



المركز السوري للإعلام وحرية التعبير

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Syrian Center for Media and Freedom of Expression

# Enforced Disappearances in Syria

Advice to Members of the Constitutional Committee





# Report on Enforced Disappearances in Syria

## Advice to Members of the Constitutional Committee

**Syrian Center for Media and Freedom of Expression (SCM)** is an independent non-governmental non-profit organization. We seek to build a society that guarantees freedom of expression and belief, human rights, and justice. Our vision is a democratic world based on justice, freedom, equality and respect for human rights and dignity.

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# Executive Summary

The issue of the missing and forcibly disappeared in Syria is one of the major challenges facing any resolution to the conflict. It has gone on for decades, has been documented extensively, and yet continues to occur in complete impunity. The International Committee of the Red Cross has qualified the issue of disappearance during the Syrian conflict as “one of the most significant and complex that the ICRC has had to deal with in its modern history.”<sup>1</sup>

The challenge is not just about the unprecedented scale of the issue in Syria, the number of perpetrators involved or that victims’ families are dispersed across the globe as a result of fleeing the conflict. It is also that the practice of enforced disappearance by Syria’s security agencies has been an integral tool deployed by the Syrian regime to control society and repress any form of dissent for the last four decades. It is a systematic practice by a security bureaucracy that operates in total impunity. This impunity has been embedded in Syrian laws and practice for so long that without addressing it comprehensively, there cannot be any sense of justice or rule of law, and accordingly no sustainable peace.

This report aims to present other countries’ experiences in tackling the issue of enforced disappearance. By highlighting main challenges and points of tension in other contexts - from neighboring Lebanon and Iraq to experiences from farther afield such as Colombia - as well as attempts to overcome them, it hopes to help inform the discussions as well as the proposals of the Syrian Constitutional Committee’s third group.

## **The report in particular focuses on four aspects that will need to be tackled:**

- 1) Issues related to the search for the missing (location and identification): Searching for the missing and forcibly disappeared and discovering their fate and whereabouts is always the priority set forth by their families. But it’s a complex process that requires important capacity and coordination efforts between States’ institutions, victims’ groups, civil society groups and forensic experts.
- 2) Issues related to the right to truth and right to justice: The challenge of tackling persistent impunity in Syria and the need to imagine processes that will hold those most responsible to account while also recognizing - based on the experiences from around the world - that a range of other judicial and non-judicial measures will be needed to provide information to the families.
- 3) Issues related to reparations: While victims and survivors crave accountability for the crimes they have endured, reparations’ measures for the harm suffered are also an essential part of victims’ healing process. Putting in place a reparation program is a complex process that raises a number of important questions that need to be tackled: what forms of reparations should be put in place (individual or collective; financial or symbolic)? Who is entitled to receive reparation measures? What are the resources required for effective implementation?
- 4) Issues related to participation of victims: Associations of relatives of missing persons or victims of enforced disappearance play a vital role in seeking the truth about their loved ones and in the pursuit of justice, reparation and non-recurrence. They often do so at great personal risk. It is essential that victims and victims’ associations participate in any process that aims to tackle the issue of the

disappeared.

The report also analyses the mechanisms set in place to address the issue of the disappeared in various contexts by examining issues related to mandate and institutional set-up and based on these experiences draws some recommendations and lessons for the Syrian context.

One of the main challenges in tackling the issue in the Syrian context is that the wide scale practice of enforced disappearance is still ongoing. There is a need to provide victims and survivors with accountability for the crimes they have endured while ensuring immediate tangible measures to stop the practice, clarify the fate and whereabouts of the missing and release those still in detention. The challenge then becomes how to sequence an approach that does not abandon or compromise on justice but is also able to deliver tangible results in a short timeframe.

While the report details various approaches and recommendations based on best practices and international norms, it recognizes that political will is absolutely required and should be supported by a clear and comprehensive legal framework. Building political momentum on the importance of addressing the issue of the missing and disappeared is a long process that depends on many internal and external complex factors unique to each context. Through the analysis of the experiences of Colombia and Lebanon, the report seeks to highlight the importance of long term sustained efforts in Syria.

A new constitutional framework and new laws should be established to ensure a comprehensive response by State bodies as well as to prevent a possible backtracking in the future as attention to the issue declines or political momentum shifts. Currently, Syria does not have laws that deal specifically with the issue of the missing and disappeared. Existing provisions only focus on the procedures necessary in declaring a missing person dead. Syria has also not yet ratified the Convention for the protection of all persons from enforced disappearance.

The report recognizes the immense challenges faced by those seeking to pursue justice and accountability in Syria but draws inspiration from the courage of the victims' families, former detainees and the many Syrian human rights activists who against all odds and at great personal cost have ensured that the issue of the disappeared has remained at the centre of negotiations despite the desire of the Syrian regime, its backers as well as other international stakeholders, to move on. It hopes to contribute to their efforts by presenting in an accessible manner lessons learned from other experiences.

<sup>1</sup> <https://www.icrc.org/en/document/syria-tens-thousands-families-no-news-loved-ones>

# Background

## 1. Overview of Enforced Disappearances in Syria: A Climate of Total Impunity

Since the late 1970s, Syrian authorities have followed a policy of forcibly disappearing people for political opposition, critical reporting, and human rights activism. It is estimated that there were more than 17,000 cases of disappearance during the rule of Hafez al-Assad, most of them dating back to the 1980s.<sup>2</sup>

The use of enforced disappearances dramatically escalated since the 2011 uprising. The exact number of disappeared in Syria cannot be determined because the overwhelming majority of detention facilities remain off limits to outsiders. According to the Syrian Network for Human Rights (SNHR), around 100,000 people have been detained, abducted and later disappeared in Syria since 2011, at least 90,000 of them at the hands of government forces.<sup>3</sup> The Syrian authorities generally do not allow detainees to have any contact with the outside world and leave their families wondering whether their detained relatives were alive or dead.

Syria's four main intelligence agencies, referred to collectively as the mukhabarat, have virtually unlimited de facto authority to carry out arrests, searches, interrogation, and detention. Most detention cases at the hands of the Syrian security services can be qualified as enforced disappearances. In international law this is when state agents or other persons acting with the support of the state detain someone and then refuse to acknowledge the detention or conceal his/her fate or whereabouts.<sup>4</sup> Each of these four agencies maintains central branches in Damascus as well as local branches across the country. In virtually all of these branches, there are detention facilities of varying size that are off limits to any independent monitors as well as Syria's own judiciary. The UN Commission of Inquiry on Syria has determined that the use of enforced disappearance by the Syrian government is widespread, and may amount to a crime against humanity.<sup>5</sup>

While the majority of disappearances were committed by government forces, non-state armed groups have also engaged in abductions which often lead to the disappearance of the person. Starting in 2013, specific anti-Government armed groups adopted a practice of hostage-taking, targeting civilians perceived to be supporting the Government, human rights defenders, journalists and religious leaders.<sup>6</sup> The emergence of a pattern of abductions and arbitrary

<sup>2</sup> For a historical overview of disappearances in Syria in the 1980s and 1990s, see Amnesty International, "Report from Amnesty International to the Government of the Syrian Arab Republic", April 1983 <https://www.amnesty.org/download/Documents/200000/mde240041983en.pdf>; Human Rights Watch, Under Assad's Rule.

<sup>3</sup> SNHR, [https://reliefweb.int/sites/reliefweb.int/files/resources/At\\_least\\_98000\\_have\\_been\\_forcibly\\_disappeared\\_in\\_Syria\\_since\\_March\\_2011\\_en.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/At_least_98000_have_been_forcibly_disappeared_in_Syria_since_March_2011_en.pdf)

<sup>4</sup> Definition in the International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, A/RES/61/177 Article 2 "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."<sup>5</sup> <https://www.ohchr.org/Documents/HRBodies/HRCouncil/ColSyria/ThematicPaperEDInSyria.pdf>

<sup>6</sup> For example, the kidnapping and subsequent disappearance of prominent Syrian human rights defenders Razan Zaitouneh, Samira al-Khalil, Wael Hamada, and Nazem Hammadi on December 9, 2013, in an area under the control of the armed group Jaish al-Islam.



deprivation of liberty has characterized the ever-growing presence of certain armed groups, particularly in northern Syria.<sup>7</sup>

The Islamic State in Syria (ISIS) also detained and kidnapped thousands of people who subsequently went missing.<sup>8</sup> While the full scale of the missing at the hands of ISIS has not been confirmed, SNHR has reported more than 8,143 cases of individuals detained by ISIS whose fates remain unknown. Many victims vanished during ISIS's military offensives, notably in 2014 when the group dramatically expanded the territory under its control. ISIS detained hundreds of soldiers from Syrian government bases near Raqqa, Kurdish men from villages near Kobani, and men from the al-Shuaitat community who rose against the group. The group also targeted those it saw as an obstacle to its expansion or resisting its rule. This was clearly the case with the disappearance of activists in Raqqa in 2013.

Many other Syrians' fate is unknown as a result of the massive bombardment conducted by the many participants in the Syrian conflict where many victims - many of whom were displaced from other parts of the country -- were quickly buried without any proper identification. Syrians who have fled the fighting have also gone missing along migratory routes, in dangerous Mediterranean crossings or through criminal enterprises that prey upon migrants and refugees.<sup>9</sup>

In addition, there are persons who are not Syrian who went missing in Syria. Those include Lebanese and Palestinians abducted from Lebanon in the 1980s and 1990s and illegally transferred to Syria,<sup>10</sup> as well as more recent cases of journalists, humanitarian workers, foreign combatants, and families of foreign fighters associated with ISIS.

In all the cases documented by human rights groups, the perpetrators operated with impunity. The UN's Working Group on Enforced Disappearances noted in its last report to the Human Rights Council that "enforced disappearances are perpetrated unabatedly with impunity throughout the Syrian Arab Republic in clear violation of international humanitarian law and international human rights law."<sup>11</sup>

Syria's security services benefit from extensive legal immunity. Decree No. 14, of January 15, 1969, and Legislative Decree 69, of September 30, 2008 provide immunity to members of the security forces by requiring a decree from the General Command of the Army and Armed Forces to prosecute any member of the internal security forces, Political Security, and customs police.<sup>12</sup>

<sup>7</sup> UN COI, Without a Trace, paras. 28-31 ; Amnesty International, Syria: Abductions, torture and summary killings at the hands of armed groups, 5 July 2016, <https://www.amnesty.org/en/documents/mde24/4227/2016/en/> ; Human Rights Watch, "You Can Still See Their Blood", <https://www.hrw.org/report/2013/10/10/you-can-still-see-their-blood/executions-indiscriminate-shootings-and-hostage#7042>, Section III.

<sup>8</sup> For background, see HRW, Kidnapped by ISIS, February 11, 2020, <https://www.hrw.org/report/2020/02/11/kidnapped-isis/failure-uncover-fate-syrias-missing>

<sup>9</sup> For background on missing Syrians while on migratory routes, see <https://missingmigrants.iom.int/mediterranean-irregular-migrants-syria-now-top-sending-country>;

<sup>10</sup> Human Rights Watch, "An Alliance Beyond the Law," May 1997, <https://www.hrw.org/report/1997/05/01/syria/lebanon-alliance-beyond-law/enforced-disappearances-lebanon>

<sup>11</sup> A/HRC/45/13, para. 83.

<sup>12</sup> <https://www.hrw.org/news/2011/03/30/syria-president-asad-fails-deliver-reform#:~:text=On%20September%2030%2C%202008%2C%20al.Political%20Security%2C%20and%20customs%20police.>

## 2. The agony of Syrian families: Impact on victims and on society

The victims of enforced disappearance are not only those who have disappeared. Enforced disappearances wreak havoc on families, tearing the social fabric of entire communities. Perpetrators intentionally create a paralysing uncertainty that leaves families hanging between hope and despair. Not knowing whether their loved ones are dead and, if so, what has happened to their bodies, they can neither mourn nor adjust to their loss.

In Syria, silence and fear shroud enforced disappearances. In several cases, individuals who reported a disappearance were themselves detained.<sup>13</sup> Most families or relatives interviewed by human rights groups over the years reported that they spent months or years searching for news of their loved ones in detention. Some visited government offices and lodged formal requests for information.<sup>14</sup> Others feared arrest or chose not to make official inquiries because they did not trust the government to provide them with accurate information.

Many families paid bribes to middlemen who had government contacts or who worked in the government or security forces. For the most part, both those who made official and unofficial inquiries received conflicting reports as to their relative's whereabouts, or no information at all. Families paid thousands and in some cases millions of Syrian pounds for information, often to no avail.<sup>15</sup> In one study conducted by the Association of Detainees and the Missing in Sednaya Prison based on interviews with 508 families of disappeared, more than a quarter of the respondents indicated that relatives had paid sums of money to obtain information about the forcibly disappeared. Additionally, more than 7% (or 38 people) of them indicated that they had paid money for a promise to visit their forcibly disappeared relative.

In a few cases, families did approach government officials and security branches through official channels. While in most instances, families got no responses, in some cases, they did receive a death certificate but with no details on circumstances of death nor did they return the remains.<sup>16</sup> Those who receive a death certificate - the only piece of "evidence" provided - are legally bound to then register the person's death in civil records, in order to obtain an official death certificate.

<sup>13</sup> UN COI, <https://www.ohchr.org/Documents/HRBodies/HRCouncil/ColSyria/ThematicPaperEDInSyria.pdf>, para. 34.

<sup>14</sup> See for example, HRW, *If the Dead Could Speak*, Section V.; UN COI, *Without a Trace*, paras. 38-50

<sup>15</sup> See for example, HRW, *If the Dead Could Speak*, Section V

<sup>16</sup> See for example, HRW, *If the Dead Could Speak*, Section V

### 3. The Issue of the Disappeared and Syria's Political Negotiations

UN Security Council Resolution 2139, adopted in February 2014, strongly condemned kidnappings, abductions, and forced disappearances in Syria, and demanded an immediate end to such practices and the release of all people arbitrarily detained. However, no concrete steps were taken to implement this aspect of the resolution and multiple rounds of political negotiations have failed to deliver any breakthrough.

The issue of the detainees and the missing has been on the agenda of the Geneva political talks brokered by the United Nations (UN) between the Syrian government and its opponents.

It gathered some momentum in December 2017 when a working group on the Release of Detainees/Abductees, the Handover of Bodies and the Identification of Missing Persons was created as part of the talks in Astana, Kazakhstan. Hosted by Iran, Russia, and Turkey, with the UN represented through the office of the Special Envoy, and the International Committee of the Red Cross (ICRC) attending as an observer and resource, the working group ultimately fell short of hopes and did not deliver.

In March 2018, the UN's Commission of Inquiry on Syria issued a policy paper recommending a number of urgent steps to tackle the issue including releasing those most vulnerable (children, women, the elderly, and the infirm), providing lists of the names of those in detention, and allowing access to all official and unofficial places of detention<sup>17</sup>.

But the prevailing logic between the warring parties remains focused on exchanges of prisoners as opposed to an approach based on providing answers to families, unilateral releases and monitoring of places of detention.

Victims groups have strongly denounced this approach. On 16 June 2020, Noura Ghazi, founder of "Families for Freedom", one of the main victims' associations, in her statement to the Security Council qualified this prisoner exchange as "nothing but blackmail". She called for "a radical, comprehensive and fair solution for all the detainees and disappeared in Syria, not only for a part of them".

In his 29 August 2019, briefing to the Security Council, Special Envoy for Syria Geir Pedersen also said that meaningful action on detainees, abductees and missing persons—such as "unilateral releases [that] move beyond one-for-one exchanges" would help open up space for the political process.

