

# AN INNOVATIVE RESPONSE TO DISAPPEARANCES:

**Non-judicial Search Mechanisms  
in Latin America and Asia**



**GIJTR**

Global Initiative for Justice  
Truth & Reconciliation



International Coalition of  
**SITES of CONSCIENCE**

The International Coalition of Sites of Conscience (ICSC, or 'the Coalition') is a global network of museums, historic sites and grassroots initiatives dedicated to building a more just and peaceful future through engaging communities in remembering struggles for human rights and addressing their modern repercussions. Founded in 1999, the Coalition now includes more than 300 Sites of Conscience members in 65 countries. The Coalition supports these members through seven regional networks that encourage collaboration and international exchange of knowledge and best practices. The Global Initiative for Justice, Truth and Reconciliation is a flagship program of the Coalition.



The Due Process of Law Foundation (DPLF) is a non-profit organization dedicated to human rights and the rule of law in Latin America. DPLF is headquartered in Washington DC, with an office in El Salvador and a multinational team of professionals based throughout the region. Working alongside civil society organizations throughout Latin America, DPLF provides technical legal assistance, promotes dialogue with government representatives, and creates opportunities for the exchange of information and experience. DPLF also conducts research and produces publications that analyze and discuss the major human rights challenges in the region, in light of international law and comparative perspectives. Founded in 1996 by Professor Thomas Buergenthal and his colleagues from the United Nations Truth Commission for El Salvador, DPLF has worked on transitional justice issues since its inception, promoting compliance with international standards and the use of Inter-American and international law to improve legislation, policies, and practices through comparative research and the sharing of lessons learned in the Americas and other regions of the world.



**ASIA JUSTICE AND RIGHTS**

Asia Justice and Rights (AJAR) works to strengthen accountability and human rights in the Asia-Pacific region. AJAR's work focuses on countries involved in transition from contexts of mass human rights violations to democracy, and AJAR strives to build cultures based on accountability, justice, and a willingness to learn from the root causes of mass human rights violations. Currently, AJAR's priority countries are Indonesia, Timor-Leste, Myanmar, and Sri Lanka. AJAR has taken action to defend the rights of victims of human rights violations in difficult contexts, and to prevent the recurrence of State-sanctioned human rights violations. It works with national and regional partners who seek to end impunity and defend human rights, providing partners with opportunities to increase their skills and knowledge, strengthen the organizations they work in, and access the resources they need for their work.



With decades of experience, FAFG has developed a unique multidisciplinary approach to the search for Disappeared victims, identification of unidentified remains, and holds leading expertise on the investigation into enforced disappearance from the local context of the internal armed conflict in Guatemala. FAFG employs scientific disciplines, such as victims investigation, forensic archaeology, forensic anthropology, and forensic genetics, in an interdisciplinary fashion. The primary goal is to recover, analyze, identify, and return individuals to their families so they may be buried with dignity according to cultural traditions, all the while documenting, analyzing, and safeguarding physical forensic evidence for the use in legal prosecutions for the human rights violations committed. The success in Guatemala is displayed by the support and trust from family members, organizations, and prosecutors working these cases, as well as the recovery of over 8,000 victims' remains and return of over 5,000 remains to their families. FAFG emphasizes a victim centered approach and adapts to local context that allows the multidisciplinary identification methodology to be replicated in other environments and types of cases. FAFG is committed to sharing this expertise and methodology that it has generated over decades of work in Guatemala with countries, organizations, and families who are in the process of searching for and uncovering the truth surrounding Disappeared victims.



Foundation Humanitarian Law Center

The Humanitarian Law Center (HLC) has been documenting war crimes and human rights violations committed during conflict in the former Yugoslavia since 1992. Today, it is the largest center for documentation about crimes committed during those conflicts. The HLC's Human Losses projects aim to document every death and enforced disappearance that occurred during the conflicts. The program is based around the War Crimes and Past Human Rights Violations Database, which preserves a broad range of over 100,000 digitalized sources. Documentation from the database has been used by prosecutors in the International Criminal Tribunal for the former Yugoslavia, and domestic courts in the region, in numerous cases. HLC has trained local civil society organizations (CSOs) in Iraq, Guatemala, Ukraine, and Turkish Kurdistan on use of human rights documentation. The HLC launched an ongoing initiative to campaign for the setting up of a regional truth commission, to be known as the Regional Commission for Establishing the Facts about War Crimes and other Gross Violations of Human Rights Committed on the Territory of the Former Yugoslavia, RECOM. HLC's actions in the struggle against impunity include the filing of criminal complaints against suspected perpetrators and demanding their removal from public office. The HLC has undertaken numerous legislative initiatives for securing reparations for victims, enhancing the national prosecution of war crimes, and improving witness protection systems.

**Cover photo caption:** Halil Hasani, left, joined by his niece Agnesa, displays four photos of his missing sons taken by Serb forces during the Kosovo war two decades ago, as he sits in the porch of his house in the village of Qabra, May 4, 2020. Hasani believes his four sons are alive and imprisoned somewhere in Serbia more than two decades after police and paramilitary forces took them from a village in Kosovo. (AP Photo/Visar Kryeziu)

# ABOUT THIS REPORT

This research report, **'An Innovative Response to Disappearances: Non Judicial Search Mechanisms in Latin America and Asia'**, published in early 2022, presents information about the structure and functions of existing State led mechanisms to search for disappeared persons in four countries in Latin America (Mexico, El Salvador, Peru, and Colombia), and four countries in Asia (Indonesia, Timor Leste, Sri Lanka, and Nepal). It also provides information about the search for the disappeared in Guatemala and the former Yugoslavia (Bosnia and Herzegovina, Serbia, and Kosovo), where no official State led mechanisms currently exist. The report draws on analysis of these examples to present lessons and recommendations as to how State search mechanisms can better promote the search for victims of disappearance and serve the needs of victims' families, thereby contributing more effectively to the transitional justice aims of truth, justice, reparation, and non repetition.

The report was prepared by members of the Global Initiative for Justice, Truth and Reconciliation (GIJTR), with the support of independent experts on enforced disappearances. GIJTR is a consortium of transitional justice practitioners, advocates, and activists from nine organizations across the globe.<sup>1</sup> The five GIJTR members who researched and co authored this report are: Asia Justice and Rights (AJAR), the Due Process of Law Foundation (DPLF), the International Coalition of Sites of Conscience (ICSC); the Forensic Anthropology Foundation of Guatemala (FAFG), and the Humanitarian Law

1 The International Coalition of Sites of Conscience (USA); the American Bar Association's Rule of Law Initiative (ABA-ROLI) (USA); Asia Justice and Rights (AJAR) (Indonesia); Centre for the Study of Violence and Reconciliation (CSVR) (South Africa); Documentation Center of Cambodia (DC-CAM) (Cambodia); Due Process of Law Foundation (DPLF) (USA); Forensic Anthropology Foundation of Guatemala (FAFG) (Guatemala); Humanitarian Law Center (HLC) (Serbia); and the Public International Law and Policy Group (PILPG) (international, headquartered in the USA).

Center (HLC). DPLF and AJAR were the main partners on the project, with the other organizations named here involved in a consultative capacity.

The document draws on both desk based research and interviews with stakeholders from over a dozen countries. Interviewees included members of search mechanisms, civil society organizations, relatives of victims of disappearance, academic experts, and members of human rights bodies. The authors are grateful for the rich contributions of everyone who was interviewed for the report or provided information for it. The insights provided by these sources about the role and workings of mechanisms to search for the disappeared were invaluable in preparing this document. The authors would particularly like to thank relatives of victims of disappearance worldwide, to whom this report is dedicated. The tireless efforts of relatives to search for their loved ones have long been, and continue to be, the driving force for justice and truth, and the impetus behind State and civil society efforts to search for the disappeared. Without their valiant struggle, the mechanisms studied in this document would never have become a reality.

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Nepalese human rights activists and relatives of disappeared persons light candles to mark the International Day of the Disappeared, in Katmandu, Nepal, Aug. 30, 2011. The UN and Nepal's human rights commission asked the government to find hundreds of people still missing following the decade-long armed conflict. (AP Photo/Niranjan Shrestha)

# ABOUT THE GLOBAL INITIATIVE FOR JUSTICE, TRUTH AND RECONCILIATION (GIJTR)

There are increasingly frequent calls around the world for justice, truth, and reconciliation to deal with the legacies of gross violations of human rights and/or of international humanitarian law, violations whose aftereffects cast a long shadow over post conflict societies or societies in transition from repressive regimes toward participatory and democratic forms of governance. To help meet this need, the International Coalition of Sites of Conscience (henceforth, ICSC or ‘the Coalition’) launched the Global Initiative for Justice, Truth and Reconciliation (GIJTR) in August 2014.

GIJTR seeks to address new challenges in countries experiencing past or ongoing conflict or repression, struggling with the present reality or aftermath of gross abuses. The GIJTR is



Attendees at the International People's Tribunal 1965 which opened hearings intended to publicize allegations of mass killings of hundreds of thousands of suspected Communists, 50 years ago by Indonesian authorities at the Nieuwe Kerk, or New Church, in The Hague, Netherlands, Nov. 10, 2015. (AP Photo/Peter Dejong)

led by the Coalition, and also includes eight other partner organizations. These are: the American Bar Association's Rule of Law Initiative (ABA ROLI), based in the USA; Asia Justice and Rights (AJAR), Indonesia; Centre for the Study of Violence and Reconciliation (CSVR), South Africa; the Documentation Center of Cambodia (DC Cam), Cambodia; the Due Process of Law Foundation (DPLF), United States; the Forensic Anthropology Foundation of Guatemala (FAFG), Guatemala; the Humanitarian Law Center (HLC), Serbia; and the Public International Law & Policy Group (PILPG), international, headquartered in the USA. As well as leveraging the expertise of the GIJTR's member organizations, the Coalition is able to draw on the knowledge base and longstanding community connections of its 300 plus members, in 65 countries, to deepen and broaden the work of the GIJTR.

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# INTRODUCTION

Enforced disappearance is both a grave human rights violation and, in some circumstances, a crime against humanity. It has been used as a tool of repression in a range of settings worldwide. It has three elements. First, a person is deprived of their liberty against their will. Second, this was done by or with the involvement of State agents. Third, what happened to the person is denied, and so is information about where they are now, or what happened to them. When disappearance or enforced disappearance occurs,<sup>1</sup> it results in psychological trauma, economic and social dislocation, and fragmentation for affected families and communities. Harm of this nature and on this scale can never be fully undone. In international law, the human rights violation created by enforced disappearance is considered to be ‘continuous’ (ongoing), for as long as the fate and/or whereabouts of the person who has been forcibly disappeared are unknown, and perpetrators do not reveal them.<sup>2</sup> Until this happens, relatives – who are themselves also victims – must endure the pain of not knowing what has happened to their loved one.<sup>3</sup> Society as a whole is also

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1 For an explanation of the distinction between disappearance and enforced disappearance, see below.

2 Article 17(1) of the United Nations Declaration on the Protection of All Persons from Enforced Disappearance, adopted in 1992, (henceforth ‘UN Declaration’).

3 The UN Working Group on Enforced or Involuntary Disappearances (UNWGEID) has made it clear that relatives (broadly defined) are to be treated as direct, not only ‘secondary’ or ‘indirect’, victims

harmful by the perpetration of disappearance or enforced disappearance, and so the need to investigate and to search exists whether or not victims have a family actively seeking to know their fate. The search for the disappeared is therefore a crucial State obligation, whether or not State forces carried out the original crime.<sup>4</sup> Searching for the disappeared, and providing associated justice, reparations, and reforms, has become an important dimension of many transitional justice processes.<sup>5</sup>

Several States have created specialized bodies to undertake search for people disappeared and/or forcibly disappeared in contexts of past political violence, or – as in cases including Mexico – due also to ongoing widespread violence, some of it rooted in macrocriminality. Given the importance of such initiatives, as well as the unique challenges they face, these search bodies potentially have much to gain from exchanges of information and the sharing of best practices, which could help them to be more effective and have greater impact. To date, although some search entities in Latin America have managed to establish interconnections, the rich potential for sharing and exchange between Latin America and Asia remains largely untapped. This report therefore considers various non-judicial State search institutions<sup>6</sup> from each of those two regions, discussing their structures and mandates, and the challenges they face. It also considers how search for the disappeared is structured in two settings where non-State or international organization (IO) initiatives have predominated: namely, Guatemala and the former Yugoslavia.

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of enforced or involuntary disappearance. This interpretation comes from Article 24(1) of the International Convention for the Protection of all Persons from Enforced Disappearance (henceforth ‘International Convention’ or ‘ICPPED’), adopted 2006, in force since 2010, where ‘victim’ refers to “any individual who has suffered harm as the direct result of an enforced disappearance”.

4 Article 1 of the UN Declaration affirms that “[n]o State shall practice, permit or tolerate enforced disappearances”.

5 By ‘transitional justice processes’, here, we mean actions taken over truth, justice, reparations and guarantees of non-repetition, in places where systematic or widespread political violence during authoritarian rule or internal armed conflict is being addressed after regime change or peace negotiations.

6 By ‘non-judicial’, here, we mean official entities created under legislative and/or executive authority, that act independently of, or in parallel to, judicially-driven responses to disappearance. These entities could usefully be thought of as performing ‘administrative search’, as distinct from ‘judicial search’.

We hope that this report may help existing search institutions who want to improve or fine-tune their practices, as well as offering potentially useful insights to inform future search in places that face similar issues and challenges.

In many places, including some of those considered here, disappearances are sometimes also committed by non-State groups or actors. For the purposes of this report, we follow prevailing current practice in international human rights law, using **‘enforced’ disappearance’ where States, or State-linked groups**, are known or believed to have directly carried out the disappearance. **‘Disappearance’ is used: (a) where groups that appear to be non-State, and/or ‘anti-State’, are responsible, and/or (b) (sometimes) generically, to refer to both State and non-State perpetration.**

In **Latin America**, disappearance and enforced disappearance is one of the most emblematic crimes associated with repressive regimes or internal armed conflicts of the recent past, such as those that took place in Chile, Argentina, Peru, and El Salvador. It is also an ongoing reality in countries including Mexico and Colombia. Necessarily inexact, but probably conservative, estimates suggest that up to 250,000 people may have been forcibly or involuntarily disappeared in the region over the past two decades alone.<sup>7</sup> Of the ten countries that the United Nations has identified as suffering the highest rates of disappearances or enforced disappearances since 1980, seven are in Latin America.<sup>8</sup> Despite or perhaps because of this grim history, the region has been a pioneer in promoting responses. The Inter-American Human Rights system (Commission and Court) has developed a substantial body of case law, practice, and standards through adjudication of State responsibilities surrounding cases of enforced disappearance. Latin America was also the first region in the world to establish a specific regional treaty, the Inter-American Convention on the Forced Disappearance of Persons (adopted 1994, came into force 1996).

At domestic level, many of the historically worst affected Latin American countries – particularly those that have undergone recognizable transitional justice processes – held subsequent truth commissions that dealt, inter alia, with

7 International Committee of the Red Cross, “The missing in Latin America: Families will not stop searching, now will we stop helping,” July 23, 2019, available at: <https://www.icrc.org/en/document/missing-latin-america-families-will-not-stop-searching>

8 Latin American Post, “Latin America: The region with the highest number of enforced disappearances,” September 11, 2018, available at: <https://latinamericanpost.com/23187-latin-america-the-region-with-the-highest-number-of-enforced-disappearances>

disappearance. Some countries also later prosecuted perpetrators in national courts, at times with associated judicially-driven search activity. Latin America can also draw on a strong history of civil society activism that actively advocates for justice for victims and relatives, and for the location and identification of those still disappeared, which has favored the rise of specialized independent forensic teams with particular relevant expertise.<sup>9</sup>

Moreover, in the past few years, four Latin American States have issued legislation, or presidential decrees, establishing specialized official mechanisms or institutions to search for the disappeared and/or forcibly disappeared. The four States are **Peru, Colombia, Mexico, and El Salvador**. The Latin America section of this report concentrates on these recent experiences. A later section also considers **Guatemala** as a Latin American example of predominantly non-State search actions. These are all settings where the disappearances at issue result primarily from internal armed conflict and/ or ongoing macrocriminality met with violent State response. This means that no non-judicial State search office of the type described here has yet emerged in any of the South American post-dictatorship settings in which enforced disappearance was systematically practiced in the 1970s and 1980s.<sup>10</sup>

In **Asia**, ongoing impunity and denial of past mass atrocities have also created complex and intractable situations surrounding disappearance. **Sri Lanka** is on most measures considered to be one of the countries most affected by this scourge worldwide. In **Indonesia**, widespread enforced disappearances took place in the aftermath of the 1965 military coup attempt that preceded the downfall of President Sukarno (1945-1967). Estimates suggest that mass killings

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- 9 For more on recent Latin American responses see Collins, Cath (2018), ‘Caring for the Missing: Forensic, Humanitarian and Judicial Responses to Disappearance and Enforced Disappearance’. Observatorio de Justicia Transicional, Universidad Diego Portales, Santiago de Chile, and Ulster University, Northern Ireland. Available at SSRN: <http://dx.doi.org/10.2139/ssrn.3121678>. The document synthesizes insights from meetings between relatives, other activists, and forensic and legal practitioners: for the full series see <https://www.ulster.ac.uk/transitional-justice-institute/our-research/disappearance-and-state-responses-in-latin-america> (some in Spanish only). Last accessed 1 January 2022.
- 10 Although some, notably Uruguay and Chile, have recently promised or delivered more robust attention specifically to search processes. Paraguay has a small search team attached to a ministerial office, and Argentina, where most search and identification has been left in the hands of a world-renowned non-State forensic team, does have a State effort dedicated to the specific task of identifying surviving abducted children of the disappeared (the Banco Nacional de Datos Genéticos, <https://www.argentina.gob.ar/ciencia/bndg>). For visual schema depicting State and non-State search efforts in various of the countries mentioned, see <https://www.ulster.ac.uk/transitional-justice-institute/our-research/disappearance-and-state-responses-in-latin-america>, last accessed 1 January 2022.

and disappearance may have claimed between half a million and a million victims in Indonesia between late 1965 and mid-1966. Enforced disappearance continued throughout the subsequent authoritarian regime, headed by Soeharto (1967-1998), which included armed conflicts with or in East Timor, Aceh, and Papua, adding to the victim toll. The runup to Soeharto's downfall, in 1998, was marked by a notorious case in which 13 pro-democracy activists were kidnapped, tortured, and later disappeared. A senior military officer was discharged from the army in mid-1998, after appearing to admit involvement. Notwithstanding, this same officer – sometime son-in-law of Soeharto – subsequently ran twice for president, and was made Minister of Defense in 2019. The rise or resurgence of 'strongmen' of this kind, with alleged links to enforced disappearance, torture, and extrajudicial killings, is a reality across many countries in Asia, where, as in Latin America, enforced disappearance has been part of a broader pattern of mass human rights violations further enabled by ongoing impunity. Accountability mechanisms in many Asian States remain generally weak, making it perhaps surprising, therefore, that at least four official (i.e. State) mechanisms currently exist which either have a specific mandate to find the disappeared, or in which enforced disappearance features as part of a wider mandate. These mechanisms, in **Indonesia, Timor Leste, Nepal, and Sri Lanka**, are described in Section B of this report.

Each State search institution covered in this report, whether in Latin America or Asia, has different, country-specific, features, and each has its strengths and weakness. Nonetheless, they have some **shared characteristics**: the State bodies focused on are non-judicial, i.e., administrative, mechanisms, as specified above, with relatively autonomous powers and capabilities in the search for, and/or identification of, disappeared persons. They also generally maintain close contact with families of the disappeared, who can be an essential source of information, as well as having a right to participate and be kept informed. Each non-judicial search mechanism has its own unique mandate, which often limits it to certain historical events or time periods, as well as outlining the legal and operational relationship between search and any parallel or subsequent justice system activity.<sup>11</sup> These characteristics are often determined by the political and institutional environment prevailing at the time each was set up.

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11 Including, but not necessarily limited to, criminal investigation: in many countries, the courts also have a necessary role in confirming or certifying identification of remains, authorizing certification of death, where appropriate, and resolving civil law matters arising.

Beyond these context-specific details, search institutions often face similar **challenges**. Most are tasked with investigating disappearances that may have begun decades previously, meaning that early victims may have few surviving relatives, and direct perpetrators may have died without confiding or confessing needed information. The disappearances they deal with were frequently carried out on a massive scale, and/or, as in the case of Mexico, cover a wide range of distinct types of disappearance.<sup>12</sup> All of these circumstances can make successful investigation, including the application of forensic techniques, more difficult. For non-judicial entities, the detail of whether and how to co-exist alongside, interact with, or be insulated from the judicial system also needs to be worked out. In Peru and Sri Lanka, for example, mechanisms need to rely on prosecutors' offices to order or carry out exhumations. In other countries, including Colombia, that is not the case. Search mechanisms need to try to preserve operational independence in often-fraught political environments. Opening channels of direct communication with perpetrating individuals or institutions can be important for effective search processes, but may create tensions with justice imperatives if confidentiality and anonymity are to be offered. Another relatively common feature is that search institutions' vital work is often done with extremely limited resources.

In addition to the Latin American and Asian State search mechanisms already mentioned, this report also includes two examples of places which can claim some success in searching for and identifying the disappeared under different kinds of arrangement. The experiences of **Guatemala**, and the States that today make up the territory of **the former Yugoslavia**, both of which have ongoing search processes, offer valuable lessons about coordinating efforts each in complex post-conflict contexts.

In the case of **Guatemala**, an internal armed conflict lasting 36 years (1960-1996) saw the prolonged and systematic violation of human rights. This included acts of genocide against the indigenous Mayan population, carried out by government forces with the involvement of paramilitary groups. Guatemala's official truth commission registered an overall death toll of approximately 200,000 people, 40,000 of whom were disappeared.<sup>13</sup> Members of specific social groups (such as indigenous people) were often singled out as targets of enforced disappearance,

12 State, non-State and mixed perpetration; linked to macrocriminal operations and people smuggling as well as with political motives, etc.

13 Final report of the Guatemalan Truth Commission. Comisión para el Esclarecimiento Histórico (CEH) (1999) *Guatemala: Memoria del Silencio*. Ciudad de Guatemala: CEH, Tomo II, sección XI, 'La desaparición forzada', and see below, main text, section C.

as too were individuals considered by the government to be a political threat. Absent a robust judicial response, or a State mechanism to search for and identify victims of disappearance, relatives and civil society organizations have united to propel search initiatives forward despite significant obstacles.

The armed conflicts of the 1990s have left similarly dire long-term consequences for the **successor States of the former Yugoslavia**. Of the approximately 130,000 people who were killed and/or disappeared during those conflicts, more than 35,000 remained missing or disappeared after the formal end of conflict. No more than 25,000 cases have been resolved since, leaving 10,000 people still unaccounted for.<sup>14</sup> Accordingly, the States that now make up the territory of the former Yugoslavia need to redouble their efforts to effectively investigate the circumstances of each disappearance, using a coherent strategic approach that makes best use of all available avenues.<sup>15</sup>

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14 According to figures produced by the International Committee of the Red Cross, ICRC, and the International Commission on Missing Persons, ICMP: see below, Section C.

15 See, inter alia, Council of Europe Commissioner for Human Rights (2016) ‘Missing persons and victims of enforced disappearance in Europe’, Issue Paper, Brussels: Council of Europe, section 1.2 ‘The Western Balkans’. Available at: <https://rm.coe.int/missing-persons-and-victims-of-enforced-disappearance-in-europe-issue-/16806daa1c>, last accessed 1 January 2022.



Nepalese human rights activists and relatives point to photographs of disappeared persons at an event to mark the International Day of the Disappeared, in Katmandu, Nepal, Aug. 30, 2011. (AP Photo/Niranjan Shrestha)

# DEFINITIONS, STANDARDS, AND APPLICABLE NORMS

## DEFINITIONS

The ways in which the terms ‘disappearance’ and ‘enforced disappearance’ are used in this report has been set out above. A third term – ‘missing’ – also appears in some external sources cited here (particularly, for the Western Balkans). It refers in a broader sense to all people who cannot be reliably located after an international or internal armed conflict.<sup>16</sup>

As we have seen, **enforced disappearances** occur when people are **deprived of liberty** by State actors, or by organized groups or private individuals acting on **behalf of, or with the support, consent, or direct or indirect acquiescence** of, **State actors**; and when this deprivation of liberty is **followed by a refusal to disclose the fate or whereabouts of the persons concerned**, and/or a **refusal to acknowledge the deprivation of their liberty**. The effect is to place people who have been subjected to enforced disappearance, **beyond the protection of the law**. So enforced disappearance is both a crime and a human rights violation, one that involves various acts of repression by the State, or State-linked actors.

This specific usage of **enforced** disappearance, as signaling connection to the State, is the current prevailing practice in international human rights law, as per the terms of the ICPPED. This raises the question of whether and how international

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<sup>16</sup> This will include any victims of disappearance or enforced disappearance, but also people whose absence is due to other causes, such as temporary displacement or wartime disruption involving family separation. As will be clear below, however, investigation must still be carried out to determine the cause of any particular absence.

definitions and standards can take account of disappearances perpetrated by non-State-linked, and/or anti-State, actors. The Rome Statute of the International Criminal Court, drafted in 1998, attempted to expand the list of possible perpetrators of ‘enforced’ disappearance, to include ‘political organizations’. The exact intention and effects of this change were not particularly clear, though, and it has not been widely accepted.<sup>17</sup> It is more common for international human rights law and international humanitarian law, and relevant international actors, to preserve the ‘disappearance-enforced disappearance’ distinction already mentioned, while emphasizing that States have responsibilities in regard to both.<sup>18</sup>

For example, the ICPPED explicitly establishes the non-derogable right of every person not to be subjected to enforced disappearance, and imposes duties on States parties to investigate acts that contravene this right, whether carried out by State or non-State-linked individuals or groups (Arts. 2 and 3). Similarly, the respective UN treaty regime body –the UN Committee on Enforced Disappearances, CED –adopted guidelines in 2019 that consider States parties’ **search duties to apply to both enforced disappearance and disappearance**.<sup>19</sup> The UN Working Group on Enforced and Involuntary Disappearances, UNWGEID, meanwhile acknowledges that its individual casework remit is limited to enforced disappearance only,<sup>20</sup> but underlines States’ Article 3 duties in regard to non-State actors.<sup>21</sup> In a 2020 report, case law from the European and the Inter-American Courts of Human Rights is cited in support of the contention that that the same requirements regarding investigation, participation, and impartiality apply to both State and non-State perpetrated disappearances.<sup>22</sup>

- 17 See Rome Statute of the International Criminal Court, Article 7 (2) (i); and Giorgou, Irena (2013) ‘State Involvement in the Perpetration of Enforced Disappearance and the Rome Statute’, *Journal of International Criminal Justice* 11(5), pp. 1001–1021.
- 18 While international humanitarian law, and the law of armed conflict, can be read as also establishing duties on non-State combatants, regarding people who are captured or go missing during internal or international armed conflict. See for example International Committee of the Red Cross (ICRC) (2005), *Customary International Humanitarian Law*, Volume I, Rule 98.
- 19 See UN Committee on Enforced Disappearances (CED) ‘Guiding principles for the search for disappeared persons’, UN Doc. Ref. CED/C/7, May 8, 2019, Principle 10, para. 1.
- 20 Moreover excluding even enforced disappearances, where these occur in the context of international armed conflict (in deference to the Geneva Conventions’ prior establishment of the ICRC as the proper authority).
- 21 UN Office of the High Commissioner for Human Rights (OHCHR) ‘Enforced or Involuntary Disappearances’, Factsheet no. 6/ Rev. 3, pp. 11-12, available at <https://www.ohchr.org/Documents/Publications/FactSheet6Rev3.pdf> , last accessed 1 January 2022.
- 22 UN Working Group on Enforced and Involuntary Disappearances, ‘Report on Standards and Public

## GENERAL STANDARDS AND NORMS

A complete review of the applicable international standards and norms surrounding disappearance and enforced disappearance is outside the scope of this report. For a comprehensive general treatment, see the official UN OHCHR presentation of **‘International Standards on Enforced and Involuntary Disappearances’**.<sup>23</sup> The UN WGEID’s ‘Compilation of General Comments on the Declaration on the Protection of All Persons from Enforced Disappearance’ (hereafter, ‘UN WGEID Compilation of General Comments’) provides guidance on the correct interpretation of the (non-binding) UN Declaration,<sup>24</sup> while its counterpart the UN CED offers information based on its monitoring of States parties’ implementation of the Convention for the Protection of all Persons against Enforced Disappearance, ICPPED.<sup>25</sup> **Of the 11 case studies presented here which are eligible to take part in the ICPPED,<sup>26</sup> only five have both signed and ratified,** while one more (Peru) has acceded (which does not require signature). **Three States have neither signed nor ratified,** while two have only signed. The breakdown by region is revealing: all five Latin American States in the report bar one (El Salvador) have either signed or ratified, whereas half of the four Asian States have done neither, and only one (Sri Lanka) has done both. For Europe, each of the two eligible territories (Serbia, and Bosnia and Herzegovina) have done both. Only the Americas currently has a specific regional instrument, the Inter-American Convention on the Forced Disappearance of Persons: four of the five Latin American States featured here as case studies have both signed and ratified, with El Salvador again the only outlier (having done neither).<sup>27</sup>

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Policies for an Effective Investigation of Enforced Disappearance’, August 7, 2020, A/HRC/45/13/Add.3, section II.G.

23 Available at <https://www.ohchr.org/EN/Issues/Disappearances/Pages/IntStandards.aspx>, last accessed 1 January 2022.

24 Available at [https://www.ohchr.org/Documents/Issues/Disappearances/GeneralCommentsDisappearances\\_en.pdf](https://www.ohchr.org/Documents/Issues/Disappearances/GeneralCommentsDisappearances_en.pdf), last accessed 1 January 2022.

25 See <https://www.ohchr.org/EN/HRBodies/CED/Pages/CEDIndex.aspx>. The collection includes Guiding Principles developed specifically to take account of the COVID pandemic, as well as country reports from and about all of the States discussed in this report that are States parties to the ICPPED. An updated ratification status can be viewed at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-16&chapter=4](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4), according to which the ICPPED had 98 signatories, and 65 States Parties, as of 1 January 2022.

26 The twelfth, Kosovo, is not currently internationally recognized by a sufficient number of other States to afford it the necessary legal recognition under international law.

27 All data as of 1 January 2022, sourced from the respective official treaty body webpages at <https://>

Given the focus of this report, the remainder of this introduction homes in, first, on certain ICCPED duties that feature in the country case studies presented in sections B and C, and second, on ICCPED and other norms, standards, or guidelines particularly relevant to search and investigation. It should be borne in mind that **ICCPED obligations are strictly speaking only binding on States parties.**<sup>28</sup>

The ICCPED requires States parties to codify enforced disappearance as a standalone criminal offence in their domestic criminal code or equivalent. In other words, States cannot rely on drawing analogies to other crimes: according to the UN WGEID, “[i]t is not sufficient for Governments to refer to previously existing criminal offences relating to enforced deprivation of liberty, torture, intimidation, excessive violence, etc. In order to comply with article 4 of the Declaration, the very act of enforced disappearance as stipulated in the Declaration must be made a separate criminal offence”.<sup>29</sup> Also, according to the UN CED, States parties must address and resolve the legal status of the disappeared by incorporating domestic legislation providing for some equivalent of a ‘declaration of absence as a result of enforced disappearance’, i.e., without requiring or imposing a presumption of death.<sup>30</sup> As we will see, these provisions have rarely been fully complied with even by States that have taken action over search – a reminder that search mechanisms, even where effective, do not address all of the extrajudicial needs and duties surrounding disappearance.

## RESPONSIBILITIES SURROUNDING INVESTIGATION AND SEARCH

Pursuant to Articles 14 and 15 of the ICCPED, States parties must provide each other with all possible mutual legal assistance surrounding the prosecution of perpetrators and assistance to victims (including search). Article 24(3) meanwhile requires States parties to “take all appropriate measures to search for, locate

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[treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-16&chapter=4](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4), (ICCPED), and <https://www.oas.org/juridico/english/sigs/a-60.html> (Inter-American Convention).

- 28 Except insofar they can be held to enshrine principles of international customary law. The Inter-American Court of Human Rights has at times affirmed that prohibiting acts of enforced disappearance, investigating them, and punishing perpetrators, should be considered a *ius cogens* norm, although this affirmation does not of itself create this state of affairs (see for example IACtHR, *Goiburú et al. vs Paraguay*, 2006).
- 29 UN WGEID ‘Compilation of General Comments’, op. cit.
- 30 UN CED, *inter alia*, “Concluding observations on the report submitted by Montenegro”, CED/C/MNE/CO/1, 17 September 17, 2015, paras. 32 and 33, and see UN WGEID, ‘Compilation of General Comments’, op. cit., general comment on Article 19.

and release disappeared persons and, in the event of death, to locate, respect and return their remains”, having already established that victims, i.e., all those who have suffered harm, have “the right to know the truth”.<sup>31</sup> It should however be borne in mind that under international humanitarian law, where persons are considered “missing” (including by reason of disappearance) in the aftermath of armed conflict, only the obligation to provide all available information to relatives, is treated as an obligation of result. The equivalent obligation to account for missing persons is classed as an “obligation of means”, i.e., while all parties to a conflict are enjoined to make efforts to search and facilitate search, compliance should not impose a disproportionate or impossible burden. Nonetheless, a 2010 UN Human Rights Council Advisory Committee report affirmed that searches for missing persons should continue “without any time limit until all feasible measures ... have been taken”.<sup>32</sup> Similarly, the UN WGEID notes that both the UN Declaration and the ICPPED are “forceful in affirming that investigations related to enforced disappearance must be carried out until the fate of the disappeared person has been clarified”, adding that “as a rule”, investigations, as well as being promptly initiated, should also “extend to the clarification of the whereabouts of the victim”.<sup>33</sup>

These declarations are indicative of an important development in both norms and practice since the turn of the millennium, namely, a loosening of a previously almost invariable subordination of the search for the disappeared to the criminal justice process. More recently, international organizations, and at least some States, have instead sought to establish, recognize, and respond to an **autonomous obligation to search for the disappeared**. This obligation, and the search that proceeds from it, is held to be **distinct** from the obligations which arise when investigating the originating crime, accumulating evidence of it, and prosecuting and punishing its perpetrators. This new emphasis can be discerned as gradually coming into focus in several international instruments, norms, and sources of guidance and best practice standards, including:

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- 31 Regarding the enforced disappearance itself, the subsequent investigation, and the eventual fate of the disappeared person. (Art. 24(1) and 24(2)).
- 32 UN HRC, ‘Progress report of the Human Rights Council Advisory Committee on best practices on the issue of missing persons’, March 22, 2010, A/HRC/14/42, para. 13.
- 33 UN WGEID, ‘Report on Standards and Public Policies for an Effective Investigation of Enforced Disappearance’ UN Doc. Ref. A/HRC/45/13/Add.3, August 7, 2020, section E, para. 33.

- The Inter-American Convention on the Forced Disappearance of Persons (1994);<sup>34</sup>
- UN Guiding Principles on Internal Displacement (1998);<sup>35</sup>
- UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005);<sup>36</sup>
- ICRC Rules of Customary International Law (2005);<sup>37</sup>
- International Convention for the Protection of All Persons from Enforced Disappearance (2006);<sup>38</sup>
- United Nations Security Council Resolution 2474, June 11, 2019;<sup>39</sup>
- UN Committee on Enforced Disappearances, ‘Guiding Principles on the Search for Disappeared Persons’ (2019); and

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34 Article XII: “The States Parties shall give each other mutual assistance in the search for, identification, location, and return of minors who have been removed to another state or detained therein as a consequence of the forced disappearance of their parents or guardians.”

35 Principle 16, paras. 1 and 2 read as follows: “1. All internally displaced persons have the right to know the fate and whereabouts of missing relatives. 2. The authorities concerned shall endeavour to establish the fate and whereabouts of internally displaced persons reported missing, and cooperate with relevant international organizations ... inform the next of kin on the progress of the investigation and notify them of any result.” UN Doc. Ref. E/CN.4/1998/53/Add.2, February 11, 1998.

36 Article 22: “*Satisfaction* shall include ... any or all of ... (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities.” (UN Resolution 60/147, adopted December 16, 2005).

37 Rule 117: “Each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate” (this is applicable in both international and non-international armed conflicts).

38 Article 24(3): “Each State Party shall 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.” Article 15: “States Parties shall cooperate with each other and render all possible assistance in assisting the victims of States Parties shall cooperate with each other and shall afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains.”

39 Recognizing, in the light of international humanitarian law, the obligation of the State and other parties to an internal or international conflict to search for persons who go missing in the context of such conflict.

- UN Working Group on Enforced and Involuntary Disappearances, 'Report on Standards and Public Policies for an Effective Investigation of Enforced Disappearance' (2020).

