

Missing persons and victims of enforced disappearance in Europe



Issue paper



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Missing persons and victims of enforced disappearance in Europe

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Summary

Introduction: overview of the situation

Chapter 1 makes clear that the notion of “missing person” is broader than that of “person subjected to enforced disappearance”. The former refers to a person whose whereabouts are unknown to his or her relatives and who has been reported missing in connection with an armed conflict or a situation of internal violence, or in connection with natural catastrophes or lethal accidents. It is stressed that the analysis of the phenomenon and the actions taken by states to tackle it must be victim-centred, that is, focused particularly on the families of missing persons and of victims of enforced disappearance who are subjected to extreme suffering. Women and children are especially affected and states must take appropriate measures to address their situation, considering their special needs. All direct victims and their families have the right to know the truth, to have effective access to justice and to obtain redress. The right to know the truth, which is the core of the issue, has an individual and collective dimension. Society at large is entitled to know about the perpetration of serious human rights violations and about the circumstances and causes that led to them. On the other hand, enforced disappearance is a crime under international law and a violation of multiple human rights. When committed as part of a widespread or systematic attack against any civilian population, it amounts to a crime against humanity. The prohibition of enforced disappearance and the corresponding obligation to investigate and punish those responsible have attained the status of *ius cogens*, that is, a norm that enjoys a higher rank in international law hierarchy than treaty law and “ordinary” customary rules.

Enforced disappearance is a continuous crime and lasts until the fate and whereabouts of the victim are established with certainty. States must investigate cases of enforced disappearance to establish the fate and whereabouts of the disappeared persons and to identify and prosecute those responsible. Reparation, in the form of compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition must also be ensured.

Chapter 1 also provides a concise overview of the situation, especially with regard to Armenia, Azerbaijan, Georgia, the Western Balkans, Cyprus, Northern Ireland, Turkey, Spain, Russia and Ukraine. In addition, reference is made to the victims of “extraordinary renditions” committed in the context of counter-terrorism operations, and to victims in the context of extraditions. This practice amounts to enforced disappearance. The emerging, yet under-analysed, phenomenon of migrants reported missing within or on their way to Europe is also tackled.

Major international and European standards and mechanisms concerning missing persons and victims of enforced disappearance

Chapter 2 is a bird’s-eye view of the international and European legal framework and standards concerning missing persons and victims of enforced disappearance, encompassing international humanitarian law, international and European human rights law, and international criminal law. The United Nations Declaration on the Protection of All Persons from Enforced Disappearance and the International Convention for the Protection of All Persons from Enforced Disappearance are analysed, as well as the relevant provisions of the Rome Statute of the International Criminal Court.

The chapter also considers pertinent European standards on the subject, including resolutions and recommendations of the Parliamentary Assembly of the Council of Europe, the Commissioner for Human Rights’ positions, and the Council of Europe Committee of Ministers’ 2011 guidelines on eradicating impunity for serious human rights violations.

The mandate and functioning of the main international institutions dealing with missing persons and enforced disappearance, including the International Committee of the Red Cross, the International Commission on Missing Persons, the UN Working Group on Enforced or Involuntary Disappearances, and the UN Committee on Enforced Disappearances are examined. Chapter 2 also highlights the major case law of the UN Human Rights Committee as well as that of the Inter-American Court of Human Rights, a leading international court in this domain. Lastly, this chapter illustrates the crucial role played by associations of relatives and other non-governmental organisations (NGOs) in the struggle against enforced disappearance and in discovering the fate of missing persons.

Major case law of the European Court of Human Rights

Chapter 3 provides an overview of the major jurisprudence of the European Court of Human Rights on enforced disappearances concerning Bosnia and Herzegovina, Croatia, Russia, Spain and Turkey. The Court has held that enforced disappearances amount to violations of Articles 2 (right to life), 3 (prohibition of torture), 5 (right to liberty and security of person) and 13 (right to an effective remedy) of the European Convention on Human Rights.

Relatives of disappeared persons are considered victims of a violation of Article 3 notably because of the attitude of indifference often displayed by authorities vis-à-vis their acute suffering. In certain circumstances, the Strasbourg Court employs the reversal of the burden of proof. However, a lack of coherence in the criteria applied can be noted, as well as scarce use of interim measures to protect applicants, relatives of the disappeared persons and witnesses from reprisals, and a narrow interpretation of the notion of measures of reparation, usually limited to pecuniary and non-pecuniary compensation. The Court's judgments in this field are often slowly executed or are not implemented by respondent states. The process of execution must therefore be strengthened.

European state practice and major human rights challenges concerning missing persons and victims of enforced disappearance

Chapter 4 considers the major human rights challenges in the struggle against enforced disappearance and in resolving cases of missing persons. While some states have made considerable progress in this field, other national scenarios are characterised by inertia and impunity. The main obstacles include a lack of political will and determination; limited national capacity and a lack of qualified forensic experts, compounded by economic constraints due to the costly process of DNA identification; lack of relevant information about gravesites due to witnesses' fear of testifying or the lack of co-operation between former rival parties; and reprisals against relatives of missing persons and victims of enforced disappearance, human rights defenders and lawyers.

Challenges in setting up effective truth-seeking mechanisms in post-conflict situations are also examined, with special attention on security concerns, weak institutions, controversies regarding the aptness of commissioners and their mandate, and the poor implementation of final recommendations. Existing obstacles in securing access to archives that may contain relevant information on the fate of missing and disappeared persons are also considered. This chapter also illustrates the major pitfalls in domestic legislation concerning enforced disappearance and missing persons, which often fails to encompass the complexity and serious nature of these crimes and to settle matters related, *inter alia*, to inheritance, social welfare and family law. The need for European states to redouble their efforts to eradicate impunity for enforced disappearances, especially those linked to armed conflicts, is also highlighted. Finally, the chapter underlines the need for states to establish comprehensive programmes of reparation for victims of enforced disappearance. Initiatives to establish special funds for victims of enforced disappearance, such as the one in Bosnia and Herzegovina, deserve to be highlighted, promoted and implemented by all states concerned.

Instances of good practices

Chapter 5 presents good practices and initiatives undertaken worldwide. In particular, reference is made to programmes of exhumations, identification and return of mortal remains; truth-seeking initiatives; opening of archives; adoption of adequate legislation; thorough investigation and prosecution of those responsible for acts of enforced disappearance; and the provision of redress to victims. Successful programmes of exhumation, identification and return of mortal remains require the work of trained professionals, the guarantee of psychosocial support to victims throughout the entire process, the setting up of centralised databases and, often, the use of DNA-matching techniques. Information, including genetic data, must be collected, protected and managed by specialised institutions and used to help clarify the fate and whereabouts of missing and disappeared persons. Independent, specialised NGOs have been effective, particularly in fostering the trust of the families of missing and disappeared persons.

Truth-seeking initiatives, including unofficial commissions set up by civil society, have greatly contributed to transitional processes and their impact has been enhanced by the quality of the commissions' members, their timely creation, their openness to civil society and the use of a victim-centred approach.

Good practices in the fulfilment of the right to know the truth of relatives of missing and disappeared persons include national and interstate initiatives related to the opening of archives, including military archives that may contain useful information for the process of clarification.

The chapter emphasises that an effective response to end the scourge of missing persons and enforced disappearance requires also the adoption of legislative reforms and the strengthening of the overall domestic legal framework: enforced disappearance must be codified as a separate offence and sanctioned in accordance with its extreme gravity. The legal status of missing and disappeared persons must be adequately regulated. Successful programmes of reparation include compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition. Moreover, access to measures of social support and compensation must not be conditional on the declaration of death of a missing or disappeared person.

It is also stressed that independent national human rights institutions such as ombudsmen or human rights commissions have a valuable role to play. States are invited to establish or enhance the performance of such institutions at national and local levels in order to facilitate easy access for all those whose rights have been violated.

Criminal prosecutions also strengthen transitional processes, providing recognition to victims, fostering trust in the legal system and eventually enhancing the rule of law. Policies of prioritisation in the prosecution allow one to overcome some of the usual post-conflict constraints. The struggle against impunity has been facilitated by the use of universal jurisdiction and the removal of procedural impediments, such as the defence of due obedience to superior orders, unreasonably short statutes of limitation or amnesty laws that exempt perpetrators from criminal proceedings or sanctions.

Concluding observations

The observations summarise the Commissioner's recommendations to Council of Europe member states, with particular emphasis on those concerning truth-seeking, the strengthening of domestic legislation and the eradication of impunity for enforced disappearance. It highlights areas that require more concerted and sustained efforts by states and competent institutions, such as the effective execution of relevant judgments delivered by the Strasbourg Court. Lastly, further research is recommended, for instance on the subject of missing persons and enforced disappearance in the context of migration, and on "short-term disappearances" in the context of operations to counter organised crime or terrorism.



Nils Muižnieks, Commissioner for Human Rights

The Commissioner's recommendations

The Commissioner for Human Rights calls on Council of Europe member states to fulfil their responsibilities by looking into and acting on all cases of missing persons and enforced disappearance. Such cases raise very serious humanitarian and human rights issues and the passage of time makes finding direct victims and, where necessary, identifying their remains harder, increasing the suffering of their families. In particular, states must:

I. Direct victims and their families

1. Place the families of missing persons and victims of enforced disappearance and their right to know the truth at the centre of all actions concerning these issues, especially by promoting a multidisciplinary assessment of their needs.
2. Support organisations and associations, in particular NGOs and associations of relatives concerned with establishing the fate of missing and disappeared persons.
3. Provide the families of missing persons and victims of enforced disappearance with the necessary legal, psychological and social assistance.
4. Guarantee that relatives of victims of enforced disappearance receive prompt, fair and adequate reparation, including compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition.
5. Ensure that measures of assistance and reparation are gender-sensitive, and pay special attention to the needs of single heads of families, taking into account the specific situation of women.

II. Enhancing processes of exhumation, identification and return of mortal remains

6. Intensify the search for gravesite locations and ensure that the mortal remains of missing persons and victims of enforced disappearance are located, exhumed, respected, identified and returned to families. Victims' associations and NGOs

working on missing persons and enforced disappearance must be involved in the work of relevant national or other mechanisms dealing with these issues.

7. Ensure that the right of relatives of missing persons and victims of enforced disappearance to recover the remains of their missing family members is respected and that the identification process of mortal remains includes DNA analysis and other forensic and scientific methods of expertise. Acts of mutilation and despoliation of the dead must be criminalised and sanctioned.
8. Guarantee that relatives of missing persons and victims of enforced disappearance obtain adequate psychological support prior, during and after the process of exhumation of remains.
9. Enhance national expertise concerning the management, identification and recovery of the mortal remains of missing persons and victims of enforced disappearance.

III. Support to mechanisms working on missing persons and enforced disappearance and effective interstate co-operation

10. Support the functioning of national, bilateral and regional mechanisms working on the issues of missing persons and enforced disappearance and ensure their independence and impartiality. Provide these mechanisms, as well as international organisations and institutions working on these important issues, with the necessary financial and human resources.
11. Co-operate at the international level to effectively solve cases of missing persons and enforced disappearance by providing mutual assistance in the form of information sharing, victim assistance, and locating and identifying missing and disappeared persons, as well as in exhuming, identifying, respecting and returning mortal remains. Actions to address the issue of missing persons and enforced disappearance must not be subjected to the condition of reciprocity by parties to armed conflicts.

IV. Training public officials and personnel on missing persons and enforced disappearance

12. Provide adequate training to law-enforcement personnel (civil or military), medical staff, forensic experts and pathologists, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty and, in general, with the issue of missing persons and enforced disappearance.

V. truth-seeking initiatives and national human rights institutions

13. Support the establishment of effective and independent national and, where appropriate, regional truth-seeking mechanisms and provide them with the necessary human and financial resources to operate effectively.
14. Establish or enhance the performance of independent national human rights institutions such as ombudspersons or human rights commissions and ensure that they are easily accessible to, among others, relatives of missing and disappeared persons.

VI. Access to information and archives

15. Guarantee that information on missing persons and victims of enforced disappearance is collected, protected and managed by specialised national authorities able to ensure that the victims' identity, location, fate and circumstances of disappearance and, where applicable, death, are established. This information should be made available to interested persons.
16. Ensure the opening of state and military archives so information concerning missing persons and victims of enforced disappearance can be gathered and made public.
17. Guarantee that the information required by the judicial or administrative institutions in charge of the investigation of cases of missing persons or enforced disappearance is not withheld for reasons of confidentiality, public interest or national security.

VII. Strengthening domestic legislation

18. Codify enforced disappearance as an autonomous offence under criminal legislation and establish sanctions that are commensurate to the extreme gravity of the crime.
19. Ensure that domestic legislation explicitly rules out the possibility that persons who have or are alleged to have committed enforced disappearances benefit from amnesty or similar measures that may exempt them from criminal responsibility and sanctions.
20. Recognise in domestic legislation the right to know, and ensure that the systematic violation by authorities of the right of the families of missing persons and victims of enforced disappearance to an effective investigation and to know the truth is punished as a criminal offence.

21. Regulate the legal situation of missing and forcibly disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights. Introduce in domestic legislation the provision of “declaration of absence due to enforced disappearance” in order to address the legal situation of disappeared persons and that of their relatives in areas such as social welfare, financial matters, family law and property rights. Also, refrain from forcing relatives of missing persons and victims of enforced disappearance to have their loved ones declared dead as a condition to access measures of social assistance or reparations.

VIII. Thorough investigations and the eradication of impunity

22. Fully and expeditiously investigate all cases where there is a reasonable suspicion that an enforced disappearance may have occurred within their jurisdiction, and adopt all necessary measures to establish jurisdiction over cases that occurred in those other countries that are unwilling or unable to take appropriate action.
23. Ensure that families of missing persons and victims of enforced disappearance are involved in investigations into cases concerning their loved ones. Appoint specially trained personnel within prosecutors’ offices in charge of regularly meeting with families and informing them about the progress made in their cases.
24. Ensure that perpetrators of enforced disappearance, including those who order, solicit, induce the commission of, attempt to commit, are accomplices to, or participate in an enforced disappearance are prosecuted and sanctioned. The continuous nature of the crime of enforced disappearance must be duly taken into account, and no statutory limitation shall apply to crimes against humanity, irrespective of the date of their commission.
25. Adopt adequate measures to protect from ill-treatment, reprisals and intimidation all witnesses and relatives of missing persons and victims of enforced disappearance, and their defence counsels, as well as persons participating in the investigation of complaints.

IX. The promotion and implementation of relevant international and European standards and compliance with international obligations

26. Draw upon, effectively implement and widely disseminate the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005).

