

Advances and progress in the obligation to return the remains of missing and forcibly disappeared persons

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Abstract

This article analyzes the evolution in international law of the obligation to search for and return the remains of forcibly disappeared and missing persons. Receiving the remains of forcibly disappeared and missing persons is one of the primary needs of their families, who bring the issue to international courts and non-judicial mechanisms. This obligation has been incrementally recognized and developed by different human rights courts, which have included the obligation to search for and return the remains of disappeared persons in their remedies. In parallel to the development of the obligation by international courts, the international community has begun to become more involved in assisting in return of the remains of forcibly disappeared and missing persons to their families.

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Introduction

Many people go missing during both international and non-international armed conflicts, causing anguish and uncertainty to their families. Some people are purposely rendered “disappeared” by one of the belligerents or in peacetime by State authorities. The disappeared are very often victims of secret extrajudicial killings, and their mortal remains are further violated, leaving their next of kin with uncertainty about their fate.¹ In the frequent cases of death, such uncertainty is allayed through return of the remains.² This article analyzes the advances of the obligation to return the remains of missing and forcibly disappeared persons in international law.

While for the families of both missing and forcibly disappeared persons their situation may be identical, the two terms differ. An enforced disappearance occurs when a person is deprived of liberty with at least the acquiescence of a State, followed by a refusal to acknowledge the disappearance or by concealment of the person’s whereabouts or fate.³ There is no accepted definition for “missing persons”, but they are usually seen as those who have gone missing as a result of armed conflict, which is also the sense in which the term is used in this paper.⁴

Until the adoption of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) in 2006, there was no treaty containing a legal obligation to take measures to return the remains of disappeared persons in peacetime. Nevertheless, the importance of locating the bodies of disappeared and missing persons, as well as returning them to their families, has been recognized for decades. For example, the United Nations (UN)

1 Tullio Scovazzi and Gabriella Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention*, Brill, Leiden, 2007, pp. 360–362; Lisa Ott, *Enforced Disappearances in International Law*, Intersentia, Antwerp, 2011, p. 270.

2 Simon Robins, *Families of the Missing: A Test for Contemporary Approaches to Transitional Justice*, Routledge, New York, 2014, pp. 48, 102.

3 As defined in Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance, 2716 UNTS 3, 20 December 2006 (entered into force 23 December 2010) (ICPPED). It should be noted that according to the Rome Statute, an enforced disappearance can also be conducted with at least the acquiescence of a political organization: Rome Statute of the International Criminal Court, 2187 UNTS 3, 17 July 1998 (entered into force 1 July 2002), Art. 7.2(i). See also Christoph Hall, “Article 7: Crimes against Humanity”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Note, Article by Article*, Beck and Hart, Baden-Baden, 1999, pp. 117–172.

4 For more comments on the two terms and their usage, see the following section. At the same time, the two terms overlap, and for different reasons the judicial bodies and international initiatives cited in this contribution may choose to use one of the two or both. For example, judicial bodies (with the exception of the Human Rights Chamber for Bosnia and Herzegovina) use mostly “enforced disappearances”, while the Special Process on Missing Persons in the Territory of the former Yugoslavia uses “missing persons”. When analyzing each of them, the phrase used by the particular judicial body or international initiative will be used.

General Assembly, in a resolution on assistance and cooperation in accounting for persons who are missing or dead in armed conflicts adopted in 1974, called upon parties to armed conflicts, regardless of the character of the conflict, “to take such action as may be within their power to ... facilitate the disinterment and the return of remains, if requested by their families”.⁵

International jurisprudence has played an important role in the rise of the legal obligation to search for and return the bodies of persons who were purposely disappeared, especially by including the issue in reparations measures. This has been influenced and shaped by the wishes of families of disappeared persons, who have put forward various types of claims aimed at fulfilling this need.⁶ In parallel with the developments in international jurisprudence, the international community has begun to get actively involved in returning the remains of forcibly disappeared and missing persons to their families. This is an important change,⁷ as in some situations international support and cooperation are needed in order to carry out exhumation and identification.

This article is divided into five sections. The first section introduces the differences of terminology in international human rights law and international humanitarian law (IHL). The second section shows that returning the remains of missing and forcibly disappeared persons is – in case of death – a primary need of their families. The third, and main, section recounts the development of international law on the subject. First treaty law is introduced, showing how international human rights law and IHL have evolved in their approach toward returning the remains of disappeared and missing persons; the section then discusses international jurisprudence, presenting brief analyses of significant judgments and decisions of four judicial bodies that have included the issue in their reparations remedies. The fourth section examines how international actors have become involved in forensic work and in returning the remains of missing and disappeared persons. The fifth and final section offers conclusions.

Enforced disappearances and missing persons

“Enforced disappearances” are defined in the ICPPED as any form of deprivation of liberty by an agent of the State or persons acting with at least the acquiescence of the

5 UNGA Res. 3220 (XXIX), 6 November 1974.

6 For more on the role played by families of the disappeared in shaping contemporary transitional justice policies and the evolution of an international legal framework on the issue, see Iosif Kovras, *Grassroots Activism and the Evolution of Transitional Justice: Families of the Disappeared*, Cambridge University Press, Cambridge, 2017.

7 In many previous post-conflict situations, the emphasis has been put on other aspects. For example, during some exhumations carried out in Bosnia and Herzegovina and later in Kosovo for the purpose of collecting evidence for the International Criminal Tribunal for the former Yugoslavia, bodies were reburied without identification because individual identification was found to be unnecessary, Laurie Vollen, “All that Remains: Identifying the Victims of the Srebrenica Massacre”, *Cambridge Quarterly of Healthcare Ethics*, Vol. 10, 2001; Human Rights Advisory Panel, *Nenad Stojković against UNMIK*, Case No. 87/09, Opinion, 14 December 2013, para. 98.

State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law.⁸ According to the Convention, not only is the disappeared person the victim of an enforced disappearance, but all individuals who suffered harm as a direct result of an enforced disappearance – including parents, children, life partners or other close relatives of the disappeared person – are considered victims of the disappearance as well.⁹ In cases of enforced disappearance, an official policy of denying the fact of the disappearances and/or State involvement will lead to a reluctance to carry out exhumations and identifications. Furthermore, the violation of mortal remains is one of the most common features of disappearances, leading to an inability to return the remains in certain contexts.¹⁰

The term “enforced disappearance” is not referred to as such in IHL treaties. Nevertheless, the act “violates, or threatens to violate, a range of customary rules of international humanitarian law”, in particular the prohibitions against arbitrary deprivation of liberty and against torture and other cruel or inhuman treatment, as well as against murder.¹¹ The term “missing persons”, which is used in IHL, does not just include persons who went missing because of an enforced disappearance. While there is no accepted definition of a “missing person”, they are usually seen as those who have gone missing as a result of armed conflict.¹² The International Committee of the Red Cross (ICRC) has defined “missing persons” as “*all those whose whereabouts are unknown to their*

8 ICPPED, Art. 2. For more on enforced disappearances, see Maria Fernanda Perez Solla, *Enforced Disappearances in International Human Rights*, McFarland, Jefferson, NC, and London, 2006; T. Scovazzi and G. Citroni, above note 1; L. Ott, above note 1.

9 ICPPED, Art. 24.1. As such, they have the right to know the truth regarding the circumstances of the disappearance, the progress and results of the investigation, and the fate of the disappearance person (Art. 24.2), as well as the right to obtain reparations and prompt, fair and adequate compensation (Art. 24.4).

10 For example, when human remains have been thrown from airplanes into the ocean or blown up by explosives; see T. Scovazzi and G. Citroni, above note 1, p. 360.

11 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, New York, 2009 (ICRC Customary Law Study), p. 340; see also pp. 421–427. For a detailed discussion on the differences between “disappearances” and “missing persons”, see also Working Group on Enforced or Involuntary Disappearances (WGEID), *Report on the Visit to former Yugoslavia by a Member of the Working Group on Enforced or Involuntary Disappearances at the Request of the Special Rapporteur on the Situation of Human Rights in the former Yugoslavia (4–13 August 1993)*, UN Doc. E/CN.4/1994/26/Add.1, 15 December 1993, particularly paras 30–32, 42–60.

12 For a broader approach in international humanitarian law, see, for example, the definition adopted in ICRC, *Guiding Principles/Model Law on the Missing*, Geneva, 28 February 2009, Art. 2.1, available at: www.icrc.org/en/document/guiding-principles-model-law-missing-model-law (all internet references were accessed in August 2017): “‘Missing person’ is a person whose whereabouts are unknown to his/her relatives and/or who, on the basis of reliable information, has been reported missing in accordance with the national legislation in connection with an international or non-international armed conflict, a situation of internal violence or disturbances, natural catastrophes or any other situation that may require the intervention of a competent State authority.” See also Jeremy Sarkin, “The Need to Deal with All Missing Persons including Those Missing as a Result of Armed Conflict, Disaster, Migration, Human Trafficking and Human Rights Violations (including Enforced Disappearances) in International and Domestic Law and Processes”, *Inter-American and European Human Rights Journal*, Vol. 1, 2015.

