

THE MISSING

the right to know

The Missing:
Action to resolve the problem of people unaccounted for as a result of armed conflict or internal violence
and to assist their families

**International Conference of Governmental and Non-Governmental Experts
Geneva, 19 - 21 February 2003**

OUTCOME

Working Group on the *Observations and Recommendations*

**Report by the Chairman to the Plenary
Mr Nicolas Michel, Director, Directorate of Public International Law, Federal Department of
Foreign Affairs, Switzerland**

**Observations and Recommendations
Adopted by Consensus on 21 February 2003**

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The objective of the Working Group was to have an overview of the *Observations and Recommendations*¹, to share considerations on this document's relationship to the process launched by the ICRC on *The Missing*, and to comment upon and clarify its text. The Working Group was not intended to be a forum for negotiations, nor the *Observations and Recommendations* to be a legally binding document. There was a common understanding that the *Observations and Recommendations* should not be interpreted in anyway as undermining existing legal standards. The *Observations and Recommendations* should be seen as an operational tool containing practical measures.

As it was understood that the *Observations and Recommendations* were to be adopted by consensus, additional comments and proposals on this text had to be presented in a separate but related document. These comments and proposals are presented in this Report, which is part of the official Acts of the Conference. The *Observations and Recommendations* are to be read together with this Report.

The Working Group was open to all Conference participants and was well attended. As the Chairman of the Working Group, my role was enormously facilitated by the positive and constructive atmosphere prevailing during our work.

The substantive work of the Working Group began with a presentation demonstrating the links between the contents of the *Observations and Recommendations* and the *ICRC Report: 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)*². The Working Group then proceeded to discuss each section of the text in order to obtain clarifications and exchange views. I will do my best to reflect the main points.

Many participants expressed their gratitude for the work done by the governmental and non-governmental experts as well as by the ICRC in the preparation of the text and for the text's added value, which will stimulate all actors in better understanding and implementing the full spectrum of operational best practices related to the problem of persons unaccounted for. It was repeated that the *Observations and Recommendations* should be seen as a focal point for future practical action.

During the discussion, it was recalled that the term "missing persons" should be understood in its broadest sense. Missing persons or persons unaccounted for are those whose families are without news of them and/or are reported missing on the basis of reliable information. People become unaccounted for due to a wide variety of circumstances, such as displacement, whether as an internally displaced person or a refugee, being killed in action during an armed conflict, or forcibly or involuntarily disappearing. Particular attention was drawn to the vulnerability of children, and it was said that, in addition to the term "unaccompanied children" used in the text, reference to the term "separated children" should also be made. Regardless of the circumstances for which a person becomes unaccounted for, the families need to know the fate of their relative. However, different approaches are needed to handle the varied circumstances.

Because of the reference to armed conflict and internal violence in the text, several participants raised the question whether all persons unaccounted for are covered by the *Observations and Recommendations*. Armed conflict and internal violence take place in a large number of contexts in the world today, and most circumstances in which persons become unaccounted for occur in these situations. Nevertheless, it was emphasized that the work of the experts in this process on *The Missing* may, in fact, be used in efforts concerning persons missing in all situations, if appropriate.

The need to recognize the universal right to know was strongly advocated. Numerous participants affirmed its existence and customary character; others specifically referred to regional and domestic jurisprudence on the right to know. It was also affirmed that the right to know can, in addition to the specific reference in Art. 32 of the

¹ TheMissing/Conf/02.2003/EN/1

² ICRC/TheMissing/01.2003/EN/10

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First Additional Protocol of 1977 applicable in international armed conflicts, be deduced from the Geneva Conventions' general obligations to provide information on detainees and internees, thus, demonstrating the existence of the families' right to know. In addition, the right to know was compared with other rights, such as the right to health, as not being obligations of result. This means that in the face of proven impossibility to provide information, there could be no violation of the right to know. These delegations were in favour of introducing stronger language on the right to know. However, other participants made the reminder that the Working Group was discussing a consensus-orientated text in a forum with inherent limitations, as there are representatives of States, inter-governmental organisations and non-governmental organisations as well as independent experts involved. These participants expressed the view that not all agree that there is a universal right to know; they mentioned that not all States adhere to the First Additional Protocol of 1977 and some debate the customary character of this right.

Some participants spoke of the essential role played by National Societies of the Red Cross and Red Crescent in the clarification of the fate of missing persons by the reestablishment of family links (RFL) and through tracing programs. Addressing the problem of *The Missing* at the International Conference of the Red Cross and Red Crescent to be held in Geneva in December, 2003, will further stress this issue's importance and facilitate coordinated action.

When referring to preventive measures, the need for *effective* protection was emphasized. When discussing internationally recognized standards on the deprivation of liberty, it was recalled that the right to access to justice, including *habeas corpus*, must be respected in all circumstances. In addition, as the text makes specific mention of international humanitarian and human rights law, it was suggested to also refer to refugee law.

It was further said that preventive measures must and can indeed be taken by armed groups. Unless armed groups are included in the solutions, the problem of missing persons will be far from adequately addressed. Obligations foreseen by international humanitarian law applicable in non-international armed conflicts are equally addressed to States and armed groups taking part in the conflict. Practical means, taking into account the specificities of armed groups, should be explored and developed, including in cooperation with these groups.

