

GUIDANCE NOTE 11

ENSURING COMPLEMENTARITY IN THE SEARCH FOR AND INVESTIGATION OF CASES OF MISSING PERSONS, INCLUDING VICTIMS OF ENFORCED DISAPPEARANCES

Central Tracing Agency

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This Guidance note examines the relationship between search and criminal investigative processes related to missing persons and identifies key concerns that need to be addressed in order to ensure that these processes are conducted in a complementary manner and in accordance with international legal frameworks and standards.

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1. BACKGROUND AND PURPOSE

When a person is unaccounted for, international law sets out obligations for states relating to searching for and clarifying what has happened to that person, depending on the specific circumstances. International law also requires that states investigate and, if appropriate, prosecute international crimes, including those resulting in persons going missing. Where there are indications that a disappearance may be linked to a criminal offence, such as enforced disappearance, hostage-taking, homicide, kidnapping or extrajudicial execution, a criminal investigation must be opened. In contexts where the search for missing persons is conducted separately from criminal investigations, despite the complementary nature of the legal obligations, which are equally binding on states, challenges related to the interplay between the search and criminal investigations can arise – often, with regard to a specific caseload of missing persons. Bearing in mind that coordination practices must be context- and case-specific, this guidance note[1] discusses what needs to be anticipated to ensure that searches and criminal investigations are conducted in a complementary manner and in accordance with international legal frameworks and standards.

2. TERMINOLOGY

For the purpose of this guidance note, **"missing persons"** is understood to mean individuals of whom their families have no news and/or who, on the basis of reliable information, have been reported missing as a result of an armed conflict, other violence, or any other situation that may require the involvement of a competent state authority.[2] This notion includes victims of enforced disappearance and other crimes, such as hostage-taking, homicide, kidnapping or extrajudicial execution; it also includes people who have gone missing in the absence of a crime.

The notion of **missing persons**, although not defined in international law, is found in different international humanitarian law (IHL) rules, which broadly refer to persons reported missing for reasons related to an armed conflict, including those who were forcibly disappeared. Under international human rights law (IHRL), **enforced disappearance** is defined as 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.[3] Enforced disappearance is a continuing violation against victims, including the disappeared person and their next of kin, until the fate and whereabouts are clarified. States party to the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) must take the necessary measures to ensure that enforced disappearance constitutes an offence under their criminal law and to bring those responsible to justice.[4] When such acts are committed by persons or groups of persons acting without the authorization, support or acquiescence of a given state, that state must take the appropriate measures to investigate and bring those responsible to justice.[5]

1 This guidance note forms part of the set of guidance notes published by the ICRC Missing Persons Project relating to the creation of national search mechanisms for missing persons. The aim of these notes is to provide guidance to stakeholders in countries where the decision has been taken to create a new search mechanism. This document benefited from comments and feedback provided by a large number of stakeholders, including representatives of civil society organizations, state institutions and international institutions. The other guidance notes in the set focus on the following themes: contextual approaches, needs of families, assessment of political contexts, existing authorities, domestic legal and policy frameworks, involvement of families and family associations, impact measurement, data management and forensic aspects.

2 ICRC, Guiding Principles/Model Law on the Missing, ICRC Advisory Service on International Humanitarian Law, Geneva, 2009.

3 ICPPED, Art. 2. See also the preamble of the Declaration on the Protection of all Persons from Enforced Disappearance; and the Inter-American Convention on Forced Disappearance of Persons, Article II, 9 June 1994.

4 ICPPED, Arts. 4 and 11.

5 ICPPED, Art. 3.

Criminal investigations seek to establish whether the disappearance is linked to the commission of a crime (for example, enforced disappearance, hostage-taking, homicide, kidnapping or extrajudicial execution) and, if so, to identify, prosecute and, if appropriate, sanction the alleged perpetrators. They also seek to locate and release the person concerned, recover the body in the event of their death, and gather and preserve all evidence pertaining to the crime.

A **search process** is initiated because a person has been reported missing by his/her family or by any other actor, including state authorities. The search for missing persons involves a series of steps aimed at tracking and reconstructing their journey to determine their fate and whereabouts. In conjunction with the identification process, it aims to provide individualized answers on the fate and whereabouts of missing persons, including those forcibly disappeared, to their families and, ultimately, to reunite them with, or return their remains to, their loved ones. In a generic sense, "fate" refers to the state or condition of the person (alive or dead) and the circumstances and journey that led to that state, while "whereabouts" relates to the person's location.[6]

In this guidance note, **coordination between the search process and criminal investigation** is understood as processes of interaction and exchange between different actors, institutions and mechanisms involved in the search and criminal investigations concerning missing persons. Coordination in these contexts includes, among other things, the recognition of respective mandates, a mutual understanding of the technical processes involved and the putting in place of procedures that support (and do not hinder) these processes and respect the specific mandates of those involved.

3. COMPLEMENTARY INTERNATIONAL LEGAL OBLIGATIONS

Both the search and criminal investigation are essential to meet the basic needs and uphold the rights of the missing and their families, and to ensure compliance by states with their international obligations related to accounting for missing persons and to accountability for international crimes. In addition, comprehensively addressing a legacy of serious violations of IHL and gross human rights violations that resulted in persons going missing is key to achieving and maintaining peace.[7]

In situations of armed conflict, IHL contains obligations for the parties to the conflict, whether states or non-state armed groups, to clarify the fate and whereabouts of persons who go missing as a result of the conflict, as well as obligations for states related to the repression of international crimes.[8] The families of persons reported missing as a result of armed conflict have a right, under IHL, to know the fate and whereabouts of their relatives.[9] Parties to the conflict must take all feasible measures to account for persons reported missing as a result of the conflict and to

6 ICRC, The Forensic Human Identification Process: An Integrated Approach, ICRC, Geneva, 2022, p. 10.

7 See, for instance, the preamble of United Nations Economic and Social Council Commission on Human Rights, Promotion and Protection of Human Rights: Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher. Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (E/CN.4/2005/102/Add.1), 8 February 2005; United Nations Human Rights Council, Accountability: Prosecuting and Punishing Gross Violations of Human Rights and Serious Violations of International Humanitarian Law in the Context of Transitional Justice Processes: Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Fabián Salvioli (A/HRC/48/60), 9 July 2021, para. 94; Swiss Peace Foundation, A Conceptual Framework for Dealing with the Past, swisspeace Essential, Bern, February 2016, p. 5.

8 For more detail on relevant legal obligations, see ICRC, Missing Persons and their Families, ICRC factsheet, Geneva, November 2023.