The two most recent documents listed, i.e., the UN Guiding Principles on the Search for Disappeared Persons (hereafter, 'UN Guiding Principles on Search'), and the UN Report on Standards and Public Policies for an Effective Investigation of Enforced Disappearance (hereafter, 'UN Report on Standards' are particularly important resources which summarize the current state of international law and practice as regards the search for disappeared persons, and the delivery of justice for the crimes committed against them.<sup>40</sup> The documents call upon States to consider that:

- The obligation to search for the disappeared does not exonerate the State from its obligation to investigate the crime(s) committed; regardless of whether that search is carried out within a judicial and/or administrative framework: i.e., "[t]he existence of mechanisms and procedures for searches by administrative, non-judicial and other bodies cannot be invoked as an obstacle to the pursuit of criminal investigations or as an alternative to them".<sup>41</sup>
- Conversely, the obligation to search cannot be conditioned by, or subordinated to, the progress made by any related criminal investigation. However, when administrative search operates in parallel with criminal investigation, the two should be mutually reinforcing, which may entail the sharing of information.
- "The search for a disappeared person should continue until his or her fate and/or whereabouts have been determined with certainty";<sup>42</sup> since "an effective investigation of enforced disappearances must include information about the whereabouts and the fates of the disappeared persons, the circumstances of their disappearance and the identity of the perpetrators".<sup>43</sup>

40 UN Human Rights Council Working Group on Enforced or Involuntary Disappearances, *UN Report of the Working Group on Enforced or Involuntary Disappearances on standards and public policies for an effective investigation of enforced disappearances*, 2020, A/HRC/45/13/Add.3, available at: <https://digitallibrary.un.org/record/3878686?ln=en>

41 UN Guiding Principles on Search, op. cit., Principle 13(2).

42 UN Guiding Principles on Search, op. cit., Principle 7(1).

43 UN Report on Standards, op. cit., Summary.

- Accordingly, wherever search and criminal investigation are both being carried out within a judicial framework, the fact that criminal proceedings may have been brought to a close (whether by discontinuation, temporary suspension, or the delivery of a verdict) should not prevent the search from continuing, nor does it fulfil or dissolve the obligation to search.

As far as the role of relatives in the search process is concerned, States are reminded that they must not treat the search for the disappeared as a matter of private concern rather than of public interest. Accordingly, neither investigation nor search can be delegated to the relatives or community of reference of a disappeared person. The State's obligation to search must moreover be activated *de officio*, i.e., as soon as the State has information that a disappearance may have occurred, regardless of whether relatives or any other persons have lodged a formal or informal complaint. While relatives of a disappeared person, and others with a legitimate interest, have a right to participate in search, the State's obligation to search persists regardless of whether this right is exercised: "[i]n no way should the refusal ... to exercise [the] right to participate be used, by the authorities, as a reason for not initiating or advancing in the search."<sup>44</sup> In sum, States are enjoined to conduct both an effective search to determine the fate and whereabouts of disappeared persons, and a prompt, robust, investigation of the crimes committed and the perpetrators of them. Access to archives, especially official ones, and to necessary forensic expertise should be assured.

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<sup>44</sup> UN Guiding Principles on Search, op. cit., Principle 5(1).

# A. LATIN AMERICA

## 1. STATE OBLIGATIONS ARISING FROM DISAPPEARANCES AND ENFORCED DISAPPEARANCES IN LATIN AMERICA

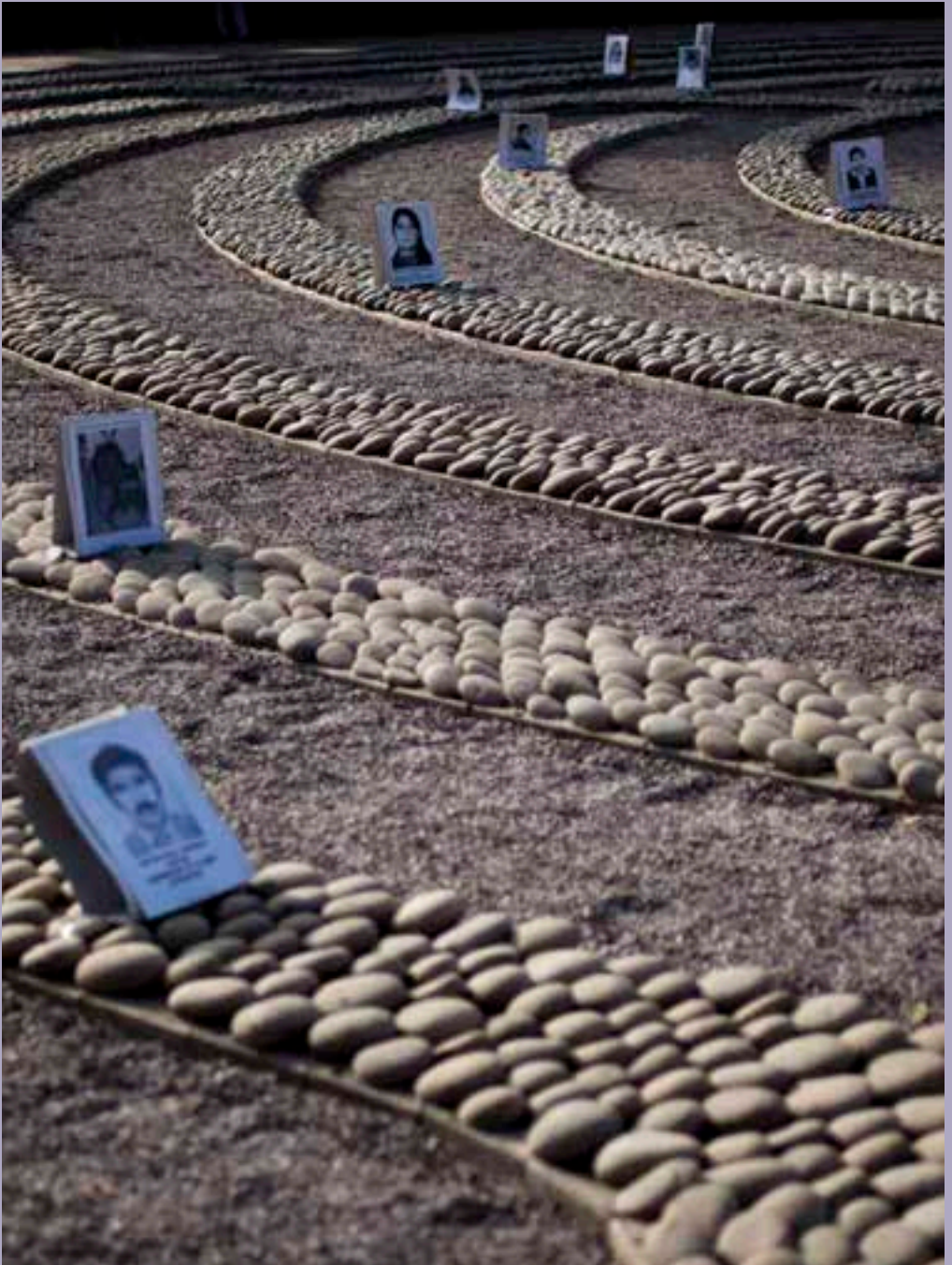
The practice of both disappearance and enforced disappearance has profoundly and tragically marked the history of Latin America, as can be seen in the specific attention to, and repudiation, of the practice in the reports, decisions and jurisprudence of the Inter-American human rights system (i.e. the Inter-American Commission on Human Rights, IACHR, and the Inter-American Court of Human Rights, IACtHR). Inter-American human rights standards, like universal ones – some of which they anticipated and preceded – stipulate the enforced disappearance of persons to be a grave human rights violation at times amounting to a crime against humanity.<sup>45</sup> Recommendations adopted by the General Assembly of the Organization of American States also remind member States of their obligation not to bring the search for missing persons to an end until their whereabouts have been determined, regardless of whether or not any associated criminal investigation has been brought to a conclusion.<sup>46</sup>

Although the extent and type of practice of disappearance and/or enforced disappearance varies across Latin America depending on the country and

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45 See for example the Preamble to the Inter-American Convention on Forced Disappearance of Persons “[T]he systematic practice of enforced disappearances of persons constitutes a crime against humanity” (adopted 1994, entered into force 1996).

46 OAS Doc. ref. AG/RES. 2717 (XLII-O/12), June 4, 2012 and AG/RES. 2794 (XLIH-O/13), June 5, 2013.



Portraits of victims stand on stones at the “Ojo que Lloro” (Eye that Cries) memorial, in honor of those killed or disappeared during Peru’s internal conflict (1980-2000). Lima, Peru, Aug. 28, 2013, the 10th anniversary of The Truth and Reconciliation Commission (TRC) report. (AP Photo/Rodrigo Abd)

historical period, there are also some common patterns. In the cases of the right wing civil-military dictatorships of 1970s and 1980s South America, for example, members of government security forces would often target perceived or actual political opponents, illegally deprive them of their liberty, and take them to secret detention centers. Victims were often tortured, and it is known or suspected that many or most were then extrajudicially executed, with their bodies disposed of in secret. This pattern of highly organized State-perpetrated disappearances prevailed, to a greater or lesser degree, across Argentina, Brazil, Chile, Uruguay, and Paraguay in this period. Other patterns of disappearance and/or enforced disappearance occurred in the internal armed conflicts of 1980s and 1990s Guatemala and El Salvador, and still persist in Colombia. In these latter Central American and Andean settings, a range of different conflict-related or criminal logics underpin the perpetration of disappearance. Victims are or were less likely to have spent time in clandestine detention centers, and there is a greater prevalence or proportion of disappearance, as distinct from 'enforced' disappearance, i.e., disappearances attributable to non-State, anti-State actors, including guerrilla groups, or whose perpetrators are unknown.

What all the settings named to date, however, have in common is that even where the disappearances were enforced, i.e., occurred with State involvement, the authorities at the time consistently denied holding victims or having any information about their whereabouts. In some situations and cases, this denial continues through to the present day. Most of the Latin American settings mentioned to date suffered disappearance or enforced disappearances in a concentrated way, at a particular identifiable time period in the recent past.

In the present day, disappearance continues in high numbers in a more limited set of countries, having become a more sporadic or isolated occurrence in others. In some of the Latin American countries with continued or resurgent high incidence of victims, particularly Mexico and El Salvador, disappearances today occur in significant numbers in **contexts other than political violence and/or State repression** (although State involvement is certainly still present and prevalent). These more novel contexts include disappearances carried out by gangs, organized crime groups, and drug cartels; scenarios which also overlap with disappearances caused in the contexts of human trafficking and/or to the flow of migration between Central America, Mexico, and the United States. In all settings, the boundaries between enforced disappearance, disappearance, internal displacement, and 'ordinary' missing persons cases can of course

be difficult to determine a priori,<sup>47</sup> which is one reason recent standards are emphatic in seeking to create and enforce a State duty to investigate all potential occurrences as if they were cases of disappearance or enforced disappearance.

The Inter-American Court of Human Rights has held that under Articles 1(1), 8, and 25 of the American Convention on Human Rights, member States have the obligation to investigate facts relating to disappearance and enforced disappearance, and has made it clear that in the Court's opinion, it is incumbent upon the State to ensure progress in the search for the disappeared. Accordingly, it has been highly critical of the fact that search processes today are mostly driven by family members and other private individuals, at times even being undertaken directly by these non-State actors.

## 2. SEARCH MECHANISMS AS A STATE RESPONSE TO DISAPPEARANCES IN LATIN AMERICA

Scholars and practitioners alike have tended to approach the challenge of determining the fate of disappeared persons through a judicial framework, where seeking to discover the whereabouts of disappeared persons is often treated as essentially an accessory to the primary goal of identifying those responsible for the disappearance. This judicial approach was, until recently, the one that predominated in Latin America. Search was overseen and carried out by the justice system, and in particular, the criminal justice system. This often meant that no official search and identification process could begin in the absence of a simultaneous investigation by the relevant police, prosecutorial, or judicial authorities.

In recent years, as discussed in earlier sections, this approach has been replaced or complemented by a different rationale. The new rationale prioritizes obtaining information about victims' whereabouts, in order to provide answers to relatives (or other communities of reference) of the disappeared. **While these two approaches address two distinct and autonomous obligations – the obligation to search, and the obligation to seek justice and accountability – they are not mutually exclusive. The search for truth and/or to find victims, pursued through a non-judicial mechanism, does not preclude the pursuit of justice for**

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47 Colombia, for example, has had up to three separate mechanisms operating in its recent history, each attempting to address different classes of disappearance. The proper demarcation of the limits of each with respect to the others has, predictably, proved challenging.

**the perpetrators of crime. Indeed, these obligations, far from being mutually exclusive, are interrelated, and activities carried out in pursuit of them should be complementary.**<sup>48</sup> This new thinking has been adopted and amplified by demands and advocacy from victims and relatives, and vocal support from international human rights institutions.<sup>49</sup> Outcomes have included the creation of dedicated State institutions or offices in at least four countries: Colombia, Mexico, El Salvador, and Peru. These new entities have been set up to conduct or support search and identification activities. Mandated by Constitutions, statutory law, or presidential decree, they follow a range of organizational models and structures.

The section of this report that follows will describe and compare the different institutional models adopted by these mechanisms to search for disappeared persons. The description covers organizational structure, scope of mandates, technical capacities, and budget considerations, all of which affect whether these bodies can meet their objectives. These mechanisms are quite a recent creation, and are therefore still consolidating their institutional frameworks. Nonetheless, it is not too soon to begin assessing the adequacy of their underlying structures. Similarly, some insights can be gained as to the effectiveness or lack of effectiveness of certain types of inter-institutional cooperation arrangements.

Turning to consideration of overarching differences and similarities, we should first consider a number of **ways in which these search institutions differ from one another**. These include variation in the level of independence and autonomy they are afforded from other State entities, which carries significant implications for search. Other differences include the powers afforded to each – e.g., whether a particular mechanism is empowered to carry out all search-

48 This perspective has been reiterated in particular in UN CED, Guiding Principles for search (op. cit) and UNWGEID, 'Report on Standards and Public Policies for an Effective Investigation of Enforced Disappearance', UN Doc. Ref. A/HRC/45/13/Add.3, August 7, 2020.

49 See, for example: Preliminary observations of the UN Working Group on Enforced and Involuntary Disappearances following their visit to Peru (2015), available at: Working Group on Enforced and Involuntary Disappearances ("the search for disappeared persons is carried out [...] within the framework of investigations whose main objective is to determine the criminal responsibilities of the perpetrators, rather than search for the disappeared person. This prosecution strategy largely limits the success of the search. [...] the humanitarian aspect of the search should be emphasized rather than the judicial one. This means that a strategy focused on the search, identification, and restitution of remains should be urgently developed, regardless of judicial processes. This humanitarian strategy must be conducted in parallel and complementary to the judicial one, in particular to preserve all the evidence so that it can be used in a subsequent judicial process."); see also Inter-American Court of Human Rights (IACtHR) *Blanco Romero et al. vs. Venezuela*. Monitoring Compliance with Judgment. Resolution of November 22, 2011, paragraph 13 ("The duty to find the whereabouts of the victims is independent of the obligation to investigate the facts denounced, and eventually punish them,").

related activities on its own initiative or must rely on judicial authorities to undertake tasks such as exhumations. Primary purpose(s) and mission(s), as set down in organizational mandates, also vary. Each country has arrived at its own definition and demarcation of search, according to the particular set of problems faced. Some States' mechanisms, for example, deal solely with searching for those disappeared during a past internal armed conflict or authoritarian period. Others may (also) be searching for victims of disappearances perpetrated during peacetime or after transition, whether by the State, paramilitaries, or other violent actors – as we have seen, the mandate of some State offices includes locating people whose disappearance seems likely to have been at the hands of organized crime. Searches may be aimed at finding disappeared people alive, or may focus on the recovery and dignified restitution of their remains. There is even variation over who can be considered disappeared, forcibly disappeared, and/or 'missing', for the purposes of demarcating what kinds of disappearance are the concern of the relevant office. In Colombia, for example, the term used by the search institutions is "person reported as disappeared" which is much broader than the "person forcibly disappeared" that is used in some other contexts. The wider the scope, the more complex the task that falls to the office in question.<sup>50</sup>

Above and beyond these differences, **each search unit or commission faces some quite similar challenges:** a frequent lack of political will to finance and strengthen institutions; inefficacy or lack of cooperation from State prosecution services, and the kinds of resistance and resentment that, while unacceptable, seem almost invariably to arise when the search for truth exposes serious transgressions, by omission and commission, inflicted by a State on its own people.

## **2.1 Colombia: Search Unit for Persons Presumed Disappeared During and By Reason Of the Armed Conflict (Unidad de Búsqueda de Personas dadas por Desaparecidas en el contexto y en razón del conflicto armado, UBPD)**

Colombia's recent history has been indelibly marked by almost six decades of internal armed conflict, involving State, paramilitary, and guerrilla forces.<sup>51</sup> The

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50 In the case of Colombia, as we will see, this very breadth of definition is one of the factors obliging Colombia's new State search unit to negotiate boundaries with pre-existing entities which have potentially overlapping responsibilities.

51 For the purposes of what follows, the term 'guerrilla', when used in regard to Colombia and other recent Latin American settings, denotes illegal armed actors engaged in left-wing inspired insurrectionary violence aimed at overturning or seizing control of the existing State apparatus. 'Paramilitary' is used for a range of irregular and illegal armed groups who oppose the guerrilla, and see themselves as thereby aligned with State interests. Disappearances committed by paramilitary

devastating effects of that conflict are still apparent, and the incidence of violence is still troublingly high. Nonetheless, for the purposes of what follows, January 1, 1958, and December 1, 2016 are taken as marking beginning and end points for the principal open phase of conflict. Some of the worst violence of the period took place over the most recent three decades, with escalation of violence in general, and increasing rates of particular expressions of it, including disappearance and enforced disappearance. These new dynamics were a direct result of changes in strategies of engagement by the various armed actors mentioned above. This included, in some cases, resort to other illegal activities such as drug trafficking and kidnapping, as a mode of financing purportedly political goals.<sup>52</sup>

By mid-2016, the way seemed open for a hopefully definitive peace agreement between the Colombian State and the country's largest guerrilla force, the FARC-EP,<sup>53</sup> promising an end to over 50 years of armed conflict. It was foreseen that additional transitional justice measures would be put in place. The plan was that the new measures would complement existing mechanisms, implemented at various points since the year 2005, that had sought to establish the responsibility of demobilized paramilitaries – specifically—for gross abuses, including violations of international humanitarian law; and to provide reparations for various categories of victims of the long-running internal armed conflict. The ongoing human tragedy surrounding disappearance and enforced disappearance was, and remains, one of the most critical matters to be addressed in this new phase. The repercussions of the practice stretch to all sectors of society: the rollcall of people forcibly taken, with no information available as to their fates, includes labor leaders, politicians, journalists, peasant farmers, and many others, including regular soldiers and members of the illegal armed groups. Known perpetrators of disappearance and enforced disappearance include right-wing paramilitaries, leftist guerrilla groups, and State security forces (principally, the army). Perhaps in few other conflicts has disappearance, in all of its various intentional forms, been so persistently practiced over so many years.

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forces therefore often fall under the prevailing international definition of enforced disappearance, whereas those committed by the guerrilla would be classified as disappearance. The specific tactic of kidnapping people for ransom, utilized by a range of groups but most often associated with the guerrilla, falls outside both definitions inasmuch as the component of denial is not present.

52 Centro Nacional de Memoria Histórica ('National Center for Historical Memory') (2013) '¡Basta Ya! Colombia: Memorias de Guerra y Dignidad'. Bogotá: CNMH. Available at <http://www.centrodememorialhistorica.gov.co/micrositios/informeGeneral/descargas.html>, last accessed 1 January 2022.

53 Fuerzas Armadas Revolucionarias de Colombia-Ejército del Pueblo, ('Revolutionary Armed Forces of Colombia–People's Army').

Establishing the exact number of people who have fallen victim to this practice is therefore highly complex. One source, Colombia's official National Center for Historical Memory, Centro Nacional de Memoria Histórica (CNMH), has worked to consolidate information and statistics on the victims of Colombia's internal conflict (from 1958 to 2021), including disappearance victims, from thousands of databases and documents from hundreds of diverse institutions and social organizations.<sup>54</sup> Current CNMH records, which are regularly updated to reflect new data, show the number of disappearance victims from Colombia's internal conflict to be over 80,000 people<sup>55</sup> and the number of people killed during the conflict to be over 267,000.<sup>56</sup> The CNMH documents cases of other modalities of violence and violations of individual liberty, such as kidnapping and forced recruitment, separately from disappearance cases.<sup>57</sup> Resolved disappearances or enforced disappearances, i.e., those in which the person was later found and/or their fate was clarified, have, in over 8,000 cases, resulted in the determination that the victim is now dead.<sup>58</sup> A significant minority of resolved disappearances have however resulted in the recovery of the person, alive.

As mentioned above, the 2016 peace agreement therefore promised to be a significant step forward in efforts to resolve this and many other unresolved legacies of conflict. The final accord, signed on November 24, 2016,<sup>59</sup> put an end

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- 54 Centro Nacional de Memoria Histórica (n.d.), 'Fuentes', available at <https://micrositios.centrodememoriahistorica.gov.co/observatorio/infografias/fuentes/> last accessed 1 January 2022.
- 55 Centro Nacional de Memoria Histórica (n.d.), 'Desaparición forzada, Tablero Principal' Available via <http://micrositios.centrodememoriahistorica.gov.co/observatorio/portal-de-datos/el-conflicto-en-cifras/desaparicion-forzada/>, last accessed 1 January 2022; see also Centro Nacional de Memoria Histórica (n.d.), 'Lo que sabemos de los desaparecidos de Colombia', available at <https://www.centrodememoriahistorica.gov.co/micrositios/balances-jep/desaparicion.html#:~:text=En%20el%20pa%C3%ADs%20por%20lo,a%20comunidades%20y%20sociedades%20enteras> last accessed 1 January 2022.
- 56 Centro Nacional de Memoria Histórica (n.d.), 'Características de las personas Afectadas', available (under the title 'Características de las Víctimas') from the CNMH data portal at <http://micrositios.centrodememoriahistorica.gov.co/observatorio/portal-de-datos/el-conflicto-en-cifras/> last accessed 1 January 2022.
- 57 Centro Nacional de Memoria Histórica (n.d.), 'Balance General', available at: <https://micrositios.centrodememoriahistorica.gov.co/observatorio/infografias/balance-general/> last accessed 1 January 2022.
- 58 Centro Nacional de Memoria Histórica (n.d.), 'Balance General', available at: <https://micrositios.centrodememoriahistorica.gov.co/observatorio/infografias/balance-general/> last accessed 1 January 2022.
- 59 The Acuerdo para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera ('Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace') was signed by

to four years of intense negotiation between the Colombian government and the FARC guerrilla. It laid the institutional foundations for building a comprehensive transitional justice policy, since the obligations it established included the creation of a tailor-made legal framework designed to end the armed conflict and build a stable and lasting peace. The transitional justice ‘piece’ of the post-conflict puzzle was accordingly set up in 2017, under the title ‘Comprehensive System of Truth, Justice, Reparation, and Non-Repetition’ (henceforth SIVJRNR, after its Spanish acronym).<sup>60</sup> Created by statutory legislation (Legislative Act 01/2017 of April 4, 2017), the SIVJRNR was to comprise three newly-created entities: (1) a judicial mechanism to investigate and sanction particularly grave offences, the Special Jurisdiction for Peace, or ‘JEP’; (2) a truth commission (Commission for the Clarification of the Truth, Coexistence, and Non-Repetition, or ‘CEV’), and (3) the Search Unit for Persons Presumed Disappeared During and By Reason Of the Armed Conflict, ‘UBPD’.<sup>61</sup>

Our main focus here, for obvious reasons, is the UBPD, whose existence and structure was further specifically regulated by Legislative Decree No. 589 of April 5, 2017, which designates it as a humanitarian, extrajudicial (non-judicial) institution within the SIVJRNR, tasked with discovering the fate and whereabouts of victims of disappearance and enforced disappearance, in the name of satisfying victims’ and/ or society’s rights to truth and reparation. Some experts interviewed for this report, identified certain flaws in the Decree, including: lack of specificity as to how the Unit’s powers were to be implemented and perhaps insufficient detail on data and information handling.<sup>62</sup> In general, however, the Decree has been well received, and other experts consulted located the main hindrances to the Unit’s work elsewhere, such as in a lack of political will, particularly political will at the highest level under the current<sup>63</sup> government administration.

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government representatives and representatives of the FARC-EP on November 24, 2016, and ratified by Congress five days later.

60 Full title the ‘Sistema Integral de Verdad, Justicia, Reparación y No Repetición’.

61 Full titles, respectively: the Jurisdicción Especial para la Paz (JEP); Comisión para el Esclarecimiento de la Verdad, la Convivencia y la No repetición (CEV), and Unidad de Búsqueda de Personas dadas por Desaparecidas en el contexto y en razón del conflicto armado (UBPD). Each entity is transitory, with the original legislation foreseeing institutional lifespans of up to 15 years for the JEP; up to 3 years for the CEV, and up to 20 years for the UBPD. Each period can, if necessary, be extended via subsequent legislation.

62 Although the text of the Decree does address these matters quite extensively, in Titles II (Arts. 5-10) and III (Arts. 11-14).

63 At time of writing (2021), a right-wing administration headed by president Iván Duque (2018-).

The search for the disappeared in Colombia did not begin with the UBDP: it has been preceded by various other institutional mechanisms and efforts, some of them ongoing.<sup>64</sup> These efforts have, however, had a checkered history, dismissed by some as unsuccessful and/or a source of secondary victimization. The UBDP's already onerous responsibilities and mandate therefore also include a strong commitment to not repeating the mistakes of the past – for which efficient, effective management and the provision of adequate resources will be key.

## Mandate, key powers, and main characteristics

The UBDP was designed to operate at quasi-ministerial rank within government structures, and to have functional and operational independence of all branches of government, including the executive. Although Decree Law No. 589 states that the UBDP is “an entity of the justice sector” (*entidad de Sector Justicia*), its “special nature” is also specified.<sup>65</sup> Colombia's Constitutional Court also clarified, in a later ruling, that although the Peace Accords and subsequent transitory legislation do not award the UBDP the same level of autonomy as was afforded to the Truth Commission, the location of the UBDP within the administrative and legal ambit of the justice sector:

“operates only as a mandate allowing the UBDP, like any other autonomous, independent, national public body, to operate as part of the State, and articulate itself with other public entities that deal with matters related to or complementary to the fulfillment of [its] responsibilities and functions, such as the Ministry of Justice and Law, the Victims' Unit (‘Unit for Attention and Comprehensive Reparation to Victims’), and the National Institute of Legal Medicine and Forensic Sciences, in the interests of greater effectiveness and efficiency in the work of [State] administration,

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64 These previous and/or pre-existing efforts, distinguished from the UBDP *inter alia* by their judicial nature or connections, include a State Search Commission, (Comisión de Búsqueda, CBPD), set up in 2000 under Law 589 to “support and promote (*apoyar y promover*)” investigation of the crime of disappearance”. The CBPD, which still exists, was behind the setting up of a National Register of the Disappeared (the Registro Nacional de Desaparecidos), and the drawing up of the country's first National Search Plan, Plan Nacional de Búsqueda, in 2007. Since 2018, when the UBDP began operations, the CBPD has concentrated its efforts on cases which appear to fall outside of the remit of the internal armed conflict. A second entity, the Urgent Search Mechanism (Mecanismo de Búsqueda Urgente), was set up under judicial auspices in 2005 (by Law 971) to investigate cases that the prosecutors' office deemed to fall under the definition of ‘enforced disappearance’.

65 Article 1, Decree Law 589, 2017.

with the proviso that, precisely because [the UBPD] is a national organism of a particular juridical nature, it cannot be subordinated or made subject to the hierarchical control of any other [justice] sector entity.”<sup>66</sup>

As this ruling makes clear, the Unit’s position in governmental structures is designed to ensure that it has the power to call on other State institutions where this is necessary for the effective and efficient implementation of its mandate. Decree Law 589 also affords the Unit—at least on paper—a high degree of administrative, budgetary, and technical autonomy.

The UBPD also has a wide temporal and thematic mandate. The endpoint of its temporal scope is set at disappearances that began before December 1, 2016; while thematically it is tasked with searching for anyone who falls under the category of ‘persons presumed to be disappeared’, during and by reason of the armed conflict.<sup>67</sup> The rather broad category of ‘persons presumed to be disappeared’ encompasses a range of different possible situations, whose common element is that relatives (or the equivalent community of reference) of the person or persons concerned, do not know what happened to the person or where they are to be found. This description of course covers a range of possible situations, including: (i) people who have been forcibly disappeared; (ii) people who were kidnapped, and never subsequently released, and whose fate or whereabouts remain unknown; (iii) people – both adults and minors – recruited by actors in the armed conflict, whose fate or whereabouts are unknown to their

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66 Constitutional Court verdict C-067/18, point 7.5.1, editor’s translation.

67 The Final Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace (Final Peace Agreement), Legislative Act 01 of 2017 and Decree Law 589 of 2017 do not define or characterize the concept “persons presumed disappeared.” For its part, although it did not define or characterize this concept, the Constitutional Court specified that article 2 of Decree Law 589 of 2017, when establishing the humanitarian mandate of the UBPD, called for the UBPD to search for all “persons considered missing in the context and in reason for the armed conflict,” and it did so “without establishing any limitation referring only to enforced disappearance.” In the same vein, it is important to point out that the Final Peace Agreement refers to “the disappeared of all kinds.” Thus, it is clear that the mandate of the UBPD is not limited to only enforced disappearances from the conflict, but rather *all* kinds of disappearances occurring within the conflict context prior to December 2016. In other words, the mandate of the UBPD: 1) is not limited to searching for victims of enforced disappearance, but all “missing persons”, which includes, among others: kidnapped people, those who were not released and whose fate or whereabouts are unknown by their relatives; people (adults and minors) who have been recruited by actors in the armed conflict, whose fate or whereabouts are unknown to their families; and, civilians or members of the armed actors who disappeared during the hostilities, whose fate or whereabouts are unknown to their family members; and 2) covers a period from 1958 to December 2016 (that is, 58 years).

family members or equivalent, and (iv) civilians or members of regular or irregular armed groups, who disappeared during hostilities and whose fate or whereabouts remain unknown. Across all of these situations, the UBPD's potential involvement is predicated on the supposition that the disappearances have occurred in some demonstrable relation to the internal armed conflict, including (but not limited to) the suspicion of perpetration by, or with the involvement of, members of State security forces or illegal armed groups.<sup>68</sup>

The abovementioned categories are moreover indicative rather than exhaustive. Other possible scenarios that may involve or lead to persons being presumed disappeared, in terms that place the disappearances within the context of or in causal connection to the internal armed conflict, include: (v) persons extrajudicially executed by State agents or paramilitary groups, or killed by insurgent groups, in circumstances where although the death is known about, and may even be acknowledged or claimed by those responsible, the burial place or current location of the person's remains is not known to their relatives (and/or to the relevant authorities). In these situations, although the "destiny" or "fate" of the person may be considered established, their current whereabouts remain unknown. Finally, (vi) cases of legal minors, whose families do not know their fate and/or whereabouts. This category may include, for example, children of combatants in illegal armed groups, and/or children who became separated from their parents or carers in the course of the conflict. (This situation should not be confused with scenarios where parents or carers know the fate and whereabouts of a minor, but for whatever reason, have not (yet) been able to be reunited with them. In those cases, the challenge is how to achieve family reunification, rather than how to locate the child).

The tasks assigned to the UBPD include developing a fuller account and understanding of each of these categories of presumed disappearance, as well as attempting to establish the total universe of persons who should be presumed disappeared according to these definitions (i.e., during and by reason of the internal armed conflict).<sup>69</sup> The Unit is also tasked with creating and implementing

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68 As we have seen (above, and especially *supra* n.68), the UBPD is specifically tasked with searching for persons disappeared 'during and by reason of' the internal armed conflict, i.e., between 1958 and December 2016; while other bodies (the CBPD, and the regular justice system – so, in the first instance, the Attorney General's Office - are responsible for investigating other disappearances. This may mean, for example, disappearances that began before December 1, 2016, in circumstances seemingly unconnected to the conflict, and covers all disappearances subsequent to December 1, 2016, with or without apparent relationship to conflict dynamics.

69 See, particularly, Decree Law (DL) 589, Article 5, 'Functions and Attributions'. See also the breakdown

a national search plan, plus regional search plans that are sensitive to variations in needs, contexts of disappearance, and search scenarios across different regions of the country. Finally, it is also instructed to “guarantee participation” of relatives in search, location, recovery, identification, and dignified restoration of the remains of disappeared persons who are found to be deceased.<sup>70</sup>

As a humanitarian and extrajudicial mechanism, the Unit cannot substitute for or pre-empt any judicial investigations that may be appropriate. Rather, its primary purposes are to search for and locate disappeared persons while they are still alive, or, where this proves impossible, to trace and where possible to recover, identify, and restore their remains in a dignified manner.

DL 589 endows the UBPD with several specific functions and powers to enable it to meet these primary obligations. These include establishing protocols for involvement of victims’ representatives, developing diagnostics that establish profiles of victimization in particular regions and population groups, and designating priority territories for the implementation of regional search plans. The Unit is also empowered to set up or sign such arrangements and agreements as may be necessary to allow it to cooperate with and/or source information from: the competent judicial authorities; other State entities with related or overlapping concerns;<sup>71</sup> and national or international organizations, whether public or private.<sup>72</sup>

Three overarching methodological orientations are laid down for the work: (1) a territorial focus that takes account of particular region-by-region profiles of

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and analysis of DL 589 provided in Castilla Juárez, K. (2018), ‘UBPD. Ideas para asegurar una de las apuestas por la verdad’. Barcelona: Institut de Drets Humans de Catalunya y Colectivo OFB. Available, in Spanish only, at: [https://www.idhc.org/arxius/recerca/1527248123-Estudio\\_UBPD\\_webBO.pdf](https://www.idhc.org/arxius/recerca/1527248123-Estudio_UBPD_webBO.pdf) Last accessed: 22 November 2021.

70 DL 589 Art. 5.4

71 The State entities whose work has evident overlaps with the UBPD’s concerns, and which are therefore obvious candidates for cooperation protocols, include the Attorney General’s Office; the National Civil Registry; the National Institute of Legal Medicine and Forensic Sciences; the Agustín Codazzi Geographical Institute (ICAG); the Ministry of the Interior; the National Center for Historical Memory, and the Victims’ Unit.

72 This empowers the UBPD to enter into contracts and agreements with relatives’ associations, civil society human rights organizations, and overseas entities. For example, for the purposes of carrying out forensic identification using DNA or other methods, the Unit is not obliged to rely only on the State’s National Institute of Legal Medicine and Forensic Sciences: it can also enter into contracts or agreements with national or overseas private laboratory services, such as the specialist Forensic Anthropology Foundation of Guatemala. This point was explicitly specified by the Constitutional Court in its interpretation of Decree Law 589, contained in Sentence C-067/18.

victimization in each territory; (2) a ‘differential approach’ that takes specific account of victim characteristics, and proceeds accordingly, at all stage and in all actions; and (3) a gender focus that gives “priority attention”, at all stages and in all actions, to women and girls who are victims of the conflict, especially those who have been harmed by or participated in it.<sup>73</sup>

## Limitations of the UBDP

One major challenge facing institutions that search for the disappeared is that many of their functions can be perceived as duplication or interference, especially when they were created to provide results that existing institutions proved unable to achieve. Colombia certainly fits this bill, and has several other challenging contextual factors that must be taken into account. First, the UBDP is operating in a context of extreme political polarization regarding attitudes to the 2016 Peace Agreement and the SIVJRNR transitional justice system as a whole. The SIVJRNR has been on the receiving end of criticism and attacks from the ruling political party, Centro Democrático, and (less aggressively) from the government as a whole. Although the JEP and Truth Commission have been the main targets, governmental and/or ruling party initiatives have also tried to limit the UBDP’s capacity and powers (for example, in terms of access to confidential or national security-related information). Although these attempts have to date been unsuccessful, all three component parts of the SIVJRNR were forced to dedicate a great deal of time and effort, particularly between 2018 and 2020, to defending the system, responding to anti-SIVJRNR initiatives, and mobilizing allies in parliament, civil society, and the international community. A significant part of the challenges faced by the UBDP are a function of this post-agreement scenario, illustrating the difficulties of creating and consolidating under one administration, a system created by a from Peace Agreement signed by a previous one (that of former president Juan Manuel Santos, 2010-2018).

Another challenge is the ongoing nature of conflict: the reality is that the 2016 Peace Agreement did not actually lead to a complete cessation of the internal armed conflict. Formally speaking, only one faction of the guerrilla- the FARC-EP- agreed to sign and demobilize. The other main left-wing guerrilla group, the Ejército de Liberación Nacional, ELN, continues to launch violent actions, as too do so-called ‘dissident’ splinter groups of the (ex)FARC, and illegal right-wing paramilitary groups. Several hundred social leaders, human rights activists,

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<sup>73</sup> DL 589 Art. 4 and Castilla Juárez (2018) op. cit.

demobilized members of the FARC, and their family members have been targeted for murder and/or disappearance since the Accords were signed, and armed confrontations still regularly occur in several regions of the country. All of this severely limits the capacity of the UBPD to operate search activities in the field.

