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Progress report of the Human Rights Council Advisory Committee on best practices on the issue of missing persons*

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I. Introduction

1. In its resolution 7/28 of 28 March 2008 entitled “Missing persons”, the Human Rights Council decided to hold a panel discussion on the question of missing persons at its ninth session and requested the High Commissioner for Human Rights to prepare a summary of the panel’s deliberations with a view to subsequently charging the Advisory Committee of the Human Rights Council, at the same session, with the preparation of a study on best practices in the matter.

2. Pursuant to the above-mentioned resolution, the Human Rights Council held a panel discussion on the question of missing persons at its ninth session, with the participation of experts of the International Committee of the Red Cross (ICRC), delegates of Governments and non-governmental organizations and national human rights institutions and international organizations. The Office of the High Commissioner for Human Rights prepared a summary of the panel’s deliberations.¹

3. Subsequently, the Human Rights Council adopted decision 9/101, in which it renewed its request to the Advisory Committee to prepare the study and to submit it to the Council at its twelfth session.

4. The Advisory Committee, at its second session held on 26–30 January 2009, set up a drafting group with the task of preparing a study on best practices in the matter of missing persons in situations of armed conflict, and designated the following of its members as members of the drafting group: Ansar Burney, Chinsung Chung, Wolfgang Stefan Heinz (Chairperson of the drafting group), Latif Hüseyinov (Rapporteur of the drafting group), Miguel Alfonso Martínez and Bernard Andrews Nyamwaya Mudho. The drafting group was also requested to submit the results of its work on the study to the Advisory Committee at its third session, with a view to submitting them to the Council at its twelfth session.

5. The Advisory Committee, at its third session held on 3–7 August 2009, continued its deliberations on the issue of missing persons. As a result of those deliberations, the Advisory Committee adopted recommendation 3/2 entitled “Missing persons” in which it noted that considerable difficulties had been encountered by the drafting group in finding the necessary information and research resources, and requested the latter to submit the results of its work on the study to the Advisory Committee at its fourth session, with a view to submitting them to the Council at its fourteenth session.

6. In its decision 12/117 of 1 October 2009, the Human Rights Council took note of recommendation 3/2 and requested the Advisory Committee to submit the study to the Council at its fourteenth session.

7. In order to continue its work on the above-mentioned study, the drafting group of the Advisory Committee elaborated a questionnaire addressed to Governments, which was transmitted by note verbale dated 2 November 2009 by the Secretariat. At the time of submission of the present report, the Secretariat has received 21 Governments’ replies to the questionnaire.

8. At its fourth session held from 25 to 29 January 2010, the Advisory Committee continued its deliberations on the issue of missing persons and adopted this progress report on best practices in the matter of missing persons prepared by its drafting group on missing persons.

¹ A/HRC/10/10.

9. The progress report mainly focuses upon the international legal obligations of States and parties to an armed conflict relating to the issue of missing persons. For the final report, the drafting group will have to thoroughly analyse the replies received from the States and, based upon this analysis, identify the best practices in the matter of missing persons. The Advisory Committee expresses its gratitude to the Office of the United Nations High Commissioner for Human Rights for the support in the process of collection of information and to other partners.

II. The respect for and implementation of international law

10. For the purposes of this study, “missing persons” are those whose families are without news of them and those who are reported, on the basis of reliable information, unaccounted for as a result of an international or non-international armed conflict. This term is different from and broader in scope than “enforced or involuntary disappearance”, as defined in the International Convention for the Protection of All Persons from Enforced Disappearance.²

11. International obligations to prevent and resolve situations of missing persons in connection with armed conflict are based both on international humanitarian law and international human rights law. Whereas international humanitarian law is specifically designed for armed conflicts, human rights treaties apply at all times and in all circumstances to all persons within the jurisdiction of a State party. Strict observance of such fundamental rights as the right to life, the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment, the right to liberty and security, the right to a fair trial and the right to respect for private and family life could, to a great extent, prevent persons from going missing, including as a result of an armed conflict. If, in armed conflict, protected persons were treated in conformity with rules of international humanitarian law, including in terms of exchanges of family news, and if humanitarian organizations were allowed access to particularly vulnerable individuals, there would be fewer missing persons and fewer families without information on the fate and whereabouts of their loved ones. In this context, the general obligation of States parties to the Geneva Conventions of 1949 to respect and to ensure respect for the rules of international humanitarian law should be specifically mentioned.

12. International rules regarding missing persons apply in both international and non-international armed conflicts.³ States must take all appropriate measures to reduce the

² “For the purposes of this Convention, ‘enforced disappearance’ is considered to be 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”, International Convention for the Protection of All Persons from Enforced Disappearance, art. 2.

³ ICRC has stipulated, for situations of international armed conflict, that:

- Families have the right to be informed of the fate of missing relatives (Protocol I, art. 32)
- The parties to a conflict must search for persons reported missing by an adverse party (Protocol I, art. 33) and facilitate enquiries made by members of families dispersed as a result of the conflict so as to help them restore contact with one another and try to bring them together again. The parties to a conflict must also encourage the work of organizations engaged in this task (Geneva Convention IV, art. 26)
- Lists showing the exact location and markings of the graves, together with particulars of the dead interred therein, must be exchanged (Protocol I, art. 34)

likelihood that people will go missing. Such measures might be practical and of a general or specific nature, as detailed in the following section. Also, they must ensure that their laws implement their international obligations aimed at preventing persons from becoming unaccounted for and accounting for persons missing as a result of an armed conflict. Measures on implementation of international humanitarian law should be adopted by States in times of peace so as to ensure that international humanitarian law is immediately applicable in case of conflict.