The link between solving the issue of the missing and disappeared and resolving armed conflict more broadly has been clearly established in Resolution 2474 adopted unanimously by the Security Council in June 2019. The Council called upon parties to the armed conflict to take all appropriate measures, to actively search for persons reported missing, to enable the return of their remains and to account for persons reported missing "without adverse distinction."<sup>18</sup>

<sup>17</sup> <https://reliefweb.int/report/syrian-arab-republic/tackling-impunity-gap-syria-detainees-and-disappearances>

<sup>18</sup> Full text of resolution available at [https://undocs.org/s/res/2474\(2019\)](https://undocs.org/s/res/2474(2019))

Perdersen also noted that “the launch of a constitutional committee should be accompanied by measures that have real impact on the ground. Real action on detainees, abductees and missing persons could be one such measure, if done in a meaningful way and on a meaningful scale.”

But to date, and despite repeated calls, no breakthrough has occurred.

## Dimensions of the Constitutional Debate on the Issue of the Disappeared

This part of the report aims to present the different dimensions that should be discussed within the constitutional debate. It will highlight key issues and points of tension that usually arise for countries seeking to address the issue of the disappeared and will discuss the manifestation of these issues in the Syrian context. The following experiences will be analyzed and used as examples where relevant: Iraq, Lebanon, Cyprus, Colombia, Mexico, Guatemala, Peru, Sri Lanka, and Western Balkans.

### 1. Issues related to the search (location, identification of the missing)

Searching for the missing and forcibly disappeared and discovering their fate and whereabouts is always the priority set forth by their families. But it’s a complex process that requires important capacity and coordination efforts between States’ institutions, victims’ groups, civil society groups and forensic experts. While the context in Syria presents its own challenges, it is useful to look at recent search experiences and analyze the innovative responses that were provided.

#### Lessons from Other Experiences

##### Colombia’s “Unit for the Search for Persons deemed as Missing” (UBPD)

Colombia has one of the highest numbers of forcibly disappeared and missing persons in South America. There are an estimated 120,000 persons missing due to the 60 years of internal armed conflict.<sup>19</sup> After several failed attempts to address the issue, the 2016 peace accord created a dedicated search unit (known as the “Unit for the Search for Persons deemed as Missing” (UBPD)) considered as the first institution in the country to independently tackle the issue of the victims of enforced disappearance related to the conflict.

<sup>19</sup> <https://www.icrc.org/en/missing-persons-Colombia-IHL>

The unit is solely mandated to look into the fate and whereabouts of victims and collects strictly humanitarian information. It gathers information from all the parties involved in the conflict (state military, armed paramilitary and guerrilla groups) as well as the many victims' organizations. The peace agreement provides that the unit will coordinate the information collection with the ICRC in order to speed up the search and collection of information.<sup>20</sup> The information gathered is centralized and administered by two public institutions: the National Registry for All People Missing and the National Forensic Institute that administers the DNA bank. The UBPD also gathers and maps the locations of clandestine graves in the National Registry of Ditches, Illegal Cemeteries, and Graves.

To organize and coordinate the search in a vast territory where many areas are difficult to access, the UBPD has developed a National Search Plan (PNB) that centralizes search efforts and Regional Search Plans that respond to the specific characteristics of different regions and the unique needs of communities.<sup>21</sup> The unit has its own task force. Based on the information gathered and analyzed, its investigators carry out search expeditions across Colombia to locate the places where people are believed to have been buried and conduct exhumations.

It is too early to assess the efficiency of the new strategies and tools put in place in Colombia but their efforts are worth noting given the similarities in scale to the Syrian context.

<sup>20</sup> The 2016 Colombia peace agreement states that "as part of the operations of the Unit for the Search for Persons deemed as Missing, we have agreed to start up a special process of contribution and collection of strictly humanitarian information between the National Government, the FARC-EP, the victims' organisations, including the Committee on Enforced Disappearances of the Colombia - Europe - United States Coordination, FEVCOL, PAIS LIBRE, ASFADDES, ECIAF, the Visible Victims Foundation, MOVICE, the Nydia Erika Bautista Foundation and with permanent coordination by the ICRC in order to continue and speed up the search and collection of information."

<sup>21</sup> Article 5.2 of Decree 589 states the UBPD must design and implement a national plan which, along with regional plans, will establish procedures for the search, localization, recovery, identification, and return of missing persons. Plan officially launched by the search unit on May 6, 2020. It is the framework that allows the UBPD to plan, organize, and implement tools to search for missing persons. Based on the evolving circumstances due to continued armed violence in the territories, the national plan is subject to change. <http://es.presidencia.gov.co/normativa/normativa/DECRETO%20589%20DEL%2005%20DE%20ABRIL%20DE%202017.pdf>

## Mexico's National Search Commission (CNB)

Mexico also had to contend with a challenging and multifaceted problem of disappearances and in recent years developed interesting strategies and tools to tackle it. An estimated 62,000 people have disappeared in the country, most of them since 2006.<sup>22</sup> According to the Washington Post, Mexicans are uncovering two clandestine graves a day, on average.<sup>23</sup> Mexico also has to deal with migrants who have gone missing in Mexico or at the border between Mexico and the USA.

In 2018 the authorities established the National Search Commission (known by its Spanish acronym, CNB) to coordinate efforts to search for the missing. One of the first efforts of the Search Commission was to hire people - programmers, systems' analysts, lawyers - to consolidate and update the information previously scattered among different registers at the federal and State levels and that was previously absorbed in the "National Register of Disappeared and Not Localized Persons" created in 2017.

For families who fear that reporting the crime to local authorities may lead to reprisals, the CNB has launched a digital platform where individuals can directly report a disappearance to the search commission. A National Forensic Database was also created to consolidate all databases at the federal and state level that contains information relevant to the search and identification of disappeared persons.

To operationalize the search, the CNB has worked closely with state governments, international human rights bodies and experts, and families of the disappeared to develop search plans at the regional and national level and strengthen coordination between government institutions. Also, the authorities have established local search commissions or offices to strengthen the search.

But Mexico clearly lacks the forensic capacity and infrastructure to handle the identification and storage of all the human remains exhumed. The Mexican government received international support from the Guatemalan Forensic Anthropology Foundation and the International Commission of Missing Persons (ICMP) but its facilities currently house a backlog of over 50,000 bodies (buried in unknown graves) and an unknown number of bone fragments that have yet to be processed and identified.

Under the pressure of a nationwide collective of families of disappeared, the Mexican government created on December 5, 2019 the Extraordinary Mechanism for Forensic Identification (MEIF), a temporary body to help speed up the process of identifying the remains found across the country. Its mandate is limited to analyze remains that were already in government custody by the date of its creation. The creation of the mechanism will enable the domestic forensics teams to focus their investigations into recent disappearance cases. The 7 experts that will form the body (4 forensic experts, 1 legal expert, 1 outreach expert with victims and 1 expert on international cooperation) are currently being recruited. To ensure the body's autonomy, the experts will be UN staff and all nationalities are welcome to apply.

<sup>22</sup> <https://www.icrc.org/en/document/mexico-missing>

<sup>23</sup> <https://www.washingtonpost.com/graphics/2020/world/mexico-losing-control/mexico-disappeared-drug-war/>

## Regional Mechanism to Deal with Missing Migrants in Central America

Migrants have gone missing in large numbers on their route through Central America to the United States. Determining their fate poses a number of challenges because the victims are from different nationalities and their families are scattered in several countries and any solution requires the involvement of the authorities of multiple States.

To address the transnational dimension of the issue and improve the exchange of information on missing migrants and unidentified remains in Central America and Mexico, it was crucial to standardize how information about missing migrants and dead bodies is collected, preserved and processed. For this purpose forensic databases (Bancos de Información Forense de Migrantes Desaparecidos) were created in each of the countries concerned to gather information collected by governmental and non-governmental organizations including committees of families of missing and disappeared migrants, national human rights institutions, attorney generals' offices in the different countries concerned, consular and diplomatic services, ministries of foreign affairs, and the Argentine Forensic Anthropology Team (EAAF) (an expert organization with extensive experience in exhumation work).

These databases include information on the circumstances surrounding the disappearance, along with ante-mortem information on the missing individuals and genetic information obtained from DNA samples provided by relatives. This data is verified and catalogued so that it can be cross-referenced with forensic data on unidentified remains recovered by forensic institutions in the different countries where unidentified bodies are found.

In addition, multi-stakeholder mechanisms were created to strengthen the search given the multiple countries involved: a forensic commission created to establish good practices (protocols) in the process of exhumation, identification and return of mortal remains as well as an External Mechanism of Support for Search and Investigation that facilitates communication and coordination at the national and transnational levels with all actors involved including with families.

## Iraq's Lack of a Uniform Approach

Iraq's experience in searching for the missing can be considered as the opposite of good practices when it comes to the search for the missing. The country faced several waves of disappearances related to conflicts with neighboring countries (Iran and Koweit), crimes of the regime of Saddam Hussein, Da'esh (ISIS) and paramilitary groups. According to ICMP, the total estimated number of missing people runs from 250,000 to possibly one million people.<sup>24</sup> Other challenges include the security situation (with ongoing violence and presence of explosives over the territory) and the fact that many relatives of missing persons no longer live in Iraq.

<sup>24</sup> <https://www.icmp.int/where-we-work/middle-east-and-north-africa/iraq/>

Iraq lacks a uniform approach to the issue. Over the last 30 years, different search mechanisms were established depending on the circumstances of the disappearance and the nationality or ethnic group of the victim.

In order to improve the search for the missing, in 2006 the Iraqi parliament passed the Law on Protection of Mass Graves (Law No. 5, 2006) that provides for the establishment of a legal mechanism in charge of coordinating the efforts of locating, protecting, exhuming, identifying and documenting evidence that can be used in a court of law for prosecuting serious international crimes. The law was initially focused on the protection of mass graves “that resulted from crimes committed by the past regime” but was later amended to expand the temporal jurisdiction to crimes committed after 2003 and to specify what the ‘protection, inspection and investigation’ of mass graves entails.

The Iraqi Ministry for Human Rights was designated to lead the efforts and within the ministry a directorate named Directorate of Mass Graves Affairs and Protection was created to oversee the process. But it does not have its own task force and according to interviews with experts familiar with the process, the coordination between the different entities involved is not effective.

There is no central record for the data. Several ministries and directorates involved have their own database that are not compatible. For example, families of the missing must report their missing person case to more than five separate State entities.

Also, the search, location and exhumation depend on many national and local entities: when a mass grave is located, the Ministry of Human Rights has to ask the judiciary for a decision to conduct search and exploration. For the exhumation work to start a committee needs to be set up in the area concerned involving the Supreme Judicial Council, Ministry of Human Rights, Prosecutor general, Ministry of Interior, Ministry of Health, Martyrs Foundation, Ministry of Martyrs and Anfal Victims Affairs in Kurdistan region, the High Commission of Human Rights, and the head of the provincial council.

All these procedures are very complex, long and depend on the willingness to act of each entity involved. This explains why the number of victims found and identified in Iraq is still low despite the efforts and resources invested in Iraq.

The only form of coordination that seems to be a bit more effective is related to ISIS crimes. A national coordination committee (NCC) was put in place to facilitate the work of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da’esh/ISIL (UNITAD) -- an international commission that has a prosecutorial mandate over the crimes committed by ISIS.<sup>25</sup> It is headed by a representative of the office of the Prime Minister and encompasses all agencies that have a stake in investigating ISIS related crimes.

These coordination efforts facilitated the recent DNA collection campaign and exhumation of mass graves related to missing persons from the Yazidi community. But international experts say that this was a relatively “easy case” of identification as the Yazidis form a close knit community (which facilitates DNA identification process) and most sites of graves were known.

<sup>25</sup> UNITAD is an independent, impartial investigative team, mandated by the United Nations Security Council to support Iraqi efforts to hold ISIS members accountable for their crimes.



## Recommendations for Syria

There are important challenges in Syria that limit dramatically what can be done in terms of search process at this stage, the most important one being that the main perpetrators of disappearances remain in power and there is little leverage on them to acknowledge the detention in secret of tens of thousands of people or disclose the fate and whereabouts of those who disappeared. Other actors with territorial control also failed to provide information. In areas controlled by the Syrian Democratic Forces (SDF), the local authorities did some efforts - notably in the Raqqa area -- to investigate the issue of those who disappeared at the hands of ISIS but the absence of a responsible body or focal point to register cases of missing prevented the conduct of proper investigation and to compare these cases with the remains and associated evidence found in the 20 mass graves discovered in areas formerly held by ISIS. While they have detained thousands of ISIS fighters, including many in positions of authority, the US-led coalition and the SDF did not set up a process to collect information from these detainees that would help identify the fate and whereabouts of the missing and disappeared or help locate particular mass graves<sup>26</sup>.

Many reports have been written by Syrian and international human rights organizations to denounce the situation of detainees and disappeared and address recommendations to all authorities involved to facilitate access to information and support the families' search for their loved ones. We will not repeat or compile these recommendations here but rather devise action lines for civil society to prepare the ground for an effective search process in Syria in the future. In particular, we will focus on four axes:

- 1) How to better organize existing information on human rights violations to make it usable for search purposes;
- 2) How to better coordinate and possibly centralize the different databases;
- 3) How to strengthen forensic capacity of actors involved in exhumations in Northeast Syria and ensure the effort is inclusive for all families of victims; and
- 4) How to approach the complex task of collecting Biological Reference Samples (BRS) from families of disappeared.

### 1. Collect and organize information to serve the search for the missing

Many Syrian and international organizations have done incredible work to document the violations committed in Syria since the outbreak of the conflict, including enforced disappearances. But most of the documentation efforts have been directed towards accountability efforts and not for searching and identifying the missing. When these databases include information on the identity of missing persons collected from their relatives in general it is not standardized, categorized and analyzed for the purpose of locating the missing or identifying them.

<sup>26</sup> Kidnapped by ISIS. Failure to Uncover the Fate of Syria's Missing, Human Rights Watch, Feb 11, 2020.

As a consequence, while the databases developed by Syrian civil society organizations contain a large amount of information and have strong capabilities, the data that could contribute to the search for the missing is not indexed and as such not sufficiently exploited today.

To better understand what is at stake here, we should look at the experience of the Western Balkans. Over a period of more than 20 years a large amount of information was gathered to support the International Criminal Tribunal for the former Yugoslavia (ICTY) prosecutions. Among the data amassed, more than nine millions pages of evidence according to the IIIM<sup>27</sup>, there was crucial information on the fate and whereabouts of the missing. Yet this data sat in the ICTY database for years. It is only toward the end of the judicial process that the ICTY established a framework to enable the access to its database to organizations specialized in the search for the missing. But this was a long and arduous process because the data serving for the clarification of the fate and whereabouts of the missing was not indexed and organized to support the search for the missing.

Headed by Ms. Marchi-Uhel, former Head of Chambers at the ICTY, the IIIM has learned from ICTY's experience. From the start of its mandate, the IIIM has sought to tackle the intersection between accountability efforts and the search for the missing. In its bulletin #4 dedicated to the issue of the missing, IIIM states: "we determined from the beginning that we would integrate the search for the missing component into our working processes and develop systems to maximise the use of information that can support such searches in a timely manner rather than years later". The IIIM team consulted with organizations working on the search for the missing to understand better the types of evidence and data that were needed and how the data should be organized in its central repository so that when the team processes the information it can identify clearly what should be channeled to these organizations. It is crucial to build on this experience, and develop the understanding and capacities of all actors (notably Syrian human rights groups) involved in documentation work to help them analyze, index and process their data (which was initially collected for violation documentation purposes) in ways that can facilitate future search processes. In particular, the collection of information on events and patterns could ultimately shed light on the place of detention of the disappeared, the circumstances of their disappearance and the location of mass graves

## **2. Strengthen the coordination between the different actors working on the issue and establish a central database**

The experiences analyzed above show the importance of coordinating the search for the missing and disappeared and develop a secure and centralized database on the identity of all the disappeared in order to have a clear figure of the number of missing people and to facilitate their location as well as enable future identification of those who died (matching the ante mortem data with the human remains found in the mass graves).

