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and cause of their death should be explicitly recognized for individual family members.

### **... and assistance for families**

Families waiting for information on the fate of their relatives have specific material, financial, psychological and legal needs and often require help from the authorities and various organizations. In addition to the emergency steps that must be taken to provide for material needs, the legal status of those reported missing must be determined so as to clarify the legal situation of these families and make it possible, where necessary, to hold funeral ceremonies in keeping with local traditions and practice.

### **Whose responsibility is it to implement protection measures?**

Various actors have a role to play in the implementation of prevention and protection measures.

States are required to take and apply measures in fulfilment of their international obligations. Depending on the case, these measures must be adopted by one or several ministries, the legislative power, the courts, the armed forces or other State bodies.

As for armed groups, they should be made aware of their obligations under

international humanitarian law and of their responsibility for any failure to comply with the relevant provisions.

Many governmental and non-governmental organizations also seek to prevent people from disappearing and to help the families of those who do.

Finally, in situations of armed conflict or internal violence, the ICRC strives to ensure that people are protected from any threat to their lives, physical integrity or dignity, to prevent people from going missing, to restore family ties and to elucidate the fate of people whose whereabouts are unknown to their families.

### **Recommendations on best practices...**

The ICRC has brought State representatives, international organizations and individual experts together in a process aimed at raising awareness of the importance of the issue of missing persons, examining prevention methods and agreeing upon best operational practices in this area.

Recommendations based on best practices have now been adopted as a result of the work carried out in the first part of the process. These recommendations concern protection activities and the restoration of family ties, the handling of mortal remains,

help for the families of missing persons, the gathering and management of personal data and the establishment of mechanisms for dealing with cases of missing persons. The ICRC is striving to ensure that these recommendations are followed as widely as possible.

### **... and on the development of national legislation**

An important aspect of the process launched by the ICRC concerns the development of national legislation.

This topic is addressed in the attached "Recommendations for the development of domestic law" contained in Chapter V of the ICRC Report entitled *The Missing and Their Families. Summary of the Conclusions Arising from Events Held Prior to the International Conference of Governmental and Non-Governmental Experts (19-21 February 2003)*.

These recommendations concern the measures to be taken at the national level to implement the relevant rules of international law and various other measures for developing that law which were identified within the process launched by the ICRC.

# RECOMMENDATIONS FOR THE DEVELOPMENT OF A DOMESTIC LAW ON THE MISSING AND THEIR FAMILIES

This document is an extensive reproduction of Chapter V of the *ICRC Report: The Missing and their Families. Summary of the Conclusions arising from the Events held prior to the International Conference of Governmental and Non-Governmental Experts (19-21 February 2003)*. The present annex corresponds to paragraphs 28 to 36 of the original Report; the paragraph numbering hereunder has been modified to make the recommendations easier to follow.

## 1. KNOWING THE FATE OF THEIR RELATIVES

All necessary legislative, regulatory and practical measures must be taken to implement obligations arising from international humanitarian law, including obligations relative to the clarification of the fate of missing persons.

In armed conflict and internal violence, domestic law and regulations should recognize the individual right of family members to know the fate of missing relatives, including their whereabouts or, if dead, the circumstances and cause of their deaths. Implementing measures should include, in particular:

- A. the duty of the competent national authorities regularly to inform family members about the process and results of the investigation concerning the whereabouts or fate of a missing relative;
- B. remedies in case the right of family members to receive regular and adequate information on the whereabouts or fate of missing relatives, or on the process and results of investigation, is violated, said remedies to include the review of decisions denying access to information and the award of adequate compensation;
- C. penal or administrative sanctions for unlawfully withholding available information or refusing to make reasonable efforts to obtain and provide information on the fact of death and/or on the cause and the reasons / circumstances of death when such information is requested by a relative of a missing person.

Standing operating procedures, directives and instructions should include measures to implement the right of families of members of armed forces or armed groups to know the fate of their relatives.

Domestic law and regulations must ensure that, in international armed conflicts, protected persons are allowed to inform their families of their capture / arrest, address and state of health. Capture / internment cards must be issued by the authorities for that purpose.

In non-international armed conflicts and situations of internal violence, domestic law and regulations should ensure that persons deprived of their liberty for reasons related to the conflict or the situation have the right to inform their families of, at least, their capture / arrest, address and state of health. Adequate means of communication should be provided for that purpose. The right to inform relatives of one's capture / arrest, address and state of health should not be interpreted as restricting the right to correspond with the members of one's family.

Domestic law should recognize that no individual should be punished for maintaining private or personal contact with relatives, or for inquiring about the fate or whereabouts of a relative, whatever the nature of the act, including criminal acts and acts against State security, that relative may have or is suspected of having committed.

The systematic and deliberate denial of the right to know the fate of one's relative should be punished as a criminal offence under domestic law. Penalties should be defined that are appropriate to the gravity of the offence.

The systematic and deliberate denial of the right to inform relatives of one's capture / arrest, address and state of health should be punished as a criminal offence under domestic law. Penalties should be defined that are appropriate to the gravity of the offence.