13. Obligations relating to the issue of missing persons are incumbent not only on States, but also on the parties to an armed conflict. Each party to an armed conflict must take all feasible measures to account for persons reported missing as a result of an armed conflict and must provide their family members with any information it has on their fate. It is to be underlined that States and parties to an armed conflict continue to be bound by certain obligations of international humanitarian law even if the conflict has ended. For instance, it is obvious that the search for missing persons should continue without any time limit until all feasible measures to account the missing persons have been taken. In practice, this means that the measures are often carried out after the conflict, because it is only at that time that parties are in a position to fulfil their obligations.

14. The rules of international humanitarian law, including those to prevent persons from going missing, cannot be respected if they are not known. Dissemination of international humanitarian law is therefore the responsibility of States and the parties to armed conflicts. Thus, each party to a conflict must ensure that the forces under its command are aware of their obligations under international humanitarian law and their responsibility for any failure to comply with the relevant provisions. The civilian population, including civil servants, should receive the necessary education in international humanitarian law. Furthermore, members of the armed forces and the civilian population should receive the necessary education in international human rights law.

15. International humanitarian law must be duly incorporated into domestic legislation. Enacting domestic legislation is highly important in dealing with the issue of missing persons, preventing disappearances, ascertaining the fate of missing persons, ensuring the proper management of information and supporting the families of missing persons. There may be good reasons for bringing together into a single law relevant provisions relating to missing persons.⁴ In this respect, a specific law on missing persons that was adopted in Bosnia and Herzegovina⁵ should be noted. National legislation concerning the punishment of grave breaches of international humanitarian law, the treatment of prisoners of war and the protection of civilians is also pertinent.

16. Furthermore, all necessary measures must be provided for in domestic legislation for the suppression of all acts contrary to international humanitarian law, whether committed by members of the armed forces, public officials or civilians.

17. The International Committee of the Red Cross has prepared a draft model law on missing persons⁶ containing the main elements to be taken into account by States when

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- Similar treaty-based and customary rules apply in situations of non-international armed conflicts

See also http://www.help.cicr.org/Web/Eng/siteeng0.nsf/htmlall/section_ihl_missing_persons?OpenDocument.

⁴ In a resolution on missing persons adopted at its 115th Assembly, the Inter-Parliamentary Union indicated that the national policies should entail the passage and enactment of a national law on missing persons, accompanied by the necessary regulatory and administrative measures. Resolution available from <http://www.ipu.org/conf-e/115/115-3.htm>.

⁵ See *Official Gazette of Bosnia and Herzegovina*, No. 50, 9 November 2004.

⁶ For details of the areas the model law covers, see A/HRC/10/28, para. 20. For the model law, see ICRC, Advisory Service on International Humanitarian Law, "Guiding Principles/Model Law on the

drafting legislation on the issue. The model law offers a framework legislation aiming to help national authorities to bring legislation into conformity with the requirements of international law.

III. Measures to prevent persons from going missing

18. Under both international humanitarian law and human rights law, States are obliged to take measures to prevent persons from going missing. In its resolution 61/155 of 14 February 2007, the General Assembly called upon States that were parties to an armed conflict to take all appropriate measures to prevent persons from going missing in connection with armed conflicts and account for persons reported missing as a result of such a situation. Such measures, especially those of a legislative and institutional nature, must preferably be adopted in peacetime.

19. National authorities should establish strict lines of command within armed forces, security forces and armed groups so as to ensure effective supervision.

20. Proper identification of members of armed forces or armed groups is a key means of preventing people from becoming missing in armed conflict. Personal records, identity cards and identity discs are the only secure means of identification. Measures should be taken to ensure that these means of identification are mandatory and properly used since they can — in particular identity discs — help to establish the status of the persons who fall into the hands of the adverse party and the identity of those who have been seriously wounded or killed. The issue of identification also involves other populations at risk such as isolated populations, civilians in conflict zone, displaced persons, the elderly and children.⁷ Furthermore, it is recommended that the personal data of members of armed forces or armed groups and persons at risk, including in particular unaccompanied children, elderly and disabled persons be properly registered, which may assist in a later identification of mortal remains.

21. National authorities should register deaths and issue the appropriate certificates. Moreover, an information bureau⁸ and graves registration service,⁹ as provided for under the 1949 Geneva Conventions, should be set up. More particularly, national information bureaux should be tasked to collect and forward information (documents and objects) on individuals protected by international humanitarian law (principally prisoners of war and civilian internees) who have fallen into enemy hands. Registration of such persons is fully in keeping with the objectives of humanitarian law, one of which is to protect persons not or no longer taking part in hostilities. By setting up an information bureau in accordance with the provisions of the 1949 Geneva Conventions, a party to an armed conflict provides itself with a means of obtaining information about individuals who have gone missing

Missing". Available from [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/model-law-missing-300908/\\$File/Model%20law.missing-0209_eng%20.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/model-law-missing-300908/$File/Model%20law.missing-0209_eng%20.pdf).