9 This right is enshrined in Protocol I additional to the Geneva Conventions, Article 32. See also J-M Henckaerts and L. Doswald-Beck (eds), *Study on Customary International Humanitarian Law, Vol. I*, ICRC/Cambridge University Press, 2005, Rule 117 (Obligation to account for missing persons) and its interpretation, which notes that "[p]ractice indicates that this rule is motivated by the right of families to know the fate of their missing relatives". See also, ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflict, ICRC, Geneva, September 2024, section III.

provide their family members with any information they have on their fate.[10] Furthermore, in armed conflicts, there are also obligations under IHL to maintain, to the degree possible, family unity and contact between family members.[11] IHL also contains obligations relating to the dead that are of relevance to accounting for missing persons.[12] For instance, parties to the conflict must take all possible measures to search for, collect and evacuate the dead without adverse distinction. Bodies of those who died during armed conflict must be properly handled and their dignity protected. Parties must also record all available information before disposing of the dead and mark the location of the graves, with a view to identification and to informing the families of their fate and whereabouts. Parties must also endeavour to facilitate the return of remains to families, upon their request. Importantly, in addition to obligations related to accounting for persons who go missing in armed conflicts, IHL establishes obligations to investigate serious violations of IHL (or "war crimes"), including those resulting in persons going missing or being forcibly disappeared, and, if appropriate, to prosecute the suspects.[13]

IHRL also contains obligations and standards that are relevant to clarifying the fate and whereabouts of missing persons, and on the treatment of the dead, in connection not only with armed conflict but other situations also. In the case of enforced disappearance, under the ICPPED, states parties must take appropriate measures to uphold each victim's 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.[14]

States party to the ICPPED must 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.[15] States parties must cooperate and afford one another the greatest measure of mutual assistance in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming, identifying and returning their remains.[16] Other than with regard to enforced disappearance, human rights law treaties do not set out detailed provisions dealing specifically with missing persons or the treatment of the dead. However, several provisions contained in these have been interpreted by United Nations treaty bodies and regional courts as giving rise to obligations relevant to missing persons, the dead and the rights of their relatives, including provisions on clarifying the fate and whereabouts of missing persons. Under IHRL, states can be held responsible for failing to uphold: the rights to life, human dignity, private and family life,[17]

10 J-M Henckaerts and L. Doswald-Beck (eds), *Study on Customary International Humanitarian Law, Vol. I*, ICRC/Cambridge University Press, 2005, Rule 117, applicable in international and non-international armed conflicts.

11 See, for instance, J-M Henckaerts and L. Doswald-Beck (eds), *Study on Customary International Humanitarian Law, Vol. I*, ICRC/Cambridge University Press, 2005, Rule 105 (Respect for family life) and its interpretation.

12 See, for instance, ICRC Database, Customary IHL, Rules, Customary IHL, Chapter 35. For more detailed information on specific provisions of the Geneva Conventions and their Additional Protocols, please refer to ICRC, Humanity after Life: Respecting and Protecting the Dead, ICRC factsheet, Geneva, 2019.

13 For further information on this point, see the factsheets and reports listed under "Penal repression" in the ICRC's documentation on the national implementation of IHL. Under IHL, enforced disappearances are not specifically listed as grave breaches or other serious violations of IHL. However, when an act of enforced disappearance amounts to one of the grave breaches listed in the Geneva Conventions of 1949 and their Additional Protocol I (e.g. torture, inhuman treatment, wilfully causing great suffering or serious injury to body or health, and taking of hostages), it must be investigated, and those allegedly responsible must be prosecuted, as required by the grave breaches regime. Furthermore, under customary IHL, serious violations of IHL, whether committed in international or non-international armed conflicts, constitute war crimes. See ICRC Database, Customary IHL, Rules, Customary IHL, Rule 98 (Enforced disappearance); *ibid.*, Rule 156 (Definition of war crimes); *ibid.*, Rule 158 (Prosecution of war crimes).

14 ICPPED, Art. 24.2. See also United Nations Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances (A/HRC/16/48), January 2011, para. 39, General comment 10, on the right to the truth in relation to enforced disappearance.

15 ICPPED, Art. 24(3).

16 ICPPED, Art. 15.

17 The protection of the family and the right to family life and unity are enshrined in numerous international and regional human rights instruments; under IHRL, no one shall be subjected to arbitrary or unlawful interference with one's family life.

and an effective remedy; and the prohibition of torture, cruel, inhuman, or degrading treatment or punishment, and enforced disappearance.[18] Notably, the right to life imposes a procedural duty on states to carry out an effective investigation of unlawful or suspicious deaths that occur within their jurisdiction.[19] Finally, based on the right to an effective remedy and the obligation of public authorities to carry out an effective investigation into the circumstances surrounding a disappearance or other gross violations of human rights, human rights bodies and regional courts have also recognized a right to the truth.[20] Going beyond the individual rights and needs of the missing and their families, and the obligations of states, human rights bodies and regional courts have recognized that the respective community or society has a collective right to know what led to people going missing, and that there is a need to ensure that similar events are prevented from happening in the future.[21]

Where gross violations of human rights or serious violations of IHL have allegedly occurred in connection with a missing person, states have an obligation to investigate those violations and bring alleged perpetrators of international crimes to justice. Under IHRL, families have a right to justice.[22] The ICPPED also requires that states take appropriate measures to investigate acts of enforced disappearance and bring those responsible to justice, and to inform families about

18 The relevant provisions can be found in several international human rights law instruments, such as the 1948 Universal Declaration of Human Rights (UDHR), the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the 2006 ICPPED, as well as in various regional treaties, such as the 1950 European Convention on Human Rights (ECHR), the 1969 American Convention on Human Rights (ACHR) and the 1986 African Charter on Human and Peoples' Rights (AfCHPR).

19 See United Nations Human Rights Committee, International Covenant on Civil and Political Rights: General Comment No. 36 (CCPR/C/GC/36), 3 September 2019, paragraphs 27–29.

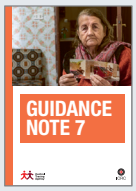
20 See, for instance, United Nations General Assembly, Human Rights Council, Implementation of General Assembly Resolution 6/251 of 15 March 2006 Entitled "Human Rights Council": Right to the Truth – Report of the Office of the High Commissioner for Human Rights (A/HRC/5/7), 7 June 2007; United Nations Economic and Social Council, Commission on Human Rights, Promotion and Protection of Human Rights: Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher. Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (E/CN.4/2005/102/Add.1), 8 February 2005. See also, for instance, Inter-American Court of Human Rights, *Bámaca-Velásquez v. Guatemala*, Judgment of 25 November 2000 (Merits), para. 201; *Barrios Altos* v. *Peru*, Judgment of 14 March 2001 (Merits), para. 48; European Court of Human Rights, Cyprus v. *Turkey*, Judgment, 10 May 2001, para. 136.

21 See, for instance, Principle 2 – The Inalienable Right to the Truth, in UN Economic and Social Council, Commission on Human Rights, Promotion and Protection of Human Rights: Impunity – Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher*: Addendum – Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity (E/CN.4/2005/102/Ad.1), 8 February 2005; United Nations Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances (A/HRC/16/48), January 2011, para. 39, General comment 10, on the right to the truth in relation to enforced disappearance; Inter-American Court of Human Rights, *Barrios Altos case*, Judgment of 14 March 2001, Series C No. 75, para. 45. For more information on the four pillars of a holistic approach to dealing with the past (or transitional justice), beyond disappeared persons, see Swiss Peace Foundation, A Conceptual Framework for Dealing with the Past, swisspeace Essential, Bern, February 2016.