27. Draw upon, effectively implement and widely disseminate the Council of Europe Committee of Ministers' guidelines on eradicating impunity for serious human rights violations (2011), as well as the UN's Updated Set of principles for the protection and promotion of human rights through action to combat impunity (2005).
28. Ratify or accede to and fully and effectively implement the UN's International Convention on the Protection of All Persons from Enforced Disappearance (2006); also recognise the competence of the UN Committee on Enforced Disappearances to receive and examine individual and interstate complaints pursuant to Articles 31 and 32 of the convention.
29. Sign, ratify and give full effect to the Council of Europe Convention on Access to Official Documents (2009) in order to facilitate access to archives and other publicly held documents that are crucial for the enjoyment of the right to truth by victims of enforced disappearance, missing persons and their families.
30. Fully and effectively implement the judgments of the European Court of Human Rights, as well as the Views of the UN Human Rights Committee, concerning missing persons and enforced disappearance.
31. Effectively implement the recommendations of the UN Working Group on Enforced or Involuntary Disappearances, the Human Rights Committee, and the Committee on Enforced Disappearances as contained in mission reports and concluding observations. Where applicable, accept without delay the request of the Working Group on Enforced or Involuntary Disappearances to undertake a visit to the country.

Chapter 1

Introduction: overview of the situation

The issue of missing persons and victims of enforced disappearance constitutes a very important part of the political, legal and social transition processes that many European countries have to go through, or will have to go through, especially following conflicts or repressive regimes. This is a constituent part of transitional justice, a long-term process the success of which depends primarily on a supportive, mature political climate at national level, characterised by political will.

As of 2015,¹ tens of thousands of persons remain missing or have been subjected to enforced disappearance across Europe due to repressive regimes and past or ongoing conflicts.² European states have to live up to their responsibilities, and look into and act on these serious humanitarian and human rights violations, particularly given that the passage of time makes finding and identifying mortal remains harder and increases the suffering of the victims' families.³

This issue paper aims at raising awareness and sensitising Council of Europe member states on the issue of missing persons and victims of enforced disappearance, and their serious human rights and humanitarian ramifications. It also aims to encourage a wide-ranging discussion to highlight possible solutions and to foster co-operation, given the complexity and gravity of the challenges for all states concerned.

The notion of "missing person" is markedly broader than that of "person subjected to enforced disappearance". Under international humanitarian law, "missing persons" or "persons unaccounted for" are those whose families are without news of them or who are reported missing, on the basis of reliable information, owing to an international or non-international armed conflict, a situation of internal violence or disturbances.⁴ The term "missing" is used also for victims of natural calamities or catastrophes.⁵ This issue paper does not refer to the latter category.

In certain circumstances missing persons are indeed victims of an enforced disappearance and the terms "missing" and "disappeared" have often been interchangeable. While enforced disappearance is always a crime, this is not necessarily the case for persons reported missing.

Enforced disappearance is a crime under international law and a violation of multiple human rights, including the right to personal liberty and security, the right to recognition as a person before the law, the right not to be subjected to torture or

other cruel, inhumane or degrading treatment or punishment, the right to a fair trial, and the right to life. Enforced disappearance also violates the economic, social and cultural rights of the disappeared person and his or her family.⁶ When committed as part of a widespread or systematic attack against any civilian population, enforced disappearance is a crime against humanity.⁷ The prohibition of enforced disappearance and the corresponding obligation of states to investigate and punish those responsible have attained the status of *ius cogens*.⁸

Enforced disappearance is a continuous crime, as it extends to the point at which the fate and whereabouts of the victim are established with certainty.⁹ Even when it can be inferred that the disappeared person was actually subjected to an arbitrary execution, for instance through the discovery of mortal remains and the recognition of personal belongings, as long as the whereabouts of that person are not determined, or his or her remains are not located and identified, the situation is that of enforced disappearance.¹⁰ States have a positive obligation to investigate cases of enforced disappearance to establish the fate and whereabouts of the disappeared and to identify and prosecute those responsible. If the body of the victim is discovered or his or her death can be presumed, the obligations to account for the disappearance and death, to identify and prosecute the perpetrators, and to provide adequate redress to victims generally remain. Enforced disappearance causes a multiplicity of victims, encompassing the disappeared person, his or her relatives, and any other person who suffers direct harm as a consequence of the crime.

Enforced disappearance is on occasion perpetrated within the context of armed conflicts or repressive regimes, but it is also committed in times of peace and under supposedly democratic regimes. The practice has been used to silence political opponents, and to spread terror among the population, but also as a means to counter organised crime or terrorism, in the form of secret detention and “extraordinary renditions”.

Relatives of missing and disappeared persons are exposed to extreme suffering, often nourished by the indifference of authorities vis-à-vis their ordeal and by the anguish of not knowing what has happened to their loved ones. Women and children are particularly affected and states are under an obligation to adopt special measures that take into account their special situation.¹¹

Relatives of missing persons and victims of enforced disappearance have the right to be informed about the fate and whereabouts of their next of kin, the circumstances of the disappearance and the progress of the investigation, as well as its conclusions.¹² The right to know has also a collective dimension. Society at large has the right to know the truth about these events.¹³

In situations of conflict or internal violence, opposing parties bear the primary responsibility for preventing enforced disappearances, clarifying the fate of missing persons, and responding to the needs of the families involved. This obligation lasts until a proper investigation has been carried out, the truth has been established and those responsible have been brought to justice. Besides struggling to discover the truth on the fate and whereabouts of their loved ones and to obtain justice and reparation, families of missing and disappeared persons face obstacles in accessing social benefits and welfare measures. They are often stigmatised and suffer serious

psychological harm, which requires long-term specialised assistance and psychosocial support.

The families of missing persons and victims of enforced disappearance and their needs must thus be placed at the centre of all actions concerning these issues to foster reconciliation within conflict-torn societies and between former warring parties.¹⁴

1.1 ARMENIA, AZERBAIJAN AND GEORGIA

The conflicts over Nagorno-Karabakh, Abkhazia and South Ossetia generated a significant number of missing persons. In the region of Armenia, Azerbaijan and Georgia 7 538 persons, both military and civilian, were reported missing.¹⁵ Despite the efforts made by the authorities and the passing of almost 20 years since the end of hostilities, the issue remains largely unresolved.

Further, the armed conflict of August 2008 in Georgia generated a large number of missing persons whose fate has not been adequately clarified.¹⁶

1.2 THE WESTERN BALKANS

Between 6 000 and 8 000 persons are estimated to have gone missing in Albania between 1945 and 1991. According to the Albanian Rehabilitation Centre for Trauma and Torture, approximately 4 000 persons are still unaccounted for. There have been few institutional efforts to address this issue. In 2010, a task force for searching, locating and identifying persons executed during the communist regime was established. However, no significant progress has been reported since then.

It is estimated that around 40 000 persons went missing due to the armed conflicts of the 1990s in the Western Balkans involving Bosnia and Herzegovina, Croatia, Montenegro, Kosovo*, Serbia and "the former Yugoslav Republic of Macedonia".¹⁷ Thanks to the assistance of the International Committee of the Red Cross (ICRC) and the International Commission on Missing Persons (ICMP), the fate and whereabouts of 70% of these persons are now known.¹⁸ According to the ICRC, as of June 2015, the families of 10 824 missing persons across the region are still looking for them.¹⁹

Even though processes of exhumation and identification of mortal remains are ongoing, lack of knowledge about new gravesites, lack of strategies to address this issue and a decrease in the financial and human resources devoted to these tasks have slowed progress. It has been noted that "if the identification of remains in Kosovo continues at the present rate, it may take up to 30 years to solve all cases of missing persons".²⁰ The fact that there are still hundreds of unidentified bodies in morgues and unidentified DNA samples across the region seems to confirm that

* All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with UN SC Res. 1244 (1999) and without prejudice to the status of Kosovo.

errors have occurred in the identification process, and a review of the work carried out so far is needed.

In June 2014 the United Nations Working Group on Enforced or Involuntary Disappearances (WGEID) conducted a regional country visit to Croatia, Montenegro, Serbia and Kosovo and highlighted that, given the amount of time that has passed since the enforced disappearances occurred and the advanced age of many witnesses, relatives and perpetrators, there is an urgent need for everyone involved in the search for missing persons in the region to set, as an immediate priority, the establishment of the truth. The WGEID called on all states involved to promote regional co-operation, inter-ethnic reconciliation and social cohesion, fostering national and regional strategies and demonstrating a renewed commitment at the highest political level.²¹

On 29 August 2014, under the auspices of the ICMP, the representatives of Bosnia and Herzegovina, Croatia, Montenegro and Serbia signed a declaration on the role of the state in addressing the issue of persons missing as a consequence of armed conflict and human rights abuses.²² With the aim of ensuring lasting peace and promoting co-operation and reconciliation, the states committed themselves to addressing the issue of missing persons as their responsibility. They agreed to co-operate and share information that could help locate and identify the missing, in order to fulfil the families' right to know. In 2015, the Commissioner for Human Rights welcomed this development, and reiterated the importance of regional co-operation for the successful completion of the process of clarifying the fate of missing persons and providing relief to their families.²³

1.3 CYPRUS

In Cyprus, 1 508 Greek Cypriots and 493 Turkish Cypriots have been recorded missing by the Committee on Missing Persons (CMP), as a result of communal conflicts as well as the armed conflict of July 1974 and its aftermath. As of 30 September 2015, 1 050 Greek Cypriots and 348 Turkish Cypriots were still missing.²⁴

In 1981, under the auspices of the UN, the Greek Cypriot and Turkish Cypriot communities agreed to establish the CMP, a bi-communal body tasked to conduct exhumations, identify and return the remains of missing persons. In 2006 the CMP, whose work relies on donor support, launched its Project on the Exhumation, Identification and Return of Remains under the guidance of the Argentine Forensic Anthropology Team (EAAF). Since 2008, the CMP's bi-communal forensic team has been carrying out exhumations autonomously (up to eight teams in the north and two teams in the south). Exhumations have been carried out over the entire island and remains have been identified through DNA tests.

1.4 NORTHERN IRELAND

During the Northern Ireland conflict, 16 people were registered as "disappeared". In this particular context, the expression refers to those killed and buried in secret by illegal

organisations prior to 10 April 1998. The Provisional Irish Republican Army admitted responsibility for 13, the Irish National Liberation Army admitted responsibility for one, but no attribution has been given to the remaining two. To date, 10 bodies have been recovered thanks to the work of the Independent Commission for the Location of Victims' Remains, established by an intergovernmental agreement signed on 27 April 1999 between the Irish and British Governments.

1.5 RUSSIAN FEDERATION

Within the Council of Europe, the Chechen Republic of the Russian Federation²⁵ has been considered the "most affected by the scourge of enforced disappearances".²⁶ There are still up to 5 000 persons unaccounted for in Chechnya. The Republics of Dagestan and Ingushetia have also been severely affected by enforced disappearances, which continue to be committed. Impunity is rampant.²⁷ Relatives of missing persons and victims of enforced disappearance as well as human rights defenders and lawyers have been subjected to harassment. The European Court of Human Rights has rendered many judgments declaring the Russian Federation responsible for violating, among others, Articles 2 (right to life), 3 (prohibition of torture), 5 (right to personal liberty) and 13 (right to an effective remedy) of the European Convention on Human Rights (ECHR). The Court held the Russian Federation responsible for violating its obligations under the Convention also in those cases where it was not possible to establish the direct involvement of law-enforcement officials in the perpetration of an enforced disappearance, arguing that the state must nonetheless conduct an effective criminal investigation into these events.²⁸ No significant progress has been registered and the level of implementation of the Court's judgments remains low or non-existent. It has been noted that "the authorities content themselves with paying the compensation fixed by the Court to the applicant, but nothing, or next to nothing, is done to prosecute the perpetrators and ensure that there are no further acts of this kind".²⁹

On 2 November 2006, the WGEID requested an invitation to undertake a visit to the Russian Federation. As of October 2015, no positive response has been received in spite of reminders.³⁰

1.6 SPAIN

Due to the lack of a centralised database there is as yet no official figure for the number of missing persons and victims of enforced disappearance engendered by the Spanish Civil War (1936-1939) and the Franco dictatorship (1939-1975). According to the investigation carried out by the Criminal Investigation Court No. 5 of the National High Court, the number of victims of enforced disappearance from 17 July 1936 to December 1951 is 114 226.³¹ This figure could not be reliably confirmed by a court inquiry because the criminal investigation was blocked. The same holds true for the 30 960 children of Republican detainees who were allegedly abducted

and given to families who supported the Franco regime once their identities had been changed in the civil register.³² During the Civil War, many Republican parents sent their children abroad. Allegedly, when the conflict was over, the Franco regime decided that all those children should return and, after repatriation, many were sent to Auxilio Social centres, where parental rights were automatically transferred to the state. Many of these children were adopted without the knowledge or consent of their biological families that, to date, do not know of their fate and whereabouts.

Since the return of democracy in Spain, fragmented efforts have been taken to secure truth and reparation and to preserve the memory of the disappeared. On 26 December 2007, Act No. 52 on Historical Memory was adopted, introducing measures to combat the exaltation of the coup d'état, the Civil War and the repression of the Franco dictatorship, including through the removal of symbols and monuments. Act No. 52 also contains provisions aiming at granting reparation to victims and their relatives. However, its scope remains limited and its implementation poor, also due to the lack of any budget for such purpose.³³ In terms of investigation and punishment of those responsible, very little has been done, due, among other factors, to the application of the 1977 Amnesty Law.³⁴ The processes of search, exhumation and identification of disappeared persons are often left solely to the initiative of families and they face several obstacles. Access to archives, especially military, that may contain useful information to establish the truth, is also virtually impossible.

1.7 TURKEY

The military campaign against the Kurdistan Workers' Party (PKK) in Eastern Anatolia has been marked by hundreds of enforced disappearances. Although the precise number has not been established with certainty, estimates refer to approximately 1 350 victims of enforced disappearance between 1980 and 2013.³⁵ Most of the victims are persons of Kurdish ethnic origin and the cases followed a similar pattern: the victims were allegedly arrested at their homes on charges of belonging to the PKK and taken to police stations, though their detention was later denied by the authorities, in most cases police officers or state prosecutors. Some of the disappearances occurred during raids conducted by gendarmes accompanied by village guards (a civil defence corps). Victims also included members of political opposition parties, journalists working for newspapers opposed to the government, and trade unionists.³⁶ The Strasbourg Court has issued many judgments on these cases, but compliance is unsatisfactory.

1.8 UKRAINE

Concern has been expressed about the growing number of missing persons as a result of the ongoing military conflict in Ukraine. The Parliamentary Assembly of the Council of Europe has highlighted that "among the disappeared are not only soldiers, but also civilians, including volunteers who were helping people who were suffering during the conflict. There is no exact information on the number and

possible location of missing persons as many of them could be in territory under the control of separatist groups”³⁷

Since the beginning of the conflict in early 2014, more than 1 300 persons have been reported missing. This figure only takes into account data collected by the Ukrainian authorities, and therefore the real number is certainly higher.³⁸

In September 2014, the Ukrainian authorities set up an Interagency Centre for Assistance in the Release of Captives and Hostages and the Search for Missing Persons. It examines reports from Ukrainian and foreign nationals who are searching for missing persons and assists them. It is also drafting a list of missing persons. Several territorial working groups mandated to collect information on missing, abducted and imprisoned persons have also been established in the administrative regions. However, to date, the central authorities have not set up a consolidated list of missing persons. Instead, there are separate, often conflicting or overlapping, lists. This jeopardises operations to search for and locate missing persons.