⁷ The importance of identification of children is aptly emphasized in the report of the Secretary-General on missing persons of 18 August 2008 (A/63/299). In particular, it states that "Means of personal identification for minors is of importance in terms of prevention, as they are particularly vulnerable in time of conflict, notably to forced recruitment. State authorities must, in that regard, take effective measures to provide means of personal identification to minors with a view to preventing their disappearance" (para. 16).

⁸ See Geneva Convention I, arts. 16, 17, para. 4; Geneva Convention II, arts. 19, para. 2, and 20; Geneva Convention III, arts. 120–123, Geneva Convention IV, arts. 130, 136–138; Additional Protocol I, art. 33, para. 3; and the Hague Regulations of 1907, art. 14.

⁹ See Geneva Convention I, art. 17, para. 3; Geneva Convention III, art. 120, para. 6; Geneva Convention IV, art. 130, para. 3.

either on the battlefield or on enemy-controlled territory, and hence of easing the anguish of their families and relatives.

22. Administrative rules and regulations should be adopted in keeping with the internationally recognized norms regarding such matters as arrest, detention, imprisonment and captivity. The security and physical integrity of all those who are not or no longer taking part in the hostilities, in particular, persons deprived of their freedom should be ensured. Delivery of news and mail between members of armed forces/groups and their families at least once a month should be ensured. For this to function effectively, clear responsibilities should be established on all levels of military, police and other relevant State agencies, with a clear-cut information and reporting system established before armed conflict starts.

IV. Missing persons and the restoration of family links

23. Families have the right to communicate with their family members and to know the fate of their relatives. Respect for the right to exchange family news is essential to prevent individuals from becoming unaccounted for.

24. The population groups most at risk of losing contact with their relatives are members of the armed forces and armed groups, isolated civilians in conflict areas, displaced people and refugees, persons deprived of their liberty and vulnerable persons such as children, the elderly and persons with disabilities. In armed conflicts, when the usual means of communication are disrupted, the ICRC together with the National Red Cross and Red Crescent Societies help to maintain and restore contact between family members through the worldwide Red Cross and Red Crescent Family Links Network.

25. This network facilitates the exchange of personal news between family members everywhere in the world, using all available means, subject to agreements with the authorities: Red Cross messages are collected and distributed, satellite/mobile phones are provided to those who have the telephone number of their relatives and Internet is used to trace people via the ICRC Family Links website. With the consent of those concerned, lists of people either providing news or looking for news from relatives are published in hard copies (in newspapers or ad hoc) and on the ICRC website, and broadcast on radio or television.

26. In order to facilitate searches, the parties to an international armed conflict must transmit all relevant information concerning people reported missing by an adverse party and their requests concerning their own missing persons. This information must be transmitted directly to the Central Tracing Agency established by the ICRC under the 1949 Geneva Conventions.

27. During an armed conflict, ICRC and the National Red Cross and Red Crescent Societies collect tracing requests and all available information on people unaccounted for and the circumstances under which they disappeared from their families, direct witnesses, the authorities and any other reliable source. This information is crucial when tracing a person and establishing his or her fate. The information is stored centrally and managed in accordance with the legal provisions applying to the protection of personal data.

28. Using this information, ICRC tries to locate the person in places of detention, hospitals, internally displaced person and refugee camps, morgues, remote villages, etc. Tracing activities also include supplying the authorities with lists of people unaccounted for, together with information on the circumstances in which they disappeared, requesting information on location of graves and asking authorities to allow the recovery and identification of human remains. The tracing process also involves maintaining a constant

dialogue and making confidential representations to the authorities or armed groups in order to clarify the fate of the missing person.

29. There are also other humanitarian organizations involved in activities linked to restoring family links. The Office of the United Nations High Commissioner for Refugees and the International Organization for Migration are regular partners of the Red Cross and Red Crescent. Other agencies, such as United Nations Children's Fund (UNICEF) and non-governmental organizations such as Save the Children Fund cooperate with the Red Cross and Red Crescent in specific cases, for example in assisting unaccompanied children.

V. Mechanisms established to clarify the fate of missing persons

30. The efficient treatment of missing persons requires the establishment of competent mechanisms at various levels. It might be necessary to put into place mechanisms ensuring coordination and information-sharing process between the parties concerned. They are usually set up in the period following the end of the conflict and might be included in documents aiming at settling the situation, such as ceasefire and peace agreements.

31. When such mechanisms are set up, particular attention should be given to their mandate which should focus on their humanitarian objectives, i.e., tracing persons that are unaccountable for because of a situation of armed conflict and informing their families accordingly. They should be granted sufficient capacity and powers to be able to carry out their mandate effectively. For instance, the constitutive documents should ensure that such mechanisms have access to grave sites and human remains so as to proceed to exhumation and identification. Appropriate rules of procedure specifying the representatives' necessary qualities and number, the quorum rule and the voting procedure should be drafted. Sufficient attention should be given to creating an environment that is conducive to information-sharing, including the possibility of working in a confidential manner.

32. States need to organize at national level the efficient treatment of missing persons. One way promoted by the ICRC Model Law on the Missing is to establish an independent and impartial State authority responsible for tracing missing persons and identification of human remains. Of course, it must be ensured that such an authority does not overlap with other structures already existing, such as the national information bureaux mentioned earlier. In such a case, the extension of the latter's mandate should be explored.

