



# ICRC

## ADVISORY SERVICE

### ON INTERNATIONAL HUMANITARIAN LAW

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## Missing persons and their families

In situations of armed conflicts and other situations affected by violence falling outside an armed conflict, countless families suffer great anguish when loved ones go missing, and make desperate attempts to find them. Waiting to learn about a missing person's fate and whereabouts means living in limbo, afforded neither the closure of mourning nor a reason to stop hoping against hope. Such uncertainty has severe psychological and emotional effects. It can also create legal, administrative, social and economic difficulties. The deep wounds inflicted by disappearance continue to undermine relationships among communities and peoples, sometimes for decades afterwards. International humanitarian law (IHL) and international human rights law (IHRL) uphold the right of families to know the fate and whereabouts of their missing relatives. States must therefore make every effort to prevent people from disappearing, to search for missing persons and to deal with the consequences of such events. Pursuant to the mandate conferred on it by the international community, the International Committee of the Red Cross (ICRC) strives to ensure that people do not go missing in armed conflicts and other situations affected by violence falling outside an armed conflict and to elucidate the fate and whereabouts of those who do.

### Who is a missing person?

There is no legal definition of a missing person under international law. However, it is understood that a missing person is one "whose whereabouts are unknown to his/her relatives and/or who, on the basis of reliable information, has been reported missing in accordance with national legislation in connection with an international or non-international armed conflict, a situation of internal violence or disturbances, natural catastrophes or any other situation that may require the intervention of a competent State authority".<sup>1</sup>

The circumstances in which disappearances occur vary greatly. For instance, armed conflicts can cause mass displacements, which frequently result in many migrants, refugees or internally displaced people going missing because they are afraid of contacting their families, or because they lack means of communication. Individuals enrolled in armed forces or armed groups can go missing in action. Victims whose bodies are abandoned, buried in haste or destroyed before identification and without any information given to their families may also be reported missing. So may people who are captured,

arrested or abducted and held incommunicado or in a secret location.

The 2006 International Convention for the Protection of All Persons from Enforced Disappearance (ICCPED), the first universal treaty on that subject, uses the term "disappeared person" and defines it narrowly. Its Article 2 specifically covers people who go missing following "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law".

### Protection of missing persons and their families

Both IHL – in particular the 1949 Geneva Conventions (GC I-IV), their 1977 Additional Protocols (AP I and II) and customary IHL – and IHRL seek to ensure that people do not go missing.

These bodies of law give rise to two general obligations which States and respectively parties to an armed

conflict have to fulfil: the obligation to clarify the fate and whereabouts of missing persons and the obligation to prevent people from going missing. The first also implies respect for the families' right to know the fate and whereabouts of their relatives. In addition, States need to ensure the adoption of domestic measures to protect personal data, respond to the needs of the families of missing persons and identify and manage human remains.

*The obligation to clarify the fate and whereabouts of missing persons*

Under international humanitarian law:

The Geneva Conventions and their Additional Protocols seek to ensure that people do not go missing.

In situations of international armed conflicts, Parties to the conflict must take all possible measures to elucidate the fate and whereabouts of missing persons (GC I, Arts 16-17; GC II, Arts 19-20; GC III, Arts 122-124; GC IV, Arts 136-141; AP I, Arts 32-33) and to search for, recover and identify the dead (GC I, Arts 15-17; GC II, Arts 18-20; GC III, Arts 120-121; GC IV, Art. 16; AP I, Arts 33-34; AP II, Art. 8).

<sup>1</sup> See ICRC, "Guiding principles/model law on the missing", *The Domestic*

*Implementation of International Humanitarian Law: A Manual*, Annex IV

<https://www.icrc.org/eng/resources/documents/publication/pdvd40.htm>

In situations of non-international armed conflict, Article 3 common to the four Geneva Conventions (common Article 3), contains no specific provisions on missing persons. The general protection afforded to persons not or no longer taking a direct part in hostilities however applies to them. In particular, they "shall in all circumstances be treated humanely" and shall be protected from the acts prohibited by common Article 3(a), (b), (c) and (d).

Article 8 of Additional Protocol II requires that "whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken (...) to search for the dead, prevent their being despoiled, and decently dispose of them".

Under Rules 112, 116 and 117 of the ICRC Customary International Humanitarian Law study (CIHL),<sup>2</sup> each party to a conflict must take all possible measures to account for persons reported missing and to search for, collect, identify and evacuate the dead. These rules are applicable to both international and non-international armed conflicts.