## 2. GENERAL PROTECTION

### **The duty to respect and ensure respect for international humanitarian law and to give effect to protected human rights**

- A. All necessary legislative, regulatory and practical measures must be taken to implement the obligations arising from international humanitarian law and aimed at preventing persons from becoming unaccounted for and accounting for persons reported missing as a result of an armed conflict.
- B. All legislative or other measures must be taken to give effect to internationally protected human rights, without distinction of any kind, in order to prevent persons from becoming unaccounted for and to account for persons reported missing. Those rights include:
  - a. the right not to be arbitrarily deprived of one's life;
  - b. the right not to be arbitrarily deprived of one's liberty;
  - c. the right to a fair trial affording all judicial guarantees;
  - d. the right to respect for one's family life;
  - e. the prohibition of torture and other cruel, inhuman or degrading treatment;
  - f. the prohibition of enforced disappearances;
  - g. the rights of persons deprived of their liberty.

### **The duty to establish a responsible command**

- A. Orders and instructions must be given to ensure compliance with international humanitarian law, and their execution supervised. In particular, regulations, orders and instructions must be issued to:
  - a. prevent the killing and ill-treatment of persons not participating or no longer participating in hostilities, including persons *hors de combat*;
  - b. regulate capture / arrest for reasons related to an armed conflict and ensure that those captured / arrested are treated humanely.
- B. It must be ensured that military commanders prevent and where necessary suppress and report to the competent authorities breaches of international humanitarian law committed by members of the armed forces / armed groups under their command and other persons under their control. To that end:
  - a. a strict chain of command must be maintained to ensure that subordinates obey the rules;
  - b. the necessary orders / procedures should be issued;
  - c. effective supervision should be exercised.
- C. In situations of internal violence, the State authorities should ensure that commanders and/or superiors prevent and where necessary suppress and report to the competent authorities breaches of the applicable rules of conduct and engagement committed by arms carriers under their command or authority.

### **The duty to suppress violations of international humanitarian law and to establish an internal disciplinary system**

- A. Domestic law must provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of international humanitarian law. The relevant authorities must search for such persons and bring them to justice.
- B. Domestic law and regulations must ensure that the armed forces, including the armed members of resistance movements, are organized and subject to an appropriate internal disciplinary system allowing for enforcement of the rules of international humanitarian law and international human rights law.
- C. Domestic law and regulations must include all necessary measures for the suppression of all acts contrary to international humanitarian law, whether committed by members of the armed forces / armed groups, public officials or civilians.
- D. Domestic law and regulations should include all necessary measures for the prevention and punishment of enforced disappearances.

- E. Domestic law should ensure that all persons, whatever their quality or rank, are held accountable for offences that they committed or ordered to be committed.
- F. Domestic law and regulations must recognize that combatants have a duty not to carry out manifestly unlawful orders. They should recognize such a duty for arm carriers in situations of internal violence.

**The duty to spread knowledge of international humanitarian law and international human rights law**

- A. Each party to a conflict must ensure that the forces under its command know their obligations under international humanitarian law, in particular that:
  - a. committing or ordering the commission of an act that constitutes a violation of international humanitarian law may entail domestic and international criminal responsibility;
  - b. members of the armed forces have the right and duty not to carry out a manifestly unlawful order;
  - c. orders from a superior officer may not be invoked as a defence.
- B. Domestic law and regulations must ensure that commanders are required to undertake to make their subordinates aware of their obligations under the law.
- C. The civilian population, including civil servants, should receive the necessary education in international humanitarian law.
- D. Members of the armed forces and the civilian population should receive the necessary education in international human rights law.

**3. USE OF FORCE BY LAW ENFORCEMENT OFFICIALS**

- A. To ensure that law enforcement officials play their role properly, domestic law and regulations should uphold the following principles:
  - a. law enforcement officials, including military or State security officers exercising police powers, should use force only when strictly necessary and to the extent required for the performance of their duty;
  - b. intentional lethal use of firearms may only be made when strictly unavoidable in order to protect human life;
  - c. whenever the lawful use of force and firearms is unavoidable:
    - I. assistance and medical aid should be rendered to any injured or affected persons at the earliest possible moment;
    - II. relatives of or other persons having close relationships with the injured or affected person should be notified at the earliest possible moment.
- B. The rules and regulations on the use of firearms by law enforcement officials should include guidelines:
  - a. ensuring that firearms are used only in appropriate circumstances and in a manner likely to decrease the risk of unnecessary harm;
  - b. regulating the control, storage and issuing of firearms, including procedures for ensuring that law enforcement officials are accountable for the firearms and ammunition issued to them;
  - c. providing for a system of reporting whenever law enforcement officials use firearms in the performance of their duty.

**4. PROTECTION OF PERSONS DEPRIVED OF THEIR LIBERTY**

Arrest, detention or imprisonment must be carried out only in strict accordance with the provisions of the law and by competent officials or persons authorized for that purpose; those persons should be identifiable and, wherever possible, should identify themselves. To that end, regulations, orders and instructions should be issued to govern arrest and detention procedures.