33. An independent and impartial national institution could play a crucial role in clarifying the fate of missing persons. States should ensure the establishment and day-to-day functioning of such an institution (commission or committee for missing persons) through adequate structures such as working groups or other appropriate mechanisms. The commission for missing persons should have a clear humanitarian mandate established by law, focusing on tracing persons that are unaccountable for as a result of an armed conflict, and the necessary resources and powers. It should, inter alia: (a) receive tracing requests and, on the basis of submitted tracing requests, collect, check and provide the applicant and State authorities with available information and facts on disappearance, as well as information on the whereabouts and fate of a person in accordance with the national legislation and standards on the protection and management of personal data; (b) be responsible for the operation of a registry of data and adopt necessary regulations to this end; (c) take appropriate measures to ensure the right of persons deprived of freedom to inform their relatives of their condition, whereabouts and circumstances of their detention/imprisonment; (d) take measures to ensure the enjoyment of rights by relatives of the missing person; and (e) execute any other tasks required for the performance of its duties. Said body should provide mechanisms such as telephone hotlines and web pages for relatives and witnesses to register missing persons and trace potential burial sites.

34. It must be kept in mind that the longer it takes to establish functioning mechanisms to deal with the issue of the missing, the less likely it will be that the missing will be identified and returned to their families.

35. The commission for missing persons should work closely with the judiciary and other governmental and non-governmental entities, employing a strong coordinating mechanism. Furthermore, it should closely cooperate with a team of forensic anthropologists, conducting the exhumations and identifications of the remains of missing persons.

36. As practice shows, these commissions focus largely on the missing persons of their own side of the conflict. It is essential that they deal with the issue of missing on both sides and not make their work conditional on the results achieved by any other side. Their mandates should make it clear that they also have responsibility, insofar as they have information or control over the relevant territory, for clarifying the fate of the missing on the other side(s) as well. In addition, the commissions need to cooperate with their counterparts. When there is no cooperation between respective commissions of the parties to armed conflict, the latter should consider establishing an international commission to look into the issue of the missing, with persons on the commission acting in an individual capacity but from the region and chosen by the different parties to the conflict (as in Cyprus and Nepal).

37. The commissions need to be as depoliticized as possible, work in a transparent manner and have, alongside members of Government bodies, representatives of civil society and representatives of the families of the missing. They should deal with the issue of missing persons as a humanitarian and not a political issue.

38. Apart from commissions for missing persons, other instruments and mechanisms could be explored when dealing with the issue of missing persons; for example, bodies such as human rights commission and ombudspersons. Both usually have a broad mandate to address human rights violations and should therefore include the missing within their jurisdiction.

39. All justice and rule of law mechanisms, including the local judiciary, parliamentary commissions and truth-finding mechanisms, are of key importance for solving the issue on the basis of transparency, accountability and public involvement in the process of addressing the issue of missing persons. Judicial process might for instance permit victims' families to intervene at various stages of proceedings and exercise their right to know. Also, when tribunals are investigating large-scale killings and initiating mass exhumations and forensic activities, it should be ensured that such work is conducted in a manner serving the best interests of the families in terms of being provided with an answer, while also bringing the persons responsible for those crimes to justice. Exhumations can reveal what happened to victims of such killings and give families information about the fate of loved ones. They can also enable the next of kin to honour the dead in conformity with the precepts of their culture and religion.

40. Truth and reconciliation exercises may have a role to play in clarifying events and helping communities move forward. Such exercises would undoubtedly benefit families for answers about the fate of missing relatives. In its resolution 12/11 of 1 October 2009 entitled "Human rights and transitional justice", the Human Rights Council emphasized that "truth-seeking processes, such as truth and reconciliation commissions, that investigate patterns of past human rights violations and their causes and consequences are important tools that can complement judicial processes and, when established, such mechanisms have to be designed within a specific societal context and to be founded on broad national consultations with the inclusion of victims and civil society, including non-governmental organizations".

VI. The right to know

41. The right to know is the pillar of the protection that ought to be given to missing persons and their families.

42. The right of family members to know the fate of missing relatives as a result of armed conflict, including their whereabouts or, if dead, the circumstances and cause of their deaths and the correlative obligation to carry out an effective investigation into the circumstances surrounding a disappearance, is provided for both under international human rights law and international humanitarian law.

43. The Convention on the Protection of All Persons from Enforced Disappearance provides in article 24, paragraph 2, that: “Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.” Under article 24, paragraph 1, of the Convention, “victim” means “the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance”.

44. The right of the relatives to know the fate of their family member is also laid down, as earlier mentioned, in article 32 of Protocol I to the 1949 Geneva Conventions. Article 33 of that Protocol further provides that “as soon as circumstances permit ... each party to the conflict shall search for the persons who have been reported missing by an adverse Party”. The same was recognized as applying in non-international armed conflict.

45. The right to know also includes the right to get information about the place of burial of a missing relative, if known. Parties to a conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which it belongs or upon the request of the next of kin, to whom the deceased’s personal effects must be returned.

46. In addition to international instruments which lay down obligations in relation to missing persons, there is also a wealth of relevant case law that has been built up by regional supervisory bodies over the past 20 years. Thus, it has been generally recognized that a person’s disappearance can inflict grievous suffering not only on the person who has disappeared but also on his family, and that this suffering can amount to inhuman treatment. Relevant examples from the case law of the Inter-American Court of Human Rights are the *Velásquez Rodríguez* case (1988) and the *Blake* case (1998). The African Commission on Human and Peoples’ Rights took a similar line in the case of *Amnesty International and others v. Sudan* (1999). Reference should also be made to the case law of the European Court of Human Rights: in a number of its decisions the Strasbourg Court has emphasized the obligation of States to take adequate measures to trace missing persons and satisfy families’ right to know (see, e.g. *Aziyev and Aziyeva v. Russia* (2008)).