But building a central database among civil society actors is a sensitive issue in all contexts and Syria is not an exception. This is mainly due to the following: lack of trust between actors, distrust of the working methods and impartiality of the others, problems of compatibility between information systems, problem of "ownership" of data and competition between the actors (locally and internationally).

<sup>27</sup> International Impartial and Independent Mechanism, Bulletin #4, Spotlight on the Missing, October 2020.

One way to overcome these misgivings could be to establish a multi-stakeholder mechanism composed of victims' groups, Syrian organizations working on the issue and expert organizations. That mechanism would be in charge of developing protocols on the collection, preservation and processing of information on the identity of the missing and would ensure that data collection and data fields are standardized across different efforts. It would also develop and manage a central database of the missing and disappeared that would gather all the information collected by the different actors and that each actor could fill with new information.

The coordination of efforts and centralization of information is also crucial to identify the remains that were discovered in Northeast Syria. First responders exhumed approximately 2,000 bodies mainly around Raqqa.<sup>28</sup> The difficulty to identify the remains is obviously due to the lack of forensic capacity but also because of the absence of a centralized database on the identity of the missing that would allow those conducting the exhumations to compare this information with the post mortem cases. While volunteers on the ground are trying to collect data from families, it is very disorganized and the data is not centralized. They also do not have access to the many relatives of victims - Syrian and other nationalities - who live abroad.

A specific multi-stakeholders mechanism should be put in place to support and build the data collection capacity of the teams on the ground and to coordinate the collection of data from people living abroad.

### **3. Increase the forensic capacity of actors involved in exhumations in Northeast Syria**

Multiple actors have controlled northeast Syria following the 2013 withdrawal of the Syrian army. After a short period of control by armed opposition groups, ISIS assumed control killing and kidnapping thousands. In the battle to defeat ISIS, the US-led Coalition (in partnership with the Syrian Democratic Forces (SDF)) engaged in intensive airstrikes and fierce ground battles. The remains of many of those killed during these battles are still unaccounted for, either buried in haste or left under the rubble, and subsequently reported missing. The missing in northeast Syria include local residents from the area, but also Syrians and Iraqis who had been displaced to the area in earlier stages of the conflict, as well as many foreigners - many who came to join ISIS and brought with them their families, but also victims who had been kidnapped by ISIS and whose remains were never found.

Access to sites of mass graves in Northeast Syria after the defeat of ISIS raised hopes among the families of those who had disappeared from the area that they would be able to have answers about the fate of their loved ones and in case of death, recover the remains.

Starting in early 2018, teams of First Responders were formed in Raqqa with the support of the US Government to exhume the bodies.<sup>29</sup>

<sup>28</sup> Interview with Luis Foundebrieder, director of Argentine Forensic Anthropology Team (EAAF)

<sup>29</sup> For more background, see HRW, Syria: Mass Graves in Former ISIS Areas, July 3, 2018, <https://www.hrw.org/news/2018/07/03/syria-mass-graves-former-isis-areas>; ICMP, Missing Persons in North East Syria: a Stocktaking, March 25, 2020, <https://www.icmp.int/wp-content/uploads/2020/05/icmp-gr-mena-065-6-w-doc-stocktaking-missing-persons-in-north-east-syria.pdf>

To date, the First Responders have recovered 5,656 bodies in and around Raqqa City. Another 522 bodies were recovered by the Deir Ezzor 'forensic team.' In total, 22 mass graves have been excavated and bodies reburied in the two main cemeteries in Raqqa. But these operations were conducted with rudimentary methods and without standardized procedures which risked losing information that would have been valuable in helping identify the missing.<sup>30</sup>

Efforts by Syrian organizations abroad have been made to support these local teams and build their capacity in conducting proper exhumations through training by independent forensic experts. These trainings aimed at ensuring that the first responders apply best practices: interpret the context (e.g. date, single grave, etc.); document the remains and the context in which they are deposited (photograph, notes, sketch, plans as appropriate); excavate the remains and recover any associated evidence/material; and place them in bags and transport them following the chain of custody to a secured place (laboratory or mortuary) where the analysis of the remains will be conducted or rebury them if they cannot be identified.

Unfortunately, because of the deteriorating situation on the ground, the training had to be conducted online with translation issues and bad connection.

Moreover the forensic operations that can be conducted by the teams on the ground are quite limited because they do not have the expertise to analyze the remains and have no infrastructure to handle the identification of the human remains exhumed.

Yet, in some cases, remains have been handed over to families of missing who claimed they recognized artefacts found with the remains (a ring, chain identity paper, etc.) even though proper analysis were not conducted. This is highly problematic because experts explain that with such rudimentary methods there is a high risk of mis-identification.

In the current situation efforts should be reinforced to build the capacity of first responders in exhuming and documenting the remains and related artefacts and in re-burying them in cemeteries which is, according to experts, the best way to protect them. A clear tracking system of the remains and related evidence / artefacts should be put in place to enable proper identification in the future when better capacity will be available.

#### **4. Collecting Biological Reference Samples (BRS) and DNA**

One of the issues that has come up in many conversations between Syrian groups in recent years is whether biological samples - saliva from which DNA is extracted -- should be collected from families of the missing to facilitate the future identification of remains. Biological Reference Samples (BRS) are a crucial tool to identify remains but before such an exercise is conducted, a number of issues and questions need to be addressed.

First, collecting such information necessitates an important capacity to collect, handle and secure a large amount of data, including genetic data, knowing that many relatives of missing people live in regime controlled areas of and would fear providing such samples and that those living outside Syria are scattered in many countries. It would require the support of expert organizations to train data collectors, to develop protocols, to provide a repository for genetic data as well as an identification information management system that processes ante disappearance and genetic data.

<sup>30</sup> <https://www.icmp.int/wp-content/uploads/2020/05/icmp-gr-mena-065-6-w-doc-stocktaking-missing-persons-in-north-east-syria.pdf>

The second issue raised is the risk of re-traumatization of the relatives of the missing. Consultations and interviews conducted among families of the missing show that most of them still believe that their loved one are alive in the regime's prisons. They may not be prepared to provide information for the purpose of identifying dead bodies.

A third issue is that in the absence of a political resolution to the conflict, there is little hope to see forensic investigations conducted in regime controlled areas where most of the disappeared have taken place. This means that any collected biological samples may remain unused for years.

While these challenges require careful consideration and discussions among key stakeholders, notably Syrian association of families, there is a risk that waiting for a political resolution to the conflict delays the process for years, possibly decades, and in the process, risk the loss of key data. This is what happened in Lebanon where efforts to collect BRS from the families of people who went missing during the Lebanese civil war began in 2016 - a full 26 years after the end of the conflict, and after many relatives had already died.<sup>31</sup>

Once a decision has been taken to collect biological samples from families, it will be essential to minimize the risks of such an exercise on the families by being very clear with the objectives and the process and to manage their expectations. Continuous and clear lines of communication will be important to ensure transparency and build trust with families.

## 2. Issues related to the right to truth and right to justice

One of the common tension points in negotiations around the issue of the disappeared is the friction that often arises between the right to truth and right to justice. Families have a right to know what happened to their missing loved ones, to hear the truth about the circumstances of the disappearance and to identify those responsible.<sup>32</sup> There is also a well established right to justice for victims and their families with international law requiring states to investigate and prosecute perpetrators of grave crimes such as enforced disappearance in order to give meaning to a victim's right to access judicial remedies.<sup>33</sup>

But how to get to know the truth when perpetrators are not keen to disclose the information they possess for fear of reprisals or criminal prosecution? Or how to collect information from perpetrators when they are in a position of strength that allows them to ignore any demands for truth or justice or when they are able to negotiate their immunity in exchange of any information that they may possess?

This tension between the right to truth and right to justice is negotiated differently depending on the political context.

<sup>31</sup> <https://www.icrc.org/en/document/lebanon-collection-biological-samples-renews-hope-families-missing>

<sup>32</sup> The "right to know" or the "right to know the truth" is a right enshrined in international law. International human rights bodies hold that, in cases of enforced disappearance, the right to know the truth encompasses the fate and whereabouts of the disappeared person, as well as the circumstances of the disappearance, the cause of death and the identity of the perpetrator(s).

<sup>33</sup> See the the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005).

In contexts where a political transition has not happened or is incomplete - with perpetrators often retaining power or influence - the families of the missing and disappeared are often left with the difficult - almost unbearable - choice to choose or prioritize between their right to know and their right to justice. Indeed in order to create an environment that is conducive to perpetrators or witnesses sharing information about disappearances which is often vital to clarify the fate of missing people and retrieve their remains (if they are dead), the perpetrators are not prosecuted for what they did.

In Cyprus, for example, the warring parties (Greek Cypriots and Turkish Cypriots) agreed to provide information to locate and identify the missing upon the condition that it will not lead to any prosecutions. The right to know of the families was conditioned on them giving up their right to justice.

In Lebanon, where a political transition did not occur at the end of the war and where the leaders of armed groups responsible for disappearances managed to stay in power, the interrelation between right to truth and right to justice is more blurry and is at the centre of civil society divisions on the issue. At the end of the war, Lebanese victims got neither truth nor justice. The warlords managed to negotiate an amnesty that shielded them from accountability while also evading any responsibility for telling the truth. After years of struggle by families of the disappeared and their allies in civil society, Lebanese courts recognized the right to know of families. Finally, in 2018, 28 years after the end of the civil war, Lebanon's parliament enacted a law (Law no. 105/2018) which criminalizes the act of disappearance and creates a national commission charged with collecting information about the fate and whereabouts of the missing -- but not about the identity of the perpetrators -- and provides immunity for people who share information with the commission to encourage them to contribute.

Lebanon's 2018 law clearly favors the right to know over a right to justice. A position that many families of the disappeared have come to accept as they seek closure. But for many human rights activists in Lebanon as well as a number of families, the absence of a statute of limitation for the crime of disappearance - which international law considers ongoing until the whereabouts are investigated and truth disclosed to the family - remains a small window of opportunity for them to pursue accountability.

So the question that is posed in Lebanon and in many post-conflict societies is how to create an environment conducive to information sharing without jeopardizing victims' right to justice and broader accountability efforts?

Another issue raised is how to balance the need for justice with the desire to achieve peace and reconciliation in countries torn apart by internal conflicts and where many people (with different levels of implications) may have been involved in disappearances.

In Lebanon, at the end of the civil war, a large part of society acquiesced to - or at least was too exhausted to challenge - the general amnesty law passed in 1991 as it was accepted at the time that it's a necessary price to pay in order to achieve peace and reconciliation.

Blanket immunity to perpetrators of serious human rights violations classified as international crimes is now categorically rejected by international human rights law. The Declaration on the Protection of all Persons from Enforced Disappearance states that "persons who have committed offences of enforced disappearance shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal

proceedings or sanction.”<sup>34</sup>

In Argentina, after the end of the military dictatorship that ruled the country between 1976 and 1983, amnesty laws benefiting mid and lower-rank military officers involved in gross human rights violations were passed.<sup>35</sup> The argument to justify the measure was that it was necessary to uphold social peace. In this context, in order to give some redress to families of the victims, a system of “truth-finding trials” (juicios por la verdad) was established to investigate the truth but without the ability to establish criminal responsibility and impose sanctions. So these laws left unpunished the majority of military personnel involved in crimes against humanity. But in 2005, after years of lobbying by victims’ groups and civil society organizations, the Supreme Court of Argentina overruled the laws of amnesty and opened the door to reopening criminal proceedings. Since then, in the absence of definite criteria of selection, there has been a proliferation of criminal proceedings against perpetrators involved in disappearances at different levels of responsibility.<sup>36</sup>

Countries that have recently established transitional mechanisms are opting more and more for what is called a ‘justice balance’ approach to transitional justice where humanitarian mechanisms (with their focus on search procedures) as well as truth commissions are combined with trials and amnesties measures.

In Colombia for example the Special Jurisdiction for Peace (JEP) created as part of the peace agreement is an ad hoc transitional justice mechanism designed to investigate, prosecute and punish those responsible for the most serious human rights violations committed during the armed conflict in Colombia but it can provide alternative punishment for perpetrators (reduction or avoidance of sentence in return for confession to crimes).

On January 2021, following two and a half years of investigation, the court unveiled its first indictment against eight persons of the highest circle of power of the Revolutionary Armed Forces of Colombia (FARC) and ruled that kidnappings that were committed by the armed group constitute “war crimes” and “crimes against humanity”.

The accused can decide to receive a more lenient sentence (a special sanction of 5 to 8 years in a non-prison setting) if they accept the JEP’s indictment and acknowledge their responsibility, tell kidnapping survivors or relatives of the disappeared the truth about what happened to their loved ones and personally redress them. If they reject the decision of the court, the case will be forwarded to the tribunal’s prosecution unit where they will face sentences ranging from 15 to 20 years under regular prison conditions<sup>37</sup>.

<sup>34</sup> United Nations General Assembly, Declaration on the Protection of all Persons from Enforced Disappearance, Resolution 47/133, 18 December 1992

<sup>35</sup> The laws were known as Laws of Full Stop and Due Obedience. For more background, see Amnesty International; Argentina: The Full Stop and Due Obedience Laws and International Law; 1 April 2003, <https://www.refworld.org/docid/3f13d9d34.html>.

<sup>36</sup> [https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.183/&sa=D&source=editors&ust=1614441167058000&usq=AOvVaw1jM7sIro2d4D1\\_97h8W6Au](https://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.183/&sa=D&source=editors&ust=1614441167058000&usq=AOvVaw1jM7sIro2d4D1_97h8W6Au)

<sup>37</sup> <https://www.justiceinfo.net/en/69281-first-colombia-eight-farcs-charged-war-crimes-crimes-against-humanity.html>

## Recommendations for Syria

There are currently two realities when it comes to the tension between the right to truth and the right to justice in the context of Syria:

- 1) Inside Syria, victims are neither able to exercise their right to truth nor to justice. It is a situation of complete impunity with the main perpetrators still in power and not willing to provide any information on the fate and whereabouts of the missing and no capacity for the victims to pursue accountability inside the country. In some cases, the authorities issue death certificates for people who disappeared, but they provide the families with no information about the circumstances of death nor do they return any remains.
- 2) Internationally, while the road to the International Criminal Court was blocked by Russia and China's multiple vetoes, the efforts of victims groups as well as Syrian and international human rights groups have led to a series of criminal complaints under the principle of universal jurisdiction in European courts<sup>38</sup>. These efforts -- which have led in some cases to international arrest warrants for senior regime figures -- as well as the creation of the UN's International, Impartial, and Independent Mechanism (IIIM) (with an explicit mandate to collect evidence of violations of international humanitarian law and human rights and prepare files for criminal proceedings), have ensured that the right to justice for the victims has remained a key issue that neither the regime nor the international community can simply ignore.<sup>39</sup> Despite their importance for pursuing accountability, these efforts have not been able to provide victims with specific information about the fate of their loved ones -- a process that would require some form of collaboration by perpetrators or access to relevant information (detention and prisons records, data from morgues, etc.).

The experience of other countries highlights a number of key priorities to protect victims' right to truth and justice.. There must not be any amnesty deal for grave crimes as part of any peace or constitutional negotiations. While legally speaking, such amnesty deals are in violation of international laws, the experience of Argentina shows that it will still take years of efforts to overcome them if they are put in place. In Lebanon, the amnesty deal that was signed at the end of the civil war remains in force despite efforts by civil society to challenge it. Hence, it will be essential to insist on the need for accountability as part of any peace process.