In October 2014, the State Scientific Research Forensic Centre of the Ministry of Internal Affairs was tasked with maintaining a database of DNA cards containing the genetic characteristics of unidentified bodies and the relatives of missing persons in regions subjected to anti-terrorism operations. The efforts undertaken so far have not been enough to identify the mortal remains that have been located, especially in mass graves.

Since May 2014, several persons, mainly representatives of the opposition to the political changes leading to the annexation, have also been reported missing in Crimea,³⁹ although the exact number is unknown.

1.9 OTHER COUNCIL OF EUROPE MEMBER STATES

Several Council of Europe member states have been involved in so-called extraordinary renditions.⁴⁰ As this practice amounts to enforced disappearance, states are under an obligation to establish the fate and whereabouts of the victims; to disclose the truth regarding these events; to investigate, identify those responsible, prosecute and sanction them; and to provide adequate compensation and redress. To date the elucidation of these cases and the sanctioning of perpetrators have proven particularly difficult, mainly due to the lack of political will and to the abuse of state secrecy with the intent to block judicial or parliamentary investigations.⁴¹

An emerging phenomenon that also involves many Council of Europe member states is that of migrants reported missing on their way to or within Europe. Between January and August 2015 there were 2 040 recorded migrant deaths in the Mediterranean. The International Organization for Migration has reported that in 2014, migrant deaths in the Mediterranean rose to 3 279.⁴² The search for missing migrants is exceptionally difficult due to the fact that often the persons concerned are on the move, or are not officially registered in the country where they are staying. The National Societies of the Red Cross and the ICRC are paying increasing attention to this issue in order to help families locate their loved ones. The unique features and

scope of this phenomenon, vis-à-vis an evident under-reporting, call for further study and for the adoption of adequate responses. In 2016, the WGEID will issue a thematic study on enforced disappearance in the context of migration.

Chapter 2

Major international and European standards and mechanisms concerning missing persons and victims of enforced disappearance

2.1 INTERNATIONAL LEGAL STANDARDS

Under customary international humanitarian law, applicable in both international and non-international armed conflicts, each party to a conflict must take all feasible measures to account for persons reported missing as a result of the conflict and must provide their family members with any information it has on their fate and whereabouts. Although the term “enforced disappearance” is not used as such in international humanitarian law instruments, this crime violates a range of customary rules, including the prohibition of arbitrary deprivation of liberty, the prohibition of torture and other cruel, inhumane or degrading treatment, and the prohibition of murder. Customary international humanitarian law has established various rules aimed at preventing enforced disappearance, in particular by requiring belligerent parties to register persons deprived of their liberty, transmit the corresponding information to families and allow visits to detention facilities.⁴³

The 1949 Geneva Conventions provide for the setting up of Information Bureaux mandated to centralise information on prisoners of war and civilians belonging to an adverse party, transmit such information to that party, and open inquiries to elucidate the fate and whereabouts of missing persons.⁴⁴ Article 26 of the Fourth Geneva Convention obliges parties to the conflict to facilitate enquiries by persons looking for missing family members.

Article 32 of Additional Protocol I to the four Geneva Conventions establishes that the general principle governing the activities of parties to a conflict and of international humanitarian organisations with regard to the issue of missing persons must be the right of families to know the fate of their relatives. Article 33 of Additional Protocol I requires each party to the conflict to search for persons who have been reported missing by the adverse party. Deliberately withholding information from relatives concerning missing persons amounts to inhumane treatment and should be punished as a criminal offence under domestic law.

Under international humanitarian law, the obligation to account for missing persons is an “obligation of means”, not “of result”, that is, irrespective of the outcome, all parties to a conflict must undertake their best efforts notably to search and facilitate the search for persons reported missing due to a conflict. However, this must be interpreted in a way that does not impose an impossible or disproportionate burden on the parties. On the other hand, the obligation to provide all available information to relatives is “of result”, that is, parties to a conflict must always notify the relatives of the missing person about all information they have on the fate and whereabouts of the person concerned and on the steps taken to locate him or her. In many cases, exhumations are an appropriate method to establish the fate of missing persons. Parties to the conflict are under an obligation to locate mortal remains, conduct exhumations, and identify, respect and return remains to the families. Forensic sciences and DNA matching offer a means to fulfil the right to know.⁴⁵

In 2010 the Advisory Committee of the UN Human Rights Council published a report on best practices in the matter of missing persons, highlighting that searches for missing persons should continue without any time limit until all feasible measures to account for the missing persons have been taken. It added that when tribunals investigate the deaths of missing persons, it should be ensured that their work is conducted in a manner that serves the best interest of the families, in that the latter are provided with an answer, including the identification of the deceased, and brings the persons responsible for those crimes to justice.⁴⁶

2.1.1 UN Declaration on the Protection of All Persons from Enforced Disappearance

On 18 December 1992 the UN General Assembly adopted Resolution 47/133 containing the Declaration on the Protection of All Persons from Enforced Disappearance. The preamble defines enforced disappearance as the fact that persons:

are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.

Enforced disappearance is considered an offence to human dignity and a grave and flagrant violation of multiple human rights. Under Article 7 of the declaration, no circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances. The declaration affirms that the systematic practice of enforced disappearance is a crime against humanity. Under Article 17, enforced disappearance must be considered a continuing offence as long as the perpetrators continue to conceal the fate and whereabouts of the disappeared.

Article 3 requires states to take effective legislative, administrative, judicial or other measures to prevent and terminate enforced disappearances. States must codify enforced disappearance as a separate criminal offence under domestic legislation, punishable by appropriate penalties (Article 4), and carry out prompt and thorough investigations into reports of enforced disappearances and prosecute and sanction those responsible (Articles 13 and 14). States must ensure that all those involved in the investigation, including the relatives, counsel, witnesses and those conducting the investigation, are protected against reprisals.

Under the declaration, persons alleged to have committed enforced disappearance must not be tried by military courts. They shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction (Articles 16 and 17).

Lastly, Article 19 establishes that victims of enforced disappearance and their families shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible.

2.1.2 Statute of the International Criminal Court

Under Article 7.1.i of the Statute of the International Criminal Court (ICC), enforced disappearance is listed among crimes against humanity, “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. Enforced disappearance is defined by Article 7.2.i as:

the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

The definition provided by the ICC Statute differs from those contained in international human rights law instruments because it includes political organisations or persons or groups of persons acting with the tolerance, acquiescence and support of such organisations among the potential perpetrators of the crime. Moreover, it is required that the perpetrator act with the intention of removing the victim from the protection of the law for a prolonged period of time. Neither the Elements of Crimes or the case law of the ICC provide any indication of how prolonged the period of time has to be to fall under the threshold of Article 7.2.i.

2.1.3 International Convention for the Protection of All Persons from Enforced Disappearance

The International Convention for the Protection of All Persons from Enforced Disappearance was adopted by the UN General Assembly by Resolution 61/177 in December 2006. It was opened for signature on 6 February 2007 and it entered into force on 23 December 2010. As of October 2015, there are 51 states parties to the convention.⁴⁷ The convention is the first internationally legally binding instrument that deals specifically with enforced disappearance, detailing states' obligations in terms of prevention of the practice, investigation and sanction of those responsible, and adoption of adequate measures to ensure victims' rights. The convention explicitly establishes the non-derogable right of every person not to be subjected to enforced disappearance. It also affirms that the widespread or systematic practice of enforced disappearance constitutes a crime against humanity and is not subject to statutory limitations.

2.1.3.1 Strengthening the domestic legal framework

The convention determines that states parties must codify enforced disappearance as a separate criminal offence under their domestic legislation, holding criminally responsible any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance. Superior responsibility must also be regulated and sanctioned. States parties may establish mitigating or aggravating circumstances (Articles 4, 6 and 7).

The convention requires states parties to codify and punish under their criminal legislation failure to record the deprivation of liberty of any person; the registration of inaccurate data concerning persons deprived of their liberty; the refusal to provide information on persons deprived of their liberty; and the falsification, concealment or destruction of documents attesting the true identity of children subjected to enforced disappearance (Articles 22 and 25).

2.1.3.2 Investigation, prosecution and sanction of those responsible

States parties are under an obligation to investigate thoroughly allegations of enforced disappearance until the fate of the disappeared person has been clarified, taking into account the continuous nature of the offence (Articles 8, 12 and 24.6). States parties must also establish their competence to exercise jurisdiction over the offence of enforced disappearance, including when persons accused of having committed the crime abroad are present in any territory under their jurisdiction, unless said persons have been extradited or surrendered to another state or to an international criminal tribunal (Articles 9 to 11).

When persons or groups of persons acting without the authorisation, support or acquiescence of the state are involved in an enforced disappearance, states parties are obliged to investigate and bring those responsible to justice (Article 3).

2.1.3.3 Interstate co-operation

Pursuant to Articles 14 and 15, states parties must afford one another the greatest measure of mutual legal assistance in connection with criminal proceedings brought in respect of enforced disappearances, and co-operate with a view to assisting victims of enforced disappearance; searching for, locating and releasing disappeared persons; and, in the event of death, in exhuming and identifying them and returning their remains.

2.1.3.4 Prohibition of secret detention and access to information on persons deprived of their liberty

Article 17 provides that no one shall be held in secret detention. States parties must establish effective guarantees for persons deprived of liberty, including the authorisation to communicate with and be visited by relatives, counsel or any other person of choice, and that any person with a legitimate interest has access to basic information. One or more up-to-date official registers of persons deprived of their liberty must be set up and regularly updated and be made promptly available, upon request, to any judicial or other competent authority (Articles 17 to 22).

2.1.3.5 Training

Article 23 requires states parties to train law-enforcement personnel (civil or military), medical personnel, public officials and other persons involved in the custody or treatment of persons deprived of liberty on the contents of the convention.

2.1.3.6 The notion of “victim”

Under Article 24.1, the “victim” is the disappeared person, as well as any individual who has suffered harm as the direct result of an enforced disappearance. Families are therefore encompassed by the term.

2.1.3.7 Right to know the truth

Article 24.2 enshrines the victims’ right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation, and the fate of the disappeared person.

2.1.3.8 Obligation to search, locate, respect and return mortal remains

Article 24.3 requires states parties to take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.

2.1.3.9 Compensation and other measures of reparation

States parties must ensure that victims obtain “reparation and prompt, fair and adequate compensation”. Reparation includes restitution, rehabilitation, satisfaction and guarantees of non-repetition (Article 24.4 and 24.5). Appropriate steps must be taken to regulate the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights (Article 24.6). According to the Committee on Enforced Disappearances (CED), states parties must incorporate in their legislation the “declaration of absence as a result of enforced disappearance”, a procedure aiming to address the legal situation of disappeared persons and that of their relatives in areas such as social welfare, financial matters, family law and property rights.⁴⁸

In addition, states parties are bound to guarantee the right to form, and participate freely in, organisations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims (Article 24.7).

2.1.3.10 Child victims of enforced disappearance

Article 25 obliges states parties to prevent and sanction the wrongful removal of children who are subjected to enforced disappearance; children whose father, mother or legal guardian is subjected to enforced disappearance; or children born during the captivity of a mother subjected to enforced disappearance. States parties must take all measures to search for and identify such children and return them to their families of origin.

2.2 EUROPEAN STANDARDS

Several European organisations deal with missing persons and victims of enforced disappearance. The Organization for Security and Co-operation in Europe assists the identification of recovered mortal remains and provides support to the families of the missing.

The Council of Europe deals with the issue at different levels. The Commissioner for Human Rights has looked into the problem in Human Rights Comments and in several country reports, including in Armenia, Georgia, Kosovo, Croatia, Bosnia and Herzegovina, Cyprus, Russia, Serbia and “the former Yugoslav Republic of Macedonia”.⁴⁹

The Parliamentary Assembly of the Council of Europe expressly referred to missing persons for the first time in Recommendation 1056 (1987) on national refugees and missing persons in Cyprus, emphasising that relatives of missing persons have to know the truth.⁵⁰ Since then, several reports, resolutions and recommendations have been adopted relating to particular countries and regions in Europe⁵¹ or subjects of special relevance, such as the International Convention for the Protection of All Persons from Enforced Disappearance.⁵²

The guidelines on eradicating impunity for serious human rights violations adopted by the Council of Europe Committee of Ministers adopted in 2011 stress that states have an absolute duty to investigate cases concerning Articles 2 and 3 of the ECHR. These guidelines rely to a great extent on the case law of the European Court of Human Rights (examined in the next chapter) and on the work of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Of particular relevance in the struggle against enforced disappearance are the states' obligation to carry out effective investigations in cases involving persons deprived of their liberty, including those who have not been seen since (Guidelines V and VI), the involvement of victims in the investigations, including the provision of information to the missing persons' families (Guideline VII), and the principle of accountability of subordinates (Guideline XIII).

2.3 INTERNATIONAL MECHANISMS DEALING WITH MISSING PERSONS AND VICTIMS OF ENFORCED DISAPPEARANCE

This section examines the mandate of the ICRC, ICMP, WGEID and CED, as well as the jurisprudence of the Human Rights Committee (HRC) and of the Inter-American Court of Human Rights (IACtHR).

2.3.1 International Committee of the Red Cross

Together with the National Red Cross and Red Crescent Societies, the ICRC works to locate persons reported missing and put them back into contact with their relatives. This includes looking for family members, restoring contact, reuniting families and seeking to clarify the fate of those who remain missing. In situations of conflict, the ICRC promotes the filling of tracing requests by relatives of missing persons and submits these forms to authorities that may be able to provide information on the persons sought.

Since 1996, the ICRC has launched an online tracing service when large-scale emergencies occur. Relatives can look for information on their loved ones through this service, which is currently available for persons reported missing in connection with, among others, the conflicts in Bosnia and Herzegovina, Croatia and Kosovo.

2.3.2 International Commission on Missing Persons

The ICMP, now headquartered in The Hague, was established at the G7 Summit in Lyon in 1996.⁵³ Its initial mandate was to help account for the thousands of persons reported missing after the conflicts in the Western Balkans. Since 2003, the mandate has been extended to address the issue of missing persons, including from natural catastrophes, globally.

The ICMP works with governments, civil society organisations, judicial authorities, international organisations and other stakeholders. It promotes the adoption of domestic legislation, fosters social and political advocacy, and provides technical expertise to locate and identify the missing.

In the Western Balkans, the ICMP has facilitated the identification, through DNA matching, of the remains of more than 27 000 missing persons. It has also launched a specialised online missing persons database that can be used by families to obtain and provide information. The database contains a “post-mortem sample inquiry” to allow authorities and forensic professionals to track cases; the “excavation site inquiry” provides general information regarding the status of DNA for specific excavation sites.