22 See, for instance, the International Covenant on Civil and Political Rights, Art. 2, para. 3a and 3b, requiring states to give an effective remedy to any persons whose rights or freedoms are violated, to ensure that any person claiming such a remedy has their right thereto determined by competent authorities and to develop the possibilities of judicial remedy. See also United Nations Human Rights Committee, General comment no. 31, 80th session, New York, 2004, para. 18. Beyond enforced disappearance, other relevant violations of human rights that can occur in the context of persons going missing or being disappeared include torture, cruel, inhuman and degrading treatment, and extrajudicial killings. Under international criminal law, international crimes may occur in the context of persons going missing or being disappeared, including enforced disappearances as a crime against humanity – see Rome Statute, Art. 7(1)(i). See also United Nations Human Rights Council, Accountability: Prosecuting and Punishing Gross Violations of Human Rights and Serious Violations of International Humanitarian Law in the Context of Transitional Justice Processes: Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Fabián Salvioli, (A/HRC/48/60), 9 July 2021, para. 94, which states: "Mechanisms for seeking the truth are complements to justice and full redress, not substitutes for them."

developments.[23] In cases of enforced disappearance, families are also considered victims under the ICPPED.[24] The authorities should at all times respect families and, where relevant, communities, and encourage and enable their participation in the search process and, where appropriate, in criminal investigations, without prejudice to the measures taken to preserve the integrity and effectiveness of the search and of criminal investigations.[25] Such participation can be hampered if the respective institutions do not work in a coordinated manner. It is the responsibility of state authorities to ensure that this is not the case.

For further information, refer to the following guidance note:



4. THE NEED TO ENSURE COMPLEMENTARITY IN PRACTICE

Despite a robust international legal framework protecting the missing, those who have died and their families, coordination among the different actors involved in search processes and criminal investigations can be challenging in practice. Challenges can arise owing to the fact that the search and criminal investigation look for similar information, such as personal and biological information regarding missing persons and their families; the circumstances in which the person went missing; and their suspected whereabouts, such as places of detention or the location of suspected gravesites. If there is no coordination between the search and the criminal investigation, one institution may monopolize the information, or create competition over access to and custody of it. As a result, the two processes may impede one another. This is relevant, for example, with regard to the investigation of human remains and gravesites, as activities such as excavations and exhumations can only be carried out once. Lack of coordination can cause delays and loss of critical information. If family members and witnesses are interviewed multiple times by different institutions, this can cause them undue stress and emotional harm. Improperly conducted interviews may also compromise testimonial evidence. Finally, lack of cooperation between search and criminal investigation processes can also revictimize families by asking them to choose one process over another.[26]

In most contexts, law enforcement authorities are responsible for both the search and criminal investigations. However, separate search mechanisms,[27] as well as accountability mechanisms, are sometimes created, because existing law enforcement institutions do not have the capacity or willingness to deal with a large volume of complex cases, they lack the required independence and political trust, or they don't have a mandate to provide answers to families. While some such institutions do have mandates to focus exclusively on the search (for example, the Unit for

23 Under IHRL, persons may disappear as a result of the crime of enforced disappearance – see, for instance, Articles 3, 4, 5, and 6 ICPPED; the preamble of the ICPPED also refers to the crime of enforced disappearance and to the right of victims to justice.

24 ICPPED, Art. 24(1): "For the purposes of this Convention, 'victim' means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance."

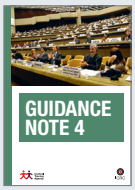
25 ICPPED, Art. 24(2); Principle 5 of the United Nations Committee on Enforced Disappearances (CED) Guiding Principles on the Search for Disappeared Persons.

26 United Nations Human Rights Council, Accountability: Prosecuting and Punishing Gross Violations of Human Rights and Serious Violations of International Humanitarian Law in the Context of Transitional Justice Processes: Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Fabián Salvioli, (A/HRC/48/60), 9 July 2021, para. 95.

27 For the purpose of this guidance note, the term "mechanism" refers to all national institutions, commissions and other bodies and processes established by authorities that aim to provide individualized answers on the fate and whereabouts of missing persons and provide support to families of missing persons.

the Search for Persons Presumed Disappeared in Colombia, the National Search Commission in Mexico, the Committee on Missing Persons in Cyprus, the General Directorate for the Search for Disappeared Persons in Peru, the Missing Persons Task Team in South Africa, or the recently created UN Independent Institution on Missing Persons in Syria), others focus on the criminal investigation (for example, most prosecutorial institutions, Colombia's Special Jurisdiction for Peace, or the UN's International, Impartial and Independent Mechanism on international crimes committed in the Syrian Arab Republic). Still others seek to contribute, to varying degrees, to both objectives (for example, the Office on Missing Persons in Sri Lanka, whose primary goal is the search for missing persons but it also has the authority to coordinate with other authorities, including the judiciary). Where such separate search mechanisms or accountability mechanisms are created – for instance, based on a peace agreement, domestic law or UN resolutions – or where an existing institution sets up new procedures in this regard, any potential tensions between the search and criminal investigations need to be prevented and addressed from the outset.[28]

For further information, refer to the following guidance note:



5. FACTORS THAT CAN IMPEDE COORDINATION, AND CONSIDERATIONS TO ADDRESS THEM

This section identifies key factors that can affect coordination. To show how these factors have been dealt with in practice, examples from different domestic contexts are provided. These examples are intended to be illustrative and are not indicative of good or bad practice.

5.1 Different institutional set-ups, mandates and sequencing

Where a new mechanism is created, issues of overlapping mandates and sequencing can arise. Specifically, overlap may refer to the types of cases regarding missing persons that a search mechanism has authority to pursue and that also fall under the authority of other entities, such as investigative authorities. Both search and criminal investigations may have limitations based on the law. For example, a search mechanism's mandate may be limited by time, geography, a specific situation or the circumstances of the disappearance. Meanwhile, a criminal investigation must follow rules of evidence and procedure that may not allow for the investigation of all missing persons cases for the purposes of the search.

Where a search and criminal investigation take place at different points in time, coordination challenges can arise. There is no legal basis under international law regarding sequencing of efforts to clarify the fate and whereabouts of missing persons, or investigation and prosecution of enforced disappearance and other crimes resulting in people going missing. However, in contexts where, prior to a new search mechanism being established, one institution is responsible for both the search and the criminal investigation, it often tends to prioritize either establishing the fate and whereabouts or criminal responsibility, especially where there is a large caseload. In other contexts, political or other constraints may prevent criminal investigations from advancing and only permit search activities to take place.

28 Certain considerations mentioned can also be relevant if one and the same institution is responsible for pursuing both objectives.

Issues to be considered:

- Where cases have been the subject of a criminal investigation or a search in the past, a new search mechanism should have access to relevant information. At a minimum, this should include list(s) of missing persons, their suspected locations (for example, places of detention, hospitals, mortuaries, or gravesites) and any other information relevant to establishing their fate and whereabouts. Although due consideration must be given to the humanitarian purpose of accessing information, the scope of the information that can be shared (for example, sources of the information) might be limited by laws that protect privacy, confidentiality and due process rights. In such cases, consideration must be given to amending relevant laws to include compliance with international legal obligations related to clarifying fate and whereabouts as a legal basis for processing and sharing personal and confidential information.
- If the search mechanism is established in a context where there is, for the time being, little scope for progression of a criminal investigation, search activities must in any case comply with due process (i.e. they must be conducted according to the law and in such a way as to protect the rights of individuals) and chain-of-custody requirements, to ensure that future criminal investigations are not impeded (see also sections 5.2 and 5.3 below). Moreover, it will be important to ensure that strategies are adopted to overcome decay of physical evidence over time and the potential loss of witness and informant information (because of ill health, old age, loss of memory or death).
- Where prevailing conditions prevent criminal investigations from moving forward at the time of the establishment of the new search mechanism, it is necessary to ensure that the search mechanism is authorized to collect information regarding the locations of suspected gravesites, existence of unidentified bodies and possibility that a crime may have occurred (see sections 5.2 and 5.3 below). Likewise, authorities will need to ensure that suspected gravesites are protected from further disturbance, intentional and unintentional, including from construction works.
- Regardless of the presumed perpetrator(s) of crimes (state or non-state actors), access to independent forensic expertise may be an important consideration in circumstances where identifications would otherwise risk being called into question.

