false expectations or hope.

## Mechanisms and structures

The efficient treatment of the issue of missing persons requires the existence of competent humanitarian, political, judicial and non-judicial mechanisms at the universal, regional, national and local levels, with bridges between them to cover the range of needs expressed by the families of the missing and the communities involved.<sup>35</sup> When such mechanisms are set up, whatever their format, particular attention should be given to their mandate. They should include humanitarian objectives, including responding to the needs of the victims in terms of providing answers, in a non-discriminatory way, about the fate and whereabouts of missing persons. They should be granted sufficient capacity and powers to be able to

*Argentina*, Springer, New York, 2014. See also the interview with Estela de Carlotto, President of the Grandmothers of the Plaza de Mayo, in this issue of the *Review*.

- 32 In the Balkans, family associations have played an increasing role in putting pressure on the authorities and their respective national mechanisms for dealing with the issue of the missing. In Bosnia and Herzegovina, the advisory board of the Missing Persons Institute (MPI) is the direct channel of communication for the families of the missing with the body itself, and the families use it to voice their concerns and to put pressure on the MPI to address their needs. For a critical analysis of the MPI, see Kirsten Juhl, "The Problem of Ethnic Politics and Trust: The Missing Persons Institute in Bosnia-Herzegovina", *Genocide Studies and Prevention: An International Journal*, Vol. 4, No. 2, 2009.
- 33 In Cyprus, family associations have been distancing themselves from their authorities and are now better able to exert a significant amount of pressure on them. See Resources for Democracy, "Citizens in Action: The Search for Missing Persons – and the Truth – in Cyprus", October 2015, available at: [www.resourcesfordemocracy.com/audio/citizens-in-action-the-search-for-missing-persons-and-the-truth-in-cyprus/](http://www.resourcesfordemocracy.com/audio/citizens-in-action-the-search-for-missing-persons-and-the-truth-in-cyprus/). See also Iosif Kovras, "Unearthing the Truth: The Politics of Exhumations in Cyprus and Spain", *History and Anthropology*, Vol. 19, No. 4, 2008.
- 34 ICRC, "Georgia: Efforts to Clarify the Fate of Missing Persons", 2016, available at: [www.icrc.org/en/document/georgia-missing-persons-clarifying-the-fate](http://www.icrc.org/en/document/georgia-missing-persons-clarifying-the-fate).
- 35 The term "mechanisms" is used to refer to all institutions, organs, bodies and processes established – formally or not – by the relevant authorities to clarify the fate and whereabouts of missing persons and inform their families accordingly.

carry out their mandate effectively. They also need to have a clear role when it comes to ensuring access to information related to gravesites and human remains. Special attention should be paid to creating an environment that is conducive to information-sharing, including the possibility of working in a confidential manner, as will be further explained below.

Sometimes, former adversaries agree to take specific measures in the form of agreements that might be concluded at the end of a conflict or violence under the auspices of a neutral party. These agreements might include the setting up of coordination mechanisms to exchange information and to keep each other informed of the progress achieved in resolving the fate and whereabouts of the missing and informing their families. They might also include explicit or implicit commitments to adjusting and changing the national setting or structure in order to ensure, at the national level, an effective treatment of the issue of missing persons and the respect of international obligations. In all cases, particular care should be put into making sure that there is a proper channel of communication with already existing mechanisms, such as tribunals and truth commissions, in order to contribute to meaningful answers for families regarding the fate and whereabouts of their missing relatives. Even if these mechanisms carry out different mandates, they can hold and share information that is relevant to helping clarify the fate and whereabouts of the missing.

## Coordination mechanisms on the missing

During armed conflicts and other violence, information about the missing is often withheld or manipulated for a number of reasons: to exert pressure on the enemy, to leave its population in ignorance and distress, to avoid criticism for losses suffered, or to maintain hatred of the enemy or ethnic exclusion. After violence has ended, those individuals who might have been involved in the events leading to a disappearance often choose to remain silent, having no interest in being held accountable for their deeds. Others, such as witnesses and bystanders, may have knowledge of disappearances but will avoid speaking out due to fear of possible reprisals or stigmatization.

In such contexts, efforts and strategies are required to increase mutual pressure on the authorities involved in the conflict or violence in order to put an end to their resistance to providing information that might help to resolve the fate and whereabouts of missing persons. Means should be invested into developing an approach that mutually stimulates the authorities involved in the past conflict or violence to provide information. It is in this regard that recourse to coordination mechanisms dealing with the humanitarian dimension of the missing should be envisaged. Of course, authorities will need to see significant benefit to garner a positive response. Parties that had been fighting each other may indeed have an interest in cooperating, if that means obtaining results not achievable by themselves alone. For example, it may give them access to territories under the other side's control, where bodies of their own

missing nationals may be buried or where they can expect to find information of value.<sup>36</sup> Furthermore, showing goodwill and cooperation may improve authorities' public image and give them easier access to foreign support and assistance.

Such mechanisms established by former enemies may ensure coordination and information-sharing on issues such as lists of missing persons or the recovery, identification and transfer of human remains. They are usually set up in the period following the end of armed conflicts or violence, or during a long lull in the fighting. They refer to the provisions of relevant international instruments, such as peace or ceasefire agreements, if they exist, or international conventions, such as the Geneva Conventions and their Additional Protocols, UN resolutions, or relevant international human rights law instruments. Such coordination mechanisms were established, for example, after the conflicts in Bosnia and Herzegovina, between Croatia and Serbia; in Cyprus; after the 1998–99 conflict in Kosovo; after the 1991 Gulf War and the conflict between Iran and Iraq; after the 1992–1993 conflict in Abkhazia; and after the 2008 conflict in South Ossetia.

Experience has shown that in many instances the efficiency of a coordination mechanism for missing persons increases if its *mandate* focuses solely on humanitarian objectives that address the main needs of the victims. Concretely, this means the implementation of a process to:

- clarify, without discrimination, the fate and whereabouts of all persons that are unaccounted for in relation to the armed conflict or the violence;
- inform their families accordingly;
- put into place a coordinated system to ensure effective search for missing persons and, when human remains are found, a multidisciplinary process of recovery and identification of those remains;
- hand the bodies over to the families, if missing persons are found dead; and
- ensure support to the families of missing persons (covering psychological, legal, administrative and economic needs).

A humanitarian mandate is particularly relevant when the analysis of the environment shows that the institutions from the ex-warring parties are clearly identifiable but are not necessarily keen to share the information they possess for a number of reasons, including fear of reprisals or criminal prosecution.<sup>37</sup> In such cases, a powerful approach to consider is a combination of a mandate based on humanitarian objectives (meaning that the mechanism should not attempt to attribute responsibility) and ensuring the proper management of confidential information (see discussion below). It is believed that a clear separation between

36 This was the case, for instance, in the search for missing persons in relation to the conflict in Kosovo and the Iraq–Kuwait and Iraq–Iran international conflicts. See Additional Protocol I, Art. 34(2–4); Report of the Secretary-General on Missing Persons, UN Doc. A/71/299, 5 August 2016, paras 25–26.

37 Conversely, in a situation where governments or authorities have changed and the judicial system is independent and functioning, approaches that are more inclusive and contribute to bringing those responsible for the disappearance to justice might be more appropriate.



## The Coordination Mechanism on Persons Unaccounted for in Connection with the Events of the 1992–93 Armed Conflict and After (Abkhazia)

Civilians continue to feel the effect of the 1992–93 armed conflict in Abkhazia. In 2017, over 2,400 people were still unaccounted for. A coordination mechanism bringing Georgian and Abkhaz participants to the table was established at the end of 2010 to clarify the fate of missing persons in relation to the conflict. The ICRC agreed to chair this mechanism. The mechanism does not attempt to attribute responsibility for the deaths of any missing person, nor make findings as to the cause of such deaths. It is not linked to any political or judicial proceedings dealing with cases related to the conflict.

As of April 2018, the mechanism has been able to identify the remains of 148 missing persons and hand them over to their families. Local NGOs have also been able to provide psychological, legal and administrative support to the families of the missing persons.

Source: ICRC, “Where We Work: Georgia”, available at: [www.icrc.org/en/where-we-work/europe-central-asia/georgia](http://www.icrc.org/en/where-we-work/europe-central-asia/georgia).

the humanitarian mandate and the relevant justice institutions is the most efficient way to obtain information in such contexts.<sup>38</sup>

The members *stricto sensu* of a coordination mechanism should represent directly or indirectly the former parties to the armed conflict or violence. They should have decision-making power and the capacity to ensure efficient follow-up of the decisions taken by the mechanism at the national or local level. The mechanism should guarantee that the views of other important stakeholders are also considered through appropriate forms of participation, such as limited membership or status as observers or experts. If this is respected, relevant experts (e.g. in forensic sciences, information management, law or psychology), civil society, and in particular representatives of the families of missing persons and NGOs, as well as interested international actors and States, should be able to contribute constructively to the process. Such a set-up should have the ability and commitment to foster political will, to maintain the momentum for resolving the fate and whereabouts of missing persons, and to mobilize the necessary resources.

38 For example, the mandate of the Cyprus CMP is to establish the fate and whereabouts of missing persons; the CMP does not attempt to establish the cause of death or attribute responsibility for the death of missing persons. See Cyprus CMP Terms of Reference, Art. 11. Moreover, it is reported that a letter issued by the Attorney General of the Republic of Cyprus on 3 August 1990 specifies that it was not in the public interest, in the sense of Article 113.2 of the Constitution, to prosecute any witness who, in giving evidence to the Cyprus CMP during the course of its investigations, disclosed self-incriminating information. For more information on the Cyprus CMP, see the “Facts and Figures” page of the CMP website, available at: [www.cmp-cyprus.org/content/facts-and-figures](http://www.cmp-cyprus.org/content/facts-and-figures).

## **Sub-Working Group on Forensic Issues of the Kosovo Working Group on missing persons**

The Sub-Working Group on Forensic Issues of the Kosovo Working Group on missing persons was established in March 2005. Its purpose is to improve the management of the forensic process and to accelerate the recovery and identification of individuals found dead in relation to the conflict in Kosovo.

More specifically, the Sub-Working Group aims to foster cooperation and increase coordination among the various parties involved at the technical level (the security, forensic and health representatives of each concerned authority, international organizations, NGOs, etc.) and to facilitate the speedy return of remains that have been identified to the families of the deceased.

The Sub-Working Group tracks the process and keeps records of each organization's holdings in its facilities (number of cases, blood and bone samples collected and analyzed, etc.), thus providing an independent forum for conflict resolution, monitoring and reporting on the forensic process, including providing statistics, and minimizing the misunderstanding and distrust that can exist between the various parties involved. It reports to and works under the responsibility of the Kosovo Working Group.

Source: ICRC, "Missing Persons in the Western Balkans", 2 June 2015, available at: [www.icrc.org/en/document/missing-persons-western-balkans](http://www.icrc.org/en/document/missing-persons-western-balkans).

The mechanism should be granted sufficient competences, capacity and powers to be able to carry out its mandate effectively. This should include the capacity to establish subcommittees in which members and designated participants might meet on a more frequent basis in smaller groups to address specific issues such as recovery, analysis and identification of human remains. These subcommittees should receive their mandate from and regularly report to the coordination mechanism.<sup>39</sup>

Appropriate constitutive documents should be drafted and adopted for both the coordination mechanism and its subcommittees. These should include

39 In Georgia, a forensic working group was also established in 2010 under the coordination mechanism discussed above, with a mandate to establish priorities and coordinate the work of the forensic specialists involved in the process of the clarification of the fate and whereabouts of missing persons. Its work focuses on activities related to information on gravesite locations, as well as, based on agreed-upon protocols, the recovery, analysis and identification of the human remains of individuals who went missing in relation to the 1992–93 armed conflict. The working group met for the first time on 24 May 2011, and since then, twelve meetings have been held. It is chaired by the ICRC and is comprised of one Abkhaz and one Georgian representative of the coordination mechanism, and one Abkhaz and one Georgian forensic specialist. The group regularly reports to the coordination mechanism on the progress made on the forensic aspects of the process. See Report of the Secretary-General on the Missing, UN. Doc. A/71/299, 5 August 2016, para. 23.

rules and working procedures specifying *inter alia* the representatives' qualities and number, the quorum, the decision-making process, the working language(s), the venue, and the preparation and holding of meetings. However the coordination mechanism should not see its work hampered by the absence of such specific regulations if there is willingness from the parties to move ahead in providing answers on the missing. Quite often, it will be difficult for former adversaries to agree on such a text without importing into it elements of the dispute which led to the violence or conflict. It might be wiser, in the early stage of the process, to seek from the participants a non-formal agreement on the spirit, goal and mandate of the forum in order for its work plan to be implemented.<sup>40</sup>

The decision to hold meetings behind closed doors or to allow a wider audience to assist and be informed of the results needs to be addressed. Often parties to the coordination mechanism are inclined to adopt a mixed approach where confidential meetings are combined with a strategy for public communication. Information-sharing between former enemy parties might work more effectively if the issue of missing persons is kept away from the spotlight, because of the obvious risk of sensitive issues being brought to the fore. In the aftermath of an armed conflict or violence, former enemy parties are usually more inclined not to put too much publicity on their work and to establish an independent humanitarian mechanism that works in private sessions and on a confidential basis. Proceedings and findings are confidential in order to preserve the work of the mechanism. This is the case for the coordination mechanisms established in relation to the conflict in Cyprus,<sup>41</sup> the war between Iran and Iraq (1980–88),<sup>42</sup> the Gulf war (1990–91),<sup>43</sup> the conflict between Croatia and Serbia (1991–95), the conflicts in Bosnia and Herzegovina (1992–95)<sup>44</sup> and in Kosovo (1998–99),<sup>45</sup> and the 1992–93 and 2008 conflicts in Abkhazia and South Ossetia.<sup>46</sup> However, all of these mechanisms have had a duty to inform the families of the missing and the communities involved. They have also had an

40 According to these authors, alternatives to formal regulations need to be found in order to protect the process, particularly when it comes to the confidential management of information related to the exhumation of human remains, or collection of *ante mortem* data and biological reference samples. More precisely, bilateral exchanges or agreements on standard operating procedures for such topics with all participants could be explored.

41 See Cyprus CMP Terms of Reference, Art. 9.

42 See Rules of Procedure for the Tripartite Committee on Missing and Human Remains of the Iran–Iraq War 1980–1988, Rule 14.

43 See Rule 9 constitutive documents of the Technical Subcommittee on Military and Civilian Missing Prisoners of War and Mortal Remains, which stipulates that (a) the Subcommittee shall meet in closed session and that its deliberations shall remain confidential unless it decides otherwise, and (b) apart from the representatives of Subcommittee's members and the ICRC, no other person may be present at its meetings, unless the Subcommittee decides otherwise.

44 See Rules and Procedures of the Bosnia and Herzegovina Working Group, Rule 10 ("Privacy and Confidentiality").

45 See Working Rules of the Kosovo Working Group, Rule 11 ("Privacy and Confidentiality").

46 See Article 17 of the terms of reference of the Coordination Mechanism on Persons Unaccounted for in Connection with the Events of the 1992–93 Armed Conflict and After, which states that the mechanism shall meet *in camera* and that all those taking part in the meetings of the mechanism shall respect the confidentiality of all information and of all the documents generated or circulated within or by the mechanism and that, apart from the participants and the chair, no other person may be present at the

interest in linking the issue of the missing to existing political initiatives, and thus treat it partially in the public domain. Therefore they all have rules on reporting and communication. It is usually the responsibility of the parties to the mechanism to decide whether to issue public statements and to report without prejudice on the work of the mechanism, but this is also a responsibility of the chair. As mentioned above, a link between such coordination mechanisms dealing solely with the humanitarian dimension of the issue of the missing and a political process might help the issue to remain on the political agenda, boosting also the political will required for ensuring progress. The above-mentioned examples have all rendered some of the results of their work public through different means, so as to inform the communities and the families concerned.

Furthermore, the parties to the mechanism will usually look for the support of a trusted third-party neutral mediator or facilitator, in order to ease negotiations and collaboration between them and help move the information-sharing process along. As a neutral, independent and impartial organization, the ICRC has been asked to play this role in the past and has agreed to do so.<sup>47</sup> Other organizations, such as the UN, have also accepted this role.<sup>48</sup>

Finally and in a nutshell, the real challenge of such coordination mechanisms is to build a process, an environment and a relationship that are conducive to obtaining and sharing information on missing persons step by step. Working on concrete cases according to an action plan which includes indicators that are decided by the members of the coordination mechanism might help to improve results.

## Mechanisms at the national or local level

Once it is established that national authorities are willing to engage in the resolution of the issue of the missing, there is a need to address a number of policy issues and draft an all-encompassing strategy at national level which takes into consideration issues such as the appropriate legal framework – which shall include reference to applicable law, information-gathering, data management and protection, the process of recovery and identification of the remains, the rights of the victims, the sources of financing and the budget, etc. According to the present authors, it is fundamental that a lead exists, at high level, which is trusted by all parties concerned.<sup>49</sup>

meetings of the mechanism, unless it decides otherwise. Furthermore, Article 18 specifies that deliberations shall remain confidential.

47 This was the case in Bosnia and Herzegovina and Kosovo, the 1980–88 war between Iran and Iraq, the 1990–91 Gulf war, and the 1992–93 and 2008 conflicts in Abkhazia and South Ossetia.

48 In Cyprus, the third member of the CMP is selected by the ICRC and appointed by the UN Secretary-General. *A contrario*, the coordination mechanism between Croatia and Serbia functions autonomously, without the intervention of a mediator. The ICRC and the ICMP have observer status.

49 For example, in Iraq, the Ministry of Human Rights has the leading role for dealing with the issue of missing persons. Related policy issues are discussed in inter-ministry sessions. In Bosnia and Herzegovina, the Ministry of Human Rights and Refugees led the drafting of the Law on Missing Persons. The Ministry was given that task by the Bosnia and Herzegovina Council of Ministers in 2003

Furthermore, there should be a designated official body responsible for coordinating the strategy's implementation, the details of which will be further explained below. The mechanism at national level should also allow the authorities to fulfil and follow up on their commitments taken in the frame of the coordination mechanism, including access to sites or locations where the remains of the missing persons are presumed to be buried.

As is the case with the coordination mechanisms discussed in the previous section, national mechanisms for missing persons should pursue a humanitarian objective and should not be given the task of ascertaining responsibility for wrongdoing. Adding an accountability objective to the humanitarian one can, in certain cases, hinder the mechanism's ability to obtain information necessary for clarifying the fate and whereabouts of missing persons. The information gathered by the mechanism should remain confidential and should be used exclusively for the purpose for which it was obtained – i.e., to clarify the fate and whereabouts of missing persons. To make sure that it is understood by all, it is recommended to expressly specify that the mechanism is not entrusted with the task of looking at responsibility for disappearances.<sup>50</sup>

The mechanism in charge of the missing should be granted the necessary resources and powers. It should be able to coordinate, support and supervise the process of tracing missing persons and informing the families accordingly. A process of recovery and identification of human remains and their handover to the families should exist. The mechanism should also include support to families of the missing.<sup>51</sup>

In practical terms, the role of the national mechanism should be, *inter alia*, to:

- receive and register tracing requests from the families and the relevant authorities;
- collect, verify, update and provide to the applicant and relevant authorities all appropriate information on missing persons (including *ante mortem* data), on events and circumstances having led to disappearances, and on unidentified dead bodies (*post mortem* data), in accordance with national legislation, the right to privacy and internationally recognized standards on the protection and management of personal and sensitive data;

(in 2001 the Bosnia and Herzegovina Parliament passed a resolution on persons unaccounted for, which requested the presidency and the Council of Ministers to engage actively in determining the whereabouts of the missing persons). In Kosovo, the Office of the Prime Minister has the leading role and the issue is discussed in inter-ministerial sessions of the Governmental Commission on Missing Persons.

50 The government of Sri Lanka has provided the OMP with a humanitarian mandate and it will not be empowered to carry out any search activities for the purpose of a criminal investigation. However, the mechanism does have the power “to inform victims, relatives, witnesses and other informants who provide information to the OMP, of their right to directly refer matters to relevant authorities, including their right to report serious crimes to the relevant law enforcement or prosecuting authority”: OMP Act, Section 12(i). In other words, the OMP's humanitarian mandate is independent of, yet complementary to, the Sri Lankan domestic judicial processes that families may wish to undertake in order to address their needs for justice.

51 When it comes to efficient support for families of the missing, links should be established with existing support mechanisms such as schemes for social protection.

## State practice on missing commissions with a humanitarian mandate

When created, national mechanisms in charge of the missing should have a clear mandate established by law focusing on their humanitarian objectives – i.e., the tracing without discrimination of persons unaccounted for. They should investigate the cases and clarify the fate and whereabouts of the missing from all sides and not focus only on their “own” missing persons; neither should they condition their work on the results achieved by any other side. Where a commission on the missing relates to an armed conflict, it should cover all persons protected under international humanitarian law.

Such commissions have been or are in the process of being established in Bosnia and Herzegovina, Colombia, Croatia, Kosovo, Lebanon, Montenegro, Serbia and Sri Lanka, amongst others.

Other countries, such as Mexico, have initiated the process of creating a State commission on the missing.

Source: ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Cambridge University Press, Cambridge, forthcoming.

- carry out or request to have carried out any measures necessary to investigate and verify any information, including recovery and identification of human remains;
- be responsible (or be in direct connection with the body responsible) for the operation of a unique registry of missing persons and adopt necessary regulations to this end (consolidation of a list of missing persons);
- take measures to ensure the enjoyment of rights by relatives of missing persons; and
- keep the families and communities abreast of the process and the results achieved.<sup>52</sup>

The *members* of the mechanism should be representative of and able to reflect all actors who were involved in the conflict or violence. The mechanism should comprise, alongside members of government bodies, representatives of civil society, including representatives of the families of missing persons and, wherever feasible, the relevant National Red Cross and Red Crescent Society (National Society).<sup>53</sup>

The mechanism in charge of missing persons should be able to obtain from the relevant governmental and non-governmental entities, including the judiciary, all information that may help to clarify the fate and whereabouts of missing persons,

52 In the same vein, see ICRC, *Guiding Principles/Model Law on the Missing*, 2009, Arts 12–14, available at: [www.icrc.org/en/download/file/1066/model-law-missing-icrc-eng-.pdf](http://www.icrc.org/en/download/file/1066/model-law-missing-icrc-eng-.pdf)

53 If National Societies participate, the issue of the form that participation will take – status, tasks and responsibilities, etc. – should be addressed.

such as the circumstances of the disappearance, the names of witnesses and perpetrators, and information on persons who died or were wounded or detained. In particular, links should be established with national forensic institutions recovering the dead and conducting recovery, examination and identification of human remains of missing persons, where they exist. Forensic work on protection, recovery and identification of the dead is often an apolitical entry point allowing the mechanism to tackle extremely sensitive issues and progress in providing information and answers on the missing.<sup>54</sup> Where the investigative and/or forensic capacity is insufficient or non-existent, links should be established with actors mandated to carry out forensic work in a given context.<sup>55</sup> In addition, building capacity should be a priority for the long term. Forensics has become a key component of efforts to resolve the issue of the missing. While one has to acknowledge that not all cases of missing persons from an armed conflict or violence may be solved, without proper forensic management of human remains, the likelihood of the families receiving answers on the fate and whereabouts of their loved ones – including the identification and return of related bodies – is greatly reduced.

The obvious challenge is to put in place a mechanism that is able to search for and collect the relevant information as soon as possible in the aftermath of the armed conflict or violence that generated the disappearances. The longer it takes to establish such a mechanism, the more difficult it will be to clarify the fate and whereabouts of missing persons, and to return their bodies and remains, if found, to their families. At the same time, the issue of missing persons is susceptible to political exploitation and obtaining necessary information is not easy immediately after the cessation of a conflict. While taking measures to establish a legal framework at the proper level, it is vitally important that all relevant actors, incentives and measures are mobilized and put into place without delay to enable information bearers to share reliable and valuable data, for instance for locating possible gravesites.

## Other mechanisms

In addition to the establishment of a body that would be specifically responsible for addressing the question of missing persons, it is important to recall that local and international or mixed tribunals, parliamentary commissions, human rights commissions, inquiry commissions, ombudspersons and truth-seeking mechanisms may also play a useful role in providing relevant information on the fate and whereabouts of missing persons. Thus, they may also be key actors and

54 In Africa, the ICRC works with, encourages and supports national forensic institutions in a number of countries, including Cote d'Ivoire, Algeria, Nigeria, Mali, the Central African Republic, Uganda, Morocco and South Africa, although no commission for the missing has yet been established in these countries. For more information, see ICRC, *Annual Report 2016*, Geneva, 2017, Africa section.

55 E.g. in Kosovo, the ICMP and the EU Rule of Law Mission in Kosovo. In Lebanon, the ICRC provides support for the collection of data from families, in preparation for future identification efforts. In Georgia, while local forensic capacities are being built to the extent that the realities of the context will allow, the ICRC carries out most of the activities related to the forensic process of recovery, analysis and identification of human remains. For more information, see *ibid.*

## The experience of Peru

In Peru, the families of some 15,000 people who went missing in relation to the past conflict remain without news of their relatives. In 2001, the authorities established a Truth and Reconciliation Commission tasked with examining gross violations of human rights law between May 1980 and November 2000. With the consent of the families concerned, the ICRC collaborated with the Commission and provided more than 400 cases which did not appear in any database. In its exhaustive conclusions, the Commission recommended the putting into place of follow-up mechanisms that would allow authorities to respond to the needs of the families of the missing.

On 22 June 2016, the Peruvian authorities enacted a new law on the search for missing persons that takes a humanitarian approach to the issue and seeks to relieve the suffering of affected families.

Together with the Peruvian Red Cross, the ICRC has been providing financial and technical support for families of missing persons and local associations, with a view to enabling these families to travel to exhumation sites and collect their relatives' remains, and to have better access to psychological care.

Source: Report of the Secretary-General on the Missing, UN Doc. A/71/299, 5 August 2016, paras 12, 58, 61; ICRC, *Annual Report 2016*, Vol. 1, Geneva, 2017, pp. 282–284.

directly contribute to addressing the families' right to know. Their contribution should not be underestimated, and it should be assessed to what extent it might be complementary to the tasks assigned to a specialized body responsible for tackling the issue of missing persons from a strictly humanitarian perspective. For instance, human rights commissions and ombudspersons usually have a broad mandate to address human rights violations, and it could be appropriate to ensure that the issue of the missing falls within their jurisdiction.

Furthermore, truth commissions, whose aim generally is to understand the extent and the patterns of past violence, can potentially address the needs of the families of missing persons in several ways: by acknowledging the fact of disappearance and the responsibility for it; by learning the fate and whereabouts of the missing; by instigating recovery of human remains; by providing a public forum in which families can present their testimonies; and by pushing for compensation and reparation schemes. Their mandate should therefore include the question of the missing, or at least that of enforced disappearance, and their recommendations should propose putting in place follow-up mechanisms that would allow them to respond to the needs of the families.<sup>56</sup>

<sup>56</sup> Such recommendations can be found, *inter alia*, in the final reports of the following truth and reconciliation commissions: Chilean National Commission for Truth and Reconciliation (Rettig



## Agreement between the ICRC and the International Criminal Court on the Missing

The ICRC and the International Criminal Court (ICC) concluded in early 2012 a general Memorandum of Understanding according to which the prosecutor undertakes to assist the ICRC in the identification of material in its possession that could be relevant in the determination of the fate and whereabouts of missing persons in countries where the ICRC is involved in the issue of missing persons.

Source: Report of the Secretary-General on the Missing, UN Doc. A/67/267, 8 August 2012, para. 47.

*Editor's note:* The inverse, however, is not true – the ICRC does not provide evidence to the ICC. In order to carry out its humanitarian mandate and fully assume its operational role in the protection and assistance of victims of armed conflict and other situations of violence, confidentiality is an essential tool that allows the ICRC to build the necessary trust to secure access, open channels of communication, influence change and ensure the security of its staff. To read about the legal bases for this privilege, including the ICRC's absolute privilege before the ICC, see "The ICRC's Privilege of Non-Disclosure of Confidential Information", *International Review of the Red Cross*, Vol. 97, No. 897/898, 2016.

Finally, it is important to stress the complementarity of domestic judicial processes which might permit victims' families to intervene at various stages and exercise their right to know. Also, when tribunals are investigating large-scale killings and setting in motion mass exhumations and forensic activities, it should be ensured that their work is done in a manner that best serves the interests of the families: they should be given satisfactory answers when possible and the persons responsible for these crimes brought to justice. Recovery and examination of human remains within a judicial process can reveal what happened to victims of such crimes and give families information about the fate and whereabouts of their loved ones. It is thus of the utmost importance that clear procedures are established at the outset to ensure the collection and protection of such information even if it is not directly used in court proceedings.

### Relevant information for resolving the fate and whereabouts of missing persons, proper data management and confidentiality

"Relevant information" is information that is reliable and pertinent for resolving the fate and whereabouts of missing persons. In practice, this means, first and foremost, information on the missing persons (including *ante mortem* data) and on the alleged

Commission), 1991, pp. 1060–1074, 1081–1082, 1099–1101, 1103, 1113, 1115–1117; Truth and Reconciliation Commission in Peru, 2003, Vol. 9, pp. 129, 219–225, and Annex 5; Commission for Historical Clarification in Guatemala, 1999, "Recommendations", Chap. 3, §§ 22–31; Commission for Reception, Truth and Reconciliation in East Timor, 2005, pp. 6–7, 31–33; Truth and Reconciliation Commission of South Africa, 1998, Vol. 5, p. 347, and Vol. 6, pp. 533–540.

circumstances of their disappearance, including information on the events having led to their disappearance, the names of witnesses and perpetrators, unidentified bodies (including *post mortem* data) and the location of graves.

Both the coordination and national mechanisms are looking for this information, which can be provided by a number of sources: national authorities and institutions such as police, army, hospitals, cemeteries and forensic institutions; witnesses, anonymous or not; members of the families concerned; victims; the adverse party or parties; or even the perpetrators themselves. Over the last decade, more and more *international* bodies – including multinational forces, international/regional organizations and entities, and international/foreign tribunals – have been involved in armed conflicts or violence in which persons have disappeared. These have proved to be excellent sources of information in the search for and identification of missing persons, and in the search for justice.

The greatest challenge in the search for information on missing persons is creating incentives and a protected framework that encourage individuals having such information to talk rather than to remain silent; these individuals will often choose to do the latter out of fear of criminal prosecution, stigmatization or reprisal. Organizations might be reluctant to share their information because of the negative consequences this could have on the carrying out of their mandate – for instance, lack of access or breach of confidentiality agreements. The present authors argue that the building of a protected framework is feasible if certain measures are taken.

Firstly, the mechanisms put into place should allow for the exchange of all information that is useful to the search for missing persons and their identification within each mechanism's framework. This means that relevant tools for managing the information that will be generated by the overall process should be set up,<sup>57</sup> and cooperation modalities with those bodies likely to possess relevant information should be ensured. In Bosnia and Herzegovina, for example, the 2004 Law on Missing Persons creates an independent institution for tracing missing persons and establishes an obligation for all entity authorities and relevant institutions to provide information and to cooperate with the Missing Persons Institute.<sup>58</sup>

Secondly, the handling and management of sensitive and personal data should be done in accordance with the rules and principles of international law, including the right to privacy and relevant regional and national laws on

57 Specific case management and forensic tools have been developed by different organizations in order to manage forensic information on the dead and on missing persons. These include, to name but a few, the ICRC Ante-Mortem/Post-Mortem Database; the CMP Database; the NamUS database (US National Institute of Justice); the SIRDEC Database (Colombian National Institute of Medicolegal and Forensic Sciences); the EAAF Database (Argentine Forensic Anthropology Team); the M-FISys Database (Gene Codes Corporation); Kenyon Response (Kenyon International Emergency Services Corporation); the ICMP Identification Data Management System); the DPAA Case Management System (US Defense PoW/MIA Accounting Agency); and the Interpol databases on forensics and missing persons.

58 Bosnia and Herzegovina Law on Missing Persons, *Official Gazette of Bosnia and Herzegovina*, No. 50, 9 November 2004, Arts 4–7. National information bureaux (further explained below) in Argentina, Canada, France, the Netherlands, Paraguay, Peru and the UK also possess the authority to request such information.

personal data protection. More precisely, and in order to avoid any misuse of the information that might be provided by various sources, there should be no acquiring nor holding of personal data without a legitimate basis or the informed consent of the source concerned – hence the importance of verifying consent when collecting the information. Sensitive personal data should be handled with particular care.<sup>59</sup> Furthermore, the data should be used only for the purpose for which it was gathered and not for any other purpose, unless consent to that end is obtained. If such consent is withheld, this information shall remain confidential and there can be no disclosure to a third party, except in order to meet statutory requirements defined in a very restricted manner and in accordance with international rules and standards. If such guarantees are respected, sources might be more willing to share information. In return, they should be informed in a transparent manner on how the information will be processed and used.

Thirdly, the conditions under which the information was provided should be respected during the entire tenure of its use. Often, relevant information is accessible only if confidentiality is guaranteed – i.e., the information will not be disclosed to unauthorized persons and will not enter into the public domain through its public use, for instance, in judicial proceedings. Normally this can be ensured by appropriate data protection management rules to be included in the relevant framework via the terms of reference of the mechanism, a decision of the executive, or laws and regulations; closed or private sessions; sensitization; appropriate instructions; or supervision and monitoring.<sup>60</sup>

Fourthly, it is not sufficient that the mechanism and its members alone guarantee confidentiality. The entire system put into place at the domestic level should ensure that all relevant organs respect such confidentiality if one of the following conditions is met: such a commitment was undertaken at the level of the coordination mechanism on the missing; the information was collected on that basis from individuals and organizations; or the information refers to personal and sensitive data.

Finally, and in addition to the above, protective measures to address the concerns of those who are afraid to talk should be foreseen, such as anonymization of data and witness protection schemes. It might also be appropriate to explore the extent to which information providers might benefit from mitigating circumstances if prosecuted. This could take a number of forms, such as reduced charges, penalties or time to be served. In addition, the constitutive documents for the mechanism might expressly state that the information given cannot be used against the information providers. This was done, for example, in Sierra Leone, where the prosecutor of the Special Court decided not to use the information gathered by the Truth Commission and searched for his own evidence and information.<sup>61</sup> It allows those who might feel some form of remorse

59 Sensitive personal data include information on genetics (DNA) and biometrics, race, political opinion, physical or mental health, religious beliefs, political affiliations, sexuality, and criminal offences.

60 See notes 35 to 45 above for specific examples of Terms of Reference, including confidentiality rules.

and are in possession of relevant information to express that remorse and at the same time contribute to the search for answers.

## **Valorizing complementarity between the right to justice and the right to know**

Clarifying the fate and whereabouts of missing persons is also part of the more global pursuit of justice. Providing answers on missing persons and fighting against impunity are distinct yet complementary objectives in this pursuit. When a gravesite, regarded as a crime scene, is discovered, criminal investigations are generally opened. Site assessments and the recovery of human remains cannot be carried out without proper authorization, including in most contexts court orders. The presence of competent authorities, such as the police officers investigating the case, is in most cases required by the applicable legal framework before any gravesite related to the criminal investigation can be opened. The judiciary might be in possession of pertinent information on the fate and whereabouts of the missing persons. Conversely, mechanisms for missing persons might have information of interest to judicial and quasi-judicial processes, because understanding the patterns of conduct and events that led to the commission of crimes can be extremely helpful in meeting judicial objectives.

While a mechanism mandated to work solely on the missing – meaning a coordination mechanism, or national or local mechanism – can under no circumstances hinder the work of the judiciary, it should also receive full cooperation from governmental bodies and structures, including the judiciary, in order to fulfil its objectives. This includes that these institutions respect the conditions under which the mechanism collected its information. The mechanism's terms of reference and working modalities should make it clear that it is not a substitute for the police, the prosecutorial authorities or the judiciary: their objectives are distinct though complementary, which implies differing working methods.

In mass killings, practice has shown that the information strictly necessary to establish the fate and whereabouts of missing persons may not be the information that will be investigated as a priority while establishing potential criminal responsibility. When facing a mass grave, a criminal investigation may generally collect as a priority information on the cause and circumstances of the death as well as any indicia that could help to find the perpetrator(s) and prove a pattern in the victims (depending on the jurisdiction and mandate of the investigating body), while the humanitarian mechanism will focus on data that will assist in

61 See Special Court for Sierra Leone, “TRC Chairman and Special Court Prosecutor Join Hands to Fight Impunity”, press release, 10 December 2002. This move may have reassured some participants who were concerned that any information they might provide to the Truth and Reconciliation Commission would be used to build a case against them.

the identification of the human remains. The data substantiating the clarification of the fate and whereabouts of missing persons would not therefore be collected systematically by default by a criminal investigator or a judge or be of interest in public hearings as part of the criminal prosecution process. In a nutshell, it is important to stress that all necessary measures should be taken to ensure the proper documentation and preservation of information used for locating, recovering and identifying missing persons is not used as direct evidence, thus entering into the public domain, unless the information providers consent to such a change in its nature and the purpose for which it was originally collected. This, of course, should not be interpreted as constraining the powers of the judiciary or as an impediment to the judicial authorities fulfilling their mandate. They may approach the information providers through their own channels, applying the rules governing the sharing of evidence and information with the judiciary, which also include, in most cases, measures to protect the information and the information provider(s).

In cases where authorities decide to sequence their actions in order to respond to the most pressing needs of the missing and their families, as discussed above, measures should be taken to ensure that nothing jeopardizes the full realization, in due time, of both the right to know and the right to justice. In his last report, the Special Rapporteur on Transitional Justice observed:

[I]t is essential that efforts are made to satisfy both humanitarian and judicial aims with regard to missing and disappeared persons. Once again, such an ambition is not feasible in the short run; but virtually all decisions create path-dependence. It is therefore important to be clear about the diversity of the ends to be reconciled.<sup>62</sup>

Hence, the importance of having clear procedures established at the outset between the humanitarian and judicial mechanisms in order to ensure the proper management of the information relevant for the fulfilment of both objectives. Also, particular attention should be brought to the information as well as support schemes that need to be provided to the families of the missing so that they are able to pursue the fulfilment of their rights.

## **Interaction between mechanisms on the missing, national information bureaux and the ICRC Tracing Agency**

The mechanisms on the missing discussed above will inevitably enter into contact with other bodies implemented by authorities to fulfil their obligations to search for missing persons under international law. Indeed, because of the undisputable importance of informing the next of kin of the fate and whereabouts of their relatives, the obligation to account and search for all missing persons has evolved into a rule of customary international humanitarian law, applicable in both

62 Report of the Special Rapporteur on Transitional Justice, above note 15, para. 82.

international and non-international armed conflicts.<sup>63</sup> The obligation extends also to situations amounting to serious violations of human rights law, regardless of the existence of an armed conflict or not.<sup>64</sup> There is also an emerging trend towards recognizing the right to know of families of missing migrants.<sup>65</sup>

When putting into place a mechanism on the missing, authorities should reflect on its complementarity and coordination with other existing bodies and processes in order to avoid, to the extent possible, duplication in mandates and tasks which would render more difficult the collection, management and protection of the relevant information. If such structures do exist, the possibility of extending their jurisdiction to encompass the issue of missing persons should be explored.

For instance, at the beginning of an armed conflict, national authorities are encouraged to set up national information bureaux (NIBs) for prisoners of war and protected persons who are in their power, and their relations with any mechanisms on the missing will need to be clearly defined at the outset.<sup>66</sup> NIBs are usually put in place to obtain and transmit relevant information and communicate with families.<sup>67</sup> Examples of NIBs can be found in, amongst others, Argentina, France, Paraguay,

63 See ICRC Customary Law Study, above note 4, Rule 116, which states that “[e]ach party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate”.

64 Under international human rights law this is linked in particular to the protection of the right to life, the prohibition of torture and other forms of cruel, inhuman or degrading treatment, and the right to family life. In the case of enforced disappearances, States must also take appropriate measures to uphold the right of victims to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the person who has disappeared. For enforced disappearance, see ICPPED, Article 24. In general, for gross violations of international human rights law, see Basic Principles and Guidelines on Reparation, above note 23, paras 22(b), 24. See also Guiding Principles on Internal Displacement, Principle 16.1.

65 For instance, see the 2007 call of the Council of Europe’s Commissioner for Human Rights for the EU to account for and identify migrant deaths, or the Council of Europe’s proposal that European States set up a system of data collection for the mortal remains of lives lost at sea (Council of Europe Parliamentary Assembly, 8 June 2014). See also Bernard Duhaime and Andréanne Thibault, “Protection of Migrants from Enforced Disappearance: A Human Rights Perspective”, in this issue of the *Review*. The right to family life also supports the family’s right to know whether a body has been found and where it is buried. See, for example, the *Sabanchiyeva* case, where the European Court of Human Rights found a violation of the respect for family life in a case where the State prevented families from participating in funeral ceremonies and paying their last respects to the deceased. European Court of Human Rights, *Sabanchiyeva and others v. Russia*, 6 June 2013.

66 There is a strict obligation for States Parties to set up such bureaux in international armed conflict for prisoners of war and protected persons in their power: see Geneva Convention III (GC III), Art. 122; Geneva Convention IV (GC IV), Arts 136–139. For the corresponding obligation in non-international armed conflict, see, for example, ICRC Customary Law Study, above note 4, Rule 123.

67 The tasks of NIBs as set out in the Geneva Conventions are:

- a. Obtaining information: the NIB centralizes/processes the information collected by the services of the power to which it answers on certain categories of vulnerable persons who have fallen into that power’s hands.
- b. Transmission of information: the NIB functions as a relay for the urgent transmission of information to the other parties to the conflict and interested States, and to the ICRC Central Tracing Agency.
- c. Communication with the families: the NIB is also obliged to reply to and to make enquiries so as to obtain additional information.

Canada, the United States and the United Kingdom.<sup>68</sup> NIBs' mandate may cover prisoners of war only, or may be extended to all protected persons under the Geneva Conventions, or can even missing persons in relation to an armed conflict or violence. After the end of an armed conflict, such structures might be chosen to continue their work on the missing because they are already in possession of a wealth of relevant information and have developed relevant practice and expertise. NIBs might also be called to play a role within coordination mechanisms on the missing as discussed above, since they can be designated as active members within such bodies. In these cases, the NIB is tasked with finding and providing relevant information on the fate and whereabouts of those who have disappeared and of fully cooperating with the coordination mechanism.

Finally, mechanisms on the missing will most certainly interact with the ICRC and its Tracing Agency, whose first task is to collect information on vulnerable persons in the hands of the parties to the conflict or persons affected by the violence in order to inform the families concerned.<sup>69</sup> In parallel to any existing mechanism on the missing or NIB, the Tracing Agency often proceeds to its own collection of data. This is even more necessary if the data collected and transmitted by national authorities are non-existent or unreliable. While efforts should be engaged towards building local capacities for the ex-warring parties to acquire know-how and expertise in order to fulfil their responsibilities, the pressing need of the families to receive answers on the fate and whereabouts of their missing relatives may require that the Agency fulfils tasks assigned to national authorities, if the necessary bodies are not put into place or are not functioning properly.

## Concluding remarks

The humanitarian approach proposed in this article is not meant to be exclusive. It is suggested as one option for obtaining information on the fate and whereabouts of missing persons when sources of information are not inclined to share what they know. By advocating for the recognition of a legal status for missing persons and their families, this approach has proved particularly valuable for “institutionalizing” their voices in public debates and making them part of the search for appropriate remedies. It has contributed to linking programmes aimed at responding to the needs of the missing and their families with others

68 The State Commissions on Prisoners of War, Hostages and Missing People established in Armenia and Azerbaijan have similar characteristics to NIBs. Other countries, such as Germany, Croatia, Slovenia, Sweden and Norway, have assigned to their National Societies the task of setting up such bureaux.

69 See GC III, Art. 123; GC IV, Art. 140. Embedded in the ICRC's structures, the Tracing Agency is thus part of the ICRC, a neutral, independent and impartial humanitarian organization which has an international legal personality and a status equivalent, but not identical to that of an intergovernmental organization. Like the ICRC, the Agency is guided by humanitarian concerns, in contrast to other approaches which might focus on attributing responsibilities and collaborating with the judicial process.

advocating for the realization of their rights. The humanitarian approach has also contributed to establishing the importance of forensic work for humanitarian purposes, the information that such work might be able to provide on missing persons, and its crucial role in bringing the bodies of missing persons back to their families. Of course, a lot remains to be done, especially when it comes to the role of national and coordination mechanisms in the collection, gathering, centralization, management and protection of all relevant information, although elements of recent practice can raise hope and expectations.

While the practice so far experienced with coordination mechanisms on the missing has demonstrated the added value of such an approach in fulfilling the families' right to know, its implementation through national mechanisms on the missing would need to be tested further, with particular attention paid to identifying the factors that can make it more effective in providing meaningful answers to the families of missing persons. As mentioned, working on concrete cases according to an action plan which includes indicators that are decided by the stakeholders concerned might help to improve the achievement of meaningful results.

Additionally, the humanitarian approach's interaction with other mechanisms, including those that favour a retributive approach, should be examined in more detail, with a view to enhancing and strengthening their complementary responses to the needs of the missing and their families. Further reflections and discussions should also be held on the sequencing of responses to the priority needs of the victims, in light of needs assessments respecting a rigorous methodology.

Finally, working models should be developed to better appreciate and take advantage of the links between mechanisms aiming at providing answers to families of the missing and relevant programmes existing at national level whose purpose is to improve living conditions for those who are the most vulnerable – often the families of the missing – with a view to better matching their socio-economic needs, enhancing the realization of their rights and protecting their human dignity.



# The Sri Lankan Office on Missing Persons: Truth and justice in tandem?

**Isabelle Lassée**

Dr. Isabelle Lassée is Co-Founder and Head of Programmes of the South Asian Centre for Legal Studies, based in Colombo, Sri Lanka. She holds a doctorate in international law with high honours from Université Paris II Panthéon-Assas.

## Abstract

*In October 2015, by co-sponsoring United Nations Human Rights Council Resolution 30/1 entitled “Promoting Reconciliation, Accountability and Human Rights in Sri Lanka”, the Sri Lankan government formally committed to embarking on a transitional justice process following three decades of armed conflict. Several thousand people allegedly disappeared during this period, often in connection with the armed conflict or as a result of internal disturbances. It is in this context that the Office on Missing Persons (OMP) was operationalized in 2018. This article discusses the nature of tracing investigations into the fate and whereabouts of missing persons of the type to be carried out by the OMP. It argues that these investigations, while ostensibly pursuing a humanitarian approach, cannot be artificially and hermetically separated from criminal justice processes. Further, it seeks to demonstrate that an integrated approach whereby strong linkages with criminal processes are provided for and encouraged best serves the interests of truth and justice.*

**Keywords:** tracing investigations, missing persons, enforced disappearances, transitional justice, Office on Missing Persons, criminal investigations, humanitarian approach, international crimes, Sri Lanka, truth-seeking.

⋮ ⋮ ⋮ ⋮ ⋮ ⋮

## Introduction

During a visit to Sri Lanka in November 2015 the Working Group on Enforced or Involuntary Disappearances emphasized that “the road that leads to truth and justice is long but is the right one to take, even if it may be painful at times”.<sup>1</sup> It is on this journey that Sri Lanka embarked in 2015 by co-sponsoring a landmark resolution at the United Nations (UN) Human Rights Council which addressed issues of reconciliation, accountability and human rights in Sri Lanka.<sup>2</sup> In doing so, the government of Sri Lanka committed itself to a comprehensive approach to dealing with the country’s atrocity-ridden past. In particular, it has undertaken to set up four special mechanisms to this end: a Special Court and a Special Prosecutor’s Office; a Truth, Justice, Reconciliation and Non-Recurrence Commission; an Office for Reparations; and an Office on Missing Persons (OMP).<sup>3</sup> These proposed mechanisms are intended to address allegations of human rights and humanitarian law violations committed in the context of the thirty-year armed conflict between the Sri Lankan armed forces and the Liberation Tigers of Tamil Eelam (LTTE), as well as violations committed in the context of armed violence, internal disturbances and widespread State repression. The exact mandate of these institutions, other than the OMP, is yet to be determined.<sup>4</sup>

The OMP was envisaged as a discrete mechanism for receiving complaints and investigating the tens of thousands of missing persons cases that remain unresolved to date despite the past setting up of several commissions of inquiry tasked with a similar mandate. The work of these commissions – including the recent Paranagama Commission – has been criticized for lacking credibility and falling short of a full-fledged investigation.<sup>5</sup> Therefore, the proposal to set up yet another mechanism has triggered both scepticism and high expectations.<sup>6</sup> It is in this context that the Sri Lankan government received the advice and technical expertise of the International Committee of the Red Cross (ICRC) with respect to

- 1 United Nations (UN) Office of the High Commissioner for Human Rights (OHCHR), “Sri Lanka’s Disappearances: ‘The Road Towards Truth and Justice Is the Right One to Take’”, 15 September 2016, available at: [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20499&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20499&LangID=E) (all internet references were accessed in August 2017).
- 2 UN Human Rights Council, Res. 30/1, “Promoting Reconciliation, Accountability and Human Rights in Sri Lanka”, UN Doc. A/HRC/30/1, 1 October 2015.
- 3 High-Level Segment of the 34th Session of the UN Human Rights Council, “Statement by Hon. Mangala Samaraweera, MP, Minister of Foreign Affairs of Sri Lanka”, Geneva, 28 February 2017, available at: [www.mfa.gov.lk/wp-content/uploads/2018/03/34-8.pdf](http://www.mfa.gov.lk/wp-content/uploads/2018/03/34-8.pdf).
- 4 The bill entitled “Office for Reparations”, gazetted on 25 June 2018, has a similar mandate *ratione materiae* to that of the OMP.
- 5 See Kishali Pinto Jayawardena, *Post-War Justice in Sri Lanka: Rule of Law, the Criminal Justice System, and Commissions of Inquiry*, International Commission of Jurists, January 2010; Isabelle Lassée, *The Last Stages of the War: Clarifying the Application of IHL*, South Asian Centre for Legal Studies, November 2015.
- 6 Consultation Task Force on Reconciliation Mechanisms (CTF), *Final Report of the Consultation Task Force on Reconciliation Mechanisms*, Vol. 1, 17 November 2016 (CTF Final Report), p. 188, available at: <https://tinyurl.com/yqcky655>. Several participants stressed that “if the OMP is to truly provide them with the solutions, it has to address the obstacles they have already faced from the State, and crucially, to ensure that it wouldn’t repeating errors of other State agencies”.

the design of the OMP. The government has also engaged in – admittedly limited<sup>7</sup> – consultations with civil society organizations on this question.

At the time, since the government was also considering the setting up of a Special Court and a Special Prosecutor’s Office, the envisaged linkages between the OMP and these proposed institutions were inevitably discussed among civil society. This debate was rooted in a more fundamental controversy regarding the very purpose of the OMP investigations. While some argued that the OMP investigations should serve a purely humanitarian objective of ascertaining the fate and whereabouts of missing persons without otherwise contributing to criminal investigations, others argued that the Office’s role should also be to prepare and assist criminal investigations. This view was shared by affected persons, as indicated in the report of the Consultation Task Force on Reconciliation Mechanisms.<sup>8</sup>

In August 2016, the Sri Lankan Parliament passed the Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act (OMP Act).<sup>9</sup> The OMP Act defines missing persons as persons who went missing in the context of “the conflict which took place in the Northern and Eastern Provinces or its aftermath”, as well as “member[s] of the armed forces or police who [are] identified as ‘missing in action’” and persons who went missing “in connection with political unrest or civil disturbances”.<sup>10</sup> In addition, the Office’s mandate covers enforced disappearances as defined in the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).<sup>11</sup> The OMP Act therefore recognizes that missing persons cases in Sri Lanka potentially involve criminal conduct. Interestingly, as will be explained below, the drafters of the Act did not appear to subscribe to the false dichotomy between criminal and humanitarian approaches to investigations into missing persons cases. This article argues that the OMP Act should be interpreted and implemented in a manner that is fully cognizant of the intricate nature of tracing and criminal investigations in order to enable the joint pursuit of truth and justice.

The humanitarian approach generally advocated for by the ICRC<sup>12</sup> aims at tracing missing persons, irrespective of the commission of a crime or of a violation of international law. Under this approach, a “missing person” would be anyone unaccounted for “in connection with an international or non-international armed conflict, a situation of internal violence or disturbances, natural catastrophes or

7 Human Rights Watch, “Sri Lanka: Consultations Lacking on Missing Persons’ Office”, 27 May 2017, available at: [www.hrw.org/news/2016/05/27/sri-lanka-consultations-lacking-missing-persons-office](http://www.hrw.org/news/2016/05/27/sri-lanka-consultations-lacking-missing-persons-office).

8 CTF Final Report, above note 6, p. 230: “Although there is no provision for the OMP to get directly involved with prosecutions within the existing framework of the OMP, the expectation by affected families that the findings of the OMP would lead to some form of justice, cannot be overstated.”

9 Sri Lanka, Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No. 14 of 2016 (OMP Act).

10 *Ibid.*, section 27.

11 *Ibid.* Sri Lanka ratified the ICPPED in May 2016. In March 2017, Sri Lanka enacted the International Convention for the Protection of All Persons from Enforced Disappearance Act, No. 5 of 2018, available at: [srilankalaw.lk/gazette/2018\\_pdf/05-2018\\_E.pdf](http://srilankalaw.lk/gazette/2018_pdf/05-2018_E.pdf). The Act criminalizes enforced disappearances.

12 See, for example, ICRC, *Action in Nepal for Missing Persons and Their Families*, Geneva, April 2011, p. 1, available at: [www.icrc.org/eng/assets/files/2011/missing-nepal-report-icrc-2011-04.pdf](http://www.icrc.org/eng/assets/files/2011/missing-nepal-report-icrc-2011-04.pdf).

any other situation that may require the intervention of a competent State authority”.<sup>13</sup> For instance, a person may be unaccounted for as a result of combat operations, because the means to identify combatants were insufficient or inadequate. While in this case a crime or an international law violation may not have occurred, there remains a need to trace the person and provide answers to the family regarding his/her fate. Although the ICRC emphasizes the need for the prosecution of crimes uncovered through investigations into the fate of missing persons (tracing investigations),<sup>14</sup> it does not through its work facilitate criminal prosecutions.<sup>15</sup> In criminal investigations, on the other hand, the primary purpose is to establish individual criminal responsibility for a crime, be it national or international. The search for the person is therefore undertaken as part of the overarching search for evidence of the crime.

While the focus of each of these approaches and the scope of their corresponding investigations may vary slightly from one case to the next, they are not mutually exclusive. However, this author argues that conversations about the establishment of the OMP in Sri Lanka have falsely dichotomized the humanitarian and the criminal approaches, thereby presenting victims with an artificial and unfair choice between truth and justice. This article seeks to demonstrate that the two approaches have much in common and that pursuing both concurrently through an integrated approach would help further both truth and justice. The first part of the article explains that a strict separation between the OMP investigations and those carried out as part of a criminal process is neither desirable nor feasible. In light of this, the second part explores the institutional and operational arrangements that would be required to ensure that the OMP Act is implemented in a manner which enables the joint pursuit of truth and justice.

## **Humanitarian and criminal approaches to tracing investigations: A false dichotomy**

When carrying out investigations into missing persons cases, humanitarian and criminal approaches should not and cannot be artificially separated. In fact, this

13 ICRC, “Guiding Principles/Model Law on the Missing”, in *The Domestic Implementation of International Humanitarian Law: A Manual*, Geneva, 2015, Annex IV, available at: [www.icrc.org/eng/resources/documents/publication/pdvd40.htm](http://www.icrc.org/eng/resources/documents/publication/pdvd40.htm)

14 “Enforced disappearances are not specifically listed as grave breaches or other serious violations of IHL. However, when an act of enforced disappearance amounts to one of the grave breaches listed in the Geneva Conventions and Additional Protocol I (such as torture, inhuman treatment, willfully causing great suffering or serious injury to body or health, and taking of hostages), it must be investigated and the perpetrators prosecuted as required by the grave breaches regime.” ICRC Advisory Service, “Missing Persons and Their Families”, Geneva, December 2015, available at: [www.icrc.org/en/download/file/17255/missing\\_persons\\_and\\_their\\_families.pdf](http://www.icrc.org/en/download/file/17255/missing_persons_and_their_families.pdf).

15 *Ibid.*: “When the ICRC collects and processes information relating to missing persons, it does so within the framework of its neutral, independent, impartial and strictly humanitarian action. It will not participate in or associate itself with any process aimed at gathering evidence for the criminal prosecution of persons suspected of having committed a crime, nor will it cooperate with any such prosecution.”

author argues that a strict separation between tracing and criminal investigations has no added benefits for truth-seeking and is likely detrimental to the pursuit of justice. In addition, both types of investigations tend to converge in practice, so an artificial separation between them – that is, the absence of any link between the two investigations – could lead to undesirable interferences with one another.

### Dispelling misconceptions regarding the perceived benefits of separate investigations

While the neutrality obligation of the ICRC requires it to adopt a purely humanitarian approach to investigations into missing persons cases, similar considerations do not apply to a State institution such as the OMP. Other arguments have nonetheless been put forward in Sri Lankan civil society circles to demand a strict separation of the OMP from criminal investigations and prosecutorial efforts. In fact, there exists a perception that a strict separation of the OMP from criminal investigations would have lessened the public resistance to the creation of this institution and could further incentivize lower-level perpetrators to participate in investigations carried out by the Office. The following section argues that both perceptions are unfounded and that in fact, a strict separation of criminal and tracing investigations would be detrimental to both endeavours.

#### *Argument 1: A stated humanitarian approach would diminish public and political resistance to the OMP*

In the Sri Lankan context, the main argument in favour of a strict separation between tracing and criminal investigations is one of political pragmatism. The proposal to set up the OMP was formulated in a context in which the majority of the Sri Lankan population is perceived to be averse to the pursuit of accountability for grave crimes allegedly committed by the armed forces, and where opposition and ruling politicians are openly making pronouncements against investigating these crimes.<sup>16</sup> In such a context, the creation of the Special Court and the Special Prosecutor's Office was regarded by many in civil and political society as the government's most controversial transitional justice undertaking.<sup>17</sup> As opposition to the transitional justice project crystallized around the setting up of the judicial mechanism, many considered a strict separation between the pursuit of truth and the pursuit of justice opportune. This stated separation would have ensured that the opposition to the justice project would not diminish public support for the establishment of the OMP.

However, this strategy is based on a political miscalculation – indeed, whether the OMP in fact proceeds from a purely humanitarian approach is

16 See “Updated: Flip-Flopping on Accountability – a Timeline”, *Groundviews*, March 2017, available at: [groundviews.org/2017/03/27/updated-flip-flopping-on-accountability-a-timeline/](http://groundviews.org/2017/03/27/updated-flip-flopping-on-accountability-a-timeline/).

17 *Ibid.*

irrelevant. The purpose, mandate and work of the Office have and will continue to be misrepresented in public and political discourse.<sup>18</sup> Former president Mahinda Rajapakse, in a piece against the OMP, stated that “even though it is described as an ‘office’ the proposed OMP will be a tribunal for all practical purposes which can examine witnesses, issue summons and hold hearings”,<sup>19</sup> concluding that “this Office of Missing Persons is meant to be an integral part of the judicial mechanism to deal with allegations of war crimes that the yahapalana government has undertaken to establish”.<sup>20</sup> This statement is characteristic of the position of the Joint Opposition with regards to the OMP, a position that was emphasized in public communications and mischaracterizes the OMP’s purpose and functions. Ultimately, despite the absence of provisions in the OMP Act enabling the OMP to directly and substantially contribute to criminal investigations,<sup>21</sup> political opposition to the OMP led to protracted delays in its establishment. At the time of writing, close to two years after the passing of the OMP Act, while the OMP’s members have finally been appointed, they have yet to set up the Office’s units and divisions, adopt its rules and regulations, or hire its staff.

### *Argument 2: A purely humanitarian approach would incentivize collaboration with the OMP*

Another reason adduced to justify the separation between tracing and criminal investigations is that this separation is necessary to incentivize witnesses to come forward and collaborate with the OMP. This argument is based on the premise that witnesses are more likely to effectively and meaningfully cooperate with a tracing body if the latter is strictly separated from a judicial process. However,

- 18 See, for example, “Mangala Urges Halt to Misleading Information over Office for Missing Persons Act”, *DailyFT*, 26 August 2016, available at: [www.ft.lk/article/564001/ft](http://www.ft.lk/article/564001/ft). See also “An Open Letter to the Most Venerable Mahanayake Theras and Maha Sangha by Mahina Rajapaksa”, *Lanka Business Online*, 24 July 2017, available at: [www.lankabusinessonline.com/new-laws-to-give-foreign-powers-a-central-role-in-persecuting-armed-forces-mr/](http://www.lankabusinessonline.com/new-laws-to-give-foreign-powers-a-central-role-in-persecuting-armed-forces-mr/). Former president Mahinda Rajapakse characterizes the OMP as a body set up to “give foreign powers a central role in persecuting our armed forces”. See “Wimal Weerawansa Wants the OMP Bill to be Brought Back to Parliament”, *Tamil Focus*, 24 August 2016, available at: [news.tamilfocus.com/politics/02/102015](http://news.tamilfocus.com/politics/02/102015). Member of Parliament Wimal Weerawansa characterizes the OMP as a “factory” for generating evidence with which to accuse and punish war heroes.
- 19 “Betraying the Armed Forces through the ‘Office of Missing Persons’”, *Colombo Telegraph*, 20 July 2016, available at: [www.colombotelegraph.com/index.php/betraying-the-armed-forces-through-the-office-of-missing-persons/](http://www.colombotelegraph.com/index.php/betraying-the-armed-forces-through-the-office-of-missing-persons/).
- 20 *Ibid.* *Yahapalana* means “good governance” in Sinhala. The current administration is referred to as the yahapalana government because “good governance” was its main electoral platform during the January 2015 presidential elections.
- 21 See OMP Act, above note 9, section 12(i) for the only provision that relates to the OMP’s obligation to contribute to criminal investigations. This section specifies that “where it appears to the OMP that an offence within the meaning of the Penal Code or any other law, has been committed, that warrants investigation, the OMP may, after consultation with such relatives of the missing person as it deems fit, in due consideration of the best interests of the victims, relatives and society, report the same to the relevant law enforcement or prosecuting authority: such report will provide information relating to the missing person’s civil status (such as the name, age and gender of the missing person), the place(s) or district(s) in which the missing person was last seen and the date thereof”.

this is based on a series of inaccurate assumptions with regard to the Sri Lankan context or even elsewhere.

First, non-perpetrator witnesses may be willing to cooperate with investigations into missing persons cases for a wide range of reasons, including assisting the pursuit of criminal accountability.<sup>22</sup> In any event, their concern is not one of prosecution. They may, however, have safety concerns, which can be addressed by putting in place robust witness protection measures.<sup>23</sup>

Second, even if the search for missing persons adopts a purely humanitarian approach, perpetrator witnesses – even those of lower rank or those whose participation in a crime was minimal – are unlikely to come forward willingly. Perpetrator witnesses summoned by the tracing body may also be reticent to cooperate fully. This is because the public revealing of the truth is never in the interest of perpetrators. In addition, even if the testimony of perpetrator witnesses remains confidential, the mere progress of the tracing investigation and the discovery of evidence of crimes invariably increases the prospect of prosecutions. The natural – and in fact rational – inclination is therefore to refrain from cooperating.<sup>24</sup> Thus, unless the tracing body is able to offer tangible guarantees that prosecutions will not take place – for instance, by granting amnesties – perpetrator witnesses are unlikely to cooperate. However, if there is *prima facie* evidence of an international crime (such as the crime against humanity of enforced disappearance or a war crime), amnesties would be deemed illegal by the UN<sup>25</sup> and under the international human rights framework.<sup>26</sup>

Therefore, the separation of the tracing and criminal investigations does not provide an adequate or sufficient incentive for witnesses to come forward and

22 See CTF Final Report, above note 6, pp. 230–232.

23 See ICPPED, Art. 12.4, recalling the need to take measures “to prevent and sanction acts that hinder the conduct of an investigation”, including reprisals against witnesses.

24 It is important to recall in this respect that underlying the crime of enforced disappearance is the perpetrators’ willingness to hide evidence of their crimes. Therefore, perpetrators not only refrain from cooperating with investigations but often also actively temper with evidence in an attempt to hinder those investigations. See, for example, International Commission on Missing Persons (ICMP), *Bosnia and Herzegovina: Missing Persons from the Armed Conflicts of the 1990s: A Stocktaking*, Sarajevo, 2014, p. 94, available at: [www.icmp.int/wp-content/uploads/2014/12/StocktakingReport\\_ENG\\_web.pdf](http://www.icmp.int/wp-content/uploads/2014/12/StocktakingReport_ENG_web.pdf).

25 UN Security Council, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915, 4 October 2000, paras 22–24; UN Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, UN Doc. S/2004/616, 23 August 2004, paras 10, 64(c); UN Economic and Social Council, Res. 1989/65, “Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions”, 24 May 1989, para. 19. See also UNGA Res. 47/133, “Declaration on the Protection of All Persons from Enforced Disappearance”, UN GAOR, 47th Session, Supp. No. 49, 18 December 1992, Art. 18.

26 See, for example, UN Human Rights Committee (HRC), CCPR General Comment No. 20, “Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)”, 10 March 1992, para. 15. On the obligation to prosecute, see, more generally, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Arts 5(1)(a–c), 5(2); ICPPED, Arts 9 (1)(b–c), 9(2); HRC, CCPR General Comment No. 31[80], “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant”, 26 May 2004. While the Geneva Conventions also provide for an obligation to prosecute those who allegedly committed grave breaches (Geneva Convention I, Art. 49; Geneva Convention II, Art. 50; Geneva Convention III, Art. 129; Geneva Convention IV, Art. 146), these provisions only apply in international armed conflicts.

collaborate fully with the tracing body. However, the merging of both investigations into a single investigative effort that serves both the tracing and the criminal purposes is more likely to advance truth-seeking. Notably, if the OMP had been assisted by a prosecutor or had been invested with prosecutorial powers, it could have offered far more incentives for cooperation. In this configuration, many options could have been explored to obtain relevant information. These could have taken the form of immunity agreements, plea bargains or reduced sentences in the event that the witness is able to provide useful information.<sup>27</sup> This would have ensured that witnesses summoned by the tracing body could receive tangible guarantees in exchange for their full cooperation.

For these reasons, the strict separation between a tracing and a criminal investigation is not desirable. It is not feasible either, as both investigations tend to converge in practice.

## Humanitarian and criminal approaches: Converging investigations

Humanitarian and criminal approaches to investigations into missing persons cases have much in common. In fact, while the scope of each type of investigation is somewhat different, the same type of evidence is relevant for both. Similar powers of investigation are also required to procure the evidence necessary for both tracing and criminal investigations. Therefore, these two types of investigations converge necessarily, and this is why they should ideally be carried out simultaneously and jointly. At the very least, the converging nature of both investigations ought to be recognized and should give rise to institutional and procedural arrangements required to ensure smooth cooperation between the various investigative efforts, including the sharing of relevant evidence.

### *Scope of tracing and criminal investigations*

A criminal investigation commences when information about a crime is brought to the attention of the law enforcement authorities. The trigger for an investigation into a disappearance may therefore be a police complaint lodged by relatives of the disappeared or the discovery of a crime site, typically a gravesite. For this reason, a criminal investigation may be regarded as case-specific. On the other hand, in a post-conflict context, a “tracing investigation” – that is, an investigation aiming primarily at ascertaining the fate of missing persons – will adopt a broader approach. The first step will generally be the gathering and centralizing of all information relevant to tracing missing persons.<sup>28</sup> Depending on the context, this could be tracing requests made to different institutions, or lists of people in

27 In Bosnia and Herzegovina, the criminal procedure codes of the country were amended to allow plea bargaining in appropriate circumstances. This has been a mechanism to obtain evidence/information regarding mass graves from perpetrators. See, in this regard, Working Group on Enforced or Involuntary Disappearances, *Mission to Bosnia and Herzegovina*, 14–21 June 2010, available at: [www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-48-Add1\\_fr.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-48-Add1_fr.pdf).

28 ICRC, above note 13, Commentary on Arts 15, 17.



detention or medical facilities, displaced persons or refugee camps, morgues etc. In this respect, the OMP Act specifies that the Office should centralize all available data on missing persons.<sup>29</sup> To fulfil its mandate, the OMP must therefore collect and process large amounts of information and evidence, and to this end it must set up a database.<sup>30</sup>

The centralization of this data increases the chances of generating leads and establishing correlations for as many cases as possible. In order to establish correlations, forensic experts and investigators compare ante-mortem data (information on missing persons, such as personal, physical, medical and dental information, as well as information on the circumstances of their disappearance) as well as post-mortem data (information obtained during post-mortem examination, including detailed pathology, anthropology and odontology data, and information related to the cause of death), often in a large-scale and systematic manner.<sup>31</sup> Tracing investigations therefore proceed from a much more systematic approach than that of criminal investigations.

### *Pursuing the same evidence*

Although they proceed from different approaches, both criminal and tracing investigations rely on the same type of evidence. For these reasons, both investigations are likely to overlap. For example, the physical evidence typically discovered at a mass grave site is relevant to tracing as well as criminal investigations.<sup>32</sup> The physical characteristics of the bodies (height, dental print, fractures, injuries, etc.), the DNA collected, and any artefacts found on or near the body are highly relevant to a tracing investigation,<sup>33</sup> but this type of evidence is also relevant to a criminal investigation as it may assist in identifying the victim of a crime. Conversely, the position of the bodies, bullet holes and ties around the bones may constitute *prima facie* evidence of crimes, but they are also relevant evidence for a tracing investigation as they may give indications regarding the fate and whereabouts of missing persons. Similarly, evidence found at other crime sites may also be relevant to either type of investigation. Recognizing this, the OMP Act empowers the OMP – provided certain conditions are met – to carry out on-site investigations in order to procure relevant evidence.<sup>34</sup>

In addition, as the tracing investigation progresses, it proceeds in a very similar way to a criminal investigation. In order to increase the chances of matching ante-mortem and post-mortem data, the tracing body would need to pursue other investigative methods including analyzing archival documentation,

29 OMP Act, above note 9, section 10(1)(e).

30 *Ibid.*, sections 10(1)(e), 13(1)(h).

31 ICRC, *Missing Persons, DNA Analysis and Identification of Human Remains*, Geneva, 2009, pp. 11–14, available at: [www.icrc.org/eng/assets/files/other/icrc\\_002\\_4010.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_4010.pdf).

32 Melanie Klinker, “Towards Mass Grave Protection Guidelines”, *Human Remains and Violence*, Vol. 3, No. 1, 2017, p. 53, available at: [eprints.bournemouth.ac.uk/29259/7/Towards%20mass-grave%20protection%20guidelines.pdf](http://eprints.bournemouth.ac.uk/29259/7/Towards%20mass-grave%20protection%20guidelines.pdf).

33 *Ibid.*

34 OMP Act, above note 9, sections 12(f), 12(g).

conducting interviews of witnesses, and mapping criminal activities, events and networks.<sup>35</sup> Furthermore, in cases where a person may be missing as a result of a crime (enforced disappearance and/or murder), the mere identification of the person or the remains by the tracing body is insufficient. In fact, under international human rights law, any investigation into a human rights violation must determine the circumstances of the violation (disappearance or killing) and establish responsibilities.<sup>36</sup> This would also require an in-depth investigation akin to a criminal investigation.

### *Exercising similar powers*

In order to carry out a full-fledged investigation, a tracing body must be able to exercise various powers. Interestingly, although they did not exercise them, the various commissions of inquiry into the fate of disappeared or missing persons in Sri Lanka were vested with wide-ranging powers of investigation.<sup>37</sup> Similarly, the OMP Act grants the Office with a broad range of powers to receive and procure information. In particular, the Act allows the OMP to receive and collate data and evidence on missing persons from governmental and non-governmental third parties.<sup>38</sup> It also enables the OMP to procure documents and statements from relevant sources,<sup>39</sup> including witnesses and government authorities. Notably, the OMP is vested with summoning powers.<sup>40</sup>

The OMP Act also empowers the Office to carry out on-site investigations, including in actual or suspected detention sites<sup>41</sup> and premises suspected to contain evidence relevant to its investigation.<sup>42</sup> While the OMP's expected role with respect to on-site investigations and the extent of its powers depend upon the site concerned, the OMP Act notably empowers the Office to carry out warrantless<sup>43</sup> searches of suspected places of detention.<sup>44</sup>

35 Medhaka Fernando and Isabelle Lassée, *Operationalizing the Office on Missing Persons: Manual of Best Practices*, South Asian Centre for Legal Studies, November 2016 (OMP Manual), Chap. 5, "Receiving and Procuring Information".

36 European Court of Human Rights (ECtHR), *Leonidis v. Greece*, Appl. No. 43326/05, Judgment, 8 January 2009, para. 68: "The investigation must be capable, firstly, of ascertaining the circumstances in which the incident took place and, secondly, of leading to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony and forensic evidence."

37 Commissions of Inquiry on Sri Lanka Act, No. 17 of 1948, sections 7 to 12.

38 OMP Act, above note 9, section 10(1)(e): "The OMP shall have the mandate to collate data related to missing persons obtained by processes presently being carried out, or which were previously carried out, by other institutions, organizations, Government Departments and Commissions of Inquiry and Special Presidential Commission of Inquiry."

39 *Ibid.*, section 12(c).

40 *Ibid.*, section 12(c)(ii).

41 *Ibid.*, section 12(f).

42 *Ibid.*, section 12(g).

43 *Ibid.*, section 12(f). The only obligation is for the OMP to report to the inspector-general of police within twenty-four hours of conducting the search. Other places may also be searched provided that the OMP has applied for and obtained a warrant (section 12(g)).

44 *Ibid.*, section 12(f).

In the event that the OMP exercises its powers fully in order to actively seek out evidence into the fate of missing persons, it may seize and handle evidence that is otherwise critical to the carrying out of a criminal investigation. It is therefore essential that this evidence could be summoned by judicial authorities when necessary; this would be the case unless the evidence had been obtained confidentially. This would ensure that the OMP's investigations do not hinder criminal investigations. As emphasized by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence:

It is essential that efforts are made to satisfy both humanitarian and judicial aims with regard to missing and disappeared persons. Once again, such an ambition is not feasible in the short run; but virtually all decisions create path-dependence. It is therefore important to be clear about the diversity of the ends to be reconciled.<sup>45</sup>

In light this, the OMP Act must be interpreted and implemented so as to ensure the joint pursuit of truth and justice.

## **Implementing the OMP Act to ensure the joint pursuit of truth and justice**

While the OMP Act itself does not prevent the OMP from contributing to criminal investigations, in practice this may pose a number of challenges. Notably, institutional arrangements may be required to facilitate cooperation between the OMP and prosecutorial authorities. In addition, the OMP rules<sup>46</sup> must also address operational questions relevant to enabling the Office's contribution to criminal investigations and prosecutions of crimes uncovered while carrying out the tracing investigation.

### **Institutional arrangements required**

A comparative study of tracing bodies vested with a mandate similar to that of the OMP reveals that these bodies are generally designed to support investigations led by the courts. The OMP Act, on the other hand, does not specifically provide for institutional linkages between the OMP and the courts that would directly enable the Office to support criminal investigations and prosecutions. The Act nonetheless leaves open the possibility of a sub-unit being created for that purpose. Whether or not that sub-unit is eventually created, close coordination and collaboration between the OMP and prosecutorial authorities will be required to avoid interferences and enable the joint pursuit of truth and justice.

<sup>45</sup> UN Human Rights Council, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, UN Doc. A/HRC/36/50, 21 August 2017, para. 82.

<sup>46</sup> *Ibid.*, section 26.

## Comparative overview

While the ICRC's initiatives for tracing missing persons pursue a purely humanitarian objective, very few other initiatives proceed from the same approach. One notable exception is the Committee on Missing Persons in Cyprus (CMP), established in 1981. The mandate of the CMP is to locate and identify persons who went missing during inter-communal violence between the Greek Cypriots and Turkish Cypriots in the 1960s and 1970s. The Committee overtly pursues a humanitarian approach and is therefore not mandated to establish the cause of death or attribute responsibility for the death of missing persons.<sup>47</sup> However, for this reason, investigations conducted by the CMP have been considered as falling short of an effective investigation as required from the State under a human rights framework.<sup>48</sup> It is therefore important to recall that international human rights law requires States to fully investigate allegations of human rights violations, which includes identifying the circumstances of the violation and those responsible.<sup>49</sup>

In many State-led initiatives, the search for missing persons departs from a purely humanitarian approach and is coupled with criminal investigations for domestic and international crimes. In some cases, the search is carried out directly by regular state institutions, with the assistance of international organizations (such as the International Commission on Missing Persons) or NGOs. For instance, in Iraq, the Law on Protection of Mass Graves provides that the Ministry of Human Rights assumes the leading role in the opening and indexing of mass graves, as well as documenting their contents.<sup>50</sup> When a mass grave is discovered, the Ministry takes possession of the location and an *ad hoc* commission is created to supervise the exhumation process.<sup>51</sup> The commission is composed of representatives of the prosecutor's department, the police and the court of appeals, amongst others.<sup>52</sup> The purpose of the investigation is explicitly to ascertain the fate of missing persons, to identify perpetrators and to assist in the collection of evidence to prove their criminal responsibility.<sup>53</sup>

In Guatemala, investigations into the fate of missing persons are led by the judiciary. The purpose of the investigation is therefore both to assist the tracing of missing persons and to collect evidence for criminal prosecutions. An NGO, the Forensic Anthropology Foundation of Guatemala (Fundación de Antropología

47 Committee on Missing Persons in Cyprus, "About the CMP", 2015, available at: [www.cmp-cyprus.org/content/about-cmp-0](http://www.cmp-cyprus.org/content/about-cmp-0).

48 ECtHR, *Cyprus v. Turkey*, Appl. No. 25781/94, Judgment, 10 May 2001, para. 135: "[T]he respondent State's procedural obligations at issue cannot be discharged through its contribution to the investigatory work of the CMP. Like the Commission, the Court notes that, although the CMP's procedures are undoubtedly useful for the humanitarian purpose for which they were established, they are not of themselves sufficient to meet the standard of an effective investigation required by Article 2 of the Convention, especially in view of the narrow scope of that body's investigations."

49 *Ibid.*, read in conjunction with paras 27 and 127 of the Judgment.

50 Republic of Iraq, Law on Protection of Mass Graves, Law No. 5, 2006, Art. 1(II).

51 *Ibid.*, Art. 6.

52 *Ibid.*, Art. 6(I).

53 *Ibid.*, Art. 1(I)(d).

Forense de Guatemala, FAFG),<sup>54</sup> plays a central role in assisting the process. Its experts are appointed, in their individual capacity, as forensic experts by the courts or the prosecutor to conduct forensic investigations and participate in exhumations, generally after a complaint has been filed and a legal case initiated.<sup>55</sup>

In other countries, specialized institutions have been created to address the problem of missing persons. For instance, in Bosnia and Herzegovina, a specialized body for the search and identification of missing persons – the Missing Persons Institute – was created in 2005.<sup>56</sup> However, the investigation of missing persons cases is carried out under the purview of the courts,<sup>57</sup> and the search is therefore linked to criminal prosecutions. The Prosecutor’s Office, which conducts war crimes investigations, initiates and supervises mass grave exhumations.<sup>58</sup> The Missing Persons Institute, on the other hand, plays a crucial role in locating mass graves and addresses exhumation requests to the prosecutor.<sup>59</sup>

Similarly, in Kosovo, the Governmental Commission on Missing Persons is mandated to coordinate the search for missing persons and to centralize data on missing persons.<sup>60</sup> The Commission is composed of members of various ministries as well as representatives of families of missing persons.<sup>61</sup> The role of the Commission is similar to that of the Missing Persons Institute in Bosnia and Herzegovina.<sup>62</sup>

In Colombia, a National Commission for the Search of Disappeared Persons was created in 2007.<sup>63</sup> The role of the Commission was mainly to promote, support and assist the search for disappeared persons undertaken by other institutions, including by designing and evaluating search plans.<sup>64</sup> The Prosecutor’s Office was in charge of the investigation, together with other institutions referenced in the national search plan developed by the

54 FAFG, “Nuestra Labor”, 2016, available at: [fafg.org/nuestra-labor.html](http://fafg.org/nuestra-labor.html).

55 The appointment of FAFG experts is often pursuant to a request by the human rights or victims’ organization that initiated the complaint. FAFG also collects ante-mortem DNA data from families, after having received informed consent. The families’ genetic profiles are entered into the National Genetic Database for Families and Victims of Enforced Disappearance for comparison with victims’ genetic profiles extracted from DNA samples collected during previous investigations. In the event of a positive identification, both the family and the prosecutor are informed.

56 Bosnia and Herzegovina, Law on Missing Persons, 2004, Art. 7.

57 *Ibid.*, Art. 5.

58 ICMP, above note 24, p. 46.

59 Law on Missing Persons, above note 56, Art. 7.

60 Republic of Kosovo, Law No. 04/L-023 on Missing Persons, 29 August 2011, available at: [www.kuvendikosoves.org/common/docs/ligjet/Law%20on%20missing%20persons.pdf](http://www.kuvendikosoves.org/common/docs/ligjet/Law%20on%20missing%20persons.pdf).

61 *Ibid.*, Art. 9.

62 ICMP, *Missing Persons from the Kosovo Conflict and Its Aftermath: A Stocktaking*, 2017, p. 17, available at: [www.icmp.int/wp-content/uploads/2017/05/Kosovo-stocktaking-ENG.pdf](http://www.icmp.int/wp-content/uploads/2017/05/Kosovo-stocktaking-ENG.pdf)

63 ICMP, “Where We Work: Colombia”, 2014, available at: [www.icmp.int/where-we-work/the-americas/latin-america-and-the-caribbean/colombia/](http://www.icmp.int/where-we-work/the-americas/latin-america-and-the-caribbean/colombia/). Decree 929 of 2007 defined the structure and scope of work of the Commission.

64 OHCHR, “Committee on Enforced Disappearances Considers Report of Colombia”, available at: [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20651&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20651&LangID=E); Lisa Haugaard and Kelly Nicholls, *Breaking the Silence: In Search of Colombia’s Disappeared*, Latin American Working Group Education Fund, December 2010, p. 10.

Commission.<sup>65</sup> Ten years later, a Missing Persons Search Unit was created by decree.<sup>66</sup> The decree asserts the humanitarian and extra-judicial nature of the Unit<sup>67</sup> as a remedy to the shortcomings of searches carried out within the ambit of the criminal justice system.<sup>68</sup> The newly created Unit is in charge of directing, coordinating and contributing to the search for and identification of missing persons. In order to ensure the humanitarian nature of the Unit, the decree specifies that the evidence received or procured by the Unit cannot be used in a criminal process.<sup>69</sup> As underscored in the decree, this represents a complete shift in the approach to the search for missing persons in Colombia. It also represents a shift in the approach in the region, since similar institutions were also created in Peru and El Salvador. Interestingly, despite the ostensible humanitarian nature of the Unit, the decree nonetheless specifies that the Unit shall establish cooperation protocols with the competent judicial authorities with respect to forensic investigations into gravesites,<sup>70</sup> thereby acknowledging the need for a minimum degree of cooperation with the judicial process.

In Peru, a recently adopted law assigns to the Justice and Human Rights Ministry the leading role in the search for missing persons who disappeared between 1980 and 2000.<sup>71</sup> According to the law, the search ostensibly pursues a humanitarian approach and as such shall neither impede nor contribute to a judicial process.<sup>72</sup> However, the implementation of the national search plan will be collaborative in nature and will involve various institutions.<sup>73</sup> Notably, the law specifically mentions the role and normative competency of the public prosecutor when carrying out forensic investigations.<sup>74</sup>

In El Salvador, a National Commission on the Search for Disappeared Persons was created by decree in August 2017.<sup>75</sup> The Commission is tasked with formulating a national search plan and facilitating its implementation. One of the Commission's functions is to promote the right to access justice for victims of human rights violations and to transfer information, at their request, to competent authorities<sup>76</sup>. The decree therefore adopts a victim-centred approach

65 ICMP, above note 63.

66 Republic of Colombia, Decreto 589 de 2017 por el Cual se Organiza la Unidad de Búsqueda de Personas dadas por Desaparecidas en el Contexto y en Razón del Conflicto Armado, 5 April 2017, available at: <https://tinyurl.com/y7lecbwa>.

67 *Ibid.*, Art. 3.

68 *Ibid.*, p. 6.

69 *Ibid.*, Art. 3.

70 *Ibid.*, Art. 5(13).

71 See Republic of Peru, Ley No. 30470 de búsqueda de personas desaparecidas durante el período de violencia 1980–2000, 22 June 2016, available at: [busquedas.elperuano.com.pe/download/url/ley-de-busqueda-de-personas-desaparecidas-durante-el-periodo-ley-n-30470-1395654-1](http://busquedas.elperuano.com.pe/download/url/ley-de-busqueda-de-personas-desaparecidas-durante-el-periodo-ley-n-30470-1395654-1).

72 *Ibid.*, Arts 1, 2.

73 *Ibid.*, Art. 5.

74 *Ibid.*, Art. 8.

75 Republic of El Salvador, Decreto No. 33, Creacion de la Comision Nacional de Busqueda de Personas Adultas Desaparecidas en el Contexto del Conflicto Armado de El Salvador, 21 August 2017, available at: [www.refworld.org/es/pdfid/59d28c8e4.pdf](http://www.refworld.org/es/pdfid/59d28c8e4.pdf).

76 *Ibid.*, Art. 6(c).

whereby the Commission may contribute to justice if victims and families formulate a request in this respect.

Finally, in Nepal, while the Enforced Disappearances Enquiry Commission is not overtly a purely humanitarian endeavour,<sup>77</sup> the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act does not contain provisions regarding the use of evidence in a criminal process. This is particularly concerning since the Commission is also vested with extensive powers regarding the excavation and exhumation of mass graves.<sup>78</sup>

As the above examples illustrate, in most countries where special legislation has been enacted to facilitate the search for missing persons – with the exception of Nepal and Cyprus – the relevant legislation contains provisions for coordination and cooperation between tracing investigations and criminal investigations and prosecutions. This is so even when the legislation explicitly mentions the humanitarian nature of the missing persons' commission or tracing mechanism. As explained below, these procedural as well as operational arrangements are essential to ensuring that the tracing investigation does not hinder the course of justice.

### *A specialized unit within the OMP to carry out or assist prosecutions?*

In Sri Lanka, a number of considerations with respect to the magnitude of the missing persons problem, the poor track record of the Attorney-General's Department on human rights-related issues,<sup>79</sup> and the need for capacity support in forensic investigations<sup>80</sup> justified the setting up of a specialized body to carry out or assist in the carrying out of tracing investigations – the OMP. While the OMP could take the lead in investigations into the fate of missing persons, as explained previously, its work ought not to be artificially separated from criminal investigations.