Another lesson is to ensure that archives and documents of the regime as well as non-state armed groups are preserved and handed over to any independent transitional justice mechanism created<sup>40</sup>. The question of preserving documentary evidence is essential to resolving the issue of the disappeared. As the Caesar photos revealed, the Syrian regime maintains meticulous files about the detainees and those who died in detention. It will be essential to preserve those files. Non-state armed groups also often maintain detailed documents about detainees and kidnapped (particularly about prisons they may have managed)

<sup>38</sup> The principle of universal jurisdiction allows to bring cases involving war crimes, crimes against humanity or genocide in national courts regardless of where the alleged crime was committed and regardless of the accused's nationality, country of residence, or any other relation with the prosecuting entity.

<sup>39</sup> On 21 December 2016, the United Nations General Assembly adopted resolution 71/248, establishing the International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011.

<sup>40</sup> For a detailed discussion on the different models for mechanisms to deal with the issue of the disappeared see section III below.



and these armed groups should hand over such documents as part of any peace deal. One lesson from the Lebanese conflict is that the failure to ask militias to hand over their archives to the authorities at the end of the war denied thousands of families possible information about the fate of loved ones.

But as the experience of other countries has also shown, an approach that only emphasizes criminal prosecution will not be sufficient to provide truth to the families of the victims of enforced disappearance. The accused may refuse to speak or intentionally destroy any records. Colombia's experience of a mixed approach -- which emphasizes justice by first insisting on investigation and prosecution but also provides for reduction of punishment in return for confessions and truth telling -- is worth exploring in the context of constitutional talks and peace negotiations.

In parallel to these conversations, it will be essential to maintain the push for accountability at the international level, particularly by bringing forward charges for the crime of enforced disappearance in universal jurisdiction cases.

Since 2014 Syrian and international groups have joined their efforts to collect evidence and file cases in national courts in Europe against those responsible for atrocities committed in Syria. Yet, while enforced disappearance committed in Syria constitutes a crime against humanity and despite the large amount of evidence, this crime is not yet at the forefront of the cases that have been brought to date.<sup>41</sup> For example, even the landmark trial of two former intelligence officers (al-Khatib and Raslan) by a court in Koblenz, Germany<sup>42</sup> has focused on their involvement in the killing and torture of detainees but not on their role for their role in enforced disappearance.

The only active investigation in Europe - that we are aware of - that relates to enforced disappearance is that of Mazen and Patrick Dabbagh. On 24 October 2016, a complaint was filed before the Paris Tribunal by Obeida Dabbagh, a Syrian-French national, on behalf of his nephew and brother, Mazen and Patrick Dabbagh, who were forcibly disappeared in Syria in 2013.<sup>43</sup> An investigation into torture, crimes against humanity and enforced disappearances was opened by the French specialized unit for the prosecution of genocide, crimes against humanity, war crimes and torture within the Paris Tribunal, and in October 2018, investigative judges issued three international arrest warrants against three high-level regime suspects, Ali Mamluk, Jamil Hassan and Abdel Salam Mahmoud, for complicity to crimes against humanity and war crimes.<sup>44</sup>

<sup>41</sup> For an overview of universal jurisdiction cases in Germany and Sweden for crimes committed in Syria, see Human Rights Watch, "These are the Crimes we are Fleeing", Justice for Syria in Swedish and German Courts, 3 October 2017, <https://www.hrw.org/report/2017/10/04/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts>

<sup>42</sup> The al Khatib trial started in Koblenz, Germany, in April 2020 where the Higher Regional Court has charged Anwar R and Eyad A, two former officials of President Bashar al-Assad's security apparatus, for crimes against humanity.

<sup>43</sup> For more details about the case, see FIDH, Q&A on the Dabbagh Case: French judges issue 3 international arrest warrants against top Syrian officials, 5 November 2018, <https://www.fidh.org/en/issues/litigation/q-a-on-the-dabbagh-case-french-judges-issue-3-international-arrest>

<sup>44</sup> <https://www.fidh.org/en/issues/litigation/breaking-french-judges-issue-international-arrest-warrants-against>

According to legal experts working on such cases<sup>45</sup>, the crime of enforced disappearance has not been prioritized so far in universal jurisdiction cases because national prosecutors in Europe are more experienced in prosecuting crimes of murder and torture than enforced disappearance which is a relatively new crime in their context. Another reason mentioned is related to the collection of evidence. At national level there is a temptation for prosecutors to go for charges that will be easier to prove and would not risk compromising their jurisdiction. For this reason they focus their prosecution strategy on strong evidence they have - ie. the Caesar photos - and call for witnesses that can confirm them without expanding beyond that. As such, the mothers of disappeared persons who testified in the al-Khatib trial were only heard to confirm they recognized their loved ones in the Caesar photos.

The crime of enforced disappearance is also absent from the trials of members in the Islamic State (ISIS) or other extremist groups like al-Nusra, which tend to focus on their membership in a terrorist organization or participation in terrorist acts as opposed to the underlying crimes, including kidnapping or disappearing victims.<sup>46</sup>

It is essential to bring attention to the crime of enforced disappearance that constitutes a crime against humanity, advocate for trials against this crime and bring testimonies and evidence to make the case stronger. The experience of Syrian and international organizations that have pushed successfully for Sexual Gender Based Violence charges should be analyzed further to help design a strategy.

### 3. Issues related to reparations

Reparations' measures for the harm suffered are an essential part of victims' healing process. Putting in place a reparation program is a complex process that raises a number of important questions: what forms of reparations should be put in place (individual or collective; financial or symbolic)? Who is entitled to receive reparation measures? What are the resources required for effective implementation?

Reparation (for harm suffered) are measures taken by the State to redress gross violations of human rights or humanitarian law through compensation, restitution and rehabilitation measures to the victims. Reparations can be material (financial compensation, medical and psychological care, legal and social services) as well as symbolic (acknowledgment, apology, memorial).<sup>47</sup>

Under the Declaration on the Protection of All Persons from Enforced Disappearance, States have an obligation to provide reparations to all victims of enforced disappearances, taking into account the intrinsic connection between enforced disappearances and economic, social and

<sup>45</sup> Interview with Alexandra Lily Khater, Legal Advisor - International Crimes and Accountability Program at ECCHR

<sup>46</sup> For an analysis of the preference of relying on terrorism charges as opposed to pursuing the underlying crimes, see Trial International, Universal Jurisdiction Annual Review 2020, <https://trialinternational.org/latest-post/universal-jurisdiction-annual-review-2020-atrocities-must-be-prosecuted-soundly-and-rigorously/>. An overview of universal jurisdiction cases in Germany and Sweden for crimes committed in Syria, see Human Rights Watch, "These are the Crimes we are Fleeing", *Justice for Syria in Swedish and German Courts*, 3 October 2017,

<sup>47</sup> United Nations General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Resolution 60/147, 16 December 2005.

cultural rights.<sup>48</sup> The UN's Working Group on Enforced or Involuntary Disappearances has recognized that enforced disappearances violate various economic, social and cultural rights and have a particularly negative impact on the enjoyment of such rights by the disappeared person, the family members of the disappeared person, and others. It was explicit in noting that redress to victims should not be limited to monetary compensation and should include medical and psychological care and legal and social rehabilitation and that "measures should be taken to ensure that members of families of disappeared persons are entitled to social benefits and other measures of social support, including health care, special education programmes and psychological assistance."<sup>49</sup>

## Lessons from Other Experiences

### Peru

In Peru the Truth and Reconciliation Commission<sup>50</sup> created to investigate the violence that occurred from May 1980 to November 2000 established a Comprehensive Reparations Plan (Plan Integral de Reparaciones or PIR) that combines individual reparation measures with collective measures, as well as symbolic and material reparation measures.

The reparation plan adopts a broad definition of victim and defined beneficiaries to include victims of displacement, arbitrary imprisonment, torture, rape, and kidnapping, as well as members of the military, the police, and self-defense committees injured as a result of the conflict. It also included relatives of the disappeared and killed and some indirect victims: children born from rape, children conscripted by self-defense committees, and those who became undocumented as a result of the conflict.

The individual reparation measures recommended by the Commission include economic reparations (financial compensation) for relatives of victims of murder, extrajudicial execution, and disappearance, victims who are partially or totally disabled and victims of rape. It recommended a lump sum, equivalent to USD 10,000, to be distributed to families in a proportion of two-fifths to the widows or permanent partners, two-fifths to the children, and one-fifth to the parents of the non surviving victims.

Individual reparation also includes restitution of civil and political rights including the declarations of absence due to enforced disappearance to allow the relatives of the disappeared to exercise their civil and inheritance rights, education programs (like scholarships and tuition), physical and mental health programs.

The reparation plan -- which drew from Peru's Truth and Reconciliation Commission's (known by its Spanish acronym, CVR) recommendations -- also provides for collective reparations

<sup>48</sup> See the UN's Report of the Working Group on Enforced or Involuntary Disappearances, 9 July 2015, A/HRC/30/38/Add.5, [https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A\\_HRC\\_30\\_38\\_Add\\_5\\_ENG.docx](https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A_HRC_30_38_Add_5_ENG.docx)

<sup>49</sup> For more details, see the UN's Report of the Working Group on Enforced or Involuntary Disappearances, 9 July 2015, A/HRC/30/38/Add.5, paras 58-68 [https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A\\_HRC\\_30\\_38\\_Add\\_5\\_ENG.docx](https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A_HRC_30_38_Add_5_ENG.docx)

<sup>50</sup> ICTJ Report, Reparations in Peru: From Recommendations to Implementation, June 2013.

aimed at fostering reconciliation in the country and addressing deep socioeconomic disparities targeting especially historically marginalized communities. It includes for example assistance for regularizing community property; building of infrastructure like road construction; support for the return and resettlement of people displaced due to the conflict.

Symbolic reparations measures included public gestures like public apologies from representatives of the State, official letters to victims, and public ceremonies. It also provided for the creation of commemorative monuments, transformation of locations linked to State violence into memory sites, as well as the permanent closure of places linked to State violence, renaming symbols or places associated with violations.

While Peru's reparation programme is quite comprehensive, one of its great weaknesses is that it excludes from the definition of victim individuals that the authorities consider to have belonged to a "subversive organization". Those individuals are not eligible for reparations, even if they have suffered grave human rights abuses like torture, rape, kidnapping, or assassination by state forces. In 2013 this exclusion was expanded to those charged with having committed crimes of terrorism or "apology of terrorism". This political manipulation of the reparation plan that aimed at excluding political opponents to the regime violates the obligation to provide effective remedies to victims without discrimination.

Also even though this program received strong support and funding, the amounts dedicated still fell short of the CVR's recommendations. The successive Peruvian governments tried through different means to diminish their financial contribution to the programme.

## Guatemala

In Guatemala the National Reparation Programme (PNR) created in 2003 also followed a broad definition of victim. It provides individual and collective reparation to civilians who suffered directly or indirectly, individually or collectively, the following human rights violations during the armed conflict: enforced disappearance, extrajudicial execution, physical and psychological torture, forced displacement, forced recruitment of minors, sexual violence, violations against children, massacres and injuries by indiscriminate attack, crossfire, persecution, and use as human shield, as well as by attempted arbitrary execution.

The plan includes material restitution and financial compensation, psychosocial support and rehabilitation and cultural restitution measures. It also provides support for burials of victims of the armed conflict.

But the Guatemalan State has never taken charge of the exhumations of missing and disappeared people. This task has always been carried out by civil society organizations and financed by the international community.

To date, the programme has had limited results. According to official data, between 2005 and 2015 the PNR has only compensated 32,802 victims out of a total of 200,000 dead and disappeared estimated in the Commission for Historical Clarification (CEH) Report.<sup>51</sup>

<sup>51</sup> See Denis Martinez & Luisa Gomez, A promise to be fulfilled: Reparations for Victims of the Armed Conflict in Guatemala, August 2019, <https://reparations.qub.ac.uk/assets/uploads/Guatemalan-Report-FNG-IR.pdf>. Impunity Watch, Reparations for Gross Human Rights Violations in Guatemala, 19 December 2018. <https://www.impunitywatch.org/post/event-on-transformative-reparations-for-victims-of-conflict-related-sexual-violence-in-guatemala>

Over time it has faced a gradual weakening mainly due to lack of political will and reduction of allocated budget as well as lack of capacity and experience from the officers in charge of the programme. The successive governments were also accused of using individual compensation as a clientelistic strategy.

## Colombia

Colombia has established what is defined by experts as the most ambitious programme to provide reparations for victims. It includes land restitution, access to education, psychosocial and healthcare, access to housing, education and employment, and financial compensations. Official dates for commemoration and other measures which allow the state and civil society to pay tribute to the missing and promote awareness of the issue were also established.

The Colombian government also provides for immediate humanitarian assistance that includes shelter, food assistance and immediate care to victims as well as measures to guarantee that child victims receive health care and education. It also guarantees payments for funeral expenses and guarantees financial assistance for victims' participation at handover and burial ceremonies.

A dedicated unit known by the name of "Unit for Reparations for Victims" was created to register victims (by 2020, 9 million victims were registered i.e more than 15% of the population).<sup>52</sup> Any person that considers themselves as a victim of grave human rights violations or humanitarian law which occurred before 1985 (no end date given) whether committed by armed groups or state agents is eligible for reparation. It also includes as victims the direct relatives of those who were killed or disappeared. Victims can apply as individuals and/ or as part of a group that collectively suffered violence.

The programme adopts a differentiated approach as it recognizes the specific impacts of human rights violations on vulnerable groups (women, children, indigenous groups, Afro-descendants, and other ethnic minorities) who can access the maximum amount of financial compensation offered through the program.<sup>53</sup>

But the real challenge for the Colombian reparation program is its implementation. The open registration process that led to the large number of victims that can pretend to benefit reparation measures represents a huge financial burden and threatens the government's ability to comply with its policy.<sup>54</sup>

<sup>52</sup> Interview with Alejandro Jimenez Ospina, Investigador en Centro de Estudios de Derecho, Justicia y Sociedad (Dejusticia)

<sup>53</sup> [https://www.ictj.org/sites/default/files/ICTJ\\_Report\\_ColombiaReparationsChallenges\\_2015.pdf](https://www.ictj.org/sites/default/files/ICTJ_Report_ColombiaReparationsChallenges_2015.pdf)

<sup>54</sup> For an analysis of the financial sustainability of the reparation policy see ICTJ, From Principles to Practice: Challenges of Implementing Reparations for Massive Violations in Colombia, October 2015.

## Recommendations for Syria

In Syria, where victims of the conflict number in the millions, the establishment of a comprehensive reparation programme will require strong political support and long term financial commitment.

Like in the cases of Colombia and Guatemala, it should recognize individual and collective harm (harm caused to particular communities or areas), and reparation measures should include financial and symbolic steps.

A broad definition of victims that includes all those who have suffered harm as a result of disappearance (direct and indirect victims) should be retained and no exception should be applied. There shouldn't be any discrimination in terms of community, region and current country of residence for the victim (given the large number of people displaced) and the Counter-Terrorism Law shouldn't be used to violate the rights of certain victims.

The design of a reparation programme should be based on a wide assessment of victims' needs that reaches out to families in all regions inside Syria and other countries of residence.

The process should look into the differentiated impact of the disappearance on the most vulnerable groups and devise a reparation mechanism that adopts a differentiated approach that can tailor provisions for particularly vulnerable groups. Particular consideration should be given to the impact of women and children, which have been shown to wear the brunt of the long term impact of enforced disappearance.<sup>55</sup> Former United Nations Deputy High Commissioner for Human Rights, Kyung-wha Kang, noted that "in societies where gender-based discrimination in laws and policies hinders the full realization of the human rights of women and limits their autonomy and participation in aspects of public and political life, the social and economic impact of disappearances is felt more strongly and, in turn, renders women and their children more vulnerable to exploitation and social marginalization."<sup>56</sup> This has definitely been the case in Syria so far.

The reparations programs that have been developed recently in other contexts should be analyzed further to understand their limitations and challenges, especially their financial sustainability, and to inform the peace negotiations discussions.

