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Agenda item 3

**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development****Report of the Working Group on Enforced or Involuntary  
Disappearances on standards and public policies for an  
effective investigation of enforced disappearances\*, \*\****Summary*

The Secretariat has the honour to transmit to the Human Rights Council the report of the Working Group on Enforced or Involuntary Disappearances on standards and public policies for an effective investigation of enforced disappearances.

In the report, the Working Group draws the attention of the international community to impunity as a distinctive trait of enforced disappearances. It continues to observe alarming patterns of impunity, both in relation to past acts of enforced disappearance and to new disappearances occurring in different parts of the world.

Impunity can have a multiplying effect, which causes additional suffering and anguish to the victims and their families. The Working Group believes that the international community should not stand neutral in the face of such suffering. Instead, it must strengthen cooperation efforts, increase the assistance available to victims and pursue judicial investigations and prosecutions both at the local and international levels.

The distinctive components of an enforced disappearance – in particular, the participation of State agents and the attempts to conceal information and cover up the crime – necessitate that investigations be carried out with the requisite independence and autonomy.

Delays in investigations are usually the result of multiple obstacles faced during judicial proceedings, including the destruction or loss of evidence and the passing of the perpetrators, victims and witnesses. Such obstacles may lead to de facto impunity.

The Working Group concludes that an effective investigation of enforced disappearances must include information about the whereabouts and the fates of the disappeared persons, the circumstances of their disappearance and the identity of the perpetrators. Such an investigation is not only required by the State's international obligations, but it is also the best way to effectively combat impunity and to realize the

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\*\* The annex to the present document is being circulated as received, in the language of submission only.



right to truth, for both the victims and society as a whole.

The examples mentioned in the report are drawn from: cases received by the Working Group and included in its reports; other public reports by United Nations agencies or other international organizations; submissions received by the Working Group following a call for contributions and a questionnaire for States; and information received from experts participating in a meeting held on the sidelines of the Working Group's 116th session, held in Geneva in September 2018.

## I. Introduction

1. An enforced disappearance differs from other crimes against the liberty of persons. As highlighted in both the Declaration on the Protection of All Persons from Enforced Disappearance and the International Convention for the Protection of All Persons from Enforced Disappearance, it is a crime characterized both by the involvement of State agents – or persons or groups of persons acting with the authorization, support or acquiescence of the State – and the refusal to acknowledge that a deprivation of liberty has occurred or the concealment of the fate or whereabouts of the disappeared person. The involvement of the State has often resulted in impunity for the perpetrators.

2. The Working Group has for decades brought the issue of structural impunity for enforced disappearance to the attention of the international community. In 1993, following consultations with States, relatives of the disappeared and civil society organizations, it issued a report outlining recommendations aimed at ensuring accountability and preventing impunity for acts of enforced disappearance.<sup>1</sup>

3. The Working Group has repeatedly underscored that an effective criminal investigation is crucial not only for upholding the right to justice, but also to fulfilling the obligation to search for the disappeared person and for the enjoyment of the right to the truth and reparation, as these rights are closely intertwined.<sup>2</sup>

4. Nevertheless, the Working Group continues to observe reluctance when it comes to the diligent investigation of all allegations of disappearances and the holding of their perpetrators to account. Even within contexts where there is political will to tackle impunity and address cases of enforced disappearance (mostly in transitional processes), the limited availability of institutional instruments often represents an obstacle to their completion.

5. The present report is aimed at identifying the principal elements necessary for the design and implementation of investigative standards and relevant public policies in order to more effectively investigate cases of enforced disappearance and bring their perpetrators to justice. Challenges and good practices will also be analysed.

6. In preparing the present report, the Working Group consulted with experts during its 116th session, held in Geneva in September 2018, and issued a questionnaire for States<sup>3</sup> and a call for contributions for other stakeholders.<sup>4</sup> The Working Group thanks States and other stakeholders for their contributions.

## II. Elements of the obligation to investigate enforced disappearances and the obstacles thereto

7. The obligation for States to investigate enforced disappearances is now codified in the Declaration on the Protection of All Persons from Enforced Disappearance (art. 13) and in the International Convention on the Protection of All Persons from Enforced Disappearance (art. 12). These standards have been developed over the course of many years, following relevant jurisprudence articulated by international, regional and national courts, as well as the practices established by different States.

8. The obligation of States to investigate with due diligence was initially raised in the first ruling of the Inter-American Court of Human Rights, in the *Velásquez Rodríguez* case,<sup>5</sup> and was later extended into many of the Court's decisions. The first set of judgments of the Court referred to the complete lack of investigation at the national level in many Latin American countries under suppressive political regimes.

<sup>1</sup> E/CN.4/1994/26, para. 45.

<sup>2</sup> A/HRC/16/48, para. 39. See also the International Convention on the Protection of All Persons from Enforced Disappearance, art. 24 (2).

<sup>3</sup> [www.ohchr.org/Documents/Issues/Disappearances/QuestinaireEtats\\_ED\\_EN.pdf](http://www.ohchr.org/Documents/Issues/Disappearances/QuestinaireEtats_ED_EN.pdf).

<sup>4</sup> [www.ohchr.org/Documents/Issues/Disappearances/StudyEffectiveInvestigation.pdf](http://www.ohchr.org/Documents/Issues/Disappearances/StudyEffectiveInvestigation.pdf).

<sup>5</sup> Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*, Case No. 7920, Judgment, 29 July 1988, para. 177.

9. In its 2006 ruling on the *Goiburú et al.* case, the Inter-American Court of Human Rights stated that prohibiting acts of enforced disappearance, and the related duty to investigate them and punish perpetrators, should be considered a *jus cogens* norm.<sup>6</sup>

10. In its article 13, the Declaration describes in detail the obligations arising from the duty to investigate enforced disappearance thoroughly and impartially, making clear that such investigations should not be curtailed or impeded in any way. The present report is informed by the recommendations developed by the Working Group over the years and the practices of States and other entities.

## A. Prompt and ex officio nature of the investigation

11. Article 13 of the Declaration on the Protection of All Persons from Enforced Disappearance and article 12 of the International Convention on the Protection of All Persons from Enforced Disappearance set out the obligation for States to ensure the effective enjoyment of the right to issue a complaint to a competent and independent State authority, and to have such complaint promptly, thoroughly, effectively and impartially investigated.

12. The requirement to conduct prompt investigations is connected to the main objectives of finding the disappeared person alive and ensuring that sufficient evidence is obtained in order to establish the truth and identify the perpetrators. However, in many countries, law enforcement agencies implement a waiting period of up to 72 hours before initiating investigations on disappearances, which is problematic given that the first hours after the deprivation of liberty are key for the investigation of an enforced disappearance. This period can potentially provide perpetrators with an opportunity to circumvent the protections established by law, and to subject victims to unlawful interrogations, torture and, in some instances, extrajudicial executions.

13. In this regard, States must establish specific early complaint mechanisms for the reception and investigation of allegations of enforced disappearance that are easily available within the initial period of disappearance. In line with the Declaration (art. 13 (1)), these mechanisms should be independent and committed to carrying out impartial and prompt investigations into all allegations of enforced disappearances.

14. The Declaration and the International Convention stipulate that States cannot invoke the lack of a formal complaint as a valid reason to not initiate investigations. This clause is designed as a safeguard to help ensure that investigations take place, including in contexts where relatives are at high risk of facing reprisals or other situations where the complainant is unaware of existing mechanisms, and/or unable or unwilling to communicate with them for whatever reason.<sup>7</sup>

15. Practices in many countries demonstrate that the lack of willingness to investigate, on the part of State authorities, puts the burden on the relatives to collect evidence and find witnesses and, in some instances, even search grave sites to look for their loved ones. However, although States should assume the duty to investigate, relatives and civil society organizations supporting them should be allowed to actively participate in this process.

16. With regard to the question of “promptness” or investigations carried out “without delay”, it is well established that the delaying of investigations has often resulted in de facto impunity.<sup>8</sup> These delays can also increase the anguish of the relatives of the disappeared,

<sup>6</sup> Inter-American Court of Human Rights, *Goiburú et al. v. Paraguay*, ruling of 22 September 2006, Series C. No. 153, para. 84. See para. 7 of the annex to the present document for other precedents, and see also the contribution for this report of Fundación para la Justicia y el Estado de Democrático de Derecho and TRIAL International, “Mexico: aportación dirigida al Grupo de Trabajo sobre las desapariciones forzadas o involuntarias en vista del estudio temático sobre normas y políticas públicas para la investigación eficaz de las desapariciones forzadas” (February 2019), para. 6. Available at [www.ohchr.org/EN/Issues/Disappearances/Pages/effective-investigation.aspx](http://www.ohchr.org/EN/Issues/Disappearances/Pages/effective-investigation.aspx).

<sup>7</sup> See, for instance, references to France and Portugal in para. 23 of the annex.

<sup>8</sup> See the contribution for the report by the Human Rights Law Clinic, University of Texas School of Law, p. 48. Available at [www.ohchr.org/Documents/Issues/Disappearances/effective-](http://www.ohchr.org/Documents/Issues/Disappearances/effective-)

who, in many instances, are unable to see results in efforts deployed to find their loved ones and obtain justice and other forms of reparation. The Inter-American Court of Human Rights has considered that the right to access justice entails taking all the necessary steps to find out the truth and to punish the perpetrators within a reasonable time.<sup>9</sup>

17. Delays can sometimes be employed as an intentional means to shield perpetrators. They can also be the consequence of deficient institutions, which are not adequately equipped to investigate complex crimes such as enforced disappearance. The Working Group considered that delays could put witnesses at risk and foster revictimization.<sup>10</sup>

18. In many countries where enforced disappearances have occurred, investigations have been bureaucratic, material resources have been insufficient or investigators have lacked the required special training to undertake such investigations effectively.<sup>11</sup>

19. At the same time, it should be stressed that the duty to conduct diligent investigations should not lead to rushed or unduly hurried investigations.<sup>12</sup>

## **B. Prompt legal remedy to determine the whereabouts of the disappeared persons**

20. In line with article 9 of the Declaration on the Protection of All Persons from Enforced Disappearance, it is the victim's right and the State's obligation to grant them access, under all circumstances, to a prompt and effective judicial remedy as a means of determining the whereabouts and welfare of persons deprived of their liberty, and to disclose the identity of the authorities who ordered or carried out the act of deprivation of liberty (art. 9 (1)). This judicial remedy, often called habeas corpus, is aimed at ending and preventing enforced disappearances, but it is also a means of guaranteeing an efficient investigation. As stipulated in the International Convention on the Protection of All Persons from Enforced Disappearance, this right can be exercised by any person with a legitimate interest, including relatives of the victims, their representatives or a lawyer (art. 17 (2) (f)).

21. As required by article 9 of the Declaration, within the framework of a habeas corpus, the competent judicial authorities and/or investigators should have full access to any place where persons deprived of liberty may be kept or places where there are grounds to believe that such persons may be found, irrespective of whether or not such places are official detention facilities.<sup>13</sup>

22. Prompt access to possible sites of detention can help ascertain important information towards the clarification of the facts and identification of the perpetrators. On the other hand, any delays by the judicial authorities in producing the necessary evidence may increase the risk to the life and welfare of the disappeared person and create favourable conditions for the concealment of the whereabouts of the victim or destruction of evidence. Therefore, any such delays must be investigated and sanctioned, both at the criminal and administrative levels.

23. Furthermore, experience has shown that, even in contexts in which habeas corpus remedies did not yield results, their mere presentation was of decisive documentary value as judicial evidence of the facts related to the disappearance.

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investigation/university-texas-austin-school-law-human-rights-clinic.pdf. See also CCPR/C/119/D/2259/2013, para. 7.5.

<sup>9</sup> Inter-American Court of Human Rights, *Terrones Silva et al. v. Perú*, Case 11.053, Judgment, 26 September 2018, para. 196 (in Spanish).

<sup>10</sup> A/HRC/10/9/Add.1, para. 76 (in Spanish).

<sup>11</sup> Inter-American Court of Human Rights, *Anzualdo Castro v. Perú*, Case 11.385, Judgment, 22 September 2009, para. 135.

<sup>12</sup> European Court of Human Rights, *Pomilyayko v. Ukraine*, Application No. 60426/11, Judgment, 11 February 2016, para. 53. See also Office of the United Nations High Commissioner on Human Rights, *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (2017), para. 23.

<sup>13</sup> See also art. 13 (2) of the Declaration.

### C. Access to relevant information

24. Authorities in charge of the investigation must have access to all relevant information, including military, police and intelligence information.<sup>14</sup> To this end, the authorities must be able to order the declassification of such files. The denial of access to information on the grounds that it may pose a risk to national security, international relations or the privacy of the persons should be strictly analysed by judges and be the object of a judicial decision.

25. Although the public disclosure of classified information may be limited in exceptional circumstances, legal means should be adopted to allow the authorities in charge of investigations, as well as those persons entitled to the information in the context of judicial procedures, to have full access to it, on the basis of confidentiality. Whenever a limitation is imposed, a judicial revision must be ensured. The Working Group has asserted that once the investigation is concluded, archives must be preserved and made available to the public.<sup>15</sup>

26. The institutional and legal framework must also provide the necessary powers and resources to relevant institutions to be able to compel attendance of witnesses and production of relevant evidence.<sup>16</sup>

### D. Prohibition of amnesties, pardons and other similar measures

27. Article 18 of the Declaration prohibits amnesties and other similar measures that could benefit the perpetrators or alleged perpetrators of acts of enforced disappearance.<sup>17</sup> The same article limits the right to pardons, considering the extreme seriousness of acts of enforced disappearance.

28. In its general comment on article 18 of the Declaration, the Working Group urged States to refrain from making or enacting amnesty laws that would exempt the perpetrators of enforced disappearance from criminal proceedings and sanctions, and other similar measures that would prevent the proper implementation of other provisions of the Declaration.<sup>18</sup>

29. In the same general comment, the Working Group found that other similar measures would be contrary to the Declaration, such as:

- (a) Ceasing an investigation owing to the impossibility of identifying the perpetrators, in contravention of article 13 (6) of the Declaration;
- (b) Imposing conditions to the right to the truth and reparations;
- (c) Withdrawing charges or granting pardons to the alleged perpetrators;
- (d) Imposing statutes of limitations that are meagre or applicable while the disappearance is still ongoing and prosecuting the perpetrators with the intent of absolving them or punishing them with insignificant sanctions.<sup>19</sup>

30. Amnesties and similar measures that may contribute to impunity are in direct violation of the rights of the families to an effective remedy and to be heard before a competent, impartial and independent court in order to determine and learn the truth.<sup>20</sup>

<sup>14</sup> A/HRC/16/48, para. 39 (general comment on the right to the truth in relation to enforced disappearance, para. 9).

<sup>15</sup> Ibid.

<sup>16</sup> Declaration, art. 13 (2); E/CN.4/2005/102/Add.1, principle 16; and *Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, para. 27.

<sup>17</sup> E/CN.4/1984/21, para. 35.

<sup>18</sup> E/CN.4/2006/56, para. 49.

<sup>19</sup> Ibid.

<sup>20</sup> International Commission of Jurists, *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction* (Geneva, 2015), p. 208.

31. The Working Group has recognized as good practices the judicial or legislative decisions in several countries that have enabled the reopening of cases of enforced disappearance that had been suspended or dismissed.<sup>21</sup>

32. The Declaration provides that States may include mitigating circumstances in their legislation in two particular cases: when the accused discloses information that is instrumental in bringing the victims forward alive or that would contribute to clarifying the fate of victims or identifying the perpetrators.<sup>22</sup> Such information can be crucial towards determining the fate or whereabouts of the victims and therefore of great value in terms of reparation. However, these mitigating circumstances should not lead to the absence of sanctions<sup>23</sup> and must not be extended to perpetrators other than the person who revealed the information.

## **E. Extension of investigations**

33. Both the Declaration on the Protection of All Persons from Enforced Disappearance (art. 13 (6)) and the International Convention on the Protection of All Persons from Enforced Disappearance (art. 24 (6)) are forceful in affirming that investigations related to enforced disappearance must be carried out until the fate of the disappeared person has been clarified. The Working Group has interpreted that, as a rule, the investigation should also extend to the clarification of the whereabouts of the victim,<sup>24</sup> and that these principles are based on the continuing nature of the crime of enforced disappearance.<sup>25</sup>

34. The Working Group rejects as contrary to the right to the truth and the obligation to investigate enforced disappearances the practices whereby, as a condition for the payment of monetary compensation as means of reparation, families are required to accept a death certificate, which results in the termination of both the search and the investigation, including into the circumstances of the disappearance and the responsibility of the perpetrators. In its general comment on article 19 of the Declaration, the Working Group noted that as a general principle, no victim of enforced disappearance shall be presumed dead over the objections of the family.<sup>26</sup>

## **F. Autonomy and independence of the authorities in charge of the investigation**

35. The obligation to guarantee the autonomy and independence of the authorities charged with the criminal investigation and prosecution, including the judicial authorities, is the cornerstone that underpins any system that effectively guarantees victims' rights. The Working Group's experience has shown that institutional shortcomings and the absence of autonomy, impartiality and independence are among the greatest obstacles to investigating enforced disappearance. This can particularly be the case in countries where enforced disappearances occur repeatedly or in a generalized and systematic manner.<sup>27</sup>

36. In this regard, the Declaration requires States to establish independent authorities to receive complaints of enforced disappearances and to conduct prompt, thorough and

<sup>21</sup> A/HRC/16/48/Add.3, para. 51, and its footnote 57.

<sup>22</sup> Declaration, art. 4 (2); see also International Convention, art. 7 (2).

<sup>23</sup> The Working Group specified the limitations that should be imposed on the right to pardons and mitigating circumstances, if applicable, in its general comment on article 18 (E/CN.4/2006/56, para. 49).

<sup>24</sup> A/HRC/16/48, para. 39 (general comment on the right to the truth in relation to enforced disappearance, para. 4); and CED/C/7, principle 7 (1). The Working Group also shares the assertions of principles 7 (4) and (5).

<sup>25</sup> E/CN.4/2001/68, and Working Group on Enforced or Involuntary Disappearance, general comment on enforced disappearance as a continuing crime.

<sup>26</sup> E/CN.4/1998/43, para. 74.

<sup>27</sup> A/HRC/30/38/Add.1, paras. 73–74; and A/HRC/33/51/Add.1, paras. 33–35.

impartial investigations; prohibits any measures taken to curtail or impede investigations (art. 13 (1));<sup>28</sup> and establishes a set of related requirements (arts. 16 (1), (2) and (4)).

37. Persons accused of having committed acts of enforced disappearance must be suspended from any official duty so as to prevent any interference with the investigation and to protect those involved in the investigation from ill-treatment, intimidation or reprisals.<sup>29</sup> In order to help prevent institutional or internal solidarity from obstructing investigations, the proceedings should be conducted by institutions other than or separate from those where the suspects work or with which they are affiliated.<sup>30</sup>

38. States should consider establishing investigative teams that can work in a competent, independent and autonomous manner,<sup>31</sup> with no relation with any authorities that might have an interest in hindering the investigations. This would be particularly important in contexts where acts of enforced disappearance are recurring or systematic. It should be stressed that the teams in charge of the investigations must be impartial and act at all times without bias and analyse objectively all the evidence, considering and appropriately pursuing both exculpatory and incriminatory evidence.<sup>32</sup>

39. In order to strengthen the independence of the criminal investigation, prosecution and adjudication, measures should be taken to ensure that judicial investigators cannot be removed during their terms in office,<sup>33</sup> and that they are equipped with privileges to help ensure their protection.<sup>34</sup> However, these measures aimed at ensuring independence and autonomy should not become an impediment to transparency and accountability, especially vis-à-vis the victims and their families.<sup>35</sup>

40. Regarding trials and judicial proceedings, the Declaration sets forth that the accused should only be tried by competent ordinary courts and not by other special tribunals, in particular military courts or those of national security agencies.<sup>36</sup> The experience of the Working Group has shown that under certain circumstances, some States, such as those in post-conflict situations or States transitioning to democracy, should consider extending the prohibition of trial by any special tribunal, including a military tribunal, to include pretrial

<sup>28</sup> See also art. 12 (1) of the International Convention.