Drawing from comparative experiences, and given the specific challenges of the Sri Lankan context, a number of options were available in terms of institutional arrangements for the OMP. However, it was paramount that the option finally adopted enabled coordination and cooperation between the OMP and other judicial mechanisms, whether regular or *ad hoc*. This is because the OMP may uncover international as well as domestic crimes in the course of its investigation.

These concerns were taken into consideration by the drafters of the OMP Act. According to the Act, the OMP is tasked *inter alia* with reporting to the relevant law enforcement or prosecuting authorities any offence uncovered in the course of

77 See Federal Democratic Republic of Nepal, Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2071 (2014), 11 May 2014, Art. 25, available at: [www.ciedp.gov.np/downloadfile/actsrulesguidelines\\_1502092337.pdf](http://www.ciedp.gov.np/downloadfile/actsrulesguidelines_1502092337.pdf).

78 *Ibid.*, Arts 14(6–7).

79 UN Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on His Mission to Sri Lanka*, UN Doc. A/HRC/34/54/Add.2, 22 December 2016, para. 94.

80 OMP Act, above note 9, section 17(2).

the investigation.<sup>81</sup> In addition, this author argues that evidence collected by the OMP should ideally be made available to assist criminal investigations. As explained previously, this would avoid undue interference with ongoing or future criminal investigations.<sup>82</sup>

Institutional arrangements may facilitate such coordination. A possible option to ensure the coordination of criminal investigations with that carried out by the OMP would have been to invest the OMP with prosecutorial powers. Such a model would have been similar to that adopted for the Sri Lankan Bribery Commission.<sup>83</sup> However, given the resistance to accountability for grave human rights violations in some political and public spheres, this option was not considered.

Although the OMP Act does not embed a special prosecutor within the OMP, other institutional arrangements may nonetheless be made to ensure coordination with criminal investigations. Indeed, while the Act provides for the OMP's basic structure,<sup>84</sup> it also specifies that the Office may establish committees, divisions and/or units to enable the fulfilment of its mandate.<sup>85</sup> Notably, the Act mandates the Office to identify avenues of redress to which missing persons and relatives of missing persons are entitled.<sup>86</sup> On this basis, the OMP may make recommendations for prosecutions based on evidence collected in the course of its investigations. The carrying out of this function may justify the setting up of a specialized sub-unit. That sub-unit may be dedicated to analyzing evidence of criminal conduct and making recommendations for the prosecution of specific cases. It could also be charged with liaising with prosecutors and criminal investigators.

Whether or not this sub-unit is eventually created to facilitate cooperation between the OMP and other institutions in charge of criminal investigations, coordination and cooperation between the various institutions carrying out investigations will be required.

### *The need for institutional cooperation*

Cooperation between the OMP and prosecutorial authorities will be essential to enable the sharing of information as well as to ensure that the activities carried out by the OMP do not hinder the pursuit of justice. Any difficulties with respect to the coordination of the tracing and criminal investigations are likely to hinder both these investigations.<sup>87</sup> Collaboration will be needed when dealing with

81 *Ibid.*, section 12(h).

82 See above section "Humanitarian and Criminal Approaches: Converging Investigations".

83 Sri Lanka, Bribery Commission Act No.19 of 1994, sections 12, 13.

84 OMP Act, above note 9, sections 16, 17, 18.

85 *Ibid.*, section 11(e).

86 *Ibid.*, section 10(d).

87 For example, in South Africa a tracing body known as the Missing Persons Task Team (MPTT) has been placed within South Africa's National Prosecuting Authority (NPA). There have been allegations of selective investigations levelled against the MPTT by certain victims. See "NPA missing Persons Task Team Under Fire", *Press Reader*, 15 February 2016, available at: [www.pressreader.com/south-africa/the-new-age-free-state/20160215/281702613768477](http://www.pressreader.com/south-africa/the-new-age-free-state/20160215/281702613768477).



questions of investigative strategies, and handling both testimonial and physical evidence. In addition, given the current institutional arrangements under the OMP Act, whereby investigations into gravesites are carried out under the purview of the Magistrates' Courts, this coordination and cooperation will also be necessary to ensure progress in the OMP investigations. Indeed, if inter-institutional arrangements derail, or if the criminal investigations stall, the tracing investigation will also be paralyzed.

As far as testimonial evidence is concerned, it is important to bear in mind that a witness statement obtained by the OMP may eventually differ from – or contradict – one obtained in a criminal investigation. In fact, the duplication of statements to parallel investigations invariably increases the chance of contradictions between the various statements made by the same witness.<sup>88</sup> In addition, given that the purposes of both investigations will be presented and perceived as different, the stakes for the witnesses and the motivation for giving a statement to either investigation are also likely to differ. This, in turn, may increase the likelihood of discrepancies. As a result of contradicting statements, key testimonial evidence risks being discounted in a criminal trial.<sup>89</sup> In addition, in the course of its investigation, the tracing body may reveal sensitive information to witnesses that it hears or interrogates. In some cases, the revealing of information may be detrimental to the prosecutorial work and strategy. Indeed, if witnesses and suspects are made aware at an early stage of key information regarding the course of the criminal investigation, they may anticipate the prosecutorial policy and may make strategic choices that they would not otherwise have made. This could also negatively impact their decision to further collaborate with the OMP investigation. In order to minimize the risks of this occurring, it will be essential for the OMP to closely liaise with prosecutorial authorities when carrying out its investigations. In this respect, the indefinite postponement of the establishment of the Special Prosecutor's Office is a matter of grave concern. Indeed, families of disappeared persons have often expressed distrust in the Attorney-General's Department.<sup>90</sup> For this reason, a close collaboration between this department and the OMP may be perceived as problematic.

Finally, cooperation between the OMP and the prosecution will be necessary to ensure the transfer and sharing of evidence.<sup>91</sup> The question of who ultimately supervises the handling, transfer and preservation of physical and

88 See, for example, International Criminal Tribunal for Rwanda, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Trial Chamber), 2 September 1998, paras 237–238.

89 International Criminal Court, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment Pursuant to Art. 74 of the Statute (Trial Chamber I), 14 March 2012, para. 479.

90 CTF, *Interim Report on the Office on Missing Persons Bill and Issues Concerning the Missing, the Disappeared and the Surrendered*, August 2016, p. xvii, available at: <https://tinyurl.com/yctq5qy8>.

91 In Bosnia and Herzegovina, the Missing Persons Institute collects, classifies and preserves documents relating to missing persons, and shares such information with the Office of the Prosecutor of Bosnia and Herzegovina. Further, the Institute carries out joint investigations with the Special Department on War Crimes located within the Office of the Prosecutor and forwards exhumations requests to the latter. See, in this regard, ICMP, above note 24, p. 131.

testimonial evidence relevant to both the criminal and tracing investigation would have to be resolved.<sup>92</sup> In addition, operational arrangements will also have to be put in place to facilitate the sharing of evidence between the OMP and prosecutorial authorities.

### Operational aspects: Enabling the sharing of information and evidence

In order to enable the OMP's effective contribution to tracing investigations, standard operating procedures should be adopted to ensure that the evidence collected by the Office – whether physical or testimonial – will be admissible in a criminal process. Another important consideration pertains to the interpretation of the scope of the OMP's confidentiality obligation. Indeed, if this obligation is interpreted too broadly, it may prevent the OMP from sharing crucial information with the prosecution.

#### *Standards for evidence collection*

Special care must be taken to ensure that any handling of evidence by the OMP, whether physical or testimonial, does not compromise, render inadmissible or lower the probative value of this evidence in a judicial process, whether international, domestic or hybrid. Therefore, the collection, handling and preservation of evidence by this body must follow the same standards as those required in domestic as well as international criminal proceedings. For example, the chain of custody for physical as well as testimonial evidence must be rigorously documented throughout.<sup>93</sup> In addition, the sampling of physical evidence as well as the excavation of mass graves must follow criminal standards to ensure that no evidence relevant to a criminal investigation deteriorates or is lost.<sup>94</sup>

Interestingly, the OMP Act provides that excavations and exhumations of mass graves must be carried out under the purview of a Magistrates' Court,<sup>95</sup> ostensibly to ensure that these are conducted in accordance with standards normally followed in criminal investigations. The OMP's role, limited to that of an observer, will be to ensure that the excavation, exhumation and "other proceedings pursuant to the same"<sup>96</sup> are done in a manner that will not

92 In Bosnia and Herzegovina, since 2011, the Prosecutor's Office has exercised full supervisory responsibilities over exhumation activities relating to both tracing and criminal investigations. See *ibid.*, p. 46.

93 OMP Manual, above note 35, Chap. 5, "Receiving and Procuring Information".

94 *Ibid.*, Chap. 6, "On-Site Investigations".

95 OMP Act, above note 9, section 12(d). In a partial recognition of the intricate nature of tracing and criminal investigations, the OMP Act limits the role of the OMP for the carrying out of excavations and/or exhumations of gravesites. While the Office may apply to the Magistrates' Court with territorial jurisdiction for an order to carry out excavations and/or exhumations, its subsequent role as envisaged in the Act will be limited to that of an observer. Accordingly, excavations and exhumations must be carried out under the purview of a Magistrates' Court.

96 *Ibid.*, section 12(d).

compromise the identification of remains and subsequent OMP investigations into the fate and whereabouts of missing persons. Under the Act, the judiciary's involvement in investigations relevant to the OMP mandate is not limited to excavations and exhumations. In fact, although the OMP may carry out searches of suspected places of detention, the conduct of the search may be regulated by guidelines formulated by the minister of justice and approved by Parliament.<sup>97</sup> This provision is also meant to ensure that the search is carried out in compliance with standards typically adopted in criminal proceedings.

While provisions in the OMP Act evidence the drafters' concern for the probative value of physical evidence collected in the course of on-site investigations, a similar concern does not arise for the handling and preservation of other types of evidence, including physical and testimonial evidence otherwise received and procured by the OMP. However, this evidence will be equally relevant to criminal investigations. Therefore, when handling received or procured documents or audio/video recordings, the OMP must also comply with investigative best practices to ensure that their probative value is preserved. Documents and audio/video recordings are physical evidence, and as such, their probative value depends on proof that no one has forged or tampered with them. This is best provided by producing a written chain of custody record; such a record documents the collection and handling of a piece of physical evidence from its creation (in the case of documents and recordings) until the moment it was transferred to the relevant criminal court. The OMP must therefore adopt standard operating procedures for the systematic documentation in writing of the chain of custody of physical evidence.<sup>98</sup> It is also essential that physical evidence is stored in a manner that is appropriate to ensure its preservation.<sup>99</sup> The Office would also need to adopt standard operating procedures for witness examination, and investigators conducting the interviews and recording the statements must be specifically trained in investigative best practices for criminal investigations.<sup>100</sup>

The adoption of standard operating procedures for the collection, handling and preservation of evidence would enable the sharing of that evidence with criminal investigators, provided that the evidence is not covered by a confidentiality agreement.

### *Scope of confidentiality*

At the conclusion of an investigation into each case, the OMP must inform the relatives of the missing person of his or her fate or whereabouts and the

97 *Ibid.*

98 International Institute of Higher Studies in Criminal Sciences, *Siracusa Guidelines for International, Regional and National Fact-finding Bodies*, eds M. Cherif Bassiouni and Christina Abraham, Intersentia, Cambridge, 2013, guideline 8.6.

99 *Ibid.*, guideline 8.7: "physical evidence should be properly preserved and protected from contamination while in the custody of the fact-finding body".

100 OMP Manual, above note 35, Chap. 5, "Receiving and Procuring Information".

circumstances in which that person went missing.<sup>101</sup> However, the provision of information to relatives is subject to the Office's obligation of confidentiality under the OMP Act. Section 15 of the Act provides that "notwithstanding anything to the contrary in any written law, except in the performance of his duties under this Act, every member, officer, servant and consultant of the OMP shall preserve and aid in preserving confidentiality with regard to matters communicated to them in confidence".<sup>102</sup> However, the scope of the confidentiality obligation under this section is not defined in the Act.

A broad interpretation of the scope of confidentiality under section 15 could deprive families of essential information regarding the circumstances in which the person went missing and therefore hamper the right to truth. Such an interpretation could also impede the pursuit of justice. In light of this, it is essential that the determination of the scope of confidentiality be guided only by two imperatives: (1) the safety of witnesses and (2) victims' right to truth and justice. In order to strike a balance between these two objectives, the scope of confidentiality agreements should ideally be limited to potentially identifying information.<sup>103</sup> It should not be extended to other information unless absolutely necessary to obtain key information<sup>104</sup> or to ensure the witness's safety. This would have to be assessed on an individual basis and justified in light of the circumstances. For confidentiality agreements to be used on a strict need basis, the OMP will also have to develop a full-fledged witness protection programme that will encompass a wide range of protection measures to replace or complement the granting of confidentiality.<sup>105</sup>

## Conclusion

While humanitarian and criminal approaches to investigations into missing persons cases proceed from a different logic and ultimately have different purposes, operationally they tend to converge and overlap. In particular, both investigations pursue the same type of evidence and exercise similar investigative powers. For this reason, if not integrated or coordinated, they may compete for access and

101 OMP Act, above note 9, section 13(1)(d).

102 *Ibid.*, section 15(1).

103 Federal Democratic Republic of Nepal, Commission of Investigation on Enforced Disappeared Person Rule, 2072 (2016), 13 March 2016, Rule 28(1), available at: [www.ciedp.gov.np/downloadfile/CIEDP%20Rules\\_1464689744.pdf](http://www.ciedp.gov.np/downloadfile/CIEDP%20Rules_1464689744.pdf); Bosnia and Herzegovina, Witness Protection Program Law, 2003, Art. 6(2), available at: <https://advokat-prnjavorac.com/legislation/The-Law-on-Witness-Protection-Programme-in-Bosnia-and-Herzegovina.pdf>; Republic of Kenya, Witness Protection Act, 2012, section 23(3), available at: [www.unodc.org/res/cld/document/ken/witness-protection-act\\_html/Kenya\\_Witness\\_Protection\\_Act\\_Revised\\_Edition\\_2012.pdf](http://www.unodc.org/res/cld/document/ken/witness-protection-act_html/Kenya_Witness_Protection_Act_Revised_Edition_2012.pdf); Republic of the Philippines, An Act Providing for a Witness Protection, Security and Benefit Programme and for Other Purposes, 24 April 1991, sections 3, 7, available at: [www.lawphil.net/statutes/repacts/ra1991/ra\\_6981\\_1991.html](http://www.lawphil.net/statutes/repacts/ra1991/ra_6981_1991.html).

104 It is noteworthy that when the witness's concerns are not related to his/her security, granting confidentiality to his/her information is rarely sufficient to incentivize participation in a truth-seeking process for the reasons explained in the "Argument 2" section above.

105 OMP Manual, above note 35, Chapter 3, "Witness Protection".

custody of evidence and interfere with one another. In addition, the handling of evidence by various institutions in charge of criminal or tracing investigations may compromise the evidentiary value of the information collected. In light of this, an integrated approach between criminal and tracing investigations is required. This approach was adopted in most countries where institutions with a mandate similar to that of the OMP were created.

In Sri Lanka, the perception that a purely humanitarian approach would lessen the resistance to the OMP and encourage participation in the institution had gained some traction within civil society prior to the adoption of the OMP Act. However, as explained in this article, such a perception is unfounded. Any progress in tracing investigations would necessarily render the prospect of prosecutions for crimes relating to disappearances and/or death of missing persons more likely. Therefore, those who oppose prosecutions will also oppose the OMP for this very reason. Similarly, a stated humanitarian approach to the OMP is unlikely to convince perpetrator witnesses to collaborate.

The OMP Act indirectly recognizes the overlapping scope of criminal and tracing investigations by bringing the excavation and exhumation of gravesites under the purview of the Magistrates' Courts. It also specifies that the minister of justice may issue guidelines for on-site investigations in suspected places of detention. However, the Act does not offer guidance regarding the handling and preservation of other evidence which may be equally important for criminal investigations, nor does it specify the scope of confidentiality. This evidences a limited understanding of the intricate nature of tracing and criminal investigations. It is therefore crucial that the OMP issues rules to fill this legislative gap in a manner that would ensure the sharing of evidence with prosecutorial authorities.

Given that the OMP investigations are formally separated from criminal investigations, an in-depth collaboration between the OMP and prosecutorial authorities will be required to ensure that the various investigations do not interfere with one another. Unless and until the Special Court and Special Prosecutor's Unit are created, the OMP will have to coordinate its investigations with regular judicial institutions, including the Magistrates' Courts and the Attorney-General's Department. This is problematic given the poor track record of these two institutions in many disappearance cases. It is therefore essential that special institutions dedicated to investigating, prosecuting and trying international crimes are created without further delay.



# The Office on Missing Persons in Sri Lanka: The importance of a primarily humanitarian mandate

**Vishakha Wijenayake\***

Vishakha Wijenayake is a doctoral student at McGill University. She worked as a Legal Adviser for the Colombo Delegation of the International Committee of the Red Cross in 2016–18.

## Abstract

*This article attempts to situate the Office on Missing Persons (OMP) in Sri Lanka in relation to varying approaches to mechanisms for searching for the missing. In particular, the article examines the possible tensions between a humanitarian and an accountability-based mandate and supports the position of the International Committee of the Red Cross that these two approaches can in fact be complementary in nature. It goes on to contend that the OMP's mandate is primarily humanitarian rather than exclusively humanitarian, and analyzes how this distinction may impact possible criminal prosecutions. It emphasizes the importance of preserving the humanitarian character of the OMP with the objective of ensuring that the victims' rights are at the centre of transitional justice processes.*

**Keywords:** transitional justice, missing persons, enforced disappearances, criminal proceedings.



\* The views expressed in this article are those of the author and do not necessarily reflect the position of the International Committee of the Red Cross.

## Introduction

I am dying bit by bit. Sometimes when I set off on the road, I wish that a vehicle would hit me. But she [pointing to the other lady next to her] says don't die, we will see them again... we will.

Mother at Kandavalai public meeting<sup>1</sup>

Every year, as a result of armed conflicts and other situations of violence, many persons are separated from their loved ones. Some return, while the fate and whereabouts of others remain unknown long after the fighting has ceased. The families of the missing wait in an ambiguous state of trauma in hopes that their loved ones will one day return.<sup>2</sup> This has been the case in Nepal,<sup>3</sup> Georgia,<sup>4</sup> Lebanon<sup>5</sup> and Cyprus,<sup>6</sup> as in many other countries. In Sri Lanka, the numbers paint a similar picture in which, almost a decade following the end of the three-decade non-international armed conflict, 16,000 persons remain missing.<sup>7</sup> The Tamil New Tigers was formed in 1972 and became the Liberation Tigers of Tamil Eelam (LTTE) in 1976. After they conducted an attack in Jaffna in July 1983, during which a hospital was badly damaged and thirteen government soldiers were killed, communal violence erupted across the country in what became known as “Black July”.<sup>8</sup> More than 3,000 Tamils were killed, properties and businesses of Tamils were destroyed, and many fled Sinhalese-majority areas.<sup>9</sup> The LTTE developed as a military organization, capable of conducting attacks on military objectives and civilian objects in all parts of the island.<sup>10</sup> In 2009, the government forces were able to secure a military defeat of the LTTE.<sup>11</sup> In

- 1 Consultation Task Force on Reconciliation Mechanisms (CTF), *Interim Report: The Office on Missing Persons Bill and Issues Concerning the Missing, the Disappeared and the Surrendered*, August 2016, p. 13, available at: [https://docs.wixstatic.com/ugd/bd81c0\\_1872d48845bd45afaafa7813ce2c89a0.pdf](https://docs.wixstatic.com/ugd/bd81c0_1872d48845bd45afaafa7813ce2c89a0.pdf) (all internet references were accessed in October 2018).
- 2 For more on this, see Pauline Boss, “Families of the Missing: Psychosocial Effects and Therapeutic Approaches”, in this issue of the *Review*.
- 3 International Committee of the Red Cross (ICRC), “Nepal: Families of Missing Persons Still Searching for Loved Ones”, 16 October 2014, available at: [www.icrc.org/en/document/nepal-families-missing-still-searching-loved-ones](http://www.icrc.org/en/document/nepal-families-missing-still-searching-loved-ones): “According to the ICRC, 3,777 individuals went missing during the internal armed conflict. Of them, 1,347 – about one in three – are still missing.”
- 4 ICRC, “Georgia: Efforts to Clarify the Fate of Missing Persons”, 26 April 2106, available at: [www.icrc.org/en/document/georgia-missing-persons-clarifying-the-fate](http://www.icrc.org/en/document/georgia-missing-persons-clarifying-the-fate). According to ICRC data in Georgia, “more than 2,300 persons are still reported missing as a result of armed conflicts in the 1990s and in August 2008”.
- 5 International Centre for Transitional Justice, “A Mapping of Serious Human Rights and Humanitarian Law Violations in Lebanon (1975–2008)”, 2013: “It is estimated that as a result of the 15-year conflict, ... 17,415 [people are] missing or disappeared.”
- 6 According to the Committee on Missing Persons (CMP) in Cyprus, there are approximately 2,000 missing. See: [www.cmp-cyprus.org/content/facts-and-figures](http://www.cmp-cyprus.org/content/facts-and-figures).
- 7 ICRC, *Living with Uncertainty: Needs of the Families of Missing Persons in Sri Lanka*, July 2016, available at: [www.icrc.org/sites/default/files/wysiwyg/Worldwide/asia/sri-lanka/families\\_of\\_missing\\_persons\\_in\\_sri\\_lanka\\_-\\_living\\_with\\_uncertainty.pdf](http://www.icrc.org/sites/default/files/wysiwyg/Worldwide/asia/sri-lanka/families_of_missing_persons_in_sri_lanka_-_living_with_uncertainty.pdf).
- 8 Human Rights Council, *Report of the OHCHR Investigation on Sri Lanka (OISL)*, UN Doc. A/HRC/30/CRP.2, 16 September 2015, para. 48.
- 9 *Ibid.*
- 10 *Ibid.*, para. 49.
- 11 *Ibid.*, para. 732.



addition to the armed conflict between the Sri Lankan armed forces and the LTTE, the country also saw two other situations of violence involving the leftist rebels Janatha Vimukthi Peramuna, once in 1971 and then again from 1987 to 1989. During these situations of violence, in addition to loss of life,<sup>12</sup> thousands were reported missing.<sup>13</sup>

Enforced disappearances have also been a recurrent phenomenon in Sri Lanka even following the end of the war.<sup>14</sup> The government of Sri Lanka has come under constant pressure from the international community to address the needs of war-affected communities.<sup>15</sup> There is a demand by segments affected by the armed conflict for the “truth”, as evidenced by submissions made to the Consultation Task Force on Reconciliation Mechanisms (CTF) by families of the missing.<sup>16</sup> Submissions received by the CTF also articulate the need to punish perpetrators and to hold them accountable.<sup>17</sup> While it may not be possible to quantify and hierarchize these varying demands, it is important to recognize their prevalence.

## Tracing footsteps towards a process for transitional justice

It would be remiss not to highlight certain notable milestones in the path towards transitional justice in post-war Sri Lanka. Firstly, in the immediate aftermath of the armed conflict, two bodies of similar yet different mandates were constituted to look into the alleged violations during the conflict. The Lessons Learned and Reconciliation Commission appointed in 2010 by the then president, Mr Mahinda Rajapaksa, was mandated to investigate the facts and circumstances which led to the failure of the ceasefire agreement made operational in 2002, the lessons that should be learned from those events, and the institutional, administrative and legislative measures which need to be taken in order to prevent any recurrence of such concerns in the future, and to promote further

- 12 “Sanguinary Memories: JVP Insurgence of 1971”, *Daily News*, 5 April 2017, available at: <http://www.dailynews.lk/2017/04/05/features/112482/sanguinary-memories-jvp-insurgence-1971>. According to this article, 8,000–10,000 deaths have been recorded in the 1971 uprising. See also Ben Christian and Mogdeh Rahimi, “Sri Lanka (JVP) 1987–1990”, 1 October 2015, p. 2, available at: [www.hsfk.de/fileadmin/HSFK/hsfk\\_publicationen/Sri-Lanka-JVP-1987-1990.pdf](http://www.hsfk.de/fileadmin/HSFK/hsfk_publicationen/Sri-Lanka-JVP-1987-1990.pdf). These authors state that “[d]uring the 41 months of war, 2,000 people were killed according to the UCDP [Uppsala Conflict Data Program]. This number is highly contested by the estimates from other sources – the range of these estimates lies between 10,000 and more than 60,000.”
- 13 Asian Federation Against Involuntary Disappearances, “Sri Lanka: The Phenomenon of Disappearances”, 1 January 2005, available at: [www.afad-online.org/resources/books/healing-wounds-mending-scars/sri-lanka-the-phenomenon-of-disappearances](http://www.afad-online.org/resources/books/healing-wounds-mending-scars/sri-lanka-the-phenomenon-of-disappearances). “About seventeen thousand (17,000) persons disappeared during this period of 1971. Non-governmental organizations claim that over sixty thousand (60,000) persons disappeared between 1987 and 1991.”
- 14 Human Rights Watch, “Sri Lanka: No Progress in Investigating Journalist’s Disappearance”, 24 January 2011, available at: [www.hrw.org/news/2011/01/24/sri-lanka-no-progress-investigating-journalists-disappearance](http://www.hrw.org/news/2011/01/24/sri-lanka-no-progress-investigating-journalists-disappearance).
- 15 UN News Center, “UN Officials Outraged at Accounts of Sri Lanka War Crimes, Stress Need for Accountability”, 17 September 2015.
- 16 CTF, *Final Report: Consultation Task Force on Reconciliation Mechanisms*, Vol. 1, 17 November 2016, p. xiii.
- 17 *Ibid.*, p. xvi.

national unity and reconciliation among all communities.<sup>18</sup> The Commission submitted its report to the president on 15 November 2011. On the other hand, the Panel of Experts appointed by the United Nations (UN) Secretary-General to advise the Secretary-General on the issue of accountability with regard to any alleged violations of international human rights and international humanitarian law (IHL) during the final stages of the Sri Lankan Civil War produced a 2011 report finding credible allegations which, if proven, indicated that war crimes and crimes against humanity were committed by the Sri Lankan military and by the LTTE.<sup>19</sup> These efforts, irrespective of the extent of their success, were important to signal that inaction was not an appropriate response in the immediate aftermath of the conflict.

In its Resolution A/HRC/25/1, adopted in March 2014, on “Promoting Reconciliation, Accountability and Human Rights in Sri Lanka”, the UN Human Rights Council requested the UN High Commissioner for Human Rights to

undertake a comprehensive investigation into alleged serious violations and abuses of human rights and related crimes by both parties in Sri Lanka during the period covered by the Lessons Learnt and Reconciliation Commission, and to establish the facts and circumstances of such alleged violations and of the crimes perpetrated with a view to avoiding impunity and ensuring accountability, with assistance from relevant experts and special procedures mandate holders.<sup>20</sup>

The mandate of the UN Office of the High Commissioner for Human Rights (OHCHR) Investigation on Sri Lanka, which was more extensive than that of the Panel of Experts, required the OHCHR to undertake investigations into alleged serious violations and abuses of human rights and related crimes by both parties to the conflict. The request for a comprehensive investigation followed increasing international and national concerns about the absence of a credible national process of accountability, including for allegations of war crimes and crimes against humanity allegedly committed towards the end of the conflict in 2009 by both the government of Sri Lanka and the LTTE.<sup>21</sup> The report concluded that, *inter alia*, egregious violations occurred on a large scale during the last phase of the armed conflict, and noted the persistence of serious human rights violations, abuses which include extensive and endemic patterns of extrajudicial killings, enforced disappearances, abductions, unlawful arrests and arbitrary detention, torture and sexual violence.<sup>22</sup> The report was instrumental in consolidating, locally and internationally, a movement towards recognizing the necessity of comprehensive transitional justice mechanisms in Sri Lanka.

18 *Report of the Commission of Inquiry on Lessons Learnt and Reconciliation*, November 2011, p. 1.

19 *Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, p. 1.

20 Human Rights Council, Res. A/HRC/25/1, “Promoting Reconciliation, Accountability and Human Rights in Sri Lanka”, March 2014, para. 10 (b).

21 Human Rights Council, above note 8, p. 5.

22 *Ibid.*, para. 1269.

Following the aforementioned events, Resolution 30/1 on “Promoting Reconciliation, Accountability and Human Rights in Sri Lanka” was adopted without a vote in October 2015 by the UN Human Rights Council.<sup>23</sup> The resolution was co-sponsored by the newly elected government of Sri Lanka. At the Universal Periodic Review of 2017, the Sri Lankan delegation reaffirmed its commitment to implementing Resolution 30/1.<sup>24</sup> The resolution welcomed a comprehensive approach to dealing with the past, incorporating the full range of judicial and non-judicial measures.<sup>25</sup> In this regard, it also welcomed the proposal by the government to establish a Commission for Truth, Justice, Reconciliation and Non-Recurrence, an Office on Missing Persons (OMP) and an Office for Reparations. It further welcomed the government’s willingness to conduct trials and punish those most responsible for the full range of crimes under the general principles of law recognized by the community of nations relevant to violations and abuses of human rights and violations of international humanitarian law, in a manner consistent with its international obligations.<sup>26</sup> Likewise, Sri Lanka has taken several measures to ensure the implementation of its obligations under this resolution. Of such measures, those of the most relevance for this paper are the establishment of the OMP,<sup>27</sup> a step which has been complemented by the passing of the law criminalizing enforced disappearances;<sup>28</sup> enacting legislation to enable families to apply for Certificates of Absence;<sup>29</sup> establishing an authority to provide protection to victims and witnesses;<sup>30</sup> and the presenting before Parliament of a bill to set up an Office for Reparations in July 2018.<sup>31</sup> Following the enactment of the Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act (OMP Act) in August 2016,<sup>32</sup> and its Amendment in September 2017,<sup>33</sup> the seven OMP commissioners were appointed by the president of Sri Lanka in February 2018.<sup>34</sup> Since then the OMP has been engaged in inquiries on specific cases, supporting the ongoing excavation and exhumation of a mass grave in Mannar, consolidating existing records of missing

23 Human Rights Council, Res. A/HRC/RES/30/1, “Promoting Reconciliation, Accountability and Human Rights in Sri Lanka”, 14 October 2015.

24 Sanja de Silva Jayathileke, “Sri Lanka Reaffirms ‘Very Firm Commitment’ To Resolution 30/1 At UPR In Geneva”, *Colombo Telegraph*, 17 November 2017, available at: [www.colombotelegraph.com/index.php/sri-lanka-reaffirms-very-firm-commitment-to-resolution-301-at-upr-in-geneva/](http://www.colombotelegraph.com/index.php/sri-lanka-reaffirms-very-firm-commitment-to-resolution-301-at-upr-in-geneva/).

25 Res. A/HRC/RES/30/1, above note 23, p. 2.

26 *Ibid.*, para. 7.

27 *Gazette of the Democratic Socialist Republic of Sri Lanka (Extraordinary)*, No. 2036/21, 12 September 2017, available at: [www.documents.gov.lk/files/egz/2017/9/2036-21\\_E.pdf](http://www.documents.gov.lk/files/egz/2017/9/2036-21_E.pdf).

28 Sri Lanka, International Convention for the Protection of All Persons from Enforced Disappearance Act, No. 5 of 2018.

29 Sri Lanka, Registration of Deaths (Temporary Provisions) (Amendment) Act, No. 16 of 2016.

30 Sri Lanka, Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015.

31 Office of Reparations Bill, *Gazette of the Democratic Socialist Republic of Sri Lanka*, Part II of 22 June 2018 (Supplement) (issued on 25 June 2018).

32 Sri Lanka, Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No. 14 of 2016.

33 Sri Lanka, Office on Missing Persons (Establishment, Administration and Discharge of Functions) (Amendment) Act, No. 9 of 2017.

34 “President Appoints OMP Commissioners”, *News.lk*, 1 March 2018, available at: [www.news.lk/news/political-current-affairs/item/19662-president-appoints-omp-commissioners](http://www.news.lk/news/political-current-affairs/item/19662-president-appoints-omp-commissioners).

persons, and preparing recommendations and clarifications on legal issues affecting victims and families.<sup>35</sup>

## The ICRC in post-conflict Sri Lanka

As part of its activities in Sri Lanka following the end of the conflict, the International Committee of the Red Cross (ICRC) has been particularly interested in ensuring that the families of missing persons know the fate and whereabouts of their loved ones. To this end, the ICRC, between October 2014 and November 2015, conducted an island-wide assessment during which it met 395 families of missing persons, including those of missing security forces and police personnel, along with the authorities and organizations providing assistance to these victims. The findings of the Families' Needs Assessment highlight the need of the families to know the fate and whereabouts of their missing loved ones, as well as circumstantial information related to their disappearance.<sup>36</sup> Additionally, it finds that the families have emotional, economic, legal and administrative needs,<sup>37</sup> as well as needs relating to acknowledgement and justice.<sup>38</sup> Accordingly, the ICRC shared comparative best practice with the government of Sri Lanka in the process of drafting the OMP Act. Further to the appointment of the commissioners of the OMP, the ICRC has been providing technical support to the OMP in multiple disciplines in order to assist the Office in its functions.

The ICRC's involvement with the OMP has not been received positively by all segments of Sri Lanka's transitional justice process. The fact that the ICRC's institutional position supports a solely humanitarian mandate for mechanisms to search for the missing has been interpreted to mean that the ICRC does not support criminal investigations into serious violations of IHL committed during armed conflict. To this effect a false dichotomy has been created, painting humanitarian and accountability measures as being mutually exclusive in mechanisms such as the OMP.<sup>39</sup> Furthermore, segments of society have expressed their concern about information-sharing by the ICRC with the OMP with a view to facilitating the search for missing persons. These concerns stem from the fact

35 OMP, *Interim Report*, August 2018, p. 3.

36 ICRC, above note 7, p. 15.

37 *Ibid.*, p. 24: "Families referred to the following legal and/or administrative hurdles to address their day-to-day needs, because they were dependent on obtaining a certificate of death (CoD): inability to access/close the bank account of the missing person; difficulties in making insurance claims entered into by the missing person; inability to release property pawned by the missing person; difficulties to register children in school; inability to claim the monthly salary of the missing person which was deposited by the employer; inability to reclaim wrongful occupation of land owned by the missing person; difficulty/inability to make transactions with movable or immovable property owned by the missing person."

38 *Ibid.*

39 Isabelle Lassée, "Criminal" and "Humanitarian" Approaches to Investigations into the Fate of Missing Persons: A False Dichotomy, South Asian Center for Legal Studies, May 2016, p. 2. Lassée acknowledges that investigations into the fate of missing persons may stem from different approaches, either humanitarian or criminal, which are not mutually exclusive. However, she highlights the risk of this dialogue being falsely dichotomized, thereby presenting victims with an artificial and unfair choice between truth and justice. She therefore argues that pursuing both concurrently through an integrated approach would help further both truth-seeking and criminal prosecutions.

that such information can only be shared by the ICRC on the basis of a guarantee that it will not be used in criminal investigations or prosecutions.<sup>40</sup> While such concerns may still exist in a non-politicized context, the antagonism between the ICRC’s confidentiality policy and the pursuit of justice can be expected to be heightened in a context where such terms as “truth” and “justice” can often become politicized. Various actors involved in the issue of the missing are heterogeneous and represent different points of view, which may at times be political, and/or may not be representative of the views of the families of the missing. This politicization of victims’ needs has also affected the discourse on the missing in Sri Lanka. The debate on whether the OMP’s functions are seen as humanitarian or accountability-focused cannot be understood outside of this context.

In light of the above, this article intends to analyze where the OMP stands in relation to varying approaches to mechanisms for searching for the missing. In particular, the article examines the argument that there may be tensions between a humanitarian and an accountability-based mandate and the position of the ICRC that these two approaches are complementary in nature. It goes on to argue that the OMP’s mandate is *primarily* humanitarian rather than *exclusively* humanitarian and emphasizes that it is important to preserve this humanitarian character of the OMP, with the objective of ensuring that the victims’ rights, including the right to know, are at the centre of transitional justice processes.

## Different approaches to setting up mechanisms to search for the missing

A uniform approach has not been developed by States or other actors (such as the UN, ICRC and International Commission on Missing Persons) to address the issue of the missing. In fact, the issue, which is often generally labelled as dealing with “missing persons”, can contain further subcategories such as the “disappeared” or “enforced disappearances”, “surrendees”, and “missing in action” as its constitutive elements.<sup>41</sup> Unlike in certain languages – such as French and Spanish, where the terms *disparus* and *desaparecidos* encompass both the missing and the disappeared as one and the same – in Sri Lanka there is a cultural and political difference between the terms “missing” and “disappeared”. Disappearances, in this context, are associated with enforced disappearances and with criminal proceedings that seek to attribute accountability for a criminal act. The term “missing”, on the other hand, does not imply an attribution of guilt for a person’s absence.<sup>42</sup> Accordingly, certain parties may perceive that the term

40 Niran Anketell, *Commentary on the Bill Titled Office on Missing Persons*, South Asian Center for Legal Studies, June 2016, p. 17.

41 ICRC and Inter-Parliamentary Union, *Missing Persons: A Handbook for Parliamentarians*, 2009 (Handbook for Parliamentarians), pp. 9–10.

42 CTF, above note 1, p. 17: “‘My child didn’t suddenly grow wings or fall out of someone’s pocket to go missing, they were taken’ – Mother at Kandavalai public meeting”.

“missing” in the title of the OMP was intended to frame this highly political issue in such a manner as to dilute the criminal acts due to which certain persons may have gone missing. For example, submissions to the CTF emphasize the need to explicitly acknowledge the “disappeared” in the title of the Office.<sup>43</sup>

The discussions surrounding the OMP’s functions have been influenced by these political and contextual factors and should not be disregarded. However, such debates, which may or may not necessarily reflect the views of the victims themselves, should not also stand in the way of and jeopardize the actual work that the OMP is mandated to perform. Contrary to concerns by certain segments of society, the OMP does not ignore the significance of the issue of enforced disappearances in the overarching issue of the missing. As per the OMP Act, the definition of a missing person includes enforced disappearance as defined in the International Convention on the Protection of All Persons from Enforced Disappearance (ICPPED). It is significant that the Act makes direct reference to the ICPPED definition as opposed to a definition that may be provided in a domestic legislation.<sup>44</sup>

The definition of enforced disappearance does not cover all missing persons. Rather, it covers only

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>45</sup>

Accordingly, this is a narrower group of people as compared to the missing as identified in IHL, which is in turn narrower than the definition of missing persons used by the ICRC. As per IHL, as soon as circumstances permit, and at the latest from the end of active hostilities, a party to the conflict must take all feasible measures to account for persons who have been reported missing as a result of armed conflict and must provide their family members with any

43 *Ibid.*, p. 18: among the submissions made, one view calls for the replacement of “missing persons” with “involuntary or enforced disappearances”, while another calls for the addition of “disappeared” or “involuntary disappearances”. However, for family members of those who surrendered to the army during the final phase of the war, neither “missing” nor “disappeared” captures their experience, and therefore they also call for the inclusion of “surrendees”.

44 Section 27 of the OMP Act, above note 32, defines a “missing person” as “a person whose fate or whereabouts are reasonably believed to be unknown and which person is reasonably believed to be unaccounted for and missing –  
(i) in the course of, consequent to, or in connection with the conflict which took place in the Northern and Eastern Provinces or its aftermath, or is a member of the armed forces or police who is identified as “missing in action”; or  
(ii) in connection with political unrest or civil disturbances; or  
(iii) as an enforced disappearance as defined in the ‘International Convention on Protection of All Persons from Enforced Disappearances’.”

45 ICPPED, Art. 2.

information it has on their fate.<sup>46</sup> The term “missing” can be found in Article 32 of Additional Protocol I to the Geneva Conventions (AP I), which recognizes the right of families to know the fate of their relatives, as a guiding principle that shall prompt States, parties to armed conflicts and humanitarian organizations in the implementation of the obligations of parties to the conflict relating to missing and dead persons.<sup>47</sup>

There is, however, no definition of missing persons in IHL. Despite this, the term is generally understood as including all persons, whether civilian or military, whose whereabouts are unknown to their relatives and who, on the basis of reliable information, have been reported missing in connection with an armed conflict.<sup>48</sup> By “missing persons”, the ICRC refers to individuals whose whereabouts are unknown to their families and/or who, on the basis of reliable information, have been reported missing as a result of an armed conflict – international or non-international – or of internal violence not amounting to armed conflict, internal disturbances or any other situation that might require a neutral and independent intermediary.<sup>49</sup> Likewise, the definition of a family member or relative of a missing person will in principle be found in domestic law, but must be interpreted in a broad sense in line with international human rights law and must include at least close kin such as children born in and out of wedlock; adopted children and step-children; life partners, whether by marriage or not; parents, including step-mothers, step-fathers, mothers-in-law, fathers-in-law and adoptive or foster parents; brothers and sisters, whether born of the same parents, of different parents, or adopted; and, where applicable, members of the extended family or community as provided by local custom.<sup>50</sup> Given that IHL does not make a distinction based on the cause due to which a person is missing, such provisions would capture persons who go missing due to criminal activities, including as a result of enforced disappearances.<sup>51</sup> According to the Customary Law Study conducted by the ICRC, the obligation to account for missing persons is consistent with the prohibition against enforced disappearances.<sup>52</sup>

Given that activities related to missing and dead persons must be prompted mainly by the right of families to know the fate of their relatives, as provided in

46 See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 117, available at: [www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf](http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf). For more information on the legal framework applicable to missing persons and their families, see: ICRC, *Missing Persons and Their Families*, Factsheet, 31 December 2015, available at: [www.icrc.org/en/document/missing-persons-and-their-families-factsheet](http://www.icrc.org/en/document/missing-persons-and-their-families-factsheet).

47 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977.

48 Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction*, ICRC, Geneva, 2016, p. 156.

49 Handbook for Parliamentarians, above note 41, p. 9; definition based on ICRC, *The Missing and Their Families: Documents of Reference*, Geneva, 2004, p. 6.

50 Handbook for Parliamentarians, above note 41; note that section 27 of the OMP Act, above note 32, refers to all these groups of persons as constituting “relative[s] of a missing person”.

51 ICRC Customary Law Study, above note 46, Rule 98.

52 *Ibid.*, Rule 117. See also the explanation to Rule 11, stating that the obligation to account for missing persons is consistent with the prohibition against enforced disappearances.

Article 32 of AP I, addressing the humanitarian needs of the families of the missing is fundamental. The present article terms this the “humanitarian approach”. Juxtaposed to this is what can be termed the “accountability approach”, which may integrate the search for missing persons into a criminal investigation or delve exclusively into the issue of the “disappeared” or “enforced disappearances”<sup>53</sup> as set out in human rights law.<sup>54</sup> However, it is important to note that international human rights law does not exclusively support the accountability perspective, as it also looks at disappearances from a transitional justice perspective, and refers to the right of families to know. In a post-conflict context, a State may implement both humanitarian and accountability approaches concomitantly, while some States have opted for one approach over another. For example, in 2003 a Working Group on Missing Persons was set up in Kosovo, with a purely humanitarian mandate; this organization was established under UN auspices and chaired by the ICRC to clarify the fate and whereabouts of people unaccounted for in connection with events in Kosovo, and to inform their families accordingly.<sup>55</sup> On the other hand, the UN Working Group on Enforced or Involuntary Disappearances’ (WGEID) mission to Kosovo was concerned with cases of enforced disappearance that had not been properly investigated by the UN Mission in Kosovo during its full-range administration there.<sup>56</sup>

An exclusively humanitarian approach may not always be at ease with certain international obligations, in particular those related to the investigation and prosecution of international crimes. The Committee on Missing Persons (CMP) in Cyprus, for example, does not attempt to attribute responsibility for the deaths of any missing persons or make findings as to the cause of such deaths, and merely draws up lists of missing persons of both communities, specifying whether they are alive or dead, and in the latter case noting the approximate time of their deaths.<sup>57</sup> The CMP also only works to determine the identity of a person when human remains are found. In the *Cyprus v. Turkey* case, the European Court of Human Rights (ECtHR) stated that although the CMP’s procedures are undoubtedly useful for the humanitarian purpose for which they were established, they are not of themselves sufficient to meet the standard of an effective investigation required by Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, especially in view

53 National Commission on the Disappearance of Persons (CONADEP), *Nunca Más – Never Again*, 1984, Prologue: “Thus, in the name of national security, thousands upon thousands of human beings, usually young adults or even adolescents, fell into the sinister, ghostly category of the *desaparecidos*, a word (sad privilege for Argentina) frequently left in Spanish by the world’s press.”

54 In 1980 the UN Commission on Human Rights established the United Nations Working Group on Enforced or Involuntary Disappearances (WGEID) through Resolution 20 (XXXVI) of 29 February 1980. It was the first *ad hoc* mechanism set up by the United Nations with the humanitarian mandate to “assist the relatives of the disappeared”.

55 Manfred Nowak, “Disappearances in Bosnia and Herzegovina”, in Michael O’Flaherty and Gregory Givold, *Post-War Protection of Human Rights in Bosnia and Herzegovina*, Martinus Nijhoff, Leiden, 1998, pp. 107–122.

56 WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances: Mission to Serbia, including Kosovo*, UN Doc. A/HRC/30/38/Add.1, 2015, para. 69.

57 CMP, Terms of Reference and Mandate, Cyprus, 1981, section 13.



of the narrow scope of that body's investigations.<sup>58</sup> However, in the same case, in a partly dissenting opinion, Judge Fuad stated that the CMP's procedures are in themselves sufficient to meet the standard of an effective investigation required by Article 2, given that the cooperation provided by both sides to the conflict enables the creation of an effective investigating team.<sup>59</sup> This case demonstrates the divergence of opinion and the lack of clarity that exists with regard to the obligations and standards that the mechanisms set up by States to deal with the missing are required to respect.

### Where does the ICRC stand in the humanitarian and accountability spectrum?

In fulfilling its role as the guardian of IHL, the ICRC advocates for the respect and ensuring of respect of the Geneva Conventions by all States Parties.<sup>60</sup> This includes the obligation of States to ensure criminal prosecution of war crimes. To this effect, the ICRC has advocated for domestic legislation to implement the Geneva Conventions. Moreover, as per the ICRC's position on customary IHL, States are bound by customary international law to criminally prosecute all war crimes, whether in international or non-international armed conflicts. The ICRC also provides trainings on IHL for prosecutors and the judiciary in order to ensure the effective application of IHL if and when the violations are redressed through judicial proceedings. For example, in Sri Lanka the ICRC has consistently advocated for the implementation of an effective Geneva Conventions Act.<sup>61</sup> However, although an important part of its work is to call on States to comply with their obligations related to the criminal repression of war crimes, the ICRC does not participate in or associate itself with any process charged with looking into abuses and violations of domestic or international law that may have occurred in situations of armed conflict or other situations of violence, nor does it cooperate with any such processes. This is a manifestation of the ICRC's strict observance of a confidential approach, which is essential to enable it to fulfil its internationally recognized humanitarian mandate in full conformity with its Fundamental Principles.<sup>62</sup> Indeed, should the ICRC breach or be seen as breaching its commitment to confidentiality, it would risk undermining the perception that the organization is a neutral, independent and impartial

58 ECtHR, *Cyprus v. Turkey*, Appl. No. 25781/94, 2001, para. 135.

59 *Ibid.*, Dissenting Opinion of Judge Fuad, para 22.

60 Article 1 common to the four Geneva Conventions of 1949.

61 In Sri Lanka, the Geneva Conventions Act, which was enacted in 2006, has not yet been operationalized. Furthermore, the Act as it stands now does not criminalize violations of common Article 3.

62 For more information, see "Memorandum: The ICRC's Privilege of Non-Disclosure of Confidential Information", *International Review of the Red Cross*, Vol. 97, No. 897/898, 2016, available at: [www.icrc.org/en/download/file/19024/irc\\_97\\_1-2-18.pdf](http://www.icrc.org/en/download/file/19024/irc_97_1-2-18.pdf); Jérémie Labbé and Pascal Daudin, "Applying the Humanitarian Principles: Reflecting on the Experience of the International Committee of the Red Cross", *International Review of the Red Cross*, Vol. 97, No. 897/898, 2016, available at: [www.icrc.org/en/download/file/19006/irc\\_97\\_1-2-8.pdf](http://www.icrc.org/en/download/file/19006/irc_97_1-2-8.pdf); Fiona Terry, "The International Committee of the Red Cross in Afghanistan: Reasserting the Neutrality of Humanitarian Action", *International Review of the Red Cross*, Vol. 93, No. 881, 2011, available at: [www.icrc.org/en/download/file/14050/irc-881-terry.pdf](http://www.icrc.org/en/download/file/14050/irc-881-terry.pdf).

humanitarian actor and, consequently, may risk losing the trust necessary to open and maintain an effective dialogue with authorities and parties to armed conflict, to secure access to conflict zones, and to ensure the security of its staff and beneficiaries, who include families of the missing. In recognition of the ICRC's unique operational needs and the risks associated with the use of information gathered in the framework of its humanitarian activities in judicial proceedings, the ICRC enjoys a privilege of non-disclosure of its confidential obligations under both international and domestic law. This privilege protects the ICRC's confidential information from being used, and ICRC staff from being compelled to testify, in legal proceedings.

At the international level, the privilege of non-disclosure was first explicitly recognized by a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), which in its decision of 27 July 1999 in the case of *The Prosecutor v. Simić et al.* ruled that as a matter of customary international law, the ICRC enjoys an absolute privilege to withhold information related to its activities.<sup>63</sup> The ICTY decision concludes that the ICRC's mandate to protect victims of armed conflict under the Geneva Conventions, the Additional Protocols and the Statutes of the International Red Cross and Red Crescent Movement represents a "powerful public interest, the fulfilment of which depends on the willingness of warring parties to grant the ICRC access to the victims of such conflict. Such willingness, in turn, depends upon the ICRC's adherence to its principles of impartiality and neutrality, and rule of confidentiality".<sup>64</sup> The ICRC's privilege of non-disclosure has since been reaffirmed by the ICTY Appeals Chamber,<sup>65</sup> by the International Criminal Tribunal for Rwanda (ICTR)<sup>66</sup> and, indirectly, by the Special Court for Sierra Leone (SCSL),<sup>67</sup> the Special Tribunal for Lebanon (STL),<sup>68</sup> the Mechanism for International Criminal Tribunals (MICT),<sup>69</sup> and the Kosovo Specialist Chambers and Specialist Prosecutor's Office.<sup>70</sup>

At the domestic level, the ICRC has been granted privileges and immunities that are necessary to fulfil its functions, including protection of ICRC information, in more than 100 countries to date, be it through bilateral status agreements or through primary legislation. In Sri Lanka, the ICRC's confidential information is protected from disclosure, even when it is in the hands of the government, by virtue of the status agreement between the government of the Democratic

63 ICTY, *The Prosecutor v. Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović, Simo Zarić*, Case No. IT 95-9. PT, Decision (Trial Chamber), 27 July 1999, para. 73.

64 *Ibid.*

65 ICTY, *Prosecutor v. Brdjanin*, Case No. IT-99-36, Decision on Interlocutory Appeal (Appeals Chamber), 11 December 2002, para. 32.

66 ICTR, *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55, Reasons for the Chamber's Decision on the Accused's Motion to Exclude Witness TQ, 15 July 2005, paras 14–16.

67 Statute of the Special Court for Sierra Leone, 16 January 2002 (entered into force 12 April 2002), Rule 20, para. 3, providing that the SCSL follows the jurisprudence of the ICTY and the ICTR.

68 STL, Rules of Procedure and Evidence, STL-BD-2009-01-Rev.6-Corr.1, 20 March 2009, Rule 164.

69 MICT, Rules of Procedure and Evidence, MICT/1, 8 June 2012, Rule 10.

70 Rules of Procedure and Evidence before the Kosovo Specialist Chambers including Rules of Procedure for the Specialist Chamber of the Constitutional Court, 25 Aug 2017, Rule 111, paras 4, 6.

Socialist Republic of Sri Lanka and the ICRC relating to the granting of immunities, privileges and facilities to the ICRC and its delegation in Sri Lanka of 16 July 1990, and its 2016 Addendum.<sup>71</sup>

Yet, it is false to assume that the ICRC's confidential approach or its privilege of non-disclosure would be exercised in a manner that prevents families of the missing from seeking justice. Accordingly, the ICRC's involvement in a transitional justice process must be analyzed bearing in mind its protection policy, which emphasizes the imperative to ensure that its actions do not have adverse impacts on, or create new risks for, individuals or populations.<sup>72</sup> This principle requires, firstly, that the form of humanitarian assistance and the environment in which it is provided do not further expose people to physical hazards, violence or other rights abuses. The ICRC in Sri Lanka is not only careful to ensure that it does not expose people to such risks and violations through its actions, but it also promotes a system for victim and witness protection in transitional justice processes that would minimize such violations.

Secondly, such assistance and protection efforts should not undermine the affected population's capacity for self-protection. Accordingly, the ICRC informs beneficiaries about available mechanisms to seek justice and, in that way, avoids undermining their right to do so. Finally, humanitarian agencies should manage sensitive information in a way that does not jeopardize the security of the informants or those who may be identifiable from the information.<sup>73</sup> In that light, recognizing the obligation of the parties to the conflict to investigate and, if appropriate, prosecute persons suspected of committing war crimes as well as the obligation of public authorities under international human rights law to carry out an effective investigation into alleged violations, the ICRC's humanitarian action does not hinder the beneficiaries' ability to seek justice through criminal prosecutions, civil reparations or administrative means. Nevertheless, the fact remains that the ICRC itself would not take part in or associate itself with such procedures. Indeed, if the ICRC was to proactively share its confidential information with criminal prosecutors, there is a distinct possibility that such information may be used to advance the case in certain situations. However, as was highlighted in the *Simić* judgment, such possible benefits must be weighed against the adverse implications on beneficiaries, in a more global and long-term

71 *Gazette of the Democratic Socialist Republic of Sri Lanka (Extraordinary)*, No. 1987/23, 5 October 2016, p. 14A.

72 "This 'do no harm' imperative is fleshed out in the first protection principle of the Humanitarian Charter and Minimum Standards in Humanitarian Response, emphasizing the need to "avoid exposing people to further harm as a result of your actions".' Kristin Bergtora Sandvik, Katja Lindskov Jacobsen and Sean Martin McDonald, "Do No Harm: A Taxonomy of the Challenges of Humanitarian Experimentation", *International Review of the Red Cross*, Vol. 99, No. 904, 2018, p. 323, available at: [www.icrc.org/en/download/file/72619/irrc\\_99\\_17.pdf](http://www.icrc.org/en/download/file/72619/irrc_99_17.pdf); "ICRC Protection Policy", *International Review of the Red Cross*, Vol. 90 No. 871, 2008, available at: [www.icrc.org/en/download/file/20806/irrc-871-icrc-protection-policy.pdf](http://www.icrc.org/en/download/file/20806/irrc-871-icrc-protection-policy.pdf).

73 K. B. Sandvik, K. L. Jacobsen and S. M. McDonald, above note 72, p. 323. As regards personal data, the ICRC applies its own Rules on Personal Data Protection, available at: [www.icrc.org/en/publication/4261-icrc-rules-on-personal-data-protection](http://www.icrc.org/en/publication/4261-icrc-rules-on-personal-data-protection). It also refers in its work to the *Handbook on Data Protection in Humanitarian Action*, available at: [www.icrc.org/en/publication/handbook-data-protection-humanitarian-action](http://www.icrc.org/en/publication/handbook-data-protection-humanitarian-action).

context, of the ICRC not being allowed to carry out its humanitarian mandate.<sup>74</sup> In a post-conflict context, from a beneficiary's point of view, this may be a difficult premise to fully appreciate. Beneficiaries tend to more easily understand operational implications, and therefore the importance of the confidential approach, when the conflict is still ongoing.

In light of this, the ICRC's involvement in the drafting of the OMP Act was observed with scepticism by certain parties,<sup>75</sup> who were concerned that the ICRC's privilege of non-disclosure would be extrapolated to the mandate of the OMP by making the OMP completely alienated from criminal prosecutions. Likewise, some have seen the OMP as having a purely humanitarian mandate that has the capacity to hinder families of the missing from gaining access to criminal prosecutions. The following sections of this article will aim to clarify the nature of the mandate of the OMP as going beyond purely catering to the identification of missing persons. However, the article will reiterate and provide reasons to justify the importance of the OMP functioning with adequate independence from other transitional justice mechanisms as well as from judicial proceedings in general, and exercising a primarily humanitarian function.

## **The OMP's mandate: Purely humanitarian or primarily humanitarian?**

### **A broad scope and a humanitarian mandate**

When one delves into the mandate of the OMP, it can be deduced that its purpose and powers go beyond a purely humanitarian mechanism which has no links whatsoever to the justice system. On the contrary, the OMP's mandate is a broad one, which considers the multifaceted needs of families of the missing and which adopts a forward-thinking attitude in dealing with the issue of the missing. Accordingly, the OMP has the power to make recommendations to the relevant authorities, relevant to its mandate, including recommendations relating to the prevention of future disappearances, based on patterns identified in the course of its work.<sup>76</sup> This is vital in light of the fact that the OMP does not have a time-bound mandate. It is also empowered to cooperate with various government agencies in order to ensure the effective fulfilment of its mandate.

As per the OMP Act, the Office is mandated to search for and trace missing persons and identify appropriate mechanisms for the same and to clarify the

74 Laura M. Olson and Toni Pfanner, "Cooperation between Truth Commissions and the International Committee of the Red Cross", *International Review of the Red Cross*, Vol. 88, No. 862, 2006. See, for instance, on p. 365: "Providing assistance in the short-term must be weighed against medium- and long-term needs. Action taken in one context must also be assessed in the light of its impact on ICRC operations worldwide." Other articles in that issue of the *Review* may also be of interest, available at: [www.icrc.org/en/international-review/truth-and-reconciliation-commissions](http://www.icrc.org/en/international-review/truth-and-reconciliation-commissions).

75 N. Anketell, above note 40, p. 17; I. Lassée, above note 39.

76 OMP Act, above note 32, section 10(1)(b).

circumstances in which such persons went missing.<sup>77</sup> Initially, this marks a departure from mechanisms considered to be exclusively humanitarian such as the CMP in Cyprus, the mandate of which does not warrant investigations into the circumstances in which a person went missing so as to establish a cause of death but purely to identify the status of a missing person as dead or alive.<sup>78</sup> In order to facilitate the process of searching for missing persons, the OMP is also vested with a mandate to collate data related to missing persons obtained by processes presently being carried out, or which were previously carried out, by other institutions, organizations, government departments, commissions of inquiry and Special Presidential Commissions of Inquiry, and to centralize all available data within the database established under the OMP Act.<sup>79</sup> Such a database is vital in order to establish a uniform narrative on the issue of the missing in Sri Lanka. Currently, there is no consensus as to the numbers of the missing, which leads not only to disagreements about the gravity and scale of the problem but also to fragmented and politicized narratives. Moreover, the consolidation of the work of previous commissions of inquiry means that such work does not need to be duplicated. The Interim Report of the CTF specifically notes that families of the missing have conveyed their exhaustion with having had to approach multiple mechanisms but having received no answers;<sup>80</sup> consolidation of work would mean that the victims do not have to be subjected to filing complaints and going through the harrowing experience of providing evidence again and again, leading to the trauma of revictimization.

The OMP is also mandated to protect the rights and interests of missing persons and their relatives, as provided for in the OMP Act.<sup>81</sup> One such right protected under the Act is their right to directly refer matters to relevant authorities, including their right to report serious crimes to the relevant law enforcement or prosecuting authority, and to be informed of the availability of any mechanism through which they may make claims for administrative relief.<sup>82</sup> The international human rights law obligation to protect requires States to protect individuals and groups against human rights abuses and entails a positive duty to adopt a legal framework to identify, prevent and mitigate the risks of violations of rights, to avoid such rights being abused, and to account for any negative impacts.<sup>83</sup> Accordingly, this mandates the OMP to go beyond a passive tolerance of criminal prosecutions in order to actively help families of missing persons to refer matters to other authorities. Finally, one of the OMP's mandates is to identify avenues of redress to which missing persons and relatives of missing persons are entitled, and to inform the missing person (if found alive) or their

77 *Ibid.*, section 2(a).

78 CMP, Terms of Reference, Establishment of the Committee on Missing Persons in Cyprus, 1981, Art. 11.

79 OMP Act, above note 32, section 10(1)(e).

80 CTF, above note 1, p. 14.

81 OMP Act, above note 32, section 2(c).

82 *Ibid.*, section 13(i).

83 Human Rights Committee, General Comment No. 31, "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", 29 March 2004.

relative of the same.<sup>84</sup> Full and effective redress must take into consideration the human consequences of violations of human rights and humanitarian law and the situation of the victims in the present day.<sup>85</sup> Accordingly, the OMP has the power to provide, or facilitate the provision of, administrative assistance and welfare services – including, where required, psychosocial support – to the relatives of the missing person. Furthermore, it can recommend that the relevant authority grant reparations to missing persons and/or relatives of missing persons, including but not limited to compensation, and/or recommend the provision of other administrative and welfare services, including psychosocial services.<sup>86</sup>

### Drawing the contours of the OMP’s link to criminal prosecutions

In spite of the fact that the OMP has been vested with this broad mandate and powers which go beyond a strict mandate to identify missing persons to the exclusion of all other needs of families of the missing, what has given rise to much controversy is the OMP’s ability to forward cases for prosecution and the extent to which the OMP’s functions overlap with that of a criminal prosecutor or that of a judicial body.<sup>87</sup> Certain families of the disappeared have submitted that the OMP should have punitive powers if its investigations reveal the identity of perpetrators.<sup>88</sup> It must be noted, however, that according to the ICRC’s Family Needs Assessment for Sri Lanka, some families did not express a need for justice.<sup>89</sup>

The OMP Act does not aim to completely divorce the search for missing persons from criminal prosecutions. As per section 12(i) of the Act,

where it appears to the OMP that an offence within the meaning of the Penal Code or any other law, has been committed, that warrants investigation, the OMP may, after consultation with such relatives of the missing person as it deems fit, in due consideration of the best interests of the victims, relatives and society, report the same to the relevant law enforcement or prosecuting authority: such report will provide information relating to the missing person’s civil status (such as the name, age and gender of the missing person), the place(s) or district(s) in which the missing person was last seen and the date thereof:

Provided that where a witness consents, the OMP may also inform the relevant authority, of the details of such witness, in order to enable such relevant authority to secure a statement from such witness to be used in the process of investigation.

84 OMP Act, above note 32, section 10(1)(d).

85 UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted and proclaimed by UNGA Res. 60/147, 16 December 2005.

86 OMP Act, above note 32, section 13(1)(f).

87 K. Rajasingham, “Can OMP Deliver Justice when Sri Lanka’s President Won’t?”, *Journalists for Democracy in Sri Lanka*, 12 June 2018, available at: [www.jdslanka.org/index.php/news-features/human-rights/782-can-omp-deliver-justice-when-sri-lankas-president-wont](http://www.jdslanka.org/index.php/news-features/human-rights/782-can-omp-deliver-justice-when-sri-lankas-president-wont).

88 CTF, above note 1, p. 29.

89 ICRC, above note 7, p. iv.

This provision can be seen as an attempt to compromise the need to facilitate criminal prosecutions while also ensuring that even at this stage, the public interest of doing so and, more importantly, the views of the relatives of the missing person are taken into consideration. It takes cognizance of the fact that the right to a criminal investigation is one that certain families may not wish to exercise for various reasons. This section of the Act has to be read in line with section 13(2), which states that the findings of the OMP shall not give rise to any criminal or civil liability.<sup>90</sup> While these two provisions may seem contradictory at first glance, a closer examination reveals that they indicate that the OMP is neither a purely and exclusively humanitarian body nor an accountability mechanism; rather, it is a mechanism with a primarily humanitarian mandate which facilitates links to prosecutorial mechanisms so as not to hinder the families' ability to exercise their right to a judicial remedy through criminal prosecutions.

Section 13(2) of the OMP Act must be examined while also considering section 12(c)(iii), which states that the OMP has the power to admit any statement or material, whether written or oral, which might be inadmissible in civil or criminal proceedings. This provides an explanation for the fact that findings of the OMP would not give rise to criminal or civil liability. However, the Act also provides for such evidence that cannot be replicated to be accessed through the justice system so that the work of the Office does not render valuable evidence before judicial proceedings useless. Accordingly, the OMP must apply to the appropriate magistrate's court having territorial jurisdiction for an order of court to carry out an excavation and/or exhumation of suspected grave sites, and to act as an observer at such excavation or exhumation, and at other proceedings, pursuant to the same.<sup>91</sup> Furthermore, the OMP is obliged to make an application to the magistrate having territorial jurisdiction for the issuance of a search warrant, to enable police or specified officers of the OMP to search any premises suspected to contain evidence relevant to an investigation being conducted by the OMP, and to examine, make copies of, extract from, seize and retain any object that is deemed necessary for the purposes of any investigation being conducted by the OMP.<sup>92</sup>

These provisions, which require coordination between the justice system and the OMP, can be of concrete practical use. One example of this is the management of human remains in the identification process. In such a process, the dignity, honour, reputation and privacy of the deceased must be respected at all times while also taking into consideration the known religious beliefs and opinions of the deceased and his or her relatives. Importantly, the families should be kept informed of the decisions taken in relation to exhumations and post-mortem examinations, and of the results of any such examinations, while also permitting, to the extent feasible, the presence of the families or of family

90 OMP Act, above note 32, section 13(2).

91 *Ibid.*, section 12(d).

92 *Ibid.*, section 12(g).

representatives when carrying out exhumations.<sup>93</sup> Such concerns are best addressed through a humanitarian body such as the OMP rather than a judicial body, which does not have the expertise or the incentive to attend to such needs. However, the processes of identifying human remains for the families' sake and of investigating the cause of death for the purpose of judicial proceedings are both of equal importance. The analysis of human remains can be vital in the identification process for the humanitarian purposes of the OMP as well as in establishing criminal liability in a potential mechanism for accountability. Currently, the criminal justice system in Sri Lanka is not equipped to collect biological reference samples of families of the missing in order to ensure that a match can be made if and when human remains are found. This is a process that the OMP may have to conduct under its mandate to search for and trace missing persons. However, under the OMP Act, the Office has limited power to perform the function of observer in handling human remains and excavations. Therefore, it would appear that the OMP's mandate would not hinder the justice system from retaining these remains and using them as evidence in a potential criminal prosecution. Accordingly, it is feasible and in fact necessary to have close collaboration and cooperation between the justice system and the OMP in order for each to carry out its functions without hindering those of the other.

For the aforementioned reasons, it can be inferred that the OMP Act has been drafted in a manner that does not proactively hinder criminal prosecutions but which facilitates such judicial investigations and prosecutions while also maintaining its independence from them. In the following section this article will elaborate as to why such independence from criminal proceedings is vital for a mechanism that seeks to search for missing persons.

## **Why should the OMP function as a primarily humanitarian mechanism?**

While, as argued above, the primarily humanitarian functions of the OMP do not hinder possible criminal proceedings, the inverse is not equally true. Writers have examined how extensive overlap between criminal prosecutions and the search for the missing could result in adversely affecting such proceedings and then deprive the victims of control over the process of searching for their relatives.

In their article entitled "The Missing in the Aftermath of War: When Do the Needs of Victims' Families and International War Crimes Tribunals Clash?", Stover and Shigekane examine the tensions that may arise in balancing the humanitarian needs of families of the missing and the evidentiary needs and limitations of international war crimes tribunals in the aftermath of mass

93 ICRC, *The Missing and Their Families: Summary of the Conclusions Arising from Events Held Prior to the International Conference of Governmental and Non-Governmental Experts (19–21 February 2003)*, 2003, p. 31.



killings.<sup>94</sup> They submit that international war crimes tribunals, which are charged with investigating large-scale killings, may lack the resources and/or political will to undertake forensic investigations aimed at identifying all of the dead. In another article, Vasuki Nesiah outlines how reasonably well-functioning judicial mechanisms address, or could address, family needs.<sup>95</sup> She accepts that judicial investigations ensure that the information gathered is focused on the crime and feeds into accountability processes. Moreover, because police and prosecutorial investigators have training and professional experience that have been honed precisely for the purpose of procuring information about crimes, they can be particularly effective in gathering sensitive information. At the same time, however, police and prosecutorial investigations for judicial proceedings can also be unresponsive to the needs of families. In most cases, the launching of a criminal investigation with a view to a trial may depend solely on the prosecutor's decision as to whether to pursue the matter, with little or no input from victims. Investigations are designed to attain the prosecutorial goals of identifying those who can be proven to be legally culpable, but families of the missing may have broader goals. Hostile cross-examination can further exacerbate the injury suffered by victims even in the process of providing accountability. This may be a symptom of a broader problem: the manner in which judicial systems are often alienated from victims and attuned to the needs of the law and legal victory rather than to the needs of victims and their families.

The above sheds light on the fact that while the investigations carried out in criminal proceedings and by mechanisms such as the OMP seem similar at a cursory glance, in practice they differ in terms of their ultimate purpose and objective. Firstly, for the purposes of the OMP it is necessary to maintain a database of all missing persons and to strive to search for them irrespective of whether their absence is related to criminal activity. To this extent, the collection of evidence, whether it be ante-mortem data, biological reference samples or post-mortem data, is geared towards identification of a missing person for the benefit of their families or in the interest of a missing person being found. On the other hand, a criminal investigation focuses on the crime and is directed in a manner which facilitates the establishing of the elements of a crime. Accordingly, it is a serious concern that making a mechanism set up to search for the missing dependent on criminal investigations, or allowing such a search to be instrumentalized for the purposes of criminal investigations, can adversely affect the control and agency that families would have otherwise had over the process of identifying their loved ones and could require them to sacrifice their right to know the fate and whereabouts of their loved ones for more accountability-oriented interests of justice.

The Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence has addressed the issue of complementarity between

94 Eric Stover and Rachel Shigekeane, "The Missing in the Aftermath of War: When Do the Needs of Victims' Families and International War Crimes Tribunals Clash?", *International Review of the Red Cross*, Vol. 84, No. 848, 2002.

95 Vasuki Nesiah, "Overcoming Tensions between Family and Judicial Procedures", *International Review of the Red Cross*, Vol. 84, No. 848, 2002.

humanitarian and judicial aims and has insisted that “efforts are made to satisfy both humanitarian and judicial aims with regard to the missing”.<sup>96</sup> For him “it is important to be clear about the diversity of the ends to be reconciled”.<sup>97</sup> He has further recommended focusing in the early stages of truth-seeking processes “on a type of case that is important also in the post-conflict settings in terms of both its prevalence and its consequences – namely, those missing in general, and those who have been forcibly disappeared”.<sup>98</sup> UN Resolution 30/1 on Sri Lanka was reflective of this broad and inclusive approach to transitional justice. It pushes the post-conflict society to consider and actively address varying needs of those affected by the conflict, which may include humanitarian concerns and economic needs as well as a demand for accountability. In this sense, it is important as well as prudent not to prioritize one element of transitional justice over another or to fashion implementing mechanisms which allow one mechanism or one aspect of transitional justice to dominate the others. This will enable those affected by the conflict to choose from multiple options and redresses without being forced to give up certain needs in order to achieve some others.

A glance at practice from other comparable jurisdictions emerging from conflict situations highlights the fact that justice achieved through criminal prosecutions cannot be the be-all and end-all of post-conflict justice and that space should be provided for “truth” to be achieved through more than just one means. For example, a study conducted by Simon Robins shows that while Nepal’s transitional justice process is polarized between a human rights community that prioritizes prosecutions and a political class that seeks to avoid them, victims emphasize the need to know the truth about the disappeared and for economic support to help meet basic needs. He notes in this light that while families of the disappeared would welcome justice, this is not their priority.<sup>99</sup> In Peru, where a law on the search for persons who went missing during the period 1980–2000 was adopted in 2016, the transitional justice process is shifting from a mechanism to search for the missing, which is framed in investigations and criminal proceedings aimed at determining responsibilities for the commission of a crime (e.g. gross or serious violations of international human rights law), to a new process which prioritizes the humanitarian search for missing persons and the clarification of the circumstances in which a person went missing, including their fate and whereabouts. Such a process puts the families at its centre.<sup>100</sup> Currently, “authorities can turn over remains uncovered by forensic scientists

96 Human Rights Council, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, UN Doc. A/HRC/36/50, 21 August 2017, para. 82.

97 *Ibid.*

98 *Ibid.*, para. 79.

99 Simon Robins, “Towards Victim-Centred Transitional Justice: Understanding the Needs of Families of the Disappeared in Postconflict Nepal”, *International Journal of Transitional Justice*, Vol. 5, No. 1, 2011.

100 See Ximena Londoño and Alexandra Ortiz, “Implementing International Law: An Avenue for Preventing Disappearances, Resolving Cases of Missing Persons and Addressing the Needs of Their Families”, in this issue of the *Review*.

before determining a cause of death or completing an investigation”.<sup>101</sup> There is also no requirement for families to file a complaint with the chief prosecutor’s office first.<sup>102</sup>

A victim-centred approach requires either broad prior consultation with victims or for victims and their representatives to be engaged at all levels of planning and implementation.<sup>103</sup> It must also be kept in mind that victims are not a monolithic group, and they should not be expected to speak in a unified voice.<sup>104</sup> It is necessary to recognize the agency of victims and to be wary of others who claim to speak on their behalf. To this end the OMP Act has also included provisions to ensure that the families of the missing will not be denied agency while the search for their loved ones is ongoing. For example, the OMP has to provide relatives of a missing person with information relating to the status of an ongoing investigation pertaining to that person, unless the Office is of the view that doing so would hinder the investigation or that it is not in the best interests of the missing person. The OMP also protects the rights of victims and families by protecting their personal data.<sup>105</sup> Furthermore, in making policy-level recommendations to relevant authorities, the OMP must consult, as it deems appropriate, the relatives of missing persons and/or organizations representing missing persons. The victims must be allowed to change their minds, and they will. Accordingly, the choices available to the victims must be flexible. This is most true for families of the missing, given the ambiguous state in which they find themselves.

## Conclusion

The task before the OMP is not a simple one, and the road to finding those who went missing is long and arduous. The Office will have to engage in fulfilling its mandate while also contending with changes in political regimes domestically and internationally. Accordingly, political will, which is indeed an important contributive element in the OMP successfully implementing its mandate, is at best variable. The OMP’s ability to balance its humanitarian mandate while not jeopardizing potential criminal prosecutions, efficient cooperation between the OMP and other governmental entities, the security provided to victims and witnesses who engage with the mechanism, the appointment of commissioners who are suitable to carry out the mandate, and the overall perception with which the society at large views the OMP will be largely dependent on this consistently

101 Rodrigo ABD and Franklin Briceno, “Families of Peru’s Disappeared Hope for Answers”, *AP News*, 17 August 2018, available at: [apnews.com/d6c4990fe60e4b06a5853571985c4536](https://apnews.com/d6c4990fe60e4b06a5853571985c4536).

102 *Ibid.*

103 S. Robins, above note 99.

104 Bhavani Fonseka and Joanna Naples-Mitchell, *Victim-Centred Transitional Justice in Sri Lanka: What Does it Really Mean?*, Center for Policy Alternatives, February 2017, p. 4.

105 See OMP Act, section 13(1)(k)(v), which states that the publishing of information on issues of missing persons for public knowledge must be done with due consideration to all relevant laws pertaining to confidentiality and protection of data.

volatile political climate. However, to view the future of the OMP only through the lens of political will, thereby completely surrendering to political forces beyond its control, could be a self-fulfilling prophecy and deny the OMP the power that it is in fact capable of exercising.<sup>106</sup> Furthermore, while the OMP is merely one element of a larger transitional justice project, other such transitional justice mechanisms are yet to be fully concretized and their success is at best speculative. The relationship that the OMP would have with these bodies is uncertain.

The ICRC will continue to work to ensure the families' right to know the fate and whereabouts of their loved ones who went missing during the armed conflict in Sri Lanka. To this end, the ICRC supports the primarily humanitarian functions of the OMP. While recognizing that cooperation with justice is necessary, and while acknowledging the importance of accountability for serious violations of human rights and humanitarian law during an armed conflict, this paper has argued that victims' interests should be at the centre of the implementation of all transitional justice mechanisms and in particular of mechanisms to search for the missing. In this light, a humanitarian focus for the OMP which is not instrumentalized for the purpose of other mechanisms will do the most to expand the rights of victims. This, as argued above, is not a zero-sum game. The humanitarian and accountability-based approaches are complementary. Searching for the missing and informing families should not take precedence over justice, but these processes should be separate and judicial proceedings should not interfere with the work of the humanitarian mechanism.

106 The OMP Act has provided the OMP with certain tools which may be used to protect the Office from political influence in order to fulfil its mandate without interference.

# Determining the fate of missing persons: The importance of archives for “dealing with the past” mechanisms

**Elisabeth Baumgartner and Lisa Ott**

Elisabeth Baumgartner and Dr Lisa Ott are Co-Heads of the Dealing with the Past Program at swisspeace.

Elisabeth Baumgartner coordinates the project Archives and Dealing with the Past, mandated and financed by the Swiss Federal Department of Foreign Affairs. She is a Swiss attorney at law who has previously worked for the International Committee of the Red Cross and the Office of the Prosecutor of the Special Court for Sierra Leone in Freetown. She teaches international criminal law at the University of Lucerne and was a member of the Swiss National Commission for the Prevention of Torture.

Dr Lisa Ott previously worked with the UN Office of the High Commissioner for Human Rights in Nepal and Colombia. She worked as a Research and Teaching Assistant at the University of Lucerne, where she also completed her PhD on enforced disappearance in international law.

## **Abstract**

*This article discusses the role of archives of transitional justice and “dealing with the past” (DWP) mechanisms when determining the fate of missing persons. The concept of dealing with the past, the terms “enforced disappearance” and “missing person”,*

and the specific role of archives in periods of transition are examined. Subsequently, specific questions and challenges related to access and use of archives by DWP mechanisms, including those mechanisms with a mandate to determine the fate of missing persons, are described. Many questions related to access to archives, information management and preservation of records are similarly applicable to DWP mechanisms in general and to specific mechanisms mandated to search for missing persons. The article provides some examples of States' obligations related to maintaining and providing access to archives that could assist in the search for missing persons under international law and policy. The article concludes by emphasizing the importance of the preservation and protection of archives relevant for dealing with the past. It further highlights the need to grant DWP mechanisms, especially those aimed at determining the fate of missing persons, access to those archives.

**Keywords:** dealing with the past, archives, missing persons/enforced disappearance, transitional justice.

.....

## Introduction

Archives play a crucial role in processes of transition, particularly in situations where societies go through processes that are commonly referred to as “transitional justice”<sup>1</sup> or “dealing with the past”.<sup>2</sup> Archives are a fundamental basis for the work of so-called “dealing with the past” (DWP) mechanisms, the institutions and measures that aim at helping societies to cope with a past which is marked by violence, dictatorship and massive human rights violations.

- 1 The United Nations (UN) define transitional justice as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.” *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, UN Doc. S/2004/616, 23 August 2004, available at: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/2004/616&Lang=E> (all internet references were accessed in July 2018). The International Centre for Transitional Justice (ICTJ) defines transitional justice as “the ways countries emerging from periods of conflict and repression address large scale or systematic human rights violations so numerous and so serious that the normal justice system will not be able to provide an adequate response.” See: [www.ictj.org/about/transitional-justice](http://www.ictj.org/about/transitional-justice). According to the *Stanford Encyclopaedia of Philosophy*, transitional justice is “a field of academic inquiry, as well as political practice, concerned with the aftermath of conflict and large-scale human rights abuses”. See: <https://plato.stanford.edu/entries/justice-transitional/>.
- 2 For a detailed discussion on the concept of dealing with the past, see swisspeace, *A Conceptual Framework for Dealing with the Past: Holism in Principle and Practice*, swisspeace Essential No. 03/2013, 2013, available at: [www.swisspeace.ch/fileadmin/user\\_upload/Media/Publications/Essentials/Essential\\_3\\_2013.pdf](http://www.swisspeace.ch/fileadmin/user_upload/Media/Publications/Essentials/Essential_3_2013.pdf); Jonathan Sisson, “A Conceptual Framework for Dealing with the Past”, *Dealing with the Past*, Politorbis No. 50, Federal Department of Foreign Affairs, Bern, 2010, pp. 11–16, available at: [www.eda.admin.ch/publikationen/fr/eda/schweizer-aussenpolitik/reihe-politorbis/archiv-politorbis/politorbis-50.html](http://www.eda.admin.ch/publikationen/fr/eda/schweizer-aussenpolitik/reihe-politorbis/archiv-politorbis/politorbis-50.html).

Depending on the national and at times international political context, a broad range of specifically established mechanisms and sometimes ordinary constitutional institutions contribute to this difficult task: DWP mechanisms thus include fact-finding and truth commissions; international, hybrid or domestic courts; reparations programmes; procedures to demobilize and reintegrate armed actors; and institutional reforms. As the search for missing persons is considered a fundamental part of dealing with the past, entities mandated to search for missing and forcibly disappeared persons are also considered DWP mechanisms.<sup>3</sup>

All DWP mechanisms both use and produce archives, which often contain relevant information related to the search for missing persons, irrespective of whether it is part of their mandate to determine the fate of missing persons. For instance, one of the first truth commissions, the National Commission on the Disappearance of Persons (Comisión Nacional sobre la Desaparición de Personas, CONADEP) in Argentina, had the mandate to clarify the fate of persons that were forcibly disappeared during the military regime between 1976 and 1983.<sup>4</sup> Other truth commissions with a broader mandate than CONADEP followed and carried out substantial, sometimes even forensic investigations into the fate of disappeared persons.<sup>5</sup> Those commissions produced important archives that can be used by subsequent bodies to further investigate missing persons cases.

This article argues that access to archives is crucial for the search for missing persons, and that therefore archives containing such information must be preserved for the future and must be accessible to mechanisms mandated to search for missing persons. After briefly presenting the basic concepts relevant to the topic, the article will discuss issues around access to archives (particularly State archives), analysis of archival information and how such archival material is used in DWP processes with a view to resolving missing persons cases. Subsequently, the international standards on missing and forcibly disappeared persons relevant for documentation and archives will be presented.

3 J. Sisson, above note 2, p. 14.

4 For the final report of the Commission, see CONADEP, *Nunca Más: Informe de la Comisión Nacional sobre la Desaparición de Personas*, 1984, available at: [www.desaparecidos.org/arg/conadep/nuncamas/](http://www.desaparecidos.org/arg/conadep/nuncamas/) (English version available at: [www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain\\_001.htm](http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain_001.htm)). See also Thomas C. Wright, *Impunity, Human Rights, and Democracy: Chile and Argentina, 1990–2005*, University of Texas Press, Austin, TX, 2014, pp. 27 ff.; Emilio Crenzel, “Argentina’s National Commission on the Disappearance of Persons: Contributions to Transitional Justice”, *International Journal of Transitional Justice*, Vol. 2, No. 2, 2008.

5 E.g. in Peru, where the mandate of the Truth and Reconciliation Commission was to investigate killings, torture, disappearances, displacement, employment of terrorist methods and other violations attributable to the State, the Shining Path and the Túpac Amaru Revolutionary Movement between May 1980 and November 2000, during the administrations of former presidents Fernando Belaúnde (1980–85), Alan García (1985–90) and Alberto Fujimori (1990–2000). See United States Institute of Peace (USIP) Truth Commissions Digital Collection, available at: [www.usip.org/publications/2001/07/truth-commission-peru-01](http://www.usip.org/publications/2001/07/truth-commission-peru-01).

In Guatemala, the Commission for Historical Clarification was tasked with investigating human rights violations and acts of violence that had occurred between January 1962 and 29 December 1996, during thirty-five years of conflict. See Joanna Crandall, “Truth Commissions In Guatemala And Peru: Perpetual Impunity And Transitional Justice Compared”, *Peace, Conflict and Development*, No. 4, April 2004, p. 5. It operated for two years from 1997 to 1999. See also: [www.usip.org/publications/1997/02/truth-commission-guatemala](http://www.usip.org/publications/1997/02/truth-commission-guatemala).

## Basic concepts

### Dealing with the past

In this article, the term “dealing with the past” is used rather than “transitional justice”, as it is broader and emphasizes that transition measures go beyond pure justice measures. The search for missing persons during and after conflict and dictatorial regimes is an important objective of judicial and non-judicial measures that help societies cope with atrocities that were committed in the past.<sup>6</sup> Coming to terms with past massive human rights violations and dictatorial systems, including enforced disappearances, is a huge challenge for the societies concerned and often takes several generations. Dealing with a painful past is part of a political and social transition process, which generally includes a number of different actors and mechanisms with diverse perceptions of “the past”.<sup>7</sup> It encompasses processes, mechanisms and institutions that help societies emerging from armed conflict or authoritarian regimes to deal with a legacy of human rights violations and violations of international humanitarian law (IHL).<sup>8</sup> It is argued that dealing with a past which is marked by massive violence should be a “necessary precondition for the establishment of the rule of law and the pursuit of reconciliation”.<sup>9</sup> The search for missing persons is often an important first step in such a process and the immediate priority for relatives and victims, the quest for justice being secondary in many contexts.<sup>10</sup> IHL and human rights law recognize that family members have an “imprescriptible right to be informed of

6 J. Sisson, above note 2, p. 14; Anne-Marie La Rosa and Monique Crettol, “The Missing and Transitional Justice: The Right to Know and the Fight against Impunity”, *International Review of the Red Cross*, Vol. 88, No. 862, 2006, available at: [www.icrc.org/en/international-review/article/missing-and-transitional-justice-right-know-and-fight-against-impunity](http://www.icrc.org/en/international-review/article/missing-and-transitional-justice-right-know-and-fight-against-impunity). See also Vasuki Nesiah, “Overcoming Tensions between Family and Judicial Procedures”, *International Review of the Red Cross*, Vol. 84, No 848, 2002, available at: [www.icrc.org/en/download/file/20255/irrc\\_848.pdf](http://www.icrc.org/en/download/file/20255/irrc_848.pdf).

7 Briony Jones, Elisabeth Baumgartner and Sidonia Gabriel, *A Transformative Approach to Dealing with the Past*, swisspeace Essential No. 01/2013, 2013, available at: [www.swisspeace.ch/publications/essentials.html](http://www.swisspeace.ch/publications/essentials.html). Transitional justice and “dealing with the past mechanisms often have a tendency to seek closure through an end to direct violence and a desire to manage and somehow neutralise conflict within societies in transition.” Yet conflict transformation is concerned with conflict as part of society and human life, and academics therefore suggest that dealing with the past and transitional justice are part of social and political negotiations. Briony Jones, “Analysing Resistance to Transitional Justice: What Can We Learn from Hybridity?”, *Conflict and Society*, Vol. 2, No. 1, 2006.