Finally, although designing a search agency with autonomous technical capabilities has undoubted merit, the UBPD continues to depend on the competent operation and cooperation of other offices and branches of State. While some of the UBPD's powers are exclusive and autonomous, others are shared with sister institutions. For example, although Articles 5(3a) and 6 of DL 589 give the UBPD the power to carry out exhumations in its own right, without the intervention of judicial authorities, it can also delegate or share that task with the Attorney General's Office. Other relevant competencies are explicitly excluded from the UBPD's purview because they are reserved for other institutions, even though in some cases it might make more sense for the UBPD to (also) be able to perform some of these functions.<sup>74</sup>

For example, the Victims' Unit and the Ministry of Health continue to be responsible for coordinating family involvement in the search for the disappeared; and assisting the identification, (re)burial, and/or exhumation for definitive identification, of remains. The National Register of Disappeared Persons (whose existence pre-dates the UBPD) continues to be run by, and headquartered at, the National Institute of Legal Medicine and Forensic Sciences (INMLCF). The only change to the Register that was made in response to the setting up of the UBPD was to designate a sub-register, within it, containing the names of those whose disappearance is believed to be by reason of the armed conflict. Responsibility for the sub-register is in theory shared between the INMLCF and the UBPD. Meanwhile, although the INMLCF's other legal duties and prerogatives include, in principle, the "preservation of unidentified or unclaimed bodies", the Constitutional Court has ruled that the INMLCF's role can be limited to the provision of technical support to the UBPD. The Court has also explicitly supported the interpretation that the UBPD is free to instead cooperate with other entities for the same purpose, pointing out that the UBPD is authorized to "resort to other different and complementary activities that allow it to carry out the central objective of its action, focused on the search, location and identification of

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<sup>74</sup> See for example Law 938 of 2004, which establishes the organic structure of the Attorney General's Office, and whose Articles 33 to 36 set out the powers and prerogatives of the National Institute of Legal Medicine and Forensic Sciences, as an administratively autonomous judicial branch entity.

persons.”<sup>75</sup> This means, according to the Court, that the UBPD “may contract the scientific technical support of other entities for the development and execution of its attributions, in accordance with the contracting power provided by Decree Law 589 of 2017.”<sup>76</sup> It should also be remembered that the wording of Article 5(3) of DL 589 stipulates that the UBPD is to: “**coordinate and advance**” the search, location, recovery, identification and dignified restitution of bodies “**with the technical scientific support of the INMLCF** and other public entities” (emphasis added). In fact, the UBPD has been exploring the possibilities of creating its own facilities for holding unidentified remains, while setting up a forensic and genetics laboratory capacity in association with the JEP. These ideas are however likely to founder for essentially financial, rather than necessarily legal, reasons.

The UBPD is supposed to guarantee participation of relatives of the disappeared at every stage, and ensure psychosocial accompaniment for them, as stated in Arts. 5(4) and 5(5) of DL 589 and reaffirmed by the Constitutional Court. Two additional bodies nonetheless retain competence for specific pieces of the process.<sup>77</sup> The Victims’ Unit – or Victim Assistance and Comprehensive Reparation Unit (UARIV), to give it its full title – is in theory responsible for covering funeral expenses, travel, lodging and food for relatives during the process of restoration of remains of disappeared persons found by the UBPD.<sup>78</sup> However, in all the cases that the UBPD has resolved to date, the costs of travel, lodging and food during searches for and at possible burial sites have been covered by the UBPD (generally using resources from international donor cooperation). The Ministry of Health and Social Protection, for its part, shares responsibility with the Victims’ Unit for the provision of psychosocial accompaniment to families of the disappeared.

Another, perhaps the most important, limitation on UBPD powers comes into play where it needs to undertake activities that require judicial authorization. These may include gaining access to, and preserving, houses or other buildings where there is reason to suspect remains of disappeared persons might be found, but whose owners or occupiers have not given express consent. In these cases, the UBPD needs to have recourse to another of the SIVJNRN’s three component entities: the director of the UBPD has the non-delegable power to request a

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<sup>75</sup> Sentence C-067/18.

<sup>76</sup> Sentence C-067/18.

<sup>77</sup> Art. 5(4) of DL 589 specifically notes that the Victims’ Unit’s existing competences are to be respected.

<sup>78</sup> Article 5(4), Decree Law 589.

specific authorization from the Review Section of the Peace Tribunal of the JEP. The process is however at least more streamlined than in comparable situations faced by search bodies in other countries, in that in Colombia these authorizations do not moreover require the Attorney General's Office to act as an intermediary before the court.

## Forensic and investigative capabilities

The investigative functions of the UBPD are restricted to those that could be considered proper to its humanitarian and extrajudicial nature. Thus, while other institutions carry out some of the specific component tasks of the recovery and restitution process, it is the overarching purpose involved that sets the UBPD apart. For example, absent the ultimate goal of determining criminal responsibility that characterizes judicial and/or police investigations, the UBPD neither attributes responsibility nor seeks to prosecute, or contribute to prosecuting, criminal offences. Accordingly, the term 'investigation', when applied to the UBPD, denotes a process focused not the retrieval of evidence, but on the situation of disappeared persons and those searching for them (including, of course, relatives). This ought to afford the UBPD greater scope for recognizing, acknowledging, and incorporating the experiences, wisdom, expectations, and needs of families at each phase of its investigative and search process.

The UBPD's Technical Directorate for Information, Planning, and Localization for Search (DTIPL, after its Spanish acronym) is in charge of the first stage of the humanitarian, extrajudicial search process. This first stage includes the collection and cross-referencing of multiple sources of information, in an effort to determine what happened and develop a hypothesis as to the present whereabouts of a person presumed disappeared during and by reason of the armed conflict. The information sought at this stage may refer to detail about the disappeared person themselves; data about places where bodies are known to have been disposed of; or information about the context of disappearances, the conflict, and the terrain in the particular geographical area concerned. Key successes since the start of operations have been spread across different regions, while the DTIPL is based in the capital, Bogotá. The growing numbers of cases taken on by the Unit meanwhile present a challenge given the Directorate's limited size. Both developments have led to regionally-based field teams assuming a key role.

Information provided by family members and others close to victims can be of critical importance. The DTIPL therefore also needs to work closely with another

Technical Directorate, the Technical Directorate for Participation, Contact with Victims and Differential Approaches (DTPCVED, after its Spanish acronym). Efforts to get relatives, civil society organizations, and other national institutions involved mean that Directorate staff and members of field teams take on roles in accompaniment, and have also led to the compiling and publication of a proposed Methodological Guide for Search. Work also began in 2018 to develop methodological tools for data handling which allow necessary gathering, storing, and analysis of information while ensuring confidentiality and respecting the humanitarian and extrajudicial parameters of the work. Guidelines were drawn up around information retrieval; initial contact with family members and other persons involved in search, and documentation of places used to dispose of remains.

There have been some significant breakthroughs in establishing access to information. In 2018, the UBPD gained access to information provided by four other State institutions whose work is of obvious relevance: the National Center for Historical Memory shared with the UBPD the entire contents of the database of its Observatory of Memory and Conflict; the National Institute of Legal Medicine and Forensic Sciences conceded access to the dedicated Network Information System on Missing Persons and Corpses (SIRDEC); the Victim's Unit (UARIV) allowed the UBPD to access its information system, and finally, as part of the consolidation of the SIVJNRN, the UBPD began to receive information from the Special Jurisdiction for Peace, JEP. Other agreements and protocols have also been established between the UBPD and the Attorney General's Office; the Ombudsman's Office; the Office in Colombia of the United Nations High Commissioner for Human Rights, and the International Committee of the Red Cross. Nevertheless, there have been difficulties in establishing similarly smooth communication with other institutions.

In a country with such a strong legal tradition, the relationship between the UBPD and the JEP has inevitably been key. The JEP is the component of the SIVJNRN that is perhaps best known among the general public and victims' groups alike. Even regarding disappearance – which is really the business of the UBPD – the JEP is still relevant, due to its role in issuing precautionary measures, ordering the sealing and securing of potential search areas, performing judicial inspections, and issuing warrants where needed.

## Organization and human resources

The UBPD's structures and staffing were set out over the course of 2018 and 2019 by three presidential decrees. Decree 290 of 2018 partially determined the Unit's staffing; Decree 289 of 2018 established a special system for remuneration of public servants, and Decree 288 of 2018 set out some of the functions of the UBPD's organizational structure. Within these parameters, the Unit has autonomy to make specific staffing decisions, and to recruit posts based on its needs and functions. The organizational structure, as outlined in Decree 288, consists of:

- A Director General
- A Secretary General
- 10 UBPD advisors
- 2 UBPD administrative technicians

The Director-General of the UBPD took office on February 20, 2018, and was expected to ensure the Unit became fully operational five months later, opening its doors to members of the public by July 15, 2018. Decree 1393 of 2018 came into effect just over two weeks later, on August 2, establishing the following modifications and thereby creating the definitive internal organizational structure of the UBPD:<sup>79</sup>

- Six new offices were added to the existing Office of the Director General. These were: Legal Counsel, the Planning Advisory Office, the Communications and Pedagogy Advisory Office, Knowledge Management, Information and Communications Technologies, and Internal Oversight.
- Three offices and two sub-offices were created, all attached to the Office of the Technical and Territorial Deputy Director General. These were: the Office of Surveying, Recovery, and Identification; the Office of Victim Involvement, Victim Contact, and Differential Approaches, and the Office of Information, Planning, and Search Location. The latter was given two sub-offices: the Sub-office of the Deputy Director of Search Information Management, and the Sub-office of Analysis, Planning, and Search Location.
- Two further sub-offices (Human Resource, and Administration and Finance) were attached to the Office of the Secretary General.

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79 Decree 1393 of 2018.

- Advisory bodies and an Advisory Council were created.

Initial criticisms of this design included that its apparent administrative efficiency masks some disparities, with distinct administrative/ hierarchical levels assigned to functions that are so closely related, that they should really operate at the same level. According to Castilla Juárez (2018), one example of this is “the separation between the office that will assist victims, and the technical offices for search and location, identification, and dignified return. Although the Office of the Director General could act to prevent any loss of coordination, there is not enough reason to place [these offices] at different levels when their work is equally important; these processes should be comprehensive, rather than fragmented, if the aim is to move beyond mere administrative efficiency and allow each to work effectively.”<sup>80</sup> In addition, there is arguably a need to fine-tune the role of the UBPD’s Territorial Teams, and their relationships with the center (in particular with the Technical Directorate of Information, Planning and Localization for Search; and the Technical Directorate for Participation, Contact with Victims and Differential Approaches).

## Inter-institutional relations and coordination

The way the UBPD is designed means that it needs to coordinate with other State institutions if it is to function properly. However, most coordination seems to take place via specific agreements proceeding from negotiations between the heads of the respective services, rather than being the result of permanent arrangements supported by legislation.

For example, one of the most obvious collaborations needed for the work of the UBPD to succeed, is its partnership with the Attorney General’s Office. The UBPD signed an agreement with the Office in May 2019, without which they would not have been able to gain access to information on 103,224 relevant investigations that were ongoing at the time.<sup>81</sup> Access to these investigations is essential for the work of the UBPD, and agreements of this kind are certainly welcome. Other kinds and levels of collaboration with the Attorney General’s Office are also needed,

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80 Castilla Juárez, K (2018), ‘Unidad para la Búsqueda de Personas...’ Op. cit., editor’s translation.

81 Bulletin 26726 of May 2, 2019. Available (in Spanish only) at: <https://www.fiscalia.gov.co/colombia/noticias/fiscalia-firma-convenio-interinstitucional-con-la-unidad-de-busqueda-de-personas-dadas-por-desaparecidas/> last accessed 30 December 2021. According to this source, the vast majority of the caseload - 99,114 of the 103,224 - concerned criminal conduct attributed to the FARC-EP, with agents of the State suspected of involvement in the remaining 4,110.

though. For instance, whenever the UBPD identifies a “place of interest” – i.e., somewhere that may hold evidence relevant to locating disappeared persons – intervention is needed from the Attorney General’s Office, alongside the National Institute of Legal Medicine and Forensic Sciences (INMLCF), to safeguard the place and any remains it may contain.

The INMLCF, which administers the Network Information System on Missing Persons and Corpses (SIRDEC) and provides its forensic anthropology inputs, is also responsible for collating the National Register of Disappeared Persons. As we have seen, DL 589 gives the UBPD and INMLCF joint responsibility for establishing the special sub-register dedicated to persons presumed disappeared during and by reason of the armed conflict.<sup>82</sup> The UBPD is also responsible for geo-referencing, surveying, exhumations, and collecting physical artefacts in line with technical requirements for documentation and preservation of physical evidence. However, the Ministry of Health and Social Protection also needs to get involved, since it is the Ministry, rather than the INMLCF, that has to assist the UBPD in developing a national registry of graves, illegal cemeteries, and possible burial sites. The Victims’ Unit—which is part of a different administrative entity—meanwhile oversees the Unified Victims’ Register. The UBPD is also charged with developing rules for interoperability, and negotiating with the Victims’ Unit over inclusion in the Registry of names of victims of enforced disappearance, and/or the correct registration of multiple types of victimization that may have been suffered by persons presumed disappeared.<sup>83</sup>

## Funding

The UBPD is financially autonomous, meaning, first, that it is funded directly by a line-item allocation in the national budget and can take its own decisions about spending; and, second, that its legal status allows it to receive donations, enter into agreements, and receive resources from international cooperation agencies.

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82 Art. 5 (1, d) of DL 589.

83 Article 5(1) of DL 589 of 2017

# Relationships with relatives and/or victims<sup>84</sup>

The participation of family members needs to be facilitated at every stage of the entire process of investigation, search, location, recovery, identification, and, where relevant, restitution of remains. The obligation to guarantee this participation is enshrined in Article 3 of Legislative Act No. 1 of 2017, making it a constitutional requirement. DL 589 of 2017 also calls for the participation of “victims, victims’ organizations, and human rights organizations” in the design, preparation, and implementation of the National Search Plan (Art 5(2)), and in:

<p><b>Collection of information:</b> in the course of investigations aimed at search, location, recovery, and identification. Importantly, in relation to the Unit’s “territorial, differential and gender focus,” specific reference is made to victim and civil society involvement in developing guidelines for determining the whereabouts of girls and women presumed disappeared.<sup>85</sup></p>
<p><b>Regional plans:</b> The law provides for the active participation of victims in the design and implementation of regional plans for search, location, recovery, identification, and dignified return of remains; and allows for involvement in the preparation and implementation of the national register of graves, illegal cemeteries, and possible burial sites.</p>
<p><b>UBPD Advisory Board:</b> Participation is mandated in the meetings the Advisory Board is to hold at least once a year in each of the regions the Unit has elected to prioritize for implementing regional search plans.</p>

These mentions represent only a summary of the various UBPD activities where the law provides for victim participation in the Unit’s day-to-day work. Although no official information has been produced to date evaluating relatives’ satisfaction

84 In what follows, and in the text of the legislation, the terms ‘victim’ and ‘victims’ organization’ refer at times to family members, and/or other members of the community of reference, of a still-disappeared person. At other times (such as when the ‘Victims’ Unit’ is discussed) ‘victim’ also denotes broader categories of harm, not necessarily related solely to disappearance. The specific usage can generally be deduced from context.

85 Article 4 of DL 589 of 2017.

with efforts to include them and act upon the information they provide, it is public knowledge that victims' organizations have widely differing perceptions of the UBPd, proceeding in part from long-running differences about what the unit's powers and priorities should be. The necessary prioritization of certain agendas over others in operational practice perhaps inevitably deepens these disagreements.

Some civil society organizations have opted to go directly to the JEP, asking it to issue judicial orders for search for the disappearance. This cuts out the need for negotiating with the UBPd around search priorities, since the JEP has tended to grant such actions almost immediately. There is also a large percentage of victims and relatives who are not necessarily familiar with the work of the UBPd. As mentioned, insufficient attention has been paid to increasing public awareness of the UBPd as an institutional channel that citizens can turn to, as illustrated in the fact that the Victims' Unit, created in 2011 to oversee reparations, is much better known and has a higher public profile. Some of the problems faced by the Unit are however common to most or all State entities that have involvement in the search for the disappeared, including the Victims' Unit. The task is so enormous, and the sense of unpaid debts being owed to families is so great, that relationships are perhaps inevitably strained. Families are understandably disillusioned and frustrated.

## **2.2. Mexico and the National Search Commission (Comisión Nacional de Búsqueda, CNB)**

Mexico features alongside Colombia as one of the two Latin American countries with the most serious ongoing problem of disappearances, i.e., countries where disappearances are still being committed or initiated in large numbers today, adding to those that began in the past and are still unresolved. According to recent official figures, **as of 30 June 2021, 89,488 of a total of 220,330 people reported in Mexico as having disappeared at some point after 15 March 1964, remained unaccounted for.**<sup>86</sup> The vast majority of those victims – over 71,000 – disappeared in the decade and a half that spans the three most recent presidential periods,<sup>87</sup> with 49,581 of the total of reported cases occurring during

86 Secretaría de Gobernación (2021), 'Búsqueda e Identificación de Personas Desaparecidas, Reporte Semestral, 1 de enero al 30 junio 2021', available at [https://www.gob.mx/cms/uploads/attachment/file/650760/8\\_AM\\_AER\\_Karla\\_CNB\\_7\\_julio\\_2021.pdf](https://www.gob.mx/cms/uploads/attachment/file/650760/8_AM_AER_Karla_CNB_7_julio_2021.pdf), last accessed 1 January 2022.

87 US Congressional Research Service, 'Human Rights Challenges in Mexico: Addressing Enforced Disappearances', October 21, 2020, reproducing a table attributed to the Mexican National Search



Family members hold posters that show images of their missing sons, during a signing ceremony at the National Palace in Mexico City, Dec. 3, 2018. Mexico's President Andres Manuel Lopez Obrador signed a decree creating a truth commission to investigate the 2014 disappearance of 43 students from the Ayotzinapa teachers college in an apparent massacre in the Mexican state of Guerrero. (AP Photo/Christian Palma)

the current administration (headed by President Andrés Manuel López Obrador, who took office in December 2018).<sup>88</sup> One particularly distinctive feature of this victim universe is that 25% of those currently officially recognized as having been subjected to disappearance in Mexico, are women and girls between 15 and 19 years old.<sup>89</sup>

Another distinctive feature is that the current national crisis posed by disappearance in Mexico is part of a broader nationwide pattern of ongoing violence of extreme proportions. This violence is driven by extremely powerful organized criminal groups, involved in the illegal drugs trade, and/or driving or preying on flows of informal or illegalized migration between Central America, Mexico, and the US. The presence of large numbers of migrants, some undocumented, on Mexican territory makes identification additionally challenging when human remains are found, and also presents challenges for search in the countries of origin of migrants who fall victim to disappearance.

The illicit and violent activities of the criminal groups often happen with the complicity, support, or direct involvement of State actors. In some cases, State actors involved in the commission of disappearances themselves belong to what are known as ‘macrocriminal’ networks, *de facto* illegal power structures that advance the interests of Mexico’s powerful organized criminal groups. The Mexican State unleashed increasingly lethal violence of its own after 2006, when then-newly-elected President Felipe Calderón declared a ‘war on drugs’ that was supposed to combat drug trafficking and organized crime. This strategy has had limited, if any, success,<sup>90</sup> with State actors continuing to be directly and indirectly involved in the commission of human rights violations including

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Commission. Available at: <https://fas.org/sgp/crs/row/IF11669.pdf>, last accessed 1 January 2022.

88 Secretaría de Gobernación (2021), op. cit.

89 Casi una cuarta parte de personas desaparecidas en México son mujeres: Segob’, *Infobae*, July 8, 2021, <https://www.infobae.com/america/mexico/2021/07/08/casi-una-cuarta-parte-de-personas-desaparecidas-en-mexico-son-mujeres-segob/>, last accessed 1 January 2022. In response, the country’s National Search Commission has worked hard since 2018 to construct and apply a differential gender perspective on causes, harms, and necessary responses. See comments by National Search Commission director Karla Quintana, made to the Universidad Iberoamericana, Ciudad de México’s November 2020 Congress on Gender Perspectives in Peacebuilding and reported on the University website at: <http://ibero.mx/prensa/congresoibero-perspectiva-de-genero-esencia-del-protocolo-de-busqueda> (last accessed 1 January 2022).

90 US Council on Foreign Relations, ‘Mexico’s Long War: Drugs, Crime, and the Cartels’, February 26, 2021, available at <https://www.cfr.org/background/mexicos-long-war-drugs-crime-and-cartels>, last accessed 1 January 2022.

enforced disappearance. Indeed, human rights groups including leading domestic NGO the Comisión Mexicana de Defensa y Promoción de los Derechos Humanos (Mexican Commission for the Defense and Promotion of Human Rights) have drawn a connection between increased militarization of Mexico's internal security policies since 2006, and a sharp increase in human rights violations including arbitrary and unlawful detentions, torture, extrajudicial executions and enforced disappearance: as powers and functions formerly undertaken by civilian authorities and local police forces have been assumed by military personnel in various regions of the country, reports of grave violations including enforced disappearance have increased exponentially.<sup>91</sup>

As we have already seen, moreover, even where State agents are not the material or intellectual authors of disappearance, and/or where there is no evidence that particular disappearances are occurring with the knowledge or direct acquiescence of State actors, under international human rights law the State still has positive obligations to prevent disappearances, and to investigate and sanction the perpetrators of those that do occur.

Mexico ratified the International Convention on Forced Disappearance of Persons in 2002, and the International Convention for the Protection of All Persons from Enforced Disappearance in 2008, and representatives of both the universal and regional human rights systems have accordingly been urging Mexico for somewhere close to two decades, to urgently address its ongoing disappearance crisis. While the phenomenon itself appears intractable, there have been recent signs of increasing engagement with the relevant regional and international bodies. In 2011, the UN Working Group on Enforced or Involuntary Disappearances (UNWGEID) carried out a country mission to Mexico.<sup>92</sup> The UN Committee on Enforced Disappearances (CED) then carried out a country review, based on the UNWGEID's initial and follow-up reports, publishing Concluding Observations on Mexico in 2015. In 2020 the Mexican Senate voted unanimously to recognize the competence of the CED to examine individual complaints,<sup>93</sup> while in June 2021

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91 Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, 'El resurgimiento de la desaparición forzada en México: Briefing Noviembre 2012', Mexico DF: CMDPDH, available at <https://cmdpdh.org/wp-content/uploads/2013/01/Briefing-Nov-2012-desapariciones-forzadas-FINAL.pdf>, last accessed 1 January 2022.

92 Report available as UN Human Rights Council, 'Report of the Working Group on Enforced or Involuntary Disappearances, Addendum: Mission to Mexico', December 20, 2011, A/HRC/19/58/Add.2.

93 UN Office of the High Commissioner on Human Rights, OHCHR, "UN Committee welcomes

the country's Supreme Court issued a welcome, and internationally pioneering, high-level judicial recognition of the binding nature of the calls to urgent action included in the CED's 2015 report.<sup>94</sup> In 2021, Mexico finally accepted a longstanding CED request – first made in 2013 – to carry out its first ever in-country visit to Mexico.<sup>95</sup> The Inter-American system has similarly issued numerous reports and recommendations on Mexico over a long period. The 2014 mass disappearance of 43 teacher-training students that became known worldwide as the 'Ayotzinapa case', led to the creation, under the auspices of the Inter-American Commission on Human Rights (IACHR), of an Interdisciplinary Group of Independent Experts (GIEI, after its Spanish acronym). The GIEI's increasingly tense relationship with the Mexican authorities culminated in the publication of two official GIEI reports (in 2015 and 2016), and the setting up, in 2016, of a follow-up mechanism also mandated by the IACHR.<sup>96</sup> The Inter-American Court of Human Rights had previously handed down adverse findings against Mexico in cases including *Radilla Pacheco v. México*,<sup>97</sup> over an historic disappearance begun during the so-called 'Dirty War' period of the 1970s, and the frequently cited 'Cotton Field' sentence of 2009.<sup>98</sup> The Cotton Field case deals with disappearances and femicide perpetrated in 2001, apparently by non-State actors, in the context of an ongoing onslaught of seemingly gendered violence against women in the environs of Mexico's Ciudad Juárez.

National and international human rights organizations from civil society in Mexico and beyond have also, of course, helped to inform and galvanize this monitoring

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Mexico's decision on individual complaints," September 4, 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26209&LangID=E> last accessed 1 January 2022.

- 94 Trial International, 'Enforced Disappearances: Mexico Faces its Responsibilities', July 20, 2021, available at: <https://trialinternational.org/latest-post/enforced-disappearances-mexico-faces-its-responsibilities/>; last accessed 1 January 2022.
- 95 The CED's historic visit took place in November 2021, with an initial report expected in March 2022.
- 96 GIEI, "Informe Ayotzinapa: Investigación y primeras conclusiones de las desapariciones y homicidios de los normalistas de Ayotzinapa", September 6, 2015; and GIEI, "Informe Ayotzinapa II: Avances y nuevas conclusiones sobre la investigación, búsqueda y atención a las víctimas", April 24, 2016. Available (Spanish only), together with an executive summary of report 1, from: <https://www.oas.org/es/cidh/actividades/giei.asp>
- 97 Inter-American Court of Human Rights, *Radilla Pacheco v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2009. Series C No. 209.
- 98 Inter-American Court of Human Rights, *González et al. ("Cotton Field") v. Mexico*. Preliminary Objection, Merits, Reparations, and Costs. Judgment of November 16, 2009. Series C No. 205.

and pressure from international intergovernmental human rights bodies, by documenting enforced and involuntary disappearances and advocating before the Mexican authorities for urgent action to be taken.<sup>99</sup> Academic sources in and based in Mexico have also contributed significantly to monitoring and analysis of the ongoing disappearance crisis, and deeper appreciation of its devastating impact.<sup>100</sup> Relatives' associations, including specifically feminized and feminist responses, have also been central to increasingly vocal and active citizen-led movements. These include the 'Madres Buscadoras', mothers who band together to conduct their own searches for their disappeared children, facing direct and very real personal risk of violent reprisals.

In November 2017, after two years of legislative debate and constant pressure from families and other civil society actors, a dedicated law was passed in Mexico to provide a new response to various aspects of disappearance. The 'Ley General en Materia de Desaparición Forzada de Personas, Desaparición Cometida por Particulares y del Sistema Nacional de Búsqueda de Personas', hereinafter 'Ley General' or 'General Law', came into force in January 2018.<sup>101</sup> The law enacted the differentiation and functional separation of search and criminal investigation that is common to the four Latin American countries analyzed here and has also taken place, or is being considered, elsewhere in the region. Accordingly, Mexico's new law provided for the setting up of a National Search Commission (the Comisión Nacional de Búsqueda, CNB).

The Commission was designed as a decentralized administrative body, attached to the Secretaría de Gobernación (Ministry of the Interior). Its functions are to design, implement, and monitor actions to search for disappeared and missing persons nationwide, including by setting up search groups made up of specially trained public servants assisted by other experts, and specialized police officers. The General Law also ordered the creation of specialized Prosecutors' Offices to investigate both enforced disappearance and disappearance by non-State

99 See Open Society Justice Initiative (2016) 'Undeniable Atrocities: Confronting Crimes against Humanity in Mexico', New York: Open Society Foundations. <https://www.justiceinitiative.org/publications/undeniable-atrocities-confronting-crimes-against-humanity-mexico> last accessed 1 January 2022.

100 See for example the work of the Grupo de Investigación en Antropología Social y Forense, GIASF, housed at CIESAS-México (<https://www.giasf.org/>) and/or of the Mexico-US-UK linked Observatorio sobre Desaparición e Impunidad en México, ODIM (<https://odim.juridicas.unam.mx>).

101 Ley General en Materia de Desaparición Forzada de Personas, Desaparición Cometida por Particulares y del Sistema Nacional de Búsqueda de Personas, ('General Law on Enforced Disappearance of Persons, Disappearances Committed by Private Actors, and the National System for Search') November 17, 2017.

actors, placing the new offices under an obligation to also “continually advance the search for disappeared persons.”<sup>102</sup>

The General Law moreover mandated the creation of a National System for Search, composed of various existing governmental agencies, overseen by a ‘Citizens’ Council’, acting in an advisory capacity. The legislation also made provision for necessary ancillary and support services, such as a National Register of Disappeared and Missing Persons, a National Register of Graves, a National Forensic Data Bank, and a National Exhumation Program. New protocols were to be created, and the Law provided for the creation of regional search commissions within individual states in Mexico’s federal system.

## **Mandate, key powers and characteristics of the CNB**

The working definition of ‘disappeared person’ explicitly adopted by the CNB matches those used in other countries in stipulating a nexus with criminality (thereby offering a basis for differentiating between the disappeared, and missing persons): a disappeared person is defined as “any person whose whereabouts are unknown, and in respect of whom there are indications to suggest they have disappeared as a result of a crime, of whatever nature”. This may include, for example, victims of enforced disappearance or disappearance committed by non-State actors, human trafficking, kidnap, murder, femicide, domestic violence, unlawful deprivation of liberty, organized crime, and child abduction.<sup>103</sup> What distinguishes the CNB from other search mechanisms in the region, however, is that its mandate is extremely broad in at least two respects. First, it is given responsibility for searching for victims who fall into any or all of the abovementioned categories of disappeared person. Second, its temporal mandate is unlimited. In other words, it is to search for disappeared persons regardless of the date of their disappearance, rather than being focused on or limited to a certain timespan. It was also created with an indefinite institutional lifespan, i.e., without any specified number of years of operation.

The CNB’s declared aims, according to its website self-presentation, include promoting coordination, operation, management, evaluation, and monitoring of actions between authorities involved in the search, location, and identification of disappeared persons. The CNB is to instigate, conduct, monitor, and generally

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102 Ley General en Materia de Desaparición Forzada... op. cit., Article 68, our translation.

103 Source: CNB website, section ‘¿Qué es la Comisión Nacional de Búsqueda?’, <https://comisionnacionaldebusqueda.com/que-es-la-comision-nacional-de-busqueda/>. Editor’s translation. Last accessed 1 January 2022.

take the lead in coordinating the efforts of the local (individual state level) search commissions); liaise as necessary in order to implement different types of search (immediate, pattern, and extended), and work closely with specialized prosecutors, State forensic services, the families of the disappeared, and international human rights organs and organizations. Another central *raison d'être* mentioned is to act as a bridge and intermediary between state institutions and families, guaranteeing relatives' rights to participation and information.<sup>104</sup>

Search actions take place in response to reports received by the CNB directly, or referred from other official bodies. They may also be undertaken in response to analyses of context, carried out to identify modes of operation, practices, and patterns in the criminal organization of disappearance. As a result, links may be made between cases that allow the triggering of pattern searches and/or joint searches for people whose disappearances are related.

Across Mexico's federal territory, state-by-state realities differ widely. Some states have a strong presence of organized crime groups, which may also have influence in or control over local government. The nature of the challenges faced by the CNB, and its ability to work with local authorities to facilitate search, can therefore vary widely from state to state. While some state-level governments and their associated local search commissions are genuinely committed to the search process, and thus to collaborating with the CNB in good faith, others are less receptive and/or place obstacles in the way.

The CNB's main tasks also include ensuring that family members have the right to participate in the search process and producing reports and notification of relatives when disappeared persons are located, whether dead or alive. The CNB also manages and provides input to databases and lists including the National Directory of Immediate Search Links and Contacts, the Unified Logbook of Individualized Search Actions, and the National Register of Disappeared and Missing Persons. It also provides input to the National Register of Mass and Clandestine Graves (RNFCFC, after its Spanish acronym).

## Forensic and investigative capabilities

Mexico faces a serious forensic services crisis, due in part to large numbers of unidentified sets of human remains awaiting identification. This complicates the

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<sup>104</sup> Information extracted from the official CNB web page, <https://www.gob.mx/cnb>, last accessed 1 January 2022.

work of the relevant institutions, who also face a chronic shortage of the lack of the necessary technical, human, and financial resources. According to a March 2020 analysis by the US-based NGO WOLA, the Washington Office on Latin America, “government facilities currently house a backlog of over 37,000 bodies and an unknown number of bone fragments—a total that likely extends into the hundreds of thousands—that have yet to be processed and identified.”<sup>105</sup> Given this reality, relatives and other campaigners for more effective action on disappearance lobbied over a two-year period to obtain for special procedures and facilities for forensic work dedicated to the search for and identification of disappeared persons. Following a public hearing before the Inter-American Commission on Human Rights (IACHR), and meetings between families of disappearance victims, civil society, international organizations, international cooperation agencies, and federal authorities, an agreement was reached to create the **Extraordinary Forensic Identification Mechanism (MEIF)**. The intention is to set the MEIF to work reducing the backlog of unidentified remains, some or many of which may prove to be those of deceased victims of disappearance. According to the text of the December 2019 Accord ordering its creation,<sup>106</sup> the Mechanism is to be a multidisciplinary government body connected to the National Search System. Operating with technical and scientific autonomy, the MEIF aims to recruit national and international experts from each of the specialized scientific disciplines relevant to forensic study of corpses or human remains. Specifically, its initial staffing structure is given as:

- Four forensic identification specialists
- A specialist in legal and juridical matters related to enforced disappearances, and disappearances perpetrated by non-State actors
- A specialist in international technical cooperation
- A specialist in providing psychosocial support and assistance to family members

As this report went to press, the process of forming the MEIF was still ongoing.

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105 Hinojosa & Meyer (2020, March) ‘Mexico Moves Forward with Efforts to Address Disappearances Crisis’, WOLA. Available at <https://www.wola.org/analysis/mexico-disappearances-lopez-obrador/>, last accessed 1 January 2022.

106 ‘ACUERDO SNBP/001/2019 por el que se aprueba la creación del Mecanismo Extraordinario de Identificación Forense’, see [http://www.dof.gob.mx/nota\\_detalle.php?codigo=5589797&fecha=19/03/2020](http://www.dof.gob.mx/nota_detalle.php?codigo=5589797&fecha=19/03/2020), last accessed 1 January 2022.

Once installed, the MEIF's main contribution to the forensic capabilities of the CNB is foreseen as being addressing the identification backlog, applying international standards and national and international best practice protocols.<sup>107</sup> Guidelines for cooperation, and for the operation of the MEIF, can be proposed by the Attorney General's Office,<sup>108</sup> which previously carried out what are now MEIF and/or CNB functions through specialized prosecutors' offices. Under the agreements, the actions of the MEIF will in future be afforded the same validity and status. For instance, it is envisaged that the MEIF will have the authority to conduct multidisciplinary expert analyses of bodies and other human remains awaiting identification. These may still be in clandestine graves, the location of which is known or suspected by the authorities, or may be already held by competent authorities in morgues, containers, ossuaries, overcrowded forensic institutes, or mass graves in cemeteries. If the necessary agreements were not in place, the MEIF would not be entitled to have access to the human remains, could not carry out expert analyses of them, and, above all, could not use them in related legal proceedings.

The fact that the current shortage of both space to store remains, and expertise to process them, is being addressed in this way by the CNB promises to be a significant step forward.<sup>109</sup> The hiring of national and international expert forensic anthropologists, archaeologists and etc. is also being complemented by direct international support to strengthen forensic capacity and search efforts in some Mexican states, provided by regionally and internationally renowned non-State forensic NGO the Fundación de Antropología Forense de Guatemala, FAFG.<sup>110</sup>

## Organization and human resources

No official documentation is available to date providing any more detail on the CNB's staffing than is set out in the general regulations laying out its structure and

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107 Including a forensics protocol drawn up between the country's prosecutorial office (at the time, the Procuraduría General de la República, replaced in 2018 by the Fiscalía General de la República) and national forensic science entity the Grupo Nacional de Servicios Periciales y Ciencias Forenses. The 'Protocolo para el Tratamiento e Identificación Forense' can be consulted on a range of state-level transparency websites, including: <https://transparencia.info.jalisco.gob.mx/sites/default/files/u509/PROTOCOLO%20PARA%20EL%20TRATAMIENTO%20E%20IDENTIFICACI%C3%93N%20FORENSE%20AUTORIZACION.pdf>, last accessed 1 January 2022.

108 And by any of the other institutions that make up an interagency consortium known as the National Conference of Justice Administration (Conferencia Nacional de Procuración de la Justicia).

109 Camacho, Fernando, 'Gobierno comienza a crear cementerios forenses: CNB' *La Jornada*, September 24, 2020.

110 Hinojosa & Meyer (2020) op. cit.

composition. However, the text of the 2017 General Law specifies that in addition to its necessary administrative structures, the CNB is to feature a specialized search group, as well as teams/ departments dedicated to Context Analysis, and to Information Management and Processing.<sup>111</sup> In accordance with Art. 51 of the same Law, the CNB is to be led by a Commissioner designated by the Mexican President. The Commissioner is part of the Ministry of the Interior (*Secretaría de Gobernación*), but acts with autonomy in his or her capacity as CNB head.