If the search mechanism is temporary, its mandate should include provisions that indicate what happens to information held by it after the end of its mandate, including preservation and protection of that information against unauthorized access, and under what conditions law enforcement authorities or other institutions and actors may gain access to it and for what purpose.



Mexico

Before the General Law on Enforced Disappearance of Persons, Disappearance Perpetrated by Private Individuals and on the National Search System (*Ley General en Materia de Desaparición Forzada de Personas, Desaparición Cometida por Particulares y del Sistema Nacional de Búsqueda de Personas*) entered into force in 2018, the prosecutors' offices were in charge of both criminal investigations and searches for disappeared persons.[29] After the law entered into force, search and criminal investigation concerning disappeared persons were entrusted to different institutions, leading to the creation of, among other entities, the National Search Commission (*Comisión Nacional de Búsqueda,* CNB) and state search commissions. The main obligation of the CNB, a decentralized branch of the Ministry of the Interior, is to carry out and/or coordinate, together with the various federal and state authorities, search activities in order to clarify the fate or whereabouts of missing persons. The CNB is required by law to search for all missing persons, past, present and future, as long as they fall within the definition of "disappeared or unaccounted for".[30]

29 A. Srovin Coralli, Coordination Between the Search and Criminal Investigations Concerning Disappeared Persons. Case Studies on Bosnia and Herzegovina and Mexico, swisspeace, Bern, June 2021.

30 CNB, "¿Qué es la Comisión Nacional de Búsqueda?" (About the National Search Commission).



Colombia

In Colombia, the Prosecutor's Office has always been responsible for both the search and criminal investigations. To fulfil the former task, a separate section responsible for the search was created within the Prosecutor's Office.

Based on the Peace Agreement signed in 2016 between the Colombian Government and the FARC-EP (Revolutionary Armed Forces of Colombia – People's Army), new measures have been implemented in Colombia. Specifically, in 2017, the Comprehensive System of Truth, Justice, Reparation and Non-Repetition (abbreviated to SIVJNR in Spanish) was established. It comprises different mechanisms, such as the Special Jurisdiction for Peace (abbreviated to JEP in Spanish), the Search Unit for Missing Persons (abbreviated to UBPD in Spanish) and the Truth, Coexistence and Non-Repetition Commission. The UBPD and the JEP have specific mandates regarding, respectively, the search for and criminal investigations concerning disappeared persons.

The UBPD is a humanitarian and non-judicial authority that leads, coordinates and contributes to the search for persons who went missing, for whatever reason, during the various armed conflicts that have affected the country and whose disappearance was reported before 1 December 2016. In cases where the person concerned is found to have died, and where possible, it recovers and returns the remains. The UBPD has a remaining mandate of 15 years, extendable by law.[31]

The JEP is the justice component of the SIVJNR. It has the task of investigating, clarifying, judging and punishing the most serious crimes committed prior to 1 December 2016 due to, on the occasion of, or in direct or indirect relation to the armed conflict. Crimes committed after that date fall under the jurisdiction of the ordinary justice system. The JEP focuses on the most serious and representative crimes of the armed conflict (including enforced disappearances), in accordance with the selection and prioritization criteria defined by law and the judiciary. The JEP may try crimes committed by former FARC-EP members, members of the security forces, or other agents of the state, and civilian third parties. The JEP has a maximum term of 20 years.[32]

In addition to the Peace Process mechanisms, ordinary state institutions, such as the National Forensics Institute, are involved in the search and/or criminal investigation processes.

In 2024, the state created a National Search System to unite search and investigation mechanisms under one public policy.[33]

31 Colombia, Decreto Ley 589 de 2017 (Abril 5), *Por el cual se organiza la Unidad de Búsqueda de Personas dadas por desaparecidas en el contexto y en razón del conflicto armado*.

32 Jurisdicción Especial para la Paz.

33 Colombia, Decreto 532 de 2024 (Abril 29), *Por el cual se adiciona el Capítulo 9 al Título 5 de la Parte 2 del Libro 2 del Decreto 1069 de 2015, Único Reglamentario del Sector Justicia y del Derecho, para reglamentar el Sistema Nacional de Búsqueda de Personas dadas por Desaparecidas en contexto y en razón del conflicto armado, incluyendo a las víctimas de desaparición forzada*.



Sri Lanka

Prior to the establishment of the Office on Missing Persons (OMP), the Police held primary responsibility for both the search for missing and disappeared persons and criminal investigations of such cases. However, other mechanisms, too, were legally entrusted with the power to investigate and search for missing and disappeared persons, though not necessarily with a criminal or prosecutorial function. For example, the Human Rights Commission of Sri Lanka (HRCSL) conducts its own investigations into those reported missing. Its legal basis for doing so derives from a possible violation of a fundamental right established by the Constitution (such as prohibition of arbitrary arrest or detention, or prohibition of torture) and committed by a state official. It can visit places for purposes of investigation, call for evidence and record statements from concerned parties. Where the HRCSL finds, as a result of its investigation, a possible violation of a fundamental right, it will refer this to the authorities for criminal prosecution. Among the other alternative mechanisms are the various commissions of inquiry that were created under the Commissions of Inquiry Act and presidential gazettes. These have conducted investigations relating to, and searches for, missing and disappeared persons but on an ad hoc basis for particular situations, and they were disbanded once they had fulfilled their mandate. Their investigations were not of a criminal nature, leaving the police with the task of gathering evidence for any subsequent prosecution.

Only a handful of cases involving missing and disappeared persons were prosecuted before the establishment of the OMP, however. In these cases, the missing and disappeared persons were not identified, and their remains were not returned to their families. For example, in the "Embilipitya abduction and murder case", although several perpetrators were convicted before Ratnapura High Court, the remains of the victims were not identified or returned to the families.

The OMP was established by the Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act No. 14 of 2016 (OMP Act). Under section 10(1), it has a mandate to:

- "(a) search for and trace missing persons and identify appropriate mechanisms for the same and to clarify the circumstances in which such persons went missing
- (b) make recommendations to the relevant authorities towards addressing the incidence of missing persons
- (c) protect the rights and interests of missing persons and their relatives …
- (d) identify avenues of redress to which missing persons and relatives of missing persons are entitled …
- (e) collate data related to missing persons obtained by processes presently being carried out, or which were previously carried out, by other[s] … and centralize all available data, within the database established under this Act …".[34]

Under section 27 of the OMP Act, the OMP's mandate extends to persons who went missing or disappeared in connection with the conflict, political unrest, or civil disturbances, or as an enforced disappearance; and to personnel of the armed forces or police who have been identified as missing in action. Searching for missing persons who fall outside of the OMP's mandate – for example, those who went missing in connection with a natural disaster, on account of mental illness, or following a personal dispute – would come under the authority of the Police.

34 Sri Lanka, Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act No. 14 of 2016.



Peru

Before the adoption in 2016 of Law No. 30470 on the Search for Disappeared Persons During the Period of Violence 1980–2000 (*Ley de Búsqueda de Personas Desaparecidas durante el período de violencia 1980–2000*), the prosecutor's office was in charge of criminal investigations and searches for missing and disappeared persons (in individual cases).