8 The Swiss Ministry of Foreign Affairs and swisspeace, for instance, developed a framework based on the “principles against impunity” developed by legal scholar Louis Joinet in his influential 1997 report to the UN Commission on Human Rights. See Louis Joinet, *The Administration of Justice and the Human Rights of Detainees: Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)*, Final Revised Report Prepared Pursuant to Sub-Commission Decision 1996/119, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997 (Joinet Principles), available at: <https://undocs.org/E/CN.4/Sub.2/1997/20/Rev.1>. Professor Diane Orentlicher updated the principles in UN Docs E/CN.4/2005/102 and E/CN.4/2005/102/Add.1, 8 February 2005, available at: [www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/InternationalInstruments.aspx](http://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/InternationalInstruments.aspx).

9 J. Sisson, above note 2, p. 11.

10 Simon Robins, *Families of the Missing: A Test for Contemporary Approaches to Transitional Justice*, Routledge, New York, 2013; see also V. Nesiah, above note 6.



the fate and/or whereabouts of the disappeared person”.<sup>11</sup> While the task of a missing persons commission focuses on the search for individual persons, other DWP mechanisms, such as truth commissions, have a much broader mandate to investigate not only individual human rights violations but also the larger historical, political and conflict context in which they occurred.<sup>12</sup> Nevertheless, a number of truth commissions in the past had the explicit mandate to investigate the fate of missing persons.<sup>13</sup>

## Missing persons and victims of enforced disappearance

Different definitions of the term “missing persons” can be found in policy and practice.<sup>14</sup> Though there are both narrower and broader definitions of the term, this article uses the wide definition developed by the International Committee of the Red Cross (ICRC), whereby a “missing person” is

a person whose whereabouts are unknown to his/her relatives and/or who, on the basis of reliable information, has been reported missing in accordance with national legislation in connection with an international or non-international armed conflict, a situation of internal violence or disturbances, natural catastrophes or any other situation that may require the intervention of a competent State authority.<sup>15</sup>

This includes a range of different sub-groups, including persons who may have died as well as living persons and children separated from their families. For example, persons who may have been killed and unaccounted for in combat or in detention are considered missing because their families do not know where they are.

The applicable international and domestic legal framework varies depending on the context and specific case: while the norms and principles enshrined in IHL apply to situations in which persons have gone missing in the framework of international and non-international armed conflicts, the provisions set out in the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED)<sup>16</sup> envisage situations in which persons have

11 See Joint Principles, above note 8, Principle 3.

12 For a comprehensive overview, see Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd ed., Routledge, London and New York, 2011.

13 See the references cited in above note 5.

14 Derek Congram, “Missing Persons and Those Who Seek Them: Questions of Perspective and Place”, in Derek Congram (ed.), *Missing Persons: Multidisciplinary Perspectives on the Disappeared*, Canadian Scholars Press, Toronto, 2016. See also S. Robins, above note 10, pp. 19–22.

15 ICRC, “Guiding Principles/Model Law on the Missing”, in *The Domestic Implementation of International Humanitarian Law: A Manual*, 2015, Annex IV, available at: [www.icrc.org/eng/resources/documents/publication/pdvd40.htm](http://www.icrc.org/eng/resources/documents/publication/pdvd40.htm). See also Marie-Louise Tougas and Marco Sassòli, “The ICRC and the Missing”, *International Review of the Red Cross*, Vol. 84, No. 848, 2002, available at: [www.icrc.org/en/download/file/20255/irrc\\_848.pdf](http://www.icrc.org/en/download/file/20255/irrc_848.pdf). See also the article by Ximena Londoño and Alexandra Ortiz in this issue of the *Review*.

16 International Convention for the Protection of All Persons from Enforced Disappearance, UN Doc. A/RES/61/177, 20 December 2006 (entered into force 23 December 2010), available at: [www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx](http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx).

been subjected to enforced disappearance, whether in peacetime or in war. The ICPPED defines enforced disappearance as

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>17</sup>

Under certain circumstances, enforced disappearances can also be committed by non-State actors.<sup>18</sup>

Many of the international principles aimed at preventing persons from going missing or determining the fate and whereabouts of persons were developed in the case law of international human rights monitoring bodies in cases of enforced disappearances<sup>19</sup> and enshrined in legal instruments addressing enforced disappearance.<sup>20</sup> As enforced disappearance is considered one of the most atrocious violations of human rights committed during armed conflicts or by repressive regimes,<sup>21</sup> it usually receives a great degree of attention in DWP processes. Notwithstanding, the families of persons who have gone missing for other reasons – for example, as a result of indiscriminate actions in combat – also have the right to know what happened to their loved ones and for the acts in question to be properly investigated.<sup>22</sup> Therefore, the analysis in this article refers to “missing persons” as the broader category of cases relevant in DWP processes. Where considerations are solely relevant to cases of enforced disappearance, this will be explicitly stated.

## Archives and dealing with the past

Archives, as long-term holders of information, can play an important role in DWP processes because they can form the basis for the creation – as well as the

17 ICPPED, Art. 2. For a more detailed discussion of this definition, see e.g. Lisa Ott, *Enforced Disappearance in International Law*, Intersentia, Mortsels, 2011, pp. 15 ff.

18 ICPPED, Art. 3. For a detailed analysis of these circumstances, see e.g. L. Ott, above note 17, pp. 200 ff.

19 For instance, Inter-American Court of Human Rights (IACtHR), *Velasquez Rodriguez v. Honduras*, Judgment, 29 July 1988, (Ser. C) No. 4 (1988), para. 155; European Court of Human Rights, *Kurt v. Turkey*, Judgment, 25 May 1998, *Reports 1998-III*, No. 74, para. 117; Human Rights Commission, *Nydia Erika Bautista de Arellano v. Colombia*, Communication No. 563/1993, 27 October 1995, para. 8.5.

20 See Declaration on the Protection of All Persons from Enforced Disappearance, adopted by UNGA Res. 47/133, 18 December 1992, available at: [www.un.org/documents/ga/res/47/a47r133.htm](http://www.un.org/documents/ga/res/47/a47r133.htm).

21 See e.g. the fifth preambular paragraph of the ICPPED: “Aware of the extreme seriousness of enforced disappearance, which constitutes a crime and, in certain circumstances defined in international law, a crime against humanity ...”. See also the third preambular paragraph of the Declaration on the Protection of all Persons from Enforced Disappearance, above note 20: “Considering that enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts is of the nature of a crime against humanity ...”.

22 See UNGA Res. 68/165, “Right to the Truth”, 18 December 2013, available at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/RES/68/165](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/RES/68/165).

contestation – of narratives within a society on what happened in the past. Scholars and practitioners assume that finding a commonly accepted narrative about past events enhances reconciliation, particularly if this narrative can be conveyed and communicated to younger generations.<sup>23</sup> Such narratives may change over time as a society’s or parts of a society’s perception of past injustices changes.<sup>24</sup> However, if the basis for the creation of narratives of the past does not exist anymore or is not accessible – for example, in the form of archives – there is an imminent danger that myths of the past will emerge, that past injustices will be denied or that history will be manipulated.<sup>25</sup>

The term “archive” describes “[m]aterials created or received by a person, family, or organization, public or private, in the conduct of their affairs and preserved because of the enduring value contained in the information they contain or as evidence of the functions and responsibilities of their creator”.<sup>26</sup> This definition highlights an aspect of particular relevance in DWP processes: archives are produced not only by State institutions but also by non-State actors, such as individuals or non-governmental organizations. Despite the definition referring to the elements of “enduring value” of the information and “evidence of the functions and responsibilities”,<sup>27</sup> when dealing with serious violations of human rights and IHL, it becomes clear that archives are not necessarily reliable custodians of a factual and presumably objective truth.<sup>28</sup> This is particularly true for enforced disappearances, which represent a particular category of missing persons, as described above. In cases of enforced disappearance, records often contain false information as cases were documented incorrectly in order to

23 Karina V. Korostelina, “Peace Education and Joint History Textbook Projects”, in Karina V. Korostelina and Simone Lässig (eds), *History Education and Post-Conflict Reconciliation: Reconsidering Joint Textbook Projects*, Routledge, London, 2013, pp. 19 ff.

24 Briony Jones and Ingrid Oliveira, “Truth Commission Archives as New Democratic Spaces”, *Journal of Human Rights Practice*, Vol. 8, No. 1, 2016.

25 Antonio González Quintana describes the unfortunate situation in Greece, “which used the documents of repressive bodies in the years immediately after the dictatorship for administrative tasks such as compensation and purging those responsible for repression. The archives were later destroyed, in accordance with new legislation, which judged it undesirable to keep references, in registries and public archives, to people who had been vindicated for activities or attitudes considered illegal in the previous regime. Though it enabled the purging of those responsible and the compensation of their victims, Greece has been left with no written history of the repression, preventing possible new ways of compensation.” Antonio González Quintana, *Archives of the Security Services of Former Repressive Regime*, Report Prepared for UNESCO on Behalf of the International Council on Archives, 1997, available at: <http://unesdoc.unesco.org/images/0014/001400/140074e.pdf>.

26 Richard Pearce-Moses, *A Glossary of Archival and Records Terminology*, Society of American Archivists, 2005, available at: <http://files.archivists.org/pubs/free/SAA-Glossary-2005.pdf>.

27 In archival science the term “evidential value” means that records which are considered authentic and reliable “are valuable as evidence of the origins, structure, functions, procedures and significant transactions of an institution or organization”. Further, some records are kept for their “informational value”, meaning that they “derive their value and are retained by archives for the information they contain as distinct from their evidential value”. Trudy Huskamp Peterson, *The Probative Value of Archival Documents*, swisspeace Essential No. 02/2014, 2014, p. 3, available at: [www.swisspeace.ch/publications/essentials.html](http://www.swisspeace.ch/publications/essentials.html).

28 Altanian Melanie, *Archives against Genocide Denialism?*, swisspeace Working Paper No. 1/2017, 2017, pp. 6–8, available at: [www.swisspeace.ch/fileadmin/user\\_upload/Media/Publications/SP\\_Working-Paper\\_1701-WEB.pdf](http://www.swisspeace.ch/fileadmin/user_upload/Media/Publications/SP_Working-Paper_1701-WEB.pdf).

disguise the true fate of the victim. The purpose of such fabrications is to ensure that relatives and authorities stop looking for the disappeared person or are misled in their search.<sup>29</sup> As Kaplan emphasizes,

the pervading view of archives as sites of historical truth is at best outdated, and at worst inherently dangerous. The archival record does not just happen; it is created by individuals and organizations, and used, in turn, to support their values and missions, all of which comprises a process that is certainly not politically and culturally neutral.<sup>30</sup>

In the field of dealing with the past, particularly in the search for missing persons, it becomes evident that archives are part of a political system, established and controlled by the regimes in power to enhance their position and to control – and if necessary to hide and manipulate – history and information about past events.<sup>31</sup> Despite these considerations, experiences of DWP mechanisms dating back to the Nuremberg Trials<sup>32</sup> and the truth commissions established in the 1980s in Latin America show that access to archives is crucial in the aftermath of gross human rights violations and serious breaches of IHL, in particular for mechanisms with a mandate to search for missing persons.<sup>33</sup> The right to know, to justice and to reparations, as well as guarantees of non-recurrence, can only be rendered if credible documentation of past violations exists.<sup>34</sup>

29 See IACtHR, *Velásquez-Rodríguez*, above note 19, para. 131, where the Court stated that “this type of repression is characterized by an attempt to suppress all information about the kidnapping or the whereabouts and fate of the victim”.

30 Elisabeth Kaplan, “We Are What We Collect, We Collect What We Are: Archives and the Construction of Identity”, *American Archivist*, Vol. 63, No. 1, 2000, p. 147. Similarly, see Verne Harris, *Archives and Justice: A South African Perspective*, Society of American Archivists, Chicago, IL, 2007, p. 13.

31 Joan M. Schwartz and Terry Cook, “Archives, Records, and Power: The Making of Modern Memory”, *Archival Science*, Vol. 2, No. 1–2, 2002. See also the description of how the military regime in Argentina falsified documentation necessary for its unlawful operations and massive human rights violations, in the commented edition of CONADEP’s *Nunca Más* report: *El Nunca Más y los crímenes de la dictadura*, Buenos Aires, 2006, pp. 142–143, available at: [http://librosycasas.cultura.gob.ar/wp-content/uploads/2015/11/LC\\_NuncaMas\\_Digital1.pdf](http://librosycasas.cultura.gob.ar/wp-content/uploads/2015/11/LC_NuncaMas_Digital1.pdf).

32 “The American prosecutors at Nuremberg decided the best evidence against Nazi war criminals was the record left by the Nazi German state itself. They wanted to convict Nazi war criminals with their own words. While the Germans destroyed some of the historical record at the end of the war and some German records were destroyed during the Allied bombing of German cities, Allied armies captured millions of documents during the conquest of Germany in 1945. Allied prosecutors submitted some 3,000 tons of records at the Nuremberg trial. More than a decade later, beginning in 1958, the United States National Archives, in collaboration with the American Historical Association, published 62 volumes of finding aids to the records captured by the US military at the end of the war. More than 30 further volumes were published before the end of the 20th century.” See US Holocaust Memorial Museum, “Combating Holocaust Denial: Evidence of the Holocaust Presented at Nuremberg”, *Holocaust Encyclopedia*, Washington, DC, available at: [www.ushmm.org/wlc/en/article.php?ModuleId=10007271](http://www.ushmm.org/wlc/en/article.php?ModuleId=10007271).

33 Emilio Crenzel, *Memory of the Argentina Disappearances. The Political History of Nunca Más*, Routledge, New York, 2012, pp. 4, 53, 25, 92.

34 IACtHR, *Blake v. Guatemala*, Judgment (Merits), 24 January 1998, para. 49.

## Access to and use of archives by DWP mechanisms

The importance of archives for the work of DWP mechanisms cannot be underestimated. Archives can provide invaluable information for determining the fate and whereabouts of missing persons, both for specific missing persons mechanisms and for other DWP mechanisms mandated to address missing persons issues.<sup>35</sup>

At the end of the Cold War, when many authoritarian regimes were dissolved and replaced by democratic systems, many societies in transition had to decide what should happen to the archives of the repressive regimes.<sup>36</sup> In many countries, there were intense discussions on whether these “archives of terror”<sup>37</sup> should be kept or destroyed.<sup>38</sup> Today it is widely accepted that destroying such archives would constitute another violation of the rights of victims and their families, and more largely of the entire society’s right to know.<sup>39</sup>

- 35 In Canada, the Indian Residential Schools Settlement Agreement (available at: [www.residential-schoolsettlement.ca/English.html](http://www.residential-schoolsettlement.ca/English.html)), which was signed in 2006 and approved by the courts in early 2007, mandated the Truth and Reconciliation Commission of Canada to, *inter alia*, identify sources and create as complete an historical record as possible of the Indian Residential Schools system and legacy, including the fate of missing children, which included in this context “both those who died at school and those whose fate after enrolment was unknown, at least to their parents”. See Truth and Reconciliation Commission of Canada, *Final Report of the Truth and Reconciliation Commission of Canada*, Vol. 4, Montreal, 2015, p. 5, available at: <http://nctr.ca/reports.php>; Alex Maass, “Perspectives on the Missing: Residential Schools for Aboriginal Children in Canada”, in D. Congram (ed.), above note 14.
- 36 For a general overview of the archives of former repressive States, see A. González Quintana, above note 25.
- 37 There is a UNESCO World Heritage collection entitled “Archives of Terror”. It is the documentary heritage submitted by Paraguay for inclusion in the Memory of the World Register in 2009 that encompasses the “official documents of police repression during the thirty-five years of Alfredo Stroessner’s dictatorship.” This archival collection is of particular interest for transitional justice in Latin America, since it contains “supporting evidence of Operation Condor activities as a part of a campaign of political repressions involving assassination and intelligence operations which was officially implemented in 1975 by the right-wing dictators of the Southern Cone of South America”. See: [www.unesco.org/new/en/communication-and-information/memory-of-the-world/register/full-list-of-registered-heritage/registered-heritage-page-1/archives-of-terror/](http://www.unesco.org/new/en/communication-and-information/memory-of-the-world/register/full-list-of-registered-heritage/registered-heritage-page-1/archives-of-terror/).
- 38 E.g. in Bulgaria and Germany: see Federal Commissioner for the Records of the State Security Service of the former German Democratic Republic (Bundesbeauftragte für die Stasi-Unterlagen, BSTU), *The “European Network of Official Authorities in Charge of the Secret Police Files”: A Reader on the Legal Foundations, Structures and Activities*, 2nd rev. ed., Berlin, 2014, p. 27, available at: [www.bstu.de/assets/bstu/de/Downloads/international\\_reader-europaisches-netzwerk\\_englisch.pdf](http://www.bstu.de/assets/bstu/de/Downloads/international_reader-europaisches-netzwerk_englisch.pdf). This publication gives a good overview of the situation in other former communist States and the existing archives of former State security agencies in Europe (pp. 7, 32). For Greece and other countries, see A. González Quintana, above note 25, p. 7.
- 39 Joint Principles, above note 8, Principle 14. A. González Quintana, above note 25, p. 10, underlines: “The right of the people to the integrity of their written memory ought to be unquestioned. If a community chooses to pardon as a means of achieving political transition, this must not result in the disappearance of the documentary heritage of the past. Nations have both a right and an obligation to preserve their memory by depositing it in their archives. Although one generation should be free to decide on the political processes for which they are responsible, they cannot choose for other generations: The right to choose the path to political transition precludes the right to destroy documents.”

## Access to archives

In practice, DWP mechanisms face many challenges with regard to the use of archives. Those who collect and safeguard important information for DWP processes, especially non-State actors, often lack the resources and expertise to archive and preserve such documentation in a professional and safe manner.<sup>40</sup> In addition, official documents that could be used as evidence by DWP mechanisms are often in danger, particularly when they remain in the hands of those who committed crimes. In many instances, important evidence has been destroyed,<sup>41</sup> or hidden from DWP mechanisms.<sup>42</sup> Destruction often occurs when regime changes are in sight and those holding relevant and potentially incriminating information realize that the archival material they had meticulously collected over decades could be used as evidence against them in judicial proceedings or by truth-seeking bodies.<sup>43</sup> Many if not most DWP mechanisms<sup>44</sup> face the problem that many relevant documents are not accessible during their temporary mandate, either because they have been destroyed or are not accessible for other reasons.<sup>45</sup> For instance, the Truth and Reconciliation Commission of Canada describes in detail the problem of obtaining access to State archives related to missing children in Indian Residential Schools.<sup>46</sup> Similarly, researchers accessing the archives of security forces often encounter difficulty because the related records management systems are set up in such a way that only members of the

40 Louise Bickford, Patricia Karam, Hassan Mneimneh and Patrick Pierce, *Documenting Truth*, ICTJ, 2009, available at: <https://ictj.org/sites/default/files/ICTJ-DAG-Global-Documenting-Truth-2009-English.pdf>.

41 At the end of the Cold War, when many Eastern European States underwent regime change, enormous amounts of archival material from State security institutions all over Europe were destroyed. For instance, there are estimations from the Czech Institute for the Study of Totalitarian Regimes and Security Services Archive that “approximately 30% of the documents” in State security archives in the Czech Republic were destroyed in 1989. BStU, above note 38, p. 27.

42 Verne Harris describes “large-scale and systematic sanitisation of official memory authorised at the highest levels of government” in South Africa, which mainly “targeted the records of the security establishment”. He continues: “Between 1990 and 1994 huge volumes of public records were destroyed in an attempt to keep the apartheid state’s darkest secrets hidden.” Verne Harris, “The Archival Sliver: Power, Memory, and Archives in South Africa”, *Archival Science*, Vol. 2, No. 1–2, 2002, p. 64.

43 In Germany for instance, employees of the former German Democratic Republic (GDR) Ministry of State Security followed official orders (*Vernichtungsbefehle*) to destroy large amounts of documents during the peaceful revolution in 1989–90. They wanted to destroy the evidence of unlawful acts and hide the identities of informants. Documents were shredded, burned, put in water or torn apart. When citizens started to occupy the offices of the State Security Service (Stasi) in December 1989, the destruction was stopped, and Germany now has an enormous archive that allows citizens to know what happened in the past, to find out who deserves compensation and to decide who should not be eligible for public office. More information on the work of the BStU, which preserves and protects the archives, is available at: [www.bstu.bund.de/EN/Home/home\\_node.html](http://www.bstu.bund.de/EN/Home/home_node.html).

44 See CONADEP, above note 31, p. 217: “La destrucción o emoción de la documentación que registró minuciosamente la suerte corrida por las personas desaparecidas, dispuesta antes de la entrega del gobierno a las autoridades constitucionales, dificultó la investigación encomendada a esta Comisión por el decreto constitutivo.”

45 See A. González Quintana, above note 25, p. 6, describing the lack of access of the Chilean truth commission to relevant archival material: “The Chilean experience is enlightening: those who had most to lose by the disappearance of the documents were the Chilean people and those with most to gain were the agents of the repression and those most responsible for it.”

46 Truth and Reconciliation Commission of Canada, above note 35, p. 5.

security service can understand and handle them.<sup>47</sup> This is particularly true for archives of repressive regimes.<sup>48</sup>

As a consequence of the difficulty involved in accessing official archives, many DWP mechanisms, including those concerned with the fate of missing persons, have had to rely on oral testimonies and on other sources, such as civil society archives. First-hand information collected from victims, survivors and witnesses<sup>49</sup> is an important basis for the work of most DWP mechanisms. These include mechanisms that are mandated to search for missing persons;<sup>50</sup> those conducting judicial investigations and prosecutions; mechanisms mandated to determine and provide reparations, restitution and compensation; disarmament, demobilization and reintegration programmes;<sup>51</sup> and mechanisms for conducting vetting processes. The Instance for Truth and Dignity (Instance Vérité et Dignité, IVD) in Tunisia, as an example, has collected 62,713 files from victims in Tunisia during its four-year mandate and carried out 49,637 hearings.<sup>52</sup> CONADEP in Argentina carried out meticulous inspections of clandestine detention places, together with witness interviews. These protocols were then compiled with other documentation about the detention centres, forming a “dossier” to be submitted to the courts.<sup>53</sup> However, only if such statements have been collected in a coherent manner and in accordance with certain standards can they be used by such mechanisms.<sup>54</sup>

As the design and implementation of any successful DWP initiative demands the gathering of relevant data, interesting developments can be noted

47 Gilda Waldman, “La ‘cultura de la memoria’: Problemas y reflexiones”, *Política y Cultura*, No. 26, January 2006, p. 19, available at: [www.scielo.org.mx/pdf/polcul/n26/n26a2.pdf](http://www.scielo.org.mx/pdf/polcul/n26/n26a2.pdf).

48 For example, the State Security Service in the former GDR developed a complicated archival system to hide information. The complicated records management system is described in several publications of the BStU, which safeguards and administers the records of the former State Security Service and makes them accessible. See, for instance, Roland Lucht, “Karteien, Speicher, Datenbanken: Kern des Informationssystems der Abteilung XII”, in Karsten Jedlitschka and Philipp Springer (eds), *Das Gedächtnis der Staatssicherheit: Die Kartei- und Archivabteilung des MfS*, Archiv zur DDR-Staatssicherheit, Vol. 12, Göttingen, 2015.

49 “The basis for our work has therefore been the statements made by relatives or by those who managed to escape from this hell, or even the testimonies of people who were involved in the repression but who, for whatever obscure motives, approached us to tell us what they knew.” CONADEP, above note 4. As another example, see the Impunity Watch, *We Struggle With Dignity: Victims’ Participation in Transitional Justice in Guatemala*, Research Report, May 2016, chap. 2, available at: [www.impunitywatch.org/docs/Victim\\_participation\\_Guatemala.pdf](http://www.impunitywatch.org/docs/Victim_participation_Guatemala.pdf).

50 For example in Argentina, where the NGO Equipo Argentino de Antropología Forense (Argentine Forensic Anthropology Team, EAAF), a scientific organization that applies forensic sciences to investigate serious human rights violations, collected numerous “oral testimonies about disappeared persons and the circumstances in which they were disappeared or killed” from “a number of sources, including relatives of the presumed victims, former prisoners, and former political activists targeted by the state during the dictatorship”. EAAF, *1998 Annual Report: Argentina*, 1998, p. 1, available at: <http://eaf.typepad.com/pdf/1998/01Argentina1998.pdf>. The EAAF “aims to recover and identify remains, return them to families and provide evidence in court proceedings”; see: [http://eaf.typepad.com/about\\_us/](http://eaf.typepad.com/about_us/).

51 See definition available at: <https://peacekeeping.un.org/en/disarmament-demobilization-and-reintegration>.

52 See the IVD website, available at: [www.ivd.tn/?lang=en](http://www.ivd.tn/?lang=en).

53 E. Crenzel, above note 4, p. 185.

54 Briony Jones and Sandra Rubli, *Archives for a Peaceful Future*, swisspeace Essential No. 01/2013, 2013, available at: [www.swisspeace.ch/publications/essentials.html](http://www.swisspeace.ch/publications/essentials.html).

with regard to how more recent mechanisms use archives in their work and how they plan the transfer of their own archives to permanent institutions in advance. Several mechanisms have been provided with a stronger legal basis for accessing and using the archives of other institutions than their predecessors.<sup>55</sup> The legal basis of a given mechanism – be it in a transitional justice law, in a presidential decree, or in any other form depending on the domestic legal framework – should provide for unlimited access to archives.

The so-called Joint Principles against impunity, drafted in 1996<sup>56</sup> and updated by Diane Orentlicher in 2005,<sup>57</sup> are considered to be a milestone in the conceptualization of transitional justice.<sup>58</sup> They recognize the importance of preserving archives and facilitating access in order to guarantee the right to know and to “enable victims and their relatives to claim their rights”. Moreover, the Joint Principles acknowledge that access to archives “should also be facilitated in the interest of historical research”, emancipating the right to truth from a narrow individual conception and giving it a collective sense.<sup>59</sup> Although the Joint Principles are considered to be soft law,<sup>60</sup> they are, at least partially, reflective of existing international “hard” law.<sup>61</sup>

Understanding what archives are available to be used in a DWP process is an essential first step in assembling information and material to be used by missing persons commissions, truth commissions, fact-finding bodies, tribunals and other mechanisms that help a society cope with a past troubled by violence, dictatorship and armed conflict. However, especially in contexts of transition, accessing archives containing relevant information regarding missing persons is usually not straightforward. For instance, access to State security archives has even been denied to State-sponsored truth-finding mechanisms tasked with addressing the fate of missing persons, such as the truth commission in Argentina, CONADEP,<sup>62</sup> or more recently in Peru, Guatemala and East

55 E.g. Article 40 of Tunisia’s Organic Law No. 2013-53 on Establishing and Organizing Transitional Justice, 24 December 2013 (entered into force 31 December 2013), available at: <https://tinyurl.com/yag19yek>.

56 Joint Principles, above note 8.

57 UN Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005; and see the accompanying reports by Diane Orentlicher: *Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity*, UN Doc. E/CN.4/2004/88, 27 February 2004; and *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, UN Doc. E/CN.4/2005/102, 18 February 2005.

58 Frank Haldemann and Thomas Unger, “Introduction”, in Frank Haldemann and Thomas Unger (eds), *The United Nations Principles to Combat Impunity: A Commentary*, Oxford University Press, Oxford, 2018, pp. 13 ff.

59 Joint Principles, above note 8. For more details, see Valentina Cadelo and Trudy Huskamp Peterson, “Principle 15: Measures for Facilitating Access to Archives”, in F. Haldemann and T. Unger (eds), above note 58, pp. 172 ff.

60 See F. Haldemann and T. Unger, above note 58, p. 14.

61 *Ibid.*, p. 15.

62 CONADEP in Argentina had a limited mandate, namely to investigate the fate of missing persons: Article 1 of Decree No. 187/83 limited its mandate to “clarify[ing] the facts related to the disappearance of persons that occurred in the country” (“Constituir una Comisión Nacional que tendrá por objeto esclarecer los hechos relacionados con la desaparición de personas ocurridos en el país”). See: [www.usip.org/files/file/resources/collections/commissions/Argentina-Charter.pdf](http://www.usip.org/files/file/resources/collections/commissions/Argentina-Charter.pdf).



Timor.<sup>63</sup> Denial of access to archives does not necessarily indicate that the records were destroyed,<sup>64</sup> but this is often provided as an excuse for denying access. Other reasons for denial include State security<sup>65</sup> or problems in document production.<sup>66</sup> DWP mechanisms are often not informed about the existence of relevant archives. Thus, in several contexts, military and police archives containing relevant information with regard to missing persons were discovered decades after the end of a dictatorship or an armed conflict, and after the truth commissions had ended its work, for instance in Paraguay,<sup>67</sup> Guatemala<sup>68</sup> and Argentina.<sup>69</sup>

As a result of the difficulties involved in gaining access to relevant State archives, accessing civil society archives was crucial for many truth commissions.<sup>70</sup> Truth commissions also tried to access the archives of third States. Accessing foreign records has proven difficult, in particular where the archives of security services were concerned.<sup>71</sup>

- 63 Trudy Huskamp Peterson, *Final Acts: A Guide to Preserving the Records of Truth Commissions*, Woodrow Wilson International Center for Scholars, Washington, DC, 2004, pp. 24 ff., available at: [www.wilsoncenter.org/sites/default/files/Petersonfinpdf.pdf](http://www.wilsoncenter.org/sites/default/files/Petersonfinpdf.pdf). For East Timor, see Commission for Reception, Truth and Reconciliation in East Timor (Comissão de Acolhimento, Verdade e Reconciliação de Timor-Leste, CAVR), *Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor*, 2013, chap. 7.2, available at: [www.chegareport.net/](http://www.chegareport.net/).
- 64 David Thomas, Simon Fowler and Valerie Johnson, *The Silence of the Archive*, American Library Association, 2017, pp. 10 ff., 101 ff.
- 65 See e.g. “Part 1: Introduction”, in CAVR, above note 63, available at: [www.etan.org/etanpdf/2006/CAVR/01-Introduction\\_CAVR.pdf](http://www.etan.org/etanpdf/2006/CAVR/01-Introduction_CAVR.pdf); P. B. Hayner, above note 12, pp. 228 ff.
- 66 Truth and Reconciliation Commission of Canada, above note 35.
- 67 In Argentina, thousands of files and documents dating back to the military dictatorship were found in 2013, thirty years after CONADEP had ended its work, in premises of the Navy. They contained important information regarding missing persons. “Listas negras y otros documentos secretos de la Junta Militar argentina”, *BBC Mundo*, 4 November 2013, available at: [www.bbc.com/mundo/ultimas-noticias/2013/11/131104\\_ultnot\\_argentina\\_documentos\\_regimen\\_militar\\_ao](http://www.bbc.com/mundo/ultimas-noticias/2013/11/131104_ultnot_argentina_documentos_regimen_militar_ao) and <http://mindef.gov.ar/archivosAbiertos/index.php>.
- 68 In Paraguay, about “700,000 documents forming a complete record of the activities of the Paraguayan secret police over three decades – a cache that became known as the Archive of Terror” – were discovered in 1995. They contain crucial information on missing persons and were used, *inter alia*, in criminal trials in Argentina in the Operation Condor case. See Simon Watts, “How Paraguay’s ‘Archive of Terror’ put Operation Condor in Focus”, *BBC World Service*, 22 December 2012, available at: [www.bbc.com/news/magazine-20774985](http://www.bbc.com/news/magazine-20774985). Today the “Archives of Terror” form part of the Museo de la Justicia at the Supreme Court in Asunción and of the UNESCO Memory of the World Program. More information is available at: [www.pj.gov.py/contenido/132-museo-de-la-justicia/334](http://www.pj.gov.py/contenido/132-museo-de-la-justicia/334) and [www.unesco.org/new/en/communication-and-information/memory-of-the-world/register/full-list-of-registered-heritage/registered-heritage-page-1/archives-of-terror/](http://www.unesco.org/new/en/communication-and-information/memory-of-the-world/register/full-list-of-registered-heritage/registered-heritage-page-1/archives-of-terror/). See also Katie Zoglin, “Paraguay’s Archive of Terror: International Cooperation and Operation Condor”, *University of Miami Inter-American Law Review*, Vol. 32, No. 1, 2001.
- 69 In Guatemala, a vast archive of the former National Police of Guatemala that was responsible for numerous serious human rights violations in the Guatemalan Civil War, including enforced disappearance, was discovered in 2005. For more information, see the website of the Archivo Histórico de la Policía Nacional, available at: <http://archivohistoricopn.org/>.
- 70 E.g. in East Timor, where the truth commission “issued a call to all persons and organisations in possession of relevant records to forward these materials to the CAVR”. See “Part 1: Introduction”, in CAVR, above note 63, para. 110, available at: [www.etan.org/etanpdf/2006/CAVR/01-Introduction\\_CAVR.pdf](http://www.etan.org/etanpdf/2006/CAVR/01-Introduction_CAVR.pdf).
- 71 *Ibid.*, paras 113 ff.; P. B. Hayner, above note 12, pp. 228 ff.; John Ciorciari and Jesse Franzblau, “Hidden Files: Archival Sharing, Accountability, and the Right to the Truth”, *Columbia Human Rights Law Review*, Vol. 46, No. 1, 2014, available at: <https://ssrn.com/abstract=2446205>.

## Special powers to access archives

There are examples of DWP mechanisms that have received special powers to access important State documents and archives, such as the South African Truth and Reconciliation Commission, which was provided with quasi-judicial subpoena powers,<sup>72</sup> and the Tunisian IVD.<sup>73</sup> The IVD<sup>74</sup> has unlimited “access to public and private archives” and can investigate human rights violations as stipulated in the law, “using all the means and mechanisms it deems necessary while ensuring the defense rights”.<sup>75</sup> The IVD can further carry out “inspections in private and public places as well as searches and confiscate documents, movables and tools used in relation to the violations [that are the] subject of its investigations”, and is therefore “empowered with the powers of judicial police taking into account the necessary procedural safeguards in this regards”.<sup>76</sup> Similarly far-reaching powers can be found in the constituting documents of other truth commissions. Article 8 of the Sierra Leone Truth and Reconciliation Commission Act (2000)<sup>77</sup> vested the Sierra Leonean Truth and Reconciliation Commission with specific powers, namely “to gather, by means it deems appropriate, any information it considers relevant” and “to request reports, records, documents or any information from any source, including governmental authorities, and to compel the production of such information”.<sup>78</sup> As another example, in Canada, the Ontario Superior Court of Justice determined in 2014 that the federal

72 T. Huskamp Peterson, above note 63, p. 25. A subpoena is a writ/order known in different Anglo-Saxon legal systems which is usually issued by a government agency, most often a court, to compel testimony by a witness or production of evidence under a penalty for failure. See “Subpoena”, *Wex*, Legal Information Institute, Cornell Law School, available at: [www.law.cornell.edu/wex/subpoena](http://www.law.cornell.edu/wex/subpoena).

73 According to Article 17 of Organic Law No. 2013-53, above note 55, the commission’s work “shall cover the period extending from 1 July 1955 up to the issuance of this law [2013]”. Further, Article 39 limits the tasks of the IVD to “holding private or public hearings for victims of violations”; “examin[ing] ... cases of enforced disappearance”, “establish[ing] a unified record of victims of violations”, “determin[ing] the responsibility of the organs of the State or any other parties for ... violations, clarify[ing] its reasons and propos[ing] the remedies that prevent the recurrence of such violations in the future”, and “develop[ing] a comprehensive individual and collective program for reparations for victims of violations”.

74 *Ibid.*, Art. 40, para. 1.

75 *Ibid.*, Art. 40, para. 3.

76 *Ibid.*, Art. 40, para. 10.

77 Truth and Reconciliation Commission Act 2000, *Supplement to the Sierra Leone Gazette*, Vol. 131, No. 9, 10 February 2000, available at: [www.sierra-leone.org/Laws/2000-4.pdf](http://www.sierra-leone.org/Laws/2000-4.pdf).

78 Further, the Sierra Leonean Truth and Reconciliation Commission also had the power “to visit any establishment or place without giving prior notice, and to enter upon any land or premises for any purpose which is material to the fulfilment of the Commission’s mandate and in particular, for the purpose of obtaining information or inspecting any property or taking copies of any documents which may be of assistance to the Commission, and for safeguarding any such property or document; (c) to interview any individual, group or members of organisations or institutions and ... to conduct such interviews, in private; (d) ... to call upon any person to meet with the Commission or its staff ...; (e) to require that statements be given under oath or affirmation and to administer such oath or affirmation; (f) to request information from the relevant authorities of a foreign country and to gather information from victims, witnesses, government officials and others in foreign countries; (g) to issue summonses and subpoenas as it deems necessary in fulfilment of its mandate; and (h) to request and receive police assistance as needed in the enforcement of its powers.” *Ibid.*, section 8(1).

government was required to compile all relevant documents with regard to missing children for the Truth and Reconciliation Commission.<sup>79</sup>

When institutions or organizations engage in the search for missing persons, the archives of previously existent DWP mechanisms are crucial, because they include public and confidential material that could contain relevant information as a starting point for further investigations or even an answer to unresolved cases.<sup>80</sup> As an example, in the Balkans, the ICRC received special access to the archives of the International Criminal Tribunal for the former Yugoslavia and other international organizations in its search for missing persons.<sup>81</sup> The Law on Missing Persons in Bosnia and Herzegovina even foresees punitive measures if access to information relevant for tracing a missing person is hindered.<sup>82</sup> For mechanisms specifically created to search for missing persons, the power to access archives or receive information from government or non-government archives is often not that explicit. For instance, the International Commission on Missing Persons (ICMP) – which is not a transitional justice mechanism in the narrow sense, but an international organization established by a multinational treaty in 2014, with the humanitarian mandate to locate and identify persons “missing [as a result of] conflict, human rights abuses, disasters, organized crime, irregular migration and other causes”, and to assist States in doing so<sup>83</sup> – has general powers to take “lawful action necessary to accomplish the purpose of the Commission”.<sup>84</sup> This general provision assumedly includes legal action to obtain access to archives. The question of whether these special powers are sufficient to grant access to State or private archives depends on the legal basis on which the ICMP operates in a specific context, mainly the agreements concluded with governments,<sup>85</sup> as well as the applicable domestic

79 Ontario Superior Court of Justice, *Larry Philip Fontaine et al. v. The Attorney General of Canada et al.*, 2014 ONSC 283, 14 January 2014; Truth and Reconciliation Commission of Canada, above note 35.

80 Trudy Huskamp Peterson, *Temporary Courts, Permanent Records*, Woodrow Wilson Center for Scholars, 2008, available at: [www.wilsoncenter.org/sites/default/files/TCPR\\_Peterson\\_HAPPO02.pdf](http://www.wilsoncenter.org/sites/default/files/TCPR_Peterson_HAPPO02.pdf); a shorter version of this 146-page report was previously published under the same title by USIP in 2006, available at: [www.usip.org/sites/default/files/sr170.pdf](http://www.usip.org/sites/default/files/sr170.pdf).

81 Lina Milner, “The ICTY Legacy in Finding Missing Persons”, in Richard H. Steinberg (ed.), *Assessing the Legacy of the ICTY*, Martinus Nijhoff, Leiden and Boston, MA, 2011, p. 123.

82 Law on Missing Persons, *Official Gazette of Bosnia and Herzegovina*, No. 50/04, 9 November 2004, Art. 25, available at: <https://advokat-prnjavorac.com/legislation/Law-on-missing-persons.pdf>. This law foresees fines for “an official who blocks access to information to a family member of a missing person or to an institution in charge of tracing missing persons” or “who, without justified cause, delays or hinders making available the requested information”.

83 The treaty between the Netherlands, the United Kingdom, Sweden, Belgium and Luxembourg granted the ICMP, an organization that was “created at the initiative of US President Bill Clinton in 1996 at the G-7 Summit in Lyon, France”, a new legal status as “a treaty-based international organization with its own system of governance and international capacities”. Agreement on the Status and Functions of the International Commission on Missing Persons, 15 December 2014.

84 *Ibid.*, Art. 6.

85 In Iraq, for example, the ICMP has signed “an agreement with the four ministries engaged in addressing the missing persons’ process: the Ministry for Human Rights, the Ministries of Health in Baghdad and Erbil and the Ministry of Martyrs and Anfal Affairs”. See: [www.icmp.int/where-we-work/middle-east-and-north-africa/iraq/](http://www.icmp.int/where-we-work/middle-east-and-north-africa/iraq/). Ideally, such agreements contain clauses regarding access to government records and archives that are likely to support the search for missing persons.

legislation in this context, such as archive laws and freedom of information legislation. A careful analysis of the existing legal framework is therefore recommended, as well as the conclusion of agreements that grant access to State and non-State records and archives.

## Use, processing and handling of archival material

DWP mechanisms, including missing persons mechanisms, mostly have temporary mandates and limited capacities to process the large quantities of material that are needed to fully implement their mandates.<sup>86</sup> They face the immense task not only of gathering information on past human rights violations and breaches of IHL from victims and from other sources, including State and non-State archives, as described above, but also of processing this data and often of producing a report with recommendations. For instance, the South African Truth and Reconciliation Commission had the enormous task of processing 21,298 statements taken from victims, “containing 37,672 gross violations of human rights”.<sup>87</sup>

Model legislation regarding missing persons recommends that such information about missing persons is kept “in a centralized institution, to give a coherent overview of the scope of the problem, to assist with the location of the missing person and to give a reference point to other authorities, including foreign authorities”.<sup>88</sup> Such central registers should contain all the information that is relevant for the search for missing persons and should be kept according to international archival standards, in particular with regard to security, data protection and documentary preservation.<sup>89</sup> Special technical and legal provisions apply for DNA databases.<sup>90</sup> Ideally, these records should be kept in a

86 For example, the mandate of CONADEP in Argentina (see *El Nunca Más y los criminales de la dictadura*, above note 31); the CAVR in East Timor operated from 7 February 2002 to 31 October 2005 and covered the years 1974–99 (see: [www.usip.org/publications/2002/02/truth-commission-timor-leste-east-timor](http://www.usip.org/publications/2002/02/truth-commission-timor-leste-east-timor)); the Truth and Reconciliation Commission for Sierra Leone worked from 2002 to 2005 and covered the years 1991–99 (see: [www.sierraleonetrc.org/](http://www.sierraleonetrc.org/)). The length of the mandate of bodies with the specific humanitarian mandate of searching for missing persons differs. The Terms of Reference of the Committee on Missing Persons (CMP) in Cyprus, which was established in April 1981 by agreement between the Greek Cypriot and Turkish Cypriot communities under the auspices of the UN, does not provide a time limit (see: [www.cmp-cyprus.org/content/terms-reference-and-mandate](http://www.cmp-cyprus.org/content/terms-reference-and-mandate)); the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2071 (2014) in Nepal foresees in its Article 38 a mandate of “two years from the date of its constitution” (which has been extended in the meantime) for the Enforced Disappearances Enquiry Commission (see: <http://ciedp.gov.np/downloads.php>).

87 Gerald O’Sullivan, “The South African Truth and Reconciliation Commission: Database Representation”, in Patrick Ball, Herbert F. Spier and Louise Spier (eds), *Making the Case: Investigating Large Scale Human Rights Violations Using Information Systems and Data Analysis*, American Association for the Advancement of Science, 2000.

88 ICRC, “Guiding Principles and Model Law on the Missing”, Legal Factsheet, 28 February 2009, p. 32, available at: [www.icrc.org/en/document/guiding-principles-model-law-missing-model-law](http://www.icrc.org/en/document/guiding-principles-model-law-missing-model-law).

89 *Ibid.*, pp. 32, 40 ff.

90 Particularly since such information “is increasingly used in relation to criminal investigations”: see *ibid.*, p. 40.

governmental institution, as for example in Bosnia and Herzegovina at the Missing Persons Institute.<sup>91</sup>

The work of the Argentine Forensic Anthropology Team (Equipo Argentino de Antropología Forense, EAAF), as an NGO that uses forensic science to investigate serious human rights violations<sup>92</sup> – namely, enforced disappearance cases in Argentina and worldwide – with a humanitarian approach, shows how archives can be used in a systematic manner in the search for missing persons. In Argentina, the EAAF gained access to police archives through judicial measures in the late 1990s and used archival material systematically to identify persons who were disappeared during the military regime, using a humanitarian approach. It used numerous written sources that were established during the military dictatorship in the course of the bureaucratic procedures by the army and the police to disguise the thousands of cases of enforced disappearance in the years from 1976 to 1983. The EAAF created several databases where all the information collected from archives, reports and testimonies was entered (e.g. from death certificates of unidentified persons, testimonies from family members or former detainees, and police reports). “The death certificates were taken from the 1976, 1977 and 1978 registration books from the counties in the province of Buenos Aires that surround the Buenos Aires city limits”, and in total around 3,319 death certificates were entered in 1998 alone.<sup>93</sup> The fact that the police had accurately recorded the crimes they had committed and had archived this information systematically helped the EAAF to identify missing persons almost two decades later. The consequence of this is that the families of the victims can finally know what happened, receive the remains, carry out funeral rites and mourn their dead.<sup>94</sup>

Similarly, the Committee on Missing Persons (CMP) in Cyprus, established in April 1981 by an agreement between the Greek Cypriot and Turkish Cypriot communities under the auspices of the United Nations (UN), employs an archival team to guarantee the professional management and preservation of the documents and information obtained in the framework of the procedures to exhume and identify the bodies and to return the remains to the families.<sup>95</sup>

91 Law on Missing Persons, above note 82. See also *Agreement between the International Commission on Missing Persons (ICMP) and the Missing Persons Institute (MPI) Concerning Transfer of Missing Persons and Relatives Data To Become Part of the Missing Persons Institute’s Central Records*; Kirsten Juhl, “The Problem of Ethnic Politics and Trust: The Missing Persons Institute of Bosnia-Herzegovina”, *Genocide Studies and Prevention: An International Journal*, Vol. 4, No. 2, 2009, p. 240, available at: <http://scholarcommons.usf.edu/gsp/vol4/iss2/14>.

92 The EAAF “was established in 1984 to investigate the cases of at least 9,000 disappeared people in Argentina under the military government that ruled from 1976–1983. Today, the team works in Latin America, Africa, Asia and Europe.” See the EAAF website, available at: [www.eaaf.org/](http://www.eaaf.org/).

93 EAAF, *1998 Annual Report*, above note 50, p. 4.

94 “These procedures included writing a description of the find, taking photographs, fingerprinting the corpse, conducting an autopsy or external examination of the body, writing a death certificate, making an entry in the local civil registry, issuing a certificate of burial, and making an entry in the cemetery records. Through these procedures, the bureaucracy created a number of documents containing important information about the ‘disappeared’”. EAAF, *1999 Annual Report: Argentina, 1999*, available at: <http://eaaf.typepad.com/pdf/1999/03Argentina1999.pdf>, p. 8; EAAF, *1998 Annual Report*, above note 50, p. 2.

95 See the CMP website, available at: [www.cmp-cyprus.org/content/what-we-do](http://www.cmp-cyprus.org/content/what-we-do).

Linking professional physical archives with a functioning database that allows for quick access to pertinent information, both in digital and physical form, is a complex and time-consuming task that requires cooperation between different professionals, ranging from experts on the contexts to be investigated, to archivists and information technology experts.<sup>96</sup> Databases need to be tailored to the specific task of the mechanism in question. Thus, the means of establishing specific databases that allow for the collection, cross-checking and corroboration of information depend on the specific mandate of the mechanism in question. Organizations searching for the fate and whereabouts of missing persons use complex databases fed with information from a number of sources, including material collected in archives. In order to facilitate the identification of missing persons, not only forensic procedures should be documented, but also the work undertaken with family members and communities.

### Archives as part of the legacy of DWP mechanisms

DWP mechanisms necessarily collect, produce and use archival material from the beginning of their mandate. The collected and created records relate both to their administrative procedures and to their substantive work, including investigations, adjudication, truth-seeking, truth-telling, reparations and memorialization. They usually receive large amounts of material, for instance in the form of submissions by direct victims or family members, and they create their own records.<sup>97</sup> Other records may include written and oral forms of testimony from victims, witnesses, experts and accused perpetrators; the minutes of public hearings and meeting notes; and reports and recommendations.<sup>98</sup> The final outputs of DWP mechanisms, including judgments of tribunals, published final reports of truth commissions, conclusions and recommendations, reparation decisions, and similar outcome documents, often consist of several hundred pages, which also belong to the records created by the mechanisms. Despite their length, these final and published documents usually present a very condensed version of what is contained in the wealth of archival material that has been collected and produced by such mechanisms.<sup>99</sup>

The amount of material which DWP mechanisms receive and collect from individuals, non-governmental institutions and State bodies is enormous. These records can be of various types, including paper and electronic documents in different formats and styles, audio and video recordings, photographs, maps, artefacts and even artistic objects. Since such mechanisms typically investigate serious human rights violations and breaches of IHL, the records contain a lot of personal and sensitive information regarding the identity of victims and their families, presumed perpetrators, informants and witnesses. As these records constitute the basis upon which judgments and findings are rendered, the fate of

96 Sonia Zambrano, "The Guatemalan Commission for Historical Clarification", in P. Ball, H. F. Spierer and L. Spierer (eds), above note 87, p. 288.

97 T. Huskamp Peterson, above note 63.

98 T. Huskamp Peterson, above note 80 (2008 version).

99 *Ibid.*, pp. 10–11.

missing persons is investigated, recommendations are formulated and reparation decisions are taken, their professional appraisal and preservation is crucial.<sup>100</sup> This is particularly important because tribunals, courts, truth commissions and reparations programmes establish social, institutional and individual responsibilities and decide upon the future of individuals. In addition, the work of such mechanisms is by its nature contested and controversial, particularly in contexts where those responsible for human rights violations are still in power.

## State obligations relevant for archives and missing persons

The international legal framework on enforced disappearance and missing persons reflects the fact that archives play an important role in both the prevention of disappearances and the search for missing persons. In addition, keeping records and providing access to archives are crucial means of implementing the right of family members and society to know about the fate of missing persons. The relevant international instruments, as well as the jurisprudence and domestic legislation, entail three principles which have far-reaching implications for the use of archives: firstly, the right to report when a person has gone missing and the respective duty of the authorities to investigate such reports; secondly, the duty to keep records of places of detention; and thirdly, the duty to provide access to the archives.

### Right to report and duty to investigate missing persons cases

Both IHL and international human rights law include detailed provisions regarding States’ duties to report and investigate missing persons cases. These provisions involve creating and maintaining records, and sometimes even require archival research.

Most of the IHL rules concerning the missing are related to the clarification of the fate and whereabouts of persons in the hands of the enemy or those killed on the battlefield.<sup>101</sup> During international armed conflicts, Articles 32–34 of Additional Protocol I to the 1949 Geneva Conventions (AP I) stipulate the right of families to know the fate of their relatives and oblige the parties to the conflict to “search for the persons who have been reported missing by an adverse Party” and to “transmit all relevant information concerning such persons in order to facilitate such searches”. Analogous duties have been found applicable under customary law during non-international armed conflicts: the ICRC Customary Law Study establishes that “each party to the conflict must take all feasible measures to account for persons

100 B. Jones and S. Rubli, above note 54, pp. 12–13; B. Jones, E. Baumgartner and S. Gabriel, above note 7, p. 31.

101 See Geneva Convention I (GC I), Arts 16–17; Geneva Convention II (GC II), Arts 19–20; Geneva Convention III (GC III), Arts 122–124; Geneva Convention IV (GC IV), Arts 136–141; Additional Protocol I (AP I), Arts 33–34; Additional Protocol II (AP II), Art. 8; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rules 112, 116, 117, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>.

reported missing as a result of armed conflict and must provide their family members with any information it has on their fate”.<sup>102</sup>

The ICPPED sets out the responsibility of States to “ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities, which shall examine the allegation promptly and impartially and, where necessary, undertake without delay a thorough and impartial investigation”.<sup>103</sup> This provision can be interpreted as implying that the respective authorities also have to create files when individuals allege that an enforced disappearance has occurred. Such files can provide relevant information in determining the fate and whereabouts of missing persons. In addition, a proper investigation into a disappearance case necessarily requires archival research, meaning investigations both into archives that are still in use – so-called active or intermediary archives – and into archives that are no longer in active use. As a consequence, paragraph 3 of said provision expressly states that the authorities must have “access to the documentation and other information relevant to their investigation”.<sup>104</sup>

## Duty to keep archives of places of detention

Proper record-keeping – particularly in the context of places of detention, due to the vulnerability of detainees – is an important element of the prevention of enforced disappearances, and can assist in clarifying the fate of a person in the event that he or she does go missing. This basic rule to protect persons deprived of their liberty in armed conflict derives both from treaty law<sup>105</sup> and from customary IHL applicable in international and non-international armed conflicts, and states that “personal details of persons deprived of their liberty must be recorded”.<sup>106</sup> This rule is usually also contained at the domestic level in military manuals<sup>107</sup> and national legislation.<sup>108</sup> Under IHL, there is also a requirement to keep archives related to the dead.<sup>109</sup>

102 ICRC Customary Law Study, above note 101, Rule 117.

103 ICPPED, Art. 12(1).

104 *Ibid.*, Art. 12(3)(a).

105 Article 33 of AP I (available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/470-750040?OpenDocument>) foresees specific reporting obligations with regard to “persons who have been detained, imprisoned or otherwise held in captivity for more than two weeks as a result of hostilities or occupation, or who have died during any period of detention”, and persons who “have died in other circumstances as a result of hostilities or occupation”. Such information may be transmitted directly or through the Central Tracing Agency of the ICRC or National Red Cross and Red Crescent Societies. Further, parties to the conflict shall facilitate “arrangements for teams to search for, identify and recover the dead from battlefield” (paras 1–3).

106 ICRC Customary Law Study, above note 101, Rule 123.

107 *Ibid.*, Vol. 2: *Practice*, Practice relating to Rule 123, available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_cha\\_chapter37\\_rule123](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter37_rule123).

108 *Ibid.*

109 “Moreover, in order to prevent loss of information, each party to an armed conflict has the obligation to record all available information relating to the dead and the personal details of persons deprived of their liberty (GC I, Art. 16; GC II, Art. 19; GC III, Arts 120–121; GC IV, Arts 129–131; CIHL Rules 116 and 123).” ICRC, *Missing Persons and Their Families*, Factsheet, 31 December 2015, available at: [www.icrc.org/en/document/missing-persons-and-their-families-factsheet](http://www.icrc.org/en/document/missing-persons-and-their-families-factsheet).



Similarly, States party to the ICPPED are under the obligation to “assure the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty”.<sup>110</sup> Further, such records must “be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose”.<sup>111</sup> Registers must contain at a minimum the identity of the person deprived of liberty, the date, time and place where the person was deprived of liberty, and the identity of the authority that made the arrest. The information must also include the authority that ordered the deprivation of liberty and the grounds on which it was ordered, as well as the authority responsible for supervising the deprivation of liberty.

The most important information for the search for persons who go missing in detention is the indication of the place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty, the authority responsible for the place of deprivation of liberty, the date and time of release or transfer to another place of detention, the destination of the transfer, and the authority responsible for the transfer, as well as, in the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains.<sup>112</sup> Article 22 of the ICPPED provides for the State’s responsibility to “take the necessary measures to prevent and impose sanctions for” the “[f]ailure to record the deprivation of liberty of any person, or the recording of any information which the official responsible for the official register knew or should have known to be inaccurate”. Such punitive provisions are important to ensure the implementation of the obligation to document detention.

## Duty to provide access to archives

It is widely recognized today that States are obliged to provide access to information related to past IHL and human rights violations both on the basis of the “right to know”<sup>113</sup> and within the larger framework of remedies for human rights violations. The ICPPED thus states that States Parties shall guarantee to any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel, access to at least the following information:

- (a) The authority that ordered the deprivation of liberty;

110 ICPPED, Art. 17(3).

111 *Ibid.*

112 *Ibid.*, Art. 18.

113 Joinet Principles, above note 8; V. Cadelo and T. Huskamp Peterson, above note 59, pp. 173 ff. For IHL, see “Commentary on Article 33 of the first Additional Protocol to the 1949 Geneva Conventions”, in ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1987, paras 1271 ff., available at: <https://tinyurl.com/ybb87epf>; ICRC Customary Law Study, above note 101, Rule 117. See also Principle 6 of the Principles of Access to Archives of the International Council on Archives (available at: [www.ica.org/en/principles-access-archives](http://www.ica.org/en/principles-access-archives)), which states: “Institutions holding archives ensure that victims of serious crimes under international law have access to archives that provide evidence needed to assert their human rights and to document violations of them, even if those archives are closed to the general public.”

- (b) The date, time and place where the person was deprived of liberty and admitted to the place of deprivation of liberty;
- (c) The authority responsible for supervising the deprivation of liberty;
- (d) The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer;
- (e) The date, time and place of release;
- (f) Elements relating to the state of health of the person deprived of liberty;
- (g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains.<sup>114</sup>

In order to “balance between the protection of persons from enforced disappearances on the one hand and the right to privacy and constraints imposed on states in the context of criminal investigations on the other hand”,<sup>115</sup> this right to information can be restricted only under certain conditions: it must be guaranteed that the person deprived of liberty remains under the protection of the law, and that the restriction is of an exceptional nature, is strictly necessary and is provided for by the law.<sup>116</sup> The right to a remedy to obtain this information cannot be restricted.<sup>117</sup>

Underlining the importance of correct procedure when collecting and processing personal information, the ICCPED also highlights that the privacy rights of the persons concerned have to be respected: personal information, including medical and genetic data, which is collected and/or transmitted within the framework of the search for a disappeared person shall not be used or made available for purposes other than the search for that person.<sup>118</sup> The ICCPED does not provide specific access rules for missing persons mechanisms or other DWP mechanisms, but in the ambit of soft law, a number of international instruments do address these specific questions, as described below.

Despite the narrow definition of the exceptions to the right to information in the ICCPED, in practice the problem remains that States do not want to reveal certain information, arguing its relation to State security.<sup>119</sup> As referred to above, many truth commissions have thus had difficulties accessing records concerning State security.<sup>120</sup> Therefore, domestic policies on freedom of information and access to public information are highly relevant in this regard. Although issues of

114 ICCPED, Art. 18(1).

115 Commission on Human Rights, *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, UN Doc. E/CN.4/2005/66, 10 March 2005, para. 92.

116 ICCPED, Art. 20(1).

117 *Ibid.*, Art. 20(2).

118 *Ibid.*, Art. 19.

119 P. B. Hayner, above note 12, pp. 227 ff.

120 Truth and Reconciliation Commission of South Africa, *Truth and Reconciliation Commission of South Africa Report*, Vol. 1, 1998, chap. 8, section 104, available at: [www.justice.gov.za/trc/report/finalreport/Volume%201.pdf](http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf); Chilean National Commission on Truth and Reconciliation, *Informe de la Comisión Nacional de Verdad y Reconciliación*, Vol. 1, 1991, p. 5, available at: <http://bibliotecadigital.indh.cl/bitstream/handle/123456789/170/tomo1.pdf?sequence=1>; CONADEP, above note 4, p. 273.

State security as well as access to information and freedom of information very much depend on domestic legislation and the context in which DWP mechanisms operate, international standards such as the Global Principles on National Security and the Right to Information (Tshwane Principles),<sup>121</sup> the Model Inter-American Law on Access to Public Information<sup>122</sup> and the 2009 Council of Europe Convention on Access to Official Documents<sup>123</sup> provide orientation.

The Tshwane Principles were developed by experienced academics and practitioners. They were not adopted within the UN system, but were developed in consultation with UN, Organisation of American States (OAS) and African Union Special Rapporteurs on freedom of expression. They are not legally binding but aim at providing

guidance to those engaged in drafting, revising, or implementing laws or provisions relating to the state’s authority to withhold information on national security grounds or to punish the disclosure of such information.

They are based on international (including regional) and national law, standards, good practices, and the writings of experts.<sup>124</sup>

The Tshwane Principles underline that there are “some categories of information” that

are of particularly high public interest given their special significance to the process of democratic oversight and the rule of law, including categories related to missing persons. Accordingly, there is a very strong presumption, and in some cases an overriding imperative, that such information should be public and proactively disclosed.<sup>125</sup>

They go on to state that principally, there is

an overriding public interest in disclosure of information regarding gross violations of human rights or serious violations of international humanitarian law, including crimes under international law, and systematic or widespread violations of the rights to personal liberty and security. Such information may not be withheld on national security grounds in any circumstances.<sup>126</sup>

121 The Tshwane Principles have been drafted by seventeen organizations and five academic centres throughout Africa, the Americas, Europe and Asia based on conversations and information provided by more than 500 experts from more than seventy countries, including government and former government officials and military officers, at meetings around the world over a two-year period. Global Principles on National Security and the Right to Information (Tshwane Principles), 12 June 2013, available at: [www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles](http://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles).

122 Organisation of American States (OAS), Model Inter-American Law on Access to Public Information, AG/RES. 2607 (XL-O/10), 8 June 2010, para. 44, available at: [www.oas.org/en/sla/dil/docs/Access\\_Model\\_Law\\_Book\\_English.pdf](http://www.oas.org/en/sla/dil/docs/Access_Model_Law_Book_English.pdf).

123 Council of Europe Convention on Access to Official Documents, CETS No. 205, 18 June 2009, available at: [www.coe.int/en/web/conventions/full-list/-/conventions/treaty/205/signatures?p\\_auth=VjubcSkv](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/205/signatures?p_auth=VjubcSkv). So far, nine states have ratified this convention; ten ratifications are necessary for it to enter into force.

124 Tshwane Principles, above note 121, p. 5.

125 *Ibid.*, Principle 10.

126 See the references cited in above note 91.

This type of documentation often entails material that is relevant to clarifying the fate and whereabouts of missing persons, in particular cases of enforced disappearance. With a view to DWP processes in States undergoing political transitions, Principle 10 of the Tshwane Principles notes that “a successor government should immediately protect and preserve the integrity of, and release without delay, any records that contain such information that were concealed by a prior government”.<sup>127</sup> This principle is very important in the search for missing persons in general and in particular regarding enforced disappearance, as especially in the latter cases the information is often systemically concealed.

The Model Inter-American Law on Access to Public Information, which was adopted in 2010 by the General Assembly of the OAS,<sup>128</sup> is based on the principle of maximum disclosure, “so that all information held by public bodies is complete, timely, and accessible, subject to a clear and narrow regime of exceptions set out in law that are legitimate and strictly necessary in a democratic society”.<sup>129</sup> The Model Inter-American Law is clear that the exceptions to disclosure “do not apply in cases of serious violations of human rights or crimes against humanity”.<sup>130</sup> This leads to the conclusion that investigations into enforced disappearance cases, whether by a judicial investigation, truth commission or missing persons mechanism, could not be impeded by referring to the exceptions for disclosure. This does not cover all missing persons cases, however.

The organs of the Inter-American system have highlighted the importance of access to information and to archives, emphasizing “that victims and their relatives, as well as the society as a whole, have the right to access information on serious violations of human rights in the archives of the State”, even those of the security sector.<sup>131</sup> In the case of *Gomes Lund et al. v. Brazil*, the Inter-American Court of Human Rights (IACtHR) held that

it is essential that, in order to guarantee the right to information, the public powers act in good faith and diligently carry out the necessary actions to assure the effectiveness of this right, particularly when it deals with the right to the truth ... in cases of gross violations of human rights.<sup>132</sup>

The most important finding of the Court in this case was that it is not the institution accused of committing mass human rights violations that should decide whether or not the information exists, and whether or not to make it public. Similarly, a State

127 Tshwane Principles, above note 121, Principle 10(A)(3).

128 Model Inter-American Law on Access to Public Information, above note 122. The Model Inter-American Law was drafted by the OAS Department of International Law, in cooperation with the Inter-American Juridical Committee, the Special Rapporteur for freedom of expression of the Inter-American Commission on Human Rights, the Department of State Modernization and Effective Public Management, member States, and civil society.

129 *Ibid.*, Art. 2.

130 *Ibid.*, Art. 2.

131 Inter-American Commission on Human Rights, *Access to Information, Violence against Women, and the Administration of Justice in the Americas*, OAS/Ser.L/V/II.154, Doc. 19, 2015, p. 28, available at: [www.oas.org/en/iachr/reports/pdfs/Access-information.pdf](http://www.oas.org/en/iachr/reports/pdfs/Access-information.pdf).

132 *Ibid.*, para. 36. See also J. Ciorciari and J. Franzblau, above note 71, pp. 27 ff.

cannot release itself from its obligations simply by alleging that the required information on mass human rights violations committed in the past was destroyed. On the contrary, the State has the obligation to search for such information by all possible means.<sup>133</sup>

The Council of Europe Convention on Access to Official Documents is the “first binding international legal instrument to recognise a general right of access to official documents held by public authorities”. It also provides a list of exemptions for access to information, but at the same time narrows the scope for abuse by imposing a strict public interest test.<sup>134</sup> Further, it requires that State officials “preserve and organize records, process requests for information promptly, provide reasons for any refusal, and make available a review procedure by a court or ‘another independent and impartial body established by law’”.<sup>135</sup> Although the Convention does not refer specifically to mechanisms tasked with the search for missing persons, it nevertheless applies and is important, since it obliges States Parties to take the necessary measures in their domestic law to give effect to the provisions set out in the Convention.<sup>136</sup> As Article 3 of the Convention proposes the “balancing of interests” when assessing requests to access public information, the interest of finding information about missing persons will most probably prevail.<sup>137</sup>

The instruments above should serve domestic authorities as examples of good practice with regard to access to information in general, and access to records containing information related to the fate of the missing in particular. They should be taken into consideration when specific laws relating to, and agreements with mechanisms tasked with the search for missing persons are drafted.

## Conclusions

During times of internal violence or armed conflict, but also in other contexts, many persons go missing or are forcibly disappeared. These cases are of major importance in DWP processes. Documentation and archives of different sources can provide crucial elements in the search for and establishment of the fate of those who are missing. This is critical for the victims who are still alive and for the family members of the victims. However, it is not only the next of kin of the missing persons who have the right to know what happened to their loved ones, but also their community and society as a whole.

133 IACtHR, *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 24 November 2010, Series C, No. 219, para. 211, available at: [www.corteidh.or.cr/docs/casos/articulos/seriec\\_219\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_219_ing.pdf).

134 See information on the website of the Council of Europe at [www.coe.int/en/web/conventions/full-list/-/conventions/treaty/205](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/205) and J. Ciorciari and J. Franzblau, above note 71.

135 J. Ciorciari and J. Franzblau, above note 71, p. 28.

136 Council of Europe Convention on Access to Official Documents, above note 123, Art. 2, para. 2.

137 See *Explanatory Report to the Council of Europe Convention on Access to Official Documents*, CETS 205, 18 June 2009, para. 38, available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d3836>.

In practice, DWP mechanisms, including those focusing on missing persons, encounter difficulties in gaining access to archives. In addition, they sometimes have to work with archives which have not been handled properly or have been partly destroyed. Nevertheless, archives remain critical to the work of DWP mechanisms, and the international standards are clear that authorities have to document, in a detailed manner, information which helps to prevent persons from going missing. This information should only be classified in exceptional circumstances.

In conclusion, the important role of archives in dealing with the past and in particular in the framework of the search for missing persons should be taken into consideration more carefully. This is only possible if State agencies and international organizations, as well as non-governmental bodies such as human rights and victims' organizations and other civil society actors holding such archives, guarantee their preservation and safeguard. It is also crucial that the mechanisms investigating the fate of missing persons are given privileged and timely access to archives containing information that could support the search for missing persons.



## Using forensic science to care for the dead and search for the missing: In conversation with Dr Morris Tidball-Binz

Forensic Manager of the Missing Persons Project, ICRC\*

*Dr Morris Tidball-Binz is a forensic doctor who joined the International Committee of the Red Cross (ICRC) in 2004 and has since worked for the organization in numerous contexts, helping to develop its novel forensic capacity. Having begun his career with forensic and human rights organizations, he helped pioneer in his native South America the application of forensic science to human rights investigations, particularly the search for the disappeared. He helped create the ICRC's Forensic Unit, of which he was the first Director until early 2017; he then headed the forensic operation for the Humanitarian Project Plan. He is currently the Forensic Manager for the ICRC's new Missing Persons Project. He spoke with the Review to share his insights on the development of humanitarian forensic action and its role in protecting the dead and clarifying the fate of missing persons.*

**Keywords:** missing, Falkland/Malvinas Islands,\*\* forensics, the dead, management of the dead, HPP.

\* Dr Morris Tidball-Binz dedicates this interview to the memory of María Isabel Chorobik de Mariani, founder and first president of the Grandmothers of Plaza de Mayo, who passed away on 20 August 2018 aged 94. She was a true visionary, who saw the value of forensic science for the search for the missing and promoted the first investigations of this kind in the world.

This interview was conducted in Geneva on 16 January 2018 by Ellen Policinski, Managing Editor, and Jovana Kuzmanovic, Thematic Editor at the Review.



“Humanitarian forensic action”, a concept developed by the International Committee of the Red Cross (ICRC), refers to the use of forensic science to address the needs of victims of armed conflicts and other catastrophes for humanitarian, rather than criminal, purposes.<sup>1</sup> The ICRC’s forensic services provide advice, support and training to local authorities and forensic practitioners in searching for, recovering, analyzing, identifying and managing the bodies of those who have died as a result of armed conflicts, catastrophes and migration, and in building local forensic capacity. They may also carry out forensic activities in certain contexts, such as recovery and identification operations, when no other forensic actors are available. The objective is to ensure the proper and dignified management of the dead, to prevent and resolve disappearances, and to bring answers to grief-stricken families, helping fulfil their right to know the fate and whereabouts of their loved ones.

When people die in contexts of armed conflict or disaster, or while migrating, the remains of the deceased must be handled respectfully and with dignity. Their bodies must be searched for, recovered and identified. Forensic sciences such as anthropology, archaeology, pathology, fingerprint analysis, dentistry and genetics, including forensic DNA analysis, can help ensure the professional and dignified management and documentation of the dead and provide objective answers about the identity and fate of missing persons, whether they are dead or alive.

Over the years, the ICRC’s expertise and influence in the field of forensics has grown considerably. Indeed, the ICRC is the only organization offering forensic assistance exclusively for humanitarian purposes. Despite this, the use of forensic sciences for humanitarian purposes, including for clarifying the fate of missing persons, is relatively new, and still faces several challenges. During and immediately after a conflict, searching for missing persons is often one of many pressing needs, but is rarely carried out as a priority. Conducting forensic investigations requires financial and human resources that are not always readily available in the aftermath of conflicts or other disasters. Additionally, forensic investigations in humanitarian contexts can be risky for practitioners – such as health professionals – who may be targets of threats and attacks or face other dangers while carrying out their work, such as exposure to explosive remnants of war. This requires adapting and developing the forensic knowledge, skills, procedures and tools required to overcome the exceptional challenges posed by humanitarian action.

\*\*\*

\*\* The term “Falkland/Malvinas Islands” does not imply official endorsement or the expression of any opinion whatsoever concerning the legal status of that territory, or concerning the delimitation of its frontiers or boundaries. Both names are used together, and are presented in alphabetical order.

1 See Stephen Cordner and Morris Tidball-Binz, “Humanitarian Forensic Action – Its Origins and Future”, *Forensic Science International*, Vol. 279, 2017.



## ***Tell us a little bit about your background. How did you come to work in forensics?***

It happened quite by chance back in 1984 when I was a medical student. At the time, I was studying and living in La Plata, Argentina, where I met a foreign delegation of forensic scientists that were visiting the country that year with the aim of helping to provide some answers for the families of the missing. These families were asking two main questions to the scientists. The first one was about the possibility of identifying a child who had been abducted as a baby and whose parents were disappeared. The second question was about the possibility of recovering and identifying the skeletonized remains of a large number of people who were disappeared and believed to have been killed and buried in clandestine graves. In the wake of the newly elected democratic government coming to power in December 1983, the delegation of forensic scientists had come to Argentina upon request of the families to help provide answers to these questions. In other words, it was the families of the missing who had the vision and initiative which led to the development of pioneering forensic science.

The invitation of foreign forensic experts ensued due to the mistrust on the part of the families of the missing towards the existing medico-legal structures in the country. Indeed, many members of the forensic community in Argentina were suspected, and later some of them were proven to have been involved somehow in the State machinery for disappearing people – for instance, by signing false death certificates of people who had been executed, stating that they had died in an accident or due to unspecified causes. Understandably, the relatives had very little trust in the Argentine forensic officials, but trusted instead the foreign specialists who they had called for help. I was invited to assist the visiting delegation of foreign forensic experts in my capacity as a medical student, because I was trusted by the families, had knowledge of medical terminology and possessed the necessary medical skills. I also spoke English, which proved to be useful for translation purposes. I was tasked with convening a team of trustworthy anthropology and archaeology students who were willing to assist in what turned out to be the first independent forensic investigation into human rights violations in Argentina. Even though I was studying medicine and had other jobs, I accepted, as I also had a commitment to human rights. I had been involved for a few years in the nascent human rights movement, including helping the families of the disappeared in their quest for answers.

I was not a born forensic scientist. I was instead a relatively successful medical student, eager to specialize in public health and family medicine and to work in rural areas. The thought of dedicating my professional career to forensic medicine – at that time still an underdog in the medical sciences – was not at all in my mind. However, upon meeting these outstanding forensic scientists and helping them to carry out the first forensic investigations of their kind in the country, I got hooked on this specialty. What happened thereafter was that I and some of the colleagues I had called upon to assist continued doing the work on a

voluntary basis and formed a team exclusively dedicated to these novel forensic activities. Back then, it did not cross anyone's mind that we would ever charge for any of this kind of work, which was done in addition to our normal jobs and studies, and we therefore ended up working on weekends and holidays to meet the huge need for independent forensic expertise.

We were invited early on to carry out this work by one of the first ever truth commissions established, the National Commission on Disappeared Persons in Argentina, in response to requests coming from the relatives of the disappeared anxious to know the whereabouts and fate of their loved ones.

The question of how to locate the missing was already on the table for quite a while. As human rights activists we did not have the answers, but we suspected that some of the disappeared were buried in unmarked graves in public cemeteries. However, it was very difficult, if not impossible, to do anything about it since at the time any such action would have been seriously repressed by the regime.

When the delegation of foreign forensic scientists visited Argentina, scientific knowledge was ripe for carrying out what turned out to be the first use of forensic sciences applied to investigations of this kind. It also happened at a time when some authorities had ordered massive and hasty excavations in cemeteries to try to find the disappeared. This led to the destruction of human remains and evidence, proved to be extremely traumatic for the bereaved, received much attention from the media, and became known at the time as a "horror show".<sup>2</sup> Bulldozers were in fact digging up masses of skeletal remains, with no respect for the dead, and publicly destroying bodies which, as a result, would never be identified. This was an affront to the dead and to their families, as well as to society as a whole. There was therefore an urgent need and calls to put a stop to such practice through professional and scientific methods of investigation. It is important to note that this was a time when forensic anthropology was still a very exclusive domain in science, barely known outside US academic circles and in a handful of other developed countries. The concept of using it or applying it to these massive investigations was not in people's minds. This was well before television shows featured forensic crime scene investigations and forensics took on a trendy profile.

I was also invited at the time by the Grandmothers of Plaza de Mayo, an NGO formed in 1977 with the aim of finding their disappeared grandchildren, to assist in their quest.<sup>3</sup> They were part of the group of families who had invited the foreign forensic scientists, based on the brilliant and truly innovative idea of using grand-paternity testing to help in their search. This required adapting standard forensic paternity testing – used in courts to establish whether a child is biologically related to a putative father or not – to grand-paternity, by comparing instead the blood of the grandparents with that of a child believed to be their relative. At that time, before the advent of forensic DNA testing, this type of

2 See Cora Gamarnik, "Imágenes de la post-dictadura Argentina", *Artelogie*, No. 7, 2015, available at: <https://journals.openedition.org/artelogie/1072> (all internet references were accessed in May 2018).

3 For more on the Grandmothers of Plaza de Mayo, see the interview with Estela de Carlotto in this issue of the *Review*. Also see: <https://abuelas.org.ar/idiomas/english/history.htm>.

analysis had no precedent in forensic practice, and the first scientists to whom the Grandmothers presented this seemingly crazy idea shunned them. However, there were others who saw merit in the idea, carried out the necessary research and slowly started building up this novel procedure.<sup>4</sup> I was invited to be part of their nascent forensic genetic team, which ended up creating the first ever national genetic data bank for the identification of the missing in 1987.<sup>5</sup>

The first successful use in courts of this revolutionary grand-paternity testing was carried out in Argentina in 1984 and, as a result, a missing young girl was identified and returned to her original family, her grandparents, years after her father and mother were disappeared. She had been abducted as a baby, together with her parents, and taken away by a member of a death squad that was responsible for the subsequent disappearance and murder of her parents. The Grandmothers rescued her years later and successfully proved her identity in court. This same girl went on to study biology and became a geneticist working with the Grandmothers to help identify other disappeared children. The Grandmothers were seen and are still regarded as a truly exceptional group of women. I was very fortunate and honoured to work for them. As mentioned earlier, in my opinion they deserve the full credit for the early development of humanitarian forensic action.

While working with the Grandmothers, I continued carrying out forensic anthropology and archaeology investigations into the disappeared, together with the early team of friends and colleagues with whom in May 1987 we formally created the first ever non-governmental organization dedicated exclusively to this kind of work, the Argentine Forensics Anthropology Team [Equipo Argentino de Antropología Forense, EAAF].<sup>6</sup> The team's work was vitally supported by the Grandmothers and also by some of the forensic experts who had visited Argentina in 1984, most notably Clyde Snow, who provided us with continuous training and professional advice. Dr Snow was in fact the "patron saint" of the team, and I believe that its existence is largely owed to him. I was invited to be the team's first director and managed to complete my medical career, now fully geared towards the application of forensic medicine and science to human rights investigations.

In 1990, I left Argentina to work for Amnesty International as a researcher at its general secretariat in London. While this job did not primarily require using my forensic skills, they proved to be very useful for carrying out evidence-based investigations into allegations of human rights violations, examining torture survivors, carrying out visits to places of detention and guiding investigations into cases of the missing and disappeared. I took the opportunity of living in London to pursue my forensic studies applied to the documentation of human rights

4 Jorge Luis Berra, Norberto Liwski, Diana Grinspon and Morris Tidball-Binz, "A National Bank for Genetic Data of Disappeared Children in Argentina: Task Up to 2050", *Advances in Forensic Heterogenetics* series, 1986, available at: [https://link.springer.com/chapter/10.1007/978-3-642-73330-7\\_120](https://link.springer.com/chapter/10.1007/978-3-642-73330-7_120).

5 See "Historia del BNDG", available at: [www.argentina.gob.ar/ciencia/bndg/historia](http://www.argentina.gob.ar/ciencia/bndg/historia).

6 See the official webpage of the EAAF, available at: [www.eaaf.org](http://www.eaaf.org).

violations and help further develop this field.<sup>7</sup> Also during that time, I participated in some of the first forensic investigations carried out into the whereabouts of the missing from the Balkans' wars.<sup>8</sup>

***You were one of the very first forensics experts to work for the ICRC. How did that come about? What is unique about doing forensic work at the ICRC, as opposed to other organizations?***

The ICRC hired its first forensic expert in 2003. This was Professor Stephen Cordner from Australia, who was on sabbatical leave from his post as director of the Victoria Institute of Forensic Medicine. He was tasked with following up on the recommendations from the 2003 International Conference on “The Missing and their Families”, in particular those related to forensic science, and providing preliminary proposals on the way forward in forensics at the ICRC. To this end, he carried out a couple of missions to the field – to Iraq, and to the Balkans – and prepared a framework for developing additional forensic activities in the ICRC before returning home to his job in Melbourne. At the time, I was working as director of the International Service for Human Rights, an NGO based in Geneva. Although its activities are not related to forensic science, we helped promote its use in United Nations human rights procedures, since this is an NGO dedicated to the development of international human rights standards and mechanisms, and the training of activists for their implementation worldwide. Incidentally, I was invited in 2002 by the ICRC to participate in the preparatory workshops for the 2003 Conference, which I also attended. In autumn of 2003, Professor Cordner and Dr Robin Coupland, an ICRC surgeon who participated actively in the Conference, invited me for lunch at the ICRC, during which – to my utter surprise – they offered me the job of the ICRC's first forensic coordinator. I asked myself at the time, what would the ICRC use my forensic skills for? However, after some hesitation I accepted the kind offer, and I began working for the organization in February 2004. It was, I believe, one of the best decisions I have made in my life, albeit not devoid of challenges.

Many things are strikingly different about working for the ICRC compared to the human rights activities I was engaged with previously. Most of the forensic expertise used in similar work elsewhere is ultimately aimed at providing reliable evidence for criminal investigations and court proceedings. This includes, for example, the determination of cause and manner of death in suspicious cases, or documenting injuries such as those resulting from torture, sexual violence or other forms of physical abuse and collecting evidence on the perpetrators. However, when it comes to the ICRC, forensic science is primarily used for

7 See, for example, Duncan Forrest, Bernard Knight and Morris Tidball-Binz, “The Documentation of Torture”, in *A Glimpse of Hell: Reports on Torture Worldwide*, Cassell, London, 1996.

8 Morris Tidball-Binz, “Forensic Investigation of Alleged War Crime near Vukovar”, *The Lancet*, Vol. 341, 1993, p. 625.

humanitarian purposes and not for establishing criminal responsibility. This means, for example, using forensic science to prevent and resolve cases of missing persons; to properly search for and recover the dead in very challenging environments and circumstances; to protect their dignity and help in their identification; and to inform the families about the fate and whereabouts of their deceased loved ones. This requires specialized knowledge and expertise, which only forensic science can provide, in order to ensure the professionalism required from the ICRC's humanitarian activities. While self-evident today, this was not clearly understood by many back in 2004. Therefore, one of the big challenges I faced when I started working for the ICRC, and an urgent one at that, was to prove the added value of forensic science for ICRC field activities. The uniqueness of its application in humanitarian work is that it provides a box full of tools and knowledge adaptable to different settings, which can assist in, and is often essential for, strictly humanitarian work, typically but not exclusively in relation to the dead. The dead are part of the ICRC's mandate, and armed conflicts will almost always result in large numbers of dead. The dead and their dignity are clearly protected by the four Geneva Conventions and their Additional Protocols, which require that they are properly recovered, documented, identified and buried. This recognition is by no means new; Henry Dunant was one of the first to realize that the dead have rights, and he campaigned for measures to help ensure the dead would be identified after death.<sup>9</sup> It is today recognized that the fulfilment of the obligations towards the dead can only be professionally ensured with the use of forensic science.

Hence, I set out early on at the ICRC to try and prove the value of forensics in the eyes of colleagues in the field, by going to the Balkans, the Caucasus and other areas and contexts where the ICRC faced many challenges in resolving cases of missing persons. I had many questions about how to improve the management of the dead, and it soon became apparent to colleagues, especially in the field, that forensic expertise was indeed very useful for the organization's activities on behalf of the dead and missing. Nowadays, I believe that most in the ICRC and elsewhere regard forensics as an essential tool for humanitarian action, for both the dead and the living, as it helps bring answers and relief to the bereaved families and their communities. Also, by helping fulfil the obligations towards the dead, we reassert our own humanity. In addition, the forensic capacity developed by the ICRC nowadays provides the organization with a unique and competitive edge for responding to humanitarian emergencies and also for addressing the legacy of past conflicts. Indeed, the ICRC is the world's only humanitarian organization that has forensic capacity and is using it exclusively for humanitarian purposes. As a result, the organization is today regarded as an authority in humanitarian forensic action.

I am therefore confident that the new Missing Persons Project, launched in 2018, will help further consolidate the role of forensic practitioners and the

9 During the Franco-Prussian War of 1870, Henri Dunant visited and comforted the wounded brought to Paris and introduced the wearing of a badge so that the dead could be identified. See ICRC, "Henry Dunant (1828–1910)", available at: [www.icrc.org/eng/resources/documents/misc/57jnvq.htm](http://www.icrc.org/eng/resources/documents/misc/57jnvq.htm).

contribution of forensic science to preventing and resolving cases of missing persons. Indeed, the Project offers a new and unique opportunity for building on lessons learned since 2003. It aims to mobilize and empower communities of practice worldwide, including forensic professionals and institutions, and to develop new standards and guidance required to meet new challenges, such as those of missing migrants, for effectively resolving the tragedy of the missing everywhere.

There is also, in my opinion, a chapter which still needs to be developed in the ICRC, which concerns forensic science applied directly to the living. I believe this will evolve in line with today's requirements and expectations in humanitarian action. For example, interventions on behalf of detainees believed to have suffered ill-treatment should benefit from having a forensic expert's opinion to substantiate their claims. This is not to say that such claims should not be taken seriously without the opinion of a forensic expert, but often only the latter can provide the necessary evidence-based arguments in favour of the victims. Slowly but surely, awareness is growing that forensics can assist the living, such as in the documentation of torture and sexual violence. Concerning the last point, for example, I have been involved in helping develop some standards which the ICRC has found very useful. One example concerns virginity testing; we have been working to help refute the scientific and ethical validity of such practices, which may amount to cruel, inhuman or degrading treatment.<sup>10</sup>

In summary, humanitarian forensic action is an important ICRC activity today. It started as a technical, scientific tool for the institution, but became growingly regarded as a necessary one, not only for field operations but also for humanitarian dialogue and for positioning the organization as a leader in this field.

Personally, having helped create the ICRC Forensic Unit is as important and significant in my professional career as having helped create the EAAF. Both teams have undoubtedly helped expand the scope of forensic science, to include unprecedented human rights and humanitarian dimensions respectively. I am extremely grateful to all the colleagues with whom I have worked and who have helped make this possible. I cannot fail to mention here as well the immense support I have received from my family throughout these years, as they have allowed and encouraged me to dedicate the necessary time and energy to this shared endeavour.

The development of humanitarian forensic action has undeniably contributed to the humanitarian community's understanding of the value of forensic science to its activities. Remarkably, it has also contributed to the forensic community's understanding of the importance and value of its contribution to humanitarian activities. A good example of this was the creation in 2015 of the Humanitarian and Human Rights Resource Centre, by the American Academy of Forensic Sciences.

10 Independent Forensic Experts Group, "Statement on Virginity Testing", *Journal of Forensic and Legal Medicine*, Vol. 33, 2015, available at: [www.sciencedirect.com/science/article/pii/S1752928X15000335](http://www.sciencedirect.com/science/article/pii/S1752928X15000335).