## Inter-institutional relations and coordination

Under the current legal framework, the search for disappeared or missing persons is a responsibility equally shouldered by all institutions of the Mexican State. It is envisaged that all must therefore deploy the necessary means to promptly carry out the actions required from them in searching for missing persons, and cooperating effectively with the CNB. The exact nature of the participation of each State institution of course differs according to its nature and powers. The Standardized Protocol for the Search for Disappeared and Non-Located Persons ('Protocolo Homologado para la Búsqueda de Personas Desaparecidas y No Localizadas', PHB, introduced in 2020) categorizes these other institutions or authorities as primary, transmitting, reporting, and/or disseminating.<sup>112</sup>

Primary authorities include, obviously, the search commissions, but also the justice system authorities, i.e., the Attorney General and Public Prosecutors' Offices, public security institution and forces, and courts which hear *habeas corpus* petitions or similar (*amparo* petitions) concerning disappearance or enforced disappearance. Primary authorities bear the brunt of the responsibility during search, as it falls to them to take proactive, coordinated steps to determine the whereabouts of missing and potentially disappeared persons, assist them if they are being held captive, are lost, or are in danger, and identify and return their remains to their relatives if they are found to have died. The term 'transmitting' authorities refers, on the other hand, to Mexican embassies and consulates, official human rights commissions, and municipal authorities designated to receive reports. The terminology echoes the fact that their role in search is to attend to victims or relatives who report cases, and communicate the information

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111 *Ley General en Materia de Desaparición Forzada...* op. cit., Article 58.

112 Protocolo Homologado para la Búsqueda de Personas Desaparecidas y No Localizadas. Available at: [https://dof.gob.mx/nota\\_detalle.php?codigo=5601905&fecha=06/10/2020](https://dof.gob.mx/nota_detalle.php?codigo=5601905&fecha=06/10/2020), last accessed 1 January 2022.

immediately to the primary authorities. ‘Reporting’ authorities, the third category, covers all authorities that in any way produce, store, or generate information relevant to the search for disappeared or missing persons, and/or identification of human remains. Examples include prisons, or services or offices that deal with tax, immigration, intelligence, electoral services, transportation, ports, roads, airports, shelters, orphanages, cemeteries, hospitals, banks, or health; public records offices, and victim support agencies. Finally, the CNB also coordinates with the ‘dissemination’ category of authorities, whose contribution is to spread messages to assist with searches.

This description of arrangements refers only to how the CNB, and the General Law that created it, envisage collaborative relationships with other entities of the Mexican State. There is currently little evidence beyond the anecdotal as to how this relationship works in practice. The fact that Mexico is a federal State makes the work of any national-level organization such as the CNB particularly complex. The CNB may, for example, be able strike up a close working relationship with the prosecutor’s office of a given state, but may find itself unable to achieve the same level of harmony with the main national-level office. Or the CNB may manage to agree on coordinated actions with the municipal police service in a particular state, only to find that the state police refuse to cooperate with the search actions assigned to them. In the last analysis, in Mexico as in any country, a successful search policy depends on the goodwill of the people at the head of the dozens of institutions whose contribution, however modest, may have a bearing on the search for the disappeared.

## Funding

The CNB’s annual budget was over 400 million Mexican pesos (Mex\$) for 2019 (approximately USD 20 million<sup>113</sup>), set to rise substantially in 2020 to Mex \$ 720 million (approximately USD 36 million), a third of which was assigned directly to CNB operating expenses, with the remainder earmarked for subsidizing such local (state-level) search commissions as had been set up by that date.<sup>114</sup> In 2021

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113 Note that the conversion of pesos to dollars was done for the purposes of this report using an online currency conversion tool.

114 Comisión Nacional de búsqueda (CNB), ‘Informe para el Comité contra las Desapariciones Forzadas de Naciones Unidas’, at 52, available at: <https://comisionacionaldebusqueda.gob.mx/wp-content/uploads/2022/03/CNB-Informe-CED-Espanol.pdf> last accessed 1 January 2022; see also Gobierno de México, ‘Compromiso del Gobierno de México búsqueda de personas en vida: Secretaria de Gobernación, Boletín No. 380/2019, available at <https://www.gob.mx/segob/prensa/compromiso-del-gobierno-de-mexico-busqueda-de-personas-en-vida-secretaria-de-gobernacion> last accessed 1

and 2022, the CNB's annual budget was just over Mex \$720 million (roughly USD 36 million), and Mex \$ 744 million (just under USD 38 million), respectively.<sup>115</sup> The budget increases that the CNB has received in the years since 2019 is the result of the fact that the it has steadily grown in size, and its work searching for Mexico's disappeared has steadily expanded and increased since its inception. However, this funding is still quite limited, and insufficient, given the extraordinary magnitude and complexity of Mexico's disappearance crisis and of the work that the CNB is tasked with.<sup>116</sup>

## Relationships with victims

The General Law follows international standards, and the practice of other countries, in establishing rights for individual and organized relatives' associations and their representatives, including the right to participate in search. This right encompasses, inter alia, being able to contribute information and have it promptly considered by the relevant authorities, sharing knowledge and experience, suggesting search actions, assisting in field search, and giving an opinion on the planning and logistics of searches. The law also establishes the right of the relatives to be informed immediately, and on an ongoing basis, about what search actions are being undertaken to find their disappeared or missing relatives.

One facet of the CNB that has undoubtedly marked a step change in Mexico's official narrative about disappearance since its creation is that the Commission understands the need to facilitate participation of families. At the same time, the CNB has demonstrated that it appreciates that participation is not a requirement, and that the obligation to carry out search actions persists independently of levels of involvement or inaction by relatives. This is significant, as there is a widespread and correct perception that when search responsibilities were the sole prerogative of the public prosecutors' offices, search actions were rarely if ever implemented without constant urging from families, who therefore came under considerable pressure to provide leads and information. Relatives have, by contrast, been supported by the work of the CNB, which provides assistance ranging from

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January 2022; and see: Source: press report (MVS Noticias), at December 25, 2019.

115 Eduardo Ortega, 'A la Comisión Nacional de Búsqueda le dan ligero aumento', *El Financiero*, 16 November 2021, available at <https://www.elfinanciero.com.mx/nacional/2021/11/16/a-la-comision-nacional-de-busqueda-le-dan-ligero-aumento/> last accessed 1 January 2022.

116 Eduardo Ortega, 'A la Comisión Nacional de Búsqueda le dan ligero aumento', *El Financiero*, 16 November 2021, available at <https://www.elfinanciero.com.mx/nacional/2021/11/16/a-la-comision-nacional-de-busqueda-le-dan-ligero-aumento/> last accessed 1 January 2022.

material resources to local police escorts. The latter is crucial because, in Mexico, search often involves entering territories controlled by organized crime.

Victims' groups are also pushing for a balance between efforts to search for clandestine graves, and strategies to search for victims while still alive. According to Hinojosa and Meyer, also cited above:

[F]amilies have called on the government to not neglect searching for victims who may still be alive. This should include strengthening the capacities of local authorities to rapidly respond to missing or disappeared persons' reports, and overturning certain State protocols that recommend authorities wait several hours to initiate a search after receiving a report. It should also include doubling down on searches and investigations related to criminal networks known to forcibly recruit victims into working for them.<sup>117</sup>

### **2.3. Peru: Office for the Search for Disappeared Persons (Dirección General de Búsqueda de Personas Desaparecidas, DGBPD)**

In Peru, the State's search for the disappeared is limited to disappearances that occurred during the internal armed conflict that took place between 1980 and 2000. The conflict pitted two avowedly left-wing insurgent movements against State forces. The movements emerged in and after 1980, when Peru was transitioning from over a decade of military rule toward a period of formally democratic government. 1980 saw the irruption of Sendero Luminoso, Shining Path, a millenarist group, drawing on Maoist ideas, which sought to dissolve existing State structures in favor of an indigenist agrarian utopia. The smaller of the two groups, the Movimiento Revolucionario Tupac Amaru, MRTA, closer to the profile of other Latin American left-wing guerrilla movements of the time, began its armed campaign in 1984. In response, the Peruvian State under successive governments launched a campaign of so-called 'counter-insurgent' violence involving lethal, often apparently indiscriminate, force and grave and systematic human rights violations including massacres, extrajudicial executions, and enforced disappearances.<sup>118</sup>

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<sup>117</sup> Hinojosa & Meyer (2020) op. cit.

<sup>118</sup> Jo-Marie Burt (2018) 'Transitional Justice in the Aftermath of Civil Conflict: Lessons from Peru, Guatemala and El Salvador', Washington: Due Process of Law Foundation.



Relatives of students disappeared and murdered at La Cantuta university in Lima, during the government of former Peru's President Alberto Fujimori, hold candles at a protest in Lima, Sept, 19, 2007. (AP Photo/Karel Navarro)

Some of the most brutal violations occurred under the increasingly authoritarian government of Alberto Fujimori (1990-2000). Elected in 1990 during a period of economic crisis and mounting violence, Fujimori campaigned as a populist “strongman,” convincing the public that he could bring stability to Peru. In 1992, just two years after being voted into office, Fujimori suspended the Constitution, dissolved Congress, and took control of the judicial branch, all with the support of the Armed Forces. He began to centralize power in his own hands, stifling dissent and freedom of expression by portraying all opposition as ‘terrorist’. While retaining some of the trappings of a democratic State, Peru under Fujimori became an essentially authoritarian regime unleashing repression against all those it perceived or constructed as a threat. The regime utilized clandestine death squads, made up of military men, to carry out some of its most brutal violations. One such group, Grupo Colina, acted under the orders of the military high command, itself reporting directly to Fujimori. The Grupo Colina was responsible for some of the most notorious massacres and enforced disappearances of the entire conflict period, including the high-profile Barrios Altos massacre, and the disappearance and killing of nine students and a professor from La Cantuta university.<sup>119</sup>

Fujimori manipulated electoral and constitutional rules to have himself “re-elected” in the year 2000. But his third term in office never materialized: mounting corruption scandals triggered mass protest, and the legislature declared him unfit to lead the country. The regime collapsed, and Fujimori fled the country. Victims’ and relatives’ associations, and the human rights movement in general, began to mobilize and lobby the interim administration, led by President Valentín Paniagua (2000-2001), for the creation of a truth commission that would investigate the abuses committed during the conflict. In 2001, Peru’s official truth commission (Comisión de la Verdad y Reconciliación, CVR) was established. Its final report, published in 2003, contained careful statistical projections estimating that just under 70,000 people had been killed and disappeared during the conflict.<sup>120</sup> It documented many other serious, widespread, and systematic human rights violations by Peruvian State forces, and violations of international humanitarian

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119 Burt (2018) op. cit., p. 14

120 Comisión de la Verdad y Reconciliación (CVR) (2003) ‘Informe Final’, 9 vols. Lima: CVR. Available to download at <https://www.cverdad.org.pe/ifinal/>, last accessed 1 January 2022. . For an abbreviated version in English, see ‘Hatun Willakuy: Abbreviated Version of the Final Report of the Truth and Reconciliation Commission’, <https://www.ictj.org/peru-hatun-willakuy-en/>, last accessed 1 January 2022.

law committed by members of Shining Path and the MRTA.<sup>121</sup> The report stated that “the practice of enforced disappearance became more prevalent from 1983, when the Armed Forces took over from the police in keeping domestic order and combating subversion.”<sup>122</sup> The CVR documented 8,558 cases of disappeared persons and listed 4,644 potential burial sites as requiring investigation.<sup>123</sup> The Public Prosecution Service (*Ministerio Público*) subsequently adopted a working total of over 15,000 disappeared persons,<sup>124</sup> while today’s official register contains over 20,000 names.<sup>125</sup>

In June 2016, following many years of advocacy from victims’ families and civil society organizations,<sup>126</sup> Peru’s then-president Ollanta Humala (2011-2016) signed into law Ley 30470, “Law on the Search for Persons Disappeared during

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121 Amnesty International (2013) ‘Perú: Cuatro testimonios a diez años del Informe Final de la Comisión de la Verdad y Reconciliación’.

122 Comisión de la Verdad y Reconciliación (CVR) (2003), op. Cit. Tomo VI, Sección cuarta: los crímenes y violaciones de los derechos humanos, Capítulo 1: Patrones en la perpetración de los crímenes y de las violaciones de los derechos humanos., p. 57. Available at <https://www.cverdad.org.pe/ifinal/>

123 República de Perú, Defensoría del Pueblo, (2013) ‘Resumen Ejecutivo: Informe Defensorial No. 162, “A diez años de verdad, justicia y reparación. Avances, retrocesos y desafíos de un proceso inconcluso”’, Lima: Defensoría del Pueblo. Capítulo III, para. 1. Available at: [https://www.verdadyreconciliacionperu.com/admin/files/articulos/1771\\_digitalizacion.pdf](https://www.verdadyreconciliacionperu.com/admin/files/articulos/1771_digitalizacion.pdf) last accessed 1 January 2022.

124 Jave, Iris (2018, October 23) ‘La Búsqueda de personas desaparecidas: una experiencia de acción política de las víctimas’, Lima: Instituto de Democracia y Derechos Humanos de la Pontificia Universidad Católica del Perú (IDEHPUCP). Available at: <https://idehpucp.pucp.edu.pe/analisis/la-busqueda-de-personas-desaparecidas-una-experiencia-de-accion-politicas-de-las-victimas-por-iris-jave/> , last accessed 1 January 2022.

125 Jave (2018) op. cit. The register is maintained by dedicated national search agency the DGBP: see below.

126 Peruvian civil society groups including non-State forensic team the Equipo Peruano de Antropología Forense (EPAF), and national human rights consortium the Coordinadora Nacional de Derechos Humanos, met regularly with representatives of national ombudsman’s office the Defensoría del Pueblo, and international organizations including the International Committee of the Red Cross, over a period of years, to develop concrete proposals for a comprehensive humanitarian law, and accompanying public policy actions, to address the legacy of disappearance and enforced disappearance. For a full and instructive account (in Spanish) see Jave, Iris et. al. (2018) ‘Organizaciones de víctimas y políticas de justicia: Construyendo un enfoque humanitario para la búsqueda de personas desaparecidas’. Lima: IDEHPUCP. Available at: [https://cdn01.pucp.education/idehpucp/wp-content/uploads/2018/10/25164640/ford-anfasep\\_1pagina-final-isbn.pdf](https://cdn01.pucp.education/idehpucp/wp-content/uploads/2018/10/25164640/ford-anfasep_1pagina-final-isbn.pdf) , last accessed 1 January 2022. The UN Working Group on Enforced or Involuntary Disappearances had also previously recommended a law of this nature, and a draft bill had been presented before Peru’s Council of Ministers in May 2014. However it took three more years, and the process described above, before a law was finally passed.

the Period of Violence from 1980–2000”,<sup>127</sup> as almost the last official act of his term in office. Ley 30470 introduced a specifically humanitarian<sup>128</sup> mode of search, one that would initiate and coordinate actions in search, recovery, analysis, identification, and, where relevant, the restoration of human remains to families. The law also charged the Ministry of Justice and Human Rights with responsibility for approving, implementing, and monitoring a national search plan “with a humanitarian focus”.<sup>129</sup> This was to operate parallel to and separate from decisions about prosecution: “neither advancing nor impeding” (*[sin] alentar [ni] dificultar*) the determination of criminal responsibility.<sup>130</sup> The enactment of Law 30470 signified a paradigm shift in State intervention. Previously in Peru, as elsewhere, the search for the disappeared had taken place, if at all, at the initiative of the public prosecutor. This meant search had been conditioned on, and/or oriented toward, identification and prosecution of perpetrators.<sup>131</sup> Law 30470 was accordingly perceived by relatives’ associations as a significant step forward. The subsequent creation of a dedicated new official entity, the Office for the Search for Disappeared Persons (Dirección General de Búsqueda de Personas Desaparecidas, DGBPD), was especially welcomed.<sup>132</sup>

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127 Ley 30470, ‘Ley de Búsqueda de Personas Desaparecidas durante el Periodo de Violencia 1980-2000’, available at <https://www.leyes.congreso.gob.pe/Documentos/Leyes/30470.pdf>, last accessed 1 January 2022.

128 i.e. a mode emphasizing search and recovery, parallel to and separate from judicial investigation aimed at prosecution.

129 Ley 30470, Art. 4. Article 2a of the same Law defines ‘humanitarian focus’ as “attention centered on the alleviation of suffering and uncertainty, and [on] family members’ need for answers”, spelling out that “prioritization” is to be understood as “orienting search to the recovery, identification, restitution, and dignified burial of the mortal remains of disappeared persons, in such a manner as to produce a reparatory effect for families”. Editor’s translation.

130 Ley 30470, Art. 2a.

131 The year 2000, when the Fujimori regime collapsed, saw a sharp increase in reports of irregular or clandestine burial sites in some of the regions hit hardest by the internal armed conflict (including Ayacucho and Huánuco). The rise in denunciations can be attributed in part to the emergence, in the transitional period, of dedicated bodies or institutions able and open to receiving such reports (e.g. the truth commission, and newly-created specialized human rights prosecutors’ offices). In this way, the Attorney General’s Office, overseeing the public prosecution service, became directly involved in the search for the disappeared almost two decades after mass disappearances had first begun. The Office took on major forensic investigations, including the cases of Pampas, Tayacaja, and Churcampa in the Huancavelica region of the country.

132 Law 30470 had not specifically contemplated or mandated a dedicated new institution: its terms only require the Ministry of Justice and Human Rights to create a national search plan.

## Mandate, key powers, and characteristics

The DGBPD, which operates within the Ministry of Justice and Human Rights, adopted the stated purpose of Law 30470, which was, as we have seen, to create a priority humanitarian approach to the search for persons disappeared during the period of violence between 1980 and 2000. In pursuit of the objectives laid down in the Law, the DGBPD was granted the following powers and functions:

The DGBPD is responsible for the design, execution, and evaluation of the National Plan for the Search for Disappeared Persons,<sup>133</sup> and the administration of the National Register of Missing Persons and Burial Sites (Registro Nacional de Búsqueda de Personas Desaparecidas, RENADE). It also manages the participation of family members in search and provides them with psychosocial and practical support. It is also charged with improving State infrastructure and human and technical resources needed for search and support.

The operating definition of disappearance as set down in Law 30470 is connected specifically to the internal armed conflict, but is otherwise drawn widely, covering all persons whose whereabouts are unknown by their relatives, or about whose fate or location there is no legal certainty, owing to the period of violence between 1980 and 2000.<sup>134</sup> The DGPBD operates nationwide, and there are no time restrictions on its institutional lifespan.

The DGBPD has chosen to break the search process down into three stages, which it calls “humanitarian investigation”; “joint intervention”, and “closure”.<sup>135</sup> The humanitarian investigation, conducted entirely by the DGBPD, aims to establish the ultimate fate of a disappeared person by actions such as researching context; collating information; contacting relatives and local authorities; visiting the area in question; identifying possible current whereabouts or burial sites, as applicable, and collecting biological samples. The samples, collected from relatives and from recovered remains, are transformed into genetic profiles for purposes of identification. The second stage, joint intervention, involves collaboration between the DGBPD, the Office of the Public Prosecutor, and forensic teams,

133 Plan Nacional para la Búsqueda de Personas Desaparecidas. See [https://www.minjus.gob.pe/wp-content/uploads/2017/01/Plan\\_busqueda\\_personas\\_desaparecidas.pdf](https://www.minjus.gob.pe/wp-content/uploads/2017/01/Plan_busqueda_personas_desaparecidas.pdf). Last accessed 1 January 2022

134 Ley 30470, art. 2 (b), editor’s translation.

135 “[I]nvestigación humanitaria, intervención conjunta y cierre del proceso”. Description of the DGBPD provided on the Ministry of Justice website at <https://www.gob.pe/11866-ministerio-de-justicia-y-derechos-humanos-direccion-general-de-busqueda-de-personas-desaparecidas>, last accessed 1 January 2022

for recovery, analysis, and identification of remains, where applicable. The third stage, closure, involves the dignified restoration of remains to families, where disappeared persons have been found to be deceased; or family reunification, where disappeared personas have been traced alive.<sup>136</sup>

## Forensic and investigative capabilities

One noteworthy feature of Peru's institutional search design is that forensic work is not conducted directly by the search body – i.e., the DGBPD – but instead falls under the Office of the Prosecutor General, i.e., the State institution that previously had sole responsibility for search, carried out in a judicial mode. After the end of the conflict and the fall of the Fujimori regime, the Office of the Prosecutor General set up a dedicated system for cases of disappearance and enforced disappearance. The Office of the Special Prosecutor for Enforced Disappearances, Extrajudicial Executions, and Exhumation of Clandestine Graves was set up in April 2002, operating from the capital, Lima, with nationwide jurisdiction. In 2003, a corresponding specialized forensic team (the Equipo Forense Especializado, EFE) was established within the existing national forensic institute, the Institute of Legal Medicine and Forensic Sciences. EFE's main function was to handle exhumation requests from the two most directly relevant special prosecutorial offices: the Special Prosecutor for Human Rights Crimes and the Office of the Special Prosecutor for Enforced Disappearances, Extrajudicial Executions, and Exhumation of Clandestine Graves. EFE did not, however, handle requests from ordinary district prosecutors' offices, meaning it was rarely deployed in the regions most affected by disappearance. Also, EFE's work was subject to the same judicially-focused logic as the prosecutors' offices that it served, i.e., was carried out in the service of identifying perpetrators and/or providing evidence that could be used in criminal prosecutions.

The DGBPD has managed to establish productive lines of coordination with the prosecutors' offices, which are still charged with operating a judicial response to disappearance and enforced disappearance. This coordination between judicial and humanitarian modes of search was enhanced in 2017 by the directive that established the three-phase search process referred to above, whereby

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136 Barriga, Mónica (2020, August 25), 'La búsqueda de personas desaparecidas con enfoque humanitario: un balance de la política pública (I)' Lima: IDEHPUCP. Available at: <https://idehpucp.pucp.edu.pe/notas-informativas/la-busqueda-de-personas-desaparecidas-con-enfoque-humanitario-un-balance-de-la-politica-publica-i/>, last accessed 1 January 2022. At the time the article was written, Ms. Barriga was Director-General of the DGBPD.

cooperation between the DGBPD and the Office of the Prosecutor comes about during stage two, “joint intervention”. Once a particular case reaches this stage, the Office of the Prosecutor General assigns a lead prosecutor to it. The prosecutor, in turn, designates a forensic team that will assist the DGBPD in identification and exhumation, where required. Finally, if a body is recovered, the DGBPD takes responsibility for ongoing psychosocial and other family support, and the prosecutor’s office closes its case.

Stage two is perhaps the most challenging phase of the process, as recovery, analysis, identification, and restitution of remains require close inter-institutional coordination, which does not always go smoothly. Although the establishing of formal cooperation agreements between the respective institutions has represented a major step forward, there is still a great deal of resistance at the operational level and a widespread lack of knowledge about the existence and content of the relevant directives and agreements.<sup>137</sup>

A specific aspect of forensic capacity that does fall under the direct control of the DGBPD is the genetic data bank, Banco de Datos Genéticos, set up in 2019 under the terms of Legislative Decree No. 1398, and its accompanying regulations (Decreto Supremo N° 014-2018-JUS), both passed in 2018. The creation of this dedicated genetic databank represented a significant advance, allowing the DGBPD to begin collecting and storing reference samples from relatives of the disappeared. Given the time that has elapsed since the conflict, many of these relatives are now elderly, making it crucial to act now in order to obtain their samples during the lifespan of direct family members of those still disappeared Susana Cori Ascona, Head of the Disappeared Persons Program of the International Committee of the Red Cross, ICRC, points out that the importance of the databank lies in its capacity “store centrally, and in one place, genetic information from relatives and from [still-unidentified] bodies recovered during the search process,” since otherwise “the passage of time can make it impossible to identify more missing persons”.<sup>138</sup>

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137 Monica Barriga, former Director-General of the DGBPD, Interview for this report.

138 International Committee of the Red Cross, “Perú: nuevo Banco de Datos Genéticos trae esperanza a familiares de personas desaparecidas,” October 3, 2018, available at: <https://www.icrc.org/es/document/peru-nuevo-banco-de-datos-geneticos-trae-esperanza-familiares-de-personas-desaparecidas> or <https://reliefweb.int/report/peru/nuevo-banco-de-datos-gen-ticos-trae-esperanza-familiares-de-personas-desaparecidas>

## Organization and human resources

At time of writing, the DGBPD had a workforce of 30 people: 17 in Lima, and 13 in other regions of the country. Its multidisciplinary team includes specialists in law, anthropology, sociology, history, archaeology, and biology, alongside administrative and support staff. All the operational staff are experienced in working with victims and/or in forensic investigation.

## Inter-institutional relations and coordination

The functional separation of search investigations and associated forensic tasks distinguishes the Peruvian setup from the Mexican and Colombian dedicated search mechanisms discussed elsewhere in this study, which, as we have seen, concentrate all the disciplines involved in search and identification of disappeared persons into a single institution. One possible advantage of the Peruvian design is that there is greater clarity about the specific powers that correspond to each institution. However, it also creates a more pronounced need for coordination, and especially for cooperation between the DGBPD, the Office of the Prosecutor General, and forensic services.

## Funding

In contrast to Colombia, whose search mechanism manages its own resources, Peru's DGBPD mechanism is funded via the regular national budget allocation to the public entities involved (Ministry of Justice and Human Rights, etc.). However, the search for the disappeared has not been made a priority within these entities, by any of Peru's post-2000 administrations. This same relative neglect of post-conflict issues in general, and of the question of the disappeared in particular, is also reflected more widely in State structures, public policy planning and goal-setting, and overall national budget priorities. Peru's National Center for Strategic Planning (CEPLAN) has no explicit goal related to assisting victims of the internal armed conflict or otherwise addressing its aftermath. This has a negative impact on the willingness of regional and local governments when asked, for example, to handle the logistics for burial ceremonies of recovered and restored remains. Three specific entities whose duties have a bearing on matters concerning the disappeared have also suffered reductions to their budgets in recent years.<sup>139</sup>

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<sup>139</sup> Namely, the Public Prosecution Service and the national Ombudsperson's office, whose roles have already been described, plus 'CMAN', a multisectorial commission whose function is to oversee the implementation of reparations to victims of the internal armed conflict.

Due to the COVID-19 pandemic, the original annual budget of the DGPD has also been substantially reduced. The ongoing impact of the pandemic, plus additional possible mid-term effects of the turbulent political situation prevailing in the country at time of writing, make it difficult to predict what budget allocation is likely for 2022, and what operating conditions the DGBPD will be forced to navigate.<sup>140</sup>

## Relationship with victims

The State's actions in the search for disappeared persons have tended to be focused in the capital, Lima, in keeping with a long-running tendency to centralism. They have also clustered around Ayacucho, the region where the conflict was at its most concentrated and where the largest number of cases have been reported. However, over 10,100 cases in other regions of the country are still awaiting the initiation of a search process. Relatives of victims of disappearance have repeatedly requested searches in the most heavily affected of these 'other' areas, such as Junín (2976 cases), Huánuco (2530 cases), San Martín (1206 cases), and Huancavelica (1048 cases).<sup>141</sup> Thus, although the recent creation of the genetic data bank has created positive expectations, there is a need for the State to further improve its investigative work and search, and to do better in encouraging the participation of family members.

### **2.4. El Salvador: The National Commission on the Search for Adults Disappeared during the Armed Conflict, CONABÚSQUEDA, and the National Commission on the Search for Children Disappeared during the Internal Armed Conflict in El Salvador, CNB.**

Enforced disappearance as a repressive practice deployed by the State against political opponents began to be used systematically in El Salvador in the mid-1970s. It later became part of the "counterinsurgency" strategy for the elimination of perceived political opponents, during the 1980-1992 internal armed conflict

<sup>140</sup> A closely fought presidential election in mid-2021 led to a protracted standoff between Keiko Fujimori, daughter of imprisoned former autocrat Alberto Fujimori, and grassroots socialist candidate Pedro Castillo, who was finally confirmed as the winner.

<sup>141</sup> According to a report on relatives' expectations, co-edited by Iris Jave and Gisela Ortiz and subscribed to by a range of relatives' associations. See Ortiz and Jave (eds.), 2019, February), 'Informe sobre las expectativas de los familiares de víctimas respecto de la implementación de la Ley de búsqueda de personas desaparecidas en el periodo de violencia (1980 – 2000)'. Joint publication of IDEHPUCP and the Equipo Peruano de Antropología Forense, EPAF. Available at: <https://cdn01.pucp.edu.pe/idehpucp/wp-content/uploads/2019/03/19171025/informe-encuentro-de-actores-sociales.pdf>, last accessed 1 January 2022.



Relatives pay tribute to their loved ones killed or disappeared in the war in El Salvador, at the Victims memorial, in San Salvador, El Salvador. At least 75,000 people were executed in the conflict between the government and the guerrillas that devastated the country from 1980 to 1992. (Léonor Arteaga / DPLF)

between State forces – supported by far-right paramilitary groups and death squads - and left-wing armed guerilla movements grouped under the banner of the Frente Farabundo Martí para la Liberación Nacional, FMLN ('Farabundo Martí National Liberation Front'). Between 1970 and 1992, thousands of people were disappeared in El Salvador. Hundreds of accounts from survivors and victims' relatives, compiled and investigated by national and international human rights organizations, show common features: targeted disappearances, often in urban settings, saw heavily armed men, sometimes in uniform, sometimes in civilian dress—abducting victims without warning from their homes, outside their workplaces, or at roadblocks; victims deprived of their liberty with no arrest warrant – abducted, in other words - and forcibly taken in military or private vehicles to unknown destination. What followed was the classic denial of information that is part of the crime of enforced disappearance: no authority would acknowledge the detentions, or provide any information on the whereabouts of victims, exacerbating families' uncertainty and suffering. A second strand or pattern of enforced disappearance, occurring in El Salvador as in Peru and elsewhere, consists of the disappearance of groups of people, including family groups, during so-called "scorched earth" military operations in rural areas, in which the army massacred thousands of civilians. This form of enforced disappearance has similar psychosocial, family, and community-level effects to the other, more individually targeted, form described.

Among the most appalling human rights violations committed during the conflict was the abduction and appropriation of children, often specifically the sons and daughters of individuals who were persecuted, disappeared, or killed by State agents. The vast majority of these abducted children were kept alive,<sup>142</sup> and their birth identities were erased and replaced. Some were later appropriated by perpetrators into their own families; given to other families who falsely registered them as their own; or put up for pseudo-legal adoption, either in El Salvador or abroad, through the institutions responsible for organizing adoptions at the time.

This State-perpetrated enforced disappearance of children in El Salvador reached its height between 1980 and 1984.<sup>143</sup> The majority of children disappeared in

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142 According to information from the National Commission for the Search for Children Disappeared during the Internal Armed Conflict in El Salvador, CNB, in 70% of the cases of disappeared children that were resolved, the victims were found alive.

143 Asociación Pro-Búsqueda de Niños y Niñas Desaparecidos (henceforth, 'Asociación Pro-Búsqueda') (n.d.) 'Informe sobre El Salvador ante la Comisión Interamericana de Derechos Humanos, La Actuación del Estado de El Salvador en la problemática de la niñez desaparecida a consecuencia del conflicto armado', p. 8. See also Mejía, Azucena (2003), *La Paz en Construcción: un estudio sobre la problemática de la niñez*

this way were quite young, as children of this age were generally less able to hide, escape or protect themselves. Younger children were also less likely to be considered a threat by the armed forces.<sup>144</sup> In addition to these enforced disappearances carried out by State agents, some cases of child disappearance have also been attributed to the FMLN. These disappearances had a distinctive nature: the FMLN used kidnapped or abducted children as a cover for clandestine activities in safe houses,<sup>145</sup> or sometimes as so-called “mail children”: messengers sent to carry communications to the front lines of the conflict. Although these child abductions and disappearances were far less numerous than those committed by the armed forces, they took an equally heavy emotional and psychological toll on the children’s families and communities.

On January 16, 1992, the ‘Chapultepec’ peace accords were signed between the Salvadoran government and the FMLN, officially putting an end to El Salvador’s 12-year internal armed conflict. The peace agreement, supported by the United Nations, contained immediate measures aimed at bringing the open phase of conflict to an end –such as disarmament, demobilization, and reintegration of combatants –as well as numerous measures for legal, judicial, and security services reform.<sup>146</sup> Some of the long-term reform measures were however never implemented, while others were only implemented much later. Among the transitional justice measures adopted in El Salvador following the end of the internal conflict, with varying degrees of success, were a vetting process for public officials, a land restitution program, and judicial and security sector reforms, and a truth commission.<sup>147</sup>

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*desaparecida por el conflicto armado en El Salvador*, San Salvador: Asociación Pro-Búsqueda, p. 25.

144 Mejía, Azucena (2003), *La Paz en Construcción...*, op. cit., p. 16.

145 Safe houses sheltered members of insurgent groups, allowing them to evade detection and continue their activities. The presence of young children was used to simulate a family home, in an effort to avoid suspicion.

146 The 1992 Chapultepec Peace Accords contained provisions for a cease-fire; the demobilization of regular army and guerrilla forces; the conversion of the FMLN into a political party and the reintegration of its combatants into society; reduction, streamlining and other changes in the armed forces; the creation of a new, de-militarized national civilian police force and intelligence service; the creation of human rights infrastructure including a Human Rights Ombudsperson’s Office; electoral and judicial reforms; legal, including constitutional, change including to enshrine human rights protections; and limited social and economic programs primarily benefiting members of the demobilized combatant forces and war-ravaged communities. See Chapultepec Agreement, Chapter V, Economic and Social Questions, available in official translation at <https://peacemaker.un.org/elsalvador-chapultepec92>, last accessed 1 January 2022.

147 For a more detailed discussion of El Salvador’s transitional justice process and efforts to combat

El Salvador's Truth Commission, provided for in the country's 1991 and 1992 peace accords, was tasked with investigating the "serious acts of violence" committed during the conflict whose "impact on society urgently demands that the public should know the truth."<sup>148</sup> The Commission, established in July 1992, was made up of international commissioners and staff, an effort to ensure objectivity and the safety of the commission, as El Salvador remained extremely polarized.<sup>149</sup> The Truth Commission operated under severe time constraints and faced significant challenges: it was initially given only six months to carry out its work (later extended for two more months), and powerful sectors of society with valuable information, such as those with military connections, were openly hostile to the Commission's work. In spite of these challenges, the Truth Commission was able to document a significant, though far from comprehensive, number of the atrocities that took place during the conflict. The Commission recorded 3,880 cases of enforced disappearance based on primary sources, and 1,057 cases of enforced disappearance based on secondary sources, between 1980 and 1992 in the context of the internal armed conflict<sup>150</sup>. The United Nations Working Group on Enforced or Involuntary Disappearances lists of 2,281 registered cases of enforced disappearances dating from the Salvadoran armed conflict, while human rights organizations have estimated the number of cases to be around 8,000<sup>151</sup>.

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impunity, see Daniel Cerqueira and Leonor Arteaga (2016) 'Challenging the Amnesty Law in El Salvador: Domestic and International Alternatives to Bring an End to Impunity', Washington: Due Process of Law Foundation, available at [https://www.dplf.org/sites/default/files/amnesty\\_law-final-24june.pdf](https://www.dplf.org/sites/default/files/amnesty_law-final-24june.pdf), last accessed 1 January 2022. See also Jo-Marie Burt (2018) 'Transitional Justice in the Aftermath'... op. cit.

148 UN Security Council (1993), 'Final report of the Commission on the Truth for El Salvador, "From Madness to Hope"' Section II, 'The Mandate'. UN Security Council doc. S/25500 (Official UN translation) (hereinafter El Salvador Truth Commission Report).

149 Priscilla Hayner (2010), *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*. New York: Routledge, 2<sup>nd</sup> edition.

150 These are the figures confirmed by CONABÚSQUEDA on the basis of information in the annexes published by the Truth Commission. CONABÚSQUEDA (2020, August), 'La Desaparición Forzada en el Contexto del Conflicto Armado de El Salvador: Una primera aproximación al fenómeno', San Salvador: CONABUSQUEDA, p. 53-55 available at: <https://en.calameo.com/read/003512072c3f70ba6a19d?fbclid=IwAR3-0cYIUJVO-rMJKZWChO9Hayutvg141YxjGaPaW0g4ySbwn9UIwzCzmE> (hereinafter CONABÚSQUEDA 2020), at 17, last accessed 1 January 2022. For a discussion of the Truth Commission's methodology, see El Salvador Truth Commission Report, op. cit., at 17.

151 CONABUSQUEDA has determined that this figure is not at this time empirically supported, although many organizations do have files on cases of disappearances. Determining the exact number of people disappeared in the war is a pending task in El Salvador, and CONABÚSQUEDA is working on its own registry, using different sources. CONABÚSQUEDA 2020, op. cit., at 53-55..