47. The Human Rights Council has discussed on various occasions the right to the truth, although in a broader context. In its resolution 12/12 of 12 October 2009, the Council recognized the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights. The Council noted that the right to the truth may be characterized differently in some legal systems as the right to know or the right to be informed or freedom of information.

48. The right to know must be clearly recognized in domestic law and regulations. States and parties to an armed conflict are under an obligation to take the necessary measures to clarify the fate of the missing person and inform the family thereof. Family members must be regularly informed about the progress and results of investigation concerning the fate or whereabouts of a missing relative. Effective remedies, including adequate compensation, must be provided for any violation of this obligation. The

systematic and deliberate denial of the right to know the fate of one's relative should be punished as a criminal offence under domestic law. Moreover, any available information must be provided not only to the families, but also to relevant institutions for tracing the missing persons.

49. In armed conflicts, protected persons must be allowed to inform or require the competent authorities to notify their families (or any other person of their choice) of their capture/arrest, address and state of health. The systematic and deliberate denial of this right should be criminalized under domestic law. The right of protected persons to correspond with the members of their family must also be ensured.

50. National and international institutions working in the area of human rights and humanitarian law, including ICRC, should be granted unhindered access to any place where people are being deprived of their liberty.

51. No punishment should be imposed for maintaining private or personal contact with relatives, or for seeking information regarding the fate or whereabouts of a relative who is detained or interned. The right must be upheld no matter the nature of the act the person is suspected of having committed, including criminal acts and against State security.¹⁰

VII. Criminal investigation and prosecution of human rights violations linked to missing persons

52. As it can be seen above, the efficient treatment of missing persons requires thorough commitment from all parties concerned and the necessary resources. Unfortunately, a number of stumbling blocks can be observed in practice which make the whole process very challenging. Information about missing persons can and has been used as pressure point in political negotiations, instead of being understood and accepted as a natural humanitarian obligation for all conflict parties.¹¹ Cases/statistics of missing persons are used for the international political debate among conflict parties to show who the principal culprit for the violent conflict is. Thus, they tend to support intransigent positions, such as that one conflict party would not want to start the investigation of cases until the other side acknowledges guilt and responsibility. Furthermore, leaders who played a major part in perpetuating the conflict often remain prominent figures in the subsequent peace process, a situation that does not facilitate the resolution of missing person cases.

53. One additional challenge is that cases of missing persons can also constitute dormant cases of arbitrary detention, enforced disappearances or extrajudicial executions. Therefore, while focusing on the humanitarian dimension of missing persons in armed conflict, it is also necessary to take note of the work of human rights mechanisms in three fields, i.e., those of the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances and of the Special Rapporteur on extrajudicial executions, and work on impunity (including resolutions by the Human Rights Council on all related topics).

54. In the first panel discussion of the Human Rights Council on missing persons on 7 January 2009, the Deputy High Commissioner for Human Rights, Ms. Kang, stressed the importance of fighting impunity and implementing appropriate domestic law. She stressed the importance of criminalizing in national legislation violations of international humanitarian and human rights standards. Furthermore, she referred to measures to be

¹⁰ See "Guiding Principles/Model Law on the Missing".

¹¹ Christophe Girod and Angelo Gnaedinger, "Politics, military operations and humanitarian action: an uneasy alliance". Available from www.icrc.org/web/eng/siteeng0.nsf/html/p0709.

adopted in order to guarantee the right to the truth, such as effective tracing activities, conducting investigations of cases, developing appropriate forensic expertise, treating the mortal remains with dignity and respect and ensuring adequate management of information.¹²

55. In the light of the above, a delicate balance needs to be struck between putting into place effective means of collecting relevant information on missing persons and generally recognizing the importance of prosecuting war crimes. As observed by La Rosa and Crettol in “The missing and Transitional Justice: the right to know and the fight against impunity”, “such mechanisms would need ... to generate greater incentives for those with information on the fate of the missing to speak out, rather than to remain silent and be an obstacle to the fight against impunity”.¹³

56. The political and legal challenge then is how to strengthen the political will of conflict parties to cooperate in sharing information on missing persons, without however neglecting the human rights dimension of such cooperation. Here, clearly, international organizations and other relevant actors must take a proactive role.

VIII. Legal status of missing persons and support for the families of persons unaccounted for

57. The issue of persons going missing has consequences not only for the victims themselves, but also for their families, especially dependent women, elderly persons and children, who prove to be more vulnerable in such situations. States are obliged to take measures to respond to the material, financial, psychological and legal needs faced by the families of persons unaccounted for. In this context, a mechanism for needs assessment and processing of requests for assistance should be established, to which the persons concerned would have ready access.

58. First and foremost, the legal situation of persons reported missing as a result of armed conflict and their relatives should be established in domestic legislation. Specifically, the law should envisage circumstances and the procedure by which a person can be declared absent or missing. Furthermore, legal consequences of a declaration of absence and a declaration of death, including in terms of property administration, guardianship and parental authority, should be clearly prescribed in law.