<sup>29</sup> Declaration, art. 16 (1); and the International Convention, art. 12 (4).

<sup>30</sup> CED/C/MEX/CO/1, para. 28 (d); art. 12 (4) of the International Convention. When it legally implemented the three international instruments for the protection against enforced disappearance (through its Act 26.679), Argentina added a generic article 194 bis to its Code of Criminal Procedure, which provides that the judge will remove the law enforcement officials who conduct investigations, either ex officio or per a party's request, in instances where there are grounds to believe that those officials may be involved in the events under investigation, even in cases in which it is mere suspicion. See also A/61/311, paras. 49–54; and *Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016), para. 28.

<sup>31</sup> See *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment: Istanbul Protocol* (United Nations publication, Sales No. Sales No. E.04.XIV.3), paras. 85 and 108; and E/CN.4/2005/102/Add.1, principle 7.

<sup>32</sup> *Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016), para. 31. The Working Group notes a good practice in Mexico, where an interdisciplinary group of independent experts (GIEI) was established to conduct the investigation of enforced disappearance of 43 students of Ayotzinapa School in Iguala, Mexico. The GIEI investigation opened new lines of investigations that had been ignored by the prosecution and unveiled serious irregularities, such as the covering up of evidence and a false depiction of the facts, including facts in relation to the alleged torture of several defendants. See GIEI, *Metodologías de investigación, búsqueda y atención a las víctimas: del caso Ayotzinapa a nuevos mecanismos en la lucha contra la impunidad* (Editorial Temis, Bogotá), 2017 (in Spanish).

<sup>33</sup> Except on grounds of incapacity or behaviour rendering them unfit to discharge their duties, and pursuant to procedures ensuring due process and the participation of the victims.

<sup>34</sup> E/CN.4/2005/102/Add.1, principles 7 (a) and (b).

<sup>35</sup> Fundación para la Justicia y el Estado Democrático de Derecho, “Estándares internacionales sobre la autonomía de los fiscales y las fiscalías” (Mexico City, 2017), p. 16 (in Spanish).

<sup>36</sup> Declaration, art. 16 (2). See also Committee on Enforced Disappearance, “Statement on enforced disappearance and military jurisdiction”, para. 3. The position that no role or intervention should be given to the armed forces in the prosecution and trial of enforced disappearances has been reiterated by the Working Group in a number of country visit reports, for instance, A/HRC/39/46/Add.1, para. 54. See also Inter-American Convention on Forced Disappearance of Persons, art. IX.



investigations, in order to restrict the participation of institutions and agencies that are suspected of committing or having committed enforced disappearances.

41. Investigation, criminal prosecutions and trials by the agencies involved in the alleged enforced disappearance have also often led to the violation of the rights of those accused of committing this crime, who are denied due process, including fair treatment at all stages of the proceedings and judicial guarantees before a competent, independent, transparent and impartial court of law.<sup>37</sup>

42. Nevertheless, any limitation of military jurisdiction should not serve as an excuse for the armed forces or other law enforcement or intelligence bodies to withhold full cooperation with the civilian authorities in charge of the investigation. On the contrary, the former should ensure unfettered and immediate access to potential detention sites and relevant documentation and guarantee that their personnel can be heard as witnesses without any pressure or limitations. They must also ensure that arrest warrants against their members are duly executed.

## **G. Inadmissibility of defence of superior orders**

43. In the context of transitions to democracy, attempts have often been made to use criminal law in order to obtain exemption from responsibility for those who carried out enforced disappearances by invoking compliance with orders from their superiors. For this reason, article 6 of the Declaration established that no order or instruction from a public authority, whether civil, military or any other, may be invoked to justify an enforced disappearance. Any person who receives such an order or instruction has the right and duty not to obey it.<sup>38</sup> The same norm established the obligation of States to prohibit this type of legislation in relation to enforced disappearances and the requirement to train law enforcement officials accordingly.

44. The Working Group has emphasized that none of the human rights instruments on enforced disappearance recognize due obedience as grounds to mitigate criminal sanctions and that, should any legislation contemplate it, the legislation should never go against the obligation to apply sanctions in accordance with the extreme seriousness of the offence.<sup>39</sup> The Working Group has also stated that an order to commit or participate in any way in an act of enforced disappearance is manifestly unlawful and should be interpreted as such by the courts.<sup>40</sup>

## **H. Statute of limitations and the principle of *ne bis in idem***

45. Article 17 of the Declaration establishes that, when the remedies provided for in article 2 of the International Covenant on Civil and Political Rights are no longer effective, the statute of limitations relating to acts of enforced disappearance shall be suspended until these remedies are effectively re-established.<sup>41</sup>

46. It also provides that, where statutes of limitations exist relating to acts of enforced disappearance, they should be proportionate to the extreme seriousness of the crime. If applicable, the statute of limitation must only begin once the act of enforced disappearance has ceased.<sup>42</sup> This is reiterated in article 8 of the International Convention on the Protection of All Persons from Enforced Disappearance.

<sup>37</sup> Inter-American Court of Human Rights, *Rodríguez Vera et al. v. Colombia*, Judgment, 14 November 2014, para. 490.

<sup>38</sup> See also International Convention, art. 6 (2).

<sup>39</sup> A/HRC/16/48/Add.3, para. 52; Declaration, art. 4 (1); E/CN.4/2005/102/Add.1, principle 27 (a); and A/HRC/33/51/Add.1, paras. 19–20.

<sup>40</sup> A/HRC/16/48/Add.3, para. 53.

<sup>41</sup> E/CN.4/2001/68, paras. 27–28.

<sup>42</sup> See, for example, A/HRC/27/49/Add.1, paras. 39 and 41; and A/HRC/33/51/Add.1, para. 19. See also references to Chile, Ecuador and France in para. 94 of the annex.

47. The statute of limitations does not apply to enforced disappearances as a crime against humanity, whether this is defined as a widespread or systematic practice of enforced disappearance<sup>43</sup> or as a single act of enforced disappearance.<sup>44</sup>

48. In instances of connivance of judicial structures with the perpetrators, the Working Group has observed situations where there have been intentionally superficial investigations aimed at acquitting the accused and granting them judicial protection through the principles of *res judicata* and *ne bis in idem*.

49. Terminating investigations in a fraudulent manner, or even through an amnesty law, can in some legal systems lead to the inability to reopen them, owing to the above-mentioned principles. Accordingly, the principle of double jeopardy, although recognized as a judicial guarantee in the International Covenant on Civil and Political Rights, is not absolute in nature and cannot be resorted to in order to perpetuate impunity.<sup>45</sup> It has been established that States should adopt safeguards against this type of abuse,<sup>46</sup> such as ensuring the possibility of reopening investigations.

### III. Public policies for an efficient investigation of enforced disappearances

50. The Working Group has identified several underlying obligations concerning the duty to investigate that require the enforcement of specific public policies, which are vital to the obligation itself.

#### A. Obligation to criminalize enforced disappearance autonomously

51. The obligation of the State to qualify enforced disappearance as an independent crime, as provided for in article 4 of the Declaration on the Protection of All Persons from Enforced Disappearance, is a critical requirement for an efficient investigation. This qualification enables the authorities in charge to understand the specific nature of the offence and to initiate a prompt, proper and effective investigation into the allegations. In the Working Group's experience, acts amounting to enforced disappearance are sometimes investigated and prosecuted as other crimes, such as kidnapping, torture, murder and illegal deprivation of liberty, owing to the lack of a specifically codified offence of enforced disappearance. This creates a situation in which suspected perpetrators of enforced disappearances can be acquitted if the standards of proof for the crimes of which they are accused are not met.<sup>47</sup>

52. The Working Group has also noticed that in those countries where enforced disappearances are investigated and prosecuted under other criminal definitions, the sanctions are often not commensurate with the extreme seriousness of the crime.

53. As enforced disappearances usually take place within organized State power structures, or are perpetrated by criminal groups benefiting from the support or acquiescence of the State, the Working Group has recommended the criminalization of the multiple types of participation or responsibility.<sup>48</sup> Although the Declaration does not expressly establish the responsibility of superiors, article 6, paragraph 1, of the International Convention on the Protection of All Persons from Enforced Disappearance does, as it explicitly requires States to take the necessary steps to criminalize:

<sup>43</sup> International Convention, art. 5.

<sup>44</sup> A/HRC/45/13/Add.2, para. 19.

<sup>45</sup> Inter-American Court of Human Rights, *Almonacid-Arellano et al. v. Chile*, Judgment, 26 September 2006, par. 154, which contains the classification of three types of fraudulent double jeopardy, namely: (a) when a court acted towards exempting the defendant from the charge of serious violations to human rights of their criminal responsibility; (b) when the proceeding was not independently and impartially carried out, following due process; and (c) when there was no actual intent to subject the defendant to any legal action.

<sup>46</sup> E/CN.4/2005/102/Add.1, principle 22.

<sup>47</sup> A/HRC/39/46/Add.1, para. 30; and A/HRC/33/51/Add.1, para. 15.

<sup>48</sup> A/HRC/16/48/Add.3, para. 62.

- (a) Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance;
- (b) A superior who:
  - (i) Knew, or consciously disregarded information which clearly indicated that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance;
  - (ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance;
  - (iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation or prosecution.<sup>49, 50</sup>

## **B. Coordination of the authorities in charge of the search and criminal investigations**

54. The obstacles to criminal proceedings already discussed and the lack of cooperation of the perpetrators in the location of the disappeared, owing to the fear of being prosecuted, led to the creation in many countries of special bodies for the purposes of searching for victims.

55. The Working Group has noted that a lack of coordination between State agencies with different responsibilities as regards enforced disappearances – that is, the search for victims, the investigation and the criminal prosecution – can often be one of the key factors that can undermine their effectiveness and result in undue delays.<sup>51</sup> This issue can be particularly acute in States with a federal system of government. Overlapping and interferences can discredit State authorities in the eyes of the public and complicate the process for the victims, who have to repeat depositions, thus risking retraumatization, and at times even personally have to act as the connection between judicial and non-judicial authorities.

56. The search and the criminal investigation should be mutually reinforcing. In line with the Committee on Enforced Disappearances guiding principles for the search for disappeared persons, when the search is conducted by non-judicial authorities, mechanisms and procedures should be clearly established by law<sup>52</sup> to ensure cooperation, coordination and an exchange of information between them and the ones responsible for carrying out the criminal investigation, in order to guarantee that the progress and results achieved on both sides feed into one another regularly and without delay.<sup>53</sup> Coordinating the efforts of the different agencies, thereby avoiding unnecessary bureaucracy, offers the potential to better manage their generally limited resources and facilitates the exchange of information among authorities.<sup>54</sup> Ensuring the interoperability of databases of both the search and criminal

<sup>49</sup> Several countries solved the issue of accusation through the theory of indirect perpetrator through organized power structures. See International Commission of Jurists, *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction*, p. 220ff. The need to include the responsibility of superiors in legislation brings about strong consensus. See E/CN.4/2005/102/Add.1, principle 27 (b); *Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, para. 26; Rome Statute of the International Criminal Court, arts. 25 and 28. See also the contribution by the Asociación Abuelas de Plaza de Mayo to the Committee on Enforced Disappearances, communication reference No. CED/C/15/2, 24 January 2019, p. 4. Available at [www.ohchr.org](http://www.ohchr.org).

<sup>50</sup> See the contribution by Asociación Abuelas de Plaza de Mayo, p. 4.

<sup>51</sup> See, for instance, E/CN.4/1996/38, para. 203; and A/HRC/WGEID/114/1, para. 40. See also Swisspeace, “Report: coordinating the search and criminal investigations concerning disappeared persons”, June 2020, p. 2, describing experiences of coordination in Colombia, the Gambia, Mexico, Sri Lanka and the United Kingdom of Great Britain and Northern Ireland.

<sup>52</sup> In particular with regards to exhumations, seizure of evidence, chain of custody and the setting of confidential databases.

<sup>53</sup> CED/C/7, annex, principle 13, para. 2.

<sup>54</sup> In the report on their visit to Mexico, the Working Group recommended the creation of an inter-institutional committee, supervised by one federal authority able to coordinate the different authorities

investigation has been described as a good practice to enhance effectiveness and to prevent overlap.<sup>55</sup>

### C. International cooperation

57. In some contexts, enforced disappearances may have a transnational component. In some cases, political opponents or even refugees were abducted in exile, as was the case during “Operation Condor”.<sup>56</sup> In other cases, the disappeared were transferred to secret detention places in other countries, as with the practice of “extraordinary renditions”,<sup>57</sup> or disappearances in the context of migration.<sup>58</sup> The Working Group has raised concerns on the increase of transnational abductions perpetrated by States in cooperation with others that lead to enforced disappearances, as with the cases of Uighurs, Kazakhs, or followers of the Hizmet/Gülen movement.<sup>59</sup>

58. This additional challenge requires States to respond and to honour their obligation to fully cooperate in criminal proceedings by producing all the evidence in their possession, subject to their internal regulations and any international treaties they may have ratified.<sup>60</sup> It is also critical that States establish mutual cooperation mechanisms focused on fully assisting victims:<sup>61</sup> in terms of investigations and the effective search for the disappeared persons, as well as for their physical protection and the provision of psychological support.

59. Finally, alleged perpetrators of enforced disappearances should be handed over or extradited to the competent civil authorities of the State where the acts allegedly happened, unless they have been extradited to another State exercising jurisdiction, in accordance with international agreements on the matter.<sup>62</sup> Otherwise, States shall exercise their own jurisdiction, to initiate serious criminal proceedings or transfer them to an international criminal tribunal whose jurisdiction it has recognized.<sup>63</sup>

### D. Access of victims to investigation and protection from reprisals

60. The duty to investigate enforced disappearance is closely related to the rights of the victims, including their families, and other stakeholders to access and take part in the investigations.<sup>64</sup> Enforced disappearance can cause deep anguish, suffering and harm to victims and their relatives. Not knowing the whereabouts of a family member can amount to torture.<sup>65</sup> Having access to information during and at all stages of the investigation can be the most effective means of guaranteeing their right to truth.<sup>66</sup> The active participation of

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and government agencies (A/HRC/19/58/Add.2, para. 112). In 2017, the State passed the General Law on the Forced Disappearance of Persons, Disappearances Committed by Individuals and the National Missing Persons System, which establishes the jurisdiction and coordination among authorities at different government levels, which can be considered a good example of how to legally overcome this type of obstacle.

<sup>55</sup> Swisspeace, “Report: coordinating the search and criminal investigations concerned disappeared persons”, p. 7.

<sup>56</sup> See the sentence on the case CFP 13445/1999/TO1, Federal Criminal Tribunal I of Buenos Aires. Available at [www.derechos.org/nizkor/arg/doc/condor14.html](http://www.derechos.org/nizkor/arg/doc/condor14.html) (in Spanish).

<sup>57</sup> A/HRC/13/42.

<sup>58</sup> A/HRC/36/39/Add.2, para. 83.

<sup>59</sup> A/HRC/42/40, para. 56.

<sup>60</sup> International Convention, art. 14.

<sup>61</sup> *Ibid.*, art. 15.

<sup>62</sup> Declaration, art. 14.

<sup>63</sup> International Convention, art. 11.

<sup>64</sup> Declaration, art. 13 (4); A/HRC/16/48, para. 39 (general comment on the right to the truth in relation to enforced disappearance, para. 3). Within the context of searches for disappeared persons, see also CED/C/7, principle 5, and references to country visit reports to Serbia, Sri Lanka and Turkey in the annex thereto, sect. II.C.

<sup>65</sup> A/HRC/16/48, para. 39 (general comment on the right to the truth in relation to enforced disappearance, para. 4).

<sup>66</sup> International Convention, art. 12 (2).

victims and their families in the investigation is also the best means to guarantee transparency and accountability of the investigative process.

61. Victims, civil society and other non-governmental organizations have often played a key role in obtaining evidence and achieving significant progress through litigation in criminal proceedings related to allegations of enforced disappearances, especially in contexts where governmental action is limited and widespread impunity exists. Consequently, the Working Group considers as a good practice the recognition of the procedural status of victims' groups and other specialized organizations. This can enable these actors to more effectively participate in the investigative process, including through demanding access to relevant information, offering experts to monitor and review said information and making appeals against decisions. Furthermore, the collective representation of victims through family or civil society organizations has in many instances served as a means of protecting victims, by reducing their exposure to risks, both physical and psychological.<sup>67</sup>

62. The effective participation of relatives in the investigative process should be facilitated by States through the provision of adequate financial support to aid such involvement, as well as through the adoption of measures requiring that information-sharing meetings be held regularly with the teams carrying out the investigation.

63. However, in many contexts, relatives are threatened, intimidated and subjected to reprisals, rather than invited to participate in investigations. In many such cases, acts of reprisals are not duly investigated as required by the Declaration, and consequently go unpunished. This promotes an unsafe environment for the conduct of effective investigations. Similarly, relevant authorities sometimes exercise pressure over civil society organizations and relatives of disappeared persons by restraining their legal capacity or ability to seek financial support for their advocacy. In some cases, these activities have even been criminalized with ambiguous and unfounded allegations of subversion and terrorism.<sup>68</sup>

64. In situations where relatives are afraid to file complaints, or individuals with important information refuse to testify, which can contribute to impunity, it is essential to provide adequate protection programmes and incentives for witness testimony,<sup>69</sup> in compliance with article 13 (3) of the Declaration.<sup>70</sup>

65. It is of paramount importance to establish adequately funded institutions to protect and assist the victims, their families, witnesses and other stakeholders taking part in the investigation, including defendants that could present evidence. Furthermore, protection programmes should be established within functional independent institutions.<sup>71</sup> It should be stressed that in many instances those who perpetrated enforced disappearances continue to operate underground, even when transitional justice processes are taking place, and often retain the ability to cause damage to anyone who attempts to hold them to account.<sup>72</sup>

66. Comprehensive witness protection measures should also be guaranteed. Witnesses should be clearly informed that they have the opportunity to benefit from identity protection, and they should also be informed if and when their testimony is to be disclosed to the defence or made public. Witness relocation schemes should also be considered in situations where serious danger exists.<sup>73</sup>

<sup>67</sup> Ibid., art. 24 (7); E/CN.4/2005/102/Add.1, principle 19. See, for example, Argentina, Code of Criminal Procedure of 10 December 2014, article 82 bis; and communication OL MEX 16/2018, 12 November 2018 (in Spanish).

<sup>68</sup> A/HRC/30/38/Add.5, para. 34.

<sup>69</sup> A/HRC/39/46/Add.1, para. 60; and A/HRC/30/38/Add.1, paras. 10 and 75.

<sup>70</sup> International Convention, arts. 12 (1) and (4); CED/C/7, annex, principle 14; E/CN.4/2005/102/Add.1, principle 10.

<sup>71</sup> A/HRC/16/48, para. 39 (general comment on the right to the truth in relation to enforced disappearance, para. 10); and A/HRC/10/9/Add.1, paras. 80 and 94 (in Spanish).

<sup>72</sup> Inter-American Court of Human Rights, *Rochela Massacre v. Colombia*, Judgment, 11 May 2007, para. 165; regarding the enforced disappearance of the witness and victim Julio López in Argentina, see A/HRC/10/9/Add.1, para. 69 (in Spanish).

<sup>73</sup> A/HRC/10/9/Add.1, para. 78 (in Spanish).

67. Even though protection programmes may affect the daily life of persons subjected to them, processes must be put in place to properly assess the risks and to exhaust every available resource to ensure that relatives can continue the search for their loved ones and take part in the investigations, while also maintaining their daily routines and sources of income. In this sense, it is critical that the authorities are responsive to the concerns of witnesses, ideally through the establishment of procedures or mechanisms that can facilitate their continued communication with them.

68. The physical and psychological security of the persons involved in the investigations is also important for the purposes of creating an environment in which the relatives and civil society can properly document cases and gather evidence. Although this can facilitate the attainment of results, it should not substitute the international obligations of States in this respect.

