

**STATE COOPERATION ON MISSING AND DISAPPEARED PERSONS:
BEST PRACTICES**

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Your Excellencies, Ladies and Gentlemen,

On behalf of the International Commission on Missing Persons, I would like to express my sincere gratitude to the Office of the High Commissioner for Human Rights and the Working Group on Enforced or Involuntary Disappearances for their invitation to participate in the commemoration of the 30th Anniversary of the Working Group.

I recently had the pleasure of meeting the Chairman and some of the members of the Working Group for the first time this year while they were on an assessment visit to Bosnia and Herzegovina, where ICMP has its headquarters. While I look forward to their full report, I found their public statement, including their preliminary recommendations to be incredibly insightful and very useful for the government of Bosnia and Herzegovina as it continues to struggle with addressing the issue of missing persons from the armed conflict that took place in the 1990's.

In this regard, the Working Group plays a fundamental role, not only in following specific cases, but in monitoring the compliance of states with the Declaration on the Protection of all Persons from Enforced Disappearance and in reflecting on the manner in which states should address this complicated issue. While this has been a critical function of the Working Group for the past 30 years, it is time to move from monitoring adherence to the Declaration to seeking compliance with binding obligations as set forth in the International Convention on the Protection of all Persons from Enforced Disappearance. In this regard the ICMP encourages states to ratify the Convention.

While the assurance of protection from enforced disappearance is critical to eradicating this dreadful act, the issue I wish to address today, at a time when the Convention has not yet entered into force, is what happens when protection fails, not only in individual cases, but especially when there has been a widespread or systematic practice of enforced disappearance, which is defined by the International Criminal Court and the Convention as a crime against humanity. What is the role of states in addressing missing persons' cases, especially when the person is missing and presumed dead and how can the families of the missing constructively engage in asserting their right to the truth, to justice and to reparations? To a large extent these measures are defined in the Declaration and the Convention; however, there are a vast number of issues, particularly those that entail best practice that have yet to be satisfactorily addressed by states.

The International Commission on Missing Persons was established in 1996 as an inter-governmental, human rights organization tasked with endeavoring to secure the cooperation of governments and other authorities in locating and identifying persons missing as a result of armed conflicts, other hostilities or violations of human rights and to assist them in doing so. ICMP also supports the work of other organizations in their efforts, encourages public involvement in its activities and contributes to the development of appropriate expressions of commemoration and tribute to the missing.

We have 14 years of direct and primarily operational experience in this issue. In that time we have sought to assist governments to build rule of law institutions to address missing persons cases. We have assisted in the development of legislation on the search for and recovery of missing persons as well as on fair treatment for surviving relatives.

Simultaneously we have educated and helped to empower families of the missing and other victims groups to access their rights; promoting trust and reconciliation between victims and the state and encouraging the creation of universal expressions of commemoration and memory.

At a technical level we have worked with state actors to develop databases that can track and store information relevant to locating, recovering and identifying missing persons, which enable states in turn to provide accurate and reliable information to their citizens.

We have also provided technical assistance in locating and excavating mass grave sites through the application of the latest archeological techniques and we have pioneered the accurate identification of missing persons on a large scale through the use of DNA identity testing and an integrated scientific process that incorporates the latest in anthropological standards. ICMP is very much an operational organization since 2001 and as such has assisted governments in excavating over 5,000 clandestine graves and scientifically identifying over 18,000 missing persons world-wide.

One thing we have learned is that best practice cannot be defined out of context; societal and political conditions are not static; addressing the issue of the missing is a lengthy process, and it is one that begins during hostilities and continues for a long time after the violence has ceased. It is a process that bridges dramatic societal changes, and can entail both changing standards of work and shifting objectives. It is precisely that long-term commitment during times of fundamental change that makes the issue of persons missing complicated and requires that “best practice” be specific to the specific context.

Having said this, the following is a list of practices in which states have engaged in where ICMP operates, including Colombia, Iraq and the countries of the Western Balkans and that are worthy of consideration as models for application in other areas:

- **Domestic legislation on missing persons**

In the absence of binding international agreements, states should seek to create domestic legislation to holistically address the issue of enforced disappearance and the specific needs of victims. Such legislation should not only reaffirm the right to the truth and reparations, but can also be used, *inter alia*, to establish domestic rule of law institutions; create central

archives or databases to track missing persons cases; provide for the protection of clandestine graves; provide for the protection of personal data (specifically genetic information used for identification purposes); and to establish mechanisms for the creation of appropriate expressions of commemoration or memorials dedicated to the missing.

Such legislation should – where possible - be created in consultation with victims groups. In this manner credence is given not only to the law that is eventually adopted, but as importantly, by including victims groups, a forum is created that can act as a basis for building trust between victims and the state.

- **Rule of law institutions**

It is important to build domestic rule of law institutions that enable states to comply with human rights obligations on the missing persons issue in a non-discriminatory, transparent and accountable manner. The best examples are high-level, inter-ministerial bodies that allow the state to demonstrate its political willingness to engage in the processes of locating, recovering and identifying mortal remains in coordination with state-level criminal judicial investigations. Allowing victims groups a space for participation in such an institution enhances transparency and builds trust.