- A. Domestic law and regulations must ensure that, in international armed conflicts, protected persons deprived of their liberty are allowed to inform their families of their capture / arrest, address and state of health.
- B. Domestic law and regulations should ensure that persons deprived of their liberty for reasons related to non-international armed conflict or internal violence have the right to inform their families - or any other person of their choice - of, as a minimum, their capture / arrest, address and state of health. In addition:
- a. accurate information about the arrest and the place of detention or internment, including any transfers and release, should be made available without delay to relatives and defence counsels;
  - b. the death or serious illness of persons deprived of their liberty, whether interned or detained, should be notified without delay to the spouse, a near relative or any other person previously designated by the person interned or detained.
- C. Domestic law and regulations, including orders and instructions, must ensure that any persons deprived of their liberty for reasons related to non-international armed conflict or internal violence are informed promptly of the reasons why. In addition, they should ensure the effective protection, *inter alia*, of the right:
- a. to the assistance of a defence counsel of their choice;
  - b. to request and receive a medical examination and health care.
- D. Domestic law and regulations should ensure that:
- a. persons deprived of their liberty, whether interned or detained, are held in officially recognized places of internment or detention;
  - b. persons deprived of their liberty, whether interned or detained, are not kept in secret locations, or prevented from informing their relatives or other close relations of their arrest and place of detention or internment;
  - c. official registers of all persons, whether interned or detained, are maintained and kept up-to-date in every place of internment or detention (including police stations and military bases) and made available to relatives, judges, attorneys, any other person having a legitimate interest, and other authorities;
  - d. in case of arrest, detention or internment, the information to be registered includes:
    - I. the name and identity of each person interned or detained, and the reasons for the arrest, detention or internment;
    - II. the name and identity of the officials who made the arrest;
    - III. the date and time the person was arrested and taken to a place of internment or detention;
    - IV. the date and time of the person's appearance before a judicial authority;
    - V. the date, time and circumstances of the person's release or transfer to another place of internment or detention;
  - e. the transfer or release of persons deprived of their liberty is notified to the spouse, a close relative or any other person designated by them.
- E. Domestic law and regulations must ensure that persons deprived of their liberty for reasons related to armed conflict or internal violence are treated in conformity with applicable international standards. In particular:
- a. with regard to children, women and members of the same family:
    - I. in international armed conflicts, interned members of the same family must be lodged together in the same place of internment;
    - II. in international and non-international armed conflicts, women deprived of their liberty must be separated from interned or detained men, unless they are members of the same family; the same treatment should be applied in situations of internal violence;
    - III. in all circumstances, children deprived of their liberty must be separated from interned or detained adults, unless they are members of the same family;
  - b. with regard to visits and correspondence:
    - I. the right of persons deprived of their liberty to correspond with family members must be respected;
    - II. persons deprived of their liberty must be allowed to receive visitors; in particular, relatives, lawyers and doctors should have regular access to them;
  - c. with regard to visits of inspection:

- I. in international armed conflicts, access to all protected persons deprived of their liberty for reasons related to the conflict must be granted to the ICRC immediately after their capture or arrest;
  - II. in all circumstances, regular, independent, unannounced and unrestricted visits of inspection by the ICRC, or another independent national or international organization, should be allowed.
- F. In non-international armed conflicts and situations of internal violence, domestic law must ensure that any form of detention is subject to the effective control, including in respect of its lawfulness, of a judicial authority whose status and tenure should afford the strongest possible guarantees of competence, impartiality and independence.
- G. Domestic law and regulations must ensure that persons deprived of their liberty for reasons related to armed conflict or internal violence and subject to judicial / criminal proceedings are afforded the rights of a fair and regular trial and that fundamental judicial guarantees are observed.

#### **Release of persons deprived of their liberty**

- A. The necessary measures, including orders and instructions, should be adopted to ensure that persons deprived of their liberty are released in a manner allowing for reliable verification of their release and guaranteeing their security.
- B. The release of persons deprived of their liberty should be notified by the relevant authorities to the spouse, a close relative or any other person designated by them.
- C. The adequate measures, including orders and instructions, should be adopted to ensure that, on their release, prisoners of war are not repatriated against their will.

#### **Amnesty**

- A. In non-international armed conflicts, at the end of the hostilities the authorities in power are encouraged to grant an amnesty to persons who participated in the conflict for acts of hostility that are lawful under international humanitarian law. The amnesty should be granted by a legislative act.
- B. Such amnesty must not cover persons who committed crimes under international law, including war crimes, genocide and crimes against humanity.
- C. The granting of an amnesty should not preclude the initiation of civil proceedings or have a legal effect on the victims' right to reparations.
- D. An amnesty for acts other than crimes under international law or acts of hostility that are lawful under international humanitarian law should be granted only to individuals and under certain conditions; for example, it should be made conditional on a special hearing, on full disclosure of wrongdoing, or on the provision of information on missing persons.
- E. Amnesty procedures must involve all guarantees of due process.
- F. Amnesty procedures should provide an opportunity for identifiable victims to question and challenge the decision.

### **5. COMMUNICATION BETWEEN FAMILY MEMBERS**

#### **The right to exchange news**

- A. Persons affected by armed conflict or internal violence (other than persons deprived of their liberty for reasons related to armed conflict or internal violence)
  - a. Domestic law and regulations must ensure that persons affected by armed conflict or internal violence, including displaced persons and persons living in occupied / controlled territory, have the right to correspond with their families wherever the families may be.
  - b. The right to correspond with family members should be extended to other persons with whom there is a close relationship.