## **E. Developing policies aimed at ensuring psychosocial assistance**

69. Taking part in the process of an investigation into a case of enforced disappearance can be a very difficult experience for the relatives of a disappeared person. They may learn painful details, such as vivid descriptions of ill-treatment and torture, and visit sites where the victim might be buried or may have been detained. In order to ensure that their participation is a form of reparation rather than a revictimization, it is vital to take into consideration the mental health and psychological welfare of victims and relatives. Some fundamental elements in this respect are:

- (a) The adequate preparation of the victim's family in terms of the information that they might be exposed to;
- (b) Carrying out informative meetings in a setting and manner that reduces stress;
- (c) Providing psychosocial support using experienced staff who specialize in counselling in relation to cases of enforced disappearance.<sup>74</sup>

70. In addition, it is critical that the persons in charge of the investigation, particularly lawyers, carry out their work in a sensitive and considerate manner. This can help ensure that victims process their pain, make sense of their loss and rebuild relationships that may have been affected as a consequence of the disappearance. To this end, there is a need for trained professionals who approach their work with empathy, understanding and patience, in order to support the victims throughout the process.<sup>75</sup>

## **F. Creating specialized multidisciplinary units for investigation and contextual analysis**

71. In the context of acts of enforced disappearance, experience has shown that the creation of specialized units for their investigation and criminal prosecution can be an effective approach and can contribute to better coordination of criminal policy.<sup>76</sup> In many instances, the fragmented nature of investigations is one of the main factors hindering their effectiveness. Multidisciplinary investigative units can foster a joint investigation of related cases and provide a comprehensive contextual picture to the various institutions involved.<sup>77</sup> Contextual analysis can also be important for the purposes of demonstrating the general or systematic nature of the offence. This comprehensive approach can enable the prioritization of cases and a better use of new investigative techniques, including the analysis of scientific

<sup>74</sup> See the written contribution of Carlos Beristain to the expert consultation of the Working Group on Enforced or Involuntary Disappearance Expert Consultation at its 116th session, para. 6 (in Spanish). Available at [www.ohchr.org](http://www.ohchr.org).

<sup>75</sup> *Ibid.*, paras. 5 and 13.

<sup>76</sup> CED/C/URY/CO/1, para. 22; and CED/C/ARG/CO/1, para. 19. See references to France and Portugal in para. 23 of the annex.

<sup>77</sup> A/HRC/19/58/Add.2, paras. 96–97; and CED/C/COL/CO/1, para. 20 (e). In Mexico, the General Law on Enforced Disappearance of Persons, Disappearance Committed by Non-State Actors and the National System of Search of Persons, passed on 17 November 2017, establishes the creation of contextual analysis units (art. 58).

evidence. It can also facilitate the identification of responsibilities in terms of the chain of command in organized power structures.<sup>78</sup>

72. Moreover, centralizing the information in specialized investigation units has the potential to drive more efficient searches and to enable better coordination with other agencies, particularly those in charge of searching for disappeared persons.<sup>79</sup>

73. At the same time, public accountability mechanisms and related procedures should be established, with the participation of victims and their relatives, as well as national human rights institutions and civil society organizations, as a safeguard against the potential risks resulting from the centralization of the investigation in a single unit.<sup>80</sup>

## G. Independence and technical expertise of forensic investigations

74. The absence of forensic agencies with high professional expertise and independence standards can also act as an obstacle to the advancement of effective investigations in some countries.<sup>81</sup> The autonomy of a forensic team is of the utmost importance in carrying out the investigation without fearing that it might pose a risk of retaliation.<sup>82</sup>

75. In many countries, successful initiatives have been developed by civil society and academia, which have facilitated not only the identification of hundreds of disappeared persons,<sup>83</sup> but have also proven critical in terms of understanding how State structures have perpetrated enforced disappearance in a systematic manner. Furthermore, forensic teams have often been able to create relationships with the families of the disappeared, who in many cases had been mistreated by public officials who initially denied that disappearances had taken place.<sup>84</sup> The Working Group was also able to document positive State experiences in this sense during their country visits<sup>85</sup> and has recognized the critical role that international organizations such as the International Committee of the Red Cross and the International Commission on Missing Persons can play.<sup>86</sup>

76. Some positive results have been achieved through the use of new forensic techniques in investigations of enforced disappearances. Besides the broadly developed techniques of identification through DNA samples, scientific progress in the cross-matching of data of telephone calls, geolocation of mobile phones, the use of satellite imagery and optical detectors have also been very useful.<sup>87</sup>

## H. Policies for the conservation and disclosure of archives

77. In cases where the State directly participated in enforced disappearances, there may be bureaucratic traces that in many instances can prove useful in the search for the truth. The investigation of military, national security, intelligence and police agency archives can be particularly relevant. In addition, even the administrative records of such agencies,

<sup>78</sup> Verónica Hinestroza, Human Rights Institute of the International Bar Association, contribution to the expert consultation of the Working Group on Enforced or Involuntary Disappearance at its 116th session. Available at [www.ohchr.org](http://www.ohchr.org). See also Mariano Gaitan, “Prosecutorial discretion in the investigation and prosecution of massive human rights violations: lessons from the Argentine experience”, *American University International Law Review*, vol. 32, No. 2 (2015), p. 548.

<sup>79</sup> CED/C/MEX/CO/1, para. 29.

<sup>80</sup> See contribution by the Asociación Abuelas de Plaza de Mayo, 24 January 2019, p. 8. Available at [www.ohchr.org](http://www.ohchr.org).

<sup>81</sup> *Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, para. 31.

<sup>82</sup> A/69/387, para. 37.

<sup>83</sup> Examples include the Argentine Forensic Anthropology Team (EAAF), the Peruvian Forensic Anthropology Team (EPAF) and the Guatemalan Forensic Anthropology Foundation (FAFG).

<sup>84</sup> EAAF, recommendation No. 1. Available at <https://eAAF.typepad.com/recommendations/>.

<sup>85</sup> A/HRC/22/45/Add.1, para. 18.

<sup>86</sup> A/HRC/16/48/Add.1, paras. 28–29.

<sup>87</sup> For example, a study of fire to rule out the hypothesis of cremation of the bodies in a dumpster in the city of Cocula was especially important for the investigation of the disappearance of 43 students of the School of Ayotzinapa in Mexico (GIEI, *Informe Ayotzinapa II: Avances y Nuevas Conclusiones Sobre la Investigación, Búsqueda y Atención a las Víctimas*, p. 278 (in Spanish)).

which are often not classified, may contain information that can prove valuable to the investigation, including records of the acquisition of weapons, promotions and decorations granted, or health records. General population records from civil registries, cemeteries, institutes of legal medicine or hospitals can be similarly helpful.<sup>88</sup>

78. States should develop and implement policies for the disclosure and conservation of archive information. These policies should include the necessary human and material resources required to assess the information in the records, which should be done by specialized professionals, independent from the authorities of the institution that might be affected by the disclosed information.

79. Few States have taken significant steps towards declassifying their own sealed records, or towards the thorough research of public records. Other States have readily opened their confidential files regarding enforced disappearances, and this has drawn the families and civil society closer to the truth, and in many cases these files fed into criminal procedures.<sup>89</sup>

## I. Policies for a differential approach in cases of disappearances of women

80. The experience of the Working Group demonstrates that the effects of enforced disappearances are lived and faced in different ways by women and girls owing to gender roles, which are deeply embedded in history, tradition, religion and culture.<sup>90</sup>

81. Women subjected to enforced disappearance are particularly vulnerable to sexual violence, including rape and forced pregnancy, as well as various forms of humiliation and physical and mental harm, which also fall within the definition of torture.<sup>91</sup>

82. Women and girls who suffer the enforced disappearance of a relative often face the loss of the primary or sole source of income in the family, which generates negative economic, social, psychological and legal effects. Women whose husbands have disappeared may be ostracized in the community because their husbands are falsely accused of crimes or because people fear associating with someone who has been the target of an enforced disappearance. Mothers, traditionally focused on seeking and claiming justice, are also often socially stigmatized and unfairly held accountable for not caring for their children.<sup>92</sup>

83. These circumstances require a gender-based approach to investigations, both within the framework of truth commissions and in the judicial, police and forensic institutions involved, which entails an even greater need for gender balance in the selection of those responsible for investigations,<sup>93</sup> both at the operational level and at the highest levels of responsibility. States should provide specific resources in the processes of investigation for the analysis of the particular impact of enforced disappearances on women, in order to give greater visibility to this issue that is not always adequately addressed.<sup>94</sup>

<sup>88</sup> See input by Centro de Estudios Legales y Sociales (CELS) for this study, pp. 7–10. The records of human rights organizations have also proven very valuable, since they contain information on violations during periods when the information and actions of State authorities could not be trusted.

<sup>89</sup> The United States of America recently opened classified records related to human rights violations in Argentina, Chile, El Salvador and Guatemala. Records known as “The Archives of Terror” were found in Paraguay, with communications between military, security and intelligence officials that document, among other things, the transfer of disappeared persons between the countries that were part of “Operation Condor”: Argentina, Brazil, Chile, Paraguay and Uruguay. France and the Holy See have also initiated processes for the declassification of records, at the request of families from Argentina.

<sup>90</sup> A/HRC/WGEID/98/2, preamble.

<sup>91</sup> *Ibid.*, para. 8.

<sup>92</sup> A/HRC/30/38/Add.5, para. 23.

<sup>93</sup> A/HRC/WGEID/98/2, paras. 23–24.

<sup>94</sup> A/HRC/19/58/Add.2, para. 67. With regard to the factors that contribute to the invisibility of these crimes and the lack of response from the judicial systems, see Lorena Balardini, Ana Oberlin y Laura Sobredo, “Violencia de género y abusos sexuales en centros clandestinos de detención: un aporte a la comprensión de la experiencia argentina”, p. 12 (in Spanish); and Ana Oberlin, “Respuestas judiciales



84. It is also necessary that the protocols, questionnaires and guides for the interviewing of victims and witnesses take into account the particular importance of victim testimonies as evidence. Specific mechanisms should be established that allow women to report their experiences in a framework of respect and privacy and that, when required, provide psychosocial support to them.<sup>95</sup>

85. It is also essential, for a reparative approach, that crimes of a sexual nature committed in the context of disappearances be attributed autonomously to enforced disappearances and torture and that the differential impact be reflected in the seriousness of the penalties provided for in the legislation.<sup>96</sup>

86. On the other hand, women's activism to demand for the end of enforced disappearances has often been accompanied by acts of intimidation or reprisals that have sometimes reached the level of extrajudicial executions and their own disappearances. Therefore, witness protection schemes should fully take gender dimensions into consideration with regard to the type of services that are provided and the gender composition of the staff.

## **J. Policies for a differential approach in cases of disappearances of migrants**

87. The Working Group has recently called attention to another recurrent and alarming phenomenon: the disappearance of migrants. In addition to the difficulties related to the search for the victims, the disappearance of migrants has been marked by high degrees of inefficiency resulting in impunity.<sup>97</sup> Factors that could explain this phenomenon include the structural vulnerability of migrants in a foreign country,<sup>98</sup> their lack of family ties or of the resources needed to effectively claim access to justice and their rights, and the lack of capacity of investigative bodies in dealing with illegal markets linked to human trafficking, in some cases with apparent links to State agencies.<sup>99</sup>

88. In addition, a key element in this failure has often been the lack of cooperation between States, as well as a lack of interest on the part of the countries of origin. This has led to the absence of adequate transnational inquiries, which could provide important information for the clarification of the facts, such as the location of witnesses, and even information about those involved in the crimes.<sup>100</sup> Relatives of the missing persons must be informed and be able to participate in the investigations irrespective of where they reside.<sup>101</sup>

89. In regions with a wide migration flow, it is therefore particularly important that a special and differentiated approach to carry out investigations of disappeared migrants be established. It should foster a transnational approach and increased possibilities of cooperation with the States of origin.<sup>102</sup> States should take steps to create flexible and operational mechanisms for the exchange of evidence, in order to limit unnecessary delays

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en Argentina, Chile y Uruguay a las violencias estatales diferenciales hacia mujeres y personas fuera de la cis/heteronormatividad durante el terrorismo de Estado”, *Amérique Latine Histoire et Mémoire*, vol. 38 (2019) (in Spanish). See also International Center for Transitional Justice, “Morocco: gender and the transitional justice process”, September 2011, pp. 21–22.

<sup>95</sup> This support should begin before the interview or statement and be of sufficient duration to avoid revictimization.

<sup>96</sup> A/HRC/WGEID/98/2, para. 19.

<sup>97</sup> A/HRC/36/39/Add.2, para. 50. The Working Group has not documented any instances in which States or non-State actors have been held accountable.

<sup>98</sup> *Ibid.*, para. 46. This is based on being exposed to situations of conflict and violence and to multiple forms of discrimination and partner economic difficulties, among others.

<sup>99</sup> *Ibid.*, paras. 34–35; and A/HRC/19/58/Add.2, para. 69.

<sup>100</sup> See the contribution made by Fundación para la Justicia y el Estado Democrático de Derecho and TRIAL International, para. 126. In Mexico, a mechanism for foreign action was created and has favoured accountability by the authorities and a better follow-up of the proceedings by the victims and opened the possibility for investigations outside its frontiers, although it is yet to demonstrate efficacy (*Ibid.*, paras. 31, 32 and 125). Available at [www.ohchr.org](http://www.ohchr.org).

<sup>101</sup> A/HRC/36/39/Add.2, para. 77. See in para. 144 of the annex.

<sup>102</sup> CED/C/MEX/CO/1, para. 24.

and other bureaucratic obstacles. It is of particular importance that States, including those that have not ratified the International Convention, follow the provisions of its article 14, which requires the provision of all possible judicial assistance, including necessary evidence. This provision is an essential way to comply with the obligation to ensure an effective investigation into all cases of enforced disappearance.

## **K. Obligations to investigate disappearances committed by non-State actors**

90. The investigation of disappearances potentially committed by non-State actors entails a series of specific challenges and has generated diverse interpretations regarding the protection that States owe victims. In its practice of transmitting cases, the Working Group has interpreted that where there are elements indicating a potential or indirect involvement of the State or of any of its officials, whether through support or acquiescence, the cases must be investigated as enforced disappearances, and it will be the burden of the State to investigate the facts and demonstrate that it has not participated in the acts of disappearance in question. In considering these cases, the Working Group has taken into account the context and patterns of disappearances in the concerned country.

91. It has equally been established that a State has an obligation to investigate disappearances, even if that State did not participate. This obligation was outlined in article 3 of the International Convention, which sought to amend a gap in the protection of victims. In addition, States may have tools and means to carry out in-depth investigations and, in some cases, have channels of communications with these non-State actors or with third parties, all of which can contribute to the success of such a process.

92. The multiplication of abductions committed by non-State actors, in particular in the context of internal armed conflicts, and the lack of adequate protection has led the Working Group to initiate a process for documenting cases that may amount to enforced disappearances when the alleged perpetrators are exercising effective control or governmental functions over a territory.<sup>103</sup>

## **IV. Conclusions and recommendations**

93. **Throughout its history, the Working Group has drawn the attention of the international community to impunity as a distinctive trait of enforced disappearances. It continues to observe alarming patterns of impunity, both in relation to past acts of enforced disappearance and to new disappearances occurring in different parts of the world.**

94. **Impunity can have a multiplying effect, which causes additional suffering and anguish to the victims and their families. The Working Group believes that the international community should not stand neutral in the face of such suffering. Instead, it must strengthen cooperation efforts, increase the assistance available to victims and pursue judicial investigations and prosecutions, both at the local and international levels.**

95. **The distinctive components of an enforced disappearance – in particular, the participation of State agents and attempts to conceal information and cover up the crime – necessitate that investigations be carried out with the requisite independence and autonomy.**

96. **Delays in investigations are usually the result of multiple obstacles faced during judicial proceedings, such as, but not limited to, the destruction or loss of evidence and the passing of the perpetrators, victims and witnesses. Such obstacles may lead to de facto impunity.**

97. **An effective investigation of enforced disappearances must include information about the whereabouts and the fates of the disappeared persons, the circumstances of their disappearance and the identity of the perpetrators. Such an investigation is not**

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<sup>103</sup> A/HRC/42/40, para. 94.

only required by the State's international obligations, but it is also the best way to effectively combat impunity and to realize the right to the truth for the victims and society as a whole.

98. The Working Group recommends that States:

(a) Define enforced disappearance as an autonomous crime in national legislation and establish different modes of criminal liability, including abetting, instigating, acquiescing and actively covering up an enforced disappearance, as well as criminal liability for command or superior responsibility;

(b) Create mechanisms that can promptly receive and process complaints of enforced disappearances, under the responsibility of authorities who are independent of the institutions to which the alleged perpetrators belong or may be linked. These mechanisms should be empowered to trigger prompt investigations of the complaints received. It is imperative that complaints of disappearances that involve the alleged participation of State officials, or of non-State actors with the support or acquiescence of State officials, are recognized as cases of enforced disappearance and immediately trigger the application of the principles that guide the investigation of such crimes. States cannot invoke the lack of a formal complaint to refuse to initiate investigations;

(c) Guarantee unrestricted access to all the competent judicial authorities and investigators that work with them to any place where people deprived of their liberty are kept or to any place, official or unofficial, where there is reason to believe disappeared persons could be found;

(d) Ensure that the authorities in charge of investigations have access to all the relevant information, including any contained in records and archives pertaining to military, police, intelligence and other national security bodies;

(e) Remove obstacles in national law that may lead to impunity in cases of enforced disappearances, including by:

(i) When applicable, only initiating statutes of limitations from the date of the clarification of the fate and whereabouts of the person;

(ii) Prohibiting amnesties, pardons and other measures that may be aimed at avoiding or indirectly hindering the obligation to investigate, prosecute and punish the perpetrators of said crimes;

(iii) Prohibiting the defence of superior orders;

(iv) Limiting the application of the principles of *res judicata* and *ne bis in idem* in cases of fraudulent investigations;

(f) Establish a swift and effective judicial recourse system in order to ascertain the whereabouts of disappeared persons and to ensure their mental and physical well-being and identify the authorities, including the specific individuals or bodies, who ordered or carried out the deprivation of liberty. This remedy should be applicable in all circumstances and with no exceptions;

(g) Ensure the independence, autonomy and integrity of investigations. To this end, States should:

(i) Suspend any alleged perpetrator from official duties, in order to help prevent them from influencing the investigation, or from putting pressure on, intimidating or carrying out reprisals against those directing or participating in the investigation;

(ii) Take steps to limit the participation in the investigations of the institution to which the alleged perpetrators belong;

(h) Establish mechanisms for the protection of victims, their family members, witnesses and other persons involved in the investigation, including defendants who may provide relevant information on cases, which should operate under the auspices of an independent institution with sufficient resources to meet their objectives;

(i) Facilitate the participation of those who survived and of the families of disappeared persons in the different proceedings. To this end, mechanisms should be established to ensure they receive psychosocial support from professionals with experience in dealing with cases of enforced disappearance and who are trusted by the victims. Follow-up mechanisms should also be established;

(j) Create specialized multidisciplinary units for the investigation and criminal prosecution of cases of enforced disappearances and foster joint contextual investigations, in order to ensure better coordination of criminal policy and reduce the fragmentation of investigations;

(k) Promote the use of scientific evidence, on the basis of the Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), including through the creation of local, autonomous forensic teams with access to sufficient resources;

(l) Develop policies for the conservation and disclosure of records, both public and confidential, and take steps to ensure that qualified professionals and adequate material resources are available to search those records;

(m) Establish clear mechanisms to ensure coordination, cooperation and exchange of information between all State agencies involved in the investigations, in particular those responsible for the criminal investigation and prosecution and for the search for disappeared persons, in order to guarantee that progress and results are achieved on all sides;

(n) Cooperate with other States, both during the search for disappeared persons and during criminal investigations, including by producing any relevant evidence in their possession, establishing cooperation frameworks focused on offering comprehensive assistance to the victims, surrendering or extraditing alleged perpetrators and ensuring their investigation and trial;

(o) Reform intelligence, military and security agencies that have actively participated in acts of enforced disappearances, in order to help ensure their transparency and enhance oversight by democratic institutions.

