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人权理事会
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促进和保护所有人权——公民权利、政治权利、
经济、社会及文化权利，包括发展权

强迫或非自愿失踪问题工作组关于有效调查强迫失踪的标准和公共政策的报告* **

概要

秘书处谨向人权理事会转交强迫或非自愿失踪问题工作组关于有效调查强迫失踪的标准和公共政策的报告。

工作组在报告中提请国际社会注意有罪不罚是强迫失踪的一个显著特点。工作组继续注意到令人震惊的有罪不罚现象，其中既涉及过去的强迫失踪行为，也涉及在世界不同地区发生的新失踪事件。

有罪不罚会产生倍增效应，给受害人及其家人带来更多的痛苦和折磨。工作组认为，在这种痛苦面前，国际社会不应保持中立。相反，必须加强合作努力，增加对受害人的援助，并在地方和国际层面进行司法调查和起诉。

强迫失踪的独特组成部分——特别是国家工作人员的参与以及隐藏信息和掩盖罪行的企图——使得调查必须要有必要的独立性和自主性。

调查方面的拖延通常是由司法程序期间面临的多种障碍造成的，包括证据的销毁或灭失以及犯罪人、受害人和证人的死亡。这些障碍可能导致事实上的有罪不罚。

工作组认为，对强迫失踪的有效调查必须包括有关失踪者下落和命运、失踪情况及犯罪人身份的信息。这样的调查不仅是国家承担的国际义务的要求，也是

* 因提交方无法控制的情况，经协议，本报告迟于标准发布日期发布。

** 本文件附件不译，原文照发。

有效打击有罪不罚现象和实现受害人和整个社会了解真相的权利的最佳途径。

报告中提到的例子来自：工作组收到并列入其报告的案件；联合国机构或其他国际组织的其他公开报告；工作组在征集意见和向各国发出调查表后收到的材料；以及 2018 年 9 月在日内瓦举行的工作组第 116 届会议期间的某次会议上与会专家提供的信息。

一. 导言

1. 强迫失踪不同于其他侵犯人身自由的罪行。如《保护所有人不遭受强迫失踪宣言》和《保护所有人免遭强迫失踪国际公约》所强调的那样，这种犯罪有两个特点，一是国家工作人员或在国家授权、支持或默许下行事的个人或群体的参与；二是拒绝承认发生了剥夺自由行为，或者隐瞒失踪者的命运或下落。国家的参与往往导致犯罪人逍遥法外。

2. 几十年来，工作组一直在提请国际社会注意强迫失踪的结构性有罪不罚问题。1993 年，在与各国、失踪者亲属和民间社会组织协商后，工作组发布了一份报告，提出了旨在确保对强迫失踪行为追究责任和防止其不受惩罚的建议。[1]

3. 工作组一再强调，有效的刑事调查不仅对于维护获得正义的权利至关重要，对于履行搜寻失踪者的义务以及享有了解真相和获得赔偿的权利也至关重要，因为这些权利是紧密交织在一起的。[2]

4. 然而，工作组仍然注意到在尽职调查所有失踪指控和追究犯罪人责任方面的不情愿。即便是在有解决有罪不罚问题和处理强迫失踪案件的政治意愿的情况下(主要是在过渡进程中)，体制工具的有限性也往往成为完成这些工作的障碍。

5. 本报告旨在确定制定和实施调查标准和相关公共政策的必要原则要素，以便更有效地调查强迫失踪案件，将犯罪人绳之以法。还将分析挑战和良好做法。

6. 为编写本报告，工作组在 2018 年 9 月于日内瓦举行的第 116 届会议期间与专家进行了协商，向各国发出了一份调查表，[3] 并呼吁其他利益攸关方提供意见。[4] 工作组对各国和其他利益攸关方的贡献表示感谢。

二. 强迫失踪调查义务的要素及其障碍

7. 各国调查强迫失踪的义务现被列入了《保护所有人不遭受强迫失踪宣言》(第 13 条)和《保护所有人免遭强迫失踪国际公约》(第十二条)。这些标准是多年来根据国际、区域和国家法院的相关判例以及不同国家确立的做法制定的。

8. 尽职调查义务最初是在美洲人权法院对 Velásquez Rodríguez 案作出的首次裁决中提出的，[5] 后来被纳入了该法院的许多决定。该法院的第一组判决提到，镇压性政治制度下的许多拉丁美洲国家完全缺乏国家层面的调查。

[1] E/CN.4/1994/26, 第 45 段。

[2] A/HRC/16/48, 第 39 段。另见《保护所有人免遭强迫失踪国际公约》，第二十四条第二款。

[3] www.ohchr.org/Documents/Issues/Disappearances/QuestinnaireEtats_ED_EN.pdf.

[4] www.ohchr.org/Documents/Issues/Disappearances/StudyEffectiveInvestigation.pdf.

[5] Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*, Case No. 7920, Judgment, 29 July 1988, para. 177.

9. 美洲人权法院在 2006 年对 Goiburú 等人案作出的裁决中指出，禁止强迫失踪行为以及调查这些行为并处罚犯罪人的相关义务应被视为强行法规范。[6]

10. 《宣言》第 13 条详细阐述了彻底和公正调查强迫失踪的义务，明确指出不得以任何方式限制或妨碍这种调查。本报告参考了工作组多年来提出的建议以及各国和其他实体的做法。

A. 调查的即时性和当然性

11. 《保护所有人不遭受强迫失踪宣言》第 13 条和《保护所有人免遭强迫失踪国际公约》第十二条规定各国有义务确保切实享有向独立的国家主管当局提出申诉的权利，并对这种申诉进行迅速、彻底、有效和公正的调查。

12. 迅速开展调查的要求与找到生还的失踪者和确保获得足够证据以确定真相和查明犯罪人的主要目标有关。然而，在许多国家，执法机构在启动失踪调查之前实行长达 72 小时的等待期，这是有问题的，因为剥夺自由后的最初几个小时对于调查强迫失踪案件非常关键。这一期限可能会使犯罪人有机会规避法律规定的保护，并对受害人进行非法审讯、实施酷刑，在有些情况下还予以法外处决。

13. 在这方面，各国必须为接收和调查强迫失踪指控建立具体的、在失踪初期方便利用的早期申诉机制。根据《宣言》第 13 条第 1 款，这些机制应当是独立的，并致力于对所有强迫失踪指控进行公正和迅速的调查。

14. 《宣言》和《国际公约》规定，各国不能以没有正式申诉为由不启动调查。这项条款旨在作为一项保障措施，帮助确保调查得以进行，包括在亲属很可能面临报复的情况下，或在申诉人不知道现有机制和/或无论出于何种原因无法或不愿与他们沟通的其他情况下。[7]

15. 许多国家的做法表明，国家当局缺乏调查的意愿，使收集证据和寻找证人，在有些情况下甚至是搜查墓地来寻找亲人的负担落在亲属身上。不过，虽然各国应承担调查义务，但应允许亲属和支持他们的民间社会组织积极参与这一进程。

16. 关于“迅速”或“立即”进行调查的问题，众所周知，调查方面的拖延往往导致事实上的有罪不罚。[8] 这些拖延还会增加失踪者亲属的痛苦，在许多情况下，他们看不到为寻找亲人以及获得正义和其他形式的赔偿所做努力的结果。美

[6] Inter-American Court of Human Rights, *Goiburú et al. v. Paraguay*, ruling of 22 September 2006, Series C. No. 153, para. 84. 其他先例见本文件附件第 7 段，另见正义与民主权利研究基金会和穷追未受惩罚者组织对本报告的供稿，“Mexico: aportación dirigida al Grupo de Trabajo sobre las desapariciones forzadas o involuntarias en vista del estudio temático sobre normas y políticas públicas para la investigación eficaz de las desapariciones forzadas” (February 2019), para. 6。可查阅：www.ohchr.org/EN/Issues/Disappearances/Pages/effective-investigation.aspx。

[7] 例如见附件第 23 段中提到的法国和葡萄牙。

[8] 见德克萨斯大学法学院人权法诊所对本报告的供稿，第 48 页。可查阅：www.ohchr.org/Documents/Issues/Disappearances/effective-investigation/university-texas-austin-school-law-human-rights-clinic.pdf。另见 CCPR/C/119/D/2259/2013, 第 7.5 段。

洲人权法院认为，获得正义的权利要求采取一切必要步骤查明真相，并在合理时间内惩罚犯罪人。[9]

17. 拖延有时可被用作故意包庇犯罪人的手段。拖延也可能是机构缺陷所致，这些机构没有足够的能力来调查强迫失踪等复杂犯罪。工作组认为，拖延会使证人面临危险，并导致再次受害。[10]

18. 在许多发生强迫失踪的国家，调查是官僚式的，物质资源不足，或者调查人员缺乏有效开展此类调查所需的特殊培训。[11]

19. 与此同时，应当强调的是，尽职调查义务不应导致匆忙或过于仓促的调查。[12]

B. 立即采取法律补救措施，确定失踪者的下落

20. 根据《保护所有人不遭受强迫失踪宣言》第 9 条，让受害人在任何情况下都能获得迅速而有效的司法补救，以确定被剥夺自由者下落和健康状况，并披露下令或实施剥夺自由行为的当局，这是受害人的权利，也是国家的义务(第 9 条第 1 款)。这种司法补救通常被称为人身保护令，旨在结束和防止强迫失踪，同时也是保证有效调查的一种手段。根据《保护所有人免遭强迫失踪国际公约》的规定，任何有合法利益的人，包括受害人亲属、其代表或律师，均可行使这一权利(第十七条第二款第(六)项)。

21. 根据《宣言》第 9 条的要求，在人身保护令框架内，主管司法当局和/或调查人员应能充分进入任何可能关押被剥夺自由者的地方，或有理由相信可能找到他们的地方，无论这些地方是否为官方拘留设施。[13]

22. 迅速进入可能的拘留场所有助于确定可以澄清事实和查明犯罪人的重要信息。另一方面，司法当局在提供必要证据方面的任何拖延都可能增加失踪者的生命和健康风险，并为隐瞒受害人的下落或销毁证据创造有利条件。因此，对任何此类拖延都必须在刑事和行政层面进行调查和制裁。

23. 此外，经验表明，即使在人身保护令补救办法没有取得成果的情况下，仅仅提出这些补救办法作为与失踪有关的事实的司法证据，也具有决定性的证明价值。

[9] Inter-American Court of Human Rights, *Terrones Silva et al. v. Perú*, Case 11.053, Judgment, 26 September 2018, para. 196 (西班牙语)。

[10] A/HRC/10/9/Add.1, 第 76 段(西班牙语)。

[11] Inter-American Court of Human Rights, *Anzualdo Castro v. Perú*, Case 11.385, Judgment, 22 September 2009, para. 135.

[12] European Court of Human Rights, *Pomilyayko v. Ukraine*, Application No. 60426/11, Judgment, 11 February 2016, para. 53. 另见联合国人权事务高级专员办事处，《关于或属非法致死事件调查的明尼苏达规程(2016 年)：联合国有效防止和调查法外、任意和即决处决手册修订本》(2017 年)，第 23 段。

[13] 另见《宣言》第 13 条第 2 款。

C. 获取相关信息

24. 负责调查的当局必须能够获取所有相关信息，包括军事、警察和情报信息。[14] 为此，当局应能下令解密这类文件。以可能对国家安全、国际关系或个人隐私构成风险为由不允许获取信息的情况应由法官进行严格分析，并就此作出司法决定。

25. 尽管在特殊情况下公开披露机密信息可能受到限制，但应采取法律手段，允许负责调查的当局以及在司法程序中有权获取这些信息的人在保密的基础上充分接触到这些信息。只要规定了限制，就必须确保司法审查。工作组认为，一旦调查结束，必须保存档案并向公众开放。[15]

26. 体制和法律框架还必须向有关机构提供必要的权力和资源，以便能够强制证人出庭和提供相关证据。[16]

D. 禁止大赦、赦免和其他类似措施

27. 《宣言》第 18 条禁止大赦和其他可能有利于强迫失踪行为犯罪人或被指控犯罪的其他类似措施。[17] 考虑到强迫失踪行为的极其严重性，该条对赦免权作了限制。

28. 工作组在其关于《宣言》第 18 条的一般性意见中，促请各国不要制定或颁布赦免法，使强迫失踪行为的犯罪人免于刑事诉讼和制裁，也不要采取其他类似措施，妨碍《宣言》其他条款的适当执行。[18]

29. 在该一般性意见中，工作组认为其他类似措施也会违反《宣言》，例如：

(a) 因无法查明犯罪人而停止调查，违反《宣言》第 13 条第 6 款；

(b) 对了解真相和获得赔偿的权利附加条件；

(c) 撤销指控或赦免被指控犯罪人；

(d) 适用过短的或者在失踪仍在继续时即可适用的诉讼时效，起诉犯罪人的意图是为了将其无罪开释或予以无关痛痒的处罚。[19]

30. 大赦和可能导致有罪不罚的类似措施直接侵犯了家属获得有效补救的权利，以及由主管、公正和独立的法院审理以确定和了解真相的权利。[20]

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[14] A/HRC/16/48, 第 39 段(关于在强迫失踪方面了解真相权的一般性意见，第 9 段)。

[15] 同上。

[16] 《宣言》，第 13 条第 2 款；E/CN.4/2005/102/Add.1, 原则 16；以及《关于或属非法致死事件调查的明尼苏达规程》(2016 年)，第 27 段。

[17] E/CN.4/1984/21, 第 35 段。

[18] E/CN.4/2006/56, 第 49 段。

[19] 同上。

[20] International Commission of Jurists, *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction* (Geneva, 2015), p. 208.

31. 工作组认为，一些国家的司法或立法决定是良好做法，使被中止或驳回的强迫失踪案件得以重新审理。[21]

32. 《宣言》规定，各国立法可在两种特定情况下列入减轻处罚情节：被告披露有助于受害人生还或有助于澄清受害人命运或查明犯罪人的信息。[22] 这种信息对于确定受害人的命运或下落至关重要，因此在赔偿方面具有重大价值。然而，这些减轻处罚的情节不应导致不予惩罚，也不能扩大到除披露者之外的犯罪人。[23]

E. 扩大调查范围

33. 《保护所有人不遭受强迫失踪宣言》(第 13 条第 6 款)和《保护所有人免遭强迫失踪国际公约》(第二十四条第六款)都有力地申明，在失踪者的命运得到澄清之前，必须进行与强迫失踪有关的调查。工作组将其解释为，通常情况下，调查的范围还应扩大到澄清受害人的下落；[24] 这些原则是基于强迫失踪罪的持续性。[25]

34. 工作组反对作为支付金钱赔偿的一个条件，要求家属接受死亡证明的做法，认为这有违了解真相的权利和调查强迫失踪的义务，会导致搜索和调查终止，包括对失踪情况和犯罪人责任的调查。工作组在其关于《宣言》第 19 条的一般性意见中指出，作为一项一般原则，不应不顾家属的反对，推定强迫失踪的受害人死亡。[26]

F. 负责调查的当局的自主权和独立性

35. 保障负责刑事调查和起诉的当局，包括司法当局自主权和独立性的义务，是任何有效保障受害人权利的制度的基石。工作组的经验表明，体制缺陷以及缺乏自主、公正和独立是调查强迫失踪的最大障碍。在强迫失踪一再发生或以普遍和系统的方式发生的国家，情况尤其如此。[27]

36. 在这方面，《宣言》要求各国建立独立的机构，接受关于强迫失踪的申诉，并开展迅速、彻底和公正的调查；禁止采取任何限制或妨碍调查的措施(第 13 条第 1 款)；[28] 并确立了一套相关要求(第 16 条第 1、第 2 和第 4 款)。

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[21] A/HRC/16/48/Add.3, 第 51 段及其脚注 57。

[22] 《宣言》，第 4 条第 2 款；另见《国际公约》，第七条第二款。

[23] 工作组在其关于第 18 条的一般性意见中具体说明了在适用情况下应对赦免权和减轻处罚情节施加的限制(E/CN.4/2006/56, 第 49 段)。

[24] A/HRC/16/48, 第 39 段(关于在强迫失踪方面了解真相权的一般性意见，第 4 段)；以及 CED/C/7, 原则 7(1)。工作组还赞同原则 7(4)和(5)的主张。

[25] E/CN.4/2001/68 和强迫或非自愿失踪问题工作组关于强迫失踪是一种持续性犯罪的一般性意见。

[26] E/CN.4/1998/43, 第 74 段。

[27] A/HRC/30/38/Add.1, 第 73-74 段；以及 A/HRC/33/51/Add.1, 第 33-35 段。

[28] 另见《国际公约》第十二条第一款。

37. 被控实施强迫失踪行为的人必须暂停一切公职，以防止对调查的任何干扰，并保护参与调查的人免遭虐待、恐吓或报复。[29] 为协助防止机构或内部团结起来妨碍调查，调查应由嫌疑人工作或隶属的机构以外的或者不同的机构进行。[30]

38. 各国应考虑设立能够以称职、独立和自主的方式开展工作、与可能有意阻碍调查的任何当局均无关系的调查小组。[31] 在强迫失踪行为一再发生或系统发生的情况下，这一点尤为重要。应当强调的是，负责调查的小组必须公正，在任何时候都不带偏见地行事，客观分析所有证据，考虑并适当寻找能够证明无罪和有罪的证据。[32]

39. 为加强刑事调查、起诉和审判的独立性，应采取措施确保司法调查人员在任职内不被撤职，[33] 并为他们提供特权，以确保他们受到保护。[34] 然而，这些旨在确保独立和自主的措施不应成为透明度和问责制的障碍，特别是对受害人及其家属而言。[35]

40. 关于审判和司法程序，《宣言》规定，被告只应在主管的普通法院受审，而不应在任何其他特别法庭尤其是军事法庭或国家安全机构的法庭受审。[36] 工作组的经验表明，在某些情况下，一些国家，如处于冲突后局势或向民主过渡的国家，应考虑扩大禁止任何特别法庭包括军事法庭审判的范围，将审前调查也包括在内，以限制涉嫌实施或已经实施强迫失踪行为的机构参与。

41. 参与据称强迫失踪行为的机构所进行的调查、刑事起诉和审判也经常导致被指控犯有这一罪行的人的权利遭到侵犯，他们被剥夺了正当程序，包括在诉讼的

[29] 《宣言》，第 16 条第 1 款；另见《国际公约》，第十二条第四款。

[30] CED/C/MEX/CO/1, 第 28(d)段；《国际公约》第十二条第四款。阿根廷在(通过其 26.679 号法)合法实施保护免遭强迫失踪的三项国际文书时，在其《刑事诉讼法》中增加了通用条款第 194 条之二，其中规定，在有理由相信执法人员可能参与了所调查事件的情况下(即使仅仅是怀疑)，法官也将以当然方式或应当事人的要求将其免职。另见 A/61/311, 第 49-54 段；以及《关于或属非法致死事件调查的明尼苏达规程》(2016 年)，第 28 段。