*families or, based on reliable information, who are reported missing as a consequence of armed conflict, internal violence or internal disturbances”.*¹³

While in respect to missing persons the reasons for not taking action in order to return the remains are not as evident as with enforced disappearances, it is still common for States not to get involved in searching for, identifying and returning the remains of missing persons. Such activities require resources and political will, which is often lacking in the aftermath of conflict. Sometimes the sheer number of missing persons can make it very hard to undertake forensic investigation, which would need to be large-scale. In inter-ethnic conflicts, the demand for reciprocity can also hinder the process.¹⁴ In addition, people go missing across national borders or in countries other than their own.

In many situations, it is not possible to establish whether a crime meets all the criteria of an enforced disappearance, or an incident initially identified as such turns out not to fall within the definition, and *vice versa*. At same time, the term “enforced disappearance” can include a situation which would not be classified as “missing persons” in IHL, such as when State authorities purposely disappear a political opponent during peacetime. While there is thus a notable difference between those two categories, many acts fall within both. The terms are often used interchangeably, both in political discourse and by international judicial bodies.¹⁵ The two terms overlap, but it is important that they are not equated, as they involve two different legal frameworks. This contribution deals both with missing persons and enforced disappearances, and the two terms will be used according to their meaning in international human rights law and IHL respectively.

Returning the remains of missing and forcibly disappeared persons as a primary need of their families

Disappearances have long-lasting effects on families, who have to deal with the uncertainty surrounding the fate of their relatives, while usually also coping with economic, social and legal problems.¹⁶ Family members of missing and forcibly disappeared persons experience what has been termed as an “ambiguous loss”, defined as “a situation of unclear loss resulting from not knowing whether a loved one is dead or alive, absent or present”.¹⁷ This reflects the fact that family

13 ICRC, *Accompanying the Families of Missing Persons: A Practical Handbook*, Geneva, 2013, p. 16 (emphasis in original).

14 See, for example, Special Process on Missing Persons in the Territory of the former Yugoslavia, *Report Submitted by Mr. Manfred Nowak, Expert Member of the Working Group on Enforced or Involuntary Disappearances, Responsible for the Special Process, Pursuant to Commission Resolution 1996/71*, UN Doc. E/CN.4/1997/55, 15 January 1997, para. 57.

15 See, for example, European Court of Human Rights (ECtHR), *Varnava et al. v. Turkey*, Case Nos 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, 16073/90, 18 September 2009.

16 Margriet Blaauw and Virpi Lähteenmäki, “‘Denial and Silence’ or ‘Acknowledgment and Disclosure’”, *International Review of the Red Cross*, Vol. 84, No. 848, 2002, p. 769.

17 Pauline Boss, “Ambiguous Loss Research, Theory, and Practice: Reflections after 9/11”, *Journal of Marriage and Family*, Vol. 66, No. 3, 2004, p. 554.

members of forcibly disappeared and missing persons do not know what to think, so they often deny the permanence of the loss and continue to hope for the person to return. In that sense, the person is “psychologically present but physically absent”.¹⁸ This state of affairs can continue for years; for example, the possibility of travelling between the northern and southern parts of Cyprus in 2003 awakened the hopes of some of the families of those who went missing thirty to forty years earlier that their loved ones might still return.¹⁹

While obviously the primary need and aim of actions taken following a disappearance is to secure the freedom and release of the victim, as mentioned above, the disappeared frequently become victims of secret extrajudicial killings. In such cases, finding the remains becomes the key issue for the majority of families. As research has shown, in case of death, the ambiguity of the loss is best addressed through the return of the remains of those who have died. Documents providing evidence, such as death certificates or statements from a perpetrator regarding a death, do not have the same impact of closure on families as the body, especially for illiterate families.²⁰ In a study conducted in Nepal, 85% of the families sought to retrieve the body, arguing that they needed a sign of proof of the death, as well as to enable the performance of rituals.²¹ Similarly, research in Bosnia and Herzegovina has shown that the absence of bodies prevented family members from funerary rituals and acknowledging the death of their loved ones, and thus from passing through the states of mourning and grief.²²

There appears to be a universal human need to bury one’s dead.²³ According to Pauline Boss, there are several reasons why families feel the need to bury a body of a missing or disappeared person, even when it seems obvious that the person is dead. These include breaking the cultural denial of death and loss; the need to know what happened in order to cope, grieve and make decisions; stimulating the process of letting go; and the need for a supportive ritual, which accompanies burials.²⁴

When analyzing the phenomenon of missing and forcibly disappeared persons, it should be stressed that not all the remains of those who have died can be found.²⁵ In some situations the bodies were purposely destroyed or

18 S. Robins, above note 2, p. 45. See also Monique Crettol and Anne-Marie La Rosa, “The Missing and Transitional Justice: The Right to Know and the Fight against Impunity”, *International Review of the Red Cross*, Vol. 88, No. 862, 2006.

19 Öncel Polili, *Kuzey Kıbrıs’ta kayıp kişiler ve ailelerinin insan hakları*, Kıbrıslı Türk İnsan Hakları Vakfı Yayınları, No. 9, Nicosia, 2012, Appendix 2.

20 S. Robins, above note 2, pp. 48, 102; see also Eric Stover and Rachel Shigekane, “The Missing in the Aftermath of War: When do the Needs of Victims’ Families and International War Crimes Tribunals Clash?”, *International Review of the Red Cross*, Vol. 84, No. 848, 2002, p. 855. For more on the use of death certificates in enforced disappearance cases, see Gabriella Citroni, “The Pitfalls of Regulating the Legal Status of Disappeared Persons Through Declaration of Death”, *Journal of International Criminal Justice*, Vol. 12, No. 4, 2014.

21 S. Robins, above note 2, pp. 102–103.

22 E. Stover and R. Shigekane, above note 20, p. 860.

23 Pauline Boss uses the phrase “bury one’s dead” in her research, which clearly also covers other traditions and rituals, such as incinerations. This article uses “bury one’s dead” in the same sense.

24 P. Boss, above note 17, pp. 561–562. On the importance of rituals and funerals for families of the missing, see also ICRC, above note 13, pp. 62–63.

25 T. Scovazzi and G. Citroni, above note 1, pp. 360–362.

incinerated, or all the persons who knew the place of burial have died. Families of forcibly disappeared and missing persons whose remains will not be found need additional help, such as targeted psychological support.²⁶

The legal development of the obligation to return the remains of missing and disappeared persons

Treaty law

The Geneva Conventions of 1949 mention missing persons only in the context of families dispersed owing to the war, stipulating that States shall facilitate the enquiries of such family members, with the object of renewing contact with one another and of meeting.²⁷ There are no provisions in the Geneva Conventions for providing specific assistance to family members of missing persons who have died, or directly encouraging States to undertake actions to return remains. As regards the dead, the Geneva Conventions contain a number of provisions relating to their burial and identification²⁸, as well as stipulating explicitly that they must be respected and given a decent burial.²⁹

States' obligations with regard to missing persons within the framework of IHL were strengthened in the 1997 Additional Protocol I (AP I) to the Geneva Conventions, which requires each party to a conflict to search for persons who have been reported missing by the adverse party. According to Article 32 of AP I, in implementing their obligations arising from the Protocol, States Parties shall be prompted to act by the right of families to know the fate of their relatives. They shall also "endeavour to agree on arrangements ... to search for, identify and recover the dead from battlefield areas" (Article 33.4). Furthermore, AP I contains detailed provisions concerning how each side should deal with the bodies of the deceased. Specifically, it calls upon adverse parties to conclude agreements "to facilitate the return of the remains of the deceased and of personal effects to the home country upon its request or, unless that country

26 See P. Boss, above note 17, as well as the Special Issue on ambiguous loss theory of the *Journal of Family Theory & Review*, Vol. 8, No. 3, 2016, especially Theo Hollander, "Ambiguous Loss and Complicated Grief: Understanding the Grief of Parents of the Disappeared in Northern Uganda", and Simon Robins, "Discursive Approaches to Ambiguous Loss: Theorizing Community-Based Therapy After Enforced Disappearances".

27 Geneva Convention (IV) relative to the Protection of Civilian Persons in time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 26.

28 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 17; Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Art. 120.2–6; GC IV, Art. 130.

29 GC I, Art. 17; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces in the Field of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950), Art. 20.

objects, upon the request of the next of kin” (Article 34.2(c)).³⁰ This provision is conditional and follows provisions concerning access to gravesites and the obligation to mark, protect and maintain them (Articles 34.1, 34.2(a–b)), demonstrating that the return of remains is not treated as the highest priority. Returning the dead is made dependent on a request and on a lack of objection by the home country.³¹ Consequently, there is no absolute obligation in IHL to search for, identify and return the remains of a missing person, although parties are strongly encouraged to cooperate on this issue.