In 2017, the General Directorate for the Search for Disappeared Persons (*Dirección General de Búsqueda de Personas Desaparecidas*, DGBPD) was created as a line agency of the Ministry of Justice and Human Rights and given responsibility for implementing the National Missing Persons Search Plan. The DGBPD is in charge of searching for persons who disappeared during the period of violence from 1980 to 2000, in coordination with other entities such as the prosecutor's office. It has a humanitarian mandate, so, in ongoing cases where a crime has been committed, or when a judicial sentence determines that the search must be conducted by the prosecutor's office, the search is led by the Public Ministry (which has its own protocol to adopt a humanitarian approach in these cases). According to Law No. 30470, the DGBPD's humanitarian mandate requires it to orient the search for missing persons towards the recovery, identification, restitution and dignified burial of remains, without encouraging or hindering the determination of criminal responsibility. In addition, the DGBPD is in charge of managing the National Registry of Missing Persons and Burial Sites (abbreviated to RENADE in Spanish) and the Genetic Data Bank.

Disappearances that occurred before 1980 and after 2000 are investigated through the ordinary justice system, i.e. the search (and, where necessary, the criminal prosecution) is conducted under the auspices of the Public Ministry. There is also a specific mechanism for searching for vulnerable persons who have gone missing (children, women, victims of gender-based violence, migrants, elderly people, people with disabilities, indigenous people, LGBTQI+, people in poverty, etc.). In these cases, the National Police leads the search process, in coordination with other authorities (Legislative Decree 1428 of 2018). None of these mechanisms was created in response to a specific situation or period of armed conflict.

Bosnia and Herzegovina

With the adoption of the Law on Missing Persons (LMP) in 2004, a new institutional and legal framework for the search for missing persons was established in Bosnia and Herzegovina (hereafter Bosnia-Herzegovina).[35] The LMP, according to Article 2, applies to persons who disappeared in the period from 30 April 1991 to 14 February 1996. It provides *inter alia* for the establishment of the Missing Persons Institute (MPI) of Bosnia-Herzegovina – a mechanism at the state level, which replaced two existing search commissions at the federal level.[36] The MPI was established in 2005 – co-founded by the International Commission on Missing Persons (ICMP) and the Bosnia-Herzegovina Council of Ministers.[37] It has a "mandate to search for and identify missing persons across the country and to establish and manage a central register of missing and identified persons".[38] Specifically, its tasks are to:

1) "document and maintain records of missing persons and grave sites, as well as to request court orders to investigate these sites
2) participate in technical activities relating to the search, excavation, examination, identification and storage of the mortal remains of missing persons

35 OHCHR, "Preliminary Observations from the Official Visit to Bosnia and Herzegovina", Statement by the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Sarajevo, 10 December 2021.

36 A. Srovin Coralli, Coordination Between the Search and Criminal Investigations Concerning Disappeared Persons. Case Studies on Bosnia and Herzegovina and Mexico, swisspeace, Bern, June 2021.

37 ICMP, "Council of Ministers formally approves Missing Persons Institute", press release, 5 August 2005.

38 *Official Gazette of Bosnia and Herzegovina* No. 13/5, 29 December 2005.

3) provide support to families of the missing and their associations, especially in covering funeral costs
4) cooperate with relevant authorities in neighbouring countries in searching for the missing, and
5) inform the public about the outcomes of investigations and progress made."[39]

In addition, in the aftermath of the conflict, priority was given to the prosecution of war crimes, led by the work of the International Criminal Tribunal for the Former Yugoslavia (ICTY). As part of these efforts, a special prosecutor's office and a special chamber on war crimes were created within the Court of Bosnia-Herzegovina.[40] Although enforced disappearances were not included in the mandate of the ICTY, "it prepared the ground for the prosecution of this crime in domestic settings … by referring to the commission of [the crime of] enforced disappearances in a few cases …"[41]

5.2 Gathering, handling and sharing information

When it comes to coordination between the search and the criminal investigation, a key challenge is the gathering, handling and sharing of information. Similar types of information are often sought by criminal investigations and searches, and both may exercise similar investigative powers.

Rules applicable to how search processes and criminal investigations gather and handle information can impact coordination. Criminal investigations must follow due process rules in gathering evidence and comply with chain-of-custody requirements as provided for by law. Search mechanisms can be made exempt from evidentiary rules applicable in criminal investigations.[42] While this often allows search mechanisms to obtain information more easily and use a much broader range of information, it also means that information gathered by them may be of limited use to a criminal investigation.

Search mechanisms and law enforcement authorities may gain access to confidential information and information that was acquired on conditions of confidentiality, which may not be accessible to any other institution. At times, obtaining information from perpetrators may be critical to finding a person alive, locating a gravesite or establishing the identity of the deceased person in a grave. Such information may be obtained on conditions of confidentiality and/or, as appropriate, in exchange for lesser penal sanctions. In such a situation, if there is no coordination, one institution could monopolize access to and/or custody of the information, impeding the work of the other. For example, if information regarding the occurrence of a crime is acquired by a search mechanism on the condition of confidentiality, it may not be possible to share that information with a criminal investigation. At the same time, however, if confidentiality is not protected and the source of the information has to be disclosed in all circumstances, certain institutions/sources of information may not be willing or able to cooperate with the search mechanism and thus withhold potentially important information necessary to clarify the fate and whereabouts of a person.

39 J. Sarkin, L. Nettelfield, M. Matthews and R. Kosalka, *Bosnia and Herzegovina: Missing Persons from the Armed Conflicts of the 1990s: A Stocktaking*, International Commission on Missing Persons, Sarajevo, 2014, p. 39.
40 OHCHR, "Preliminary Observations from the Official Visit to Bosnia and Herzegovina", Statement by the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Sarajevo, 10 December 2021.
41 A. Srovin Coralli, Coordination Between the Search and Criminal Investigations Concerning Disappeared Persons. Case Studies on Bosnia and Herzegovina and Mexico, swisspeace, Bern, June 2021, p. 20.
42 For instance, the Sri Lankan Office on Missing Persons is not bound by the Evidence Ordinance and it can admit evidence that might be inadmissible in civil or criminal proceedings (Office on Missing persons Act No. 14 of 2016, section 12(c)(iii)).

Coordination issues can also arise where remains need to be recovered and identified. Key activities relating to the investigation of human remains, such as excavation and exhumation, can only be carried out once. Criminal investigations and the search may use different methods of investigation or lenses to analyse the remains and any other relevant finds discovered at a gravesite (the associated finds). For example, when investigating human remains, a criminal investigation seeks to go beyond processes required for identification in order to obtain evidence that a crime was committed. In such a context, if a search mechanism takes possession of physical evidence, including remains and associated finds at a gravesite, information relevant for criminal investigations might not be gathered or shared with law enforcement authorities.[43] Similarly, where law enforcement authorities recover and handle remains in the absence of a clearly defined search mandate, there may be a risk that relevant information is not gathered or analysed in a manner that enables the identification of the remains and their return to families.[44] For instance, information that may be relevant to searches for other missing persons may not be gathered or appropriately considered as part of a criminal investigation.