2.3.3 Working Group on Enforced or Involuntary Disappearances

The WGEID was established in 1980. It is composed of five independent experts who hold three sessions per year, and it assists families of victims of enforced or involuntary disappearance to establish the fate and whereabouts of their loved ones.

Upon receiving credible information on an alleged enforced disappearance occurring within the preceding three months, the WGEID transmits a report to the minister of foreign affairs of the country concerned with a request to establish the fate and whereabouts of the person concerned. Cases that have occurred more than three months previously are examined during the sessions and, where appropriate, referred to governments with the request that they carry out investigations to clarify the fate and whereabouts of the disappeared persons and inform the WGEID about the results.

Since its inception, the WGEID has transmitted almost 55 000 cases to 105 governments. More than 43 500 cases concerning 88 states remain under active consideration. If the WGEID receives information concerning cases of reprisals against relatives of disappeared persons, witnesses, members of associations or human rights defenders concerned with enforced disappearance, it appeals to the state concerned to protect these persons.

The WGEID conducts country visits and issues reports containing specific recommendations, as well as follow-up reports on the status of implementation of its recommendations.

If the WGEID receives claims of practices of enforced disappearance that may amount to crimes against humanity, it can refer them to the competent authorities, be they international, regional, sub-regional or domestic. In 2014, the WGEID requested the UN Security Council to consider a referral to the ICC with regard to enforced disappearances occurring in Syria and the Democratic People’s Republic of Korea.

The WGEID also monitors states’ progress in implementing the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance. It issues general comments to facilitate the interpretation of this declaration and, if it receives credible information that discloses the existence of obstacles in the implementation of the declaration, it sends a general allegation to the government concerned, requesting comments and information.

2.3.4 Committee on Enforced Disappearances

The CED monitors the implementation of the International Convention for the Protection of All Persons from Enforced Disappearance. It is composed of 10 independent experts and holds two sessions per year. Under Article 29, the CED receives and examines the reports submitted by states parties on the measures

taken to implement the convention. It issues concluding observations, containing recommendations and requests to receive follow-up information on the status of implementation within one year. It has issued concluding observations on the reports presented by several Council of Europe member states, namely Armenia, Belgium, France, Germany, Montenegro, the Netherlands, Serbia and Spain.

The CED can launch an “urgent procedure” if it receives, from the relatives of a disappeared person or their representatives or any person authorised by them, a request that the disappeared person should be sought and found as a matter of urgency (Article 30). The CED continues its dialogue with the state concerned under this procedure as long as the fate of the person sought remains unresolved.

Articles 31 and 32 of the convention allow the CED to receive and examine individual and interstate complaints concerning alleged violations. States parties must make a separate declaration to recognise the competence of the CED pursuant to these provisions. Of the 17 Council of Europe member states that are currently parties to the convention, 13 have done so.

Upon receiving the permission of the state concerned, the CED can carry out a country visit and issue a report and recommendations when it receives reliable information indicating that the state is seriously violating the provisions of the convention (Article 33). If it receives well-founded indications that enforced disappearances are taking place on a widespread or systematic basis in the territory of a state party, the CED may urgently bring the matter to the attention of the UN General Assembly, through the Secretary-General.

Article 35.1 of the convention establishes that the CED shall have competence solely in respect of enforced disappearances that commenced after the entry into force of the convention. The CED has held that while it cannot adjudicate on individual complaints concerning enforced disappearances as such that commenced before the entry into force of the convention for the state concerned, if information related to the past is useful during the analysis of state reports, the CED will take it into account in its concluding observations.⁵⁴

2.3.5 Human Rights Committee

The HRC has developed a significant body of case law on enforced disappearance and formulated numerous recommendations in its concluding observations, including with regard to a number of Council of Europe member states.⁵⁵

It has held that states parties to the International Covenant on Civil and Political Rights (ICCPR) must take specific and effective measures to prevent the disappearance of individuals and establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances that may involve a violation of the right to life.⁵⁶ The HRC has affirmed that states must investigate and bring to justice those responsible for enforced disappearance.⁵⁷

In its Views (decisions) on individual communications concerning enforced disappearances, the HRC has found violations of Articles 6 (right to life), 7 (prohibition of torture), 9 (right to liberty and security of person), 10 (right to humane treatment of

persons deprived of their liberty) and 16 (right to recognition as a person before the law) of the ICCPR, read alone and in conjunction with Article 2.3 (right to an effective remedy). On certain occasions, it has also found violations of Articles 17 and 24 (right to family life and right to special measures of protection for children, respectively). The HRC has held that the anguish and stress caused to relatives amounts to ill-treatment contrary to Article 7 of the ICCPR and the denial of information on the fate and whereabouts of one's loved ones is a violation of the right to know the truth.⁵⁸

The HRC has adopted several decisions on complaints concerning enforced disappearances, particularly in Bosnia and Herzegovina.⁵⁹ It found violations of Articles 6, 7 and 9, read in conjunction with Article 2.3, of the ICCPR with regard to disappeared persons, and of Article 7, read alone and in conjunction with Article 2.3, of the ICCPR with regard to their relatives. These provisions were considered violated because of the lack of information on the investigations concerning missing persons and related criminal proceedings. In addition, the HRC has emphasised that to oblige families of disappeared persons to have the disappeared family member declared dead in order to be eligible for compensation constitutes inhumane and degrading treatment.

In its Views, the HRC has requested Bosnia and Herzegovina to continue its efforts to establish the fate and whereabouts of missing persons; to bring to justice those responsible by the end of 2015, as required by the National Strategy for War Crimes Processing; to abolish the obligation for family members to declare their missing relatives dead to benefit from social allowances or any other form of compensation; and to ensure that the applicants receive adequate compensation. Bosnia and Herzegovina has also been called upon to ensure that investigations into enforced disappearances are accessible to the missing persons' families, and to publish the HRC's decisions and have them disseminated in local languages. To date, Bosnia and Herzegovina has implemented only the last measure.

2.3.6 Inter-American Court of Human Rights

The IACtHR has been at the forefront of the struggle against enforced disappearance over the past 35 years. It has developed dynamic case law on this phenomenon, and set out valuable interpretative criteria. In particular, its jurisprudence on reparations has been described as "by far, the most developed and creative."⁶⁰

The IACtHR considers enforced disappearance a complex form of human rights violation that must be understood and confronted in an integral manner.⁶¹ Even if an enforced disappearance took place before the entry into force of the 1969 American Convention on Human Rights (ACHR)⁶² or before the state concerned accepted the jurisdiction of the IACtHR, if a disappearance continues after these dates the IACtHR has the competence to consider the act as a whole.

The IACtHR examines jointly the provisions allegedly violated due to an enforced disappearance (Article 3, right to juridical personality; Article 4, right to life; Article 5, right to humane treatment; and Article 7, right to personal liberty of the ACHR in relation to Article 1.1, obligation to respect rights, thereof). Where minors are involved, Article 19 of the ACHR (rights of the child) also comes into play.

The IACtHR has also found violations of the right to know the truth, both in respect of relatives of disappeared persons and in respect of society at large. Although such a right is not expressly recognised in inter-American human rights instruments, the IACtHR has held that it is enshrined in Articles 8 (right to a fair trial) and 25 (right to judicial protection) of the ACHR. In some cases, Article 13 (freedom of thought and expression) has also been considered violated.⁶³

Relatives of disappeared persons are considered victims of inhumane and degrading treatment contrary to Article 5 of the ACHR. This finding has also been applied to relatives born after the enforced disappearance took place.⁶⁴

Taking into account the peculiarities of the practice, the IACtHR reverts the burden of proof. It presumes that enforced disappearance violates the right to life if it can be shown that there was an official practice carried out by the government or at least tolerated by it, and the case at stake can be linked to that practice.⁶⁵ The burden of proof on the presumption of death of a victim of enforced disappearance falls upon the state that had control over the detained persons.⁶⁶

The IACtHR applies a presumption also with regard to the violation of the prohibition of torture in respect of the disappeared person. Cases that occurred within a systematic practice, together with a failure to investigate by authorities, allow the inference that the victims experienced deep feelings of fear, and defencelessness. Thus, at a minimum, they were subjected to cruel, inhumane or degrading treatment.⁶⁷

The IACtHR has consistently held that:

all 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 ... forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.⁶⁸

The same reasoning has been applied in the case of amnesty laws endorsed by referendum, and the respondent state was ordered to amend or abrogate such provisions.⁶⁹ In cases of enforced disappearance, the IACtHR has also ordered respondent states to adopt interim measures to protect applicants, relatives, their representatives or witnesses.⁷⁰

With regard to measures of reparation, besides awarding pecuniary compensation, the IACtHR has ordered measures aiming to guarantee restitution, rehabilitation, satisfaction, restoration of dignity and reputation, and guarantees of non-repetition. Such measures include the carrying out of an investigation into the events leading to the enforced disappearance, and the prosecution and sanctioning of those responsible; the localisation, exhumation and identification of mortal remains and their restitution to relatives; the abrogation of amnesty laws; the provision of medical and psychological assistance to victims and their relatives; the establishment of training and educational programmes for members of armed forces and penitentiary personnel on international human rights and humanitarian law; the carrying out of public ceremonies where state authorities acknowledge international responsibility for the violations committed, and apologise; and the building of monuments to honour

victims and re-establish their dignity. In cases involving women, in particular, the IACtHR has paid special attention to the determination of gender-sensitive measures, meant to effectively contribute to rehabilitation and exercise a transformative role by breaking down pre-existing gender hierarchies and stereotypes.⁷¹

2.4 ROLE OF VICTIMS' ASSOCIATIONS AND NGOS

Associations of relatives of missing persons or victims of enforced disappearance play a vital role in establishing the truth, and in the pursuit of justice, reparation and non-recurrence. They have often done so at great personal risk, as they have been subjected to reprisals and harassment.

Such associations conduct activities aiming at documenting cases, collecting information and, where applicable, evidence, locating gravesites and prompting the intervention of judicial authorities or bringing complaints before international human rights bodies. Associations of relatives of missing and disappeared persons have been especially active in advocating for the adoption of domestic legislation and international legal instruments.

Regional federations of associations of relatives of missing and disappeared persons also exist, including the Euro-Mediterranean Federation against Enforced Disappearances. The latter encompasses member organisations of relatives of disappeared persons from Bosnia and Herzegovina, Cyprus, Kosovo, Serbia, Spain and Turkey.

International human rights NGOs often support the activities carried out by associations of relatives of missing persons and victims of enforced disappearance. In 2007, human rights NGOs and family organisations from across the world joined the International Coalition against Enforced Disappearances, the main objective of which is to favour the universal ratification and implementation of the International Convention for the Protection of All Persons from Enforced Disappearances.

Chapter 3

Major case law of the European Court of Human Rights

The European Court of Human Rights has dealt with a number of applications related to missing persons and enforced disappearance, mainly brought against Bosnia and Herzegovina, Croatia, Cyprus, Russia and Turkey. In addition, more than 12 applications against Spain, concerning enforced disappearances during the Spanish Civil War and the Franco regime, have been lodged before the Court. However, the Court has declared these applications inadmissible. On the one hand, it considered itself lacking in competence to deal with these applications because there was no genuine temporal link between such violations and the entry into force of the ECHR in respect of Spain (1979); on the other hand, it held that the applicants failed to show due diligence and lodge their applications without delay.⁷²

3.1 SIX-MONTH RULE

The Strasbourg Court has held that in cases of continuing violation, such as enforced disappearances, the six-month time limit for lodging an application (Article 35.1, ECHR) ends once the offence ceases. The Court has also specified that applicants cannot wait indefinitely before bringing a case to Strasbourg. They must demonstrate diligence and initiative and introduce their complaints without undue delay. In a case concerning enforced disappearance perpetrated in northern Cyprus, the Court held that in complex situations arising in a situation of international conflict it may be expected that the relatives lodge an application within, at most, several years following the incident. If there is an investigation of sorts, even if sporadic and problematic, the relatives may reasonably wait some more years, until hope of progress has effectively evaporated. Where more than 10 years have elapsed, the applicants would generally have to prove that there was some ongoing activity, and concrete advances being achieved to justify further delay in going to Strasbourg. Stricter expectations would apply in cases where the applicants have direct access to the investigative authorities.⁷³

3.2 HUMAN RIGHTS VIOLATED AND STATES' POSITIVE OBLIGATIONS

The Court usually analyses cases of enforced disappearance in connection with Articles 2 (right to life), 3 (prohibition of torture), 5 (right to liberty and security) and 13 (right to an effective remedy) of the ECHR. The latter is read in conjunction with Articles 2 and 3. In some cases, the Court has also declared a violation of Article 8 (right to respect for private and family life).

In all cases of enforced disappearance adjudicated so far the Court has found a violation of Article 5 of the Convention. However, given its extremely serious nature and specificities, enforced disappearance cannot be understood only as an aggravated form of arbitrary detention; it entails the violation of other human rights as well. In the case of violation of Articles 2 and 3 of the Convention with regard to the disappeared person, the Court assesses whether the offence encompasses only the substantive aspect of the provisions, or also the procedural one, which requires states to carry out an effective investigation into the alleged crime. Such an investigation must be launched *ex officio* and certain particular features of an effective investigation, such as independence and impartiality, adequacy, promptness and public scrutiny, must be met whatever form that investigation takes. In particular, the victims or their relatives must be involved in the procedure to the extent necessary to safeguard their interests.

The Court applies a presumption of violation of the substantive limb of Article 2 of the ECHR 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.⁷⁴ When disappearances occur in these 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.⁷⁵ In certain cases, the Court has examined whether the respondent state took effective operative measures to protect the right to life of the disappeared person, as required by the positive obligations stemming from Article 2 of the ECHR.⁷⁶

In *Cyprus v. Turkey* the Court found a continuing violation of Article 2 on account of the failure of the Turkish authorities to conduct an effective investigation into the whereabouts and fate of missing persons who disappeared in life-threatening circumstances. The Court also declared an ongoing violation of Article 5 and considered Article 3 violated in respect of the families of missing persons, assessing that the silence of the authorities in the face of the real concerns of relatives attained a level of severity that could be categorised as inhumane treatment.⁷⁷ In 2014, the Court issued its judgment on just satisfaction,⁷⁸ ordering the payment by Turkey of €30 million in respect of non-pecuniary damage suffered by relatives of the missing persons.