[31] 见《酷刑和其他残忍、不人道或有辱人格的待遇或处罚的有效调查和文件记录手册：伊斯坦布尔规程》(联合国出版物，出售品编号：C.04.XIV.3)，第 85 和第 108 段；以及 E/CN.4/2005/102/Add.1, 原则 7。

[32] 《关于或属非法致死事件调查的明尼苏达规程》(2016 年)，第 31 段。工作组注意到墨西哥的良好做法，该国设立了一个跨学科的独立专家小组，对墨西哥伊瓜拉市 Ayotzinapa 学校 43 名学生的强迫失踪事件进行调查。该小组的调查开辟了被检方忽视的新调查路线，揭露了严重的违规行为，如掩盖证据和虚构事实，包括与据称对几名被告实施的有关的事实。见 GIEI, *Metodologías de investigación, búsqueda y atención a las víctimas: del caso Ayotzinapa a nuevos mecanismos en la lucha contra la impunidad* (Editorial Temis, Bogotá), 2017 (西班牙语)。

[33] 除非是以失去行为能力或其行为使之不适合履行职责为由，并且是根据确保正当程序和受害人参与的程序。

[34] E/CN.4/2005/102/Add.1, 原则 7(a)和(b)。

[35] Fundación para la Justicia y el Estado Democrático de Derecho, “Estándares internacionales sobre la autonomía de los fiscales y las fiscalías” (Mexico City, 2017), p. 16 (西班牙语)。

[36] 《宣言》，第 16 条第 2 款。另见强迫失踪问题委员会，“关于强迫失踪与军事管辖权的声明”，第 3 段。工作组在一些国别访问报告中，例如在 A/HRC/39/46/Add.1 号文件第 54 段重申了不应让武装部队在起诉和审判强迫失踪案件中发挥作用或进行干预的立场。另见《美洲被迫失踪人士公约》，第九条。

所有阶段获得公平待遇，以及由主管、独立、透明和公正的法院提供的司法保障。[37]

42. 然而，对军事管辖权的任何限制都不应成为武装部队或其他执法或情报机构拒绝与负责调查的民事当局充分合作的借口。相反，前者应确保可以不受限制地立即进入可能的拘留场所和查阅相关文件，并保证其工作人员可以在没有任何压力或限制的情况下作为证人接受询问。他们还必须确保针对其成员的逮捕令得到适当执行。

G. 不得以上级命令作为辩护理由

43. 在向民主过渡的背景下，经常有人试图利用刑法，以服从上级命令为由来免除实施强迫失踪行为者的责任。为此，《宣言》第 6 条规定，不得援引民事、军事或任何其他公共当局的命令或指示作为造成强迫失踪的理由。任何接到这种命令或指示的人均有权利和义务不予服从。[38] 同一准则还规定各国有义务禁止与强迫失踪有关的这类立法，并要求对执法人员进行相应培训。

44. 工作组强调，没有任何一项关于强迫失踪的人权文书承认正当服从是减轻刑事处罚的理由，如有任何立法考虑这样做，也绝不应违背根据该罪行的极其严重性实施制裁的义务。[39] 工作组还指出，命令实施或以任何方式参与强迫失踪行为显然是非法的，法院也应将作此解释。[40]

H. 诉讼时效与一罪不二审原则

45. 《宣言》第 17 条规定，当《公民及政治权利国际公约》第二条规定的补救办法不再有效时，在重新有效确定法律补救办法之前，应中止与强迫失踪行为有关的诉讼时效限制。[41]

46. 该条还规定，如果有任何与强迫失踪行为有关的诉讼时效限制，这种限制应与该罪行的极其严重性质相称。在适用情况下，诉讼时效必须在强迫失踪行为停止后才能开始。[42]《保护所有人免遭强迫失踪国际公约》第八条重申了这一点。

47. 诉讼时效不适用于作为危害人类罪的强迫失踪，无论是被界定为大规模或有组织的强迫失踪，[43] 还是单一的强迫失踪行为。[44]

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[37] Inter-American Court of Human Rights, Rodríguez Vera et al. v. Colombia, Judgment, 14 November 2014, para. 490.

[38] 另见《国际公约》，第六条第二款。

[39] A/HRC/16/48/Add.3, 第 52 段；《宣言》，第 4 条第 1 款；E/CN.4/2005/102/Add.1, 原则 27(a)；以及 A/HRC/33/51/Add.1，第 19-20 段。

[40] A/HRC/16/48/Add.3, 第 53 段。

[41] E/CN.4/2001/68, 第 27–28 段。

[42] 例如见 A/HRC/27/49/Add.1, 第 39 和第 41 段；以及 A/HRC/33/51/Add.1, 第 19 段。另见附件第 94 段提到的智利、厄瓜多尔和法国。

[43] 《国际公约》，第五条。

[44] A/HRC/45/13/Add.2, 第 19 段。

48. 在司法机构纵容犯罪人的情况下，工作组注意到调查故意流于表面的现象，目的是通过既判力原则和一罪不二审原则宣判被告无罪并给予他们司法保护。

49. 由于上述原则，以欺诈方式甚至通过大赦法终止调查的，在某些法律制度中可能导致无法再重启调查。因此，双重危险原则虽然在《公民及政治权利国际公约》中被确认为一项司法保障，但并不是绝对性的，不能用来延续有罪不罚现象。[45] 已经确定的是，各国应采取防止这种滥用的保障措施，[46] 例如确保重新调查的可能性。

三. 有效调查强迫失踪的公共政策

50. 工作组确定了与调查义务有关的一些基本义务，这些义务要求执行对义务本身至关重要的具体公共政策。

A. 自主将强迫失踪定为刑事犯罪的义务

51. 国家有义务根据《保护所有人不遭受强迫失踪宣言》第 4 条的规定，将强迫失踪定为独立的犯罪，这是有效调查的一个关键要求。这种界定使负责的当局能够了解该罪行的具体性质，并就指控展开迅速、适当和有效的调查。根据工作组的经验，由于没有明确规定的强迫失踪罪，构成强迫失踪的行为有时会作为绑架、酷刑、谋杀和非法剥夺自由等其他罪行进行调查和起诉。这造成了一种情况，即如果达不到被指控罪行的证据标准，强迫失踪的犯罪嫌疑人可被无罪释放。[47]

52. 工作组还注意到，在那些根据其他的犯罪定义调查和起诉强迫失踪的国家，惩罚往往与该罪行的极其严重性不相称。

53. 由于强迫失踪通常发生在有组织的国家权力结构内，或由得到国家支持或默许的犯罪集团实施，工作组建议将多种类型的参与或责任定为刑事犯罪。[48] 虽然《宣言》没有明确规定上级的责任，但《保护所有人免遭强迫失踪国际公约》第六条第一款明确要求各国采取必要措施，将以下人员定罪：

(a) 所有制造、指令、唆使或诱导制造或企图制造强迫失踪的人，以及同谋或参与制造强迫失踪的人；

(b) 上级官员：

(一) 知情，或已有清楚迹象表明受其实际领导或控制的下属正在或即将犯下强迫失踪罪而故意对有关情况置若罔闻；

[45] Inter-American Court of Human Rights, *Almonacid-Arellano et al. v. Chile*, Judgment, 26 September 2006, par. 154, 其中包含三种欺诈性双重危险分类，即：(a) 法院采取行动免除被指控严重侵犯人权的被告的刑事责任；(b) 诉讼并非遵循正当程序独立公正地进行；(c) 没有对被告提起任何法律诉讼的实际意图。

[46] E/CN.4/2005/102/Add.1, 原则 22。

[47] A/HRC/39/46/Add.1, 第 30 段；以及 A/HRC/33/51/Add.1, 第 15 段。

[48] A/HRC/16/48/Add.3, 第 62 段。

(二) 对与强迫失踪罪有牵连的活动，实际行使过责任和控制；

(三) 没有在本人的权限范围内采取一切必要、合理的措施，防止或制止强迫失踪，阻止犯下此种罪行，或将有关问题提交主管当局调查或起诉。[49] [50]

B. 负责搜寻和刑事调查的当局之间的协调

54. 由于前面讨论的刑事诉讼障碍，以及犯罪人因害怕被起诉而在失踪者的下落方面缺乏合作，导致许多国家设立了专门机构来搜寻受害人。

55. 工作组注意到，在强迫失踪方面负有不同责任──即搜寻受害人、调查和刑事起诉──的国家机构之间缺乏协调，往往是影响其工作效力和导致不适当拖延的关键因素之一。[51] 在实行联邦制政府的国家，这个问题可能特别尖锐。工作重叠和干涉会损害国家当局在公众心目中的形象，并使程序对受害人而言复杂化，他们不得不重复作证，因此有可能再次受到伤害，有时甚至不得不亲自充当司法和非司法当局之间的纽带。

56. 搜寻和刑事调查应当是相辅相成的。根据强迫失踪问题委员会的搜寻失踪人员指导原则，当搜寻工作由非司法当局开展时，应依法明确建立相关机制和程序，[52] 以确保它们与负责刑事调查的机构之间的合作、协调和信息交流，从而保证定期和毫不拖延地相互交流双方取得的进展和成果。[53] 协调不同机构的努力，从而避免不必要的官僚主义，有可能更好地管理其通常有限的资源，并促进当局之间的信息交流。[54] 确保搜寻和刑事调查数据库的互操作性被认为提高效力和防止重叠的良好做法。[55]

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[49] 一些国家通过有组织的权力结构，用间接犯罪人理论解决了指控问题。见 International Commission of Jurists, Enforced Disappearance and Extrajudicial Investigation: Investigation and Sanction (Geneva, 2015), p. 208。将上级责任纳入立法的必要性带来了强烈的共识。见 E/CN.4/2005/102/Add.1, 原则 27(b)；《关于或属非法致死事件调查的明尼苏达规程》(2016 年)，第 26 段；《国际刑事法院罗马规约》，第二十五和第二十八条。另见五月广场祖母协会对强迫失踪问题委员会的供稿，来文编号：CED/C/15/2，2019 年 1 月 24 日，第 4 页。可查阅：www.ohchr.org。

[50] 见五月广场祖母协会的供稿，第 4 页。

[51] 例如见 E/CN.4/1996/38, 第 203 段；以及 A/HRC/WGEID/114/1, 第 40 段。另见 Swisspeace, “Report: coordinating the search and criminal investigations concerning disappeared persons”, June 2020, p. 2，其中述及哥伦比亚、冈比亚、墨西哥、斯里兰卡和大不列颠及北爱尔兰联合王国的协调经验。

[52] 特别是在挖掘遗骸、查获证据、证据监管链和建立机密数据库方面。

[53] CED/C/7, 附件，原则 13, 第 2 段。

[54] 在关于访问墨西哥的报告中，工作组建议设立一个机构间委员会，由一个能够协调不同当局和政府机构的联邦当局进行监督(A/HRC/19/58/Add.2, 第 112 段)。2017 年，该国通过了《强迫失踪、个人造成的失踪和失踪人员全国搜寻系统一般法》，确立了各级政府当局之间的管辖权和协调，可被视为如何在法律上克服这类障碍的一个很好的例子。

[55] Swisspeace, “Report: coordinating the search and criminal investigations concerned disappeared persons”, p. 7.

C. 国际合作

57. 在某些情况下，强迫失踪可能包含跨国成分。在一些情况下，政治反对者甚至难民在流亡中被绑架，就如“秃鹰行动”中的情况一样。[56] 在另一些情况下，失踪者被转移到其他国家的秘密拘留场所，如“特别引渡”做法，[57] 或在移民背景下失踪。[58] 工作组对各国与其他国家合作实施的导致强迫失踪的跨国绑架案增加表示关切，例如维吾尔人、哈萨克人或 Hizmet/Gülen 运动追随者的案件。[59]

58. 这一额外挑战要求各国在其国内法规和可能批准的任何国际条约允许的情况下，作出回应并履行在刑事诉讼方面充分合作的义务，提供掌握的所有证据。[60] 同样至关重要的是，各国应建立以充分援助受害人为重的相互合作机制：[61] 包括在调查和有效搜寻失踪人员，以及对受害人进行人身保护和提供心理支持方面。

59. 最后，应向据称发生强迫失踪行为的国家的民事主管当局移交或引渡被指控的强迫失踪犯罪人，除非已根据这方面的国际协定将其引渡到另一个行使管辖权的国家。[62] 否则的话，各国应行使各自的管辖权，启动正式的刑事诉讼程序或将他们移交该国承认其管辖权的国际刑事法庭。[63]

D. 受害人了解调查和获得免遭报复的保护

60. 调查强迫失踪的义务与受害人(包括其家人)和其他利益攸关方了解和参与调查的权利密切相关。[64] 强迫失踪会给受害人及其亲属带来深深的痛苦和伤害。不知道家人的下落等于是折磨。[65] 在调查期间和调查的所有阶段获取信息可能是保障他们的了解真相权的最有效手段。[66] 受害人及其家属积极参与调查也是保证调查过程透明和问责的最佳手段。

61. 受害人、民间社会和其他非政府组织往往在获取证据和通过与强迫失踪指控有关的刑事诉讼程序取得重大进展方面发挥关键作用，特别是在政府行动有限和

[56] 见布宜诺斯艾利斯第一联邦刑事法庭 CFP 13445/1999/TO1 号案件的判决。可查阅：www.derechos.org/nizkor/arg/doc/condor14.html (西班牙语)。

[57] A/HRC/13/42。

[58] A/HRC/36/39/Add.2, 第 83 段。

[59] A/HRC/40/42, 第 56 段。

[60] 《国际公约》，第十四条。

[61] 同上，第十五条。

[62] 《宣言》，第 14 条。

[63] 《国际公约》，第十一条。

[64] 《宣言》，第 13 条第 4 款；A/HRC/16/48, 第 39 段(关于在强迫失踪方面了解真相权的一般性意见，第 3 段)。在搜寻失踪人员方面，另见 CED/C/7, 原则 5，及其附件第二.C 节提到的对塞尔维亚、斯里兰卡和土耳其的国别访问报告。

[65] A/HRC/16/48, 第 39 段(关于在强迫失踪方面了解真相权的一般性意见，第 4 段)。

[66] 《国际公约》，第十二条第二款。

普遍存在有罪不罚现象的情况下。因此，工作组认为承认受害人团体和其他专门组织的程序地位是一种良好做法，可以使这些行为者更有效地参与调查过程，包括要求获取相关信息，提供专家来监测和审查这些信息，并就决定提出上诉。此外，通过家人或民间社会组织来集体代表受害人，在许多情况下成为保护受害人的一种手段，减少了他们的身心风险。[67]

62. 各国应促进亲属有效参与调查过程，为这种参与提供足够的财政支持，并采取措施要求定期与开展调查的小组举行信息交流会议。

63. 然而，在很多情况下，亲属受到威胁、恐吓和报复，而不是被邀请参与调查。在许多此类情况中，报复行为没有按照《宣言》的要求得到适当调查，因此未受惩罚。这导致了开展有效调查的环境不安全。同样，有关当局有时对民间社会组织和失踪者亲属施加压力，限制他们的法律行为能力或为其主张寻求财政支持的能力。在一些情况下，他们的活动甚至被以模糊和毫无根据的颠覆和恐怖主义指控定为犯罪。[68]

64. 在亲属不敢申诉或掌握重要信息的个人拒绝作证的情况下，这可能会助长有罪不罚现象，必须根据《宣言》第 13 条第 3 款，[69] 为证人作证提供充分的保护方案和鼓励措施。[70]

65. 至关重要的是，必须建立资金充足的机构，保护和协助受害人、其家人、证人和其他参与调查的利益攸关方，包括可能提出证据的被告。此外，应在职能独立的机构内设立保护方案。[71] 应当强调的是，在许多情况下，甚至在过渡期正义进程中，实施强迫失踪的人继续进行地下活动，而且往往仍有能力对试图追究其责任的任何人造成损害。[72]

66. 还应保障全面的证人保护措施。应明确告知证人，他们有机会受到身份保护，如果他们的证词要向辩护方披露或公开，也应当告知他们。当存在严重危险时，还应考虑证人异地安置计划。[73]

67. 尽管保护方案可能会影响受保护者的日常生活，但必须制定相关程序来适当评估风险，并利用一切可用资源，确保亲属能够继续寻找其亲人并参与调查，同时维持他们的日常生活和收入来源。从这个意义上说，当局顾及证人的关切十分重要，最好是建立便利继续与他们沟通的程序或机制。

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[67] 同上，第二十四条第七款；E/CN.4/2005/102/Add.1, 原则 19。例如，见阿根廷，2014 年 12 月 10 日《刑事诉讼法》第 82 条之二；以及 2018 年 11 月 12 日 OL MEX 16/2018 号来文(西班牙语)。

[68] A/HRC/30/38/Add.5, 第 34 段。

[69] 《国际公约》，第十二条第一和第四款。CED/C/7, 附件，原则 14；E/CN.4/2005/102/Add.1, 原则 10。

[70] A/HRC/39/46/Add.1, 第 60 段；A/HRC/30/38/Add.1, 第 10 和第 75 段。

[71] A/HRC/16/48, 第 39 段(关于在强迫失踪方面了解真相权的一般性意见，第 10 段)；以及 A/HRC/10/9/Add.1, 第 80 和第 94 段(西班牙语)。

[72] Inter-American Court of Human Rights, *Rochela Massacre v. Colombia*, Judgment, 11 May 2007, para. 165;关于证人和受害人 Julio López 在阿根廷遭强迫失踪一事，见 A/HRC/10/9/Add.1, 第 69 段(西班牙语)。

[73] A/HRC/10/9/Add.1, 第 78 段(西班牙语)。

68. 参与调查人员的身心安全对于创造一个使亲属和民间社会能够适当记录案件和收集证据的环境也很重要。尽管这有助于取得成果，但不应取代各国在这方面的国际义务。

E. 制定旨在确保社会心理援助的政策

69. 对于失踪者的亲属来说，参与强迫失踪案件的调查可能是一种非常艰难的经历。他们可能会了解到令人痛苦的细节，例如对虐待和酷刑的生动描述，以及参观受害人可能被埋葬或拘留的地点。为确保他们的参与是一种补偿，而不是再次受害，必须考虑到受害人和亲属的精神和心理健康。这方面的一些基本要素包括：