59. The main principle is that the rights and interests of missing persons, including their civil status, property and assets, must be protected at all times until their fate has been ascertained or their death recognized. The interests of missing persons should be adequately protected through designation of an appropriate representative.

60. Missing persons should be presumed to be alive until their fate has been ascertained. The foremost right of a missing person is that of search and recovery. A person should not be declared dead without sufficient supporting evidence. The death of a missing person may be determined through the discovery of human remains or presumed as a result of other evidence, events or certain defined situations, or may be presumed after the passage of time. Issuance of a death certificate should have all of the effects to a missing person as it does with regard to any other person.

¹² See United Nations Human Rights Council, summary of the panel discussion on the question of missing persons, document A/HRC/10/10.

¹³ ICRC, 2006, vol. 88, No. 862, pp. 355–362, p. 360.

61. As concerns the assistance to be provided to the families of persons unaccounted for, it is essential to ensure that the dependents of such persons are entitled to the same social or financial benefits provided for other victims. States should adopt a gender-sensitive approach to ensuring the rights of the relatives. Such matters as the custody of the children of the missing person, inheritance rights, re-marriage rights, pension rights and entitlements to public assistance should be properly addressed in domestic legislation. In this respect, the draft recommendation on principles concerning missing persons and the presumption of death¹⁴ prepared by the Council of Europe Directorate General of Human Rights and Legal Affairs should be noted. According to the draft recommendation, a fair balance must be struck between the interests of missing persons and of those with a legitimate interest, particularly as regards property and inheritance rights, pension and life insurance rights, right to enter a new union (marriage, registered partnership or similar union), legal affiliation and parental rights.

62. If needed, financial assistance should be provided to all dependents. The interests of the child should be given primary importance. Children should receive special support and protection. In particular, measures should be taken to reunite unaccompanied children with their families. The needs of single heads of families should be given special attention, taking into consideration the specific needs faced by women in such situations. States should ensure that the families of persons unaccounted for benefit from support programmes in order to adapt to their situations and come to terms with events. Community and psychological support, including therapeutic when necessary, should also be provided to those in need.

63. The right of relatives of missing persons to be granted reparation should be ensured.

64. States should provide support for civil society initiatives in favour of the families of the missing and those linked with solving the issue of the missing. Furthermore, they should facilitate contacts, including cross-border contacts, between families of the missing.

65. The international community as well as national authorities could play a more proactive role in assisting the families of the missing to organize themselves, including through the provision of funding, provision of premises, equipment for communication, etc. It is important to avoid politicizing this support and to allow the families of the missing to run their own independent organizations.

IX. Treatment of the dead and identification of human remains

66. National legislation should contain provisions governing the situation of the dead and human remains.

67. The main principle is that the dead should be sought, collected and identified without distinction. The exhumation, collection, transportation, temporary storage or burial, and repatriation of human remains and corpses should be ensured. The dead should be treated with respect and dignity. When identified, they should be buried in individually marked graves in sites that are identified and registered. The missing persons' relatives have the right to demand that places of burial and exhumation where the missing persons were either buried or exhumed be marked. Adequate training and information on means of identification and the treatment of the dead should be provided to members of the armed forces and relevant services involved in the collection and management of the dead.

¹⁴ Document CDCJ (2009) 35 Final.

68. An important step is identifying, mapping and preserving burial sites. With the passing of time, the movement away of persons with knowledge and the death of some of those with information, it becomes increasingly important to tackle this aspect of the missing. Information needs to be collected from different sources including from high-ranking officers, combatants and civilians who all may have information concerning burial sites. More effort needs to be made to encourage people to come forward with information about the missing, for example, using incentives or guarantees of anonymity.

69. International humanitarian law prohibits the despoliation and mutilation of the dead. All acts of mutilation and despoliation must be criminalized. It must be borne in mind that intentional mutilation may also be an element of concealing separate criminal offences which resulted in the death. Moreover, the act of mutilating or despoiling the dead can constitute the war crime of committing outrages upon personal dignity, in particular humiliating or degrading treatment as identified in article 8 (2) (b) (xxi) and article 8 (2) (c) (ii) of the Statute of the International Criminal Court for both types of armed conflict.

70. Criminal sanctions should also be established for the non-respect of burial sites and the desecration of graves.

71. Whenever there is a confirmed case of a death, the competent State authorities are obliged to undertake all necessary measures to recover the human remains. The remains should be returned to the family, if possible. For the families of missing persons, the return of the body for burial is often the first step towards achieving justice and for being able to start the mourning process. If it is not possible to return the remains, a proper burial should be ensured. Also, all necessary measures should be undertaken to ensure proper handling of the personal effects of the deceased.

72. The main responsibility for the proper handling of all the dead and for providing information to the families lies with the authorities and armed groups.

73. Thus, the process of revealing the fate of any missing person begins often with the exhumation and identification of their mortal remains. The exhumation of human remains constitutes part of the right to know the truth and helps establish the whereabouts of the disappeared. It also dignifies the victims, as the right to bury the dead and to carry out ceremonies for them according to each culture is inalienable for all human beings.

74. Exhumation serves several important purposes, including: recovery of the remains for physical examination and analysis for their identification; release of remains to relatives so as to facilitate funeral arrangements and emotional healing; documentation of injuries and other evidence for legal proceedings and to uncover human rights abuses; the search for clues that may assist in the historical reconstruction of events and revelations to create awareness; and acknowledgement that is necessary for healing and drawing lessons for the future of the community. Exhumations should be performed only with the proper authorizations and according to the conditions specified in law.