Developments in international human rights law have gone further. According to the ICPPED, States Parties “shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains” (Article 24.3). The ICPPED was preceded by two documents dealing with enforced disappearance: the Declaration on the Protection of All Persons from Enforced Disappearance (DPPED) in 1992, and the Inter-American Convention on Forced Disappearance of Persons in 1994. Neither of the above two contains an obligation to take measures to return the remains of disappeared persons. The DPPED obliges authorities to carry out an investigation for as long as the fate of a victim of enforced disappearance remains unclarified (Article 13.6), which normally includes searching for the body in cases where the disappeared person has died, though this is not stated explicitly. Importantly, the ICPPED has changed the rationale behind States’ obligation to search for the disappeared person: it is not only to establish their fate but also, in the event of death, to return the remains.

The return of remains can be viewed as a simple act of justice or a form of remedy. According to a UN report prepared by Manfred Nowak, a decent burial in accordance with the religious practices of the disappeared person and his family – the ultimate outcome of the return of the remains – can be considered both a form of restitution and a form of moral or social rehabilitation of the disappeared person.³²

The obligation to return remains is due to the relatives of the disappeared person. As argued by Gabriella Citroni and Tullio Scovazzi, in certain cases it is also due to the community to which the person belonged or to society in general, which has a right to know where the remains of disappeared persons are located and to be sure that they are respected, even if there is nobody who claims their return. Furthermore, the authors maintain, the obligation is also due to the disappeared

30 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Arts 33–34.

31 In addition, in the absence of such an agreement and if the home country of the deceased is not willing to arrange at its expense for the maintenance of such gravesites, the party in whose territory the gravesites are situated may offer to return the remains, but this offer has to be accepted by the party (*ibid.*, Art. 34.3). See also ICRC Customary Law Study, above note 11, pp. 340, 411–414, 421–427.

32 *Report Submitted by Mr. Manfred Nowak, Independent Expert Charged with Examining the Existing International Criminal and Human Rights Framework for the Protection of Persons from Enforced or Involuntary Disappearances, Pursuant to Paragraph 11 of Commission Resolution 2001/46*, UN Doc. E/CN.4/2002/71, 8 January 2002, paras 86–87.

persons themselves, in the sense that the lack of respect for their remains amounts to a violation of their personal dignity, as a sort of particular humiliating and degrading treatment.³³ Similarly, the Inter-American Court of Human Rights (IACtHR) has stated that the returning of mortal remains leads to a dignifying of the victims.³⁴ In other judgments, the IACtHR has argued that the obligation to return remains is generated by the desire of the victim's next of kin to receive the remains and bury them according to their beliefs (which constitutes a right), in addition to the right of the families to know the truth.³⁵ Therefore, the obligation to return the remains is most commonly connected to the relatives of the disappeared person.

The Committee on Enforced Disappearances (CED) has clarified the content and specific scope of the obligation enshrined in Article 24.3 of the ICPPED in its Reporting Guidelines. This document lays out which information should be provided in the States Parties' periodic reports,³⁶ and was created to advise them on the form and content of those reports. With regard to locating, respecting and returning remains, the CED asks States Parties to provide information on the existence of, or the steps taken to establish,

- (1) mechanisms to locate, respect and return mortal remains of victims to families;
- (2) protocols to handle mortal remains of disappeared persons to their families in line with international standards;
- (3) a systematic collection of ante-mortem data related to the persons disappeared and their relatives, and the setting-up of national databases of DNA relevant to identifying victims of enforced disappearance; and
- (4) mechanisms for the storage of genetic material of the disappeared persons and their relatives.³⁷

The CED monitors States Parties' periodic reports and adopts concluding observations, which are an additional indicator of how the CED interprets the content of the obligation to locate, respect and return remains. For example, the Committee drew attention of a number of States Parties to the necessity of guaranteeing effective coordination, cooperation and data cross-checking between authorities responsible for identifying the remains in case of death,³⁸ showing

33 T. Scovazzi and G. Citroni, above note 1, p. 369.

34 IACtHR, *Juan Humberto Sánchez v. Honduras*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 7 June 2003, para. 187.

35 IACtHR, *Gelman v. Uruguay*, Judgment (Merits and Reparations), 24 February 2011, para. 258.

36 In accordance with Article 29 of the ICPPED, States Parties are required to submit to the CED periodic reports on the measures taken to fulfil its obligation under the ICPPED.

37 CED, *Guidelines on the Form and Content of Reports under Article 29 to be Submitted by States Parties to the Convention, Adopted by the Committee at its Second Session (26–30 March 2012)*, UN Doc. CED/C/2, 8 June 2012, para. 35.

38 CED, *Concluding Observations on the Report Submitted by Mexico under Article 29, Paragraph 1 of the Convention*, UN Doc. CED/C/MEX/CO/1, 5 March 2015, para. 41; CED, *Concluding Observations on the Report Submitted by Iraq under Article 29(1) of the Convention*, UN Doc. CED/C/IRQ/CO/1, 13 October 2015, para. 34; CED, *Concluding Observations on the Report Submitted by Colombia under Article 29(1) of the Convention*, UN Doc. CED/C/COL/CO/1, 27 October 2016, para. 26.

that this is an area which can be problematic.³⁹ Another aspect that has been raised by the CED is the involvement of families of the disappeared in the process of searching for, identifying and returning the remains, which should be guaranteed also when the relatives reside in other countries.⁴⁰ Authorities should additionally ensure that in the process of identifying and returning remains, the traditions and customs of the people or communities to which the victims belong are taken into account.⁴¹

The CED has also commented on State obligations relating to locating, respecting and returning the remains with regard to disappearances which commenced before the ICPPED came into force. With regard to Paraguay, the CED mentioned persons who disappeared between 1954 and 1989 and recommended that Paraguay expedite the development and launch of a DNA database, as well as ensuring that the agencies responsible for searching and identifying disappeared persons have sufficient resources to carry out their work promptly and effectively.⁴² Commenting on Spain's report, the CED criticized the fact that under the Historical Memory Act, which deals with victims of the Spanish Civil War (1936–39) and Franco's dictatorship (1939–75), efforts to locate and identify disappeared persons rely on initiatives taken by relatives, and recalled that this is the obligation of the State, even if no formal complaint has been laid.⁴³

The change in international law introduced by the ICPPED has been acknowledged by the Working Group on Enforced or Involuntary Disappearances (WGEID), which has been entrusted with providing governments with assistance in the implementation of the DPPED and adopts general comments in this capacity. The WGEID, established in 1980, was the very first UN initiative for disappeared persons and did not include any reference to returning the remains of disappeared persons to their families.⁴⁴ In 2010 – the year the ICPPED came into force – the WGEID adopted a General Comment on the right to truth, in which it stated that the right to truth includes “the right of the family to have the remains of their loved one returned to them, and to dispose of those remains according to their own tradition, religion or culture”.⁴⁵

39 The existence of many different bodies and initiatives involved in the issue of missing and disappeared persons can lead to duplication and competition between them, which has also been considered a problem by experts; see, for example, Manfred Nowak, “Lessons for the International Human Rights Regime from the Yugoslav Experience”, *Collected Courses of the Academy of European Law*, Vol. 8, No. 2, 2000, pp. 203–205.

40 CED, *Concluding Observations on Mexico*, above note 38, paras 23–24.

41 See CED, *Concluding Observations on Colombia*, above note 38, para. 26(f), in which the CED points in particular to indigenous peoples and Afro-descendent communities.

42 CED, *Concluding Observations on the Report Submitted by Paraguay under Article 29, Paragraph 1 of the Convention*, UN Doc. CED/C/PRY/CO/1, 20 October 2014, para. 28.

43 CED, *Concluding Observations on the Report Submitted by Spain under Article 29, Paragraph 1 of the Convention*, UN Doc. CED/C/ESP/CO/1, 12 December 2013, paras 31–32.

44 Commission on Human Rights, Res. 20 (XXXVI), 29 February 1980. The mandate has since been regularly renewed.

45 See para. 6 of the WGEID's “General Comment on the Right to the Truth in Relation to Enforced Disappearance”, in WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/16/48, 26 January 2011, p. 15.

It also stated that authorities should not dispose of the remains of disappeared persons without the full participation of the family.⁴⁶ The WGEID conducts country visits and in this capacity it has also pointed to the need to identify the remains on numerous occasions,⁴⁷ but returning the remains was not explicitly mentioned until 2015.⁴⁸

The families of those who have disappeared (as defined in the ICPPED) and the families of those who went missing during international and non-international armed conflicts have different rights. While IHL treaties also contain provisions aimed at helping families to receive the remains of their missing relatives, only in the case of enforced disappearances is there an obligation to take appropriate measures to return them. Placing more responsibility on the State in cases of enforced disappearances seems justified, as State involvement is an inherent aspect of the act.