#### Under international human rights law:

Various IHRL instruments are relevant to preventing and protecting against forced disappearance (e.g. the Inter-American Convention on Forced Disappearance of Persons). However, the ICPPED is the first universal treaty to include specific obligations for States Parties. Specifically, the Convention provides that:

- States Parties shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains (Art. 24);
- States shall take appropriate measures to investigate acts of enforced disappearance and bring those responsible to justice (Art. 3).

#### *The right to know*

Under both IHL and IHRL, the obligation to clarify the fate and whereabouts of missing persons also implies respect for the families' right to know the fate of relatives reported

missing, their whereabouts or the circumstances and cause of their death (AP I, Art. 32; ICPPED, Art. 24). This right should be explicitly recognized for individual family members. In addressing this right, States shall take appropriate measures to investigate cases of disappearance and to inform families about the state of progress of such procedures.

Additionally, regardless of the applicable legal framework, activities such as the search for burial sites and the exhumation of human remains are an essential part of clarifying the fate and whereabouts of missing persons. In particular, recovering and identifying the bodies of missing persons would allow the families to hold a proper funeral, conduct religious and culturally appropriate ceremonies and overcome the past.

#### *The obligation to prevent people from going missing*

Practical measures of a general nature must be taken to reduce the likelihood that people will go missing. In particular, States should:

- establish strict lines of command within armed forces and security forces so as to ensure effective supervision;
- adopt simple procedures and ensure that everyone can easily obtain identity documents;
- register all people at risk of disappearing;
- register deaths and issue the appropriate certificates;
- adopt administrative rules and regulations in keeping with internationally recognized norms regarding such matters as arrest, detention, imprisonment and captivity;
- cooperate with each other in sharing all relevant information regarding people at risk of disappearing.

In addition, the following specific measures should be taken:

#### Under international humanitarian law:

- Produce and provide members of armed forces or groups with proper means of identification, including identity cards and discs; (GC I, Arts 16(f), 39-41,

Annex II; GC II, Arts 19(f), 41-42, Annex I; GC III, Arts 4(a), 17, 70, Annex IV; AP I, Arts 18(1), 67(1)(c), Annex I (Art. 15));

- Set up an Information Bureau and Graves Registration Service (GC III, Arts 120 and 122-124; GC IV, Art. 136);
- Ensure the delivery of news and mail between members of armed forces or groups, other persons deprived of their liberty for reasons related to the armed conflict, and their families (GC III, Arts 70-71; GC IV, Arts 25, 106-107; AP II, Art. 5(2); CIHL Rules 105, 125-126) at least once a month (GC IV, Art. 25);
- Ensure the security and physical integrity of all those who are not or are no longer taking part in the hostilities, in particular persons deprived of their freedom (GC III, Arts 13, 17, 130; GC IV, Arts 16, 27, 31-32, 51, 55-56, 76, 83, 85, 88, 119, 127-128; GC I-IV, common Article 3; AP II, Arts 4-5, 7; CIHL Rules 87, 89, 90, 91, 92, 94, 98);
- Ensure that human remains are appropriately handled (GC I, Art. 17; GC II, Art. 20; GC III, Art. 120; GC IV, Art. 130; AP I, Art. 34; AP II, Art. 8; CIHL Rules 112-116).

Moreover, in order to prevent loss of information, each party to an armed conflict has the obligation to record all available information relating to the dead and the personal details of persons deprived of their liberty (GC I, Art. 16; GC II, Art. 19; GC III, Arts 120-121; GC IV, Arts 129-131; CIHL Rules 116 and 123).

#### Under international human rights law:

The ICPPED, requires States Parties, among other measures, to:

- ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts (Art. 12), that no one will be held in secret detention, and that any person deprived of liberty shall be authorized to communicate with his or her family (Art. 17).

In general, the issue of disappearances and of States' obligations in this regard has been broadly dealt with and developed in the jurisprudence of regional bodies, such as the Inter-American Court of

<sup>2</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International*

*Humanitarian Law, Volume I: Rules*, ICRC/Cambridge University Press, 2005

<http://www.icrc.org/customary-ihl/eng/docs/home>

Human Rights and the European Court of Human Rights.

### **Processing of personal data concerning missing persons**

While preventing people from going missing through the registration of information, States have specific obligations regarding the protection and processing of personal data.