75. Authorities must ensure that the examination of human remains and their identification are undertaken by qualified and competent people. An authority competent to issue and deliver death certificates must be designated.

76. According to the ICRC, the procedures of exhumation and post-mortem examination should respect the following principles: (a) at all times, the dignity, honour, reputation and privacy of the deceased must be respected; (b) the known religious beliefs and opinions of the deceased and his or her relatives should be taken into consideration; (c) families should be kept informed of the decisions in relation to exhumations and post-mortem examinations, and the results of any such examination; (d) after post-mortem examination, the remains should be released to the family at the earliest time possible; (e) it is essential

that all information be collected for the purpose of identification whenever exhumations are performed.¹⁵

77. Cross-border agreements should be established with the neighbouring countries where there is reasonable suspicion that grave sites may exist. The discovery of burial sites can be important not only in tracing missing persons but also in the identification of the commission of crimes and their potential subsequent prosecution.

78. While there is a trend of relying heavily on DNA testing for identification of remains, there are, however, certain difficulties associated with this process, including the cost involved, the facilities and expertise required and the accuracy of the testing, in some cases, there is no known DNA from the missing person or there is no living survivor to provide DNA for comparison. Identification should not be based on one single method but take into account all available information. If available, medical and dental records are helpful in the identification of remains of missing persons.

79. Any forensic work should be based on certain standards (legal, ethical and technical) and conducted with the primary aim of identifying victims and returning their remains to their families. Direct contacts should be established between forensic teams and the relatives of the missing persons. Domestic legislation should provide for the possibility of conducting independent forensic investigations in cases of persons unaccounted for during an armed conflict. Such investigations are critically important for investigating violations of humanitarian law and human rights law.

80. The competent authorities must adopt adequate procedures for providing information on identity, location and cause of death to the appropriate authorities and to the families. In particular, information on deceased persons as well as the location of human remains and graves should be centralized and transmitted to the other party to the conflict.

81. The authorities must ensure that the dead, including burials, are recorded as well as the particulars of graves and those interred there. This task might be entrusted to the State's official graves registration service – if not, it would require the establishment and functioning of a complementary system to record the details of the death and internment of protected persons.

X. Information management and legal protection of personal data

82. Information on the fate of missing persons is at times denied by parties either during or post conflict, the reason being that information is not disclosed as a means of continuing the conflict or because prosecution is feared.

83. The principal purpose of collecting data as regards missing persons is to establish the identity, location and fate of persons unaccounted for (both living and deceased) and to provide information to the families on the whereabouts and fate of their missing relatives.

84. Coordination of the activities of all those involved and the sharing of information would increase the effectiveness of any action taken to ascertain the fate of persons who have not been unaccounted for. States should ensure that information collected on persons unaccounted for is comprehensive, yet limited to what is necessary for the purpose identified. Information should be collected and processed fairly and lawfully. The collection and use of information should be subject to the consent of the person to whom

¹⁵ “Guiding Principles/Model Law on the Missing”.

that information relates. States should ensure respect for the relevant standards and principles on the protection of personal data whenever information, including medical and genetic information, is managed and processed. Exchange of information among those involved should take place without endangering victims, the persons collecting the information or the sources of information.

85. The data must be adequate, relevant and not excessive in relation to the purposes for which they are processed. Such purposes must be explicit, legitimate and determined at the time of collection. The data should be destroyed as soon as the purpose of their collection has been fulfilled or when they are no longer needed. They may, however, be retained for a given period if required for the benefit of the person to whom they relate or if they are essential for the performance of the humanitarian tasks of the organization that collected the data.

86. Locating missing persons and/or finding information about them requires searches of all possible records. The records of local government units, such as the police, are important, as is information that can be derived from cemetery and morgue records.

87. The issue of data management is also relevant to exhumation projects in the search for missing persons. While oral reports may provide information about possible sites of graves or mass graves, records of military or other government personnel, who may have been assigned to, for example, dig graves or who were involved in transportation to or from the site, may also provide or corroborate information.

88. State authorities should provide access to pre-war health and dental records to facilitate the identification process of mortal remains in more traditional ways.

89. States should provide adequate sanctions for destroying or unlawfully withholding information on missing persons.

XI. Cooperation

90. States should cooperate at the international level in order to effectively solve cases of missing persons by providing mutual assistance in terms of information-sharing, victim assistance, location and identification of missing persons, and exhuming, identifying and returning human remains.

91. International humanitarian law can only work in practice if belligerents, or former belligerents, cooperate with each other. Accordingly, the issue of the missing cannot be solved unilaterally by one side to the conflict: close cooperation and coordination is necessary between the different sides to the conflict. Parties to an armed conflict should refrain from acting on the basis of reciprocity in dealing with the issue of the missing. Sharing of information or taking action, for example, should not be conditional on the other side doing the same. In other words, cooperation should be unconditional; humanitarian law is not subject to any principle of reciprocity.

92. Following an armed conflict, bilateral and multilateral cooperation among States in conjunction with humanitarian organizations can lead to more effective assistance to families. States should endeavor to address the humanitarian nature of the problem independently of other inter-State issues so as to avoid further distress to the families of missing persons pending the resolution of political issues.

93. Intergovernmental organizations and ICRC, acting in conformity with their respective mandates, should be available to support government authorities and armed groups in fulfilling their responsibilities.