(a) 受害人家属在可能接触到的信息方面做好充分准备；

(b) 在减轻压力的环境和方式下举行通报会；

(c) 利用专门从事强迫失踪案件咨询的有经验的工作人员提供社会心理支持。[74]

70. 此外，负责调查的人员，特别是律师，必须以敏感周到的方式开展工作。这有助于确保受害人消除其痛苦，理解其损失，并重建可能因失踪而受到影响的关系。为此，需要训练有素的专业人员以同情、理解和耐心对待他们的工作，在整个过程中为受害人提供支持。[75]

F. 设立专门的多学科机构进行调查和背景分析

71. 在强迫失踪行为方面，经验表明，为调查和刑事起诉设立专门机构可能是一种有效的办法，有助于更好地协调刑事政策。[76] 在许多情况下，调查的零散性是损害其有效性的主要因素之一。多学科调查机构可以促进对相关案件的联合调查，并向各有关机构提供全面的背景情况。[77] 背景分析对于证明该罪行的一般或系统性质也很重要。这种全面的调查方法有助于确定案件的轻重缓急，并更好地运用新的调查技术，包括分析科学证据。它还有助于确定有组织的权力结构中指挥系统方面的责任。[78]

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[74] 见 Carlos Beristain 向强迫或非自愿失踪问题工作组第 116 届会议的专家协商提供的书面材料，第 6 段(西班牙语)。可查阅：www.ohchr.org。

[75] 同上，第 5 和第 13 段。

[76] CED/C/URY/CO/1, 第 22 段；以及 CED/C/ARG/CO/1, 第 19 段。例如见附件第 23 段中提到的法国和葡萄牙。

[77] A/HRC/19/58/Add.2, 第 96-97 段；以及 CED/C/COL/CO/1, 第 20(e)段。在墨西哥，2017 年 11 月 17 日通过的《强迫失踪人员、非国家行为体造成的失踪和失踪人员全国搜寻系统一般法》规定要设立背景分析机构(第 58 条)。

[78] Verónica Hinestroza，国际律师协会人权研究所，对强迫或非自愿失踪问题工作组第 116 届会议专家协商的供稿。可查阅：www.ohchr.org。另见 Mariano Gaitan, “Prosecutorial discretion in the investigation and prosecution of massive human rights violations: lessons from the Argentine experience”, American University International Law Review, vol. 32, No. 2 (2015), p. 548。

72. 此外，将信息集中在专门的调查机构可以推动更有效的搜寻工作，并有助于和其他机构，特别是负责搜寻失踪人员的机构更好地协调。[79]

73. 同时，应在受害人及其亲属以及国家人权机构和民间社会组织参与下建立公共问责机制和相关程序，防范将调查集中在一个单位造成的潜在风险。[80]

G. 法医调查的独立性和技术专长

74. 缺乏具有高度专业知识和独立标准的法医机构，也可能成为一些国家推进有效调查的障碍。[81] 法医小组的自主性对于开展调查而不必担心带来报复风险至关重要。[82]

75. 在许多国家，民间社会和学术界制定了成功的举措，这些举措不仅协助查明了数百名失踪者，[83] 事实证明它们对于理解国家机构如何系统地实施强迫失踪也至关重要。此外，法医小组经常能与失踪者家属建立关系，后者在许多情况下受到公职人员的粗鲁对待，而这些人员最初否认发生了失踪事件。[84] 工作组还在国别访问期间记录了国家在这方面的积极经验，[85] 并认识到红十字国际委员会和失踪人员国际委员会等国际组织可以发挥的重要作用。[86]

76. 通过在调查强迫失踪案件中使用新的法医技术，取得了一些积极成果。除了广泛发展的通过 DNA 样本进行鉴定的技术外，电话数据交叉比对、移动电话地理定位、卫星图像和光学探测器的使用等方面的科学进步也非常有用。[87]

H. 档案保存和披露政策

77. 在国家直接参与强迫失踪的情况下，可能会有官僚主义的痕迹，在许多情况下，这些痕迹可能有助于查明真相。对军事、国家安全、情报和警察机构档案的调查也许特别相关。此外，即使是这些机构的行政记录(通常并不保密)，也可能包

[79] CED/C/MEX/CO/1, 第 29 段。

[80] 见五月广场祖母协会的供稿，2019 年 1 月 24 日，第 8 页。可查阅：www.ohchr.org。

[81] 《关于或属非法致死事件调查的明尼苏达规程》(2016 年)，第 31 段。

[82] A/69/387, 第 37 段。

[83] 例如阿根廷法医人类学小组(EAAF)、秘鲁法医人类学小组(EPAF)和危地马拉法医人类学基金会(FAFG)。

[84] EAAF：建议 1。可查阅：https://eaaf.typepad.com/recommendations/。

[85] A/HRC/22/45/Add.1, 第 18 段。

[86] A/HRC/16/48/Add.1, 第 28-29 段。

[87] 例如，一项旨在排除关于在科库拉市的一个垃圾填埋场焚尸的假设的火灾研究对于调查墨西哥 Ayotzinapa 学校 43 名学生的失踪事件特别重要(GIEI, Informe Ayotzinapa II: Avances y Nuevas Conclusiones Sobre la Investigación, Búsqueda y Atención a las Víctimas, p. 278 (西班牙语))。

含对调查有价值的信息，包括购买武器的记录、晋升和授予的勋章，或健康记录。民事登记处、公墓、法医学研究所或医院的一般人口记录也有类似的作用。[88]

78. 各国应制定和实施关于披露和保存档案信息的政策。这些政策应包括对记录中的信息进行评估所需的必要人力和物力，评估应由独立于可能受所披露信息影响的机构当局之外的专业人员进行。

79. 少数几个国家已采取重大步骤解密本国密封记录，或公共记录进行彻底研究。另一些国家则欣然公开了关于强迫失踪的机密档案，使家属和民间社会更加接近真相，在许多情况下，这些档案为刑事诉讼程序提供了信息。[89]

I. 在妇女失踪案件中采取不同方法的政策

80. 工作组的经验表明，由于深深植根于历史、传统、宗教和文化的性别角色，妇女和女童承受和面对强迫失踪影响的方式不同。[90]

81. 遭强迫失踪的妇女特别容易遭受性暴力，包括强奸和强迫怀孕，以及各种形式的羞辱及身体和精神伤害，这些也属于酷刑的定义。[91]

82. 亲属遭强迫失踪的妇女和女童往往面临家庭的主要或唯一收入来源丧失的问题，这产生了负面的经济、社会、心理和法律影响。丈夫失踪的妇女在社区中可能会受到排斥，因为她们的丈夫被诬告犯罪，或者因为人们害怕与强迫失踪对象交往。传统上专注于寻求和主张正义的母亲，也经常因没有照顾孩子而受到社会的鄙视和不公平待遇。[92]

83. 在这些情况下，无论是在真相委员会框架内，还是在介入的司法、警察和法医机构中，都需要采取基于性别的调查方法，这就更需要在选择负责调查的人员时实现性别平衡，[93] 无论是在业务层面还是最高责任层面。各国应在调查过程

[88] 见法律与社会研究中心(CELS)为这项研究提供的资料，第 7-10 页。事实证明，人权组织的记录也非常有价值，因为它们包含了在国家当局的信息和行动不能信任时期的侵犯人权信息。

[89] 美利坚合众国最近开放了与发生在阿根廷、智利、萨尔瓦多和危地马拉的侵犯人权行为有关的机密记录。在巴拉圭发现了被称为“恐怖档案”的记录，其中有军事、安全和情报官员之间的通信，这些通信除其他外记录了在参加“秃鹰行动”的国家即阿根廷、巴西、智利、巴拉圭和乌拉圭之间转移失踪人员的情况。应阿根廷家属的要求，法国和罗马教廷也启动了记录解密程序。

[90] A/HRC/WGEID/98/2, 序言。

[91] 同上，第 8 段。

[92] A/HRC/30/38/Add.5, 第 23 段。

[93] A/HRC/WGEID/98/2, 第 23-24 段。

中提供专门资源，用于分析强迫失踪对妇女的特殊影响，以提高对这个并非总能得到充分解决的问题的认识。[94]

84. 还需要在与受害人和证人面谈的程序、问卷和指南中考虑到受害人证词作为证据的特殊重要性。应建立具体机制，使妇女能够在尊重和隐私框架内报告她们的经历，并在必要时向她们提供社会心理支持。[95]

85. 同样至关重要的是，作为一种补偿办法，在失踪背景下实施的性犯罪应自动归于强迫失踪和酷刑，并在立法规定的处罚的严重性上反映对妇女的不同影响。[96]

86. 另一方面，妇女要求结束强迫失踪的行动往往会招致恐吓或报复行为，有时甚至达到法外处决和她们本人失踪的程度。因此，证人保护计划应在所提供服务的类型和工作人员的性别构成方面充分考虑到性别因素。

J. 在移民失踪案件中采取不同方法的政策

87. 工作组最近提请注意另一个反复出现的令人震惊的现象，即移民失踪。除了与搜寻受害人有关的困难外，移民失踪的特点是效率很低，导致有罪不罚。[97] 能够解释这一现象的因素包括：移民在外国的结构性脆弱性、[98] 他们缺乏家庭联系或有效诉诸司法和主张其权利所需的资源，以及调查机构缺乏处理与人口贩运有关的非法市场的能力等，在某些情况下，这些非法市场显然与国家机构有联系。[99]

88. 此外，这种失败的一个关键因素往往是各国之间缺乏合作，以及原籍国不感兴趣。这导致缺乏充分的跨国调查，而跨国调查可为澄清事实，如查找证人提供重要信息，甚至是有关参与犯罪人员的信息。[100] 失踪人员的亲属必须被告知并能参与调查，无论他们住在哪里。[101]

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[94] A/HRC/19/58/Add.2, 第 67 段。关于导致这些罪行不为人知和司法系统缺乏反应的因素，见 Lorena Balardini, Ana Oberlin y Laura Sobredo, “Violencia de género y abusos sexuales en centros clandestinos de detención: un aporte a la comprensión de la experiencia argentina”, p. 12 (西班牙语)；以及 Ana Oberlin, “Respuestas judiciales en Argentina, Chile y Uruguay a las violencias estatales diferenciales hacia mujeres y personas fuera de la cis/heteronormatividad durante el terrorismo de Estado”, Amérique Latine Histoire et Mémoire, vol. 38 (2019) (西班牙语)。另见国际过渡期正义中心，“Morocco: gender and the transitional justice process”, September 2011, pp. 21–22。

[95] 这种支持应在面谈或陈述前开始，并持续足够长的时间，以避免再次受害。

[96] A/HRC/WGEID/98/2, 第 19 段。

[97] A/HRC/36/39/Add.2, 第 50 段。工作组没有记录任何追究国家或非国家行为体责任的情况。

[98] 同上，第 46 段。这是由于面临冲突和暴力局势以及多种形式的歧视和伙伴经济困难等情况。

[99] 同上，第 34-35 段；以及 A/HRC/19/58/Add.2, 第 69 段。

[100] 见正义与民主权利研究基金会和穷追未受惩罚者组织的供稿，第 126 段。在墨西哥，建立了一个外国行动机制，该机制有利于当局问责和受害人更好地跟踪诉讼程序，并为境外调查提供了可能性——尽管这一机制尚未显示出效力(同上，第 31、32 和 125 段)。可查阅：www.ohchr.org。

[101] A/HRC/36/39/Add.2, 第 77 段。见附件第 144 段。

89. 在有大量移民流动的地区，制定一种特殊和有区别的方法来调查失踪移民非常重要。这种方法应促进跨国做法，增加与原籍国合作的可能性。[102] 各国应采取步骤，建立灵活和可操作的证据交换机制，以限制不必要的拖延和其他官僚障碍。尤其重要的是，各国，包括尚未批准《国际公约》的国家，应遵守公约第十四条的规定，该条要求提供一切可能的司法协助，包括必要的证据。这项规定是履行确保对所有强迫失踪案件进行有效调查义务的重要方式。

K. 调查非国家行为体实施的失踪行为的义务

90. 调查非国家行为体可能实施的失踪行为涉及一系列具体挑战，并在国家应给予受害人的保护方面产生了不同的解释。工作组在转交案件的实践中作出的解释是，如果一些迹象表明有国家或其任何官员的可能或间接参与，无论是通过支持还是默许，这些案件都必须作为强迫失踪案件进行调查，国家有责任调查事实并证明其没有参与有关失踪行为。在审议这些案件时，工作组考虑到有关国家的失踪背景和模式。

91. 同样已经确定的是，国家即使没有参与，也有义务调查失踪案件。《国际公约》第三条概述了这项义务，该条试图弥补保护受害人方面的不足。此外，各国可能拥有开展深入调查的工具和手段，在某些情况下，还拥有与这些非国家行为体或第三方沟通的渠道，所有这些都有助于调查工作的成功。

92. 由于非国家行为体实施的绑架数量增加，特别是在国内武装冲突背景下，而且缺乏充分的保护，导致工作组启动了一项程序，记录被指控犯罪人对一个领土行使有效控制或政府职能时可能构成强迫失踪的案件。[103]

四. 结论和建议

93. 工作组在其整个历史中，一直提请国际社会注意有罪不罚是强迫失踪的一个显著特点。工作组继续注意到令人震惊的有罪不罚现象，其中既涉及过去的强迫失踪行为，也涉及世界不同地区发生的新失踪事件。

94. 有罪不罚会产生倍增效应，给受害人及其家人带来更多的痛苦和折磨。工作组认为，在这种痛苦面前，国际社会不应保持中立。相反，必须加强合作努力，增加对受害人的援助，并在地方和国际层面进行司法调查和起诉。

95. 强迫失踪的独特组成部分——特别是国家工作人员的参与以及隐藏信息和掩盖罪行的企图——使得调查必须要有必要的独立性和自主性。

96. 调查方面的拖延通常是由司法程序期间面临的多种障碍造成的，包括证据的销毁或灭失以及犯罪人、受害人和证人的死亡。这些障碍可能导致事实上的有罪不罚。

[102] CED/C/MEX/CO/1，第 24 段。

[103] A/HRC/42/40，第 94 段。

97. 工作组认为，对强迫失踪的有效调查必须包括有关失踪者下落和命运、失踪情况及犯罪人身份的信息。这样的调查不仅是国家承担的国际义务的要求，也是有效打击有罪不罚现象和实现受害人和整个社会了解真相的权利的最佳途径。

98. 工作组建议各国：

(a) 在国家立法中将强迫失踪界定为一种独立的犯罪，并确定不同的刑事责任模式，包括煽动、教唆、默许和积极掩盖强迫失踪，以及指挥的刑事责任或上级责任；

(b) 建立能够迅速接受和处理强迫失踪申诉的机制，由独立于被指控犯罪人所属或可能与之有关联的机构的当局负责。应授权这些机制迅速对收到的申诉进行调查。必须将据称国家官员参与或非国家行为体在国家官员支持或默许下参与的失踪申诉视为强迫失踪案件，并立即启动适用指导调查此类罪行的原则。各国不能以没有正式申诉为由拒绝启动调查；

(c) 保障与其合作的所有主管司法当局和调查人员不受限制地进入关押被剥夺自由者的任何地方或有理由相信可以找到失踪者的任何官方或非官方地方；

(d) 确保负责调查的当局能够获取所有相关信息，包括与军事、警察、情报和其他国家安全机构有关的记录和档案中所载的任何信息；

(e) 消除国内法中可能导致强迫失踪案件有罪不罚的障碍，包括：

(一) 在适用的情况下，仅从该人的命运和下落得到澄清之日起启动诉讼时效；

(二) 禁止大赦、赦免和其他可能旨在避免或间接妨碍调查、起诉和处罚上述罪行犯罪人之义务的措施；

(三) 禁止以上级命令作为辩护理由；

(四) 限制既判力原则和一罪不二审原则在欺诈性调查案件中的适用；

(f) 建立快速有效的司法求助系统，以确定失踪者的下落，确保他们的身心健康，并查明下令或实施剥夺自由的当局，包括具体的个人或机构。这一补救办法应适用于所有情况，没有例外；

(g) 确保调查的独立性、自主性和公正性。为此，各国应：

(一) 暂停任何被指控犯罪人的公职，以有助于防止他们影响调查或对指挥或参与调查的人施加压力、恐吓或实施报复；

(二) 采取步骤，限制被指控犯罪人所属机构参与调查；

(h) 建立保护受害人、其家人、证人和其他参与调查人员，包括可能提供案件相关信息的被告的机制，这些机制应在一个拥有实现其目标所需的充足资源的独立机构主持下运作；

(i) 为幸存者和失踪者家属参与不同程序提供便利。为此，应建立机制，确保他们获得在处理强迫失踪案件方面有经验并得到受害人信任的专业人员提供的社会心理支持。还应建立后续机制；

(j) 为强迫失踪案件的调查和刑事起诉设立专门的多学科机构，并促进联合背景调查，以确保更好地协调刑事政策，减少调查的零散性；

(k) 在《关于或属非法致死事件调查的明尼苏达规程》(2016 年)基础上促进科学证据的使用，包括建立能够获得充足资源的地方自主法医小组；

(l) 制定保存和披露公开和保密记录的政策，并采取措施确保有查询这些记录所需的合格的专业人员和充足的物质资源；

(m) 建立明确的机制，确保参与调查的所有国家机构之间，特别是负责刑事调查和起诉以及搜寻失踪人员的机构之间的协调、合作和信息交流，以保证在各方面取得进展和成果；

(n) 在搜寻失踪人员和刑事调查期间与其他国家合作，包括提供所掌握的任何相关证据，建立以向受害人提供全面援助为重的合作框架，移交或引渡被指控犯罪人，并确保对他们进行调查和审判；

(o) 改革积极参与强迫失踪行为的情报、军事和安全机构，以协助确保其透明度，并加强民主机构的监督。

Annex

Annex on jurisprudence and related policies of the thematic Report of the Working Group on Enforced or Involuntary Disappearances: Standards and Public Policies for an Effective Investigation of Enforced Disappearance

I. The elements of the obligation to investigate enforced disappearances and obstacles thereto

1. The obligation for States to investigate enforced disappearances is well codified in international law namely in the 1992 Declaration on the Protection of All Persons from Enforced Disappearance (the Declaration) and the International Convention on the Protection of All Persons from Enforced Disappearance (the Convention). These standards have been developed over the course of many years, following relevant jurisprudence articulated by international, regional and national courts, as well as the practices established by different States as exemplified in this annex.