International jurisprudence

Because of the reluctance and/or inability of national authorities to deal with enforced disappearance cases, many families of disappeared persons file applications to international human rights courts.⁴⁹ These proceedings can lead to a finding that the authorities violated a provision of a specific international treaty.⁵⁰ Additionally, the courts can decide to prescribe remedies to States, which – in cases of enforced disappearance – may include returning the remains of a disappeared person.⁵¹ This is a developing trend, with the first international bodies to include this issue in their reparation measures being the IACtHR in 1996 and the Human Rights Chamber for Bosnia and Herzegovina in 2001,

46 *Ibid.*

47 See for example, WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances: Mission to Croatia*, UN Doc. A/HRC/30/38/Add.3, 17 August 2015, paras 73, 91; WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances: Mission to Mexico*, UN Doc. A/HRC/19/58/Add.2, 20 December 2011, para. 103; WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances: Mission to Morocco*, UN Doc. A/HRC/13/31/Add.1, 9 February 2010, para. 106.

48 WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances on Its Mission to Albania*, UN Doc. A/HRC/36/39/Add.1, 18 July 2017, paras 79(a), 82(c); WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances on Its Mission to Peru*, UN Doc. A/HRC/33/51/Add.3, 8 July 2016, paras 79(c), 79(n).

49 As the reappearance of a disappeared person is rare, the vast majority of applications were filed by the families of the disappeared. Examples of reappearances in international case law include Human Rights Committee, *Aboussedra v. Libya*, Case No. 1751/2008, Views, 25 October 2010; ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia*, Case No. 39630/09, Judgment, 13 December 2012.

50 Courts have repeatedly found that in case of an enforced disappearance the right to life and prohibition against torture and inhuman treatment have been violated. See, for example, ECtHR, *Çakıcı v. Turkey*, Case No. 23657/94, Judgment, 8 July 1999 (Articles 2 and 3 of the European Convention of Human Rights); Human Rights Committee, *Sarma v. Sri Lanka*, Case No. 950/2000, Views, 16 July 2003 (Articles 6 and 7 of the International Covenant on Civil and Political Rights).

51 See the first decisions and judgments including such remedies: IACtHR, *Neira Alegria et al. v. Peru*, Judgment (Reparations and Costs), 19 September 1996, para. 69; Human Rights Chamber for Bosnia and Herzegovina, *Palić v. Republika Srpska*, Case No. CH/99/3196, Decision on the Merits, 11 January 2001, para. 91.8. For a detailed analysis, see the following sections.

followed by the UN Human Rights Committee in 2010. The European Court of Human Rights (ECtHR) has not integrated returning the remains of disappeared persons into its remedies, but it did point out States' obligation to carry out exhumations and identify disappeared persons in a judgment in 2012.⁵² This jurisprudence will be presented herein in the order in which the judicial bodies in question have approached the issue of returning the remains of disappeared persons in their reparations.

The Inter-American Court of Human Rights

In its very first judgment concerning enforced disappearances, *Velasquez-Rodriguez v. Honduras* in 1988, the IACtHR decided that in such cases the State is obliged “to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains”.⁵³ While this does not unequivocally mean returning the bodies to the families, it recognizes to a certain extent the needs of the families in this respect. This aspect was strengthened by the IACtHR when it developed the concept of the right to truth. In so doing, the Court stated that internal barriers which may hinder the identification of perpetrators, such as amnesty laws, did not absolve the State from informing the relatives of where the victim's remains are located in cases of the death of the disappeared person.⁵⁴

The IACtHR has developed an extensive approach to reparations.⁵⁵ In enforced disappearance cases, the reparations have included – among other things – the obligation to identify, respect and return the remains of the disappeared person. In a case concerning three detainees who disappeared after a riot in a Peruvian correctional facility was put down, it was stated for the first time by the IACtHR in its reparation judgment in 1996 that “as a form of moral reparation” the State “has the obligation to do all in its power to locate and identify the remains of the victims and deliver them to the next of kin”.⁵⁶ In 2001, in a case concerning children kidnapped and killed by security forces, the Court included the need to carry out the exhumation of one of the deceased and transfer the remains to “the place chosen by his next of kin, without any cost to them, so as to satisfy the desire of the family to give [the deceased] appropriate burial,

52 It should be pointed out that none of the treaties enforced or interpreted by the analyzed international judicial bodies contain provisions specifically mentioning enforced disappearances.

53 IACtHR, *Velasquez-Rodriguez v. Honduras*, Judgment (Merits), 29 June 1988, para. 181.

54 IACtHR, *Castillo-Paez v. Peru*, Judgment (Merits), 3 November 1997, para. 90. For more on the right to truth in the jurisprudence of the IACtHR, see Marthe Lot Vermeulen, *Enforced Disappearance: Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance*, Intersentia, Utrecht, 2012, pp. 334–337.

55 See, for example, Thomas M. Antkowiak, “Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond”, *Columbia Journal of Transnational Law*, Vol. 46, No. 2, 2008.

56 IACtHR, *Neira Alegria*, above note 51, para. 69. Similarly, in a judgment one year later, see IACtHR, *Caballero-Delgado and Santana v. Colombia*, Judgment (Reparations and Costs), 29 January 1997, para. 66(4).

according to their religious beliefs and customs”.⁵⁷ When ordering this form of reparation measure in 2002, the Court stated that returning the mortal remains is an act of justice and a reparation in itself. It also mentioned that this enables the relatives of the disappeared person to give him or her an adequate burial.⁵⁸

The IACtHR has obliged States not only to “seek and find mortal remains”,⁵⁹ but also to give additional support to families regarding the burial. For example, States were ordered to cover the cost of transferring the remains of disappeared persons to the place of choice of their relatives,⁶⁰ including to another country in a case where the disappeared person was a foreign national and this was the wish of their family.⁶¹ Furthermore, the IACtHR has obliged States to cover the expenses of the burial of the disappeared in agreement with their next of kin.⁶² The remains should be returned to the relatives as soon as possible after genetic proof,⁶³ and families of disappeared persons should be informed about the search and, when possible, their presence should be ensured.⁶⁴ The obligation to search for the remains continues many years after the disappearance, even when it is very probable that it will be impossible to find them.⁶⁵ The IACtHR has also ordered the Guatemalan authorities to create and implement a genetic database to safeguard the information of the remains that were found and exhumed, as well as of the next of kin of the persons who were presumably executed or disappeared.⁶⁶

Although the IACtHR did not mention the reasons for ordering the return of the remains in all its judgments, the earlier cases in particular show that cultural

57 IACtHR, *Villagrán Morales and Others v. Guatemala* (“Street Children”), Judgment (Reparations), 26 May 2001, para. 102.

58 IACtHR, *Trujillo-Oroza v. Bolivia*, Judgment (Reparations and Costs), 27 February 2002, para. 115. See also IACtHR, *Caracazo v. Venezuela*, Judgment (Reparations and Costs), 29 August 2002, para. 123.

59 See, for example, IACtHR, *Goiburú et al. v. Paraguay*, Judgment (Merits, Reparations and Costs), 22 September 2006, para. 172.

60 IACtHR, *Bamaca-Velasquez v. Guatemala*, Judgment (Reparations and Costs), 22 February 2002, para. 82; IACtHR, *Juan Humberto Sánchez*, above note 34, para. 187.

61 IACtHR, *Caracazo*, above note 58, para. 124.

62 IACtHR, *Goiburú*, above note 59, para. 172; IACtHR, *Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 14 November 2014, para. 564.

63 IACtHR, *Rodríguez Vera*, above note 62, para. 564; IACtHR, *Radillo-Pacheca v. Mexico*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 23 November 2009, para. 336.

64 IACtHR, *García and Family Members v. Guatemala*, Judgment (Merits, Reparations and Costs), 29 November 2012, para. 200; IACtHR, *Osorio Rivera and Family Members v. Peru*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 26 November 2013, para. 251.

65 IACtHR, *The 19 Merchants v. Columbia*, Judgment (Merits, Reparation and Costs), 5 July 2004, paras 270–271. In this case, sixteen years had elapsed since the disappearance and it had been proven that the bodies of the victims had been dismembered and thrown into a river. The Court stated that Colombia’s omissions at a time when it was still probable that the remains of the victims could be found led to the fact that locating the remains was, at the time of the proceedings before the Court, a very difficult and improbable task. Because of that, the Court considered it fair and reasonable “to order Colombia to conduct a genuine search, making every possible effort to determine with certainty what happened to the remains of the victims and, should it be possible, to return these to their next of kin” (para. 271).

66 IACtHR, *Gudiel Alvarez et al. (“Diario Militar”) v. Guatemala*, Judgment (Merits, Reparations and Costs), 20 November 2012, para. 336.

and religious motives played an important role in this development. In *Bamaca-Velasquez v. Guatemala*, the Court justified the necessity of returning the body of the disappeared person by the fact that respect for human remains has a very special significance in the Mayan culture, to which the disappeared and his family belonged.⁶⁷ In fact, the family of the victim often strongly emphasized their need to receive the body in the proceedings before the IACtHR.⁶⁸ In addition, the IACtHR has called the destruction of the remains of disappeared persons “an assault on ... cultural values ... with regard to respecting the dead”.⁶⁹ Thus the Court emphasized the reasons for returning the remains and the meaning this had in the culture of the families.⁷⁰ It should be noted that the IACtHR introduced this innovative approach a decade before the ICPPED was adopted.