With regard to cases of missing persons and enforced disappearances perpetrated in Bosnia and Herzegovina, in concert with alleged investigative shortcomings and a lack of sanctions on those responsible, the Court has taken a rather more

restrictive stance compared to the HRC. While the latter declared the international responsibility of the state for breaching its positive obligations under the ICCPR, the Court declared various applications against Bosnia and Herzegovina manifestly ill-founded, as the authorities were seen to have done all that they could have.⁷⁹ The Court has observed that, taking into account the exceptional circumstances prevailing in Bosnia and Herzegovina up to 2005, authorities could not be reasonably expected to undertake any effective investigations.⁸⁰ After that date, the domestic legal system became capable of dealing with cases of disappearance. However, the Court has pointed out that the standard meant to govern the expediting of investigations in such historical cases is very different from the standard applicable to recent incidents. Recalling that the positive obligation stemming from Article 2 of the ECHR is of means and not of result⁸¹ and that it must be interpreted in a way that does not impose an impossible or disproportionate burden on the authorities, the Court considered that the minimum standard required by such a provision had not been infringed.

The Court has also affirmed that the procedural obligation arising from Article 2 of the ECHR is separate and autonomous from the substantive limb and can be regarded as “detachable”, thus binding states also when the disappearance or death of the victim took place before the entry into force of the ECHR for the state concerned. The procedural obligation continues as long as measures to clarify the circumstances of the violation and establish responsibility can reasonably be expected.⁸²

However, in its Grand Chamber judgment on the case *Janowiec and Others v. Russia* from 2013, the Court limited its competence with regard to the violation of procedural obligations arising from Article 2 of the ECHR. The Court held that its temporal jurisdiction extended to procedural acts and omissions that took place or ought to have taken place in the period after the entry into force of the ECHR. Moreover, the period of time between the triggering event (intended by the Court as the death of the victim) and the entry into force of the ECHR must have been reasonably short and, in any case, should not exceed 10 years. In exceptional circumstances, the extension of such a time limit may be justified, if the need to ensure the real and effective protection of the guarantees and underlying values of the ECHR constitutes a sufficient basis for recognising the existence of a connection. In any event the Court held in this case that the latter criterion could not be applied to events that occurred prior to 4 November 1950 (the date of adoption of the ECHR).⁸³

Amnesty laws are generally incompatible with the duty of states to investigate and prosecute crimes under international law. Granting amnesty in respect of the enforced disappearance of civilians runs contrary to a state’s obligations under Articles 2 and 3 of the ECHR since it hampers investigations into such acts and necessarily leads to impunity.⁸⁴ The Court has emphasised that where there are particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, amnesty measures are possible.⁸⁵ However, the compatibility of such amnesty measures with international human rights law must be thoroughly assessed on a case-by-case basis.

Unlike the IACtHR, the 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, nor does it apply any presumption, instead requesting applicants to prove beyond reasonable doubt that their relative has in fact been tortured.⁸⁶

However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.⁸⁷

The Court has often asked respondent states to provide copies of the criminal investigation files, but co-operation on the part of the authorities has been unsatisfactory.⁸⁸ In these cases the Court has found breaches of the states' duty to provide all necessary facilities for the examination of applications, in violation of Article 38 of the ECHR.

3.3 RELATIVES OF THE DISAPPEARED PERSON

Relatives of disappeared persons may also be themselves victims of a violation of Article 3 of the ECHR, mainly due to the authorities' reactions and attitudes when the situation has been brought to their attention. To assess the occurrence of such a violation, the Court considers the proximity of the family tie, the circumstances of the relationship, the extent to which the relative witnessed the events in question, and the involvement of the family member in attempts to obtain information on the disappearance.⁸⁹ In the case of relatives born after the enforced disappearance of their loved ones, notwithstanding the efforts undertaken to elucidate their fate and whereabouts and the indifference shown by state authorities, the Court has considered that their mental anguish does not fall within the threshold of Article 3.⁹⁰

3.4 ENFORCED DISAPPEARANCE IN THE CONTEXT OF EXTRAORDINARY RENDITIONS AND EXTRADITIONS

The Court has held that the ongoing situation of uncertainty and unaccountability that characterises victims' captivity in cases of extraordinary renditions makes the latter, although temporary, an enforced disappearance.⁹¹ The direct victim, his family, other victims of similar crimes, and the general public have a right to know the truth about what has happened.⁹²

In a number of cases concerning abductions or enforced disappearances in the context of extraditions from Russia to Tajikistan or Uzbekistan, the Court has found various violations by Russia of the ECHR,⁹³ given that the applicants could not have been abducted or have disappeared and been forcibly transferred from Russian territory without the knowledge and passive or active involvement of the Russian authorities. In some of these cases the Court notably found violations of Article 3 of the ECHR due to the respondent state's failure to protect the applicants from exposure to the risk of torture and other forms of ill-treatment, as well as in omitting to hold an effective investigation into the disappearances or abductions.

3.5 INTERIM MEASURES

Sometimes applicants before the Court or witnesses are subjected to reprisals. The Court has not consistently used interim measures to order physical protection measures. In *Bitiyeva and X. v. Russia* the Court requested the respondent state to take all measures to ensure that there was no hindrance in any way of one of the applicants' right to individual petition.⁹⁴ In *Shabazova v. Russia*, the Court requested the government to provide without delay information on the fate and whereabouts of the applicant's husband.⁹⁵ Although the respondent state did not fully implement the measure, the precedent is worth consideration.

Recently, the Court made reference to a phenomenon observed in the Russian Federation involving the temporary disappearance of applicants protected by interim measures issued by the Court to prevent their extradition to states where their life or personal integrity would be at risk. In some of these cases, the applicants later reappeared in the country that had requested their extradition.⁹⁶

3.6 MEASURES OF REPARATION

The Court's general approach to the determination of measures of reparation is restrictive compared to the case law of the IACtHR and the HRC.⁹⁷ With some notable exceptions, the Court interprets "just satisfaction" as meaning compensation for pecuniary and non-pecuniary damages. Especially in cases of enforced disappearance, applicants often request the Court to order the respondent state to verify the facts and publicly disclose the truth on the fate and whereabouts of the disappeared. The Court usually refrains from granting the requested measure, alleging that states are free to choose the means whereby they will comply with a judgment in which a breach has been found. In the Court's view it is not its place to make consequential orders or declaratory statements. Rather, it falls to the Committee of Ministers, acting pursuant to Article 46 of the ECHR, to address the issue as to what may be required in practical terms by way of compliance in each case. However, some judges have affirmed that the Court should order states to carry out, as a measure of reparation, a thorough and effective investigation into the alleged violations.⁹⁸

The judgment rendered on 18 December 2012 in *Aslakhanova and Others v. Russia* represents a significant, although still isolated, precedent in the Court's interpretation of measures of reparation in cases of enforced disappearance. The Court held that enforced disappearance and the corresponding lack of investigation in the North Caucasus result "from systemic problems at the national level, for which there is no effective remedy".⁹⁹ Such a situation requires the prompt implementation of comprehensive and complex measures. The Court held that measures to redress the systemic failure to investigate disappearances in the region would fall into two principal categories: the first concerning the suffering of the relatives of the victims, and the second relating to the ineffectiveness of criminal investigations and the

resulting impunity enjoyed by the perpetrators. The Court gave detailed indications on the nature of the required measures, although it did not incorporate this in the form of an express order in the dispositive paragraphs of the judgment.

3.7 IMPLEMENTATION OF THE COURT'S JUDGMENTS

The Court's judgments concerning enforced disappearances remain poorly or only slowly implemented.¹⁰⁰ Investigations are very seldom launched, thus prolonging impunity for serious human rights violations and perpetuating the violation of the victims' rights to truth and justice.

A change in the jurisprudence of the Court concerning measures of reparation in cases of enforced disappearance, along the lines of the jurisprudence of the IACtHR and the WGEID's recommendations,¹⁰¹ as well as an increased use of pilot judgments or of semi-pilot judgments, as in *Aslakhanova and Others v. Russia*, could certainly be useful. National parliaments and the Parliamentary Assembly of the Council of Europe could complement the work of the Committee of Ministers to ensure prompt, full and effective compliance of states with the Court's judgments.

Chapter 4

European state practice and major human rights challenges concerning missing persons and victims of enforced disappearance

In some Council of Europe member states, such as Cyprus or the region of the former Yugoslavia, progress has been made in resolving cases of missing and disappeared persons. The situation appears to be different in Armenia, Azerbaijan, Georgia, the Russian Federation, Spain and Ukraine. In many countries, investigation, prosecution and sanction of those responsible for enforced disappearances appear to be in fact virtually impossible.

Without pretending to be exhaustive, this chapter analyses some of the major challenges faced by Council of Europe member states in fulfilling the right to know the truth, providing for reparations and combating impunity for serious human rights violations.

4.1 OBSTACLES IN THE SEARCH FOR MISSING PERSONS AND VICTIMS OF ENFORCED DISAPPEARANCE AND IN EXHUMATION PROCESSES

National commissions on missing persons have been established in Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Kosovo, Montenegro and Serbia. Although the creation of national commissions or central institutions mandated to co-ordinate the search for missing persons is a positive development, experience shows that if such mechanisms are not provided with adequate human and financial resources and if they do not work in a fully transparent and independent manner,

closely co-operating with forensic specialists, NGOs and associations of relatives of missing persons, they are doomed to failure.

Since the significant achievements of the past years, mentioned above, exhumation and identification processes in the Western Balkans have slowed down. This is due to problems related to the scarce information on new gravesites, cases of mistaken identification, and lack of pathologists and forensic experts as well as professionals able to provide adequate psychological support to relatives of missing persons and victims of enforced disappearance throughout. For families that have not managed to learn the truth about the fate and whereabouts of their loved ones, hope is fading or is completely lost.

In Cyprus, the CMP was unable to exhume even a single grave for over 20 years mainly due to the lack of bi-communal co-operation and trust. Although the situation eventually changed, 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, and 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. In 2015, the CMP was granted authorisation to access military zones; this may speed up the process. The Committee of Ministers of the Council of Europe closely follows these developments in the context of its supervision of execution by Turkey of the Court's judgments in the cases *Varnava and Others v. Turkey* and *Cyprus v. Turkey*.

As regards in particular the Northern Caucasus, the Strasbourg Court has in *Aslakhanova and Others v. Russia* stressed the need for Russia 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". The existing databases maintained by various institutions in Russia, it maintained, were not sufficiently interrelated and indicated the need for a more coherent approach. By its Interim Resolution CM/ResDH(2015)45 the Council of Europe's Committee of Ministers "strongly urged" Russia to give effect to the above measure that was highlighted by the Court in order to provide relief to the families of victims of enforced disappearance.

The impossibility of obtaining access to military archives or to documentation covered by state secrecy laws, often for alleged reasons of national security, represents an almost insurmountable obstacle to establishing the truth and obtaining justice in cases of missing persons and enforced disappearance.¹⁰² This kind of argument has been frequently used in cases related to the practice of extraordinary renditions and has hindered investigations and prosecutions.¹⁰³ For instance, in Serbia the archives of the Ministry of Defence are kept secret, making it extremely difficult to gather the information necessary to establish the fate and whereabouts of missing and disappeared persons.¹⁰⁴

4.2 NATIONAL AND REGIONAL TRUTH AND RECONCILIATION COMMISSIONS

Several attempts have been made to establish Truth and Reconciliation Commissions (TRCs) at the national and regional level in the Western Balkans. To date, none can be considered successful, mostly because of the lack of political will and co-operation. For instance, despite the recommendations issued by international human rights bodies in this regard, Spain has not managed to set up an effective and independent truth-seeking mechanism.¹⁰⁵

The major obstacles faced by TRCs have been concisely identified by the UN Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence, who has observed:

Truth commissions in post-conflict settings face particular challenges. They must provide an account of violations often perpetrated by a multiplicity of agents of violence, each much less structured than the security sector of authoritarian regimes and frequently with circulating membership, while the perpetrator/victim line is often porous. Furthermore, security concerns negatively affect virtually all aspects of the operation of commissions, providing powerful disincentives to potential witnesses, statement-takers and even commissioners. Commissions in post-conflict contexts operate in an overall environment of weak institutions, depleted social capital, fragmented civil societies, severe capacity and resource constraints, and often in situations marked by deep ethnic cleavages.¹⁰⁶

In September 2015, the UN Special Rapporteur issued a useful set of general recommendations for truth commissions and archives.¹⁰⁷

Other challenges faced by TRCs include controversies on the aptness of certain commissioners related to their alleged lack of independence; a tendency to continuously expand the mandate of these mechanisms; a frequent inability to meet the deadlines initially assigned; and poor implementation of recommendations.

4.3 PITFALLS IN DOMESTIC LEGISLATION

A significant number of Council of Europe member states criminalise enforced disappearance as a crime against humanity, reproducing the wording contained in the ICC Statute. However, the WGEID and the CED have stressed that this is not sufficient to meet international obligations and offer an effective criminal legal framework, because:

Experience shows that enforced disappearances often do not occur as part of a widespread or systematic attack against civilians. In this perspective, criminalizing enforced disappearance in domestic law only when committed in this specific context implies that many acts of enforced disappearances remain outside the scope of domestic criminal law and the jurisdiction of national courts.¹⁰⁸

Even if the legislation of several states criminalises offences that are linked with enforced disappearance, such as abductions, kidnapping, unlawful detention, illegal deprivation of liberty, trafficking in persons, illegal constraint and abuse of power, this plurality of fragmented offences fails to encompass the complexity and particularly serious nature of enforced disappearance. The mentioned offences may form part of a type of enforced disappearance, but none of them are sufficient to cover all the elements of enforced disappearance and often the sanctions envisaged are not proportionate to the gravity of the crime.

The regulation of the legal status of missing and disappeared persons while their fate and whereabouts are unknown is necessary to settle matters related in particular to inheritance, social welfare, family law and property rights. Most Council of Europe member states lack ad hoc legislation that takes into account the specificities of the phenomenon and apply provisions on presumptions of death or even make social assistance and compensation conditional on obtaining a declaration of death. This re-victimises relatives and may amount to a form of ill-treatment. The fictitious requalification of enforced disappearance as homicide can be used to favour impunity.¹⁰⁹

4.4 OBSTACLES TO THE ERADICATION OF IMPUNITY FOR ENFORCED DISAPPEARANCES

Impunity encourages the committing of and repetition of crimes, inflicts additional suffering on victims, and has adverse effects on the rule of law and public trust in the justice system, especially in cases where there is a legacy of serious human rights violations. Perpetrators of serious violations of human rights or of international humanitarian law should be subject to effective investigations, prosecutions and fair trials.¹¹⁰

Impunity of perpetrators of enforced disappearance remains rampant in many countries, including Council of Europe member states. Prosecutions in the aftermath of serious or mass violations face extraordinary challenges, including the high number of suspected perpetrators, the relative scarcity of financial and human resources, capacity and will, and the fact that in many processes of transition important figures from the previous regime retain influence.