## Annex

### **Annex on jurisprudence and related policies of the thematic Report of the Working Group on Enforced or Involuntary Disappearances: Standards and Public Policies for an Effective Investigation of Enforced Disappearance**

#### **I. The elements of the obligation to investigate enforced disappearances and obstacles thereto**

1. The obligation for States to investigate enforced disappearances is well codified in international law namely in the 1992 Declaration on the Protection of All Persons from Enforced Disappearance (the Declaration) and the International Convention on the Protection of All Persons from Enforced Disappearance (the Convention). These standards have been developed over the course of many years, following relevant jurisprudence articulated by international, regional and national courts, as well as the practices established by different States as exemplified in this annex.

2. The conditions for an adequate investigation in enforced disappearance cases under the European Convention of Human Rights (ECHR) have mostly been elaborated referring to Article 2 (the right to life). The obligation to protect life under Article 2, read in conjunction with the general duty under Article 1 of the ECHR, “requires by implication that there should be some form of an effective official investigation when individuals have been killed as a result of the use of force.”<sup>104</sup> The European Court of Human Rights (European Court) has focused on the concept of primary protection, which ensures the victim’s substantive right *ex post facto* through investigation. The European Court also analyses cases of enforced disappearance referring to Article 3 (prohibition of torture), Article 5 (right to liberty and security) and Article 13 (right to an effective remedy) of the ECHR. In some cases, the European Court declared a violation of Article 8 (right to respect for private and family life).

3. The jurisprudence of the European Court establishes a procedural obligation that obliges States to undertake an effective investigation into alleged breaches of the ECHR. The procedural obligation to investigate enforced disappearances continues as long as the circumstances of the violation have not been clarified and until the establishment of responsibility can be reasonably expected.<sup>105</sup> The European Court referred to Article 13 ECHR concluding that an effective remedy in cases of enforced disappearances includes “a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure.”<sup>106</sup>

4. The European Court stated in *Ergi v. Turkey* (paragraph 79): “[P]rocedural obligations have been implied in varying contexts under the Convention, where this has been perceived as necessary to ensure that the rights guaranteed under the Convention are not theoretical or illusory but practical and effective.”<sup>107</sup>

5. With respect to the State’s obligation to investigate complaints of enforced disappearance of persons, the Inter-American Court of Human Rights (Inter-American Court) identified an effective investigation to be diligent, not a mere formality, initiated ex

<sup>104</sup> European Court of Human Rights, *Timurtaş v. Turkey*, Application No. 23531/94, 13 June 2000, para. 87.

<sup>105</sup> European Court of Human Rights, *Šilih v. Slovenia*, Application No. 71463/01, 9 April 2009, paras. 157–160.

<sup>106</sup> European Court of Human Rights, *Kurt v. Turkey*, Application No. 15/1997/799/1002, 25 May 1998, para. 140. See also *Timurtaş v. Turkey* (see footnote 117), para. 111.

<sup>107</sup> European Court of Human Rights, *Ergi v. Turkey*, Application No. 23818/94, 28 July 1998, para. 79; European Court of Human Rights, *Ilhan v. Turkey*, Application No. 22277/93, 27 June 2000 para. 91.

officio if required,<sup>108</sup> clarifying all circumstances,<sup>109</sup> impartial<sup>110</sup> and aiming to identify the authors of the crime.<sup>111</sup> An effective investigation is to be undertaken in view of ensuring proceedings that safeguard “the rights of access to justice, to the truth about the facts and to the reparation of the next of kin.”<sup>112</sup> First deriving the duty to investigate from Article 1(1) of the American Convention on Human Rights (ACHR) (the general duty to respect and ensure), the Inter-American Court subsequently interpreted the content of this duty referring to Article 8 (the right to a fair trial) and Article 25 (the right to effective recourse) ACHR.<sup>113</sup>

6. The Inter-American Court stated in the *The Pueblo Bello Massacre v. Colombia* (paragraph 170): “[T]he Court will examine the due diligence in the conduct of these official actions to investigate the facts, as well as additional elements, in order to determine whether the procedures and proceedings were conducted respecting the right to a fair trial, within a reasonable time, and whether they constituted an effective recourse to ensure the rights of access to justice, to the truth about the facts and to the reparation of the next of kin.”

7. Furthermore, the Inter-American Court has held that “faced with the particular gravity of such offenses and the nature of the rights harmed, the prohibition of the forced disappearance of persons and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens*.”<sup>114</sup> Accordingly, all States, including third States, are required to take actions in the face of a breach of a peremptory norm of international law.<sup>115</sup> The investigations have to be undertaken in a “serious manner,” and to be continued as long as the fate of the victim remains unknown.<sup>116</sup> This obligation in relation to effective investigations is only discharged when the disappeared persons will be released or their remains will be returned to families for burial in accordance with their customs and beliefs. Circumstances, in which structural patterns of violence are apparent, such as in contexts of widespread violence against women, warrant heightened due diligence in relation to investigative steps and require strengthened local mechanisms in order to carry out “specific search actions.”<sup>117</sup> The Inter-American Court indicated that human rights violations, including disappearances, are to be contextualized within the historical and political events that led to their occurrence.<sup>118</sup> The identification of patterns of disappearances in relation to their historical, political, material, temporal and spatial context contribute to a society’s collective right to know the truth.<sup>119</sup> Importantly, if prosecutions

<sup>108</sup> IACHR, *Velásquez Rodríguez v. Honduras*, Merits, Judgment of July 29, 1988, Series C No. 4, para. 177.

<sup>109</sup> IACHR, *Bámaca-Velásquez v. Guatemala*, Reparations, Judgment of February 22, 2002, Series C No. 91, para. 75.

<sup>110</sup> Inter-American Commission of Human Rights, *Monsenor Oscar Arnulfo Romero and Galdámez v. El Salvador*, Report No. 37/00, OEA/Ser.L/V/II.106 doc. 3 rev., 13 April 2000, para. 80.

<sup>111</sup> Inter-American Commission of Human Rights, *Ignacio Ellacuría et al. v. El Salvador*, Report No. 136/99, OEA/Ser.L/V/II.106 doc. 3 rev., 22 December 1999, para. 196.

<sup>112</sup> IACHR, *The Pueblo Bello Massacre v. Colombia*, Judgment of January 31, 2006, Series C No. 140 para. 170.

<sup>113</sup> See IACHR, *Serrano-Cruz Sisters v. El Salvador*, (Merits, Reparations and Costs) Judgment of March 1, 2005, Series C No. 118.

<sup>114</sup> See IACHR, *Goiburú et al v. Paraguay*, Merits, Reparations and Costs, Judgment of September 22, 2006, Series C No. 153, para. 84; IACHR, *Anzualdo Castro v. Peru* (see footnote 16) para. 59; and IACHR, *Radilla Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 23, 2009, Series C No. 209, para. 139.

<sup>115</sup> See, Draft Articles on the Responsibility of States for Internationally Wrongful Acts by the International Law Commission (ILC) in August 2001, articles 40 and 41, available at [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf).

<sup>116</sup> IACHR, *Velásquez-Rodríguez v. Honduras* (see footnote 126) paras. 177, 180 and 181; See also IACHR, *Serrano-Cruz Sisters v. El Salvador* (footnote 128) paras. 61, 65; IACHR, *Villagrán Morales et al. v. Guatemala*, Judgment of November 19, 1999, Series C No., para. 226.

<sup>117</sup> IACHR, *González et al. ('Cotton Field') v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment of November 16, 2009, Series C No. 205, para. 284.

<sup>118</sup> IACHR, *Case of the Rochela Massacre v. Colombia* (see footnote 86) paras. 76, 158 and 194.

<sup>119</sup> Verónica Hinestroza, Human Rights Institute of the International Bar Association, contribution to the expert consultation of the Working Group on Enforced or Involuntary Disappearance at its 116th

and punishment remain legally or factually impossible, State must continue to undertake an effective investigation in order to disclose the factual circumstances of the disappearance.

8. The Inter-American Court stated in the *Godínez Cruz Case* (paragraph 188): “The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government.”<sup>120</sup>

9. The Inter-American Court stated in *Serrano-Cruz Sisters v. El Salvador* (paragraph 65): “The obligatory investigation by the State must be carried out with due diligence, because it must be effective. This implies that the investigating body must, within a reasonable time, take all necessary measures to try and obtain results.”

10. The Inter-American Court stated in *González et al. (‘Cotton Field’) v. Mexico* (paragraph 258): “The foregoing reveals that States should adopt comprehensive measures to comply with due diligence in cases of violence against women. In particular, they should have an appropriate legal framework for protection that is enforced effectively, and prevention policies and practices that allow effective measures to be taken in response to the respective complaints. (...) This should take into account that, in cases of violence against women, the States also have the general obligation established in the American Convention, an obligation reinforced since the Convention of Belém do Pará came into force.”

11. The Inter-American Court stated in *Rochela Massacre v. Colombia* (paragraph 76): “The Court deems it relevant to point out that in all cases submitted to this body, it has required that the context be taken into consideration because the political and historical context is a determinant element in the establishment of the legal consequences in a case. (...) For this reason, the analysis of the events that occurred on January 18, 1989, which the State recognized, cannot be considered separately from the context in which they took place. Likewise, their legal consequences cannot be established in a vacuum, which is what would result from their decontextualization. (Paragraph 158): In context of the facts of the present case, the principles of due diligence required that the proceedings be carried out taking into account the complexity of the facts, the context in which they occurred and the systematic patterns that explain why the events occurred. In addition, the proceedings should have ensured that there were no omissions in gathering evidence or in the development of logical lines of investigation.”

12. In the event that the body of the disappeared person was eventually found, the Inter-American Court referred to the United Nations Manual on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions for conducting an investigation.<sup>121</sup>

13. The Human Rights Committee understands the duty to investigate in relation to Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) (the right to an effective remedy), identifying the “general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.”<sup>122</sup> The Human Rights Committee also derived the duty to investigate from Articles 4(2) Optional Protocol 1 and 14(3) ICCPR.<sup>123</sup> In relation to the case *Kimouche v. Algeria*,

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session. Available at [www.ohchr.org](http://www.ohchr.org), p. 3; CED/C/COL/CO/1; para. 20.e); A/HRC/19/58/Add.2, para. 97.

<sup>120</sup> IACHR, *Godínez Cruz v. Honduras*, Judgment of January 20, 1989, Series C No. 5, para. 144; See IACHR, *Velásquez Rodríguez v. Honduras* (see footnote 123) para. 188.

<sup>121</sup> IACHR, *Pueblo Bello Massacre v. Colombia*, (see footnote 127) paragraph 177, referring to the United Nations Manual on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, see E/ST/CSDHA/12 (1991); the IACHR concluded in relation to the Juan Humberto-Sánchez Case, that the investigation did not satisfy all the measures by The UN Manual; see IACHR, *Juan Humberto Sánchez v. Honduras*. Preliminary Objections, Merits, Reparations and Costs, Judgment of June 7, 2003, Series C No. 99, para. 127.

<sup>122</sup> Human Rights Committee, general comment No. 31 (2004), para. 15.

<sup>123</sup> Human Rights Committee, *Bleier v. Uruguay*, communication No. R.7/30, 29 March 1982, para. 13.3.

the Human Rights Committee stressed the duty to undertake a thorough and effective investigation of the fate and whereabouts of the disappeared person and to provide adequate information emerging from all investigative steps.<sup>124</sup> The investigation is part of an effective remedy and should elucidate the circumstances of the disappearance and, if possible, lead to the location and return of remains of the disappeared to their families.<sup>125</sup> A failure to investigate would amount to a violation of the ICCPR itself.<sup>126</sup>

14. The Human Rights Committee stated in *Kimouche v. Algeria* (paragraph 9): “[T]he State party is under an obligation to provide the authors with an effective remedy, including a thorough and effective investigation into the disappearance and fate of their son, his immediate release if he is still alive, and the appropriate information emerging from its investigation, and to ensure that the authors and the family receive adequate reparation, including in the form of compensation.”

15. The Human Rights Committee stated in *Chhedulal Tharu et al. v. Nepal* (paragraph 10.10): “Despite the authors’ efforts, no thorough and effective investigation has been concluded by the State party to elucidate the circumstances surrounding their relatives’ detention and alleged deaths, and no criminal investigation has even been started to bring the perpetrators to justice. The State party has failed to explain the effectiveness and adequacy of investigations carried out by the Ministry of Home Affairs Disappearances Committee and the concrete steps taken to clarify the circumstances of their detention or the cause of their alleged deaths. It has also failed to locate their mortal remains and return them to the authors’ families. Therefore, the Committee considers that the State party has failed to conduct a thorough and effective investigation into the disappearance of the authors’ relatives.”

#### A. Ex-officio and promptness of the investigation

16. The authorities must act of their own motion once an enforced disappearance has come to their attention. They cannot rely on the initiatives of the next of kin either to lodge a formal complaint or to propose a certain line of inquiry.<sup>127</sup>

17. The European Court first articulated a duty of investigation of a disappearance in *Kurt v. Turkey*. The Court stated that Article 5 ECHR (right to liberty and security) must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and “to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since.”<sup>128</sup> Furthermore, the European Court applies a presumption of violation of Article 2 of the ECHR (right to life) when the victim has last been seen alive in life-threatening circumstances and the respondent State fails to provide convincing explanations as to his or her fate and whereabouts or investigation that caused those events.<sup>129</sup> In those contexts, offenses arising from these life-threatening circumstances must be met with adequate accountability mechanisms by national courts.<sup>130</sup>

18. The European Court stated in *Cyprus v. Turkey*, (paragraph 132): “The Court recalls that there is no proof that any of the missing persons have been unlawfully killed. However, in its opinion, and of relevance to the instant case, the above-mentioned procedural obligation also arises upon proof of an arguable claim that an individual, who was last seen

<sup>124</sup> Human Rights Committee, *Kimouche v. Algeria*, communication No. 1328/2004, 10 July 2007, para. 9.

<sup>125</sup> Human Rights Committee, *Chhedulal Tharu et al. v. Nepal*, communication No. 2038/2011, 21 October 2015, paras.9.3 and 10.10.

<sup>126</sup> Human Rights Committee, general comment No. 31 (2004), para. 18.

<sup>127</sup> European Court of Human Rights, *Ergi v. Turkey* (see footnote 122) para. 83. See Section II, A of the Thematic Report.

<sup>128</sup> European Court of Human Rights, *Kurt v. Turkey*, (see footnote 121) para. 24; European Court of Human Rights, *Cyprus v. Turkey*, application No 25781/94, 10 May 2001 para. 132.

<sup>129</sup> European Court of Human Rights, *Bazorkina v. Russia*, application No. 69481/01, 27 July 2006, paras. 110–112.

<sup>130</sup> European Court of Human Rights, *Nilkolova and Velichkova v. Bulgaria*, application No. 7888/03, 20 December 2007, para. 57.



in the custody of agents of the State, subsequently disappeared in a context which may be considered life-threatening.”

19. Furthermore, the European Court held in *Aslakhanova and Others v. Russia* that measures to redress the systemic failure to investigate disappearances in the region would fall into two principal categories. The first concerned the suffering of the relatives of the victims, while the second relates to the ineffectiveness of criminal investigations and the subsequent impunity enjoyed by the perpetrators.<sup>131</sup> In *Cyprus v. Turkey*, the European Court held that failing to investigate into circumstances conducive to the disappearance of missing persons caused distress and anxiety for the victim’s next of kin, which amounts to inhumane treatment. The latter results from inadequate reactions by State authorities.<sup>132</sup>

20. The Inter-American Court established that whenever there are reasonable motives to suspect that a person has been subjected to enforced disappearance an investigation should be opened ex officio and without delay.<sup>133</sup> In any case, every State authority, public or private officer who is aware of acts intended to forcibly disappear persons, is under the duty to immediately report them.<sup>134</sup> In the case *Anzualdo Castro v. Peru*, the Inter-American Court stated, “whenever there is reason to believe that a person has been subjected to enforced disappearance, an investigation must be conducted.”<sup>135</sup> Importantly, investigations do not depend on proof presented before the relevant authorities by the next of kin of the victims and, therefore, if State authorities receive information of an enforced disappearance, these authorities must immediately report those acts so that adequate steps can be taken.<sup>136</sup> Family members should have the possibility to become engaged at all stages of the investigative steps while they should be informed of the progress of these steps constantly.

21. The Inter-American Court stated in *Anzualdo Castro v. Peru*, (paragraph 65): [W]henever there is a reason to belief that a person has been subjected to forced disappearance, an investigation must be conducted. This obligation is independent from the filing of a complaint, since in cases of forced disappearance, International Law and the general duty to guarantee, to which Peru is bound, imposes upon States the obligation to investigate the case ex officio, without delay and in a serious, impartial and effective way. This is a fundamental and conditioning element for the protection of certain rights that are otherwise affected or annulled by those situations, such as the right to life, personal liberty and personal integrity. Without detriment to the foregoing, in any case, every State authority, public or private officer who is aware of acts purported to forcibly disappear persons, shall immediately report them.”

22. The Inter-American Court indicated in *Pueblo Bello Massacre v. Colombia* (paragraph 145): “The execution of an effective investigation is a fundamental and conditioning element for the protection of certain rights that are affected or annulled by these situations, such as, in the instant case, the rights to personal liberty, humane treatment and life. This assessment is valid whatsoever the agent to which the violation may eventually be attributed, even individuals, because, if their acts are not investigated genuinely, they would be, to some extent, assisted by the public authorities, which would entail the State’s international responsibility.”<sup>137</sup>

23. In France, the public prosecutor may initiate investigations into enforced disappearances even if no formal complaint has been lodged. Moreover, Article 40, paragraph 3 of the Code of Criminal Procedure provides that “any constituted authority, public officer or civil servant who, in the performance of his duties, acquires knowledge of a crime or offence shall be required to give notice thereof without delay to the public

<sup>131</sup> European Court of Human Rights, *Aslakhanova v. Russia*, Application No. 32059/02, 18 December 2012, para. 217.

<sup>132</sup> European Court of Human Rights, *Cyprus v. Turkey* (see footnote 143).

<sup>133</sup> IACHR, *Anzualdo Castro v. Peru* (see footnote 16) para. 65; IACHR, *Radilla Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2009. Series C No. 209, para. 143; *Velásquez-Rodríguez v. Honduras* (see footnote 123) para. 177.

<sup>134</sup> *Ibid.*

<sup>135</sup> IACHR, *Anzualdo Castro v. Peru* (see footnote 16) para. 135.

<sup>136</sup> IACHR, *Gomes-Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 24, 2010, Series C No. 219, para. 108.

<sup>137</sup> IACHR, *Pueblo Bello Massacre v. Colombia* (see footnote 127) para. 145.

prosecutor and to transmit to that judge all information, minutes and acts relating thereto.”<sup>138</sup> In Portugal, the offence of enforced disappearance is criminalized as crime against humanity pursuant to article 9 (i) of Law No. 31/2004 of 22 July 2004. It is classified as a “public offence” (“crime público”), meaning that a formal complaint by the victim or other person is not a precondition for the competent authorities to launch an investigation, initiating the latter *ex officio*.<sup>139</sup>

## **B. Prompt legal remedy to determine the whereabouts of the disappeared persons**

24. The standards of a prompt and effective investigation include the securing of evidence such as eyewitness testimonies and gathering forensic evidence.<sup>140</sup> The investigation has to be conducted promptly and in a reasonably expeditious manner.<sup>141</sup>

25. In assessing the effectiveness of the criminal investigation of cases of enforced disappearances, the European Court has not explicitly considered their outcome. Instead the European Court focused on the delays in the investigation and deficiencies in securing evidence. The Court considered the investigation by State authorities to be ineffective if the authorities took witness statements with an inappropriate delay in time exceeding two months after the notification of the disappearance while starting to conduct official inquiries only two years after the occurrence of the disappearance.<sup>142</sup>

26. The European Court stated in *Timurtaş v. Turkey* (paragraphs 89 and 90): “[the Court] notes the length of time it took before an official investigation got under way and before statements from witnesses were obtained, the inadequate questions put to the witnesses and the manner in which relevant information was ignored and subsequently denied by the investigating authorities. The Court is in particular struck by the fact that it was not until two years after the applicant’s son had been taken into detention that enquiries were made of the gendarmes in Şırnak. (...) In the light of the foregoing, the Court finds that the investigation carried out into the disappearance of the applicant’s son was inadequate and therefore in breach of the State’s procedural obligations to protect the right to life.”