2. The conditions for an adequate investigation in enforced disappearance cases under the European Convention of Human Rights (ECHR) have mostly been elaborated referring to Article 2 (the right to life). The obligation to protect life under Article 2, read in conjunction with the general duty under Article 1 of the ECHR, "requires by implication that there should be some form of an effective official investigation when individuals have been killed as a result of the use of force."[104] The European Court of Human Rights (European Court) has focused on the concept of primary protection, which ensures the victim's substantive right ex post facto through investigation. The European Court also analyses cases of enforced disappearance referring to Article 3 (prohibition of torture), Article 5 (right to liberty and security) and Article 13 (right to an effective remedy) of the ECHR. In some cases, the European Court declared a violation of Article 8 (right to respect for private and family life).

3. The jurisprudence of the European Court establishes a procedural obligation that obliges States to undertake an effective investigation into alleged breaches of the ECHR. The procedural obligation to investigate enforced disappearances continues as long as the circumstances of the violation have not been clarified and until the establishment of responsibility can be reasonably expected.[105] The European Court referred to Article 13 ECHR concluding that an effective remedy in cases of enforced disappearances includes "a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure."[106]

4. The European Court stated in *Ergi v. Turkey* (paragraph 79): "[P]rocedural obligations have been implied in varying contexts under the Convention, where this has been perceived as necessary to ensure that the rights guaranteed under the Convention are not theoretical or illusory but practical and effective."[107]

5. With respect to the State's obligation to investigate complaints of enforced disappearance of persons, the Inter-American Court of Human Rights (Inter-American Court) identified an effective investigation to be diligent, not a mere formality, initiated ex

[104] European Court of Human Rights, *Timurtaş v. Turkey*, Application No. 23531/94, 13 June 2000, para. 87.

[105] European Court of Human Rights, *Šilih v. Slovenia*, Application No. 71463/01, 9 April 2009, paras. 157–160.

[106] European Court of Human Rights, *Kurt v. Turkey*, Application No. 15/1997/799/1002, 25 May 1998, para. 140. See also *Timurtaş v. Turkey* (see footnote 117), para. 111.

[107] European Court of Human Rights, *Ergi v. Turkey*, Application No. 23818/94, 28 July 1998, para. 79; European Court of Human Rights, *İlhan v. Turkey*, Application No. 22277/93, 27 June 2000 para. 91.

officio if required,[108] clarifying all circumstances,[109] impartial[110] and aiming to identify the authors of the crime.[111] An effective investigation is to be undertaken in view of ensuring proceedings that safeguard "the rights of access to justice, to the truth about the facts and to the reparation of the next of kin."[112] First deriving the duty to investigate from Article 1(1) of the American Convention on Human Rights (ACHR) (the general duty to respect and ensure), the Inter-American Court subsequently interpreted the content of this duty referring to Article 8 (the right to a fair trial) and Article 25 (the right to effective recourse) ACHR.[113]

6. The Inter-American Court stated in the *The Pueblo Bello Massacre v. Colombia* (paragraph 170): "[T]he Court will examine the due diligence in the conduct of these official actions to investigate the facts, as well as additional elements, in order to determine whether the procedures and proceedings were conducted respecting the right to a fair trial, within a reasonable time, and whether they constituted an effective recourse to ensure the rights of access to justice, to the truth about the facts and to the reparation of the next of kin."

7. Furthermore, the Inter-American Court has held that "faced with the particular gravity of such offenses and the nature of the rights harmed, the prohibition of the forced disappearance of persons and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens*."[114] Accordingly, all States, including third States, are required to take actions in the face of a breach of a peremptory norm of international law.[115] The investigations have to be undertaken in a "serious manner," and to be continued as long as the fate of the victim remains unknown.[116] This obligation in relation to effective investigations is only discharged when the disappeared persons will be released or their remains will be returned to families for burial in accordance with their customs and beliefs. Circumstances, in which structural patterns of violence are apparent, such as in contexts of widespread violence against women, warrant heightened due diligence in relation to investigative steps and require strengthened local mechanisms in order to carry out "specific search actions."[117] The Inter-American Court indicated that human rights violations, including disappearances, are to be contextualized within the historical and political events that led to their occurrence.[118] The identification of patterns of disappearances in relation to their historical, political, material, temporal and spatial

[108] IACHR, *Velásquez Rodríguez v. Honduras*, Merits, Judgment of July 29, 1988, Series C No. 4, para. 177.

[109] IACHR, *Bámaca-Velásquez v. Guatemala*, Reparations, Judgment of February 22, 2002, Series C No. 91, para. 75.

[110] Inter-American Commission of Human Rights, *Monsenor Oscar Arnulfo Romero and Galdámez v. El Salvador*, Report No. 37/00, OEA/Ser.L/V/II.106 doc. 3 rev., 13 April 2000, para. 80.

[111] Inter-American Commission of Human Rights, *Ignacio Ellacuría et al. v. El Salvador*, Report No. 136/99, OEA/Ser.L/V/II.106 doc. 3 rev., 22 December 1999, para. 196.

[112] IACHR, *The Pueblo Bello Massacre v. Colombia*, Judgment of January 31, 2006, Series C No. 140 para. 170.

[113] See IACHR, *Serrano-Cruz Sisters v. El Salvador*, (Merits, Reparations and Costs) Judgment of March 1, 2005, Series C No. 118.

[114] See IACHR, *Goiburú et al v. Paraguay*, Merits, Reparations and Costs, Judgment of September 22, 2006. Series C No. 153, para. 84; IACHR, *Anzualdo Castro v. Peru* (see footnote 16) para. 59; and IACHR, *Radilla Pacheco v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2009. Series C No. 209, para. 139.

[115] See, Draft Articles on the Responsibility of States for Internationally Wrongful Acts by the International Law Commission (ILC) in August 2001, articles 40 and 41, available at https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

[116] IACHR, *Velásquez-Rodríguez v. Honduras* (see footnote 126) paras. 177, 180 and 181; See also IACHR, *Serrano-Cruz Sisters v. El Salvador* (footnote 128) paras. 61, 65; IACHR, *Villagrán Morales et al. v. Guatemala*. Judgment of November 19, 1999, Series C No., para. 226.

[117] IACHR, *González et al. ('Cotton Field') v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 16, 2009, Series C No. 205, para. 284.

[118] IACHR, *Case of the Rochela Massacre v. Colombia* (see footnote 86) paras. 76, 158 and 194.

context contribute to a society's collective right to know the truth.[119] Importantly, if prosecutions and punishment remain legally or factually impossible, State must continue to undertake an effective investigation in order to disclose the factual circumstances of the disappearance.

8. The Inter-American Court stated in the *Godínez Cruz Case* (paragraph 188): "The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government."[120]

9. The Inter-American Court stated in *Serrano-Cruz Sisters v. El Salvador* (paragraph 65): "The obligatory investigation by the State must be carried out with due diligence, because it must be effective. This implies that the investigating body must, within a reasonable time, take all necessary measures to try and obtain results."

10. The Inter-American Court stated in *González et al. ('Cotton Field') v. Mexico* (paragraph 258): "The foregoing reveals that States should adopt comprehensive measures to comply with due diligence in cases of violence against women. In particular, they should have an appropriate legal framework for protection that is enforced effectively, and prevention policies and practices that allow effective measures to be taken in response to the respective complaints. (…) This should take into account that, in cases of violence against women, the States also have the general obligation established in the American Convention, an obligation reinforced since the Convention of Belém do Pará came into force."

11. The Inter-American Court stated in *Rochela Massacre v. Colombia* (paragraph 76): "The Court deems it relevant to point out that in all cases submitted to this body, it has required that the context be taken into consideration because the political and historical context is a determinant element in the establishment of the legal consequences in a case. (…) For this reason, the analysis of the events that occurred on January 18, 1989, which the State recognized, cannot be considered separately from the context in which they took place. Likewise, their legal consequences cannot be established in a vacuum, which is what would result from their decontextualization. (Paragraph 158): In context of the facts of the present case, the principles of due diligence required that the proceedings be carried out taking into account the complexity of the facts, the context in which they occurred and the systematic patterns that explain why the events occurred. In addition, the proceedings should have ensured that there were no omissions in gathering evidence or in the development of logical lines of investigation."

12. In the event that the body of the disappeared person was eventually found, the Inter-American Court referred to the United Nations Manual on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions for conducting an investigation.[121]

13. The Human Rights Committee understands the duty to investigate in relation to Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) (the right

[119] Verónica Hinestroza, Human Rights Institute of the International Bar Association, contribution to the expert consultation of the Working Group on Enforced or Involuntary Disappearance at its 116th session. Available at www.ohchr.org, p. 3; CED/C/COL/CO/1; para. 20.e); A/HRC/19/58/Add.2, para. 97.

[120] IACHR, *Godínez Cruz v. Honduras*, Judgment of January 20, 1989, Series C No. 5, para. 144; See IACHR, *Velásquez Rodríguez v. Honduras* (see footnote 123) para. 188.

[121] IACHR, *Pueblo Bello Massacre v. Colombia*, (see footnote 127) paragraph 177, referring to the United Nations Manual on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, see E/ST/CSDHA/12 (1991); the IACHR concluded in relation to the Juan Humberto-Sánchez Case, that the investigation did not satisfy all the measures by The UN Manual; see IACHR, *Juan Humberto Sánchez v. Honduras*. Preliminary Objections, Merits, Reparations and Costs, Judgment of June 7, 2003, Series C No. 99, para. 127.

to an effective remedy), identifying the "general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies."[122] The Human Rights Committee also derived the duty to investigate from Articles 4(2) Optional Protocol 1 and 14(3) ICCPR.[123] In relation to the case *Kimouche v. Algeria*, the Human Rights Committee stressed the duty to undertake a thorough and effective investigation of the fate and whereabouts of the disappeared person and to provide adequate information emerging from all investigative steps.[124] The investigation is part of an effective remedy and should elucidate the circumstances of the disappearance and, if possible, lead to the location and return of remains of the disappeared to their families.[125] A failure to investigate would amount to a violation of the ICCPR itself.[126]

14. The Human Rights Committee stated in *Kimouche v. Algeria* (paragraph 9): "[T]he State party is under an obligation to provide the authors with an effective remedy, including a thorough and effective investigation into the disappearance and fate of their son, his immediate release if he is still alive, and the appropriate information emerging from its investigation, and to ensure that the authors and the family receive adequate reparation, including in the form of compensation."

15. The Human Rights Committee stated in *Chhedulal Tharu et al. v. Nepal* (paragraph 10.10): "Despite the authors' efforts, no thorough and effective investigation has been concluded by the State party to elucidate the circumstances surrounding their relatives' detention and alleged deaths, and no criminal investigation has even been started to bring the perpetrators to justice. The State party has failed to explain the effectiveness and adequacy of investigations carried out by the Ministry of Home Affairs Disappearances Committee and the concrete steps taken to clarify the circumstances of their detention or the cause of their alleged deaths. It has also failed to locate their mortal remains and return them to the authors' families. Therefore, the Committee considers that the State party has failed to conduct a thorough and effective investigation into the disappearance of the authors' relatives."

A. Ex-officio and promptness of the investigation

16. The authorities must act of their own motion once an enforced disappearance has come to their attention. They cannot rely on the initiatives of the next of kin either to lodge a formal complaint or to propose a certain line of inquiry.[127]

17. The European Court first articulated a duty of investigation of a disappearance in *Kurt v. Turkey*. The Court stated that Article 5 ECHR (right to liberty and security) must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and "to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since."[128] Furthermore, the European Court applies a presumption of violation of Article 2 of the ECHR (right to life) when the victim has last been seen alive in life-threatening circumstances and the respondent State fails to provide convincing explanations as to his or her fate and whereabouts or investigation that caused those events.[129] In those contexts, offenses arising

[122] Human Rights Committee, general comment No. 31 (2004), para. 15.

[123] Human Rights Committee, *Bleier v. Uruguay*, communication No. R.7/30, 29 March 1982, para. 13.3.

[124] Human Rights Committee, *Kimouche v. Algeria*, communication No. 1328/2004, 10 July 2007, para. 9.

[125] Human Rights Committee, *Chhedulal Tharu et al. v. Nepal*, communication No. 2038/2011, 21 October 2015, paras.9.3 and 10.10.

[126] Human Rights Committee, general comment No. 31 (2004), para. 18.

[127] European Court of Human Rights, *Ergi v. Turkey* (see footnote 122) para. 83. See Section II, A of the Thematic Report.

[128] European Court of Human Rights, *Kurt v. Turkey*, (see footnote 121) para. 24; European Court of Human Rights, *Cyprus v. Turkey*, application No 25781/94, 10 May 2001 para. 132.

[129] European Court of Human Rights, *Bazorkina v. Russia*, application No. 69481/01, 27 July 2006, paras. 110–112.

from these life-threatening circumstances must be met with adequate accountability mechanisms by national courts.[130]

18. The European Court stated in *Cyprus v. Turkey*, (paragraph 132): "The Court recalls that there is no proof that any of the missing persons have been unlawfully killed. However, in its opinion, and of relevance to the instant case, the above-mentioned procedural obligation also arises upon proof of an arguable claim that an individual, who was last seen in the custody of agents of the State, subsequently disappeared in a context which may be considered life-threatening."

19. Furthermore, the European Court held in *Aslakhanova and Others v. Russia* that measures to redress the systemic failure to investigate disappearances in the region would fall into two principal categories. The first concerned the suffering of the relatives of the victims, while the second relates to the ineffectiveness of criminal investigations and the subsequent impunity enjoyed by the perpetrators.[131] In *Cyprus v. Turkey*, the European Court held that failing to investigate into circumstances conducive to the disappearance of missing persons caused distress and anxiety for the victim's next of kin, which amounts to inhumane treatment. The latter results from inadequate reactions by State authorities.[132]

20. The Inter-American Court established that whenever there are reasonable motives to suspect that a person has been subjected to enforced disappearance an investigation should be opened ex officio and without delay.[133] In any case, every State authority, public or private officer who is aware of acts intended to forcibly disappear persons, is under the duty to immediately report them.[134] In the case *Anzualdo Castro v. Peru*, the Inter-American Court stated, "whenever there is reason to believe that a person has been subjected to enforced disappearance, an investigation must be conducted." [135] Importantly, investigations do not depend on proof presented before the relevant authorities by the next of kin of the victims and, therefore, if State authorities receive information of an enforced disappearance, these authorities must immediately report those acts so that adequate steps can be taken.[136] Family members should have the possibility to become engaged at all stages of the investigative steps while they should be informed of the progress of these steps constantly.

21. The Inter-American Court stated in *Anzualdo Castro v. Peru*, (paragraph 65): [W]henever there is a reason to belief that a person has been subjected to forced disappearance, an investigation must be conducted. This obligation is independent from the filing of a complaint, since in cases of forced disappearance, International Law and the general duty to guarantee, to which Peru is bound, imposes upon States the obligation to investigate the case ex officio, without delay and in a serious, impartial and effective way. This is a fundamental and conditioning element for the protection of certain rights that are otherwise affected or annulled by those situations, such as the right to life, personal liberty and personal integrity. Without detriment to the foregoing, in any case, every State authority, public or private officer who is aware of acts purported to forcibly disappear persons, shall immediately report them."

22. The Inter-American Court indicated in *Pueblo Bello Massacre v. Colombia* (paragraph 145): "The execution of an effective investigation is a fundamental and conditioning element for the protection of certain rights that are affected or annulled by these situations, such as, in the instant case, the rights to personal liberty, humane treatment

130 European Court of Human Rights, *Nilkolova and Velichkova v. Bulgaria*, application No. 7888/03, 20 December 2007, para. 57.

131 European Court of Human Rights, *Aslakhanova v. Russia*, Application No. 32059/02,18 December 2012, para. 217.

132 European Court of Human Rights, *Cyprus v. Turkey* (see footnote 143).

133 IACHR, *Anzualdo Castro v. Peru* (see footnote 16) para. 65; IACHR, *Radilla Pacheco v. Mexico*, Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2009. Series C No. 209, para. 143; *Velásquez-Rodríguez v. Honduras* (see footnote 123) para. 177.

134 Ibid.

135 IACHR, *Anzualdo Castro v. Peru* (see footnote 16) para. 135.

136 IACHR, *Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of November 24, 2010, Series C No. 219, para. 108.

and life. This assessment is valid whatsoever the agent to which the violation may eventually be attributed, even individuals, because, if their acts are not investigated genuinely, they would be, to some extent, assisted by the public authorities, which would entail the State's international responsibility."[137]

23. In France, the public prosecutor may initiate investigations into enforced disappearances even if no formal complaint has been lodged. Moreover, Article 40, paragraph 3 of the Code of Criminal Procedure provides that "any constituted authority, public officer or civil servant who, in the performance of his duties, acquires knowledge of a crime or offence shall be required to give notice thereof without delay to the public prosecutor and to transmit to that judge all information, minutes and acts relating thereto."[138] In Portugal, the offence of enforced disappearance is criminalized as crime against humanity pursuant to article 9 (i) of Law No. 31/2004 of 22 July 2004. It is classified as a "public offence" ("crime público"), meaning that a formal complaint by the victim or other person is not a precondition for the competent authorities to launch an investigation, initiating the latter ex officio.[139]

B. Prompt legal remedy to determine the whereabouts of the disappeared persons

24. The standards of a prompt and effective investigation include the securing of evidence such as eyewitness testimonies and gathering forensic evidence.[140] The investigation has to be conducted promptly and in a reasonably expeditious manner.[141]

25. In assessing the effectiveness of the criminal investigation of cases of enforced disappearances, the European Court has not explicitly considered their outcome. Instead the European Court focused on the delays in the investigation and deficiencies in securing evidence. The Court considered the investigation by State authorities to be ineffective if the authorities took witness statements with an inappropriate delay in time exceeding two months after the notification of the disappearance while starting to conduct official inquiries only two years after the occurrence of the disappearance.[142]

26. The European Court stated in *Timurtaş v. Turkey* (paragraphs 89 and 90): "[the Court] notes the length of time it took before an official investigation got under way and before statements from witnesses were obtained, the inadequate questions put to the witnesses and the manner in which relevant information was ignored and subsequently denied by the investigating authorities. The Court is in particular struck by the fact that it was not until two years after the applicant's son had been taken into detention that enquiries were made of the gendarmes in Şırnak. (…) In the light of the foregoing, the Court finds that the investigation carried out into the disappearance of the applicant's son was inadequate and therefore in breach of the State's procedural obligations to protect the right to life."

27. The European Court found a failure to carry out an effective criminal investigation under Article 2 ECHR in the event of an applicant remaining without information in relation to the progress of the investigation. Similar significant and inappropriate delays and failings in the investigation process led the European Court to find repeated violations by States when they did not comply with their procedural obligations arising under Article 2 ECHR in enforced disappearance cases.