In March 2006, the United Nations Interim Administration Mission in Kosovo (UNMIK) established the Human Rights Advisory Panel (HRAP) with the mandate of examining individual complaints against UNMIK for human rights violations committed between 23 April 2005 and 9 December 2008. However, the narrow mandate and non-judicial nature of the HRAP, which can only issue advisory opinions, severely limited this initiative.¹¹¹ Domestic authorities and the European Union Rule of Law Mission in Kosovo (EULEX Kosovo) did not carry out thorough and effective investigations either. Impunity for past abuses remains rampant.¹¹² After several attempts, in August 2015 the Kosovo parliament eventually approved Law No. 05/L-053 on Specialist Chambers and Specialist Prosecutor's Office to prosecute war crimes, including enforced disappearance (Article 13.i). This represents a significant step forward.

Effective legal mechanisms aiming at guaranteeing that independent and fair trials can take place must now be set up.

In Bosnia and Herzegovina, although a number of trials have taken place, the current pace of implementation of the 2008 National Strategy for War Crimes Processing is too slow. The financial and human resources allocated have proven insufficient and the fact that the deadlines established for the prosecution ("most complex and top priority cases" prosecuted by the end of 2015 and "other war crimes cases" prosecuted by the end of 2023) will most likely not be met nourishes a sense of distrust among victims and their relatives. Families of missing and disappeared persons face significant difficulties in accessing information concerning the status of criminal investigations and this also undermines faith in institutions and the rule of law.

In Croatia, prosecution of war-related crimes has been delayed or prevented due to the lack of expertise of local courts as well as the lack of infrastructure for witness protection and support. Moreover, the passing of a law in October 2011 that proclaimed null and void all legal acts relating to the war (1991 to 1995) in which Croatian nationals were suspected of or indicted or sentenced for war crimes represented a major setback to the pursuit of justice.¹¹³

In 2011, the parliament of "the former Yugoslav Republic of Macedonia" decided to apply the 2002 Amnesty Law to all cases returned from the International Criminal Tribunal for the former Yugoslavia for prosecution at the domestic level. This, coupled with a weak judiciary, made obtaining justice for past deeds in this country extremely difficult.¹¹⁴

The struggle against impunity in the Western Balkans has been hindered by the lack of measures of mutual legal co-operation among the states concerned, also with regard to the problem of war crime fugitives reportedly travelling between countries. Even where extradition agreements have been eventually signed, their effectiveness has been undermined by the fact that some countries have barred the extradition of their own nationals. All in all, war-related prosecutions in the region are made difficult by the lack of judicial expertise and resources, and by the absence of effective measures of protection and support of witnesses prior to, during and after trials.¹¹⁵

Lastly, it is to be noted that the application of the 1977 Amnesty Law in Spain and of statutes of limitations in Turkey makes justice for cases of enforced disappearance virtually impossible in both countries.

4.5 LACK OF COMPREHENSIVE PROGRAMMES OF REPARATION FOR VICTIMS

None of the Council of Europe member states dealing with missing persons or victims of enforced disappearance has adopted, to date, a comprehensive programme of reparations.

For example, in Bosnia and Herzegovina, Article 15 of the Law on Missing Persons, in force since November 2004, prescribes the creation of a Fund for Support to the Families of Missing Persons of Bosnia and Herzegovina. Pursuant to this provision,

the Fund should have been established within 30 days of the entry into force of the law. More than 11 years have passed, yet the Fund has not seen the light of day, while many relatives of missing persons and victims of enforced disappearance live in dire financial situations. The non-establishment of the Fund also violates a number of decisions delivered by the Constitutional Court of Bosnia and Herzegovina, which referred to the Fund as a guarantee for providing reparation to the relatives of missing persons. This lack of implementation of the verdicts of the highest judicial authority of the country undermines the rule of law. In addition, notions of reparation and of social allowances for the relatives of disappeared people are unduly confused, and civilian victims receive lower social allowances than veterans.¹¹⁶

In other instances, the adoption of legislation aiming at granting reparation to relatives of missing persons or victims of enforced disappearance has been hindered by the lack of funding and human resources to guarantee effective implementation.¹¹⁷ Another existing problem is the absence of domestic mechanisms for claiming compensation where no individual perpetrator has been identified or prosecuted and criminal proceedings remain suspended.¹¹⁸

The crucial importance of adopting adequate measures to provide assistance, support and compensation to victims and witnesses has been stressed by the International Criminal Tribunal for the former Yugoslavia, which has noted the need to create a trust fund for victims of crimes falling within its jurisdiction.¹¹⁹ The tribunal's President has made it clear that peace and reconciliation cannot be achieved in the region through criminal justice alone. Other remedies must complement the criminal trials, and one such remedy should be adequate assistance to the victims for their suffering. Although in 2012 the International Organization for Migration issued a comprehensive assessment study on the subject,¹²⁰ so far the initiative has not made progress. However, it is noted that a Trust Fund for Victims (TFV) was foreseen by Article 79 of the ICC Statute and established by states parties. It covers victims of crimes against humanity, war crimes and genocide. The ICC has set forth two mandates for the TFV: first, to implement court-ordered reparations, and second, to provide physical and psychosocial rehabilitation or material support to victims of crimes that fall within the jurisdiction of the court.

Chapter 5

Instances of good practices

Solving the issue of missing persons and victims of enforced disappearance requires efforts on several fronts by the states concerned, including the adoption and effective implementation of legislative, forensic, administrative and judicial measures, as well as efficient inter-agency and interstate co-operation. Non-judicial initiatives, such as truth-seeking processes, reparation programmes and institutional reforms can also be of use, but cannot completely substitute the judicial process. However, none of these efforts, alone or in combination, is likely to succeed if sensitivity and genuine political will and determination are not demonstrated by the governments concerned.

5.1 SUCCESSFUL EXPERIENCES OF EXHUMATION PROCESSES, CO-OPERATION, TRUTH-SEEKING AND OPENING OF ARCHIVES

5.1.1 Exhumation processes

Despite the recent decrease in the pace of exhumations, identifications and return of mortal remains of missing persons to families, the results obtained in the Western Balkans with the co-ordination and support of the ICMP and the employment of DNA-matching techniques remain outstanding. The establishment of centralised DNA databases has greatly enhanced the search and identification of missing persons and victims of enforced disappearance in that region's countries.

The work successfully carried out in other regions of the world by organisations such as the EAAF and the Peruvian Forensic Anthropology Team is also worth mentioning. The intervention of these organisations is usually appreciated by relatives of missing persons and victims of enforced disappearance, who see them as highly professional experts, and also as actors that can guarantee independence and impartiality in the processes of exhumation of gravesites, identification and return of remains. Additionally, these organisations offer psychosocial support to families throughout these processes.

The importance of actively involving the families of missing persons or direct victims of enforced disappearance and their representatives from different countries in endeavours relating to exhumation and identification of mortal remains is shown

by the recent positive experience of the Forensic Commission to Identify Remains established in Mexico in August 2013. This commission, 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 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. Being able to rely on independent professionals and have access to information on the ongoing process has gained the trust of family associations in the different countries involved and the results obtained appear to be positive.¹²¹

5.1.2 Truth and reconciliation commissions

TRCs have proven capable of making significant contributions to transitional processes in over 40 countries that have established them. Major factors determining their impact include the moral authority of their members; their creation in the wake of social turmoil or upheaval, when the basic social contract is being revised; the fact that the topics that they address are closely related to fundamental rights; a sound and consistent methodology; openness to civil society; and a victim-centred, inclusive approach.¹²² However, despite the importance of truth-seeking exercises, truth cannot be a substitute for justice, reparation or guarantees of non-recurrence, singly or collectively.

An innovative initiative was launched in the region of the former Yugoslavia in 2008 by a regional coalition of NGOs that proposed the establishment of a regional truth commission (RECOM).¹²³ In March 2011, the coalition, composed of about 1 800 NGOs and individuals from all the countries in the region of the former Yugoslavia, adopted a draft statute for an international agreement that said countries have been requested to ratify and incorporate in their domestic legislation.¹²⁴ Pursuant to the above agreement, an independent commission was to have been established to investigate war crimes and serious human rights violations committed in the former Yugoslavia from 1 January 1991 to 31 December 2001. The commission was to have a three-year mandate, and would publish a final report and create an archive open to the public, excluding classified documents. Although the authorities of various countries of the region expressed their support (in particular the Parliament of Montenegro, and the Presidents of Serbia, Croatia and Slovenia), other leading politicians have openly opposed this initiative, which currently appears to be at an impasse.

The experience of “unofficial” TRCs carried out by civil society groups is encouraging. The examples of Guatemala,¹²⁵ Brazil,¹²⁶ Northern Ireland¹²⁷ and the Western Sahara¹²⁸ can be cited. These commissions were established in the face of states’ inability or unwillingness to conduct an effective truth-seeking exercise. They represented a means of empowerment for civil society but also a tool to unveil the truth on past human rights abuses and trigger subsequent investigations.

In Guatemala and Brazil, the work carried out by these unofficial TRCs was complemented at a later stage by the work of official mechanisms, set up either as a result of peace agreements or after significant political changes. In Brazil, the

establishment of the National Truth Commission in November 2011 was accompanied by the adoption of a Law for Public Access to Information aiming to enable the commission to make information available to the public.

5.1.3 Access to state-held information and archives

Ready availability of information on issues of public interest is of vital importance in a pluralistic, democratic society of transparent public administration. The Council of Europe's Committee of Ministers has underlined the need for states to ensure wide access to official documents, on the basis of equality and in accordance with clear rules. Limitations should be set down precisely in law, be considered necessary in a democratic society and be proportionate to the aim of protection.¹²⁹ The 2009 Council of Europe Convention on Access to Official Documents has usefully regulated these issues but has not as yet entered into force, having been ratified only by seven member states (as of October 2015).

In the case of missing persons and enforced disappearances, access to archives is key to ensuring that families enjoy their right to know the truth. National human rights institutions, such as data protection authorities, have a pivotal role to play in this context. National and interstate initiatives aiming at opening archives that may contain useful information have proven especially useful. For instance, in 2005, the ICRC, as chair of the Working Group on persons who are unaccounted for in Kosovo, negotiated access to archives of the international organisations that had worked or were still working in the region, particularly those that might contain documentation related to gravesite locations and exhumations carried out immediately after the conflict. Formal requests for disclosure of information were also forwarded to the governments of countries whose military contingents operated in Kosovo within the Kosovo Force. The lack of response by the latter points to the crucial importance of political will for resolving the issue of missing persons and victims of enforced disappearance. Legal provisions relating to state secrets or national security cannot be invoked to obstruct the handing over of such documentation. A positive example is the opening of the archives of the Serbian Ministry of Interior in 2013, in contrast to the Ministry of Defence.

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 the conflict in the country. The PDH adopted measures to preserve the documentation and to enable access and consultation by the public. On the basis of evidence contained in the archives, two members of the National Police responsible for the enforced disappearance of a trade unionist and university student in 1984 were identified, arrested, prosecuted and sentenced to 40 years' imprisonment.

Another positive example 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.

5.2 STRENGTHENING THE DOMESTIC LEGAL AND INSTITUTIONAL FRAMEWORK

Notwithstanding the problems related to the implementation of some of its provisions, the Law on Missing Persons in Bosnia and Herzegovina can be regarded as a good practice. The ICRC has drafted a model law on missing persons containing the main elements to be taken into account in domestic legislation.¹³⁰ The WGEID has published a study on best practices on enforced disappearances in domestic criminal legislation, which describes the criteria that states should follow to strengthen their domestic criminal legal framework to sanction enforced disappearance.¹³¹

A handful of Latin American countries have adopted provisions to regulate the status of missing or disappeared persons while their fate and whereabouts remain unknown and introduced in their legislation the declaration of absence due to enforced disappearance,¹³² seeking to address the element of uncertainty provoked by the concealment of the fate and whereabouts of victims. An example of comprehensive legislation concerning the rights of relatives of missing persons and victims of enforced disappearance is the General Law on Victims adopted in Mexico on 9 January 2013, which 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). This law also envisages special measures in cases involving women and children. A national mechanism has been set up to ensure the implementation of the law.

It should also be noted that independent national human rights institutions such as ombudsmen or human rights commissions have a vital role to play in this domain. Throughout their history, they have proven to be valuable institutions for independent monitoring of human rights and the administration, and have been able to act promptly in order to provide relief to victims of human rights violations. Their reports and recommendations provide valuable pointers in identifying problems and setting priorities. States should establish or enhance the performance of such institutions at national and local level to facilitate easy access for all those whose rights have been violated.

5.3 EFFECTIVE PROSECUTION AND SANCTION OF PERPETRATORS

Criminal prosecutions enhance transitional processes, including by providing recognition to victims as right-holders and allowing the legal system to establish its trustworthiness. Effective prosecutions strengthen the rule of law and contribute to achieving social reconciliation.¹³³

In order to overcome the significant constraints on prosecutions in the aftermath of serious human rights violations, efforts must be directed at increasing their effectiveness, for instance by means of prioritisation, and establishing a strategic order for investigation and prosecution. Victims' participation in the design and implementation of prosecutorial strategies must be granted, as well as the institutionalisation of participatory mechanisms.

The use of universal jurisdiction facilitates the struggle against impunity. The removal of procedural impediments, such as the defence of due obedience to superior orders or unreasonably short statutes of limitations, is also crucial. In the same sense, good practices against impunity include the abrogation of amnesty laws. Among others, the examples of Argentina and Peru can be cited. After the abrogation in these cases, *de facto* or *de jure*, of the respective amnesty provisions, several criminal proceedings were opened or re-opened, leading to the sentencing of perpetrators of enforced disappearances.¹³⁴

Concluding observations

The issue of missing persons and victims of enforced disappearance is far from resolved in Europe. Given the very serious implications it has for human rights and the rule of law, the search for missing and disappeared persons must be assumed by all European states concerned as a priority. As time passes, thousands of people are struggling to discover the truth about the fate and whereabouts of their loved ones; they are caught between hope and despair. Even recognising the issue and determining its exact scope through the gathering of clear and reliable data would represent a sign of genuine commitment and a significant step in the right direction. Families of missing persons and direct victims of enforced disappearance have a right to know the truth and must be placed at the core of all related actions in terms of receiving adequate support, assistance and reparation.

Justice remains key. There cannot be any reconciliation and social cohesion so long as impunity for enforced disappearance is not eradicated. In this sense, Council of Europe member states must strengthen their domestic criminal legislation and ensure that thorough and effective investigations are carried out without delay and perpetrators are prosecuted and sanctioned. It is also important that Council of Europe member states that have not yet done so accede to the UN's International Convention on the Protection of All Persons from Enforced Disappearance and recognise the competence of the CED to receive and examine individual and interstate complaints.

Even though the Strasbourg Court has pronounced on a large number of cases of enforced disappearance, its judgments often remain unimplemented, thus re-victimising the applicants and failing to offer redress for the harm suffered, not to mention guarantees of non-repetition. Swift and complete compliance with the Court's judgments must be ensured, and national parliaments and the Parliamentary Assembly could complement the work of the Committee of Ministers to achieve this goal.