94. International and regional organizations should encourage inter-State cooperation and may have an important role to play on their own.

95. International and regional organizations involved in solving the problem of missing persons should further develop cooperation within their respective mandates while ensuring synergies and avoiding duplication.

96. There is a pressing need to develop cooperation agreements and partnerships not only at intergovernmental level, but also with national Red Cross and Red Crescent societies, civil society structures and, in particular, the associations of families of missing persons.

97. Civil society organizations could play an important role concerning different issues such as the provision of psychological rehabilitation for affected family members. They should be provided with adequate financial and technical assistance. Working groups or committees could be set up comprising of government representatives, relatives of missing persons and civil society representatives.

XII. Conclusions

98. International obligations to prevent and resolve situations of missing persons in connection with armed conflict are based both on international humanitarian law and international human rights law.

99. Enacting national legislation is highly important when dealing with the issues of missing persons, preventing disappearances, ascertaining the fate of missing persons, protecting their rights, ensuring the proper management of information and supporting the families of missing persons. In this respect, a draft model law on missing persons prepared by the International Committee of the Red Cross (ICRC) is of great importance.

100. States and parties to an armed conflict are obliged to take all appropriate measures to prevent persons from going missing. In particular, members of armed forces or armed groups and populations at risk (such as isolated populations, civilians in conflict zone, displaced persons, the elderly and children) must be properly identified. An information bureau and graves registration service, as provided for under the 1949 Geneva Conventions, should be set up.

101. Respect for the right to exchange family news is essential to preventing individuals from becoming unaccounted for. In armed conflicts, when the usual means of communication are disrupted, ICRC together with the national Red Cross and Red Crescent societies help to maintain and restore contact between family members through the worldwide Red Cross and Red Crescent Family Links Network. In order to facilitate searches, the parties to an international armed conflict must transmit all relevant information concerning people reported missing by an adverse party and their requests concerning their own missing persons. This information must be transmitted directly to the Central Tracing Agency established by ICRC under the 1949 Geneva Conventions.

102. States and parties to an armed conflict should ensure the establishment and day-to-day functioning of an independent and impartial national institution that could play a crucial role in clarifying the fate of missing persons. Such institutions (commissions on missing persons) should deal with the issue of missing on both sides to the conflict and not condition their work on the results achieved by any other side. They should work closely with governmental and non-governmental entities, family associations, and families of the missing. States and parties to an armed conflict

should also provide for the putting into place of necessary coordinating and information-sharing process.

103. The right of family members to know the fate of missing relatives as a result of armed conflict, including their whereabouts or, if dead, the circumstances and cause of their deaths, is provided for under both international human rights law and international humanitarian law. States and parties to an armed conflict are under an obligation to take the necessary measures to clarify the fate of the missing person and to inform the family thereof. Family members must be regularly informed about the progress and results of investigation concerning the fate or whereabouts of a missing relative.

104. While focusing on the humanitarian dimension of missing persons in armed conflict, it is also necessary to keep in mind that cases of missing persons can sometimes constitute grave offences, including war crimes. States should ensure effective investigation and prosecution of all human rights violations linked to missing persons.

105. The legal situation of persons reported missing as a result of armed conflict and of their relatives should be clearly established in domestic legislation. The rights and interests of missing persons, including their civil status, property and assets, must be protected at all times until their fate has been ascertained or their death recognized.

106. States are obliged to take measures to respond to the material, financial, psychological and legal needs faced by the families of persons unaccounted for. States should adopt a gender-sensitive approach to ensuring the rights of the relatives. The right of relatives of missing persons to be granted reparation should be ensured.

107. The dead should be sought, collected and identified without distinction. They must be identified and buried in individually marked graves in sites that are identified and registered. All acts of mutilation and despoliation of the dead must be criminalized.

108. The competent State authorities are obliged to undertake all necessary measures to recover the human remains. The remains should be returned to the family, if possible. If it is not possible to return the remains, a proper burial should be ensured.

109. The exhumation of human remains constitutes part of the right to know the truth and helps establish the whereabouts of the disappeared. Exhumations should be performed only with the proper authorizations and according to the conditions specified in law. Families should be kept informed of the decisions in relation to exhumations and of the results of any such examination. After post-mortem examination, the remains should be released to the family at the earliest time possible.

110. Domestic legislation should provide for the possibility of conducting independent forensic investigations in cases of persons unaccounted for during an armed conflict.

111. Information on persons unaccounted for should be collected and processed fairly and lawfully. States should ensure respect for the relevant standards and principles with regard to the protection of personal data whenever information, including medical and genetic information, is managed and processed.

112. Of key importance for solving the issue of missing persons are all justice and rule of law mechanisms, including the local judiciary, parliamentary commissions and truth-finding mechanisms.

113. States should cooperate at the international level in order to effectively solve cases of missing persons by providing mutual assistance in terms of information sharing, victim assistance, location and identification of missing persons, and exhuming, identifying and returning human remains. Parties to an armed conflict should refrain from acting on the basis of reciprocity in dealing with the issue of the missing.

114. International and regional organizations involved in solving the problem of missing persons should further develop cooperation within their respective mandates while ensuring synergies and avoiding duplication. Cooperation agreements and partnerships should be developed not only at intergovernmental level, but also with national Red Cross and Red Crescent societies, civil society structures and associations of families of missing persons.

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