In parallel to these discussions, civil society actors and international organizations should reinforce their assistance to victims of enforced disappearance. Possible areas of intervention could include:

- economic assistance;
- access to education programmes for children of disappeared persons and literacy opportunities for women with no formal education;
- vocational training and access to employment;

<sup>55</sup> For an analysis of the impact of enforced disappearance on women and children and their needs, see Anna Fleicher, Gender Impact of enforced disappearances in Syria, Peace in Progress no. 38, Henrich Boell / [http://www.icip-perlapau.cat/numero38/articles\\_centrales/article\\_central\\_5/](http://www.icip-perlapau.cat/numero38/articles_centrales/article_central_5/) and Shadows of the Syrian Disappeared: Testimonies of Female Relatives Left with Loss and Ambiguity, Dawlaty and Women Now for Development, 2018.

<sup>56</sup> "Protecting women from the impact of enforced disappearances", OHCHR, 2012.

- access to health and psycho-social programmes. Families are alternating between mourning their loved ones loss and hoping for their return. This causes severe health and psychological problems.

Families of victims should also be supported in their efforts to memorialize their loved ones and to restore their dignity. This has proved to be very important to empower relatives of missing people, allow them to regain a sense of control over their lives and break their isolation.

These programmes should be accompanied by legal support to resolve administrative and legal issues related to the disappearance. Without having to declare their loved ones dead the family members' situation should be clarified in fields such as social welfare, financial matters, family law and property rights.

## 4. Participation of the victims

Associations of relatives of missing persons or victims of enforced disappearance play a vital role in seeking the truth about their loved ones and in the pursuit of justice, reparation and non- recurrence. They often do so at great personal risk. Such associations are often the first to document cases, collect information, try to locate gravesites and prompt the intervention of judicial authorities or international human rights bodies. From the experience of Argentina's "Grandmothers of the Plaza de Mayo" to Lebanon's Committee of the Families of Kidnapped and Disappeared, it is often the families that have kept the issue of the disappeared on the political agenda. This has also been the case in Syria and it is essential that victims and victims' associations participate in any process that aims to tackle the issue of the disappeared.

### Lessons from Other Experiences

Historically, the role of relatives of missing and disappeared persons is limited to providing information and receiving the remains of their loved ones (when possible). This was the only role assigned to families by the Commission on Missing Persons in Cyprus. During 25 years, from the establishment of the Commission in 1981 to 2006 when it became operational and it exhumed its first body, the families were left without any information about the progress of the investigation. This created a lot of frustration and disappointment among the families<sup>57</sup>.

But in recent experiences, the central role of the relatives of the missing and disappeared has been increasingly recognized. Their participation is crucial to build trust and legitimize the whole process, to ensure that the process designed meets their needs and minimizes the risk of harming them and retraumatizing them. The search can also benefit from their experience in searching for their loved ones. Open lines of communication are also important to balance expectations and feasibility, and ensure transparency and communication throughout the process so as not to raise false hopes.

<sup>57</sup> <https://www.youtube.com/watch?v=t2kvP08xkKU>

But families have to advocate strongly to ensure that their participation does not only remain a wishful thought -- consecrated by international human rights bodies -- but that it is translated into practice. It requires strong victims' groups that can ensure that their needs will be central to any effort and impose their participation in decision making and implementation processes. Engaging wide consultation processes and building consensus among families to avoid fragmentation that could weaken their demands and participation is very important.

In Colombia, victim's groups managed to impose their participation at each step of the search process. They have been involved in the early stage of the Special Search Unit work and played an important role in designing the search plan. 870 individuals and 124 civil society organizations who have historically worked on missing persons cases were consulted to share their experiences and the difficulties of the search process. It included among other members the LGBT+ community, women's groups, relatives of forcibly disappeared and kidnapped victims, exiled Colombians, and human rights organizations. Families are part of the advisory board of the search unit made of 12 members including delegates of victims' groups and international advisors. To ensure the effective participation of relatives, a technical division was also created inside the Special jurisdiction for Peace (JEP) to ensure continuous communication with families. A manual detailing how the families can concretely participate in the search was produced and is available on the website of the JEP.<sup>58</sup>

In Guatemala the Forensic Anthropology Foundation of Guatemala (FAFG), an independent expert organization that was charged by the authorities to search for the missing, set as a priority to inform the families at each step of the process and to keep open a line of communication. After initiating an investigation based on the request of the families, the expert team comes back to them with a report that confirms that the information they provided is introduced in their database and that they are actively working on their case. They also visit the communities to explain the search process and invite them to their offices to show how they treat the dead. When FAFG initiates an exhumation the relatives are informed and invited to attend the forensic work on the ground.

But families often face barriers to their participation, including security risks. It is essential to assess the risks and provide safe spaces for family engagement from the data collection phase to the exhumation and burial phase. This also includes the protection of their personal data.

In Colombia, victims are entitled to protection of their personal security and privacy. The Investigation and Accusation Unit of the Special Jurisdiction for Peace is in charge of studying requests for protection and to decide the measures applicable when victims and witnesses' personal safety is threatened.

It is also crucial to ensure the families' psychological well-being. People involved in the search process should have the capacity and skills to support families of missing persons and avoid re-traumatization. In Guatemala FAFG provides psychological accompaniment to the families of the victims during all the search process and especially during the exhumation and before the burial ceremony.

Another barrier that can prevent families' participation is when they are remote from the country of operations like the case of IDPs, refugees in other countries, or the relatives of missing migrants.

<sup>58</sup> [\\_https://www.jep.gov.co/Paginas/Participa-en-la-JEP.aspx](https://www.jep.gov.co/Paginas/Participa-en-la-JEP.aspx)



In Mexico a specific mechanism was established to face this important challenge: the Mechanism of External Support for Search and Investigation which aims at being a channel through which relatives of missing and disappeared migrants can be informed on the progress of the investigation and be closely involved with the operations of the search.

## Recommendations for Syria

Syrian families of missing - usually female relatives - have often had to struggle alone to find answers about disappeared relatives. Those in Syria faced isolation and security risks while many others found themselves as refugees in neighboring countries with little ability to mobilize.

The participation of the families in the early stages of any process to tackle the issue of the disappeared is crucial. It requires building a wide and strong network of relatives that represents all groups of victims without discrimination and that can voice their demands and impose their presence at the table of the peace negotiations as well as all other efforts driven by Syrian and international organizations.

But many challenges lie ahead. To date, it remains impossible for the families of disappeared to mobilize inside Syria. Even though their capacity to mobilize outside Syria has strengthened over the years, collaboration between the groups remains challenging for a number of reasons: many are dispersed in different countries; many are dealing with the trauma of loss and the fear that mobilizing would endanger their loved ones who may still be alive in prison; and the different fate of the disappeared (alive in detention or killed and buried in clandestine graves) and perpetrators involved (regime, opposition groups, ISIS) -- even though victims of the regime are far more numerous -- has at times lead the relatives to express different priorities which can weaken their demands or ability to mobilize as a cohesive group.

In recent years, some families, especially those who found themselves in safe places like Europe, often supported by local and international civil society, began to mobilize to voice their demands and some even organized themselves in associations of victims. A number of victims' groups have collaborated with human rights groups to undertake effective and high-level advocacy efforts.

The recent launch of the "Truth and Justice Charter" by a group of five organizations representing Syrian victims' and family members' organisations which presented a common vision on the question of Enforced Disappearance and Arbitrary Detention in Syria is a landmark in efforts aiming at aligning their demands and influence decisions at the political level.<sup>59</sup>

It is crucial to support these efforts and encourage the creation of spaces/platforms where family members can organize themselves, be empowered, exchange information and views in order to make well informed decisions.

<sup>59</sup> The five groups are: Caesar Families Association; Massar - the Coalition of Families of Persons Kidnapped by ISIS-Da'esh; Ta'afi; Families for Freedom; Association of Detainees and the Missing in Sednaya Prison.

## 5. Mechanisms Set in Place to Address the Issue of the Disappeared

The term “mechanism” refers to all institutions, organizations, bodies and processes formally or informally established by authorities to clarify the fate and whereabouts of missing persons and to provide support to their families.<sup>60</sup> Human rights bodies and experts’ organizations recognize the necessity of dedicated mechanisms to ensure a comprehensive response to the issue of the missing and disappeared. There are varying approaches and a broad range of mechanisms that are possible and their set-up is usually informed by the demands and priorities set forth by the families as well as the political context.

This section of the report will analyze the different mandates that can be assigned to a mechanism, especially the tension between a process focused on determining fate and whereabouts of victims without focusing on responsibilities (often referred to as a humanitarian mandate) and an accountability-based mandate. It also addresses the different institutional setups that are developed based on the political context and the existing national capacity to search and identify missing persons.

These different experiences/approaches can inform the discussions on a future investigative mechanism addressing the issue of the missing in Syria.

### 1. Mandate

Both approaches, humanitarian and accountability-based, are not exclusive and can be followed concomitantly, but in certain complex contexts (where a political transition does not take place or where peace is not attained), it is often the humanitarian approach that is chosen over one that emphasizes accountability because warring parties resist any determination of responsibility.

#### a) Search Mechanisms “Exclusively” Humanitarian

Exclusively humanitarian mechanisms are strictly mandated to identify missing persons and deal with the scientific and forensic aspects of the issue to the exclusion of all other needs of families of the missing. They do not look into the circumstances of the disappearance nor the identity of who is responsible.

This approach that aims to depoliticize the issue and adopt a purely technical approach was adopted in Cyprus where the warring parties (Greek Cypriots and Turkish Cypriots) agreed to establish a mechanism that focuses solely on the clarification of the fate and whereabouts of the missing and disappeared with a clear separation from any potential accountability processes. This strategy was supposed to be the most efficient way to obtain information in a context where a peace agreement was not reached and to speed up the search in order to address the most pressing needs of the families.

<sup>60</sup> M. Crettol, L. Milner, A.M. La Rosa, and J. Stockwell, “Establishing mechanisms to clarify the fate and whereabouts of missing persons: A proposed humanitarian approach”, *International Review of the Red Cross*, Vo. 99, No. 905, pp. 589-618 According to its mandate, Cyprus’ Commission on Missing Persons (CMP) “does not attempt

According to its mandate, Cyprus' Commission on Missing Persons (CMP) "does not attempt to establish the cause of death or attribute responsibility for the death of missing persons. Its objective is a humanitarian one, bringing closure to thousands of affected families through the return of the remains of their missing relatives."<sup>61</sup>

The information gathered by CMP cannot be transferred to the relevant judicial body. The crimes committed are not amnestied but an immunity is given to any person disclosing information.

This information is also withheld from the families of the missing who are not given any information on the circumstances of the disappearance, the identity of perpetrators or the cause of death. Families only receive from the forensic team in charge of the identification a multidisciplinary presentation in the CMP laboratory to explain the process, build confidence that the identification is the result of a high-quality scientific process and thus ensure that the families trust the result.

The same approach was adopted in Northern Ireland where the Independent Commission for the Location of Victims' Remains (ICLVR) was formed to find the disappeared following the Good Friday Agreement signed between the Irish and British Governments. The information provided to the ICLVR cannot be used for any purpose other than locating the remains of victims. Those responsible for the disappearances have a spokesperson who is in communication with the ICLVR to provide information and maps about the places where the disappeared are located. To reach out more effectively to the community, the ICLVR has also put in place a confidential free-phone service and post office box address through which information can be passed to it.

This type of mechanism usually allows for a more effective search process because they enable an information-sharing environment (often facilitated by legal incentives to provide information) and keep the search operations separate from political negotiations. But these mechanisms do not have the power to summon potential witnesses, and investigators in charge of the search rely solely on the witnesses' goodwill and readiness to cooperate.

Establishing an ad hoc mechanism independent from existing national bodies and structures also simplifies legal and administrative procedures. But it requires to put in place new capabilities and to inject a significant budget. In Cyprus, an investigative unit, a forensic team as well as an anthropological laboratory, had to be created from scratch.

But the argument that such humanitarian mechanisms will allow searches to take place regardless of political dynamics should be tempered by the fact that in practice, there is a still need for a political decision to facilitate the work. For example, in Cyprus, even though the CMP operational work could be conducted without interruption since the authorities from both sides agreed to separate the file from political negotiations (in the 2000s), the CMP discovery and access to sensitive mass graves still required behind the scene political negotiations. This shows that even exclusive humanitarian mechanisms cannot totally extract themselves from the political context they are operating in.

But the main criticism that is directed against this model is obviously that it jeopardizes the right to justice of families as well as part of their right to know.

<sup>61</sup> Ibid.

## b) Transitional Justice Mechanisms that Include the Missing and Disappeared

Historically, the issue of the missing and disappeared hasn't been dealt with through a specific and separate mechanism but rather as part of a broader set of violations tackled through a transitional justice mechanism (such as Truth Commissions).

Early transitional justice mechanisms were designed primarily to facilitate political transition rather than addressing victims' needs. Their objectives tended to focus on understanding patterns and responsibilities and promoting reconciliations after truth telling exercises. While most of them did not have the power to prosecute perpetrators, in their final report they usually recommended judicial investigations into the events that they documented to render justice to victims. But they often lacked the mandate and capacity to provide answers to families of the missing and disappeared in individual cases.

The South African Truth and Reconciliation Commission (TRC) created in 1996 has contributed to shed light on the violations committed under apartheid but did not provide answers to the families of the missing and disappeared. Through "amnesty hearings" - public hearings in which perpetrators were required to disclose the truth about the crimes they committed (in exchange of amnesty provisions) - the TRC was able to confirm the disappearance of 477 persons but it did not investigate these cases further. Also, the categories of missing persons that the Commission retained were limited and excluded another 1,500 cases according to the estimations of victims' groups and organizations working on the issue. Families of the disappeared had to prove that the disappearance of their loved ones had an explicit political connection or that the victims were involved in political activities.<sup>62</sup>

At the end of its mandate, in 2002, the Commission submitted the disappearance cases that were officially registered and where there had been no amnesty granted to the Government for further investigation.<sup>63</sup> It is only in 2005, almost 10 years after the TRC creation, that a Task Team was established to look into these cases, for prosecution purposes mainly and not to find the missing person. But for political reasons, these cases were not seriously investigated and most of the victims were left without answers on the fate and whereabouts of their loved ones and without justice.<sup>64</sup>

As a more recent example, the Tunisian "Truth and Dignity Commission" includes the issue of the missing as part of its broader mandate. It covers all human rights violations as well as acts of corruption that occurred between 1955 and 2013. The Commission is tasked to investigate the truth, determine the responsibility of the organs of the State or any other parties for the violations committed and propose remedies for non-repetition and develop a comprehensive individual and collective program for reparations.

The search for the disappeared is only mentioned in article 39 of the Organic Law on Establishing and Organizing Transitional Justice which stipulates that the Commission is responsible to examine the cases of enforced disappearance based on the declarations and complaints to be submitted thereto, as well as determine the fates of the victims. But the law does not provide any clarification on how to implement the search and does not grant

<sup>62</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3185365/>

<sup>63</sup> <http://www.saflii.org/za/journals/SPECJU/2015/5.html>

<sup>64</sup> For an analysis of the South African experience, see <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3185365/> and <http://www.saflii.org/za/journals/SPECJU/2015/5.html>

any technical capacities to the Commission.<sup>65</sup>

### c) Search Mechanisms that are Part of a Comprehensive Transitional Justice System

More recent mechanisms established in complex contexts aim to create incentives for people to share the information they have but without impeding the right to justice of families.

In Sri Lanka, the Office on Missing Persons (OMP) was established in 2016 following the adoption of a UN Human Rights Council resolution that was co-sponsored by Sri Lanka. Its mandate is to search and identify the missing persons as well as to clarify the circumstances in which they went missing (as opposed to exclusively humanitarian mechanisms which focus simply on identification). It is also mandated to identify avenues of redress to which victims are entitled and to make recommendations to the authorities. The OMP does not have a prosecutorial mandate but victims can seek justice through the Special Court established by the authorities to investigate crimes committed during the armed conflict. But while the OMP does not hinder the victims' right to justice, it cannot provide information that it gathers through its investigation to any judicial bodies. Its mandate states clearly that "its findings shall not give rise to any criminal or civil liability".