- c. The right to correspond should be extended to any means of communication available.
- B. Persons deprived of their liberty
  - a. Domestic law and regulations must ensure that:
    - I. in international and non-international armed conflicts, persons deprived of their liberty for reasons related to the conflict have the right to send and receive letters and cards;
    - II. in situations of internal violence, persons deprived of their liberty for reasons related to the situation have the right not to be subjected to arbitrary or unlawful interference with their correspondence.
  - b. The right to receive letters and cards should be extended to any other means of communication available.
  - c. Censorship of correspondence, if permitted, must be done as quickly as possible.
- C. Penal sanctions
  - a. The systematic and deliberate denial of the right to exchange news with relatives or other persons with whom there is a close relationship should be punished as a criminal offence under domestic law.
  - b. Penalties should be defined that are appropriate to the gravity of the offence.

#### **Exemptions from communication charges**

- A. Exemption from charges for communications intended for or dispatched to persons deprived of their liberty
  - a. Domestic law and regulations must provide that correspondence intended for prisoners of war or civilian internees or dispatched by them is exempt from all postal charges.
  - b. The exemption should be extended to any other means of communication available.
  - c. In non-international armed conflicts and situations of internal violence, communications should be exempt from all charges, or at least charged at a preferential rate.
- B. Exemption from charges for the ICRC
  - a. Domestic law and regulations must provide that correspondence concerning prisoners of war and civilian internees, dispatched or received by them via the ICRC or an Information Bureau, is exempt from all postal charges.
  - b. The exemption should be extended to any other means of communication available.
  - c. In non-international armed conflicts and situations of internal violence, communications sent via the ICRC should be exempt from all charges, or at least charged at a preferential rate.

#### **Contacts between members of armed or security forces and their relatives**

- A. Domestic military law or regulations should provide for the possibility of armed or security forces to maintain contact with their relatives.
- B. Standing operating procedures should be issued on the system used to exchange news between members of armed forces and their relatives to ensure that:
  - a. contact between members of the armed or security forces and their relatives are allowed and made possible at least once a month under any circumstances;
  - b. the communications are free of charge, or at least no more costly than internal communications.

### **6. TREATMENT OF THE DEAD AND GRAVES AND IDENTIFICATION OF HUMAN REMAINS**

#### **Treatment of the dead**

- A. The remains of those who have been killed in action and of other dead persons must be disposed of in compliance with the rules of international law applicable in armed conflict or internal violence.
- B. The competent authorities must take all necessary measures of a legislative, regulatory or practical nature to implement their obligations under international law, in particular with regard to the search,

collection, identification, transportation, disposal or burial, and repatriation of the persons deceased in relation to armed conflict or internal violence.

- C. For the benefit of members of the armed forces, including those involved in peace-keeping or peaceenforcement operations, of armed groups, and of civilian auxiliary services or other organisms involved in the collection and management of the dead, Standing operating procedures, directives or instructions should be issued on:
  - a. the search, collection, and identification of the dead without distinction;
  - b. the exhumation, collection, transportation, temporary storage or burial, and repatriation of human remains and corpses;
  - c. training and information on means of identification and the treatment of the dead.
- D. In all circumstances, applicable procedures, directives and instructions should respect *inter alia* the following principles:
  - a. the dead must be treated with respect and dignity;
  - b. the dead must be identified, whenever possible, before their remains are disposed of.
- E. With regard to the burial of the dead, in international and non-international armed conflicts, procedures, directives and instructions must provide *inter alia* that:
  - a. burial should be in individual graves, unless unavoidable circumstances require the use of collective graves;
  - b. all graves must be marked.
- F. In times of armed conflict or internal violence, provision should be made for the return of remains and personal effects to the other party or to the families on request.

#### **Identification of human remains and investigation into the cause of death**

- A. Domestic law and regulations should ensure that the identity of human remains and the cause of death are established with due diligence by a competent official. In particular they should designate the public official or person competent:
  - a. to perform *post mortem* examinations;
  - b. to make the final determination as to identity and cause of death.
- B. The authority, or authorities, competent to issue and deliver death certificates must be designated. In addition, provision should be made:
  - a. for circumstances where a medical practitioner or other person competent to issue a death certificate is not readily available within a reasonable time;
  - b. for the delivery and issuing of death certificates on the basis of information obtained from official sources or reliable witness accounts provided by the ICRC (attestation of knowledge of death).
- C. In situations of internal violence, domestic law and regulations must provide for an effective official investigation into the circumstances of death when any person is killed or appear to have been killed as a result of the use of force by agents of the State.

#### **Exhumations and *post mortem* examinations**

- A. Domestic law should ensure that exhumations are performed only with the proper authorizations, and according to the conditions specified in law. Regulations on health and environmental standards should be issued.
- B. The procedures of exhumation and *post mortem* examination should respect the following principles.
  - a. At all times, the dignity, honour, reputation and privacy of the deceased must be respected.
  - b. The known religious beliefs and opinions of the deceased and his or her relatives should be taken into consideration.
  - c. Families should be kept informed of the decisions in relation to exhumations and *post mortem* examinations, and of the results of any such examination.
  - d. When carrying out exhumations and when the circumstances permit, consideration should be given to the presence of the families or of family representatives.