27. The European Court found a failure to carry out an effective criminal investigation under Article 2 ECHR in the event of an applicant remaining without information in relation to the progress of the investigation. Similar significant and inappropriate delays and failings in the investigation process led the European Court to find repeated violations by States when they did not comply with their procedural obligations arising under Article 2 ECHR in enforced disappearance cases.

28. The European Court stated in *Baysayeva v. Russia* (paragraphs 126 and 127): “Such delays by themselves compromised the effectiveness of the investigation and could not but have had a negative impact on the prospects for arriving at the truth. While accepting that some explanation for these delays can be found in the exceptional circumstances that have prevailed in Chechnya and to which the Government refer, the Court finds that in the present case they clearly exceeded any acceptable limitations on efficiency that could be tolerated in dealing with such a serious crime.”<sup>143</sup>

29. However, in *Palić v. Bosnia and Herzegovina*, the European Court did not find a violation of the procedural duty to carry out an investigation that is capable of leading to the identification of the perpetrators despite of several delays in the proceedings. Instead, the European Court concluded that the authorities carried out the appropriate investigative

<sup>138</sup> France, Code of Criminal Procedure of 2 March 1952, Article 40, para. 3.

<sup>139</sup> Portugal, Law No. 31/2004 of 22 July 2004, Article 9 (i).

<sup>140</sup> European Court of Human Rights, *Salman v. Turkey*, Application No. 21986/93, 26 June 2000, para. 106; see Section II, B of the Thematic Report.

<sup>141</sup> European Court of Human Rights, *Selmouni v. France*, Application No. 25803/94, 28 July 1999, paras. 78–79.

<sup>142</sup> European Court of Human Rights, *Timurtaş v. Turkey*, (see footnote 119) paras. 47 and 89.

<sup>143</sup> European Court of Human Rights, *Baysayeva v. Russia*, paras. 126 and 127; European Court of Human Rights, *Aslakhanova and others v. Russia* (see footnote 147) para.123.

actions, which resulted in the issuing of an international arrest warrant.<sup>144</sup> Despite the absence of a conviction of alleged perpetrators numerous years after the disappearance, the Court considered the investigative steps undertaken by relevant authorities as sincere and thorough efforts in order to disclose the fate and whereabouts of the disappeared and to seek accountability of alleged perpetrators. The Court held that the State complied with its procedural obligations under Article 2 ECHR.

30. The European Court stated in *Palić v. Bosnia and Herzegovina* (paragraph 65): “In these circumstances, the Court finds that the domestic criminal investigation was effective in the sense that it was capable of leading to the identification and punishment of those responsible for the disappearance and death of Mr Palić, notwithstanding the fact that there have not yet been any convictions in this connection. The procedural obligation under Article 2 is indeed not an obligation of result, but of means.”

31. Although the duty to investigate is an obligation of means, it has been asserted that in relation to the State’s duty towards family members of a victim of enforced disappearances to fully establish his or her whereabouts, this obligation has evolved towards entailing a result-orientated component.<sup>145</sup> If the duty to investigate were not to be construed as an obligation of result, the cruel and inhuman treatment of the disappeared person’s family continues, violating article 7 ICCPR.<sup>146</sup>

32. The Human Rights Committee stated in the case *Kimouche v. Algeria* (paragraph 9): “[T]hat while the Covenant does not give individuals the right to demand the criminal prosecution of another person, the Committee nevertheless considers the State party duty-bound not only to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances and infringements of the right to life, but also to prosecute, try and punish the culprits.”<sup>147</sup>

33. The Inter-American Court has held that an effective investigation has to have an objective in line with the logic behind the investigation, such as identifying the location of disappeared persons and their remains, determining the truth and ending impunity.<sup>148</sup> States are obliged to carry out an effective investigation with the view to establishing the truth about the circumstances of the disappearance and the fate and whereabouts of those disappeared. This obligation is separate from the objective of prosecution.<sup>149</sup> However, while the Inter-American Court has indicated that the duty to investigate is one of means, not of outcome, it has stressed that the duty to investigate should be assumed by the State as a legal obligation in and of itself and not as a simple formality condemned from the onset to be unsuccessful, or a matter of particular interests, which depends on the procedural initiative of the victims or their next of kin.<sup>150</sup>

34. The Inter-American Court has also reiterated that the passage of time bears a directly proportionate relationship to the limitation – and in some case, the impossibility – of obtaining evidence and/or testimony, making it difficult and even useless or ineffective, to carry out probative measures in order to clarify the facts that are being investigated, to identify the possible authors and participants, and to establish the eventual criminal

<sup>144</sup> European Court of Human Rights, *Palić v. Bosnia and Herzegovina*, Application No. 4704/04, 15 February 2011, para. 65.

<sup>145</sup> See the contribution made by Fundación para la Justicia y el Estado Democrático de Derecho and TRIAL International, para. 9; Human Rights Committee, *Cifuentes Elgueta v. Chile*, communication No. 1536/2006, individual opinion of Committee members Ms. Helen Keller and Mr. Fabián Salvioli (dissenting), para. 26.

<sup>146</sup> See the contribution made by Fundación para la Justicia y el Estado Democrático de Derecho and TRIAL International, para. 9.

<sup>147</sup> Human Rights Committee, *Kimouche v. Algeria* (see footnote 139) para. 9.

<sup>148</sup> IACHR, *Velásquez-Rodríguez v. Honduras* (see footnote 123), para. 181; IACHR, *The Pueblo Bello Massacre v. Colombia* (see footnote 127) para. 143.

<sup>149</sup> IACHR, *Velásquez-Rodríguez v. Honduras* (see footnote 123) para. 177.

<sup>150</sup> See IACHR, *Tenorio Roca y otros Vs. Peru*, Preliminary Objections, Merits, Reparations and Costs. Judgement of 22 June 2016. Serie C No. 314.

responsibilities, as well as to clarify the fate of the victim and to identify those responsible for his disappearance.<sup>151</sup>

### C. Access to relevant information

35. The obligation to provide access to information constitutes a crucial part of an effective investigation. Authorities in charge of the investigation must have access to all relevant information, including military, police and intelligence information, and any classification of vital information for reasons of national security should be subjected to close scrutiny.<sup>152</sup>

36. Where applicants have no access to public information in the course of investigations, the European Court identified a violation of the procedural aspect of Article 2 ECHR, particularly considering procedural fairness. The investigative steps undertaken by relevant authorities must consider all elements of public scrutiny. At a minimum, according to the European Court, relatives of the victim of the disappearance “must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.”<sup>153</sup> Rendering the access to case files in administrative proceedings impossible to the next of kin of the victim was one of the considerations that led the European Court to conclude a violation of the procedural obligations by a state arising under Article 2 ECHR.

37. The European Court stated in *Oğur v. Turkey* (paragraph 92): “[...] during the administrative investigation the case file was inaccessible to the victim’s close relatives, who had no means of learning what was in it. The Supreme Administrative Court ruled on the decision of 15 August 1991 on the sole basis of the papers in the case, and this part of the proceedings was likewise inaccessible to the victim’s relatives. Nor was the decision of 15 August 1991 served on the applicant’s lawyer, with the result that the applicant was deprived of the possibility of herself appealing to the Supreme Administrative Court.”

38. The European Court stated in *Tahsin Acar v. Turkey* (paragraph 225): “[T]here must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.”

39. In *Tsechoyev v. Russia* the European Court reiterated the significance of the relatives’ ability to access case files as a minimum standard of procedural obligations under Article 2 ECHR in relation to an effective investigation.<sup>154</sup>

40. Databases that contain information on the fate and whereabouts of a disappeared person have to be sufficiently interlinked. In *Aslakhanova and Others v. Russia*, the European Court stressed the need for the State to create “a single, sufficiently high-level body in charge of solving disappearances in the region, which would enjoy unrestricted access to all relevant information and would work on the basis of trust and partnership with the relatives of the disappeared.”<sup>155</sup> Limitations of access to official documents should be set down precisely in law, be considered necessary in a democratic society and be proportionate to the aim of protection.<sup>156</sup> In line with the European Court, the Inter-American Court held that State authorities have to provide information about the results of

<sup>151</sup> See IACHR, *Radilla Pacheco Vs. México*, Preliminary Objections, Merits, Reparations and Costs. Judgement of 23 November 2009, para. 215; IACHR, *Chitay Nech y otros Vs. Guatemala*, Preliminary Objections, Merits, Reparations and Costs, Judgement of 25 May 2010, para. 196; IACHR, *Ibsen Cárdenas e Ibsen Peña Vs. Bolivia*, Merits, Reparations and Costs, Judgment of 1 September 2010, para. 167; IACHR, *Torres Millacura y otros Vs. Argentina*, Merits, Reparations and Costs, Judgement 26 August 2011, para. 122; IACHR, *Caso Gudiel Álvarez y otros (“Diario Militar”) Vs. Guatemala*, Merits, Reparations and Costs, Judgement 20 November 2012, para. 259.

<sup>152</sup> See Section II, C of the Thematic Report.

<sup>153</sup> European Court of Human Rights, *Tahsin Acar v. Turkey*, application No. 26307/95, 6 May 2003, paras. 224 and 225.

<sup>154</sup> European Court of Human Rights, *Tsechoyev v. Russia*, application No. 39358/05, 15 March 2011, para. 149.

<sup>155</sup> European Court of Human Rights, *Aslakhanova and Others v. Russia*, (see footnote 147) para. 225.

<sup>156</sup> Available at <https://wcd.coe.int/ViewDoc.jsp?id=262135>.

investigations to relatives of a disappeared person, independent from the possibility of punishment of alleged perpetrators for the commission of any enforced disappearance.<sup>157</sup>

41. The Human Rights Committee in the case *Bashasha v. Libyan Arab Jamahiriya* confirmed that States considered to be responsible for an enforced disappearance hold the duty to furnish adequate information arising from an effective investigation into the disappearance. The authorities are under the obligation, in the case of death, to return the remains of the disappeared person as a means to provide an effective remedy.<sup>158</sup> In the case of *El Boathi's disappearance*, Algeria issued many contradictory pieces of information regarding the victim's fate, which, according to the Human Rights Committee, contributed to a situation of impunity.<sup>159</sup>

42. The Human Rights Committee stated in *Bashasha v. Libyan Arab Jamahiriya* (paragraph 9): “[T]he State party is under an obligation to provide the author with an effective remedy. The Committee therefore urges the State party a) to conduct a thorough and effective investigation into the disappearance and death of the author’s cousin; b) to provide adequate information resulting from its investigation (...).”

#### **D. Investigations should continue until the fate and whereabouts of the disappeared person have been clarified**

43. The European Court understood enforced disappearance as being continuous, linking it to the prolonged time of distress, anxiety and suffering of the relatives of a disappeared person.<sup>160</sup> In *Cyprus v. Turkey* the Court concluded that the continuous nature of enforced disappearances prompts an ongoing effort to investigate until the fate and whereabouts of the disappeared person have been clarified.<sup>161</sup>

44. The European Court stated in *Cyprus v. Turkey* (paragraph 150): “[D]uring the period under consideration, there has been a continuing violation of Article 5 of the Convention by virtue of the failure of the authorities of the respondent State to conduct an effective investigation into the whereabouts and fate of the missing Greek-Cypriot persons in respect of whom there is an arguable claim that they were in custody at the time they disappeared.”

45. The European Court reiterated the obligation of a state to identify and initiate prosecutions of an alleged perpetrator of enforced disappearances under Article 2 ECHR in *Varnava a.o. v. Turkey*.<sup>162</sup> Moreover, when disappearances occur in life-threatening circumstances, the State’s obligation to conduct an effective investigation and to identify and prosecute perpetrators does not come to an end upon discovery of the body or presumption of death.<sup>163</sup>

46. The European Court stated in *Varnava and Others v. Turkey* (paragraph 145): “The Court would note that the procedural obligation to investigate under Article 2 where there has been an unlawful or suspicious death is triggered by, in most cases, the discovery of the body or the occurrence of death. Where disappearances in life-threatening circumstances are concerned, the procedural obligation to investigate can hardly come to an end on discovery of the body or the presumption of death; this merely casts light on one aspect of

<sup>157</sup> IACHR, *Velásquez-Rodríguez v. Honduras* (see footnote 123) para. 181; IACHR, *The Pueblo Bello Massacre v. Colombia* (see footnote 127) para. 143.

<sup>158</sup> Human Rights Committee, *Bashasha v. Libyan Arab Jamahiriya*, communication No. 1776/2008, 20 October 2008, para. 9.

<sup>159</sup> CCPR/C/119/D/2259/2013 para. 7.5.

<sup>160</sup> European Court of Human Rights, *Çiçek v. Turkey*, application No. 45175/12, 5 February 2019, para. 173; European Court of Human Rights, *Varnava and Others v. Turkey*, Applications nos. 16064/90 – 16073/90, 18 September 2009, para. 186; European Court of Human Rights, *Timurtaş v. Turkey* (see footnote 119) para. 98; See Section II, E of the Thematic Report.

<sup>161</sup> European Court of Human Rights, *Cyprus v. Turkey* (see footnote 143) para. 150.

<sup>162</sup> European Court of Human Rights, *Varnava and Others v. Turkey*, (see footnote 174) para. 145; European Court of Human Rights, *Palić v. Bosnia and Herzegovina*, Application No. 4704/04, 15 February 2011, para. 64.

<sup>163</sup> European Court of Human Rights, *Varnava and Others v. Turkey*, (see footnote 174) paras. 144 and 145.

the fate of the missing person. An obligation to account for the disappearance and death, and to identify and prosecute any perpetrator of unlawful acts in that connection, will generally remain.”

47. The Human Rights Committee in the case *Bleier v. Uruguay* considered this case to be admissible as the enforced disappearance was ongoing and related to events after Uruguay’s ratification of the ICCPR and its Optional Protocol 1 on 23 March 1976. The Committee confirmed the continuous nature of enforced disappearances.<sup>164</sup> In the case *Sarma v. Sri Lanka* the Human Rights Committee also held that the enforced disappearance of the victim was continuous.<sup>165</sup>

48. The Inter-American Court reiterated the continuous nature of an enforced disappearance, which allows for the Court’s competence to rule on any actions and their consequences taking place in the aftermath of the recognition of jurisdiction.<sup>166</sup> In this relation the duty to investigate instances of alleged enforced disappearances is considered to be continuous as long as the fate of the person disappeared has not been clarified.<sup>167</sup> The obligation remains in force as long as there is uncertainty around what ultimately happened to individuals who are missing, because the right of victims’ families to know the victim’s fate and, where applicable, to locate their bodily remains, constitutes a fair expectation that the State must meet through all available means.<sup>168</sup>

49. The Inter-American Court stated in *Velásquez-Rodríguez v. Honduras* (paragraph 181): “The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated 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.”

## **E. Autonomy and independence of the authorities in charge of the investigation**

50. The persons responsible for the investigation and the ones who carry out that investigation must be impartial and independent from those allegedly involved in the events.<sup>169</sup> The European Court discussed the independence and impartiality of adjudicatory authorities relating to cases in Turkey. In these cases the Court concluded that National Security Courts were not sufficiently independent due to the involvement of a military judge in relation to the requirements under Article 6 ECHR. The Court stated, “the court may be unduly influenced by considerations which had nothing to do with the nature of the case.”<sup>170</sup> Elements beyond the institutional and hierarchical organization of courts are considered when assessing the independence of investigations.<sup>171</sup>

<sup>164</sup> Human Rights Committee, *Bleier v. Uruguay* (see footnote 138) paras. 7(b), 13, 14.

<sup>165</sup> Human Rights Committee, *Sarma v. Sri Lanka*, Communication No. 950/2000, 16 July 2003, para. 6.2.

<sup>166</sup> IACHR, *Blake v. Guatemala*, Merits. Judgment of January 24, 1998, Series C No. 57, paras. 39 and 40; IACHR, *Velásquez-Rodríguez v. Honduras* (see footnote 123) para. 155; IACHR, *Radilla-Pacheco v. Mexico*, Preliminary objections, Merits, Reparations, and Costs. Judgment of November 23 2009, Series C No. 209, para. 24.

<sup>167</sup> IACHR, *Velásquez-Rodríguez v. Honduras* (see footnote 123) para. 181.

<sup>168</sup> See IACHR, *García y Familiares Vs. Guatemala*, Merits, Reparations and Costs, Judgment of 29 November 2012, Series C No. 258 para. 132; IACHR, *Osorio Rivera y Familiares Vs. Perú*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 26 November 2013, Series C No. 253, para. 179; and IACHR, *Rodríguez Vera y otros (Desaparecidos del Palacio de Justicia) Vs. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 14 November 2014, para. 439.

<sup>169</sup> European Court of Human Rights, *Tahsin Acar v. Turkey*, Application No. 26307/95, 23 November 2004, paras. 221–223; See Section II, F of the Thematic Report.

<sup>170</sup> European Court of Human Rights, *Mahmut Kaya v. Turkey*, Application No. 22535/93, 28 March 2000, para. 97.

<sup>171</sup> European Court of Human Rights, *Tahsin Acar v. Turkey* (see footnote 180) para. 221.

51. The European Court stated in *Öcalan v. Turkey* (paragraph 115): “Where a military judge has participated in an interlocutory decision that forms an integral part of proceedings against a civilian, the whole proceedings are deprived of the appearance of having been conducted by an independent and impartial court.”

52. The European Court stated in *Tahsin Acar v. Turkey* (paragraphs 221–223): “(...) The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (...) For an investigation into an alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events.”

53. In the case *La Cantuta v. Peru*, the Inter-American Court reiterated that an effective investigation must be independent and impartial.<sup>172</sup> In the case *Serrano-Cruz Sisters v. El Salvador*, the Inter-American Court found that the investigation lacked impartiality of the investigating authorities because the prosecutor was involved in the visit of one of the potential witnesses of the case interpreted as acting in the defense of the respondent State at the Inter-American Court, while simultaneously acting as prosecutor at the domestic level as well.<sup>173</sup>

54. The Inter-American Court stated in *Serrano-Cruz Sisters v. El Salvador* (paragraph 103): [T]he prosecutor demonstrated that he had not maintained his impartiality in the investigation and that the line of investigation in the criminal proceedings was not totally separate from the State’s defense before the Inter-American Court.

55. In Greece, pursuant to article 14 and 15 of the Criminal Procedure Code (CPC) and the relevant proceedings persons involved in any way in committing the felony of enforced disappearance are not allowed to participate under any capacity, not even the one of a secretary, during the criminal preliminary proceedings. These include the preliminary examination, filing criminal charges, interrogation, the intermediate proceedings of judicial councils and the main proceedings before a court.<sup>174</sup> In France, a public prosecutor or investigating judge who directs the judicial investigation could not entrust it to a police service, which would itself be suspected of the crime of enforced disappearance.<sup>175</sup> In relation to the newly established Office of the Missing Persons (OMP) in Sri Lanka, the Working Group reiterated the importance of ensuring that the OMP’s independence is scrupulously respected. The Working Group further underscored the State’s obligation to ensure impartial and thorough investigations into enforced disappearances, with the competent authorities having the necessary powers and resources to conduct the investigation effectively.<sup>176</sup>

## F. Right to Truth in relation to effective investigation

56. The Human Rights Committee, the Inter-American Court and the European Court affirmed the existence of the right to know the truth afforded to relatives of victims of gross human rights violations. Importantly, the collective dimension of this right is viewed as intrinsically intertwined with the obligation to carry out an effective investigation into the factual circumstances of a disappearance. Furthermore, it is asserted that this right holds a

<sup>172</sup> IACHR, *La Cantuta v. Peru*, Merits, Reparations, and Costs. Judgment of November 9, 2006, Series C No. 162 para. 110; See Inter-American Commission of Human Rights, *Monsenor Oscar Arnulfo Romero and Galdámez v. El Salvador*, IACCommHR Report No. 37/00, OEA/Ser.L/V/II.106 doc. 3 rev. (13 April 2000) para. 80.