- Personal data should be collected and processed fairly, lawfully and in compliance with the legal obligations deriving from IHL and IHRL;
- When the fate and whereabouts of missing persons are being clarified, personal data can be processed on the basis of the vital interest of the person concerned or of another person, as well as for important grounds of public interest.
- Regardless of the applicable legal framework (IHL or IHRL), the collection and use of personal data should, where possible and on the basis of the vital interest of the person concerned or of another person or for important grounds of public interest, be based on the informed consent of the person concerned.
- Data should not be used, disclosed or transferred for purposes other than those identified and explained at the time of their collection. Their use should be also compatible with further humanitarian purposes.
- Appropriate safeguards should be applied when collecting, storing or otherwise processing data, taking into account the sensitivity of the information.
- The rights of data subjects should be respected. This includes the right of access to information and the right to object to, delete and rectify information.
- The transfer of personal data to organizations performing a mandate under international law to clarify the fate and whereabouts of missing persons is deemed to constitute a processing operation carried out for important grounds of public interest and in the vital interest of the data subject or of another person.

Finally, States need to ensure that genetic information that can be used to identify missing persons is properly handled and that human remains are treated with dignity and respect and handed over to their families in the same manner.

### **Responding to the needs of families**

As recognized by the 2003 International Conference of Governmental and Non-Governmental Experts on missing persons,<sup>3</sup> families waiting for information on the fate and whereabouts of their relatives have specific needs. These include the need for administrative, economic, psychological and psychosocial support, the need to have their suffering acknowledged and the need for justice. Moreover, the legal status of those reported missing must be determined so as to clarify the legal situation of their families. This may be done, for example, by establishing a mechanism for the declaration of absence in the domestic legal system.

### **Management of human remains**

In cases where missing persons are believed to be dead, the recovery, identification and dignified management of their remains are essential. A failure to identify deceased persons in situations of armed conflicts and other situations affected by violence falling outside an armed conflict can contribute to a significant increase in the number of persons unaccounted for.

As seen above, IHL requires parties to an armed conflict to take all possible measures to search for, collect and evacuate the dead without adverse distinction. This also includes permitting humanitarian organizations such as the ICRC to search for and collect of human remains. In the same vein, parties to the conflict should ensure the proper and dignified burial and commemoration of the deceased and should inform the families accordingly.

The ICPPED encourages States to cooperate with each other to ensure that human remains are exhumed, identified and returned to the families (Art. 15).

With regard to the process of recovery and identification of human remains, the 2003 International Conference of Governmental and Non-Governmental Experts on the missing and their families proposed that such a process should begin only once a framework has been agreed upon by all those concerned. This framework should include 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 that have been previously adopted by the scientific community.

The ICRC recommends the use of standardized policies and procedures in all contexts, which should be developed by the pertinent authorities (e.g. courts, investigators, forensic institutes).<sup>4</sup>

### **Criminal repression**

Under international humanitarian law:

Enforced disappearances are not specifically listed as grave breaches or other serious violations of IHL. However, when an act of enforced disappearance amounts to one of the grave breaches listed in the Geneva Conventions and Additional Protocol I (such as torture, inhuman treatment, wilfully causing great suffering or serious injury to body or health, and taking of hostages), it must be investigated and the perpetrators prosecuted as required by the grave breaches regime.

In the context of international armed conflicts, the Geneva Conventions and Additional Protocol I contain lists of “grave breaches” of those instruments (GC I, Art. 50; GC II, Art. 51; GC III, Art. 130; GC IV, Art. 147; AP I, Arts 11 and 85). A State party to the Geneva Conventions and Additional Protocol I has the obligation to “enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches” specified in those instruments. All States Parties must also “search for persons alleged to have committed, or to have ordered

<sup>3</sup> See 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)*  
<https://www.icrc.org/eng/resources/documents/misc/5jahr8.htm>

<sup>4</sup> See ICRC, *Forensic identification of human remains*, December 2013,  
<https://www.icrc.org/eng/resources/documents/publication/p4154.htm>

to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another [State Party] concerned (...)" (GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146; AP I, Art. 85(1)).

According to Rule 98 of the Customary International Humanitarian Law study, enforced disappearance is prohibited during international and non-international armed conflicts.

Under customary IHL, serious violations of IHL, whether committed in international or non-international armed conflicts, constitute war crimes (see CIHL Rule 156). CIHL Rule 157 declares that "States have the right to vest universal jurisdiction in their national courts over war crimes".<sup>5</sup>

In situations of non-international armed conflicts, common Article 3 contains no specific prohibition of enforced disappearance, but it categorically demands that persons not or no longer taking an active part in hostilities be treated humanely in all circumstances, without any adverse distinctions. As a consequence of the human treatment absolute obligation, common Article 3 notably prohibits violence to life and person, including cruel treatment and torture, the taking of hostages, outrages upon personal dignity and, in particular, humiliating and degrading treatment. Depending on the circumstances, Enforced disappearance can fall under one or more of those prohibitions.