***Has humanitarian forensics work fundamentally changed over the course of your career? What have been the biggest shifts in terms of the science?***

Humanitarian forensic action, defined as the application of forensic science to humanitarian activities, is in fact a new field of forensic science developed by the ICRC. There have been some dramatic changes in the profession over the years, as initially forensic science was regarded as a tool to assist primarily in the determination of cause and manner of death. The concept, knowledge and understanding of the need to ensure primarily the dignity of the dead and their documentation as required for their identification and traceability, regardless of whether they are identified or not, is something which has evolved with time, thanks largely to the ICRC. As a result, the understanding of this field of knowledge and activity has moved from being focused mostly or exclusively on the recovery of the dead in order to find out how they died, to primarily ensuring their dignity, professional documentation and helping to provide answers to the families. The latter not only requires mere reporting, but also being directly engaged in a dialogue and fulfilling the psychosocial needs of families whose loved ones have gone missing or died.<sup>11</sup>

***You have often worked to identify the remains of missing persons. What are the specificities of working to identify the missing?***

Unlike standard criminal investigations, those aimed at resolving cases of missing persons, alive or dead, can help people overcome some of the worst suffering that a person can endure: that of not knowing the whereabouts and fate of a missing loved one, or whether that person is alive or dead. If found dead, the certainty of the identity, which the bereaved often require in order to be able to proceed with their mourning, can only be provided by forensic science. Equally important is ensuring that the dignity of the dead is protected throughout, for which forensic science can prove indispensable.

In other words, helping resolve cases of missing persons provides a truly unique humanitarian meaning to forensic work. In addition, the specific challenges posed by these investigations, including complex and large-scale recovery and identification processes, offer an opportunity for further developing forensic science on behalf of humanity.

***How do you keep the deceased and their families at the centre of this type of work?***

There are several angles to consider when answering this question. From a purely pragmatic point of view, one cannot identify a dead body or a set of human

11 For more on this, see the article by Pauline Boss in this issue of the *Review*.

remains without information about the person. In most cases, the best and often the only source of such information – which we call *ante mortem* data – are the families themselves. For this reason, as forensic professionals investigating the missing and trying to identify the dead, we need to develop good working relations with concerned families, who should be able to trust those helping resolve their cases.

In humanitarian action, however, this goes beyond this purely pragmatic perspective. Carrying out humanitarian forensic work means not only that the families are instrumental in assisting in the identification, but also that they are satisfied that their loved one is who we inform them he or she is. This requires a dialogue, building trust, whereby the forensic scientist cannot work in a detached manner from the family. Being close to the families at all times is essential for forensic identification, but even more so for humanitarian forensic action. This requires a highly professional and empathic approach for communicating and relating with the bereaved families. An empathic approach means literally putting oneself in the other person's shoes in order to better understand their views and feelings. As a medical doctor, I would say that this requires developing a quasi-therapeutic relationship, which should be established with the bereaved to both empower them in their capacity as active participants in the investigation process and ensure their trust in the results of the investigation, whatever those might be. I hope that the ICRC's new Missing Persons Project will help further develop guidance and standards to help practitioners in their dialogue with the bereaved, and will help ensure that such dialogue is most useful for fulfilling the humanitarian goal of resolving cases of missing persons.

### ***What have been the most challenging contexts you have worked in over your career?***

In terms of challenging contexts, it would have to be the early work I was involved in, in Argentina, at a time when there were still people who did not want cases to be investigated. This was in the immediate post-military regime context, when among some sectors of society there was a great discomfort about investigations into crimes that had happened. This involved a certain amount of danger and threats that were pretty serious at times. Early on there were often discussions with colleagues and friends about whether we should continue working or not, because I had a family and the threats were serious enough to question it. We were only students and did not have a network or an institution behind us that could protect us. Working for the Grandmothers later on helped. They were an extraordinary solace, because they had been the subject of threats themselves and had endured years of hard repression. This was quite reassuring, because if they had managed to endure and overcome challenges, we could as well.

Apart from the difficult general context in the early stages of my career, I would say there are a number of specific challenges that all forensic practitioners face while carrying out humanitarian forensic work in the field. They range from having to manage unprecedented operations to facing genuinely life-threatening



situations during armed conflict or other situations of violence. On such occasions, questions may arise as to whether working for the dead is worth risking your life for. My recollections of this last point are very much related to some of the fieldwork I carried out with the ICRC.

In 2011, for instance, we were tasked with helping to recover and identify the bodies of thirty-five men who had been abducted and killed in Libya, in the context of the civil war which was raging at the time.<sup>12</sup> This operation was carried out by the ICRC on site during Ramadan, at a critical time of the civil war, with the full support of the local community. Interestingly, the community told the ICRC that the recovery of their dead was more important and urgent than any other assistance they were receiving from the ICRC, including medical care for those wounded in battle. There was in fact a lot of shooting around. One day in particular, we had to flee the site because there were reports that a large armed contingent was coming full force to take over the area and wipe out all of those around. We left everything behind, and only came back when it turned out that the reports were not true. This can prove very challenging, because you are trying to be as professional as possible in carrying out the forensic work, which requires a certain methodology, standards and time frame. On the other hand, risk related to the operation needs to be reduced to the minimum possible. Hence, you have to strike a balance while respecting procedures and standards as much as possible, thinking always about the families and, ultimately, the humanitarian objective of the work under way. We managed to complete the work in five working days, from dawn to dusk. This was a forensic job that would typically require at least triple that time and a double-sized team. To my satisfaction, we identified twenty-seven out of thirty-five bodies, with the means and procedures that we followed, which conformed to our own standards and the general requirements set by the Geneva Conventions regarding the management, documentation and identification of war dead. This satisfied the community's main concerns and request to bring the bodies of the lost men back and identify them. Contexts like these illustrate how one has to adapt forensic procedures and skills to very challenging circumstances, which is something we often encounter in the ICRC.

Further, there are other types of challenging contexts, where you feel the brunt of extreme political pressure. A good example is the case when the ICRC was called to assist in the exchange of prisoners and human remains between Israel and Hezbollah in Lebanon in July 2008.<sup>13</sup> War had flared up two years earlier after two Israeli soldiers were taken away across the border by a Hezbollah unit, and Israel retaliated. It took two years until an agreement was made with a chief negotiator from a neutral country, with the ICRC acting as a neutral

12 See ICRC, "Libya: Helping Identify the Dead", News Release, 14 September 2011, available at: [www.icrc.org/eng/resources/documents/news-release/2011/libya-news-2011-09-14.htm](http://www.icrc.org/eng/resources/documents/news-release/2011/libya-news-2011-09-14.htm).

13 See Ayat Basma and Avida Landau, "Hezbollah Delivers Remains of Two Israeli Soldiers", *Reuters*, 16 July 2008, available at: [www.reuters.com/article/us-israel-lebanon-prisoners-idUSL141960220080716](http://www.reuters.com/article/us-israel-lebanon-prisoners-idUSL141960220080716). See also Anna Petrig, "The War Dead and Their Gravesites", *International Review of the Red Cross*, Vol. 91, No. 874, 2009.

intermediary, for the exchange of detainees and human remains. The Israeli soldiers would be returned by Hezbollah in exchange for the return from Israel of Lebanese and Palestinian prisoners, along with the remains of dead Palestinians. However, it remained unclear whether the two Israeli soldiers were alive or dead. This became an important issue, not only for the families and the two countries, but for the international community as well. I happened to be in Lebanon at the time carrying out an unrelated ICRC forensic assessment on the missing in the country. The head of the ICRC delegation there asked me if I would make myself available as a medical doctor to examine the Israeli soldiers. In case they were alive, I was to examine their health conditions, document any injuries they might have, and so on. In case they were dead, I was to do the required examination of their human remains. What appeared to be a simple job in the beginning turned out to be an extremely sensitive and difficult one when two coffins appeared on the scene, allegedly holding the bodies of the two Israeli soldiers. I received a request from the chief negotiator, who informed me that the Israeli side would not move unless the ICRC provided proof of the identity of the remains.

All I had brought with me on that day were some surgical gloves and the basics for carrying out an external medical examination, but I was suddenly expected instead to do a full forensic identification of human remains, for whom I had no *ante mortem* data. The pressure was on; further tensions would likely ensue if these turned out not to be the Israeli soldiers. Firstly, I said that I would do my best to carry out the job, because there was simply no alternative. Secondly, I had certain conditions: there was to be no media present, as the examination needed to be done in privacy for the sake of the dignity of the dead. I requested that I be left alone with the negotiator and the ICRC colleagues who assisted me. After some discussion, I finally had a little shed organized where I could open the two coffins in full privacy. The clock was ticking: the prisoners were waiting on the other side to be transferred, as well as trucks with human remains to be transferred, and the armed forces waiting for an order.

One thing I had requested was *ante mortem* data – I needed physical information, including some dental information, in order to say whether these remains were or were not the individuals in question. I got teeth X-rays at the last minute. I opened the coffins and, with the understanding of the religious imperatives for not disrupting the bodies, I was limited in how much forensic analysis I could do in order to respect the dignity of the dead. The findings that were quickly made on examining the remains confirmed their identities, because the dental traits that I saw in the bodies were fully consistent with those of the dental charts that the Israeli side had sent. I was able to write succinct reports on site confirming that the remains were those of the individuals in question. It was a big relief on all sides. I received my greatest professional credit ever when, about four hours later, the chief negotiator expressed his satisfaction with the fact that the ICRC forensic expert managed to do in forty-five minutes what the full forensic team required four and a half hours to confirm. As you can imagine, this operation and its challenges proved quite daunting. This did not entail physical threats, but if something went wrong it would have had major negative consequences.

Other challenges involved the environment. In 2007, I was asked by the ICRC delegation in Bogotá to help in the recovery of the bodies of eleven legislators who had been abducted by the main guerrilla force in 2002, and had died a few months earlier in contested circumstances.<sup>14</sup> The guerrillas said they died in a botched rescue operation by government forces, while the government straightforwardly accused the guerrillas of executing the eleven legislators. The families wanted the bodies of their loved ones back. Both sides agreed on a ceasefire for a handful of days for the ICRC to collect the bodies. This was the result of a lengthy negotiation with both parties, and a very complex one at that. It required that we fly out in a helicopter to the middle of the jungle, with the condition that the coordinates of where the bodies were would be provided to us during the flight. We ended up landing in the middle of a coca field, where we had to fend for ourselves for nearly a week, even though it was initially believed this operation would last a day or two only. Unexpectedly, the precise GPS coordinates provided by the guerrillas did not match our own GPS readings. Sometimes this happens. Different systems were used, and this required that we walk through the jungle for days, dozens of miles across very difficult mined terrain, under mounting pressure, to try and locate the site of burials. The government started accusing the guerrillas of having lied; this was contested by the guerrillas, who assured us that the bodies were there. At night, there were a couple of occasions when we heard explosions around, which indicated the fragility of the ceasefire. Most of all, this mission was physically extremely exhausting and challenging because we had to blindly move through deep tropical rainforest to locate the site of the burials. We finally managed to find the bodies using forensic techniques borrowed from forensic archaeology. Once the burial site was found, the bodies had to be properly exhumed, documented and safely transported out of the site. Once exhumed, getting the bodies out of the site proved extremely challenging indeed. We could not physically carry the bodies back to the first landing site through the thick jungle and deep ravines that we had come in through. We ended up having to build an improvised helicopter landing field in the middle of the jungle, chopping down trees that were more than fifty feet high. While I was exhuming the bodies, the other colleagues in the team prepared this landing site, which was slightly larger than the size of a basketball court. The flight out of that place proved to be interesting.

More recently, the implementation of the Humanitarian Project Plan [HPP] for the Falkland/Malvinas Islands was extremely challenging in many ways, including the fact that there was no precedent in the ICRC of a similar operation. At the ICRC, we usually support forensic activities and assist structures which already exist, so planning and implementing such a large, complex and challenging humanitarian forensic operation in full substitution mode was totally unprecedented. However, despite the remoteness and extreme weather conditions prevailing in the Islands, we managed to successfully set up

14 “11 bodies handed over in Colombia probe”, *Reuters*, 9 September 2007, available at: <https://tinyurl.com/yabda5py>.

and operate on site – meaning at the cemetery – a high-tech mortuary, to ensure that the necessary IT and communications support systems were functioning, and to follow our protocols as planned. This included ensuring that every exhumed body was analyzed, sampled, reported and reburied on the same day of recovery, and treated with the utmost respect, including reburial in new coffins – and we also made sure that the cemetery was restored to its original shape after the operation. For me personally, managing a sizeable team of highly skilled forensic experts and making sure throughout that everything ran smoothly, harmoniously and up to the required standards was a very challenging but also a very rewarding experience. Mind you, we all worked all day long and into the respective nights, nearly seven days a week for nearly three months, in those conditions. Fortunately, I worked with an exceptional team of highly committed, hard-working and very experienced forensic scientists, who share my love for this kind of work. By the end we felt like a very happy family indeed. The forensic operation, which benefited from the support of the local population (without which it would have been impossible), also required a lot of very hard work and long-lasting commitment from many colleagues at the ICRC's headquarters in Geneva and the ICRC delegations in London and Brasilia, where the adrenaline flow was also ever-present during the entire operation. I believe that we were very fortunate to accomplish that project as planned, given the seemingly insurmountable challenges which we faced. In the end, everything worked out fantastically well and, most importantly of all, we were able to name the dead, inform their families accordingly and thus fulfil a humanitarian goal which would have made Henry Dunant very proud.

***Tell us more about the work in the Falkland/Malvinas Islands. How did the ICRC get its mandate to work in this context?***

The general mandate for the ICRC to carry out that operation arose from a request by the Argentine government to the ICRC back in 2012. We were asked to help in the identification of Argentine soldiers buried without a name in the Islands because they could not be identified at the time. They died there during the 1982 armed conflict between Argentina and the United Kingdom and were buried soon after in a military cemetery in Darwin. Despite efforts by the British forces at the time to identify all the dead, many remained unidentified. There were two bases for this mandate to the ICRC. One came from the families, who wished to have their loved ones identified and to know exactly in which graves they were buried. The other stemmed from the obligations under the Geneva Conventions, which require the parties to do their best to identify the war dead.<sup>15</sup>

15 *Editor's note:* These obligations can be found in Geneva Convention I (GC I), Arts 15–17; Additional Protocol I (AP I), Arts 32, 34; Additional Protocol Additional II, Art. 8 (regarding search for and collection of bodies).

Importantly, the request and the mandate came to the ICRC as a recognition of its humanitarian forensic capacity, without which such a mandate would not have been possible. This was in fact one of the first clear acknowledgements of the ICRC's novel forensic capacity, coming directly from governments. When we speak of a "mandate" in this situation, it is in the form of a legally binding document. It takes two to tango, so to speak, and in this case it concerned two countries: Argentina and the United Kingdom. It took five years of negotiations between them and the ICRC to come up with the formal mandate, the HPP, which was signed by both countries and the ICRC in December 2016. That mandate called specifically for this job to be done with a strictly humanitarian purpose, and with a plan of action developed by the ICRC, to be completed before the end of 2017. I was tasked with developing this plan of action for the forensic recovery and identification of the dead. Hence, you can say that the mandate sprang from the request of the families, from international humanitarian law [IHL] obligations, from the agreement between the countries, and from the acknowledgement and recognition by all concerned that only the ICRC could do the job. In fact, no other organization had this capacity, including the required neutrality, independence and impartiality. Even though the armed conflict was long over and both countries are now at peace with each other and enjoy full diplomatic relations, this is still a very sensitive file; it required absolute neutrality throughout the operation, which only the ICRC can provide.

### ***What were the outcomes of the HPP? Did families get the answers they were hoping for? What will this mean for them?***

We found, recovered and carefully analyzed the bodies of 122 Argentine soldiers buried without a name in Darwin, within the time frame of the HPP, which was January to December 2017. The 122 bodies were part of 148 Argentine soldiers missing in action, meaning that some of those missing in action were never found and are therefore not buried in that cemetery. We managed to document all the remains as required in our own protocols, and to bury them back as planned and mandated in the HPP – meaning on the same day of their exhumation and protecting their dignity throughout – and we obtained full DNA profiles for each and every one of the remains analyzed. This means that every one of the bodies that we examined is identifiable, if the necessary *ante mortem* data and reference DNA samples can be obtained from the corresponding family. This is an important caveat, because not all the families had come forward in time to provide the necessary information and samples required for the identification of all the bodies.

By the end of the HPP, 107 families came forward, providing the necessary *ante mortem* data and biological reference samples for DNA testing. We were able to fully identify eighty-eight bodies and provide the corresponding reports for their families, within the time frame of the HPP. In addition, ten families were informed that their loved ones were not among the 122 bodies analyzed, meaning

that they are not buried in the cemetery. The ICRC also issued reports, including the corresponding DNA profiles, for all the bodies which remained unidentified, so that they may be identified in the future by the Argentine authorities once the corresponding families come forward with the necessary information and reference samples. This included families who had donated insufficient DNA samples for concluding an identification above the threshold set for the HPP: 99.95% certainty of identity.

After the reports were handed over to the countries and to the families, some families felt further reassured that this process was both serious and professional and were convinced that it was worthwhile coming forward. Currently, there are new families coming forward and new identifications have been made since the beginning of 2018 with the information and samples that they have provided. In the future, I expect and hope that most if not all of the bodies which we analyzed will be identified.

Also, we found a small number of personal belongings during the forensic examination of the bodies. This came as a surprise and I had to make a decision on the site regarding what to do with these items, because the HPP did not include a clause on keeping any belongings from the dead. We found items that we were not expecting to find, such as ID cards and highly personal items like a wedding ring. We were previously reassured by the British who had collected the dead that all personal belongings had been handed over to Argentina. Unavoidably, however, they missed some of the belongings concealed within the heavy winter clothing worn by the soldiers. Our thorough forensic examination, including the use of last-generation imaging equipment, allowed us to find all such objects. There was simply no time for lengthy consultations with ICRC headquarters about what to do with such objects, as the dead had to be buried back in their original graves on the same day. I therefore took the decision, based on the Geneva Conventions (which are very clear on this matter), that we would keep the items and hand them to the parties.<sup>16</sup> Our lawyers were later fully in agreement with this decision. There is an obligation under IHL for these objects to go back to the corresponding families.

I am glad to say that all the families were extremely satisfied with the results handed out by the ICRC, including those that did not get an identification report but were very grateful for the effort made on behalf of their loved ones. I was initially a bit doubtful that all families would be satisfied with the results – I was expecting that some families would contest the findings – but I was fortunately proved wrong.

For example, the head of one of the family commissions had been initially very critical about the operation, and had challenged the ICRC from the beginning. However, her mother wanted to be part of the process; she requested for the identification of her son, believed to be buried in Darwin, and provided the necessary information and reference samples. Her son was identified among the cases which we analyzed, and the family was informed accordingly; they also

<sup>16</sup> *Editor's note:* See GC I, Art. 16; Geneva Convention II, Art. 19; Geneva Convention III, Art. 122; Geneva Convention IV, Art. 139; AP I, Art. 34(2)(c).

received some personal belongings which we found with the body. This was highly appreciated by the family. In fact, the daughter apologized publicly for her earlier remarks and urged all remaining families to come forward to provide information and donate reference samples to help identify their loved ones buried in Darwin.

In the end and without exception, we received extremely positive feedback from all the families concerned. There was a ceremony held at Darwin cemetery on 26 March 2018, where they were able to honour their dead and lay a wreath on the individual graves. In my opinion, the sheer intensity and magnanimity of that ceremony was a testimony to the importance and humanitarian necessity of honouring the dead, on the one hand, and to the need of families to know exactly where they are laid to rest, on the other. They had waited and campaigned for thirty-five years for that moment.

### ***What would you say were the important lessons that can be taken away from this case for the future?***

Firstly, this operation confirmed the ICRC's capacity to carry out highly complex forensic recovery and identification operations in challenging contexts. Initially, there were many doubts as to whether we could or should do this exceptional job in what we call "full substitution mode" in terms of forensic work, meaning taking full responsibility for the entire process, including issuing the identification reports. This operation confirmed that the ICRC has the know-how, the standards, the protocols and forms, and the network of experts who we can hire as ICRC staff if required for these very challenging operations. As importantly, the case proved that forensic science today offers an indispensable toolbox for resolving complex humanitarian endeavours.

In addition, the case provided us with lessons in terms of forensics, including on how to approach identifications, particularly the value of what we call an "integrated approach" to identification, meaning combining all available information – including the place of death, available *ante mortem* data and the DNA results – into the forensic identification process. This concept was developed by the ICRC's forensic services and its Forensic Advisory Board.<sup>17</sup> For example, some could not understand why I requested information on where these soldiers had died to assist in their identification. They believed that we should be satisfied with DNA identifications only. However, the information on the places of soldiers' deaths was very useful, because the British had documented precisely where the bodies had been found. Thus, when this information matched with the site where someone was supposed to have died, it proved extremely helpful to

17 The ICRC's Forensic Advisory Board was established in 2010 to offer advice to the organization on complex forensic matters which might arise in relation to humanitarian activities. It is composed of nearly thirty renowned forensic scientists from around the world who represent several disciplines and offer their advice on a voluntary basis.

narrow down the hypothesis of identity of that individual. The fact is that from a forensic point of view, DNA does not provide a definite answer in every case and additional information is often required to conclude an identification with a sufficient degree of certainty. We had the benefit of having *ante mortem* data provided by the families, which in some cases helped in confirming an identification, but often proved insufficient to conclude an identity. The integrated approach to identification proved to be indispensable in this case. We also learned important lessons for developing the ICRC's new and next-generation *ante mortem–post mortem* database, including with regards to recording and managing information in real time and by many forensic users working together. This has already helped inspire some of the thinking behind the development of the new database, which is under way at the moment.

From an ICRC operational point of view, this operation turned the standard model for field activities, usually implemented by delegations with advice from headquarters, upside down. It was instead implemented directly by a headquarters team deployed to the field, with support from the concerned delegations, in a truly participatory effort of all those involved.

For me personally, this case has confirmed once again and above all the importance of the dead for the families, their communities and their countries. As mentioned before, these two countries are at peace with each other, with full diplomatic relations, but this issue is still contentious. While it might not be the aim, putting the dead to rest is providing a fundamental step in building up the trust among nations.

The missing are one of the core concerns of the ICRC and a guiding one for me. Arguably, however, in this case the unnamed soldiers were not “missing” in the full sense of the term, since most of their families knew that their loved ones lay buried in a proper resting place in the Islands. Yet, they needed to know more; they needed to know precisely where they were buried, and especially, they pleaded for their dead loved ones to be given their names back. The case proved, once again, that the families' need to know about their dead, to be able to lay a wreath on the exact place, is fundamental for human beings. It is not by accident that these are requirements under IHL.

By the way, the case also proved the lasting value and need for the Geneva Conventions and their Additional Protocols, without which the dead would not have been collected and properly buried in the first place and the HPP would not have taken place. The precise requirements under IHL regarding the dead also proved essential for guiding our forensic work in this case, as exemplified by the recovery of personal objects.

***To conclude, what should the average person understand about the role forensics work plays in humanitarian action?***

There is a line from the poet Wyston Hugh Auden, which reads as follows: “Through art, we are able to break bread with the dead, and without communion



with the dead, a fully human life is impossible.” If you change “art” to “science” and “human life” with “humanitarian action”, you get “Through science, we are able to break bread with the dead, and without communion with the dead, a fully humanitarian action is impossible”, which gets you closer to what forensic science can do for humanitarian work. Again, it is not only about the dead, it is about the living, because we are part and parcel with the dead, and when we work for the dead, we work for the living as well. The relatives are a very immediate example, but it goes well beyond that: it touches the core of humanity itself.

I therefore hope that the new Missing Persons Project, which the ICRC has launched in 2018 to help develop new guidelines and standards for preventing and resolving cases of missing persons, will help further build on the many lessons learned from its humanitarian forensic activities, including last year’s HPP, to ascertain the rights of the dead, shed light on the whereabouts of the missing and fulfil the rights of their families.



# Advances and progress in the obligation to return the remains of missing and forcibly disappeared persons

**Grażyna Baranowska\***

Dr Grażyna Baranowska is a Senior Researcher at the Poznan Human Rights Centre of the Institute of Law Studies of the Polish Academy of Sciences, and a Post-Doctoral Researcher in the Memory Laws in European and Comparative Perspectives (MELA) research consortium.

## Abstract

*This article analyzes the evolution in international law of the obligation to search for and return the remains of forcibly disappeared and missing persons. Receiving the remains of forcibly disappeared and missing persons is one of the primary needs of their families, who bring the issue to international courts and non-judicial mechanisms. This obligation has been incrementally recognized and developed by different human rights courts, which have included the obligation to search for and return the remains of disappeared persons in their remedies. In parallel to the development of the obligation by international courts, the international community has begun to become more involved in assisting in return of the remains of forcibly disappeared and missing persons to their families.*

\* The research for this paper was conducted as part of the MELA project, funded by Humanities in the European Research Area (HERA). The author would like to thank Manfred Nowak, Jeremy Sarkin and Ariel Dulitzky for their very helpful comments on early drafts of this paper. Additionally, the paper has benefited greatly from comments provided by the editorial team of the *Review* and anonymous reviewers, for which the author is most grateful. This article reflects the views of the author alone and not necessarily those of any organization with which she may be affiliated.

**Keywords:** enforced disappearances, missing persons, mortal remains, memory laws.



## Introduction

Many people go missing during both international and non-international armed conflicts, causing anguish and uncertainty to their families. Some people are purposely rendered “disappeared” by one of the belligerents or in peacetime by State authorities. The disappeared are very often victims of secret extrajudicial killings, and their mortal remains are further violated, leaving their next of kin with uncertainty about their fate.<sup>1</sup> In the frequent cases of death, such uncertainty is allayed through return of the remains.<sup>2</sup> This article analyzes the advances of the obligation to return the remains of missing and forcibly disappeared persons in international law.

While for the families of both missing and forcibly disappeared persons their situation may be identical, the two terms differ. An enforced disappearance occurs when a person is deprived of liberty with at least the acquiescence of a State, followed by a refusal to acknowledge the disappearance or by concealment of the person’s whereabouts or fate.<sup>3</sup> There is no accepted definition for “missing persons”, but they are usually seen as those who have gone missing as a result of armed conflict, which is also the sense in which the term is used in this paper.<sup>4</sup>

Until the adoption of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) in 2006, there was no treaty containing a legal obligation to take measures to return the remains of disappeared persons in peacetime. Nevertheless, the importance of locating the bodies of disappeared and missing persons, as well as returning them to their families, has been recognized for decades. For example, the United Nations (UN)

1 Tullio Scovazzi and Gabriella Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention*, Brill, Leiden, 2007, pp. 360–362; Lisa Ott, *Enforced Disappearances in International Law*, Intersentia, Antwerp, 2011, p. 270.

2 Simon Robins, *Families of the Missing: A Test for Contemporary Approaches to Transitional Justice*, Routledge, New York, 2014, pp. 48, 102.

3 As defined in Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance, 2716 UNTS 3, 20 December 2006 (entered into force 23 December 2010) (ICPPED). It should be noted that according to the Rome Statute, an enforced disappearance can also be conducted with at least the acquiescence of a political organization: Rome Statute of the International Criminal Court, 2187 UNTS 3, 17 July 1998 (entered into force 1 July 2002), Art. 7.2(i). See also Christoph Hall, “Article 7: Crimes against Humanity”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Note, Article by Article*, Beck and Hart, Baden-Baden, 1999, pp. 117–172.

4 For more comments on the two terms and their usage, see the following section. At the same time, the two terms overlap, and for different reasons the judicial bodies and international initiatives cited in this contribution may choose to use one of the two or both. For example, judicial bodies (with the exception of the Human Rights Chamber for Bosnia and Herzegovina) use mostly “enforced disappearances”, while the Special Process on Missing Persons in the Territory of the former Yugoslavia uses “missing persons”. When analyzing each of them, the phrase used by the particular judicial body or international initiative will be used.

General Assembly, in a resolution on assistance and cooperation in accounting for persons who are missing or dead in armed conflicts adopted in 1974, called upon parties to armed conflicts, regardless of the character of the conflict, “to take such action as may be within their power to ... facilitate the disinterment and the return of remains, if requested by their families”.<sup>5</sup>

International jurisprudence has played an important role in the rise of the legal obligation to search for and return the bodies of persons who were purposely disappeared, especially by including the issue in reparations measures. This has been influenced and shaped by the wishes of families of disappeared persons, who have put forward various types of claims aimed at fulfilling this need.<sup>6</sup> In parallel with the developments in international jurisprudence, the international community has begun to get actively involved in returning the remains of forcibly disappeared and missing persons to their families. This is an important change,<sup>7</sup> as in some situations international support and cooperation are needed in order to carry out exhumation and identification.

This article is divided into five sections. The first section introduces the differences of terminology in international human rights law and international humanitarian law (IHL). The second section shows that returning the remains of missing and forcibly disappeared persons is – in case of death – a primary need of their families. The third, and main, section recounts the development of international law on the subject. First treaty law is introduced, showing how international human rights law and IHL have evolved in their approach toward returning the remains of disappeared and missing persons; the section then discusses international jurisprudence, presenting brief analyses of significant judgments and decisions of four judicial bodies that have included the issue in their reparations remedies. The fourth section examines how international actors have become involved in forensic work and in returning the remains of missing and disappeared persons. The fifth and final section offers conclusions.

## Enforced disappearances and missing persons

“Enforced disappearances” are defined in the ICPPED as any form of deprivation of liberty by an agent of the State or persons acting with at least the acquiescence of the

5 UNGA Res. 3220 (XXIX), 6 November 1974.

6 For more on the role played by families of the disappeared in shaping contemporary transitional justice policies and the evolution of an international legal framework on the issue, see Iosif Kovras, *Grassroots Activism and the Evolution of Transitional Justice: Families of the Disappeared*, Cambridge University Press, Cambridge, 2017.

7 In many previous post-conflict situations, the emphasis has been put on other aspects. For example, during some exhumations carried out in Bosnia and Herzegovina and later in Kosovo for the purpose of collecting evidence for the International Criminal Tribunal for the former Yugoslavia, bodies were reburied without identification because individual identification was found to be unnecessary, Laurie Vollen, “All that Remains: Identifying the Victims of the Srebrenica Massacre”, *Cambridge Quarterly of Healthcare Ethics*, Vol. 10, 2001; Human Rights Advisory Panel, *Nenad Stojković against UNMIK*, Case No. 87/09, Opinion, 14 December 2013, para. 98.

State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law.<sup>8</sup> According to the Convention, not only is the disappeared person the victim of an enforced disappearance, but all individuals who suffered harm as a direct result of an enforced disappearance – including parents, children, life partners or other close relatives of the disappeared person – are considered victims of the disappearance as well.<sup>9</sup> In cases of enforced disappearance, an official policy of denying the fact of the disappearances and/or State involvement will lead to a reluctance to carry out exhumations and identifications. Furthermore, the violation of mortal remains is one of the most common features of disappearances, leading to an inability to return the remains in certain contexts.<sup>10</sup>

The term “enforced disappearance” is not referred to as such in IHL treaties. Nevertheless, the act “violates, or threatens to violate, a range of customary rules of international humanitarian law”, in particular the prohibitions against arbitrary deprivation of liberty and against torture and other cruel or inhuman treatment, as well as against murder.<sup>11</sup> The term “missing persons”, which is used in IHL, does not just include persons who went missing because of an enforced disappearance. While there is no accepted definition of a “missing person”, they are usually seen as those who have gone missing as a result of armed conflict.<sup>12</sup> The International Committee of the Red Cross (ICRC) has defined “missing persons” as “*all those whose whereabouts are unknown to their*

8 ICPPED, Art. 2. For more on enforced disappearances, see Maria Fernanda Perez Solla, *Enforced Disappearances in International Human Rights*, McFarland, Jefferson, NC, and London, 2006; T. Scovazzi and G. Citroni, above note 1; L. Ott, above note 1.

9 ICPPED, Art. 24.1. As such, they have the right to know the truth regarding the circumstances of the disappearance, the progress and results of the investigation, and the fate of the disappearance person (Art. 24.2), as well as the right to obtain reparations and prompt, fair and adequate compensation (Art. 24.4.).

10 For example, when human remains have been thrown from airplanes into the ocean or blown up by explosives; see T. Scovazzi and G. Citroni, above note 1, p. 360.

11 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, New York, 2009 (ICRC Customary Law Study), p. 340; see also pp. 421–427. For a detailed discussion on the differences between “disappearances” and “missing persons”, see also Working Group on Enforced or Involuntary Disappearances (WGEID), *Report on the Visit to former Yugoslavia by a Member of the Working Group on Enforced or Involuntary Disappearances at the Request of the Special Rapporteur on the Situation of Human Rights in the former Yugoslavia (4–13 August 1993)*, UN Doc. E/CN.4/1994/26/Add.1, 15 December 1993, particularly paras 30–32, 42–60.

12 For a broader approach in international humanitarian law, see, for example, the definition adopted in ICRC, *Guiding Principles/Model Law on the Missing*, Geneva, 28 February 2009, Art. 2.1, available at: [www.icrc.org/en/document/guiding-principles-model-law-missing-model-law](http://www.icrc.org/en/document/guiding-principles-model-law-missing-model-law) (all internet references were accessed in August 2017): “‘Missing person’ is a person whose whereabouts are unknown to his/her relatives and/or who, on the basis of reliable information, has been reported missing in accordance with the national legislation in connection with an international or non-international armed conflict, a situation of internal violence or disturbances, natural catastrophes or any other situation that may require the intervention of a competent State authority.” See also Jeremy Sarkin, “The Need to Deal with All Missing Persons including Those Missing as a Result of Armed Conflict, Disaster, Migration, Human Trafficking and Human Rights Violations (including Enforced Disappearances) in International and Domestic Law and Processes”, *Inter-American and European Human Rights Journal*, Vol. 1, 2015.

*families or, based on reliable information, who are reported missing as a consequence of armed conflict, internal violence or internal disturbances”.*<sup>13</sup>

While in respect to missing persons the reasons for not taking action in order to return the remains are not as evident as with enforced disappearances, it is still common for States not to get involved in searching for, identifying and returning the remains of missing persons. Such activities require resources and political will, which is often lacking in the aftermath of conflict. Sometimes the sheer number of missing persons can make it very hard to undertake forensic investigation, which would need to be large-scale. In inter-ethnic conflicts, the demand for reciprocity can also hinder the process.<sup>14</sup> In addition, people go missing across national borders or in countries other than their own.

In many situations, it is not possible to establish whether a crime meets all the criteria of an enforced disappearance, or an incident initially identified as such turns out not to fall within the definition, and *vice versa*. At same time, the term “enforced disappearance” can include a situation which would not be classified as “missing persons” in IHL, such as when State authorities purposely disappear a political opponent during peacetime. While there is thus a notable difference between those two categories, many acts fall within both. The terms are often used interchangeably, both in political discourse and by international judicial bodies.<sup>15</sup> The two terms overlap, but it is important that they are not equated, as they involve two different legal frameworks. This contribution deals both with missing persons and enforced disappearances, and the two terms will be used according to their meaning in international human rights law and IHL respectively.

## **Returning the remains of missing and forcibly disappeared persons as a primary need of their families**

Disappearances have long-lasting effects on families, who have to deal with the uncertainty surrounding the fate of their relatives, while usually also coping with economic, social and legal problems.<sup>16</sup> Family members of missing and forcibly disappeared persons experience what has been termed as an “ambiguous loss”, defined as “a situation of unclear loss resulting from not knowing whether a loved one is dead or alive, absent or present”.<sup>17</sup> This reflects the fact that family

13 ICRC, *Accompanying the Families of Missing Persons: A Practical Handbook*, Geneva, 2013, p. 16 (emphasis in original).

14 See, for example, Special Process on Missing Persons in the Territory of the former Yugoslavia, *Report Submitted by Mr. Manfred Nowak, Expert Member of the Working Group on Enforced or Involuntary Disappearances, Responsible for the Special Process, Pursuant to Commission Resolution 1996/71*, UN Doc. E/CN.4/1997/55, 15 January 1997, para. 57.

15 See, for example, European Court of Human Rights (ECtHR), *Varnava et al. v. Turkey*, Case Nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, 16073/90, 18 September 2009.

16 Margriet Blaauw and Virpi Lähteenmäki, “‘Denial and Silence’ or ‘Acknowledgment and Disclosure’”, *International Review of the Red Cross*, Vol. 84, No. 848, 2002, p. 769.

17 Pauline Boss, “Ambiguous Loss Research, Theory, and Practice: Reflections after 9/11”, *Journal of Marriage and Family*, Vol. 66, No. 3, 2004, p. 554.

members of forcibly disappeared and missing persons do not know what to think, so they often deny the permanence of the loss and continue to hope for the person to return. In that sense, the person is “psychologically present but physically absent”.<sup>18</sup> This state of affairs can continue for years; for example, the possibility of travelling between the northern and southern parts of Cyprus in 2003 awakened the hopes of some of the families of those who went missing thirty to forty years earlier that their loved ones might still return.<sup>19</sup>

While obviously the primary need and aim of actions taken following a disappearance is to secure the freedom and release of the victim, as mentioned above, the disappeared frequently become victims of secret extrajudicial killings. In such cases, finding the remains becomes the key issue for the majority of families. As research has shown, in case of death, the ambiguity of the loss is best addressed through the return of the remains of those who have died. Documents providing evidence, such as death certificates or statements from a perpetrator regarding a death, do not have the same impact of closure on families as the body, especially for illiterate families.<sup>20</sup> In a study conducted in Nepal, 85% of the families sought to retrieve the body, arguing that they needed a sign of proof of the death, as well as to enable the performance of rituals.<sup>21</sup> Similarly, research in Bosnia and Herzegovina has shown that the absence of bodies prevented family members from funerary rituals and acknowledging the death of their loved ones, and thus from passing through the states of mourning and grief.<sup>22</sup>

There appears to be a universal human need to bury one’s dead.<sup>23</sup> According to Pauline Boss, there are several reasons why families feel the need to bury a body of a missing or disappeared person, even when it seems obvious that the person is dead. These include breaking the cultural denial of death and loss; the need to know what happened in order to cope, grieve and make decisions; stimulating the process of letting go; and the need for a supportive ritual, which accompanies burials.<sup>24</sup>

When analyzing the phenomenon of missing and forcibly disappeared persons, it should be stressed that not all the remains of those who have died can be found.<sup>25</sup> In some situations the bodies were purposely destroyed or

18 S. Robins, above note 2, p. 45. See also Monique Crettol and Anne-Marie La Rosa, “The Missing and Transitional Justice: The Right to Know and the Fight against Impunity”, *International Review of the Red Cross*, Vol. 88, No. 862, 2006.

19 Öncel Polili, *Kuzey Kıbrıs’ta kayıp kişiler ve ailelerinin insan hakları*, Kıbrıslı Türk İnsan Hakları Vakfı Yayınları, No. 9, Nicosia, 2012, Appendix 2.

20 S. Robins, above note 2, pp. 48, 102; see also Eric Stover and Rachel Shigekane, “The Missing in the Aftermath of War: When do the Needs of Victims’ Families and International War Crimes Tribunals Clash?”, *International Review of the Red Cross*, Vol. 84, No. 848, 2002, p. 855. For more on the use of death certificates in enforced disappearance cases, see Gabriella Citroni, “The Pitfalls of Regulating the Legal Status of Disappeared Persons Through Declaration of Death”, *Journal of International Criminal Justice*, Vol. 12, No. 4, 2014.

21 S. Robins, above note 2, pp. 102–103.

22 E. Stover and R. Shigekane, above note 20, p. 860.

23 Pauline Boss uses the phrase “bury one’s dead” in her research, which clearly also covers other traditions and rituals, such as incinerations. This article uses “bury one’s dead” in the same sense.

24 P. Boss, above note 17, pp. 561–562. On the importance of rituals and funerals for families of the missing, see also ICRC, above note 13, pp. 62–63.

25 T. Scovazzi and G. Citroni, above note 1, pp. 360–362.



incinerated, or all the persons who knew the place of burial have died. Families of forcibly disappeared and missing persons whose remains will not be found need additional help, such as targeted psychological support.<sup>26</sup>

## The legal development of the obligation to return the remains of missing and disappeared persons

### Treaty law

The Geneva Conventions of 1949 mention missing persons only in the context of families dispersed owing to the war, stipulating that States shall facilitate the enquiries of such family members, with the object of renewing contact with one another and of meeting.<sup>27</sup> There are no provisions in the Geneva Conventions for providing specific assistance to family members of missing persons who have died, or directly encouraging States to undertake actions to return remains. As regards the dead, the Geneva Conventions contain a number of provisions relating to their burial and identification<sup>28</sup>, as well as stipulating explicitly that they must be respected and given a decent burial.<sup>29</sup>

States' obligations with regard to missing persons within the framework of IHL were strengthened in the 1997 Additional Protocol I (AP I) to the Geneva Conventions, which requires each party to a conflict to search for persons who have been reported missing by the adverse party. According to Article 32 of AP I, in implementing their obligations arising from the Protocol, States Parties shall be prompted to act by the right of families to know the fate of their relatives. They shall also "endeavour to agree on arrangements ... to search for, identify and recover the dead from battlefield areas" (Article 33.4). Furthermore, AP I contains detailed provisions concerning how each side should deal with the bodies of the deceased. Specifically, it calls upon adverse parties to conclude agreements "to facilitate the return of the remains of the deceased and of personal effects to the home country upon its request or, unless that country

26 See P. Boss, above note 17, as well as the Special Issue on ambiguous loss theory of the *Journal of Family Theory & Review*, Vol. 8, No. 3, 2016, especially Theo Hollander, "Ambiguous Loss and Complicated Grief: Understanding the Grief of Parents of the Disappeared in Northern Uganda", and Simon Robins, "Discursive Approaches to Ambiguous Loss: Theorizing Community-Based Therapy After Enforced Disappearances".

27 Geneva Convention (IV) relative to the Protection of Civilian Persons in time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 26.

28 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 17; Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Art. 120.2–6; GC IV, Art. 130.

29 GC I, Art. 17; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces in the Field of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950), Art. 20.

objects, upon the request of the next of kin” (Article 34.2(c)).<sup>30</sup> This provision is conditional and follows provisions concerning access to gravesites and the obligation to mark, protect and maintain them (Articles 34.1, 34.2(a–b)), demonstrating that the return of remains is not treated as the highest priority. Returning the dead is made dependent on a request and on a lack of objection by the home country.<sup>31</sup> Consequently, there is no absolute obligation in IHL to search for, identify and return the remains of a missing person, although parties are strongly encouraged to cooperate on this issue.

Developments in international human rights law have gone further. According to the ICPPED, States Parties “shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains” (Article 24.3). The ICPPED was preceded by two documents dealing with enforced disappearance: the Declaration on the Protection of All Persons from Enforced Disappearance (DPPED) in 1992, and the Inter-American Convention on Forced Disappearance of Persons in 1994. Neither of the above two contains an obligation to take measures to return the remains of disappeared persons. The DPPED obliges authorities to carry out an investigation for as long as the fate of a victim of enforced disappearance remains unclarified (Article 13.6), which normally includes searching for the body in cases where the disappeared person has died, though this is not stated explicitly. Importantly, the ICPPED has changed the rationale behind States’ obligation to search for the disappeared person: it is not only to establish their fate but also, in the event of death, to return the remains.

The return of remains can be viewed as a simple act of justice or a form of remedy. According to a UN report prepared by Manfred Nowak, a decent burial in accordance with the religious practices of the disappeared person and his family – the ultimate outcome of the return of the remains – can be considered both a form of restitution and a form of moral or social rehabilitation of the disappeared person.<sup>32</sup>

The obligation to return remains is due to the relatives of the disappeared person. As argued by Gabriella Citroni and Tullio Scovazzi, in certain cases it is also due to the community to which the person belonged or to society in general, which has a right to know where the remains of disappeared persons are located and to be sure that they are respected, even if there is nobody who claims their return. Furthermore, the authors maintain, the obligation is also due to the disappeared

30 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Arts 33–34.

31 In addition, in the absence of such an agreement and if the home country of the deceased is not willing to arrange at its expense for the maintenance of such gravesites, the party in whose territory the gravesites are situated may offer to return the remains, but this offer has to be accepted by the party (*ibid.*, Art. 34.3). See also ICRC Customary Law Study, above note 11, pp. 340, 411–414, 421–427.

32 *Report Submitted by Mr. Manfred Nowak, Independent Expert Charged with Examining the Existing International Criminal and Human Rights Framework for the Protection of Persons from Enforced or Involuntary Disappearances, Pursuant to Paragraph 11 of Commission Resolution 2001/46*, UN Doc. E/CN.4/2002/71, 8 January 2002, paras 86–87.

persons themselves, in the sense that the lack of respect for their remains amounts to a violation of their personal dignity, as a sort of particular humiliating and degrading treatment.<sup>33</sup> Similarly, the Inter-American Court of Human Rights (IACtHR) has stated that the returning of mortal remains leads to a dignifying of the victims.<sup>34</sup> In other judgments, the IACtHR has argued that the obligation to return remains is generated by the desire of the victim's next of kin to receive the remains and bury them according to their beliefs (which constitutes a right), in addition to the right of the families to know the truth.<sup>35</sup> Therefore, the obligation to return the remains is most commonly connected to the relatives of the disappeared person.

The Committee on Enforced Disappearances (CED) has clarified the content and specific scope of the obligation enshrined in Article 24.3 of the ICPPED in its Reporting Guidelines. This document lays out which information should be provided in the States Parties' periodic reports,<sup>36</sup> and was created to advise them on the form and content of those reports. With regard to locating, respecting and returning remains, the CED asks States Parties to provide information on the existence of, or the steps taken to establish,

- (1) mechanisms to locate, respect and return mortal remains of victims to families;
- (2) protocols to handle mortal remains of disappeared persons to their families in line with international standards;
- (3) a systematic collection of ante-mortem data related to the persons disappeared and their relatives, and the setting-up of national databases of DNA relevant to identifying victims of enforced disappearance; and
- (4) mechanisms for the storage of genetic material of the disappeared persons and their relatives.<sup>37</sup>

The CED monitors States Parties' periodic reports and adopts concluding observations, which are an additional indicator of how the CED interprets the content of the obligation to locate, respect and return remains. For example, the Committee drew attention of a number of States Parties to the necessity of guaranteeing effective coordination, cooperation and data cross-checking between authorities responsible for identifying the remains in case of death,<sup>38</sup> showing

33 T. Scovazzi and G. Citroni, above note 1, p. 369.

34 IACtHR, *Juan Humberto Sánchez v. Honduras*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 7 June 2003, para. 187.

35 IACtHR, *Gelman v. Uruguay*, Judgment (Merits and Reparations), 24 February 2011, para. 258.

36 In accordance with Article 29 of the ICPPED, States Parties are required to submit to the CED periodic reports on the measures taken to fulfil its obligation under the ICPPED.

37 CED, *Guidelines on the Form and Content of Reports under Article 29 to be Submitted by States Parties to the Convention, Adopted by the Committee at its Second Session (26–30 March 2012)*, UN Doc. CED/C/2, 8 June 2012, para. 35.

38 CED, *Concluding Observations on the Report Submitted by Mexico under Article 29, Paragraph 1 of the Convention*, UN Doc. CED/C/MEX/CO/1, 5 March 2015, para. 41; CED, *Concluding Observations on the Report Submitted by Iraq under Article 29(1) of the Convention*, UN Doc. CED/C/IRQ/CO/1, 13 October 2015, para. 34; CED, *Concluding Observations on the Report Submitted by Colombia under Article 29(1) of the Convention*, UN Doc. CED/C/COL/CO/1, 27 October 2016, para. 26.

that this is an area which can be problematic.<sup>39</sup> Another aspect that has been raised by the CED is the involvement of families of the disappeared in the process of searching for, identifying and returning the remains, which should be guaranteed also when the relatives reside in other countries.<sup>40</sup> Authorities should additionally ensure that in the process of identifying and returning remains, the traditions and customs of the people or communities to which the victims belong are taken into account.<sup>41</sup>

The CED has also commented on State obligations relating to locating, respecting and returning the remains with regard to disappearances which commenced before the ICPPED came into force. With regard to Paraguay, the CED mentioned persons who disappeared between 1954 and 1989 and recommended that Paraguay expedite the development and launch of a DNA database, as well as ensuring that the agencies responsible for searching and identifying disappeared persons have sufficient resources to carry out their work promptly and effectively.<sup>42</sup> Commenting on Spain's report, the CED criticized the fact that under the Historical Memory Act, which deals with victims of the Spanish Civil War (1936–39) and Franco's dictatorship (1939–75), efforts to locate and identify disappeared persons rely on initiatives taken by relatives, and recalled that this is the obligation of the State, even if no formal complaint has been laid.<sup>43</sup>

The change in international law introduced by the ICPPED has been acknowledged by the Working Group on Enforced or Involuntary Disappearances (WGEID), which has been entrusted with providing governments with assistance in the implementation of the DPPED and adopts general comments in this capacity. The WGEID, established in 1980, was the very first UN initiative for disappeared persons and did not include any reference to returning the remains of disappeared persons to their families.<sup>44</sup> In 2010 – the year the ICPPED came into force – the WGEID adopted a General Comment on the right to truth, in which it stated that the right to truth includes “the right of the family to have the remains of their loved one returned to them, and to dispose of those remains according to their own tradition, religion or culture”.<sup>45</sup>

39 The existence of many different bodies and initiatives involved in the issue of missing and disappeared persons can lead to duplication and competition between them, which has also been considered a problem by experts; see, for example, Manfred Nowak, “Lessons for the International Human Rights Regime from the Yugoslav Experience”, *Collected Courses of the Academy of European Law*, Vol. 8, No. 2, 2000, pp. 203–205.

40 CED, *Concluding Observations on Mexico*, above note 38, paras 23–24.

41 See CED, *Concluding Observations on Colombia*, above note 38, para. 26(f), in which the CED points in particular to indigenous peoples and Afro-descendent communities.

42 CED, *Concluding Observations on the Report Submitted by Paraguay under Article 29, Paragraph 1 of the Convention*, UN Doc. CED/C/PRY/CO/1, 20 October 2014, para. 28.

43 CED, *Concluding Observations on the Report Submitted by Spain under Article 29, Paragraph 1 of the Convention*, UN Doc. CED/C/ESP/CO/1, 12 December 2013, paras 31–32.

44 Commission on Human Rights, Res. 20 (XXXVI), 29 February 1980. The mandate has since been regularly renewed.

45 See para. 6 of the WGEID's “General Comment on the Right to the Truth in Relation to Enforced Disappearance”, in WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/16/48, 26 January 2011, p. 15.

It also stated that authorities should not dispose of the remains of disappeared persons without the full participation of the family.<sup>46</sup> The WGEID conducts country visits and in this capacity it has also pointed to the need to identify the remains on numerous occasions,<sup>47</sup> but returning the remains was not explicitly mentioned until 2015.<sup>48</sup>

The families of those who have disappeared (as defined in the ICPPED) and the families of those who went missing during international and non-international armed conflicts have different rights. While IHL treaties also contain provisions aimed at helping families to receive the remains of their missing relatives, only in the case of enforced disappearances is there an obligation to take appropriate measures to return them. Placing more responsibility on the State in cases of enforced disappearances seems justified, as State involvement is an inherent aspect of the act.

## International jurisprudence

Because of the reluctance and/or inability of national authorities to deal with enforced disappearance cases, many families of disappeared persons file applications to international human rights courts.<sup>49</sup> These proceedings can lead to a finding that the authorities violated a provision of a specific international treaty.<sup>50</sup> Additionally, the courts can decide to prescribe remedies to States, which – in cases of enforced disappearance – may include returning the remains of a disappeared person.<sup>51</sup> This is a developing trend, with the first international bodies to include this issue in their reparation measures being the IACtHR in 1996 and the Human Rights Chamber for Bosnia and Herzegovina in 2001,

46 *Ibid.*

47 See for example, WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances: Mission to Croatia*, UN Doc. A/HRC/30/38/Add.3, 17 August 2015, paras 73, 91; WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances: Mission to Mexico*, UN Doc. A/HRC/19/58/Add.2, 20 December 2011, para. 103; WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances: Mission to Morocco*, UN Doc. A/HRC/13/31/Add.1, 9 February 2010, para. 106.

48 WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances on Its Mission to Albania*, UN Doc. A/HRC/36/39/Add.1, 18 July 2017, paras 79(a), 82(c); WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances on Its Mission to Peru*, UN Doc. A/HRC/33/51/Add.3, 8 July 2016, paras 79(c), 79(n).

49 As the reappearance of a disappeared person is rare, the vast majority of applications were filed by the families of the disappeared. Examples of reappearances in international case law include Human Rights Committee, *Aboussedra v. Libya*, Case No. 1751/2008, Views, 25 October 2010; ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia*, Case No. 39630/09, Judgment, 13 December 2012.

50 Courts have repeatedly found that in case of an enforced disappearance the right to life and prohibition against torture and inhuman treatment have been violated. See, for example, ECtHR, *Çakıcı v. Turkey*, Case No. 23657/94, Judgment, 8 July 1999 (Articles 2 and 3 of the European Convention of Human Rights); Human Rights Committee, *Sarma v. Sri Lanka*, Case No. 950/2000, Views, 16 July 2003 (Articles 6 and 7 of the International Covenant on Civil and Political Rights).

51 See the first decisions and judgments including such remedies: IACtHR, *Neira Alegria et al. v. Peru*, Judgment (Reparations and Costs), 19 September 1996, para. 69; Human Rights Chamber for Bosnia and Herzegovina, *Palić v. Republika Srpska*, Case No. CH/99/3196, Decision on the Merits, 11 January 2001, para. 91.8. For a detailed analysis, see the following sections.

followed by the UN Human Rights Committee in 2010. The European Court of Human Rights (ECtHR) has not integrated returning the remains of disappeared persons into its remedies, but it did point out States' obligation to carry out exhumations and identify disappeared persons in a judgment in 2012.<sup>52</sup> This jurisprudence will be presented herein in the order in which the judicial bodies in question have approached the issue of returning the remains of disappeared persons in their reparations.

### *The Inter-American Court of Human Rights*

In its very first judgment concerning enforced disappearances, *Velasquez-Rodriguez v. Honduras* in 1988, the IACtHR decided that in such cases the State is obliged "to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains".<sup>53</sup> While this does not unequivocally mean returning the bodies to the families, it recognizes to a certain extent the needs of the families in this respect. This aspect was strengthened by the IACtHR when it developed the concept of the right to truth. In so doing, the Court stated that internal barriers which may hinder the identification of perpetrators, such as amnesty laws, did not absolve the State from informing the relatives of where the victim's remains are located in cases of the death of the disappeared person.<sup>54</sup>

The IACtHR has developed an extensive approach to reparations.<sup>55</sup> In enforced disappearance cases, the reparations have included – among other things – the obligation to identify, respect and return the remains of the disappeared person. In a case concerning three detainees who disappeared after a riot in a Peruvian correctional facility was put down, it was stated for the first time by the IACtHR in its reparation judgment in 1996 that "as a form of moral reparation" the State "has the obligation to do all in its power to locate and identify the remains of the victims and deliver them to the next of kin".<sup>56</sup> In 2001, in a case concerning children kidnapped and killed by security forces, the Court included the need to carry out the exhumation of one of the deceased and transfer the remains to "the place chosen by his next of kin, without any cost to them, so as to satisfy the desire of the family to give [the deceased] appropriate burial,

52 It should be pointed out that none of the treaties enforced or interpreted by the analyzed international judicial bodies contain provisions specifically mentioning enforced disappearances.

53 IACtHR, *Velasquez-Rodriguez v. Honduras*, Judgment (Merits), 29 June 1988, para. 181.

54 IACtHR, *Castillo-Paez v. Peru*, Judgment (Merits), 3 November 1997, para. 90. For more on the right to truth in the jurisprudence of the IACtHR, see Marthe Lot Vermeulen, *Enforced Disappearance: Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance*, Intersentia, Utrecht, 2012, pp. 334–337.

55 See, for example, Thomas M. Antkowiak, "Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond", *Columbia Journal of Transnational Law*, Vol. 46, No. 2, 2008.

56 IACtHR, *Neira Alegria*, above note 51, para. 69. Similarly, in a judgment one year later, see IACtHR, *Caballero-Delgado and Santana v. Colombia*, Judgment (Reparations and Costs), 29 January 1997, para. 66(4).

according to their religious beliefs and customs”.<sup>57</sup> When ordering this form of reparation measure in 2002, the Court stated that returning the mortal remains is an act of justice and a reparation in itself. It also mentioned that this enables the relatives of the disappeared person to give him or her an adequate burial.<sup>58</sup>

The IACtHR has obliged States not only to “seek and find mortal remains”,<sup>59</sup> but also to give additional support to families regarding the burial. For example, States were ordered to cover the cost of transferring the remains of disappeared persons to the place of choice of their relatives,<sup>60</sup> including to another country in a case where the disappeared person was a foreign national and this was the wish of their family.<sup>61</sup> Furthermore, the IACtHR has obliged States to cover the expenses of the burial of the disappeared in agreement with their next of kin.<sup>62</sup> The remains should be returned to the relatives as soon as possible after genetic proof,<sup>63</sup> and families of disappeared persons should be informed about the search and, when possible, their presence should be ensured.<sup>64</sup> The obligation to search for the remains continues many years after the disappearance, even when it is very probable that it will be impossible to find them.<sup>65</sup> The IACtHR has also ordered the Guatemalan authorities to create and implement a genetic database to safeguard the information of the remains that were found and exhumed, as well as of the next of kin of the persons who were presumably executed or disappeared.<sup>66</sup>

Although the IACtHR did not mention the reasons for ordering the return of the remains in all its judgments, the earlier cases in particular show that cultural

57 IACtHR, *Villagrán Morales and Others v. Guatemala* (“Street Children”), Judgment (Reparations), 26 May 2001, para. 102.

58 IACtHR, *Trujillo-Oroza v. Bolivia*, Judgment (Reparations and Costs), 27 February 2002, para. 115. See also IACtHR, *Caracazo v. Venezuela*, Judgment (Reparations and Costs), 29 August 2002, para. 123.

59 See, for example, IACtHR, *Goiburú et al. v. Paraguay*, Judgment (Merits, Reparations and Costs), 22 September 2006, para. 172.

60 IACtHR, *Bamaca-Velasquez v. Guatemala*, Judgment (Reparations and Costs), 22 February 2002, para. 82; IACtHR, *Juan Humberto Sánchez*, above note 34, para. 187.

61 IACtHR, *Caracazo*, above note 58, para. 124.

62 IACtHR, *Goiburú*, above note 59, para. 172; IACtHR, *Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 14 November 2014, para. 564.

63 IACtHR, *Rodríguez Vera*, above note 62, para. 564; IACtHR, *Radillo-Pacheca v. Mexico*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 23 November 2009, para. 336.

64 IACtHR, *García and Family Members v. Guatemala*, Judgment (Merits, Reparations and Costs), 29 November 2012, para. 200; IACtHR, *Osorio Rivera and Family Members v. Peru*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 26 November 2013, para. 251.

65 IACtHR, *The 19 Merchants v. Columbia*, Judgment (Merits, Reparation and Costs), 5 July 2004, paras 270–271. In this case, sixteen years had elapsed since the disappearance and it had been proven that the bodies of the victims had been dismembered and thrown into a river. The Court stated that Colombia’s omissions at a time when it was still probable that the remains of the victims could be found led to the fact that locating the remains was, at the time of the proceedings before the Court, a very difficult and improbable task. Because of that, the Court considered it fair and reasonable “to order Colombia to conduct a genuine search, making every possible effort to determine with certainty what happened to the remains of the victims and, should it be possible, to return these to their next of kin” (para. 271).

66 IACtHR, *Gudiél Álvarez et al. (“Diario Militar”) v. Guatemala*, Judgment (Merits, Reparations and Costs), 20 November 2012, para. 336.

and religious motives played an important role in this development. In *Bamaca-Velasquez v. Guatemala*, the Court justified the necessity of returning the body of the disappeared person by the fact that respect for human remains has a very special significance in the Mayan culture, to which the disappeared and his family belonged.<sup>67</sup> In fact, the family of the victim often strongly emphasized their need to receive the body in the proceedings before the IACtHR.<sup>68</sup> In addition, the IACtHR has called the destruction of the remains of disappeared persons “an assault on ... cultural values ... with regard to respecting the dead”.<sup>69</sup> Thus the Court emphasized the reasons for returning the remains and the meaning this had in the culture of the families.<sup>70</sup> It should be noted that the IACtHR introduced this innovative approach a decade before the ICPPED was adopted.

### *The Human Rights Chamber for Bosnia and Herzegovina*

During the period 1996–2003, the Human Rights Chamber for Bosnia and Herzegovina established a consistent jurisprudence regarding missing persons and enforced disappearances.<sup>71</sup> In its first decision on the merits in such a case in 1997, the Chamber ordered the authorities of Republika Srpska to immediately “take all necessary steps to ascertain the whereabouts or fate of the applicants and

67 IACtHR, *Bamaca-Velasquez*, above note 60, para. 81. As stressed by Judge Antônio Augusto Cançado Trindade, the obligation to locate and hand over the remains to the next of kin was the very first resolutive point of the judgment contained in this order, before all other kinds of reparations. Antônio Augusto Cançado Trindade, “The Right to Cultural Identity in the Evolving Jurisprudential Construction of the Inter-American Court of Human Rights”, in Sienho Yee and Jacques-Yvan Morin (eds), *Multiculturalism and International Law: Essays in Honour of Edward McWhinney*, Martinus Nijhoff, Leiden and Boston, MA, 2009, p. 483.

68 IACtHR, *Bamaca-Velasquez*, above note 60, para. 20 (testimonial evidence); IACtHR, *19 Merchants*, above note 65, paras 71–72.

69 IACtHR, *Blake v. Guatemala*, Judgment (Merits), 24 January 1998, para. 115. This was invoked in the context of the suffering of the disappeared person’s relatives. In this case the IACtHR did not mention returning the remains among the reparations, as they had been incinerated: see IACtHR, *Blake v. Guatemala*, Judgment (Reparations and Costs), 22 January 1999.

70 For a complex legal analysis of the connection between the living and the dead and the need to receive the remains, see IACtHR, *Bamaca-Velasquez v. Guatemala*, Judgment (Reparations and Costs), Separate Opinion of Judge Antônio Augusto Cançado Trindade, 22 February 2002.

71 The Human Rights Chamber for Bosnia and Herzegovina was a judicial body established within Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina. For more on the Human Rights Chamber and its jurisprudence on enforced disappearances and missing persons, see, for example, David Yeager, “The Human Rights Chamber for Bosnia and Herzegovina: A Case Study in Transitional Justice”, *International Legal Perspectives*, No. 14, 2004; Dietrich Rausching, “Menschenrecht auf Information über das Schicksal Vermißter: Das Beispiel von Bosnien und Herzegowina”, in Jürgen Bröhmer *et al.* (eds), *Internationale Gemeinschaft und Menschenrechte: Festschrift für Georg Röss*, Carl Heymanns Verlag, Munich, 2005, pp. 161–175; T. Scovazzi and G. Citroni, above note 1, pp. 224–243; Tilman Blumenstock, “Legal Protection of the Missing and Their Relatives: The Example of Bosnia and Herzegovina”, *Leiden Journal of International Law*, Vol. 19, No. 3, 2006, pp. 781–793; Simone Fennell (ed.), *Jurisprudence of the Human Rights Chamber for Bosnia and Herzegovina*, Vols 1–44, Wolf Legal Publishers, Nijmegen, 2004–2015.



to secure their release if still alive”.<sup>72</sup> Because the Chamber acknowledged with this statement that the missing persons might be dead, it restricted the obligation of the authorities to releasing the person “if alive”. In a landmark decision in 2001, the Chamber ordered that the mortal remains of the disappeared Colonel Avdo Palić be made available to his wife in the event that he was not alive.<sup>73</sup> In following decisions, the Chamber slightly changed its phrasing and ordered the release of all available information regarding the location of the mortal remains.<sup>74</sup> It did not stipulate returning the body *per se*, but the proper execution of the Chamber’s decision in this respect would lead to the families knowing the fate of their missing relative and the place of burial.

The Chamber has acknowledged the need of the families of missing and disappeared persons to receive the remains of their loved one in the event of his or her death. At that point in time – the Chamber issued its last decision in 2003 – there was however no legal obligation to take all appropriate measures to return the remains of disappeared persons. The current approach was influenced by the families of the missing and disappeared, who were predominantly Muslims and emphasized the importance of receiving the remains in order to give the dead a religious funeral.<sup>75</sup>

### *The UN Human Rights Committee*

In its case law,<sup>76</sup> the UN Human Rights Committee has found that States have an obligation to conduct effective investigations aimed at clarifying the whereabouts

72 Human Rights Chamber for Bosnia and Herzegovina, *Matanović v. Republica Srpska*, Case No. CH/96/1, Decision on the Merits, 11 July 1997, para. 64.2. The Chamber’s powers with regard to remedies constituted an important and innovative feature of this body: see Manfred Nowak, “Reparation by the Human Rights Chamber for Bosnia and Herzegovina”, in S. Kostić (ed.), *Strategy for Transitional Justice in the former Yugoslavia: Dealing with the Past – Post-Conflict Strategies for Truth, Justice and Reconciliation in the Region of the former Yugoslavia*, Fond za Humanitarno Pravo, Belgrade, 2005, pp. 283–285.

73 Human Rights Chamber for Bosnia and Herzegovina, *Palić*, above note 51, para. 91.8.

74 Human Rights Chamber for Bosnia and Herzegovina, *Slimović v. Republica Srpska*, Case Nos CH/01/8365, CH/01/8397, CH/01/8398, CH/01/8399, CH/01/8410, CH/01/8411, CH/01/8412, CH/01/8414, CH/01/8428, CH/01/8484, CH/01/8487, CH/01/8521, CH/02/8842, CH/02/8927, CH/02/9357, CH/02/9375, CH/02/9385, CH/02/9390, CH/02/9403, CH/02/9427, CH/02/9431, CH/02/9433, CH/02/9470, CH/02/9484, CH/02/9485, CH/02/9486, CH/02/9487, CH/02/9505, CH/02/9506, CH/02/9507, CH/02/9508, CH/02/9513, CH/02/9514, CH/02/9515, CH/02/9528, CH/02/9529, CH/02/9530, CH/02/9532, CH/02/9542, CH/02/9546, CH/02/9547, CH/02/9548, CH/02/9549, CH/02/9550, CH/02/9552, CH/02/9553, CH/02/9594, CH/02/9595, CH/02/9596, Decision on the Merits, 7 March 2003, para. 220.7; Human Rights Chamber for Bosnia and Herzegovina, *Jovanović v. Federation of Bosnia and Herzegovina*, Case No. CH/02/9180, Decision on the Merits, 5 December 2003, para. 102.6.

75 Interview with Manfred Nowak, Judge of the Human Rights Chamber for Bosnia and Herzegovina, Vienna, April 2015.

76 The Human Rights Committee was provided with the competence, under the First Optional Protocol to the International Covenant on Civil and Political Rights, to examine individual complaints with regard to alleged violations of the Covenant by States party to the Protocol. Because of this competence, the Human Rights Committee is considered a quasi-judicial body (Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, N.P. Engel, Kehl-Strasbourg-Arlington, 2005, pp. 668–669) and its decisions regarding enforced disappearances are analyzed as such in this section.

and fate of disappeared persons.<sup>77</sup> Although the Committee did not specifically comment on the issue of returning the remains of disappeared persons in its early decisions, it stated that the anguish and stress caused by the continuing uncertainty concerning the fate and whereabouts of the disappeared person constituted a violation of the International Covenant on Civil and Political Rights.<sup>78</sup>

When the Committee finds a violation of the Covenant, it usually specifies the kinds of remedies that the State Party is obliged to guarantee to the victim. In some decisions concerning enforced disappearances, the Committee has pointed to, *inter alia*, the obligation to return to the family the mortal remains of the disappeared if he or she is deceased. Authors of communications have asked the Human Rights Committee for such steps before,<sup>79</sup> but it was first included in a decision in 2010,<sup>80</sup> and it has been repeated since.<sup>81</sup> While there was no reference to the ICPPED in this part of the Committee's decision, it should be noted that the first decisions which included an obligation to return the mortal remains of the disappeared to the family were handed down in the same year that the ICPPED came into force.

Although the Committee did not comment on this aspect, it is apparent from its jurisprudence that it does not include returning the remains in its remedies when the applicants do not request the Committee to conclude that the disappeared person is dead, or ask for his/her release, presumably thus indicating that they have not abandoned hope for their loved one's reappearance. In such cases the Committee has stated that it considers it appropriate not to make a finding in respect of the right to life,<sup>82</sup> and remedies have included only the immediate release of the person if he or she is still alive.

### *The European Court of Human Rights*

The ECtHR issued its first ruling in a case of enforced disappearance in 1998.<sup>83</sup> Since then complaints concerning the matter have significantly increased, the clear majority in the first decade being against Turkey, and currently against Russia.<sup>84</sup> The Court has found that States have a continuing obligation to conduct effective investigations aimed

77 For more on the Human Rights Committee's jurisprudence concerning enforced disappearances, see, for example, the relevant parts in M. L. Vermeulen, above note 54 (comparative case law analysis on pp. 157–434).

78 Human Rights Committee, *Qinteros v. Uruguay*, Case No. 107/1981, Views, 21 July 1983, para. 14.

79 See, for example, Human Rights Committee, *El Hassy v. Libya*, Case No. 1422/2005, Views, 24 October 2005, para. 3.7.

80 Human Rights Committee, *Bashasha v. Libya*, Case No. 1776/2008, Views, 20 October 2010, para. 9(c).

81 See, for example, Human Rights Committee, *Zarzi v. Algeria*, Case No. 1780/2008, Views, 22 March 2011, para. 9(iv); Human Rights Committee, *Mihoubi v. Algeria*, Case No. 1874/2009, Views, 18 October 2013, para. 9(d).

82 Human Rights Committee, *Sarma*, above note 50, para. 9.6; Human Rights Committee, *El Hassy*, above note 79, para. 6.10.

83 ECtHR, *Kurt v. Turkey*, Case No. 24276/94, Judgment, 25 May 1998.

84 Juliette Chevalier-Watts, "The Phenomena of Enforced Disappearances in Turkey and Chechnya: Strasbourg's Noble Cause?", *Human Rights Review*, Vol. 11, No. 4, 2010. For current judgments concerning disappearances, see the ECtHR Human Rights Documentation (HUDOC) database, available at: [www.echr.coe.int/Pages/home.aspx?p=caselaw/HUDOC&#n1355308343285\\_pointer](http://www.echr.coe.int/Pages/home.aspx?p=caselaw/HUDOC&#n1355308343285_pointer).

at clarifying the whereabouts and fate of those persons who have gone missing in life-threatening circumstances.<sup>85</sup> Furthermore, the ECtHR has ruled that presenting families with mutilated bodies amounts to a violation of the ICPPED. In one such case the Court argued that “the applicants have been unable to bury the dead bodies of their loved ones in a proper manner, which in itself must have caused their profound and continuous anguish and distress”.<sup>86</sup> Thus the ECtHR has recognized the need of families to bury their dead, albeit not in a case of disappeared persons.

In the landmark 2012 judgment of *Aslakhanova and Others v. Russia*, the ECtHR stated that it felt compelled to provide some guidance on certain measures that must be taken by the Russian authorities due to their systemic failure to investigate disappearances.<sup>87</sup> The first and – as the ECtHR itself highlighted – most pressing group of measures concerned easing the suffering of the relatives of the disappeared, who continued to remain in agonizing uncertainty as to the fate of their loved ones. Among the most pressing needs in this context, the ECtHR mentioned “large-scale forensic and scientific work on the ground, including the location and exhumation of presumed burial sites”, and “the collection, storage and identification of remains and, where necessary, systematic matching through up-to-date genetic databanks”.<sup>88</sup> While the judgment does not explicitly mention returning the remains to the families, it recognizes the necessity of carrying out exhumation and identification,<sup>89</sup> which one can presume would eventually lead to the families receiving the remains.

The ECtHR judgments are subject to monitoring procedures by the Committee of Ministers (CoM), which carries out a dialogue with the State and decides when a judgment is considered to have been executed.<sup>90</sup> The first enforced disappearance judgments concerning Turkey and Russia were handed down in 1998 and 2006 respectively, but they are still subject to the monitoring procedures of the CoM. Since the above-cited *Aslakhanova* judgment was handed down, Russia is expected to get involved in the search for disappeared persons by, *inter alia*, identifying possible burial sites and taking other relevant practical measures.<sup>91</sup> Turkey – against whom the judgments were handed down earlier than Russia – is not required by the CoM to take actions aimed at returning the

85 ECtHR, *Cyprus v. Turkey*, Case No. 25781/94, Judgment, 10 May 2001, para. 136.

86 ECtHR, *Khadzhaliyev and Others v. Russia*, Case No. 3013/04, Judgment, 6 November 2008, para. 121. See also ECtHR, *Akkum and Others v. Turkey*, Case No. 21894/93, Judgment, 14 March 2005, paras 252–259; ECtHR, *Akpınar and Altun v. Turkey*, Case No. 56750/00, Judgment, 27 February 2007, paras 84–87.

87 ECtHR, *Aslakhanova and Others v. Russia*, Case Nos 2944/06, 8300/07, 50184/07, 332/08, 42509/10, Judgment, 18 December 2012, para. 221.

88 *Ibid.* para. 226; see also paras. 223–228.

89 *Ibid.* para. 226.

90 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14, ETS 5, 4 November 1950 (entered into force 3 September 1953), Art. 46.2; for more on the role of the Court and the CoM in this respect, see William Schabas, *The European Convention on Human Rights. A Commentary*, Oxford University Press, Oxford 2015, pp. 869–871.

91 The enforced disappearances judgments are monitored, along with other judgments concerning actions of the Russian security forces, within the Khasihev group and concern violations resulting from, or relating to, the actions of Russian security forces during anti-terrorist operations, mostly in Chechnya, between 1999 and 2006: see, for example, CoM, Interim Res. CM/ResDH(2011)292, CM/ResDH(2015)45.

remains of disappeared persons in order to implement the ECtHR judgments.<sup>92</sup> This could indicate an evolution in the practice of the CoM towards countries in which a violation has been found as a result of enforced disappearances. However, the change in the CoM's practice could also be related to the number of disappearances which took place in the Chechen Republic, as this was invoked by the court in the *Aslakhanova* judgment as well as by the CoM interim resolutions.<sup>93</sup> To determine whether the CoM is currently paying greater attention to finding and identifying the remains of disappeared persons, it would be first necessary for the ECtHR to pass new judgments concerning enforced disappearances regarding other States.

These developments in international jurisprudence were triggered by families of the disappeared. The two bodies that first recognized the need of families to receive the remains in their remedies – a decade before the ICPPED came into force – took into consideration the specific cultural and religious background of the disappeared, as raised by the families themselves.<sup>94</sup> This shows the importance of including the needs of victims of human rights abuses in international jurisprudence: targeted and well-thought-out remedies can be of great significance for victims.

## The international community's involvement in forensic work and returning remains

Very often the only possibility of returning the remains of disappeared and missing persons is through the process of carrying out exhumation and identification.<sup>95</sup> Forensic evidence has made the right to truth more accessible for the families of the missing and forcibly disappeared: it yields specific and verifiable information about those individuals, with respect to both where they are and what happened to them.<sup>96</sup> As has been demonstrated in the preceding sections, States are obliged

92 The enforced disappearances judgments are monitored along with other judgments concerning actions of the Turkish security forces, in particular in the southwest of Turkey, mainly in the 1990s, within the Aksyoy group: see, for example, CoM, Interim Res. CM/ResDH(2005)43, CM/ResDH(2008)69. Some of the elements have already been found to have been executed, such as trainings for judges and prosecutors (CoM, Interim Res. CM/ResDH(2008)69).

93 ECtHR, *Aslakhanova*, above note 87, paras 216–221; ECtHR, Interim Res. CM/ResDH(2011)292, 2 December 2011.

94 IACtHR, *Street Children*, above note 57, para. 102; the Human Rights Chamber did not include this reasoning in its decision, but according to an interview with Manfred Nowak, the families have triggered this development.

95 S. Robins, above note 2, p. 48. See also Jeremy Sarkin, "How Developments in the Science and Technology of Searching, Recovering and Identifying the Missing/Disappeared are Positively Affecting the Rights of Victims around the World", *Human Remains and Violence: An Interdisciplinary Journal*, Vol. 3, No. 1, 2017.

96 Jeremy Sarkin, "Dealing with Enforced Disappearances in South Africa (with a Focus on the Nokuthula Simelane Case) and around the World: The Need to Ensure Progress on the Rights to Truth, Justice and Reparations in Practice", *Speculum Juris*, Vol. 29, No. 1, 2015, p. 41. For more on the right to truth, see Yasmin Naqvi, "The Right to Truth in International Law: Fact of Fiction?", *International Review of the Red Cross*, Vol. 88, No. 862, 2006; Jose Brunner and Daniel Stahl (eds), *Recht auf Wahrheit: Zur Genese eines neuen Menschenrechts*, Wallstein Verlag, Göttingen, 2016; Sevanne Garibian, "Ghosts also Die: Resisting Disappearance through the 'Right to the Truth' and the *Juicios por la Verdad* in Argentina", *Journal of International Criminal Justice*, Vol. 12, No. 3, 2014.

under international law to take all appropriate measures to return the remains of forcibly disappeared persons and are strongly encouraged to return the remains of missing persons. Nevertheless, States are sometimes reluctant or not able to undertake exhumations and identifications.<sup>97</sup> It has been argued that when State authorities are not willing to carry these out, the task falls to international organizations and mechanisms.<sup>98</sup> While there is currently no legal obligation for such actions,<sup>99</sup> there have been a number of initiatives and developments in this area, simultaneously to the evolution in international jurisprudence. In this section, three international actors traditionally involved in the issue of missing and disappeared persons will be presented, along with their approach to and involvement in exhumation, identification and returning the remains: the ICRC, the Working Group on Enforced or Involuntary Disappearances, and the International Commission on Missing Persons (ICMP). Furthermore, two case studies – both UN initiatives – will be briefly analyzed: firstly, the Special Process on Missing Persons in the Territory of the former Yugoslavia, which was one of the first attempts to involve the international community in exhumations and identifications; and secondly, the Committee on Missing Persons in Cyprus, which has undergone essential transformations and is now returning remains.

Traditionally, the ICRC has been engaged in addressing the missing persons issue, *inter alia* through the general protection of civilians affected by conflict, visits to detained persons, and the compilation and processing of tracing requests.<sup>100</sup> With regard to returning the remains, the ICRC, as a neutral intermediary, is sometimes involved in transferring or repatriation of human remains, facilitating the exchange of human remains, covering the costs of visits by families of missing persons to exhumation sites, supporting institutes conducting exhumations by providing them with protective equipment, providing cash assistance for transporting remains or coffins, and expanding the forensic capabilities of State organizations with technical equipment and advice.<sup>101</sup>

97 For some of the reasons for this, see the first section of this article, “Enforced Disappearances and Missing Persons”, above.

98 Special Process on Missing Persons in the Territory of the former Yugoslavia, *Report Submitted by Mr. Manfred Nowak, Expert Member of the Working Group on Enforced or Involuntary Disappearances, Responsible for the Special Process, Pursuant to Paragraph 4 of Commission Resolution 1995/35*, UN Doc. E/CN.4/1996/36, 4 March 1996, para. 78.

99 With the exception of the UN Interim Administration Mission in Kosovo, which played a key administrative role in Kosovo after 1999 and was responsible for maintaining order and security, as well as for exhumations and identifications of missing and disappeared persons: see Manfred Nowak, “Enforced Disappearances in Kosovo: Human Rights Advisory Panel Holds UNMIK Accountable”, *European Human Rights Law Review*, No. 3, 2013, p. 269.

100 For a complex analysis and evaluation of the actions of the ICRC with regard to missing persons, see Marco Sassoli and Marie-Louise Tougas, “The ICRC and the Missing”, *International Review of the Red Cross*, Vol. 84, No. 848, 2002. For more information on missing persons, including news about current developments, see the ICRC web page on the subject, available at: [www.icrc.org/en/war-and-law/protected-persons/missing-persons](http://www.icrc.org/en/war-and-law/protected-persons/missing-persons).

101 ICRC, *Annual Report 2015*, Geneva, 2016, pp. 34, 228, 298, 351, 414; ICRC, *Annual Report 2014*, Geneva, 2015, pp. 93, 125, 165, 269, 296, 382, 441.

While the ICRC has in recent years developed expertise in forensic science,<sup>102</sup> its main efforts are aimed at supporting the appropriate actions by local authorities and do not typically involve carrying out its own forensic work.<sup>103</sup> In particular, the ICRC provides advice, support and training to local authorities and forensic practitioners in searching for, recovering, analyzing, identifying and managing large numbers of unidentified remains. In this context it focuses on building sustainable local forensic capacity as well as promoting the use of scientific best practice and the provision of necessary training.<sup>104</sup> The ICRC's forensic services provide assistance to many countries to help ensure the proper and dignified management of the dead and to help prevent and resolve cases of missing persons.<sup>105</sup> Only in exceptional circumstances is the ICRC itself involved in exhuming and identifying mortal remains.<sup>106</sup>

One of the primary tasks of the WGEID is to assist families in determining the fate or whereabouts of their family members who are reportedly disappeared. Reports submitted to the WGEID are considered to be clarified when the fate or whereabouts of the disappeared persons are clearly established and detailed information is transmitted to the group. To clarify a case brought to the Working Group, it is not necessary for the State to return the remains, although in most cases it would be necessary for the authorities to undertake measures to locate them if the persons have died.<sup>107</sup>

The amount of disappearances during the wars in the former Yugoslavia in the 1990s led to a sudden increase in communications received by the WGEID, to over 6,000 in 1992 alone. In its annual report, the Working Group stated that its resources were inadequate to meet this influx and its working methods were not geared to handle situations of the size and scope of the one in former Yugoslavia. Thus the Working Group supported the recommendations of Tadeusz Mazowiecki, the Special Rapporteur on the Situation of Human Rights in the Territory of the former Yugoslavia, to establish a special commission to look into

102 ICRC, above note 13, p. 89.

103 ICRC, *Annual Report 2015*, above note 101, p. 15. See also ICRC Advisory Service on International Humanitarian Law, "Missing Persons and Their Families: Factsheet", Geneva, 2015; while this fact sheet covers the subject of "Management of Human Remains" (p. 3), this aspect is not mentioned in the part devoted to the ICRC's role (pp. 4–5).

104 ICRC, *Forensic Science and Humanitarian Action*, Geneva, 2017, available at: [www.icrc.org/en/document/forensic-science-and-humanitarian-action#.VL\\_PRCinGm8](http://www.icrc.org/en/document/forensic-science-and-humanitarian-action#.VL_PRCinGm8).

105 The ICRC's *Annual Report 2015* (above note 101, p. 62) mentions seventy countries, and its *Annual Report 2014* (above note 101, p. 94) eighty countries, to which assistance in this respect has been provided.

106 For example, in Colombia in 2013 (ICRC, *Annual Report 2014*, above note 101, p. 421), or in post-conflict Yugoslavia (ICRC, *Annual Report 1997*, Geneva, 1998, pp. 186–187). In Bosnia the use of such measures was justified by "the need to identify bodies and accord them a decent burial – a need particularly acute for the families of the dead, who could only then begin the catharsis of mourning" (ICRC, *Annual Report 1996*, Geneva, 1997, p. 175).

107 In order to provide the WGEID with "clear and detailed information on the fate or whereabouts of the disappeared person": see WGEID, *Methods of Work of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/WGEID/102/2, 2 May 2014, Rules 25, 26.

the question of disappearances in the area.<sup>108</sup> This led to the setting-up, in 1994, of the Special Process on Missing Persons in the Territory of the former Yugoslavia, with the aim of clarifying the fate and whereabouts of missing persons in the territory.<sup>109</sup>

The Special Process functioned as a channel of communication between the relatives of missing persons and other sources of information.<sup>110</sup> Its working methods were similar to those of the WGEID, with some minor differences.<sup>111</sup> The Special Process's mandate did not explicitly encompass exhumations and returning remains, but very soon indications arose that most of the 30,000 missing persons in the territory of the former Yugoslavia might be victims of arbitrary killings and buried in mass graves. The only way of clarifying their fate and whereabouts was to excavate the mass graves and to exhume and identify all the mortal remains.

Manfred Nowak, who was the expert of the Special Process, stated in 1996 that if the local authorities under whose jurisdiction mass graves fall were not willing to carry out exhumations, "the task will fall to international organizations and mechanisms, including the special process".<sup>112</sup> Based on this reasoning, he requested the Commission on Human Rights to consider this issue and authorize additional funding.<sup>113</sup> His appeal received a reluctant response. Some governments and the ICRC argued that the problem of missing persons should be solved by putting pressure on the parties concerned to disclose all relevant information.<sup>114</sup> The Commission on Human Rights adopted a resolution by which it allowed for an examination of mass grave sites by the expert "in cases where other means of determining the fate of the missing have proven unsuccessful and upon the recommendation by qualified experts that exhumation will provide an efficient means for resolving cases that are unlikely to be resolved by other means."<sup>115</sup> This shows that the actions performed by the Special Process were conditional acts of last resort. At the same time, the expert of the Special

108 WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN.4/1993/25, 7 January 1993, paras 6, 36–44. At this time, the WGEID's working methods did not cover disappearances, which happened in international armed conflicts. This was changed in 2012.

109 For more on the course of events that led to establishing the Special Process, see *ibid.*, paras 37–44; WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN.4/1994/26, 22 December 1993, paras 41–44; WGEID, above note 11. For more on the Special Process, see Renate Frech, *Disappearances in Bosnia and Herzegovina*, Association for the Promotion of the Ludwig Boltzmann Institute of Human Rights, Sarajevo, Tuzla and Vienna, 1998, pp. 11–20; Manfred Nowak, "Monitoring Disappearances – The Difficult Path from Clarifying Past Cases to Effectively Preventing Future Ones", *European Human Rights Law Review*, Vol. 1, 1996, pp. 358–360.

110 Special Process on Missing Persons in the Territory of the former Yugoslavia, *Report Submitted by Mr. Manfred Nowak, Member of the Working Group on Enforced or Involuntary Disappearances, Pursuant to Paragraph 24 of Commission Resolution 1994/72*, UN Doc. E/CN.4/1995/37, 15 January 1995, para. 12.

111 Most importantly, the Special Process's target group was broader and it acted as a channel of communication not only between families and government, but also for all other sources of information. *Ibid.*, para. 12.

112 Special Process on Missing Persons in the territory of the former Yugoslavia, above note 98, para. 78.

113 *Ibid.*, paras 74–79.