The Human Rights Chamber for Bosnia and Herzegovina

During the period 1996–2003, the Human Rights Chamber for Bosnia and Herzegovina established a consistent jurisprudence regarding missing persons and enforced disappearances.⁷¹ In its first decision on the merits in such a case in 1997, the Chamber ordered the authorities of Republika Srpska to immediately “take all necessary steps to ascertain the whereabouts or fate of the applicants and

67 IACtHR, *Bamaca-Velasquez*, above note 60, para. 81. As stressed by Judge Antônio Augusto Cançado Trindade, the obligation to locate and hand over the remains to the next of kin was the very first resolutive point of the judgment contained in this order, before all other kinds of reparations. Antônio Augusto Cançado Trindade, “The Right to Cultural Identity in the Evolving Jurisprudential Construction of the Inter-American Court of Human Rights”, in Sienho Yee and Jacques-Yvan Morin (eds), *Multiculturalism and International Law: Essays in Honour of Edward McWhinney*, Martinus Nijhoff, Leiden and Boston, MA, 2009, p. 483.

68 IACtHR, *Bamaca-Velasquez*, above note 60, para. 20 (testimonial evidence); IACtHR, *19 Merchants*, above note 65, paras 71–72.

69 IACtHR, *Blake v. Guatemala*, Judgment (Merits), 24 January 1998, para. 115. This was invoked in the context of the suffering of the disappeared person’s relatives. In this case the IACtHR did not mention returning the remains among the reparations, as they had been incinerated: see IACtHR, *Blake v. Guatemala*, Judgment (Reparations and Costs), 22 January 1999.

70 For a complex legal analysis of the connection between the living and the dead and the need to receive the remains, see IACtHR, *Bamaca-Velasquez v. Guatemala*, Judgment (Reparations and Costs), Separate Opinion of Judge Antônio Augusto Cançado Trindade, 22 February 2002.

71 The Human Rights Chamber for Bosnia and Herzegovina was a judicial body established within Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina. For more on the Human Rights Chamber and its jurisprudence on enforced disappearances and missing persons, see, for example, David Yeager, “The Human Rights Chamber for Bosnia and Herzegovina: A Case Study in Transitional Justice”, *International Legal Perspectives*, No. 14, 2004; Dietrich Rausching, “Menschenrecht auf Information über das Schicksal Vermißter: Das Beispiel von Bosnien und Herzegowina”, in Jürgen Bröhmer *et al.* (eds), *Internationale Gemeinschaft und Menschenrechte: Festschrift für Georg Röss*, Carl Heymanns Verlag, Munich, 2005, pp. 161–175; T. Scovazzi and G. Citroni, above note 1, pp. 224–243; Tilman Blumenstock, “Legal Protection of the Missing and Their Relatives: The Example of Bosnia and Herzegovina”, *Leiden Journal of International Law*, Vol. 19, No. 3, 2006, pp. 781–793; Simone Fennell (ed.), *Jurisprudence of the Human Rights Chamber for Bosnia and Herzegovina*, Vols 1–44, Wolf Legal Publishers, Nijmegen, 2004–2015.

to secure their release if still alive”.⁷² Because the Chamber acknowledged with this statement that the missing persons might be dead, it restricted the obligation of the authorities to releasing the person “if alive”. In a landmark decision in 2001, the Chamber ordered that the mortal remains of the disappeared Colonel Avdo Palić be made available to his wife in the event that he was not alive.⁷³ In following decisions, the Chamber slightly changed its phrasing and ordered the release of all available information regarding the location of the mortal remains.⁷⁴ It did not stipulate returning the body *per se*, but the proper execution of the Chamber’s decision in this respect would lead to the families knowing the fate of their missing relative and the place of burial.

The Chamber has acknowledged the need of the families of missing and disappeared persons to receive the remains of their loved one in the event of his or her death. At that point in time – the Chamber issued its last decision in 2003 – there was however no legal obligation to take all appropriate measures to return the remains of disappeared persons. The current approach was influenced by the families of the missing and disappeared, who were predominantly Muslims and emphasized the importance of receiving the remains in order to give the dead a religious funeral.⁷⁵

The UN Human Rights Committee

In its case law,⁷⁶ the UN Human Rights Committee has found that States have an obligation to conduct effective investigations aimed at clarifying the whereabouts

72 Human Rights Chamber for Bosnia and Herzegovina, *Matanović v. Republica Srpska*, Case No. CH/96/1, Decision on the Merits, 11 July 1997, para. 64.2. The Chamber’s powers with regard to remedies constituted an important and innovative feature of this body: see Manfred Nowak, “Reparation by the Human Rights Chamber for Bosnia and Herzegovina”, in S. Kostić (ed.), *Strategy for Transitional Justice in the former Yugoslavia: Dealing with the Past – Post-Conflict Strategies for Truth, Justice and Reconciliation in the Region of the former Yugoslavia*, Fond za Humanitarno Pravo, Belgrade, 2005, pp. 283–285.

73 Human Rights Chamber for Bosnia and Herzegovina, *Palić*, above note 51, para. 91.8.

74 Human Rights Chamber for Bosnia and Herzegovina, *Slimović v. Republica Srpska*, Case Nos CH/01/8365, CH/01/8397, CH/01/8398, CH/01/8399, CH/01/8410, CH/01/8411, CH/01/8412, CH/01/8414, CH/01/8428, CH/01/8484, CH/01/8487, CH/01/8521, CH/02/8842, CH/02/8927, CH/02/9357, CH/02/9375, CH/02/9385, CH/02/9390, CH/02/9403, CH/02/9427, CH/02/9431, CH/02/9433, CH/02/9470, CH/02/9484, CH/02/9485, CH/02/9486, CH/02/9487, CH/02/9505, CH/02/9506, CH/02/9507, CH/02/9508, CH/02/9513, CH/02/9514, CH/02/9515, CH/02/9528, CH/02/9529, CH/02/9530, CH/02/9532, CH/02/9542, CH/02/9546, CH/02/9547, CH/02/9548, CH/02/9549, CH/02/9550, CH/02/9552, CH/02/9553, CH/02/9594, CH/02/9595, CH/02/9596, Decision on the Merits, 7 March 2003, para. 220.7; Human Rights Chamber for Bosnia and Herzegovina, *Jovanović v. Federation of Bosnia and Herzegovina*, Case No. CH/02/9180, Decision on the Merits, 5 December 2003, para. 102.6.

75 Interview with Manfred Nowak, Judge of the Human Rights Chamber for Bosnia and Herzegovina, Vienna, April 2015.

76 The Human Rights Committee was provided with the competence, under the First Optional Protocol to the International Covenant on Civil and Political Rights, to examine individual complaints with regard to alleged violations of the Covenant by States party to the Protocol. Because of this competence, the Human Rights Committee is considered a quasi-judicial body (Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, N.P. Engel, Kehl-Strasbourg-Arlington, 2005, pp. 668–669) and its decisions regarding enforced disappearances are analyzed as such in this section.

and fate of disappeared persons.⁷⁷ Although the Committee did not specifically comment on the issue of returning the remains of disappeared persons in its early decisions, it stated that the anguish and stress caused by the continuing uncertainty concerning the fate and whereabouts of the disappeared person constituted a violation of the International Covenant on Civil and Political Rights.⁷⁸

When the Committee finds a violation of the Covenant, it usually specifies the kinds of remedies that the State Party is obliged to guarantee to the victim. In some decisions concerning enforced disappearances, the Committee has pointed to, *inter alia*, the obligation to return to the family the mortal remains of the disappeared if he or she is deceased. Authors of communications have asked the Human Rights Committee for such steps before,⁷⁹ but it was first included in a decision in 2010,⁸⁰ and it has been repeated since.⁸¹ While there was no reference to the ICPPED in this part of the Committee's decision, it should be noted that the first decisions which included an obligation to return the mortal remains of the disappeared to the family were handed down in the same year that the ICPPED came into force.

Although the Committee did not comment on this aspect, it is apparent from its jurisprudence that it does not include returning the remains in its remedies when the applicants do not request the Committee to conclude that the disappeared person is dead, or ask for his/her release, presumably thus indicating that they have not abandoned hope for their loved one's reappearance. In such cases the Committee has stated that it considers it appropriate not to make a finding in respect of the right to life,⁸² and remedies have included only the immediate release of the person if he or she is still alive.

The European Court of Human Rights

The ECtHR issued its first ruling in a case of enforced disappearance in 1998.⁸³ Since then complaints concerning the matter have significantly increased, the clear majority in the first decade being against Turkey, and currently against Russia.⁸⁴ The Court has found that States have a continuing obligation to conduct effective investigations aimed

77 For more on the Human Rights Committee's jurisprudence concerning enforced disappearances, see, for example, the relevant parts in M. L. Vermeulen, above note 54 (comparative case law analysis on pp. 157–434).