Although enforced disappearance was a systematic, institutional practice during the war, the State allowed these grave acts to go unpunished for decades by denying their occurrence and covering for perpetrators. Nor did it take any action to search for the disappeared. It was not until years later, following years of advocacy from victims and civil society, that the Salvadoran government began to engage in dialogue with victims, experts, and civil society to address the massive human rights violations committed during the armed conflict. Change began to be visible in 2009, the year in which the FMLN, now a political party, became the largest single party in the country's legislature and took the presidency, both for the first time.<sup>152</sup> In 2010, then-President Mauricio Funes, in his capacity as Head of State, publicly and officially acknowledged the State's responsibility for the grave human rights violations committed during El Salvador's internal conflict.<sup>153</sup> Following this acknowledgment, the government established two national mechanisms (commissions) to search for persons forcibly disappeared during the conflict. One mechanism, to search for disappeared children, was set up in 2010 in response to an Inter-American Court of Human Rights ruling. Later, in 2017, a separate mechanism was created to search for adult victims of disappearance. While not explicitly contemplated in the Peace Accords, the creation of these mechanisms was a major step forward for transitional justice and the peace process in El Salvador. The commissions, unified into a single mechanism in 2018 (see below), are still in operation today despite ongoing challenges and limited resources.

## The National Commission on the Search for Children, CNB

In 2010, the National Commission on the Search for Children Disappeared during the Internal Armed Conflict in El Salvador (Comisión Nacional de Búsqueda de Niñas y Niños Desaparecidos durante el Conflicto Armado Interno de El Salvador, CNB, henceforth 'National Commission on the Search for Children' or CNB) was created by executive decree.<sup>154</sup> The decree came about in response to a reparations

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152 The FMLN is a left-wing political party founded by former members of the FMLN guerrilla group. Its platform in the 2009 elections included a promise of reconciliation regarding the aftermath of the internal armed conflict.

153 In addition to this general public recognition, the State also acknowledged responsibility and issued public apologies for certain notorious incidents, including the massacres of El Calabozo, Las Canoas, and San Francisco Angulo, and the 1980 assassination of Archbishop Oscar Romero.

154 Executive Decree No. 5, of January 15, 2010, subsequently amended (regarding civil society representation, independence and co-operation, and duration) by Executive Decrees No. 45, of April 9, 2010; No. 133, of August 31, 2011, and No. 18 of February 19, 2014.

measure ordered by the Inter-American Court of Human Rights in its judgment in the *Serrano Cruz* case: requiring El Salvador to set up “... a national commission, to trace the young people who disappeared when they were children during the armed conflict, with the participation of civil society”.<sup>155</sup> The subsequent decree made it the mission of the CNB to investigate and determine the whereabouts and status of children who disappeared during the internal armed conflict in El Salvador, and promote family reunification while ensuring absolute respect for the dignity of the victims. The commission did not actually start work until 2011, since which time it has seen some important success in tracing children –now adults– still alive, and reuniting them or placing them back into contact with their families. The CNB’s resolution rate has averaged one case per month: as of end 2020, it had resolved 113 cases of children who disappeared during the conflict, and had 250 cases under active investigation.<sup>156</sup> By mid-June 2021, the open caseload had reached 367, with some cases opened ex officio, and others in response to requests from families of disappeared children and others ex officio. As a result of the Commission’s resolved cases, 38 young people have been reunited with their families face to face, with a further five reunifications carried out virtually, due to the COVID 19 pandemic.

The CNB is the longest-running experience of its kind in State-sponsored search for disappeared persons in these types of contexts in Latin America.<sup>157</sup> A pioneering institution in a number of ways, it has set an important precedent in the history of deploying ad hoc State mechanisms to search for and identify persons disappeared as the result of internal armed conflict. The CNB has used innovative methodologies to search for, identify, and, where necessary, exhume the bodies of disappeared children. It has also led the way in providing psychosocial accompaniment to families of the disappeared,<sup>158</sup> an experience that served as a solid foundation for the later creation and operation of CONABÚSQUEDA.

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155 Inter-American Court of Human Rights, *Serrano Cruz sisters vs. El Salvador* Merits, Reparations and Costs, Judgment of March 1, 2005, Series C, No. 120.

156 Héctor Rosemberg and Leonor Arteaga Rubio (2021, March 30), ‘La otra historia: el robo de niños y niñas en la Guerra de El Salvador’ Blog *Justicia en las Américas*, available at: <https://dplfblog.com/2021/03/30/la-otra-historia-el-robo-de-ninos-y-ninas-en-la-guerra-de-el-salvador/>, last accessed 1 January 2022.

157 Rosemberg and Arteaga, “La otra historia...”, op. cit.

158 Idem.

## CONABÚSQUEDA

In August 2017, following decades of advocacy and tireless struggle by the relatives of the disappeared and human rights organizations, the Salvadoran government created the National Commission on the Search for Adults Disappeared during the Armed Conflict in El Salvador (Comisión Nacional de Búsqueda de Personas Adultas Desaparecidas en el contexto del Conflicto Armado de El Salvador, CONABÚSQUEDA). The window of opportunity that led to the establishment of CONABÚSQUEDA came about in part due to the 2016 overturning, by the Supreme Court, of the 1992 blanket Amnesty Law that had done much to ensure impunity for conflict-related violations. The 2016 sea change allowed for renewed dialogue, creating new opportunities for clarifying the truth about the enforced disappearance of children and adults during the armed conflict, as about other serious human rights violations.<sup>159</sup>

CONABÚSQUEDA was set up as an independent entity, attached to the Ministry of Foreign Affairs but with functional (technical and administrative) autonomy. The fact that CONABÚSQUEDA was, like the CNB, created via executive decree<sup>160</sup> rather than by legislative statute nonetheless means that its continued existence and budget allocation depend on the will of each successive presidential administration. Its mandate is to “investigate and determine the whereabouts and status of adult victims of enforced disappearances during the internal armed conflict in El Salvador, and promote family reunification or the return of remains to their families, ensuring respect for the dignity of the victims”.<sup>161</sup> The mention of the return of remains as part of the mandate is read as also tasking CONABÚSQUEDA with exhumation and identification.

Three commissioners were appointed, *ad honorem*, and CONABÚSQUEDA opened its doors and began search operations in September 2018. Its budget is very limited, and local capacity in forensic genetics has proved insufficient for the new demands. While the previous experience of the CNB has been useful, as mentioned, CONABÚSQUEDA’s work and trajectory are distinctive in significant ways. First, there has been much more political will behind the search for

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159 Due Process of Law Foundation, (2018, April) ‘*La Comisión de búsqueda y la tarea de reconstruir la verdad*’, Washington: DPLF. Available at: [http://www.dplf.org/sites/default/files/la\\_comision\\_de\\_busqueda\\_y\\_la\\_tarea\\_de\\_reconstruir\\_la\\_verdad.pdf](http://www.dplf.org/sites/default/files/la_comision_de_busqueda_y_la_tarea_de_reconstruir_la_verdad.pdf), last accessed 1 January 2022.

160 Executive Decree No. 33, August 17, 2017.

161 Executive Decree No. 33, op. cit.

disappeared children in El Salvador than there has been for the corresponding search for adult victims. Due to the circumstances prevailing in each type of case, there is also a much greater chance that disappeared children may be traced alive. One positive sign for both mechanisms is that they have had greater support from civil society than many initiatives that were suggested in the immediate aftermath of the conflict, a change that constitutes a hopeful sign for search and for the broader transitional justice process.

In 2018, the Ministry of Foreign Affairs merged the functions of CONABÚSQUEDA and CNB into a single body, the 'Integrated Search Mechanism in El Salvador', via an internal agreement.<sup>162</sup> This has had positive impacts<sup>163</sup>, particularly in logistical and practical matters: given extremely limited resources, the sharing of staff, offices, and infrastructure has been especially useful. The merger has also, however, posed significant challenges, particularly for the objectives of CONABÚSQUEDA: the process of searching for and identifying adult victims of disappearance – almost all of whom are most likely deceased – is completely distinct from, and more complex than, the search for disappeared children, the majority of whom are alive.

## Mandate, key powers, and characteristics of CONABÚSQUEDA

Under its current legal framework, CONABÚSQUEDA's main responsibility is to investigate, on its own initiative or on request, enforced disappearances<sup>164</sup> that began during the internal armed conflict, in order to determine the location of adult victims of enforced disappearance, and to restore the person or their remains to their relatives.<sup>165</sup> CONABÚSQUEDA is to coordinate with other public institutions and with national or international non-State organizations to this end, and is also authorized to request information and inspect the records of executive branch institutions that may hold documents or information related to disappearance during the internal armed conflict, and/or the current whereabouts of persons disappeared. This applies especially to the records or archives of the intelligence

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162 Ministerial Agreement No. 1925, 2018.

163 Elsy Flores, General Coordinator of CNB and CONABUSQUEDA, Interview for this report.

164 Article 3 of CONABUSQUEDA's mandate refers to conducting searches for forced disappearances, but CONABUSQUEDA has also interpreted this mandate to include looking for people that disappeared at the hands of non-State actors as well, especially Salvadoran guerrilla forces during the Civil War. CONABÚSQUEDA 2020, op. cit.

165 Ibid.

services, the armed forces and police, detention centers, hospitals, or prisons that were in operation before January 16, 1992 (i.e., the date of the Chapultepec peace accords).

Importantly, as we will see below, CONABÚSQUEDA has the power to ask the Office of the Prosecutor General and the Office of the Human Rights Ombudsperson to issue any precautionary measures for protection or inspection that may be necessary to ensure the integrity of the search actions. This includes, for example, measures to preserve relevant information that is in danger of being altered, destroyed, or concealed. Regarding its obligations toward victims, CONABÚSQUEDA's mandate makes it responsible for maintaining regular communications with victims and/or relatives. It is also tasked with promoting national campaigns to raise awareness of the rights of victims of enforced disappearance; fostering academic and cultural exchanges, and undertaking other activities to publicize its mandate and preserve historical memory about the phenomenon of enforced disappearance, nationally and internationally.

In order to accomplish all of this, CONABÚSQUEDA is responsible for entering into technical and financial cooperation arrangements, both nationally and internationally, to enable its day-to-day operations. This task has proved to be a difficult administrative burden, given the Commission's limited human resources and the erratic financial situation it has had to face.

## Limitations of CONABÚSQUEDA's mandate

CONABÚSQUEDA's activities have nationwide reach, and it is headquartered in office space belonging to the Ministry of Foreign Affairs in the capital, San Salvador. The specifics of its mandate mean it is not asked or able to search for any and all missing persons: rather, it exists solely to establish the whereabouts of adults who were victims of enforced disappearances during the internal armed conflict that ended on January 16, 1992.

Although the institution's mandating decree establishes limits on the term of office of commissioners and staff, it is silent on the subject of the duration of the commission's mandate. CONABUSQUEDA itself has stated, in its publications, that it will have an indefinite term of operation in order to guarantee the continuity of the search processes it conducts, until its objectives are fully achieved.<sup>166</sup>

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166 CNB and CONABÚSQUEDA produce a regular joint publication, *Re-Cordis*, which reports on the search, location, and reunification work carried out by the two commissions.

One factor of uncertainty, already mentioned, is CONABÚSQUEDA's dependence on the executive branch, and specifically on the president, given its nature as an institution created and sustained by executive mandate. As well as introducing potential instability, this lack of legislative backing also means that only institutions dependent on the executive branch can be obliged to cooperate with CONABÚSQUEDA. This introduces an initial structural limitation on access to information, further exacerbated in practice because even those agencies and institutions that are dependent on the executive branch, do not cooperate even when required to do so. The Armed Forces have been particularly uncooperative over requests for access and information, whether made by CONABÚSQUEDA or others. One illustrative example concerns access to historical archives in possession of the Armed Forces, which they have been reluctant to open up even to the judicial branch. There is currently a major domestic criminal trial in course over the emblematic case of El Mozote, a 1981 massacre in which an elite, United States-trained, Salvadoran military unit murdered over 1,000 civilians in a single day.<sup>167</sup> Military officials prevented the trial court judge from entering military premises housing relevant historical archives.<sup>168</sup> The court later ordered the military to unseal the archives and allow for their inspection. It is clear that ensuring respect for, and compliance with, CONABÚSQUEDA's authority will be extremely difficult unless backed by political will from the president at the head of the executive branch.

## Investigative and forensic capabilities

CONABÚSQUEDA's most recent public report shows that until November 2021 there's 416 cases actively being investigated<sup>169</sup>. When broken down by gender, 78% of these cases were over people identified as men, with 22% corresponding to women. This is consonant with what is already known about patterns of enforced

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167 For more on El Mozote and the ongoing criminal case against 17 former military officers, see Cristosal, 'El Mozote', available at: <http://www.cristosal.org/el-mozote>; see also DPLF (2018, October 16) 'The El Mozote massacre trial: the decades-long search for justice in El Salvador continues', available at: <http://www.dplf.org/en/resources/el-mozote-massacre-trial-decades-long-search-justice-el-salvador-continues>. Last accessed 1 January 2022.

168 Arteaga, Leonor (2020, November), 'Caso El Mozote: la información militar secreta sobre crímenes de la guerra en El Salvador', *Diálogo Derechos Humanos*. Available at: <https://dialogoderechoshumanos.com/agenda-estado-de-derecho/caso-el-mozote-la-informacion-militar-secreta-sobre-crimenes-de-la-guerra-en-el-salvador>, last accessed 1 January 2022.

169 CONABUSQUEDA and CNB, *Re-Cordis—CNB: 10 años de reparaciones*, 16th Ed., No. 3, November 2021, available at: <https://t.co/pxdThnT86b>

disappearance during the conflict: the majority of direct victims were men.<sup>170</sup>

El Salvador's first National Search Commission Plan for locating victims of disappearance victims was publicly presented in May 2019. The plan sets down general guidelines for the search commissions to follow, allowing for more specific search plans to be drawn up for individual cases or for situations, such as massacre victims, that present particular characteristics, challenges, and patterns. Forensic investigative work is in its early stages: to date, 19 exhumations of adult disappearance victims have been started, but no cases have yet been resolved. It is still too early to make a meaningful assessment of how well coordination arrangements between CONABÚSQUEDA and the public prosecutor's office are working.

According to the decree creating CONABÚSQUEDA, the forensic part of its mandate is to be carried out through collaboration with the Institute of Legal Medicine of the Supreme Court of Justice, and where necessary with international forensic agencies. It is to promote the creation of a forensic data bank to contain genetic profiles of disappearance victims and their relatives for comparison and identification. Although the data bank has not yet become a reality, there has been some notable progress. Investigative teams from both commissions (CNB and CONABÚSQUEDA) are being trained, by the specialist non-State Guatemalan Forensic Anthropology Foundation (FAFG), in the application of forensic sciences to the search for missing persons. Other inter-institutional cooperation has included work with the equally renowned non-State Equipo Argentino de Antropología Forense, EAAF, which has assisted and advised CONABÚSQUEDA regarding the use of forensic sciences in the search, localization, and identification of disappeared persons.

## Organization and human resources

The decree that created CONABÚSQUEDA stipulates that it is to have three commissioners, who serve for renewable five-year terms. One commissioner is appointed directly at the discretion of the president. The other two are also appointed by the executive branch, but from a list of six candidates proposed by relatives' associations and relevant human rights organization. The commissioners, who are not remunerated for their work, may not be active members of any political party, nor hold any concurrent public office. No current or past member of the

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170 CONABUSQUEDA and CNB, *Re-Cordis*, No. 15.

armed forces, former member of any other armed groups, or person convicted of a human rights violations or other crime, may be appointed as a commissioner.

CONABÚSQUEDA relies on technical support for operations in two main areas: investigation and psychosocial support services. Its in-house staff team is multidisciplinary, including historians and specialists in communication, law, psychology, and other fields. The Integrated Search Mechanism currently maintains a permanent staff of at least 14 members.

## Inter-institutional relations and coordination

The decrees that created both CONABÚSQUEDA and the CNB stipulate that all institutions dependent on the executive branch must cooperate with search actions, within their respective areas of responsibility. This includes facilitating access to archives that may be relevant to the investigation of enforced disappearances, and determination of the current status and whereabouts of adult or child victims of this practice, during El Salvador's internal armed conflict. Where the entity in question is a body dependent on the other (legislative and judicial) branches of State, or an autonomous or local government institution, CONABÚSQUEDA is empowered by law to request the assistance needed for the effective performance of its duties.

## Funding

Considering only domestic direct funding, i.e., without taking into account contributions made by international cooperation agencies, CONABÚSQUEDA and the CNB together receive an annual budget of US\$350,000. This annual budget is part of the budget of the Ministry of Exterior Relations.

## Relationship with victims

CONABÚSQUEDA and CNB were created thanks to the tireless work of the families of victims of disappearances during the internal conflict in El Salvador: for instance, as we have seen, it took three years of negotiations and, finally, months of joint efforts by the government and civil society to get CONABÚSQUEDA created.<sup>171</sup> Both institutions clearly have considerable moral backing. However,

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<sup>171</sup> Due Process of Law Foundation (2018, April), 'La Comisión de búsqueda y la tarea de reconstruir la verdad sobre las personas desaparecidas en El Salvador', available at: [http://www.dplf.org/sites/default/files/la\\_comision\\_de\\_busqueda\\_y\\_la\\_tarea\\_de\\_reconstruir\\_la\\_verdad.pdf](http://www.dplf.org/sites/default/files/la_comision_de_busqueda_y_la_tarea_de_reconstruir_la_verdad.pdf) , last accessed 1 January 2022.

administrative obstacles, budgetary restrictions, and the lack of specific search strategies for the adult population, have already led to significant rifts between CONABÚSQUEDA and some of the civil society organizations that supported its creation. Relatives have a well-founded fear that the creation of this fledgling institution will be used to give an impression for international consumption that El Salvador is complying with its legal obligations, but without truly substantial and effective action.

### **3. CONCLUSIONS ON THE SEARCH FOR THE DISAPPEARED VIA STATE MECHANISMS IN LATIN AMERICA**

The very existence of special search mechanisms for disappeared person in Latin America is itself irrefutable evidence of the challenges still faced by several countries in the region in healing fractures caused by years of internal armed conflict, authoritarian rule, and/or the widespread and violent presence of organized crime. Transition toward more democratic governments, where they have happened, have rarely featured a transitional justice policy that addresses the individual and political responsibilities of those who perpetrated serious violations, including disappearance and enforced disappearance. For years, the justice systems have dealt with the violence of the present as if it had no connection to the impunity that often prevails for the crimes of the past. The creation of special search bodies is also an explicit and painful acknowledgement that States have seemed unable to date to use existing channels to investigate the truth, uncover the whereabouts of disappeared persons, and hold perpetrators criminally accountable. Creating and sustaining search institutions has proved a major political challenge, for many of the same reasons.

Most of the current search commissions have a fragile institutional design, depending, in most cases, on the willingness of the executive branch to allocate sufficient material and human resources for their work. Much of the day-to-day work of these institutions involves managing material and human resources, imposing a considerable administrative burden that hinders the capacity for substantive work.

To close this section on Latin America we briefly sum up in turn, some of the most important design and operational features of each of the search mechanisms described above.



Relatives of victims of the Guatemalan Civil War (1960-1996) take part in a ceremony to commemorate the 10th anniversary of the Truth Commission report, which documented thousands of cases of killings and disappearances committed during the conflict. Guatemala City, Feb. 25, 2009. (AP Photo/Rodrigo Abd)

**Colombia's UBPD.** Colombia's search mechanism is, without a doubt, one of the most sophisticated in Latin America. The fact that the UBPD is part of a transitional justice system specifically designed to provide institutional responses to victims of the internal armed conflict is an advantage that other countries do not have. This is especially true because that special system includes a dedicated judicial apparatus, the JEP, whose mandate involves it in adjudicating victims' petitions and other activities that complement the work of the UBPD. The UBPD's institutional complexity and command of financial resources exceed, comparatively speaking, those of any other special search entity in Latin America. Nonetheless, there is no evidence so far that the system has achieved a degree of consolidation that would allow for concrete results. This means that, to date, not as many disappeared persons have been identified as might perhaps have been expected from a mechanism with the characteristics of Colombia's UBPD. Relatively few of the search processes that the UBPD has carried out or taken part in so far, have resulted in the identification of disappeared persons.

The relatively short time during which the unit has been in operation may be one explanation, but the UBPD has also faced significant difficulties gathering information crucial to the search process. These difficulties include, without a doubt, the ongoing nature of the conflict: despite the signing of official peace accords in Colombia, in many respects the conflict persists. This poses problems for transitional justice efforts of all kinds. There is also significant resistance and hostility from within the current government administration towards the Peace Accords, and the ensuing comprehensive transitional justice system of which the UBPD is part. This lack of institutional and political support makes the UBPD's work that much more challenging. The UBPD has also had to compete with other authorities for recognition and trust, and has not always come out on top. The Victims' Unit, for instance has sometimes proved a more direct and practical resource for the victim population, with its focus on reparations. The JEP has also proved more expeditious even for certain activities related to

the search for the disappeared, such as the protection of burial sites, exhumation orders, and the issuing of precautionary measures. A diagnostic assessment of the unit's performance thus far, with the results made public, could be helpful. Such an assessment should include consideration how other Colombian institutions have influenced the trajectory of the UBPD to date, and recommendations as to how they can better collaborate to assist it in meeting its objectives.

**Mexico's CNB.** The first point about the CNB in Mexico particularly worthy of note is the nature of its jurisdiction. Any mechanism with national scope operating in a federal system faces particular challenges in addressing local realities. The local state-level commissions that should complement its work to date exist in some, but not all, of the country's 32 states. These gaps increase the CNB's central workload, creating simultaneous needs to act directly where there is currently no state-level mechanism, liaise with those that do exist, and help promote their formation where they should exist but do not. Forging links and co-operation with all necessary federal authorities as well as with 32 sets of local state authorities is also enormously challenging in a country with such a large geographical area, and such a diverse range of institutional capacities. The speed and expertise with which particular state-level iterations even of one single institution function may differ greatly between one state and another. The part of the CNB's mandate that involves it in searching for missing migrants is also particularly complex, given that certain areas of Mexico are under the control of organized crime, which often preys on migrants.

One positive aspect is that the agenda of the search for disappeared persons has become a priority for the federal government as never before. And this prioritization has resulted in a historically unprecedented amount of available funding. The question remains as to whether the CNB can fortify itself sufficiently to withstand the changes that will come with a different political environment.

**Peru's DGBPD.** The Peruvian search mechanism is noteworthy for the productive coordination it has established with public prosecutors' offices and other Peruvian State institutions in the search for disappeared persons. The fact that it has been possible to standardize the search process in three phases with several State agencies is an important step forward that has not been achieved in parallel bodies in other countries. Admittedly, due to the absence of an assertive communication policy or the fact that the DGBPD was created so recently, the relationship between the Office and the people working in the prosecutors' offices is not always smooth. Nevertheless, these relationships are on their way to being more firmly consolidated.

Another positive aspect is that the Peruvian institutional framework for the search for disappeared persons is less complex and cumbersome than in other jurisdictions. This helps to increase the victims' recognition of this institution and, therefore, establishes stronger bonds of trust that result in obtaining useful information for the searches carried out by the DGBPD.

**El Salvador's CONABÚSQUEDA.** Of the four search mechanisms described in this section, El Salvador's presents the greatest contrasts. The CNB of El Salvador has a long and distinguished track record in the search for children who disappeared during the conflict, and has provided leadership on that issue regionwide. The more recent search for adults has not, however, gained the same traction. As explained in the previous sections, CONABÚSQUEDA's material and financial resources are still meager and uncertain. This is not only because of the fragile institutional context within which it is forced to operate, but also because its efforts have not enjoyed the political backing necessary for success. The most troubling aspects include the lack of progress in developing forensic capabilities, coupled with the failure to devise strategies for search for, and identification of, persons presumed deceased. Such a strategy would naturally require the collection of biological samples from relatives of the disappeared, to be included in a national forensic DNA databank. However, no progress has been made towards creating such a bank. There is an urgent need to overcome the bureaucratic and political lethargy that has stalled CONABÚSQUEDA's operations.

# B. ASIA

## 1. DISAPPEARANCES AND ENFORCED DISAPPEARANCES IN ASIA

### 1.1 Overview

Many countries in Asia have, like their Latin American counterparts, suffered political violence, including grave and systematic human rights violations, in the recent past. Efforts to achieve justice and accountability for these continue to face challenges. Enforced disappearances in Asia have generally occurred in two types of context: under dictatorship or military occupation, as in the case of Indonesia and Timor-Leste; or during internal armed conflicts, as is the case of Nepal and Sri Lanka. Most countries have refused to officially acknowledge their past history of enforced disappearances, making Asia the region with the lowest number of State ratifications of the International Convention for the Protection of all Persons from Enforced Disappearance, relative to the number of eligible States.<sup>172</sup> Many Asian countries accordingly still lack specific domestic or internationally-derived legal frameworks for addressing disappearances, presenting yet another obstacle to effective protection of all persons from enforced disappearance. Nonetheless, some Asian countries have recently started to face up to their past history of enforced disappearances, by establishing judicial and non-judicial mechanisms. These processes have been particularly concentrated in countries which have undergone recognizable periods or processes of transition following the end of an armed conflict and/

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<sup>172</sup> States in Asia that have both signed and ratified the Convention are limited to Iraq, Japan, Kazakhstan, Cambodia, Mongolia, and Sri Lanka. Meanwhile India, Thailand, Indonesia, Armenia, Azerbaijan, Cyprus, Laos, and Thailand have signed, but have not ratified.



A Sri Lankan census official records details of an ethnic Sinhalese war survivor, facing camera, during a nationwide census of war victims at a village in Medawachchiya, Sri Lanka, Dec. 6, 2013. The country's quarter-century civil war between Sri Lanka's army and Tamil Tiger rebels ended in 2009. (AP Photo/Eranga Jayawardena)

or repressive regime. This section of the present report will focus on four such cases: Indonesia, Timor-Leste, Nepal, and Sri Lanka.<sup>173</sup> It will examine their experiences of enforced disappearance, and some examples of response in the form of non-judicial search efforts and mechanisms. Nepal and Sri Lanka have dedicated State search mechanisms; Indonesia and Timor Leste currently do not.

In **Indonesia**, enforced disappearance began during the 1965-1966 killings, when purges aimed against the Indonesian Communist Party resulted in mass slaughter. Estimates for the number of victims from this period range from 100,000 to 2 million people.<sup>174</sup> The subsequent regime, which considered itself to be ushering in a 'New Order', continued to perpetrate systematic violence against real and perceived political opponents. Members of Islamic groups were assassinated or forcibly disappeared in Tanjung Priok, Jakarta (1984) and Talangsari, Lampung (1989). The same fate befell suspected separatists and other civilians during military operations in Aceh and Papua. The regime committed additional widespread violations during the occupation of East Timor (1975-1999), and against domestic activists who confronted the authoritarian regime during the 1998 period of social unrest and opposition known as '*reformasi*'.

Enforced disappearance in Indonesia started to garner national public attention in 1997-1998 due to the emblematic case of the illegal detention of 23 pro-democracy activists. The case came to public notoriety mainly because it happened at a time when public protests against the authoritarian regime were at their height. Once the then-incumbent regime fell, later in 1998, continuous pressure from civil society led to the reappearance, alive, of nine of the victims. One more was found dead, but the fate and whereabouts of the remaining 13 are still unknown.

Indonesia's official National Human Rights Institution (Komnas HAM), and civil

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173 For a comprehensive, NGO-impulsed consideration of enforced disappearance and responses more widely in the region, see Lauritsch, Katharina (ed.) (n.d.) *We Need the Truth: Enforced Disappearance in Asia*. Guatemala: ECAP/GEZA, a follow up to the first ever regional conference on psychosocial support for search, held in the Philippines in 2009. Available from <http://www.simonrobbins.com/ECAP-We%20need%20the%20Truth-Asia%20disappearances.pdf>, last accessed 1 January 2022.

174 MacGregor, Katharine E. (2009), 'The Indonesian Killings of 1965-1966,' SciencesPo. <https://www.sciencespo.fr/mass-violence-war-massacre-resistance/fr/document/indonesian-killings-1965-1966.html>, last accessed 1 January 2022.

society human rights organizations, register enforced disappearance cases as a form of gross human rights violation<sup>175</sup> but to date there has been a notable dearth of follow-up measures to deal with either the 1998 case in particular, or the issue of disappearance more broadly. Attempts at more or less comprehensive transitional justice measures have moreover had a complex history: a 2004 law mandating a national truth commission for Indonesia was struck down in 2006 by the Constitutional Court, and Indonesia's participation in a bilateral truth initiative between 2005 and 2008<sup>176</sup> seems to have left little lasting impact. A specific regional truth commission for the province of Aceh, mandated in 2005 as part of peace accords with a local separatist group, was meanwhile stalled for years, finally managing to report only in late 2021.<sup>177</sup>

The specific victim profile associated with enforced disappearance in Indonesia mainly consists of civilians who opposed authoritarian rule. Even though enforced disappearances have occurred over a long period, domestic criminal law does not today specifically criminalize enforced disappearance as such (a figure relating to 'kidnap' is clearly constructed principally to sanction criminal acts committed by private individuals, without specific consideration of potential State involvement, systematicity, and/or the denial of information). The legal right not to become a victim of disappearance does appear to be protected, in Law no. 39 of 1999 ('Law Concerning Human Rights')<sup>178</sup>, whose Article 33 reads: "every person has the right to be free from enforced disappearance and disappearance of life." However, the absence of an accompanying definition, combined with the domestic criminal code deficiency already mentioned, make it extremely difficult to satisfactorily prosecute or sanction existing or future perpetrators.<sup>179</sup> Indonesia signed

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175 Komnas HAM (2014), 'Executive Summary Report of the Investigation of Gross Human Rights Violations, 2014', Jakarta: Komnas HAM. Komnas HAM continues to investigate and document cases of gross human rights violations in Aceh and Papua, which include denunciations of practice of enforced disappearances.

176 The Commission of Truth and Friendship (CTF) – see below, main text, overview of Timor Leste.

177 Asia Justice and Rights (AJAR) (2021, December 31), 'Indonesia: Handover of Truth and Reconciliation Commission Findings and Recommendations to Aceh Parliament, A Milestone for Truth and Justice in Indonesia', <https://asia-ajar.org/2021/12/31/indonesia-handover-of-truth-and-reconciliation-commission-findings-and-recommendations-to-aceh-parliament/> . Last accessed 1 January 2022.

178 Whose articles 33(2) and 34 read as follows: "Article 33 (2) Everyone has the right to freedom from abduction and assassination. Article 34 No one shall be subject to arbitrary arrest, detention, torture or exile". See English-language text as published at <http://ilo.org/dyn/natlex/docs/ELECTRONIC/55808/105633/F1716745068/IDN55808%20Eng.pdf> , last accessed 1 January 2022.

179 According to the Indonesian Coalition Against Enforced Disappearance. See a 2011 report published

the International Convention for the Protection of All Persons from Enforced Disappearance on 27 September 2010, but had not yet ratified the Convention as of end 2021.

In **Timor-Leste**, enforced disappearances were committed during the occupation of the country by Indonesia, which lasted for over two decades (1975-1999). By 1999 Indonesia controlled the entire territory of Timor Leste, maintaining its illegal occupation by suppressing both democratic political movements of the Timorese people, and armed opposition. Numerous grave human rights violations were perpetrated over the period, with the official truth commission later determining that 102,800 Timorese deaths were attributable to the occupation, with a further 18,600 adults and children forcibly disappeared.<sup>180</sup> Growing pressure for change led to a 1999 referendum in which the option for full independence won a landslide victory (78.5% of votes cast, on a 97% turnout) over the alternative of supposedly increased autonomy within a framework of continued occupation. Violence accompanying the runup and aftermath of the referendum led to the arrival of an international peacekeeping force, under the auspices of the United Nations, and the transformation of the previous UN Mission into a fully-fledged transitional administration (the United Nations Transitional Authority in East Timor, UNTAET). A new Constitution was established, and Timor-Leste transitioned to full independence in early 2002.

Although a **hybrid tribunal** was set up in 2000 under UN auspices, its mandate, like that of a Serious Crimes Unit set up alongside it, was limited to grave crimes that had taken place during the violence of 1999. The remit of a later (2005-2008) bilateral 'Commission of Truth and Friendship' (CTF) an official body set up between Timor-Leste and Indonesia in 2005, was in theory open to reviewing events prior to the 1999 violence, though some suspected that it was principally an attempt to pre-empt pressure for more robust international criminal accountability over the events of 1999. For these, it moreover concentrated on questions of institutional, rather than individual, accountability. The Commission did however include among its recommendations the formation of a bilateral Missing Persons Commission, inter alia to reunite separated children with their families, but to little discernible effect to date.<sup>181</sup>

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at <https://kontras.org/wp-content/uploads/2020/10/Orang-Hilang-1.pdf> (in Indonesian only).

180 Report of the official truth commission, Comissão de Acolhimento, Verdade e Reconciliação (CAVR), ('Commission for Reception, Truth and Reconciliation') (2005) *Chega!* Volume I Part 6, p. 488

181 Asia Justice and Rights (AJAR), '13 Years of Indonesian-Timor-Leste CTF Report; Indonesian-

Comprehensive consideration of violations committed during the preceding period of occupation was largely left to a **national truth commission**, set up in 2002. The **truth commission, Comissão de Acolhimento, Verdade e Reconciliação de Timor-Leste, CAVR (Commission for Reception, Truth and Reconciliation)** reported in 2005. Its report, entitled ‘Chega!’ - which can be translated as “Enough!”, or “No More!” – covered the entire period of 1974-1999 and recommended reparations, memorials, and further enquiry into mass graves and the fate of the disappeared.<sup>182</sup> Follow-up has included the 2016 creation, by law, of the ‘**Centro Nacional Chega**’ (CNC),<sup>183</sup> envisaged as an **independent body with a mandate to follow up on the recommendations of both the CAVR, and the CTF**. The CNC’s mandate accordingly includes promoting implementation of CAVR’s recommendations on memory, human rights education, and solidarity with “the most vulnerable survivors of human rights violations”, including children who were separated from their families, relatives of the disappeared, and displaced East Timorese still living in Indonesia.

In terms of the specific victim profile associated with enforced disappearance, in Timor-Leste, most reported or suspected victims of this practice in the period to 1999 were pro-independence activists and/or members of ‘Failintil’, an armed group that resisted Indonesian occupation, illegally detained and/or captured by the occupying Indonesian forces. The profile also includes numerous Timorese children, under seventeen years old, forcibly recruited by the Indonesian military and/or appropriated by religious organizations and taken to Indonesia, many of whom survived. The largest single incident associated with enforced disappearance involves the disappearance of a considerable number of pro-independence activists after an episode known as the ‘November 12 massacre’, ‘Dili massacre’, or ‘Santa Cruz massacre’, in which occupying Indonesian troops fired on pro-independence demonstrators who had gathered in a cemetery on November 12, 1991. Estimates of the numbers of people killed and/or disappeared vary widely, though the truth commission cites a figure of around 250 victims.<sup>184</sup>

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Timor Leste Community Initiative Responds to Limited Role of the State in Continuing KKP Recommendations’, July 2021. <https://asia-ajar.org/event/13-years-of-indonesian-timor-leste-ctf-report-indonesian-timor-leste-community-initiative-responds-to-limited-role-of-the-state-in-continuing-kkp-recommendations/>. Last accessed 1 January 2022.

182 CAVR (2005) *Chega!*, op. cit.

183 Decree Law No. 48/2016.

184 CAVR (2005) *Chega!*, op. cit., Volume 1, Part 3, p. 267.

As of end 2021, Timor-Leste had neither signed nor ratified the International Convention for the Protection of All Persons from Enforced Disappearance.

In **Nepal**, some sources locate the earliest registered occurrences of enforced disappearance as far back as the early 1950s.<sup>185</sup> Arbitrary arrests, incommunicado detentions and enforced disappearances increased during the authoritarian, monarchical, '*panchayat*' regime which prevailed between 1961 and 1989.<sup>186</sup> Most of the detained-disappeared were targeted because they were viewed by the authorities as anti-monarchists, advocating the restoration of multi-party democracy. Enforced disappearance committed by the State, and disappearances by non-State actors, continued after constitutional democracy was established in 1990. Although a semblance of investigation of disappearance, in particular, was attempted at that time,<sup>187</sup> disappearances increased significantly once more between 1996 and 2006, in the context of a decade of armed confrontation between authorities and Maoist insurgents. In particular, rates of both enforced disappearance and disappearance<sup>188</sup> soared after November 2001, when a State of Emergency was declared and internal security functions were militarized.<sup>189</sup> The armed insurgency concluded in November 2006 with the signing of a Comprehensive Peace Agreement. Estimated casualty figures for the decade of armed conflict hover around 13,000-16,000 fatal or missing victims, around ten per cent of them, disappeared,<sup>190</sup> although the official commission dedicated to the issue had received, as of March 2020, reports concerning a higher total of

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185 See for example <https://www.insec.org.np/wp-content/uploads/2017/12/Uniharu-Kahan-Chhan.pdf>, last accessed 1 January 2022.

186 '*Panchayat*', which can be translated as 'council of elders', harked back to a traditional system of village-level political organization under which political parties were abolished and banned, leaving the royal family to exercise unfettered central authority.

187 One abortive, and one completed, Commission of Inquiry investigated over a hundred cases, despite limited powers, concluding that at least 35 people had been victims of enforced disappearance prior to 1990. However, no-one was prosecuted, nor were any remains apparently traced, as a result.