- e. After *post mortem* examination, the remains should be released to the family at the earliest time possible.
- C. Domestic law and regulations should ensure that the processes of identifying human remains for the families' sake and of investigating the cause of death for the purpose of judicial proceedings are of equal importance, in particular with regard to the exhumation of mass graves. Hence:
  - a. information should be collected for the purpose of identification whenever exhumations are performed;
  - b. regulations and procedures should be in conformity with the principles governing the protection of personal data and genetic information.
- D. Ethical rules of conduct on the use of means of identification, in particular for investigations carried out in an international context, should be promoted and/or adopted by the competent authorities.

#### **Information to facilitate the identification of human remains**

- A. In international and non-international armed conflicts, the competent authorities must adopt adequate procedures for providing information on identity, location and cause of death to the appropriate authorities or to the families. The procedures should provide for:
  - a. the centralization of information on deceased persons, in particular when the corpses or human remains cannot be returned to the families immediately;
  - b. the establishment of the following lists, to be transmitted to the other party to the conflict through its Information Bureau, the ICRC or otherwise, whenever necessary:
    - I. persons deceased under their authority or control, whether identified or not;
    - II. the location of human remains and graves;
    - III. death certificates issued;
  - c. the official confirmation of deaths known from other reliable sources, in particular information provided by the ICRC.
- B. Individual notifications should be made to the other party to the conflict, to the families or to the ICRC, when appropriate.
- C. In situations of internal violence, the necessary measures should be taken so that appropriate mechanisms are put in place to ensure that all relevant information on persons affected by the situation of internal violence is collected and centralized, and the families are informed.
- D. In international armed conflicts, the authorities must provide for the establishment and operation of an official Grave Registration Service to see to the dead, including burials, and to record the particulars of graves and those there interred. A similar procedure should be established in non-international armed conflicts.

#### **Penal sanctions**

- A. The crimes under international law of despoliation and desecration of the dead should be punished as a criminal offence under domestic law. Intentionally mutilating the dead before their repatriation as part of a widespread and systematic policy should be considered an aggravated form of the crime.
- B. Intentionally obstructing, interfering with, or impeding the process of identification of human remains for the purpose of preventing said identification should be punished as a criminal offence under domestic law.

### **7. IDENTIFICATION AND THE COLLECTING AND FORWARDING OF INFORMATION**

#### **Identification of members of the armed and security forces**

- A. Domestic military law or regulations must ensure that members of the armed forces liable to become prisoners of war are provided with an identity card.
- B. The compulsory use of means of identification should be extended to all members of the armed and security forces involved in international or non-international armed conflicts, in situations of internal

violence, or in peace-keeping or peace-enforcement operations. At a minimum, identity discs should be used.

- C. Standing operating procedures should be issued on:
  - a. the identification system for members of armed forces;
  - b. the proper use of identity discs.

#### **Identification of other persons to prevent them from becoming unaccounted for**

- A. All necessary legislative and regulatory measures should be taken to ensure that births and deaths are duly registered.
- B. In times of armed conflict and internal violence, all necessary legislative and regulatory measures should be taken to ensure that a personal identity document or any other means of identification is available to any person on request. Children should have either their own personal ID or be registered on their parents' ID. The issuing and use of the ID, or the information appearing on it, should not be likely to give rise to arbitrary or unlawful discrimination.
- C. In times of armed conflict and internal violence, all necessary measures should be taken to ensure that all persons at risk, such as unaccompanied children, elderly and disabled persons, displaced persons, refugees, asylum-seekers, etc., are registered individually, as quickly as possible, in order to make specific arrangements for their protection and assistance. Such registration should be carried out in compliance with the rules governing the protection of personal data.

#### **Rules of criminal procedure**

- A. The rules of criminal procedure and investigation should provide that:
  - a. all information collected during exhumations that might help identify the victims of armed conflict or internal violence is forwarded to the authorities responsible for identifying the victims;
  - b. all information / evidence gathered on deceased persons during judicial proceedings or investigations is forwarded directly to the family or to the ICRC, the latter acting either as an intermediary or to ensure that the information is properly stored pending transmission to the families.
- B. Sentencing rules may establish mitigating circumstances for convicted persons who provide relevant information on the fate of missing persons and on the location of human remains.

#### **Information Bureaux**

- A. Every State must take all the measures required to establish an Information Bureau when a conflict breaks out and in all cases of occupation:
  - a. to centralize, without adverse distinction, all information on the wounded, sick, shipwrecked, dead, protected persons deprived of their liberty, children whose identity is in doubt and persons who have been reported missing and to provide this information to the appropriate authorities, through the intermediary of the Protecting Powers and of the ICRC Central Tracing Agency;
  - b. to be responsible for replying to all enquiries concerning protected persons and for making any enquiries needed to obtain any information requested that is not in its possession;
  - c. to act as an intermediary for the free transport of matter, including correspondence, sent to and by protected persons.
- B. An Information Bureau with analogous responsibilities should be set up in a non-international armed conflict whenever appropriate. Its mandate could include:
  - a. informing family members of the whereabouts or fate of their relatives;
  - b. taking all necessary measures to enquire about the whereabouts or fate of a missing person when requested, in the event it is not in possession of the relevant information, and searching for additional information.
- C. In international and non-international armed conflicts, Information Bureaux should also centralize information on persons belonging to the party responsible for the Information Bureau.