28. The European Court stated in *Baysayeva v. Russia* (paragraphs 126 and 127): "Such delays by themselves compromised the effectiveness of the investigation and could not but

137 IACHR, *Pueblo Bello Massacre v. Colombia* (see footnote 127) para. 145.

138 France, Code of Criminal Procedure of 2 March 1952, Article 40, para. 3.

139 Portugal, Law No. 31/2004 of 22 July 2004, Article 9 (i).

140 European Court of Human Rights, *Salman v. Turkey*, Application No. 21986/93, 26 June 2000, para. 106; see Section II, B of the Thematic Report.

141 European Court of Human Rights, *Selmouni v. France*, Application No. 25803/94, 28 July 1999, paras. 78–79.

142 European Court of Human Rights, *Timurtaş v. Turkey*, (see footnote 119) paras. 47 and 89.

have had a negative impact on the prospects for arriving at the truth. While accepting that some explanation for these delays can be found in the exceptional circumstances that have prevailed in Chechnya and to which the Government refer, the Court finds that in the present case they clearly exceeded any acceptable limitations on efficiency that could be tolerated in dealing with such a serious crime."[143]

29. However, in *Palić v. Bosnia and Herzegovina*, the European Court did not find a violation of the procedural duty to carry out an investigation that is capable of leading to the identification of the perpetrators despite of several delays in the proceedings. Instead, the European Court concluded that the authorities carried out the appropriate investigative actions, which resulted in the issuing of an international arrest warrant.[144] Despite the absence of a conviction of alleged perpetrators numerous years after the disappearance, the Court considered the investigative steps undertaken by relevant authorities as sincere and thorough efforts in order to disclose the fate and whereabouts of the disappeared and to seek accountability of alleged perpetrators. The Court held that the State complied with its procedural obligations under Article 2 ECHR.

30. The European Court stated in *Palić v. Bosnia and Herzegovina (paragraph 65)*: "In these circumstances, the Court finds that the domestic criminal investigation was effective in the sense that it was capable of leading to the identification and punishment of those responsible for the disappearance and death of Mr Palić, notwithstanding the fact that there have not yet been any convictions in this connection. The procedural obligation under Article 2 is indeed not an obligation of result, but of means."

31. Although the duty to investigate is an obligation of means, it has been asserted that in relation to the State's duty towards family members of a victim of enforced disappearances to fully establish his or her whereabouts, this obligation has evolved towards entailing a result-orientated component.[145] If the duty to investigate were not to be construed as an obligation of result, the cruel and inhuman treatment of the disappeared person's family continues, violating article 7 ICCPR.[146]

32. The Human Rights Committee stated in the case *Kimouche v. Algeria* (paragraph 9): "[T]hat *w*hile the Covenant does not give individuals the right to demand the criminal prosecution of another person, the Committee nevertheless considers the State party duty-bound not only to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances and infringements of the right to life, but also to prosecute, try and punish the culprits."[147]

33. The Inter-American Court has held that an effective investigation has to have an objective in line with the logic behind the investigation, such as identifying the location of disappeared persons and their remains, determining the truth and ending impunity.[148] States are obliged to carry out an effective investigation with the view to establishing the truth about the circumstances of the disappearance and the fate and whereabouts of those disappeared. This obligation is separate from the objective of prosecution.[149] However, while the Inter-American Court has indicated that the duty to investigate is one of means, not of outcome, it has stressed that the duty to investigate should be assumed by the State as a legal obligation in and of itself and not as a simple formality condemned from the onset to

[143] European Court of Human Rights, *Baysayeva v. Russia*, paras. 126 and 127; European Court of Human Rights, *Aslakhanova and others v. Russia* (see footnote 147) para.123.

[144] European Court of Human Rights, *Palić v. Bosnia and Herzegovina*, Application No. 4704/04, 15 February 2011, para. 65.

[145] See the contribution made by Fundación para la Justicia y el Estado Democrático de Derecho and TRIAL International, para. 9; Human Rights Committee, *Cifuentes Elgueta v. Chile*, communication No. 1536/2006, individual opinion of Committee members Ms. Helen Keller and Mr. Fabián Salvioli (dissenting), para. 26.

[146] See the contribution made by Fundación para la Justicia y el Estado Democrático de Derecho and TRIAL International, para. 9.

[147] Human Rights Committee, *Kimouche v. Algeria* (see footnote 139) para. 9.

[148] IACHR, *Velásquez-Rodríguez v. Honduras* (see footnote 123), para. 181; IACHR, *The Pueblo Bello Massacre v. Colombia* (see footnote 127) para. 143.

[149] IACHR, *Velásquez-Rodríguez v. Honduras* (see footnote 123) para. 177.

be unsuccessful, or a matter of particular interests, which depends on the procedural initiative of the victims or their next of kin.[150]

34. The Inter-American Court has also reiterated that the passage of time bears a directly proportionate relationship to the limitation – and in some case, the impossibility – of obtaining evidence and/or testimony, making it difficult and even useless or ineffective, to carry out probative measures in order to clarify the facts that are being investigated, to identify the possible authors and participants, and to establish the eventual criminal responsibilities, as well as to clarify the fate of the victim and to identify those responsible for his disappearance.[151]

C. Access to relevant information

35. The obligation to provide access to information constitutes a crucial part of an effective investigation. Authorities in charge of the investigation must have access to all relevant information, including military, police and intelligence information, and any classification of vital information for reasons of national security should be subjected to close scrutiny.[152]

36. Where applicants have no access to public information in the course of investigations, the European Court identified a violation of the procedural aspect of Article 2 ECHR, particularly considering procedural fairness. The investigative steps undertaken by relevant authorities must consider all elements of public scrutiny. At a minimum, according to the European Court, relatives of the victim of the disappearance "must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."[153] Rendering the access to case files in administrative proceedings impossible to the next of kin of the victim was one of the considerations that led the European Court to conclude a violation of the procedural obligations by a state arising under Article 2 ECHR.

37. The European Court stated in *Oğur v. Turkey* (paragraph 92): "[…] during the administrative investigation the case file was inaccessible to the victim's close relatives, who had no means of learning what was in it. The Supreme Administrative Court ruled on the decision of 15 August 1991 on the sole basis of the papers in the case, and this part of the proceedings was likewise inaccessible to the victim's relatives. Nor was the decision of 15 August 1991 served on the applicant's lawyer, with the result that the applicant was deprived of the possibility of herself appealing to the Supreme Administrative Court."

38. The European Court stated in *Tahsin Acar v. Turkey* (paragraph 225): "[T]here must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."

[150] See IACHR, *Tenorio Roca y otros Vs. Peru*, Preliminary Objections, Merits, Reparations and Costs. Judgement of 22 June 2016. Serie C No. 314.

[151] See IACHR, *Radilla Pacheco Vs. México*, Preliminary Objections, Merits, Reparations and Costs. Judgement of 23 November 2009, para. 215; IACHR, *Chitay Nech y otros Vs. Guatemala*, Preliminary Objections, Merits, Reparations and Costs, Judgement of 25 May 2010, para. 196; IACHR, *Ibsen Cárdenas e Ibsen Peña Vs. Bolivia*, Merits, Reparations and Costs, Judgment of 1 September 2010, para. 167; IACHR, *Torres Millacura y otros Vs. Argentina*, Merits, Reparations and Costs, Judgement 26 August 2011, para. 122; IACHR, *Caso Gudiel Álvarez y otros ("Diario Militar") Vs. Guatemala*, Merits, Reparations and Costs, Judgement 20 November 2012, para. 259.

[152] See Section II, C of the Thematic Report.

[153] European Court of Human Rights, *Tahsin Acar v. Turkey*, application No. 26307/95, 6 May 2003, paras. 224 and 225.

39. In *Tsechoyev v. Russia* the European Court reiterated the significance of the relatives' ability to access case files as a minimum standard of procedural obligations under Article 2 ECHR in relation to an effective investigation.[154]

40. Databases that contain information on the fate and whereabouts of a disappeared person have to be sufficiently interlinked. In *Aslakhanova and Others v. Russia*, the European Court stressed the need for the State to create "a single, sufficiently high-level body in charge of solving disappearances in the region, which would enjoy unrestricted access to all relevant information and would work on the basis of trust and partnership with the relatives of the disappeared."[155] Limitations of access to official documents should be set down precisely in law, be considered necessary in a democratic society and be proportionate to the aim of protection.[156] In line with the European Court, the Inter-American Court held that State authorities have to provide information about the results of investigations to relatives of a disappeared person, independent from the possibility of punishment of alleged perpetrators for the commission of any enforced disappearance.[157]

41. The Human Rights Committee in the case *Bashasha v. Libyan Arab Jamahiriya* confirmed that States considered to be responsible for an enforced disappearance hold the duty to furnish adequate information arising from an effective investigation into the disappearance. The authorities are under the obligation, in the case of death, to return the remains of the disappeared person as a means to provide an effective remedy.[158] In the *case of El Boathi's disappearance*, Algeria issued many contradictory pieces of information regarding the victim's fate, which, according to the Human Rights Committee, contributed to a situation of impunity.[159]

42. The Human Rights Committee stated in *Bashasha v. Libyan Arab Jamahiriya* (paragraph 9): "[T]he State party is under an obligation to provide the author with an effective remedy. The Committee therefore urges the State party a) to conduct a thorough and effective investigation into the disappearance and death of the author's cousin; b) to provide adequate information resulting from its investigation (…)."

D. Investigations should continue until the fate and whereabouts of the disappeared person have been clarified

43. The European Court understood enforced disappearance as being continuous, linking it to the prolonged time of distress, anxiety and suffering of the relatives of a disappeared person.[160] In *Cyprus v. Turkey* the Court concluded that the continuous nature of enforced disappearances prompts an ongoing effort to investigate until the fate and whereabouts of the disappeared person have been clarified.[161]

44. The European Court stated in *Cyprus v. Turkey* (paragraph 150): "[D]uring the period under consideration, there has been a continuing violation of Article 5 of the Convention by virtue of the failure of the authorities of the respondent State to conduct an effective investigation into the whereabouts and fate of the missing Greek-Cypriot persons

[154] European Court of Human Rights, *Tsechoyev v. Russia*, application No. 39358/05, 15 March 2011, para. 149.

[155] European Court of Human Rights, *Aslakhanova and Others v. Russia*, (see footnote 147) para. 225.

[156] Available at https://wcd.coe.int/ViewDoc.jsp?id=262135.

[157] IACHR, *Velásquez-Rodríguez v. Honduras* (see footnote 123) para. 181; IACHR, *The Pueblo Bello Massacre v. Colombia* (see footnote 127) para. 143.

[158] Human Rights Committee, *Bashasha v. Libyan Arab Jamahiriya*, communication No. 1776/2008, 20 October 2008, para. 9.

[159] CCPR/C/119/D/2259/2013 para. 7.5.

[160] European Court of Human Rights, *Çiçek v. Turkey*, application No. 45175/12, 5 February 2019, para. 173; European Court of Human Rights, *Varnava and Others v. Turkey*, Applications nos. 16064/90 – 16073/90, 18 September 2009, para. 186; European Court of Human Rights, *Timurtaş v. Turkey* (see footnote 119) para. 98; See Section II, E of the Thematic Report.

[161] European Court of Human Rights, *Cyprus v. Turkey* (see footnote 143) para. 150.

in respect of whom there is an arguable claim that they were in custody at the time they disappeared."

45. The European Court reiterated the obligation of a state to identify and initiate prosecutions of an alleged perpetrator of enforced disappearances under Article 2 ECHR in *Varnava a.o. v. Turkey*.[162] Moreover, when disappearances occur in life-threatening circumstances, the State's obligation to conduct an effective investigation and to identify and prosecute perpetrators does not come to an end upon discovery of the body or presumption of death.[163]

46. The European Court stated in *Varnava and Others v. Turkey* (paragraph 145): "The Court would note that the procedural obligation to investigate under Article 2 where there has been an unlawful or suspicious death is triggered by, in most cases, the discovery of the body or the occurrence of death. Where disappearances in life-threatening circumstances are concerned, the procedural obligation to investigate can hardly come to an end on discovery of the body or the presumption of death; this merely casts light on one aspect of the fate of the missing person. An obligation to account for the disappearance and death, and to identify and prosecute any perpetrator of unlawful acts in that connection, will generally remain."

47. The Human Rights Committee in the case *Bleier v. Uruguay* considered this case to be admissible as the enforced disappearance was ongoing and related to events after Uruguay's ratification of the ICCPR and its Optional Protocol 1 on 23 March 1976. The Committee confirmed the continuous nature of enforced disappearances.[164] In the case *Sarma v. Sri Lanka* the Human Rights Committee also held that the enforced disappearance of the victim was continuous.[165]

48. The Inter-American Court reiterated the continuous nature of an enforced disappearance, which allows for the Court's competence to rule on any actions and their consequences taking place in the aftermath of the recognition of jurisdiction [166] In this relation the duty to investigate instances of alleged enforced disappearances is considered to be continuous as long as the fate of the person disappeared has not been clarified.[167] The obligation remains in force as long as there is uncertainty around what ultimately happened to individuals who are missing, because the right of victims' families to know the victim's fate and, where applicable, to locate their bodily remains, constitutes a fair expectation that the State must meet through all available means.[168]

49. The Inter-American Court stated in *Velásquez-Rodríguez v. Honduras* (paragraph 181): "The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain

[162] European Court of Human Rights, *Varnava and Others v. Turkey*, (see footnote 174) para. 145; European Court of Human Rights, *Palić v. Bosnia and Herzegovina*, Application No. 4704/04, 15 February 201, para. 64.

[163] European Court of Human Rights, *Varnava and Others v. Turkey*, (see footnote 174) paras. 144 and 145.

[164] Human Rights Committee, *Bleier v. Uruguay* (see footnote 138) paras. 7(b), 13, 14.

[165] Human Rights Committee, *Sarma v. Sri Lanka*, Communication No. 950/2000, 16 July 2003, para. 6.2.

[166] IACHR, *Blake v. Guatemala*, Merits. Judgment of January 24, 1998, Series C No. 57, paras. 39 and 40; IACHR, *Velásquez-Rodríguez v. Honduras* (see footnote 123) para. 155; IACHR, *Radilla-Pacheco v. Mexico*, Preliminary objections, Merits, Reparations, and Costs. Judgment of November 23 2009, Series C No. 209, para. 24.

[167] IACHR, *Velásquez-Rodríguez v. Honduras* (see footnote 123) para. 181.

[168] See IACHR, *García y Familiares Vs. Guatemala*, Merits, Reparations and Costs, Judgment of 29 November 2012, Series C No. 258 para. 132; IACHR, *Osorio Rivera y Familiares Vs. Perú*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 26 November 2013, Series C No. 253, para.179; and IACHR, *Rodríguez Vera y otros (Desaparecidos del Palacio de Justicia) Vs. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 14 November 2014, para. 439.

circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains."

E. Autonomy and independence of the authorities in charge of the investigation

50. The persons responsible for the investigation and the ones who carry out that investigation must be impartial and independent from those allegedly involved in the events.[169] The European Court discussed the independence and impartiality of adjudicatory authorities relating to cases in Turkey. In these cases the Court concluded that National Security Courts were not sufficiently independent due to the involvement of a military judge in relation to the requirements under Article 6 ECHR. The Court stated, "the court may be unduly influenced by considerations which had nothing to do with the nature of the case."[170] Elements beyond the institutional and hierarchical organization of courts are considered when assessing the independence of investigations.[171]

51. The European Court stated in *Öcalan v. Turkey* (paragraph 115): "Where a military judge has participated in an interlocutory decision that forms an integral part of proceedings against a civilian, the whole proceedings are deprived of the appearance of having been conducted by an independent and impartial court."

52. The European Court stated in Tahsin *Acar v. Turkey* (paragraphs 221–223): "(…) The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (…) For an investigation into an alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events."

53. In the case *La Cantuta v. Peru*, the Inter-American Court reiterated that an effective investigation must be independent and impartial.[172] In the case *Serrano-Cruz Sisters v. El Salvador*, the Inter-American Court found that the investigation lacked impartiality of the investigating authorities because the prosecutor was involved in the visit of one of the potential witnesses of the case interpreted as acting in the defense of the respondent State at the Inter-American Court, while simultaneously acting as prosecutor at the domestic level as well.[173]

54. The Inter-American Court stated in *Serrano-Cruz Sisters v. El Salvador* (paragraph 103): [T]he prosecutor demonstrated that he had not maintained his impartiality in the investigation and that the line of investigation in the criminal proceedings was not totally separate from the State's defense before the Inter-American Court.

55. In Greece, pursuant to article 14 and 15 of the Criminal Procedure Code (CPC) and the relevant proceedings persons involved in any way in committing the felony of enforced disappearance are not allowed to participate under any capacity, not even the one of a secretary, during the criminal preliminary proceedings. These include the preliminary

[169] European Court of Human Rights, *Tahsin Acar v. Turkey*, Application No. 26307/95, 23 November 2004, paras. 221–223; See Section II, F of the Thematic Report.

[170] European Court of Human Rights, *Mahmut Kaya v. Turkey*, Application No. 22535/93, 28 March 2000, para.97.

[171] European Court of Human Rights, *Tahsin Acar v. Turkey* (see footnote 180) para. 221.

[172] IACHR, *La Cantuta v. Peru*, Merits, Reparations, and Costs. Judgment of November 9, 2006, Series C No. 162 para. 110; See Inter-American Commission of Human Rights, *Monsenor Oscar Arnulfo Romero and Galdámez v. El Salvador*, IACommHR Report No. 37/00, OEA/Ser.L/V/II.106 doc. 3 rev. (13 April 2000) para. 80.