<sup>173</sup> IACHR, *Serrano-Cruz Sisters v. El Salvador* (see footnote 128) para. 103.

<sup>174</sup> Greece, Criminal Procedure Code (CPC) of 1 January 1950, Articles 14 and 15.

<sup>175</sup> France, submission to the WGEID of 11 March 2019, paragraph 7.

<sup>176</sup> AL LKA 1/2020.

preventive dimension.<sup>177</sup> In this context, truth-seeking processes and truth and reconciliation commissions should not absolve the States' obligation to carry out an effective investigation into the facts.<sup>178</sup>

57. The Inter-American Court established most strongly that effective investigations are undertaken with the view to determine the truth surrounding the disappearance. Since the *Velásquez Rodríguez Case*, the Inter-American Court has affirmed in its jurisprudence the existence of a right of the victim's relatives to know the victim's fate and, if applicable, where a disappeared person's remains are located.<sup>179</sup> The Inter-American Court found for the first time in the *Castillo-Páez Case* that a failure to investigate corresponds to a violation of the right to truth.<sup>180</sup> In this context, the right to truth refers to both, determining the factual circumstances of a disappearance and identifying alleged perpetrators responsible for it.<sup>181</sup> The right to know the truth of the relatives of victims of serious human rights violations is framed within the right to access to justice and the duties to investigate and to prosecute, deriving from articles 8 and 25 ACHR.<sup>182</sup> As part of these duties, States hold the obligation to effectively search for the truth, which is considered to be an independent duty from any criminal proceedings, which may be barred by statutes of limitation.<sup>183</sup> The Court has also considered the obligation to investigate as a form of reparation, given the need to remedy the violation of the right to truth.<sup>184</sup> The right to truth refers to a collective dimension, as a right owed to the society as a whole, in order to have access to information that is essential for the establishment and safeguarding of a democratic system.<sup>185</sup>

58. The Inter-American Court held in *Pueblo Bello Massacre v. Colombia* in relation to the reasonable timeframe of an effective investigation (paragraph 171): "[T]he right of access to justice is not exhausted with the filing of domestic proceedings, but must also ensure, within a reasonable time, the right of the alleged victims or their next of kin for every necessary measure to be taken to know the truth about what happened and to sanction those who are eventually found to be responsible."

59. The Inter-American Court stated in *Castillo-Páez v. Peru*, (paragraphs 85 and 86): "[T]he [Inter-American] Commission considers that there has been a violation of the right to truth and information, in the light of the State's lack of interest in investigating the events that gave rise to this case. (...) it [the right to truth] may correspond to a concept that is being developed in doctrine and case law, which has already been disposed of in this Case through the Court's decision to establish Peru's obligation to investigate the events that produced the violations of the American Convention."

60. The Inter-American Court stated in *Bámaca-Velásquez v. Guatemala* (paragraphs 197 and 201): "[A]s a result of the disappearance of Bámaca Velásquez, the State violated the right to the truth of the next of kin of the victim and of society as a whole. In this respect, the Commission declared that the right to the truth has a collective nature, which includes the right of society to "have access to essential information for the development of democratic systems", and a particular nature, as the right of the victims' next of kin to know what happened to their loved ones, which permits a form of reparation (...). (para 201) [T]he right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities

<sup>177</sup> A/HRC/16/48 para. 39; E/CN.4/2005/102/Add.1 Principle 2.

<sup>178</sup> IACHR, *19 Tradesmen v. Colombia*, Merits, Reparations and Costs, Judgment of July 5, 2004, Series C No. 109, para. 72(g).

<sup>179</sup> IACHR, *Velásquez-Rodríguez v. Honduras* (see footnote 123) para. 181.

<sup>180</sup> IACHR, *Castillo Páez v. Peru*, Judgment of November 3, 1997, Series C No. 34 paras. 85 and 86; IACHR, *Castillo-Páez v. Peru*, Reparations and Costs. Judgment of November 27, 1998, Series C No. 43 para. 106.

<sup>181</sup> IACHR, *Serrano-Cruz Sisters v. El Salvador* (see footnote 128) para. 62.

<sup>182</sup> IACHR, *Bámaca-Velásquez v. Guatemala* (see footnote 124) para. 201.

<sup>183</sup> IACHR, *Velásquez-Rodríguez v. Honduras* (see footnote 123) para. 177; IACHR, *Villagrán Morales et al. v. Guatemala*, Judgment of November 19, 1999, Series C No. para. 226; IACHR, *La Cantuta v. Peru* (see footnote 183) para. 157.

<sup>184</sup> IACHR, *Serrano-Cruz Sisters v. El Salvador* (see footnote 128) para. 62.

<sup>185</sup> IACHR, *Bámaca-Velásquez v. Guatemala* (see footnote 124) para. 197; IACHR, *Serrano-Cruz Sisters v. El Salvador* (see footnote 126) para. 62.



from the competent State organs, through the investigation and prosecution established in Articles 8 and 25 of the Convention.”

61. The Inter-American Court stated in *Serrano-Cruz Sisters v. El Salvador* (paragraph 62): “The Court has reiterated that everyone, including the next of kin of victims of serious human rights violations, has the right to know the truth. Consequently, the next of kin of the victims, and society as a whole, must be informed of everything that happened in relation to the said violations.”

62. The Human Rights Committee in the case *Mariam Sankara et al. v. Burkina Faso* in relation to the assassination of the President of Burkina Faso in 1987, the Human Rights Committee indicated that the family had the right to know the circumstances conducive to the violation.<sup>186</sup> In the case *Benaziza v. Algeria* the Human Rights Committee implicitly interlinked the right of victims to know the truth and receive factual information surrounding the disappearances as part of a diligent investigation.<sup>187</sup>

63. The Human Rights Committee stated in *Bashasha v. Libyan Arab Jamahiriya* (paragraph 9): [T]he State party is under an obligation to provide the author with an effective remedy. The Committee therefore urges the State party a) to conduct a thorough and effective investigation into the disappearance and death of the author’s cousin; b) to provide adequate information resulting from its investigation (...).

64. In relation to truth commissions in Algeria, the Human Rights Committee pointed to the fact that their reports were not publicly available by demanding the Algerian authorities to publicize these.<sup>188</sup> These concerns of the Human Rights Committee point to the fact that these reports should be known by a wider audience than the victims of enforced disappearances, namely by the society as a whole.

65. The right to truth as part of an effective investigation is not commonly mentioned as part of the European Court’s jurisprudence. However, it is often treated as part of the procedural obligation under Article 2 ECHR in cases of gross human rights violations. In order to satisfy this right criminal investigations must be conducted. In cases relating to Russia, the European Court found that delays in the investigation hindered the effectiveness of the investigation, as required by Article 2 ECHR and, therefore, negatively impacted “the prospects of arriving at the truth.”<sup>189</sup>

66. The European Court in *Kurt v. Turkey* (paragraph 175): “[G]iven [the fact] that the authorities have not assisted the applicant in her search for the truth about the whereabouts of her son, which has led it to find a breach of Articles 3 and 13 in her respect, the Court considers that an award of compensation is also justified in her favour.”

67. In Mexico, the “General Law on Victims” adopted on 9 January 2013 contains a broad definition of the notion of victims and spells out all fundamental rights that shall be guaranteed to them, including the right to know the truth (Articles 18 to 25), the right to the localisation, identification and restitution of mortal remains (Article 21), the right to access to justice (Article 117), and the right to reparation, including compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition (Articles 26 to 78).<sup>190</sup>

68. In Bolivia, the Commission of Truth established pursuant to Law No. 879 reiterated the obligation of the State to an effective, diligent and exhaustive investigation into cases of enforced disappearances, which is accompanied by the imprescriptible nature of the crime and the prohibition of amnesties for enforced disappearances.<sup>191</sup>

69. In Bosnia and Herzegovina, the “Law on Missing Persons,” provides for the legal possibility for families of missing persons to initiate appeals if the relevant institutions fail

<sup>186</sup> Human Rights Committee, *Mariam Sankara et al. v. Burkina Faso*, communication No. 1159/2003, 28 March 2006, para. 12.2.

<sup>187</sup> Human Rights Committee, *Benaziza v. Algeria*, communication No. 1588/2007, 26 July 2010 para. 11; Human Rights Committee, *Bashasha v. Libyan Arab Jamahiriya* (see footnote 174) para. 9.

<sup>188</sup> Human Rights Committee, Concluding observations Algeria, CCPR/C/DZA/CO/3, para. 10.

<sup>189</sup> European Court of Human Rights, *Bazorkina v. Russia* (see footnote 144) para. 121.

<sup>190</sup> Mexico, Ley General de Víctimas of 9 January 2013, Article 18–25.

<sup>191</sup> Bolivia, Law No.879 of 23 December 2016.

to comply with their legal obligations. According to the Law, this is a means for families to exercise their right to know the truth and seek protection before the Constitutional Court.<sup>192</sup>

70. In relation to the lack of information surrounding the fate and whereabouts of disappeared persons in the course of the civil war in Tajikistan, the Working Group indicated that the Government should adopt a truth-seeking State policy and develop specific mechanisms, supported by dedicated resources, for dealing with disappearances caused by and related to the civil war. This should include the creation of a national register to collect information on disappeared persons, the search for, mapping and conservation of burial sites, and the exhumation, identification and return of identified remains to families.<sup>193</sup>

## G. Burden of Proof regarding effective investigations

71. The European Court does not revert the burden of proof with regard to an alleged violation of the substantive limb of Article 3 of the ECHR in respect of a disappeared person requesting applicants to prove beyond reasonable doubt that their relative has in fact been tortured.<sup>194</sup> However, such proof results from “the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact.”<sup>195</sup>

72. The European Court stated in *Avkhadova and others v. Russia*, (paragraph 84): “Detained persons are in a vulnerable position and the obligation on the authorities to account for the treatment of a detained individual is particularly stringent where that individual dies or disappears thereafter. Where the events at issue lie wholly or to a large extent within the exclusive knowledge of the authorities, as in the case of persons under their control in detention, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.”

73. The European Court in *Bazorkina v. Russia*, (paragraph 106): “As to the facts that are in dispute, the Court recalls its jurisprudence confirming the standard of proof “beyond reasonable doubt” in its assessment of evidence. Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact. In this context, the conduct of the parties when evidence is being obtained has to be taken into account.”

74. The Inter-American Court considers that crucial facts clarifying the circumstances of enforced disappearances are in the control of the State, which may hinder the author of the complaint to access evidence.<sup>196</sup> Therefore, the Inter-American Court held that the burden of proof shifts to the respondent State, if the Inter-American Commission on Human Rights demonstrated circumstantial evidence linking a systematic pattern of enforced disappearances and a specific complaint in relation to a disappeared person. In the event of classification of relevant information by the State necessary for the disclosure of the whereabouts or the fate of the disappeared person, the Inter-American Court stated in the *Gomes Lund* case, that the burden of proof is on the State to provide reasons for the classification of this information.<sup>197</sup>

75. The Inter-American Court stated in *Gomes-Lund et al. (“Guerrilha do Araguaia”) v. Brazil* (paragraph 230): [A]ll denials of information must be motivated and founded, to which the State is responsible for the burden of proof on the impossibility of presenting said information, and given doubts or empty legal arguments, the right to access to information will be favored.

<sup>192</sup> Bosnia and Herzegovina, Law on Missing Persons of Bosnia and Herzegovina of 21 October 2004, “Official Gazette of BiH”, No. 50/05 (2004).

<sup>193</sup> A/HRC/45/13/Add.1 para. 37.

<sup>194</sup> European Court of Human Rights, *Zaurbekova and Zaurbekova v. Russia*, Application No. 27183/03, 22 January 2009, paras. 91 and 92.

<sup>195</sup> European Court of Human Rights, *Ireland v. the United Kingdom*, Application No. 5310/71, 18 January 1978, para. 161.

<sup>196</sup> IACHR, *Velásquez-Rodríguez v. Honduras* (see footnote 123) para.123.

<sup>197</sup> IACHR, *Gomes-Lund et al. (“Guerrilha do Araguaia”) v. Brazil* (see footnote 152) para. 230.

76. In the case *Grioua v. Algeria*, the Human Rights Committee applied the concept of a shared burden of proof allowing for rendering a default decision. As such both the respondent State and the complainant hold the duty, respectively, to investigate the complaint and present supporting evidence.<sup>198</sup> The Human Rights Committee took this approach in subsequent cases in contexts of Algeria, Libya and Nepal.<sup>199</sup>

77. The Human Rights Committee stated in *Grioua v. Algeria* (paragraph 7.4): “The Committee reaffirms that the burden of proof cannot rest on the author of the communication alone, especially considering that the author and the State party do not always have equal access to the evidence and frequently the State party alone has the relevant information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it.”

78. The Human Rights Committee stated in *Chhedulal Tharu and others v. Nepal* (paragraph 10.2): “In cases in which the author has submitted allegations that are corroborated by credible evidence and in which further clarification depends on information that is solely in the hands of the State party, the Committee may consider the author’s allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party.”

## H. Obstacles to effective investigation: Statute of limitations, principle of *ne bis in idem* and prohibition of amnesties, pardons and other similar measures

79. Indicators of ineffective investigation recorded by the European Court included the length of time before an actual investigation was initiated and witness statements were taken, the length of time before statements were taken from the alleged perpetrators or inquiries by police officers on duty at the time, inadequate questions put to the witnesses, a failure by the authorities to consider all relevant information, the failure of the public prosecutor to make any serious attempts to inspect the custody records and to visit the detention places himself,<sup>200</sup> sole reliance on the statements of police officers,<sup>201</sup> decisions of non-jurisdiction and the lack of securing evidence,<sup>202</sup> the lack of cooperation between State agencies and as a result the lack of access to requisite information<sup>203</sup> and delays through repeatedly adjourning and reopening investigations.<sup>204</sup>

80. Further obstacles to effective investigations include limited national capacity and a lack of qualified forensic experts, compounded by economic constraints due to the costly process of DNA identification, the lack of relevant information about gravesites due to witnesses’ fear of testifying or lack of exhumations of known sites, the lack of cooperation between former rival parties, difficulties for investigative bodies to visit places of detention or to obtain essential information from relevant authorities. Obstacles to conducting effective investigations also stem from difficulties in securing access to archives that may contain vital information on the fate of disappeared persons.

81. The Human Rights Committee stated that amnesties are incompatible with the obligation of States to investigate and reiterated that States are to be “duty-bound to

<sup>198</sup> Human Rights Committee, *Grioua v. Algeria*, Communication No. 1327/2004, 10 July 2010, para. 7.4.

<sup>199</sup> Human Rights Committee, *Sharma v. Nepal*, Communication No. 1469/2006, 28 October 2008, para. 7.5 ; Human Rights Committee, *Madoui v. Algeria*, Communication No. 1495/2006, 28 October 2008 para. 7.3; Human Rights Committee, *Benaziza v. Algeria* (see footnote 205) para. 9.4; Human Rights Committee, *El Alwani v. the Libyan Arab Jamahiriya*, Communication No 1295/2004, 11 July 2007 para. 6.3.

<sup>200</sup> European Court of Human Rights, *Timurtaş v. Turkey* (see footnote 119) para. 89; European Court of Human Rights, *Mahmut Kaya v. Turkey* (see footnote 187) para. 104.

<sup>201</sup> European Court of Human Rights, *Ergi v. Turkey* (see footnote 122) para. 83.

<sup>202</sup> European Court of Human Rights, *Mahmut Kaya v. Turkey* (see footnote 187) paras. 24–52 and 104.

<sup>203</sup> European Court of Human Rights, *Aslakhanova and others v. Russia* (see footnote 147) para. 125.

<sup>204</sup> European Court of Human Rights, *Baysayeva v. Russia*, application No. 47354/07, European Court of Human Rights, 12 June 2012, para. 129; See Section II, D, G, and H of the Thematic Report.

conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances [...], and to prosecute, try and punish those responsible for such violations.”<sup>205</sup> The duties of a proper effective investigation prevail any domestic legal impediments as to evade the persistence of impunity.<sup>206</sup>

82. Furthermore, the Human Rights Committee, in relation to the inadmissibility of death certificates, underscored that by issuing these the State cannot bypass its duty to investigate the facts, which derives from the continuous nature of this obligation.<sup>207</sup>

83. The Human Rights Committee stated in *Bashasha v. Libyan Arab Jamahiriya* (paragraph 7.3): “[T]he Committee observes that on 20 June 2009, the family was provided with Milhoud Ahmed Hussein Bashasha’s death certificate, without any explanation as to the cause or the exact place of his death or any information on any investigations undertaken by the State party. In the circumstances, the Committee finds that the right to life enshrined in article 6 has been violated by the State party.”<sup>208</sup>

84. The Inter-American Court in *Barrios Altos v. Peru* found that the self-amnesty in relation to Amnesty Act Nos. 26479 and 26492 was incompatible with the duty to investigate and prosecute leading to the persistence of impunity. In the *Castillo-Páez v. Peru* case, the Inter-American Court held that an amnesty law, which impedes the identification of a perpetrator, did not evade the State’s responsibility from complying with the victim’s right to know.<sup>209</sup>

85. The Inter-American Court stated in *Castillo-Páez v. Peru* (paragraph 90): “In connection with the above-mentioned violations of the American Convention, the Court considers that the Peruvian State is obliged to investigate the events that produced them. Moreover, on the assumption that internal difficulties might prevent the identification of the individuals responsible for crimes of this kind, the victim’s family still have the right to know what happened to him and, if appropriate, where his remains are located. It is therefore incumbent on the State to use all the means at its disposal to satisfy these reasonable expectations.”

86. The Inter-American Court stated in *Barrios Altos v. Peru* (paragraph 41): “[A]ll amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.”

87. Furthermore the Inter-American Court held that State authorities must not suppress information obtained through administrative procedures or from judicial authorities investigating an alleged enforced disappearance justifying these acts under the cover of national security.<sup>210</sup>

88. The Inter-American Court stated in *Gomes-Lund et al. (“Guerrilha do Araguaia”) v. Brazil* (paragraph 202): “[T]he Court has also established that in cases of violations of human rights, the State authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or pending procedures.”

<sup>205</sup> Human Rights Committee, *El Abani v. Algeria*, communication No. 1640/2007 (2010), 26 July 2010, para. 9; Human Rights Committee, General Comment No. 31 (2004), para. 18.

<sup>206</sup> Human Rights Committee, *Laureano v. Peru*, communication No. 540/1993, 16 April 1996, para. 10; Human Rights Committee, *Benaziza v. Algeria* (see footnote 205) para. 9.2.

<sup>207</sup> Human Rights Committee, *Bashasha v. Libyan Arab Jamahiriya* (see footnote 174) para.7.3; see Human Rights Committee, *S.E. v. Argentina*, communication No. 275/1988, 26 March 1990.

<sup>208</sup> *Ibid.*

<sup>209</sup> IACHR, *Castillo-Páez v. Peru* (see footnote 198) para. 90.

<sup>210</sup> IACHR, *Gomes-Lund et al. (“Guerrilha do Araguaia”) v. Brazil* (see footnote 152) para. 202.

89. In relation to statutes of limitation, it is of particular importance that the obligation to undertake effective investigations in order to determine the truth exists independently from criminal proceedings.<sup>211</sup>

90. In most cases brought before the European Court, no legal impediments such as amnesty laws have been instituted. The former European Commission in *Dujardin v. France*<sup>212</sup>, considered an amnesty shielding fifty individuals from prosecution for the killing of several gendarmes. Understanding that the amnesty emerged in relation to broader efforts for the settlement of conflicts between communities in New Caledonia, the European Commission concluded that such an amnesty did not contravene the ECHR “unless it can be seen to form part of a general practice aimed at the systematic prevention of prosecution of the perpetrators of such crimes.”<sup>213</sup>

91. However, when ill-treatment or torture is concerned the European Court found in *Yaman v. Turkey* (paragraph 55.): “[W]here a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an ‘effective remedy’ that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible.”