- D. The structure and the working procedures of the Information Bureau to be set up, the role to be played by the National Red Cross / Red Crescent Society, and the coordination mechanisms for the collection and transmission of information should be defined in peacetime.
- E. Procedures, directives or instructions must be issued to ensure that, in international armed conflicts, all persons belonging to the adverse party who are detained or interned and all known deaths resulting from the hostilities are registered, and that the information is transmitted to the appropriate authorities. These procedures, directives or instructions must provide that:
  - a. the information recorded be of a nature to make it possible to identify the persons exactly and to advise the next-of-kin quickly;
  - b. information the transmission of which might be detrimental to the person concerned or to his or her relatives is forwarded to the ICRC Central Tracing Agency only.
- F. Similar procedures, directives or instructions should be issued to ensure that, in non-international armed conflicts, all persons belonging to the adverse party who are detained or interned and all known deaths resulting from the hostilities are registered, and that the information not detrimental to the concerned persons or to his / her relatives is transmitted to the families or to the appropriate authorities.
- G. Domestic law and regulations must provide that the Information Bureaux and the ICRC Central Tracing Agency enjoy free postage for all mail. The exemption from charges should be extended to any other means of communication available, or at least the charges greatly reduced.

## **8. THE LEGAL SITUATION OF MISSING PERSONS AND OF THEIR RELATIVES**

### **The legal situation of persons reported missing as a result of armed conflict or internal violence**

- A. Persons presumed to be alive
  - a. Missing persons should be presumed to be alive until their fate has been ascertained or their death legally declared.
  - b. A person should not be declared dead before sufficient evidence has been gathered.
  - c. It might be desirable to provide for an interim period of absence before a death certificate is issued.
  - d. Provision must be made for the consequences of the return of missing persons who have been legally declared dead.
- B. Persons declared absent
  - a. A declaration of absence should be issued if it has been established that a person has been missing for a determined period of time. The minimum period of absence before a declaration of absence is issued should not be less than one year, but provision may be made for a shorter period with regard to particular events or circumstances.
  - b. A declaration of absence should be issued at the request of relatives or the competent authority. If someone other than the relatives requests a declaration of absence, the relatives should be allowed to oppose such declaration.
  - c. A declaration of absence should be issued by a competent judicial, administrative or military authority.
  - d. Account must be taken of the particular difficulty of gathering and furnishing the necessary evidence / documentation in times of armed conflict or internal violence, and in post-conflict situations. Provision should be made for the presentation of substitute or alternate evidence / documentation. It may be appropriate for attestations of absence established by military units, reliable local institutions or the ICRC to be given probative value (e.g. ICRC attestations based on tracing requests).
- C. Persons declared dead
  - a. A declaration of death should be issued at the request of any interested person or the competent authority. If someone other than the relatives requests a declaration of death, the relatives should be allowed to oppose such declaration.
  - b. A declaration of death should not be issued before all available measures or actions to ascertain the fate of the missing person have been taken, including public notifications that a declaration of death is to be issued.

- c. A declaration of death should be issued after a reasonable period of absence has elapsed, said period to be shorter than the period generally applicable in time of peace and not more than 2 years, or if, in the circumstances, it can be reasonably believed that the missing person has died.
- d. A declaration of death should be issued by a judicial authority.
- e. As in point B.d above, in certain circumstances, the presentation of substitute or alternate evidence / documentation should be allowed.
- f. The courts in the missing person's place of residence or the courts in the family's current place of residence should be competent to hear a request for a declaration of death.

#### **Consequences of a declaration of absence or a declaration of death**

- A. Civil status of the spouse and children
  - a. The civil status of the spouse and children should not be modified before the death of the missing person has been legally recognized.
  - b. The dissolution of the marriage should be pronounced at the request of the surviving spouse. Cultural and religious traditions should be taken into account with regard to matrimonial matters.
  - c. The interests of the child should be paramount. It is recommended that:
    - I. measures be taken for the provisional custody of the child immediately after the parents have been reported missing;
    - II. whenever possible, the surviving parent should have custody of the child after the other parent has been declared absent or dead; if both parents are reported missing, the child should be placed in the custody of another family member;
    - III. there should be no adoption against the express wishes of the child or its concerned relatives or legal guardians;
    - IV. the rules governing adoption must be consistent with the 1989 Convention on the Rights of the Child.
- B. Property
  - a. The rights and interests of missing persons must be protected at all times until their fate has been ascertained or their death recognized.
  - b. In order to protect the interests of missing persons and meet the material needs of their dependents:
    - I. in the period immediately following a disappearance, the dependents should be entitled to request that an allowance be drawn from the assets of the missing person in order to meet their immediate needs, especially when there is no public assistance available; a representative, preferably a member of the family, should be appointed to see to the immediate interests of the missing person;
    - II. a declaration of absence should enable the heirs to take provisional possession of the missing person's estate; in the absence of a designated representative, one should be appointed (preferably a family member) to manage the property and exercise the missing person's rights until his/her fate has been determined; the representative should act under the control of a judicial or other competent public authority, and judicial authorization should be required for important decisions affecting the missing person's property;
    - III. a judicial declaration of death should have the same civil effects as a death certificate. However, provision should be made in the event a missing person's return with regard to compensation / reparation, restitution, assistance and social care.