114 Special Process on Missing Persons in the Territory of the former Yugoslavia, above note 14, paras 49–54.

115 Commission on Human Rights, Res. 1996/71, 23 April 1996, para. 34.

Process was called upon to prepare a comprehensive plan for dealing with this question and securing financial assistance for the activities.<sup>116</sup> In practice, the implementation of the programme of action met with both financial and political obstacles.<sup>117</sup> When Manfred Nowak resigned, the first reason he offered for his resignation was the lack of adequate support for exhumations.<sup>118</sup>

The goal of the Special Process was to clarify the fate and whereabouts of missing persons in the territory of the former Yugoslavia. The expert explained that the necessity of undertaking exhumations was connected with the wish to “facilitate a decent burial”,<sup>119</sup> thereby recognizing the need of victims’ families to receive the remains of their dead relatives.

Although exhumations were not performed on the necessary scale, the very fact that the Special Process dealt with them was groundbreaking and paved the way for further developments. The situation of missing and disappeared persons and their families in post-war Yugoslavia, as revealed by the actions of the Special Process, were the reason for the creation of the ICMP, which was a US initiative, in 1996.<sup>120</sup> The ICMP’s aim is to ensure the cooperation of governments and other authorities in locating persons missing for involuntary reasons – such as armed conflicts, human rights abuses and natural or man-made disasters – and to assist them in those actions.<sup>121</sup> Therefore the ICMP deals with both enforced disappearances and missing persons. It initially operated only in post-war Yugoslavia, but has gradually expanded its activities to include other countries, such as Iraq, Colombia and Libya.<sup>122</sup> While the activities of the ICMP can lead to returning the remains of missing and disappeared persons to their families, this is not its main objective and in addition there is no mechanism accessible for individuals.

In practice, the mandate of the Special Process evolved towards exhumation and – if effective – would have also covered returning the remains to families through a mechanism established by the UN. A similar pattern can be observed with respect to the Committee on Missing Persons in Cyprus (CMP), which was established in 1981.<sup>123</sup> This tripartite mechanism,<sup>124</sup> consisting of two members

116 *Ibid.*, para. 36.

117 Special Process on Missing Persons in the Territory of the former Yugoslavia, above note 14, paras 49–52, 57.

118 The other two were lack of coordination among international actors in the field and lack of cooperation from the Federal Republic of Yugoslavia: see Special Process on Missing Persons in the Territory of the former Yugoslavia, “Final Statement by Manfred Nowak”, 26 March 1997.

119 See *ibid.*

120 Manfred Nowak proposed the creation of a very similar multilateral commission on missing persons; while the initiative was never implemented, it did receive support from the majority of regional authorities (Republic of Croatia, Republic of Bosnia and Herzegovina, Republika Srpska). See Special Process on Missing Persons in the Territory of the former Yugoslavia, above note 98, paras 80–82.

121 See the ICMP website, available at: [www.icmp.int/about-us/mandate/](http://www.icmp.int/about-us/mandate/).

122 See also Jeremy Sarkin, Lara Nettelfield, Max Matthews and Renee Kosalka, *Bosnia and Herzegovina: Accounting for Missing Persons from the Conflict: A Stocktaking*, ICMP, Sarajevo, 2014, pp. 34–35.

123 For more on the CMP, see Grażyna Baranowska, “Shedding Light on the Fate of the Disappeared? Committee on Missing Persons in Cyprus”, *International Journal of Rule of Law, Transitional Justice and Human Rights*, Vol. 3, 2013, pp. 101–108.

124 Multilateral or tripartite mechanisms with regard to missing persons have also been set up after other conflicts; for example, the 1980–88 Iran–Iraq war (ICRC, *Annual Report 2015*, above note 101, p. 484) and the Yugoslav wars (ICRC, *Annual Report 1997*, above note 106, pp. 186–187).



appointed respectively by the Greek Cypriot and Turkish Cypriot communities and one selected by the ICRC and appointed by the UN Secretary-General, originally had a very narrow mandate: looking into the cases of persons reported missing in the inter-communal fighting as well as in the events of July 1974 and afterwards, and drawing up a comprehensive list of missing persons without attributing responsibility or making findings about the causes of the deaths.<sup>125</sup> Owing to political tensions, the CMP did not undertake any meaningful activities during the first two decades of its existence.<sup>126</sup> In August 2004, the Greek Cypriot and Turkish Cypriot communities agreed to a proposal made by the UN Secretary-General, who called for the resumption of the work of the CMP. No change was introduced to the mandate; nevertheless, exhumations became its main focus. Identified bodies are currently returned to the families and reburied, which is the final phase of actions taken by the CMP.<sup>127</sup> As of 31 May 2018, 876 of the 2,002 missing persons have been identified.<sup>128</sup>

Thus the very narrow mandate of the CMP was *de facto* extended twenty-three years after the organization was set up. As stated on its website, today “[t]he primary objective of the CMP is to enable relatives of missing persons to recover the remains of their loved ones, arrange for a proper burial and close a long period of anguish and uncertainty”.<sup>129</sup> Although the CMP cannot be perceived overall as a body which has effectively dealt with the issue of forcibly disappeared and missing persons in Cyprus,<sup>130</sup> the development which led to the extension of its activities is very positive. Such activities would not have been possible in 1981 when the CMP was set up, and the change is also due to a shift in the way the international community approaches missing and disappeared persons.

## Conclusions

International law has dealt with missing and forcibly disappeared persons for many decades, but the need to return the remains was not initially recognized. Yet the issue is of primary importance in as much as many (if not the majority of) disappeared persons are eventually killed, and there appears to be a universal

125 CMP, “Terms of Reference and Mandate”, paras 7, 11, 13, available at: [www.cmp-cyprus.org/content/terms-reference-and-mandate](http://www.cmp-cyprus.org/content/terms-reference-and-mandate).

126 G. Baranowska, above note 123, pp. 104–105.

127 The first three phases are the archaeological phase, the anthropological phase and the genetic phase.

128 Figures from the CMP website as of 31 May 2018. Updated figures can be found at CMP, “Figures and Statistics of Missing Persons”, available at: [www.cmp-cyprus.org/content/facts-and-figures](http://www.cmp-cyprus.org/content/facts-and-figures).

129 CMP website, available at: [www.cmp-cyprus.org](http://www.cmp-cyprus.org).

130 Among the reasons for this is the fact that the CMP does not designate responsibility for disappearances, so it does not reveal the fate of the disappeared persons. Additionally, because of the passage of time and since many remains were purposely destroyed, damaged or hidden by the perpetrators, not all persons will be found and identified. It is not possible to assess the total number unambiguously; it can be only estimated. Gülden Plümer Küçük, the Turkish member of the CMP, stated during an interview that finding 65% of the remains would be a great success (interview with Gülden Plümer Küçük, Turkish member of the CMP, Nicosia, October 2012). Though this is of course only an estimate, it seems quite optimistic.

human need to bury one's loved ones. As families of disappeared persons are also considered victims of enforced disappearance, their needs should be considered.

The families of those who have forcibly disappeared and the families of those who have gone missing during international and non-international armed conflicts have different rights. States are obliged under international law to take all appropriate measures to return the remains of forcibly disappeared persons and are strongly encouraged to return the remains of missing persons. Placing more responsibility on the State in cases of enforced disappearance seems justified, as State involvement is an inherent aspect of the act. The obligation to return the remains is an obligation of means, not results: in many situations it is not possible to find the bodies of forcibly disappeared or missing persons.<sup>131</sup>

The described development in international law was triggered by the families themselves, who put forward the need to receive the remains in the context of the Special Process, before the IACtHR, and before the Human Rights Chamber for Bosnia and Herzegovina. Both the IACtHR and the Chamber took into consideration the specific cultural and religious background of the disappeared and their families when including the issue in their remedies.<sup>132</sup> In two different parts of the world, with regard to two different groups – Mayan peoples and Muslims – two different judicial bodies came to the same conclusion: in order to address enforced disappearances, States should take measures to return remains to the families. Subsequently, this need of the families was specifically included in the ICPPED. While there are differences in the approaches of the analyzed courts and tribunals, they included returning the remains as a form of reparation and did not consider it as an autonomous right, as it is considered under the ICPPED. Although the ECtHR did not include returning remains explicitly in its remedies, it is also clear from the *Aslakhanova* judgment that the obligation is due to the relatives of the disappeared.

In the interpretation of the Committee on Enforced Disappearances, the obligation to return remains also applies to disappearances which commenced before the ICPPED came into force.<sup>133</sup> In practice this can also be done through memory laws, even enacted many years after the disappearances occurred. For example the Spanish Historical Memory Law, adopted in 2007, introduces measures for the identification and location of victims who disappeared and were killed eight decades earlier.<sup>134</sup>

While there is no legal obligation for international organizations to be involved in returning remains, since the 1990s there have been several

131 WGEID, “General Comment”, above note 45, paras 5, 6.

132 The IACtHR explained the issue in the judgments themselves (see, for example, IACtHR, *Bamaca-Velasquez*, above note 60, para. 81), while the Chamber did not mention it in its decisions, but according to an interview with Manfred Nowak the wishes expressed by the families filing the application triggered this development.

133 CED, above note 42, para. 28; CED, above note 43, paras 31–32.

134 Ley de Memoria Histórica de España, Art. 12. For more on Spanish memory laws, see Alfons Aragoneses, “Legal Silences and the Memory of Francoism in Spain”, in Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (eds), *Law and Memory: Addressing Historical Injustice through Law*, Cambridge University Press, Cambridge, 2017.

international initiatives in this respect. There are both disadvantages and challenges when international actors become involved in the exhumation, identification and return of the remains of disappeared and missing persons.<sup>135</sup> States are obliged to take all appropriate measures to return the remains of disappeared persons: international involvement in the issue should be considered an exceptional circumstance aimed at strengthening the capacity of national authorities to pursue those actions.

135 For more on the disadvantages and challenges for the ICRC, see M. Sassoli and M.-L. Tougas, above note 100, pp. 743–745.



# The first attempts in Mexico and Central America to address the phenomenon of missing and disappeared migrants

**Gabriella Citroni\***

Dr Gabriella Citroni is Professor of International Human Rights Law at the University of Milano-Bicocca, Italy, and International Legal Adviser for the Federación Latinoamericana de Asociaciones de Familiares de Detenidos Desaparecidos (FEDEFAM) and TRIAL International.

## Abstract

*The phenomenon of missing migrants, including victims of enforced disappearance, presents exceptional challenges due to its specific features and transnational scope. This article analyzes the case of missing and disappeared migrants in Mexico and illustrates the obstacles faced by their families, mostly residing in Central America, in their efforts to establish the fate and whereabouts of their loved ones and to obtain justice and redress. The article describes the process which led to the establishment of three mechanisms – a Forensic Commission, an Investigative Unit on Crimes against Migrants and an External Mechanism of Support for Search and Investigation – that aim at providing innovative responses and tackling the transnational dimension of the issue. The first significant achievements are presented, along with the remaining pitfalls.*

\* The views expressed here are solely those of the author and do not represent the views of TRIAL International or FEDEFAM. The author is grateful to Elena Carpanelli and Tullio Scovazzi for their invaluable comments on earlier drafts of this article, as well as to the anonymous reviewers for their constructive suggestions and to the editors for the generous support during the review process. The author can be contacted at [gabriella.citroni@unimib.it](mailto:gabriella.citroni@unimib.it).

**Keywords:** enforced disappearance, missing persons, migrants, Mexico, Central America, right to know the truth, forensic, impunity.

⋮ ⋮ ⋮ ⋮ ⋮ ⋮

## Introduction

The subject of migrants reported missing on their journey or within countries of destination is receiving increasing attention from international organizations,<sup>1</sup> scholars,<sup>2</sup> non-governmental organizations (NGOs)<sup>3</sup> and civil society associations.<sup>4</sup> Despite growing interest, however, the phenomenon is still under-studied and

- 1 Among others, the International Committee of the Red Cross (ICRC) has been actively following the subject in recent years; see ICRC, “Missing Migrants”, available at: [www.icrc.org/en/missing-migrants](http://www.icrc.org/en/missing-migrants) (all internet references were accessed in January 2018). Together with National Red Cross and Red Crescent Societies across Europe, the ICRC has set up a tracing system called Trace the Face, aimed at helping refugees and migrants finding missing family members; see ICRC, “Trace the Face: People Looking for Missing Migrants in Europe”, available at: [www.icrc.org/en/document/trace-face-people-looking-missing-migrants-europe](http://www.icrc.org/en/document/trace-face-people-looking-missing-migrants-europe). See also ICRC, *Missing Migrants and Their Families: The ICRC’s Recommendations to Policy-Makers*, August 2017, available at: [www.icrc.org/sites/default/files/document/file\\_list/missing-migrants-and-their-families.pdf](http://www.icrc.org/sites/default/files/document/file_list/missing-migrants-and-their-families.pdf). The International Organization for Migration (IOM) has launched the Missing Migrants project, available at: [missingmigrants.iom.int](http://missingmigrants.iom.int). The International Commission for Missing Persons (ICMP) has joined forces with the IOM to conduct a comprehensive assessment of the number of missing migrants in the Mediterranean region, and has also created an Online Inquiry Center to provide information about missing persons, including migrants, available at: [oic.icmp.int/index.php?w=intro&l=en](http://oic.icmp.int/index.php?w=intro&l=en). This tool uses an identification management system that collects data and information spanning different continents and time periods. Another initiative conducted by the IOM, in cooperation with the University of York and the City University of London, between 2015 and 2016, is the Mediterranean Missing project: see “Mediterranean Missing: Understanding Needs of Families and Obligations of Authorities”, available at: [www.mediterraneanmissing.eu/](http://www.mediterraneanmissing.eu/).
- 2 Iosif Kovras and Simon Robins, “Death as the Border: Managing Missing Migrants and Unidentified Bodies at the EU’s Mediterranean Frontier”, *Political Geography*, No. 55, 2016; Cristina Cattaneo and Marilisa D’Amico, *I diritti anegati – I morti senza nome del Mediterraneo*, FrancoAngeli, Milano, 2016; Tara Brian and Frank Laczko (eds.), *Fatal Journeys*, Vol. 2: *Identification and Tracing of Dead and Missing Migrants*, IOM, Geneva, 2016; Christina Oelgemöller, “The Illegal, the Missing: An Evaluation of Conceptual Inventions”, *Millennium: Journal of International Studies*, Vol. 46, No. 1, 2017.
- 3 Among others, see the websites of the Fundación para la Justicia y el Estado Democrático de Derecho, available at: [fundacionjusticia.org/](http://fundacionjusticia.org/); and the Regional Mixed Migration Secretariat, available at: [www.regionalmms.org](http://www.regionalmms.org).
- 4 In recent years, especially in Central America, various committees of relatives of missing migrants have been created, including the Comité de Familiares de Migrantes Desaparecidos del Progreso (COFAMIPRO) of Honduras, the Comité de Familiares de Migrantes Fallecidos y Desaparecidos de El Salvador (COFAMIDE), and the Comité de Familiares de Migrantes Desaparecidos del Centro de Honduras (COFAMICENH). For a similar initiative in the Mediterranean, Terre pour Tous (Tunisia) can be mentioned. Notably, several associations of support for relatives of missing migrants have been established in countries of destination, such as Carovane Migranti in Italy ([carovanemigranti.org](http://carovanemigranti.org)), the Movimiento Migrantes Mesoamericano in Mexico and Central America ([movimiento.migrantemesoamericano.org](http://movimiento.migrantemesoamericano.org)), and Caravana Abriendo Fronteras, which is organized in Spain but also active in France, Italy and Greece ([caravanaagrecia.info](http://caravanaagrecia.info)). In July 2017 the Permanent Peoples Tribunal on Human Rights of Migrant and Refugee Peoples (PPT) launched a process concerning violations of the human rights of migrants and refugees. During the first two sessions, held in Barcelona and Palermo, the issue of missing migrants was also dealt with; see the PPT website, available at: [transnationalmigrantplatform.net/migrantppt/](http://transnationalmigrantplatform.net/migrantppt/).

certainly under-reported, due to the exceptional challenges that it poses in terms of analysis and documentation and the practical difficulties in search operations and in the adoption of effective legal and humanitarian responses.

The very nature of the phenomenon of missing migrants implies the involvement of different countries. On the one hand, this entails the existence of different applicable jurisdictions and legal provisions, and the need for special measures of cooperation, including the activation of diplomatic and consular channels. On the other hand, families of missing and disappeared migrants face extraordinary obstacles in their struggle to determine the fate and whereabouts of their loved ones and, where appropriate, to obtain justice and redress for the harm that their relatives may have suffered. Hindrances vary from the impossibility of travel due to lack of resources or documents, to the *de facto* inability to file complaints or reports in other countries because of the pitfalls of domestic legislation that does not recognize any legal standing.<sup>5</sup> The existing legal framework and the mechanisms in place to facilitate search operations or the filing of complaints have so far proved incapable of fully seizing the transnational scope of the phenomenon and of adequately addressing the impediments described, thus demanding the adoption of new tools and innovative responses.<sup>6</sup>

Furthermore, the universe of migrants reported missing is a complex one: there are victims of fatalities, natural calamities or catastrophes, and unidentified victims of shipwrecks, but also victims of crimes that may include human-smuggling and human trafficking, arbitrary executions and massacres, as well as enforced disappearance. With regard to the latter, in its 2016 annual report, the United Nations (UN) Working Group on Enforced or Involuntary Disappearances (WGEID) included a specific section on the subject of enforced disappearance in the context of migration, outlining the main issues that it has identified surrounding the phenomenon.<sup>7</sup> Some of the issues acknowledged in the report are migration caused by enforced disappearances; enforced disappearance of migrants (including enforced disappearances for political reasons, cases occurring during the detention of migrants or the execution of deportation procedures, and enforced disappearance of migrants by private actors operating on behalf of, or with the direct or indirect support, consent or acquiescence of, the State); factors contributing to the enforced disappearance of migrants; and State obligations in the context of the enforced disappearance of migrants.<sup>8</sup> The WGEID observed that

5 Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (Special Rapporteur on Executions), *Unlawful Death of Refugees and Migrants*, UN Doc. A/72/335, 15 August 2017, para. 73.

6 Working Group on Enforced or Involuntary Disappearances (WGEID), *Report on Enforced Disappearances in the Context of Migration*, UN Doc. A/HRC/36/39/Add.2, 28 July 2017, paras 77–79. For more on this report and the WGEID, see the article by Bernard Duhaime and Adr anne Thibault in this issue of the *Review*.

7 WGEID, *2016 Annual Report*, UN Doc. A/HRC/33/51, 28 June 2016, paras 46–80.

8 *Ibid.*

the transnational nature of migration certainly complicates the efforts of the families of migrants who wish to obtain information concerning a disappeared relative. In many instances, it is reported that there is no established protocol for family members to denounce a disappearance abroad, in the country where the crime occurred. Similarly, there are no forensic data banks to register DNA for the disappeared or evidence contributing to the research of remains. If such mechanisms exist, they are often said to be ineffective, not ensuring that family members living abroad may access them. ... [B]roader obstacles ... may complicate the search for the truth, such as language and cultural barriers, lack of cooperation from the country of origin, corruption, lack of financial means, the impossibility of travelling to the country where the disappearance occurred, the lack of access to effective legal services, etc.<sup>9</sup>

Given the importance and complexity of the phenomenon, in 2017, the WGEID issued a report entirely devoted to the analysis of enforced disappearance in the context of migration. The WGEID outlined that there is a direct link between migration and enforced disappearance and denounced that the international community as a whole does not seem to be giving the necessary attention to the matter, while States turn a blind eye and prefer to transfer the blame elsewhere, be it to another State or to a criminal group.<sup>10</sup> Hence, the WGEID pointed out that this phenomenon is a modern-day reality that should not be ignored or underestimated and recalled that under international law States bear the obligations to prevent, punish and remedy enforced disappearance of migrants, and the unique features of migration trigger additional specific obligations in the areas of search, criminalization/investigation, reparation and international cooperation.<sup>11</sup>

While the situation of missing migrants in the Mediterranean region has obtained relatively more attention<sup>12</sup> and a number of projects<sup>13</sup> to tackle it have been launched (mostly concerning the very specific case of migrants reported missing at sea), the cases of migrants unaccounted for and subjected to enforced disappearance in Mexico are relatively less studied and documented.

This article aims at analyzing the situation of migrants reported missing and victims of enforced disappearance in Mexico and the obstacles faced by their families, who mostly reside in Central American countries. The first attempts to provide efficient legal and humanitarian responses and to put in place effective mechanisms to address the needs of relatives of missing and disappeared

9 *Ibid.*, paras 68–69.

10 WGEID, above note 6, para. 81.

11 *Ibid.*, paras 57, 80. For a detailed analysis of States' obligations in the context of the enforced disappearance of migrants, see *ibid.*, paras 58–79.

12 For scholarly writings about enforced disappearance, see above note 2.

13 For projects by NGOs and international organizations, see above note 1.



migrants will also be illustrated. It is concluded that the current situation in Mexico offers an opportunity to better grasp the specificities of the phenomenon of missing and disappeared migrants and allows an examination of good practices, outstanding practical difficulties and pitfalls.

After examining the scope and nature of the phenomenon of disappearance of migrants in Mexico and the concerns, observations and recommendations expressed in this regard over the past years by international human rights mechanisms, the article focuses on three major initiatives adopted to tackle this scourge and to provide adequate responses to thousands of families in the Americas. First, the Forensic Commission mandated to identify the mortal remains found in mass graves related to three massacres of migrants perpetrated between 2010 and 2012<sup>14</sup> and to return the remains to their families is presented. Second, the mandate and functioning of the recently established Investigative Unit on Crimes against Migrants and the Mechanism of External Support for Search and Investigation are described. These two mechanisms are taking their first steps, trying to find effective ways to conduct investigations on, among others, enforced disappearance of migrants, in a complex transnational context involving organized criminal groups operating on an international scale. Similarly, these mechanisms are exploring the possibilities of adapting already existing diplomatic and consular channels to the specific situation and to use them as a means to adequately assist the families of missing and disappeared migrants. This article examines some of their most relevant achievements, and in the final part highlights the remaining outstanding practical challenges that need to be faced to eventually provide an effective response to the needs of relatives of missing and disappeared migrants.

## Missing and disappeared migrants in Mexico

Mexico is a country of origin, transit and destination for migrants. It is also a country to which migrants return, and this is likely to increase in the near future. The migration flows to and across Mexico are made up of hundreds of thousands of people, including unaccompanied minors, who have the United States, and to a lesser extent Canada, as their destination.<sup>15</sup> These mixed flows comprise asylum-seekers, refugees and victims of human trafficking.<sup>16</sup>

14 In the states of Tamaulipas and Nuevo León, further discussed below.

15 Inter-American Commission on Human Rights (IACHR), *Human Rights of Migrants and Other Persons in the Context of Human Mobility in Mexico*, OEA/SER-L/V.II, Doc. 48/114, 30 December 2013, para. 3; Special Rapporteur on Executions, above note 5, para. 7.

16 IACHR, above note 15, para. 3.

At the same time, Mexico is undergoing a human rights crisis,<sup>17</sup> characterized by the perpetration of torture,<sup>18</sup> enforced disappearances<sup>19</sup> and widespread arbitrary killings.<sup>20</sup> The existence of considerable flows of drugs across the country, as well as of extremely violent organized criminal groups, including drug cartels operating on a regional scale from South and Central America reaching far beyond the northern borders of Mexico, further complicates the picture.<sup>21</sup> Corruption, infiltration of sectors of the government and armed forces, and impunity are rampant.<sup>22</sup> As an already vulnerable group, migrants have become an “easy target” for violence and abuse, including enforced disappearance, abduction, exploitation, trafficking and executions.<sup>23</sup>

The existence of a practice of individual and mass abductions of migrants in Mexico was denounced by the Mexican National Human Rights Commission (Comisión Nacional de los Derechos Humanos, CNDH) in two comprehensive reports published in 2009 and 2011.<sup>24</sup> In 2013, the Inter-American Commission on Human Rights (IACHR) observed the “massive and systematic abductions of migrants in transit through Mexico, *perpetrated by organized crime groups*

- 17 See, among others, IACHR, *Report on the Situation of Human Rights in Mexico*, OEA/SER.L/V/II, Doc. 44/15, 31 December 2015. The persistence of a severe human rights crisis in Mexico has been recently confirmed in *Preliminary Observations by the UN Special Rapporteur on Freedom of Expression and the Special Rapporteur on Freedom of Expression of the IACHR Following Their Joint Visit to Mexico*, 4 December 2017, para. 8, available at: [www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22484&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22484&LangID=E). See also Open Society Justice Initiative, *Undeniable Atrocities: Confronting Crimes against Humanity in Mexico*, 2016, available at: [www.opensocietyfoundations.org/sites/default/files/undeniable-atrocities-2nd-edition-20160808.pdf](http://www.opensocietyfoundations.org/sites/default/files/undeniable-atrocities-2nd-edition-20160808.pdf). In July 2017, a coalition of Mexican NGOs submitted a report to the International Criminal Court with the aim of triggering an investigation on this situation; see International Federation for Human Rights, *México: Asesinatos, desapariciones y torturas en Coahuila de Zaragoza constituyen crímenes de lesa humanidad*, June 2017, available at: [www.frayjuandelarios.org/blog/wp-content/uploads/2017/07/com.pdf](http://www.frayjuandelarios.org/blog/wp-content/uploads/2017/07/com.pdf).
- 18 Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Special Rapporteur on Torture), *Report on the Mission to Mexico*, UN Doc. A/HRC/28/68/Add.3, 29 December 2014, para. 23.
- 19 Committee on Enforced Disappearances (CED), *Concluding Observations on Mexico*, UN Doc. CED/C/MEX/CO/1, 13 February 2015, para. 10; WGEID, *Follow-Up Report to the Recommendations made by the Working Group: Missions to Mexico and Timor Leste*, UN Doc. A/HRC/30/38/Add.4, 11 September 2015, para. 7.
- 20 Special Rapporteur on Executions, *Report on the Mission to Mexico*, UN Doc. A/HRC/26/36/Add.1, 28 April 2014.
- 21 *Ibid.*, para. 8.
- 22 See, for example, Special Rapporteur on Torture, above note 18, para. 31; Special Rapporteur on Executions, above note 20, paras 9, 11; Special Rapporteur on Executions, *Follow-Up Report on the Visit to Mexico*, UN Doc. A/HRC/32/39/Add.2, 6 May 2016, paras 7, 25, 50; WGEID, *Report on the Mission to Mexico*, UN Doc. A/HRC/19/58/Add.2, 20 December 2011, paras 18 and 66.
- 23 See IACHR, above note 15.
- 24 CNDH, *Informe especial sobre los casos de secuestro en contra de migrantes*, 5 June 2009, available at: [www.cndh.org.mx/sites/all/doc/Informes/Especiales/2009\\_migra.pdf](http://www.cndh.org.mx/sites/all/doc/Informes/Especiales/2009_migra.pdf); CNDH, *Informe especial sobre secuestro de migrantes en México*, 22 February 2011, available at: [www.cndh.org.mx/sites/all/doc/Informes/Especiales/2011\\_secmigra.pdf](http://www.cndh.org.mx/sites/all/doc/Informes/Especiales/2011_secmigra.pdf). In 2017 the CNDH issued a special report on disappeared persons and clandestine burial sites in Mexico, wherein some references to migrant victims of enforced disappearance can be found, although this is not the main focus of the document; see CNDH, *Informe especial de la comisión nacional de los derechos humanos sobre desaparición de personas y fosas clandestinas en México*, available at: [www.cndh.org.mx/sites/all/doc/Informes/Especiales/InformeEspecial\\_20170406.pdf](http://www.cndh.org.mx/sites/all/doc/Informes/Especiales/InformeEspecial_20170406.pdf).

*operating with the tolerance or even involvement of certain public officials*".<sup>25</sup> The fact that State agents are directly or indirectly – by means of support, tolerance or acquiescence – involved in the deprivation of liberty of migrants, followed by the concealment of their fate and whereabouts, brings these cases into the realm of enforced disappearance.

In a 2011 report, the WGEID noted:

Undocumented migrants are particularly vulnerable to enforced disappearances due to their undocumented status and the lack of financial resources, effective laws, protection schemes, and judicial remedies available to them. Many of the 150,000 migrants that travel through Mexico every year to the northern border cross through areas where there is crime and they easily fall prey to abduction or extortion. In 2009, [the CNDH] reported 9,578 cases of abduction of migrants over a period of six months, and at least 11,333 migrants were allegedly abducted between April and September 2010, primarily by criminal organizations. According to [CNDH] reports and other sources, public officials from different sectors, including the National Institute for Migration and the municipal, state and federal police forces, had in some cases collaborated with criminal organizations in the abduction of migrants, thereby committing the offence of enforced disappearance. [The CNDH] reported that 8.9 per cent of the documented abductions that occurred over a period of six months in 2010 involved the participation of Government authorities. Until a proper and comprehensive investigation is conducted, it will not be possible to accept that all abductions of migrants are carried out exclusively by criminal organizations or to rule out the possibility of the direct or indirect involvement of public officials.<sup>26</sup>

The WGEID denounced the failure to qualify cases of enforced disappearance as such, with many official reports instead invoking different offences or generic terms (including “missing” and “lost”), which has hindered search operations and doomed the outcome of criminal investigations.<sup>27</sup> In this sense, the WGEID emphasized that “a potential enforced disappearance may only be ruled out after a complete, independent and impartial investigation. Therefore, the number of cases of enforced disappearance cannot be fully established without proper investigation.”<sup>28</sup>

The existing terminological confusion makes it almost impossible to determine the exact number of missing migrants and victims of enforced disappearance in Mexico. Indeed, for families living abroad, it becomes even more complicated to understand under which category they should – when they can manage to – register their relatives, either as “victims of enforced disappearance”, “abducted”, “not localized” or “missing”. Most of these terms do

25 IACHR, above note 15, para. 109 (emphasis added).

26 WGEID, above note 22, para. 69.

27 *Ibid.*, para. 18.

28 *Ibid.*, para. 21.

not find any correspondence in existing legal categories and rather come from common parlance. In November 2017, a General Law on Enforced Disappearance of Persons, Disappearance Committed by Non-State Actors and the National System of Search of Persons was eventually enacted; this legislation explicitly refers to two categories, “disappeared persons” (“*personas desaparecidas*”) and “not localized” (“*personas no localizadas*”).<sup>29</sup> Pursuant to the 2017 General Law, a National Register of Disappeared and Not Localized Persons will be set up and will absorb the information previously scattered among different registers at the federal and State levels. The already vast group of migrants reported missing or unaccounted for in Mexico encompasses those who have been subjected to arbitrary killings and whose mortal remains have not been exhumed, identified and returned to families who, therefore, do not know the truth regarding their loved ones’ fate and whereabouts. Notably, between 2010 and 2012, three massacres where victims were largely migrants were perpetrated in the north of Mexico, in the states of Tamaulipas and Nuevo León. In August 2010, the bodies of seventy-two migrants were found in San Fernando, Tamaulipas.<sup>30</sup> Between April and May 2011, in the same municipality, forty-seven clandestine graves, containing the remains of 193 persons – including migrants – were located.<sup>31</sup> In May 2012, forty-nine mutilated bodies, some of which belonged to migrants from Honduras, Nicaragua and Guatemala, were found in Cadereyta, Nuevo León.<sup>32</sup> At the time of writing, impunity for these three incidents is still prevailing, although there are clear indications that State officials were directly or indirectly involved in the perpetration or concealment of these crimes.<sup>33</sup> Although not all mortal remains have been duly identified, it is now evident that the majority of victims were migrants travelling from Central America.<sup>34</sup> Besides the three mentioned notorious cases, many more migrants currently unaccounted for may have been

29 General Law on Enforced Disappearance of Persons, Disappearance Committed by Non-State Actors and the National System of Search of Persons, 17 November 2017 (entered into force 16 January 2018) (General Law on Disappeared Persons), available at: [www.diputados.gob.mx/LeyesBiblio/pdf/LGMDFP\\_171117.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/LGMDFP_171117.pdf). For the definition of the terms “disappeared” and “not localized”, see Art. 2. XV–XVI.

30 Secretaría de la Marina, *Personal de la Armada de México descubre rancho de presuntos delincuentes en San Fernando, Tamaulipas*, 24 August 2010, available at: [2006-2012.semar.gob.mx/sala-prensa/comunicados-2010/1436-comunicado-de-prensa-216-2010.html](http://2006-2012.semar.gob.mx/sala-prensa/comunicados-2010/1436-comunicado-de-prensa-216-2010.html).

31 Fundación para la Justicia y el Estado Democrático de Derecho, *Fosas clandestinas en San Fernando, Tamaulipas*, 2011, available at: [fundacionjusticia.org/47-fosas-con-193-restos-en-san-fernando-tamaulipas/](http://fundacionjusticia.org/47-fosas-con-193-restos-en-san-fernando-tamaulipas/).

32 Fundación para la Justicia y el Estado Democrático de Derecho, *El caso de 49 torsos encontrados en la carretera a Nuevo León*, 2012, available at: [fundacionjusticia.org/el-caso-de-49-torsos-encontrados-en-la-carretera-de-cadereyta-nuevo-leon/](http://fundacionjusticia.org/el-caso-de-49-torsos-encontrados-en-la-carretera-de-cadereyta-nuevo-leon/).

33 IACHR, above note 15, paras 179–183; Jesse Franzblau, “PGR entrega datos sobre participación de policías de San Fernando en masacre de migrantes”, *Animal Político*, 22 December 2014, available at: [www.animalpolitico.com/2014/12/policias-de-san-fernando-participaron-en-masacre-de-migrantes-pgr-entrega-datos-del-caso/](http://www.animalpolitico.com/2014/12/policias-de-san-fernando-participaron-en-masacre-de-migrantes-pgr-entrega-datos-del-caso/).

34 See, for example, CNDH, *Recomendación sobre la investigación de violaciones graves a los derechos humanos a la seguridad ciudadana y de acceso a la justicia en su modalidad de procuración, en agravio de las 49 personas halladas sin vida en el Municipio de Cadereyta, Nuevo León*, 18 October 2017, available at: [www.cndh.org.mx/sites/all/doc/Recomendaciones/ViolacionesGraves/RecVG\\_008.pdf](http://www.cndh.org.mx/sites/all/doc/Recomendaciones/ViolacionesGraves/RecVG_008.pdf).

subjected to arbitrary killings in Mexico.<sup>35</sup> Those who have not yet been identified must be counted among the ranks of missing or disappeared migrants.

In 2014, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions pointed out that

undocumented migrants who transit through Mexico put their lives at serious risk, although it is difficult to obtain reliable figures on the numbers killed. Reportedly, there is a direct link between disappearances and killings of migrants, organized crime, and complicity of law enforcement, investigative and other authorities.<sup>36</sup>

The gravity of the situation of missing and disappeared migrants in Mexico, and their extreme vulnerability, coupled with the inadequate response from State authorities, have been increasingly denounced by NGOs<sup>37</sup> and international organizations.

Due to the spike in crimes committed against migrants, including enforced disappearance, and the stark increase in the number of missing and disappeared migrants, thousands of families – mostly residing in Central America – are struggling to unveil the truth regarding the fate and whereabouts of their loved ones and to obtain justice and redress.<sup>38</sup> In this ordeal, they are confronted with unprecedented legal, judicial and administrative difficulties, mostly determined by the complex transnational nature of the phenomenon at stake and the fact that, from abroad, access to justice is further complicated by practical obstacles such as the need for a visa to enter the country and undertake the necessary activities and the overall ordeal of navigating a foreign jurisdiction without adequate assistance. In Mexico, families of disappeared persons in general are left without effective answers from the State, search operations are not effective, and impunity is rampant.<sup>39</sup> Relatives of disappeared and missing migrants find themselves in an even worse position.<sup>40</sup> In the words of the IACHR,

35 Special Rapporteur on Executions, above note 20.

36 *Ibid.*, para. 74.

37 See, for example, Amnesty International, “Mexico Becoming a ‘No-Go Zone’ for Migrants as Gruesome Massacre Remains Unresolved Five Years On”, 2015, available at: [www.amnesty.org/en/latest/news/2015/08/mexico-becoming-a-no-go-zone-for-migrants-as-gruesome-massacre-remains-unresolved-five-years-on/](http://www.amnesty.org/en/latest/news/2015/08/mexico-becoming-a-no-go-zone-for-migrants-as-gruesome-massacre-remains-unresolved-five-years-on/); Human Rights Watch, *Mexico’s Disappeared: The Enduring Cost of a Crisis Ignored*, 20 February 2013, available at: [www.hrw.org/report/2013/02/20/mexicos-disappeared/enduring-cost-crisis-ignored](http://www.hrw.org/report/2013/02/20/mexicos-disappeared/enduring-cost-crisis-ignored); Open Society Justice Initiative, above note 17.

38 Special Rapporteur on Executions, above note 5, para. 70.

39 Grupo Interdisciplinario de Expertos Independientes, *Informe Ayotzinapa*, Mexico City, 2015, pp. 347–359; Grupo Interdisciplinario de Expertos Independientes, *Informe Ayotzinapa II*, Mexico City, 2016, pp. 555–605. See also IACHR, *Violence, Children and Organized Crime*, OEA/SER.L.V/II, Doc. 40/15, 11 November 2015, paras 400–401 (on the specific situation of migrants, see paras 319–326, 340–342).

40 It must be pointed out that families of Mexican missing or disappeared migrants are exposed to a particularly harsh situation and may find themselves somewhat “overshadowed” by relatives of other Mexican disappeared. Among others, see Caterina Morbiato, “Prácticas resistentes en el México de la desaparición forzada”, *Trace*, No. 71, 2017; Aaron Nelson and Julysa Sosa, “The Search for Missing Migrants”, *Pulitzer Center*, 24 July 2017, available at: [pulitzercenter.org/reporting/search-missing-migrants](http://pulitzercenter.org/reporting/search-missing-migrants); José Ignacio de Alba, “23 migrantes mexicanos, cuatro años desaparecidos y las familias los siguen buscando”, *Animal Político*, 25 March 2015, available at: [www.animalpolitico.com/2015/03/23-migrantes-mexicanos-cuatro-anos-desaparecidos-y-las-familias-que-los-siguen-buscando/](http://www.animalpolitico.com/2015/03/23-migrantes-mexicanos-cuatro-anos-desaparecidos-y-las-familias-que-los-siguen-buscando/).

*de jure* and *de facto* impediments put justice out of reach to migrants in an irregular situation. Most of the crimes and human rights violations committed against them go unpunished, which reveals just how vulnerable they are and how unprotected they are by the system of justice.<sup>41</sup>

A first evident stumbling block is the place of residence of families, added to the fact that they often pertain to socially marginalized groups, living in precarious economic conditions or in remote areas. Filing complaints or reports from their place of residence through diplomatic or consular channels has so far been virtually impossible, as the process is plagued by gaps and delays that make it extremely inefficient.<sup>42</sup> The existing coordination mechanisms seem unsuitable for complying with States' international obligations, especially with regard to the search for and location of disappeared and missing migrants and, in the event of their death, the exhumation, identification and return of their remains.<sup>43</sup> In particular, relatives of missing migrants residing abroad face severe restraints in their access to justice.<sup>44</sup> Those relatives who envisage travelling to Mexico in order to file complaints *in loco* and be directly involved in operations of search or in the conduct of criminal investigations frequently lack the necessary documents to do so, and are denied temporary humanitarian visas that would enable them to legally enter Mexican territory.<sup>45</sup> Even when these bureaucratic problems are overcome, and the necessary resources to embark on the journey can be gathered,

41 IACHR, above note 15, para. 93.

42 See, among others, Fundación para la Justicia y el Estado Democrático de Derecho *et al.*, *Alternative Report to the CED in View of the Adoption of the List of Issues*, May 2014, available at: [tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/MEX/INT\\_CED\\_ICO\\_MEX\\_17773\\_S.pdf](http://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/MEX/INT_CED_ICO_MEX_17773_S.pdf); Fundación para la Justicia y el Estado Democrático de Derecho *et al.*, *Alternative Report to the CED in View of the Periodic Exam of Mexico*, December 2014, available at: [tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/MEX/INT\\_CED\\_NGO\\_MEX\\_19217\\_S.pdf](http://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/MEX/INT_CED_NGO_MEX_19217_S.pdf).

43 Concerning cases of enforced disappearance, a number of conventions provide obligations for States to cooperate with regard to criminal proceedings, locating and releasing disappeared persons and, in the event of death, exhuming and identifying them and returning their remains. See International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006 (ICPPED), Arts 9(2), 11(1), 14, 15, 25(3). The ICPPED entered into force on 23 December 2010; Mexico ratified it on 18 March 2008 and, among Central American States mostly concerned by the phenomenon of migration to Mexico, only Honduras is a State party, having ratified the Convention on 1 April 2008. See also the Inter-American Convention on Forced Disappearance of Persons, 9 June 1994, which has been in force since 28 March 1996 and has been ratified – among the States analyzed in this article – by Guatemala, Honduras and Mexico, respectively on 22 February 2000, 11 July 2005 and 9 April 2002. This convention establishes an obligation to cooperate in order to “prevent, punish and eliminate the forced disappearance of persons” (Art. I(c)), and to “provide one another mutual assistance in the search for, identification, location, and return of minors who have been removed to another State or detained therein as a consequence of the forced disappearance of their parents or guardians” (Art. XII). The Inter-American Court of Human Rights (IACtHR) has elaborated on the obligation to cooperate among States vis-à-vis cases of enforced disappearance, in particular with regard to the conduct of investigations, extradition of suspects and mutual legal assistance. See IACtHR, *Goiburú and Others v. Paraguay*, Judgment, 22 September 2006, paras 130–132.

44 Ximena Suárez, Andrés Díaz, José Knippen and Maureen Meyer, *El acceso a la justicia para personas migrantes en México: un derecho que existe sólo en el papel*, July 2017, available at: [fundacionjusticia.org/cms/wp-content/uploads/2013/06/Accessoalajusticia\\_Versionweb\\_Julio2017.pdf](http://fundacionjusticia.org/cms/wp-content/uploads/2013/06/Accessoalajusticia_Versionweb_Julio2017.pdf).

45 Centro Diocesano para los Derechos Humanos Fray Juan de Larios *et al.*, *Follow-up Report to the CED*, February 2017, para. 49, available at: [fundacionjusticia.org/cms/wp-content/uploads/2013/06/FINAL-InfomedeseguimientoCED-MEX2017-2.pdf](http://fundacionjusticia.org/cms/wp-content/uploads/2013/06/FINAL-InfomedeseguimientoCED-MEX2017-2.pdf).

relatives of missing and disappeared migrants who manage to enter Mexico struggle with loopholes in the domestic legislation. In particular, their legal standing and status as victims have often not been formally recognized, therefore hindering them from claiming their rights, including the right to be actively involved in operations of search and associated to criminal investigations (the latter being known in Mexico as *coadyuvancia*).<sup>46</sup> Appointing a legal counsel or representative in Mexico has also become extremely difficult, if not virtually impossible, for families of missing and disappeared migrants residing abroad, due to bureaucratic and administrative obstacles posed by Mexican authorities, including a great amount of formalism.<sup>47</sup>

While the rule of law requires the respect of certain formalities, the situation of relatives of missing migrants calls for greater flexibility due to the specific features of the phenomenon. Further, access to files containing data and information on the progress of investigations concerning missing and disappeared migrants is one of the biggest problems faced by families residing abroad, thus jeopardizing their rights to know the truth, to access justice and to obtain redress.<sup>48</sup> The impossibility of acquiring information on the fate and whereabouts of loved ones is a source of great suffering and anguish for families, often amounting to inhumane treatment and an impairment of their mental integrity.<sup>49</sup> In this case, this feeling is further exacerbated by the physical distance involved and the practical barriers encountered by families.<sup>50</sup> Out of despair, some relatives decide to leave their countries of residence and enter Mexico without documents, often relying on smugglers, thus exposing themselves to the same security risks already faced by their loved ones.<sup>51</sup>

With regard to mortal remains located in the mass graves related to the three above-mentioned massacres, having access to information concerning the exhumation and identification process and providing DNA samples proved almost impossible for families residing in Central America.<sup>52</sup> In the face of this ordeal, instances where Mexican authorities made mistakes in the identification

46 Fundación para la Justicia y el Estado Democrático de Derecho *et al.*, *Alternative Report in View of the Adoption of the List of Issues*, above note 42, paras 81–98. See also UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, recommended by Economic and Social Council Res. 1989/65, 24 May 1989, Principle 16, available at: [www.ohchr.org/Documents/ProfessionalInterest/executions.pdf](http://www.ohchr.org/Documents/ProfessionalInterest/executions.pdf).

47 X. Suárez *et al.*, above note 44; Fundación para la Justicia y el Estado Democrático de Derecho *et al.*, *Follow-Up Report to the CED*, February 2016, para. 34, available at: [tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/MEX/INT\\_CED\\_NGS\\_MEX\\_23956\\_S.pdf](http://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/MEX/INT_CED_NGS_MEX_23956_S.pdf).

48 WGEID, “General Comment on the Right to the Truth in Relation to Enforced Disappearance”, in *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/16/48, 26 January 2011, para. 39 (in particular see para. 3 of the General Comment, on the right of relatives of disappeared persons to be closely involved with the investigations). Article 24(2) of the ICPPED recognizes the victims’ right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.

49 See, for example, IACtHR, *Gutiérrez and Family v. Argentina*, Judgment, 25 November 2013, paras 97, 138–139.

50 IACHR, above note 15, paras 192, 195.

51 WGEID, above note 6, paras 11–13.

52 Centro Diocesano para los Derechos Humanos Fray Juan de Larios *et al.*, above note 45, para. 63.

of mortal remains and returned wrongly identified bodies to families have been registered.<sup>53</sup> In other cases, relatives living in Central America received information that the remains of their loved ones had been found in Mexico (without any precision on the reliability of the process of exhumation and identification conducted) and would be cremated due to hygienic and public health reasons. When they tried to oppose this before the Mexican authorities, arguing that they had no certainty whatsoever on the credibility of the identification and that cremation was against their religious beliefs and customs, they were told that they had no legal standing to do so.<sup>54</sup> In some cases, while complaints were still pending, cremation was carried out anyway.<sup>55</sup> The majority of relatives who have been exposed to this form of re-victimization have so far been unable to obtain justice and redress from the Mexican authorities for the harm suffered, and in exceptional cases where their rights were acknowledged in court, the relevant judgments remained unimplemented.<sup>56</sup> These episodes have fostered a climate of distrust towards the Mexican authorities among families, in particular vis-à-vis the forensic services and the Attorney General's Office, who some have regarded as being incapable or unwilling to establish the truth and to conduct thorough and effective investigations.<sup>57</sup>

Not only did the applicable domestic legal frameworks in Mexico and the neighbouring countries fail to offer adequate responses, but also in some cases the traditional means offered by international human rights mechanisms proved

53 Fundación para la Justicia y el Estado Democrático de Derecho *et al.*, *Alternative Report to the Committee against Torture*, May 2012, available at: [tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/MEX/INT\\_CAT\\_NGO\\_MEX\\_12976\\_S.pdf](http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/MEX/INT_CAT_NGO_MEX_12976_S.pdf), paras 136–150 (reference to the return of the wrong mortal remains at para. 139).

54 Among others, the case of Ms Bertila Parada, mother of Mr Carlos Osorio Parada, can be cited. Mr Osorio Parada left El Salvador in March 2011, heading to the United States. His mother heard from him for the last time on 26 March 2011, when he was in Monterrey (Mexico), allegedly almost ready to cross the border. Ms Parada reported the disappearance of her son to the Salvadorian authorities. In 2012, she received a communication through the Salvadorian Ministry of Foreign Affairs, according to which the remains of her son had been located among the dead bodies found in San Fernando, Tamaulipas, and were going to be incinerated. Ms Parada expressed her wish to obtain more information on the process of identification and to oppose the cremation. In order to halt this process, Ms Parada, represented by a Mexican NGO, filed an appeal before the Mexican authorities. She eventually obtained the suspension of this measure, but her case reached the Supreme Court of Justice of Mexico with regard to the refusal to acknowledge her status as a “victim” and to grant her access to data and information on the progress of the investigation. It was not until 2 March 2016 that the Supreme Court of Justice of Mexico issued a landmark verdict acknowledging the legal status as victims – along with the ensuing rights – of relatives of missing migrants. Zorayda Gallegos, “México emite un fallo histórico en el caso de los migrantes masacrados en San Fernando”, *El País*, 3 March 2016, available at: [internacional.elpais.com/internacional/2016/03/03/mexico/1456968766\\_847064.html](http://internacional.elpais.com/internacional/2016/03/03/mexico/1456968766_847064.html). See Supreme Court of Justice of Mexico, *Amparo en revisión*, Case No. 382/2015, 30 January 2017, available at: [www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=178853](http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=178853).

55 Fundación para la Justicia y el Estado Democrático de Derecho *et al.*, *Alternative Report in View of the Adoption of the List of Issues*, above note 42, paras 164–170.

56 César Contreras León, “Sentencias que no se cumplen: El derecho de papel y la justicia que no llega”, 18 September 2017, available at: [eljuegodelacorte.nexos.com.mx/?p=6904#\\_ftn1](http://eljuegodelacorte.nexos.com.mx/?p=6904#_ftn1).

57 See, for example, Red Regional Verdad y Justicia para las Personas Migrantes, *Las personas migrantes como grupo vulnerable*, February 2014, available at: [fundacionjusticia.org/cms/wp-content/uploads/2013/06/INFORME-RELATOR-EJECUCIONES-EXTRAJUDICIALES-140413.pdf](http://fundacionjusticia.org/cms/wp-content/uploads/2013/06/INFORME-RELATOR-EJECUCIONES-EXTRAJUDICIALES-140413.pdf); CNDH, above note 34.



insufficient. For instance, a Mexican NGO representing families of missing and disappeared migrants, both from Mexico and from Central America, lodged a request before the IACHR for the adoption of precautionary measures directed at the preservation of burial sites and mass graves and the carrying out of exhumation and identification operations in accordance with international standards, in order to provide opportunities for families to know the truth.<sup>58</sup> Given the features of the phenomenon of missing migrants and its transnational character, the petitioners requested that the IACHR address measures to be taken by the various States concerned. The Commission rejected the request, holding, among other things, that precautionary measures had always been directed at one State at a time and in situations where at the very least the precise nationality of the beneficiaries of the measures could be determined beforehand.<sup>59</sup> This situation revealed an unpreparedness to adapt the existing tools to the specific features of the issue of missing and disappeared migrants in a transnational context.

In recent years, the existence of these obstacles has been gradually acknowledged by international human rights mechanisms that have addressed several recommendations to Mexico. Notably, the IACHR recommended that Mexico:

Put into practice mechanisms to search for migrants who are disappeared, missing, kidnapped, or otherwise deprived of liberty. These mechanisms must be coordinated among the States, federal government, and the migrants' countries of origin in Central America and the countries of destination, primarily the United States[;]

Develop effective and regionally coordinated investigative mechanisms that enable aggrieved migrants and their family members to have effective access to justice, irrespective of their immigration status or their provenance[;] ...

Put into practice a nationwide mechanism that makes it easier to share forensic information on the unidentified remains of Mexican persons and Central Americans who disappeared in Mexico, with the forensic databanks on disappeared migrants that have been developed within the region, such as those in El Salvador, Guatemala, Honduras and the state of Chiapas, and any others that may develop in the future. This national mechanism should be merged with a like regional mechanism enabling forensic information to be shared among the countries of Central and North America. Civil society

58 Fundación para la Justicia y el Estado Democrático de Derecho, *Migrantes y mexicanos asesinados y desaparecidos en San Fernando, Tamaulipas, México en relación con Estados Unidos Mexicanos, El Salvador, Guatemala, Ecuador y Honduras*, Request for Precautionary Measures to the IACHR, 2011 (on file with author).

59 IACHR, Letter to the Petitioners of Request MC-214-11, REF: *Migrantes y mexicanos presuntamente asesinados y desaparecidos en México/Solicitud de medidas cautelares*, 19 October 2011 (on file with author).

organizations should be instrumental in running both the national and regional databanks[;] ...

Develop regional instruments and mechanisms to combat the criminal activities of transnational organized crime groups involved in the abduction of migrants, human trafficking and smuggling of migrants.<sup>60</sup>

Similar recommendations, emphasizing the need to establish specific mechanisms able to deal with the transnational scope of the phenomenon, have also been issued by other international bodies.<sup>61</sup> In particular, the Committee on Enforced Disappearances (CED) has expressed special concern for this situation and has been very vocal in recommending that Mexico,

in conjunction with countries of origin and countries of destination, and with input from victims and civil society, ... redouble its efforts to prevent and investigate disappearances of migrants, to prosecute those responsible and to provide adequate protection for complainants, experts, witnesses and defence counsels. The transnational search and access to justice mechanism should guarantee: (a) that searches are conducted for disappeared migrants and that, if human remains are found, they are identified and returned; (b) that ante-mortem information is compiled and entered into the ante-mortem/post-mortem database;<sup>62</sup> and (c) that the relatives of the disappeared persons, irrespective of where they reside, have the opportunity to obtain information and take part in the investigations and the search for the disappeared persons.<sup>63</sup>

From the above it appears that the mechanisms existing in Mexico for the search for missing and disappeared persons, as well as those in charge of conducting investigations, were not sufficient to deliver the desired results. Generally understaffed, lacking the needed financial and human resources, and incapable of meeting the international standards of due diligence,<sup>64</sup> they proved inadequate to deal with the extraordinarily complex cases of missing and disappeared migrants. New organs, with a regional, transnational nature and focus, were needed. Prompted by the reiterated recommendations received from international human

60 IACHR, above note 15, para. 409, Recommendations 14, 15, 27, 39. The IACHR holds periodic thematic audiences on the subject of access to justice for migrants in Mexico; see Organization of American States, "Audiencias y otros eventos públicos de la CIDH", available at: [www.oas.org/es/cidh/audiencias/TopicsList.aspx?Lang=es&Topic=20](http://www.oas.org/es/cidh/audiencias/TopicsList.aspx?Lang=es&Topic=20).

61 See *Report of the Working Group on the Universal Periodic Review*, UN Doc. A/HRC/25/7, 11 December 2013, paras 148.58, 148.79, 149.89, 148.131, 148.146, 148.173, 148.174, 148.175, 148.176; Special Rapporteur on Executions, above note 20, para. 74; WGEID, above note 22, paras 62, 69–70, 110.

62 In 2008, the ICRC made available an ante-mortem/post-mortem (AM/PM) database; see ICRC, "Ante-Mortem/Post-Mortem Database: An Information Management Application for Missing Persons/Forensic Data", available at: [www.icrc.org/eng/assets/files/2013/ampm-database-information-sheet-icrc-2012.pdf](http://www.icrc.org/eng/assets/files/2013/ampm-database-information-sheet-icrc-2012.pdf). Since 2014, the ICRC has supported the Mexican authorities in the implementation of the AM/PM database; see ICRC, "Actions and Results – Mexico", January–August 2014, available at: <https://tinyurl.com/y7ow6lvq>. See also Ute Hofmeister, Shuala Martin, Carlos Villalobos, Juliana Padilla and Oran Finegan, "The ICRC AM/PM Database: Challenges in Forensic Data Management in the Humanitarian Sphere", *Forensic Science International*, Vol. 279, 2017.

63 CED, above note 19, para. 24.

64 IACHR, above note 15, paras 182–199, 247–248.

rights bodies and by advocacy campaigns led by Mexican NGOs and committees of families of missing and disappeared migrants from Central America,<sup>65</sup> between 2013 and 2016 Mexico eventually set up three mechanisms aimed at providing effective humanitarian, forensic, legal and judicial responses, duly taking into account the transnational character of these enforced disappearances and the need for regionally coordinated efforts.

## The Forensic Commission

In the wake of the three massacres of migrants discussed above, the problems concerning operations of exhumation, identification and return of mortal remains to families residing abroad became evident and, fuelled by instances of mistaken identifications, a climate of distrust towards the Mexican authorities and the concerned consular and diplomatic channels spread. To tackle this situation, at the initiative of civil society organizations from Mexico, Honduras, El Salvador and Guatemala,<sup>66</sup> in August 2013 a Forensic Commission mandated to exhume, identify and return the mortal remains located in the burial sites related to the three massacres was established.

The Agreement setting up the Forensic Commission for the identification of remains in San Fernando and Cadereyta was signed by the Attorney General's Office of Mexico, the Argentine Forensic Anthropology Team (Equipo Argentino de Antropología Forense, EAAF), committees of families of missing and disappeared migrants, and NGOs from El Salvador, Honduras, Guatemala and Mexico.<sup>67</sup> The mixed composition of this body and the proactive involvement of civil society from the early stages of its design, as well as the cooperation between State-appointed and independent forensic experts (such as the EAAF) aimed at reconstructing trust towards the authorities among families of missing and disappeared migrants, represent a significant novelty.<sup>68</sup> Pursuant to Articles 4–9 and 15 of the Agreement, the Attorney General's Office and the EAAF are in

65 *Ibid.*, paras 192, 208. See also Olga Aikin and Alejandro Anaya Muñoz, “Crisis de derechos humanos de las personas migrantes en tránsito por México: Redes y presión transnacional”, *Foro Internacional*, Vol. 53, No. 1, 2013. A short film on the advocacy campaign “Por un mecanismo transnacional de justicia para migrantes” is available at: [www.youtube.com/watch?v=MeewNACYVOQ](http://www.youtube.com/watch?v=MeewNACYVOQ).

66 The organizations involved were COFAMIDE, COFAMIPRO, the Fundación para la Justicia y el Estado Democrático de Derecho, Casa del Migrante de Saltillo, Centro Diocesano de Derechos Humanos Fray Juan de Larios, Asociación Civil Voces Mesoamericanas, Mesa Nacional para las Migraciones en Guatemala, Asociación Misioneros de San Carlos Scalabrinianos en Guatemala, Centro de Derechos Humanos Victoria Diez, and Foro Nacional para la Migración en Honduras.

67 Texto oficial del Convenio de Colaboración para la Identificación de Restos Localizados en San Fernando, Tamaulipas y en Cadereyta, Nuevo León, 22 August 2013 (Agreement on the Forensic Commission), available at: [fundacionjusticia.org/proyectos-home/texto-oficial-del-convenio-de-colaboracion-para-la-identificacion-de-restos-localizados-en-san-fernando-tamaulipas-y-en-cadereyta-nuevo-leon/](http://fundacionjusticia.org/proyectos-home/texto-oficial-del-convenio-de-colaboracion-para-la-identificacion-de-restos-localizados-en-san-fernando-tamaulipas-y-en-cadereyta-nuevo-leon/).

68 IACHR, above note 15, paras 173, 234 and 322. See also Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW), *Concluding Observations on Mexico*, UN Doc. CMW/C/MEX/CO/3, 13 September 2017, para. 31; Olivier Dubois and Rocio Maldonado de la Fuente, “Armed Violence and the Missing in Mexico and Central America”, *Humanitarian Exchange*, No. 69, 2017.

charge of the scientific aspects, while civil society organizations provide data and information, and committees of families facilitate the establishment of contacts with relatives of missing and disappeared migrants.

Notably, even before the establishment of the Forensic Commission, the EAAF had been working on the setting up of genetic databases, called Bancos de Información Forense de Migrantes Desaparecidos, in El Salvador, Honduras and the Mexican state of Chiapas.<sup>69</sup> These databases gather information collected by governmental and non-governmental organizations including committees of families of missing and disappeared migrants, national human rights institutions, attorney generals' offices in the different countries concerned, consular and diplomatic services, ministries of foreign affairs, and the EAAF.<sup>70</sup> The systematic collection of DNA by morgues in the countries concerned can enable search operations, discovery and identification via matching.<sup>71</sup> The existence of a wider basis for comparison and matching increases the chances for identification.

While the mandate of the Forensic Commission at present refers solely to exhumation and identification of the remains linked to the three massacres of migrants,<sup>72</sup> since the beginning of its mandate the Forensic Commission has been trying to establish good practices in the process of exhumation, identification, return of mortal remains, and notification of families.<sup>73</sup> The establishment of such protocols should be beneficial for the authorities involved in view of the thousands of other cases of unidentified remains, even those not necessarily concerning migrants or mass casualties.<sup>74</sup>

The Forensic Commission has achieved significant results since its inception, establishing a standardized procedure to be followed to collect data, to carry out DNA matching, to respect the chain of custody, and to notify the identification of the body of a missing migrant to his or her relatives in a dignified manner that provides elements of certainty and avoids to the extent possible instances of re-traumatization.<sup>75</sup> Among the many interesting aspects of

69 IACHR, above note 15, paras 199–204.

70 *Ibid.*; Agreement on the Forensic Commission, above note 67, Arts 12, 14.

71 IACHR, above note 15, paras 199–204.

72 The very title of the Agreement establishing the Forensic Commission refers to “cooperation for the identification of remains found in San Fernando, Tamaulipas and Cadereyta, Nuevo León”; see Agreement on the Forensic Commission, above note 67. See below on the ongoing attempts to further expand the mandate of the Forensic Commission.

73 *Ibid.*, Arts 4, 9; IACHR, above note 15, paras 207–208, 322.

74 In 2017, the Mexican government acknowledged the disappearance of more than 32,000 people; see “México, el país donde hay más de 32.000 desaparecidos”, *CNN Español*, 13 September 2017, available at: [cnn.espanol.com/2017/09/13/mexico-el-pais-donde-hay-mas-de-32-000-desaparecidos/#0](https://www.cnn.espanol.com/2017/09/13/mexico-el-pais-donde-hay-mas-de-32-000-desaparecidos/#0). As of February 2018, the number of persons registered in the National Database on Missing and Disappeared Persons was 35,410; see: [secretariadoejecutivo.gob.mx/rnped/datos-abiertos.php](https://secretariadoejecutivo.gob.mx/rnped/datos-abiertos.php).

75 At the end of August 2017, the Forensic Commission had identified sixty-eight persons, although the number of notifications is slightly lower, as some have been scheduled for the near future. See Asociación de Familiares de Migrantes Desaparecidos de Guatemala *et al.*, *Report to the CMW*, August 2017, para. 86, available at: [tbinetnet.ohchr.org/Treaties/CMW/Shared%20Documents/MEX/INT\\_CMW\\_NGO\\_MEX\\_28672\\_S.pdf](https://tbinetnet.ohchr.org/Treaties/CMW/Shared%20Documents/MEX/INT_CMW_NGO_MEX_28672_S.pdf). On 4 September 2013, the Forensic Commission adopted a specific Protocol on the Notification of Identification of Remains of People Located in San Fernando, Tamaulipas and Cadereyta, Nuevo León (Protocol on Notification), available at: <https://tinyurl.com/y9ftx8pt>.

the process, particularly notable is the reversal of roles: when interviews must be conducted, DNA samples collected or an identification notified, it is no longer the responsibility of the families to travel to Mexico; rather, the responsibility is on the institutional actors and the EAAF to travel to the country of origin of the migrant.<sup>76</sup> This is also the case for the return of duly identified remains.<sup>77</sup> The Mexican authorities are in charge of taking all necessary measures – including the issuing of documents and humanitarian visas, and covering of expenses – to facilitate the presence of relatives of missing migrants in Mexico, when it is exceptionally required.<sup>78</sup> Consular and diplomatic channels have been alerted and are adapting their traditional operation system to favour this process.<sup>79</sup>

This is a paradigm shift that has greatly contributed to lessening the psychological trauma and material burdens for families of missing and disappeared migrants, and to rebuilding an environment of trust vis-à-vis the authorities. Nevertheless, some drawbacks in the functioning of the Forensic Commission and in the smooth conduct of the process remain, and these will be analyzed below.

## **The Investigative Unit on Crimes against Migrants and the Mechanism of External Support for Search and Investigation**

Prior to the establishment of the Forensic Commission, the IACHR had found the Mexican authorities in breach of their international obligations not only in terms of searching for missing migrants, but also with regard to the carrying out of effective investigations capable of leading to the identification of those responsible for the crimes concerned and to their prosecution and sanction.<sup>80</sup> Hence, in addition to the creation of a mechanism mandated to deal with the scientific and forensic aspects and the provision of humanitarian responses to families of missing and disappeared migrants, the need remained to establish a similar body in charge of criminal investigations aimed at identifying perpetrators of crimes committed against migrants and capable of dealing with transnational organized criminal groups. Similarly, pursuant to the recommendations directed at Mexico by various international human rights bodies, the creation of an effective channel of communication and coordination among the different authorities, states and families was also required.<sup>81</sup>

76 Agreement on the Forensic Commission, above note 67, Arts 4, 9. See also Protocol on Notification, above note 75, Art. VIII.

77 Protocol on Notification, above note 75, Art. VII.

78 Cámara de Diputados del H. Congreso de la Unión, Ley de Migración, 25 May 2011, Arts 41, 52.V, available at: [www.diputados.gob.mx/LeyesBiblio/ref/lmigra.htm](http://www.diputados.gob.mx/LeyesBiblio/ref/lmigra.htm); Cámara de Diputados del H. Congreso de la Unión, Ley General de Víctimas, 9 January 2013 (General Law on Victims), Arts 7.XI, 120.VII, available at: [www.diputados.gob.mx/LeyesBiblio/pdf/LGV\\_030117.pdf](http://www.diputados.gob.mx/LeyesBiblio/pdf/LGV_030117.pdf); General Law on Disappeared Persons, above note 29, Art. 53.XVIII.

79 General Law on Victims, above note 78, Arts 107, 112.

80 IACHR, above note 15, paras 182–199, 247–248.

To answer to these demands, on 16 December 2015, the Attorney General's Office of Mexico adopted an agreement establishing an Investigative Unit on Crimes against Migrants (Investigative Unit) and a Mechanism of External Support for Search and Investigation (Mechanism of External Support).<sup>82</sup>

The Investigative Unit depends on the Human Rights Section of the Attorney General's Office, and its mandate includes facilitation of access to justice and effective remedies for migrants and their families; carrying out the search for missing and disappeared migrants; investigation and prosecution of those responsible for crimes committed against migrants; and directing, monitoring and coordinating actions aimed at granting reparation to migrants and their families for the harm suffered.<sup>83</sup> The work of the Investigative Unit will be facilitated by the Mechanism of External Support, which is meant, through the use of consular and diplomatic channels, to allow families of missing and disappeared migrants to have access to, and be in communication with, Mexican authorities competent to address the cases of their loved ones, whether administrative, judicial or responsible for social support, directly from their countries of residence.<sup>84</sup> The Mechanism of External Support hence aims at being a channel through which relatives of missing and disappeared migrants can be informed on the progress of the investigation and be closely involved with the operations of search and, where appropriate, in the identification of perpetrators of crimes against their loved ones.<sup>85</sup> Moreover, the Mechanism is in charge of ensuring that relatives of missing and disappeared migrants who fall under the definition of "victim" set forth under the Mexican General Law on Victims of 9 January 2013 can obtain measures of social support (including medical and psychosocial assistance) and reparation directly in their country of residence.<sup>86</sup> The Mechanism of External Support is also meant to facilitate families of missing and disappeared migrants in the process of appointment of a legal representative of choice in Mexico.<sup>87</sup>

The agreement to establish the two mechanisms was adopted in December 2015. The Investigative Unit had commenced its work by the end of February 2016 and the Mechanism of External Support was used for the first time in the autumn of 2016, after the guidelines on its functioning were adopted in September 2016.<sup>88</sup>

81 CED, above note 19, para. 24; CMW, above note 68, paras 31–32. See above on the identification of existing gaps and the corresponding recommendations in general.

82 Acuerdo A/117/15 por el que se crea la Unidad de Investigación de Delitos para Personas Migrantes y el Mecanismo de Apoyo Exterior Mexicano de Búsqueda e Investigación y se Establecen sus Facultades y Organización, 18 December 2015 (Agreement on the Establishment of the Investigative Unit and the Mechanism of External Support), available at: [www.dof.gob.mx/nota\\_detalle.php?codigo=5420681&fecha=18/12/2015](http://www.dof.gob.mx/nota_detalle.php?codigo=5420681&fecha=18/12/2015).

83 *Ibid.*, Arts 1, 6.

84 *Ibid.*, Art. 8.

85 *Ibid.*, Art. 11.

86 General Law on Victims, above note 78, Arts 8, 9, 21, 34; Protocol on Notification, above note 75, Art. 9.

87 Agreement on the Establishment of the Investigative Unit and the Mechanism of External Support, above note 82, Art. 11(5).

88 Investigative Unit on Crimes against Migrants, *Primer informe estadístico (First Report)*, 2017, available at: [www.gob.mx/cms/uploads/attachment/file/241119/UIDPM-1er\\_Informe\\_Estadi\\_stico\\_FINAL\\_ahora\\_si.pdf](http://www.gob.mx/cms/uploads/attachment/file/241119/UIDPM-1er_Informe_Estadi_stico_FINAL_ahora_si.pdf).

The Investigative Unit and the Mechanism of External Support have been conceived and designed in the context of a participative process in which civil society associations and committees of families of missing and disappeared migrants have been actively involved since the beginning.<sup>89</sup> As pitfalls in the operation of the Unit and the Mechanism have emerged, civil society has called for further consultations in an attempt to be more engaged in decision-making and in the strengthening of the process.<sup>90</sup>

## The pitfalls of the three mechanisms and the challenges ahead

The establishment of the Forensic Commission, the Investigative Unit and the Mechanism of External Support has been regarded as a positive development by international human rights mechanisms.<sup>91</sup> However, it has been pointed out that there are still gaps and areas that require improvement.<sup>92</sup>

Since the beginning of the work of the Forensic Commission, there has been an ongoing call from civil society organizations to expand its mandate beyond the three massacres of migrants that took place in 2010–12.<sup>93</sup> On the one hand, this expansion is regarded as a means to increase the possibilities of identification: the broader the pool of mortal remains and DNA samples that can be compared, the higher the chances of identifying the bodies and unveiling the truth for the families. In this regard civil society organizations have stressed that, at the very least, it is indispensable to also include in the work of the Forensic Commission the cases registered in the states in Mexico that are known to be part of the migratory routes towards the United States.<sup>94</sup> On the other hand, associations of relatives of Mexican disappeared persons have been advocating for also having their cases dealt with by the Forensic Commission, arguing that this would increase their chances of learning the truth on the fate and whereabouts of their loved ones and that it would offer them more reliability in view of the high standards applied and the presence of independent forensic experts.<sup>95</sup>

89 *Ibid.*, pp. 4, 10, 31.

90 Centro Diocesano para los Derechos Humanos Fray Juan de Larios *et al.*, above note 45, paras 34, 106.

91 Among others, see CED, *Report on Follow-up to the Concluding Observations*, UN Doc. CED/C/11/2, 8 November 2016; and WGEID, above note 19.

92 CMW, above note 68, paras 31–32. See also Washington Office on Latin America (WOLA), *Denunciando delitos cometidos contra migrantes en México desde el extranjero*, 12 April 2017, available at: [www.wola.org/es/analisis/denunciando-delitos-cometidos-contra-migrantes-en-mexico-desde-el-extranjero/](http://www.wola.org/es/analisis/denunciando-delitos-cometidos-contra-migrantes-en-mexico-desde-el-extranjero/).

93 Centro Diocesano para los Derechos Humanos Fray Juan de Larios *et al.*, above note 45, paras 86–89.

94 *Ibid.*

95 *Ibid.* While a structural and general expansion of the Forensic Commission's mandate beyond cases of missing or disappeared migrants continues to be considered, significant progress can be registered in the northern state of Coahuila, where on 18 December 2016, with the support of the ICRC, a new law on the exhumation, identification and return of mortal remains has been adopted, available at: [http://congresocoahuila.gob.mx/transparencia/03/Leyes\\_Coahuila/coa246.pdf](http://congresocoahuila.gob.mx/transparencia/03/Leyes_Coahuila/coa246.pdf). This law entitles relatives of missing or disappeared persons to appoint independent forensic experts who can participate in the exhumation and identification process and to review the operations carried out by State authorities in case of doubt (see Arts 13, 40, 100).

At the time of writing, despite a general expression of interest from the Attorney General's Office in studying the amendment and expansion of the mandate of the Forensic Commission, this has not yet occurred.<sup>96</sup> This must be read in conjunction with the lack of coordinated efforts and measures at the State level, given that neither a map nor a unified database of all the clandestine burial sites and mass graves located in Mexico, let alone a national programme of exhumation of such sites, has yet been adopted. The lack of a national strategy on these matters also hinders the possibility of understanding and addressing crime patterns and the real scope of the issues at stake. In this sense, search operations and forensic work are still characterized by a high level of fragmentation that eventually lowers the identification rate and may even increase the families' suffering and anguish.<sup>97</sup> Adequate human and financial resources are needed in order to provide an effective answer, especially in view of the appalling number of common graves and human remains that have recently been located in certain states of Mexico.<sup>98</sup>

Despite the adoption by the Forensic Commission of the Protocol on the Notification of Identification of Remains of People Located in San Fernando, Tamaulipas and Cadereyta, Nuevo León,<sup>99</sup> episodes where this Protocol was not respected were registered in 2014 and 2015, resulting in tensions and the re-traumatization of relatives. For instance, in July 2014 the Forensic Commission conducted the first notifications of identification of the mortal remains of eleven Honduran migrants among the bodies located in Cadereyta and San Fernando.<sup>100</sup> On this occasion, the evident lack of communication and coordination between Honduran and Mexican authorities led to delays in the repatriation of the mortal remains and to the leaking of information through the press that made the forthcoming news public before the families were notified.<sup>101</sup> Moreover, authorities sought to carry out a ceremony for the return of the remains in the barracks of the Honduran Air Forces and in the presence of the media. Families were not previously consulted and they strongly opposed these ideas, considering them unnecessarily spectacular and traumatic and indicating that they would

96 The only expansion of the Forensic Commission's mandate took place on 8 April 2014, when the General Attorney's Offices of the states of Tamaulipas and Nuevo León respectively signed the institutive agreement of the Commission (above note 67). Nevertheless, this is still related to the three massacres of migrants, due to the competence of the two mentioned authorities that is concurrent to that of the Attorney General's Office at the federal level. Centro Diocesano para los Derechos Humanos Fray Juan de Larios *et al.*, above note 45, paras 86–89; Asociación de Familiares de Migrantes Desaparecidos de Guatemala *et al.*, above note 75, para. 93.

97 Asociación de Familiares de Migrantes Desaparecidos de Guatemala *et al.*, above note 75, paras 87–92.

98 “¿Ocultan en Coahuila el mayor campo de exterminio de México, con miles de restos humanos?”, *Sin Embargo*, 7 October 2016, available at: [www.sinembargo.mx/07-10-2016/3101385](http://www.sinembargo.mx/07-10-2016/3101385).

99 Above note 75.

100 Fundación para la Justicia y el Estado Democrático de Derecho *et al.*, *Alternative Report in View of the Periodic Exam of Mexico*, above note 42, paras 82–85.

101 COFAMIPRO and COFAMICENH, *Report to the CMW*, April 2015, paras 23–27, available at: [tbinternet.ohchr.org/Treaties/CMW/Shared%20Documents/HND/INT\\_CMW\\_ICS\\_HND\\_20029\\_S.pdf](http://tbinternet.ohchr.org/Treaties/CMW/Shared%20Documents/HND/INT_CMW_ICS_HND_20029_S.pdf). See also Honduprensa, *Cancillería recibe cuerpos de Hondureños víctimas de masacre en Cadereyta*, 23 July 2014, available at: [honduprensa.wordpress.com/2014/07/23/cancilleria-recibe-cuerpos-de-hondurenos-victimas-de-masacre-en-cadereyta/](http://honduprensa.wordpress.com/2014/07/23/cancilleria-recibe-cuerpos-de-hondurenos-victimas-de-masacre-en-cadereyta/).



have preferred a more private event. Further problems emerged when the families tried to coordinate with the authorities the transfer of the mortal remains to their villages of origin and claimed for expenses from the Mexican Commission of Support to Victims, which is the competent institution pursuant to the law.<sup>102</sup> These first test cases showed the tendency of the consular and diplomatic authorities and of the Commission of Support to Victims to rigidly apply traditional schemes and protocols that do not adequately reflect the reality of missing and disappeared migrants and the needs of their families. Similar instances have been reported more recently,<sup>103</sup> and underscore the necessity to abandon overly rigid bureaucratic formalities<sup>104</sup> and to adapt the process to the complex reality at hand, further enhancing regional cooperation and communication.

While the creation of the Investigative Unit and the Mechanism of External Support was aimed precisely at overcoming some of these obstacles, they struggle with certain shortcomings and practical difficulties. First, the Investigative Unit is relatively understaffed (it currently counts on thirteen prosecutors, none of whom has previous experience working in fields relating to crimes against migrants or crimes of a transnational nature),<sup>105</sup> especially considering the magnitude of the tasks at hand. So far, the operation of the Investigative Unit very much resembles that of other units of the Attorney General's Office, being based mostly on the collection of documentary evidence and not employing *in loco* investigations or a comprehensive analysis of the transnational criminal context and patterns.<sup>106</sup> Furthermore, the Investigative Unit does not have access to any structured mechanism of coordination with other Mexican authorities (such as the Commission of Support to Victims) that may be involved in dealing with the families of missing and disappeared migrants in the countries of origin.<sup>107</sup>

Although the Mechanism of External Support has begun collecting complaints from families of missing and disappeared migrants through the Mexican consulates and embassies in Honduras, El Salvador and Guatemala,<sup>108</sup> it struggles with some material constraints. First, the authority mandated to collect these complaints and to coordinate the process is an *attaché* to the Mexican Attorney General's Office, and at present the only *attaché* of the Attorney

102 General Law on Victims, above note 78, Art. 31. See Fundación para la Justicia y el Estado Democrático de Derecho et al., *Alternative Report in View of the Periodic Exam of Mexico*, above note 42, para. 97; COFAMIPRO and COFAMICENH, above note 101, para. 23.

103 Fundación para la Justicia y el Estado Democrático de Derecho et al., above note 47, paras 37–38.

104 Episodes where families living in Central America have been requested to show that they have a bank account in Mexico in order to receive the reimbursement of burial expenses have been registered, showing the inconsistency of the process, which relatives considered to be overly complicated and, eventually, re-traumatizing. Asociación de Familiares de Migrantes Desaparecidos de Guatemala et al., above note 75, para. 97.

105 Investigative Unit on Crimes against Migrants, above note 88, p. 14. See also Centro Diocesano para los Derechos Humanos Fray Juan de Larios et al., above note 45, para. 43.

106 Asociación de Familiares de Migrantes Desaparecidos de Guatemala et al., above note 75, paras 42–69.

107 Centro Diocesano para los Derechos Humanos Fray Juan de Larios et al., above note 45, paras 46, 48; Asociación de Familiares de Migrantes Desaparecidos de Guatemala et al., above note 75, para. 72.

108 Investigative Unit on Crimes against Migrants, above note 88, p. 23.

General's Office for Central America is based in Guatemala.<sup>109</sup> This implies that whenever actions relating to the Investigative Unit and the Mechanism of External Support must be undertaken in countries such as El Salvador and Honduras, the *attaché* must travel there, taking care of all the relevant practical and logistical arrangements. In practice, this equates the situation to that prior to the establishment of the Mechanism of External Support. While the aim of the latter was precisely to speed up the process of collection and transfer of data and complaints among the different countries, the registration of claims and their formal transfer to Mexico continue to take months. The work of the Investigative Unit is consequently slowed and the object and purpose of the Mechanism of External Support seem to be in jeopardy.

The second major shortcoming of the two mechanisms is that access to measures of social support and reparation for relatives of missing and disappeared migrants is hardly ensured. As a matter of fact, they encounter mostly bureaucratic difficulties in exercising these rights in their respective countries of residence and are frequently requested to travel to Mexico,<sup>110</sup> with all the ensuing, and often insurmountable, practical difficulties that this entails. Moreover, the collection of complaints through the Mechanism of External Support has so far been shown to lack sound guarantees in terms of protection of victims, witnesses and their relatives, particularly with regard to keeping sensitive data confidential.<sup>111</sup> This is especially worrisome considering that families and witnesses often live close to smugglers or members of organized criminal groups or cartels, who may have been involved in the disappearance of their loved one in the first place.

Finally, Mexican embassies and consulates in the Americas are not yet fully familiar with the existence of the Mechanism of External Support and its mandate.<sup>112</sup> This scarce awareness ultimately undermines the use of the Mechanism and leaves families of missing and disappeared migrants to face the obstacles that the Mechanism should remove.

It is evident that the creation of the Forensic Commission, the Investigative Unit and the Mechanism of External Support is to be regarded as a first step, and seemingly in the right direction – but much remains to be done.

## Conclusion

The example of mechanisms set up to address the phenomenon of missing migrants in Mexico and its neighbouring countries confirms that appropriately and effectively dealing with missing and disappeared migrants and their families presents unique challenges and requires innovative responses.

109 Centro Diocesano para los Derechos Humanos Fray Juan de Larios *et al.*, above note 45, para. 45.

110 *Ibid.*, para. 48.

111 Asociación de Familiares de Migrantes Desaparecidos de Guatemala *et al.*, above note 75, para. 73.

112 Centro Diocesano para los Derechos Humanos Fray Juan de Larios *et al.*, above note 45, para. 65; Asociación de Familiares de Migrantes Desaparecidos de Guatemala *et al.*, above note 75, para. 72; WOLA, above note 92.

First, the transnational scope of the phenomenon necessarily calls for the setting up of regional mechanisms of search, support and investigation that overcome the traditional national approaches and are capable of enhancing the level of cooperation among States' authorities, with a view to offering effective humanitarian, forensic, legal and judicial responses that meet the needs of families. These mechanisms must be adapted to the specific regional contexts within which they are operating, duly taking into account the peculiarities of migration flows in specific geopolitical settings.

Second, data collection, data sharing, data analysis and related measures to help resolve the fate of missing and disappeared migrants must be improved, standardized and better coordinated. They should not be limited to the documentation of fatalities, but must focus on the collection and circulation of information that can be used to help relatives find their loved ones.

Third, the issue of missing and disappeared migrants should not be addressed without considering the potential role played by organized criminal groups operating on an international scale. This requires the adoption of measures of protection against ill-treatment and intimidation for relatives of missing and disappeared migrants, their representatives and defence counsels, and witnesses that reflect the transnational dimension of the phenomenon and of the threats. Access to justice, redress and measures of social support to families must be granted also to those residing in a country different from the one in which the person was reported missing or was subjected to enforced disappearance.

The attempts made by Mexico and Central American countries can be regarded as first steps in this direction and deserve to be studied in order to single out good practices and learn from mistakes. One important lesson is that all initiatives aimed at dealing with this extremely complex subject greatly benefit from the active involvement of civil society organizations and, in particular, of associations of relatives of missing and disappeared migrants. Any successful mechanism mandated to search, establish the truth, and conduct effective investigations on missing and disappeared migrants requires the full participation of families and their representative associations in the phases of design, implementation, evaluation and decision-making.

Migration flows are not likely to decrease in the near future. Emerging trends that aim at putting in place higher barriers to entry to deter migrants, and which criminalize and scapegoat the latter, are only going to force thousands of people into using more dangerous channels to travel, thus exposing their lives to greater risk. In this grim scenario, it is not improbable that the figure of missing and disappeared migrants will increase. The adoption of adequate legal, administrative, humanitarian and judicial measures cannot be postponed and should be inspired by the need to find the responses that are most conducive to the protection of all persons from such suffering. Wishing to overcome mere rhetoric and to contribute to the development of actual policies, this article aims at nourishing debate and inspiring new ideas to effectively address the issue of missing and disappeared migrants.



# Management of the dead from the Islamic law and international humanitarian law perspectives: Considerations for humanitarian forensics

**Ahmed Al-Dawoody\***

Dr Ahmed Al-Dawoody, born in Egypt, is the Legal Adviser for Islamic Law and Jurisprudence at the International Committee of the Red Cross (ICRC) and a Visiting Professor at the Geneva Academy of International Humanitarian Law and Human Rights in Geneva, Switzerland. Prior to joining the ICRC, he was an Assistant Professor in Islamic studies and Islamic law at Al-Azhar University in Cairo. Dr Al-Dawoody has served as Assistant Director of Graduate Studies for the Institute for Islamic World Studies and coordinator of the MA program in contemporary Islamic studies at Zayed University in Dubai, United Arab Emirates. He has taught in Egypt, the United States, the UK, the UAE and Switzerland. He has published more than two dozen articles and book chapters on Islamic law and is the author of *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan, 2011).

\* The views expressed in this article are those of the author and should not be interpreted as official positions of the ICRC. The author would like to thank the anonymous peer reviewers, Sarah Gale, Dr. Ayman Shaban, Oran Finegan, Ellen Policinski and Yarimar C. Ruiz Orozco for their valuable comments on earlier drafts of this article.

## Abstract

This article discusses a number of contemporary issues and challenges pertinent to the management of the dead in contemporary armed conflicts and other situations of violence and natural disasters under Islamic law and international humanitarian law. Among the issues and challenges faced by forensic specialists in Muslim contexts at present are collective burial, quick burial of dead bodies, exhumation of human remains, autopsy, burial at sea, and handling of the bodies by the opposite sex. The article concludes that both legal systems have developed rules which aim at the protection of the dignity and respect of dead bodies, and that they complement each other to achieve this protection in specific Muslim contexts. The main objectives of this article are twofold: firstly, to give an overview of the Islamic law position on these specific questions and challenges, in order to, secondly, provide some advice or insight into how forensic specialists can deal with them.

**Keywords:** management of the dead, decent burial, autopsy, collective graves, burial at sea, Islam, Islamic law, international humanitarian law, Islamic law and IHL, jihad, Islamic law of armed conflict, war in Islamic law, forensics, humanitarian forensics.

.....