78 Human Rights Committee, *Qinteros v. Uruguay*, Case No. 107/1981, Views, 21 July 1983, para. 14.

79 See, for example, Human Rights Committee, *El Hassy v. Libya*, Case No. 1422/2005, Views, 24 October 2005, para. 3.7.

80 Human Rights Committee, *Bashasha v. Libya*, Case No. 1776/2008, Views, 20 October 2010, para. 9(c).

81 See, for example, Human Rights Committee, *Zarzi v. Algeria*, Case No. 1780/2008, Views, 22 March 2011, para. 9(iv); Human Rights Committee, *Mihoubi v. Algeria*, Case No. 1874/2009, Views, 18 October 2013, para. 9(d).

82 Human Rights Committee, *Sarma*, above note 50, para. 9.6; Human Rights Committee, *El Hassy*, above note 79, para. 6.10.

83 ECtHR, *Kurt v. Turkey*, Case No. 24276/94, Judgment, 25 May 1998.

84 Juliett Chevalier-Watts, "The Phenomena of Enforced Disappearances in Turkey and Chechnya: Strasbourg's Noble Cause?", *Human Rights Review*, Vol. 11, No. 4, 2010. For current judgments concerning disappearances, see the ECtHR Human Rights Documentation (HUDOC) database, available at: www.echr.coe.int/Pages/home.aspx?p=caselaw/HUDOC&#n1355308343285_pointer.

at clarifying the whereabouts and fate of those persons who have gone missing in life-threatening circumstances.⁸⁵ Furthermore, the ECtHR has ruled that presenting families with mutilated bodies amounts to a violation of the ICPPED. In one such case the Court argued that “the applicants have been unable to bury the dead bodies of their loved ones in a proper manner, which in itself must have caused their profound and continuous anguish and distress”.⁸⁶ Thus the ECtHR has recognized the need of families to bury their dead, albeit not in a case of disappeared persons.

In the landmark 2012 judgment of *Aslakhanova and Others v. Russia*, the ECtHR stated that it felt compelled to provide some guidance on certain measures that must be taken by the Russian authorities due to their systemic failure to investigate disappearances.⁸⁷ The first and – as the ECtHR itself highlighted – most pressing group of measures concerned easing the suffering of the relatives of the disappeared, who continued to remain in agonizing uncertainty as to the fate of their loved ones. Among the most pressing needs in this context, the ECtHR mentioned “large-scale forensic and scientific work on the ground, including the location and exhumation of presumed burial sites”, and “the collection, storage and identification of remains and, where necessary, systematic matching through up-to-date genetic databanks”.⁸⁸ While the judgment does not explicitly mention returning the remains to the families, it recognizes the necessity of carrying out exhumation and identification,⁸⁹ which one can presume would eventually lead to the families receiving the remains.

The ECtHR judgments are subject to monitoring procedures by the Committee of Ministers (CoM), which carries out a dialogue with the State and decides when a judgment is considered to have been executed.⁹⁰ The first enforced disappearance judgments concerning Turkey and Russia were handed down in 1998 and 2006 respectively, but they are still subject to the monitoring procedures of the CoM. Since the above-cited *Aslakhanova* judgment was handed down, Russia is expected to get involved in the search for disappeared persons by, *inter alia*, identifying possible burial sites and taking other relevant practical measures.⁹¹ Turkey – against whom the judgments were handed down earlier than Russia – is not required by the CoM to take actions aimed at returning the

85 ECtHR, *Cyprus v. Turkey*, Case No. 25781/94, Judgment, 10 May 2001, para. 136.

86 ECtHR, *Khadzhaliyev and Others v. Russia*, Case No. 3013/04, Judgment, 6 November 2008, para. 121. See also ECtHR, *Akkum and Others v. Turkey*, Case No. 21894/93, Judgment, 14 March 2005, paras 252–259; ECtHR, *Akpınar and Altun v. Turkey*, Case No. 56750/00, Judgment, 27 February 2007, paras 84–87.

87 ECtHR, *Aslakhanova and Others v. Russia*, Case Nos 2944/06, 8300/07, 50184/07, 332/08, 42509/10, Judgment, 18 December 2012, para. 221.

88 *Ibid.* para. 226; see also paras. 223–228.

89 *Ibid.* para. 226.

90 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14, ETS 5, 4 November 1950 (entered into force 3 September 1953), Art. 46.2; for more on the role of the Court and the CoM in this respect, see William Schabas, *The European Convention on Human Rights. A Commentary*, Oxford University Press, Oxford 2015, pp. 869–871.

91 The enforced disappearances judgments are monitored, along with other judgments concerning actions of the Russian security forces, within the Khasihev group and concern violations resulting from, or relating to, the actions of Russian security forces during anti-terrorist operations, mostly in Chechnya, between 1999 and 2006: see, for example, CoM, Interim Res. CM/ResDH(2011)292, CM/ResDH(2015)45.

remains of disappeared persons in order to implement the ECtHR judgments.⁹² This could indicate an evolution in the practice of the CoM towards countries in which a violation has been found as a result of enforced disappearances. However, the change in the CoM's practice could also be related to the number of disappearances which took place in the Chechen Republic, as this was invoked by the court in the *Aslakhanova* judgment as well as by the CoM interim resolutions.⁹³ To determine whether the CoM is currently paying greater attention to finding and identifying the remains of disappeared persons, it would be first necessary for the ECtHR to pass new judgments concerning enforced disappearances regarding other States.

These developments in international jurisprudence were triggered by families of the disappeared. The two bodies that first recognized the need of families to receive the remains in their remedies – a decade before the ICPPED came into force – took into consideration the specific cultural and religious background of the disappeared, as raised by the families themselves.⁹⁴ This shows the importance of including the needs of victims of human rights abuses in international jurisprudence: targeted and well-thought-out remedies can be of great significance for victims.

The international community's involvement in forensic work and returning remains

Very often the only possibility of returning the remains of disappeared and missing persons is through the process of carrying out exhumation and identification.⁹⁵ Forensic evidence has made the right to truth more accessible for the families of the missing and forcibly disappeared: it yields specific and verifiable information about those individuals, with respect to both where they are and what happened to them.⁹⁶ As has been demonstrated in the preceding sections, States are obliged

92 The enforced disappearances judgments are monitored along with other judgments concerning actions of the Turkish security forces, in particular in the southwest of Turkey, mainly in the 1990s, within the Aksyoy group: see, for example, CoM, Interim Res. CM/ResDH(2005)43, CM/ResDH(2008)69. Some of the elements have already been found to have been executed, such as trainings for judges and prosecutors (CoM, Interim Res. CM/ResDH(2008)69).

93 ECtHR, *Aslakhanova*, above note 87, paras 216–221; ECtHR, Interim Res. CM/ResDH(2011)292, 2 December 2011.

94 IACtHR, *Street Children*, above note 57, para. 102; the Human Rights Chamber did not include this reasoning in its decision, but according to an interview with Manfred Nowak, the families have triggered this development.

95 S. Robins, above note 2, p. 48. See also Jeremy Sarkin, "How Developments in the Science and Technology of Searching, Recovering and Identifying the Missing/Disappeared are Positively Affecting the Rights of Victims around the World", *Human Remains and Violence: An Interdisciplinary Journal*, Vol. 3, No. 1, 2017.

96 Jeremy Sarkin, "Dealing with Enforced Disappearances in South Africa (with a Focus on the Nokuthula Simelane Case) and around the World: The Need to Ensure Progress on the Rights to Truth, Justice and Reparations in Practice", *Speculum Juris*, Vol. 29, No. 1, 2015, p. 41. For more on the right to truth, see Yasmin Naqvi, "The Right to Truth in International Law: Fact of Fiction?", *International Review of the Red Cross*, Vol. 88, No. 862, 2006; Jose Brunner and Daniel Stahl (eds), *Recht auf Wahrheit: Zur Genese eines neuen Menschenrechts*, Wallstein Verlag, Göttingen, 2016; Sevanne Garibian, "Ghosts also Die: Resisting Disappearance through the 'Right to the Truth' and the *Juicios por la Verdad* in Argentina", *Journal of International Criminal Justice*, Vol. 12, No. 3, 2014.

under international law to take all appropriate measures to return the remains of forcibly disappeared persons and are strongly encouraged to return the remains of missing persons. Nevertheless, States are sometimes reluctant or not able to undertake exhumations and identifications.⁹⁷ It has been argued that when State authorities are not willing to carry these out, the task falls to international organizations and mechanisms.⁹⁸ While there is currently no legal obligation for such actions,⁹⁹ there have been a number of initiatives and developments in this area, simultaneously to the evolution in international jurisprudence. In this section, three international actors traditionally involved in the issue of missing and disappeared persons will be presented, along with their approach to and involvement in exhumation, identification and returning the remains: the ICRC, the Working Group on Enforced or Involuntary Disappearances, and the International Commission on Missing Persons (ICMP). Furthermore, two case studies – both UN initiatives – will be briefly analyzed: firstly, the Special Process on Missing Persons in the Territory of the former Yugoslavia, which was one of the first attempts to involve the international community in exhumations and identifications; and secondly, the Committee on Missing Persons in Cyprus, which has undergone essential transformations and is now returning remains.