[173] IACHR, *Serrano-Cruz Sisters v. El Salvador* (see footnote 128) para. 103.

examination, filing criminal charges, interrogation, the intermediate proceedings of judicial councils and the main proceedings before a court.[174] In France, a public prosecutor or investigating judge who directs the judicial investigation could not entrust it to a police service, which would itself be suspected of the crime of enforced disappearance.[175] In relation to the newly established Office of the Missing Persons (OMP) in Sri Lanka, the Working Group reiterated the importance of ensuring that the OMP's independence is scrupulously respected. The Working Group further underscored the State's obligation to ensure impartial and thorough investigations into enforced disappearances, with the competent authorities having the necessary powers and resources to conduct the investigation effectively.[176]

F. Right to Truth in relation to effective investigation

56. The Human Rights Committee, the Inter-American Court and the European Court affirmed the existence of the right to know the truth afforded to relatives of victims of gross human rights violations. Importantly, the collective dimension of this right is viewed as intrinsically intertwined with the obligation to carry out an effective investigation into the factual circumstances of a disappearance. Furthermore, it is asserted that this right holds a preventive dimension.[177] In this context, truth-seeking processes and truth and reconciliation commissions should not absolve the States' obligation to carry out an effective investigation into the facts.[178]

57. The Inter-American Court established most strongly that effective investigations are undertaken with the view to determine the truth surrounding the disappearance. Since the *Velásquez Rodríguez Case*, the Inter-American Court has affirmed in its jurisprudence the existence of a right of the victim's relatives to know the victim's fate and, if applicable, where a disappeared person's remains are located.[179] The Inter-American Court found for the first time in the *Castillo-Páez Case* that a failure to investigate corresponds to a violation of the right to truth.[180] In this context, the right to truth refers to both, determining the factual circumstances of a disappearance and identifying alleged perpetrators responsible for it.[181] The right to know the truth of the relatives of victims of serious human rights violations is framed within the right to access to justice and the duties to investigate and to prosecute, deriving from articles 8 and 25 ACHR.[182] As part of these duties, States hold the obligation to effectively search for the truth, which is considered to be an independent duty from any criminal proceedings, which may be barred by statutes of limitation.[183] The Court has also considered the obligation to investigate as a form of reparation, given the need to remedy the violation of the right to truth. [184] The right to truth refers to a collective dimension, as a right owed to the society as a whole, in order to have

[174] Greece, Criminal Procedure Code (CPC) of 1 January 1950, Articles 14 and 15.

[175] France, submission to the WGEID of 11 March 2019, paragraph 7.

[176] AL LKA 1/2020.

[177] A/HRC/16/48 para. 39; E/CN.4/2005/102/Add.1 Principle 2.

[178] IACHR, *19 Tradesmen v. Colombia*, Merits, Reparations and Costs, Judgment of July 5, 2004, Series C No. 109, para. 72(g).

[179] IACHR, *Velásquez-Rodríguez v. Honduras* (see footnote 123) para. 181.

[180] IACHR, *Castillo Páez v. Peru*, Judgment of November 3, 1997, Series C No. 34 paras. 85 and 86; IACHR, *Castillo-Páez v. Peru*, Reparations and Costs. Judgment of November 27, 1998, Series C No. 43 para. 106.

[181] IACHR, *Serrano-Cruz Sisters v. El Salvador* (see footnote 128) para. 62.

[182] IACHR, *Bámaca-Velásquez v. Guatemala* (see footnote 124) para. 201.

[183] IACHR, *Velásquez-Rodríguez v. Honduras* (see footnote 123) para. 177; IACHR, *Villagrán Morales et al. v. Guatemala*, Judgment of November 19, 1999, Series C No. para. 226; IACHR, *La Cantuta v. Peru* (see footnote 183) para. 157.

[184] IACHR, *Serrano-Cruz Sisters v. El Salvador* (see footnote 128) para. 62.

access to information that is essential for the establishment and safeguarding of a democratic system.[185]

58. The Inter-American Court held in *Pueblo Bello Massacre v. Colombia* in relation to the reasonable timeframe of an effective investigation (paragraph 171): "[T]he right of access to justice is not exhausted with the filing of domestic proceedings, but must also ensure, within a reasonable time, the right of the alleged victims or their next of kin for every necessary measure to be taken to know the truth about what happened and to sanction those who are eventually found to be responsible."

59. The Inter-American Court stated in *Castillo-Páez v. Peru*, (paragraphs 85 and 86): "[T]he [Inter-American] Commission considers that there has been a violation of the right to truth and information, in the light of the State's lack of interest in investigating the events that gave rise to this case. (…) it [the right to truth] may correspond to a concept that is being developed in doctrine and case law, which has already been disposed of in this Case through the Court's decision to establish Peru's obligation to investigate the events that produced the violations of the American Convention."

60. The Inter-American Court stated in *Bámaca-Velásquez v. Guatemala* (paragraphs 197 and 201): "[A]s a result of the disappearance of Bámaca Velásquez, the State violated the right to the truth of the next of kin of the victim and of society as a whole. In this respect, the Commission declared that the right to the truth has a collective nature, which includes the right of society to "have access to essential information for the development of democratic systems", and a particular nature, as the right of the victims' next of kin to know what happened to their loved ones, which permits a form of reparation (…). (para 201) [T]he right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities from the competent State organs, through the investigation and prosecution established in Articles 8 and 25 of the Convention."

61. The Inter-American Court stated in *Serrano-Cruz Sisters v. El Salvador* (paragraph 62): "The Court has reiterated that everyone, including the next of kin of victims of serious human rights violations, has the right to know the truth. Consequently, the next of kin of the victims, and society as a whole, must be informed of everything that happened in relation to the said violations."

62. The Human Rights Committee in the case *Mariam Sankara et al. v. Burkina Faso* in relation to the assassination of the President of Burkina Faso in 1987, the Human Rights Committee indicated that the family had the right to know the circumstances conducive to the violation.[186] In the case *Benaziza v. Algeria* the Human Rights Committee implicitly interlinked the right of victims to know the truth and receive factual information surrounding the disappearances as part of a diligent investigation.[187]

63. The Human Rights Committee stated in *Bashasha v. Libyan Arab Jamahiriya* (paragraph 9): [T]he State party is under an obligation to provide the author with an effective remedy. The Committee therefore urges the State party a) to conduct a thorough and effective investigation into the disappearance and death of the author's cousin; b) to provide adequate information resulting from its investigation (…).

64. In relation to truth commissions in Algeria, the Human Rights Committee pointed to the fact that their reports were not publicly available by demanding the Algerian authorities to publicize these.[188] These concerns of the Human Rights Committee point to the fact that these reports should be known by a wider audience than the victims of enforced disappearances, namely by the society as a whole.

[185] IACHR, *Bámaca-Velásquez v. Guatemala* (see footnote 124) para. 197; IACHR, *Serrano-Cruz Sisters v. El Salvador* (see footnote 126) para. 62.

[186] Human Rights Committee, *Mariam Sankara et al. v. Burkina Faso*, communication No. 1159/2003, 28 March 2006, para. 12.2.

[187] Human Rights Committee, *Benaziza v. Algeria*, communication No. 1588/2007, 26 July 2010 para. 11; Human Rights Committee, *Bashasha v. Libyan Arab Jamahiriya* (see footnote 174) para. 9.

[188] Human Rights Committee, Concluding observations Algeria, CCPR/C/DZA/CO/3, para. 10.

65. The right to truth as part of an effective investigation is not commonly mentioned as part of the European Court's jurisprudence. However, it is often treated as part of the procedural obligation under Article 2 ECHR in cases of gross human rights violations. In order to satisfy this right criminal investigations must be conducted. In cases relating to Russia, the European Court found that delays in the investigation hindered the effectiveness of the investigation, as required by Article 2 ECHR and, therefore, negatively impacted "the prospects of arriving at the truth."[189]

66. The European Court in *Kurt v. Turkey* (paragraph 175): "[G]iven [the fact] that the authorities have not assisted the applicant in her search for the truth about the whereabouts of her son, which has led it to find a breach of Articles 3 and 13 in her respect, the Court considers that an award of compensation is also justified in her favour."

67. In Mexico, the "General Law on Victims" adopted on 9 January 2013 contains a broad definition of the notion of victims and spells out all fundamental rights that shall be guaranteed to them, including the right to know the truth (Articles 18 to 25), the right to the localisation, identification and restitution of mortal remains (Article 21), the right to access to justice (Article 117), and the right to reparation, including compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition (Articles 26 to 78).[190]

68. In Bolivia, the Commission of Truth established pursuant to Law No. 879 reiterated the obligation of the State to an effective, diligent and exhaustive investigation into cases of enforced disappearances, which is accompanied by the imprescriptible nature of the crime and the prohibition of amnesties for enforced disappearances.[191]

69. In Bosnia and Herzegovina, the "Law on Missing Persons," provides for the legal possibility for families of missing persons to initiate appeals if the relevant institutions fail to comply with their legal obligations. According to the Law, this is a means for families to exercise their right to know the truth and seek protection before the Constitutional Court.[192]

70. In relation to the lack of information surrounding the fate and whereabouts of disappeared persons in the course of the civil war in Tajikistan, the Working Group indicated that the Government should adopt a truth-seeking State policy and develop specific mechanisms, supported by dedicated resources, for dealing with disappearances caused by and related to the civil war. This should include the creation of a national register to collect information on disappeared persons, the search for, mapping and conservation of burial sites, and the exhumation, identification and return of identified remains to families.[193]

G. Burden of Proof regarding effective investigations

71. The European Court does not revert the burden of proof with regard to an alleged violation of the substantive limb of Article 3 of the ECHR in respect of a disappeared person requesting applicants to prove beyond reasonable doubt that their relative has in fact been tortured.[194] However, such proof results from "the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact."[195]

72. The European Court stated in *Avkhadova and others v. Russia*, (paragraph 84): "Detained persons are in a vulnerable position and the obligation on the authorities to account for the treatment of a detained individual is particularly stringent where that

189 European Court of Human Rights, *Bazorkina v. Russia* (see footnote 144) para. 121.

190 Mexico, Ley General de Víctimas of 9 January 2013, Article 18–25.

191 Bolivia, Law No.879 of 23 December 2016.

192 Bosnia and Herzegovina, Law on Missing Persons of Bosnia and Herzegovina of 21 October 2004, "Official Gazette of BiH", No. 50/05 (2004).

193 A/HRC/45/13/Add.1 para. 37.

194 European Court of Human Rights, *Zaurbekova and Zaurbekova v. Russia*, Application No. 27183/03, 22 January 2009, paras. 91 and 92.

195 European Court of Human Rights, *Ireland v. the United Kingdom*, Application No. 5310/71, 18 January 1978, para. 161.

individual dies or disappears thereafter. Where the events at issue lie wholly or to a large extent within the exclusive knowledge of the authorities, as in the case of persons under their control in detention, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation."

73. The European Court in *Bazorkina v. Russia*, (paragraph 106): "As to the facts that are in dispute, the Court recalls its jurisprudence confirming the standard of proof "beyond reasonable doubt" in its assessment of evidence. Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. In this context, the conduct of the parties when evidence is being obtained has to be taken into account."

74. The Inter-American Court considers that crucial facts clarifying the circumstances of enforced disappearances are in the control of the State, which may hinder the author of the complaint to access evidence.[196] Therefore, the Inter-American Court held that the burden of proof shifts to the respondent State, if the Inter-American Commission on Human Rights demonstrated circumstantial evidence linking a systematic pattern of enforced disappearances and a specific complaint in relation to a disappeared person. In the event of classification of relevant information by the State necessary for the disclosure of the whereabouts or the fate of the disappeared person, the Inter-American Court stated in the *Gomes Lund* case, that the burden of proof is on the State to provide reasons for the classification of this information.[197]

75. The Inter-American Court stated in *Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil* (paragraph 230): [A]ll denials of information must be motivated and founded, to which the State is responsible for the burden of proof on the impossibility of presenting said information, and given doubts or empty legal arguments, the right to access to information will be favored.

76. In the case *Grioua v. Algeria*, the Human Rights Committee applied the concept of a shared burden of proof allowing for rendering a default decision. As such both the respondent State and the complainant hold the duty, respectively, to investigate the complaint and present supporting evidence.[198] The Human Rights Committee took this approach in subsequent cases in contexts of Algeria, Libya and Nepal.[199]

77. The Human Rights Committee stated in *Grioua v. Algeria* (paragraph 7.4): "The Committee reaffirms that the burden of proof cannot rest on the author of the communication alone, especially considering that the author and the State party do not always have equal access to the evidence and frequently the State party alone has the relevant information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has the duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to furnish to the Committee the information available to it."

78. The Human Rights Committee stated in *Chhedulal Tharu and others v. Nepal* (paragraph 10.2): "In cases in which the author has submitted allegations that are corroborated by credible evidence and in which further clarification depends on information that is solely in the hands of the State party, the Committee may consider the author's allegations substantiated in the absence of satisfactory evidence or explanations to the contrary presented by the State party."

196 IACHR, *Velásquez-Rodríguez v. Honduras* (see footnote 123) para.123.

197 IACHR, *Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil* (see footnote 152) para. 230.

198 Human Rights Committee, *Grioua v. Algeria*, Communication No. 1327/2004, 10 July 2010, para. 7.4.

199 Human Rights Committee, *Sharma v. Nepal*, Communication No. 1469/2006, 28 October 2008, para. 7.5 ; Human Rights Committee, *Madoui v. Algeria*, Communication No. 1495/2006, 28 October 2008 para. 7.3; Human Rights Committee, *Benaziza v. Algeria* (see footnote 205) para. 9.4; Human Rights Committee, *El Alwani v. the Lybian Arab Jamahiriya*, Communication No 1295/2004, 11 July 2007 para. 6.3.

H. Obstacles to effective investigation: Statute of limitations, principle of ne bis in idem and prohibition of amnesties, pardons and other similar measures

79. Indicators of ineffective investigation recorded by the European Court included the length of time before an actual investigation was initiated and witness statements were taken, the length of time before statements were taken from the alleged perpetrators or inquiries by police officers on duty at the time, inadequate questions put to the witnesses, a failure by the authorities to consider all relevant information, the failure of the public prosecutor to make any serious attempts to inspect the custody records and to visit the detention places himself,[200] sole reliance on the statements of police officers,[201] decisions of non-jurisdiction and the lack of securing evidence,[202] the lack of cooperation between State agencies and as a result the lack of access to requisite information[203] and delays through repeatedly adjourning and reopening investigations.[204]

80. Further obstacles to effective investigations include limited national capacity and a lack of qualified forensic experts, compounded by economic constraints due to the costly process of DNA identification, the lack of relevant information about gravesites due to witnesses' fear of testifying or lack of exhumations of known sites, the lack of cooperation between former rival parties, difficulties for investigative bodies to visit places of detention or to obtain essential information from relevant authorities. Obstacles to conducting effective investigations also stem from difficulties in securing access to archives that may contain vital information on the fate of disappeared persons.

81. The Human Rights Committee stated that amnesties are incompatible with the obligation of States to investigate and reiterated that States are to be "duty-bound to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances […], and to prosecute, try and punish those responsible for such violations."[205] The duties of a proper effective investigation prevail any domestic legal impediments as to evade the persistence of impunity.[206]

82. Furthermore, the Human Rights Committee, in relation to the inadmissibility of death certificates, underscored that by issuing these the State cannot bypass its duty to investigate the facts, which derives from the continuous nature of this obligation.[207]

83. The Human Rights Committee stated in *Bashasha v. Libyan Arab Jamahiriya* (paragraph 7.3): "[T]he Committee observes that on 20 June 2009, the family was provided with Milhoud Ahmed Hussein Bashasha's death certificate, without any explanation as to the cause or the exact place of his death or any information on any investigations undertaken by the State party. In the circumstances, the Committee finds that the right to life enshrined in article 6 has been violated by the State party."[208]

84. The Inter-American Court in *Barrios Altos v. Peru* found that the self-amnesty in relation to Amnesty Act Nos. 26479 and 26492 was incompatible with the duty to investigate and prosecute leading to the persistence of impunity. In the *Castillo-Páez v. Peru* case, the Inter-American Court held that an amnesty law, which impedes the

[200] European Court of Human Rights, *Timurtaş v. Turkey* (see footnote 119) para. 89; European Court of Human Rights, *Mahmut Kaya v. Turkey* (see footnote 187) para. 104.

[201] European Court of Human Rights, *Ergi v. Turkey* (see footnote 122) para. 83.

[202] European Court of Human Rights, *Mahmut Kaya v. Turkey* (see footnote 187) paras. 24–52 and 104.

[203] European Court of Human Rights, *Aslakhanova and others v. Russia* (see footnote 147) para. 125.

[204] European Court of Human Rights, *Baysayeva v. Russia*, application No. 47354/07, European Court of Human Rights, 12 June 2012, para. 129; See Section II, D, G, and H of the Thematic Report.

[205] Human Rights Committee, *El Abani v. Algeria*, communication No. 1640/2007 (2010), 26 July 2010, para. 9; Human Rights Committee, General Comment No. 31 (2004), para. 18.

[206] Human Rights Committee, *Laureano v. Peru*, communication No. 540/1993, 16 April 1996, para. 10; Human Rights Committee, *Benaziza v. Algeria* (see footnote 205) para. 9.2.

[207] Human Rights Committee, *Bashasha v. Libyan Arab Jamahiriya* (see footnote 174) para.7.3; see Human Rights Committee, *S.E. v. Argentina*, communication No. 275/1988, 26 March 1990.

[208] Ibid.

identification of a perpetrator, did not evade the State's responsibility from complying with the victim's right to know.[209]

85. The Inter-American Court stated in *Castillo-Páez v. Peru* (paragraph 90): "In connection with the above-mentioned violations of the American Convention, the Court considers that the Peruvian State is obliged to investigate the events that produced them. Moreover, on the assumption that internal difficulties might prevent the identification of the individuals responsible for crimes of this kind, the victim's family still have the right to know what happened to him and, if appropriate, where his remains are located. It is therefore incumbent on the State to use all the means at its disposal to satisfy these reasonable expectations."

86. The Inter-American Court stated in *Barrios Altos v. Peru* (paragraph 41:) "[A]ll amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law."

87. Furthermore the Inter-American Court held that State authorities must not suppress information obtained through administrative procedures or from judicial authorities investigating an alleged enforced disappearance justifying these acts under the cover of national security.[210]

88. The Inter-American Court stated in *Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil* (paragraph 202): "[T|he Court has also established that in cases of violations of human rights, the State authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or pending procedures."

89. In relation to statutes of limitation, it is of particular importance that the obligation to undertake effective investigations in order to determine the truth exists independently from criminal proceedings.[211]

90. In most cases brought before the European Court, no legal impediments such as amnesty laws have been instituted. The former European Commission in *Dujardin v. France*[212], considered an amnesty shielding fifty individuals from prosecution for the killing of several gendarmes. Understanding that the amnesty emerged in relation to broader efforts for the settlement of conflicts between communities in New Caledonia, the European Commission concluded that such an amnesty did not contravene the ECHR "unless it can be seen to form part of a general practice aimed at the systematic prevention of prosecution of the perpetrators of such crimes."[213]

91. However, when ill-treatment or torture is concerned the European Court found in *Yaman v. Turkey* (paragraph 55.): "[W]here a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an 'effective remedy' that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible."