#### **Public assistance and reparation**

- A. Entitlements as victims
  - a. The dependents of missing persons who have been declared absent in relation to armed conflict or internal violence should be entitled to the same social or financial benefits provided for other victims. A declaration of absence, as described above, or an attestation issued by a public authority or by the ICRC, should be sufficient for such entitlement.
  - b. There should be no adverse discrimination between the dependents of servicepersons and civilians.

- B. Financial assistance
  - a. If needed, financial assistance should be provided to all dependents.
  - b. If needed, financial assistance should also be provided to persons returning after a prolonged period of absence.
- C. Social benefits
  - a. Basic social services should be offered to the dependents of missing persons. They may include:
    - I. an allowance for basic material needs;
    - II. housing benefits and employment opportunities;
    - III. health care;
    - IV. an education allowance for the children;
    - V. legal assistance.
  - b. If needed, assistance should also be provided for the rehabilitation or reintegration into society of persons returning after a prolonged period of absence.
- D. Reparations
  - a. Persons missing as a result of a violation of international law and their relatives have a right to be granted reparation.

## 9. PROTECTION AND MANAGEMENT OF PERSONAL DATA

**Protection of personal data:** the principles described below should be incorporated into domestic law.

- A. Personal data should be collected and processed fairly and lawfully.
  - a. The method of collection should not be deceptive, fraudulent or contrary to the law. This implies that consent with respect to the collection of the data should not be obtained through deception.
  - b. This principle should not prevent the collection from a third party of data that may have been gathered improperly or unlawfully, when the purpose of the data collection is considered to be overriding.
  - c. It may be appropriate to make it mandatory to register certain databases containing personal data with a public authority.
- B. The collection and use of personal data should be subject to the consent of the individual to whom the data relate.
  - a. Consent should be freely given and informed. In particular, the purpose of the collection and the destination of the data, including their transfer to a third party, should be disclosed.
  - b. In certain circumstances, the consent of the individual may be presumed or implied, in particular when the individual to whom the data relate cannot be reached and the collection of data is considered to be clearly in his/her best interest in the circumstances.
  - c. The data may not be used, disclosed or transferred for purposes other than those for which they were collected without the consent of the person concerned, except if required by a substantial public interest or for the protection of the vital interests of the person concerned or of others.
- C. The collection and processing of personal data should be limited to that which is necessary for the purpose identified at the time of collection, or beforehand.
- D. Personal data should be collected, processed and stored with appropriate safeguards.
  - a. Sensitive data should only be collected and processed with safeguards commensurate with their sensitivity.
  - b. Personal data should be protected by physical and technical security measures to prevent loss and unauthorized access or disclosure.
  - c. The data controller should be accountable for compliance with the rules governing the protection of personal data.
  - d. A supervising authority should be established to monitor respect for data protection rules and to prescribe appropriate remedies in the event of a breach.
- E. The personal data collected should be accurate, complete and updated as is necessary for the purpose for which they were used.

- F. Personal data may not be used, disclosed or transferred for purposes other than those for which they are collected without the consent of the person concerned, except if required by a substantial public interest or for the protection of the vital interests of the person concerned or of others.
- a. When the consent of the person cannot be practically or legally obtained, personal data may be transferred or disclosed without explicit consent where:
    - I. disclosure would serve a substantial and overriding public interest;
    - II. disclosure is required to prevent or lessen a serious or immediate threat to the health or safety of the individual concerned, or of other persons;
    - III. disclosure would clearly benefit the individual concerned.
  - b. When the consent of the person cannot be practically or legally obtained, public disclosure of personal data should be considered only if it manifestly serves to protect or to ensure the vital interests of the person concerned or of another person.
  - c. Personal data may only be transferred to third parties that respect the international standards applicable to the protection of personal data.
- G. Personal data should be destroyed as soon as the purpose of their collection has been fulfilled, or when they are no longer needed. They may, however, be retained for a given period (to be defined) if required for the benefit of the individual to whom they relate or if they are essential for the performance of the humanitarian tasks of the organization that collected the data.
- H. Access to personal data should be granted to the individual to whom the information relates. A right to challenge the accuracy and completeness of the data and to have them amended as appropriate should also be provided for.
- a. The following general principles should govern access to personal data by the individual concerned:
    - I. all persons have to be informed of the existence, use and disclosure of personal information relating to them;
    - II. on request, a person has a right of access to that information and the right to obtain a copy;
    - III. all persons have the right to challenge the accuracy and completeness of the personal information relating to them and to have it amended as appropriate, or at least to have a notation placed on their file indicating their desire to have the information corrected;
    - IV. remedies should be provided for in case those rights are denied.
  - b. The controller of the files should be allowed to deny access, in part or totally, where the information sought:
    - I. contains references to other individuals or sources of information received in confidence, including information protected by confidentiality agreements concluded for a humanitarian purpose;
    - II. could be expected to seriously threaten an important public interest (national security, public order, etc.);
    - III. could be expected to be seriously detrimental to the interests of other persons;
    - IV. could impede or jeopardize the purpose for which the information was collected, including humanitarian purposes.
- I. Where relevant, exceptions to the above-mentioned principles should be provided for when the purpose of the data collection and processing is the protection of the human rights and fundamental freedoms of the individual concerned or is connected to the mandate and activities of the ICRC or an intergovernmental humanitarian organization.
- J. In the context of the clarification of the fate of missing persons:
- a. the collection and processing of personal data should be considered a lawful purpose;
  - b. the primary objectives of collecting data are:
    - I. to establish the identity, location, conditions and fate of:
      - i. living persons who are unaccounted for;
      - ii. deceased persons who are unaccounted for;
    - II. to give information to the families on the whereabouts, condition and fate of their lost relatives;
  - c. the personal data collected (for instance, *ante mortem* and *post mortem* data) on:
    - I. living persons who are unaccounted for might include:
      - i. administrative data (name, place of residence, etc.);
      - ii. qualitative data (professional details, activities, known whereabouts, etc.);