#### Under the ICPPED

The Convention, adopted in 2006, is the first universal treaty to specifically define the crime of enforced disappearance (Art. 2). It also establishes that the "widespread or systematic practice of enforced disappearance constitutes a crime against humanity" (Art. 5). The Convention also defines the basis of the jurisdiction that States are to assert over the crime of enforced disappearance (Art. 9). Specifically, it requires States to take measures in order to exercise universal

jurisdiction over the offence of enforced disappearance when the alleged offender is present in their territory and they do not extradite him or her.

#### Under the Statute of the International Criminal Court:

Finally, enforced disappearance, "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack", is considered to be a crime against humanity under the International Criminal Court (ICC) Statute (Art. 7(1)(i)). By virtue of the principle of complementarity, the ICC's jurisdiction comes into play only when a State is genuinely unable or unwilling to prosecute the crime of enforced disappearance over which it has jurisdiction. To benefit from this principle, States will need to have adequate legislation enabling them to prosecute such criminals.

#### **Who is responsible for implementing prevention and protection measures?**

The primary responsibility for preventing disappearances and ascertaining the fate and whereabouts of missing persons lies with State authorities.

States are required to adopt and apply measures to fulfil their international obligations. Depending on the case, these measures must be adopted by one or more ministries, the legislature, the courts, the armed forces or other relevant State bodies.

#### **International supervision mechanisms**

On the initiative of the United Nations Commission on Human Rights, a Working Group on Enforced or Involuntary Disappearances was established in 1980. The Working Group, whose mandate is not specifically related to a treaty, is mainly in charge of assisting families in determining the fate and whereabouts of their missing relatives. The Working Group is a mechanism complementary to those previously mentioned.

The ICPPED created the Committee on Enforced Disappearances, a body

of experts whose mandate is to monitor the implementation of the Convention by States Parties (Art. 26). The Committee can also receive and consider individual as well as inter-State complaints regarding alleged violations of the Convention (Arts 31-32).

#### **The ICRC's role**

Where it operates – in situations of armed conflicts and other situations affected by violence falling outside an armed conflict – 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 and maintain contact between family members, to reunite families and to elucidate the fate of people whose whereabouts are unknown to their families.

These activities are often carried out in cooperation with National Red Cross and Red Crescent Societies.<sup>6</sup>

In particular, in situations of international armed conflict, the ICRC must be granted access to all persons deprived of their liberty for reasons related to the conflict (GC III, Art. 126; GC IV, Art. 143; AP I, Art. 81). The ICRC is also entrusted with the organization and management of the Central Prisoners of War Information Agency and the central information agency for protected persons. These agencies are in charge of collecting and transmitting all available information concerning prisoners of war and other vulnerable persons such as children (GC III, Art. 123; GC IV, Art. 140). The ICRC can be further involved in preventing persons from going missing when invited to participate as a neutral intermediary in multilateral or tripartite mechanisms dealing with conflict-related disappearances.

In situations of non-international armed conflict, the ICRC 'may offer its services to the parties to the conflict with a view to visiting all persons deprived of their liberty for reasons related to the conflict in order to verify the conditions of their detention and to restore contacts between those persons and their families' (CIHL Rule 124; common Article 3).

<sup>5</sup> For more information, see the ICRC Advisory Service on International Law fact sheet *Penal Repression: Punishing War Crimes*, March 2014

<https://www.icrc.org/en/document/penal-repression-punishing-war-crimes>

<sup>6</sup> For more information, see ICRC, "Restoring Family Links"

<http://familylinks.icrc.org/en/Pages/HowWeWork/How-we-work.aspx>

When the ICRC collects and processes information relating to missing persons, it does so within the framework of its neutral, independent, impartial and strictly humanitarian action. It will not participate in or associate itself with any process aimed at gathering evidence for the criminal prosecution of persons suspected of having committed a crime, nor will it cooperate with any such prosecution.

The ICRC is also involved in preventing people from going missing by supporting States in

enacting legislation to implement their international obligations towards the missing and their families.

The ICRC Advisory Service on International Humanitarian Law, which offers legal and technical support to States for the implementation of IHL, has developed guiding principles and a model law to assist State authorities in the adoption of legislation to address, prevent and resolve situations of missing persons. This tool also aims to help States in protecting the rights of missing persons and their families.<sup>7</sup>

The Advisory Service also collects, compiles and facilitates the exchange of national laws and case law dealing with the protection of missing persons and their families through its Database on national implementation of international humanitarian law.<sup>8</sup>

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<sup>7</sup> See ICRC, "Guiding principles/model law on the missing", *The Domestic Implementation of International*

*Humanitarian Law: A Manual*, Annex IV <https://www.icrc.org/eng/resources/documents/publication/pdvd40.htm>,

<sup>8</sup> Available at <https://www.icrc.org/ihl-nat>