188 Alongside State-perpetrated enforced disappearance, the anti-State, armed Maoist group known as the 'Communist Party of Nepal' was also responsible for the abduction and disappearance of both security services personnel, and civilians. The group was one of a variety of Communist groups and parties that have existed and co-existed in Nepalese politics over the decades.

189 The Terrorist and Destructive Activities (Control and Punishment) Ordinance was issued, mobilizing the then Royal Nepalese Army. See UN Office of the High Commissioner on Human Rights (OHCHR) (2012), 'OHCHR Nepal Conflict Report, Executive Summary'. Geneva: United Nations. Available at [https://www.ohchr.org/Documents/Countries/NP/OHCHR\\_Nepal\\_Conflict\\_Report2012.pdf](https://www.ohchr.org/Documents/Countries/NP/OHCHR_Nepal_Conflict_Report2012.pdf) last accessed 1 January 2022.

190 See discussion at p. 35 of Lauritsch (ed.), op.cit., and OHCHR (2012), op. cit., p. 3.

2,506 possible victims between 1996 and 2006.<sup>191</sup>

In 2014, eight years after the formal end of the conflict, a single piece of legislation created two transitional justice mechanisms: a general truth commission (**the Truth and Reconciliation Commission, TRC**), and a specific **Commission of Investigations on Enforced Disappeared Persons (CIEDP)**.<sup>192</sup> The process has however been strewn with abandoned promises, missteps, and lack of trust. Neither commission could be said to have garnered legitimacy and support from the main stakeholders – including a national Network of Families of the Disappeared, NEFAD Nepal.<sup>193</sup> The originally proposed membership of each Commission was dissolved in early 2019, amid accusations of politically-motivated nominations and interference, and the transitional justice process as a whole appears to be stalled. Nepal is a case where formal transitional justice mechanisms exist, but without apparent positive results regarding the disappeared or – it seems – more broadly.

Nepal introduced the specific criminal offence of enforced disappearance in 2018, alongside a new criminal code. As of end 2021, it had neither signed nor ratified the International Convention for the Protection of All Persons from Enforced Disappearance.

**Sri Lanka** has seen a range of human rights violations in different parts of the island over the past five decades, including in the context of a 26-year armed conflict between State forces and the LTTE separatist group, that ended in mid-2009.<sup>194</sup> Many of these episodes of violence – including later ethnic violence in early 2018 – have yet to be adequately addressed, despite repeated efforts at justice – with varying degrees of political will and efficacy.<sup>195</sup> Enforced disappearance

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191 See news report at <https://english.onlinekhabar.com/ciedp-releases-list-of-2506-persons-disappeared-during-conflict.html> , accessed 1 January 2022. The CIEDP's own official reports are available on its webpage at <https://ciedp.gov.np/en/commission-reports/> , (in Nepali only).

192 On April 25, 2014, the Nepalese Parliament passed the 'The Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2071 (2014)', whose effect was to create two commissions: the Truth and Reconciliation Commission, and the 'Enforced Disappearances Enquiry Commission' (whose name was subsequently changed to the 'Commission of Investigations on Enforced Disappeared Persons (CIEDP)'. An English language text of the 2014 law can be viewed at <http://trc.gov.np/wp-content/uploads/2018/03/actsrulesguidelines-1.pdf> , last accessed 1 January 2022.

193 <https://nefadnepal.org/> , last accessed 1 January 2022.

194 The Liberation Tigers of Tamil Eelam were militarily defeated in 2009.

195 Including a so-called 'Lessons Learnt and Reconciliation Commission' (LLRC), which reported in 2011 around conflict legacy issues. Despite suspicion and a boycott of the initiative by many victims

has occurred and recurred all over the island at different periods. Some place the numbers of persons missing or disappeared in Sri Lanka among the world's highest, in both absolute and per capita terms,<sup>196</sup> and it is the country with the second highest number of individual cases currently lodged before the UN Working Group on Enforced and Involuntary Disappearance. Efforts to address this specific legacy are perhaps today the most nationally visible element of the struggle for post-conflict truth and justice. This struggle for has resulted, in Sri Lanka, as elsewhere in the world, in fatigue and mistrust towards the State: families and communities still suffering harm from enforced disappearance have spent decades demanding justice, with little visible response. This has had a debilitating effect on Sri Lankan civil society, which has had to struggle repeatedly to maintain the issue of disappearances at the forefront of transitional justice efforts and demands.<sup>197</sup> These efforts have themselves struggled to make headway in a political climate increasingly indifferent, or even hostile, to in-depth scrutiny of the past actions of the security services, perhaps best illustrated by the fact that all three Sri Lankan presidents to have held office since 2005, had previously held the office of Minister of Defense.

A UN Human Rights Council (HRC) Resolution of April 2014<sup>198</sup> mandated a comprehensive investigation by the Office of the United Nations High Commissioner for Human Rights (OHCHR) into human rights abuses during the 2002-2009 phase of armed conflict in Sri Lanka. There was a change of government in the interim (in January 2015), and the September 2015 publication of two UN reports<sup>199</sup> was accompanied by official commitments to a series of transitional justice measures, to include both a truth commission and yet more specific action

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and associations, the LLRC's recommendations were robust and widely welcomed: but few were ever implemented.

196 The International Center for Transitional Justice, for example, suggests a total of between 60,000 and 100,000 persons missing or disappeared in Sri Lanka since the late 1980s: ICTJ (n.d.), 'Sri Lanka', <https://www.ictj.org/our-work/regions-and-countries/sri-lanka>, last accessed 1 January 2022. See also UN Doc. Ref. A/HRC/30/CRP.2, Chapter VIII (paras. 386-531), which mentions the "exceptional" scale of disappearances in Sri Lanka in relation to its population (para. 387).

197 Asia Justice and Rights (AJAR) Policy Paper (2018) 'Transitional Justice: Sri Lanka Case Study'. <https://asia-ajar.org/resources/policy-papers/transitional-justice-sri-lanka-case-study/> last accessed 1 January 2022.

198 UN Human Rights Council, 'Promoting reconciliation, accountability and human rights in Sri Lanka' UN Doc. Ref. A/HRC/RES/25/1, April 9, 2014.

199 UN Doc. Refs. A/HRC/30/CRP.2, September 16, 2015, and A/HRC/30/61, September 28, 2015.

on disappearance, this time in the form of an Office on Missing Persons.<sup>200</sup> The need for both, and more besides, was underscored in a subsequent UN HRC resolution (Res. 30/1, October 14, 2015), encouraging and inviting the new Sri Lankan authorities to implement a comprehensive transitional justice process. Paras. 13 and 14 specifically addressed disappearance, suggesting measures to ratify the International Convention for the Protection of All Persons from Enforced Disappearance, ICPPED, introduce the specific criminal offence of enforced disappearance, and publish the results of the numerous prior presidential commissions on the matter. Sri Lanka did subsequently sign (December 10, 2015) and ratify (May 25, 2016) the ICPPED, giving domestic effect to its provisions via a 2018 Law.<sup>201</sup>

Notwithstanding, very little specific content seems otherwise to have been implemented for three of the four transitional justice elements proposed (namely, a special judicial mechanism, a ‘commission for truth, justice, reconciliation and non-recurrence’, an Office of Reparations, and an Office of Missing Persons).<sup>202</sup> The Office on Missing Persons, OMP was established in 2017, on the basis of legislation introduced in 2016,<sup>203</sup> but did not begin operations until early 2018. It was designed as a non-judicial mechanism which would not directly pursue or attribute criminal or civil liability, its functions in that regard being limited to “identify[ing] avenues of redress to which missing persons and relatives of missing persons are entitled

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200 Statement by Foreign Minister Mangala Samaraweera, at the 30th Session of the UN Human Rights Council, Geneva, September 14, 2015, available at <https://www.news.lk/fetures/item/9742-statement-by-mangala-samaraweera-at-the-30th-session-of-the-unhrc-geneva>, last accessed 1 January 2022. The long list of largely ineffectual previous action on disappearance, including a series of presidential commissions, is critically reviewed in UN report A/HRC/30/CRP.2, September 16, 2015: paras. 476-508 and 517-524.

201 ‘INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE ACT’, No. 5 OF 2018’, published as a Supplement to Part II of the Gazette of the Democratic Socialist Republic of Sri Lanka of March 23, 2018. Available at [https://www.srilankalaw.lk/gazette/2018\\_pdf/05-2018\\_E.pdf](https://www.srilankalaw.lk/gazette/2018_pdf/05-2018_E.pdf), last accessed 1 January 2022.

202 Concern over gaps in implementation led to the UN to issue two subsequent ‘rollover’ resolutions: Resolution 34/1 (March 2017) and Resolution 40/1 (March 2019). A dedicated civil society monitoring campaign’s assessment, as of February 2021, was that the first two of the aforementioned four elements had been neither legislatively enacted nor operationalized, the third (Office on Reparations) had been legislated for, but little information was available on progress, while the fourth – the OMP – was classed as operationally “under threat”. See Sri Lanka Campaign for Peace and Justice (2021) ‘Reversing Progress: Threats to Human Rights and Reinforced Impunity in Sri Lanka’, available at <https://www.srilankacampaign.org/wp-content/uploads/2021/02/Reversing-Progress-Sri-Lanka-Campaign-February-2021.pdf> last accessed 1 January 2022.

203 The ‘Office On Missing Persons (Establishment, Administration And Discharge Of Functions) Act’, Act No. 14 of 2016.

and to inform the missing person (if found alive) or relative of such missing person of same”.<sup>204</sup> Most reports suggest it however struggled to make early headway, a situation that was not improved when 2019 elections produced a swing toward a more hardline Sinhalese nationalist party. New president Gotabaya Rajapaksa (2019– ) withdrew from the UN HRC resolution system in 2020 in an effort to avoid further critical scrutiny of compliance with previous undertakings. He was criticized by human rights groups for remarks made early in his presidency about victims of enforced disappearance.<sup>205</sup> Similar concern has been expressed over comments by other senior government officials, and over Rajapaksa’s recent appointments to the OMP,<sup>206</sup> demonstrating yet again the sometimes-definitive impact that shifts in overall political direction can have on transitional justice initiatives including search.<sup>207</sup> See below for a more detailed analysis of the OMP.

**As mentioned above, neither Indonesia nor Timor-Leste presently has formal official search mechanisms. In Nepal and Sri Lanka, longstanding effort by relatives of the disappeared and civil society organizations have contributed to the creation of dedicated State offices. In all four countries, however, civil society groups have both created their own search responses, and called forth some semblance of State response from existing institutions. What follows considers, in turn, civil society-led, then State, responses in each of the four countries.**

## **1.2 Civil Society’s Role in Conducting and Advocating for Search Responses**

**Neither Indonesia nor Timor-Leste to date has an official mechanism specifically tasked with searching for victims of enforced disappearance, even though this was recommended in the bilateral ‘Commission on Truth and Friendship’.** It has therefore fallen to civil society to conduct its own searches, at

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204 The ‘Office On Missing Persons...’ Act 2014, op. cit., part II, Section 10.

205 International Commission of Jurists, ‘Sri Lanka: President’s remarks on “missing persons” are an affront to victims’, January 24, 2020, <https://www.icj.org/sri-lanka-presidents-remarks-on-missing-persons-are-an-affront-to-victims/> Last accessed 1 January 2022.

206 Human Rights Watch, ‘Families of Sri Lanka’s Forcibly Disappeared Denied Justice’, August 25, 2021, <https://www.hrw.org/news/2021/08/25/families-sri-lankas-forcibly-disappeared-denied-justice>. Last accessed 1 January 2022.

207 The overall assessment of the Sri Lanka Campaign for Peace and Justice (2021) is that there has been considerable rollback on 15 of the 22 specific commitments made by Sri Lanka in response to UN HRC Resolutions 30/1, 34/1, and 40/1, since the November 2019 accession of the current presidential administration of Gotabaya Rajapaksa, a former Defense Minister. Sri Lanka Campaign for Peace and Justice (2021), op. cit.

the same time as advocating for the State to fulfil its responsibility. In **Nepal and Sri Lanka**, the existence of specific State offices has not been sufficient by itself to relieve civil society groups, including relatives, of the burden of pressing for more effective action.

### 1.2.1. Indonesia

In Indonesia, civil society organizations (CSOs) along with relatives of the disappeared are leading their own efforts to document stories of families and communities, to exhume mass graves and sites thought to be places of mass killings, and to search for surviving victims and reunite them with their families. For example, survivors of crimes against humanity committed between 1965 and 1966 have joined forces with relatives to create a range of different CSOs.<sup>208</sup> One such organization, the Indonesian Institute for the Study of the 1965/66 Massacre, known as YPKP 65, is particularly active in documenting information on locations of mass burial sites and former detention camps, and collecting the names of victims and survivors in order to find facts and evidence about what happened.<sup>209</sup> In November 2000, YPKP 65, along with victims' relatives, conducted an excavation of a site in Central Java that was suspected to be a mass grave. During the excavation the remains of 24 people were found, along with personal belongings – a comb, a wedding ring – and numerous bullets. **However, the results of the excavation were declared inadmissible by the courts, because it had been conducted by civil society, and not by State-appointed officials as part of a formal investigation.** The State's refusal to consider these findings as evidence adduced the argument that the excavation could be considered as tampering with evidence. This occurred even though civil society had invited the staff of the national human rights institution, Komnas HAM, to witness the excavation. This incident, which has numerous parallels elsewhere in the region and the world, is illustrative of the **outer limits of what entirely non-State efforts can achieve. Differing cultural and religious views** among relatives, and between relatives and wider society, **also make citizen-impulsed exhumations a potentially controversial and fraught process**, which may place organizations on the wrong side of the law<sup>210</sup> – yet another reason why the State should not be allowed to abdicate its responsibilities.

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208 These include 'YPKP 65', 'LPKROB', 'LPKP 65' and 'Pakorba'.

209 See <https://ypkp1965.org/>

210 See accounts at pp. 126-130 of Lauritsch (ed.), op.cit

Efforts to document data on enforced disappearances have also been made by civil society groups in Aceh, who have consistently pushed the State to take responsibility for the search for victims in the province. On August 21, 2008 around 150 families of enforced disappearance victims went to the Province Representative Office of Komnas HAM, to officially submit reports of cases of enforced disappearance in Aceh. These reports, the result of a compilation of data from CSOs, contained denunciations of 93 cases of enforced disappearance committed during military operations in Aceh between 1989 and 1998. There are however no records of these or other denunciations having led to effective official investigation or action (see below, section on State actions)

CSOs have also led the search for stolen children,<sup>211</sup> abducted from their families in Timor-Leste and taken to Indonesia. AJAR and the Working Group on Stolen Children, which brings together civil society representatives from both countries, have identified more than 140 stolen children who are now adults living in Indonesia. CSOs have also therefore been active in urging the State to take responsibility for stolen children, calling for the urgent establishment of a Commission on Missing Persons, and for reparations.

### 1.2.2. Timor-Leste

In the absence of concrete State actions to fulfill the rights of victims of enforced disappearance, it has been left to CSOs in Timor Leste to join their counterparts in Indonesia in the search for now-adult survivors of child abduction, alongside attempting to help other families in Timor Leste find the remains of their loved ones. The initiative to carry out physical search for the remains of young people who went missing and are considered likely to be dead came initially from the parents of some of the victims. **Customary beliefs led these parents to feel that the bodies and spirits of their children were entreating them to seek them out,** begging to be treated with dignity and given proper funerals.

Relatives of disappeared victims of the 1991 November 12 massacre have conducted or initiated their own searches for the remains of their loved ones, in places known or suspected to be mass graves. Inspired by relatives' tenacity, the 'Committee for 12 November', a civil society organization started in 2008 by

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211 There is a wide spectrum of experiences of East Timorese children who were separated from their families. AJAR and its partners have chosen to focus on "stolen children"; i.e., children under 18 years old who were taken by a public official or with the consent of a public official to Indonesia during the 1975-1999 conflict in Timor-Leste without the genuine consent of their families.

survivors, lent its voice to existing requests for international assistance to carry out exhumations in several locations, particularly at Hera, and Tibar. Forensic experts from Argentina and Australia, organized into an 'International Forensic Team', had already established a Memorandum of Understanding with the Timor Leste authorities (in 2005)<sup>212</sup> and accompanied searches in 2008 and 2009. Around 17 sets of remains, recovered in the Hera district, proved to indeed belong to young people who were disappeared during the 12 November massacre. The 30<sup>th</sup> anniversary of the massacre, in 2021, produced calls from the Committee to have the government recognize more fully the contribution made by the demonstrators to subsequent independence, and to commemorate the anniversary by ratifying the International Convention against disappearance, going forward.<sup>213</sup>

As mentioned above (section on non-State actions in Indonesia) in 2013, AJAR and the Working Group on Stolen Children in Indonesia and Timor-Leste<sup>214</sup> took the first steps in the search for stolen children who had been forcibly abducted during the Indonesian occupation. After tracing and locating now-adult survivors, the Working Group facilitated reunification contacts with their Timorese families, work which continues to the present day. **The initiative has come to be partially supported by the governments of Indonesia and Timor-Leste:** in Indonesia, support comes from the Ministry of Foreign Affairs and from State human rights institution Komnas HAM. In Timor-Leste, it comes from counterpart institution the Office of the Provedor for Human Rights and Justice (PDHJ), truth commission followup body the 'Centro Nacional Chega', CNC, the Ministry of Social Solidarity, and the Presidential Office.

### 1.2.3. Nepal

Nepalese CSOs have played a key role not only in search for the forcibly disappeared, but in the transitional justice process in general. Their actions in search range from **accompanying relatives to lodge police complaints, to facilitating exhumation**

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212 See an account of the process, and the International Forensic Team at pp. 138-142 in Lauritsch, (ed.), op. cit. The account emphasizes the learning for forensic specialists involved in accompanying relatives to explore the site at Tibar on the basis of traditional beliefs and evidence including dream accounts, rather than discounting it solely on the basis of Western scientific protocols.

213 See <http://www.tatoli.tl/en/2021/11/09/12th-november-committee-calls-for-recognition-of-youths--to-independence/>, last accessed 1 January 2022.

214 The Working Group on Stolen Children is comprised of various CSOs from Indonesia and Timor-Leste, namely AJAR, KontraS, KontraS Sulawesi, IKOHI, the Timor-Leste chapter of the Red Cross, HAK, and ACbit.

**of potential burial sites.**<sup>215</sup> CSOs including Advocacy Forum-Nepal, Accountability Watch Committee, Conflict Victims Society for Justice and numerous others, have continually raised issues related to enforced disappearances, in campaigns including demands for amendment of the legislative bill that created the country's truth commission and disappearances commission.<sup>216</sup> CSOs have also pushed for the implementation of Court decisions<sup>217</sup> and the fulfillment of families' rights to know the truth about their loved ones' fates and whereabouts. Public appeals and memorandums have been used to highlight victims' demands for truth, justice and reparations, and victim commemorations around symbolically significant dates have been taken up as opportunities to bring pressure to bear on the government through press releases and statements.<sup>218</sup> CSOs have also objected to the continued politicization of appointments to the truth commission and the commission responsible for the search for the disappeared.<sup>219</sup> **The fact that the latter commission had not, as of end 2021, determined the whereabouts of a single disappeared person, despite having received over 2,500 complaints, feeds CSOs' perception that Nepal's transitional process is stalled, creating frustration for relatives and survivors and making it difficult to preserve hope.**<sup>220</sup> Nevertheless, CSOs continue to give voice to victims' and families'

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215 Work related to exhumations has also involved critique and correction of inadequate police-led procedures and investigations, viz., discussion of the Dhanusha Students case in an NGO report prepared by the Advocacy Forum, <http://www.advocacyforum.org/> See Advocacy Forum (2011) 'Exhumations of bodies of the disappeared - in need of a policy framework', Kathmandu: Advocacy Forum, available at <http://www.advocacyforum.org/downloads/pdf/publications/impunity/exhumation-of-bodies-of-the-disappeared-english.pdf> . Last accessed 1 January 2022.

216 See above, Overview section. Concerns include provisions for amnesty and/or restorative justice solutions, although according to the CIEDP, these outcomes are not available for cases of enforced disappearance (see <https://ciedp.gov.np/en/introduction/> , last accessed 1 January 2022).

217 In 2015, and again in 2020, the Supreme Court declared parts of the truth commission enacting legislation to be unconstitutional and in breach of Nepal's international obligations – see subsequent section, or joint NGO press statement at <http://www.advocacyforum.org/downloads/pdf/press-statement/2020/joint-press-statement-30-august-idd-2020-english-version.pdf> last accessed 1 January 2022.

218 See, generally, statements and publications on the Advocacy Forum website, in particular its transitional justice section at <http://www.advocacyforum.org/publications/transitional-justice.php>

219 See a press statement from January 2020, signed by a range of human rights organizations and victims' associations, which accuses the government of "misusing these Commissions in a manner that has prevented victims from accessing remedies through the regular criminal justice system". Available <http://www.advocacyforum.org/downloads/pdf/press-statement/2020/awc-press-statement-on-recommendatio-of-officials-19-january-2020-english-version.pdf> , last accessed 1 January 2022.

220 See for example a joint public statement, signed by numerous victims' groups, issued on International Day of the Disappeared in 2020. The statement enumerates various detailed motives for concern,

concerns, encouraging them not to give up fighting for justice and searching for their loved ones.<sup>221</sup>

#### 1.2.4. Sri Lanka

The recent experience of Sri Lanka, whose State office began operation in 2018), is one of continuous parallel efforts by civil society groups and individual families to search for the missing, and to join forces to engage in collective public struggle against injustice. In the north and the east of the country families have been searching since the late 1980s, often visiting police stations, military camps, and camps belonging to other armed groups, following rumors and scraps of information that circulated locally, and struggling to obtain information about their disappeared loved ones.

Families' struggles were at times highly visible and well publicized, as is the case of the mothers of victims who were disappeared in the north, south and east parts of the island during the 1980s and 1990s.<sup>222</sup> Family members, primarily mothers, made themselves visible and publicly demanded justice for their children, their relatives, and the community in general. These demonstrations sometimes took the form of protest marches, hunger strikes, or long-term sit-ins by the side of public roads. In February 2021, mothers of disappeared victims in Kilinochchi, a district in the north, marked the 4th anniversary of a series of extended sit-in protests demanding the return of their loved ones.<sup>223</sup>

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accusing new members of the disappearance commission of using COVID as a pretext to "hide from their responsibilities", and stating that "as victims we have not even been able to feel that there are so-called commissions formed for us". Available at <http://www.advocacyforum.org/downloads/pdf/press-statement/2020/victims-public-appeal-to-the-government-idd-30-august-2020.pdf> last accessed 1 January 2021.

221 See International Commission of Jurists (2017, August), 'Nepal's Transitional Justice Process: Challenges and Future Strategy A Discussion Paper', Geneva: ICJ. Available at <https://www.icj.org/wp-content/uploads/2017/08/Nepal-TJus-Process-Advocacy-2017-ENG.pdf> last accessed 1 January 2022.

222 Samuel, Kumudini. 2006. *A hidden history: women's activism for peace in Sri Lanka, 1982-2002*. Social Scientists' Association. Colombo

223 On the origins of these protests see Fernando, Ruki (2018, February 22) '366 days – Roadside Protests in Kilinochchi?', available at <https://groundviews.org/2018/02/22/366-days-roadside-protests-in-kilinochchi/> last accessed 1 January 2022.

## 2. SEARCH MECHANISMS AND OTHER STATE RESPONSES TO DISAPPEARANCES IN ASIA

### 2.1 Indonesia

There have been several State initiatives designed to address aspects of the problem of enforced disappearances, although progress has been unsatisfactory. As mentioned above ('Overview' section), a bilateral truth-telling initiative, the Commission for Truth and Friendship (CTF), concluded in March 2008. It culminated in the joint publication, by the governments of Indonesia and Timor-Leste, of a report entitled *Per memoriam ad Spem* (Through Memory Toward Hope).<sup>224</sup> The report acknowledged that there had been enforced disappearances in East Timor in 1999, and recommended the creation of an office to trace East Timorese children who had been forcibly taken to Indonesia, or otherwise separated from their families. However, and despite a 2011 presidential decree supposedly ordering implementation of the CTF recommendations, **a decade later little if any progress has been made by either government.** At most, as we have seen above (section on non-State efforts), the Indonesian Ministry of Foreign Affairs and its national human rights institution, Komnas HAM, have lent modest support to civil society initiatives to trace surviving abducted children and reunify separated families. Ignoring the CTF's recommendation of a formal apology, though, it has done so without acknowledging survivors' status as former child victims of disappearance or abduction, instead characterizing them as children who became separated from their families due to conflict and were 'rescued' by Indonesia from conflict areas.

As far as prosecution and related judicial investigations and search are concerned, a lack of clarity around legal powers and responsibility for dealing with gross human rights violations seems to have conspired with indulgent attitudes toward still-powerful former perpetrators, to ensure that little progress is made. While the enacting law of Komnas HAM seems to transfer responsibility to it – and away from the ordinary criminal justice system – for investigation of such crimes, it is far from clear that the agency actually has the enacting and operational powers needed to perform exhumations and related legal-investigative tasks. All the signs are that the Attorney General's office does not feel itself duty bound to act upon,

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<sup>224</sup> The Commission of Truth and Friendship (2008), 'Per Memoriam ad Spem – Final Report of the Commission of Truth and Friendship (CTF) Indonesia-Timor-Leste', Denpasar: CTF. Available at <http://www.chegareport.org/wp-content/uploads/2014/10/CTF-report-English-Version.pdf> (last accessed 1 January 2022).

or even to answer, referrals and requests made by the national human rights commission.<sup>225</sup>

## 2.2 Timor-Leste

**In Timor-Leste, lobbying from civil society organizations did not initially receive a response from the State. State institutions seemed confused about their role, and/or concerned that vigorous action might put them at odds with official rhetoric that preferred to emphasize reconciliation, forgetting, and looking to the future.**<sup>226</sup> Several Timorese government institutions did however show themselves more willing to take steps over time, upon perceiving a lack of pushback from their own government and from the Indonesian State: see, for example, the account above (section on non-State action) of forensic work around exhumations related to the '12 November massacre'. Even there, however, civil society initiative led the way in identifying potential sites, and the total number of remains found and returned is meager compared to most estimates of the toll of victims. Over stolen children, similarly, while both of the respective national human rights institutions (Komnas HAM, for Indonesia, and the PDHJ, for Timor-Leste) did finally become involved – signing a memorandum of understanding in 2015 – their involvement came after the fact, and in the case of the PDHJ had to overcome reluctance connected to a preference for focusing on what the agency considered to be more contemporaneous human rights matters. The Ministry of Foreign Affairs, meanwhile, has begun to assist AJAR's reunification work, e.g., by smoothing the way with Home Affairs and Immigration regarding visas, but has not gone so far as to assume more protagonism in the subject. The Ministry of Social Affairs and the Presidential Office did, however, begin to send more positive signals in 2016, arranging for the then-Prime Minister to meet a group of former child abductees and agreeing to part fund future reunification meetings and tracing actions.

Further comprehensive action seems however likely to rest on the fate of the Centro Nacional Chega!, the institution set up in 2016 to improve follow-up of the truth commission, CAVR, and Commission on Truth and Friendship, CTF. The CNC has a broad mandate, as set out in Article 3 of the enacting legislation, to promote the implementation of the CAVR and CTF recommendations focusing on memory, human rights education, and solidarity with “the most vulnerable survivors of

<sup>225</sup> See pp 127-129 of Lauritsch (ed.), op.cit.

<sup>226</sup> In 2012, for example, newly-elected president - and current Prime Minister – Taur Matan Ruak, adopted the motto “Nahe Biti Bo’ot” (‘Forgetting the Past, Looking to the Future’). See Leach, Michael (2017) *Nation-Building and National Identity in Timor-Leste*. Abingdon: Routledge.



80-year-old Muchran poses for a photo with the monument marking a mass grave where he believes his uncle Sachroni was buried with other victims of 1965-1966 anti-communist massacre, in Plumbon village, Central Java, Indonesia, Sept. 3, 2016. Writings on the monument read: "Containing 12-24 bodies. Names: Moetiah, Soesatjo, Darsono, Sachroni, Joesoef, Soekandar, Doelkhamid, Soerono and others. Died in 1965 event, may their souls accepted by God. Erected on the initiative of human rights activists, historians, journalists, students, interfaith leaders and local government." (AP Photo/Dita Alangkara)

human rights violations”, a category which must surely include former child abductees and victims and relatives of victims of disappearance.<sup>227</sup>

## 2.3 Sri Lanka: The Office on Missing Persons

### Mandate, key powers, and characteristics

The international background to the setting up of Sri Lanka’s Office on Missing Persons, OMP, has been set out above (Overview section).<sup>228</sup> The Office’s formal legal creation was established by parliament in August 2016, over a month before the completion of a ‘Consultation Task Force on Reconciliation’, which had been conceived of as a method for informing and shape all subsequent actions. In other words, while victims and the general public were supposedly still in the process of being consulted as to their wishes on transitional justice, a technocratic team had already drafted, presented, and legislated at least one outcome. This rather set the tone for the subsequent trajectory of the OMP,<sup>229</sup> with these lapses in procedure, added to controversy over the selection of commissioners (see below) weakening its legitimacy even further in a context of already extant lack of trust in State institutions. On the other hand, given the fragile nature of Sri Lanka’s extant coalition politics, it is not inconceivable that elements within the government felt it important to move sooner rather than later, to ensure that at least some legislative basis for future transitional justice measures could be put in place. This lack of political will, and/or fragility of transversal political support, is characteristic across Sri Lanka’s subsequent transitional justice trajectory and has arguably undermined it considerably.

The mandate of the OMP, as per the 2016 law that created it (henceforth, the ‘OMP Act’),<sup>230</sup> does not set geographical, temporal, or community identity parameters for the cases the Office is to attend, although it does specifically define ‘missing person’ in connection to conflict and/or political violence:

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227 For a civil society view of the prospects and status of followup, see the website <http://www.chegareport.org/>, set up to mark the 10th anniversary, in 2015, of publication of the original CAVR report. The CNC meanwhile has its own official website at <https://chega.tl/> (no English language version). Last accessed 1 January 2022.

228 And see ‘Keep the Promise: Monitoring the government of Sri Lanka’s commitments on promoting reconciliation, accountability and human rights’ <https://www.srilankacampaign.org/take-action/keep-the-promise/>

229 As well introducing a priori discrepancies with the substance of the subsequent Task Force report, which underlined the importance of pursuing the four initiatives mentioned in Resolution 30/1 in a simultaneous and mutually reinforcing manner.

230 ‘Office on Missing Persons (Establishment, Administration and Discharge of Functions) Act, No. 14

Unless the context otherwise requires, in this Act “missing person” means a person whose fate or whereabouts are reasonably believed to be unknown and which person is reasonably believed to be unaccounted for and missing-

(i) in the course of, consequent to, or in connection with the conflict which took place in the Northern and Eastern Provinces or its aftermath, or is a member of the armed forces or police who is identified as “missing in action”; or

(ii) in connection with political unrest or civil disturbances; or

(iii) as an enforced disappearance as defined in the “International Convention on Protection of All Persons from Enforced Disappearances”

(OMP Act, Art. 27).

The purposes of the Office are spelt out as the following:<sup>231</sup>

**Search for missing and disappeared persons**

(a) Search for and trace missing persons and identify appropriate mechanisms for the same and to clarify the circumstances in which such persons went missing

**Make recommendations to authorities**

(b) Make recommendations to the relevant authorities towards addressing the incidence of missing persons

**Protect the rights and interests of victims and their families**

(c) Protect the rights and interests of missing persons and their relatives as provided for in the Act

of 2016’, Published as a Supplement to Part II of the Gazette of the Democratic Socialist Republic of Sri Lanka of August 26, 2016, available at <http://ompsrilanka.org/omp-documents/omp-act> , last accessed 1 January 2022.

231 As presented to the public on the official website of the Office on Missing Persons, <http://ompsrilanka.org/about/mandate> . Last accessed 1 January 2022.

### **Identify avenues of redress**

(d) Identify avenues of redress to which missing persons and relatives of missing persons are entitled and to inform the missing person (if found alive) or relative of such missing person of same

### **Compile a database of the missing and disappeared**

(e) Collate data related to missing persons obtained by processes presently being carried out, or which were previously carried out, by other institutions, organizations, Government Departments and Commissions of Inquiry and Special Presidential Commission of Inquiry and centralize all available data within the database established under the Act

### **Other activities to achieve objectives**

(f) Do all such other necessary things that may become necessary to achieve the objectives under the Act

The OMP Act's section on Investigative Powers (Art. 12) specify relatively broad powers, though the power to initiate an investigation is described as pursuant to a complaint received, or in response to information compiled by previous Commissions of Enquiry (is not, in other words, an unfettered ex officio power). It is further enjoined to prioritize recent cases, "incidents in which there is substantial evidence already available", or cases that it considers to be "of public importance". Regarding investigations in the field, while the OMP cannot begin an exhumation process independently, it is empowered to apply to a Magistrate's Court for an order to carry out an excavation or exhumation of a suspected burial site, or to apply to act as an observer in an ongoing exhumation or other proceedings related to suspected burial sites.

## **Organization and human resources**

**The OMP has seven Commissioners**, who the OMP Act envisages will be appointed by the President in consultation with the Constitutional Council (a body set up in 2000 to provide independent oversight of the public appointment process).

**The first round of appointments, completed in March 2018, was nonetheless controversial and seemingly irregular,** with the President insisting on overruling a Council-provided shortlist, drawn up after a public call for applications. This situation weakened the legitimacy of the body even before it became operational, while the appointees themselves were criticized for including former military personnel, and for featuring only two commissioners of Tamil origin. The final 2018 lineup did, however, appear to meet at least some of the mandated criteria as regards human rights background and experience, with members coming from spheres other than State or official circles. Gender balance was also respected. The terms of office of the original Commissioners came to an end in March 2021, despite which, as of 1 January 2022 the official website mentions no new appointments or process, limiting itself to reproducing the original seven-person lineup while adding the legend ‘Former Commissioner’ alongside each name.<sup>232</sup>

The OMP Act gives it relatively broad autonomy to set up Divisions, Units and Committees, along with regional and sub-regional offices, to work under at Secretariat based in the capital, Colombo. Current OMP units include Tracing and Investigation; Legal Policy and Research; Victim and Family Support; Witness Protection; Data Management; Communications and Outreach; Human Resources and Administration, and Finance and Procurement.

## Relationship with the Criminal Justice System

Certain of the provisions made in the OMP Act seem to empower it to establish a suitably ‘arm’s length’, but active, relationship with the criminal justice system, preserving complementarity while clearly demarcating the OMP’s extra-judicial, search-focused nature. Although there are certainly many question marks as to whether the separate, judicially-focused functions of (criminal) investigation, prosecution and sanction are operational or are being actively pursued – with no visible progress towards the materialization of the special judicial mechanism or truth commission that were also promised – it might be argued that this cannot be laid at the door of the OMP.

The OMP is empowered, but not legally enjoined, to report any case falling outside of its remit, as well as any suspected criminal offence “that warrants investigation” to the “relevant law enforcement or prosecuting authority”, although only “after

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<sup>232</sup> The Constitutional Council has moreover been abolished in the interim, its duties taken over (in 2019) by a Parliamentary Council, whose composition and powers clearly in effect reassert serving politicians’ control over senior public appointments.

consultation with such relatives of the missing person as it deems fit, in due consideration of the best interests of the victims, relatives and society” (OMP Act Art. 12). Art. 13(2) meanwhile clearly underlines its primarily non-judicial character: “[t]he findings of the OMP shall not give rise to any criminal or civil liability”, although Art. 10 gives it an informational role that could indirectly lead to proceedings being initiated through action by victims.<sup>233</sup>

In pursuit of its own, non-judicial, investigations, Article 12 of the OMP Act, entitled ‘Investigative Powers’, empowers it to “take all necessary steps” to investigate cases, including summoning persons to appear before it, admitting information that would not be considered admissible in civil or criminal proceedings, and offering confidentiality. It is given the power to request and require assistance from magistrates and police in any jurisdiction, including assistance with investigations that require excavations or exhumations in cases where death is suspected.

## Support for Relatives

The OMP began to issue ‘Certificates of Absence’ in early 2020, on the basis of interim reports into particular cases that it is or was investigating. The certificate allows relatives to access certain welfare entitlements, and/or exercise certain legal rights, without being forced to apply for a death certificate, accept a declaration of presumption of death, or accept the closure of any associated administrative or judicial investigation. The issuance of these certificates, and the introduction of an associated monthly ‘relief payment’ of LKR (Sri Lankan Rupee) Rs 6,000 (approximately USD \$30), was adopted in mid-2018 on the basis of an OMP Interim Report on its activities. The Office of Reparations that was also part of the fourfold commitment made in 2015 has also not delivered on more permanent or comprehensive reparations. However, the OMP’s interim report and action has served to establish both that interim relief is essential<sup>234</sup>, and that it is not and cannot be a substitute for search, truth, justice, or permanent reparations.

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<sup>233</sup> Art 10, ‘Mandate’, empowers the OMP to **“identify avenues of redress** to which missing persons and relatives of missing persons are entitled and to inform the missing person (if found alive) or relative of such missing person of same”.