## Introduction

In Islam, human dignity is a right given by God to all people, who are referred to in the Qur'an as God's vicegerents on earth and entrusted with the mission of *'imrāh al-arḍ* (roughly translated, creating civilization on earth). Islam grants certain rights to humans even before they are born, and others after their death. Whether they are dead or alive, the dignity and respect required includes that of the human body, created by God in the perfect shape.<sup>1</sup> As an indication of the respect given to the human body even during armed conflict, the Prophet Muhammad (d. 632) instructed Muslim soldiers to avoid targeting the faces of enemy combatants during military engagement on the battlefield.<sup>2</sup> In a Hadith narrated by his wife 'Āishah (d. 678), the Prophet Muhammad said that "breaking the bone of a dead

1 Qur'an 95:4. This and other Qur'anic texts (20:55, 77:25–26) make it clear that dead bodies are to be buried.

2 See, for example, Hadith 715 in Hibah Allah ibn al-Ḥasan ibn Manṣūr al-Lākā'ī, *Sharḥ Uṣūl I'tiqād Ahl al-Sunnah wa al-Jamā'ah min al-Kitāb wa al-Sunnah wa Ijmā'* al-Ṣahābah, ed. Aḥmad Sa'd Ḥamdān, Vol. 3, Dār Ṭibah, Riyadh, 1981, p. 423; Hadith 2458 in Muḥammad ibn Fattūḥ al-Ḥumaydī, *Al-Jamī' bayn al-Ṣaḥīḥayn al-Bukhārī wa Muslim*, ed. 'Alī Ḥusayn al-Bawwāb, 2nd ed, Vol. 3, Dār ibn Ḥazm, Beirut, 2002, pp. 210 ff.; Hadith 516 in Aḥmad ibn 'Amr ibn Abī 'Āṣīm al-Ḍaḥḥāk, *Kitāb al-Sunnah*, ed. Muḥammad Nāsir al-Dīn al-Albānī, Vol. 1, Al-Maktab al-Islāmī, Beirut, 1979, p. 228; Aḥmad ibn 'Alī ibn Ḥajar al-'Asqalānī, *Bulūgh al-Marām min Adillah al-Ḥukām*, ed. Iṣām Mūsā Hādī, Vol. 1, Dār al-Ṣiddīq, Saudi Arabia, 2002, p. 377; 'Abd al-'Azīz Ṣaqr, 'Al-'Alāqāt al-Dawliyyah fi al-Islām Waqt al-Harb: *Dirāsah lil-Qawā'id al-Munazzimah li-Sayr al-Qitāl*, Mashrū' al-'Alāqāt al-Dawliyyah fi al-Islām No. 6, Al-Ma'had al-'Ālamī lil-Fikr al-Islāmī, Cairo, 1996, p. 56.

person is equivalent to breaking it when the person is alive”.<sup>3</sup> This Hadith underlies the fundamental principle of respecting dead bodies in Islam,<sup>4</sup> and in one sense any crime committed against a dead body remains punishable in the same way as it was when the person was alive.

In many ancient and modern civilizations, traditions and religions, death is a mere transitional phase between one stage of life and another. Burying dead bodies is therefore one of the ways of ensuring the dignity and respect of the dead and respecting the feelings of their living loved ones. Qur’an 5:31 narrates that when Cain did not know how to deal with the body of his brother Abel, whom he had murdered, God sent a raven to teach Cain indirectly how to bury his brother’s body by digging in the ground to bury another raven. Religions, traditions and cultural practices throughout history have influenced the ways in which dead bodies are managed both in times of armed conflict and in times of peace, and still continue to do so.

It is interesting to note that burying and grave regulations, as well as even the etiquette of visiting graves, are deliberated in the Islamic legal literature, a form of law that sometimes combines what is purely legal with what it is religious and/or what is ethical. This characteristic is one of the factors that keeps Islamic law alive, self-imposed and practiced even in areas that are not codified in the legal systems of Muslim States and for which the courts have no jurisdiction. This indicates the significant impact that Islamic law can have in influencing societal behaviour.

The main focus of discussion in this article is not situations of death in normal circumstances, during peace time. This article discusses the management of dead bodies mainly in the context of armed conflicts and other situations of violence and natural disasters under Islamic law, and shows how these Islamic law norms are consistent with international humanitarian law (IHL). It addresses a number of contemporary issues and challenges faced by forensic specialists pertinent to the management of the dead in armed conflicts in Muslim contexts. These issues and challenges include the search for and collection of dead bodies (both Muslim and non-Muslim mortal remains), the repatriation of mortal remains and the personal effects of the dead, disposal of the dead, collective graves, quick burial, exhumation of human remains, autopsy, and burial at sea. The main objectives of this article are twofold: firstly, to give an overview of the Islamic law position on these specific questions and challenges, in order to, secondly, provide some advice or insights into how forensic specialists can deal with these challenges.

- 3 See Hadith 24783 in Ahmad ibn Hanbal, *Musnad al-Imām Ahmad ibn Ḥanbal*, Vol. 6, Mu’assasah Qurṭubah, Cairo, p. 105; Hadith 2307 in Sulaymān ibn al-Ash’ath Abū Dāwūd, *Sunan Abī Dāwūd*, ed. Muḥammad Muḥyī al-Dīn ‘Abd al-Ḥamīd, Vol. 3, Dār al-Fikr, Beirut, p. 212; ‘Alī ibn Aḥmad ibn Sa’īd ibn Ḥazm, *Al-Muhallā*, ed. Committee of the Revival of Arabic Heritage, Dār al-Āfaq al-Jadīdah, Beirut, Vol. 5, p. 166, and Vol. 11, p. 40; Muḥyī al-Dīn ibn Sharaf al-Nawawī, *Al-Majmū’*, Vol. 5, Dār al-Fikr, Beirut, 1997, p. 263; Kingdom of Saudi Arabia, “Fatwas of the Permanent Committee”, available at: [www.alifta.net/Fatawa/fatawaDetails.aspx?language=en&BookID=7&View=Page&PageNo=1&PageID=3094](http://www.alifta.net/Fatawa/fatawaDetails.aspx?language=en&BookID=7&View=Page&PageNo=1&PageID=3094) (all internet references were accessed in September 2018).
- 4 Abroo Aman Andrabi, “Medical Ethics within the Islamic Tradition and the Specific Issues in the Modern Scientific Era”, *International Journal of Multidisciplinary Research and Development*, Vol. 5, No. 2, 2018, p. 114.

## Search for and collection of the dead

The classical Islamic law of armed conflict was based on certain texts – scriptural, historical and legal – that primarily addressed seventh-century war contexts in which (1) the conflicting parties in some cases knew the enemy combatants by name, partly because of their tribal affiliations, and (2) the extent of destruction and casualties was very limited, on account of the primitive weaponry available and the custom of conducting hostilities away from populated areas. The point here is to explain the remarkable documentation that is still available today, including lists of war fatalities in the early battles that took place during the Prophet’s lifetime – mainly between 624 and 632 – and the names of prisoners of war (PoWs), as well as some statements describing how they were treated during captivity. By way of example, as can be seen from a quick Google search, historical records document the full names of seventy fatalities from the opposing party and fourteen fatalities from the Muslim party at the Battle of Badr in March 624, while a similar number of fatalities is recorded among the Muslims in the Battle of Uḥud in March 625. These are the highest recorded numbers of fatalities in the battles between the Muslims and their enemies until the death of the Prophet Muhammad in 632. Even the tribal affiliation of each fatality was recorded, and in some cases, who killed who. This is understandable in tribal cultures, where even today some people in Muslim societies trace their genealogy or family tree back to the Prophet’s time.

Early Islamic sources reflect a long-standing practice of parties to conflict accounting for dead bodies, sometimes in great detail. This was the first and obvious obligation in the process of respecting the dead bodies of heroes/martyrs whose heroism and sacrifices ensured that Islam survived and reached later generations of Muslims until the present. Therefore, these accounts are still being studied to commemorate the heroism and sacrifices of the early Muslim martyrs. Islamic rulings at that time were driven by practical concerns. Respecting the mortal remains of the deceased necessitated giving them a decent burial in order to, first, prevent their bodies from being preyed upon by wild animals, and second, allow their families and loved ones to visit their graves. Such concerns remain relevant today.

Hadith (reported sayings, deeds and tacit approvals of the Prophet Muhammad) collections and *Sīrah* (biographies of the Prophet Muhammad) literature indicate that during the Prophet’s lifetime on the battlefield, women provided *inter alia* the humanitarian acts and services given by health-care personnel and aid societies in contemporary armed conflicts. Notwithstanding the fact – which is documented in many reports – that some women fought on the battlefield at that time, their roles mainly included, as explained by Nusaybah bint al-Ḥārith al-Anṣariyyah (a Hadith narrator and jurist known by the nickname Umm ‘Aṭiyyah (d. 643)), treating the injured, looking after the sick, preparing food<sup>5</sup> and, in the words of al-Rubī’ bint Mī’wwidh bin ‘Afrā’ (d. 665), “repatriating the injured and dead bodies back to

5 See Hadith 1812 in Muslim ibn al-Ḥajjāj al-Qushayrī, *Ṣaḥīḥ Muslim*, ed. Muḥammad Fū’ād ‘Abd al-Bāqī, Vol. 3, Dār Iḥyā’ al-Turāth al-‘Arabī, Beirut, p. 1447; Hadith 1065 in A. ibn Ḥanbal, above note 3, Vol. 5, p. 84; Hadith 33650 in ‘Abd Allah ibn Muḥammad ibn Abī Shaybah, *Al-Kitāb al-Muṣannaf fi al-Aḥādīth wa al-Āthār*, ed. Kamāl Yūsuf al-Ḥūt, Vol. 6, Maktabah al-Rushd, Riyadh, 1988, p. 537.



al-Madinah”.<sup>6</sup> In Arabic, the word *al-madīnah*, previously called Yathrib, means the city or the town, which here refers to the city that still carries the same name in Saudi Arabia, to which early Muslims fled after the escalation of the persecution of Meccans in 622.<sup>7</sup>

The quotation of the words of al-Rubī‘ showing that women took part in the evacuation of the mortal remains of Muslim bodies and the documentation of fatalities in every military engagement, particularly in the *Sīrah*, makes an important point. It shows that the search for and collection of dead bodies are essential actions that must be taken to ensure respect for the dignity of human bodies. For example, after the cessation of hostilities in the Battle of Uḥud, the Prophet Muhammad asked his companions to search for Sa‘d ibn al-Rabī‘ (d. 625) to find out if he was among the fatalities or if he was still alive. In the same battle, the Prophet Muhammad searched for the body of his uncle Ḥamzah (d. 625) after the cessation of fighting.<sup>8</sup> The search for and collection of the dead during the Prophet’s lifetime is documented in the available *Sīrah* literature because, firstly, it was much easier during this period compared to later periods in Islamic history since the size of the Muslim army and consequently its fatalities and casualties at the time were much smaller, and secondly, historians wanted to document everything that was reported about the life of the Prophet. The significance of documenting the Prophet’s sayings, actions and tacit approvals, which all constitute the Sunnah (tradition) of the Prophet, is that it acts as the second source of Islamic legislation after the Qur’an. Therefore, the Sunnah shows that the search for, identification and collection of dead bodies among the Muslim army is an obligation on Muslims. The disposal of the dead bodies of the opposing party will be discussed below. In consistence with the Islamic rules referred to above, the following IHL rules stipulate that parties to the conflict shall take all possible measures to search for the dead: in non-international armed conflicts (NIACs), Article 8 of Additional Protocol II (AP II) and Rule 112 of the International Committee of the Red Cross (ICRC) Customary Law Study (whenever circumstances permit); and in international armed conflicts (IACs), Article 15(1) of Geneva Convention I (GC I), Article 18(1) of Geneva Convention II (GC II), and Rule 112 of the ICRC Customary Law Study.<sup>9</sup> According to Article 16(2) of Geneva Convention IV (GC IV), parties to the conflict also have an obligation to facilitate the steps taken to search for those killed, as far as military considerations allow.

6 See Hadith 2727 in Muḥammad ibn Ismā‘īl al-Bukhārī, *Al-Jāmi‘ al-Ṣaḥīḥ al-Mukhtaṣar*, ed. Muṣṭafā Dīb al-Baghā, 3rd ed., Vol. 3, Dār ibn Kathīr, Damascus and Beirut, 1987, p. 1056; Wabbah al-Zuhaylī, *Mawsū‘ah al-Fiqh al-Islāmī wa al-Qaḍāyā al-Mu‘āṣirah*, Vol. 7, Dār al-Fikr, Damascus, 2010, p. 437.

7 This shows, as referred to above, that in some battles the conflicting parties chose to engage in hostilities outside of towns and populated areas in order to avoid causing incidental harm to civilians and civilian objects. The prime examples here are the battles of Badr and the battle of Uḥud, which both took place outside of town. The battle of Badr took place near a well of the same name in the desert between Mecca and Madīna, while the battle of Uḥud took place near the mountain of Uḥud.

8 See W. al-Zuhaylī, above note 6, Vol. 7, p. 448.

9 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul).

## Repatriation of the mortal remains and personal effects of the dead

The burial of the deceased is a collective obligation (*farḍ kifāyah*) on the Muslim community. This means that the entire Muslim community will be guilty if a Muslim body is not buried,<sup>10</sup> unless this was beyond their knowledge or capacity. As can be seen from the words of al-Rubī‘, Muslims observe the practice of returning the dead bodies of Muslim soldiers from the battlefield to their families. Obviously, this is to ensure respect for the family of the dead by burying the bodies closer to them, similar to Rule 105 of the ICRC Customary Law Study, which states that “[f]amily life must be respected as far as possible”.<sup>11</sup> Otherwise, when it is impossible to return bodies from the battlefield to their families, burying dead bodies in collective graves will be permitted in this case of necessity, as discussed below. Likewise, returning dead bodies to the opposing party finds precedence in early Islamic history. At the Battle of the Trench in 627, where Muslims numbered less than one third of the coalition of their enemy attackers, Nawfal ibn ‘Abd Allah ibn al-Mughīrah died when he attempted to jump, on horseback, the trench that Muslims had dug around Medina to prevent the Meccans’ attack. When the Meccans offered payment for the body of Nawfal, the Prophet Muhammad gave them the body and refused to accept the payment.<sup>12</sup>

Therefore, when it comes to the return of mortal remains in IACs, Islamic law is consistent with the provisions of the Geneva Conventions related to honourable burial, and in agreement with Article 34(2)(c) of AP I and Rule 114 of the ICRC Customary Law Study, which states that “[p]arties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin”.<sup>13</sup> In fact, classical Islamic law rules are not only consistent here with IHL, but appear to go even further than the traditional IHL rule in protecting the dignity of the dead and respecting the needs of their loved ones. In many cases, IHL allows for burial of the mortal remains without attempting to return them to their families so long as they are “honourably interred”. For instance, nobody argued that the burial of World War II soldiers on the beaches of Normandy,

10 See Fatwa 4263 issued by the current Grand Mufti of Egypt on 24 January 2018, available at: [www.dar-alifta.gov.eg/ar/ViewFatwa.aspx?ID=14229&LangID=1](http://www.dar-alifta.gov.eg/ar/ViewFatwa.aspx?ID=14229&LangID=1).

11 ICRC Customary Law Study, above note 9, Rule 105, available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule105](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule105).

12 See Muhammad ibn Ishāq, *Al-Sirah al-Nabawīyyah*, ed. ‘Abd al-Malik ibn Hishām, annotated by Fu‘ād ibn ‘Alī Hāfiẓ, Vol. 3, Dār al-Kutub al-‘Ilmiyyah, Beirut, 2000, pp. 123 ff.; ‘Abd al-Malik ibn Hishām and Muhammad ibn Ishāq, *The Life of Muhammad: A Translation of Ishāq’s Sirat Rasūl Allāh*, trans. Alfred Guillaume, Oxford University Press, Oxford, 1955, pp. 450–460; Ahmad ibn ‘Alī ibn Hajar al-‘Asqalānī, *Fath al-Bārī Sharh al-Sahīh al-Bukhārī*, ed. Muḥib al-Dīn al-Khaṭīb, Vol. 6, Dār al-Ma‘rifah, Beirut, p. 283; Hadith 1715 in Muḥammad ibn ‘Isā al-Tirmidhī, *Al-Jāmi‘ al-Ṣaḥīh Sunan al-Tirmidhī*, ed. Ahmad Muhammad Shākir *et al.*, Vol. 4, Dār Iḥyā’ al-Turāth al-‘Arabī, Beirut, p. 214; Ahmad Abū al-Wafā, *Al-Nazariyyah al-‘Āmmah lil-Qānūn al-Dawli al-Insāni fi al-Qānūn al-Dawli wa fi al-Sharī‘ah al-Islāmiyyah*, Dār al-Nahdah al-‘Arabiyyah, Cairo, 2006, p. 297.

13 ICRC Customary Law Study, above note 9, Rule 114, available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule114](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule114).

rather than their remains being returned to their loved ones, was in violation of IHL, whereas today families might expect that their loved ones' remains would be returned after death.<sup>14</sup> However, as Rule 114 of the ICRC Customary Law Study notes, there is a “growing trend” of recognizing the obligation of parties to a conflict to facilitate the return of the remains of the dead to their families upon request.

IHL also requires parties to both IAC and NIAC to return the personal effects of the deceased to the party to which they belong.<sup>15</sup> As noted in the ICRC Customary Law Study:

Practice indicates that the personal effects which can be returned include last wills, other documents of importance to the next of kin, money and all articles of an intrinsic or sentimental value; weapons and other materials which may be used in military operations may be kept as war booty.<sup>16</sup>

However, classical Islamic law provides that the property of a defeated non-Muslim enemy became war booty – as was the norm in international relations at the time. The classical Islamic rules on war booty are largely based on scriptural sources – Qur'an 8:41 and the Sunnah – and are regulated in detail in the Islamic legal compendia. In brief, one fifth of the booty is to be distributed to certain beneficiaries<sup>17</sup> and the rest is to be distributed to the army. Some Ḥanafī and Shāfi'ī jurists give the ruler the freedom to return property to the defeated adversary. The general and strict rule is that the ruler is the one in charge of distributing the booty<sup>18</sup> and, therefore, it is prohibited for Muslims to take anything from the booty before it is given to them by the ruler; this constitutes an act of looting, which is a major sin/crime in Qur'an 3:161.<sup>19</sup> The Second Caliph 'Umar ibn al-Khaṭṭāb (r. 634–644) sent written instructions to his officials that read: “Do not steal from the booty, do not betray; do not kill a child; and fear God in the farmers.”<sup>20</sup>

14 See Grazyna Baranowska, “Advances and Progress in the Obligation to Return the Remains of Missing and Forcibly Disappeared Persons”, in this issue of the *Review*.

15 GC I, Art. 16(4); GC II, Art. 19(3); ICRC Customary Law Study, above note 9, Rule 114 (Commentary); AP I, Art. 34(2)(c) requires parties to facilitate the return of personal effects to the home country upon its request, or to the next of kin, unless that country objects, as soon as circumstances and the relations between adverse parties permit.

16 ICRC Customary Law Study, above note 9, Rule 114.

17 Qur'an 8:41.

18 W. al-Zuhaylī, above note 6, Vol. 7, p. 614.

19 See, for example, Abū Yūsuf Ya'qūb ibn Ibrāhīm al-Ansārī, *Al-Radd 'alā Siyar al-Awzā'ī*, ed. Abū al-Wafā al-Afghānī, Dār al-Kutub al-'Ilmiyyah, Beirut, p. 48; Muḥammad ibn al-Ḥasan al-Shaybānī, *Al-Siyar al-Kabīr*, ed. Ṣalāḥ al-Dīn al-Munjid, Vol. 4, Ma'had al-Makhtūṭāt, Cairo, pp. 1206, 1208, 1239; Muḥammad ibn Idrīs al-Shāfi'ī, *Al-Umm*, 2nd ed., Dār al-Ma'rifa, Beirut, 1973, Vol. 4, pp. 251, 262, and Vol. 7, pp. 336, 345.

20 The instruction of the Second Caliph 'Umar ibn al-Khaṭṭāb to his soldiers to “fear God in the farmers” means to beware of deliberately targeting non-combatant farmers because this will incur the punishment of God. Muḥammad ibn Aḥmad ibn Muḥammad ibn Rushd, *Bidāyah al-Mujtahid wa Nihāyah al-Muqtaṣid*, Vol. 1, Dār al-Fikr, Beirut, p. 281; Muwaffaq al-Dīn 'Abd Allah ibn Aḥmad ibn Qudāmah, *Al-Mughnī: Fi Fiqh al-Imām Aḥmad ibn Ḥanbal al-Shaybānī*, Vol. 9, Dār al-Fikr, Beirut, 1984, p. 251; Rudolph Peters, *Jihad in Classical and Modern Islam*, Markus Wiener, Princeton, NJ, 1996, p. 35.

In conflicts between Muslims or what can be classified as NIACs, according to classical Islamic law, money and weapons confiscated from armed rebels – both living and dead – must be returned to them after the cessation of hostilities.<sup>21</sup> In other words, it is prohibited for both parties to take war booty in inter-Muslim fighting. If respected, this specific ruling in inter-Muslim fighting can protect many civilian objects such as cultural and private property from being looted and/or destroyed. This is particularly true if either or both parties to the armed conflict use Islamic law as their source of reference. Under IHL, nonetheless, it is worth pointing out here that “[t]he obligation to return the personal effects of the dead in non-international armed conflicts is not provided for in treaty law, but it is likely that this issue is regulated under domestic law”.<sup>22</sup>

## Disposal of dead bodies

### Muslim mortal remains

Islamic law has developed detailed regulations regarding the disposal of the dead bodies of Muslims and, importantly for the concern of this article, has made a separate body of rules for the disposal of the body of the *shahīd* (martyr, plural *shuhadāʾ*). Succinctly, classical Muslim jurists unanimously identify the martyr as one who dies in fighting against the *kuffār* (unbelievers) – precisely, non-Muslim enemy belligerents – or what can be categorized as NIAC according to the classical caliphate paradigm where all Muslims were united under the rule of one government.<sup>23</sup> By virtue of this paradigm, any inter-Muslim armed conflict would be considered NIAC, while conflict with a non-Muslim-majority country would be IAC. The classical jurists deliberated whether the specific regulations regarding the disposal of the bodies of martyrs apply in the case of dead bodies in inter-Muslim fighting, specifically in the case of fighting against *bughāh* (armed rebellion), or what can be categorized as NIAC. The majority of the jurists agreed that the same regulations that apply to martyrs apply in this case as well.<sup>24</sup> Although classed as a martyr in a certain respect, the dead body of a Muslim who is killed in natural disasters or catastrophes, or who is burned or drowns but not in the fighting contexts referred to above, receives the same ordinary process of body

21 See Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, Palgrave Series in Islamic Theology, Law, and History, Vol. 2, Palgrave Macmillan, New York, 2011, p. 164; Muḥammad ibn al-Ḥasan al-Shaybānī, *Al-Siyar*, ed. Majid Khadduri, Al-Dār al-Muttaḥidah, Beirut, 1975, p. 229; M. ibn Qudāmah, above note 20, Vol. 9, p. 11; ‘Abd al-Qādir ‘Awdah, *Criminal Law of Islam*, trans. Zakir Aijaz, Vol. 1, Kitab Bhavan, New Delhi, 2005, p. 119; Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law*, Cambridge University Press, Cambridge, 2006, p. 238.

22 ICRC Customary Law Study, above note 9, Rule 114.

23 See ‘Abd al-Raḥman ibn Gharmān ibn ‘Abd Allah al-Karīmī Al-‘Umarī, *Aḥkām al-Shahīd fī al-Fiqh al-Islāmī*, Maktabah Dār al-Bayān al-Ḥadīthah, Al-Ṭā’if, 2001, pp. 140–147.

24 *Ibid.*, pp. 148–157.

disposal as those who die in normal circumstances.<sup>25</sup> Significantly, *al-murtath*, one who was injured in the fighting in the above contexts but was then rescued and lived a normal life for a while and later died because of the injury received in the war, should not have the same process of body disposal as the martyr, according to the majority of the jurists.<sup>26</sup>

The two battles referred to above, Badr in March 624 and Uḥūd in March 625, respectively created the precedents upon which the rules for handling the dead bodies of non-Muslims and Muslims were derived, basically because these two battles witnessed the highest number of fatalities between the Muslims and their enemies during the lifetime of the Prophet Muhammad. Therefore, based on the process of handling the dead bodies of the Muslim martyrs in the Battle of Badr and the relevant reports attributed to the Prophet Muhammad, Muslim jurists agree that the following three rules should be observed exclusively in the case of martyrs. First, with the exception of mainly Sa‘īd ibn al-Musayyab (d. 712–713) and al-Ḥasan al-Baṣrī (d. 728), Muslim jurists agree that there should be no ritual washing for the body of the martyr. This majority understanding has been the norm and practice throughout Islamic history until today, though there are a host of divergent opinions among the jurists in all of these three rules, basically because of conflicting reports attributed to the Prophet Muhammad. Ibn al-Musayyab and al-Baṣrī based their opinion mainly on logistical considerations: they argued that the martyrs of the Battle of Uḥūd were buried without the ritual purification because it was not practically possible to bring water from Medina to the battlefield in the desert for such a number of dead bodies.<sup>27</sup> However, the majority based their ruling on various theological rationales, including that burying the martyrs in their blood is a testimony to their great status and the sacrifices they made in the Islamic just war.<sup>28</sup> Second, there should be no shrouding of the martyrs, and they should be buried in the same clothes in which they are killed.<sup>29</sup> Third, no funeral prayer should be performed on the bodies of the martyrs.<sup>30</sup> Again, some jurists explain this by the precedent followed by the Prophet Muhammad in the Battle of Uḥūd, while others give theological rationales related to the special status of the martyrs and the idea that they are alive in the presence of their God (Qur’an 3:169), and that their sins are already forgiven and therefore no funeral prayer is needed for them.<sup>31</sup>

25 *Ibid.*, p. 75.

26 See *ibid.*, pp. 168–180.

27 *Ibid.*, pp. 248–251.

28 See, for example, *ibid.*, pp. 254–257; Josep Lluís Mateo Dieste, *Health and Ritual in Morocco: Conceptions of the Body and Healing Practices*, trans. Martin Beagles, Brill, Boston, MA, and Leiden, 2013, p. 159.

29 ‘A. Al-‘Umarī, above note 23, pp. 259–275.

30 *Ibid.*, pp. 276–289.

31 Ahmad ibn Muḥammad ibn Salāmah al-Taḥāwī, *Tawḍīḥ ba’d al-Muṣṭalahāt al-‘Ilmiyyah fī Sharḥ al-‘Aqīdah al-Taḥāwīyyah: Wa ma’ah al-As’ilah wa al-Ajwibah al-Murdiyyah ‘alā Sharḥ al-Taḥāwīyyah*, ed. Muḥammad ibn ‘Abd al-Rahman al-Khamīs, Dār Ilāf, Kuwait, 1999, p. 214. See Asma Afsaruddin, *Striving in the Path of God: Jihād and Martyrdom in Islamic Thought*, Oxford University Press, New York, 2013, pp. 102–105.

Because of this great status of the martyrs under Islamic law and in Muslim cultures, it is interesting to add here that the Libyan ex-president Muammar Qadhafi, killed on 20 October 2011, wrote in his will that in case he is killed at the hands of his enemies, he “would like to [be] buried, according to Muslim rituals [applicable in the case of martyrs], in the clothes I was wearing at the time of my death and my body unwashed”.<sup>32</sup> Obviously, this indicates that Qadhafi expected that he might be killed and felt that he deserved to be treated as a martyr, since he evidently considered his cause to be just. Similarly, images of Palestinians killed by the Israeli military show that they are buried as martyrs – i.e., without ritual washing or shrouding. Examples of celebrating and commemorating this great status of martyrs in modern Muslim cultures include hanging images of martyrs in the streets of Iran, Egypt, Lebanon and Syria, and naming schools, streets etc. after martyrs killed both in international and non-international armed conflicts in many Muslim countries, whether killed in the fighting against Muslims or non-Muslims. Therefore, it is important that those who handle the dead bodies of Muslims who are classified as martyrs are informed about these rules and take into considerations the specific rules that do not allow washing, shrouding or performing funeral prayer. In any case, such decisions are left to the family of the deceased.

### Non-Muslim mortal remains

For both Muslim and non-Muslim enemies, there is a duty to collect and bury dead bodies of the opposing party and, as shown above, returning dead bodies of the opposing party finds precedence in early Islamic history. If for any reason the adversary does not bury its dead, then it becomes the obligation of the Muslims to do so. The Andalusian jurist Ibn Ḥazm (d. 1064), of the extinct Zāhirī school, justifies this obligation by arguing that if Muslims do not bury the dead bodies of their enemy in this case, the bodies will decompose or will be eaten by beasts or birds, which will be tantamount to mutilation, prohibited under Islamic law.<sup>33</sup> Among the many instructions of the Prophet Muhammad on the prohibition of mutilations is the following: “Do not loot, do not be treacherous and do not mutilate.”<sup>34</sup> The rationale behind the obligation to bury dead bodies of the enemy in case they are not buried by the opposing party is protecting the human dignity of dead bodies, which, although not mentioned in classical Islamic law books, leads to respecting the feelings of the families. In addition to that, some jurists have also argued that burying the dead bodies of the enemy in this case serves the *maṣlahah* (public interest) of the Muslims because it prevents harm to passers-by<sup>35</sup> – i.e., public health grounds. (It is worth mentioning here that there

32 See Rema Rahman, “Who, What, Why: What Are the Burial Customs in Islam?”, *BBC News*, 25 October 2011, available at: [www.bbc.com/news/magazine-15444275](http://www.bbc.com/news/magazine-15444275).

33 ‘A. ibn Ḥazm, above note 3, Vol. 5, p. 117.

34 Mālik ibn Anas, *Al-Muwattaʿa*, ed. Muḥammad Fūʿād ‘Abd al-Bāqī, Vol. 2, Dār Iḥyā’ al-Turāth al-‘Arabī, Beirut, 1985, p. 448.

35 See W. al-Zuhaylī, above note 6, Vol. 7, p. 445; ‘Abd Allah ibn ‘Umar ibn Muḥammad ibn al-Saḥaybānī, *Aḥkām al-Maqābir fi al-Sharīʿah*, Dār ibn al-Jawzī, Al-Damamn, 2005, p. 233.

is a common misunderstanding that the dead spread disease and therefore pose public health risks, though there are of course situations where this is true, as in the case of infectious diseases like Ebola.) In a word, it is the element of *maṣlahah* – and not the humanitarian element – that surfaces in the classical Muslim jurists’ deliberations on the Muslim obligation to bury the dead bodies of the enemy in cases where they are not buried by the opposing party. Hadith collections and *Sīrah* literature show that Muslims buried the dead bodies of the enemy in the Battle of Badr in March 624, in a collective grave in a place known as al-Qalīb and in other places until there was not a single dead body left unburied.<sup>36</sup> Despite the fact that the Islamic scriptural, classical legal and historical sources focus purely on the jurisprudential aspects of the discussion on the obligation to bury dead bodies of the enemy and hence do not elaborate on the humanitarian principles behind this obligation, the Islamic legal position is in agreement with the modern IHL principles on this issue as stated in Article 17 of GC I, Article 120 of Geneva Convention III (GC III), Article 130 of GC IV and Rule 115 of the ICRC Customary Law Study, which states that “[t]he dead must be disposed of in a respectful manner and their graves respected and properly maintained”.<sup>37</sup>

## Collective graves

The rule in Islamic law is that every dead body should be buried in an individual grave.<sup>38</sup> However, in cases of necessity, two or three dead bodies, or even more if needs be, can be buried in the same grave. Male and female dead bodies should be buried in separate graves and if necessity dictates otherwise, classical Muslim jurists add that a barrier of dust should be placed between the bodies.<sup>39</sup> It was in the Battle of Uḥud that Muslims suffered the highest recorded number of fatalities at that time in a single military encounter, and the Muslims told the Prophet Muhammad that it was difficult for them to dig individual graves for each of the seventy martyrs. Hence, the Prophet told them to dig deeper and bury two or three in each grave. Based on this precedent, Muslim jurists agree that collective graves are permitted in cases of necessity such as in armed conflicts and other situations of violence or natural disasters.<sup>40</sup>

36 See Hadith 26404 in A. ibn Ḥanbal, above note 3, Vol. 6, p. 276; Muhammed ibn Jarīr al-Ṭabarī, *Tarīkh al-Ṭabarī*, Vol. 2, Dār al-Kutub al-‘Ilmiyyah, Beirut, p. 37; W. al-Zuhaylī, above note 6, Vol. 7, pp. 445 ff.; ‘Alī ibn Muḥammad ibn Ḥabīb al-Māwardī, *Kitāb al-Aḥkām al-Sulṭāniyyah wa al-Wilāyāt al-Dīniyyah*, Vol. 1, Dār al-Kutub al-‘Ilmiyyah, Beirut, 1985, p. 57; ‘A. ibn Ḥazm, above note 3, p. Vol. 1, p. 124.

37 ICRC Customary Law Study, above note 9, Rule 114.

38 Muḥammad ibn Muḥammad ibn Aḥmad ibn al-Ikhwah, *M‘ālim al-Qurbah fī Talab al-Hisbah*, eds Muḥammad Maḥmūd Sha‘bān and Ṣiddīq Aḥmad ‘Isā al-Muṭṭī‘ī, Al-Hay‘ah al-‘Āmmah lil-Kitāb, Cairo, p. 106; ‘A. ibn al-Saḥaybānī, above note 35, p. 218; Fatwa 4263, issued by the current Grand Mufti of Egypt on 24 January 2018, available at: [www.dar-alifta.gov.eg/ar/ViewFatwa.aspx?ID=14229&LangID=1](http://www.dar-alifta.gov.eg/ar/ViewFatwa.aspx?ID=14229&LangID=1).

39 M. ibn al-Ikhwah, above note 38, p. 106. See also ‘A. ibn al-Saḥaybānī, above note 35, p. 223.

40 ‘A. Al-‘Umārī, above note 23, pp. 292 ff.; ‘A. ibn al-Saḥaybānī, above note 35, pp. 221–224.

Collective graves for dead bodies, usually from the same family, are common in many Muslim countries at present, simply because of the shortage of spaces available for graveyards in villages and towns and/or because of the unaffordability of building a grave for every dead body. It is worth adding here that there are different Islamic rulings<sup>41</sup> and regional, cultural and traditional practices throughout the Muslim world regarding the digging and/or building of graves and the marking of graves with the names of the deceased. For example, in some countries graves are built over the ground and marked with the name/s of the deceased and date of death in order to identify the different bodies, which is permissible in Islamic law according to Fatwa 4341 given by the current Grand Mufti of Egypt on 7 March 2018.<sup>42</sup> Nonetheless, in other Muslim countries, bodies are buried under the ground without the names of the deceased. Such differences should be respected in different regions by the international organizations concerned if services are provided in the context of armed conflicts and natural disasters in the Muslim world. However, if such traditional practices will hinder humanitarian assistance to victims – mainly management of dead bodies by forensic specialists in this context – then engaging with community and religious leaders and explaining the risks and the danger such practices may cause can help gain their support for the work of international organizations.

Classical Muslim jurists agree that Muslims and non-Muslims should be buried in separate graves.<sup>43</sup> They have, however, deliberated various specific cases in this regard. For example, in cases where the religious identity of a number of dead bodies cannot be identified, conflicting opinions are given by the jurists. The majority opine that they are to be buried in special graves, not in the Muslims' graves or the non-Muslims'. However, one minority argues that they are to be buried in the Muslims' graves, and another minority thinks they should be buried in the non-Muslims' graves.<sup>44</sup> Despite this difference of opinion, jurists agree that if the body of a dead child is found and her/his religious identity cannot be identified, the body should be buried in a Muslim grave.<sup>45</sup> The practice of separate Muslim and non-Muslim graves is still observed in Muslim countries, and it would be advisable to observe this practice in cases of armed conflicts and other situations of violence or natural disasters if the religious identity of dead bodies can be identified. If this practice is no longer observed in certain Muslim contexts, the issue of separating the graves should not be raised by international organizations in times of armed conflicts or other situations of violence or natural disasters.

## Decent burial without adverse distinction

The discussion above shows that burying the dead bodies of a Muslim army is an obligation on that army, while burying the bodies of their adversaries is an

41 See, for example, 'A. ibn al-Saḥaybānī, above note 35, pp. 147–212.

42 See: [www.dar-alifta.gov.eg/ar/ViewFatwa.aspx?ID=14347&LangID=1](http://www.dar-alifta.gov.eg/ar/ViewFatwa.aspx?ID=14347&LangID=1).

43 'A. ibn al-Saḥaybānī, above note 35, p. 231.

44 *Ibid.*, p. 229.

45 *Ibid.*, p. 236.



obligation if the enemy do not bury their own dead. In Islamic thought, all people are born in a state of *fiṭrah*<sup>46</sup> (roughly translated, a pure state of nature), and when they die, any grounds for enmity or hostility that existed towards them before their demise comes to an end. They are considered to have moved to another life/state where they are in the hand of the Almighty, and respecting their dead bodies is a sort of respect of their humanity. In the early years of the first decade of the Islamic era, hostility arose between the nascent Muslim society and three main Jewish tribes in Medina, but when a funeral procession of a Jew passed by the Prophet Muhammad, he stood up in respect for the dead body. It seems that one of the companions of the Prophet did not expect him to stand up in respect to this dead body, and informed him that this was a funeral procession for a Jew. The Prophet Muhammad succinctly responded, condemning the mere fact of questioning the respect for any dead body with the following words: “Isn’t it a [human] soul?”<sup>47</sup>

Therefore, respect for the dead entails the decent burial of dead bodies regardless of whether they are members of the Muslims’ army or the enemy’s. Ya’lā ibn Murrah reported:

I travelled with the Prophet (peace be upon him) on more than one occasion, and I did not see him leave a human corpse behind; whenever he came across one, he ordered its burial, without asking whether the person was a Muslim or an unbeliever.<sup>48</sup>

Apparently, it is not clear whether the context of travel referred to by Ya’lā ibn Murrah here is during armed conflict or not, but in any case it is interesting to note that this report is reminiscent of Rule 112 of the ICRC Customary Law Study in two respects, among others: first, not making a distinction between dead bodies (i.e., whether they are from the Muslim party or the enemy), and second, whether or not they have taken part in hostilities. Rule 112 reads: “Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead *without adverse distinction*.”<sup>49</sup>

Furthermore, decent burial of dead bodies is an obligation for Muslims because respecting the dignity of humans should be observed whether they are alive or dead, as shown in Ya’lā ibn Murrah’s report above. Therefore, Islamic law and modern IHL principles are compatible in this regard since both ensure the decent burial of dead bodies, as can be seen, for example, in Article 17(3) of GC I, Article 120(4) of GC III, Article 130(1) of GC IV and Rule 115 of the ICRC Customary Law Study, and stress that decent burial of dead bodies should

46 M. ibn Anas, *Al-Muwattaʿa*, above note 34, Vol. 1, p. 241.

47 See Hadith 1250 in M. al-Bukhārī, above note 6, Vol. 1, p. 441; Hadith 70 in ‘Alī ibn Al-Ja’d, *Musnad ibn Al-Ja’d*, ed. ‘Amir Aḥmad Ḥaydar, Vol. 1, Mu’assasah Nādir, Beirut, 1990, p. 27.

48 ‘Alī ibn ‘Umar Al-Dāraqutnī, *Sunan al-Dāraqutnī*, eds Shu’aib al-Arna’ūt, Ḥassan ‘Abd al-Mun’im Shalabī and Sa’id al-Laḥām, Vol. 5, Mu’assasah al-Risālah, Beirut, 2004, p. 204.

49 ICRC Customary Law Study, above note 9, Rule 112 (emphasis added). See also GC I, Art 15(1); GC II, Art. 18(1); AP I, Art. 33(4); AP II, Art. 8.

be carried out, “if possible, according to the rites of the religion to which they belonged”.

In the same vein of burying dead bodies as part of respecting the human dignity of the deceased and their families, under Islamic law, limbs of dead bodies or even severed limbs of those who are still alive, such as in cases of surgical operations or amputations carried out under Islamic corporal punishments, must be also buried.<sup>50</sup> Broadly, Muslim jurists agree that body parts found after the burial of dead bodies should be buried, and Ḥanbalī jurists add that such body parts should be buried next to the grave or inside it but without uncovering the dead body to reassemble it.<sup>51</sup> Their deliberations on burying recovered body parts resulted in different rulings regarding whether or not the performance of Islamic burial rituals is required, such as ritual washing and funeral prayers on such body parts.<sup>52</sup> In Islam, *ḥarq* (cremation) or merely discarding such limbs are disrespectful to human dignity. In fact, classical Muslim scholars have gone further, advocating even burying parts of the body such as fingernails and hair, whether this was for the sake of respect for the human body or for hygiene purposes, and stating that these should be also buried in the ground, not in a grave but under the soil.<sup>53</sup> This approach reflects the idea that burying dead bodies and human limbs is necessary for protecting human honour and dignity in Islamic legal, cultural and traditional practices, which explains the practice of quick burial in Muslim contexts, as discussed below.

## Prohibition of mutilation

In the same line of protecting the human body as part of the respect for human dignity, under the Islamic law of armed conflict, mutilation of an enemy body is strictly prohibited. Mutilation of enemy bodies as a sign of revenge was recorded in fighting between the Arabs, and the practice of carrying the severed heads of enemy military leaders was reported in the wars between the Romans and the Persians.<sup>54</sup> In the battle of Uḥud in March 625, many bodies of dead Muslims were brutally mutilated, including the body of the Prophet Muhammad’s uncle, Ḥamzah ibn ‘Abd al-Muṭṭalib. The Prophet Muhammad and other Muslims vowed revenge on their enemies by mutilating their bodies in future military engagements, and when the Qur’anic text 16:126–127 was revealed, the Prophet Muhammad prohibited mutilation. Among the Prophet’s instructions regulating

50 ‘A. ibn al-Sahaybānī, above note 35, pp. 238 ff. On the use of the medical profession in Islamic corporal punishment, see Ahmed Al-Dawoody, “Use of the Medical Profession in Torture and Punishment”, in Ayman Shabana (ed.), *The Encyclopedia of Islamic Bioethics*, Oxford University Press, New York, forthcoming 2018, available at: [www.oxfordislamicstudies.com/article/opr/t343/e0259](http://www.oxfordislamicstudies.com/article/opr/t343/e0259).

51 Kuwaiti Ministry of Awqaf and Islamic Affairs, *Al-Mawsū‘ah al-Fiqhiyyah al-Kuwaytiyyah*, Vol. 21, Kuwait, 2001, p. 19.

52 *Ibid.*

53 *Ibid.*, p. 21.

54 See Muḥammad ibn al-Ḥassan al-Shaybānī, *Sharḥ Kitāb al-Siyar al-Kabīr*, ed. Abī Abdullah Muḥammad Ḥassan Muḥammad Hassan Ismā‘il al-Shafi‘ī, commentary by Muḥammad ibn Aḥmad al-Sarakhsī, Vol. 1, Dār al-Kutub al-‘Ilmiyyah, Beirut, 1997, p. 79.

the use of force during armed conflicts: “Do not loot, do not be treacherous and do not mutilate.”<sup>55</sup> Affirming the brutality of mutilation, the Prophet Muhammad prohibited mutilation even if it was the body of a rabid dog.<sup>56</sup> Similarly, the first caliph Abū Bakr (d. 634) sent written instruction to his governor in Hadramaut, Yemen, which read: “Beware of mutilation, because it is a sin and a disgusting act.”<sup>57</sup> When Muslims severed the head of Yannāq al-Biṭrīq, the Syrian army commander, and justified it by reciprocity, Abū Bakr rebuked the justifiers with the following words: “Are we going to follow the Persians and the Romans? We have what is enough: the book [the Qur’an] and the reports [i.e., tradition of the Prophet].”<sup>58</sup> This response is quite revealing because it shows that Muslims are self-motivated to abide by Islamic law and hence if Muslim scholars disseminate the Islamic law of armed conflict among Muslims, it could have a big influence on the use of force in certain contexts in which arms bearers use Islamic law as their source of reference. In the context of management of the dead, if forensics specialists familiarize themselves with the Islamic law positions on the issues and challenges with which they are confronted in Muslim contexts, they can better communicate their humanitarian and scientific messages and in most cases overcome those challenges.

It should be added here that despite these clear-cut texts prohibiting mutilation, a few jurists such as al-Māwardī (d. 1058) and al-Shawkānī (d. 1834) opine that if it will serve the interest of Muslims (i.e., if it will help them win the war), severing the heads of enemy military leaders can be carried out as a means of intimidating the adversary and thus forcing them to stop the war.<sup>59</sup> Obviously, resorting to the principle of *maṣlaḥah* (public interest), as in this example, could be used to justify contradicting things based on the calculations of the individual/s deciding what will constitute the interests of the Muslims. More importantly, this exemplifies a characteristic of Islamic law where in many cases a host of conflicting rulings are developed by Muslim jurists on a given issue, and this explains the great weight given to *ijmā’* (consensus) as the third source of legislation in Islamic law following the Qur’an and the Sunnah. Furthermore, in case of the lack of an *ijmā’* on a certain issue, still the jurists give more weight to following the ruling that is adopted by the *jumhūr al-fuqahā’* (majority of the jurists). In the same vein, a ruling that (1) contradicts the majority’s ruling and/or (2) more specifically is not grounded or rightly grounded on the Islamic sources of legislation and therefore contradicts the Islamic legal maxims is designated by the jurists as *shādh* (irregular, odd, weak, strange, abnormal). As a consequence, Muslim jurists and scholars

55 M. ibn Anas, *Al-Muwatta’*, above note 34, Vol. 2, p. 448.

56 See Muḥammad ibn Aḥmad ibn Abī Sahl al-Sarakhsī, *Kitāb al-Mabsūt*, Dār al-Ma’rifah, Beirut, Vol. 9, pp. 135, 196, Vol. 10, pp. 129, 131, Vol. 16, p. 145, and Vol. 26, p. 175.

57 Quoted in ‘A. Ṣaqr, above note 2, p. 57.

58 Yadh Ben Ashour, *Islam and International Humanitarian Law*, ICRC, 1980, p. 7; Zayd ibn ‘Abd al-Karīm al-Zayd, *Muqaddimah fi al-Qānūn al-Dawli al-Insānī fi al-Islām*, ICRC, 2004, p. 48.

59 See Muḥammad ibn ‘Alī ibn Muḥammad al-Shawkānī, *Nayl al-Awṭār: Min Aḥādīth Sayyid al-Khyār Sharḥ Muntaqā al-Akḥbār*, Vol. 8, Dār al-Jil, Beirut, 1973, p. 74; Muḥammad ibn ‘Alī ibn Muḥammad al-Shawkānī, *Al-Sayl al-Jarrār al-Mutadaffiq ‘alā Ḥadā’iq al-Azhār*, ed. Muḥammad Ibrāhīm Zāyid, Vol. 4, Dār al-Kutub al-‘Ilmiyyah, Beirut, 1984, p. 568.

argue that this category of rules developed by individual jurists throughout Islamic history should not be followed by Muslims. But from both a practical and a scholarly perspective, such conflicting Islamic rulings should be known, analyzed and attributed to their proponents, whether they belong to the category of the *shādh* rulings or not. If non-experts in Islamic law – Muslims or non-Muslims alike – engage in Islamic law, it is not a sufficient excuse to say “I am not a Muslim” or “I am not an expert” to justify presenting *shādh* rulings as representing the true Islamic position on a given issue. Therefore, analyzing and classifying Islamic rulings could be useful in informing non-expert followers of Islamic law about such positions so that they can make informed decisions about which rules they should follow. The point here is that dissemination and education on Islamic law is necessary as long as Islamic law is being followed. This should not only be the case with Muslims, but it goes without saying that for any informed decisions or policies taken by States or international organizations related to Islam and in certain situations related to Muslim societies, in general, understating of Islamic law and its impact on society is essential.

## Quick burial

Different manifestations of the principle of respect for dead bodies exist in different cultures and periods. In Islamic law and Muslim cultures, burying the dead in the ground is the right way of respecting dead bodies, while cremation is prohibited under Islamic law because, unlike in some cultures, it is considered a violation of the dignity of the human body.<sup>60</sup> As an illustration of this, although the current Grand Mufti of Egypt Dr Shawki Allam issued Fatwa 3246 on 14 May 2015 permitting the cremation of the dead bodies of Ebola victims and then burying them in graves after that if cremation is the correct method to stop the spread of the disease,<sup>61</sup> other scholars and muftis rejected this fatwa because they considered that cremation is still prohibited even in this case.<sup>62</sup> In normal situations, based on reports attributed to the Prophet Muhammad, it is (to use Islamic legal terminology) *mustahab*, preferred, to bury the dead bodies quickly<sup>63</sup> – i.e., it is not *farḍ/wājib* (compulsory). However, no specific indications of how quick the burial should be given in these reports. But in cases of *al-maṭ'ūn* (a stabbed person), *al-maflūj* (a semi-paralyzed person) and *al-masbūt* (a comatose person), some jurists advocate that it is preferred that Muslims wait for *yaūm wa laylah* (a day and a night) until the death of persons in such cases is

60 See, for example, Fatwa 1896, issued by Dar al-Ifta of Egypt on 26 June 2001, available at: [www.dar-alifta.gov.eg/ar/ViewFatwa.aspx?sec=fatwa&ID=11896](http://www.dar-alifta.gov.eg/ar/ViewFatwa.aspx?sec=fatwa&ID=11896); Fatwa 17513 issued by the General Presidency of Scholarly Research and Ifta in the Kingdom of Saudi Arabia, available at: <https://tinyurl.com/ycqxsxzip>; Fatwa issued by the Islamic High Council of Australia, available at: <https://tinyurl.com/y9q934h7>.

61 See: [www.dar-alifta.gov.eg/ar/ViewFatwa.aspx?sec=fatwa&ID=13425](http://www.dar-alifta.gov.eg/ar/ViewFatwa.aspx?sec=fatwa&ID=13425).

62 See: [www.elnabaa.net/632207](http://www.elnabaa.net/632207).

63 See Hadith 1252 in M. al-Bukhārī, above note 6, Vol. 1, p. 442; 'A. ibn Hazm, above note 3, p. Vol. 5, p. 154; M. Al-Nawawī, above note 3, Vol. 5, p. 230; Muḥammad al-Khatīb al-Shirbīnī, *Mughnī al-Muḥtāj ilā Ma'rifah Ma'ānī Alfāz al-Minhāj*, Vol. 1, Dār al-Fikr, Beirut, p. 340.

confirmed.<sup>64</sup> The reason behind waiting in these three cases is simply because there is a possibility that the individual in question is not dead yet. They may be in a coma, and therefore the jurists preferred that the burial should be delayed until death is confirmed. But if there is a suspicion that death is due to criminal action, then burial is to be postponed until the body is examined.<sup>65</sup> A few jurists have added that waiting for relatives of the deceased is one of the reasons for postponing burial of the dead body, unless the length of time required is so long that the body will decay.<sup>66</sup> These discussions about the time frame do not change if the dead body is unclaimed or unidentified: the same rationale of respecting a human dead body applies. The humanitarian concern of respecting dead bodies will prompt Muslims to quickly bury unclaimed or unidentified bodies.

Apart from these Islamic legal deliberations, cultural and traditional practices play a major role in most of the issues related to the management of the dead. In Muslim as well as some other non-Muslim cultures, there is a tendency to quickly bury the dead, which in some cases hinders the work of forensic specialists working in Muslim contexts. This is especially true in cases of armed conflict and other situations of violence and natural disasters, and is mainly due to two reasons. First, relatives and neighbours want to prevent the body from starting to emit the odour of death, especially in some countries where temperatures are high and there are not enough fridges to keep the dead bodies in cool temperatures, or where electricity blackouts occur often and without warning, let alone in villages and remote places in the desert without electricity. Quick burial in these situations is motivated by the desire to respect the dead bodies. Second, extended relatives and neighbours want to shorten the pain of the deceased's family members and loved ones by burying the body, and to save the family from a state of fear and anxiety that the body of the deceased might decay and start to give off the odour of death, which is understandably painful for the family. Therefore, for forensic specialists to be given enough time to undertake their job, providing fridges to protect dead bodies is necessary in addition to engaging community and religious leaders and local authorities in convincing the public and relatives of the dead that giving forensic specialists enough time to examine the bodies is important for establishing their identity. Otherwise, families of the dead risk being in pain for the rest of their lives due to being unable to identify and visit the graves of their loved ones.

64 See A. al-'Asqalānī, above note 12, Vol. 3, p. 184; Muḥammad 'Abd al-Raḥman ibn 'Abd al-Raḥīm al-Mubarkāfūrī, *Tuhfah al-Aḥwadhī bi-Sharḥ Jāmi' al-Tirmidhī*, Vol. 4, Dār al-Kutub al-'Ilmiyyah, Beirut, p. 82.

65 See Fatwa 66120 issued by the Fatwa Centre affiliated to the Qatari Ministry of Endowments (Awqaf) and Religious Affairs, available at: <http://fatwa.islamweb.net/fatwa/index.php?page=showfatwa&Option=Fatwald&Id=66120>.

66 See 'Abd al-Ra'ūf al-Mināwī, *Fayḍ al-Qadīr Sharḥ al-Jāmi' al-Ṣaḡhīr*, Al-Maktabah al-Tujāriyyah al-Kubrā, Vol. 3, Cairo, 1937, p. 310.

## Exhumation of human remains

In Islamic parlance and early Islamic history, the term *nabsh al-qubūr* (exhumation of graves) is strongly associated with the crime of grave robbery; whether the jurists referred to exhuming the body for criminal actions or for other purposes such as the examples given below, they used the same term of *nabsh al-qubūr*. According to the forty-five-volume *Al-Mawsū‘ah al-Fiqhiyyah al-Kuwaytiyyah* (*Kuwaiti Islamic Law Encyclopaedia*), the *nabbāsh* (grave robber) is one who digs up graves to steal the shrouds or ornaments from the dead bodies,<sup>67</sup> a crime that disqualifies its culprit as a witness.<sup>68</sup> Partly because of this historical association, the Arabic words for exhumation of graves have a very negative connotation in many parts of the Arabic-speaking cultures. In addition to that, in principle, respect for dead bodies entails not exhuming their graves and therefore classical Muslim jurists agree on the prohibition against exhuming graves without necessity.<sup>69</sup> One of the distinctive characteristics of Islamic law is that classical Muslim jurists not only developed rules regulating the situations that Muslims encounter in their everyday lives in many areas of Islamic law, but they also envisaged hypothetical cases/situations and developed rules regulating them in case they may happen. Therefore, classical Muslim jurists deliberated the permissibility of exhuming graves in a number of cases, including apparently hypothetical ones.

According to a Hadith narrated by Anas ibn Mālik (d. 712), when the Prophet Muhammad arrived at Medina, he built a mosque in a place where some graves were exhumed and palm trees were cut down.<sup>70</sup> Based on this Hadith and this precedent, Muslim jurists agree that it is permissible to build a mosque in place of exhumed graves, meaning that it is potentially permissible to exhume graves for other purposes as well. Furthermore, there is another precedent where a dead Muslim body was exhumed for the purpose of transfer from a collective grave to an individual grave closer to the family of the dead. Jābir ibn ‘Abd Allah ibn ‘Amr, one of the Muslims whose father was buried in a collective grave with the body of ‘Amr ibn al-Jumūḥ ibn Zayd ibn Ḥarām al-Anṣārī in the battle of Uḥud, explains how much pain he was in because his father’s body was buried in a collective grave on the battlefield in Uḥud, about five kilometres from where he was living in Medina, and that he did not rest until his father’s body was transferred after six months to an individual grave in Medina.<sup>71</sup> Although there are some reports in which the Prophet Muhammad instructs Muslims to bury the Muslim martyrs where they were killed on the battlefield, these instructions were linked with the battle of Uḥud, where it was not logistically possible for the

67 See Kuwaiti Ministry of Awqaf and Islamic Affairs, above note 51, Vol. 40, p. 18.

68 See Muḥammad ibn al-Ḥasan ibn Muḥammad ibn ‘Alī ibn Ḥamdūn, *Al-Tadhkirah al-Ḥamduniyyah*, ed. Iḥsān ‘Abbās and Bakr ‘Abbās, Vol. 5, Dār Ṣādir, Beirut, 1996, p. 214.

69 See Kuwaiti Ministry of Awqaf and Islamic Affairs, above note 51, Vol. 40, p. 25.

70 See Hadith 781 in Aḥmad ibn Shu‘ayb al-Nasā’ī, *Sunan al-Nasā’ī al-Kubrā*, ed. ‘Abd al-Ghaffār Sulaymān al-Bindārī and Sayyid Kasrawī Ḥasan, Vol. 1, Dār al-Kutub al-‘Ilmiyyah, Beirut, 1991, p. 259.

71 See Aḥmed ibn al-Ḥussein ibn ‘Alī al-Bayhaqī, *Sunan al-Bayhaqī al-Kubrā*, ed. Muḥammad ‘Abd al-Qādir ‘Atṭā, Vol. 4, Dār al-Bāz, Mecca, 1994, p. 58; ‘A. ibn al-Saḥaybānī, above note 35, p. 494.

Muslims to transfer all dead bodies from the battlefield to Medina.<sup>72</sup> Therefore, this specific precedent of exhuming one of the dead bodies that was buried in a collective grave in the battle of Uḥud indicates that exhuming dead bodies for the purposes of transfer to the place of origin, and/or establishing the identity of the buried person such as in the case of dead migrants, is permissible under Islamic law. In fact, Shaykh Makhlūf, the Grand Mufti of Egypt from 5 January 1946 to 7 May 1950 and from March 1952 to December 1954, issued a fatwa permitting the transfer of the mortal remains of “the last Ottoman sultan, ‘Abd Al-Majīd, and his wife, who were embalmed and buried in France, to be buried in Egypt”.<sup>73</sup>

Other examples of exhuming graves were deliberated also for religious purposes (or what is described in Islamic parlance as the rights of God), civil liability cases (rights of humans) and even public interest considerations.

Examples of exhuming mortal remains for religious purposes include exhumation because a dead body is buried without the ritual washing, or shrouding, or the funeral prayer. The jurists agree that there is no need for exhuming the mortal remains to perform the funeral prayer because it can be performed at the grave without exhuming the body. Similarly, they tend to reject exhumation if the body was buried without shrouding because they argue that the grave already satisfies the purpose of covering the body, while they tend to accept exhuming the dead body if it was buried without the ritual washing.<sup>74</sup> Furthermore, bearing in mind that according to Islamic burial rituals, a Muslim dead body is to be placed lying on its right side and facing in the direction of Qibla, do these considerations constitute a ground for exhuming the mortal remains to make sure that their burial is in accordance with Islamic religious burial rituals? The jurists’ answer to this is negative,<sup>75</sup> which is in line with the Islamic tendency for leniency when it comes to the rights of God, unlike when it comes to the rights of the humans, as the following examples show.

Examples of exhuming mortal remains for civil liability cases include if gold,<sup>76</sup> money or valuable belongings are buried with the dead bodies, if the deceased swallowed a piece of jewellery before death, or if the body is buried in a usurped land and the landowner asks for the removal of the grave from the land, or in case of a living foetus in the womb of a dead woman. In all of these examples, the jurists support the exhumation of the graves<sup>77</sup> because after death, the possession of all such items accompanying the dead body is to be legally

72 See Vardit Rispler-Chaim, “The Ethics of Postmortem Examination in Contemporary Islam”, *Journal of Medical Ethics*, Vol. 19, No. 3, 1993, p. 166.

73 *Ibid.*

74 Muḥammad al-Ghazālī, *Al-Waṣīṭ fi al-Madhhab*, eds Aḥmad Maḥmūd Ibrāhīm and Muḥammad Muḥammad Tāmir, Vol. 2, Dār al-Salām, Cairo, 1997, p. 390; M. ibn al-Ikhwah, above note 38, p. 106. It is worth adding here that the jurists Ashhab and Ṣahnūn, from the Māliki school of law, prohibit performing the funeral prayer at the grave: see ‘A. ibn al-Ṣaḥaybānī, above note 35, p. 350.

75 Ḥasan ibn ‘Ammār Shurunbulālī, *Kitāb nūr al-Iḍāḥ wa Najāt al-Arwāḥ*, Dār al-Ḥikmah, Damascus, 1985, p. 98.

76 See Hadith 3088 in Abū Dāwūd, above note 3, Vol. 3, p. 181.

77 See, for example, M. al-Ghazālī, above note 74, Vol. 2, p. 390; Ḥ. Shurunbulālī, *Kitāb nūr al-Iḍāḥ*, above note 75, p. 98; M. ibn al-Ikhwah, above note 38, p. 106.

transferred to the heirs of the dead according to their prescribed shares under Islamic law. Hence, loose personal items and valuables found with dead bodies during armed conflicts or natural disasters should be handed to their next of kin. Likewise, the right of the living, in this case the owner of the usurped land upon which the grave is built, overrides the respect of dead bodies. The same rationale applies for rescuing the living foetus, otherwise it will constitute a crime against a living human soul, yet unborn.

Examples of exhuming mortal remains for the purpose of public interest include exhuming graves to build public roads<sup>78</sup> or if the graves were hit by floods or leaks.<sup>79</sup> Public interest considerations here constitute legitimate grounds for exhumation of graves.

Therefore, the issue of the exhumation of human remains as deliberated in Islamic legal tradition reflects not only the Islamic religious, legal and ethical dimensions, but also the cultural and contextual dimensions of the seventh and eight centuries. As shown, exhumation of human remains is permissible in some cases and prohibited in others. On the one hand, the prohibition in some of these cases is based solely or mainly on the jurists' discretion of what constitutes disrespect for human dignity. On the other hand, the permissibility is based in some cases on the jurists' discretion of what constitutes the public interest of the Muslim community. This explains the different rulings developed by the jurists and the various practices adopted in Muslim societies accordingly. Thus, forensic specialists working in Muslim societies should familiarize themselves with both the Islamic regulations on the management of the dead and how far the cultural practices in these societies correspond with what Islamic law says. This is in order to enable them to take informed decisions that will ensure respect for the dead bodies. In cases where such cultural practices constitute challenges to the forensic specialists' work, engaging with Islamic institutions, scholars and community leaders becomes essential in order to address these challenges.

## Autopsy

Autopsy, or post-mortem examination, means the dissection of dead bodies for educational, scientific or legal purposes – i.e., determining the cause of death. This practice was not unknown in Islamic history. Abū Bakr Muḥammad ibn Zakariyyah al-Rāzī, known in the West as Rhazes (854–925), and Al-Ḥusayn ibn 'Abd Allah ibn Sīnā, known in the West as Avicenna (d. 1037), both of whom were born in today's Iran, used to perform autopsies for educational purposes. But the Syrian-born and -educated 'Alī ibn Abī al-Ḥazm ibn al-Nafīs, (d. 1288), later the director of the Nāṣirī Hospital in Cairo, who was known as the first to describe the pulmonary circulation of the blood, did not perform autopsies for

78 'A. ibn al-Saḥaybānī, above note 35, p. 492.

79 *Ibid.*, p. 493.



educational purposes because he was of the opinion that it was impermissible under Islamic law.<sup>80</sup>

At present, autopsy is practiced in Muslim countries by specialists in the department of forensics based either in the Ministry of Justice or the Ministry of health. Nevertheless, unless an autopsy is performed in case of a court order because there is a suspicion that death is due to a criminal action and the family themselves are interested to know the cause of death, there is still a popular tendency in Muslim societies to reject autopsy because it will disfigure, and hence desecrate, the dead body. The Arabic word *tashrīh*, used for anatomy/autopsy, culturally and psychologically indicates in the mind of Arabic-speakers the act of cutting the body into pieces or at least cutting the corpse open in a cruel way. In addition to that, the psychological and emotional rejection of autopsy is due to the delay of the burial of the dead.<sup>81</sup> Since the issue of autopsy is not treated in the Islamic scriptures or classical legal literature, the current Islamic legal deliberations on the issue by many muftis basically reflects a sort of deliberation between the principle of respect for dead bodies, on the one hand, and the legal imperatives of identifying the cause of death in case of suspicion of criminal action and the scientific and educational benefits of autopsy, on the other. Based on the principle of *maṣlaḥah* (public interest) and the Islamic legal maxims *al-ḍarūrāt tubīḥ al-mahzūrāt* (necessity overrides the prohibition) and *ikhtiyār akhaf al-ḍararayn* (choice of the lesser of two evils), most Muslim jurists and major Islamic law and fatwa councils in many Muslim countries such as Egypt, Saudi Arabia, Jordan and Palestine permit autopsies both for criminal investigations and scientific and educational benefits. The example of dissecting a dead mother's womb to rescue the foetus given by classical Muslim jurists is borrowed here by contemporary muftis to allow autopsy.<sup>82</sup>

In order to accommodate the religious beliefs of both Jews and Muslims who object to post-mortem examination and delayed burials on religious grounds in the UK, the government allows for an alternative examination method: a magnetic resonance imaging (MRI) scan of the bodies that replaces the traditional invasive post-mortem examination.<sup>83</sup> This is a good alternative because it also expedites the burial process and therefore no grounds for objection to post-mortem examination exist. The main problem with the MRI scan is that its cost is high, particularly in cases where there are large numbers of dead bodies, such as in the context of armed conflicts and other situations of violence or natural disasters. Although the current Islamic position on autopsy and modern scientific

80 See Madadin Mohammed and Magdy A. Kharoshah, "Autopsy in Islam and Current Practice in Arab Muslim Countries", *Journal of Forensic and Legal Medicine*, Vol. 23, March 2014, p. 81.

81 Aziz Sheikh, "Death and Dying: A Muslim Perspective", *Journal of the Royal Society of Medicine*, Vol. 91, March 1998, p. 139.

82 See: <http://fatwa.islamweb.net/fatwa/index.php?page=showfatwa&Option=FatwaId&lang=A&Id=56064>.

83 See: Martin Beckford, "Muslims and Jews to Be Allowed to Have Different Post-Mortems", *The Telegraph*, 21 April 2009, available at: [www.telegraph.co.uk/news/religion/5195466/Muslims-and-Jews-to-be-allowed-to-have-different-post-mortems.html](http://www.telegraph.co.uk/news/religion/5195466/Muslims-and-Jews-to-be-allowed-to-have-different-post-mortems.html); Paul Britton, "Body Scans Instead of Post Mortems", *Manchester Evening News*, 18 April 2010, available at: [www.manchestereveningnews.co.uk/news/greater-manchester-news/body-scans-instead-of-post-mortems-955338](http://www.manchestereveningnews.co.uk/news/greater-manchester-news/body-scans-instead-of-post-mortems-955338).

achievements can help in minimizing the popular objection to post-mortem examinations in Muslim contexts, it is still necessary to raise awareness in Muslim societies about advancements in forensic science and to correct misconceptions that post-mortem examination amounts to cruel mutilation of dead bodies.<sup>84</sup>

## Handling of bodies by the opposite sex

Throughout history, religious, cultural and traditional norms have shaped the interaction between the sexes. Conservative traditions and norms dictate the extent of interaction between the sexes in Arab and Muslim-majority countries, and in some cases these may be stricter than the Islamic norms or may even contradict them. Non-Muslim minorities in Muslim societies usually have similar conservative social norms as well. Health-care workers in non-Muslim societies – and to a much lesser extent in Muslim societies – face some challenges or “dilemmas”<sup>85</sup> in providing medical services to observant Muslim patients, especially female patients. Most notable among these challenges is the examination of patients by health-care professionals of the opposite sex, particularly when this involves touching the skin or uncovering the body. Joining their expertise, Muslim medical professionals and Islamic law experts have been working together over the last few decades to respond to new medical issues and develop Islamic medical ethics.<sup>86</sup>

The handling of dead bodies by forensic specialists of the opposite sex, in principle, follows the same Islamic position on the examination of patients by medical professionals of the opposite sex, a subject of one of the chapters in the most authoritative Sunni canonical Hadith collections by Muḥammad ibn Ismā‘īl al-Bukhārī (d. 870).<sup>87</sup> The Majma‘ al-Fiqh al-Islāmī (Islamic Law and Jurisprudence Council) affiliated to the Jeddah-based Muslim World League issued Decree No. 85/12/d8 in its eighth conference, held in Brunei on 21–27 June 1993, to the effect that Muslim female patients should be examined by Muslim female medical professionals, and if those are not available, then by a trusted female non-Muslim medical professional. If there are no female medical professionals, then a Muslim male medical professional should perform the examination, and if one is not available, a non-Muslim male medical professional should do so. In case of examination by medical professionals from the opposite sex, the spouse or a *maḥram* (a relative with whom marriage is prohibited) should be present during the examination in order to avoid the prohibited *khalwah* (seclusion between a non-*maḥram* male and a female).<sup>88</sup> However, in

84 See M. Mohammed and M. Kharoshah, above note 80, p. 80.

85 See Roni Caryn Rabin, “Respecting Muslim Patients’ Needs”, *New York Times*, 1 November 2010, available at: [www.nytimes.com/2010/11/01/health/01patients.html](http://www.nytimes.com/2010/11/01/health/01patients.html).

86 For example, the Islamic Code of Medical Ethics, promulgated by the First International Conference on Islamic Medicine in Kuwait in 1981; the Code of Ethics of the Medical Profession in the Kingdom of Saudi Arabia; and the Code of Ethics of the Medical Profession in Egypt.

87 See Hadith 5355 in M. al-Bukhārī, above note 6, Vol. 5, p. 2151.

88 Majma‘ al-Fiqh al-Islāmī, “Qarār Raqam: 85/12/d8 bi-Sha’n Mudāwah al-Rajul lil-Mar’ah”, *Majalah Majma‘ al-Fiqh al-Islāmī*, Vol. 8, No. 3, 1994, p. 412.

case of necessity these rules no longer apply, based on the Islamic legal maxim of *al-darūrāt tubīḥ al-maḥzūrāt* (necessity overrides the prohibition). Hence, first, examination by medical professionals of the opposite sex could be done in the following examples of necessity: lack of specialization, lack of trust in the proficiency of the medical professionals involved, or during armed conflicts where male Muslims are fighting and female health-care personnel are needed to treat the injured and wounded.<sup>89</sup> Second, the requirement of the presence of the spouse or a *maḥram* during the examination also does not apply in case of accident and emergency medicine because this is a case of necessity.<sup>90</sup>

It is worth adding here that, in Islam, the pursuit of medical knowledge and the provision of medical services (just as with other essential services for the community) are *farḍ kifāyah* (a collective duty) – i.e., a religious duty incumbent on the Muslim community as a whole<sup>91</sup> – and failure to provide this service by specialists will mean that the entire Muslim community will be sinful. Therefore, based on this duty and the Islamic requirement of providing medical services by specialists from the same sex as far as possible, Decree No. 85/12/d8 recommends that health authorities in the Muslim world encourage women to join the medical profession.<sup>92</sup> Because of its noble mission and important role, the medical profession enjoys a prominent place both in the Islamic normative sources and Muslim societies, and at present, female medical students outnumber their male counterparts in some Muslim-majority countries.

Therefore, when handling dead bodies in Muslim societies, medical services and forensic specialists should keep these rules in mind. It goes without saying that understanding these Islamic law rules, on the one hand, and cultural and traditional norms in the various Muslim contexts, on the other, is invaluable for better communication<sup>93</sup> and for taking the appropriate decision in Muslim contexts. This is because there are wide variances in Muslims' practices both on the societal and individual levels, let alone the fact that average Muslims are not educated about these Islamic rules and the flexibility that characterizes Islamic law. The principle of *maṣlaḥah* as one of the methods of the Islamic law-making process and the Islamic legal maxims referred to above show the flexibility and changeability as well as adaptability of Islamic rules to certain circumstances. The point is that accommodating and respecting Muslim religious and cultural needs without hampering the forensic specialists' work will facilitate their work. If that is not possible, whether because of time constraints<sup>94</sup> or technical reasons, then Islamic law itself should be invoked in these situations. In other words, engaging local and international Islamic law institutions and individual Islamic law experts on these challenges facing forensics specialists in Muslim contexts and bringing

89 See 'Alī Dawūd al-Jaffāl, "Mudāwah al-Rajul lil-Mar'ah wa al-Mar'ah lil-Rajul", *Majalah Majma' al-Fiqh al-Islāmī*, Vol. 8, No. 3, 1994, p. 49.

90 *Ibid.*

91 A. Al-Dawoody, above note 50; see also: [www.fatawah.net/Fatawah/434.aspx](http://www.fatawah.net/Fatawah/434.aspx).

92 *Majma' al-Fiqh al-Islāmī*, above note 88, p. 412.

93 R. C. Rabin, above note 85.

94 *Ibid.*

to their consideration and investigation such challenges can provide authentic Islamic law solutions that are acceptable in Muslim societies.

## Burial at sea

It is interesting to find that classical Muslim jurists have deliberated the question of burial at sea, though their discussion was not necessarily linked to the context of armed conflict. Nonetheless, it is worth recalling that classical Muslim jurists have deliberated on this question since the seventh and eighth centuries, when (1) there were no international conventions governing this question and (2) a state of war was the norm in international relations at the time, unless a peace treaty was concluded, as is reflected in the jurists' deliberations on this question. Succinctly, the rationale behind their discussion of this question appears to be the need to ensure decent burial of dead bodies in case death takes place on board a ship at sea.

In this situation, the classical Muslim jurists' position envisaged the following three cases. First, if the body can wait until the ship reaches the shore without decay, burial should be postponed until the ship reaches the shore and the body can be buried as usual in a grave.<sup>95</sup> This ruling is based on the case of Abū Ṭalḥah Zayed ibn Sahl ibn al-Aswad ibn Ḥarām, who died<sup>96</sup> on board a ship at sea and his dead body was kept for seven days until the ship reached the first island where the dead body could be buried.<sup>97</sup> Second, if the body cannot wait until it reaches the shore without decay, then it should be tied to pieces of wood and placed in the water so that it will float and the waves will take it to the nearest shore, if that location is inhabited by Muslims who will respect the body and honourably bury it. Third, if the body will be received at the nearest shore by enemies who may desecrate the body, the body should be tied to a heavy object and lowered into the sea.<sup>98</sup> In any case, whether the dead body will be buried at sea or not, the Islamic burial rituals must be performed in accordance with the rules set out above.

Under the section titled "Rules Related to a Dying Person: Rules about Burial of the Dead Body", the official website of the office of his eminence Al-Sayyid Ali Al-Husseini Al-Sistani, the prominent Shī'ī authority, succinctly gives the Islamic position as follows:

If a person dies on a ship and if there is no fear of the decay of the dead body and if there is no problem in retaining it for some time on the ship, it should be kept on it and buried in the ground after reaching the land. Otherwise, after giving Ghusl, *Hunut*, *Kafan* and *Namaz-e-Mayyit* [ritual washing, shrouding and funeral prayer], it should be lowered into the sea in a vessel of clay or with a

95 Muhammad al-'Arabī al-Qarawī, *Al-Khulāṣah al-Fiqhiyyah 'alā Madhhab al-Sādah al-Mālikiyyah*, Dār al-Kutub al-'Ilmiyyah, Beirut, p. 157; 'A. ibn al-Sahaybānī, above note 35, p. 43; [www.sistani.org/english/book/48/2189/](http://www.sistani.org/english/book/48/2189/).

96 While some sources say that he died in 663–4, other sources say that he died in 671.

97 See Muhammad ibn Sa'd, *Al-Ṭabaqāt al-Kubrā*, Vol. 3, Dār Ṣādr, Beirut, p. 507; M. Al-Nawawī, above note 3, Vol. 5, p. 244; 'A. ibn al-Sahaybānī, above note 35, p. 43.

98 'A. ibn al-Sahaybānī, above note 35, pp. 43–45.

weight tied to its feet. And as far as possible it should not be lowered at a point where it is eaten up immediately by the sea predators.<sup>99</sup>

The above discussion shows that the secret burial of Osama bin Laden at sea by US forces was not in accordance with Islamic law as far as the burial place is concerned.<sup>100</sup> Although the US forces claim that bin Laden was buried in accordance with the proper Islamic burial rituals,<sup>101</sup> by which they most likely mean the ritual washing, shrouding and funeral prayer, there is no justification for burying his body at sea in light of the jurists' discussion above. According to Islamic law, dead bodies are to be buried in graves in the ground and the issue of burial at sea is deliberated only in the above situation. The US administration took the decision to bury bin Laden in a secret place at sea because if he were buried in an actual grave in the ground, it would become a shrine for some Muslims.<sup>102</sup>

Protection of dead bodies surfaced, time and again, in these Islamic deliberations regarding burial at sea, though, most notably, establishing the identity of the dead bodies is absent in these deliberations, among other considerations included in Article 20 of GC II:

Parties to the conflict shall ensure that burial at sea of the dead, carried out individually as far as circumstances permit, is preceded by careful examination, if possible by a medical examination, of the bodies, with a view to confirming death, establishing identity and enabling a report to be made. Where a double identity disc is used, one half of the disc should remain on the body.

## Conclusion

Studying the above specific contemporary issues and challenges pertinent to the management of the dead in contemporary conflicts in Muslim contexts, under both Islamic law and IHL, leads to the following conclusions. First, although the two legal systems have different sources, emerged in two different eras and, therefore, address primarily different conflict contexts, they both attempt to protect the dignity of and respect for dead bodies. Second, the two legal systems can complement each other at the present time to achieve the protection of dead bodies in the context of armed conflicts and other situations of violence and natural disasters in Muslim contexts. That is because, on the one hand, although IHL is the universally accepted, most advanced legal regime “that seek[s] to limit

99 See: [www.sistani.org/english/book/48/2189/](http://www.sistani.org/english/book/48/2189/).

100 See, e.g., Ian Black and Brian Whitaker, “Sea Burial of Osama bin Laden Breaks Sharia Law, Say Muslim Scholars”, *The Guardian*, 2 May 2011, available at: [www.theguardian.com/world/2011/may/02/sea-burial-osama-bin-laden](http://www.theguardian.com/world/2011/may/02/sea-burial-osama-bin-laden).

101 See Marcia Amidon Lusted, *The Capture and Killing of Osama Bin Laden*, ABDO Publishing, Edina, MN, 2012, p. 81.

102 *Ibid.*

the humanitarian consequences of armed conflicts”,<sup>103</sup> IHL norms are still far from being popularly known and respected by various segments of society, at least in great parts of the Muslim world. On the other hand, although it emerged over fourteen centuries ago, Islamic law still has an impact on the lives of hundreds of millions of the over 1.7 billion of today’s Muslim population. As shown above, Islamic rules are still being revisited and deliberated by both local and international Islamic law institutions as well as Islamic law experts, and average Muslims are keen to learn about and follow Islamic law. Nonetheless, the legal, technical and specialized forensic expertise that institutions such as the ICRC have developed are indispensable for achieving the protection of dead bodies in contemporary armed conflicts in Muslim contexts. The above discussion has shown that the two legal systems share the same humanitarian value of protecting dead bodies and therefore the management of the dead is an example whereby the two legal systems can cooperate to achieve this common humanitarian objective in specific Muslim contexts. In addition to that, scientific technology and advanced scientific forensic expertise can tackle some of the challenges addressed in this article.

Indeed, investigating the convergences between IHL and earlier legal, cultural and local traditions will lead to universalizing and popularizing modern IHL principles simply because those principles are not in essence in contradiction with preceding attempts by various legal, cultural and local traditions. Therefore, the universality of IHL will be reinforced by, first, explaining that its humanitarian principles and philosophy are universally intuitive and, second, stressing the fact that it is the most comprehensive/specialized and up-to-date legal regime that is capable of humanizing contemporary armed conflicts. This means that earlier legal, cultural and local traditions can play a significant role in enhancing respect for IHL in specific contexts.

103 Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction*, coordinated by Etienne Kuster, ICRC, Geneva, 2016, p. 17.

# Adoption of the Additional Protocols of 8 June 1977: A milestone in the development of international humanitarian law

## François Bugnion

Dr François Bugnion is an independent consultant in international humanitarian law and humanitarian action. He joined the International Committee of the Red Cross (ICRC) in 1970 and served as a delegate in Israel and the occupied territories, Bangladesh, Turkey, and Cyprus, and then as head of mission in Chad, Vietnam and Cambodia. From 2000 to 2006 he was Director for International Law and Cooperation at the ICRC, and from 2010 to 2017 he was a member of the ICRC Assembly. He is the author of more than eighty books and articles on international humanitarian law and on the International Red Cross and Red Crescent Movement.

## Abstract

*On 8 June 1977, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts adopted two Protocols Additional to the 1949 Geneva Conventions. This was the result of nearly ten years of intensive and delicate negotiations. Additional Protocol I protects the victims of international armed conflicts, while Additional Protocol II protects the victims of non-international armed conflicts. These Protocols, which do not replace but supplement the 1949 Geneva Conventions, updated both the law protecting war victims and the law on the conduct of hostilities. This article commemorates the 40th anniversary of the adoption of the 1977 Additional Protocols.*

**Keywords:** Geneva Conventions, Protocols Additional to the Geneva Conventions, international armed conflicts, non-international armed conflicts, wars of national liberation, protection of war victims, conduct of hostilities, nuclear weapons, customary international humanitarian law.



On 8 June 1977, the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts adopted two Protocols Additional to the 1949 Geneva Conventions.<sup>1</sup> This was the outcome of ten years of intensive and delicate negotiations – a long and sometimes painful delivery.

In 2017, we celebrated the 40th anniversary of the adoption of the Additional Protocols. This anniversary provides an opportunity to reflect on a number of questions. Why was it necessary to supplement the 1949 Geneva Conventions with the Additional Protocols? What were the issues involved in the negotiations? What were the main achievements and the main failures? These are the main issues which will be addressed in the present article.

## **Why was it necessary to supplement the 1949 Geneva Conventions with the Additional Protocols?**

All rules protecting wounded and sick members of the armed forces, shipwrecked people, prisoners of war (PoWs) and civilians in the hands of an enemy power were thoroughly overhauled following the Second World War to take into account the experiences of that terrible conflict. The process culminated with the adoption of the four Geneva Conventions of 12 August 1949, which remain in force today and still form the bedrock of the protection of war victims.<sup>2</sup>

- 1 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I); Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (AP II). Texts of the Additional Protocols can be found in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)*, 17 vols, Federal Political Department, Bern, 1978 (*Official Records*), Vol. 1, pp. 115–198; *International Review of the Red Cross*, Vol. 17, No. 197–198, 1977, pp. 3–101; United Nations Treaty Series, Vol. 1125, pp. 1–699; *Revue Générale de Droit International Public*, Vol. 82, No. 1, 1978, pp. 329–398; Dietrich Schindler and Jiří Toman (eds), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, Martinus Nijhoff, Dordrecht, and Institut Henry-Dunant, Geneva, 1988, pp. 621–718; International Committee of the Red Cross (ICRC) and International Federation of Red Cross and Red Crescent Societies, *Handbook of the International Red Cross and Red Crescent Movement*, 14th ed., Geneva, 2011 (Red Cross Handbook), pp. 239–330.
- 2 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention (III) relative to the Treatment of Prisoners of War; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War. Texts of the Geneva Conventions can be found in *Final Record of the Diplomatic Conference of Geneva of 1949*, 4 vols, Federal Political Department, Bern, 1949 (*1949 Final Record*), Vol. 1, pp. 203–341; United Nations Treaty Series, Vol. 75, 1950, pp. 5–468; D. Schindler and J. Toman (eds), above note 1, pp. 373–594; Red Cross Handbook, above note 1, pp. 33–237.



However, the Diplomatic Conference of 1949 made almost no changes to the law regarding the conduct of hostilities – in other words, the rules that govern the methods and means of warfare. Four years after Hiroshima, the rules governing the methods and means of warfare (particularly the rules relating to air warfare) still mainly consisted of the provisions of the Hague Convention relating to the Laws and Customs of War on Land of 18 October 1907, which were adopted during the era of balloons and airships.<sup>3</sup> The Soviet Union in particular criticized the Diplomatic Conference’s refusal to discuss the legality of nuclear weapons, and to take appropriate measures to protect civilians against the effects of hostilities, especially against the threat of nuclear weapons.<sup>4</sup>

Fully aware that the rules protecting civilians against the effect of hostilities needed updating, the International Committee of the Red Cross (ICRC) prepared, with the help of a group of experts, an ambitious project entitled the Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War (Draft Rules).<sup>5</sup> These rules amounted to a draft “Fifth Geneva Convention”, aiming to restore the fundamental principle of immunity of the civilian population against the effects of hostilities. That principle had been shockingly violated throughout the Second World War, and the Nuremberg Tribunal, by refusing to punish those responsible for such violations, had failed to restore its authority. Article 14 of the Draft Rules contained a ban on the use of weapons “whose harmful effects – resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents – could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population”.<sup>6</sup> That provision amounted to a ban on using nuclear weapons, which led to the failure of the project.

The ICRC submitted the Draft Rules to the 19th International Conference of the Red Cross, which took place in New Delhi in October and November 1957. The project was shot down by an unholy alliance of the United States and Soviet

3 Hague Convention (II) with respect to the Laws and Customs of War on Land, The Hague, 29 July 1899, in *The Proceedings of the Hague Peace Conferences: The Conference of 1899*, Oxford University Press, New York, 1920, pp. 251–262; Georg Friedrich von Martens, *Nouveau recueil général de traités et autres actes relatifs aux rapports de droit international*, 2nd series, Vol. 26, Librairie Dietrich, Leipzig, 1901, pp. 949–979; D. Schindler and J. Toman (eds), above note 1, pp. 63–95. Hague Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, in *The Proceedings of the Hague Peace Conferences: The Conference of 1907*, Oxford University Press, New York, 1920, pp. 620–631; Georg Friedrich von Martens, *Nouveau recueil général de traités et autres actes relatifs aux rapports de droit international*, 3rd series, Vol. 3, Librairie Hans Buske, Leipzig, 1907, pp. 461–503; D. Schindler and J. Toman (eds), above note 1, pp. 65–98; Red Cross Handbook, above note 1, pp. 344–355. Hague Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, The Hague, 18 October 1907, in *The Proceedings of the Hague Peace Conferences: The Conference of 1907*, Oxford University Press, New York, 1920, p. 678; G. F. von Martens and H. Triepel, *Nouveau recueil général de traités*, above, pp. 745–750; D. Schindler and J. Toman (eds), above note 1, pp. 201–206.

4 *1949 Final Record*, above note 2, Vol. 2-A, pp. 761–762, 802–805; Vol. 2-B, pp. 495–509; Vol. 3, p. 181.

5 Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, ICRC, Geneva, 1956.

6 *Ibid.*, p. 101.

Union.<sup>7</sup> That painful failure left a deep scar in the ICRC's memory, and for a long time prevented any new codification attempts.

No help was forthcoming from the United Nations (UN), which during the 1950s and 1960s obstinately refused to deal with humanitarian law. The UN Charter had been adopted to prevent war, and discussing the laws and customs of war would have amounted to an admission that the UN might fail in its primary mission, a prospect that it could not countenance.<sup>8</sup>

Things started to change when the International Conference on Human Rights, held in Tehran in May 1968, declared in its Resolution XXIII that "the Red Cross Geneva Conventions of 1949 are not sufficiently broad in scope to cover all armed conflicts" and asked the UN General Assembly to invite the Secretary-General to examine "the need for additional humanitarian international conventions or for possible revision of existing Conventions".<sup>9</sup>

The reference to "human rights in armed conflicts" instead of humanitarian law in the title of Resolution XXIII, and the fact that the International Conference on Human Rights failed to take into account Article 3 common to the four Geneva Conventions, which addresses "armed conflict not of an international character", showed that governments had had little interest in – not to mention blatant ignorance of – humanitarian law in the twenty years preceding the adoption of that resolution.<sup>10</sup>

So why did the International Conference on Human Rights suddenly take an interest in humanitarian law in 1968?

It was mainly a consequence of decolonization and the emergence of a group of States that had recently recovered independence in Africa and Asia. Those States did not like being bound by a set of treaties that they played no role in drafting because they were not represented at the 1949 Diplomatic Conference.