Issues to be considered regarding gathering and handling information:

Information acquired on conditions of confidentiality

- When search processes are being designed, all relevant authorities need to be consulted to ensure that a search mechanism's mandate and its provisions regarding access to information and conditions of confidentiality are in line with existing laws and regulations on access to information (information in national archives, information classified by Armed Forces, intelligence services, etc.) and with relevant international obligations.
- In consultation with relevant authorities, the search mechanism should establish rules on the conditions of confidentiality that can be granted to those who provide information to a search mechanism. Developing such rules in consultation with law enforcement and judicial authorities can help ensure that such rules support the priorities and obligations of both criminal investigations and search mechanisms – for example, by providing sufficient incentives for perpetrators to provide information – while ensuring compliance with relevant international obligations.
- Where the search mechanism has the authority to grant confidentiality regarding information that may lead to the identification of alleged perpetrators, the conditions of confidentiality should be narrowly construed to avoid impeding ongoing or future criminal investigations.[45] This can be done, for example, by ensuring that confidentiality is granted only with regard to information relevant to the fate and whereabouts of the disappeared person, thus allowing for the possibility of the source going on to cooperate with a criminal investigation. Alternatively, confidentiality may be only assured in relation to the source of the information, whereas the content of the information can be shared with a criminal investigation, which may then enable the law enforcement authorities to admit the same information into evidence using alternative sources.
- Authorities will also need to ensure that the ability of the search mechanism to accept information on the condition of confidentiality does not prevent it from reporting to

43 In Ireland, the Independent Commission for the Location of Victims' Remains is not permitted to carry out forensic testing for any purpose other than identification. See the "Confidentiality" section of the Commission's website.

44 In the context of investigations carried out by the Office of the Prosecutor of the International Criminal Tribunal for Former Yugoslavia, in some instances, following an analysis of the remains to gather information relevant for the criminal investigation, the remains were reburied without identifying markers. See E. Stover and R. Shigekane, "The missing in the aftermath of war: When do needs of victims' families and international war crimes tribunals clash?" *International Review of the Red Cross*, Vol. 84, No.848, December 2002, pp. 645–866 and p. 859.

45 Note that some organizations, such as the ICRC, have specific working procedures that impose limitations on the use of their information. See, for instance, ICRC, "The ICRC's privilege of non-disclosure of confidential information", *International Review of the Red Cross*, Vol. 97, No. 897/898, 2016, pp. 433–444.

law enforcement authorities that a crime may have occurred. This ensures that if a crime did occur in relation to a person going missing, law enforcement authorities are informed that a criminal investigation may need to be carried out, in addition to the search.

- In consultation with the search mechanism, law enforcement authorities should establish rules on how to gather information regarding the fate and whereabouts of missing persons and on how to share such information with the search mechanism.

Searching premises

- If the search mechanism has the authority to search premises (such as places of detention, hospitals, morgues), it should, in consultation with law enforcement authorities where appropriate, develop rules for carrying out such visits in a manner that would not violate a potential crime scene. The rules should consider the circumstances in which a visit is carried out (for example, a search mechanism may elect only to visit places of detention if a missing person is believed to be in detention.) Alternatively, if the mechanism intends to visit a place of detention to obtain further information regarding persons who may have disappeared following their detention, it may decide not to take any physical evidence.

Physical evidence

- Rules of evidence and chain-of-custody requirements should be observed by the search process as well as the criminal investigation, as they are the basis for ensuring reliable and accurate information and conclusions.
- Search mechanisms should ensure that the gathering and handling of physical evidence do not impede a criminal investigation. For example, the search mechanism could restrict the physical evidence collected to that necessary for the purposes of the search and identification.

Human remains

- States should ensure that the search mechanism and law enforcement authorities carry out their work in a coordinated manner and do not work in silos.
- Search mechanisms and criminal investigations should both adopt a multidisciplinary approach to the excavation, exhumation and analysis of remains and should ensure that information is gathered in a manner that respects the dignity of the dead and follows forensic standards and practices.[46]
- If the search mechanism has the authority to carry out excavations, exhumations and analyses of remains, it should adhere to rules of evidence and chain-of-custody obligations to prevent the destruction of evidence. This also helps ensure the evidence can be used in criminal investigations. In such contexts, the law enforcement authorities should be made aware that an excavation or exhumation is taking place. Further, the search mechanism may be mandated to provide information collected as a result of exhumations and analysis of remains to law enforcement authorities.[47]
- If only law enforcement authorities have the authority to investigate remains, including via excavations or exhumations, the search mechanism should be permitted to act as a stakeholder in the investigation. This stakeholder status should permit the search mechanism to directly observe the investigation; make recommendations;

46 Multidisciplinary means that multiple disciplines should be involved in the processes of excavating, exhuming and analysing remains and associated finds. For example, when remains are discovered, they and any associated finds should be gathered and analysed using the likes of witness testimony and historical research to establish the context of a gravesite, history of the local area and local burial practices. Various experts in the field of forensic science should also be used, including forensic archaeologists and anthropologists, forensic odontologists, forensic pathologists and experts in DNA analysis.

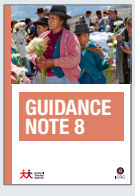
47 In Colombia, law enforcement authorities may request the forensic reports and other material elements associated with the bodies from the UBPD – see Art. 3, Decreto Ley 589 de 2017 (Abril 5).

provide support if and as appropriate; and support families to observe and, where appropriate, participate in the investigation.
- Where law enforcement authorities carry out the investigation into remains, including excavation or exhumation, they should be under a duty to share with the search mechanism, as a minimum, information relevant to establishing the identity of the deceased.

Issues to be considered with a view to enhancing the sharing of information:

- When information is shared between search mechanisms and law enforcement authorities, their different mandates, existing regulations on data privacy, and the legal rights and the safety of the missing and their families should all be taken into account.
- Search mechanisms and law enforcement authorities should establish regular channels of communication (formal and informal) to provide a space in which information can be shared and potential challenges clarified.
- Search mechanisms and law enforcement authorities should be able to request information and assistance from each other and be under a general obligation to cooperate with such requests within the limits of their respective mandates and in compliance with applicable laws and standards on the protection of personal information.
- In some circumstances, search mechanisms can decide not to share the source of the information with law enforcement authorities. This may encourage some actors to share more information with search mechanisms, if they know their confidentiality can be protected.
- Actors involved in the search and in criminal investigations should share list(s) of missing persons relevant to these processes, in compliance with applicable laws and standards on the protection of personal information. A list of missing persons can inform both search mechanisms and law enforcement authorities.
- The same actors should establish a strategy for regular sharing of information generated through secondary analysis – for example, patterns in the context in which persons went missing; historical facts of relevance to the context; information generated from technical experts and through analyses of maps, satellite images, archival records and (international and national) databases.
- Information regarding suspected or confirmed gravesites should be shared between the search mechanism and law enforcement authorities.
- Relevant databases containing information regarding missing persons should be either consolidated or their interoperability established. These could include key information such as the date on and location at which a person went missing, and their personal information. To this end, authorities should develop and comply with standard operating procedures to govern the transfer and sharing of information (including physical, testimonial, or other) both ways between the search mechanism and the criminal process. In order to facilitate such transfers, clear rules should be set out on information and data collection and sharing among different actors (regarding, for example, harmonization and standardization of the information collected, ensuring interoperability among databases).

For further information, refer to the following guidance note:





Colombia

Colombia's National Registry of Missing Persons is an interinstitutional information system with the primary purposes of identifying unidentified human remains, searching for missing individuals and following up missing persons cases. This extensive registry, known as the Registro Nacional de Desaparecidos (RND) in Spanish, comprises various independent systems and databases, which work together to assist the search for missing persons in Colombia.