<sup>234</sup> For a more in-depth discussion of the OMP’s recommendations, see the discussion in the Sri Lanka chapter (transitional justice section) on in Human Rights Watch’s report *World Report 2019: Events of 2018* available at <https://www.hrw.org/world-report/2019/country-chapters/sri-lanka#c52f04>, last accessed 1 January 2022.

## Protections and Guarantees for Victims, Witnesses and Present-Day Detainees

The main guarantees in the OMP Act for existing victims or witnesses – conceivably including implicated witnesses – who may be concerned for their safety **relate to witness protection**, on the one hand, and **confidentiality**, on the other. The Act legislates for a **Witness Protection Unit**. Confidentiality is dealt with at various points in the OMP Act, including in Article 12 (i), where the OMP's discretionary power to report possible criminal offences to justice system authorities is made consent-based as regards identification of potential witnesses.<sup>235</sup> Importantly, alongside the broader informant confidentiality that Article 12 establishes as a tool for enhancing the relative efficacy of administrative investigation, the Act also considers confidentiality of outcomes. It moreover balances the participation rights of relatives with consideration of the interests of victims, including those who may be found alive: Art 13(1), subsections (b) and (c), authorize the office to “provide to any relative... wherever the OMP is able to do so, information relating to the whereabouts of a missing person, if found to be alive, subject to the consent of the person found alive;” and “to provide relatives ... [with] information relating to the status of an ongoing investigation... unless the OMP is of the view that such would hinder the ongoing investigation or that it is not in the best interests of the missing person”. Ensuring the correct application of the discretion that this clause ascribes is of course a challenge that must be managed with suitable oversight and transparency mechanisms. **Importantly, the need to underwrite and protect confidentiality at the level of data and officers is also considered**, with specific provisions made for protection of OMP databases, and for OMP personnel to be exempted from criminal or civil proceedings, or requests under domestic access to information legislation, when acting in good faith in relation to information obtained in the course of their duties.

As regards potential future victims and the duty to guarantee non-repetition,<sup>236</sup> the OMP Act empowers OMP officers to “enter without warrant, at any time any place of detention, police station, prison or any other place in which any person

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235 OMP Act, Article 12 (i): “Provided that (...) a witness consents, the OMP may also inform the relevant authority, of the details of such witness, in order to enable such relevant authority to secure a statement from such witness to be used in the process of [judicial] investigation”.

236 A function which is reinforced and made explicit in Art 13(1) Functions and Duties: “(k) to make recommendations to the relevant authorities... including recommendations relating to ... the prevention of future disappearances, based on patterns identified”.

is suspected to be detained, or is suspected to have previously been detained”, provisions which signal a preventive function with regard to present-day detention practices.

## Funding

Funding has been a crucial concern for the OMP. While originally the Act enabled the OMP access external (non-State origin) funds from both within and beyond Sri Lanka, the paragraph that enabled the OMP to enter into independent agreements of this or any other kind was removed by a 2017 amendment. This change has left the OMP fully dependent on the government of the day for all of its funding. The ministry to which the OMP is administratively assigned has also been modified various times since the office’s creation, which has meant, *inter alia*, massive delay in access to allocated funds. Lack of funding is one of the elements that has severely hampered the ability of the OMP to function autonomously; bureaucratic delay and inefficiency is another.

### **2.4 Nepal: the Commission of Investigation on Enforced Disappeared Persons (CIEDP)**

As discussed above (Overview section), Nepal’s ‘Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2071 (2014)’ (henceforth, the ‘TRC Act’) led the country’s Council of Ministers to formally establish, in February 2015, the entity now referred to as the ‘Commission of Investigations on Enforced Disappeared Persons’, CIEDP.<sup>237</sup> This sequence of events had some significant antecedents that should be mentioned at this stage. The first Ordinance promising to establish a commission of this sort was promulgated in March 2013, but legal challenges before the Supreme Court led to certain aspects – notably, the potential for amnesty and for obligatory ‘mediation’ to be used to obviate prosecution – being declared both unconstitutional and contrary to Nepal’s international human rights obligations. Notwithstanding, the legislation finally passed in 2014 replicated a great deal of the same content.

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<sup>237</sup> The TRC Act and the establishment of the CIEDP in Nepal had some significant antecedents that should be mentioned. On March 14, 2013, Nepal’s President promulgated an Ordinance to establish a Commission on Investigation of Disappeared Persons, Truth and Reconciliation to investigate human rights violations committed during the armed conflict. However, the establishment of the commission was temporarily halted after the Supreme Court issued a stay order in April following legal challenges. Later, on January 2, 2014, the Supreme Court held that the 2013 TRC Ordinance was in contravention of the spirit of the Constitution, international human rights law and previous rulings of the Supreme Court; however, the 2014 legislation that finally established the TRC and CIEDP utilized the vast majority of the provisions of the 2013 Ordinance.

As envisaged in the 2014 TRC Act, the CIEDP was to be a temporary body with an operating life of just two years from the date of its inception. A single twelve-month extension is contemplated, subject to a founded request from the Commission itself,<sup>238</sup> after which the Commission it is anticipated that the Commission will be dissolved.<sup>239</sup> In practice the Commission completed its initial two-year mandate in 2017, without any achievements to show. The mandate was duly extended for one more year, but results were still so meager that a second extension was granted, until 2019. The positions of Commissioner then remained vacant, from April 2019 to January 2020. Civil society organizations joined forces to demand meaningful changes in the CIEDP, particularly, amendments to its legal basis (the TRC Act) to bring it into line with international law, as had been ordered by the Supreme Court in 2014 and again in 2016. CSOs also urged the Commission to take on board input from victims, and the repeated recommendations of international human rights bodies. These critical civil society voices were however completely ignored, and the Commission became mired in the politicization of the appointment process of new commissioners. This contributed to delays and institutional paralysis.

In January 2020, former Deputy Attorney General Yubaraj Subedi was appointed as Commissioner of the CIEDP. Both this new appointment, and a further extension of the original term (to April 2021) took place without the requested consultations or amendments to the TRC Act. Yet another mandate extension, to July 15, 2021, was subsequently decreed, with another widely expected, for both the CIEDP and the parallel Truth Commission. Victims remain highly skeptical about whether the CIEDP will achieve its mission, even with its repeatedly extended timeframes. The mid-2021 assessment of an international NGO report is damning: “The TRC and [CIEDP] have failed to meet international standards, both in constitution and operation. The failure of the Government to amend the TRC Act in line with the order of the Supreme Court of Nepal and the non-consultative and opaque approach of both Commissions have led to **distrust among all major stakeholders, especially the conflict victims. It is particularly concerning** that even after spending more than five years and collecting some 63,000 complaints of human rights violations and abuses [3,000 of these, corresponding to enforced disappearances denounced before the CIEDP] **both Commissions have yet to effectively investigate a single case”**.<sup>240</sup>

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238 Art. 38 of the TRC Act.

239 Art. 39 of the TRC Act.

240 International Commission of Jurists (ICJ) (2021, May), ‘Nepal: Transitional Justice Mechanisms with

## Mandate, key powers and characteristics

Investigating incidents of enforced disappearance committed during the decade of armed conflict between 13 February 1996 and 26 November 2006 is defined as the CIEDP's primary task. The self-introduction provided on the English language version of the CIEDP's official website is careful to reproduce versions of the TRC's definition a range of relevant terms – such as internal armed conflict, gross human rights violation, perpetrator, and victim – but does not reproduce the TRC definition of enforced disappearance, nor provide any alternative working definition.<sup>241</sup> It does, however, list primary objectives including investigation of cases of disappearance cases; determination of the whereabouts of victims and/or their remains; compiling records of the causes of disappearances and their nature; and publishing the results of investigations. Other functions include receiving complaints from victims' families, identifying victims and perpetrators, and providing identity cards (presumably, certifications of status) for or to victims. The CIEDP is also empowered to conduct any necessary work to identify burial sites, determine the possibility and necessity of carrying out excavations or exhumations, have this work carried out, and order subsequent DNA testing or autopsy on any recovered remains. It can also issue recommendations to the government of Nepal regarding reparations to victims and/or family members.

While conducting an investigation, the Commission can collect information and take statements, and is empowered to call witnesses or other individuals to appear before it to this end. It can also order public and governmental institutions to produce any deed or document that it deems necessary to its investigation, to investigate any relevant person or place without prior notification, and to seize goods or deeds. If there is a founded fear that a person holding a public position might destroy relevant evidence, the Commission can require the relevant authority to suspend that person for up to three months. The enacting law also establishes a duty for any person, organization or authority concerned to provide information, make statements or give testimony, and in general provide

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A Gender Perspective: A Briefing Paper', Geneva: ICJ, p.5. Available at: <https://www.icj.org/wp-content/uploads/2021/05/Nepal-Transitional-Justice-Gender-Advocacy-Analysis-Brief-2021-ENG.pdf>, last accessed 1 January 2022.

241 See <https://ciedp.gov.np/en/introduction/>, last accessed 1 January 2022. The definition of 'victim' is meanwhile notably broad ("the enforced disappeared person and his/her family members"), although the definition of 'perpetrator' is vague and imprecise: "the person who involved in the crime of enforced disappearance during armed-conflict". The enacting TRC law does define "act of enforced disappearance", in chapter 1, art. 2(k), in a sui generis way which makes explicit reference to armed conflict.

all possible assistance to the CIEDP, on pain of the imposition of fines of up to NPR (Nepalese Rupees) 15,000 (equivalent of USD \$125).

**Even with this broad authority, the stark reality is that no successful investigation of a single case of a disappeared person has yet been carried out.**

The most recently nominated set of Commissioners published, in March 2020, a list of 2,506 persons who were allegedly subjected to enforced disappearance, compiled from complaints received.<sup>242</sup> However, it should be noted that the mere publication of lists of alleged victims is not sufficient to fulfil the Commission's responsibilities.

## Commissioners

The Commission is comprised of five members: one chairperson and four members, to be selected by a separate Recommendation Committee from among the persons eligible for the positions. The selection process and criteria are supposed to be made public. Eligibility requirements, as set down in Art. 4 of the TRC Act, include non-affiliation to a political party, and suitable work experience in human rights, peace, law, conflict management or similar. Victims' and relatives' associations, and other civil society groups, have nonetheless been firm in their opinion that appointments to date have been subject to political interference, and many have stated that they will not cooperate with the Commission unless the TRC Act is amended.<sup>243</sup>

## Relationship with the Criminal Justice System

Nepal introduced the specific criminal offence of enforced disappearance in 2018, when a new criminal code was introduced.

Meanwhile, Article 29 of the TRC Act governing the CIEDP was one of the provisions which came under challenge from victims, and was eventually declared void (on February 26, 2015) by the Supreme Court.<sup>244</sup> It attempts to enshrine a procedure whereby the Commission must submit a request, via its supervising Ministry, to trigger prosecution of any gross human rights violation it considers to have

242 The list, which now has 2,511 entries, can be found - in Nepali only - on the CIEDP website at: <https://ciedp.gov.np/en/home/>. Last accessed 4 January 2022.

243 'Victims to cooperate with TRC, CIEDP only after act amendment', *The Himalayan*, Mar 10, 2020. See <https://thehimalayantimes.com/kathmandu/victims-to-cooperate-with-trc-ciedp-only-after-act-amendment/>, last accessed 1 January 2022.

244 All available information nonetheless suggests the Act had not yet been amended, as of end 2021.

been committed. The Ministry is then to write to the Attorney General, who has discretion as to whether or not to pursue the case in a ‘special court’.

## Protection and Guarantees for Victims

One primary task assumed by the CIEDP in relation to provision for victims is to identify them as such, and provide them with an identity card certifying that status.<sup>245</sup> CIEDP guidelines also spell out measures it can and indeed must undertake to provide protection for victims and witnesses, including protecting their identities, on request, and arranging protection if it is considered that their security is threatened.

## Funding

The Ministry of Peace and Reconstruction, established in 2007 specifically to implement the 2006 peace accord, is responsible for the Commission’s funding and operating expenses.

### 3. CONCLUSIONS ON THE SEARCH FOR THE DISAPPEARED IN ASIA

Various countries in Asia with a history of enforced disappearances seem to remain trapped within a long and protracted cycle of impunity, with little or no signs of robust accountability for past mass violations. This makes it difficult to create opportunities to successfully address disappearance and enforced disappearance. In Asia, State mechanisms to search for the disappeared have emerged, if at all, mainly as a response to initiatives and pressure from relatives and civil society. Even in Nepal and Sri Lanka, where designated official search mechanisms have been established, the respective commissions face many challenges and cannot be said to have enjoyed any major success since their inception. Such a situation can lead victims to lose faith in the possibility of truth, justice and/or reparations, as families are forced to continue to live with uncertainty.

Lessons that can be drawn include the observation that political will from the government of the day is crucial. If a search commission model is to succeed, the respective government must establish and respect its independence, appoint credible commissioners, ensure the commission is supported by other related

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<sup>245</sup> Bearing in mind that the expansive definition of victim already mentioned, includes close family members.

institutions, and provide it with adequate facilities and finance. Sri Lanka and Nepal, which have already established search commissions, must pay renewed and particular attention to increasing their capacity, including equipping them to conduct and/or oversee independent forensic investigations.

It is vital that political elites who wish to pursue peace and reconciliation come to appreciate that they cannot ignore the importance of efforts to fulfill the rights of victims, including victims of enforced disappearance. Some suitable form of truth-telling must be established, to ensure that both the existence of disappearance and enforced disappearance, and the existence and outcomes of present-day search, become public knowledge. Victims' families, for their part, should receive sufficient information as well as reparations. Where a separate search commission is to be established alongside a truth commission, the work of the two should always be integrated.

Where former perpetrators return to power – or were never really separated from it – any momentum that has built up around search for the disappeared often seems to grind to a halt. Leaving exhumation and other forensic processes exclusively in the hands of whatever authority oversees ordinary criminal investigation can pose challenges to finding and identifying the disappeared. In Asia as elsewhere in the world, the role of civil society associations and robust, victim and/or relative-driven voices appears as crucial in pushing for some kind of search to be carried out, and for the rights of families and communities to discover the fate of their loved ones. Trauma-sensitive, victim-centered processes can help ensure effective State-driven search processes.

Looking for **lessons that can be learned from extra-judicial State search mechanisms established to date**, Nepal and Sri Lanka make it clear that **the formal existence of such mechanisms is not sufficient by itself to guarantee success**. The process of setup and operation of mechanisms for discovering victims' whereabouts must be transparent and accountable, involving families of the disappeared and relevant civil society organizations. This permanent and active participation is all the more important because proper setup is inevitably time-consuming, despite the urgency of the task.

As far as particular country examples go, given the history and sociopolitical context of disappearances in **Sri Lanka**, the setting up of the Office for Missing Persons is a radical endeavor that has given hope to some. The very fact that a permanent body to address disappearances was established might seem to

represent the overcoming of close to impossible odds. Multiple later changes in government configuration and State machinery have made it hard for the OMP to create the desired impact and effect.

Enforced disappearances in **Timor-Leste** are unusual in having been **perpetrated mostly under a regime of foreign military occupation**. The families of the disappeared remain in Timor-Leste, while their stolen children are scattered over large areas of **Indonesia**. Official information has not been forthcoming in either place, while truth commission recommendations have not so far been followed up with any great seriousness. Civil society organizations are still leading efforts, whether to trace abducted children or search for other victims of disappearance, with minimal support from government authorities who hold the legal responsibility.

**Nepal, despite its two commissions**, has seen next to no concrete progress and much controversy, not least over heavily politicized appointment processes for commissioners. Not a single disappeared person has been found, six years after the CIEDP was created specifically for that purpose. This inability to make progress is a huge challenge, leading some to suspect a lack of effort, or worse. Both relatives' and society's rights to know have been undermined, or have simply remained unaddressed, by the transitional justice process in Nepal. For years, victims have had to knock on door after door while State responsibilities have been shifted from one government agency to the next. Commissions that were created supposedly to address and resolve human rights violations from the conflict era seem to have done little or nothing, to date, except to passively receive complaints. This has made relatives wonder whether they will ever know the fate and whereabouts of their loved ones. Victims are getting tired of waiting for justice.

# C. COMPARATIVE SEARCH EXPERIENCES OF COUNTRIES WITHOUT FORMAL STATE SEARCH MECHANISMS

## A. DISAPPEARANCES AND SEARCH IN GUATEMALA

### 1. DISAPPEARANCES IN GUATEMALA

#### 1.1 Overview

This chapter examines the history of Guatemala's internal armed conflict and Peace Agreements, and subsequent efforts to search for and identify the disappeared. It describes the national context of collaboration that permits non-State entities to take the lead in the effort to search for victims, and highlights the need to include and involve families of the disappeared if any forensic approach is to be successful.



A woman places flowers on coffins holding the remains of 172 unidentified people who were exhumed from what was once a military camp, in San Juan Comalapa, Guatemala, one day before their proper burial, June 20, 2018. In 2006, several human rights organizations presented a bill for the creation of a National Search Commission for Victims of Enforced Disappearance, but after 12 years, the initiative has not been approved. (AP Photo/Rodrigo Abd)

Guatemala bucks the trend, described in previous sections, toward establishing formal State mechanisms in Latin America to search for victims of disappearance and enforced disappearance: **in Guatemala there is no State effort to search for and identify the victims and disappeared from the internal armed conflict.** In the vacuum left by this absence, families and civil society organizations had recourse to independent forensic expertise to search for and identify victims, recover remains, open new avenues for reparations, and bolster accountability. As a result, the **Fundación de Antropología Forense de Guatemala (FAFG, Forensic Anthropology Foundation of Guatemala)** was established in 1997. FAFG puts its forensic expertise at the service of surviving family members, seeking to meet their needs and respond to their priorities concerning loved ones who have been killed and disappeared.

## 1.2 History and context of disappearances

### 1.2.1 Guatemala's Internal Armed Conflict, the Peace Agreements, and the Truth Commission

The internal armed conflict in Guatemala began in 1960 and lasted for 36 years, until the 1996 signing of Peace Agreements.<sup>246</sup> It had its roots in political instability dating back to the first half of the 20th century, as a result of which, the country's authorities developed an unremittingly anticommunist agenda. The period from 1979 to 1985, usually considered to be the most violent of the conflict, was particularly dangerous for civilians. De facto governmental administrations during those years, mostly led by military men (Lucas García 1978-1982, Efraín Ríos Montt 1982-1983, and Humberto Mejía Víctores 1983-1985), pursued military solutions to political unrest and dissent, aiming to eliminate social movements in both rural and urban areas, and using extreme repression in an effort to stifle the emergence of new insurgent groups.<sup>247</sup>

Military-led violence against the general population during this period entailed a whole host of human rights violations, including enforced disappearances, massacres, destruction of entire rural communities, rape and sexual violence, torture, and kidnappings. During 1981 and 1982, a so-called "counterinsurgency strategy" was adopted, designed in effect to systematically eliminate the

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246 Álvarez Aragón, Virgilio, et. al. (2013), *Guatemala: Historia reciente (1954-1996)*, Ciudad de Guatemala: FLACSO, p. 388.

247 See Schirmer, Jennifer (1998) *The Guatemalan Military Project: A Violence Called Democracy*. Philadelphia: U. Pennsylvania Press.

indigenous population of the Guatemalan highlands in the district known as the Ixil region. The authorities believed that the region was directly responsible for the emergence of the country's main armed guerrilla group of the time.<sup>248</sup>

The late 1980s saw an increase in political instability and a strengthening of social movements. This eventually led to important changes at the level of government in the early 1990s, helping to reduce the power of the military and slowly re-establish some semblance of democracy and constitutional rights. By 1994 a peace process was in course, as a result of which several agreements were negotiated. One of them foresaw the creation of a truth commission, the Commission for Historical Clarification (Comisión de Esclarecimiento Histórico, CEH). The truth commission was set up to shed light on human rights violations and other violent events that occurred during the war. Its mandated objectives were to investigate episodes, gather information, and create recommendations that would promote peace, memorialize victims, ensure the protection of human rights, and preserve historical memory.<sup>249</sup> International pressure helped to ensure that the Peace Agreements were finally signed, by guerrilla forces and the government of newly-elected president Alvaro Arzú, in December 1996, brokered by the United Nations.

The truth commission carried out its investigations between 1996 and 1999, when the results, including recommendations, were presented to the government. **The Commission concluded, inter alia, that the judicial branch had failed to properly investigate, prosecute, or punish grave human rights violations occurring during the internal armed conflict, and had also failed to protect victims. This failure is attributed to the judicial branch having been co-opted by other elements of the State, to the point where judges were not independent from the authorities committing the violations.** As will be seen below, the judicial system has to date continued to act only slowly, if at all, in condemning violations and their perpetrators, and in providing compensation and protection to victims. Notwithstanding, the past decade has seen certain groundbreaking events regarding justice in Guatemala, including its having become one of very few nations ever to have held a senior government official accountable in domestic courts for crimes against humanity. Regarding enforced disappearance,

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248 The Ejército Guerrillero de los Pobres, 'Guerrilla Army of the Poor'. See Drouin, Marc (2011) *Acabar hasta con la semilla: comprendiendo el genocidio guatemalteco de 1982*. Ciudad de Guatemala: F&G Editores.

249 Report of the Guatemalan Truth Commission: Comisión para el Esclarecimiento Histórico (CEH) (1999) *Guatemala: Memoria del Silencio*, Capítulo 1. Guatemala, CEH. An official summary, in English, of Volume 5 (Conclusions and Recommendations) of the report's 12 volumes, is available at [http://www.aaas.org/sites/default/files/migrate/uploads/mos\\_en.pdf](http://www.aaas.org/sites/default/files/migrate/uploads/mos_en.pdf)

the Commission also made extensive recommendations for reparations, search, and an 'agile, active' policy of exhumations.<sup>250</sup> Nonetheless as we will see below, many of these tasks either remain unfulfilled or have been left by default in the hands of non-State actors.

### 1.2.2 Disappearances during the Internal Armed Conflict

In the truth commission's final report, *Guatemala: Memory of Silence*, published in 1999, **the Commission concluded that the internal armed conflict had entailed the commission of prolonged, repeated and systematic violations of human rights, with 83% of the identified victims of these violations belonging to the country's indigenous population.**<sup>251</sup> Data compiled by the Commission includes a register of 669 massacres (626 of them committed by State forces, in indigenous communities<sup>252</sup>); an estimate that between 0.5 and 1.5 million people were displaced by violence,<sup>253</sup> and an approximate total of 200,000 deaths or disappearances<sup>254</sup> (of which number, around 40,000 were classified as enforced disappearances, mostly committed against indigenous civilians in rural areas, by military or paramilitary forces).<sup>255</sup> Overall, the report attributes responsibility for 93% of all grave violations it registered, to the Armed Forces and/or paramilitary groups allied to them. Only 3% were attributed to guerrilla groups.<sup>256</sup>

As discussed above, the 'counterinsurgency' campaign of the early 1980s entailed a military strategy that sought to eliminate the indigenous populations of entire areas of the Guatemalan highlands.<sup>257</sup> In an effort to address this and other grave crimes, in 2005 – i.e., almost two decades after the peace accords – a Human Rights Section of the Prosecutor's Office (*Ministerio Público*) was established. The

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250 CEH, *Guatemala: Memoria del Silencio*, op. cit., Tomo V, capítulo quinto, III. 21-31 inclusive.

251 CEH, *Guatemala: Memoria del Silencio*, op. cit., Tomo V, capítulo cuarto, I.1.

252 CEH, *Guatemala: Memoria del Silencio*, op. cit., Tomo V, capítulo cuarto, II.86

253 CEH, *Guatemala: Memoria del Silencio*, op. cit., Tomo V, capítulo cuarto, I.66

254 CEH, *Guatemala: Memoria del Silencio*, op. cit., Tomo V, capítulo cuarto, I.2.

255 CEH, *Guatemala: Memoria del Silencio*, op. cit., Tomo II, sección XI 'Las desapariciones forzadas'. While the term 'enforced disappearance' is used for both State and non-State perpetration, it is made clear here and elsewhere in the report that disappearance was utilized as a systematic practice only by the State, and that State forces were responsible for the vast majority of the occurrences.

256 CEH, *Guatemala: Memoria del Silencio*, op. cit., Tomo V, capítulo cuarto, II.128.

257 Sanford, Victoria (2003) *Violencia y genocidio en Guatemala*, Guatemala, F&G Editores, p. 12.

Section went on to set up a specialized Internal Armed Conflict Unit, in 2007. The Unit's job was to investigate and prosecute cases. To do so, the prosecutorial authorities relied heavily on information collected through decades of painstaking work by civil society organizations. These included the Asociación para la Justicia y Reconciliación, AJR, and the Centro para la Acción Legal de Derechos Humanos, CALDH, with FAFG forensic experts often serving as expert witnesses. The first of these cases to go to trial and proceed through to sentencing in a national court was the *Rio Negro* massacre case, which produced a domestic verdict in 2008.<sup>258</sup> Sustained subsequent efforts along the same lines led to a Guatemalan court finding, in 2013, that the **Guatemalan army had carried out a State policy of genocide against the Ixil population, under the de facto government of General Efraín Ríos Montt (1982-3)**. Ríos Montt was duly sentenced to a total of eighty years' imprisonment, though his co-defendant, former Chief of Military Intelligence Mauricio Rodríguez Sánchez, was acquitted. The entire verdict was moreover later overturned, in a highly controversial annulment ruling by the country's Constitutional Court.<sup>259</sup> A retrial, begun in 2017, lost one of its defendants when Ríos Montt died during proceedings. The case nonetheless continued, with Rodríguez Sánchez as sole defendant. Although the court once again found that the actions of the Guatemalan army had constituted the commission of genocide, Rodríguez Sánchez was again acquitted of charges. Therefore no-one was finally sentenced in the case,<sup>260</sup> and no living former high-ranking official has to date subsequently been successfully convicted for genocide or crimes against humanity committed in the relevant period (the early 1980s).

The official truth commission report estimated, as mentioned above, that up to 40,000 persons were subjected to disappearance or enforced disappearance during the conflict.<sup>261</sup> A previous independent report by the Catholic Church, known as the REMHI report (*Recuperación de la Memoria Histórica*, "Recovering

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258 Jo-Marie Burt (2016), 'From heaven to hell in ten days: the genocide trial in Guatemala', *Journal of Genocide Research*, 18 (2-3), p. 158. The incomplete nature of the verdict nonetheless gave rise to a subsequent Inter-American Court case: IACtHR, *Río Negro Massacre v. Guatemala*, Preliminary Objection, Merits, Reparations and Costs. Judgment of September 4, 2012.

259 Burt, Jo-Marie and Paulo Estrada (2020, March 6), 'Guatemala to Begin Evidentiary Phase of Genocide Trial Against Senior Military Officials', Washington Office on Latin America, <https://www.wola.org/analysis/guatemala-genocide-trial-begins-senior-military-officials/> Last accessed December 2021.

260 Burt, Jo-Marie (2018, October 16) 'Bittersweet Justice in Guatemala', *The Progressive*. <https://progressive.org/dispatches/court-delivers-bittersweet-justice-in-guatemala-burt-181016/>. Last accessed December 2021.

261 CEH, *Guatemala: Memoria del Silencio*, Tomo II, sección XI., op. cit.

Historical Memory”) documented the names of 3,893 victims of the practice.<sup>262</sup>

**Enforced disappearance often entailed illegal detention, followed by unlawful killing of the person, with their remains disposed of or hidden in ways that either impeded their being found, or purposely obscured their identity.**

The first criminal trial over armed conflict-era enforced disappearance in Guatemala was held in 2008, when former military commissioner Felipe Cusanero was convicted for the disappearance of six indigenous men in Choatulúm, Chimaltenango.<sup>263</sup> The case of Marco Antonio Molina Theissen has meanwhile become emblematic of the many difficulties involved in obtaining domestic justice, which has required sustained international efforts and activism. The 14-year-old victim was disappeared by military intelligence officers in 1982, in reprisals for his family’s involvement in social and political activities connected to the State University. Such activities were enough to mark people out as suspected ‘insurgents’, and the military had already targeted the family: Marco Antonio’s older sister, sister Emma Guadalupe, had been kidnapped, tortured and raped at the age of 15, managing subsequently to escape from illegal detention. After decades of national and international lobbying, the Molina Theissen family obtained partial justice in the form of the sentencing by a domestic court of four military officials involved in the disappearance of Marco Antonio. FAFG personnel participated in the trial as expert witnesses. Unfortunately, despite the conclusion of the case, Marco Antonio’s body has still not been found. Nor has justice been done for thousands more victims of disappearances and their families.

Sexual violence like that to which Emma Guadalupe Molina Theissen was subjected was widespread during the internal armed conflict. The Truth Commission found that **one in every four victims of the conflict were women, and that women were often tortured and raped before being killed or disappeared.**<sup>264</sup> **There is also evidence that rape was used as a weapon of war, in the terms recognized by the UN Security Council in 2008, i.e., it was deployed as a deliberate part**

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262 REMHI (Proyecto Interdiocesano de Recuperación de la Memoria Histórica). (1998). *Guatemala: Nunca más*. Guatemala: Oficina de Derechos Humanos del Arzobispado, p. 159; p 294. The CEH, for its part, documented a total of 6,159 individual cases alongside its projected total estimate of 40,000 victims: CEH, *Guatemala, Memoria del Silencio*, op. cit., Tomo V, capítulo cuarto, II.66.

263 Ortiz, Gerson (2009, August 31) ‘Por concluir primer juicio por desaparición forzada’ *La Hora*, <https://lahora.gt/hemeroteca-lh/por-concluir-primer-juicio-por-desaparicion-forzada/> Last accessed December 2021.

264 CEH, *Guatemala: Memoria del Silencio*, op. cit., Tomo III, sección XIII. ‘Violencia sexual contra la mujer’.

**of the military's genocidal strategy.**<sup>265</sup> Women and children were specifically targeted by sexual violence as part of the effort to eliminate the population of the Ixil region, particularly during 1981 and 1982. Despite this fact, the subsequent peace agreement and transitional justice efforts did not specifically address sexual and gender-based violence. One episode that later came to stand for this unmet justice agenda is the case of Sepur Zarco, a community in the Ixil region of Guatemala. In 1982, the military installed a garrison in Sepur Zarco. Over the course of the subsequent six months they instituted a system of de facto sexual slavery, repeatedly raping and otherwise abusing the local women. This case produced a landmark resolution in 2016, when two former military officials in charge of the operation were sentenced for crimes against humanity.<sup>266</sup> To date, however, this has been the only judicial resolution of a case in which sexual and gender-based violence has been dealt with as an element of genocidal strategy.

## **S2. THE SEARCH PROCESS IN GUATEMALA**

### **2.1. Documenting, Investigating, and Searching for the Disappeared**

A principal reason to search for the disappeared, in any setting, is the fact that families want to find their loved ones alive. However, in post-internal armed conflict situations where the bulk of the disappearances at issue began decades ago –such as in Guatemala and El Salvador –and also in the complex macrocriminality setting of Mexico, the reality is that many or most victims of enforced disappearance will likely not be found alive. When this is the case, families' next priority is often to recover their loved one's remains. In Guatemala, in particular, Mayan communities, hold the belief that if the spirits of those who have died are not at rest, but are still suffering, then their family will also suffer. If remains are recovered and identified, then families and communities have the opportunity to bury their loved ones according to their preferred cultural and religious practices. This represents the opportunity to put the spirits of their loved ones to rest, thereby helping alleviate the intergenerational trauma that stems

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265 Costantino, Roselyn (2012) 'Guatemaltecas Have Not Forgotten: From Victims of Sexual Violence to Architects of Empowerment in Guatemala', in Carol Rittner and John K Roth (eds.) *Rape: Weapon of War and Genocide*. St Paul, MN: Paragon House, p.261.

266 See UN Women (2016, March 3) 'Landmark ruling in Guatemala a victory against sexual violence in armed conflict', <https://www.unwomen.org/en/news/stories/2016/3/guatemala-victory-against-sexual-violence-in-armed-conflict> Last accessed December 2021. The verdict was ratified on appeal in 2017.

from the ambiguous loss that disappearances inflict. Recovery and restitution of remains also means families and society as a whole receive the truth, or at least more information, about what happened. The provision of psychosocial and legal support to victims' families and/ or communities is also essential in any efforts to document and search for the disappeared.

**Initiatives to document human rights violations and search for the disappeared in Guatemala have been driven largely by the tireless efforts of family members and the civil society organizations that they formed.** The majority of victims of disappearance and enforced disappearance in Guatemala are men. The wives and partners that many of them left behind joined forces with victims' mothers, as in so many settings around the world, and over the late 1980s and early 1990s, **women became the main actors involved in the search for those disappeared. Over the course of this period, relatives came together to form civil society associations, whose activities included creating and maintaining records of human rights violations committed during the conflict.** These associations include the National Widows' Association of Guatemala (*Coordinadora Nacional de Viudas de Guatemala*, CONAVIGUA); Association of Families of the Detained and Disappeared in Guatemala (*Asociación de Familiares de Detenidos y Desaparecidos de Guatemala*, FAMDEGUA), and the Mutual Support Group (*Grupo de Apoyo Mutuo*, GAM), to name a few. Newer groups have emerged in recent times, led by the sons and daughters of the disappeared: thus, Guatemala has a chapter of the *H.I.J.O.S.* organization that is also active in the search for truth and justice in many other Latin American countries.<sup>267</sup>

CONAVIGUA and FAMDEGUA requested the first investigations that led to the localization of clandestine burial sites containing the remains of victims of the conflict. They did so based on witness reports and information compiled through testimony from families, and archival research. The information these and other groups had gathered back in the 1980s, documenting violations as they happened, later became crucial as a basis for the 1998 REMHI report and the 1999 Truth Commission report, meaning that civil society associations have proven to be the key repository of historical memory in Guatemala. These organizations have also been active in promoting justice and reparations.

The Truth Commission declared that "(...) the exhumation of the remains of the victims of the armed confrontation and the location of clandestine and

<sup>267</sup> The acronym 'H.I.J.O.S.' was adopted because it spells out the Spanish word for 'children' (sons or daughters).

hidden cemeteries, wherever they are to be found, is in itself an act of justice and reparation and an important step on the path to reconciliation.”<sup>268</sup> The Commission accordingly recommended that the Guatemalan State develop a national exhumation policy, to be implemented with full respect for the cultural identities and needs of families and communities, ensuring a dignified treatment of victims, and promoting the involvement of forensic anthropological expertise from civil society.<sup>269</sup> The Commission further recommended active search and investigation: “the Government and the judiciary, in collaboration with civil society, [should] initiate, as soon as possible, investigations regarding all known cases of enforced disappearances”, using “[a]ll available legal and material resources (...) to clarify the whereabouts of the disappeared and, in the case of death, to deliver the remains to the relatives.”<sup>270</sup> In the course of the subsequent two decades, **the Guatemalan State has however failed to either establish a National Search Commission, or develop other official policy strategies for exhumations or search.**

Since the first exhumation, which took place in 1991, the State has not directly conducted investigations or exhumations related to enforced disappearances. **In the absence of State policy and action, civil society organizations including such as the Forensic Anthropology Foundation of Guatemala, FAFG are actively documenting and investigating cases.**<sup>271</sup> Funded through private donations and international support, FAFG provides external expertise to the Public Prosecutor’s Office. Thanks to its comprehensive investigation and multidisciplinary forensic approaches, FAFG has recovered the remains of over 8,500 victims of the internal armed conflict, some of them from mass clandestine graves on the grounds of military installations. One example is the landmark case known as ‘CREOMPAZ’, which relates to a military base also known as ‘Former Military Base No. 21’. There were grounds to believe that civilians illegally abducted by military agents in this highland area had been held for questioning, tortured, killed, and subsequently buried in the grounds of the base – i.e., that violations amounting to enforced

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268 CEH, *Guatemala: Memory of Silence: Report of the Commission for Historical Clarification - Conclusions and Recommendations* (official translation), Volume ‘Recommendations’, Section III, ‘Reparatory Measures’, para. 27, ‘Active Policy of Exhumation’ (p.54).

269 CEH, *Guatemala: Memory of Silence... Recommendations*, Section III (op. cit.), paras. 29-31 (p. 54)

270 CEH, *Guatemala: Memory of Silence... Recommendations*, Section III (op. cit.), para. 22 (p.52).

271 Although other non-State forensic teams and initiatives also exist or have existed in Guatemala, FAFG is the largest. It now also has considerable presence and renown in the wider Central American regional and beyond, constituting in effect a subregional ‘hub’ of expertise.

disappearance had occurred there. Under authority of a judicial order, FAFG conducted forensic archaeological investigations in CREOMPAZ, ultimately recovering 565 bodies from 85 graves.<sup>272</sup>

## **2.2 The Forensic Anthropology Foundation of Guatemala (FAFG) as a Non-State Search Mechanism**

### **Creation and characteristics<sup>273</sup>**

FAFG has its origins in the Equipo Antropología Forense de Guatemala, EAFG ('Forensic Anthropology Team of Guatemala'), established in July 1992 when renowned forensics pioneer Dr. Clyde Snow initiated the formation of a team of forensic experts to systematically investigate, document and exhume clandestine graves. The team originally consisted of several Guatemalans, plus a group of dedicated international forensic archaeologists and anthropologists. The EAFG's goal was to support family members of victims of disappearance by using forensic sciences to exhume and identify the remains of massacre victims who had been buried in irregular grave sites near to the site of the killings. Around the time that the 1996 Peace Accords were signed, knowledge about where large-scale massacres had occurred was both current and widely diffused in society and among affected communities. Forensic efforts were therefore able to focus on cases in which communities had witnessed how, when and where victims had been killed, then subsequently buried in mass graves. A year later, in 1997, the Forensic Anthropology Foundation of Guatemala (FAFG) was created and registered as a scientific, non-profit civil society organization with the purpose of searching for, exhuming, and identifying victims of the conflict.