92. It could be concluded that considering torture and enforced disappearance are closely related and intertwined offenses that statutes of limitation and amnesties contravene the ECHR in such cases. In *Aslakhanova and others v. Russia*, the termination of pending investigations into abductions solely on the grounds that the time limit has expired is contrary to the obligations arising in relation to the right to life enshrined in Article 2 ECHR.<sup>214</sup>

93. The implementation of judgments by the European Court in relation to enforced disappearances in the Chechen Republic of the Russian Federation, including practices of effective investigation by governmental authorities, remains low. Instead, authorities resorted to paying compensation fixed by the Court to the applicant. Yet, no action is undertaken in terms of investigation or prosecution of the alleged perpetrators.<sup>215</sup>

94. In Ecuador, according to the Constitution and the Criminal Code, a statute of limitations does not apply to enforced disappearances. In Uruguay, the courts have resorted to statutory limitations, which may result in the shelving of cases of enforced disappearances in the future.<sup>216</sup> In Chile, in numerous cases, even if there were no grounds for excluding criminal responsibility, extenuating circumstances known as a “half prescription” have been applied, which lowered the penalty handed down in light of the time elapsed since the commission of the crimes.<sup>217</sup> In France, article 221-18 of the Criminal Code sets the limitation period for prosecution at thirty years. The starting point of the limitation period for public action is the day on which the disappearance ceases, i.e. the day on which certainty about the victim’s fate replaces uncertainty, the victim reappears in full light or his death is established. Enforced disappearance constituting a crime against humanity is not subject to a statute of limitations (article 213-5 of the Criminal Code).

95. In Nepal, on 26 April 2020 the Supreme Court rejected the Government’s petition calling for a review of its landmark judgment of 2015. The latter rejected a clause, which would have afforded the Commission on Truth and Reconciliation and the Commission on Investigation of Disappeared Persons with the power to recommend amnesties for serious human rights violations committed during the internal conflict between 1996–2006. Following a similar decision in January 2014, the Court, in its ruling, reiterated the prohibition of

<sup>211</sup> IACHR, *Vera Vera et al. v. Ecuador*, Preliminary objection, Merits, Reparations, and Costs. Judgment of May 19, 2011, Series C No. 224 paras. 122 and 123.

<sup>212</sup> EComHR, *Dujardin v. France*, Application No. 16734/90, 2 September 1999, D.R. No. 72.

<sup>213</sup> *Ibid.* para. 243.

<sup>214</sup> European Court of Human Rights, *Aslakhanova and others v. Russia* (see footnote 147) para. 237.

<sup>215</sup> Parliamentary Assembly Doc. 12276, 4 June 2010, “Legal remedies for human rights violations in the North-Caucasus region”, available at <http://bit.ly/1QXp5CJ>.

<sup>216</sup> See URY 1/2013; See also the contribution for this report by Francesca Lessa, Latin American Centre, OSGA, “Investigating Crimes against Humanity in South America,” Policy Brief (Oxford, 2019) 8. Available at [www.ohchr.org](http://www.ohchr.org); See also Article 80 and 120 of the Constitution of 2008; see also the contribution for this report of Defensoría del Pueblo de Ecuador. Available at [www.ohchr.org](http://www.ohchr.org).

<sup>217</sup> A/HRC/22/45/Add.1 paras. 28 and 69, p.18.

amnesties for serious human rights violations as a means to solidify a fair and transparent transitional justice process and in order to guarantee the centrality of victims within this process.<sup>218</sup>

96. In Tunisia, the Working Group regretted the proposal to dismantle the Specialized Criminal Chambers and to replace them with two new institutions that would be empowered to examine cases of gross human rights violations committed between 1955 and 2013 and to grant amnesties to the alleged perpetrators of these violations. The Working Group held that the proposal leads to impunity.<sup>219</sup>

97. In Spain, the current legal provisions related to the obligations to conduct investigations to clarify the fate of the missing person is applicable only and exclusively to enforced disappearances that are subsequent to 23 December 2010. The application of the Amnesty Law 46/1977 prevents the thorough and impartial investigation of thousands of complaints of enforced disappearances and the prosecution and punishment of those responsible.<sup>220</sup> Moreover, on 27 February 2012, the Supreme Court issued judgment No. 101/2012, which prevents Spanish judges from investigating crimes of the Civil War. This contravenes the States' obligations to ensure that perpetrators of enforced disappearances, including those who order, solicit, or induce the commission of, attempt to commit, are accomplices to, or participate in an enforced disappearance are prosecuted and sanctioned. Obstacles to investigative processes also imply restrictive or impossible access to archives, particularly military archives, that contain information on the fate of those disappeared, and the reluctant engagement of governmental authorities in processes of search, exhumation and identification of disappeared persons.<sup>221</sup>

98. The parliament of North Macedonia decided to subject all cases returned from the International Criminal Tribunal for the former Yugoslavia for prosecution at the domestic level to the 2002 Amnesty Law as a major legal impediment to investigations.<sup>222</sup> In Bosnia and Herzegovina, the Law on Amendments to the Criminal Code of 2015 introduced enforced disappearances as a separate offense, but it cannot be implemented retroactively.<sup>223</sup>

## II. Jurisprudence related to policy measures outlined in Section III of the Thematic Report

### A. Obligation to criminalize enforced disappearance autonomously

99. Article 4 of the Declaration establishes the obligation of the State to qualify enforced disappearance as an independent crime, which is understood as a critical requirement for an effective investigation.<sup>224</sup> Many countries lack specific legal provisions dedicated to protecting persons against enforced disappearances.

100. In France, enforced disappearances is codified as an autonomous offense via article 221-12 of the Penal Code introduced by Law No. 2013-711 as a result of the broader adjustment of French legislation to the Law of the European Union.<sup>225</sup>

101. In Thailand, a draft Prevention and Suppression of Torture and Enforced Disappearance Act establishes both torture and enforced disappearances as distinct crimes. However, in February 2017, Thailand's National Legislative Assembly decided to return

<sup>218</sup> Available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25855&LangID=E>.

<sup>219</sup> AL TUN 3/2019.

<sup>220</sup> Spain, Amnesty Law 46/1977 of 15 October 1977; A/HRC/27/49/Add.1, paras. 39–41.

<sup>221</sup> A/HRC/27/49/Add.1, para. 29.

<sup>222</sup> Council of Europe, "Missing persons and victims of enforced disappearance in Europe," Issue Paper, (Brussels 2016), 47.

<sup>223</sup> Bosnia and Herzegovina, Law on Amendments to the Criminal Code of Bosnia and Herzegovina of 19 May 2015, Official Gazette of BiH, No. 40/15.

<sup>224</sup> See Section III, A. of the Thematic Report.

<sup>225</sup> France, Penal Code of 1 March 1994, article 221-12.

the Draft Act to the Thai Cabinet, indefinitely delaying the enactment of this legislation. The Thai Cabinet approved the proposed legislation. Yet, it omits the key non-derogable principles of prohibition of torture and also of non-refoulement while the definition of crimes is not on par with international standards. Until now, Thailand's penal code does not recognize enforced disappearances as a crime bypassing, therefore, the continuous obligation to investigate cases of enforced disappearances.<sup>226</sup>

102. In India, enforced disappearances have not been recognized as a specific criminal offence in its penal code. Particular obstacles are faced due to the Armed Forces (Jammu and Kashmir) Special Powers Act of 1990, designating certain areas as “disturbed” territories. This Act grants broad powers and immunity to security forces including the requirement to get prior permission or sanction from the federal government before a member of the armed forces can be prosecuted in a civilian court.<sup>227</sup>

103. In relation to Tajikistan, the Working Group noted that enforced disappearances have not been introduced as an autonomous crime in its criminal legislation and nor are enforced disappearances planned to be incorporated in the new version of the Criminal Code of Tajikistan. The codification of enforced disappearances as an autonomous crime is crucial for addressing the limited awareness in the country of the concept of enforced disappearance as a means to conduct an effective investigation and to combat future instances of disappearances.<sup>228</sup>

104. In Tunisia, in the absence of specific legal provisions requiring the application of special procedures that differ from those currently in force there is no special procedure and no special investigating authority mandated to consider the offence of enforced disappearances, which is considered under the offence of infringement of personal liberty. Accordingly, the military courts that apply the Code of Criminal Procedure deal with such offences in accordance with the procedures that are applicable to other offences within their jurisdiction.<sup>229</sup>

## **B. Coordination of the authorities in charge of the investigation**

105. The coordination of investigative entities within States and between States constitutes a crucial element for the identification and location of disappeared persons.<sup>230</sup> The requirement of international cooperation in terms of investigation was mentioned in a case of Irish and Italian applicants who were the next of kin of individuals killed in a security operation. The applicants claimed that the State failed to comply with its procedural obligations under Article 2 ECHR as the State did not cooperate with Irish authorities investigating the circumstances of the bombing. The lack of such cooperation rendered the investigations ineffective. In *Cummins et al. v. the United Kingdom*, the European Court recalled that the respondent State is under an obligation to cooperate with the State of which an alleged perpetrator is a national at all investigative stages.<sup>231</sup>

106. The European Court stated in *O’Loughlin a.o. v. the United Kingdom (para. 2)*: Accordingly, where suspected perpetrators of a bombing attack carried out elsewhere are known to be present within the jurisdiction of a Contracting State, and evidence of a criminal offence may be secured, the fundamental importance of Article 2 requires that the authorities of that State of their own motion take effective measures in that regard. Otherwise, those indulging in cross-border attacks will be able to operate with impunity and the authorities of Contracting State where the unlawful attacks have taken place will be foiled in their own efforts to protect the fundamental rights of their citizens. The nature and

<sup>226</sup> THA 3/2019.

<sup>227</sup> International Commission of Jurists, “No More ‘Missing Persons’: The Criminalization of Enforced Disappearance in South Asia” (Geneva 2017) 20; See A/HRC/45/13.

<sup>228</sup> A/HRC/45/13/Add.1, para. 23.

<sup>229</sup> Tunisia, Section VI of the Criminal Code of 19 July 1913, Articles 250, 251 and 252 of the Code and Code of Military Justice of 10 January 1957, Article 5; See OL TUN 1/2018.

<sup>230</sup> See Section III, B and C of the Thematic Report.

<sup>231</sup> See European Court of Human Rights, *Cummins a.o. v. the United Kingdom*, admissibility decision, Application No. 27306/05, 13 December 2005.

scope of those measures will, inevitably, depend on the circumstances of the particular case and it is not appropriate for the Court to attempt to be more specific in this decision.”

107. A positive example of international cooperation in investigative processes, is the agreement signed on 1 July 2011 between the Ministries of Foreign Affairs of Argentina and Italy, pursuant to which all documents related to the enforced disappearance of Italian nationals that were kept in diplomatic and consular headquarters in Argentina must be disclosed and delivered to the National Memory Archive.

108. In France, the Central Office for Combating Crimes against Humanity, Genocide and War Crimes is also the central point of contact for the cooperation with international police and works closely with foreign police services and judicial authorities, with the United Nations (UN) and its agencies, including the High Commissioner for Refugees and High Commissioner for Human Rights, with the International Criminal Police Organization (Interpol), the European network “Genocide” of Eurojust and the war crime focal point of the European law enforcement agency (Europol).<sup>232</sup>

109. Bosnia and Herzegovina and Serbia ratified the “Protocol on Co-operation in Search for the Missing Persons between the Council of Ministers of Bosnia and Herzegovina and the Government of Republic of Serbia” of 24 March 2016 that provides for more robust exchange of information on missing persons’ files, identification of grave sites and exhumation and identification of human remains.<sup>233</sup>

110. Several good practices can be mentioned in terms of the establishment of entities and mechanisms of cooperation to investigate enforced disappearances on a national level. According to the Council of Europe, national commissions on missing persons have been established in Armenia, Azerbaijan, Bosnia and Herzegovina, Montenegro and Serbia, as well as in Kosovo.<sup>234</sup> Good practices can also be identified in the practice of Argentina via the establishment of the National Commission concerning Missing Persons and in Croatia via the Commission for Tracing Persons Missing in War Activities in the Republic of Croatia. In Sri Lanka, the recently established Office of the Missing Persons (OMP) holds a range of powers in order to obtain information and evidence relevant to its investigations, including access to the records of past commissions of inquiry.<sup>235</sup> In Switzerland, when a person is reported missing, relatives can initiate a search request via a newly established network between the Confederation and the Cantons, in order to ensure that information flows efficiently and reliably between relevant entities.<sup>236</sup> In Mexico, the “General Law on Enforced Disappearance of Persons, Disappearance Perpetrated by Individuals and the National Search System,” entered into force on 16 January 2018, creates a National Search System, a National Search Commission, a National Register of Disappeared and Missing Persons, and a National Citizens Council, made up of human rights defenders, experts and relatives of victims, who advise and issue opinions provided to the National Search System.<sup>237</sup>

### **C. Production of evidence, access of victims to investigation and protection from reprisals**

111. The obligation to undertake an effective investigation of enforced disappearance is closely related to the rights of the victims, including their families, and other stakeholders to access and take part in the investigations.<sup>238</sup> The Inter-American Court stated that victim participation is an important element of effective investigations and in the production of

<sup>232</sup> See the contribution for this report by France, p. 5. Available at [www.ohchr.org](http://www.ohchr.org).

<sup>233</sup> Bosnia and Herzegovina, “Protocol on Co-operation in Search for the Missing Persons between the Council of Ministers of Bosnia and Herzegovina and the Government of Republic of Serbia” Official Gazette of BiH” No. 2/16 of 24 March 2016.

<sup>234</sup> Council of Europe (see footnote 232) 43; All references to Kosovo shall be understood to be in the context of Security Council resolution 1244 (1999).

<sup>235</sup> A/HRC/42/40/Add.1 para. 6.

<sup>236</sup> Switzerland, Submission to WGEID, March 2019, p. 4 para. 7.

<sup>237</sup> CED/C/MEX/CO/1/Add.2.

<sup>238</sup> See Section III, D, E and F of the Thematic Report.



evidence in order to clarify facts with the aim to establish the truth.<sup>239</sup> The Court also indicated that victims of human rights violations or their next of kin should dispose of a range of mechanisms for being heard and acting in proceedings in order to contribute to the clarification of facts.<sup>240</sup> Indeed, the participation of family members and the affected community in investigative steps plays a crucial role in the identification of evidence in disappearance cases.<sup>241</sup> In investigative processes, the respective cultural and ethnic background of affected communities should be taken in consideration and any operations that may lead to re-victimization or secondary victimization should be strictly avoided.<sup>242</sup>

112. The Inter-American Court stated in *Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil*, (paragraph 139): “The Court has also noted that from Article 8 of the Convention, what can be gathered is that victims of human rights violations, or their next of kin, should have ample possibilities to be heard and act in the respective procedures, in the search to ascertain the facts and in the punishment of those responsible, as well as the search for due reparation. Moreover, the Court has noted that the obligation to investigate and the corresponding right of the alleged victim or their next of kin cannot be gathered merely from the conventional norms of international law which are imperative for the States Parties, but also from the right to investigate ex officio certain illicit conduct and the norms that permit the victims or their next of kin to file a complaint or present a lawsuit, evidence, or applications, or any other matter, in order to participate procedurally in the criminal investigation with the hope of establishing the truth of the facts.”

113. The European Court considered that the obligation to investigate, construed as an obligation of means, entailed that the authorities must have taken all steps which remain available to them in order to safeguard the evidence concerning cases of disappearances and to undertake any investigative steps with the requisite due diligence.<sup>243</sup>

114. In cases of interim measures relating to applicants before the Court or witnesses being subjected to reprisals, the European Court in *Shabazova v. Russia* requested the government to provide without delay information on the fate and whereabouts of the applicant’s husband.<sup>244</sup> It is important to note that the European Court leaves State parties a considerable margin of appreciation in the choice of protective measures. In the *Mahmut Kaya Case*, the European Court stated, “positive obligations must (...) not impose an impossible or disproportionate burden on the authorities.”<sup>245</sup>

115. In Cyprus, the Committee of Missing Persons (CMP) was unable to exhume even a single grave for over 20 years mainly due to the lack of bi-communal cooperation and trust.<sup>246</sup> An obstacle was the persistent refusal of the Turkish military stationed in the north of the island to allow the search for and opening of possible burial sites located in military zones. Moreover, Turkey’s refusal to allow the search for missing persons from 1974 in the territory under its control or allow access to relevant military archives delayed and rendered investigations ineffective.<sup>247</sup>

116. In Greece, incorporating the crime of enforced disappearance of a person into article 187 paragraph 1 of the Criminal Procedure Code (CPC) also means that the regulations on protection of witnesses and their families apply in relation to cases of enforced disappearances subsequent to an order from the competent prosecutor. Particularly, it means that witnesses should be systematically guarded by the police, separately detained if

<sup>239</sup> IACHR, *Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil* (see footnote 152) para. 139.

<sup>240</sup> IACHR, *Villagrán Morales et al. v. Guatemala*, Judgment of November 19, 1999, Series C No. 63 para. 227. See IACHR, *The Pueblo Bello Massacre v. Colombia* (see footnote 127) para. 144; IACHR, *Serrano-Cruz Sisters v. El Salvador* (see footnote 128) para. 63. This obligation is derived from Article 8 ACHR.

<sup>241</sup> See the written contribution of Carlos Beristain to the expert consultation of the Working Group on Enforced or Involuntary Disappearance Expert Consultation at its 116th session, para. 5 (in Spanish). Available at [www.ohchr.org](http://www.ohchr.org).

<sup>242</sup> *Ibid.*, paras. 9 and 12.

<sup>243</sup> European Court of Human Rights, *Timurtaş v. Turkey* (see footnote 117) para. 88.

<sup>244</sup> See European Court of Human Rights, *Shabazova v. Russia*, application No. 38450/05, 2 April 2009.

<sup>245</sup> European Court of Human Rights, *Mahmut Kaya Case* (see footnote 181) para. 86.

<sup>246</sup> Council of Europe, (see footnote 232) p. 44.

<sup>247</sup> *Ibid.*

they are prisoners, change their identities, transfer them (if they are public servants), non-disclose their identity during criminal proceedings, as well as protect the trial officers accordingly, such as the prosecutor, the investigating magistrate, and judges of the case.<sup>248</sup>

117. In Mexico, the 2015 Protocol for the Search of Disappeared and Investigation of the Crime of Enforced Disappearances recommended the use of geographical data and the establishment of maps in order to undertake an effective investigation into disappearances cases.<sup>249</sup>

118. In Tajikistan, the Working Group recommended that the Government should guarantee that there will be no reprisals against or harassment of families that come forward with information about the disappeared. This process should include collaboration with independent partners who could assist with the relevant and specialized expertise required to build trust and help prevent and monitor reprisals.<sup>250</sup>

119. In the Gambia, relatives of forcibly disappeared persons were afraid to file complaints and people with crucial information refused to testify, contributing to a situation of impunity. To remedy this situation, the Working Group recommended that incentives be provided to witnesses so they are willing to testify. Moreover the Working Group suggested that an adequate witness protection program should be created.<sup>251</sup>

#### **D. Forensic investigations and conversation and disclosure of archives**

120. The access to archives is crucial in order to obtain information relevant for clarifying cases of enforced disappearance and for ensuring that State authorities cannot restrict such access.<sup>252</sup> In various country-specific contexts the access to archives, including military archives that may contain information on the fate and whereabouts of disappeared persons has been reiterated as part of the State's obligation to effectively investigate enforced disappearances.