Traditionally, the ICRC has been engaged in addressing the missing persons issue, *inter alia* through the general protection of civilians affected by conflict, visits to detained persons, and the compilation and processing of tracing requests.¹⁰⁰ With regard to returning the remains, the ICRC, as a neutral intermediary, is sometimes involved in transferring or repatriation of human remains, facilitating the exchange of human remains, covering the costs of visits by families of missing persons to exhumation sites, supporting institutes conducting exhumations by providing them with protective equipment, providing cash assistance for transporting remains or coffins, and expanding the forensic capabilities of State organizations with technical equipment and advice.¹⁰¹

97 For some of the reasons for this, see the first section of this article, “Enforced Disappearances and Missing Persons”, above.

98 Special Process on Missing Persons in the Territory of the former Yugoslavia, *Report Submitted by Mr. Manfred Nowak, Expert Member of the Working Group on Enforced or Involuntary Disappearances, Responsible for the Special Process, Pursuant to Paragraph 4 of Commission Resolution 1995/35*, UN Doc. E/CN.4/1996/36, 4 March 1996, para. 78.

99 With the exception of the UN Interim Administration Mission in Kosovo, which played a key administrative role in Kosovo after 1999 and was responsible for maintaining order and security, as well as for exhumations and identifications of missing and disappeared persons: see Manfred Nowak, “Enforced Disappearances in Kosovo: Human Rights Advisory Panel Holds UNMIK Accountable”, *European Human Rights Law Review*, No. 3, 2013, p. 269.

100 For a complex analysis and evaluation of the actions of the ICRC with regard to missing persons, see Marco Sassoli and Marie-Louise Tougas, “The ICRC and the Missing”, *International Review of the Red Cross*, Vol. 84, No. 848, 2002. For more information on missing persons, including news about current developments, see the ICRC web page on the subject, available at: www.icrc.org/en/war-and-law/protected-persons/missing-persons.

101 ICRC, *Annual Report 2015*, Geneva, 2016, pp. 34, 228, 298, 351, 414; ICRC, *Annual Report 2014*, Geneva, 2015, pp. 93, 125, 165, 269, 296, 382, 441.

While the ICRC has in recent years developed expertise in forensic science,¹⁰² its main efforts are aimed at supporting the appropriate actions by local authorities and do not typically involve carrying out its own forensic work.¹⁰³ In particular, the ICRC provides advice, support and training to local authorities and forensic practitioners in searching for, recovering, analyzing, identifying and managing large numbers of unidentified remains. In this context it focuses on building sustainable local forensic capacity as well as promoting the use of scientific best practice and the provision of necessary training.¹⁰⁴ The ICRC's forensic services provide assistance to many countries to help ensure the proper and dignified management of the dead and to help prevent and resolve cases of missing persons.¹⁰⁵ Only in exceptional circumstances is the ICRC itself involved in exhuming and identifying mortal remains.¹⁰⁶

One of the primary tasks of the WGEID is to assist families in determining the fate or whereabouts of their family members who are reportedly disappeared. Reports submitted to the WGEID are considered to be clarified when the fate or whereabouts of the disappeared persons are clearly established and detailed information is transmitted to the group. To clarify a case brought to the Working Group, it is not necessary for the State to return the remains, although in most cases it would be necessary for the authorities to undertake measures to locate them if the persons have died.¹⁰⁷

The amount of disappearances during the wars in the former Yugoslavia in the 1990s led to a sudden increase in communications received by the WGEID, to over 6,000 in 1992 alone. In its annual report, the Working Group stated that its resources were inadequate to meet this influx and its working methods were not geared to handle situations of the size and scope of the one in former Yugoslavia. Thus the Working Group supported the recommendations of Tadeusz Mazowiecki, the Special Rapporteur on the Situation of Human Rights in the Territory of the former Yugoslavia, to establish a special commission to look into

102 ICRC, above note 13, p. 89.

103 ICRC, *Annual Report 2015*, above note 101, p. 15. See also ICRC Advisory Service on International Humanitarian Law, "Missing Persons and Their Families: Factsheet", Geneva, 2015; while this fact sheet covers the subject of "Management of Human Remains" (p. 3), this aspect is not mentioned in the part devoted to the ICRC's role (pp. 4–5).

104 ICRC, *Forensic Science and Humanitarian Action*, Geneva, 2017, available at: www.icrc.org/en/document/forensic-science-and-humanitarian-action#.VL_PRCinGm8.

105 The ICRC's *Annual Report 2015* (above note 101, p. 62) mentions seventy countries, and its *Annual Report 2014* (above note 101, p. 94) eighty countries, to which assistance in this respect has been provided.

106 For example, in Colombia in 2013 (ICRC, *Annual Report 2014*, above note 101, p. 421), or in post-conflict Yugoslavia (ICRC, *Annual Report 1997*, Geneva, 1998, pp. 186–187). In Bosnia the use of such measures was justified by "the need to identify bodies and accord them a decent burial – a need particularly acute for the families of the dead, who could only then begin the catharsis of mourning" (ICRC, *Annual Report 1996*, Geneva, 1997, p. 175).

107 In order to provide the WGEID with "clear and detailed information on the fate or whereabouts of the disappeared person": see WGEID, *Methods of Work of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/WGEID/102/2, 2 May 2014, Rules 25, 26.

the question of disappearances in the area.¹⁰⁸ This led to the setting-up, in 1994, of the Special Process on Missing Persons in the Territory of the former Yugoslavia, with the aim of clarifying the fate and whereabouts of missing persons in the territory.¹⁰⁹

The Special Process functioned as a channel of communication between the relatives of missing persons and other sources of information.¹¹⁰ Its working methods were similar to those of the WGEID, with some minor differences.¹¹¹ The Special Process's mandate did not explicitly encompass exhumations and returning remains, but very soon indications arose that most of the 30,000 missing persons in the territory of the former Yugoslavia might be victims of arbitrary killings and buried in mass graves. The only way of clarifying their fate and whereabouts was to excavate the mass graves and to exhume and identify all the mortal remains.

Manfred Nowak, who was the expert of the Special Process, stated in 1996 that if the local authorities under whose jurisdiction mass graves fall were not willing to carry out exhumations, "the task will fall to international organizations and mechanisms, including the special process".¹¹² Based on this reasoning, he requested the Commission on Human Rights to consider this issue and authorize additional funding.¹¹³ His appeal received a reluctant response. Some governments and the ICRC argued that the problem of missing persons should be solved by putting pressure on the parties concerned to disclose all relevant information.¹¹⁴ The Commission on Human Rights adopted a resolution by which it allowed for an examination of mass grave sites by the expert "in cases where other means of determining the fate of the missing have proven unsuccessful and upon the recommendation by qualified experts that exhumation will provide an efficient means for resolving cases that are unlikely to be resolved by other means."¹¹⁵ This shows that the actions performed by the Special Process were conditional acts of last resort. At the same time, the expert of the Special

108 WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN.4/1993/25, 7 January 1993, paras 6, 36–44. At this time, the WGEID's working methods did not cover disappearances, which happened in international armed conflicts. This was changed in 2012.

109 For more on the course of events that led to establishing the Special Process, see *ibid.*, paras 37–44; WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN.4/1994/26, 22 December 1993, paras 41–44; WGEID, above note 11. For more on the Special Process, see Renate Frech, *Disappearances in Bosnia and Herzegovina*, Association for the Promotion of the Ludwig Boltzmann Institute of Human Rights, Sarajevo, Tuzla and Vienna, 1998, pp. 11–20; Manfred Nowak, "Monitoring Disappearances – The Difficult Path from Clarifying Past Cases to Effectively Preventing Future Ones", *European Human Rights Law Review*, Vol. 1, 1996, pp. 358–360.

110 Special Process on Missing Persons in the Territory of the former Yugoslavia, *Report Submitted by Mr. Manfred Nowak, Member of the Working Group on Enforced or Involuntary Disappearances, Pursuant to Paragraph 24 of Commission Resolution 1994/72*, UN Doc. E/CN.4/1995/37, 15 January 1995, para. 12.

111 Most importantly, the Special Process's target group was broader and it acted as a channel of communication not only between families and government, but also for all other sources of information. *Ibid.*, para. 12.

112 Special Process on Missing Persons in the territory of the former Yugoslavia, above note 98, para. 78.

113 *Ibid.*, paras 74–79.

114 Special Process on Missing Persons in the Territory of the former Yugoslavia, above note 14, paras 49–54.

115 Commission on Human Rights, Res. 1996/71, 23 April 1996, para. 34.

Process was called upon to prepare a comprehensive plan for dealing with this question and securing financial assistance for the activities.¹¹⁶ In practice, the implementation of the programme of action met with both financial and political obstacles.¹¹⁷ When Manfred Nowak resigned, the first reason he offered for his resignation was the lack of adequate support for exhumations.¹¹⁸

The goal of the Special Process was to clarify the fate and whereabouts of missing persons in the territory of the former Yugoslavia. The expert explained that the necessity of undertaking exhumations was connected with the wish to “facilitate a decent burial”,¹¹⁹ thereby recognizing the need of victims’ families to receive the remains of their dead relatives.