This issue paper shows that, sadly, missing persons and victims of enforced disappearance cannot be regarded as a phenomenon of the past or limited to a certain geographical area. On the contrary, these heinous practices evolve and occur in different contexts and new forms. This calls for further analysis in order to better understand the scope and features of emerging practices, and to study effective responses. In particular, the subjects of missing persons and enforced disappearance in the context of migration, and of the so-called "short-term enforced disappearances", often in the context of operations to counter organised crime or terrorism, require extensive research.

Much more remains to be done, and it is now time for action. Council of Europe member states can, and must, play a pivotal role in this field. The only way to achieve progress is for all states concerned to address their past. Constructive co-operation among all Council of Europe member states, both in terms of legal assistance and assistance to direct victims and relatives of missing and disappeared persons, is absolutely necessary in order to establish the truth and achieve justice, reconciliation and durable peace.

Notes

1. This issue paper is intended to be up to date to 9 October 2015.
2. The issue paper does not deal in detail with the subject of people registered as missing or victims of enforced disappearance during the Second World War. Nevertheless, it is noted that many scholars date the “origins” of enforced disappearance to the Second World War, through the decree known as *Nacht und Nebel* (“Night and Fog”), issued on 7 December 1941 by Adolf Hitler. After the Second World War, the United Nations Convention on the Declaration of Death of Missing Persons was adopted in 1950 and remained in force until 1972. The convention aimed to regulate tribunals issuing declarations of death of persons who “disappeared in the years 1939-1945”, under circumstances affording reasonable grounds to infer that they died as a consequence of events of war or of racial, religious, political or national persecution. Thus, the terms “fallen soldiers” or “casualties” are often used to refer to persons who went missing or were subjected to enforced disappearance during the Second World War. The German War Graves Commission maintains an online database as a means for relatives to trace missing soldiers from the Second World War (<http://www.volksbund.de/graebersuche.html>). Under the auspices of this Commission thousands of fallen soldiers are located and reburied each year across Eastern Europe and Russia. Moreover, in September 2008, the International Commission on Missing Persons (ICMP) agreed to assist Norway in tracing and establishing the fate of Norwegians who fought in the SS and went missing in combat.
3. See the Commissioner’s Human Rights Comment “Missing persons in Europe: the truth is yet to be told”, 28 August 2014, (<http://www.coe.int/web/commissioner/-/missing-persons-in-europe-the-truth-is-yet-to-be-told>), and the Commissioner’s thematic webpage, *Transitional Justice and Human Rights Protection in Europe* (<http://www.coe.int/en/web/commissioner/thematic-work/transitional-justice>).
4. International Committee of the Red Cross (ICRC), *Guiding principles. Model law on the missing*, 2009, Article 2.1.
5. See Council of Europe, Committee of Ministers on principles concerning missing persons and the presumption of death, Recommendation CM/Rec(2009)12, 9 December 2009, aiming at addressing the increased number of persons registered as missing in the context of “unprecedented mobility ... as well as the increased risk and occurrence of terrorist attacks and man-made or natural disasters, due among other things to climate change” (<https://wcd.coe.int/ViewDoc.jsp?id=1563505>).
6. Working Group on Enforced or Involuntary Disappearances (WGEID), “Study on enforced or involuntary disappearances and economic, social and cultural rights”, doc. A/HRC/30/38/Add.5, 9 July 2015 (<http://bit.ly/1PdBbYw>).
7. See WGEID, General Comment on enforced disappearances as a crime against humanity (<http://bit.ly/1TA6fHl>).
8. Inter-American Court of Human Rights (IACtHR), *Goiburú and Others v. Paraguay*, judgment of 22 September 2006, para. 84; Sarkin J. (2012), “Why the prohibition of enforced disappearance has attained the status of *ius cogens* in international law”, *Nordic Journal of International Law*, No. 81, pp. 537-84.
9. WGEID, General Comment on enforced disappearance as a continuous crime (<http://bit.ly/1QXUUQo>).
10. Inter-American Court of Human Rights (IACtHR), *La Cantuta v. Peru*, judgment of 29 November 2006, para. 114.
11. WGEID, General Comment on women affected by enforced disappearance, A/HRC/WGEID/98/2, 14 February 2013; and WGEID, General Comment on children affected by enforced disappearance, A/HRC/WGEID/98/1, 14 February 2013. See also International Centre for Transitional Justice (2015), “The disappeared and invisible: revealing the enduring impact of enforced disappearance on women”.
12. WGEID, General Comment on the right to the truth in relation to enforced disappearance, 2010 (<http://bit.ly/1KUy2Lj>).
13. See chapters 4, 5 and 6.

14. Parliamentary Assembly, Doc. 13294, 3 September 2013, “Missing persons from Europe’s conflicts: the long road to finding humanitarian answers”, rapporteur Mr. Sheridan (<http://bit.ly/1PwVW55>).
15. Parliamentary Assembly Resolution 1553 (2007) on missing persons in Armenia, Azerbaijan and Georgia from the conflicts over the Nagorno-Karabakh, Abkhazia and South Ossetia regions, para. 6 (<http://bit.ly/1KnRaGG>); Parliamentary Assembly Doc. 11196, 7 March 2007, “Missing persons in Armenia, Azerbaijan and Georgia from the conflicts over the Nagorno-Karabakh, Abkhazia and South Ossetia regions”, rapporteur Mr Platvoet (<http://bit.ly/1nKE9Ng>).
16. Commissioner for Human Rights, “Monitoring of Investigations into cases of missing persons during and after the August 2008 armed conflict in Georgia”, 29 September 2010 (<https://wcd.coe.int/ViewDoc.jsp?id=1675137>).
17. Parliamentary Assembly Doc. AS/Jur (2011) 45, 4 November 2011, “The International Convention for the Protection of All Persons from Enforced Disappearance”, rapporteur Mr Pourgourides, para. 9 (<http://assembly.coe.int/CommitteeDocs/2011/ajdoc45.pdf>).
18. Parliamentary Assembly Doc. 13294, para. 10, cited in endnote 14.
19. ICRC, Missing Persons in the Western Balkans, June 2015 (<http://www.icrc.org/en/document/missing-persons-western-balkans>). According to the statistics provided by the ICRC, in Bosnia and Herzegovina there are 7 019 unsolved cases; in Croatia 2 151; and in Kosovo 1 654.
20. Parliamentary Assembly Doc. 13294, cited above, para 11.
21. WGEID, “Report on the Mission to Serbia, including Kosovo”, A/HRC/30/38/Add.1, 17 August 2015; “Report on the Mission to Montenegro”, A/HRC/30/38/Add.2, 17 August 2015; and “Report on the Mission to Croatia”, A/HRC/30/38/Add.3, 17 August 2015.
22. See <http://bit.ly/1KUz6io>. The authorities in Kosovo expressed their willingness to sign the declaration but so far, this has not been possible.
23. Commissioner for Human Rights, “Report by Nils Muižnieks following his visit to Serbia from 16 to 20 March 2015”, 8 July 2015, para. 35 (<https://wcd.coe.int/ViewDoc.jsp?id=2331051>).
24. Committee on Missing Persons in Cyprus (CMP), “Figures and statistics of missing persons up to 30 September 2015” (<http://bit.ly/1o2YaPk>).
25. The number of missing persons and cases of enforced disappearance related to Communist-era repression in Russia, the former Soviet republics and the Baltic states is unknown. The Strasbourg Court referred to the issue in *Janowiec and Others v. Russia*, which is analysed in chapter 3. However, a detailed and thorough analysis of this phenomenon goes beyond the scope of this issue paper.
26. Parliamentary Assembly Doc. 10679, 3 October 2015, “Enforced disappearances”, rapporteur Mr Pourgourides, para. 16.
27. Parliamentary Assembly Doc. 12276, 4 June 2010, “Legal remedies for human rights violations in the North-Caucasus region”, rapporteur Mr Marty (<http://bit.ly/1QXp5CJ>).
28. See chapter 3.
29. Parliamentary Assembly Doc. 12276, cited in endnote 27, para. 13.
30. WGEID, “Annual report”, A/HRC/30/38, 10 August 2015, para. 82.
31. WGEID, “Report on the mission to Spain”, A/HRC/27/49/Add.1, 2 July 2014, para. 6.
32. *ibid.*, para. 7.
33. *ibid.*, paras. 20-36.
34. UN Special Rapporteur on truth, justice, reparation and guarantees of non-recurrence, “Report on mission to Spain”, 22 July 2014.
35. See Truth Justice Memory Center (2013), “Enforced disappearances and the conduct of the judiciary”, Istanbul (<http://bit.ly/20mXgyp>).
36. WGEID, “Report on the visit to Turkey”, E/CN.4/1999/62/Add.2, 28 December 1998, paras. 2 and 7. The WGEID is scheduled to conduct another visit to Turkey in 2016.
37. Parliamentary Assembly Resolution 2067 (2015) on missing persons during the conflict in Ukraine, para. 2 (<http://bit.ly/1QF3XUw>).
38. Parliamentary Assembly Doc. 13808, 8 June 2015 on missing persons during the conflict in Ukraine, rapporteur Mr Sheridan, para. 11 (<http://bit.ly/1RYmb6A>); see also Commissioner for Human Rights, “Report by Nils Muižnieks following his mission in Kyiv, Moscow and Crimea”, 27 October 2014, paras. 15-19 (<http://bit.ly/1KUzWM4>).
39. Parliamentary Assembly Doc. 13808, cited in the previous endnote, para. 16.
40. See Parliamentary Assembly Doc. 12714, 16 September 2011, “Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations”, rapporteur

- Mr Marty (<http://bit.ly/23Hal4E>); Parliamentary Assembly Doc. AS/Jur (2006) 16 Part II, 7 June 2006, "Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states", rapporteur Mr Marty (<http://bit.ly/1KUA7qK>); and Parliamentary Assembly Doc. AS/Jur (2006) 03 Rev of 22 January 2006, "Alleged secret detentions in Council of Europe member states", rapporteur Mr Marty (<http://bit.ly/1NOEm6Y>).
41. See also the Commissioner's Human Rights Comment, "Time for accountability in CIA torture cases", 11 September 2013 (<http://www.coe.int/web/commissioner/-/time-for-accountability-in-cia-torture-cas-1>).
 42. See the International Organization for Migration's Missing Migrants Project (<http://missingmigrants.iom.int>).
 43. Henckaerts J. M. and Doswald-Beck L. (2009), *Customary international humanitarian law. Volume 1, Rules*, Cambridge University Press, Cambridge, Rules 98 and 117.
 44. Article 122 of the Third Geneva Convention (<http://bit.ly/20mYiKK>); Article 136 of the Fourth Geneva Convention (<http://bit.ly/1o30oOt>); Articles 16-17 of the First Geneva Convention (<http://bit.ly/1malPuj>) and Article 19 of the Second Geneva Convention (<http://bit.ly/1SqBAwT>).
 45. United Nations High Commissioner for Human Rights (OHCHR), "Report of the Office of the United Nations High Commissioner for Human Rights on the right to truth and on forensic genetics and human rights", A/HRC/15/26, 24 August 2010.
 46. OHCHR, "Progress Report of the Human Rights Council Advisory Committee on best practices on the issue of missing persons", A/HRC/14/42, 22 March 2010; and OHCHR, "Report on best practices on the issue of missing persons", A/HRC/AC/6/2, 22 December 2010.
 47. As of 9 October 2015, the following Council of Europe member states had not yet acceded to the International Convention on the Protection of All Persons from Enforced Disappearance: Andorra, Azerbaijan, Bulgaria, Cyprus, Croatia, the Czech Republic, Denmark, Estonia, Finland, Georgia, Hungary, Ireland, Iceland, Latvia, Liechtenstein, Luxembourg, Moldova, Monaco, Norway, Poland, Romania, the Russian Federation, San Marino, Slovenia, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey and the United Kingdom.
 48. Committee on Enforced Disappearances (CED), "Concluding observations on the report submitted by Germany", CED/C/DEU/CO/1, 27 March 2014, paras. 26 and 27; and, among others, "Concluding observations on the report submitted by Montenegro", CED/C/MNE/CO/1, 17 September 2015, paras. 32 and 33.
 49. Commissioner for Human Rights: "Report on the Visit to Cyprus", 12 February 2004, paras. 46-47 (<https://wcd.coe.int/ViewDoc.jsp?id=115655>); "Report on the Visit to Armenia", 30 April 2008, paras. 96-97 (<https://wcd.coe.int/ViewDoc.jsp?id=1283639>); "Report on the Visit to Kosovo", 2 July 2009, paras. 185-193 (<https://wcd.coe.int/ViewDoc.jsp?id=1466279>); "Report on the Visit to Bosnia and Herzegovina", 29 March 2011, paras. 162-171 (<https://wcd.coe.int/ViewDoc.jsp?id=1766837>); "Report on the Visit to Croatia", 17 June 2010, para. 93 (<https://wcd.coe.int/ViewDoc.jsp?id=1636837>); "Report on the Visit to Serbia", 22 September 2011, paras. 28-45 (<https://wcd.coe.int/ViewDoc.jsp?id=1834869>); "Report on the Visit to Serbia", 8 July 2015, paras. 30-39 and 69 (<https://wcd.coe.int/ViewDoc.jsp?id=2331051>); "Report on the Visit to the Russian Federation", 6 September 2011 (<https://wcd.coe.int/ViewDoc.jsp?id=1825257>); and "Report on the Visit to the former Yugoslav Republic of Macedonia", 9 April 2013, paras. 42-51 (<https://wcd.coe.int/ViewDoc.jsp?id=2052823>).
 50. Parliamentary Assembly, Recommendation 1056 (1987), 5 May 1987, para. 17 (i) (<http://bit.ly/1nKfKN9>).
 51. See, *inter alia*, Recommendation 1869 (2009) and Resolution 1664 (2009), 29 April 2009, humanitarian consequences of the war between Georgia and Russia (<http://bit.ly/1PdMY9c>) and (<http://bit.ly/1QF5ycR>) respectively, follow-up given to Resolution 1648 (2009), 28 January 2009 (<http://bit.ly/1X0yOxm>); Resolution 1628 (2008), 1 October 2008, on the situation in Cyprus (<http://bit.ly/1nKfUE9>); Recommendation 1797 (2007) and Resolution 1553 (2007), 24 May 2007, on missing persons in Armenia, Azerbaijan and Georgia from the conflicts over the Nagorno-Karabakh, Abkhazia and South Ossetia regions (<http://bit.ly/1NOEqUq>) and (<http://bit.ly/1KnRaGG>) respectively.
 52. Parliamentary Assembly, Resolution 1868 (2012), 9 March 2012 (<http://bit.ly/1RYokiF>).
 53. In 2014, the Foreign Ministers of the Netherlands, the United Kingdom, Sweden, Belgium and Luxembourg signed a framework agreement granting the ICMP the status of a treaty-based international organisation. In October 2015 the ICMP moved its headquarters from Sarajevo to The Hague.
 54. Available at <http://bit.ly/1RYorKX>