Regarding the clarification of the fate of persons unaccounted for, it was repeated that clarification entails fully elucidating the fate, including the whereabouts and, if dead, the cause of death. In order to maximize the effectiveness in clarifying the fate of persons unaccounted for, the proper handling of personal information is essential. It was highlighted that the information collected be used only for the humanitarian purpose for which it was collected, so as not to once again sacrifice the dignity of the persons concerned. The need for special safeguards on personal data and the need to respect the relevant standards and principles on the protection of personal data were stressed. It was also stated that information must be properly preserved for historical and research purposes.

While recognizing that information on the fate of a missing relative is essential for the family, several participants made the reminder that the other needs of the families must not be ignored. For example, if the missing family member is dead, the swift return of the human remains is fundamental to many families in order for them to complete the mourning process. The needs of the families for acknowledgement and accountability were referred to. With respect to accountability, it was clarified that in the text "government authorities" includes the judiciary.

Despite the fact that many participants would have preferred the use of stronger language, the *Observations and Recommendations* will nourish this process on resolving the problem of people unaccounted for as a result of armed conflict and internal violence and to assist their families. This process is complementary to others. As an example, specific reference was made to the *UN inter-sessional open-ended working group on a draft legally binding normative instrument for the protection of all persons from enforced disappearances*.

Certain participants referred to the lack of resources as a main reason for not correctly dealing with the issue of missing persons. For instance, without adequate resources the often very expensive methods necessary to identify the dead are not used, nor are means of personal identification easily available.

Finally, it has been reaffirmed that the issue of missing persons and their families must be appropriately addressed. Further social stigmatisation of families of missing persons will thus be avoided. Those responsible can no longer ignore missing persons or their families.

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The participants in this Conference

- (I.) *Appreciating and drawing upon* the process launched by the International Committee of the Red Cross (ICRC) on the "Missing and their Families" and recognising the importance of exploring, and heightening international awareness of, the problem of people unaccounted for as a result of armed conflict or internal violence³,
- (II.) *Recognising* that uncertainty about the fate of their family members is a harsh reality for countless families, including relatives and close friends, which are thus themselves victims of the situation,
- (III.) *Recognising* that until they know whether their family members are alive or dead, families are unable to gain closure on the violent events that disrupted their lives and to move on to personal or community rehabilitation and reconciliation,
- (IV.) *Alarmed* that the resentment caused by the humiliation and suffering of families and neighbours often undermines relations between communities for future generations,
- (V.) *Aware* that preventing persons from becoming unaccounted for and addressing the consequences when they occur are complex tasks that involve numerous actors and require coordination,
- (VI.) *Having regard* to the relevant international instruments and standards of international humanitarian and human rights law and aware that the United Nations and the International Conferences of the Red Cross and Red Crescent have addressed this topic and continue to do so,
- (VII.) *Convinced* of the need to take action to prevent persons from becoming unaccounted for, to ascertain their fate, to assist their families and to hold accountable those responsible for events leading to persons becoming unaccounted for,

Make the following observations and recommendations and encourage their dissemination and application:

1. It is essential to protect all persons from becoming unaccounted for, without distinction as to the deliberate or incidental character of the events leading to the persons becoming unaccounted for.
2. It is essential that families are allowed to know the fate, including the whereabouts and, if dead, the cause of death, of their family members who are unaccounted for.
3. The principal responsibility in preventing all persons from becoming unaccounted for and in ascertaining the fate of all those unaccounted for as soon as reported missing lies with government authorities; armed groups also have a responsibility in this regard.
4. Inter-governmental organisations and the ICRC, acting in conformity with their respective mandates, should be available to support government authorities and armed groups in fulfilling their responsibilities, and, when they cannot or will not meet their responsibilities, inter-governmental organisations and the ICRC should act accordingly.
5. Non-governmental organisations, acting in accordance with their own mandates, should maximize efforts to prevent persons from becoming unaccounted for and to clarify the fate of those who have become unaccounted for.
6. It is essential that all those involved respect each individual's inherent human dignity in all circumstances.

³ For the purpose of these Observations and Recommendations, **internal violence** means internal disturbances (internal strife) and situations requiring a specifically neutral and independent institution and intermediary in conformity with the *Statutes of the International Red Cross and Red Crescent Movement*, article 5(2)(d) and 5(3), adopted by the Twenty-fifth International Conference of the Red Cross at Geneva in October 1986 and amended by the Twenty-sixth International Conference of the Red Cross and Red Crescent at Geneva in December 1995.

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7. Every effort should be made to respect the cultural, social and religious or spiritual context specific to each situation.