92. It could be concluded that considering torture and enforced disappearance are closely related and intertwined offenses that statutes of limitation and amnesties contravene the ECHR in such cases. In *Aslakhanova and others v. Russia*, the termination of pending investigations into abductions solely on the grounds that the time limit has expired is

209 IACHR, *Castillo-Páez v. Peru* (see footnote 198) para. 90.

210 IACHR, *Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil* (see footnote 152) para. 202.

211 IACHR, *Vera Vera et al. v. Ecuador*, Preliminary objection, Merits, Reparations, and Costs. Judgment of May 19, 2011, Series C No. 224 paras. 122 and 123.

212 EComHR, *Dujardin v. France*, Application No. 16734/90, 2 September 199, D.R. No. 72.

213 Ibid. para. 243.

contrary to the obligations arising in relation to the right to life enshrined in Article 2 ECHR.[214]

93. The implementation of judgments by the European Court in relation to enforced disappearances in the Chechen Republic of the Russian Federation, including practices of effective investigation by governmental authorities, remains low. Instead, authorities resorted to paying compensation fixed by the Court to the applicant. Yet, no action is undertaken in terms of investigation or prosecution of the alleged perpetrators.[215]

94. In Ecuador, according to the Constitution and the Criminal Code, a statute of limitations does not apply to enforced disappearances. In Uruguay, the courts have resorted to statutory limitations, which may result in the shelving of cases of enforced disappearances in the future.[216] In Chile, in numerous cases, even if there were no grounds for excluding criminal responsibility, extenuating circumstances known as a "half prescription" have been applied, which lowered the penalty handed down in light of the time elapsed since the commission of the crimes.[217] In France, article 221-18 of the Criminal Code sets the limitation period for prosecution at thirty years. The starting point of the limitation period for public action is the day on which the disappearance ceases, i.e. the day on which certainty about the victim's fate replaces uncertainty, the victim reappears in full light or his death is established. Enforced disappearance constituting a crime against humanity is not subject to a statute of limitations (article 213-5 of the Criminal Code).

95. In Nepal, on 26 April 2020 the Supreme Court rejected the Government's petition calling for a review of its landmark judgment of 2015. The latter rejected a clause, which would have afforded the Commission on Truth and Reconciliation and the Commission on Investigation of Disappeared Persons with the power to recommend amnesties for serious human rights violations committed the internal conflict between 1996–2006. Following a similar decision in January 2014, the Court, in its ruling, reiterated the prohibition of amnesties for serious human rights violations as a means to solidify a fair and transparent transitional justice process and in order to guarantee the centrality of victims within this process.[218]

96. In Tunisia, the Working Group regretted the proposal to dismantle the Specialized Criminal Chambers and to replace them with two new institutions that would be empowered to examine cases of gross human rights violations committed between 1955 and 2013 and to grant amnesties to the alleged perpetrators of these violations. The Working Group held that the proposal leads to impunity.[219]

97. In Spain, the current legal provisions related to the obligations to conduct investigations to clarify the fate of the missing person is applicable only and exclusively to enforced disappearances that are subsequent to 23 December 2010. The application of the Amnesty Law 46/1977 prevents the thorough and impartial investigation of thousands of complaints of enforced disappearances and the prosecution and punishment of those responsible.[220] Moreover, on 27 February 2012, the Supreme Court issued judgment No. 101/2012, which prevents Spanish judges from investigating crimes of the Civil War. This contravenes the States' obligations to ensure that perpetrators of enforced disappearances, including those who order, solicit, or induce the commission of, attempt to commit, are accomplices to, or participate in an enforced disappearance are prosecuted and sanctioned.

[214] European Court of Human Rights, *Aslakhanova and others v. Russia* (see footnote 147) para. 237.

[215] Parliamentary Assembly Doc. 12276, 4 June 2010, "Legal remedies for human rights violations in the North-Caucasus region", available at http://bit.ly/1QXp5CJ.

[216] See URY 1/2013; See also the contribution for this report by Francesca Lessa, Latin American Centre, OSGA, "Investigating Crimes against Humanity in South America," Policy Brief (Oxford, 2019) 8. Available at www.ohchr.org; See also Article 80 and 120 of the Constitution of 2008; see also the contribution for this report of Defensoría del Pueblo de Ecuador. Available at www.ohchr.org.

[217] A/HRC/22/45/Add.1 paras. 28 and 69, p.18.

[218] Available at https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25855&LangID=E.

[219] AL TUN 3/2019.

[220] Spain, Amnesty Law 46/1977 of 15 October 1977; A/HRC/27/49/Add.1, paras. 39–41.

Obstacles to investigative processes also imply restrictive or impossible access to archives, particularly military archives, that contain information on the fate of those disappeared, and the reluctant engagement of governmental authorities in processes of search, exhumation and identification of disappeared persons.[221]

98. The parliament of North Macedonia decided to subject all cases returned from the International Criminal Tribunal for the former Yugoslavia for prosecution at the domestic level to the 2002 Amnesty Law as a major legal impediment to investigations.[222] In Bosnia and Herzegovina, the Law on Amendments to the Criminal Code of 2015 introduced enforced disappearances as a separate offense, but it cannot be implemented retroactively.[223]

II. Jurisprudence related to policy measures outlined in Section III of the Thematic Report

A. Obligation to criminalize enforced disappearance autonomously

99. Article 4 of the Declaration establishes the obligation of the State to qualify enforced disappearance as an independent crime, which is understood as a critical requirement for an effective investigation.[224] Many countries lack specific legal provisions dedicated to protecting persons against enforced disappearances.

100. In France, enforced disappearances is codified as an autonomous offense via article 221-12 of the Penal Code introduced by Law No. 2013-711 as a result of the broader adjustment of French legislation to the Law of the European Union.[225]

101. In Thailand, a draft Prevention and Suppression of Torture and Enforced Disappearance Act establishes both torture and enforced disappearances as distinct crimes. However, in February 2017, Thailand's National Legislative Assembly decided to return the Draft Act to the Thai Cabinet, indefinitely delaying the enactment of this legislation. The Thai Cabinet approved the proposed legislation. Yet, it omits the key non-derogable principles of prohibition of torture and also of non-refoulement while the definition of crimes is not on par with international standards. Until now, Thailand's penal code does not recognize enforced disappearances as a crime bypassing, therefore, the continuous obligation to investigate cases of enforced disappearances.[226]

102. In India, enforced disappearances have not been recognized as a specific criminal offence in its penal code. Particular obstacles are faced due to the Armed Forces (Jammu and Kashmir) Special Powers Act of 1990, designating certain areas as "disturbed" territories. This Act grants broad powers and immunity to security forces including the requirement to get prior permission or sanction from the federal government before a member of the armed forces can be prosecuted in a civilian court.[227]

103. In relation to Tatjikiskan, the Working Group noted that enforced disappearances have not been introduced as an autonomous crime in its criminal legislation and nor are enforced disappearances planned to be incorporated in the new version of the Criminal Code of Tajikistan. The codification of enforced disappearances as an autonomous crime is crucial for addressing the limited awareness in the country of the concept of enforced

[221] A/HRC/27/49/Add.1, para. 29.

[222] Council of Europe, "Missing persons and victims of enforced disappearance in Europe," Issue Paper, (Brussels 2016), 47.

[223] Bosnia and Herzegovina, Law on Amendments to the Criminal Code of Bosnia and Herzegovina of 19 May 2015, Official Gazette of BiH", No. 40/15.

[224] See Section III, A. of the Thematic Report.

[225] France, Penal Code of 1 March 1994, article 221-12.

[226] THA 3/2019.

[227] International Commission of Jurists, "No More 'Missing Persons': The Criminalization of Enforced Disappearance in South Asia" (Geneva 2017) 20; See A/HRC/45/13.

disappearance as a means to conduct an effective investigation and to combat future instances of disappearances.[228]

104. In Tunisia, in the absence of specific legal provisions requiring the application of special procedures that differ from those currently in force there is no special procedure and no special investigating authority mandated to consider the offence of enforced disappearances, which is considered under the offence of infringement of personal liberty. Accordingly, the military courts that apply the Code of Criminal Procedure deal with such offences in accordance with the procedures that are applicable to other offences within their jurisdiction.[229]

B. Coordination of the authorities in charge of the investigation

105. The coordination of investigative entities within States and between States constitutes a crucial element for the identification and location of disappeared persons.[230] The requirement of international cooperation in terms of investigation was mentioned in a case of Irish and Italian applicants who were the next of kin of individuals killed in a security operation. The applicants claimed that the State failed to comply with its procedural obligations under Article 2 ECHR as the State did not cooperated with Irish authorities investigating the circumstances of the bombing. The lack of such cooperation rendered the investigations ineffective. In *Cummins et al. v. the United Kingdom*, the European Court recalled that the respondent State is under an obligation to cooperate with the State of which an alleged perpetrator is a national at all investigative stages.[231]

106. The European Court stated in *O'Loughlin a.o. v. the United Kingdom (para. 2.)*: Accordingly, where suspected perpetrators of a bombing attack carried out elsewhere are known to be present within the jurisdiction of a Contracting State, and evidence of a criminal offence may be secured, the fundamental importance of Article 2 requires that the authorities of that State of their own motion take effective measures in that regard. Otherwise, those indulging in cross-border attacks will be able to operate with impunity and the authorities of Contracting State where the unlawful attacks have taken place will be foiled in their own efforts to protect the fundamental rights of their citizens. The nature and scope of those measures will, inevitably, depend on the circumstances of the particular case and it is not appropriate for the Court to attempt to be more specific in this decision."

107. A positive example of international cooperation in investigative processes, is the agreement signed on 1 July 2011 between the Ministries of Foreign Affairs of Argentina and Italy, pursuant to which all documents related to the enforced disappearance of Italian nationals that were kept in diplomatic and consular headquarters in Argentina must be disclosed and delivered to the National Memory Archive.

108. In France, the Central Office for Combating Crimes against Humanity, Genocide and War Crimes is also the central point of contact for the cooperation with international police and works closely with foreign police services and judicial authorities, with the United Nations (UN) and its agencies, including the High Commissioner for Refugees and High Commissioner for Human Rights, with the International Criminal Police Organization (Interpol), the European network "Genocide" of Eurojust and the war crime focal point of the European law enforcement agency (Europol).[232]

109. Bosnia and Herzegovina and Serbia ratified the "Protocol on Co-operation in Search for the Missing Persons between the Council of Ministers of Bosnia and Herzegovina and the Government of Republic of Serbia" of 24 March 2016 that provides for more robust

[228] A/HRC/45/13/Add.1, para. 23.

[229] Tunisia, Section VI of the Criminal Code of 19 July 1913, Articles 250, 251 and 252 of the Code and Code of Military Justice of 10 January 1957, Article 5; See OL TUN 1/2018.

[230] See Section III, B and C of the Thematic Report.

[231] See European Court of Human Rights, Cummins a.o. v. the United Kingdom, admissibility decision, Application No. 27306/05, 13 December 2005.

[232] See the contribution for this report by France, p. 5. Available at www.ohchr.org.

exchange of information on missing persons' files, identification of grave sites and exhumation and identification of human remains.[233]

110. Several good practices can be mentioned in terms of the establishment of entities and mechanisms of cooperation to investigate enforced disappearances on a national level. According to the Council of Europe, national commissions on missing persons have been established in Armenia, Azerbaijan, Bosnia and Herzegovina, Montenegro and Serbia, as well as in Kosovo.[234],Good practices can also be identified in the practice of Argentina via the establishment of the National Commission concerning Missing Persons and in Croatia via the Commission for Tracing Persons Missing in War Activities in the Republic of Croatia. In Sri Lanka, the recently established Office of the Missing Persons (OMP) holds a range of powers in order to obtain information and evidence relevant to its investigations, including access to the records of past commissions of inquiry.[235] In Switzerland, when a person is reported missing, relatives can initiate a search request via a newly established network between the Confederation and the Cantons, in order to ensure that information flows efficiently and reliably between relevant entities.[236] In Mexico, the "General Law on Enforced Disappearance of Persons, Disappearance Perpetrated by Individuals and the National Search System," entered into force on 16 January 2018, creates a National Search System, a National Search Commission, a National Register of Disappeared and Missing Persons, and a National Citizens Council, made up of human rights defenders, experts and relatives of victims, who advise and issue opinions provided to the National Search System.[237]

C. Production of evidence, access of victims to investigation and protection from reprisals

111. The obligation to undertake an effective investigation of enforced disappearance is closely related to the rights of the victims, including their families, and other stakeholders to access and take part in the investigations.[238] The Inter-American Court stated that victim participation is an important element of effective investigations and in the production of evidence in order to clarify facts with the aim to establish the truth.[239] The Court also indicated that victims of human rights violations or their next of kin should dispose of a range of mechanisms for being heard and acting in proceedings in order to contribute to the clarification of facts.[240] Indeed, the participation of family members and the affected community in investigative steps plays a crucial role in the identification of evidence in disappearance cases.[241] In investigative processes, the respective cultural and ethnic background of affected communities should be taken in consideration and any operations that may lead to re-victimization or secondary victimization should be strictly avoided.[242]

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233 Bosnia and Herzegovina, "Protocol on Co-operation in Search for the Missing Persons between the Council of Ministers of Bosnia and Herzegovina and the Government of Republic of Serbia" Official Gazette of BiH" No. 2/16 of 24 March 2016.

234 Council of Europe (see footnote 232) 43; All references to Kosovo shall be understood to be in the context of Security Council resolution 1244 (1999).

235 A/HRC/42/40/Add.1 para. 6.

236 Switzerland, Submission to WGEID, March 2019, p. 4 para. 7.

237 CED/C/MEX/CO/1/Add.2.

238 See Section III, D, E and F of the Thematic Report.

239 IACHR, *Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil* (see footnote 152) para. 139.

240 IACHR, *Villagrán Morales et al. v. Guatemala*, Judgment of November 19, 1999, Series C No. 63 para. 227. See IACHR, *The Pueblo Bello Massacre v. Colombia* (see footnote 127) para. 144; IACHR, *Serrano-Cruz Sisters v. El Salvador* (see footnote 128) para. 63. This obligation is derived from Article 8 ACHR.

241 See the written contribution of Carlos Beristain to the expert consultation of the Working Group on Enforced or Involuntary Disappearance Expert Consultation at its 116th session, para. 5 (in Spanish). Available at www.ohchr.org.

242 Ibid, paras. 9 and 12.

112. The Inter-American Court stated in *Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil*, (paragraph 139): "The Court has also noted that from Article 8 of the Convention, what can be gathered is that victims of human rights violations, or their next of kin, should have ample possibilities to be heard and act in the respective procedures, in the search to ascertain the facts and in the punishment of those responsible, as well as the search for due reparation. Moreover, the Court has noted that the obligation to investigate and the corresponding right of the alleged victim or their next of kin cannot be gathered merely from the conventional norms of international law which are imperative for the States Parties, but also from the right to investigate ex oficio certain illicit conduct and the norms that permit the victims or their next of kin to file a complaint or present a lawsuit, evidence, or applications, or any other matter, in order to participate procedurally in the criminal investigation with the hope of establishing the truth of the facts."

113. The European Court considered that the obligation to investigate, construed as an obligation of means, entailed that the authorities must have taken all steps which remain available to them in order to safeguard the evidence concerning cases of disappearances and to undertake any investigative steps with the requisite due diligence.[243]

114. In cases of interim measures relating to applicants before the Court or witnesses being subjected to reprisals, the European Court in *Shabazova v. Russia* requested the government to provide without delay information on the fate and whereabouts of the applicant's husband.[244] It is important to note that the European Court leaves State parties a considerable margin of appreciation in the choice of protective measures. In the *Mahmut Kaya Case*, the European Court stated, "positive obligations must (…) not impose an impossible or disproportionate burden on the authorities."[245]

115. In Cyprus, the Committee of Missing Persons (CMP) was unable to exhume even a single grave for over 20 years mainly due to the lack of bi-communal cooperation and trust.[246] An obstacle was the persistent refusal of the Turkish military stationed in the north of the island to allow the search for and opening of possible burial sites located in military zones. Moreover, Turkey's refusal to allow the search for missing persons from 1974 in the territory under its control or allow access to relevant military archives delayed and rendered investigations ineffective.[247]

116. In Greece, incorporating the crime of enforced disappearance of a person into article 187 paragraph 1 of the Criminal Procedure Code (CPC) also means that the regulations on protection of witnesses and their families apply in relation to cases of enforced disappearances subsequent to an order from the competent prosecutor. Particularly, it means that witnesses should be systematically guarded by the police, separately detained if they are prisoners, change their identities, transfer them (if they are public servants), non-disclose their identity during criminal proceedings, as well as protect the trial officers accordingly, such as the prosecutor, the investigating magistrate, and judges of the case.[248]

117. In Mexico, the 2015 Protocol for the Search of Disappeared and Investigation of the Crime of Enforced Disappearances recommended the use of geographical data and the establishment of maps in order to undertake an effective investigation into disappearances cases.[249]

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[243] European Court of Human Rights, *Timurtaş v. Turkey* (see footnote 117) para. 88.

[244] See European Court of Human Rights, *Shabazova v. Russia*, application No. 38450/05, 2 April 2009.

[245] European Court of Human Rights, *Mahmut Kaya Case* (see footnote 181) para. 86.

[246] Council of Europe, (see footnote 232) p. 44.

[247] Ibid.

[248] Greece, Criminal Procedure Code (CPC) of 1 January 1950, Article 187 and Articles 9 and 10 of Law 2927/2001.

[249] See Office of the Prosecutor, *Protocolo Homologado para la Búsqueda de Personas Desaparecidas y la Investigación del Delito de Desaparición Forzada*, June 2015, p.45 in Verónica Hinestroza, Human Rights Institute of the International Bar Association, contribution to the expert consultation of the Working Group on Enforced or Involuntary Disappearance at its 116th session, p. 3. Available at www.ohchr.org.

118. In Tajikistan, the Working Group recommended that the Government should guarantee that there will be no reprisals against or harassment of families that come forward with information about the disappeared. This process should include collaboration with independent partners who could assist with the relevant and specialized expertise required to build trust and help prevent and monitor reprisals.[250]

119. In the Gambia, relatives of forcibly disappeared persons were afraid to file complaints and people with crucial information refused to testify, contributing to a situation of impunity. To remedy this situation, the Working Group recommended that incentives be provided to witnesses so they are willing to testify. Moreover the Working Group suggested that an adequate witness protection program should be created.[251]

D. Forensic investigations and conversation and disclosure of archives

120. The access to archives is crucial in order to obtain information relevant for clarifying cases of enforced disappearance and for ensuring that State authorities cannot restrict such access.[252] In various country-specific contexts the access to archives, including military archives that may contain information on the fate and whereabouts of disappeared persons has been reiterated as part of the State's obligation to effectively investigate enforced disappearances.