121. In its report after the visit to Turkey, for instance, the Working Group recommended that access to archives, including the military, the gendarmerie and the security and intelligence services should be guaranteed both to families and to judicial authorities, to allow them to fully investigate and prosecute those responsible (A/HRC/33/51/Add.1, para.26). In the report on Sri Lanka, the Working Group underlined that States' obligation to investigate the allegations and prosecute and punish the perpetrators requires ensuring access to all archives, including military archives, that may contain information on the fate and whereabouts of disappeared persons (persons (A/HRC/33/51/Add.2, para. 44). After the visit to Serbia, the Working Group welcomed the decision to open the archives of the Ministry of the Interior, but recommended that the archives of the Ministry of Defense be opened too for almost 300 lawsuits (A/HRC/30/38/Add.1, para. 37).

122. The Inter-American Court linked an effective investigation as a means to obtain the truth about circumstances of the disappearances and perpetrators involved to the possibility to access archives. In the case *Gomes-Lund et al. v. Brazil* the Court considered the failure by the State to comply with the obligation of granting access to crucial information contained in archives to victims in order to seek relevant facts of the disappearance. The Inter-American Court concluded that although information may be restricted, when this classification as secret is proved to be unlawful, the State has to make the information accessible within an adequate period of time in light of ongoing investigations.<sup>253</sup> The

<sup>248</sup> Greece, Criminal Procedure Code (CPC) of 1 January 1950, Article 187 and Articles 9 and 10 of Law 2927/2001.

<sup>249</sup> See Office of the Prosecutor, *Protocolo Homologado para la Búsqueda de Personas Desaparecidas y la Investigación del Delito de Desaparición Forzada*, June 2015, p.45 in Verónica Hinestroza, Human Rights Institute of the International Bar Association, contribution to the expert consultation of the Working Group on Enforced or Involuntary Disappearance at its 116th session, p. 3. Available at [www.ohchr.org](http://www.ohchr.org).

<sup>250</sup> A/HRC/45/13/Add.1, para. 37.

<sup>251</sup> A/HRC/39/46/Add.1 para. 60.

<sup>252</sup> A/HRC/7/2/Add.2 paras. 61 and 94; UN Updated Set of Principles to Combat Impunity, (see footnote 72) Principles 3, 4 and 14–18; See Section III, G and H of the Thematic Report.

<sup>253</sup> IACHR, *Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil* (footnote 152) paras. 211 and 212.

Human Rights Committee did not call for specific forensic commissions. Yet, the Human Rights Committee considered establishing central databases and platforms documenting reported disappearances, along with regular actions that assist family members in locating the disappeared persons.<sup>254</sup>

123. The Inter-American Court stated in *Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil* (paragraph 211): "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 of what occurred in cases of gross violations of human rights such as those of enforced disappearances and the extrajudicial execution in this case. To argue in a judicial proceeding, as was done in this case, the lack of evidence regarding the existence of certain information, without at least noting what procedures were carried out to confirm the nonexistence of said information, allows for the discretionary and arbitrary actions of the State to provide said information, thereby creating legal uncertainty regarding the exercise of said right. (...) (paragraph 212) Based on the preceding considerations, the Court concluded that the State violated the right to seek and receive information enshrined in Article 13 of the American Convention."

124. The "Forensic Commission to Identify Remains" established in Mexico in August 2013, created pursuant to an agreement among the Office of the Attorney General of Mexico, civil society organisations representing relatives of missing persons from Mexico, Honduras, Guatemala and El Salvador, and the Argentine Forensic Anthropology Team (EAAF), is in charge of identifying the mortal remains found in three mass graves related to massacres of migrants perpetrated in 2011 and returning the remains to families. This allowed families of missing persons and victims of enforced disappearance to be involved in investigations and to rely on independent professionals.<sup>255</sup>

125. In July 2005, the *Guatemalan Office of the Prosecutor for Human Rights* (PDH) discovered around 80 million documents by the National Police concerning the period of Guatemalan conflict. The PDH adopted steps to preserve the documentation and to enable access and consultation by the public. On the basis of evidence contained in the archives, an investigation regarding two members of the National Police responsible for the enforced disappearance of a trade unionist and an university student in 1984 was carried out which led to their identification, arrest, prosecution and sentencing to 40 years' imprisonment.<sup>256</sup>

126. In the Western Balkans, the establishment of centralised DNA databases has greatly enhanced the search and identification of missing persons and victims of enforced disappearance in the region. Although the archives of the Ministry of Defence are kept secret in Serbia, a positive example regarding obtaining access to military archives or to documentation covered by State secrecy laws concerns the opening of the archives of the Serbian Ministry of Interior in 2013.<sup>257</sup>

127. In Portugal, despite the absence of a specialised unit to investigate enforced disappearances, such cases are investigated by the Judicial Police, which disposes of a forensic lab and a unit for psychosocial support, both with specialized staff. The Judicial Police can request the support of the National Institute for Legal Medicine and Forensic Sciences with competencies in the area of forensics, anthropology and psychology.<sup>258</sup>

128. In Tajikistan, in relation to the exhumation of burial sites and identification of remains, the Working Group regretted that Tajikistan has limited forensic capabilities, and disposes only of one small facility for DNA analysis. The Working Group, therefore, recommended the establishment of a DNA bank of affected families, with appropriate guarantees on reprisals and confidentiality for families coming forward and with external assistance if required. Moreover, training for forensic officials on international standards,

<sup>254</sup> CCPR/C/79/Add.95 para. 10.

<sup>255</sup> Inter-American Commission on Human Rights, Preliminary observations on the IACHR visit to Mexico, 2 October 2015, available at <http://bit.ly/1Ssgiiiv>.

<sup>256</sup> See A/HRC/16/48/Add.2.

<sup>257</sup> A/HRC/30/38/Add.1, para. 37.

<sup>258</sup> Portugal, Submission to WGEID, March 2019, p. 5.

such as the Minnesota Protocol on the Investigation of Potentially Unlawful Death, should be strengthened.<sup>259</sup>

## E. Differential approach in cases of disappearances of women

129. The Working Group recognized a gender perspective is critical in explaining, understanding and dealing with unique challenges that women face in the exercise of their human rights and to outline solutions to address these issues.<sup>260</sup>

130. The Inter-American Court in the *Cotton Field* case, dealing with enforced disappearances and subsequent deaths of three women in Ciudad Juárez at the US-Mexico border, found that States have the positive obligation to create an appropriate legal framework to combat violence against women. The Court held that an obligation of strict due diligence to take prompt and effective investigative measures follows in the event of disappearances of women. The State has the duty to establish and implement an effective policy framework in order to combat incidences of violence reported over several years since those expose an apparent risk for relevant authorities. In this context, the Inter-American Court considered various reports outlining that the up-to-date policy methods for prevention in relation to specific violations against women have been ineffective. The Court also referred to assessments by UN bodies in relation to the general context of violence against women. The Court stated that prior to the disappearances, an increased degree of vigilance by State authorities was required in a context of widespread violence. Second, prior to the discovery of the body the State was obliged to undertake effective search operations.<sup>261</sup>

131. The Inter-American Court stated in *Gonzalez et al. ('Cotton Field') v. Mexico* (paragraph 273): “The Court observes that national and international reports agree that the prevention of the murder of women in Ciudad Juárez, and also the response to these killings, has been ineffective and insufficient. According to the 2005 CEDAW Report, it was only in 2003, primarily as a follow-up to the report of the IACHR Rapporteur, “that people began to face squarely the need for a comprehensive and integrated program with distinct and complementary areas of intervention.” (...) (Paragraph 284): Mexico did not prove that it had adopted reasonable measures, according to the circumstances surrounding these cases, to find the victims alive. The State did not act promptly during the first hours and days following the reports of the disappearances, losing valuable time. In the period between the reports and the discovery of the victims’ bodies, the State merely carried out formalities and took statements that, although important, lost their value when they failed to lead to specific search actions. (...) The foregoing reveals that the State did not act with the required due diligence to prevent the death and abuse suffered by the victims adequately and did not act, as could reasonably be expected, in accordance with the circumstances of the case, to end their deprivation of liberty. This failure to comply with the obligation to guarantee is particularly serious owing to the context of which the State was aware – which placed women in a particularly vulnerable situation – and of the even greater obligations imposed in cases of violence against women by Article 7(b) of the Convention of Belém do Pará.”

132. In this context, the Inter-American Court requested that specific legislative and policy frameworks should be established in order to comply with all investigative duties necessary in contexts of widespread violence against women.

133. The Human Rights Committee, in *Sassene v. Algeria*, reaffirmed that the suffering caused by enforced disappearances also affects their relatives and can be considered as a form of cruel and inhuman treatment warranting effective mechanisms for investigation. In this context, the specifically gender-related consequences of enforced disappearances may

<sup>259</sup> A/HRC/45/13/Add.1, para. 38.

<sup>260</sup> A/HRC/WGEID/98/2, Preamble; See Section III, I of the Thematic Report.

<sup>261</sup> IACHR, *González et al. ('Cotton Field') v. Mexico*, (see footnote 132) para. 284.

cause heightened economic hardship reinforcing structural dependencies and impact the mental and physical health of women and girls.<sup>262</sup>

134. The European Court in *Varnava v. Turkey* also held that an enforced disappearance generates a specific effect on relatives, which may amount to cruel or inhuman treatment as breach of article 3 ECHR to the detriment of these relatives. Although factors identified in relation to the impact of enforced disappearances of persons on their relatives were not considered to be gender specific, in *Çakıcı v. Turkey* the Court referred to considerations of “particular circumstances of the case,” including the family ties and relationships, the involvement of a family member in investigative steps in order to obtain information, and the States reaction to these efforts by a particular family member.<sup>263</sup> Considering that jurisprudence showed that State agents had diverging reactions towards female family members and female victims of enforced disappearances, gender-specific circumstances consideration may be interfered as part of particular circumstances of the case.<sup>264</sup>

135. For instance, in Sri Lanka, the Office of Missing Persons referred to a gender-sensitive approach, including psychosocial responsive strategies, which support family members of those disappeared at all stages of the search including in circumstances where the death of the missing or disappeared person has been confirmed.<sup>265</sup>

## F. Differential approach in cases of disappearances of migrants

136. Migrants<sup>266</sup> are frequently subject to deprivation of liberty, which may place them at risk of facing enforced disappearances due to the failure in safeguarding communication channels between migrants and family members while being in administrative detention,<sup>267</sup> or detention and summary return without due process for migrants intercepted at sea and in violation of the principle of non-refoulement.<sup>268</sup> The position of structural vulnerability of migrants in the absence of adequate transnational investigative mechanisms leads to difficulties in clarifying the fate and whereabouts of disappeared migrants and locating and returning human remains to their families. The Working Group recalled the direct link between migration and enforced disappearances in relation to particular risks arising from migratory journeys.<sup>269</sup>

137. The Working Group documented enforced disappearances of individuals during their migratory journeys in transit or in their country of destination and persons migrating due to the threat of being disappeared.<sup>270</sup> Individuals also migrated in order to take part in the search for truth seeking further information that contributes to the establishment of the whereabouts or fate of disappeared persons.<sup>271</sup> Preventing relatives from contributing to the identification of disappeared persons by State authorities results in the loss of traceable documental evidence. In other cases migrants have disappeared in detention facilities because they are not duly registered followed by the refusal of State authorities to disclose their whereabouts.<sup>272</sup>

138. In these contexts, States shall investigate any allegation of involvement, collusion or acquiescence of State authorities in criminal acts, which may result in the disappearance of

<sup>262</sup> See Human Rights Committee, *Sassene v. Algeria*, communication No. 2026/2011, 29 October 2014, paras. 3.4, 7.6, 7.11; See Human Rights Committee, *Rosa María Serna et als. v. Colombia*, communication No. 2134/2012, 9 July 2015.

<sup>263</sup> European Court of Human Rights, *Çakıcı v. Turkey*, application No. 23657/94, para. 98.

<sup>264</sup> Available at <http://opiniojuris.org/2016/09/05/emerging-voices-the-european-court-of-human-rights-and-women-affected-by-enforced-disappearances-of-their-relatives/>.

<sup>265</sup> A/HRC/42/40/Add.1, p. 65.

<sup>266</sup> See the definition used by the WGEID, A/HRC/36/39/Add.2 para. 5; See Section III, J of the Thematic Report.

<sup>267</sup> A/HRC/7/12 para. 44.

<sup>268</sup> A/HRC/33/67 para. 34; A/HRC/WGEID/112/1, para. 96; A/HRC/33/51/Add.1, para. 55.

<sup>269</sup> A/HRC/36/39/Add.2, para. 51; See A/72/335.

<sup>270</sup> A/HRC/WGEID/118/1 paras. 121–122; A/HRC/WGEID/119/1, paras. 20–21; E/CN.4/1984/21, para. 102. See also E/CN.4/1492, annex VIII, paras. 1 and 2.1 and annex IX, p. 5.

<sup>271</sup> E/CN.4/1985/15, para. 135. See also A/HRC/30/38/Add.5, paras. 33–41.

<sup>272</sup> UNHCR, *Monitoring Immigration Detention: Practical Manual* (UNHCR, 2014) p. 20.

migrants.<sup>273</sup> Any effective investigation should be undertaken with the requisite cooperation between States to conduct transnational investigations into these cases.<sup>274</sup> The Working Group recalled that an effective investigation of disappeared migrants comprises forensic investigative resources, the compilation of all relevant ante-mortem information, including the genetic information of the relatives and the creation of a central database.<sup>275</sup> Investigative steps imply the location of clandestine graves or other places where bodies may be concealed in migratory transit areas and the establishment of a register of corpses found.<sup>276</sup>

139. The Inter-American Commission on Human Rights held that the failure to take effective investigative steps and further collusion between State agents and criminal organizations led to the enforced disappearances of migrants in Mexico.<sup>277</sup> The Office of the Prosecutor of Human Rights of Guatemala documented severe flaws in relation to effective investigations in relation to the location and identification of bodies and the burial of human remains of migrants transiting through Mexico.<sup>278</sup>

140. Positive practices by States include the collection of a total of 229 genetic markers and 348 fingerprints in 2016 in Tunisia in connection with a list of 505 persons reported missing on the Italian coast as a result of clandestine immigration since 14 January 2011. A database was also compiled from the file of missing persons and steps were taken to intensify diplomatic action.<sup>279</sup> In Mexico, a forensic commission mandated to exhume, identify and return the mortal remains of missing migrants was established in August 2013 for three burial sites of mass graves.<sup>280</sup>

## G. Obligations to investigate disappearances committed by non-State actors

141. Enforced disappearances committed by non-State actors present particular challenges for the protection of victims and warrant investigative measures to be undertaken by the State as part of their due diligence obligations.<sup>281</sup> Even if the State is not involved in the commission of the enforced disappearance through the collusion or acquiescence of State agents with non-State actors, the State breaches its obligation when not engaging in effective investigations.<sup>282</sup>

142. The European Court and the Inter-American Court held that the same requirements of ex officio investigations, promptness, effectiveness, involvement of family members, and impartiality of investigating entities apply in relation to enforced disappearances allegedly committed by non-State actors.<sup>283</sup>

143. The European Court stated in *Tsechoyev v. Russia* (paragraph 145): “The obligation to conduct an effective official investigation also arises where death occurs in suspicious circumstances not imputable to State agents. It has developed a number of guiding principles to be followed for an investigation to comply with the Convention’s

<sup>273</sup> A/HRC/33/51/Add.1, para. 67; A/HRC/36/39/Add.2 para. 65.

<sup>274</sup> JAL GMB 1/2018.

<sup>275</sup> A/HRC/36/39/Add.2, para. 68.

<sup>276</sup> Ibid. 69.

<sup>277</sup> Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc. 48/13, 30 December 2013, para. 162.

<sup>278</sup> Ibid, para. 170; See Fundación para la Justicia y el Estado Democrático de Derecho et al., Alternative Report to the Committee against Torture, May 2012, available at [tinternet.ohchr.org/Treaties/CAT/Shared%20Documents/MEX/INT\\_CAT\\_NGO\\_MEX\\_12976\\_S.pdf](http://tinternet.ohchr.org/Treaties/CAT/Shared%20Documents/MEX/INT_CAT_NGO_MEX_12976_S.pdf), paragraphs 136–150.

<sup>279</sup> See the contribution for this report by Tunisia. Available at [www.ohchr.org](http://www.ohchr.org).

<sup>280</sup> See Gabriella Citroni, “The first attempts in Mexico and Central America to address the phenomenon of missing and disappeared migrants,” *International Review of the Red Cross* No. 905 (August 2017) p. 749.

<sup>281</sup> IACHR, *Velásquez-Rodríguez v. Honduras* (see footnote 123) para. 172; See Section III, K of the Thematic Report.

<sup>282</sup> European Court of Human Rights, *Mahmut Kaya v. Turkey* (see footnote 187) paragraph 78.

<sup>283</sup> European Court of Human Rights, *Tsechoyev v. Russia* (footnote 170) paragraph 145; IACHR, *The Pueblo Bello Massacre v. Colombia* (see footnote 127) paras. 142–146.

requirements, comprising, notably, the requirements of effectiveness, independence, promptness and expedition, accessibility to the family and sufficient public scrutiny.”

144. The Inter-American Court stated in *The Pueblo Bello Massacre v. Colombia* (paragraph 145–146): “The execution of an effective investigation is a fundamental and conditioning element for the protection of certain rights that are affected or annulled by these situations, such as, in the instant case, the rights to personal liberty, humane treatment and life. This assessment is valid whatsoever the agent to which the violation may eventually be attributed, even individuals, because, if their acts are not investigated genuinely, they would be, to some extent, assisted by the public authorities, which would entail the State’s international responsibility. (...) The Court has maintained that by implementing or tolerating actions aimed at carrying out extrajudicial executions, failing to investigate them adequately and, when applicable, failing to punish those responsible effectively, the State violates its obligations to respect and ensure the rights established in the Convention to the alleged victims and their next of kin, prevents society from knowing what happened, and reproduces the conditions of impunity for this type of acts to be repeated.”

145. The Inter-American Court considered the obligation of the State to undertake effective investigations as part of the collective and individual right to know the truth to be applicable to cases of enforced disappearances not directly attributed to State agents.<sup>284</sup> When particular life-threatening circumstances or specific risks of disappearances by non-State actors can be identified, additional investigative steps are required to be undertaken by State authorities, including taking witness statements, the alerting of checkpoints, checking identification papers and official records of detainees in detention facilities.<sup>285</sup> The absence of the involvement of State agents in the commission of enforced disappearances does not shield the State from incurring international responsibility if the State fails to take preventive measures.<sup>286</sup> Furthermore, States should investigate potential acts of involvement, collusion, or acquiescence of State authorities in criminal acts committed by non-State actors conducive to enforced disappearances.<sup>287</sup>

146. The Inter-American Court stated in the *Godínez Cruz case*, (paragraph 188): “Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.”

147. In Mexico, State agents and non-State actors allegedly committed enforced disappearances. The lack of effective investigative procedures make it impossible to identify if non-State actors participated in the commission of disappearances and if these have been tolerated by State actors. Therefore, new legislative and investigative mechanisms in Mexico focus on victims of disappearances, regardless if the authors of the offense were State actors or not.<sup>288</sup>

<sup>284</sup> IACHR, *The Pueblo Bello Massacre v. Colombia* (see footnote 127) paras. 143, 161, 171, 193 and 212.

<sup>285</sup> See European Court of Human Rights, *Koku v. Turkey*, Application no. 27305/95, 31 May 2005; European Court of Human Rights, *Medova v. Russia*, Application No. 25385/04, European Court of Human Rights, 15 January 2009; IACHR, *González et al. ('Cotton Field') v. Mexico* (see footnote 132).

<sup>286</sup> IACHR, *Godínez-Cruz v. Honduras* (merits) judgment of 20, 1989, Series C No. 3, para. 188; IACHR, *Velásquez Rodríguez Case* (see footnote 123) para. 177; European Court of Human Rights, *Mahmut Kaya v. Turkey* (see footnote 187) para. 78.

<sup>287</sup> A/HRC/36/39/Add.2, para. h 88(c).

<sup>288</sup> See the contribution for this report by Mexico. Available at [www.ohchr.org](http://www.ohchr.org).