As for the Search Unit for Missing Persons (UBPD – see section 5.1 above), owing to its humanitarian and extrajudicial nature, the information the unit receives with regard to clarifying the fate and whereabouts of disappeared persons is confidential: it cannot be used as evidence in criminal proceedings and shall not have probative value.[48] In addition, UBPD officials, contractors and seconded staff are exempt from the duty to report and may not be compelled to testify in judicial proceedings, provided that the knowledge of the facts was gained in the performance of their functions.[49] However, Decree 589 also states that:

- the activities of the UBPD shall not replace or impede any judicial investigations that may be undertaken. The search by the UBPD for persons reported missing shall not disqualify the competent judicial authorities from carrying out the investigations they deem necessary to establish the circumstances and responsibilities of cases taken on by the UBPD
- the technical forensic reports and the physical evidence associated with the remains may be required by the competent judicial authorities and will have probative value. Neither the technical forensic report nor the physical evidence will contain any decisive information to incriminate an individual. To guarantee the probative value of this information, Article 10 of the Decree establishes specific rules for securing physical evidence associated with the remains.[50]

Sri Lanka

Criminal or civil liability cannot arise from the findings of the OMP (section 13(2)). The OMP is also not bound by the Evidence Ordinance and it can admit evidence that might be inadmissible in civil or criminal proceedings (section 12(c)(iii)).

The responsibility for carrying out criminal investigations lies with the Police under the supervision of magistrates' courts (see Code of Criminal Procedure Act 1979, Chapter V), and prosecutions are carried out by the Attorney-General's Department before the High Court (see Judicature Act 1979, section 9).

The OMP can refer an offence to a law enforcement authority for criminal investigation, after consultation with relatives of the missing persons and in consideration of the best interests of the victims, relatives and society. A report forwarded by the OMP should "provide information relating to the missing person's civil status (such as the name, age and gender of the missing person), the place(s) or district(s) in which the missing person was last seen and the date thereof …".[51] Where the witness consents, the OMP may inform the relevant authority of details of the witness, in order to enable the authorities to secure a witness statement (OMP Act, section 12(i)).

48 Colombia, Decreto 589 de 2017 (Abril 5), Art. 3.
49 Colombia, Decreto 589 de 2017 (Abril 5), Art. 5.
50 Colombia, Decreto 589 de 2017 (Abril 5).
51 Sri Lanka, Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act No. 14 of 2016, section 12(i).

Peru

Since Law No. 30470 came into force and the DGBPD was created, the latter has been able to establish lines of coordination with the prosecutors' offices, which are still responsible for providing a judicial response in cases of disappearance and enforced disappearance. Coordination between the judicial and humanitarian search processes has been enhanced by directives from the Public Ministry and the Ministry of Justice and Human Rights, which established a three-phase search process: humanitarian investigation, joint intervention and closure of the process.[52] Stage one, the humanitarian investigation, is carried out by the DGBPD alone and aims to establish the fate of a person who has disappeared. It involves, for example, researching the context of the disappearance, collating information, contacting relatives and local authorities, visiting the area in question, identifying possible current whereabouts or burial sites, as applicable, and collecting biological samples (these are collected from family relatives and from recovered remains, and are used to create genetic profiles for the purpose of identification). Stage 2, joint intervention, entails collaboration between the DGBPD, the Office of the Public Prosecutor and forensic teams with regard to recovery, analysis and identification of remains, where applicable. Stage 3, closure, involves the dignified restoration of remains to families, where disappeared persons have been found to be deceased; or family reunification, where they have been found alive.[53] An agreement between the Public Ministry and the Ministry of Justice and Human Rights was signed in 2019 (and updated in 2023) to facilitate the exchange of information and interaction between them, within the scope of Law 30470.

The DGBPD also administers the National Registry of Missing Persons and Burial Sites (RENADE), created by Law 30470, and the Genetic Data Bank (BDG), created by Legislative Decree No. 1398 in 2018. Law 30470 establishes an obligation to share information and systematize it in the RENADE and the BDG. DGBPD is empowered, as part of its activities, to receive anonymous information on the whereabouts of a person or the suspected burial site.

Northern Ireland

During the Troubles in Northern Ireland, 17 people disappeared. Under the Belfast/Good Friday Agreement between the Irish and British Governments signed in 1998 and under legislation enacted in Ireland and the United Kingdom, the Independent Commission for the Location of Victims' Remains (ICLVR) was established. The aim of this process, which is humanitarian in nature rather than a criminal investigation and has been agreed with the individual families of the disappeared, is to receive information that may lead to the location of the remains of victims. All the information obtained is legally privileged, cannot be shared with other agencies and is not admissible as evidence in any criminal proceedings. In addition, there are restrictions on the forensic testing of human remains and other items found. As part of its one-way information-sharing process, the ICLVR has developed and agreed memoranda of understanding with various enforcement agencies instituting very strict rules on the sharing, storage, confidentiality and dissemination of information.

52 Peru, Dirección General de Búsqueda de Personas Desaparecidas and Ministerio Público, Resolución de la Fiscalía de la Nación No. 2042-2024-MP-FN, 20 September 2024.

53 C. Collins (ed.), *An Innovative Response to Disappearances: Non-Judicial Search Mechanisms in Latin America and Asia*, GIJTR, 2022.



Bosnia-Herzegovina

The LMP sets forth the following articles in connection with gathering and sharing information:

- **Article 4 (Obligation to provide information)**: the bodies and institutions of Bosnia-Herzegovina, the Federation of Bosnia-Herzegovina, the Republika Srpska and Brčko District of Bosnia-Herzegovina in charge of defence, justice and internal affairs, as well as other bodies in charge of tracing missing persons in Bosnia-Herzegovina, and other entity, cantonal and municipal bodies that, within their competences, resolve cases related to the disappearance of persons in/from Bosnia-Herzegovina … are obliged to provide families of the missing and relevant institutions in charge of tracing missing persons with available information and to give all necessary assistance to improve the tracing process and the process of resolving cases of disappearances of persons in/from Bosnia-Herzegovina.

- **Article 5 (Exchange of information)**: the relevant authorities in Bosnia-Herzegovina, at all levels, shall … designate relevant bodies, i.e. officials that/who shall cooperate with relevant institutions and bodies in charge of tracing missing persons, and family associations and members of families of the missing, and provide assistance in the realization of the rights of family members of missing persons in accordance with this and other applicable laws in Bosnia-Herzegovina.

  The relevant authorities in Bosnia-Herzegovina, on the basis of previous and new requests for information, are responsible for: collecting and verifying all relevant information and facts, quoting all sources that have been checked in the process of establishing such information concerning the disappearance of a missing person, consulting all official documents and materials within their respective institutions and submitting a written notification of the documents consulted and the findings to both the applicant/enquirer and relevant institutions in charge of tracing missing persons.

  The provisions of the Law on Administrative Procedure in Bosnia-Herzegovina (*Official Gazette of Bosnia-Herzegovina* No. 29/02) shall apply to information requests, including the provisions on deadlines for lodging a complaint in case of an unsatisfactory answer, or initiation of an administrative dispute in the case of "silent administration".

  All new information that may facilitate the tracing or identification of a missing person must be subsequently noted/accepted and investigated …

- **Article 6 (Obligation to exchange and cooperate)**: the relevant authorities in Bosnia-Herzegovina are mutually obliged to exchange information pertaining to the tracing process and determining the fate and identity of missing persons.