- **Central records and databases**

Such records should be created to provide, *inter alia*, an accurate accounting of the number of persons missing; the efforts of the state to investigate missing persons cases, including all efforts to locate, recover and identify missing persons; information concerning closed cases and places of final burial. These records should be used by the state to track missing persons' cases, to provide reliable and accurate information to victims and to citizens regarding the process and as the basis upon which to provide compensation to victims. Optimally, these records should be housed within the state-level institution that is tasked to address missing persons cases.

- **Engagement of victims groups, families of the missing and civil society**

Victim groups, families of the missing and civil society play a critical role in ensuring that states meet their legal obligations to address the missing persons' issue. As such they should be engaged in every element of the process including the development of legislation, the building of state institutions, in decisions regarding memorials and most critically, in a DNA-based process of identifications.

In this regard, families of the missing should not only be educated about their rights and actively engaged in the pursuit of those rights, but they should also be educated about the technical/legal components relevant to searching for and identifying missing persons. In the case of DNA identity testing, families should be fully educated in the use of DNA to determine identity and DNA testing should only be undertaken with the informed consent of the family member concerned. In conducting excavations, in the collection of ante mortem data and in using DNA testing it is critical that the families of the missing have confidence that the process is credible and legitimate. In this regard, appropriate data protection policies should to be adopted and enshrined in law. The potential for retribution by perpetrators or those acting on their behalf against those who provide information, including biological information, must be seriously considered prior to efforts to collect information.

- **Prosecutions**

The wrongs of the past, especially those associated with forced disappearances, are perceived by families and others as violations of their fundamental rights and a glaring example of the absence or failure of the rule of law. Coming to terms with past wrongs must involve the reinstatement of the rule of law in the eyes of those who were affected by abuses of power or arbitrariness.

To foster confidence in government institutions, including the justice system, it is particularly important that perpetrators are prosecuted and any prevailing sense of

impunity is discontinued. It appears mandatory therefore that states and international organizations cooperate with the criminal justice system domestically and internationally. In the same vein it should be recognized that the legal and practical modalities of addressing forced disappearances must conform to the requirements of justice. Best practice cannot reasonably include concepts such as “humanitarian identifications” or other standards that purport to act independently of rule of law based institutions, including the courts. For governments not to acknowledge the criminal justice dimension in addressing enforced disappearances always risks the acceptance of or creation of lesser standards in the judicial process.

- **Accurate identifications**

In politically charged, post-conflict environments accurate identifications provide an important tool to preempt denial, manipulation and myth building that invariably exploit uncertainties regarding the identity and number of missing persons. In this respect I wish to congratulate the Human Rights Council on its recent report and recommendations on Human Rights and Forensic Genetics, because it is only by advanced scientific methods, such as DNA identity testing, that accurate identifications of victims of atrocities can be made.

- **Proper excavations and exhumations**

Each clandestine grave should be treated as the scene of a crime and proper investigations should be conducted in the presence of a competent investigative authority. Furthermore, best forensic practice calls for the excavation to be performed by qualified archaeologists and/or anthropologists who, in addition to undertaking the recording and recovery of the human remains and associated evidence, should perform and document a detailed forensic examination of the environment. This should include the recording and recovery of geological evidence associated with the grave site.

Access to excavation sites should be closely controlled to preserve evidence for

identification and prosecution purposes, which is also in the interest of families of the disappeared who understand that their rights depend on the perseverance of evidence. Families should be fully informed about investigations but their presence as monitors at excavation sites should be coordinated with the authority in charge. The same holds true for NGOs and international organizations with experience in this field who can play a critical role by either monitoring the conduct of investigations or by assisting domestic authorities in the process.

- **Memorials and universal expressions of commemoration**

States should ensure that the commemoration of the missing is universal in scope and that efforts are made to transcend the remembrance of victims only by national, ethnic or political group or by event. ICMP recommends that the International Day of the Disappeared is used to honor all victims of enforced disappearance and all missing persons.

Cooperation and adherence to best practice are in the interest of states confronted with cases of enforced disappearance and missing persons. The issue powerfully symbolizes a failure to safeguard individual rights and it can also be invoked to discredit reform-minded governments if those governments are perceived as not bringing justice, or not bringing it fast enough. While governments generally have an interest in addressing the issue, for example, to demonstrate their concern for justice and the rule of law, doing so also incurs exposure to being accused of bias, or even manipulation, which can tarnish the legitimacy of post-conflict institutions. International cooperation can mitigate these risks and thus facilitate the return to justice and the rule of law. ICMP can notably ensure the integrity of technical processes and data protection, establish credible high-level partnerships and draw on the technical and legal achievements of advanced and stable societies. ICMP can thus support the credibility of reform-minded post-conflict governments and help to enable them to demonstrate their capacity to act responsibly for the benefit of their citizens.

State cooperation, including that with international and other organizations to address the issue of the missing should always be based on government accountability and rule of law principles, and thus on the basis of mechanisms that respond to individuals' rights.