In Colombia, a Special Search Unit was created by the Peace accord in 2016 as a part of the Transitional Justice Mechanism. The Search Unit has a humanitarian mandate described as follows in the peace agreement: "This will be a high-level special unit of a humanitarian and extrajudicial nature, whose goal is to direct, coordinate and contribute to the implementation of humanitarian actions for searching for and identifying all the people deemed as missing due to the conflict who are still alive, and in the cases of those deceased, whenever possible, for the location and dignified delivery of their remains."

Like in Sri Lanka, the unit has no prosecutorial mandate and the information it receives cannot be used in judicial processes. But there is an exception made for the technical forensic data (the forensic reports including post-mortem data and artefacts found with the body):

In order to guarantee the effectiveness of the [Search Unit's] humanitarian work to satisfy as much as possible the victims' rights to truth and reparation and, above all, to alleviate their suffering, the information received or produced by the [Search Unit] cannot be used with the purpose of attributing responsibilities in judicial processes and will not have probatory value .... In any case, the forensic-technical reports and the material elements associated with the corpse may be required by the competent judicial authorities and will have probative value.<sup>66</sup>

The analysis of human remains and the forensic report produced by the search unit as part of the identification process are vital in the identification process but can also serve in establishing criminal liability. For this reason they can be shared to the Special Jurisdiction for Peace (SJP) that is, along with the Special Search Unit, one of the 5 other transitional mechanisms created by the peace agreement and that prosecutes acts considered serious breaches of international humanitarian law or serious violations of human rights.

<sup>65</sup> Organic Law on Establishing and Organizing Transitional Justice: <https://www.ohchr.org/documents/countries/tn/transitionaljusticetunisia.pdf>

<sup>66</sup> <sup>66</sup> Decree 589 of 2017, Art. 1; Legislative Act 01 of 2017, Transitory Art. 4.

The peace agreement also provides that the Special Search Unit shall cooperate and exchange information with the Truth Commission (3rd transitional mechanism) mandated among others to uncover the Truth about violations and establish the responsibilities.

The Colombian case has established a humanitarian mechanism to bring answers to the families about the fate and whereabouts of the disappeared while at the same time ensuring that the search will contribute to the victims' right to truth and justice.

## **2. Institutional set up**

Mechanisms put in place have a different institutional set up depending on the political context and the capacity available in the country of operation to search and identify missing persons - which usually depends on the judicial system and the forensic procedures and facilities.

### **a) Inter-party ad hoc mechanism under international oversight**

At the end of many conflicts that involve many regional players or have a strong international implication, ad hoc mechanisms can be created under the auspices of an international agency to bring together the former warring parties in a tri- or multipartite mechanism entirely devoted to the issue of the missing.

It is the model adopted in Cyprus where the Commission on Missing Persons was established in 1981 by an agreement between the Greek Cypriots and Turkish Cypriot communities with the backing of the UN. The CMP is composed of three members, two appointed by the Greek Cypriot and Turkish Cypriot communities respectively (but who are supposed to act independently), and a third member selected by the International Committee of the Red Cross and appointed by the United Nations Secretary-General.

The mechanism is independent and created from scratch its own technical capacity to locate, exhume, identify and return the remains to families. It established two teams of investigators, operating each in one side of the Island as well as a forensic archeologists team that is bi- communal, formed of Greek Cypriots and Turkish Cypriots. It also created its own anthropological laboratory installed in the buffer zone between the two territories and its own data bank managed by a non-cypriot staff paid by the UN. Only the DNA analysis is conducted outside of the country by a specialized laboratory in the US.

Every time a grave is discovered and there is suspicion that it is not related to a recent criminal case, the case is automatically transferred to the CMP, without even informing the general prosecutor. The CMP has the mandate to obtain access to the site and has a budget to compensate the owners of the land where a grave is suspected to be for the loss induced due to the excavation (agricultural land, destruction of buildings, roads, etc.). The judiciary does not intervene at all in the whole process except to formalize the identification by an administrative legal act.

The CMP is often presented as a successful humanitarian programme and a model of cooperation in a post-conflict environment: 1382 sites have been excavated and 994 individuals have been identified and their remains returned to their families.<sup>67</sup>

The presence, as a facilitator, of a representative of an international mechanism and the conduct of the technical work by specialists and representatives of each of the former belligerents can foster trust and facilitate the conduct of the operations.

But in such complex post-violence situations where peace is not attained, the search for the missing can be manipulated and used for political exploitation. Parties can also impede the work of the mechanism by among other means threatening people to prevent them from sharing information or by blocking access to information (police and army records, cemeteries records, etc.) as well as access to gravesites.

Such a model is also very costly because it requires building full capacity from scratch. While the estimated number of missing people in the country does not exceed 2,000 people, its annual budget reaches 3.5M € funded through donations mainly from the EU that covers 73% of the annual costs.<sup>68</sup>

#### **b) National mechanism dedicated to the search for the missing**

In post-conflict national contexts where some form of political transition/settlement was reached recognizing victims' rights, the search for the missing is often conducted by an official national mechanism created for this specific purpose. In these cases the main challenge faced is the coordination of the operations with existing State's bodies responsible for the search for missing persons and the management of human remains in normal cases -- namely the police, the judiciary and the medico legal system.

In Sri Lanka the Office of Missing Persons (OMP) was created as a permanent mechanism to search for the missing of the internal conflict. While it was given quite an extensive mandate to investigate -- including to summon witnesses; to request documents from the state; to inspect places of detention; and to grant protection to victims and witnesses -- it depends largely on the judiciary to implement its mandate.<sup>69</sup>

It must apply to the appropriate magistrate's court having territorial jurisdiction for a court order to carry out an excavation of suspected grave sites. Moreover the exhumation is not conducted by the OMP but by the judiciary which receives the funds from the OMP to hire experts to carry out the work. The OMP also has to ask for an authorization from the court to act as an observer during the exhumation as well as during at the several stages of the identification process that follow. Furthermore, the OMP has to make an application to the magistrate having territorial jurisdiction for the issuance of a search warrant as well as to enable the officers of the OMP to access information relevant to its investigation.

<sup>67</sup> <http://www.cmp-cyprus.org/>

<sup>68</sup> Annual budget of 3.5M €, among which 46% is dedicated to excavation and exhumation costs, 22% to anthropological analysis costs and 32% for genetic identification. 73% of the annual cost is funded by the EU. [http://ua.icrc.org/wp-content/uploads/sites/98/2019/04/ICRC\\_Report\\_Missing\\_Conference\\_Fin\\_Web.pdf](http://ua.icrc.org/wp-content/uploads/sites/98/2019/04/ICRC_Report_Missing_Conference_Fin_Web.pdf)

<sup>69</sup> [http://ua.icrc.org/wp-content/uploads/sites/98/2019/04/ICRC\\_Report\\_Missing\\_Conference\\_Fin\\_Web.pdf](http://ua.icrc.org/wp-content/uploads/sites/98/2019/04/ICRC_Report_Missing_Conference_Fin_Web.pdf)

This lack of independence by the OMP exposes the search for the missing to political changes and manipulation, and is one of the main reasons why, since its creation in 2016, no graves have been exhumed and no answers were provided to the families.

In Lebanon, the Law No.105/2018 that provides for the establishment of the Independent National Commission for the Missing and Forcibly Disappeared is based on the same model.

While the Commission is in charge to lead and coordinate the search for the missing, it lacks the authority to effectively implement its mandate. For example, while the Commission has the prerogative to protect gravesites that are at risk of destruction, it does not have the authority to enforce protective measures. When the Commission locates a mass grave it has to inform the prosecutor with territorial competence who has the authority to seize the site and to decide if there is sufficient evidence to protect it and excavate. In a context where strong political resistance to address the issue is still important and where the judiciary is not independent, there is a high risk that the Commission's work will be paralyzed.

In Colombia where the total number of disappeared and missing people is estimated at more than 100,000, the authorities had created in the past the National Search Commission for the Disappeared (Comisión Nacional de Búsqueda de Desaparecidos), mandated to investigate crimes of enforced disappearance.<sup>70</sup> But the Commission failed to provide answers to the families. This failure is mainly due the lack of economic support but also because of the restricted role of the Commission in the search process which was limited to coordinating the operations between the different State's entities, each in charge of some aspects of the search, like the Office of the Attorney General, the National Institute of Legal Medicine and Forensic Sciences (INMLCF), the Colombian Institute of Family Welfare (ICBF); the Ministry of the Interior, among others. Because the Commission did not have a leading role, the action of the different entities involved was disjointed or fragmented. Each entity was playing a specific role depending on their authority and competency but they were not contributing to the search process as such. Beyond the issue of ownership and territoriality, there was a lack of institutional experience in implementing the search processes.<sup>71</sup>

Based on this previous experience and as part of the Peace Accord (2016), the Colombian authorities created a dedicated ad-hoc unit to search for the missing "Unit for the Search for Persons deemed as Missing" (UBPD) which started formally operating in August 2017.

The unit has its operational and financial independence. In the last quarter of 2018, it had a \$26.3 million operating budget with a total of 522 staff.<sup>72</sup>

The unit still needs the collaboration of other State's bodies but as opposed to the previous Commission it is in charge of leading the search. The legislative Act establishing the UBPD states that "[T]he State's entities will provide all the collaboration required by the Unit. The participation of the victims and their organizations in all phases of the search, location, recovery, identification and dignified delivery of remains of people reported missing in the context and because of the armed conflict should be promoted."<sup>73</sup>

<sup>70</sup> <https://www.ictj.org/news/colombia-disappeared-obligations>

<sup>71</sup> [https://www.ubpdbusquedadesaparecidos.co/wp-content/uploads/2020/05/DocumentoPNB\\_05052020..pdf](https://www.ubpdbusquedadesaparecidos.co/wp-content/uploads/2020/05/DocumentoPNB_05052020..pdf)

<sup>72</sup> [http://ua.icrc.org/wp-content/uploads/sites/98/2019/04/ICRC\\_Report\\_Missing\\_Conference\\_Fin\\_Web.pdf](http://ua.icrc.org/wp-content/uploads/sites/98/2019/04/ICRC_Report_Missing_Conference_Fin_Web.pdf)

<sup>73</sup> Legislative Act 01 of 2017, Transitory Art. 3.



The operation procedures and the role of each entity involved in the search are detailed in the National Search Plan (Plan Nacional de Búsqueda, PNB), a document of 74 pages, developed by the search unit and launched in May 2020.<sup>74</sup>

### c) Expert-led search process

In some contexts where the authorities lack the capacity or the political will to establish official mechanisms to search for the missing and disappeared, expert organizations have stepped in to substitute for them.

In Guatemala, where the estimated total number of disappeared is 45,000<sup>75</sup>, the State has never taken charge of the search for the missing and disappeared from the internal armed conflict. No law was ever passed and no search mechanisms were ever established. In the 1980's, while the conflict was still ongoing, the families of the disappeared in rural areas tried to start exhuming the mass graves and asked for the support of forensic anthropologists present in Chile and Argentina. Over time, they managed to develop capacity inside the country and in the mid 1990's the Guatemalan Forensic Anthropology Foundation (FAFG) was established. This independent expert organization has developed important in-house capacity in order to conduct each step of the search for the missing: investigation and collection of Ante Disappearance Data and BRS samples, exhumation, forensic analysis of the remains, DNA identification and retrieval to families.<sup>76</sup>

In the 2000's, the internal armed conflict unit that was created under the human rights office of the Prosecutor office nominated FAFG as independent forensic expert to overview and implement the search for the missing. Since then, all cases related to the armed conflict were referred by the prosecutor office to FAFG. The latter has carried out excavations at approximately 1,650 grave sites and exhumed the remains of more than 9,000 victims.<sup>77</sup>

FAFG's operations are conducted by a team of 90 individuals, among them 65 conduct forensic work, and with a budget of 3.5 million USD a year. This budget is entirely covered by international cooperation funds as the State of Guatemala does not provide any funding.

Another innovative experience is the case of the Forensic Commission that was created in August 2013 to deal with the issue of missing migrants in Central America. At the initiative of civil society organizations from Mexico, Honduras, El Salvador and Guatemala this

<sup>74</sup> [https://www.ubpdbusquedadesaparecidos.co/wp-content/uploads/2020/05/DocumentoPNB\\_05052020\\_.pdf](https://www.ubpdbusquedadesaparecidos.co/wp-content/uploads/2020/05/DocumentoPNB_05052020_.pdf)

<sup>75</sup> <https://www.amnesty.org/en/latest/news/2012/11/city-disappeared-three-decades-searching-guatemalas-missing/>

<sup>76</sup> FAFG has 5 forensic departments:

- Investigation unit (interviews, collect DNA samples)
- forensic archeologists (exhumation)
- Forensic anthropologist (analysis of bones and cause of death and take sample of bone)
- In house DNA lab that analyses the sample to extract DNA profile that is integrated in the DNA bank
- Confirmation identification team (team who review all the information associated with the case to develop hypothesis of identification presented to identification committee to decide if enough certainty to confirm identification)

<sup>77</sup> Interview with Erica Henderson, Special Assistant to the Executive Director of the Forensic Anthropology Foundation of Guatemala (FAFG)

Commission was mandated to exhume, identify and return the mortal remains found in mass graves in connection with three massacres of migrants perpetrated between 2010 and 2012 in northern Mexico and to facilitate their repatriation to their countries of origin in a dignified manner.<sup>78</sup>

The Commission is a mixed body composed of the Attorney General's Office of Mexico, the Argentine Forensic Anthropology Team (Equipo Argentino de Antropología Forense, EAAF), committees of families of missing and disappeared migrants, and NGOs from El Salvador, Honduras, Guatemala and Mexico.

According to the Agreement establishing the Commission,<sup>79</sup> the Attorney General's Office and the EAAF are in charge of the scientific aspects, while civil society organizations provide data and information, and committees of families facilitate the establishment of contacts with relatives of missing and disappeared migrants.

The presence of civil society actors as well as the State-appointed and independent forensic experts (EAAF) allow to build trust among families of missing and disappeared migrants.

It is significant to see that while the Forensic Commission at present refers solely to exhumation and identification of the remains linked to the three massacres of migrants, the associations of relatives of Mexican disappeared persons have been advocating for having their cases dealt with by the same Commission. These families believe that the central role of an independent forensic expert would increase their chances to know the fate and whereabouts of their loved ones.

Where forensic capacity falls short of the challenges and where lack of trust among victims' groups toward the authorities impede the establishment of a State led process these experts led process constitutes interesting innovations. Nevertheless, these expert organizations lack sufficient legal means of exerting pressure on individuals reluctant to give them information. Also, they depend on the willingness of the authorities to access official information and burial sites.

### **3. Lessons Learnt for Syria**

Each mechanism described in this section is unique because it was designed for a given context. But from the analysis of these different mechanisms, we can draw some important recommendations for Syria to ensure a mechanism that allows for an effective search process that answers the needs of victims.

#### **1) Mandate based on the needs and priorities of victims**

The needs of the victims and their priorities should be central to any mechanism's mandate. While such mechanisms usually address other needs of society or are part of a broader transitional process aiming at building peace, this process should not be done at the expense of victims' needs.

<sup>78</sup> [https://international-review.icrc.org/sites/default/files/irrc\\_99\\_905\\_14.pdf](https://international-review.icrc.org/sites/default/files/irrc_99_905_14.pdf)

<sup>79</sup> Articles 4-9 and 15 of the Agreement

There should not be any discrimination in addressing the issue of the missing and disappeared. All victims should be included, without exception and all disappearances should be investigated whatever their circumstances and perpetrators.