  In order to improve the tracing process, the relevant authorities in Bosnia-Herzegovina shall cooperate particularly, but not solely, with the ICRC, the ICMP, the Missing Persons Institute and the Red Cross Society of Bosnia-Herzegovina, in accordance with their respective mandates.

- **Article 23 (Protection of data)**: the data from the Bosnia-Herzegovina Central Records on Missing Persons (abbreviated to CEN) shall be made available to all levels of authority, in compliance with established regulations and standards on data protection.

> The regulations/manner of managing the database, entering data, exchange and usage of data, and particularly their verification, is regulated in detail by the Bosnia-Herzegovina CEN Book of Rules … Cooperation with other competent authorities in Bosnia-Herzegovina that have data relevant to tracing missing persons is regulated under a special agreement that establishes the mode of cooperation and all other important issues.
>
> Persons who are engaged/involved in managing and handling personal information related to confidential data on biological, hereditary, physical and genetic properties and medical data on a missing person are obliged to keep the information confidential and handle it in accordance with established rules for protection of such information, i.e. in accordance with the Law on Protection of Personal Data (Official Gazette of Bosnia-Herzegovina No. 32/01).
>
> The rules on the protection of data shall be regulated in detail by the Book of Rules, as referred to in paragraph 2 of this article. Regarding the main institutions involved in this matter, a study conducted by swisspeace found the following:[54]

MPI:

- receives information through families of missing persons, eyewitnesses, archives, etc.
- receives information reported anonymously
- adds data to and manages the CEN (information is partially shared with the public)
- shares all information that could be useful for exhumations with the Prosecutor's Office of Bosnia-Herzegovina (except the name of the person who provided the information to the MPI, which can be withheld)
- regularly exchanges information internally and with the State Investigative and Protection Agency's TERRA Operative Team and the Prosecutor's Office of Bosnia-Herzegovina
- notifies the families about successful DNA matching processes
- can offer a reward for reporting the location of a mass grave (but doesn't really do so in practice).

State Investigative and Protection Agency (SIPA):

- provides support in criminal investigations, especially when they involve serious violations of IHL
- assists in locating mass graves (also by sharing information)
- reports to the Prosecutor's Office of Bosnia-Herzegovina anything that could be of relevance for evidence collection
- regularly exchanges information internally and with the Prosecutor's Office of Bosnia-Herzegovina and the MPI.

Court of Bosnia-Herzegovina:

- issues exhumation orders (in this sense, it contributes to the exchange of information)
- has a policy of anonymization regarding indictments (e.g. the names of those convicted and references to the crime scene are not included in the indictments).

54 A. Srovin Coralli, Coordination Between the Search and Criminal Investigations Concerning Disappeared Persons. Case Studies on Bosnia and Herzegovina and Mexico, swisspeace, Bern, June 2021, pp. 33–34.

Prosecutor's Office of Bosnia-Herzegovina:
- is limited by the Court of Bosnia-Herzegovina's anonymization policy (cannot share certain information on indictments)
- receives information on the need for an exhumation from the MPI, or in the course of a criminal investigation
- regularly exchanges information internally and with the SIPA's TERRA Operative Team and the MPI
- coordinates the exhumation process (in this sense, it contributes to the exchange of information)
- may share information received from the MPI with the SIPA, or with local police, to verify its accuracy
- shares information received from the MPI with the Court of Bosnia-Herzegovina whenever it is convinced that an order for exhumation needs to be issued.

ICMP:
- receives information (on locations of mass graves) reported anonymously through its website
- manages Site Locator, an application for reporting the locations of mass graves
- adds data and manages the database on missing persons' relatives (information that, in principle, is not publicly available)
- is in charge of DNA testing and matching
- issues a final report about the results of the DNA matching process
- collects and stores information on missing persons for the Database of Active Missing Persons.

ICRC:
- analyses information and documents obtained from international archives (ICTY/MICT, UN, UNHCR, European Community/Union Monitoring Mission held by the European External Action Service, etc.) and shares (analytical reports) in confidence with the MPI on condition that they are used only for the clarification of the fate/whereabouts of missing persons.

Police:
- cooperates with the SIPA and the Prosecutor's Office of Bosnia-Herzegovina and regularly shares information with them.

Forensic experts:
- are bound by exhumation orders issued by the Court of Bosnia-Herzegovina (note: it could not be ascertained definitively how information among forensic experts is shared).

Private persons:
- can report information regarding missing persons to the MPI, the Prosecutor's Office of Bosnia-Herzegovina, any Police agency and the ICMP, as well as anonymously through the website of the ICMP and over the phone to the MPI
- must report locations of mass graves (failure to do so constitutes a criminal offence).

5.3 Domestic legal and policy framework

Effective coordination between the search and criminal investigations should be governed by a comprehensive domestic legal and policy framework that assigns responsibility to institutions to carry out their work in a manner that facilitates coordination between the search and the criminal investigation (and other legally authorized investigations, such as factual death investigations). This framework should promote "cooperation and collaboration among all state bodies and also with other states and international agencies".[55] This means that states may be required to create a new law for the new mechanism and amend the existing legal and policy framework, in view of the new legal reality of the search mechanism created, to ensure complementarity and avoid duplication of functions.

Issues to be considered in the policy and legal framework to enhance coordination:

Crimes

- All relevant crimes that can result in persons going missing, such as enforced disappearances as a continuous offence, kidnapping, abduction, extrajudicial killings, murder, etc., must be proscribed under the domestic law and a general duty to report them included.

Staffing

- States should ensure that the search mechanism and law enforcement authorities are headed by individuals with the same administrative rank to ensure independence and curb the possibility of one institution exercising pressure over the other.
- They should further ensure that staff working for the search mechanism has equivalent qualifications to those of forensic services and law enforcement authorities more generally, to prevent the probatory value of the evidence they collect being compromised.

Discovery of remains

- States should introduce a general obligation to report the discovery of remains to state authorities. It is important that the state is aware of the discovery of such remains, which requires competent authorities to initiate an investigation into the cause of death, any crimes that may have occurred and the identity of the deceased.

Management of remains and biological samples

- Where remains and associated finds are recovered or biological samples obtained, and where they are not immediately investigated, or if an investigation into remains was halted or delayed owing to administrative or financial hurdles, policy and legal frameworks should ensure that the remains are stored in a manner that enables them to be investigated at a later date (including over the longer term) by the search mechanism, the law enforcement authorities, or other competent authorities.

Investigation of remains

- States should introduce a general obligation to identify unidentified human remains, ensure the dignity of the dead, inform the families concerned and adapt all practices related to the discovery, reporting, excavation, exhumation, analysis and storage (including long-term storage) of the remains accordingly.
- They should further ensure that there is a general obligation to establish the cause and manner of death whenever human remains are investigated.
- Institutions authorized to carry out analyses of remains and other forensic testing should, as appropriate, have the independence required to ensure trust in their findings.

55 OHCHR, Guiding Principles for the Search for Missing Persons (CED/C/7), Geneva, 28 August 2019, Guiding Principle 3.

- All relevant institutions should be mandated to ensure respect for relevant rights, including the right to know the fate and whereabouts of missing persons, the right to know the truth, the right to an effective remedy and the right to justice.

Places of detention

- In cases where the search mechanism has the power to search in places of detention, ensure that other state institutions who have the authority to search or monitor places and conditions of detention (for example, law enforcement authorities, national human rights institutions) complement the efforts of the search mechanism.

For further information, refer to the following guidance notes:



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