In particular, those States thought that the rules relating to the conduct of hostilities were unsuited to the wars of decolonization they had to wage in order to regain their independence. They also resented the fact that captured "freedom fighters" were denied PoW status and protection under Geneva Convention III.

7 *XIXth International Conference of the Red Cross, New Delhi, October–November 1957: Proceedings*, Indian Red Cross, New Delhi, 1957; *XIXth International Conference of the Red Cross, New Delhi, October–November 1957: Final Record concerning the Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War*, ICRC, Geneva, April 1958.

8 Josef L. Kunz, "The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision", *American Journal of International Law*, Vol. 45, No. 1, 1951, pp. 37–61.

9 International Conference on Human Rights, Resolution XXIII, "Human Rights in Armed Conflicts", *Final Act of the International Conference on Human Rights, Teheran, 22 April to 13 May 1968*, UN Doc. A/CONF.32/41, New York, 1968, p. 18. Between 1968 and 1977, the UN General Assembly adopted, in each regular session, one or several resolutions relating to the reaffirmation and development of international humanitarian law, generally under the title of "Respect for Human Rights in Armed Conflicts": see Resolutions 2444 (XXIII) 1968, 2597 (XXIV) 1969, 2674 (XXV) 1970, 2675 (XXV) 1970, 2676 (XXV) 1970, 2677 (XXV) 1970, 2852 (XXVI) 1971, 2853 (XXVI) 1971, 3032 (XXVII) 1972, 3076 (XXVIII) 1973, 3102 (XXVIII) 1973, 3103 (XXVIII) 1973, 3319 (XXIX) 1974, 3500 (XXX) 1975, 31/19-1976, and 32/44-1977.

10 The French version of Resolution XXIII referred to "la Convention [singular] de Genève de la Croix-Rouge de 1949", which testifies to the degree of ignorance regarding humanitarian law that prevailed in diplomatic circles at the time.

The ICRC felt the wind of the bullet when it was informed of Resolution XXIII, which confronted it with two questions:

- First, should the ICRC let the UN take responsibility for revising the Geneva Conventions or should it reassert the leadership role that it had had in this area since the adoption of the original Geneva Convention of 22 August 1864, which marked the starting point of contemporary IHL?<sup>11</sup>
- Second, should the 1949 Geneva Conventions be overhauled by opening a revision procedure, as requested by Resolution XXIII, or should additional protocols be adopted, without touching the Conventions themselves?

On the first point, the ICRC had no doubt that if the UN took a leadership role in developing humanitarian law, this would inevitably politicize this branch of law. As a result, the ICRC had to seek to reassert its traditional leadership role in that area. It did so by submitting to the 21st International Conference of the Red Cross, which took place in Istanbul in September 1969, an important report on the reaffirmation and development of IHL, and by securing the support of National Red Cross and Red Crescent Societies, as well as of the States taking part in the Conference.<sup>12</sup>

The ICRC undertook large-scale consultations so as to identify both the expectations of the international community and the fields in which new developments appeared possible.<sup>13</sup> It then convened two conferences of experts from the International Red Cross and Red Crescent Movement, as well as two conferences of government experts.<sup>14</sup> On the basis of those consultations, the

11 François Bugnion, “The International Committee of the Red Cross and the Development of International Humanitarian Law”, *Chicago Journal of International Law*, Vol. 5, No. 1, 2004, pp. 191–215.

12 ICRC, *Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts*, Doc. D. S.4a, b, e, report submitted to the 21st International Conference of the Red Cross, Istanbul, September 1969. The report was supplemented by a second document specifically dealing with the protection of victims of non-international armed conflicts: ICRC, *Protection of Victims of Non-International Armed Conflicts*, Doc. D.S.5 a–b, report submitted to the 21st International Conference of the Red Cross, Istanbul, September 1969; *XXIst International Conference of the Red Cross, Istanbul, September 6 to 13, 1969: Report*, Turkish Red Crescent, Istanbul, 1969.

13 Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May–12 June 1971, documents submitted by the ICRC, 8 vols, Geneva, 1971: Vol. 1: *Introduction*; Vol. 2: *Measures Intended to Reinforce the Implementation of the Existing Law*; Vol. 3: *Protection of the Civilian Population against Dangers of Hostilities*; Vol. 4: *Rules Relative to Behaviour of Combatants*; Vol. 5: *Protection of Victims of Non-International Armed Conflicts*; Vol. 6: *Rules Applicable in Guerrilla Warfare*; Vol. 7: *Protection of the Wounded and Sick*; Vol. 8: *Annexes*.

14 Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, The Hague, 1–6 March 1971, *Report on the Work of the Conference*, Doc. D-1195, ICRC, Geneva, April 1971; Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May–12 June 1971, *Report on the Work of the Conference*, ICRC, Geneva, August 1971; Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 2nd Session, Geneva, 3 May–3 June 1972, documents submitted by the ICRC, 3 vols, Geneva, January 1972: Vol. 1: *Texts*; Vols 2 and 3: *Commentaries*; Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vienna, 20–24 March 1972, *Report on the Work of the Conference*, Doc. D-1254, ICRC, Geneva, April 1972; Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 2nd Session, Geneva, 3 May–3 June 1972, *Report on the Work of the Conference*, 2 vols, ICRC, Geneva, July 1972.

ICRC elaborated two draft additional protocols, which it submitted to the 22nd International Conference of the Red Cross, which met in Tehran in 1973.<sup>15</sup> The Conference expressed support for both projects.<sup>16</sup> The ICRC then requested the Swiss government, depositary of the Geneva Conventions, to convene a diplomatic conference.

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974–77 Diplomatic Conference) held four sessions in Geneva between 1974 and 1977. All States party to the Geneva Conventions were duly invited as members of the Conference. Furthermore, the UN, the ICRC and several national liberation movements recognized by regional organizations were invited as observers. ICRC representatives took part in nearly all meetings of the conference in an expert capacity.<sup>17</sup>

On the second point, the ICRC quickly realized that it would be pure folly to expose the 1949 Geneva Conventions to a revision process, since it was far from certain that the international community, deeply divided by the Cold War, would agree to any new treaties. There was a real risk that seeking to revise the existing Conventions, while failing to replace them with new treaties, would ruin their authority.<sup>18</sup> The most basic common sense therefore dictated that the aim should be to adopt additional protocols, so that the 1949 Conventions would be preserved.

This leads to our second question: what were the key issues and the main bones of contention involved in the negotiations?

- 15 Draft Protocols Additional to the Geneva Conventions of 12 August 1949, ICRC, Geneva, June 1973 (Draft APs); *Draft Protocols Additional to the Geneva Conventions of 12 August 1949: Commentary*, ICRC, Geneva, October 1973 (ICRC Commentary on Draft APs).
- 16 *XXIInd International Conference of the Red Cross, Teheran, 8–15 November 1973: Report*, Red Lion and Sun Society of Iran, Tehran, 1973; *Report on the Study by the XXIInd International Conference of the Red Cross of the Draft Additional Protocols to the Geneva Conventions of 12 August 1949*, Doc. CDDH/6, ICRC, Geneva, January 1974.
- 17 *Official Records*, above note 1. Three years after the adoption of the Additional Protocols, a small group of scholars, directed by Professor Michael Bothe, published a commentary on them. See Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, with the collaboration of Martin Eaton, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff, The Hague, 1982. Five years later, the ICRC published its own commentary, essentially written by the ICRC representatives who had served in the various committees and working groups of the Diplomatic Conference in an expert capacity: Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987 (ICRC Commentary on APs). We may also mention three collections of essays which shed light on the works of the 1974–77 Diplomatic Conference and on the interpretation and scope of the Additional Protocols: Charles Rousseau and Michel Virally, “Vers un nouveau droit international humanitaire?”, *Revue générale de droit international public*, Vol. 82, No. 1, 1978; Antonio Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, 2 vols, Editoriale Scientifica, Naples, 1979; Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC, Geneva, and Martinus Nijhoff, The Hague, 1984. For a contemporary assessment of the Additional Protocols, see Giovanni Mantilla, “The Origins and Evolution of the 1949 Geneva Conventions and the 1977 Additional Protocols”, in Matthew Evangelista and Nina Tannenwald (eds), *Do the Geneva Conventions Matter?*, Oxford University Press, Oxford and New York, 2017, pp. 35–68.
- 18 Regarding the price to be paid for a failed codification project, see Richard R. Baxter, “The Effects of Ill-Conceived Codification and Development of International Law”, in *En hommage à Paul Guggenheim*, Faculté de Droit de l’Université de Genève et Institut Universitaire de Hautes Études Internationales, Geneva, 1968, pp. 146–166.

## Issues and perspectives

Two issues dominated the debate: the question of nuclear weapons, and the classification of wars of national liberation.<sup>19</sup>

Right from the initial consultations, the United States and other States that possessed nuclear weapons made it clear that they would not take part in discussions about the legality or illegality of those weapons, which they regarded as the cornerstone of their security policies.

Since negotiations would have made no sense without the involvement of those States, it was vital to work out some compromise. In the end, it was agreed that the legality of nuclear weapons would not be on the Conference's agenda. However, it was also agreed that rules relating to the protection of civilians from the effects of hostilities, which the Conference would review, applied to all weapons, including nuclear weapons.<sup>20</sup> This explains why, in its advisory opinion of 8 July 1996 on the legality of the threat or use of nuclear weapons, the International Court of Justice (ICJ) was able to rely heavily on the provisions of Additional Protocol I (AP I), even though nuclear weapons were not mentioned as such in the treaty.<sup>21</sup>

On the second point – the legal classification of wars of national liberation – it quickly became clear that the grievances of developing countries were deeply rooted in the past. When European countries conquered countries in the Americas, Asia and Africa, they denied indigenous peoples the benefit of the laws and customs of war, on the grounds that such rules only applied between so-called “civilized nations”, not in their dealings with peoples over which they were seeking to assert their authority. Thus, to mention just one example, during the conquest of Algeria (1830–47), the French army applied a scorched-earth policy, destroying villages and crops on a massive scale – a method of combat that, without a doubt, would have been labelled as unlawful had it been used in a war between European countries.<sup>22</sup>

19 Since the two draft additional protocols prepared by the ICRC, which were accepted as the basis for the deliberations of the 1974–77 Diplomatic Conference, covered a wide range of aspects of modern warfare, the Conference was of course confronted with a wide range of issues, such as the law on the conduct of hostilities, guerrilla warfare, the status of captured combatants in irregular warfare, the fate of the missing, the protection of the civilian population against the effects of hostilities, relief operations, blockades, non-international armed conflicts, scrutiny, and repression of violations. Many of these issues led to heated and passionate debate, sometimes concluded by a vote. However, it was widely accepted that attention focused on two key issues that might have wrecked the Conference: the question of the legality or illegality of nuclear weapons, which could have led to the abstention of the United States and other nuclear powers; and the question of the legal qualification of wars of national liberation, which totally dominated the first session of the Diplomatic Conference, right from the opening ceremony, and resulted in a sharp division of the conference and two votes, the second one at the very end of the session. This issue also strongly influenced the debates on a wide range of other matters, such as the status of captured combatants in irregular warfare (Article 44 of Additional Protocol I (AP I)). The votes concluding the first session of the 1974–77 Diplomatic Conference left deep wounds which took a long time to heal, as demonstrated by the refusal of some States to ratify AP I.

20 ICRC Commentary on APs, above note 17, pp. 585–596.

21 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports 1996*, pp. 226–267, esp. pp. 256–260.

22 Alain-Gérard Slama, *La guerre d'Algérie: Histoire d'une déchirure*, Collection La Découverte, No. 301, Éditions Gallimard, Paris, 1996, pp. 16–17; Bruno Étienne and François Pouillon, *Abd El-Kader, le Magnifique*, Collection La Découverte, No. 431, Éditions Gallimard and Institut du Monde Arabe, Paris, 2003, pp. 24–53.

Conversely, when peoples in Asia and Africa took up arms to regain their independence after the Second World War, the colonial powers declared that, since a colonial territory was an integral part of the metropolitan territory, those conflicts were essentially an internal matter subject to the exclusive competence of the State concerned. The colonial powers thus argued either that IHL did not apply to those confrontations, or that such conflicts were only subject to common Article 3, which applied to non-international armed conflicts and extended only minimal protection to captured combatants and civilians. That was the position adopted by France with respect to the Algerian War (1954–62) and by the United Kingdom with respect to the Mau Mau insurrection in Kenya (1952–59).<sup>23</sup>

Based on the peoples right of self-determination, enshrined in the UN Charter and in numerous resolutions of the UN General Assembly, developing countries argued that colonial peoples had a legal personality distinct from that of the metropolitan powers, and that wars of national liberation should therefore be recognized as international armed conflicts, subject to all the provisions of the 1949 Geneva Conventions, and not as non-international armed conflicts governed by common Article 3 alone.<sup>24</sup>

This question totally dominated the first session of the 1974–77 Diplomatic Conference, resulting in a heated debate in which arguments based on *jus ad bellum* – i.e., the question of whether the use of force is lawful – interfered with the debate regarding *jus in bello* – i.e., the question of the limits on the use of armed force.

After a prolonged, impassioned debate, the Diplomatic Conference held two votes resulting in the adoption of Article 1, paragraph 4, of AP I, defining as international armed conflicts those “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination”.<sup>25</sup>

That victory came at a price, however. There is a strong presumption that Article 1, paragraph 4 is the main obstacle which prevented South Africa (until the end of Apartheid), Israel and the United States from ratifying the Additional

23 Françoise Perret and François Bugnion, *De Budapest à Saigon, Histoire du Comité international de la Croix-Rouge*, Vol. 4: 1956–1965, ICRC and Georg Editors, Geneva, 2009, pp. 177–221, 259–268 (English translation forthcoming). See also Fabian Klose, *Human Rights in the Shadow of Colonial Violence: The Wars of Independence in Kenya and Algeria*, trans. Dona Geyer, University of Pennsylvania Press, Philadelphia, PA, 2013, pp. 120–125.

24 Georges Abi-Saab, “Wars of National Liberation and the Laws of War”, *Annals of International Studies*, Vol. 3, 1972, pp. 93–117; Georges Abi-Saab, “Wars of National Liberation in the Geneva Conventions and Protocols”, *Collected Courses of the Hague Academy of International Law*, Vol. 165, No. 4, 1979, pp. 353–445. The president of the Islamic Republic of Mauritania, Mokhtar Ould Dada, specially came to Geneva to address the opening ceremony of the 1974–77 Diplomatic Conference. He forcefully denounced the ongoing colonial situations in Africa, Asia and the Middle East, asserted the right of oppressed peoples to take up arms to recover their independence, and called for recognition of “freedom fighter” status: see *Official Records*, above note 1, Vol. 5, Doc. CDDH/SR.1, pp. 12–14.

25 A first vote took place at the 13th session of Committee I on 22 March 1974; the draft of Article 1, paragraph 4 was adopted by seventy votes to twenty-one with thirteen abstentions. A second vote on Article 1 as a whole took place in the 36th plenary session on 23 May 1977; the article was adopted by eighty-seven votes to one with eleven abstentions. *Official Records*, above note 1, Vol. 8, Doc. CDDH/I/SR.13, p. 102; Vol. 6, Doc. CDDH/SR.36, pp. 40–41.

Protocols of 1977.<sup>26</sup> After all, this provision is based on the concept of “peoples”, which is fraught with uncertainty, as many recent crises around the world have continued to show.

## Achievements and failures

After setting out the main areas of controversy, we can address the third question: what were the main developments and the main shortcomings of the Additional Protocols?

There is no doubt that the main achievement of the 1974–77 Diplomatic Conference was the restoration of the traditional principle of immunity of the civilian population against the effects of hostilities, which was dramatically violated during the Second World War and in many subsequent conflicts.

After long and difficult debates, the Diplomatic Conference adopted detailed provisions on the protection of civilians and on what may appear to be the other side of the same coin – i.e., the definition of combatants and military objectives.<sup>27</sup>

A few years ago, the ICRC carried out an in-depth study on customary IHL involving some 100 highly qualified experts from all over the world.<sup>28</sup> The study showed that the provisions of AP I relating to the conduct of hostilities and the protection of civilians (Articles 35–60) reflected customary international law, either because those provisions codified pre-existing customary rules or because international customs had crystallized around the wording used in the relevant provisions of AP I. This implies that those provisions are binding upon all States, whether or not they are party to AP I.<sup>29</sup>

The study on customary IHL also showed that the customary rules codified by these provisions applied to all armed conflicts, whether international or non-international.<sup>30</sup>

26 George H. Aldrich, “Some Reflections on the Origins of the 1977 Geneva Protocols”, in C. Swinarski (ed.), above note 17, pp. 129–137, esp. p. 136.

27 AP I, Arts 35–60.

28 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study).

29 *Ibid.* See also Jean-Marie Henckaerts, “Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflicts”, *International Review of the Red Cross*, Vol. 87, No. 857, 2005, pp. 175–212; François Bugnion, “Droit international humanitaire coutumier”, *Swiss Review of International and European Law*, Vol. 17, No. 2, 2007, pp. 165–214 esp. pp. 183–190 (English translation: “Customary International Humanitarian Law”, *African Yearbook on International Humanitarian Law*, 2008, pp. 59–99).

30 See the references cited in note 29. For a critical US analysis of the ICRC Customary Law Study, see John B. Bellinger and William J. Haynes, “A US Government Response to the International Committee of the Red Cross Study on Customary International Humanitarian Law”, *International Review of the Red Cross*, Vol. 89, No. 866, 2007, pp. 443–471. For another US analysis of the customary nature of the provisions of AP I relating to the conduct of hostilities, see Michael J. Matheson, “The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions”, *American University Journal of International Law and Policy*, Vol. 2, No. 2, 1987, pp. 419–436. For an analysis by the former head of the US delegation to the 1974–77 Diplomatic Conference, see George H. Aldrich, “Customary International Humanitarian Law – An Interpretation on Behalf of the International Committee of the Red Cross”, *British Yearbook of International Law*, Vol. 76, 2006, pp. 503–524.

This conclusion can easily be explained. Indeed, it would be unacceptable for States to use methods and means of warfare against their own people that they renounced using against a foreign enemy. This had already been clearly stated by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in its judgment of 2 October 1995 in the *Tadić* case:

Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.<sup>31</sup>

This shows the remarkable impact of AP I, which goes far beyond the scope of international armed conflicts alone.

In this author's view, the most painful failure of the 1974–77 Diplomatic Conference concerned Additional Protocol II (AP II), which applies to non-international armed conflicts – i.e., the large majority of conflicts that have taken place since the end of the Second World War. After broad consultations, the ICRC submitted to the Diplomatic Conference a relatively ambitious draft aiming to strengthen the protection of both captured combatants – members of government armed forces and opposition forces alike – and civilians affected by these conflicts.<sup>32</sup> This level of protection was strengthened further during the Diplomatic Conference's debates.<sup>33</sup>

However, once wars of national liberation had been recognized as international armed conflicts, many countries in Asia, Africa and Latin America lost interest in the draft AP II. In addition, several of those countries opposed the adoption of provisions which, they feared, might restrict their ability to quell a rebellion and restore national unity.

As the Diplomatic Conference was coming to a close, it became clear that the draft AP II would not obtain the two-thirds majority required for its adoption. It was then that the Pakistani delegation proposed to replace the draft resulting from work done by the Conference's committees, which consisted of forty-seven articles, with a revised draft containing twenty-eight articles, amputated from all the controversial and most restrictive provisions. With the clock ticking, the Pakistani

31 ICTY, *The Prosecutor v. Duško Tadić a/k/a "Dule"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 119, cited in Marco Sassòli, Antoine Bouvier and Anne Quintin (eds), *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, 3rd ed., Vol. 3, ICRC, Geneva, 2011, pp. 1758–1795, esp. p. 1781.

32 Draft APs, above note 15, pp. 33–46; ICRC Commentary on Draft APs, above note 15, pp. 129–176; *Official Records*, above note 1, Vol. 1, Part 3, pp. 33–46.

33 Doc. CDDH/402. To our knowledge, this document was not reproduced in the *Official Records*. The drafts of the articles adopted by the Conference's three plenary committees can be consulted in the committees' reports, which are reproduced in Volumes 10, 13 and 15 of the *Official Records*, above note 1.



delegation's draft was hastily adopted in an atmosphere resembling liquidation at the lowest price.<sup>34</sup>

Thus, while the original ICRC draft had included several provisions for the protection of captured combatants and other persons deprived of their liberty because of a non-international armed conflict, so as to ensure them humane treatment and minimal guarantees in case of prosecution,<sup>35</sup> AP II does not afford armed combatants – insurgents or members of government armed forces – any effective legal protection in case of capture which might induce them to respect the laws and customs of war.

Indeed, no provision in AP II prevents captured combatants from being subjected to the most severe penalties – including the death penalty, provided they were not below 18 years of age at the time of the offence – simply for taking part in hostilities, either as members of insurgent armed groups or as members of government armed forces.<sup>36</sup> If captured combatants are subject to the most severe penalties simply for taking part in hostilities, violations of the laws and customs of war can in practice no longer be punished, since no additional penalty can be inflicted. Conversely, if combatants – insurgents or members of government armed forces – know that IHL will not give them any effective protection in case of capture, what incentive do they have to comply with that law?

Similarly, the ICRC draft incorporated a provision recalling that all parties enjoyed equal rights and were bound by the same obligations in case of non-international armed conflict, stating: “The rights and duties of the parties to the conflict under the present Protocol are equally valid for all of them.”<sup>37</sup> This draft provision was the expression of the principle of equality of belligerents under the law of armed conflicts, which underlies all of the laws and customs of war.<sup>38</sup>

34 Whereas the 1974–77 Diplomatic Conference's committees had dedicated part or the totality of seventy-seven sessions to examining the ICRC's draft, not to mention countless meetings of various working parties, the plenary committee rushed through its examination of Pakistan's draft in only six sessions. Deferring the adoption of AP II to a fifth session of the Diplomatic Conference or to another conference was no solution either. After four sessions of the Diplomatic Conference, most delegations wanted to conclude and had no interest in another session. It was also obvious that a majority of States would not support the prospect of a diplomatic conference, the main purpose of which would be updating the law applicable to non-international armed conflicts.

35 Draft APs, above note 15, Draft Protocol II, Arts 6–10, pp. 35–36.

36 As demonstrated by the Spanish Civil War (1936–39), nothing prevents insurgents, provided they reach a certain degree of organization, from setting up their own courts and tribunals and from prosecuting their adversaries. Thus, the officers and men who remained loyal to the Spanish Republic were indicted and convicted for armed rebellion by the military courts set up by the insurgents, just as nationalist officers and men were indicted and convicted by the military courts of the Spanish Republic.

37 Draft APs, above note 15, Draft Protocol II, Art. 5, p. 34.

38 The fact that government forces and insurgents find themselves in radically different positions under national law and, in most cases, under public international law does not prevent them from enjoying equal rights and duties under the laws and customs of war. Any other solution would be bound to lead to unrestricted warfare and unrestricted violence, since no force on earth could compel insurgents to respect a set of rules which they would perceive as discriminatory. Furthermore, the distinction between government armed forces and insurgent armed groups may become relative and fluid in case of civil war, either because the international community divides along ideological lines of fracture, with some States recognizing one party as the legitimate representative of the divided State while others recognize the opposite party as such, as was the case for many years with regard to Vietnam, Laos and Cambodia; or because military victory leads to a reversal of legal positions and status, the insurgents taking the place of the former government, as was the case at the end of the Spanish Civil War, following the victory of the insurgents led by Fidel Castro in Cuba in January 1959, following the victory of the Sandinista insurrection in Nicaragua in July 1979, and in several subsequent conflicts.

It was also intended to induce insurgents to respect the laws and customs of war by recalling that they could not claim benefit from such laws and customs without accepting the corresponding obligations. It was also a way of making sure that insurgents would be bound by the Protocol, since neither the draft AP II nor general international law provided them with the possibility of acceding to such a treaty.

This provision was struck down, as were all provisions referring to the rights and duties of insurgents. The results are plain to see.

## Conclusion

There is no doubt that the ICRC made the right decision when it decided to assume responsibility for the preparatory work ahead of the 1974–77 Diplomatic Conference. Not only did this decision enable it to draw from its experience in codifying and developing humanitarian law, but also, because of its work in the field on most theatres of war, it was able to give a voice to victims during the preparatory meetings and then at the Diplomatic Conference itself – even though several participants in the expert meetings and the Diplomatic Conference, as well as some external observers, would have expected the ICRC to speak with a clearer and louder voice when advocating for war victims.

Similarly, there is no doubt that the ICRC was right to aim for the adoption of additional protocols instead of a revision of the 1949 Geneva Conventions. That decision clearly reined in the scope of the negotiations, limited risks and preserved the achievements of the 1949 Diplomatic Conference.

When it comes to weighing up the 1977 Additional Protocols, there are two key developments to bear in mind. First, the long negotiation period leading to the adoption of the 1977 Additional Protocols gave nations that gained independence after 1949 the possibility not only of taking part in drafting the new treaties, but also of shaping them according to their expectations and needs. The debates on wars of national liberation, on the status of combatants in irregular warfare, on the conduct of hostilities and on protections for the civilian population were either largely driven or strongly influenced by third-world countries, which could, when united, ensure through votes the adoption of formula responding to their expectations. These prolonged negotiations allowed those States to take ownership of IHL, which is crucial for ensuring that it is universally accepted, applied and complied with. Second, the Additional Protocols updated the law regarding the conduct of hostilities and restored the principle of immunity of the civilian population against the effects of hostilities, in both international and non-international armed conflicts.

These represent major achievements, and it is therefore fitting that we should celebrate the 40th anniversary of the adoption of the two 1977 Additional Protocols.

# Strengthening resilience: The ICRC's community-based approach to ensuring the protection of education

**Geoff Loane and Ricardo Fal-Dutra Santos**

Geoff Loane is currently Head of Education at the International Committee of the Red Cross (ICRC). He has spent more than thirty years in a variety of operational positions in the field and at ICRC headquarters.

Ricardo Fal-Dutra Santos is a Protection Delegate in the Pretoria Regional Delegation. He was formerly an Associate in the Protection of the Civilian Population Unit of the ICRC, where he worked on child protection issues, including children's access to education.

## Abstract

*Education has received increased attention within the humanitarian sector. In conflict-affected contexts, access to education may be hampered by attacks against and the military use of educational facilities as well as attacks and threats of attacks against students, teachers and other education-related persons. Affected populations may also find themselves unable to access education, for example due to displacement.*

*This article looks into the different sets of humanitarian responses aimed at (1) ensuring the protection of educational facilities and related persons, mostly through advocacy efforts centred on weapons bearers, and (2) (re-)establishing education services where they are not present or are no longer functioning, mostly through programmes directed at affected populations. It then argues that, in contrast with*

*dominant practices, the protection of education can also be ensured through programmatic responses with meaningful participation of affected communities, and examines the example of the Safer Schools programme in Ukraine.*

**Keywords:** education in emergencies, protection of education, community-based responses, Ukraine.

.....

## Introduction

Armed conflict poses serious challenges to children's ability to access education in a safe and nurturing environment. According to the United Nations Children's Fund (UNICEF), there were 27 million children out of school in twenty-four conflict-affected countries as of 2015.<sup>1</sup> Educational facilities, students and teachers have been deliberately targeted – often in violation of international humanitarian law (IHL) – or schools have been used for military purposes by armed actors in seventy countries surveyed between 2009 and 2013, with a significant pattern of attacks observed in thirty of them.<sup>2</sup> Education can also be disrupted as a consequence of displacement,<sup>3</sup> and at times families may leave their homes in search of safe and reliable education for their children.

The impact of conflict on education is primarily a concern of children and parents in humanitarian situations. A report by Save the Children, which analyzed sixteen studies reflecting the voices of 8,749 children, revealed that “99% of children in crisis situations see education as a priority”.<sup>4</sup> The study also takes into account the voices of parents, caregivers and communities from various contexts, which also reflect the understanding of education as a priority, alongside food, shelter and water.<sup>5</sup>

Therefore, it has become increasingly apparent that education is not only a significant issue in the development agenda, but also a humanitarian need in contexts affected by conflict. This has prompted increased attention to education in emergencies in international fora and has generated growing levels of humanitarian response.

The first part of this article argues that lack or disruption of education is a humanitarian concern in two specific ways. The first way focuses on the issue of “the

1 UN Children's Fund (UNICEF), *Education Uprooted: For Every Migrant, Refugee and Displaced Child, Education*, New York, September 2017, available at: [www.unicef.org/media/files/Education\\_Uprooted\\_DIGITAL.pdf](http://www.unicef.org/media/files/Education_Uprooted_DIGITAL.pdf) (all internet references were accessed in April 2018 unless otherwise stated).

2 Global Coalition to Protect Education from Attack (GCPEA), *Education under Attack – 2014*, New York, 2014, p. 8, available at: [www.protectingeducation.org/sites/default/files/documents/eua\\_2014\\_full\\_0.pdf](http://www.protectingeducation.org/sites/default/files/documents/eua_2014_full_0.pdf).

3 See Office of the United Nations High Commissioner for Refugees (UNHCR), *Missing Out: Refugee Education in Crisis*, September 2016, available at: [www.unhcr.org/57d9d01d0](http://www.unhcr.org/57d9d01d0).

4 See Save the Children, *What Do Children Want in Times of Crisis? They Want an Education*, June 2015, pp. 1, 16, available at: [www.savethechildren.org/atf/cf/%7B9def2ebe-10ae-432c-9bd0-df91d2eba74a%7D/WHAT\\_DO\\_CHILDREN\\_WANT1.PDF](http://www.savethechildren.org/atf/cf/%7B9def2ebe-10ae-432c-9bd0-df91d2eba74a%7D/WHAT_DO_CHILDREN_WANT1.PDF).

5 *Ibid.*, p. 11.

protection of education from attack”, including the protection of educational facilities from attacks and military use,<sup>6</sup> as well as the protection of students, teachers and other education-related persons from attacks and threats of attacks. The second way concerns the lack of access to education for populations affected by conflict and violence, for example due to displacement. While the first approach focuses on the impact on existing educational infrastructure, the second looks at areas where such infrastructure is absent or not accessible.

Evidently, insecurity itself, including challenges to the protection of education from attack (first concern), can be a reason why education is inaccessible (second concern); however, the responses to these issues also vary, which makes the distinction between them even clearer. The first set of responses focuses on seeking to ensure the protection of educational facilities and education-related persons. This approach is mostly preventive, and, as will be demonstrated, has been translated largely into efforts targeting authorities and weapons bearers, mostly through advocacy or dialogue. On the other hand, the second set of responses – i.e., to address lack of access to education – focuses on establishing or re-establishing educational services where they are not present or are no longer functioning. This approach is mostly remedial, and it is argued here that it has been the most prominent arena for the proliferation of humanitarian programmes, especially by those in the education in emergencies (EiE) humanitarian sub-sector, targeting populations who lack access to education due to conflict and other emergencies.

Nonetheless, as it will be argued, although focused on the issue of lack of access to education, the EiE sub-sector also offers a basis for programmatic responses to ensure the protection of education from attack, a realm otherwise dominated by authority-centred, advocacy- or dialogue-oriented efforts.

The second part of this paper explores some operational examples of activities implemented by the International Committee of the Red Cross (ICRC) in conflict-affected contexts in favour of education, addressing both the issue of the protection of education from attack and that of lack of access to education. Finally, the ICRC's programmatic response to ensure the protection of education from attack through the case study of the Safer Schools programme in Ukraine will be examined. Special focus will be put on the value of engaging affected populations in such community-based responses.

## Education as a humanitarian concern

In this section it is submitted that education needs are usually responded to through two distinct approaches. The first focuses on attacks against and military use of

6 There is no provision of IHL that specifically prohibits the military use of schools, but such use must be assessed in light of the obligations under IHL that require parties to armed conflict to take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks.

educational facilities and attacks and threats against education-related persons, such as students and teachers. The second concerns the lack of access to education services, which become nonexistent or non-functioning due to conflict and violence.

The first approach gives rise to responses focused on ensuring the protection of education by mitigating the impact of conflict on existing educational systems as well as ensuring the safety of students and education personnel. On the other hand, responses to lack of access to education focus mostly on establishing or re-establishing education services for populations affected by armed conflict (and other emergencies).

Hence, the article will initially explore the development of an international agenda around the protection of education, under which efforts to prevent or mitigate attacks on education have mostly targeted States and non-State armed groups and focused on conduct of hostilities. Following that, it will explore the rise of EiE as a humanitarian sub-sector, with its focus on bridging gaps in the provision of education. Finally, it will discuss the programmatic responses that the EiE sub-sector can inspire to ensure the protection of education. These programmatic responses complement the range of humanitarian activities that can address the issue of the protection of education from attack by adding a programmatic option to existing authority-centred, advocacy- or dialogue-based efforts. At the same time, they also complement the range of programmatic activities targeting education in the humanitarian sector by adding a preventive approach, focused on the protection of education from attack, to the existing remedial approach, focused on re-establishing access to education.

## An issue of increased international concern: the protection of education in conflict situations

Alongside the protection afforded to education under IHL, in recent decades United Nations (UN) initiatives have increasingly sought to strengthen the protection of education in situations of conflict. In 1994, Graça Machel, former minister of education of Mozambique, was appointed to conduct a study on the impact of armed conflict on children.<sup>7</sup> The resulting report highlighted key areas in which children are affected by armed conflict, including education.<sup>8</sup> The report discussed the risks that armed conflict poses to education, due to the damage to which schools are exposed and the difficulties in keeping formal education services running, and observed challenges and opportunities in ensuring children's access to education in times of conflict.<sup>9</sup>

7 *Impact of Armed Conflict on Children: Note by the Secretary-General*, UN Doc. A/51/306, 26 August 1996, para. 1, available at: [www.un.org/documents/ga/docs/51/plenary/a51-306.htm](http://www.un.org/documents/ga/docs/51/plenary/a51-306.htm). See also UN Office of the Special Representative of the Secretary-General for Children and Armed Conflict (SRSG-CAAC), "Timeline", available at: <https://childrenandarmedconflict.un.org/about-us/mandate/history/>.

8 *Impact of Armed Conflict on Children: Report of the Expert of the Secretary-General, Ms. Graça Machel, Submitted Pursuant to General Assembly Resolution 48/157*, above note 7.

9 *Ibid.*, paras 186–202.

While some of the report's recommendations reflected a perspective focused on bridging gaps in access to education, as will be discussed below,<sup>10</sup> the first recommendation called for more active protection of educational facilities from targeting.<sup>11</sup> It was precisely around this rationale of the protection of education that the UN peace and security agenda for children developed, as outlined below.

In 1997, UN General Assembly Resolution 51/77 created the mandate of the Special Representative on the impact of armed conflict on children, and included a request for the Special Representative to prepare annual reports on the situation of children affected by armed conflict.<sup>12</sup> Two years later, in 1999, the UN Security Council (UNSC) adopted Resolution 1261 – the first UNSC resolution on children and armed conflict.<sup>13</sup> Resolution 1261 effectively “placed the issue of children affected by war on the agenda of the Security Council”<sup>14</sup> and identified and condemned grave violations against children in times of conflict, including “attacks on objects protected under international law ... such as schools and hospitals”.<sup>15</sup> It also framed the protection, welfare and rights of children during conflict as a peace and security issue,<sup>16</sup> which was reaffirmed in clearer terms a year later by UNSC Resolution 1314.<sup>17</sup>

Subsequently, in 2005, UNSC Resolution 1612 established the Monitoring and Reporting Mechanism (MRM) and the Security Council Working Group on Children,<sup>18</sup> which “created a channel to link information [on grave violations against children] collected at country level with reporting to the Security Council and to other organizations that can press actors to comply with international child rights and protection standards”.<sup>19</sup> One of the six grave violations against children to be monitored by the mechanism was attacks against schools and hospitals.<sup>20</sup>

10 *Ibid.*, para. 203(a). This is notably the case with regard to recommendations on the provision of educational opportunities for refugee and internally displaced children (para. 203(d)), and on supporting the re-establishment and continuity of education (para. 203(e)).

11 *Ibid.*

12 SRSG-CAAC, above note 7; UNGA Res. 51/77, 20 February 1997, paras 36–37, available at: [www.un.org/documents/ga/res/51/ares51-77.htm](http://www.un.org/documents/ga/res/51/ares51-77.htm).

13 UNSC Res. 1261, 30 August 1999, Item 2, available at: [http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1261\(1999\)&Lang=E](http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1261(1999)&Lang=E).

14 SRSG-CAAC, above note 7.

15 UNSC Res. 1261, above note 13.

16 *Ibid.*, Item 16.

17 UNSC Res. 1314, 11 August 2000, Item 9, available at: [http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1314\(2000\)&Lang=E](http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/1314(2000)&Lang=E).

18 UNSC Res. 1612, 26 July 2005, available at: [http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/RES/1612\(2005\)&Lang=E](http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/RES/1612(2005)&Lang=E).

19 UNICEF and SRSG-CAAC, *Machel Study 10-Year Strategic Review: Children and Conflict in a Changing World*, New York, April 2009, p. 86.

20 The other five grave violations are the killing or maiming of children; recruiting or using child soldiers; rape or other grave sexual violence against children; the abduction of children; and the denial of humanitarian access for children. See *Children and Armed Conflict: Report of the Secretary-General*, UN Doc. A/59/695-S/2005/72, 9 February 2005, para. 68, available at: <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/59/695&Lang=E>.

A more recent stepping stone in the consolidation of education as an issue in the UN peace and security agenda for children was the adoption of UNSC Resolution 1998, which requested the Secretary-General to list parties to armed conflict that engage in “recurrent attacks on schools and/or hospitals” as well as “recurrent attacks or threats of attacks against protected persons in relation to schools and/or hospitals in situations of armed conflict”.<sup>21</sup> The resolution also requests the Secretary-General to continue to monitor and report on (although not to list parties to armed conflict responsible for) the “military use of schools and hospitals in contravention of international humanitarian law”.<sup>22</sup> Since 2011, the MRM has been listing parties to conflict responsible for “attacks on schools and hospitals” on an annual basis.

In parallel to the UN processes discussed above, the issue of protection of education also gained attention amongst civil society, notably through initiatives led by the Global Coalition to Protect Education from Attack (GCPEA). The GCPEA was created in 2010 by a group of international organizations, and is now governed by a steering committee made up of both NGOs and UN agencies.<sup>23</sup> In 2014, the GCPEA released the *Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict* (the Guidelines), which present a range of practical tools for parties to armed conflict with the aim of reducing the military use of schools and universities and minimizing the negative impact such use may have on students’ safety and education.<sup>24</sup> The Safe Schools Declaration,<sup>25</sup> the document through which States can commit to implementing the Guidelines, was open for endorsements on 29 May 2015 and has been supported by eighty-one States as of 4 September 2018.<sup>26</sup> The Guidelines and the Declaration as its supporting document call for armed parties to avoid using educational buildings so as to avoid rendering them lawful targets of attack; to collect data on attacks on educational facilities, victims and the military use of schools and universities; to assist victims; to investigate and prosecute violations of national and international law; and to support programmes working to prevent or respond to attacks on education.<sup>27</sup> The Guidelines and Declaration complement the issue of protection of education featured in the UN agenda for

21 UNSC Res. 1998, UN Doc. S/RES/1998 (2011), 12 July 2011, Item 3, available at: [http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/RES/1998\(2011\)&Lang=E](http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/RES/1998(2011)&Lang=E). The first time the UN Secretary-General was asked to list parties to armed conflict engaged in violations against children was in 2001, concerning child recruitment. See UNSC Res. 1379, UN Doc. S/RES/1379 (2001), 20 November 2001, para. 16, available at: [http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/RES/1379\(2001\)&Lang=E](http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/RES/1379(2001)&Lang=E).

22 UNSC Res. 1998, above note 21, Item 4.

23 GCPEA, “Who We Are”, available at: [www.protectingeducation.org/who-we-are](http://www.protectingeducation.org/who-we-are).

24 GCPEA, “Protecting Schools and Universities from Military Use”, available at: [www.protectingeducation.org/restricting-military-use-and-occupation](http://www.protectingeducation.org/restricting-military-use-and-occupation).

25 GCPEA, Safe Schools Declaration, available at: [www.protectingeducation.org/sites/default/files/documents/safe\\_schools\\_declaration-final.pdf](http://www.protectingeducation.org/sites/default/files/documents/safe_schools_declaration-final.pdf).

26 GCPEA, “Safe Schools Declaration Endorsements”, 4 September 2018, available at: <http://www.protectingeducation.org/guidelines/support> (accessed in September 2018).

27 See GCPEA, *Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict*, available at: [www.protectingeducation.org/sites/default/files/documents/guidelines\\_en.pdf](http://www.protectingeducation.org/sites/default/files/documents/guidelines_en.pdf); see also GCPEA, above note 25.



children and armed conflict inasmuch as they address the issue of military use of educational facilities beyond the letter of IHL, noting that the UN monitors and reports, *inter alia*, cases of military use of schools when in contravention to IHL.<sup>28</sup>

The UN-led initiatives discussed above, as well as the Safe School process that culminated in the Guidelines and the Declaration, approach education in armed conflict from a perspective focused on the way parties to conflict conduct hostilities. These efforts focus on preventing and mitigating the impact of certain behaviour of weapons bearers that pose risks to educational facilities and related persons.

Consequently, this agenda gave rise to a series of efforts centred on authorities – that is, on engaging State and non-State actors in pursuit of their compliance with certain standards aimed at ensuring the protection of education, through specifically designed mechanisms, such as the MRM, and tools, such as the Guidelines and other documents produced by the GCPEA.<sup>29</sup>

Nonetheless, one of the calls in the Safe Schools Declaration is for States to “provide and facilitate international cooperation and assistance to *programmes* working to prevent or respond to attacks on education”.<sup>30</sup> This programmatic response is the approach that this article ultimately seeks to explore.

Before discussing programmatic responses to ensure the protection of education from attack, however, it is necessary to understand the development of humanitarian responses in the field of education more broadly, which have predominantly focused on bridging gaps in access to education.

## Bridging gaps in access to education

Although some humanitarian organizations have been involved in education activities over several decades,<sup>31</sup> in general, humanitarian agencies have been slow to include education in their response to emergencies.<sup>32</sup> As of 2000, only 2% of total humanitarian aid was allocated to education.<sup>33</sup>

It was only in the 2000s that EiE emerged as a sub-sector in the humanitarian platform, with the establishment of the Inter-Agency Network for Education in Emergencies (INEE) in 2000<sup>34</sup> and the publication of the *INEE Minimum Standards for Education in Emergencies, Chronic Crises and Early*

28 UNSC Res. 1998, 12 July 2011, Item 4, available at: [http://undocs.org/S/RES/1998\(2011\)](http://undocs.org/S/RES/1998(2011)).

29 See, for example, GCPEA, *Implementing the Guidelines: A Toolkit to Guide Understanding and Implementation of the Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict*, 2017, available at: [www.protectingeducation.org/sites/default/files/documents/toolkit.pdf](http://www.protectingeducation.org/sites/default/files/documents/toolkit.pdf).

30 GCPEA, above note 25 (emphasis added).

31 A notable example is the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), which has had the task of meeting the demand of Palestine refugees for education since 1950, when the Agency began its operations. See George Dickerson, “Education for the Palestine Refugees: The UNRWA/ UNESCO Programme”, *Journal of Palestine Studies*, Vol. 3, No. 3, 1974, p. 122.

32 USAID, *Education in Crisis Situations: Mapping the Field*, New York, 2005, p. 9, available at: [www.beps.net/publications/EdCrisisFinal.pdf](http://www.beps.net/publications/EdCrisisFinal.pdf).

33 INEE, *INEE Strategic Plan 2008–2010*, 7 January 2008, p. 4, available at: [http://s3.amazonaws.com/inee-assets/resources/doc\\_1\\_INEE\\_STRATEGIC\\_PLAN\\_2008-2010.pdf](http://s3.amazonaws.com/inee-assets/resources/doc_1_INEE_STRATEGIC_PLAN_2008-2010.pdf).

34 USAID, above note 32, p. 10.

*Reconstruction* (Minimum Standards) in 2004.<sup>35</sup> The establishment of the INEE Minimum Standards provided the EiE sub-sector with a clear framework for action, which served as a foundation for the creation of the UN Global Education Cluster in 2006.<sup>36</sup>

Recent developments further contributed to the development of EiE as a sub-sector. In 2012, for the first time, the Global Partnership for Education, which was at the time the world's only global fund for education and primary development actor in education, decided to allow funds to be “dispersed for educating children trapped in humanitarian contexts”.<sup>37</sup> EiE was to re-emerge as a key topic during the consultation process that led to the 2016 World Humanitarian Summit (WHS) and during the Summit itself.<sup>38</sup> The WHS also saw the launch of Education Cannot Wait, “a new global fund to transform the delivery of education in emergencies” with the ambitious aim of providing safe, free and quality education to all children affected by emergencies by 2030.<sup>39</sup>

All of this being said, however, a predominant focus of EiE has been to ensure access to education services for populations affected by humanitarian crises, including conflict. As EiE experts put it, the term “education in emergencies” – or “emergency education”, as it is sometimes referred to – is generally used at the inter-agency level to refer to education in situations where children lack access to education systems, at the national or community levels, due to man-made crises or natural disasters.<sup>40</sup> Differently from the protection approach which seeks to preserve existing education systems during conflict, the EiE sector seems to be mostly focused on establishing or re-establishing education

35 INEE, “History and Development”, available at: [www.ineesite.org/en/minimum-standards/history](http://www.ineesite.org/en/minimum-standards/history). See also INEE, *INEE Minimum Standards for Education in Emergencies, Chronic Crises and Early Reconstruction*, 2004, available at: [www.unicef.org/violencestudy/pdf/min\\_standards\\_education\\_emergencies.pdf](http://www.unicef.org/violencestudy/pdf/min_standards_education_emergencies.pdf); as well as its updated edition, *INEE Minimum Standards for Education: Preparedness, Response, Recovery*, 2010 (2010 Minimum Standards), available at: [http://toolkit.ineesite.org/toolkit/INEEcms/uploads/1012/INEE\\_GuideBook\\_EN\\_2012%20LoRes.pdf](http://toolkit.ineesite.org/toolkit/INEEcms/uploads/1012/INEE_GuideBook_EN_2012%20LoRes.pdf).

36 Education was not initially considered a key sector to be included in the Cluster System when it was created in 2005. For more details on the lengthy process which led to the establishment of the Education Cluster and the involvement of the INEE and Save the Children in those efforts, see Allison Anderson and Marian Hodgkin, *The Creation and Development of the Global IASC Education Cluster*, UNESCO and Education For All Global Monitoring Report, 2010, pp. 1–9, available at: [http://s3.amazonaws.com/inee-assets/resources/Creation\\_and\\_Development\\_of\\_Global\\_Education\\_Cluster.pdf](http://s3.amazonaws.com/inee-assets/resources/Creation_and_Development_of_Global_Education_Cluster.pdf).

37 Brookings Institution, *New Momentum for Global Education and the Post-2015 Development Agenda*, 30 November 2012, available at: [www.brookings.edu/blogs/up-front/posts/2012/11/30-education-winthrop](http://www.brookings.edu/blogs/up-front/posts/2012/11/30-education-winthrop).

38 INEE, “World Humanitarian Summit 2016”, available at: [www.ineesite.org/en/whs-2016](http://www.ineesite.org/en/whs-2016).

39 See the official website of Education Cannot Wait, available at: [www.educationcannotwait.org/](http://www.educationcannotwait.org/); see also INEE, “Education Cannot Wait: A Fund for Education in Emergencies”, available at: [www.ineesite.org/en/education-cannot-wait](http://www.ineesite.org/en/education-cannot-wait).

40 See, for example, Margaret Sinclair, “Education in Emergencies”, in Jeff Crisp, Christopher Talbot and Daiana B. Cipollone (eds), *Learning for a Future: Refugee Education in Developing Countries*, UNHCR, Geneva, 2001, p. 4, available at: [www.unhcr.org/4a1d5ba36.pdf](http://www.unhcr.org/4a1d5ba36.pdf); Susan Nicolai and Carl Triplehorn, *The Role of Education in Protecting Children in Conflict*, Humanitarian Practice Network Paper No. 42, March 2003, p. 2, available at: [www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/520.pdf](http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/520.pdf).

services for populations who have been displaced or are otherwise unable to access education due to armed conflict. Specifically, priority attention seems to have been paid to the education needs of displaced populations<sup>41</sup> and to inclusion strategies aimed at ensuring that education is accessible by specific groups of children who may be denied education due to their status, ethnicity or language. Such groups, in addition to displaced children, include ethnic or religious minorities, children with disabilities and, notably, girls.<sup>42</sup>

The INEE Minimum Standards include key actions focused on bridging gaps in access to education, such as ensuring that “[n]o individual or social group is denied access to education and learning opportunities because of discrimination”, removing “[b]arriers to enrolment, such as lack of documents or other requirements”, and ensuring that “[s]ufficient resources are available”.<sup>43</sup> In practice, organizations such as the Office of the UN High Commissioner for Refugees (UNHCR) and Save the Children implement a range of activities aimed at achieving these goals. These activities include the provision of temporary school facilities (including school tents); school construction; teacher trainings and recruitment; the provision of teaching materials; supporting curriculum development; language trainings, so that children and teachers are able to adapt to environments where the prevailing language is not their mother tongue; and supporting the costs of education.<sup>44</sup> As will be seen below, the ICRC itself also implements some of these activities – notably the provision of teaching materials and supporting the costs of education.

- 41 One of the four types of crises eligible for funding through Education Cannot Wait is “[c]rises with large-scale displacement with affected host populations”. See Education Cannot Wait, “The Situation”, available at: [www.educationcannotwait.org/the-situation/](http://www.educationcannotwait.org/the-situation/). During the WHS, in terms of education in emergencies, particular emphasis was put on displacement settings, “with several significant commitments made to guarantee the provision of quality education for refugees and to bolster education support to refugee-hosting countries”. See WHS, *Commitments to Action*, 8 September 2016, p. 5, available at: [www.agendaforhumanity.org/sites/default/files/resources/2017/jul/WHS\\_Commitment\\_to\\_Action\\_8September2016.pdf](http://www.agendaforhumanity.org/sites/default/files/resources/2017/jul/WHS_Commitment_to_Action_8September2016.pdf). Furthermore, the WHS saw thirty-eight actors, including States, NGOs and international organizations, make seventy-seven commitments related to education. A third of those commitments (i.e., twenty-six, by twenty-one actors) mentioned displacement directly, including references to migrants, refugees, internally displaced persons, host communities and countries, and refugee camps. This is based on a brief mapping, conducted by the authors, of all commitments listed under the category “Education” on Agenda for Humanity’s website. See Agenda for Humanity, “Individual Commitments”, available at: [www.agendaforhumanity.org/explore-commitments/indv-commitments/](http://www.agendaforhumanity.org/explore-commitments/indv-commitments/).
- 42 Susan Nicolai, *Education in Emergencies: A Tool Kit for Starting and Managing Education in Emergencies*, Save the Children, London, 2003, pp. 29–30, available at: [http://toolkit.ineesite.org/toolkit/INEEcms/uploads/1045/Active\\_Learning\\_Diagram.pdf](http://toolkit.ineesite.org/toolkit/INEEcms/uploads/1045/Active_Learning_Diagram.pdf). According to the mapping conducted by the authors, mentioned in above note 41, about 10% of education-related commitments made during the WHS concerned inclusive education – most notably, girls’ education. “Girls’ education and gender issues”, as well as “inclusion and social cohesion”, are also key activities of UNHCR’s Education Strategy; see UNHCR, *2012–2016 Education Strategy*, Geneva, 2012, pp. 15–16, available at: [www.unhcr.org/5149ba349](http://www.unhcr.org/5149ba349).
- 43 2010 Minimum Standards, above note 35, p. 55.
- 44 Save the Children, *Delivering Education for Children in Emergencies: A Key Building Block for the Future*, London, 2008, pp. 8–9, available at: <https://resourcecentre.savethechildren.net/node/2710/pdf/2710.pdf>; UNHCR, above note 42, pp. 11–12, 15–16, 19–20.

## Programmatic responses to ensuring the protection of education

In addition to its focus on responding to humanitarian situations in which children lack provision of education, it is argued that the EiE sub-sector also regards the protection of education from attack as a humanitarian concern, and that EiE activities contribute to the protection of education in situations of armed conflict. In this way, the expertise that this sub-sector has developed offers a basis for programmatic responses to ensure the protection of education from attack.

To start with, the INEE Minimum Standards observe that “[e]ducation facilities can be targeted during conflict or students and education personnel can be attacked on their way to and from school”,<sup>45</sup> and attacks on educational institutions, students and school staff are mentioned throughout the document. In addition, monitoring is one of its standards, and it includes the monitoring of “violations of the safety and well-being of learners, teachers and other education personnel” as well as of the state of education infrastructure.<sup>46</sup> It also emphasizes the need for learning environments to be “free from military occupation and attack”.<sup>47</sup>

Further, during the WHS, attention was given to the issue of protection of education, through mentions of safe education, safe learning environments and the safety of students and teachers in education-related commitments.<sup>48</sup>

In some cases, these mentions of safety referred to threats internal to the school environment, and were often accompanied by a logic preconizing the mainstreaming of protection in EiE activities. As a practical matter, UNCHR’s Education Strategy observes that ensuring that schools are safe learning environments should be of especial concern to organizations which are providing education directly and are engaged in school construction, with special attention paid (but not limited) to the prevention of violence inside schools, “including issues of pedagogy, corporal punishment, peer-to-peer violence, and sexual harassment or exploitation”.<sup>49</sup> Some examples of organizations that take this approach are UNHCR and the International Rescue Committee (IRC),<sup>50</sup> Plan International,<sup>51</sup> and UNICEF.<sup>52</sup>

Nonetheless, in addition to protecting individuals from threats within schools, EiE programmes can also be designed to reduce exposure to external threats – to ensure the safety of students and school staff as well as to preserve the integrity of school buildings. This can be achieved through community-based

45 2010 Minimum Standards, above note 35, p. 3.

46 *Ibid.*, p. 46.

47 *Ibid.*, p. 61.

48 Eight actors mentioned these terms in their commitments to education, according to the mapping conducted by the authors, mentioned in above note 41.

49 UNHCR, above note 42, p. 15.

50 UNHCR and IRC, “Creating Safe Learning Environments: E-Course”, available at: [http://s3.amazonaws.com/inee-assets/resources/SLE\\_e\\_course\\_flyer.pdf](http://s3.amazonaws.com/inee-assets/resources/SLE_e_course_flyer.pdf).

51 Plan International, “Preventing Violence against Girls at School”, available at: <https://plan-international.org/because-i-am-a-girl/violence-at-school>.

52 UNICEF Cambodia, “Safe Learning Spaces”, available at: [www.unicef.org/cambodia/12962\\_19147.html](http://www.unicef.org/cambodia/12962_19147.html).

programmes in which school communities, including students, their parents and school staff, prepare for future emergencies, including by strengthening their resilience and school infrastructure. Such initiatives correspond to a programmatic response to ensure the protection of education.

Some of the commitments made during the WHS reflect this focus. For example, both Save the Children and World Vision endorsed the Key Principles of Community-Based Safe School Construction and committed to adhering to these principles for “every classroom [they] substantially remodel or rebuild”.<sup>53</sup> The Key Principles establish minimum standards of life safety for every new school building to be constructed, as well as for existing school buildings that are to be “strengthened, renovated, remodelled, refurbished or modernised”.<sup>54</sup>

Even more clearly related to the issue of protection of education is the UN Relief and Works Agency for Palestine Refugees in the Near East's (UNRWA) commitment, in the context of the WHS, to recognizing “the importance of schools working hand in hand with the community towards the safety, well-being and learning of its students”,<sup>55</sup> to “ensur[ing] the safety of teachers and other staff and to develop[ing] their capacity to better cope in an emergency.”<sup>56</sup> In fact, UNRWA has already been implementing safety and security measures in its schools in Syria and Gaza, such as the provision of risk education trainings and security training materials, all of which are aimed at reducing the risk exposure of school staff and students.<sup>57</sup>

The INEE Minimum Standards also establish community participation as a foundational standard, and, within that, they recommend the “development, adaptation and delivery of education for disaster risk reduction and conflict mitigation”, drawing upon and strengthening “positive local coping strategies and capacities”.<sup>58</sup> As the Minimum Standards observe, “[b]y participating in problem-solving, decision-making and risk reduction, children and youth can feel less helpless and can contribute to their own well-being”.<sup>59</sup>

53 Agenda for Humanity, “Commitment Description (252018)”, available at: [www.agendaforhumanity.org/commitment/2675](http://www.agendaforhumanity.org/commitment/2675); Agenda for Humanity, “Commitment Description (294016)”, available at: [www.agendaforhumanity.org/commitment/3491](http://www.agendaforhumanity.org/commitment/3491).

54 See Global Alliance for Disaster Risk Reduction and Resilience in the Education Sector, *Towards Safer School Construction: A Community-Based Approach*, 2015, pp. 11–12, available at: [www.gfdrr.org/sites/default/files/publication/45179\\_towardssaferschoolconstruction2015\\_0.pdf](http://www.gfdrr.org/sites/default/files/publication/45179_towardssaferschoolconstruction2015_0.pdf).

55 Agenda for Humanity, “Commitment Description (288019)”, available at: [www.agendaforhumanity.org/commitment/3338](http://www.agendaforhumanity.org/commitment/3338).

56 Agenda for Humanity, “Commitment Description (288026)”, available at: [www.agendaforhumanity.org/commitment/3345](http://www.agendaforhumanity.org/commitment/3345).

57 UNRWA, *Schools on the Front Line: The Impact of Armed Conflict and Violence on UNRWA Schools and Education Services*, 2016, p. 12, available at: [www.unrwa.org/sites/default/files/content/resources/schools\\_on\\_the\\_front\\_line.pdf](http://www.unrwa.org/sites/default/files/content/resources/schools_on_the_front_line.pdf). UNRWA also provides security trainings to staff from Jordan and Lebanon; see UNRWA, “Fostering the Safety and Security of School Communities, UNRWA Runs an Integrated Training Programme for Education Staff and Safety Personnel”, 16 December 2015, available at: [www.unrwa.org/newsroom/features/fostering-safety-and-security-school-communities-unrwa-runs-integrated-training](http://www.unrwa.org/newsroom/features/fostering-safety-and-security-school-communities-unrwa-runs-integrated-training).

58 2010 Minimum Standards, above note 35, p. 30.

59 *Ibid.*, p. 62.

Indeed, activities aimed at preventing harm and contributing to strengthening school communities' resilience, such as mine risk education in schools, have been implemented by organizations such as Save the Children<sup>60</sup> and UNICEF.<sup>61</sup> In addition, the inclusion of disaster risk reduction (DRR) practices in curricula was part of Save the Children's global education strategy from 2012 to 2015,<sup>62</sup> and Plan International has programmes to improve safety in schools in seismic risk zones.<sup>63</sup>

DRR practices can also inform safe behaviours to be adopted by school communities exposed to armed conflict. In fact, the promotion of safe behaviour and evacuation procedures as preparedness for situations of armed violence, part of ICRC programmes in schools in the southern Caucasus, were prepared with the support and expertise of the DRR units of the Armenian Red Cross and Azerbaijan Red Crescent.

This community-based, resilience-strengthening response to education-related needs amidst conflict partially responds to concerns related to the protection of education. By focusing on communities, this programmatic response can complement the engagement with authorities and weapons bearers in ensuring the protection of schools and related protected persons.

The GCPEA, although focused on advocacy efforts vis-à-vis States to ensure the protection of education, has also paid attention to the importance of programmatic responses to the issue. As mentioned above, one of the calls of the GCPEA's Guidelines is for States to "support programmes working to prevent or respond to attacks on education", and the Coalition has produced comprehensive reports on activities that can be implemented at the community level to "protect education from attack and military use".<sup>64</sup> These include examples from contexts such as Afghanistan, the Central African Republic, Côte d'Ivoire, Mali, Pakistan and Thailand, where communities have adopted measures to ensure physical protection, such as the strengthening of school infrastructure; early warning systems, for example through text message services; psychosocial support; and even direct negotiations with parties to conflict, to protect schools from attacks and military use.

60 Save the Children Sudan, "Child Protection", available at: <https://sudan.savethechildren.net/what-we-do/child-protection>.

61 UNICEF Bosnia and Herzegovina, "Mine Risk Education in Schools", available at: [www.unicef.org/bih/mine\\_action\\_3314.html](http://www.unicef.org/bih/mine_action_3314.html).

62 Save the Children, *Moving Ahead on Education: A Focused Strategy for Achieving our Education Goals 2012–2015*, 2012, p. 12, available at: <https://resourcecentre.savethechildren.net/sites/default/files/documents/6526.pdf>.

63 See Plan International, *Policy Brief: Advancing Comprehensive School Safety for Asia and the Pacific*, November 2016, available at: <https://plan-international.org/file/14593/download?token=wOXTzRLd>.

64 See GCPEA, *The Role of Communities in Protecting Education from Attack: Lessons Learned*, New York, 2014, available at: [http://protectingeducation.org/sites/default/files/documents/the\\_role\\_of\\_communities\\_in\\_protecting\\_education\\_from\\_attack.pdf](http://protectingeducation.org/sites/default/files/documents/the_role_of_communities_in_protecting_education_from_attack.pdf); GCPEA, *What Schools Can Do to Protect Education from Attack and Military Use*, New York, 2016, available at: [www.protectingeducation.org/sites/default/files/documents/what\\_schools.pdf](http://www.protectingeducation.org/sites/default/files/documents/what_schools.pdf).

It is precisely this community-based approach to the protection of education in times of conflict that this article now wishes to explore, especially by sharing the ICRC's experience with similar programmes and the expertise developed therein. Before looking into the ICRC community-based response in schools, however, we will offer a brief overview of the organization's engagement in the field of education more broadly.

## ICRC response

Access to education has long been part of the ICRC's strategy on children, and over the years, field delegations have developed and implemented a number of initiatives in different contexts and formats, aimed at responding to challenges in accessing education in situations of conflict. In 2016, the ICRC started a process of consolidating its approach to education in humanitarian settings; this involved consultations with external experts and internal staff, both in the field and at headquarters.

Both in past examples and in the current process of consolidating the ICRC's approach to education as a humanitarian need, there is an emerging consensus within the organization that the ICRC's role is to facilitate access to education, rather than to provide education directly to affected populations. This consensus largely stems from the understanding of the added value and strengths that the ICRC brings to supporting humanitarian initiatives in situations of conflict.

In this section, three dimensions of the ICRC's response are explored. Firstly, the ICRC's authority-centred approach – that is, the dialogue that it has with State and non-State actors on the issue of access to education – is discussed. This approach benefits education both in the sense of protecting it from attack, and from the predominant EiE perspective focused on establishing or re-establishing access to education services. Secondly, the ICRC's activities that also aim to enable access to education by providing direct assistance to affected populations are examined. Finally, the article discusses how the ICRC engages communities with the goal of protecting education, while looking into the specific example of the Safer Schools programme in eastern Ukraine.

## Protection dialogue with authorities and weapons bearers

A key activity of the ICRC's protection work concerns engaging in a confidential dialogue with weapons bearers and authorities in order to prevent and/or end violations of IHL. This work relates to education in humanitarian settings in two ways.

Firstly, whether in times of peace or in conflict, States bear the primary responsibility for providing education to their citizens. Non-State armed groups

are also bound by certain rules regarding education under IHL.<sup>65</sup> From this perspective, the ICRC reminds authorities of their obligations under international law in order to ensure access to education.<sup>66</sup> In this area, the ICRC may request that authorities implement or improve education services, especially for certain groups of children who may face particular challenges in accessing education, such as displaced children and children in detention.

In this case, the ICRC's dialogue with authorities aims to ensure education for populations that do not enjoy access to such service. Therefore, this dimension of the ICRC's authority-centred activities builds on the organization's mission and the obligations of State and non-State actors under IHL, and as seen above it relates more closely to an approach focused on bridging gaps in access to education in humanitarian settings.

Another dimension of the ICRC's engagement with authorities and weapons bearers concerns the issue of protection of education, related to the conduct of hostilities by parties to armed conflict and closely linked to IHL, as seen above.

65 Additional Protocol II to the Geneva Conventions obliges parties to non-international armed conflict – which includes non-State armed groups – to ensure that children “be provided with the care and aid they require”, and in particular that “they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care”. See Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 4.3(a). Furthermore, research shows that non-State armed actors in recent history have provided education or acted as regulators and facilitators of the provision of educational services; see Protect Education in Insecurity and Attack, *Education and Armed Non-State Actors: Towards a Comprehensive Agenda*, 2015, available at: [www.genevacall.org/wp-content/uploads/dlm\\_uploads/2015/12/Geneva\\_Call\\_Paper1.pdf](http://www.genevacall.org/wp-content/uploads/dlm_uploads/2015/12/Geneva_Call_Paper1.pdf). More recently, in a study by Geneva Call, “all interviewed ANSAs [armed non-State actors] affirmed that they would support in some way or another the schools located in the territories where they operate”. Geneva Call, *In Their Words: Armed Non-State Actors Share Their Policies and Practice with Regards to Education in Armed Conflict*, November 2017, p. 8, available at: <https://genevacall.org/new-study-education-conflict-zones-perspectives-armed-non-state-actors/>.

66 Customary IHL relating to children (a norm that is applicable in both international and non-international armed conflicts) dictates that “children affected by armed conflict are entitled to special respect and protection”, and practice indicates that this includes access to education. See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 135. In addition to customary IHL, provisions specific to non-international armed conflict (see above note 65), and to the general rules of IHL that protect students, educational personnel, and educational facilities in the conduct of hostilities, the Geneva Conventions and Additional Protocol I specifically address education with regard to the following situations in international armed conflict: all children under 15 orphaned or separated as a result of war (see Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Arts 13, 24); civilian internees, notably children and young people (GC IV, Arts 94, 108, 142); occupation (GC IV, Art. 50); circumstances involving evacuation of children (Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 78); and prisoners of war (Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Arts 38, 72, 125). Finally, the right to education is also enshrined in several instruments of international human rights law, which also apply in times of armed conflict.



During conflict, both State and non-State actors have the responsibility to minimize the impact of hostilities on civilians and civilian objects.<sup>67</sup> In this regard, the ICRC documents incidents affecting education facilities and related protected persons, and the data collected inform the ICRC's interventions with weapons bearers. Reminding parties to the conflict of their obligations under IHL is a tool through which the ICRC seeks to ensure the protection of students and school staff, as civilians, as well as schools and other educational facilities, as civilian objects – insofar as they preserve their civilian character. When feasible, the ICRC also encourages parties to take measures beyond the letter of IHL, such as preventing the use of schools for purposes that could cause them to lose their protection under the law.

In practice, the ICRC has engaged both State and non-State armed actors on issues such as attacks against schools, military use of schools, and threats against teachers. It has also addressed other factors that restrict access to education during conflict, including location of checkpoints and military facilities in the vicinity of a school, security threats (such as weapon contamination) on school routes, child recruitment and sexual violence, as well as movement restrictions. These efforts are also authority-centred; however, a crucial difference between these and the advocacy work of organizations such as the GCPEA and of the MRM, is that the ICRC's dialogue with authorities and weapons bearers is confidential.

### Direct assistance to school-aged children or their caretakers

Another way in which the ICRC contributes to access to education in humanitarian contexts is through the direct provision of assistance or of specific services to children and their families.

In many conflicts, children do not have access to education for economic reasons, including because their families/caretakers are not able to afford school fees, uniforms and/or other education-related expenses. In such cases, the ICRC may provide school materials as part of aid distributions, or even cover the costs of school fees. For example, in 2015 in Egypt, the ICRC provided economic support to cover school and transportation fees for about 1,000 Syrian children. In southern Russia, the ICRC has provided school kits to over 2,000 displaced Ukrainian children, and in Syria it distributed 100,389 school kits in 2014 alone. The provision of educational materials can also support the education of children in detention, and the ICRC has provided this kind of assistance in the form of one-off distributions, for example, in Israel, Afghanistan and Ethiopia.

67 This responsibility is enshrined in the rules of customary IHL concerning the distinction between civilians and combatants, the distinction between civilian objects and military objectives, indiscriminate attacks, proportionality in attack, precaution in attack, and precautions against the effects of attacks (see ICRC Customary Law Study, above note 66, Chap. I). It is also reflected in AP I, particularly Article 48 (on the principle of distinction), Article 51 (on the protection of the civilian population) and Article 52 (on the protection of civilian objects), as well as in AP II, particularly Article 13 (on the protection of the civilian population).

In some contexts, particularly those affected by displacement, the ICRC may facilitate the transfer of documents required to enrol children in schools in their new place of residence. The organization may also support the transportation of students to and from educational institutions – for example, in 2016 in South Sudan, the ICRC transported twenty-eight internally displaced students from their displacement sites to Juba University, so that they could attend their exams in spite of the fighting.

This response to education needs in humanitarian settings reflects the predominant EiE approach focused on addressing gaps in access to education. It also corresponds to standard EiE activities for populations that lack access to education – notably, the provision of teaching materials and supporting the costs of education.<sup>68</sup>

## Community-based activities

Another pillar of the ICRC's work to ensure the protection of civilians consists of community-based activities, which are built on dialogue with communities themselves and focused on strengthening the resilience of affected populations and their capacity to reduce exposure to threats and to harmful coping strategies. Such activities complement the authority-centred approach seen above and may have a more immediate effect on the protection of schools and communities at risk.<sup>69</sup>

The ICRC's community-based activities are carried out in a multidisciplinary way, building on the specific expertise of different units within the organization's Assistance and Protection Divisions, including Health, Water and Habitat, Economic Security, Detention, Protection of the Civilian Population, and Weapon Contamination. The material assistance provided to affected populations plays a pivotal role in these programmes, as they help achieve protection outcomes by reducing risk exposure. This is precisely the case with regard to the community-based programmes examined in this section.

Community-based activities can help ensure the protection of education by strengthening the resilience of school communities, including students, teachers, school staff and parents, as well as of school buildings themselves. This article will discuss in detail the ICRC's programme in schools in Ukraine, as an example of the organization's community-based approach to protecting education.

Similar community-based programmes targeting schools and school communities particularly exposed to risks have been implemented elsewhere, including Armenia, Lebanon and various cities affected by urban violence in Latin America, such as Rio de Janeiro (Brazil), Guatemala City (Guatemala) and

68 See above note 44.

69 See Angela Cotroneo and Marta Pawlak, "Community-Based Protection: The ICRC Approach", *Forced Migration Review*, No. 53, October 2016, p. 37, available at [www.fmreview.org/sites/fmr/files/FMRdownloads/en/community-protection/cotroneo-pawlak.pdf](http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/community-protection/cotroneo-pawlak.pdf).

Ciudad Juarez (Mexico). However, for the purposes of this article, we will focus on Ukraine because it is a context in which the ICRC has implemented one of its most holistic programmes in conflict-affected schools.

### *The ICRC's Safer Schools programme in eastern Ukraine*<sup>70</sup>

Since April 2014, when the armed conflict began, people in eastern Ukraine, especially those living in proximity to the contact line (the line separating government-controlled from non-government-controlled areas) on both sides, have faced increasing hardships amidst the worsening conflict.

The continuity of education services has also been seriously challenged, particularly along the contact line. According to UNICEF, the area within 5 kilometres of the contact line on the government-controlled side is home to some 54,000 children and 110 educational facilities.<sup>71</sup> The 2018 *Humanitarian Needs Overview* for Ukraine by the UN Office for the Coordination of Humanitarian Affairs (OCHA) reports 700,000 students and teachers to be in need of educational support, including some 220,000 in “immediate need of safe and protective schools to learn and recover”.<sup>72</sup>

The ICRC had a small presence in Ukraine from 1995 until 2011, when it decided to close its presence in the country. In March 2014, with the start of the crisis, the ICRC opened a new delegation in Kiev, gradually expanding its operations to respond to growing humanitarian needs. Offices were opened on both sides of the contact line, in Donetsk, Luhansk, Sieverodonetsk, Sloviansk, Mariupol and Odesa. The delegation's staff has gradually grown to more than 500 people today.

As part of the expansion of its presence and activities in the country, in 2015 the ICRC began to implement a programme aimed at making schools and school communities safer and more resilient to the adverse impact of hostilities.

In its initial phase, up to late 2016, the programme targeted some fifty schools in thirty-one towns and villages in the Donetsk and Luhansk regions. As it evolved, it was named the Safer Schools programme<sup>73</sup> and extended to schools in all five ICRC offices along the more than 450-km contact line.<sup>74</sup>

As will be seen below, the programme, still in place today, has community engagement at its core and is multidisciplinary in nature, involving most of the

70 Unless otherwise indicated, the information in this section pertaining to ICRC programmes in Ukraine comes from internal reports on file with the authors.

71 UNICEF Ukraine, *The Children of the Contact Line in East Ukraine: An Assessment of the Situation of Children and Their Families Living in Government-Controlled Areas Along the Contact Line in the East Ukraine Conflict Zone*, June 2017, pp. 3, 14, available at: [www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/assessments/children\\_of\\_the\\_contact\\_line.pdf](http://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/assessments/children_of_the_contact_line.pdf).

72 OCHA, *Ukraine Humanitarian Needs Overview 2018*, December 2017, pp. 3, 37, available at: [https://reliefweb.int/sites/reliefweb.int/files/resources/humanitarian\\_needs\\_overview\\_2018\\_en\\_20171130.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/humanitarian_needs_overview_2018_en_20171130.pdf).

73 The ICRC Safer Schools programme in eastern Ukraine is not to be confused with the Safe Schools Guidelines initiative led by the GCPEA and outlined previously in the present article.

74 For details of the early stage of the programme, see ICRC, “ICRC Support to Schools and Kindergartens – Eastern Ukraine”, available at: <https://tinyurl.com/yboh9xm8>.

operational departments of the sub-delegations, including Protection, Health, Weapon Contamination, Water and Habitat, Economic Security, and Mental Health and Psychosocial Support.

By the summer of 2015, when the programme started, schools near the front line, in both government- and non-government-controlled areas, had sustained heavy damage – their walls and roofs had been riddled with holes, their windows broken, and their heating and water-supply systems destroyed. While some schools managed to reopen in time for the 2015 school year, others had not resumed classes. As the mother of a student from Marinka, Donetsk region, put it: “We do worry about our children, but we have nowhere to go, the whole family is here. School is the only thing which keeps us going.”<sup>75</sup>

In August 2015, the ICRC conducted focus group discussions with school communities – i.e., directors, teachers, students and their parents – at six schools in Luhansk province. This direct dialogue with affected communities, essential to a community-based approach, was central to the ICRC’s response as it strengthened the organization’s understanding of the challenges faced by communities and the threats to which they were exposed, and of the ways communities were responding to the security challenges affecting schools along the contact line.

Issues raised during the discussions included the schools’ proximity to military positions, access to safe spaces, evacuation procedures, first-aid capacities, routes used by children to and from school, and access to psychosocial support.

The discussions also revealed that community members, including children, knew which areas in their villages and what times during the day were the most dangerous. Community members reported that they were familiar with the warning signs of incoming fire, and that they had learnt to detect the distance and direction of shellfire.

In parallel to this, in July and August 2015 the ICRC conducted a risk assessment of some seventy-seven schools and kindergartens in the government-controlled areas of Luhansk and Donetsk provinces, including nine schools which were no longer operational. The exercise took into consideration the history of incidents (e.g., the last time the school was occupied by armed actors, or experienced shelling), damage (and need of repair), the proximity of military positions, and the presence of explosive remnants of war in the area. In some cases, it also documented the number of students enrolled before the conflict and at the time of the assessment, as well as the amount of time for which students were able to attend classes.

Of sixty-eight schools still operational as of September 2015, the risk assessment classified thirty-four as high-risk due to their location in contact-line areas, vulnerability to shelling, history of direct hits and/or military presence in their vicinities. Twenty schools were considered medium-risk – i.e., were less vulnerable to shelling and/or did not experience shelling within the last three

<sup>75</sup> *Ibid.*

months, and/or had a military presence within 1 to 5 km of their premises (i.e., not in their immediate vicinity).

The information gathered through the group discussions and the risk assessment provided a basis for the ICRC to start what would later become known as the Safer Schools programme in Ukraine, in September 2015.

The paragraphs below intend to provide a general overview of the community-based activities that compose the Safer Schools programme.<sup>76</sup> However, the reader should bear in mind that despite the wide implementation of the programme, the activities were tailor-made according to each school's own problems and challenges. As the head of the ICRC in Sieverodonetsk, Christophe Gravend, explained: "Together with our experts, the parents, children and the schools came up with their own plan to reinforce the safety and well-being of the students."<sup>77</sup>

One of the most widely implemented activities of the programme was school rehabilitation.<sup>78</sup> In terms of the ICRC's community-based activities, this corresponds to a reinforcement of passive security – that is, the adaptation of spaces in the interests of safety. School rehabilitation consists of efforts to repair damage done to educational facilities and/or to strengthen the structure of their buildings, in order to prevent further injury and damage. In order to achieve this, the ICRC has donated waterproofing and construction materials so that affected communities can conduct repairs themselves – only on one occasion did the ICRC conduct repairs itself, on the entrance to a school's bomb shelter. The ICRC has also done rehabilitation work on the water and sewage system of some schools.<sup>79</sup>

School rehabilitation has also involved the donation of basic equipment, such as sandbags, for the reinforcement of windows. The ICRC has also provided and installed, in some cases with the Ukrainian Red Cross, safety film to prevent windows from shattering, should shelling occur.<sup>80</sup>

In this dimension of the programme, communities have been involved not only by carrying out repairs themselves, but also by having a say in how school rehabilitation is done. For example, some schools were reluctant to have their windows reinforced with sandbags, which, as military equipment, seemed incompatible with the school atmosphere. For this reason, in eleven schools the ICRC equipped windows with special panels, made of multiple layers of plywood

76 The authors' detailed understanding of the programme stems from internal reports and a support mission of the ICRC's education adviser to the delegation in Ukraine. This allowed for a categorization of the activities implemented as follows: (1) school rehabilitation; (2) mine risk education and risk awareness; (3) evacuation drills; (4) provision of assistance for emergency preparedness; (5) first-aid trainings; and (6) psychosocial assessments and support for teachers. These are the dimensions of the programme that are explored in the paragraphs below.

77 See ICRC, above note 74.

78 See above note 76.

79 See above note 76.

80 See ICRC, "Ukraine: ICRC Helps Schools Affected by Conflict", 6 January 2016, available at: [www.youtube.com/watch?time\\_continue=7&v=6KVUdjnFoW4](http://www.youtube.com/watch?time_continue=7&v=6KVUdjnFoW4).

and metal, to protect students from shrapnel.<sup>81</sup> Contrary to the sandbags, although just as protective, the panels do allow daylight into classrooms and do not look like military equipment, and they can be painted and decorated, which allows for a better fit with the school environment.<sup>82</sup>

In addition to school rehabilitation, the programme has sought to reduce school communities' exposure to risks by promoting safe behaviours. To that end, the ICRC and the Ukrainian Red Cross have conducted sessions of mine risk education and risk awareness with school communities. Teachers were trained to recognize and manage the risks posed by explosive remnants of war, and children received comics specifically designed for them, explaining the dangers of weapon contamination and giving advice on safe behaviours.<sup>83</sup>

The promotion of safe behaviour also included training children and school staff on what to do in situations of shelling, not only in schools but also along school routes. As the mother of a student notes, "The most dangerous place is the road to the school. ... I always walk with my son to the school and bring him home again. If shooting or shelling starts, I can cover him with my body."<sup>84</sup>

In order to ensure the safety of school communities in case of shelling or shooting, the ICRC also revised schools' evacuation drills. Some communities voiced concern that evacuations could take place in an unplanned way. Most evacuation routes to safe rooms were exposed to risks, either because entrances to basements (which most often served as safe rooms) were located outside the school, or because of large external windows on the route.

In response, the ICRC proposed measures to make evacuation routes safer (such as adding handrails to stairs and other anti-slip measures), or suggested alternative evacuation routes. The ICRC also discussed with communities how warning signals could be integrated into evacuation plans, which in turn could provide school principals with a standard framework for making the decision on whether to order the evacuation.

The Safer Schools programme has also aimed to help school communities prepare for possible emergencies, which has been translated into the direct provision of assistance to schools and kindergartens. Schools have received mattresses, blankets, tarpaulins, fire extinguishers, flashlights, lamps, buckets, jerry cans and/or food supplies not subject to rapid spoilage, such as biscuits and nuts. These materials were used to equip their basements, in case students and school staff had to take shelter for extended periods of time. In some cases, the assistance provided also included water and heating equipment.<sup>85</sup>

In addition, the Ukrainian Red Cross has delivered first-aid trainings to teachers, and sometimes to students, and the ICRC has distributed dressing sets which can be used to tend to the wounded during emergencies.<sup>86</sup>

81 ICRC, above note 74.

82 The school in Novotoshkivske is an example where the special panels were used. See *ibid.*

83 *Ibid.*

84 *Ibid.*

85 *Ibid.*

86 *Ibid.*

By combining trainings with direct assistance, the ICRC, in partnership with the Ukrainian Red Cross, has sought to build school communities' capabilities and capacity to respond to future emergencies. This is an effective approach because it builds on the communities' existing protection strategies, recognizes their agency and ensures their ownership of the programme.

Nonetheless, due to their exposure to conflict over time, community members experience unusually high levels of stress. Communities also reported that children were frightened by the shelling and highlighted the need for additional psychosocial support. Thus, following an assessment of psychosocial needs, school teachers participating in the Safer Schools programme benefited from a related ICRC initiative, called "helping the helpers". Under this activity, the ICRC provided psychosocial support to teachers and trained them in providing such support to students, which helped them deal with students' as well as their own stress.<sup>87</sup>

In parallel to the activities under the Safer Schools programme, the ICRC's presence in Ukraine continues to engage authorities and weapons bearers in the protection dialogue discussed above. Although not focused on communities, such authority-centred efforts complement community-based protection and are relevant in contexts where schools and school communities are exposed to the risks created by armed conflict. The ICRC's dialogue with authorities aims to ensure that schools are respected and spared from the effects of hostilities and that military positions are not in close proximity to schools, which would put them at risk of incidental damage.

### *Strengths and challenges*

The main strength of community-based programmes aimed at mitigating the impact of conflict on schools is community involvement. In the Safer Schools programme, dialogue with communities was key not only during the early stages, when school communities helped the ICRC to understand the challenges they faced, but also throughout the programme's implementation. This allowed communities to have a voice on how to respond to their needs, which in turn allowed for raising concerns that might have otherwise gone unnoticed, such as the impact of using specific equipment to reinforce school structure on the school atmosphere. Such community participation is also essential to ensure that the humanitarian response communities receive is tailored to their specific needs, which is particularly relevant to programmes, such as Safer Schools, implemented in multiple locations across a region. All this reflects the ICRC's view that communities "are the 'experts' on their own situation".<sup>88</sup>

Partnerships with National Red Cross and Red Crescent Societies (National Societies) have also been fundamental in the ICRC's community-based programmes in schools, not only in Ukraine but also in Lebanon and Latin America. In the

<sup>87</sup> *Ibid.*

<sup>88</sup> A. Cotroneo and M. Pawlak, above note 69, p. 36.

example of the Safer Schools programme discussed above, the Ukrainian Red Cross was a key actor in activities conducted directly with the communities, such as mine risk education and first aid trainings. National Societies are valuable assets in the ICRC's response in schools, because of both their proximity to communities and their specific expertise on first aid and disaster risk reduction, which definitely plays a role in mine risk education and the promotion of safe behaviour in schools. Furthermore, the systemization of safety procedures to be adopted by school communities to mitigate the consequences of possible security incidents was initially inspired by Safer Access, a set of guidelines the ICRC created for National Societies to carry out their work in sensitive and insecure contexts.

Finally, as mentioned above, the ICRC's community-based programmes are rich in their multidisciplinary nature, building on the wide range of expertise within the organization. As seen in the Safer Schools programme, the ICRC was able to offer a holistic response to the protection challenges faced by school communities in Ukraine, which allowed it to strengthen communities' resilience and preparedness for emergencies; offer support, including psychosocial, to mitigate the consequences of armed conflict; and strengthen the structure of school buildings and other educational facilities.

One of the main challenges faced by community-based programmes is the risk of losing their community-based nature – especially when they are implemented in multiple locations in the same region. Once consultations are carried out and activities start being implemented in the first few communities, field workers may begin to feel that they already know the problem in that area, which in turn may lead to a less engaged dialogue with additional communities to be included in the programme.

It is crucial, however, that humanitarians continue to engage communities with a “blank page” – that is, that no assumptions are made, reflecting an understanding of every new community as unique in nature. Regardless of how similar the context might be, communities may see their situation in distinct ways, see the problems they face differently, assign different priorities to their needs and challenges, and have a different opinion on the response strategies adopted. Adopting a “blank page” approach keeps the door open for additional activities to be devised and included in the programme, and for improvements to existing ones.

This also applies to the lessons learned from the Safer Schools programme. While the authors hope the practices discussed above can provide some inspiration for humanitarian organizations working in the field of education, or simply on community-based protection, the essence of a community-based response remains the continued dialogue with communities. Therefore, it is not the authors' intention to provide a standard approach to ensuring the protection of education during armed conflict that can be replicated in other contexts. Each response must be based on needs and vulnerabilities, as assessed in and discussed with different communities.

The Safer Schools programme may constitute a good, comprehensive example of community-based response to the risks faced by schools and other



educational facilities exposed to shelling and shooting. Nonetheless, with the above-mentioned concerns in mind, it is important to acknowledge that many of the activities implemented in Ukraine could be problematic, and even increase risk exposure, in contexts where schools are used for military purposes.

The rehabilitation of school structures and the provision of material assistance to equip school basements for future emergencies may make schools more attractive to armed forces or armed groups for use as bases, barracks and temporary shelters, or for other military purposes. In the case of the Safer Schools programme more specifically, the circumstances were favourable to school rehabilitation and emergency preparedness activities because, at the time the programme began, a ceasefire process had started, during which emphasis was put on not using schools for military purposes. Yet, even in contexts where schools are not used for military purposes, a continued dialogue with authorities and weapons bearers is necessary in order to ensure that military positions are not in proximity to schools, as seen above.

The last challenge lies in the fact that such programmes might give a false sense of protection to affected communities, and encourage parents to send their children to schools that are, despite the protective measures implemented, still exposed to risks. Thus, it is essential that before implementing activities, a proper risk assessment is conducted, in order to evaluate whether the activities planned (or even the mechanisms already adopted by communities) can be an effective response. Maintaining a protection dialogue with the parties to the conflict is key in this sense, as it contributes to ensuring security of and around schools.

## **Concluding remarks**

This article sought to distinguish between differentiated approaches to education that have been prominent in the humanitarian field. It sought to show that, while EiE is largely associated with responses addressing gaps in access to education, the sub-sector also focuses on responding to the need to protect education. This latter area of programmatic response complements the advocacy-oriented and authority-centred efforts to ensure the protection of education from attack associated with the UN international agenda for children and the Safe Schools Declaration (and the Guidelines).