Time limitation of the mandate is a sensitive question that should be negotiated in each context. It should be guided by feasibility questions rather than by political considerations and manipulations.

Search mechanisms focusing solely on clarifying the fate and whereabouts of the missing in order to increase their chance of success should not jeopardize other rights of families (right to justice and right to reparations). Such mechanisms should not grant amnesties and should facilitate victims' pursuit of justice through other judicial bodies.

Searching for the missing and disappeared is a very long and complex process that requires long term commitment and efforts. It is absolutely necessary to plan for a long term mandate that could be extended depending on the results achieved and the demands of victims.

## **2) Independence and leading role**

Any mechanism in charge of searching for the missing and disappeared should be independent while complementary to other State's bodies in charge of the search and identification of the missing and disappeared. It should have a leading role in the process and have the power to fulfill its mandate: notably have access to all places of detention, to official records, to witnesses, to potential mass graves; have the power to protect gravesites, centralize the ante disappearance data, DNA and post mortem data; create a registry of clandestine graves; establish the protocols of operations that should be followed and implemented by all the other State's bodies involved in the search process. Its independence and its leading role should be guaranteed by law.

## **3) Good coordination with other State's bodies**

It is essential to ensure proper coordination and interactions between the different entities involved in the different phases of the search. It should be based on a clear understanding of the State institutions and procedures in order to avoid duplication of tasks and optimize the knowledge and experience of each institution involved.

## **4) Financial and human resources**

A search mechanism should have the necessary resources to fulfil its mandate. An assessment of the existing capacity should be done to develop a capacity building plan to build and strengthen the local investigative and medico legal systems over time.

In a post-conflict setting, when the number of missing person cases is important a multidisciplinary forensic team with exclusive dedication to the process, as well as dedicated facilities should be established. Assistance by expert organizations should be provided to build local capacities and ensure that protocols put in place respect international standards

and best practices.

It is crucial to provide sustainable financial capacity to a search mechanism from its creation. The search operations are very costly and the absence of a dedicated budget could hamper the operations.

#### **5) Support and Participation of the Victims**

Victims should be involved in the search process from the design phase of the mechanism and should be present in the mechanism decision making structure. Their experience and knowledge of the search process should be recognized and their participation facilitated at each step of the process.

It is essential to ensure permanent exchange and interaction with victims during the search process through a dedicated unit established within the mechanism. This unit shall be responsible to liaise with the victims, ensure that the process is transparent and that their needs and questions are addressed.

The mechanism should also have the capacity to provide support to victims (legal, financial, psychosocial) during the search process, from the investigation phase until the identification and hand over of the remains. It requires specialized procedures and professional attention.

## **4. Political momentum and comprehensive legal framework**

The analysis of the mechanisms put in place in the different contexts shows that to address the issue of the missing and disappeared in a comprehensive and sustainable manner political will is absolutely required and should be supported by a clear and comprehensive legal framework.

### **1. Building and maintaining political momentum to address the issue**

Building political momentum on the importance of addressing the issue of the missing and disappeared is a long process that depends on many internal and external complex factors unique to each context. Through the analysis of the experiences of Colombia and Lebanon, this section of the reports highlights some recommendations for Syria.

## Colombia

In Colombia the victims of the internal armed conflict, and especially the issue of the missing and disappeared, were from the start at the center of the negotiations between the Colombian State and the FARC-EP which culminated in the the Final Agreement signed on 24 August 2016 to end the conflict.

Accord #62, which is one of several agreements signed during the negotiations by both parties to de-escalate the conflict and build confidence in the peace process, addresses specifically the plight of Colombia's missing and disappeared.<sup>80</sup> This accord, signed on October 17, 2015, provides for several humanitarian measures as well as institutional changes to tackle the issue.<sup>81</sup> The parties agreed on immediate measures to accelerate the search for, identification of, and dignified return of the remains of missing persons to their families:

- They called on the ICRC and the National Institute of Forensic Medicine, with the support of the attorney general's office, to consolidate relevant information from the government, the FARC-EP, and victims' organizations.
- The Colombian government agreed to accelerate the identification of those without name—including victims of extrajudicial executions and those who died during security operations and were deposited anonymously in cemeteries—and to turn over their remains to family members.
- The FARC-EP agreed to turn over information to help locate and identify victims.
- The ICRC will assist as needed in contacting family members of the missing members of the FARC-EP.

The parties also agreed that a new search unit for the missing (Unidad de Búsqueda de Personas Desaparecidas) will be created once a final peace accord is signed by the two parties.

Accord #62 was the result of a broader political momentum on the need to put an end to the 50 year-long conflict mainly attributable to a changing national and regional political context. Following two failed attempts at formal talks between the two parties in 1984 and 1999, the FARC-EP came back to the negotiations table after realizing they would never reach a military victory over the state and in a context where leftist politicians and opponents in neighbouring countries were coming to power through the ballot. On the other side, the State accepted to negotiate peace because, despite some successes on the battlefield and the government's success in turning the vast majority of public opinion against the FARC, it was pressured by its population to prevent further loss of lives.<sup>82</sup>

<sup>80</sup> In Spanish there is only one word to describe missing and disappeared: desaparecidos

<sup>81</sup> <https://www.usip.org/publications/2016/07/colombias-peace-accord-missing>

<sup>82</sup> Norwegian Peacebuilding Research Centre, Innovation in the Colombian Peace Process, Kristian Herbolzheimer, June 2016.

But critics denounced the depoliticization of the issue and the “homogenization” of victims who were presented as ‘victims of the 50 years of conflict’ which had the effect of concealing the absence of a genuine peace and reconciliation and tended to prioritize the need to turn the page for the sake of a peaceful future.<sup>83</sup> They also regretted that Colombians’ faith in legalism was manipulated by those in power to make the population believe that the transformative capacity of the law can be an alternative to the chronic failure of the authorities to address human rights violations and enact other concrete measures on the ground.

Indeed, while the peace accord led to the establishment of comprehensive transitional justice mechanisms enshrined in the legislation (search unit for the missing, truth commission, special jurisdiction for peace, administrative reparation program, the guarantee of non-recurrence institution), its implementation was blocked or delayed by several political maneuvers to slow down the operations, especially the work of the special jurisdiction for peace (the judicial component of the Transitional justice system put in place). The current ruling party has even called for a referendum to dismantle the Comprehensive Transitional Justice System. Colombia’s experience shows the fragility of any peace process and the importance of long- term political commitment to the issue of the disappeared even in contexts where comprehensive and well-laid out legal frameworks were successfully adopted.

## **Lebanon**

In Lebanon, the issue of the missing and disappeared was totally absent from the peace negotiations that were held in Taëf in 1990. The accord was signed between the militia leaders who were all responsible for the disappearance of thousands of people. No external political pressure from the sponsors of the peace agreement were exerted on them to address the issue. The families of the missing and disappeared were politically weak and socially invisible because unlike in post-dictatorship contexts where they became the symbol of political opposition, the families in Lebanon were from all communities and the victims of diverse armed groups. The society, tired by 15 years of war and eager to reconstruct the country, accepted this peace deal that denied all victims’ rights.

Yet, the families of the missing never stopped mobilizing to demand answers. Unlike families of the missing in other countries of the region, they did not face violent repression from the authorities. Instead the political leaders ignored or manipulated their plight. While in 2000 and 2001 the authorities established two official commissions to address the issue, all families’ associations and CSOs agree that these commissions were designed to fail and shut the case once and for all without providing any answers. The strategy of the political leaders was aimed at gaining time, hoping that the issue would fade away as parents of the disappeared got older and the chances to find any of the missing declined.

<sup>83</sup> [https://www.researchgate.net/publication/329677096\\_The\\_Political\\_Lives\\_of\\_the\\_'Disappeared'\\_in\\_the\\_Transition\\_from\\_Conflict\\_to\\_Peace\\_in\\_Colombia](https://www.researchgate.net/publication/329677096_The_Political_Lives_of_the_'Disappeared'_in_the_Transition_from_Conflict_to_Peace_in_Colombia)

In Lebanon, the fate of a victim is generally thought to have depended heavily upon the identity of the perpetrator. This initially led to the creation of multiple groups of victims and human rights organizations depending on the suspected perpetrator (Israel, Syria, different local militias), with these groups emphasizing different strategies and solutions, contingent on the perpetrators' identities. This started changing at the end of the 2000's when victims' groups came together to work on drawing a collective strategy that focused on the right to know of all the families of the missing and disappeared. In 2008, a memorandum signed by 17 Lebanese human rights organizations was submitted to the President of the Republic demanding among other things an investigation to be initiated; mass graves to be located and exhumed across the Lebanese territory; a DNA database of the relatives of all those disappeared to be created; a "Truth and Reconciliation Commission" to be set up; and that a national, independent and neutral commission be created to manage and implement this plan, and to be composed of lawyers, civil society representatives, forensic specialists, and international NGOs.<sup>84</sup>

While the government pledged to deal with the issue "to resolve it as soon as possible" the authorities never took any serious measure. Faced by the authorities' inaction, in 2012, the families' associations supported by CSOs drafted a law for the creation of an official mechanism to investigate the fate and whereabouts of their missing relatives. It was followed on 4 March 2014 by a historic decision of the Council of State - the highest administrative court - that acknowledged the "Right to Know" of the families of the missing and disappeared

when it ruled that families should be allowed access to the investigation files and the full reports of the Commissions of Inquiry on the Missing and Forcibly Disappeared in Lebanon formed in 2000.

On 16 April 2014, members of parliament Ghassan Moukhayber and Ziad al-Kadir announced the submission of a draft law to Parliament to "establish an official entity which would have all the needed prerogatives to handle this issue [of missing and forcibly disappeared persons] so that we reach a day where we bring back those alive [among them] and even the remains of those who are dead."

Four years later, 27 years after the end of the conflict, the Parliament finally passed the Law on Missing and Forcibly Disappeared Persons (Law 105), mainly inspired by the draft law previously submitted by the families' associations.<sup>85</sup>

<sup>84</sup> [https://www.actforthedisappeared.com/sites/default/files/Resource%20Documents/Article\\_LynnMaalouf\\_ENG\\_0.pdf](https://www.actforthedisappeared.com/sites/default/files/Resource%20Documents/Article_LynnMaalouf_ENG_0.pdf)

<sup>85</sup> The draft law was adopted on 12 November 2018.

Even though the adoption of the Law is the result of the relentless efforts of family associations and CSOs, for many it came quite as a surprise. The reasons that triggered that political change are complex and partially related to internal political dynamics. But we can draw some lessons for Syria:

- The unification of the voice of the families' associations and human rights NGOs and their joint advocacy efforts behind a common and clear objective -- the adoption of the draft law -- fostered political momentum within a Parliament that was recently elected (on May 6th 2018) -- the first election since 2009.
- The draft law that was adopted provides for the creation of an investigative mechanism only in charge of investigating the fate and whereabouts of the missing and retrieving their remains to their families, without establishing the responsibilities of the perpetrators. The immunity given to any person disclosing information is clearly one of the main reasons behind the passing of the law. This huge concession over the right to justice of the victims was made by the main committee of the families of the missing who wanted to address the most pressing need of the families -- their right to know -- in a context where "it is the best we can get".
- Another reason we believe the political decision-makers agreed to have the Law passed is their capacity to block the operations of the investigative commission. Indeed, even though the Law gives the Commission a large mandate, its capacity to implement it depends largely on the judiciary and the police, which have been stacked by people affiliated with the sectarian leaders. Also, even though the law states that the Commission should be financially independent, it does not provide it with a dedicated budget which renders it ultimately dependent on the government's goodwill. While the law provides that 75% of the total budget of the Commission can be covered by donations and financial support from local or international entities (with the remaining quarter to be covered by the State), it provides the government with the capacity to control access to these external funds as any external funding should be "in conformity with laws in force and approved by virtue of a decree issued by the Council of Ministers."<sup>86</sup> This provision could be used to prevent the Commission from accessing external funds.

While the Law 105 is a milestone in the long struggle to get the Lebanese State to assume responsibility to clarify the fate and whereabouts of the missing, family associations and CSOs will have to redouble efforts to stop political blockages and manoeuvres and ensure a proper implementation of the Commission's mandate.

<sup>86</sup> Article 23 and 24 of Law 105, Section 3 Finances and Budget of the Commission



## Lessons learnt for Syria

Building political momentum on the issue of the missing and disappeared requires a multitude of factors and involves many players that will differ from one context to another. As such it is impossible to draw up a model to follow for Syria but important lessons can still be highlighted from the experiences of Colombia and Lebanon.

### 1) Introduce urgent measures to shed light on the fate of missing as a precondition to any peace agreement

Any meaningful peace accord should include as a precondition an agreement between belligerents on urgent measures that can shed light on the fate of the missing and disappeared (the “humanitarian” approach). This is crucial to build trust and ensure that the issue will remain a priority.

UNSCR 2254 emphasizes the need to take confidence building measures to move actors towards a political settlement which includes the release of any arbitrarily detained persons.

In his 29 August 2019 briefing to the Security Council, Special Envoy for Syria Geir Pedersen said that meaningful action on detainees, abductees and missing persons would help open up space for the political process. He noted that “the launch of a constitutional committee should be accompanied by measures that have real impact on the ground. Real action on detainees, abductees and missing persons could be one such measure, if done in a meaningful way and on a meaningful scale.”<sup>87</sup>

The UN launched the Syrian Constitutional Committee in October 2019 composed of 150 Syrians, divided equally between Syrian government-backed officials, various opposition groups, and Syrian Civil Society to implement the UNSCR 2254 measures toward a political settlement, including the drafting a Constitution and preparing for free and fair elections.

But while the Committee held its fifth and last meeting on 25 January 2021, none of the steps were taken. Critics, which consider that the Committee had lost the little legitimacy that it had, call for aborting the committee’s activity and create a new diplomatic mechanism to implement UNSCR 2254 either in addition to or in replacement of the existing committee.<sup>88</sup>

Whatever the mechanism, the Colombian experience shows that building momentum for political settlement offer requires pre-accords with limited objectives and concrete results achievable quickly to demonstrate willingness and capacity to offer answers.

<sup>87</sup> <https://undocs.org/en/S/PV.8609>

<sup>88</sup> <http://jcl-mena.org/talk-entry.php?bid=3>

One of these specific accords should be dedicated to addressing the situation of the detainees, abductees and missing persons. The measures to be taken are detailed in a number of reports published by international human rights organizations and the UN and should tackle:<sup>89</sup>

- Conditions of detention

The Syria government and all other parties to the conflict must ensure that all persons deprived of their liberty are kept in decent conditions and not subjected to torture or cruel, inhuman, or degrading treatment. And execution of detainees should cease immediately. Detainees should be provided adequate food, water, clothing, shelter, personal hygiene, and proper and qualified medical attention.

- Access to prisons by independent organizations

The Syrian government and all other parties to the conflict must provide independent and humanitarian organizations unhindered access to all places of detention, including official prisons, pretrial detention centers, intelligence service detention facilities, administrative detention areas, hospitals, psychiatric institutions, and informal or unofficial places where persons are detained or interned.

- Cease incommunicado detention

The Syrian government and all other parties to the conflict should produce lists of their detainees, jointly with independent and humanitarian organizations, specifying the legal status and location of all those being deprived of their liberty. They should transfer detainees without delay to official places of detention, or to medical facilities for treatment. All detainees should be allowed to contact their families and have access to a lawyer.

- Urgent and humanitarian releases of prisoners

In accordance with UNSC Resolutions 2254 (2014) and 2258 (2015), the Syrian government and all parties to the conflict should immediately and unilaterally release detained persons who are vulnerable, such as the sick, the elderly, children, women, and the disabled. All people arbitrarily detained or serving sentences for offenses related to the exercise of fundamental guarantees set out in the International Covenant on Civil and Political Rights (which was ratified by Syria on 23 March 1976), in particular freedom of thought, conscience, and religion, freedom of expression and information, and freedom of assembly and association, should be unconditionally released on an urgent basis.