Although exhumations were not performed on the necessary scale, the very fact that the Special Process dealt with them was groundbreaking and paved the way for further developments. The situation of missing and disappeared persons and their families in post-war Yugoslavia, as revealed by the actions of the Special Process, were the reason for the creation of the ICMP, which was a US initiative, in 1996.¹²⁰ The ICMP’s aim is to ensure the cooperation of governments and other authorities in locating persons missing for involuntary reasons – such as armed conflicts, human rights abuses and natural or man-made disasters – and to assist them in those actions.¹²¹ Therefore the ICMP deals with both enforced disappearances and missing persons. It initially operated only in post-war Yugoslavia, but has gradually expanded its activities to include other countries, such as Iraq, Colombia and Libya.¹²² While the activities of the ICMP can lead to returning the remains of missing and disappeared persons to their families, this is not its main objective and in addition there is no mechanism accessible for individuals.

In practice, the mandate of the Special Process evolved towards exhumation and – if effective – would have also covered returning the remains to families through a mechanism established by the UN. A similar pattern can be observed with respect to the Committee on Missing Persons in Cyprus (CMP), which was established in 1981.¹²³ This tripartite mechanism,¹²⁴ consisting of two members

116 *Ibid.*, para. 36.

117 Special Process on Missing Persons in the Territory of the former Yugoslavia, above note 14, paras 49–52, 57.

118 The other two were lack of coordination among international actors in the field and lack of cooperation from the Federal Republic of Yugoslavia: see Special Process on Missing Persons in the Territory of the former Yugoslavia, “Final Statement by Manfred Nowak”, 26 March 1997.

119 See *ibid.*

120 Manfred Nowak proposed the creation of a very similar multilateral commission on missing persons; while the initiative was never implemented, it did receive support from the majority of regional authorities (Republic of Croatia, Republic of Bosnia and Herzegovina, Republika Srpska). See Special Process on Missing Persons in the Territory of the former Yugoslavia, above note 98, paras 80–82.

121 See the ICMP website, available at: www.icmp.int/about-us/mandate/.

122 See also Jeremy Sarkin, Lara Nettelield, Max Matthews and Renee Kosalka, *Bosnia and Herzegovina: Accounting for Missing Persons from the Conflict: A Stocktaking*, ICMP, Sarajevo, 2014, pp. 34–35.

123 For more on the CMP, see Grażyna Baranowska, “Shedding Light on the Fate of the Disappeared? Committee on Missing Persons in Cyprus”, *International Journal of Rule of Law, Transitional Justice and Human Rights*, Vol. 3, 2013, pp. 101–108.

124 Multilateral or tripartite mechanisms with regard to missing persons have also been set up after other conflicts; for example, the 1980–88 Iran–Iraq war (ICRC, *Annual Report 2015*, above note 101, p. 484) and the Yugoslav wars (ICRC, *Annual Report 1997*, above note 106, pp. 186–187).

appointed respectively by the Greek Cypriot and Turkish Cypriot communities and one selected by the ICRC and appointed by the UN Secretary-General, originally had a very narrow mandate: looking into the cases of persons reported missing in the inter-communal fighting as well as in the events of July 1974 and afterwards, and drawing up a comprehensive list of missing persons without attributing responsibility or making findings about the causes of the deaths.¹²⁵ Owing to political tensions, the CMP did not undertake any meaningful activities during the first two decades of its existence.¹²⁶ In August 2004, the Greek Cypriot and Turkish Cypriot communities agreed to a proposal made by the UN Secretary-General, who called for the resumption of the work of the CMP. No change was introduced to the mandate; nevertheless, exhumations became its main focus. Identified bodies are currently returned to the families and reburied, which is the final phase of actions taken by the CMP.¹²⁷ As of 31 May 2018, 876 of the 2,002 missing persons have been identified.¹²⁸

Thus the very narrow mandate of the CMP was *de facto* extended twenty-three years after the organization was set up. As stated on its website, today “[t]he primary objective of the CMP is to enable relatives of missing persons to recover the remains of their loved ones, arrange for a proper burial and close a long period of anguish and uncertainty”.¹²⁹ Although the CMP cannot be perceived overall as a body which has effectively dealt with the issue of forcibly disappeared and missing persons in Cyprus,¹³⁰ the development which led to the extension of its activities is very positive. Such activities would not have been possible in 1981 when the CMP was set up, and the change is also due to a shift in the way the international community approaches missing and disappeared persons.

Conclusions

International law has dealt with missing and forcibly disappeared persons for many decades, but the need to return the remains was not initially recognized. Yet the issue is of primary importance in as much as many (if not the majority of) disappeared persons are eventually killed, and there appears to be a universal

125 CMP, “Terms of Reference and Mandate”, paras 7, 11, 13, available at: www.cmp-cyprus.org/content/terms-reference-and-mandate.

126 G. Baranowska, above note 123, pp. 104–105.

127 The first three phases are the archaeological phase, the anthropological phase and the genetic phase.

128 Figures from the CMP website as of 31 May 2018. Updated figures can be found at CMP, “Figures and Statistics of Missing Persons”, available at: www.cmp-cyprus.org/content/facts-and-figures.

129 CMP website, available at: www.cmp-cyprus.org.

130 Among the reasons for this is the fact that the CMP does not designate responsibility for disappearances, so it does not reveal the fate of the disappeared persons. Additionally, because of the passage of time and since many remains were purposely destroyed, damaged or hidden by the perpetrators, not all persons will be found and identified. It is not possible to assess the total number unambiguously; it can be only estimated. Gülden Plümer Küçük, the Turkish member of the CMP, stated during an interview that finding 65% of the remains would be a great success (interview with Gülden Plümer Küçük, Turkish member of the CMP, Nicosia, October 2012). Though this is of course only an estimate, it seems quite optimistic.

human need to bury one's loved ones. As families of disappeared persons are also considered victims of enforced disappearance, their needs should be considered.

The families of those who have forcibly disappeared and the families of those who have gone missing during international and non-international armed conflicts have different rights. States are obliged under international law to take all appropriate measures to return the remains of forcibly disappeared persons and are strongly encouraged to return the remains of missing persons. Placing more responsibility on the State in cases of enforced disappearance seems justified, as State involvement is an inherent aspect of the act. The obligation to return the remains is an obligation of means, not results: in many situations it is not possible to find the bodies of forcibly disappeared or missing persons.¹³¹

The described development in international law was triggered by the families themselves, who put forward the need to receive the remains in the context of the Special Process, before the IACtHR, and before the Human Rights Chamber for Bosnia and Herzegovina. Both the IACtHR and the Chamber took into consideration the specific cultural and religious background of the disappeared and their families when including the issue in their remedies.¹³² In two different parts of the world, with regard to two different groups – Mayan peoples and Muslims – two different judicial bodies came to the same conclusion: in order to address enforced disappearances, States should take measures to return remains to the families. Subsequently, this need of the families was specifically included in the ICPPED. While there are differences in the approaches of the analyzed courts and tribunals, they included returning the remains as a form of reparation and did not consider it as an autonomous right, as it is considered under the ICPPED. Although the ECtHR did not include returning remains explicitly in its remedies, it is also clear from the *Aslakhanova* judgment that the obligation is due to the relatives of the disappeared.

In the interpretation of the Committee on Enforced Disappearances, the obligation to return remains also applies to disappearances which commenced before the ICPPED came into force.¹³³ In practice this can also be done through memory laws, even enacted many years after the disappearances occurred. For example the Spanish Historical Memory Law, adopted in 2007, introduces measures for the identification and location of victims who disappeared and were killed eight decades earlier.¹³⁴

While there is no legal obligation for international organizations to be involved in returning remains, since the 1990s there have been several

131 WGEID, “General Comment”, above note 45, paras 5, 6.

132 The IACtHR explained the issue in the judgments themselves (see, for example, IACtHR, *Bamaca-Velasquez*, above note 60, para. 81), while the Chamber did not mention it in its decisions, but according to an interview with Manfred Nowak the wishes expressed by the families filing the application triggered this development.

133 CED, above note 42, para. 28; CED, above note 43, paras 31–32.

134 Ley de Memoria Histórica de España, Art. 12. For more on Spanish memory laws, see Alfons Aragoneses, “Legal Silences and the Memory of Francoism in Spain”, in Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (eds), *Law and Memory: Addressing Historical Injustice through Law*, Cambridge University Press, Cambridge, 2017.

international initiatives in this respect. There are both disadvantages and challenges when international actors become involved in the exhumation, identification and return of the remains of disappeared and missing persons.¹³⁵ States are obliged to take all appropriate measures to return the remains of disappeared persons: international involvement in the issue should be considered an exceptional circumstance aimed at strengthening the capacity of national authorities to pursue those actions.

135 For more on the disadvantages and challenges for the ICRC, see M. Sassoli and M.-L. Tougas, above note 100, pp. 743–745.