The ICRC's response to education needs in humanitarian settings can also be understood in parallel to the distinction between gaps in access to and the protection of education. In terms of bridging gaps in access to education, the ICRC's engagement with authorities is based on their various responsibilities and obligations regarding the facilitation or provision of education. With regard to the protection of education, the ICRC's dialogue with parties to armed conflict relies heavily on IHL (as well as complementary frameworks and standards where relevant), and focuses on the conduct of hostilities in order to prevent or mitigate the impact of armed conflict on school buildings, students and school staff.

In addition to authority-centred efforts, the ICRC also engages communities in both areas. In terms of bridging gaps in access to education, the organization's relation to communities works predominantly in one direction only, as it is based on direct provision of material assistance or other services (such as transfer of documents and transportation of students). In contrast, in seeking to ensure the protection of education the ICRC was able to establish a two-way dialogue with communities, building a deeper and meaningful engagement, as the Safer Schools programme in Ukraine demonstrates.

This is not to say that communities cannot be engaged and involved in programmes aimed at bridging gaps in access to education – this is not only a real and existing approach, but also common in contexts marked by a lack of formal education options, where communities might be directly involved in the provision of informal education.

The ultimate goal of this article was to share the ICRC's experience in the field of education, while emphasizing the potential beneficial relationship between community-based approaches and the protection of education. Although not exhaustive, the authors hope the practices and thoughts shared above can further inform the development of a growing sector.

## REPORTS AND DOCUMENTS



# Announcement: Professor Emiliano Buis and Professor Emanuela-Chiara Gillard join the Editorial Board of the *International Review of the Red Cross*

.....

The editorial team of the *Review* is pleased to announce that Professor Emiliano Buis and Professor Emanuela-Chiara Gillard have joined the journal's Editorial Board.

Emiliano Buis is an associate professor of international law, international humanitarian law (IHL) and the law of disarmament, non-proliferation and weapons control at the University of Buenos Aires Law School, as well as the coordinator of its LLM programme in international relations. He is professor of public international law at the Central University of the Province in Azul, where he is also co-director of the Center for Human Rights. An expert in the historical aspects of the law of armed conflict (especially in ancient times), Emiliano is a permanent researcher in law and philology at the National Council for Science and Technology in Argentina and the director of the seminar on theory and history of international law at the Ambrosio Gioja Research Institute. He is also the academic director of the newly created Observatory of International Humanitarian Law at the University of Buenos Aires. He holds a PhD from the University of Buenos Aires, a master's degree in history and social and human sciences from the University of Paris 1 Panthéon-Sorbonne, a postgraduate

diploma in national defence and two majors in law and classics from the University of Buenos Aires.

Having served from 2007 to 2011 as the legal adviser for the Direction for International Security and Nuclear Affairs at the Argentinean Ministry of Foreign Relations, Emiliano is currently the academic secretary of the *Revista Jurídica de Buenos Aires*. His latest book, *Taming Ares: War, Interstate Law, and Humanitarian Discourse in Classical Greece*, discusses international law, the normative discourse and the legal restrictions in the wars of ancient Greece.

Emanuela-Chiara Gillard is a senior fellow at the Institute for Ethics, Law and Armed Conflict at the University of Oxford. She is also a research fellow in the Individualisation of War Project at the European University Institute, and an associate fellow at the International Law Programme at Chatham House. From 2007 to 2012, she was chief of the protection of civilians section in the policy branch of the Office for the Coordination of Humanitarian Affairs, and for seven years prior to that she was a legal adviser at the International Committee of the Red Cross. She holds a BA in law and an LLM from the University of Cambridge.

Recently, Emanuela has co-authored the *Oxford Guidance on the Law Regulating Humanitarian Relief Operations in Situations of Armed Conflict* with Professor Dapo Akande, and has been working on two Chatham House projects, one on the interplay between sanctions, counterterrorism measures and humanitarian action, and the other on the incidental side of IHL proportionality assessments.

## REPORTS AND DOCUMENTS

# What's new in law and case law around the world?

## Biannual update on national implementation of international humanitarian law\* July–December 2016

: : : : : :

The biannual update on national legislation and case law is an important tool in promoting the exchange of information on national measures for the implementation of international humanitarian law (IHL).

In addition to a compilation of domestic laws and case law, the biannual update includes other relevant information related to accession and ratification of IHL and other related instruments, and to developments regarding national committees or similar bodies on IHL. It also provides information on some efforts by the ICRC

### ICRC Advisory Service

The ICRC's Advisory Service on International Humanitarian Law aims to provide a systematic and proactive response to efforts to enhance the national implementation of international humanitarian law. Working worldwide, through a network of legal advisers, to supplement and support governments' own resources, its four priorities are: (i) to encourage and support adherence to IHL-related treaties; (ii) to assist States by providing them with specialized legal advice and the technical expertise required to incorporate IHL into their domestic legal frameworks;<sup>1</sup> (iii) to collect and facilitate the exchange of information on national implementation measures and case law;<sup>2</sup> and (iv) to support the work of committees on IHL and other bodies established to facilitate the IHL implementation process.

\* This selection of national legislation and case law has been prepared by Estefania Polit, Legal Attaché for the ICRC Advisory Service on International Humanitarian Law, with the collaboration of regional legal advisers.

Advisory Service during the period covered to promote universalization of IHL and other related instruments and their national implementation.

## Update on the accession and ratification of IHL and other related international instruments

Universal participation in IHL and other related treaties is a first vital step toward the respect of life and human dignity in situations of armed conflict. In the period under review, seven IHL and other related international conventions and protocols were ratified or acceded to by sixteen States.<sup>3</sup> In particular, there has been notable adherence to the 1972 Convention on the Prohibition of Biological Weapons. Indeed, six States have ratified the said Convention in the second half of 2016, bringing the number of States Parties as of 31 December 2016 to 178. In addition, five States have acceded to the Arms Trade Treaty during the period in question.

Other international treaties ratified or acceded to during the period under review are also of relevance for the protection of persons during armed conflicts, such as the Optional Protocol to the Convention on the Rights of the Child and the International Convention for the Protection of All Persons from Enforced Disappearance.

The following table outlines the total number of ratifications of and accessions to IHL treaties and other relevant related international instruments, as of the end of December 2016.

### Ratifications and accessions, July–December 2016

Convention	State	Ratification/ accession date	Number of parties
1972 Convention on the Prohibition of Biological Weapons	Angola	26 July 2016	178
	Dominica	1 August 2016	
	Guinea	9 November 2016	
	Liberia	4 November 2016	
	Nepal	4 November 2016	
	Vanuatu	6 September 2016	

- 1 In order to assist States, the ICRC Advisory Service proposes a multiplicity of tools, including thematic fact sheets, ratification kits, model laws and checklists, as well as reports from expert meetings, all available at: [www.icrc.org/en/war-and-law/ihl-domestic-law](http://www.icrc.org/en/war-and-law/ihl-domestic-law) (all internet references were accessed in August 2018).
- 2 For information on national implementation measures and case law, please visit the ICRC National Implementation Database, available at: [www.icrc.org/ihl-nat](http://www.icrc.org/ihl-nat).
- 3 To view the full list of IHL-related treaties, please visit the ICRC Treaties, States Parties and Commentaries Database, available at: [www.icrc.org/ihl](http://www.icrc.org/ihl).

<b>Convention</b>	<b>State</b>	<b>Ratification/ accession date</b>	<b>Number of parties</b>
1999 Second Hague Protocol for the Protection of Cultural Property	Norway	5 September 2016	69
2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict	Pakistan	17 November 2016	166
2003 Protocol V to the Convention on Certain Conventional Weapons on Explosive Remnants of War	Burkina Faso	10 October 2016	92
2005 Protocol Additional (III) to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem	Burkina Faso	7 October 2016	73
2006 International Convention for the Protection of All Persons from Enforced Disappearance	Central African Republic	11 October 2016	54
	Switzerland	2 December 2016	
2013 Arms Trade Treaty	Benin	7 November 2016	91
	Cabo Verde	23 September 2016	
	Guatemala	12 July 2016	
	Madagascar	22 September 2016	
	Republic of Korea	28 November 2016	

## National implementation of international humanitarian law

The laws and case law presented below were either adopted by States or delivered by domestic courts in the second half of 2016. They cover a variety of topics linked to IHL, such as weapons, protection of the red cross and red crescent emblems, missing persons, criminal repression, victims' rights, protection of cultural property, and the establishment of national committees or similar bodies on IHL.

This compilation is not meant to be exhaustive; it represents a selection of the most relevant developments relating to IHL implementation and related issues based on information collected by the ICRC. The full texts of these laws and case law can be found in the ICRC's Database on National Implementation of IHL.<sup>4</sup>

### A. Legislation

The following section presents, in alphabetical order by country, the domestic legislation adopted during the period under review (July–December 2016). Countries covered are Afghanistan, Australia, Colombia, France, Guatemala, Guinea, Mexico, Peru, South Sudan and Sri Lanka.

#### Afghanistan

##### *Law on Regulation Affairs of Red Crescent Society*<sup>5</sup>

On 8 October 2016, the Law on Regulation Affairs of the Red Crescent Society entered into force in Afghanistan. The law is composed of two parts: Part One regulates issues related to the Afghani Red Crescent Society (ARCS), and Part Two deals with the red cross and red crescent emblems. The law was published in *Official Gazette* No. 1228.

Articles 13, 14 and 15 cover the use of the red crescent emblem – protective, indicative and supportive, respectively – as well as its abuse. In particular, Article 13 establishes that the emblem can only be used by ARCS staff and transport, the ICRC and the International Federation of the Red Cross.

Article 14(6) establishes that, under the express authorization of the ARCS, civilian medical personnel, governmental and private-sector clinics assigned to the transport and treatment of the wounded and sick shall, in times of armed conflict, be entitled to wear the protective emblem.

Furthermore, Article 14(8) prescribes that health units of the Ministry of Defence, Ministry of Interior and National Directorate of Security are entitled to use the red crescent emblem, both during armed conflict and peacetime, to mark their medical transport, personnel and units.

4 See the ICRC National Implementation Database, available at: [www.icrc.org/ihl-nat](http://www.icrc.org/ihl-nat).

5 Available at: <https://tinyurl.com/y9d39kot>.



## Australia

### *Criminal Code Amendment (War Crimes) Act, No. 97*<sup>6</sup>

On 7 December 2016, the Criminal Code Amendment (War Crimes) Act 2016 entered into force in Australia. The Act amends Division 268 of the Criminal Code Act 1995, establishing a distinction between civilians and members of an organized armed group and clarifying the principle of proportionality in non-international armed conflict.

Division 268 of the Criminal Code Act 1995 contains a number of war crimes offences that apply in a non-international armed conflict; in particular, sections 268.70, 268.71 and 268.72 apply where the perpetrator causes the death of, seriously endangers the health of, or inflicts severe pain or suffering upon one or more persons not taking an active part in hostilities.

Part I of the Criminal Code Amendment (War Crimes) Act 2016 clarifies that these offences will not be engaged where the person or persons affected are members of an organized armed group. The Act also establishes that the perpetrator will commit an offence under section 268.70 where his or her conduct results in the death of one or more persons who are neither taking an active part in hostilities nor are members of an organized armed group. Furthermore, a new subsection is included through this amendment whereby it is an offence to cause the death of a member of an organized armed group who is *hors de combat*.

Part II of the Act refers to the requirements of the IHL principle of proportionality and clarifies that sections 268.70, 268.71 and 268.72 will not apply to attacks on military objectives which are not reasonably expected to cause civilian death or injury that would be excessive in relation to the concrete and direct military advantage anticipated. Finally, Part III amends section 268.65 and excludes military personnel from the scope of paragraph 268.65(1)(a), which makes it an offence to use protected persons as shields.

## Colombia

### *Law No. 1820 providing for Amnesty, Pardon and Special Criminal Treatment Provisions and Other Provisions*<sup>7</sup>

On 30 December 2016, the Congress of Colombia issued Law No. 1820, which regulates amnesty, pardon and special criminal treatment provisions and other provisions. This law was adopted within the peace agreement process between the government and the Revolutionary Armed Forces of Colombia – People's Army (Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo, FARC–EP).

6 Available at: <https://tinyurl.com/ycpy56qw>.

7 Available at: <https://tinyurl.com/ybe72ayu>.

Article 3 prescribes the scope of application of this law and establishes that it will cover all of those who participated in the armed conflict and that have signed the peace agreement with the government.

Article 8 recognizes political crimes and further prescribes that in conformity with IHL, the Colombian State will grant the broadest amnesty possible at the end of the hostilities, while recalling the Article 10 obligation to investigate and repress violations of IHL and human rights.

In addition, Article 9 establishes that State agents having participated in the armed conflict will not receive amnesty or pardon, and provides for a special, symmetric, simultaneous and equitable criminal treatment which is further detailed in Title IV of this law.

Article 15 refers to amnesties *de jure*, which apply to convicted and not convicted members of the FARC–EP for political crimes and politically motivated crimes, clearly excluding crimes against humanity, genocide, “grave war crimes” and other human rights violations.

According to Article 21, in all cases that are not subject to *de jure* amnesty, the decision to grant amnesties or pardons will be taken within the Special Jurisdiction for Peace, on a case-by-case basis. *De facto* amnesties apply to convicted and not convicted members of the FARC–EP for the same type of crime, also excluding amnesty or pardon for crimes against humanity and gross human rights violations.

Finally, Article 41 provides for the legal effects of such amnesties and prescribes the extinction of the criminal action and sanction against FARC–EP members.

## France

### *Law No. 2016-925 on Freedom of Creation, Architecture and Heritage*<sup>8</sup>

On 8 July 2016, Law No. 2016-92 on Freedom of Creation, Architecture and Heritage was enacted in France. Chapter I, Title II of this law provides for the enhancement of the protection of cultural heritage and the improvement of its promotion.

Article 56 establishes that in cases where cultural property is at risk due to an armed conflict or disaster occurring in the territory of the State which has it under its possession, France, upon request of such a State or when a United Nations Security Council resolution has been adopted, may provisionally offer secured premises to shelter cultural property while informing UNESCO in this regard.

The Act further prescribes that while in deposit in French territory, and with the assent of the State which entrusted the said cultural property, an agreement can be reached to circulate cultural property outside the territory within the framework of the organization of national or international exhibitions intended to make this endangered heritage known.

<sup>8</sup> Available at: <https://tinyurl.com/y9hedrtu>.

## Guatemala

### *Migration Code, Decree No. 44-2016*<sup>9</sup>

On 16 October 2016, the Guatemalan Congress adopted the Migration Code, which restructures the institutions in the migratory system. Besides setting out the rights of migrants, the Code addresses the issue of migrants who have gone missing.

First, Article 166 prescribes for migratory officials and national police to receive training and education regarding the rights of migrants as well as on international human rights law and IHL.

Chapter V of the Code, in Article 198, regulates the procedure for providing care to the families of persons reported as missing due to migration. It establishes that relatives of persons whose whereabouts and fate remain unknown and who have migrated to another country – on a regular or irregular basis – have the right to report this person as missing.

Article 200 further prescribes for the Council for the Protection of Migrants to put in place a system to search for missing migrants, with a view to facilitating the exchange of information with the authorities of the State on whose territory the missing person is presumed to be present. This procedure shall be established in order to obtain information about identified and unidentified deceased persons, persons deprived of liberty, and persons who may find themselves in health or forensic facilities or in places that the host or transit State has set up for the care and shelter of migrants.

## Guinea

### *Law 2016-059/AN on the Criminal Code*<sup>10</sup>

On 26 October 2016, the National Assembly of Guinea adopted Law No. 2016/059/AN on the Criminal Code. The Code defines and establishes the set of rules regulating crimes against persons, including genocide, crimes against humanity, war crimes and crimes of aggression. The Code also regulates the use of weapons.

Book V of Title I of the Code deals with war crimes, crimes of aggression and mercenarism. Article 787 defines war crimes as serious violations of the Geneva Conventions and their Additional Protocols, serious violations of the laws and customs of war applicable in international armed conflicts, violations of common Article 3 to the Geneva Conventions in non-international armed conflicts, and other violations of the laws and customs of war applicable in non-international armed conflict. Articles 788 to 793 further determine the conducts constituting war crimes and transpose provisions of the Rome Statute and the

<sup>9</sup> Available at: <https://tinyurl.com/yavpzckn>.

<sup>10</sup> Available at: <https://tinyurl.com/y7edhj23>.

Geneva Conventions into their text. Furthermore, Article 795 establishes a punishment of life imprisonment for those who commit these acts.

Title II of the Code provides for violations against laws regulating weapons in accordance with the international treaties that prohibit their use in armed conflict: Chapter I prohibits the development, manufacturing, stockpiling and use of chemical weapons; Chapter II deals with small arms and light weapons; Chapter III criminalizes the use, stockpiling, manufacturing and transfer of anti-personnel mines; and Chapter IV provides for the prohibition of cluster munitions. Cyber-criminality is also regulated under this title.

Finally, and simultaneously to the adoption of this Criminal Code, the National Assembly enacted a new Criminal Procedure Code which contains a specific section on procedural aspects with respect to war crimes, crimes against humanity, genocide and crimes of aggression, as well as a section dealing with cooperation procedures with the International Criminal Court. The Criminal Procedure Code further establishes the jurisdiction of national courts over international crimes.

## Mexico

### *Law on Forensic Processes for the Localization, Recovery and Identification of Persons*<sup>11</sup>

On 20 December 2016, the Mexican State of Coahuila promulgated the Law on Forensic Processes for the Localization, Recovery and Identification of Persons. The law was published in the *Official Journal of the State of Coahuila*.

Article 7 of this law provides for the right of missing persons to be searched for. These persons and their families have the right for the authorities to undertake all necessary measures to ensure their protection.

Article 8 further prescribes the right of the deceased person for his or her identity to be established and recognized, through any scientifically approved methods, while ensuring respect of their dignity and securing the return of their human remains to their family. The General Attorney's office, as well as other authorities in the State of Coahuila de Zaragoza, will coordinate and cooperate to achieve this objective.

Articles 10 and 11 establish that information regarding the search process for missing persons and the process for location and identification of human remains should be public and accessible. These provisions also prescribe for the right of the families to be informed about ongoing procedures to find their family member as well as criminal investigations related to the disappearance.

In addition, Article 12 recognizes the right of families of missing persons to know the fate and whereabouts of their missing relatives. Article 23 provides for the protection of data collected within the identification process, information which can

<sup>11</sup> Available at: <https://tinyurl.com/y9qnzavm>.

exclusively be used for the purpose of searching for and identifying missing persons or investigating the circumstances around their disappearance. Article 24 establishes that human remains must be treated in a respectful and decent manner, from the time they are located and in every subsequent procedure, in accordance with the applicable law and local customs.

Finally, Article 29 provides for the establishment of an Information Management System (IMS) on Unidentified Missing and Deceased Persons which, by compiling and processing information, seeks to contribute to the search for missing persons and, in the case of deceased persons, to the full identification and respectful return of the remains to the family. This law regulates the components of the IMS, which include a registry of missing persons, a registry for identified and unidentified deceased persons, a genetic databank, a registry of persons detained in the State of Coahuila, and any other registry that can facilitate the search for missing persons.

## Peru

*Supreme Decree No. 010-2016-MIMP approving the Protocol for the Care of Persons and Families Abducted by Terrorist Groups*<sup>12</sup>

On 28 July 2016, Supreme Decree No. 010-2016-MIMP was issued, approving the Protocol for the Care of Persons and Families Abducted by Terrorist Groups and creating the permanent multi-sectoral commission in charge of following compliance with the Protocol.

Point 3 of the Protocol describes its main objective, which consists of promoting the restitution of the rights and autonomy of the people (including children, adolescents and families) rescued from the control of remnants of the armed group involved in the non-international armed conflict between 1980 and 2000. These vulnerable groups have been subjected to labour exploitation and sexual exploitation at the hands of terrorist groups, as explained under point 7 of the said Protocol.

In addition, point 4 provides for the Prosecutor's Office, specialized in terrorism crimes, to determine whether a person is a beneficiary of the programme or not. Furthermore, point 8 lays out the different stages of the process provided for in the Protocol: emergency response, accessibility to public services as well as programmes, and reintegration of the rescued person into his or her family and community.

Finally, the Protocol defines a terrorist group as a criminal organization made up of two or more persons that perpetrates terrorist acts as specified in Decree No. 25475. According to Article 2 of that decree, this crime consists of acts against life, body, health, freedom and personal safety, or against property or any other goods or services, causing, creating or maintaining a state of anxiety,

<sup>12</sup> Available at: <https://tinyurl.com/ycr29fes>.

alarm or fear in the population (or in a part of it) by using weapons or other means capable of causing serious disturbance of public tranquillity.

*Ministerial Resolution No. 0363-2016-JUS approving the National Plan on the Search for Missing Persons (1980–2000)*<sup>13</sup>

As required by Law No. 30470 on the Search for Persons Disappeared during the 1980–2000 Period of Violence (22 June 2016), on 23 December 2016 the Ministry of Justice issued Ministerial Resolution No. 0363-2016-JUS approving the National Plan on the Search for Missing Persons. The National Plan was prepared by the Working Group in charge of contributing to the implementation process of Law No. 30470.

The Ministerial Resolution acknowledges the suffering of the relatives of persons who went missing during the 1980–2000 period of violence and affirms their right to know the truth regarding the fate and whereabouts of their missing family members. The National Plan annexed to and approved by the Ministerial Resolution seeks to answer and address, in a comprehensive manner, the needs of the families of missing persons, according to Section II.

Section VIII establishes that the National Plan is guided by a humanitarian approach and that it applies in three determined situations: persons whose location is unknown and where there is no information about their whereabouts; missing persons presumed to be buried; and human remains of missing persons that have not been identified or that have not been returned to their communities/families.

Section IV sets out the three strategic objectives of the National Plan, which are to find out what happened to the missing person by exhausting all search efforts, and, if the person is found to be deceased, to recover, identify and return the human remains to the family; to address the psychosocial impact suffered by the relatives as a consequence of the disappearance and due to the search process; and to promote the participation of the families in the search process, which is dependent on their consent and should be based on clear, sufficient and timely information.

Finally, the specific goals, strategies and activities to be reached and performed are set out for each objective.

The Ministry of Justice is in charge of coordinating the implementation of the National Plan as well as other measures<sup>14</sup> provided for by Law No. 30470, such as the creation of a database of genetic profiles of missing persons and their families.<sup>15</sup>

13 Available at: <https://tinyurl.com/y924udqn>.

14 See Ministerial Resolution No. 0363-2016-JUS, Section X, “Implementation”.

15 See Law No. 30470 on the Search for Missing Persons, Second and Third Supplementary Provisions, 22 June 2016, available at: <https://tinyurl.com/ybexc67p>.

## South Sudan

### *Regulations for Restricted Use of the Emblem of Red Cross, Red Crescent and Red Crystal, 2016*<sup>16</sup>

On 15 November 2016, South Sudan's minister of justice signed the Regulations for Restricted Use of the Emblem of Red Cross, Red Crescent and Red Crystal. This regulation contains implementing provisions with regards to the protection of the emblem, already embodied in South Sudan Geneva Conventions Act, which was adopted on 5 June 2012.

Chapter II provides for the use of the emblems as indicative and protective devices, and specifies which entities are entitled to wear the emblems both in time of peace and time of war. In particular, Regulations 4, 6 and 7 provide for the use of the emblems as a protective sign in time of armed conflict by authorized persons, namely medical personnel, medical units and transports of the armed forces. Hospitals and other civilian medical units may use the protective emblems upon authorization from the minister of justice.

Finally, Regulation 10 prohibits the registration of any sign or signal of the red cross, red crescent or red crystal as a trademark or industrial model, and Regulation 11 emphasizes the role of the South Sudan Red Cross and relevant authorities in cooperating to prevent and repress misuse of the emblem.

## Sri Lanka

### *Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No. 14*<sup>17</sup>

On 23 August 2016, the Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act was issued. The Act is divided into sections, including Part I, on the establishment of the Office on Missing Persons (OMP); Part II, relating to the powers and mandate of the OMP; and Part III, which provides for the creation of a Secretariat, Tracing Unit, and Victim and Witness Protection Division.

Article 1 establishes as the objective of the OMP the search for and tracing of persons who have gone missing as well as the implementation of other mechanisms to protect the rights and interests of missing persons and their relatives.

Article 4 provides for the members of the OMP to be appointed by the Constitutional Council and further establishes that eligible candidates must have experience in fact-finding missions or investigation, human rights law, IHL and/or humanitarian response.

Article 10 lays out the functions of the OMP, which include searching for missing persons, coordinating with other organizations, formulating

<sup>16</sup> Available at: <https://tinyurl.com/yd4joj2q>.

<sup>17</sup> Available at: <https://tinyurl.com/y96hf4z6>.

recommendations and collecting data from various sources. In addition, Article 12 prescribes for the investigative powers of the OMP and its authority to receive complaints, statements and inquiries. Article 13 further establishes that, pending an ongoing investigation and where the OMP has sufficient material to conclude that the person to whom a complaint relates is a missing person, the OMP shall issue an interim report to the relative of the missing person which will later enable the registrar-general to issue a Certificate of Absence.

Finally, Article 27 of the Act defines “missing person” as a person whose fate or whereabouts are reasonably believed to be unknown, and who is reasonably believed to be unaccounted for and missing, when they fall into one of the following categories: those who went missing in the course of, consequent to, or in connection with the conflict which took place in the Northern and Eastern Provinces, or its aftermath, or members of the armed forces or police who are identified as “missing in action”; those who went missing in connection with political unrest or civil disturbances; or those who went missing as part of an enforced disappearance as defined in the International Convention on the Protection of All Persons from Enforced Disappearance.

*Registration of Deaths (Temporary Provisions) (Amendment) Act, No. 16 of 2016*<sup>18</sup>

On 9 September 2016, the Registration of Deaths (Temporary Provisions) (Amendment) Act, No. 16 of 2016, was issued, amending Act No. 19 of 2010 (hereinafter referred to as the principal enactment).

Article 1 amends the principle enactment to provide for the registration of persons reported missing as a result of the conflict which took place in the Northern and Eastern Provinces or its aftermath; political unrest or civil disturbances; enforced disappearances; or when dealing with members of the armed forces or police identified as missing in action.

Part IA is inserted into the principal enactment, and Article 8(A–G) therein establishes the process to be followed by a relative of the missing person in order to obtain a Certificate of Absence from the district registrar/registrar-general.

In particular, Article 8(J) provides a list of rights and benefits that relatives of the missing persons are entitled to, once they have obtained a Certificate of Absence, including benefits under social welfare schemes, management of the property and assets of the missing person, and provisional guardianship for dependent children of the missing person.

## **B. National committees or similar bodies on IHL**

National authorities face a formidable task when it comes to implementing IHL within the domestic legal order. This situation has prompted an increasing number of States to recognize the usefulness of creating a group of experts or

<sup>18</sup> Available at: <https://tinyurl.com/y9zr9ub3>.



similar body – often called a national IHL committee or a national commission for IHL – to coordinate activities in the area of IHL. Among other activities, such committees promote ratification of or accession to IHL treaties, make proposals for the harmonization of domestic legislation with the provisions of these treaties, promote dissemination of IHL knowledge, and participate in the formulation of the State's position regarding matters related to IHL. In December 2016, the National Humanitarian Law Committee was established in Papua New Guinea, bringing the total number of national IHL committees across the world to 110 as of December 2016.<sup>19</sup>

## Papua New Guinea

On 28 September 2016, the National Humanitarian Law Committee was established by a decision of the National Executive Committee of Papua New Guinea.

The main function of the National Humanitarian Law Committee is to promote Papua New Guinea's ratification of and adherence to humanitarian treaties, and their national implementation. One of its mandates is to advise the National Executive Council on issues relating to the ratification and implementation of IHL instruments, including by formulating recommendations and proposals in this regard. It also provides support to individuals or agencies involved in IHL matters, including by drafting legislation and developing national positions. In addition, the Committee is in charge of spreading knowledge of IHL and humanitarian principles as well as forging and maintaining relationships with other national IHL committees in the Pacific region, and with the ICRC, on humanitarian issues.

The National Humanitarian Law Committee is chaired by the Department of Justice and the attorney-general and is composed of representatives of the Departments of Justice, Community Development, Defence, Education, Finance, Foreign Affairs, National Planning and Monitoring, and Provincial and Local-Level Government Affairs, and the PNG Defence Force, Royal Papua New Guinea Constabulary, Papua New Guinea National Disaster Centre, National Coordination Office for Bougainville Affairs, University of Papua New Guinea School of Law, ICRC, and Papua New Guinea Red Cross Society, as well as the attorney-general, prime minister and National Executive Council.

## C. Case law

The following section lists, in alphabetical order by country, relevant domestic case law related to IHL and released during the period under review (July–December 2016). Countries covered are El Salvador and Sweden.

<sup>19</sup> To view the full list of national committees and other national bodies on IHL, please visit the ICRC's related webpage, available at: <https://tinyurl.com/y8wbgwx8>.

## El Salvador

*Decision on Amnesties, Supreme Court, 13 July 2016*<sup>20</sup>

**Keywords:** amnesties, war crimes, human rights.

On 13 July 2016, the Supreme Court of El Salvador found the 1993 Amnesty Law to be contrary to El Salvador's Constitution, the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and Additional Protocol II to the 1949 Geneva Conventions (AP II).

The Court referred to Article 6(5) of AP II, which provides that at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict and persons deprived of their liberty for reasons related to the armed conflict. The Court established that this provision is not of an absolute character, as it must be interpreted in light of other international instruments. The granting of amnesties is confined to warlike acts carried out by the parties to the conflict, thus excluding serious and systematic violations of the constitutional order and international law, such as crimes against humanity and war crimes constituting serious violations of IHL.

Taking into consideration the obligations deriving from international human rights law and the Constitution, the Court concluded that the Amnesty Law violated the right to access to justice; that it was contrary to the protection provided by fundamental human rights; and that it was a violation of the right to reparation for victims of crimes against humanity and war crimes. The Court explained that the effective protection of fundamental rights recognized by the Salvadoran legal system is an unavoidable responsibility of the State, even in the context of a non-international armed conflict.

Concretely, the Supreme Court found Articles 1 and 4 of the Amnesty Law – relating to the scope of application and effects of amnesties – to be contrary to the obligation of the State to protect the fundamental rights of persons, as these articles exempt the State from preventing, investigating, trying, punishing and repairing grave violations of fundamental rights. Having declared Articles 1 and 4 unconstitutional, the Court considered all the other provisions contained in the Amnesty Law to be void and consequently declared them unconstitutional “by connection”.

<sup>20</sup> Available at: <https://tinyurl.com/y7doauov>.

## Sweden

*Case No. B 4770-16, Svea Court of Appeal, 5 August 2016*<sup>21</sup>

**Keywords:** war crime, torture, non-international armed conflict, nexus with the armed conflict, Syria.

On 5 August 2016, the Appeal Court of Stockholm convicted Mouhannad Droubi for war crimes committed in Syria and sentenced him to eight years in prison.

During the Syrian civil war, Droubi fought for the Free Syrian Army (FSA) against the government forces loyal to Syrian president Bashar al-Assad. In the summer of 2012, Droubi and other FSA militants assaulted an unidentified man allegedly affiliated with the Syrian army. According to a video uploaded to Facebook, Droubi violently assaulted the victim, who was already injured, and whose hands and feet were tied up. Soon afterwards, Droubi uploaded a video of the incident to his Facebook page.

On 26 February 2015, Droubi was convicted for war crimes and gross assault based on the said Facebook video, as the acts amounted to torture and were inflicted upon a person *hors de combat*. Nonetheless, the case was later reopened after the victim was identified and new evidence surfaced, including the fact that the victim was also an FSA member and was tortured for several days for planning to create a new opposition group.

On the basis of these new facts, the District Court in Huddinge, in a second judgment, considered that although there has been an ongoing non-international armed conflict in Syria, there was no nexus between the act and the armed conflict, as it appeared that the victim was not a pro-regime soldier but a member of the FSA like Droubi himself. The District Court dismissed the war crime conviction and sentenced him for aggravated assault under Swedish law.

On 5 August 2016, the Appeal Court overturned this decision and qualified Droubi's conduct as a war crime. The Appeal Court considered that the first-instance tribunal did not correctly apply the criteria advanced by the International Criminal Tribunal for the former Yugoslavia on the notion of nexus. It held that the torture and ill-treatment to which the victim was subjected was linked to the armed conflict. Droubi was sentenced to eight years in prison, and the Court ordered his deportation following completion of his sentence.

## Other efforts to strengthen national implementation of IHL

To further its work on implementation of IHL, the ICRC Advisory Service organized, in cooperation with respective host States, regional or sub-regional organizations, a number of national workshops and several regional conferences directed at engaging national authorities in the period under review.

21 Available at: <https://tinyurl.com/y7xhe32x>.

On 3 September 2016, the ICRC and the National Judicial Academy of Nepal co-hosted the first ever South Asian Expert Consultation for the Judicial Sector in South Asia, which brought together high-level representatives from the National Judicial Academies of Afghanistan, Bangladesh, Bhutan, India, Iran, the Maldives, Nepal and Pakistan. The event generated useful discussion on potential approaches towards greater integration of IHL into the training of the judiciary and concluded with the adoption, by consensus, of the Kathmandu Declaration, which outlines the commitment of participants to promote IHL dissemination with the judiciary and to pursue further opportunities for peer exchange between National Judicial Academies of the South Asia region.

A similar event was the Expert Consultation on “Respect for International Humanitarian Law – the Role of Magistrates in French-Speaking African Countries”, held in Abidjan, Côte d’Ivoire, from 5 to 8 September 2016. The ICRC and the Organisation Internationale de la Francophonie, in collaboration with the Ministry of Justice and the Ministry of Foreign Affairs of Côte d’Ivoire, hosted this event, which gathered judges, magistrates and other leading legal experts from Benin, Burkina Faso, Burundi, Cameroon, the Central African Republic, Congo, Côte d’Ivoire, the Democratic Republic of the Congo (DRC), Equatorial Guinea, Gabon, Mali, Mauritius, Niger, Senegal and Togo. The Expert Consultation dealt mainly with the role of the judiciary in ensuring respect for and application of IHL.

On 4–5 October 2016, the Kenyan capital of Nairobi played host to an event on the African Union Convention for the Protection and Assistance of Internally Displaced Persons (Kampala Convention), jointly organized by the ICRC and member States of the Intergovernmental Authority on Development (IGAD). The seminar gathered civil servants from various government ministries and departments working on internally displaced persons (IDP) issues from Ethiopia, Djibouti, Kenya, Somalia, South Sudan and Uganda. The main topic on the agenda was the importance of ratifying and implementing the Kampala Convention for IDPs in Africa, and the seminar provided a platform for discussing tools and support systems available to help IGAD member States implement the Convention, including the ICRC stocktaking exercise.<sup>22</sup>

Another event of interest was the 16th Regional Seminar (Central and South Africa) on IHL, co-organized by the ICRC and the South African Department of International Relations and Cooperation, which took place on 23 to 26 August 2016 in Pretoria, South Africa. The event brought together government representatives from Angola, Botswana, Comoros, the DRC, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, South Africa, Swaziland,<sup>23</sup> Zambia and Zimbabwe. The main topics on the agenda were the protection of persons and property in times of armed conflict;

22 The ICRC stocktaking exercise on the Kampala Convention was designed to support the efforts of the African Union and States Parties to the Kampala Convention to fulfil their responsibilities with regard to the monitoring and effective implementation of the Convention. For more information, see ICRC, *Translating the Kampala Convention into Practice: A Stocktaking Exercise*, Geneva, October 2016, available at: [www.icrc.org/en/publication/4287-translating-kampala-convention-practice](http://www.icrc.org/en/publication/4287-translating-kampala-convention-practice).

23 The official name of Swaziland was changed to the Kingdom of Eswatini on 19 April 2018.

IHL and emerging challenges to armed conflict; IHL-related resolutions of the 32nd International Red Cross/Red Crescent Conference; and country reports on national IHL implementation.

Similar regional conferences on various topics were conducted in Cairo, Egypt;<sup>24</sup> Colombo, Sri Lanka;<sup>25</sup> Hiroshima, Japan;<sup>26</sup> Saint Petersburg, Russia;<sup>27</sup> Sarajevo, Bosnia and Herzegovina;<sup>28</sup> and Seoul, South Korea.<sup>29</sup>

Finally, of particular interest was the Fourth Universal Meeting of National Committees and Similar Bodies on IHL, which took place from 30 November to 2 December 2016 in Geneva, Switzerland. It was convened by the ICRC, through its Advisory Service on IHL, and organized with the support of the Swiss Federal Department of Foreign Affairs and the involvement of the Swiss Interdepartmental Committee for IHL and the Swiss Red Cross. The active participation of all attendees, 281 people in total, contributed greatly to the success of the meeting. The event continued the constructive discussions that took place during the previous events, held in March 2002, March 2007 and October 2010.

24 Regional Seminar on Strengthening Legal Protection of Victims of Sexual Violence in Armed Conflicts, Cairo, 21–22 December 2016.

25 Second Regional Drafting Workshop on IHL, Colombo, 4–5 October 2016.

26 11th Southeast and Northeast Asia Session on IHL, Hiroshima, 11–15 July 2016.

27 Conference on “Use of Weapons in Modern Conflicts: Humanitarian Aspects”, Saint Petersburg, 20–21 October 2016.

28 Regional Workshop on the Use and Protection of the Red Cross Emblem, Sarajevo, 6–7 October 2016.

29 Fifth IHL Regional Conference on New Technologies and Weapons, Means and Methods of Warfare and IHL (Asia & Pacific), Seoul, 22–23 September 2016.

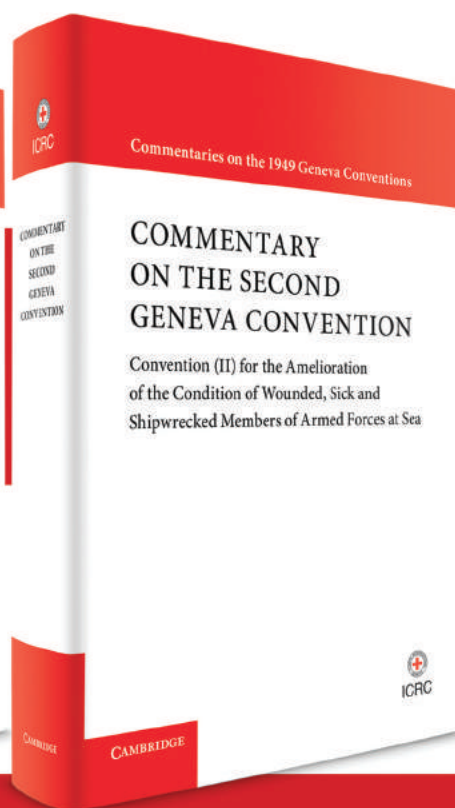
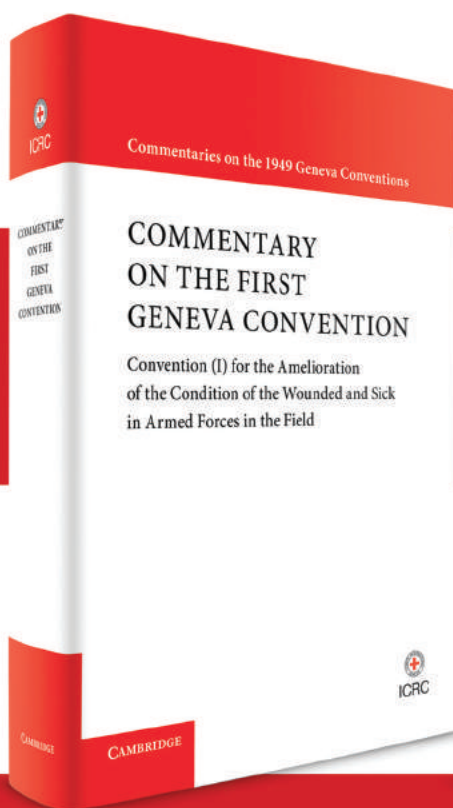


CAMBRIDGE



ICRC

## Explore the new *Commentaries on the 1949 Geneva Conventions* series



**Article-by-article commentaries based on the latest practice, case law, academic critique and ICRC experience**

Go to [cambridge.org/ICRC](https://www.cambridge.org/ICRC)  
for more information

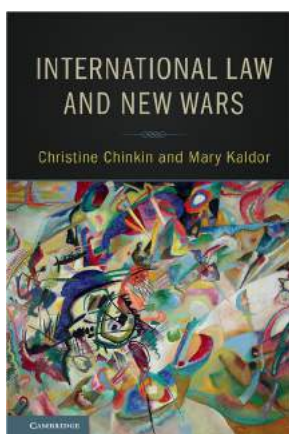


**CAMBRIDGE**  
UNIVERSITY PRESS





## BOOK REVIEW



# International Law and New Wars

**Christine Chinkin and Mary Kaldor\***

**Book review by Daniele Archibugi**, Research Director at the Italian National Research Council and Professor at Birkbeck College, University of London.<sup>1</sup>

: : : : : :

Traditional international law has become incapable of providing a useful normative framework for most of the conflicts of the contemporary world: this is what Christine Chinkin and Mary Kaldor denounce in their impressively fresh book *International Law and New Wars*, a daring venture which will provoke much discussion among theorists and practitioners of global governance. International law as taught in universities is still based on the assumption that States are sovereign and that they can effectively control transnational forces. It is conceived for a world where organized violence is waged by national armies clearly identified by uniforms and hierarchies and where boundaries are patently marked by patriotic flags. The authors argue that international law is less and less able to account for contemporary warfare, where the aggressors are insurgents, terrorists, members of criminal gangs and other groups not affiliated with any State. The book shows that, even when wars have started as inter-State disputes (like those waged in Afghanistan and Iraq), the real problem is not that of achieving a military victory, easily predictable due to the overwhelming might of Western States, but is rather one of administering and guaranteeing safety in the occupied territories after their conquest.<sup>2</sup>

\* Published by Cambridge University Press, Cambridge, 2017.

The book is divided into five parts. The first part provides the general framework, emphasizing the relevance of international law, in particular as a tool for limiting the sovereignty of States to use force. The second part discusses *jus ad bellum*, while the third is devoted to *jus in bello* and demonstrates that current international humanitarian law is ill-fitted to regulate new wars. The fourth part discusses *jus post bellum*, addressing the issue of involvement of a number of actors in delivering peacebuilding, justice and accountability. The fifth and final part wraps up by explaining how current wars require a radical transformation of international law.

The book will likely open salutary discussions on the theory of international law and the practice of humanitarian interventions carried out by military means. Chinkin and Kaldor are well aware that international law often displays a “dark side” by protecting the interests of the powerful and sustaining inequalities,<sup>3</sup> but they are sometimes reluctant to abandon the framework that they so sharply criticize. The subdivision of the substantive part of the volumes into three parts, relating to *jus ad bellum*, *jus in bello* and *jus post bellum*, adopts the organization of the subject by the Italian founder of international law, Alberico Gentili, who already in the 1590s had provided the framework that would become the backbone of legal theorizing about war and peace.<sup>4</sup> It may seem surprising that the authors give credit to Gentili’s predecessor, Francisco Vitoria, and to Gentili’s successor, Hugo Grotius, but not to Gentili himself.

The authors insist that States should no longer be the exclusive authorities in the organization of global commons, and perhaps it is time to move on and to accompany international law with something more specific to human security. Immanuel Kant suggested that public law should be subdivided into three, rather than two, branches: internal law, inter-State law and cosmopolitan law.<sup>5</sup> Under the rubric of cosmopolitan law, he included the rights and duties of humans independently from inter-State relations. Much of the human security approach advocated by Chinkin and Kaldor in the book seems to be an implementation of the Kantian idea of cosmopolitan law.

Chinkin and Kaldor remind the readers that civilians are often the primary victims of conflicts. The authors argue that in the reality of contemporary conflicts, soldiers often commit crimes,<sup>6</sup> which may imply that traditional military methods and the underpinning legal framework have become inadequate to provide what they were expected to deliver, namely security. The authors argue at the same time that security is a highly ambiguous concept. It might, in fact, be interpreted either as security of “the State” from real or illusory rivals and threats, or as security of people, regardless of their belonging to a specific State. The book

1 The author can be reached by email at [daniele.archibugi@cnr.it](mailto:daniele.archibugi@cnr.it).

2 *International Law and New Wars*, pp. 160–161 (on Afghanistan), 194 (on Iraq).

3 *Ibid.*, p. 564.

4 Alberico Gentili, *De jure belli libri tres*, Clarendon Press, Oxford, 1933 (first published 1598).

5 Immanuel Kant, “To Perpetual Peace: A Philosophical Sketch” (1795), in H. Reiss (ed.), *Kant’s Political Writings*, Cambridge University Press, Cambridge, 1991, pp. 99–105.

6 *International Law and New Wars*, pp. 13–16.

explicitly favours the latter interpretation of security and asserts that international law should therefore be reviewed: its main purpose should no longer be to defend the State from real or imagined threats, but should rather be to contribute to human security.

Chinkin and Kaldor provide comprehensive examples where the traditional approach prioritizing the security of the State has been unable to deliver what it promises. In the case of civil wars, such as in Bosnia, Libya and Syria, even for the most powerful members of the international community it may be hard to know *who* and *where* to fight.<sup>7</sup> The doctrine of the responsibility to protect, in spite of its good intentions, has focused on security of the State, and has mostly been performed by States. Therefore, the authors argue, the outcomes of conflicts in Darfur, Libya, Cote d'Ivoire and Mali have been bitterly disappointing.<sup>8</sup>

When able to identify an enemy to target, as occurred in Libya and Syria, some States have assumed that security problems could be resolved through military intervention, which has been narrowly understood as air strikes.<sup>9</sup> The book raises the question of whether air strikes, the most common warfare method, are appropriate to achieve and protect human security.<sup>10</sup> While using air strikes seems to be the most convenient form of intervention for powerful States since it allows them to exploit their military and technological capabilities without the dangers associated with putting “boots on the ground”, it may not be the best way to guarantee security of the population at large. Chinkin and Kaldor argue that in spite of its increased technological precision, aerial warfare is likely to violate the basic principle of international humanitarian law, namely the distinction between combatants and civilians.<sup>11</sup> Instead, the authors advocate for a different approach to humanitarian interventions.<sup>12</sup> The approach suggested in the book is based on the tenet that the international community should endeavour to protect civilians through cooperation with local networks and organizations.<sup>13</sup> While the interventions would not necessarily exclude the use of military means, the principal aim would not be that of striking an enemy, but would rather be that of protecting endangered populations. Chinkin and Kaldor claim that their view is far from idealistic and that it is, on the contrary, the most pragmatic way to guarantee peace and security.

The practical implications of this work bring the readers back to the hard political reality. While the authors claim the rights of *persons* – as opposed to that of States' citizens – should be protected, they do not provide a comprehensive response to the parallel issue: who has the corresponding *duty* to protect individuals when a State proves unable to perform its tasks? The availability of

7 *Ibid.*, pp. 249, 255.

8 *Ibid.*, see Section 5.3.3, “The Responsibility to Protect in Action”, pp. 202–211.

9 *Ibid.*, pp. 206, 538.

10 *Ibid.*, pp. 206, 538.

11 *Ibid.*, p. 538.

12 *Ibid.*, pp. 224, 539. The fifth part of the book in particular is aimed at reconstructing international law on the grounds of the analysis previously carried out; see pp. 477–564.

13 *Ibid.*, pp. 518–519.

armies and police forces, as well as humanitarian assistance staff and fire brigades, very much depends on the willingness of States to provide them. Even the Blue Helmets, which in principle should be provided by the United Nations (UN) as such, are in fact national troops of contributing States. The authors refer to the role that UN agencies and non-governmental organizations have played in preventing conflicts and mitigating human suffering,<sup>14</sup> and while they claim that global civil society can play a largely political role by influencing international institutions,<sup>15</sup> Chinkin and Kaldor do not discuss how the former can be empowered. At the same time, UN agencies and non-governmental organizations do not yet have the required muscle and, unfortunately, are too weak to manage large conflicts without the active support of States. The normative implication of the book can therefore be read as a plea to grant more resources and functions to international organizations and global civil society.

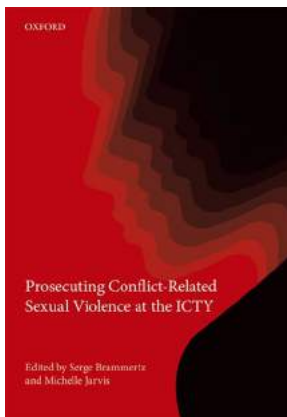
The book provides powerful arguments to show that the traditional international law framework is inadequate to regulate contemporary conflicts. It also meticulously identifies and discusses the instruments that international law can provide in order to enhance human security. Will governments be prepared to listen and to act, or will they continue to take action *ex-post* only, when the costs of managing global crises might have become much higher? According to Thomas Hobbes, a thinker highly sceptical about the potential of international law, “[c]ovenants, without the sword, are but words”.<sup>16</sup> History has partially reversed such dry wisdom, and on some occasions the might of States has effectively been tamed by international law. Chinkin and Kaldor provide powerful intellectual tools to help readers embrace the reality and challenges of contemporary conflicts.

14 *Ibid.*, pp. 378–429.

15 *Ibid.*, p. 558.

16 Thomas Hobbes, *Leviathan*, Cambridge University Press, Cambridge, 1996 (first published 1651), p. 117.

## BOOK REVIEW



# Prosecuting Conflict-Related Sexual Violence at the ICTY

**Serge Brammertz and Michelle Jarvis (eds)\***

Book review by **Silke Studzinsky**, Lawyer.

⋮ ⋮ ⋮ ⋮ ⋮

When this book reviewer started working as an international lawyer for civil parties before the Extraordinary Chambers in the Courts of Cambodia (ECCC) in early 2008, she was surprised that investigations into sexualized violence crimes were not being conducted. This lack of action was mainly due to the misconception that while the Khmer Rouge regime was brutal, it was innocent with regard to the commission of sexualized violence crimes. Hence, the prosecution concluded that there was a lack of evidence and felt obliged to focus on the investigation of an estimated 1.7 million killings and deaths as a priority. Although many staff members of the Office of the Co-Prosecutors had a background in the International Criminal Tribunal for the former Yugoslavia (ICTY) and/or the International Criminal Tribunal for Rwanda (ICTR) and had gathered experience in the prosecution of conflict-related sexualized violence, this experience was not transferred to the ECCC. It was only through the efforts of civil parties and their lawyers that at least the policy of forced marriages was later included in investigations at the ECCC and eventually became one of the charges in the indictment. Moreover, interpreters were exclusively male, as were most of the investigators. The first training on the conduct of investigations of sexualized violence only took place after the investigations into the two main cases were concluded. This clearly shows that the course for the lack

\* Published by Oxford University Press, Oxford, 2016.

of investigations to sexualized violence crimes is set right at the beginning, when strategies and priorities are determined.

*Prosecuting Conflict-Related Sexual Violence at the ICTY*, edited by Serge Brammertz and Michelle Jarvis, with contributions from fourteen authors (including the editors) and counting nearly 500 pages, sheds light on almost all aspects of the challenges related to the prosecution of conflict-related sexualized violence<sup>1</sup> at the ICTY, offering responses and solutions.

Through their roles as prosecutor and deputy prosecutor of the ICTY respectively, the two editors were able to rely on their rich practical experience in the prosecution of conflict-related sexualized violence. The authors of the chapters are all former or current members of the Office of the Prosecutor (OTP), with equally rich experience with respect to the topic of the book. Each chapter looks at and analyses different aspects of the prosecution of conflict-related sexualized violence.

The book aims to compile a record of the experiences of the OTP regarding the prosecution of sexualized violence at the ICTY, documenting the experiences, achievements, challenges and practical insights of the OTP. The common aim of all the authors is to improve future investigations and prosecutions of conflict-related sexualized violence; they describe successes and shortcomings without hiding or embellishing them, they outline the developments of the past two decades, and they explain the conclusions that may be drawn from the findings obtained.

Most of the chapters of the book are based on interviews with insiders and members of the Prosecuting Sexual Violence Working Group (PSVWG).<sup>2</sup> Interviews with investigators, interpreters, prosecutors, analysts, members of senior management and members of the Witness and Victims Section enrich the book with their first-hand insight and knowledge. In addition, according to the authors, the book benefits from the inputs of external experts.

The authors acknowledge that they did not include a specific chapter on investigations in order to avoid duplication, but that the book is built on existing resources in this regard. Likewise, the book does not contain a separate section on the elements of crimes of sexualized violence because the authors do not want to repeat the work of others.<sup>3</sup>

1 The reviewer prefers the term “sexualized” over “sexual” to express that these crimes are not of a sexual nature, but of a violent one.

2 The PSVWG was founded in 2009 in order to improve the prosecution of conflict-related sexual violence. For more information, see ICTY, “Information Sheet: Prosecuting Sexual Violence Legacy Project”, Office of the Prosecutor, May 2015, available at: [www.icty.org/x/file/Outreach/sv\\_files/psv\\_legacy\\_project\\_is.pdf](http://www.icty.org/x/file/Outreach/sv_files/psv_legacy_project_is.pdf) (accessed in March 2018).

3 To name but a few, the OTP of the ICTR published a manual on best practices from lessons learned from the investigation of sexualized violence crimes: ICTR, *Best Practices Manual for the Investigation and Prosecution of Sexual Violence Crimes in Post-Conflict Regions: Lessons Learned from the Office of the Prosecutor for the International Criminal Tribunal for Rwanda*, 2014; see also Maria Nystedt (ed.), Christian Axboe Nielsen and Jann K. Kleffner, *A Handbook on Assisting International Criminal Investigations*, Folke Bernadotte Academy and Swedish National Defence College, 2011; United Kingdom Foreign and Commonwealth Office, *Second Edition of the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict*, 2016; Women’s Initiatives for Gender Justice, *Gender in Practice: Guidelines and Methods to Address Gender Based Crime in Armed Conflict*, 2005.

The experiences described in the book rely on the specific legal and factual framework of the ICTY. Therefore, several findings only apply to the specific setting of the ICTY (for example, the possibility of amending the indictment, which is not possible for the “Document Containing the Charges” at the International Criminal Court). Any lessons drawn for the prosecution of such crimes in a different legal setting need to be adjusted to any other framework as appropriate, whether international or national.

The book consists of eleven chapters. Each chapter is followed by a very comprehensive and exhaustive summary and conclusion section with recommendations, which is akin to a checklist and is a very useful tool for practitioners. Furthermore, an inclusive table of relevant cases from international, regional and national courts and tribunals, with references to a variety of international, regional and national instruments, is provided.

In the first chapter, Michelle Jarvis describes the overarching main findings and the required hypotheses when starting investigations and prosecution. The first is that sexualized violence is committed during a conflict and is usually connected to the conflict. The second is that prosecution of sexualized violence is core for the work of any prosecution office and should not be treated differently to other crimes.

The book then looks at different aspects of the prosecution of conflict-related sexualized violence, identifies the challenges involved and offers responses and solutions for how to overcome obstacles and establish accountability for these crimes.

Following Jarvis’s introduction, the chapter by Grace Harbour puts sexualized violence into the context to which the subsequent chapters refer, examining the background of the perception of sexualized violence prior to the mandate of the ICTY and providing insight into a variety of reports that existed back then. It is important to note that reports of sexualized violence in the former Yugoslavia were among the primary concerns of many stakeholders, including the UN Security Council, eventually leading to the creation of the ICTY. Therefore, the concern with respect to such violence influenced the legal framework of the ICTY. This demonstrates that one of the reasons why the ICTY was mandated with the prosecution of sexualized violence was the existence of many reports<sup>4</sup> on the overwhelming amount of sexualized violence committed during the conflict in the former Yugoslavia.

The third chapter, by Michelle Jarvis and Kate Vigneswaran, deals with the barriers and misconceptions (a collection of the latter is based on interviews with OTP staff) which, combined with the broad discretion on the side of the OTP, negatively influence the prosecution of conflict-related sexualized violence.<sup>5</sup>

False assumptions need to be identified, addressed and overcome. The chapter shows that not only staff but also the senior management within a

4 *Prosecuting Conflict-Related Sexual Violence at the ICTY*, pp. 24–28.

5 *Ibid.*, pp. 34–42. A few examples of these assumptions and misconceptions: rape is more a sexual matter involving honour than it is a violent crime; sexualized violence is not as serious as other crimes; sexualized violence is “personally motivated” and/or “opportunistic” (this misconception poses an insurmountable problem when sexualized violence needs to be linked to senior officials); sexualized violence can only be prosecuted if it was committed in a systematic/widespread manner or committed pursuant to an order.

prosecution office need guidance and clear policies regarding how, when and why to prioritize the prosecution of conflict-related sexualized violence. In addition, as the chapter points out, courts and tribunals are subject to various types of pressure, be it political, technical or financial, and they ought to be detected and properly responded to.

Another barrier to successful prosecution of sexualized violence is the use of prosecutorial discretion, which is a demanding challenge. Thus, there is a need for setting up strategies and policies at the outset of any investigation, communicating them among all of the actors involved, and subjecting their implementation to continuous internal review and monitoring.

Jarvis and Vigneswaran also discuss in detail the phases of an investigation and trial, highlighting the stumbling blocks that the ICTY has faced over the past two decades and how they were addressed. The cutting of sexualized violence charges has occurred at several stages, for example, in the characterization of sexualized violence under “umbrella charges”, in the reduction of charges upon a chamber’s request and in the bargaining away of sexualized violence charges in guilty pleas. Being conscious and aware of the risks and having strategies in place in advance leads to a more representative and adequate prosecution of these crimes.

Chapter 4, by Michelle Jarvis and Najwar Nabti, is one of the key chapters, as it sets out in detail the institutional strategies and policies that the OTP has developed to overcome these obstacles and to successfully prosecute perpetrators of conflict-related sexualized violence on all levels. It provides for a comprehensive collection of said strategies and policies, which any prosecution office should establish and enforce in the future.

The OTP has found that a multifaceted approach is required. It is key to institutionalizing a gender policy to be applied office-wide and across teams and departments; this task should not be left to the gender adviser. Comprehensive training, awareness and knowledge of the office culture, including recruitment and gender parity, are likewise crucial for the implementation of these strategies and policies.

The fifth chapter, written by Priya Gopalan, Daniela Kravetz and Aditya Menon, discusses in detail how sexualized violence can be successfully proved beyond a reasonable doubt in the courtroom. It focuses on the victims and witnesses and their individual treatment. This chapter refers to a variety of practical examples from ICTY cases. In addition, the use of different types of evidence, such as expert, forensic and documentary, increases the success of any such prosecution.

Chapters 6 and 7, written by Laurel Baig, Michelle Jarvis, Elena Martin Salgado, Guilia Pinzauti and Barbara Goy, give an insight into how to contextualize sexualized violence. This may be done through the selection of crimes and their placement into the context of other violent crimes, such as persecution and genocide, as well as through the careful selection of the appropriate modes of liability in order to best impute the commission of sexualized violence to senior officials. These chapters further extensively discuss how to establish the foreseeability of sexualized violence crimes. This is very



useful for practitioners, who may follow the framework of foreseeability questions, which may be used as a checklist of indicators.

In Chapter 8, Laurel Baig looks into the practice of sentencing for sexualized violence crimes and offers recommendations for sentencing arguments for such crimes and any specific aggravating and mitigating factors. The ICTY's power to order the restitution of property has never been exercised. The authors recognize that the OTP should have requested such orders more vigorously and appealed rejections by chambers, and that it should also have better informed victims about their national avenues.

Chapter 9, by Saeeda Verrall, presents an overview of sexualized violence in the conflicts in the former Yugoslavia as reflected in ICTY judgments, as well as an analysis of how a more complete presentation may be achieved in future judgments.

The chapter by Serge Brammertz, Michelle Jarvis and Lada Šoljan focuses on capacity-building in national jurisdictions and the challenges related thereto. The OTP has increasingly developed a strategy for national capacity-building, but this needs to be comprehensive, structured and effective and should not just be an *ad hoc* initiative. The OTP has observed that, in national proceedings, the prosecution of sexualized violence is negatively affected by misconceptions about the nature of the crimes in question – namely, similar misconceptions and wrong assumptions encountered at the ICTY are repeated on the national level. Hence, there is room for improvement and the strengthening of capacity-building in national courts.

With regard to compensation, the OTP has realized that the existence of a comprehensive compensation framework is necessary. Such possibilities at the domestic level are limited, complicated and, often, hardly accessible for victims, especially those of sexualized violence. Even if convicted persons are ordered to pay compensation as part of national criminal proceedings, they might be unable or unwilling to pay. Therefore, an administrative framework providing compensation from the State is necessary. In Croatia, Bosnia and Herzegovina and Serbia, such laws have been adopted, but have deficiencies.

However, the reference made by the authors to the Kosovo legal framework of compensation for war victims, including sexualized violence, fails to mention the limitations of this law.<sup>6</sup> This reviewer suggests that in the future, the prosecution should hire specialized staff for matters of reparation. These staff should advise on the reparation framework of a criminal court (if applicable), possible referrals and any administrative reparation mechanisms in the respective country, and how to best serve the victims.

The authors conclude that the intersection between prosecuting and preventing sexualized violence is important. Thus, being more proactive in giving notice to commanders and military and political leaders to prevent sexualized violence could be a crucial area for the prosecution. At the same time, prosecution is but one part of the process in sexual violence trials. Ensuring

6 Republic of Kosovo, Law No. 04/L-172 on Amending and Supplementing Law No. 04/L-054 on the Status and the Rights of Martyrs, Invalids, Veterans, Members of the Kosovo Liberation Army, Sexual Violence Victims of the War, Civilian Victims and their Families, 20 March 2014.

fairness and due process also requires an effective and learned defence, as well as proper victim support at all times.

Annex A of the book contains extracts from judgments, while Annex B provides an overview of charges and outcomes in ICTY cases involving sexualized violence. These tables and extracts assist the reader in attaining an overview not only of the (legal) framework, but also of the individual cases and their specificities.

More than a decade after the establishment of the ICTY, another court began its work in Cambodia. Many of the misconceptions and wrong assumptions on the nature of sexualized violence that occurred at the ICTY were repeated there. Another ten years later, the German Higher Regional Court in Stuttgart tried two Democratic Liberation Forces of Rwanda (Forces Démocratiques de Libération du Rwanda, FDLR) leaders for the first time for international crimes under the German Code of Crimes against International Law,<sup>7</sup> but all sexualized crime charges were dismissed *inter alia*. For the first prosecution under the Code, and given the widespread sexualized violence occurring within the conflict in the Democratic Republic of the Congo, such a decision proves the sad reality of the statement given by Prosecutor Serge Brammertz in the preface of the book under review: “While recognizing that there have been important achievements over the past two decades, the fact remains that accountability for these crimes is the exception and impunity is the rule.”<sup>8</sup> These are only two examples of many that demonstrate the gap of impunity when it comes to the prosecution of conflict-related sexualized violence.

This book is not only a simple examination and analysis of official court records and judgments. It provides insight and knowledge into all levels and an analysis of all aspects that play a role in and influence successful prosecution of conflict-related sexualized violence crimes; these factors render the book outstanding and a true gem. Finally, yet importantly, the indispensable, sincerely self-critical attitude displayed by the authors while recording and analyzing the operational aspects of the OTP’s work makes this book unique and worthwhile.

This book is a must for practitioners and all those involved in the prosecution of international crimes and in particular, conflict-related sexualized violence crimes: prosecutors, investigators, interpreters, lawyers and, last but not least, judges. It will be extremely helpful for the identification of wrong assumptions and misconceptions and for the development of strategies and policies to overcome such obstacles. If all issues that the book discusses would be addressed and properly dealt with as the authors suggest, this would lead to the successful prosecution of conflict-related sexualized violence on the same level as other crimes. It is this reviewer’s hope that all those who will be involved in any future investigation of international crimes, be it on the international or national level, will read this book thoroughly and take lessons from it.

7 German Federal Parliament, Act to Introduce the Code of Crimes against International Law, 26 June 2002. The Code entered into force at the same time as the Rome Statute, on 1 July 2002. The FDLR trial was the first trial with charges pursuant to the Code.

8 *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Preface, p. x.

## BOOKS AND ARTICLES

# New publications in international humanitarian law and on the International Committee of the Red Cross

### Civilians and persons hors de combat

#### Books

Ceasefire Centre for Civilian Rights and Minority Rights Group International, *Civilian Protection in the Battle for Mosul: Critical Priorities*, London, 2016, 19 pp.

ICRC, “I Saw My City Die”: *Voices from the Front Lines of Urban Conflict in Iraq, Syria and Yemen* / “J’ai vu ma ville mourir”: *Conflits urbains en Irak, en Syrie et au Yémen: Témoignages des lignes de front* / “Vi morir a mi ciudad”: *Voces desde el frente de los conflictos urbanos en Irak, Siria y Yemen*, Geneva, 2017, 75 pp.

#### ICRC Library

The Library of the International Committee of the Red Cross (ICRC) welcomes researchers interested in international humanitarian law (IHL) and the institution’s work throughout the years. Its online catalogue is the gateway to the most recent scholarship on the subject, documents of Diplomatic and International Conferences, all ICRC publications, rare documents published between the founding of the ICRC and the end of the First World War, and a unique collection of military manuals. The Library Team also publishes research guides in order to help researchers access the full text of the most relevant and reliable sources in the field of IHL and the ICRC.\*

\* The online catalogue is available at: [library.icrc.org/library/](http://library.icrc.org/library/). For more information on the research guides, see: [blogs.icrc.org/cross-files/category/research-guide/](http://blogs.icrc.org/cross-files/category/research-guide/).

ICRC, *Renforcer la protection des civils dans les conflits armés et autres situations de violence*, Geneva, 2017, 92 pp.

## Articles

Susan Power, “Siege Warfare in Syria: Prosecuting the Starvation of Civilians”, *Amsterdam Law Forum*, Vol. 8, No. 2, 2016, pp. 1–22.

## Conduct of hostilities

### Articles

Alejandro Chehtman, “The Ad Bellum Challenge of Drones: Recalibrating Permissible Use of Force”, *European Journal of International Law/Journal Européen de Droit International*, Vol. 28, No. 1, 2017, pp. 173–197.

Ryan Goodman, “The Obama Administration and Targeting ‘War-Sustaining’ Objects in Noninternational Armed Conflict”, *American Journal of International Law*, Vol. 110, No. 4, 2016, pp. 663–679.

Marco Nel and Shannon Bosch, “Voluntary Human Shields in International Humanitarian Law: A Proposal for Suitable Future Regulation”, *African Yearbook on International Humanitarian Law*, 2016, pp. 46–64.

Arthur van Coller, “The Innocent Civilian, the Mandated Soldier and the Unlawful Fighter: A Re-Evaluation of the ‘Direct Participation in Hostilities’ Dilemma”, *African Yearbook on International Humanitarian Law*, 2016, pp. 65–84.

Luke A. Whittemore, “Proportionality Decision Making in Targeting: Heuristics, Cognitive Biases, and the Law”, *Harvard National Security Journal*, Vol. 7, No. 2, 2016, pp. 577–636.

## Cyber-warfare

### Articles

Russell Buchan, “Cyber Warfare and the Status of Anonymous under International Humanitarian Law”, *Chinese Journal of International Law*, Vol. 15, No. 4, 2016, pp. 741–772.

## Displaced persons/refugees/migrants/stateless persons

### Books

ICRC, *Traduire la Convention de Kampala dans la pratique: Exercice de bilan*, Geneva, 2017, 103 pp.

ICRC, *Translating the Kampala Convention into Practice: A Stocktaking Exercise*, Geneva, 2016, 92 pp.

## History of the ICRC

### Books

Kimberly A. Lowe, *The Red Cross and the New World Order: 1918–1924*, 2014, 389 pp.

## Humanitarian relief

### Books

Dug Cubie, *The International Legal Protection of Persons in Humanitarian Crises: Exploring the Acquis Humanitaire*, Hart, Oxford and Portland, OR, 2017, 348 pp.

Alex J. Bellamy and Tim Dunne (eds), *The Oxford Handbook of the Responsibility to Protect*, Oxford University Press, Oxford, 2016, 1129 pp.

Fabian Klose and Mirjam Thulin (eds), *Humanity: A History of European Concepts in Practice from the Sixteenth Century to the Present*, Vandenhoeck & Ruprecht, Göttingen, 2016, 324 pp.

### Articles

Dapo Akande and Emanuela-Chiara Gillard, “Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict”, *International Law Studies*, Vol. 92, 2016, pp. 483–511.

## International Committee of the Red Cross

### Books

ICRC, *Anaesthesia Handbook*, Geneva, 2017, 168 pp.

ICRC, *Annual Report 2016*, 2 vols, Geneva, 2017, 596 pp.

ICRC, *Annual Report 2016: Extract*, Geneva, 2017, 171 pp.

ICRC, *Santé mentale et soutien psychosocial*, 2nd ed., Geneva, 2017, 15 pp.

ICRC, *Urban Violence and the ICRC's Humanitarian Response*, Geneva, 2016, 3 pp.

## **International criminal law**

### **Books**

Nobuo Hayashi and Cecilia M. Bailliet (eds), *The Legitimacy of International Criminal Tribunals*, assistant ed. Joanna Nicholson, Cambridge University Press, Cambridge, 2017, 502 pp.

Gerhard Werle and Moritz Vormbaum (eds), *The African Criminal Court: A Commentary on the Malabo Protocol*, Asser Press, The Hague, and Springer, Berlin and Heidelberg, 2017, 347 pp.

### **Articles**

Beth Van Schaack, "Mapping War Crimes in Syria", *International Law Studies*, Vol. 92, 2016, pp. 282–339.

## **International human rights law**

### **Books**

Michael Gill and Cathy J. Schlund-Vials (eds), *Disability, Human Rights and the Limits of Humanitarianism*, Routledge, London and New York, 2016, 238 pp.

Jan Arno Hessbruegge, *Human Rights and Personal Self-Defense in International Law*, Oxford University Press, New York, 2017, 388 pp.

### **Articles**

Linos-Alexandre Sicilianos, "L'articulation entre droit international humanitaire et droits de l'homme dans la jurisprudence de la Cour européenne des droits de l'homme", *Swiss Review of International and European Law/Schweizerische Zeitschrift für Internationales und Europäisches Recht/Revue Suisse de Droit International et de Droit Européen*, Vol. 27, No. 1, 2017, pp. 3–17.

Shana Tabak, “Ambivalent Enforcement: International Humanitarian Law at Human Rights Tribunals”, *Michigan Journal of International Law*, Vol. 37, No. 4, 2016, pp. 661–715.

## International humanitarian law – development and scope

### Books

Annyssa Bellal, *The War Report: Armed Conflicts in 2016*, Geneva Academy of International Humanitarian Law and Human Rights, Geneva, 2017, 109 pp.

Noam Zamir, *Classification of Conflicts in International Humanitarian Law: The Legal Impact of Foreign Intervention in Civil Wars*, E. Elgar, Cheltenham and Northampton, 2017, 260 pp.

### Articles

Terry D. Gill, “Classifying the Conflict in Syria”, *International Law Studies*, Vol. 92, 2016, pp. 353–380.

Ben Saul, “Many Small Wars: The Classification of Armed Conflicts in the Non-Self-Governing Territory of Western Sahara (Spanish Sahara) in 1974–1976”, *African Yearbook on International Humanitarian Law*, 2016, pp. 85–107.

Yahli Shereshevsky, “Politics by Other Means: The Battle over the Classification of Asymmetrical Conflicts”, *Vanderbilt Journal of Transnational Law*, Vol. 49, No. 2, 2016, pp. 455–498.

Jim Slesman, “Conducting Unconventional Warfare in Compliance with the Law of Armed Conflict”, *Military Law Review*, Vol. 224, No. 4, 2016, pp. 1101–1149.

## International humanitarian law – general issues

### Books

ICRC, *Teaching Debating Researching: International Humanitarian Law, Action and Policy in Universities*, Geneva, 2016, 3 pp.

Tania Fabricius, *Aufarbeitung von in Kolonialkriegen begangenen Unrecht: Anwendbarkeit und Anwendung internationaler Regeln des bewaffneten Konflikts und nationalen Militärrechts auf Geschehnisse in europäischen Kolonialgebieten in Afrika*, Duncker und Humblot, Berlin, 2017, 405 pp.

Robin Geiss, Andreas Zimmermann and Stefanie Haumer (eds), *Humanizing the Laws of War: The Red Cross and the Development of International Humanitarian Law*, Cambridge University Press, Cambridge, 2017, 266 pp.

Dustin A. Lewis, Gabriella Blum and Naz K. Modirzadeh, *Indefinite War: Unsettled International Law on the End of Armed Conflict*, Harvard Law School Program on International Law and Armed Conflict, Cambridge, MA, 2017, 105 pp.

## **International humanitarian law – implementation and dissemination**

### **Books**

ICRC, *Servir et protéger: Droit des droits de l'homme et droit humanitaire pour les forces de police et de sécurité*, update and rev. Anja Bienert, Preface by Peter Maurer, 2nd revised and updated ed., Geneva, 2017, 483 pp.

ICRC, *Guide pour la conduite et le comportement des forces de police: Droit international des droits de l'homme et principes humanitaires dans les opérations de maintien de l'ordre*, Geneva, 2017, 16 pp.

European Center for Constitutional and Human Rights, *Litigating Drone Strikes: Challenging the Global Network of Remote Killing*, Berlin, 2017, 136 pp.

Jack McDonald, *Enemies Known and Unknown: Targeted Killings in America's Transnational War*, Hurst, London, 2017, 318 pp.

Peter Rowe, *Legal Accountability and Britain's Wars 2000–2015*, Routledge, London, 2016, 274 pp.

### **Articles**

Andrea Breslin, “A Reflection on the Legal Obligation for Third States to Ensure Respect for IHL”, *Journal of Conflict and Security Law*, Vol. 22, No. 1, 2017, pp. 5–37.

Ashley S. Deeks, “The Obama Administration, International Law, and Executive Minimalism”, *American Journal of International Law*, Vol. 110, No. 4, 2016, pp. 646–662.

Charles J. Dunlap, “The DoD Law of War Manual and Its Critics: Some Observations”, *International Law Studies*, Vol. 92, 2016, pp. 85–118.

Brian Finucane, “Partners and Legal Pitfalls”, *International Law Studies*, Vol. 92, 2016, pp. 407–431.

Alexandra Huneeus *et al.*, “Symposium on the Colombian Peace Talks and International Law”, *AJIL Unbound*, Vol. 110, 2016, pp. 161–204.



Hitoshi Nasu, “Japan’s 2015 Security Legislation: Challenges to Its Implementation under International Law”, *International Law Studies*, Vol. 92, 2016, pp. 249–280.

## International humanitarian law – types of actors

### Articles

Eva Kassoti, “The Normative Status of Unilateral ad hoc Commitments by Non-State Armed Actors in Internal Armed Conflicts: International Legal Personality and Lawmaking Capacity Distinguished”, *Journal of Conflict and Security Law*, Vol. 22, No. 1, 2017, pp. 67–96.

Wyne Ken Mutuma, “The Problem of Civilian Contractors that Directly Participate in Hostilities”, *African Yearbook on International Humanitarian Law*, 2016, pp. 8–45.

Rodrigo Lorenzo Ponce de León, “Feigning Fighters or Unlawful Civilians? An Overview of Foreign Fighters in Spanish Law”, *The Military Law and the Law of War Review*, Vol. 54, No. 1, 2015–16, pp. 57–115.

Ben Saul, “Enhancing Civilian Protection by Engaging Non-State Armed Groups under International Humanitarian Law”, *Journal of Conflict and Security Law*, Vol. 22, No. 1, 2017, pp. 39–66.

Marten Zwanenburg, “Foreign Terrorist Fighters in Syria: Challenges of the ‘Sending’ State”, *International Law Studies*, Vol. 92, 2016, pp. 204–234.

## Law of naval warfare

### Books

Haiping Wang, *On Rules of the Law of Air Warfare*, People’s Liberation Army Press, 2016, 363 pp.

### Articles

Eric Schnakenbourg, “La fin d’une illusion? Le droit de la neutralité maritime à l’épreuve de la Première Guerre mondiale”, *Relations Internationales*, No. 160, 2015, pp. 3–18.

Sandesh Sivakumaran, “Exclusion Zones in the Law of Armed Conflict at Sea: Evolution in Law and Practice”, *International Law Studies*, Vol. 92, 2016, pp. 153–203.

## Law of occupation

### Books

Aeyal Gross, *The Writing on the Wall: Rethinking the International Law of Occupation*, Cambridge University Press, Cambridge, 2017, 447 pp.

## Missing persons/deceased persons

### Books

Every Casualty Worldwide, *Standards for Casualty Recording*, London, 2016, 61 pp.

## Natural environment

### Articles

Karen Hulme, “The ILC’s Work Stream on Protection of the Environment in Relation to Armed Conflict”, *Questions of International Law: Zoom-In*, No. 34, 2016, pp. 27–41.

Stavros-Evdokimos Pantazopoulos, “Protection of the Environment during Armed Conflicts: An Appraisal of the ILC’s Work”, *Questions of International Law: Zoom-In*, No. 34, 2016, pp. 7–26.

## Persons deprived of liberty/detention

### Books

Anne Broilliard and Benoît Lenoël, *Prisonniers allemands en Normandie: Un camp américain – Foucarville 1944–1947*, OREP, Bayeux, 2017, 111 pp.

ICRC, *Faire respecter la vie et la dignité des personnes privées de liberté*, Geneva, 2016, 3 pp.

ICRC, *Protéger les personnes privées de liberté*, Geneva, 2016, 44 pp.

ICRC, *Sexual Violence in Detention*, Geneva, 2017, 24 pp.

Judith Kestler, *Gefangen in Kanada: Zur Internierung deutscher Handelsschiffsbesatzungen während des Zweiten Weltkriegs*, Transcript, Bielefeld, 2017, 542 pp.

## Articles

ICRC, *Les enfants et la detention*, Geneva, 2017, 20 pp.

Elizabeth Grimm Arsenault, “US Detention Policy Towards ISIS: Between a Rock and a Hard Place”, *Survival*, Vol. 59, No. 4, 2017, pp. 109–134.

Daragh Murray, “Non-State Armed Groups, Detention Authority in Non-International Armed Conflict, and the Coherence of International Law: Searching for a Way Forward”, *Leiden Journal of International Law*, Vol. 30, No. 2, 2017, pp. 435–456.

Neville Wylie and James Crossland, “The Korean War and the Post-War Prisoner of War Regime, 1945–1956”, *War in History*, Vol. 23, No. 4, 2016, pp. 439–456.

Felicia Yap, “International Laws of War and Civilian Internees of the Japanese in British Asia”, *War in History*, Vol. 23, No. 4, 2016, pp. 416–438.

## Protected objects

### Books

Marina Lostal, *International Cultural Heritage Law in Armed Conflict: Case Studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan*, Cambridge University Press, Cambridge, 2017, 198 pp.

## Public international law

### Books

Christine Chinkin and Mary Kaldor, *International Law and New Wars*, Cambridge University Press, Cambridge, 2017, 592 pp.

Brian D. Lepard (ed.), *Reexamining Customary International Law*, Cambridge University Press, New York, 2017, 419 pp.

Alexander Proelss (ed.), *United Nations Convention of the Law of the Sea: A Commentary*, C. H. Beck, Munich, and Hart, Oxford, 2017.

Société Française pour le Droit International and Muriel Ubéda-Saillard, *La mise en œuvre de la lex specialis dans le droit international contemporain: Journée d'études de Lille*, Pedone, Paris, 2017, 201 pp.

Wouter Werner, Marieke de Hoon and Alexis Galán (eds), *The Law of International Lawyers: Reading Martti Koskenniemi*, Cambridge University Press, Cambridge, 2017, 428 pp.

## Articles

Dan Kuwali, “Persuasive Prevention: Ending Mass Atrocities in Africa”, *African Yearbook on International Humanitarian Law*, 2016, pp. 108–136.

## Weapons

### Books

Alexandre Cassart, *Droit des drones: Belgique, France, Luxembourg*, Bruylant, Brussels, 2017, 187 pp.

ICRC, *Tackling Weapon Contamination/Agir contre la contamination par les armes*, Geneva, 2017, 4 pp.

ICRC, *The Convention on Cluster Munitions: A Treaty to End Decades of Civilian Suffering*, Geneva, 2017, 12 pp.

Tom Coppen, *The Law of Arms Control and the International Non-Proliferation Regime: Preventing the Spread of Nuclear Weapons*, Brill Nijhoff, Leiden and Boston, MA, 2017, 377 pp.

Alex Leveringhaus, *Ethics and Autonomous Weapons*, Palgrave Macmillan, London, 2016, 131 pp.

## Articles

Saeed Bagheri, “Towards Fulfillment of Fundamental Rules of Humanitarian Law in the Context of the Nuclear Non-Proliferation Treaty”, *BRICS Law Journal*, Vol. 3, No. 1, 2016, pp. 66–89.

Heather A. Harrison Dinniss and Jann K. Kleffner, “Soldier 2.0: Military Human Enhancement and International Law”, *International Law Studies*, Vol. 92, 2016, pp. 432–482.

Jaroslav Krasny and Noriyuki Kawano, “Weapons of Mass Destruction and the Principle of Unnecessary Suffering: The Use of Nuclear Weapons in an Armed Conflict”, *Hiroshima Peace Science*, Vol. 36, 2014, pp. 101–117.

Tim McCormack, “Chemical Weapons and Other Atrocities: Contrasting Responses to the Syrian Crisis”, *International Law Studies*, Vol. 92, 2016, pp. 512–544.

Jens David Ohlin, “The Combatant’s Stance: Autonomous Weapons on the Battlefield”, *International Law Studies*, Vol. 92, 2016, pp. 1–30.













# INTERNATIONAL REVIEW of the Red Cross

The Review is a peer-reviewed journal printed in English and is published three times a year.

Annual selections of articles are also published in Arabic, Chinese, French, Russian and Spanish.

Published in association with Cambridge University Press.

## Submission of manuscripts

The *International Review of the Red Cross* invites submissions of manuscripts on subjects relating to international humanitarian law, policy and action. Issues focus on particular topics, decided by the Editorial Board, which can be consulted under the heading 'Call for Papers' on the website of the *Review*. Submissions related to these themes are particularly welcome.

Articles may be submitted in Arabic, Chinese, English, French, Russian or Spanish. Selected submissions are translated into English if necessary.

Submissions must not have been published, submitted or accepted elsewhere. Articles are subjected to a peer-review process. The final decision on publication is taken by the Editor-in-Chief. The Review reserves the right to edit articles.

Manuscripts may be sent by e-mail to: [review@icrc.org](mailto:review@icrc.org)

## Manuscript requirements

Articles should be 7,000 to 10,000 words in length. Shorter contributions can be published as comments or opinion notes. Articles on themes other than the main theme of an edition may be published under the heading 'Selected articles on IHL and humanitarian action'.

For further information, please consult the website of the Review: [www.icrc.org/eng/resources/international-review](http://www.icrc.org/eng/resources/international-review).

©icrc 2018

Authorization to reprint or republish any text published in the Review must be obtained from the Editor-in-Chief. Requests should be addressed to [review@icrc.org](mailto:review@icrc.org).

## Subscriptions

The subscription price is available online at: <https://www.cambridge.org/core/journals/international-review-of-the-red-cross/subscribe>

Requests for subscriptions can be made to the following address:

Cambridge University Press, University Printing House, Shaftesbury Road, Cambridge CB2 8BS; or in the USA, Canada and Mexico, email [journals@cambridge.org](mailto:journals@cambridge.org); Cambridge University Press, 1 Liberty Plaza, Floor 20, New York, NY 10006, USA, email [journals\\_subscriptions@cup.org](mailto:journals_subscriptions@cup.org).

The *International Review of the Red Cross* is indexed in the Thomson Reuters Journal Citation Reports/Social Sciences Edition and has an Impact Factor. The Review is available on LexisNexis.

This journal issue has been printed on FSC™-certified paper and cover board. FSC is an independent, nongovernmental, not-for-profit organization established to promote the responsible management of the world's forests. Please see [www.fsc.org](http://www.fsc.org) for information.

Printed in the UK by Bell & Bain Ltd.

# The Missing

The disappeared and their families: When suffering is mixed with hope  
*Vincent Bernard*

Interview with Estela Barnes de Carlotto  
*President of the Grandmothers of the Plaza de Mayo*

Families of the missing in Sri Lanka: Psychosocial considerations in transitional justice mechanisms  
*Maleeka Salih and Gameela Samarasinghe*

Families of the missing: Psychosocial effects and therapeutic approaches  
*Pauline Boss*

Q&A: The ICRC's engagement on the missing and their families  
Implementing international law: An avenue for preventing disappearances, resolving cases of missing persons and addressing the needs of their families  
*Ximena Londoño and Alexandra Ortiz Signoret*

Protection of migrants from enforced disappearance: A human rights perspective  
*Bernard Duhaime and Andréanne Thibault*

Establishing mechanisms to clarify the fate and whereabouts of missing persons: A proposed humanitarian approach  
*Monique Crettol, Lina Milner, Anne-Marie La Rosa and Jill Stockwell*

The Sri Lankan Office on Missing Persons: Truth and justice in tandem?  
*Isabelle Lassée*

The Office on Missing Persons in Sri Lanka: The importance of a primarily humanitarian mandate  
*Vishakha Wijenayake*

Determining the fate of missing persons: The importance of archives for "dealing with the past" mechanisms  
*Elisabeth Baumgartner and Lisa Ott*

Using forensic science to care for the dead and search for the missing: In conversation with Dr Morris Tidball-Binz

Advances and progress in the obligation to return the remains of missing and forcibly disappeared persons  
*Grażyna Baranowska*

The first attempts in Mexico and Central America to address the phenomenon of missing and disappeared migrants  
*Gabriella Citroni*

Management of the dead from the Islamic law and international humanitarian law perspectives: Considerations for humanitarian forensics  
*Ahmed Al-Dawoody*

Adoption of the Additional Protocols of 8 June 1977: A milestone in the development of international humanitarian law  
*François Bugnion*

Strengthening resilience: The ICRC's community-based approach to ensuring the protection of education  
*Geoff Loane and Ricardo Fal-Dutra Santos*

Reports and documents

Books and articles



**ICRC**

ISSN 1816-3831

[www.icrc.org/eng/review](http://www.icrc.org/eng/review)

Cambridge Core

For further information about this journal please go to the journal web site at:  
[cambridge.org/irc](http://cambridge.org/irc)

Volume 99 Number 905

**INTERNATIONAL  
REVIEW**  
of the Red Cross



**MIX**  
Paper from  
responsible sources  
FSC® C007785

**CAMBRIDGE**  
UNIVERSITY PRESS