- iii. physical and biological data (sex, age, description, etc.);
  - II. deceased persons who are unaccounted for (human remains) might include:
    - i. administrative data (name, place of residence, etc.);
    - ii. qualitative data (professional details, activities, known whereabouts, etc.);
    - iii. physical and biological data (sex, age, description, etc.), including DNA information;
  - III. families and relatives might include:
    - i. administrative data (name, place of residence, etc.);
    - ii. DNA information collected and used in conformity with applicable principles;
- d. data collected for purposes other than to clarify the fate of missing persons may be disclosed or used only if:
  - I. their disclosure and use are not incompatible with the purpose for which the data were collected or obtained; or
  - II. the data were derived from publicly accessible sources (such as public registers, professional registers or published directories); or
  - III. their disclosure and use are in the vital interest of the individual to whom the data relate or of a close relative, and the individual is physically or legally incapable of consenting to the disclosure;
- e. once the data have been collected, their processing may include:
  - I. matching of information from different sources;
  - II. public disclosure of collected information, subject to the applicable rules;
  - III. *ante* and *post mortem* data analysis and matching;
  - IV. DNA analysis and matching;
  - V. providing information on the results of the process, subject to the applicable rules, possibly to:
    - i. living persons who are unaccounted for (when found);
    - ii. families and relatives;
    - iii. the public authorities;
    - iv. private organizations.

**Protection of genetic information:** the following principles should be incorporated into domestic law.

- A. The collection, use and disclosure of DNA profiles should be subject to the rules relative to the protection of personal data, in particular the management, use, storage and transfer of DNA samples and profiles.
- B. Identification of human remains through DNA typing should only be undertaken when other investigative techniques of identification are not adequate. The application of this principle does not preclude the taking of samples in order to perform DNA analysis at a later stage, in the event that other investigative techniques prove fruitless.
- C. DNA information collected to identify missing persons or human remains may only be used or disclosed for that specific purpose. In particular, the use of DNA analyses to derive or disclose health information or personal characteristics (except gender) other than those required for the purposes of identification should be prohibited.
- D. DNA samples may only be collected and analysed with the informed consent of the individual, except where an overriding public interest dictates otherwise.
  - a. Consent should be freely given and informed.
  - b. Consent may be implied when it cannot be physically or legally obtained, in particular in circumstances where human remains are unidentified.
  - c. DNA samples and analyses may not be used, disclosed or transferred for purposes other than those for which they were collected without the consent of the person concerned, except if required by a substantial public interest or for the protection of the vital interests of the person concerned or of others.
- E. DNA samples and profiles should be destroyed / deleted when the missing persons have been identified, unless they are required for related purposes.

- F. Forensic procedures should be carried out by an appropriately qualified person. Domestic law and regulations should determine the categories of persons authorized to carry out forensic procedures.
- G. DNA samples, profiles and records should be adequately protected from unauthorized access and use.
  - a. Protection should include both physical and technical / electronic security measures.
  - b. The processing of DNA samples and profiles should be independent of the processing of *ante* and *post mortem* data.
  - c. A unique anonymous reference should be the only link between DNA samples and profiles, on the one hand, and *ante* or *post mortem* data on the other. The link should only be accessible to the controllers of *ante* and *post mortem* data.
- H. DNA analyses should only be performed by certified or accredited laboratories. A procedure for the regular supervision of accredited laboratories should be established. Certified laboratories should meet the following criteria:
  - a. high level of professional knowledge and skill, scientific integrity, and appropriate quality control procedures;
  - b. adequate security of the installations and of the substances under investigation;
  - c. adequate safeguards to ensure absolute confidentiality in respect of the identity of the person to whom the DNA analysis relates.
- I. DNA profiles or samples should only be disclosed, transferred or compared in the context of international cooperation for the purpose of identification, and only with the consent of the persons concerned.
  - a. The authorities who transfer data should specify the permissible uses and disclosures by the recipient and receive valid assurances from the recipient that the information will be used and disclosed accordingly, and that applicable standards on the protection of personal data will be respected.
  - b. DNA samples should not be transferred abroad except where the analysis is to be performed abroad.