55. HRC: "Concluding observations on the report submitted by Spain", CCPR/C/ESP/CO/6 of 24 July 2015, para. 21; "Concluding observations on the report submitted by Croatia", CCPR/C/HRV/Co/3, 30 April 2015, para. 12; "Concluding observations on the report submitted by Cyprus", CCPR/C/CYP/CO/4, 30 April 2015, para. 10; "Concluding observations on the report submitted by Russia", CCPR/C/RUS/CO/7, 30 April 2015, paras. 7 and 23 (d); "Concluding observations on the report submitted by Bosnia and Herzegovina", CCPR/C/BIH/CO/2, 2 November 2012, paras. 9 and 12; "Concluding observations on the report submitted by Turkey", CCPR/C/TUR/CO/1, 2 November 2012, para. 11; and "Concluding observations on the report submitted by Spain", CCPR/C/ESP/CO/5, 31 October 2008, para. 9.
56. HRC, "CCPR General Comment No. 6: Article 6 (Right to Life)", 30 April 1982, para. 4.
57. HRC, "General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", 26 May 2004, para. 18.
58. HRC, *Bleier v. Uruguay*, views of 29 March 1982, para. 14.
59. HRC, *Prutina and Others v. Bosnia and Herzegovina*, views of 28 March 2013; *Durić v. Bosnia and Herzegovina*, views of 16 July 2014; *Selimović and Others v. Bosnia and Herzegovina*, views of 17 July 2014; *Hero v. Bosnia and Herzegovina*, views of 28 October 2014; *Kožljak v. Bosnia and Herzegovina*, views of 28 October 2014; *Rizvanović v. Bosnia and Herzegovina*, views of 21 March 2014; *Hamulić v. Bosnia and Herzegovina*, views of 30 March 2015; and *Ičić v. Bosnia and Herzegovina*, views of 30 March 2015.
60. WGEID, "Annual report for 2012", A/HRC/22/45, 28 January 2013, footnote 15.
61. IACtHR, *Velásquez Rodríguez v. Honduras*, judgment of 29 July 1988, paras. 150 and 155.
62. On 9 June 1994 the Inter-American Convention on Forced Disappearance of Persons (the Inter-American Convention) was opened for signature. It entered into force on 28 March 1996. As of October 2015, it had 15 states parties. The IACtHR may adjudicate also on alleged violations of its provisions.
63. Inter-American Commission on Human Rights (2014), "The right to truth in the Americas" (<http://bit.ly/1NOErYl>).
64. IACtHR, *Contreras and Others v. El Salvador*, judgment of 31 August 2011, para. 122.
65. *ibid.*, paras. 126, 128 and 131.
66. IACtHR, *Radilla Pacheco v. Mexico*, judgment of 23 November 2009, paras. 47 and 48.
67. IACtHR, cited in endnote 61, para. 156.
68. IACtHR, *Chumbipuma Aguirre and others (Barrios Altos) v. Peru*, judgment of 14 March 2001, para. 41.
69. IACtHR, *Gelman v. Uruguay*, judgment of 24 February 2011, paras. 238, 253 and 254.
70. *ibid.*, para. 39.
71. IACtHR, *González and Others (Campo Algodonero) v. Mexico*, judgment of 16 November 2009.
72. See, among others, European Court of Human Rights, *Gutiérrez Dorado and Dorado Ortiz v. Spain*, decision of 27 March 2012, paras. 36-42; Amnesty International (2013), "Time passes, impunity remains", Madrid, pp. 7-8; Salsench i Linares S. (2013), "Francoism facing justice. Enforced disappearance before Spanish Courts", *Journal of International Criminal Justice* No. 11, pp. 463-83.
73. European Court of Human Rights, *Varnava and Others v. Turkey*, judgment of 18 September 2009, para. 166, and *Er and Others v. Turkey*, judgment of 31 July 2012.
74. European Court of Human Rights, *Bazorkina v. Russia*, judgment of 27 July 2006, paras. 110-112.
75. *Varnava and Others v. Turkey*, cited in endnote 73, paras. 144 and 145.
76. European Court of Human Rights, *Osmanoğlu v. Turkey*, judgment of 24 January 2008, para. 72.
77. European Court of Human Rights, *Cyprus v. Turkey*, judgment of 10 May 2001.
78. European Court of Human Rights, *Cyprus v. Turkey*, judgment of 12 May 2014.
79. See European Court of Human Rights, *Fazlić and Others v. Bosnia and Herzegovina*, decision of 3 June 2014; Nowak M. (2014), "Enforced disappearances in Bosnia and Herzegovina – Recent developments in international jurisprudence", *Legal Journal of Law, issue in honour of Dr Rona Aybay*, pp. 2751-68.
80. European Court of Human Rights, *Palić v. Bosnia and Herzegovina*, judgment of 15 February 2011, para. 70.
81. *ibid.*, para. 65.
82. European Court of Human Rights, *Šilih v. Slovenia*, judgment of 9 April 2009, paras. 157-160.
83. Shabas W. (2013), "Do the 'underlying values' of the European Convention on Human Rights begin in 1950?", *Polish Yearbook of International Law* Vol. XXXIII, pp. 247-59.
84. European Court of Human Rights, *Marguš v. Croatia*, judgment of 27 May 2014, paras. 126 and 127.

85. *ibid.*, para. 139.
86. European Court of Human Rights, *Zaurbekova and Zaurbekova v. Russia*, judgment of 22 January 2009, paras. 91 and 92.
87. See, *inter alia*, European Court of Human Rights, *Ireland v. the United Kingdom*, judgment of 18 January 1978, para. 161.
88. See Keller H. and Heri K. (2014), "Enforced disappearance and the European Court of Human Rights: a 'wall of silence', fact-finding difficulties and states as 'subversive objectors'", *Journal of International Criminal Justice* No. 12, pp. 735-50; Doc. 11183, 9 February 2007, "Member states' duty to co-operate with the European Court of Human Rights", rapporteur Mr Pourgourides, paras. 44-53; and Parliamentary Assembly Doc. AS/Jur (2011) 45, cited in endnote 17, para. 58.
89. European Court of Human Rights, *Janowiec and Others v. Russia*, judgment of 16 April 2012, para. 151; and *Cakici v. Turkey*, judgment of 8 July 1999, para. 98.
90. *ibid.*, *Janowiec and Others v. Russia*, para. 154.
91. European Court of Human Rights, *El-Masri v. the Former Yugoslav Republic of Macedonia*, judgment of 13 December 2012, para. 240.
92. *ibid.*, para. 191. See also *Al Nashiri v. Poland*, judgment of 24 July 2014, para. 495 and *Husayn (Abu Zubaydah) v. Poland*, judgment of 24 July 2014, para. 489.
93. See six such judgments that became final between 2011 and 2014 (Iskandarov, Abdulkhakov, Savridin Dzhurayev, Nizomkhon Dzhurayev, Ermakov, and Kasymakhunov) and whose execution by Russia is currently supervised by the Council of Europe Committee of Ministers through the Department for the Execution of Judgments of the European Court of Human Rights, Pending cases: current state of execution, group of cases *Garabayev v. Russia* (<http://bit.ly/1TAjFTt>).
94. European Court of Human Rights, *Bitiyeva and X. v. Russia*, decision of 20 October 2005.
95. European Court of Human Rights, *Shabazova v. Russia*, decision of 2 April 2009.
96. European Court of Human Rights, *Savridin Dzhurayev v. Russia*, judgment of 25 April 2013, para. 52. See also *Mukhitdinov v. Russia*, judgment of 21 April 2015 (in this case the applicant did not reappear and a request for referral to the Grand Chamber is pending). See also Commissioner for Human Rights, "Report by Nils Muižnieks following his visit to the Russian Federation", 12 November 2013, paras. 140-144.
97. Fulton S. (2014), "Redress for enforced disappearance. Why financial compensation is not enough", *Journal of International Criminal Justice* 12 (4), pp. 769-86.
98. European Court of Human Rights, *Medova v. Russia*, judgment of 19 January 2009, Partly Dissenting Opinion of Judge Spielmann; and *Varnava and Others v. Turkey*, cited in endnote 73, Concurring Opinion of Judge Spielmann, joined by Judges Ziemele and Kalaydjieva, paras. 2, 3 and 5-7.
99. European Court of Human Rights, *Aslakhanova and Others v. Russia*, judgment of 18 December 2012, para. 217.
100. See, *inter alia*, Parliamentary Assembly Doc. 13864, 9 September 2015, "Implementation of judgments of the European Court of Human Rights", rapporteur Mr de Vries, especially appendix 1 to the explanatory memorandum, sections 2.6, 3.5 and 3.6 concerning Russia and Turkey (missing persons in Cyprus) (<http://bit.ly/1nG84G9>)
101. WGEID, A/HRC/22/45, cited in endnote 60, paras. 46-68.
102. WGEID, A/HRC/27/49, cited in endnote 31, paras. 29-31. In the case of Russia see European Court of Human Rights, *Janowiec and Others v. Russia*, cited in endnote 89.
103. Parliamentary Assembly Doc. 12714, cited in endnote 40.
104. WGEID, A/HRC/30/38/Add.1, cited in endnote 21, para. 37; CED, "Concluding observations on the report submitted by Serbia", 12 February 2015, paras 13 and 14.
105. CED, "Concluding observations on the report submitted by Spain", CED/C/ESP/CO/1, 12 December 2013, para. 32. See also the Commissioner's 2012 issue paper "Post-war justice and durable peace in the former Yugoslavia", pp. 34-6 and recommendations on pp. 46-7 (<http://bit.ly/1QbO2u4>).
106. HRC, "Report of the Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence, Pablo de Grieff", A/HRC/24/42, 28 August 2013, para. 29.
107. HRC, "Report of the Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence, Pablo de Grieff", A/HRC/30/42, 7 September 2015, pp. 27-30.
108. WGEID, "Best practices on enforced disappearances in domestic criminal legislation", A/HRC/16/48/Add.3, 28 December 2010, para. 16.

109. Citroni G. (2014), "The pitfalls of regulating the legal status of disappeared persons through declaration of death", *Journal of International Criminal Justice* No. 12, pp 787-803.
110. Committee of Ministers guidelines on eradicating impunity for serious human rights violations", 30 March 2011 (<https://wcd.coe.int/ViewDoc.jsp?id=1769177>).
111. Nowak M. (2013), "Enforced disappearance in Kosovo: Human Rights Advisory Panel holds UNMIK accountable", *European Human Rights Law Review* No. 3, pp. 275-83.
112. Amnesty International (2009), "Burying the past: 10 years of impunity for enforced disappearances and abductions in Kosovo", London.
113. See the Commissioner's issue paper, cited in endnote 105, p. 16.
114. See the Commissioner's report on his visit to "the former Yugoslav Republic of Macedonia", 2013, cited in endnote 49, paras. 37-40.
115. *ibid.*, pp. 16-18.
116. WGEID, "Follow-up report on the mission to Bosnia and Herzegovina", A/HRC/27/49/Add.2, 8 September 2014, para. 31; Commissioner's issue paper on the former Yugoslavia, cited in endnote 105, p. 27.
117. CED, "Concluding observations on the report submitted by Spain", cited in endnote 105, paras. 31 and 32.
118. *Aslakhanova and Others v. Russia*, cited in endnote 99, paras. 177, 227 and 228.
119. Address of Judge Patrick Robinson, President of the International Criminal Tribunal for the former Yugoslavia, to the United Nations General Assembly, 11 November 2011 (<http://bit.ly/1Pz7sg5>).
120. International Organization for Migration (2012), "Reparations for wartime victims in the former Yugoslavia: in search of the way forward" (<http://bit.ly/1SXzsMU>).
121. See Inter-American Commission on Human Rights, *Preliminary observations on the IACHR visit to Mexico*, 2 October 2015 (<http://bit.ly/1Ssgjiv>).
122. HRC, "Report of the Special Rapporteur on truth, justice, reparations and guarantees of non-recurrence, Pablo de Grieff", cited in endnote 106, para. 23.
123. See the Commissioner's issue paper on the former Yugoslavia, cited in endnote 105, pp. 35-6.
124. In November 2014, the assembly of this coalition adopted amendments to the above statute that aimed at making clear that RECOM is not a judicial body.
125. The truth-seeking initiative, known as the Recovery of Historical Memory Project, launched by the Human Rights Office of the Archdiocese of Guatemala, culminated in 1998 with the publication of a final report known as "Guatemala: never again!".
126. A research team sponsored by the archbishop of São Paulo and supported by the World Council of Churches conducted an investigation into allegations of torture and other human rights abuses committed during two decades of military dictatorship. The initiative culminated in 1986 with the publication of the report "Brazil: never again!".
127. In 2002, the Ardoyne Commemoration Project culminated in the publication of the book "Ardoyne: the untold truth".
128. The truth-seeking initiative co-ordinated by the HEGOA Institute of the University of the Basque Country culminated in 2012 with the publication of the final report known as "The oasis of memory. Historical memory and human rights violations in the Western Sahara".
129. Committee of Ministers Recommendation Rec(2002)2 on access to official documents (<https://wcd.coe.int/ViewDoc.jsp?id=262135>).
130. ICRC, *Guiding Principles*, cited in endnote 4.
131. WGEID, "Best practices", cited in endnote 108.
132. Argentina, Chile, Peru, Uruguay and Colombia.
133. HRC, "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Grieff", A/HRC/27/56, 27 August 2014, para. 22.
134. Supreme Court of Argentina, *Simón, Julio Héctor y otros s/privación ilegítima de la libertad, etc.*, judgment of 14 June 2005; IACtHR, *Chumbipuma Aguirre and Others (Barrios Altos) v. Peru*, judgment of 14 March 2001, para. 44.

Tens of thousands of persons remain missing or are victims of enforced disappearance across Europe as a result of past repression or conflicts. This situation raises very serious human rights and rule of law questions and, consequently, all European states concerned must undertake the search for missing and disappeared persons as a matter of priority.

As time passes, thousands of Europeans are struggling to unveil the truth about the fate and whereabouts of their loved ones. Families of missing persons and direct victims of enforced disappearance have a right to know the truth, and must receive adequate support, assistance, and reparation.

This Issue Paper provides an overview of the situation in a number of Council of Europe member states. It also focuses on the major international and European standards and mechanisms active in this field and highlights the case law of the UN Human Rights Committee and of the Inter-American Court of Human Rights. A chapter is devoted to the major relevant jurisprudence of the European Court of Human Rights, noting the need to strengthen the execution of the Court's judgments by respondent states. In addition, light is shed on European state practice and shortcomings as well as on instances of good practices and initiatives undertaken worldwide.

The Commissioner for Human Rights proposes a set of recommendations which may help governments improve their law and practice. They focus on: direct victims and their families; enhancement of processes of exhumation and identification; support to mechanisms working on missing persons and enforced disappearances; training of public officials; truth-seeking initiatives; access to information and archives; the strengthening of domestic legislation; effective investigations and eradication of impunity; and promotion and implementation of relevant international and European standards.



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The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, 28 of which are members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