<sup>89</sup> See for example, ICTJ, [https://www.ictj.org/sites/default/files/ICTJ\\_PolicyPaper\\_Syria\\_Gone\\_Without\\_a\\_Trace\\_web.pdf](https://www.ictj.org/sites/default/files/ICTJ_PolicyPaper_Syria_Gone_Without_a_Trace_web.pdf); HRW, <https://www.hrw.org/news/2019/05/13/syria-tell-families-missing-fate-loved-ones>; UN Commission of Inquiry, A decade of arbitrary detention and imprisonment, March 2021

- Return of the remains of those who died

The Syrian government and all other parties to the conflict should immediately return the remains of those who were extrajudicially executed, summarily killed, or died in detention to their families to allow for proper burials and funeral rites. They should inform their relatives of the circumstances of their disappearances and deaths.

- Protection of mass graves and support ongoing exhumations

The Syrian government and all other parties to the conflict should take urgent measures to protect mass graves, support ongoing exhumations and ensure proper storage of data. They should facilitate the collection of Ante Disappearance Data and Biological Reference Sample by independent and humanitarian organizations to identify the mortal remains or preserve for future identification.

- Protection of those searching for the missing

The Syrian government and all other parties to the conflict should ensure that those involved in the search for victims of enforced disappearance, notably the relatives, are protected against ill-treatment, intimidation, reprisal, arrests and enforced disappearance.

These urgent and humanitarian measures should be prioritized through the adoption of a specific accord prior to addressing other non urgent issues that require a genuine political settlement.

## 2) Address the issue comprehensively in a future peace agreement

Any future peace agreement should address the issue of the missing and disappeared comprehensively and address victims' right to truth, justice, and reparation and guarantee that there will be no repetition of the crime of enforced disappearance.

As the Lebanese and Colombian experiences show, victims' right to justice is one of the most sensitive issues within any post-conflict peace negotiations. It is often put in balance with the right to truth.

Depending on the context and the power dynamics, setting priorities in the negotiation process can be a necessity but it is essential to have a clear roadmap and be very clear on non-negotiable points, like the rejection of impunity for the perpetrators of war crimes and crimes against humanity.

### **3) Build consensus and capacity among victims' representatives**

The role and participation of victims in shaping any accord on the missing and disappeared is essential to build trust and ensure effective solutions. Consensus should be built among victims' groups and CSOs to strengthen their capacities to influence the political process.

It is also important to increase their understanding of the issue, the points of tensions that may arise and the mechanisms that can be set in place to enter into the negotiations.

### **4) Maintain pressure and keep political commitment**

Over the last decade many countries passed comprehensive laws that address the issue of the missing and disappeared. But in most cases the problem lies in the lack of effective implementation due to a lack of political will that often takes the shape of institutional obstruction, weak cooperation between the different official bodies set up for the task, or insufficient resources set aside for the task. It is essential to maintain political commitment and ensure that the authorities respect the strict implementation of any adopted law.

## **2. Creating or adapting the Constitutional and legal framework**

A new legislative and constitutional framework should be established to ensure a comprehensive response by State bodies as well as to prevent the obstruction or challenge of any agreement reached on the issue of the disappeared within a peace deal.

Syria does not have special legislation that deals with the issue of the missing and disappeared. Existing legal provisions only focus on the time period and procedures necessary in declaring a missing person dead.<sup>90</sup> Syria has also not ratified the Convention for the protection of all persons from enforced disappearance.

Based on an analysis of the legal frameworks developed by other countries' to address the issue of the missing as well as recommendations developed by the UN working group on Enforced Disappearance,<sup>91</sup> this section of the report presents the legal provisions required to prevent enforced disappearance and ensure effective investigations and reparations to the victims.

### **a) Constitutional Provisions**

Historically constitutional negotiations did not tend to tackle questions of enforced disappearance. It was left to either direct negotiations between warring parties or to post- conflict governments and Parliaments to tackle. However in recent years the issue of enforced disappearance has finally made its way to constitutional drafting as it became an important way to ensure that such practices do not get repeated or the rights of victims are not diluted.

There are two types of constitutional provisions.

### 1) Protection and Preventive Provisions

Recent progressive Constitutions provide for a broad human rights protection framework and have established a long list of rights with the corresponding obligations of the State. Below are the fundamental rights that are essential to protect individuals against enforced disappearance.

- Right to life, dignity, security and liberty

The right to life is inalienable. Every person shall have the right to live with dignity and shall not be deprived of his or her personal liberty except in accordance with law. Every person shall have the freedom of opinion and expression, freedom to assemble peaceably, freedom to form political parties, freedom to form unions and associations, and freedom to move.

- Right not to be tortured or treated in an inhuman or degrading way

No person shall be subjected to forced sequestration, physical or mental torture or to cruel, inhuman or degrading treatment.

- Right against preventive detention

No person shall be held under preventive detention unless there is a sufficient ground of the existence of an immediate threat to sovereignty, territorial integrity or public peace and order. Information about the situation of a person who is held under preventive detention must be given immediately to his or her family members or relatives.

- Right against unlawful detention

No person is arbitrarily deprived of freedom by any means—capture, arrest, detention, imprisonment, etc.— and that any deprivation of liberty may only be carried out in strict compliance with the conditions and procedures established by law (according to a judicial decision). Secret detention or unacknowledged detention shall be prohibited.

<sup>90</sup> [https://www.icmp.int/wp-content/uploads/2020/05/icmp-gr-mena-065-6-w-doc-stocktaking-\\_missing-persons-in-north-east-syria.pdf](https://www.icmp.int/wp-content/uploads/2020/05/icmp-gr-mena-065-6-w-doc-stocktaking-_missing-persons-in-north-east-syria.pdf)

<sup>91</sup> Report of the Working Group on Enforced or Involuntary Disappearances on standards and public policies for an effective investigation of enforced disappearances, Human Rights Council, Forty-fifth session, 14 September–2 October 2020. <http://www.undocs.org/A/HRC/45/13/Add.3>

- Right to justice and fair trial

All persons arrested, detained, or accused of a crime have the right to be informed of the reasons for their detention and provided with access to effective legal counsel and, where needed, free legal aid. They have the right to be judged by competent, independent, and impartial courts pre-established by law; the right to be presumed innocent until he/she is proved to be legally guilty, to an appropriate public trial without unreasonable delay; to present evidence and to refute evidence alleged against the accused; the right to an effective appeal; and not to be placed in double jeopardy for the same act.

- Right to access information

A victim of crime shall have the right to get information about the investigation and proceedings of a case in which he or she is the victim.

These fundamental rights cannot be suspended in any cases, including during the states of exception. Some constitutions even state that ratified international treaties that recognize human rights take priority over national laws and that the protections contained in such treaties cannot be limited during states of emergency.

## 2) Provision for remedies

Many constitutions state that victims have the right to an effective remedy through the recourse to an independent authority that has the power to decide whether a human rights violation has taken place and to provide a remedy in the sense of ordering the cessation of the violation and/or reparation for damages done.

The State's obligation to ensure effective remedies is not limited to violations of human rights committed by agents of the State but also encompasses crimes committed by private individuals or entities.

The Constitution of Nepal (20 September 2015) provides for the creation of a National Human Rights Commission with the duty to "respect, protect and promote human rights and ensure effective enforcement thereof." The Commission has the power to inquire and investigate complaints of violations of human rights and make recommendations for action against the perpetrators. It can act on its own initiative or after being petitioned by a victim or any person acting on their behalf.

The Constitution of Iraq states that victims of human rights violations have the right to seek compensation for material and moral damages. It creates a High Commission for Human Rights

(Article 102 of the Constitution) and a commission named The Martyrs' Foundation (Article 104 of the Constitution) whose mission is to "deal with the general situation of the martyrs' families and to compensate them materially and morally". It also provides for the State to "guarantee care for the families of the martyrs, political prisoners, and victims of the oppressive practices of the defunct dictatorial regime and shall guarantee compensation to the families of the martyrs and the injured as a result of terrorist acts."

### a) Specific laws and other administrative measures

Countries that have tackled the issue of enforced disappearances have often done so by enacting a series of laws. Some countries have tried to address this by presidential or governmental decrees but experience has shown that for a durable and sustainable solution a legislative framework is to be recommended.

In certain countries these issues were treated separately in different pieces of legislation while others have tended to adopt a comprehensive legislation that integrate all aspects of the issue (investigation, data protection, prosecution, reparation).

While the legislations differ between different countries they tend to tackle the following issues that Syria will need to address legislatively.

#### *Recognition of the right to the truth as an autonomous and independent right.*

The right to the truth (also called the right to know the truth) has emerged as a legal concept even though it has not yet been the object of a specific international convention.

The right to the truth applies to serious violations of human rights, but is most explicitly recognized with regards to enforced disappearances.

The International Convention for the Protection of all Persons from Enforced Disappearances (ICCPED) guarantees the right of relatives of the missing or disappeared to learn the fate and whereabouts of their loved ones and as such confirms the right to the truth as an enforceable right in itself.

This includes the right to know about the progress and results of an investigation, the fate and the whereabouts of the disappeared persons, the circumstances of the disappearances, the cause of death and the identity of the perpetrator(s).<sup>92</sup>

Over the last decade certain regional and national courts have confirmed the enforceability of this right within their jurisdictions. It is the case of Lebanon where the Lebanese high judicial authority, namely the Shura Council, ruled on 4 March 2014 that families of missing and disappeared persons should be given access to the investigation files and full report of the Commissions of Inquiry on the Missing and Forcibly Disappeared in Lebanon based on the recognition of their right to know. This right was later reasserted and recognized as an autonomous and independent right in Law 105 in its article 2:

*Family members and close parties have the right to know the fate of their missing or forcibly disappeared family members and relatives, their whereabouts, the location of their detention or abduction, and the location of their remains, which they shall also be entitled to obtain. This right also includes burial site location, collection, exhumation, and examination of remains, and determining the identity thereof.*

<sup>92</sup> United Nations Working Group on Enforced or Involuntary Disappearances, *General Comment on the Right to the Truth in Relation to Enforced Disappearances*. A/HRC/16/48

But as mentioned earlier, in Lebanese legislation the right to know of the families of the missing and disappeared is restricted as it does not include the cause of death and the identity of the perpetrator(s).

The Lebanese legislation also recognizes the right to be informed as an independent right. Law 105 in its article 3 states that:

*Family members and, in the event of their absence, close parties, have the right to access all information pertaining to tracing missing and forcibly disappeared persons and to all investigations not legally subject to confidentiality that determine his fate, within the mechanisms specified in accordance with this Law.*

### *Criminalization of the act of enforced disappearance*

The right to justice for victims of disappearance and their relatives is recognized in the International Convention for the Protection of all Persons from Enforced Disappearance. It establishes that the State should take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law and make the offence punishable by appropriate penalties which take into account its extreme seriousness<sup>93</sup>.

Specifically criminalizing the act of enforced disappearance and incorporating it as a distinct criminal offence into the Criminal Code makes it easier to prosecute the perpetrators.

It is also crucial to have a clear definition of the constitutive elements of the offence of enforced disappearance and reflect the internationally recognised definition as articulated in Article 2 of the Convention on Enforced Disappearance:

*[...] 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.*<sup>94</sup>

Even though acts committed by non-state actors are not specifically mentioned in the Convention, such acts should be qualified as acts of enforced disappearance and should be investigated by the States.

<sup>93</sup> International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, [A/RES/61/177](#), Article 4

<sup>94</sup> International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, [A/RES/61/177](#), Article 2



National legislation should also make the widespread or systematic practice of enforced disappearances a 'crime against humanity' in criminal law as per article 5 of the Convention on Enforced Disappearance;

*The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.*

The statute of limitation is not applicable to the crime of enforced disappearance. An inherent characteristic of this crime is that it continues as long as the fate and whereabouts of the victim have not been established and the case remains unresolved. The continuing nature of the violation is explicitly affirmed in Article 17 of the Declaration on the Protection of all Persons from Enforced Disappearance<sup>95</sup> and in Article 8 of the Convention on Enforced Disappearance.

The sentence for enforced disappearance should be commensurate with the seriousness of the offence. Article 18 of the Declaration categorically states that persons who have or are alleged to have committed offences of enforced disappearance shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction.

Mitigating factors should be limited to conform to Article 4 of the Declaration and Article 7(2) of the Convention on Enforced Disappearance which states that:

*Each State Party may establish: (a) Mitigating circumstances, in particular for persons who, having been implicated in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person forward alive or make it possible to clarify cases of enforced disappearance or to identify the perpetrators of an enforced disappearance;*

### ***Obligation of the State to investigate including through establishing an investigative mechanism***

The right to know is correlated to the obligation of the State to provide information to victims or to their families or even society as a whole about the circumstances surrounding serious violations of human rights.

The State has the obligation to investigate cases of disappearance, including crimes committed by non-State armed groups. In its article 3, the Convention on Enforced Disappearance states that:

*Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.*

<sup>95</sup> United Nations General Assembly, Declaration on the Protection of all Persons from Enforced Disappearance, Resolution 47/133, 18 December 1992. Article 17

The Search for the disappeared persons should be continued until they are found. If the person is found dead, the search should be considered as completed when the person has been fully identified in accordance with international standards and handed to his or her family in a dignified manner.<sup>96</sup>

In post conflict contexts or when the number of missing persons cases is very high like in Mexico, the existing legal systems don't have the resources to address the issue and specific search mechanisms have to be created.

National legislation should detail the modalities for an effective investigation. It should include provisions related to the collection, storage and protection of data (including gravesites), the recovery and transportation of human remains, the laboratory analysis and identification process, the storage and final deposit of unidentified human remains, the archive of non- identified cases and the communication with the relatives and notification of results.

It should establish clear roles and responsibilities of each competent authority and specialist and clarify how they will coordinate/collaborate.

### *Protection of data (including DNA) and gravesites*

States should adopt appropriate legal provisions on data protection. It should include measures for protecting the integrity of unidentified remains and for the protection of places of clandestine burial.

In Iraq, a 2006 law has been enacted solely dedicated to the protection of mass graves. The law formulates four aims: (1) to protect the graves from unauthorized disturbance; (2) to provide legal regulations for mass grave investigations and their legal consequences; (3) to preserve and protect evidence to identify victims and (4) to identify perpetrators and collect evidence to prove responsibility. The law also places a duty on all persons who know about a mass grave's existence on their land to report it to the authorities within 30 days of the law's enactment. Implementation, and presumably enforcement, of the law is facilitated through the establishment of a regional commission to facilitate and oversee the mass grave investigation and recording with a view to identifying the victims.

National legislation should also include measures to protect victims' information, including genetic information obtained from the exhumed remains and the relatives of the missing. It should provide for the creation of a secure database system on missing persons and institute safe and trusted processes for the collection and processing of genetic reference samples from families of the missing and from human remains.

<sup>96</sup> UN Committee on Enforced Disappearances. *Guiding principles for the search for disappeared persons*, adopted by the Committee at its sixteenth session (8-18 April 2019)

### *Provision of Reparation for Harmed Suffered*

Reparations are measures taken by the State to redress gross violations of human rights or humanitarian law through compensation, restitution and rehabilitation measures to the victims. Reparations can be material (financial compensation, medical and psychological care, legal and social services) as well as symbolic (acknowledgment, apology, memorial).<sup>97</sup>

National legislation should provide adequate remedy and reparation to the victim and/or his/her family. The definition of who is a “victim” should be in accordance with international standards provided under Article 24 of the Convention on Enforced Disappearance.

*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.*

The right to reparation should be applied in a non-discriminatory manner.

<sup>97</sup> United Nations General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Resolution 60/147, 16 December 2005.