121. In its report after the visit to Turkey, for instance, the Working Group recommended that access to archives, including the military, the gendarmerie and the security and intelligence services should be guaranteed both to families and to judicial authorities, to allow them to fully investigate and prosecute those responsible (A/HRC/33/51/Add.1, para.26). In the report on Sri Lanka, the Working Group underlined that States' obligation to investigate the allegations and prosecute and punish the perpetrators requires ensuring access to all archives, including military archives, that may contain information on the fate and whereabouts of disappeared persons (persons (A/HRC/33/51/Add.2, para. 44). After the visit to Serbia, the Working Group welcomed the decision to open the archives of the Ministry of the Interior, but recommended that the archives of the Ministry of Defense be opened too for almost 300 lawsuits (A/HRC/30/38/Add.1, para. 37).

122. The Inter-American Court linked an effective investigation as a means to obtain the truth about circumstances of the disappearances and perpetrators involved to the possibility to access archives. In the case *Gomes-Lund et al. v. Brazil* the Court considered the failure by the State to comply with the obligation of granting access to crucial information contained in archives to victims in order to seek relevant facts of the disappearance. The Inter-American Court concluded that although information may be restricted, when this classification as secret is proved to be unlawful, the State has to make the information accessible within an adequate period of time in light of ongoing investigations.[253] The Human Rights Committee did not called for specific forensic commissions. Yet, the Human Rights Committee considered establishing central databases and platforms documenting reported disappearances, along with regular actions that assist family members in locating the disappeared persons.[254]

123. The Inter-American Court stated in *Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil* (paragraph 211): "It is essential that, in order to guarantee the right to information, the public powers act in good faith and diligently carry out the necessary actions to assure the effectiveness of this right, particularly when it deals with the right to the truth of what occurred in cases of gross violations of human rights such as those of enforced disappearances and the extrajudicial execution in this case. To argue in a judicial proceeding, as was done in this case, the lack of evidence regarding the existence of certain information, without at least noting what procedures were carried out to confirm the

250 A/HRC/45/13/Add.1, para. 37.

251 A/HRC/39/46/Add.1 para. 60.

252 A/HRC/7/2/Add.2 paras. 61 and 94; UN Updated Set of Principles to Combat Impunity, (see footnote 72) Principles 3, 4 and 14–18; See Section III, G and H of the Thematic Report.

253 IACHR, *Gomes-Lund et al. ("Guerrilha do Araguaia") v. Brazil* (footnote 152) paras. 211 and 212.

254 CCPR/C/79/Add.95 para. 10.

nonexistence of said information, allows for the discretional and arbitrary actions of the State to provide said information, thereby creating legal uncertainty regarding the exercise of said right. (…) (paragraph 212) Based on the preceding considerations, the Court concluded that the State violated the right to seek and receive information enshrined in Article 13 of the American Convention."

124. The "Forensic Commission to Identify Remains" established in Mexico in August 2013, created pursuant to an agreement among the Office of the Attorney General of Mexico, civil society organisations representing relatives of missing persons from Mexico, Honduras, Guatemala and El Salvador, and the Argentine Forensic Anthropology Team (EAAF), is in charge of identifying the mortal remains found in three mass graves related to massacres of migrants perpetrated in 2011 and returning the remains to families. This allowed families of missing persons and victims of enforced disappearance to be involved in investigations and to rely on independent professionals.[255]

125. In July 2005, the *Guatemalan Office of the Prosecutor for Human Rights* (PDH) discovered around 80 million documents by the National Police concerning the period of Guatemalan conflict. The PDH adopted steps to preserve the documentation and to enable access and consultation by the public. On the basis of evidence contained in the archives, an investigation regarding two members of the National Police responsible for the enforced disappearance of a trade unionist and an university student in 1984 was carried out which led to their identification, arrest, prosecution and sentencing to 40 years' imprisonment.[256]

126. In the Western Balkans, the establishment of centralised DNA databases has greatly enhanced the search and identification of missing persons and victims of enforced disappearance in the region. Although the archives of the Ministry of Defence are kept secret in Serbia, a positive example regarding obtaining access to military archives or to documentation covered by State secrecy laws concerns the opening of the archives of the Serbian Ministry of Interior in 2013.[257]

127. In Portugal, despite the absence of a specialised unit to investigate enforced disappearances, such cases are investigated by the Judicial Police, which disposes of a forensic lab and a unit for psychosocial support, both with specialized staff. The Judicial Police can request the support of the National Institute for Legal Medicine and Forensic Sciences with competencies in the area of forensics, anthropology and psychology.[258]

128. In Tajikistan, in relation to the exhumation of burial sites and identification of remains, the Working Group regretted that Tajikistan has limited forensic capabilities, and disposes only of one small facility for DNA analysis. The Working Group, therefore, recommended the establishment of a DNA bank of affected families, with appropriate guarantees on reprisals and confidentiality for families coming forward and with external assistance if required. Moreover, training for forensic officials on international standards, such as the Minnesota Protocol on the Investigation of Potentially Unlawful Death, should be strengthened.[259]

E. Differential approach in cases of disappearances of women

129. The Working Group recognized a gender perspective is critical in explaining, understanding and dealing with unique challenges that women face in the exercise of their human rights and to outline solutions to address these issues.[260]

130. The Inter-American Court in the *Cotton Field* case, dealing with enforced disappearances and subsequent deaths of three women in Ciudad Juarez at the US-Mexico border, found that States have the positive obligation to create an appropriate legal

[255] Inter-American Commission on Human Rights, Preliminary observations on the IACHR visit to Mexico, 2 October 2015, available at http://bit.ly/1Ssgiiv.

[256] See A/HRC/16/48/Add.2.

[257] A/HRC/30/38/Add.1, para. 37.

[258] Portugal, Submission to WGEID, March 2019, p. 5.

[259] A/HRC/45/13/Add.1, para. 38.

[260] A/HRC/WGEID/98/2, Preamble; See Section III, I of the Thematic Report.

framework to combat violence against women. The Court held that an obligation of strict due diligence to take prompt and effective investigative measures follows in the event of disappearances of women. The State has the duty to establish and implement an effective policy framework in order to combat incidences of violence reported over several years since those expose an apparent risk for relevant authorities. In this context, the Inter-American Court considered various reports outlining that the up-to-date policy methods for prevention in relation to specific violations against women have been ineffective. The Court also referred to assessments by UN bodies in relation to the general context of violence against women. The Court stated that prior to the disappearances, an increased degree of vigilance by State authorities was required in a context of widespread violence. Second, prior to the discovery of the body the State was obliged to undertake effective search operations.[261]

131. The Inter-American Court stated in *Gonzalez et al. ('Cotton Field') v. Mexico* (paragraph 273): "The Court observes that national and international reports agree that the prevention of the murder of women in Ciudad Juárez, and also the response to these killings, has been ineffective and insufficient. According to the 2005 CEDAW Report, it was only in 2003, primarily as a follow-up to the report of the IACHR Rapporteur, "that people began to face squarely the need for a comprehensive and integrated program with distinct and complementary areas of intervention." (…) (Paragraph 284): Mexico did not prove that it had adopted reasonable measures, according to the circumstances surrounding these cases, to find the victims alive. The State did not act promptly during the first hours and days following the reports of the disappearances, losing valuable time. In the period between the reports and the discovery of the victims' bodies, the State merely carried out formalities and took statements that, although important, lost their value when they failed to lead to specific search actions. (…) The foregoing reveals that the State did not act with the required due diligence to prevent the death and abuse suffered by the victims adequately and did not act, as could reasonably be expected, in accordance with the circumstances of the case, to end their deprivation of liberty. This failure to comply with the obligation to guarantee is particularly serious owing to the context of which the State was aware – which placed women in a particularly vulnerable situation – and of the even greater obligations imposed in cases of violence against women by Article 7(b) of the Convention of Belém do Pará."

132. In this context, the Inter-American Court requested that specific legislative and policy frameworks should to be established in order to comply with all investigative duties necessary in contexts of widespread violence against women.

133. The Human Rights Committee, in *Sassene v. Algeria*, reaffirmed that the suffering caused by enforced disappearances also affects their relatives and can be considered as a form of cruel and inhuman treatment warranting effective mechanisms for investigation. In this context, the specifically gender-related consequences of enforced disappearances may cause heightened economic hardship reinforcing structural dependencies and impact the mental and physical health of women and girls.[262]

134. The European Court in *Varnava v. Turkey* also held that an enforced disappearance generates a specific effect on relatives, which may amount to cruel or inhuman treatment as breach of article 3 ECHR to the detriment of these relatives. Although factors identified in relation to the impact of enforced disappearances of persons on their relatives were not considered to be gender specific, in *Çakıcı v. Turkey* the Court referred to considerations of "particular circumstances of the case," including the family ties and relationships, the involvement of a family member in investigative steps in order to obtain information, and the States reaction to these efforts by a particular family member.[263] Considering that jurisprudence showed that State agents had diverging reactions towards female family

[261] IACHR, *González et al. ('Cotton Field') v. Mexi*co, (see footnote 132) para. 284.

[262] See Human Rights Committee, *Sassene v. Algeria*, communication No. 2026/2011, 29 October 2014, paras. 3.4, 7.6, 7.11; See Human Rights Committee, *Rosa María Serna et als. v. Colombia*, communication No. 2134/2012, 9 July 2015.

[263] European Court of Human Rights, *Çakıcı v. Turkey*, application No. 23657/94, para. 98.

members and female victims of enforced disappearances, gender-specific circumstances consideration may be interfered as part of particular circumstances of the case.[264]

135. For instance, in Sri Lanka, the Office of Missing Persons referred to a gender-sensitive approach, including psychosocial responsive strategies, which support family members of those disappeared at all stages of the search including in circumstances where the death of the missing or disappeared person has been confirmed.[265]

F. Differential approach in cases of disappearances of migrants

136. Migrants[266] are frequently subject to deprivation of liberty, which may place them at risk of facing enforced disappearances due to the failure in safeguarding communication channels between migrants and family members while being in administrative detention,[267] or detention and summary return without due process for migrants intercepted at sea and in violation of the principle of non-refoulement.[268] The position of structural vulnerability of migrants in the absence of adequate transnational investigative mechanisms leads to difficulties in clarifying the fate and whereabouts of disappeared migrants and locating and returning human remains to their families. The Working Group recalled the direct link between migration and enforced disappearances in relation to particular risks arising from migratory journeys.[269]

137. The Working Group documented enforced disappearances of individuals during their migratory journeys in transit or in their country of destination and persons migrating due to the threat of being disappeared.[270] Individuals also migrated in order to take part in the search for truth seeking further information that contributes to the establishment of the whereabouts or fate of disappeared persons.[271] Preventing relatives from contributing to the identification of disappeared persons by State authorities results in the loss of traceable documental evidence. In other cases migrants have disappeared in detention facilities because they are not duly registered followed by the refusal of State authorities to disclose their whereabouts.[272]

138. In these contexts, States shall investigate any allegation of involvement, collusion or acquiescence of State authorities in criminal acts, which may result in the disappearance of migrants.[273] Any effective investigation should be undertaken with the requisite cooperation between States to conduct transnational investigations into these cases.[274] The Working Group recalled that an effective investigation of disappeared migrants comprises forensic investigative resources, the compilation of all relevant ante-mortem information, including the genetic information of the relatives and the creation of a central database.[275] Investigative steps imply the location of clandestine graves or other places where bodies may be concealed in migratory transit areas and the establishment of a register of corpses found.[276]

[264] Available at http://opiniojuris.org/2016/09/05/emerging-voices-the-european-court-of-human-rights-and-women-affected-by-enforced-disappearances-of-their-relatives/.

[265] A/HRC/42/40/Add.1, p. 65.

[266] See the definition used by the WGEID, A/HRC/36/39/Add.2 para. 5; See Section III, J of the Thematic Report.

[267] A/HRC/7/12 para. 44.

[268] A/HRC/33/67 para. 34; A/HRC/WGEID/112/1, para. 96; A/HRC/33/51/Add.1, para. 55.

[269] A/HRC/36/39/Add.2, para. 51; See A/72/335.

[270] A/HRC/WGEID/118/1 paras. 121–122; A/HRC/WGEID/119/1, paras. 20–21; E/CN.4/1984/21, para. 102. See also E/CN.4/1492, annex VIII, paras. 1 and 2.1 and annex IX, p. 5.

[271] E/CN.4/1985/15, para. 135. See also A/HRC/30/38/Add.5, paras. 33–41.

[272] UNHCR, Monitoring Immigration Detention: Practical Manual (UNHCR, 2014) p. 20.

[273] A/HRC/33/51/Add.1, para. 67; A/HRC/36/39/Add.2 para. 65.

[274] JAL GMB 1/2018.

[275] A/HRC/36/39/Add.2, para. 68.

[276] Ibid. 69.

139. The Inter-American Commission on Human Rights held that the failure to take effective investigative steps and further collusion between State agents and criminal organizations led to the enforced disappearances of migrants in Mexico.[277] The Office of the Prosecutor of Human Rights of Guatemala documented severe flaws in relation to effective investigations in relation to the location and identification of bodies and the burial of human remains of migrants transiting through Mexico.[278]

140. Positive practices by States include the collection of a total of 229 genetic markers and 348 fingerprints in 2016 in Tunisia in connection with a list of 505 persons reported missing on the Italian coast as a result of clandestine immigration since 14 January 2011. A database was also compiled from the file of missing persons and steps were taken to intensify diplomatic action.[279] In Mexico, a forensic commission mandated to exhume, identify and return the mortal remains of missing migrants was established in August 2013 for three burial sites of mass graves.[280]

G. Obligations to investigate disappearances committed by non-State actors

141. Enforced disappearances committed by non-State actors present particular challenges for the protection of victims and warrant investigative measures to be undertaken by the State as part of their due diligence obligations.[281] Even if the State is not involved in the commission of the enforced disappearance through the collusion or acquiescence of State agents with non-State actors, the State breaches its obligation when not engaging in effective investigations.[282]

142. The European Court and the Inter-American Court held that the same requirements of ex officio investigations, promptness, effectiveness, involvement of family members, and impartiality of investigating entities apply in relation to enforced disappearances allegedly committed by non-State actors.[283]

143. The European Court stated in *Tsechoyev v. Russia* (paragraph 145): "The obligation to conduct an effective official investigation also arises where death occurs in suspicious circumstances not imputable to State agents. It has developed a number of guiding principles to be followed for an investigation to comply with the Convention's requirements, comprising, notably, the requirements of effectiveness, independence, promptness and expedition, accessibility to the family and sufficient public scrutiny."

144. The Inter-American Court stated in *The Pueblo Bello Massacre v. Colombia* (paragraph 145–146): "The execution of an effective investigation is a fundamental and conditioning element for the protection of certain rights that are affected or annulled by these situations, such as, in the instant case, the rights to personal liberty, humane treatment and life. This assessment is valid whatsoever the agent to which the violation may eventually be attributed, even individuals, because, if their acts are not investigated genuinely, they would be, to some extent, assisted by the public authorities, which would entail the State's international responsibility. (…) The Court has maintained that by

277 Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc. 48/13, 30 December 2013, para. 162.

278 Ibid, para. 170; See Fundación para la Justicia y el Estado Democrático de Derecho et al., Alternative Report to the Committee against Torture, May 2012, available at tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/MEX/ INT_CAT_NGO_MEX_12976_S.pdf, paragraphs 136–150.

279 See the contribution for this report by Tunisia. Available at www.ohchr.org.

280 See Gabriella Citroni, "The first attempts in Mexico and Central America to address the phenomenon of missing and disappeared migrants," International Review of the Red Cross No. 905 (August 2017) p. 749.

281 IACHR, *Velásquez-Rodríguez v. Honduras* (see footnote 123) para. 172; See Section III, K of the Thematic Report.

282 European Court of Human Rights, *Mahmut Kaya v. Turkey* (see footnote 187) paragraph 78.

283 European Court of Human Rights, *Tsechoyev v. Russia* (footnote 170) paragraph 145; IACHR, *The Pueblo Bello Massacre v. Colombia* (see footnote 127) paras. 142–146.

implementing or tolerating actions aimed at carrying out extrajudicial executions, failing to investigate them adequately and, when applicable, failing to punish those responsible effectively, the State violates its obligations to respect and ensure the rights established in the Convention to the alleged victims and their next of kin, prevents society from knowing what happened, and reproduces the conditions of impunity for this type of acts to be repeated."

145. The Inter-American Court considered the obligation of the State to undertake effective investigations as part of the collective and individual right to know the truth to be applicable to cases of enforced disappearances not directly attributed to State agents.[284] When particular life-threatening circumstances or specific risks of disappearances by non-State actors can be identified, additional investigative steps are required to be undertaken by State authorities, including taking witness statements, the alerting of checkpoints, checking identification papers and official records of detainees in detention facilities.[285] The absence of the involvement of State agents in the commission of enforced disappearances does not shield the State from incurring international responsibility if the State fails to take preventive measures.[286] Furthermore, States should investigate potential acts of involvement, collusion, or acquiescence of State authorities in criminal acts committed by non-State actors conducive to enforced disappearances.[287]

146. The Inter-American Court stated in the *Gordínez Cruz case*, (paragraph 188): "Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane."

147. In Mexico, State agents and non-State actors allegedly committed enforced disappearances. The lack of effective investigative procedures make it impossible to identify if non-State actors participated in the commission of disappearances and if these have been tolerated by State actors. Therefore, new legislative and investigative mechanisms in Mexico focus on victims of disappearances, regardless if the authors of the offense were State actors or not.[288]

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[284] IACHR, *The Pueblo Bello Massacre v. Colombia* (see footnote 127) paras. 143, 161, 171, 193 and 212.

[285] See European Court of Human Rights, *Koku v. Turkey*, Application no. 27305/95, 31 May 2005; European Court of Human Rights, *Medova v. Russia*, Application No. 25385/04, European Court of Human Rights, 15 January 2009; IACHR, *González et al. ('Cotton Field') v. Mexico* (see footnote 132).

[286] IACHR, *Godínez-Cruz v. Honduras* (merits) judgment of 20, 1989, Series C No. 3, para. 188; IACHR, Velásquez Rodríguez Case (see footnote 123) para. 177; European Court of Human Rights, *Mahmut Kaya v. Turkey* (see footnote 187) para. 78.

[287] A/HRC/36/39/Add.2, para.h 88(c).

[288] See the contribution for this report by Mexico. Available at www.ohchr.org.