8. Prevention

Respect for international humanitarian and human rights law is fundamental in preventing persons from becoming unaccounted for. It is important that full implementation by States Parties and dissemination of these obligations be ensured. Preventive measures that can be taken include:

- 8.1 providing means of personal identification to all members of the armed forces and armed groups;
- 8.2 making means of personal identification easily available to all concerned persons;
- 8.3 respecting internationally recognised standards regarding the deprivation of liberty, providing immediate notification to families, counsel or other persons having a legitimate interest in the detained persons and preventing extra-judicial executions, torture and detention in secret locations;
- 8.4 ensuring that family members wherever they may be, including members of armed forces or armed groups and their family members, can communicate with each other at regular intervals;
- 8.5 accountability, including fighting impunity.

9. Clarification of the fate of persons unaccounted for

It is crucial that families receive information on the individual fate of their unaccounted for family members. The families and communities also need both acknowledgment of the events leading to persons becoming unaccounted for and perpetrators held accountable. Measures that can be taken include:

- 9.1 government authorities and armed groups enabling independent investigations to be carried out to clarify the fate of persons unaccounted for and to provide information;
- 9.2 avoiding obstruction of, interference with or impediments to the clarification of the fate of persons unaccounted for;
- 9.3 setting up, whenever necessary, complementary mechanisms, judicial or non-judicial, to respond to the families' needs;
- 9.4 addressing issues related to reparation;
- 9.5 providing to the family, in accordance to judicial guarantees and procedures and privacy rights, information collected during criminal investigations that sheds light on the fate of a person unaccounted for.

10. Information management and the processing of files on persons unaccounted for

Coordination of the activities of all those involved and sharing information will heighten the effectiveness of the action taken to ascertain the fate of persons unaccounted for. Measures that can be taken include:

- 10.1 ensuring that the information collected on persons unaccounted for be comprehensive, yet limited to that which is necessary for the purpose identified and is impartially collected and processed;
- 10.2 sharing information on the methods and objectives of the data collection and processing procedures by those involved;
- 10.3 exchanging between those involved the information collected in a manner consistent with point 10.5 and without endangering victims, the persons collecting the information or the sources of the information;
- 10.4 centralising the information collected to increase the possibilities of informing the families about the fate of their members, in particular by:
 - A. at the latest at the outbreak of an armed conflict, setting up an Information Bureau to collect and transmit information;
 - B. forwarding to a neutral, impartial and independent humanitarian organisation, such as the ICRC, personal information that may serve to ascertain the fate of persons unaccounted for;
- 10.5 respecting the relevant standards and principles on the protection of personal information whenever information, including medical and genetic information, is managed and processed.

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11. Management of human remains and of information on the dead

The principle responsibility in the proper handling of all the dead without adverse distinction and in providing information to the families with a view to preventing anxiety and uncertainty lies with government authorities and armed groups. Measures that can be taken include:

- 11.1 ensuring that all feasible measures are taken to identify the human remains of those who died and to record their identity;
- 11.2 avoiding obstruction of, interference with or impediments to the identification of human remains;
- 11.3 issuing death certificates;
- 11.4 ensuring that all those involved respect the legal rules and professional ethics applicable to the management, exhumation and identification of human remains;
- 11.5 ensuring that forensic specialists, whenever possible, carry out the procedures to exhume and identify human remains;
- 11.6 ensuring adequate training to all persons collecting information on the dead and handling human remains;
- 11.7 beginning a process of exhumation and identification only once a framework has been agreed upon by all those concerned and ensuring that the framework includes:
 - A. the establishment of protocols for exhumation, *ante mortem* data collection, autopsies and identification based on scientifically valid and reliable methods and technologies and/or customary, clinical or circumstantial evidence that are deemed appropriate and which have been previously adopted by the scientific community;
 - B. appropriate means of associating the communities and the families in the exhumation, autopsy and identification procedures;
 - C. procedures for handing over the human remains to the family;
- 11.8 respecting and developing professional ethics and standards of practice for forensic specialists working in international contexts.

12. Support for the families

The material, financial, psychological and legal needs faced by families awaiting clarification of their family members' fate should be addressed by the concerned authorities, when necessary with the support of inter-governmental and non-governmental organisations as well as of the ICRC. Measures that can be taken include:

- 12.1 providing targeted assistance with the aim, as soon as circumstances allow, of promoting the families' self-sufficiency;
- 12.2 addressing the legal situation of persons unaccounted for and the consequences for family members, including in terms of property administration, guardianship and parental authority;
- 12.3 ensuring children special support and protection, and in particular taking measures to reunite unaccompanied children with their families;
- 12.4 ensuring that the needs of single heads of families be the object of special attention, taking into consideration the specific needs faced by women in such situations;
- 12.5 ensuring that the families of persons unaccounted for benefit from support programmes in order to adapt to their altered situations and come to terms with the events; psychological support, and whenever necessary and feasible psychiatric treatment, should be provided to those in need; all programmes should be built, as much as possible, on the local health and healing systems;
- 12.6 encouraging family networks and associations, which can provide a forum for mutual support.

13. Families and mourning

Respect for the dead and for local funeral rites supports peace and social order. The process by which the families are informed that a family member has died and human remains and/or personal effects are returned needs to be well prepared. In addition:

- 13.1 the dead and the mourning practices of individuals and communities concerned need to be respected in all circumstances;
- 13.2 commemorations, the planning and organisation of which should be left to the families and communities concerned, need to be supported.