**Since its foundation, FAFG has developed a multidisciplinary forensic system covering four main areas: Victim Investigation and Documentation, Forensic Archaeology, Forensic Anthropology, and Forensic Genetics. Together, these make up a holistic search and identification process designed to accompany families in their search for truth and justice, and to recover the remains of their loved ones.** Families are at involved and play an essential role in all stages of FAFG's process, often providing information critical for the success of search and/or identification. FAFG's forensic investigations comprise retrieval and

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272 Henderson, Erica, Catherine Nolin, and Fredy Peccerelli (2014) 'Dignifying a Bare Life and Making Place through Exhumation: Cobán CREOMPAZ Former Military Garrison, Guatemala'. *Journal of Latin American Geography* 13(2), pp. 97-116.

273 See also [www.fafg.org](http://www.fafg.org)

documentation of evidence, identification of remains, determination of causes of death, and reconstruction of events surrounding violent deaths. This allows it to contribute to the judicial process, by providing evidence and expert reports to the judicial system through the Human Rights Section of the Public Prosecutor's Office. The work also supports society in the (re)construction of recent history/historical memory, helps restore the recognition of victims' dignity, and can empower family members by presenting them with information that then opens new avenues for them to seek accountability and reparations.

**Other local civil society actors play an important role in providing psychosocial and legal support:** FAFG works directly with civil society organizations throughout Guatemala, many of long standing, and operates in a complementary fashion alongside other transitional justice actors and institutions, non-State and State; domestic and international. These multi-stakeholder efforts have contributed to bringing truth and justice to victims and/or their families. They have also helped bring pressure to bear on the justice system to resolve human rights cases and, where necessary, bring them to trial, despite the lack of a visible State commitment to the specific tasks of search and identification of victims of disappearance and enforced disappearance.

## FAFG's functions and collaboration with State institutions

**A forensic investigation can begin either when a family comes forward, to the FAFG or elsewhere, to report the disappearance of a loved one during the internal armed conflict; or when human remains are found in circumstances that suggest they may belong to victims of the internal armed conflict.** The State, for its part, is legally obliged to investigate any death that has taken place in suspicious circumstances or due to unknown causes: it is mandated to conduct a legal investigation to clarify the circumstances of death, and, where necessary, to go on to initiate prosecution of any third party deemed responsible. While a suspicious or unexplained death is being investigated, the Prosecutor's Office has the faculty designate a suitably qualified external expert as a competent authority to collect, analyze, and report on evidence.<sup>274</sup> This is the pathway by which FAFG

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<sup>274</sup> Articles 225 through 229 of the Criminal Procedural Code establish the legal framework and limitations that allow a judge or prosecutor to designate these external experts. The manual established in 1997 outlines an agreement created under these articles whereby FAFG forensic team members can serve as expert advisors to the Prosecutor's Office when carrying out work utilizing the various forensic disciplines required in a case, for example forensic archaeology, forensic anthropology, genetics, and victim investigation.

often becomes formally or officially involved in an investigation.

FAFG itself often conducts the necessary preliminary work leading to such a designation: based on information received, FAFG archaeologists will conduct a thorough site survey as a prelude to what may later become a full forensic archaeological investigation. These preliminary inspections pinpoint locations where excavations are needed in order to locate clandestine graves containing the human remains of victims from the internal armed conflict. The evidence gathered is then presented to a judge or to the respective Prosecutor's Office, requesting authorization to initiate an investigation, with the involvement of FAFG. If this request is granted, the Prosecutor's Office will issue a formal 'request for the appointment of experts', in which the objectives and scope of the forensic investigation will be laid down.<sup>275</sup> Once their investigations are concluded, FAFG staff present an expert report presenting all relevant information. FAFG forensic experts have testified in many of the principal trials for human rights violations and crimes against humanity committed during the internal armed conflict, that have taken place to date in Guatemala's domestic courts.

As can be seen from the above description, **FAFG has maintained close collaboration with the public prosecution service**, overseen by the Attorney General's Office, from the outset. Initially, each archaeological investigation and consequent exhumation was coordinated directly with the regional Prosecutor's Offices in the Department concerned.<sup>276</sup> In 1997, the FAFG and the Attorney General's office established a jointly produced *Procedural Manual of Forensic Anthropological Investigations*, allowing regional prosecutors to follow a standardized procedure in order to authorize each new exhumation.

## FAFG's multidisciplinary, family-centered approach

FAFG's self-imposed mission is to apply forensic sciences in service of life and respect for human rights. FAFG's work comprises three institutional strategies: 1) supporting family members of the disappeared with comprehensive forensic services; 2) searching for and identifying the disappeared through the application of multidisciplinary forensic sciences; and 3) sharing scientific knowledge and

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<sup>275</sup> Objectives may include the determination of cause of death, description of any indications of other human rights violations surrounding the death (e.g., torture), and identification of the person, as well as any other type of forensic genetic or anthropological information

<sup>276</sup> Guatemala is a unitary, rather than a federal State, and 'departments' are the main administrative subunits into which the country is divided.

experience with local and international institutions that working with victims and/or relatives of victims of disappearance and enforced disappearance.

The process of searching for and identifying the disappeared is long and very complex, involving many unknown variables. It could nonetheless be summed up in **two deceptively simple main questions: who are the disappeared? Where can they be found?**

**In order to answer these two questions, FAFG has devised what it refers to as a ‘Multidisciplinary Human Identification System’,** combining information from various forensic sources to screen for possible matches between recovered human skeletal remains, reports of disappeared persons, and relatives seeking a family member. The system cross-references information obtained through forensic archaeological, anthropological and genetic analysis with the contents of testimony, genetic reference samples provided by relatives, and data from previous investigations and documentation of human rights violations. **This system, specially devised for use in the search for missing or disappeared persons, includes analysis of all available antemortem<sup>277</sup> and postmortem information about a person, date/ time and geographical area, and circumstances of disappearance.** The system was created to provide an autonomous technical aid to decision-making, providing wide access to information for the forensic team working on a case.

As mentioned above, FAFG investigations often begin when a family member comes forward to report a disappeared loved one, and provide a genetic sample. Once that genetic profile is uploaded to the genetic database, it will be repeatedly compared against existing and future genetic profiles obtained from as-yet-unidentified skeletal remains that have been recovered. The hope is that a match will be found that can lead to confirmed identification of a set of remains, or alternatively to the identification of possible locations where the missing person, if now deceased, may have been buried.

The bodies of Guatemala’s disappeared are sometimes to be found in clandestine mass graves, and sometimes in unmarked graves in municipal cemeteries. In the latter case, the remains of the disappeared will potentially be commingled with those of many other people who were buried without identification for other

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<sup>277</sup> Information about the victim prior to his/her disappearance.

reasons.<sup>278</sup> It is **therefore a particular challenge to determine whether bodies found in municipal cemeteries, and also those in clandestine graves, belong to victims of conflict-related disappearance or enforced disappearance, or have an unrelated origin or cause.** In both scenarios, the information and testimonies provided by family members and civil society organizations are crucial for discerning the most likely possibility, in order to orient further examination.

Once a grave is located, FAFG forensic archaeologists begin careful exhumations, recovering not just the body, but all associated artifacts and evidence. The exhumation includes the meticulous recording, recovery, and sealing of any potential evidence from the burial site, in order to safeguard the chain of custody. Skeletal remains will then be analyzed by FAFG forensic anthropologists to generate the biological profile of the victim and, where possible, determine cause of death. Samples collected from as-yet-unidentified victims will be processed and analyzed in FAFG's in-house DNA lab to extract a useable genetic profile, which is then uploaded into the genetic database in search of matches or coincidences with other victims, or with samples provided by relatives. Any potential matches are further analyzed, to double check that all the information collected in the course of the multidisciplinary forensic investigation converges around and correlates with the proposed identification. If so, this preliminary identification is presented to FAFG's Identification Committee in the form of a hypothesis, which must then be rigorously reviewed to see whether it can be considered confirmed.

Thus it is important to note that the successful identification of disappeared and forcibly disappeared persons in Guatemala is usually the product of collaboration between FAFG's multidisciplinary forensic efforts, relatives, civil society organizations, and the Prosecutor's Office. **This multidisciplinary approach, created especially for the purposes of searching for and identifying disappeared persons, has applications and relevance not only for the rest of Latin American context but also for other parts of the world, wherever political volatility and other kinds of conflict continue to produce increasing numbers of disappearances.** FAFG accordingly considers that it has a responsibility to share its wealth of experience and expertise to support global efforts to resolve cases and identify the disappeared, especially wherever families are in need of scientific and technical support.

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<sup>278</sup> It is common practice in Latin America for the remains of persons deceased without relatives to identify or claim them, to be buried in communal grave spaces under the legend 'NN'. These spaces may come to contain remains of people who died in a range of different circumstances, including from accidents and natural causes, over diverse periods of time. Editor's note.

### 3. CONCLUSIONS ON THE SEARCH FOR THE DISAPPEARED IN GUATEMALA

Taking FAFG as an example of a non-State search effort we can see how, by remaining autonomous and hyper-focused on one mission, a non-State entity has been able to provide tangible and concrete support to families. Forensic investigation has been deployed to carry out search and identification using proven scientific methods, and to collaborate with justice by providing forensic evidence to the Prosecutor's office, thus assisting the advance of local accountability efforts. FAFG has identified over 3,600 victims of the internal armed conflict to date, and intends to continue for as long as there are families who are still searching.

FAFG's philosophy and experience suggest that forensic intervention to search for the disappeared must advocate for participation from families, in ways that afford them safeguarding and respect. There must be concerted efforts to support the development of dedicated forensic teams and institutions in countries that are searching for the disappeared, building local capacity specific to each context. Understanding that such dedicated forensic efforts are necessarily a long-term commitment entails appreciating that they require allocation of sufficient resources, investment in technological advances, and the sharing of information among the institutions and organizations involved. Attention also needs to be paid to supporting civil society organizations which accompany relatives by providing legal services and psychosocial support throughout the forensic and truth-seeking process.

# B. DISAPPEARANCES AND SEARCH MECHANISMS IN THE FORMER YUGOSLAVIA<sup>279</sup>

## 1. DISAPPEARANCES IN THE FORMER YUGOSLAVIA

### 1.1 Overview and State Obligations

This section provides basic information about the search process for the disappeared in three countries of the Western Balkan region of Europe commonly known as the former Yugoslavia. The three countries are Bosnia and Herzegovina (BiH), Serbia, and Kosovo. The section provides historical background and a general description of the achievements of search activities in each country. It also outlines the legal frameworks involved, traces the connections between search mechanisms connected with State institutions, and explains how civil society initiatives have operated in the search for the missing or disappeared in each country.<sup>280</sup>

For each of the three countries discussed here, the process of negotiating membership of the European Union (EU) must be considered a major driver of the post-conflict transitional justice process in each country. This process explicitly considered and included the search for the disappeared, an issue which occupies a prominent place in the main documents and strategic planning surrounding the EU accession framework. The European Court of Human Rights (ECtHR), for

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<sup>279</sup> Section prepared by Predrag Miletic, Humanitarian Law Center (HLC), Belgrade, Serbia.

<sup>280</sup> Across the Balkans, the term “missing persons” is often used (as opposed to the term “disappeared”), to refer to persons disappeared in the context of conflict. For the purposes of consistency, this report will generally prefer the term ‘disappeared’.



Wooden grave markers where bodies of ethnic Albanians from Kosovo were buried after they were unearthed from a mass grave in Petrovo Selo, Serbia. On Aug. 29, 2012, Amnesty International and regional Balkan human rights organizations urged the Balkan States to investigate the fate of some 14,000 people still missing from the region's conflicts and for those responsible for their disappearance to be punished. (AP Photo/Darko Vojinovic, File)

its part, has taken the view that the failure of member State authorities to carry out effective investigations into the fate of the disappeared not only constitutes an ongoing violation of the obligation to protect the **right to life**, under Article 2 of the European Convention on Human Rights (ECHR), but also amounts to a **violation of the prohibition of torture**, under ECHR Article 3.<sup>281</sup> According to the jurisprudence of the European Court, an ‘effective’ investigation means one that is official, transparent, independent, impartial, and capable of determining the facts in each individual case.<sup>282</sup> The Court has further held that these standards cannot be met without the participation of judicial institutions, in particular, criminal courts and prosecutors’ offices.<sup>283</sup>

A regional framework can be said to exist in regard to the search for the disappeared: BiH, Serbia and Kosovo **have signed several bilateral and multilateral cooperation agreements** on the issue. Croatia is also a party to some of these. International organizations the International Committee of the Red Cross (ICRC), and the International Commission on Missing Persons (ICMP)<sup>284</sup> worked to facilitate the signing of many of these agreements, and have undertaken a range of actions to improve cooperation between State institutions, families of victims of disappearance, and civil society.

Among the Balkan countries and entities that currently make up the territory previously occupied by the former Yugoslavia, BiH, Serbia, Slovenia, and Montenegro have each signed and ratified the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).<sup>285</sup> Croatia and North Macedonia had signed, but had not ratified, the Convention as of 31 December 2021.<sup>286</sup> Kosovo cannot sign as it is not presently a full UN member State, with the United Nations Security Council and General Assembly remaining

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281 European Court of Human Rights (ECHR), *Kurt v. Turkey* (Application 15/1997/799/1002), Judgment of May 25, 1998, para. 134.

282 European Court of Human Rights (ECHR). *Cyprus v. Turkey* (Application 25781/94), Judgment of May 10, 2001; and *Kurt v. Turkey*, Judgment, op. cit.

283 ECHR, *idem*.

284 The ICMP, [www.icmp.int](http://www.icmp.int), is a treaty-based international (intergovernmental) organization. The ICRC <https://www.icrc.org/>, while strictly speaking a private association, holds a number of international mandates under public international law and international humanitarian law.

285 BiH, Serbia, and Montenegro all signed on 6 February 2007, with BiH going on to ratify on March 30, 2012; Serbia on May 18, 2011, and Montenegro on September 20, 2011. Slovenia signed on 26 September 2007 and ratified on 15 December 2021.

286 Both Croatia and Macedonia (now, ‘North Macedonia’) signed on 6 February 2007.

divided on the issue of its recognition.<sup>287</sup>

## 1.2 History and context of disappearances

The Northwest Balkans region of Europe is mostly populated by Southern Slav peoples who share a common language, but whose religious identities and affiliations vary between Catholicism, Eastern Orthodox Christianity, and Islam. After the Second World War, the region was politically constituted as the Socialist Federal Republic of Yugoslavia. This new State was organized into six federal republics, and pre-existing nationalist identities and movements were suppressed.<sup>288</sup> The anti-communist revolutions of 1989 however precipitated a nationalist and religious renaissance throughout Eastern and Southern Europe. These nationalist tendencies led to the violent dissolution of Yugoslavia, from 1991 onwards, into seven new territories: **Slovenia, Croatia, BiH, Serbia, Montenegro, Macedonia (now known as 'North Macedonia'), and Kosovo**. The conquest of land by each one was conducted along ethnic faultlines, with various of the armed actors involved implementing widespread, planned and systematic ethnic cleansing of minority populations alongside the killings, enforced disappearances, imprisonment, and deportations that became commonplace during a series of post-1991 armed conflicts.

A brief initial confrontation broke out in July 1991, in the Republic of Slovenia. Armed conflict in neighboring Croatia started in 1991 and lasted until November 1995. The conflict in BiH ran from April 1992 until November 1995; in Kosovo, from February 1998 until June 1999, and in Macedonia, between October 2000 and April 2001. International diplomatic efforts, and a 1995 NATO<sup>289</sup> military intervention against the Bosnian Serb Army, finally drove the warring parties to sign peace agreements. A General Framework Agreement for Peace (the Dayton Agreement), signed in 1995, put an end to the Bosnian War, one of the longest-running of the conflicts associated with the breakup.<sup>290</sup> A second NATO military intervention, in

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287 Kosovo unilaterally declared its independence from Serbia in 2008, but its status as a republic remains the subject of an ongoing territorial dispute with the Republic of Serbia. Diplomatic recognition of Kosovo has fluctuated, since 2008, at between 97 and 112 of the 193 sovereign States that were UN members as of December 2021.

288 See Jelavich, Barbara (1989) *History of the Balkans*, Cambridge: Cambridge University Press, Vol.2, p. 296.

289 'NATO' is the North Atlantic Treaty Organization.

290 The text of the Dayton Agreement is available at <https://peacemaker.un.org/BiHdaytonagreement95> (Last accessed 31 December 2021).

1999, heralded the end of the conflict in Kosovo. The last of the open phases of violent conflict was a one-year confrontation in Macedonia between 2000 and 2001. The combined death toll from this decade of war across the region has been estimated at 130,000 deaths and/or disappearances between 1991 and 2001, with many other human rights violations committed.<sup>291</sup> Approximately 40,000 of the total casualty figures have been estimated to correspond to victims of disappearance.

Disappearance and/ or enforced disappearance took place in a relatively systematized and organized way. For example, enforced disappearances were committed on a massive scale in the areas of Srebrenica and Prijedor in BiH: mass imprisonment in detention camps in Prijedor between June and December 1992, followed by mass killings in Srebrenica in July 1995, are estimated to have left a combined total of 9,969 victims.<sup>292</sup> Many other incidents of mass disappearance took place, as did numerous enforced disappearances committed during military operations, forcible displacement and deportation, imprisonment, and even the removal of remains from graves after burial.

### The search for the disappeared

The ICMP states that **70% of the 40,000 persons it estimates to have been disappeared between 1991 and 2001, have today been accounted for.**<sup>293</sup> The ICRC meanwhile states that a total of 35,015 individual cases were reported to it, across BiH, Croatia, and Kosovo, in the immediate aftermath of the conflict and in the years that followed.<sup>294</sup> Of these, as of October 2020, 25,012 individuals had been

291 These figures are necessarily approximate and have at times been widely contested. The overall approximation of 130,000 is however consonant with a 2011 figure, produced by the now-dissolved International Criminal Tribunal for the Former Yugoslavia, ICTY, which attributed 104,732 fatal or presumed fatal (i.e., missing or disappeared) casualties to the Bosnian War (1992-1995) alone (ICTY Press Release TR/MOW/1400e, The Hague, March 29, 2011). A wider demographic data feature on victimization patterns, established at that time the ICTY website, appears to have been discontinued when the ICTY's functions were taken over, in 2018, by the UN International Residual Mechanism for Criminal Tribunals, <https://www.irmct.org/en>.

292 As of August 31, 2021; see <https://www.icrc.org/en/document/international-day-disappeared-search-continues-three-decades>.

293 See <https://www.icmp.int/the-missing/>, last accessed 31 December 2021. See also Sarkin, Jeremy, et. al. (2014) 'Bosnia i Hercegovina, Missing persons from the armed conflicts of the 1990s: A Stocktaking'. Sarajevo: ICMP, available at: [https://www.icmp.int/wp-content/uploads/2014/12/StocktakingReport\\_ENG\\_web.pdf](https://www.icmp.int/wp-content/uploads/2014/12/StocktakingReport_ENG_web.pdf).

294 The lower total is attributable in large part to the fact that not all disappearances have been reported as individual cases before the ICRC.

determined to be deceased, with identification performed, and remains returned to relatives (16,038 in BiH, 4,553 in Croatia, and 4,421 in Kosovo). A further 10,013 tracing requests were still open (6,386 in BiH, 1,974 in Croatia, and 1,643 in Kosovo).<sup>295</sup>

**No other post-conflict region in the world has achieved such a high rate of resolution of cases of disappearance.** Different approaches were required in order to reach this stage, all of them depending on the individual States that now comprise the territory, making efforts to comply with their duties to safeguard peace and promote human rights. New technical, administrative, and judicial processes have been designed and implemented, garnering support from a broad range of political and societal entities – foremost among them, relatives of the disappeared. **Families have been provided with effective legal and political recourse, empowering them to ensure that the authorities carry out the work of locating and identifying their disappeared loved ones in a transparent and accountable manner, especially in Bosnia and Herzegovina.** Search and identification processes have been implemented with the help of various international entities and actors. These have included, in particular, the EU Office of the High Representative in BiH (OHR), the International Criminal Tribunal for the Former Yugoslavia (ICTY) (now discontinued), the European Court of Human Rights (ECHR), and the International Commission on Missing Persons, ICMP.<sup>296</sup> These international entities and organizations helped to embed the issue of disappearances in the fabric of legal and constitutional guarantees in BiH, as well as in Croatia, Serbia, and Kosovo. **The ICMP in particular has played a central role in this effort in Bosnia and Herzegovina. It helped to build BiH's institutional, administrative and technical capacities to address the issue in a non-discriminatory fashion, including the crafting of legislation to safeguard the rights of families, the introduction of systematic forensic methodology including DNA-based identification, the upholding of rule-of-law principles entailing the provision of evidence to domestic courts and the ICTY (when active), and the facilitation of active engagement by the families of the disappeared.**<sup>297</sup>

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295 ICRC (2020, November 26) 'ICRC five-year strategy on the missing in former Yugoslavia', <https://www.icrc.org/en/document/missing-bosnia-herzegovina-croatia-serbia-kosovo>. Last accessed 31 December 2021.

296 The ICMP was first established at the initiative of US President Bill Clinton in 1996 at the G-7 Summit in Lyon, France. Its initial purpose was to secure the cooperation of governments to locate persons missing as a result of the conflicts in the former Yugoslavia. Since 2004, the ICMP has become a globally active international (intergovernmental) organization, assisting States to locate and identify missing persons, regardless of the circumstances and place of their disappearance.

297 Sarkin et. al. (2014) 'Bosnia i Hercegovina, Missing persons'... op. cit.

The **cross-border nature of the armed conflicts in the former Yugoslavia meant that close and intensive cooperation between the successor States in the region was vital** in the search for disappeared persons. Information about the location of burial sites was, and is, often to be found scattered across various countries. In August 2014, a multi-country Declaration on the role of the State in addressing human rights abuses and the issue of disappeared persons as a consequence of armed conflict was signed by representatives of Croatia, Serbia, BiH and Montenegro.<sup>298</sup> This Declaration, drafted under the auspices of the International Commission on Missing Persons, proved to be an important step forward in enhancing regional cooperation for search. The signatories committed themselves to addressing the issue of disappeared persons as a primary State responsibility in securing a lasting peace and promoting cooperation and reconciliation. The Declaration affirms the rights of families of the disappeared to know the fate of their loved ones, and calls on governments to work together and exchange information that can help locate and identify **victims of disappearance**.<sup>299</sup>

**Although a high success rate has been achieved, the process is not complete: as we have seen, over 10,000 individuals are still to be accounted for. The State institutions responsible for locating and identifying the disappeared have meanwhile been plagued by a lack of resources, political manipulation, and, in recent years, by increasing obstructionism.**<sup>300</sup>

## 2. THE SEARCH PROCESS IN THE FORMER YUGOSLAVIA

### 2.1 Bosnia and Herzegovina (BiH)

In 1994, while the armed conflict was still ongoing, **UN Resolution 1994/72 urged all parties to the conflict to cooperate in determining the fate of thousands of disappeared persons, by disclosing all information and documentation that could help to locate them.** Political will to address the issue of disappeared persons in a comprehensive way however began to emerge gradually in the post-war period. According to an ICMP report, although negotiations in the runup to

298 ICMP, 'Declaration on the role of the state in addressing the issue of persons missing as a consequence of armed conflict and human rights abuses', signed at Mostar in the BiH on August 28, 2014. Text available from <https://www.icmp.int/wp-content/uploads/2014/08/signed-declaration-2.pdf>. Last accessed 31 December 2021.

299 ICMP, 'Declaration on the role of the state...' op. cit.

300 Sarkin et. al. (2014) 'Bosnia i Herzegovina...' op. cit.

the Dayton Agreement initially considered making provision for a commission on disappeared persons, this proposal was excluded from the final text due to apprehension on the part of some of the international actors that exhumation of burial sites could disrupt the incipient peace process.<sup>301</sup>

The Dayton Agreement, as signed, preserved the BiH as a single sovereign State within its internationally recognized borders, while laying down that it would henceforth be regarded as comprising two main<sup>302</sup> internal entities: one Muslim-Croat (the BiH Federation, or FBiH), and the other Serb (the 'Republika Srpska', or RS). In both cases, commissions that had been set up during the war within each entity to document cases of disappearance and enforced disappearance were preserved and transformed into official bodies after the signing of the Agreement.<sup>303</sup> Allowing joint excavations to take place, coordinated between the two entity commissions, was critical given that the majority of disappeared citizens of BiH were likely to be found, if deceased, in the territory of what was now the other entity.<sup>304</sup> Inter-entity agreements were signed, with particular emphasis on allowing courts from either entity to issue orders for exhumation, collect evidence, exchange information about the location of burial sites, and oversee the safekeeping of human remains and associated artifacts recovered from crime scenes.

Between 1996 and 2001 the EU Office of the High Representative (OHR)<sup>305</sup> was responsible for coordinating this process, which became known as the **Joint**

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301 Idem.

302 A third component, the Brčko District, was formed as a semi-autonomous unit consisting of one single municipality only. The new District comprised the whole of the former Brčko municipality, 48% of which (including Brčko city) lay in the newly-created entity of Republika Srpska, while 52% belonged to an area now to be occupied by the Federation of Bosnia and Herzegovina.

303 *Odluka o obrazovanju Državne komisije za traženje nestalih osoba* ('Decision on the Formation of the State Commission on Tracing Missing Persons'), Official Gazette of Bosnia and Herzegovina, No. 9/96, March 24, 1996.

304 The Sarajevo Agreement (available at: <https://www.icmp.int/wp-content/uploads/1996/09/operational-agreement-on-exhumations-and-the-clearing-of-unburied-mortal-remains-Sarajevo-4-September-1996.pdf>) provided Rules for Exhumations and the clearing of Unburied Mortal Remains, and outlined procedures whereby each Entity commission had to submit to the other, in advance of any field visit, information about the location to be visited, and a list of personnel who would be involved. The receiving entity commission was given 24 hours in which to scrutinize the list for suspected war criminals, and ensure the security of the site to be visited. This system of advance notification became unnecessary after the formation of the MPI.

305 The Office of the High Representative is an ad hoc EU institution, unique to BiH, charged with overseeing implementation of non-military aspects of the Dayton Agreement. It has the status of an EU Diplomatic Mission. See <http://www.ohr.int/en/>

**Exhumation Process (JEP).** Annex No. 7 of the Dayton Agreement, the ‘Agreement on Refugees and Displaced Persons’, also gave the ICRC a mandate to support the process of searching for those unaccounted for, and establishing their fate or whereabouts.<sup>306</sup> At the international level, an **Expert Group on Exhumations and Missing Persons**<sup>307</sup> was established in February 1996 to coordinate the activities of the various international actors engaged in this issue. The Expert Group was chaired by the OHR in association with a number of key international and local institutions.<sup>308</sup> Also in 1996, the **ICRC** created a **Working Group on Missing Persons in BiH (WGMP)**.<sup>309</sup> Working Group membership included representatives of the former parties to the conflict, the OHR, local Red Cross societies in BiH, and **associations of relatives of the disappeared**. The Working Group’s most significant contribution was to bring the various parties together to discuss the pressing issue of disappeared persons, while the issuance and registration of tracing requests also made it possible to compile reliable lists of the disappeared.<sup>310</sup> However, according to one source, meetings of the Working Group tended to be “misused” as political platforms,<sup>311</sup> and sessions were suspended in 1999. Meetings began again in 2003 between representatives of the federal State government and the respective Entity authorities (FBiH and Republika Srpska), but the mechanism proved largely unproductive in this new phase, and it was wound up in 2007.

On January 1, 2001, the role of coordinating the Expert Group and the Joint Exhumation Process was formally transferred from the OHR to the International Commission on Missing Persons (ICMP), representing a step forward toward

306 Dayton Agreement (op. cit.), Annex 7, ‘Persons Unaccounted For’, Art. 5: “The Parties shall provide information through the tracing mechanisms of the ICRC on all persons unaccounted for. The Parties shall also cooperate fully with the ICRC in its efforts to determine the identities, whereabouts and fate of the unaccounted for.”

307 While the nomenclature of ‘missing persons’ reflects local usage, for the purposes of this report the term “missing persons” should be interpreted as referring to persons disappeared in the context of the conflict.

308 Namely, the UN Office of the High Commissioner for Human Rights (OHCHR), the UN Special Rapporteur on the Situation of Human Rights in the territory of the former Yugoslavia, the Expert on Missing Persons, the International Criminal Tribunal for the former Yugoslavia (ICTY), the NATO-led Implementation Force (IFOR), the United Nations International Police Task Force (IPTF), the UN Transitional Administration in Eastern Slavonia, Baranja and Western Sirmium (UNTAES), the ICRC, Physicians for Human Rights, a representative of the United States government, and, eventually, the ICMP.

309 For ‘missing’, here read ‘disappeared’: see *supra*. n. 302.

310 Sarkin et. al. (2014) ‘Bosnia i Hercegovina, Missing persons’... op. cit.

311 Frech, Renate (1998) ‘Disappearances in Bosnia and Herzegovina’, Association for the Promotion of the Ludwig Boltzmann Institute of Human Rights, Sarajevo/Tuzla/Vienna, p. 21, as cited in Sarkin et. al., op. cit., p. 30.

greater local ownership of the search process. By that time, the membership of the Expert Group had evolved to include representatives of the prosecutors' offices of the BiH State and its two main component Entities; official BiH State police agency the State Investigation and Protection Agency (SIPA); the Intelligence-Security Agency of BiH (known by the acronym 'OSA'), the Ministry of the Interior and other relevant ministries, and national de-mining agency the Bosnia and Herzegovina Mine Action Centre, BHMIC. It also included court-appointed forensic specialists. A final transformation took place in September 2009 when, under the terms of a Law on Missing Persons intended to enhance domestic capacity for resolving the issue of the disappeared, the Expert Group became part of the federal-level **Missing Persons Institute (MPI)** (see below).

The aforementioned **Law on Missing Persons** was passed by the BiH Parliamentary Assembly in October 2004.<sup>312</sup> It covers disappearances that began at any point between April 20, 1991 and February 14, 1996, and was adopted after intensive consultation, led by the Ministry for Human Rights and Refugees (MHRR), with relatives' associations, the Ministry of Justice, representatives of Entity authorities, the ICMP, and the ICRC. **The consultation process with relatives of the disappeared proved particularly important. Aimed at identifying their primary problems and needs,<sup>313</sup> it provided the outlined of a method for creating and managing central records about the disappeared, and for highlighting and protecting the social and economic rights of family members.** The 2004 legislation also, as mentioned, anticipated the creation of the Missing Persons Institute, negotiations for which were already under way between the ICMP and the BiH Council of Ministers.<sup>314</sup>

According to one source, the law meets relevant international standards,<sup>315</sup> and it does appear to seek to **fill in legal gaps that often present obstacles for relatives of the disappeared**. For example, prior to the adoption of the Law, families often had to proactively initiate the process of having their disappeared loved ones declared as presumed dead, in order to qualify for related financial assistance from

312 Entering into force, in accordance with usual national legislative procedure, eight days after its publication in the Official Gazette of Bosnia and Herzegovina, No. 50/04

313 Blumenstock, Tilman (2006) 'Legal Protection of the Missing and Their Relatives: The Example of Bosnia and Herzegovina', *Leiden Journal of International Law* 19 (3), October, pp. 773-793.

314 Simultaneous consultative efforts to create the MPI started in 2003 between ICMP and the Council of Ministers, Entity government representatives, representatives of the semi-autonomous Brčko District, and families of the missing.

315 Blumenstock (2006) op. cit.

the State, or so as to be able to inherit or exercise rights over assets belonging to the missing person. **The Law partially rectified this situation, setting out a procedure for collective (centralized) issuance of death certificates for verified cases, and making provision for family members to exercise property and inheritance rights in the interim.**<sup>316</sup> Chapter II of the law regulated **State entities' responsibilities for providing and exchanging information about the fate of victims of disappearance, and mentions a duty of 'assistance' for tracing such persons**, though it stops short of directly enunciating a direct responsibility on the State to search, identify, and return remains. The Law also stipulated that a Fund for the Support of Families of Missing Persons of BiH should be set up (Art. 15), although the associated right to financial support (Arts. 11-14) is heavily qualified, basically to situations in which the beneficiary has no other means of income (see also Art. 2), turning the provision into a basic social welfare or assistance measure rather than a reparations provision per se. The law also prescribed financial penalties for any individuals or institutions that obstruct the search for victims and/or deny family members access to information (Art. 25).

**Although the Law came into force in 2004, its provisions have not yet been fully implemented**, a fact which the BiH Constitutional Court has taken note of in at least 15 of its decisions,<sup>317</sup> each time ordering the Entity governments to forward all available information, including updates on the status of criminal investigations, to appellants (who were, in each case, relatives of disappeared persons). Major aspects of the Law that have not yet been realized include the fund for economic support of families; the right of family members to temporarily administer the property and assets of the missing person; priority processing of requests for financial and technical support submitted to BiH authorities by relatives' associations; priority access to education and employment for children of the disappeared; access to health services for relatives without insurance; the right to mark places of burial and exhumation, and the right to have a missing

316 Although it did not go so far as some subsequent Latin American laws, which create a permanent administrative and citizenship status of 'absent by reason of enforced disappearance', thereby obviating the need for families to accept a presumption of death. The BiH law instead decreed that the names of those whose disappearance had been verified, on a central register, by a certain date, would be entered automatically into the relevant register of deaths. Law on Missing Persons, Article 27 ('Entry Into the Register of Deaths'), text as unofficially translated by the ICMP (available at <https://advokat-prnjavorac.com/legislation/Law-on-missings-persons.pdf>), last accessed 31 December 2021). The provision on interim property rights is contained in Article 18 ('Other rights of members of families of the missing').

317 BiH Constitutional Court decisions AP 129/04, AP 228/04, AP 1226/05, AP 171/06, AP 2980/06, AP1143/06, AP 95/07, and AP36/06.

person's death, once confirmed or declared presumed, legally registered at the place the family wishes. International human rights monitoring system bodies including the UN Committee Against Torture and the UN Working Group on Enforced and Involuntary Disappearance, have repeatedly called on the BiH authorities to make more progress toward full implementation of the Law.

The plan to establish a **Missing Persons Institute (MPI)** had been the subject of discussion among OHR, ICRC, PHR, ICMP and relevant domestic institutions since 1997. **It became increasingly clear, in the post-conflict era, that any further progress would require a mechanism that would work for all victims, whatever their ethnic, religious, or national affiliation, within a regulatory framework overseen by the State.**

The MPI went through an initial founding ceremony in 2000, although it would not in point of fact be formally established until five years later, in 2005, and did not become operational for a further three years, i.e. in 2008. The initial inauguration ceremony, held on August 28, 2000 – in order to closely coincide with the International Day for Victims of Disappearance, which is commemorated worldwide each August 30th – was presided over by ICMP Commissioner Susanna Agnelli, and ICMP vice-chair and US Senator Bob Dole. During the ceremony, the two existing Entity commissions for the disappeared solemnly swore to support the MPI and help ensure that it would work on a cross-community basis, determining the fate of disappeared persons “without distinction of their ethnic or national origin.”<sup>318</sup> Datasets allowing the production of accurate, reliable numbers of persons disappeared during the conflict were to be compiled, in an effort to avert political manipulation of the figures. In 2003, ICMP invited the BiH Council of Ministers to establish the MPI jointly with them, to enhance domestic State ownership of it. Following a further two years of consultation, involving the ICRC in an observer role, the Council of Ministers signed an agreement with the ICMP on August 30, 2005. The **‘Agreement on Assuming the Role of Co-Founders of the Missing Persons Institute of BiH’** officially transformed the MPI into a State body, making this a landmark achievement and providing an important potential model for transitional justice mechanisms to deal with disappearance. This process successfully included representatives of the former parties to the conflict as well as associations of relatives of the disappeared, and ensured local ownership of the search process to create a mechanism for

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<sup>318</sup> Declaration in Support of the Missing Persons Institute for BiH’, August 28, 2000, made at the initial Inauguration Ceremony for the MPI.

all victims, whatever their ethnic, religious, or national affiliation, while applying relevant international standards within a regulatory framework overseen by the State. In its new post-2005 incarnation the MPI came to represent a sustainable domestic mechanism whose purpose was to locate victims of disappearance regardless of their ethnic, religious or national affiliation, or their role in past hostilities. It was also anticipated that it should pre-empt future manipulation of victim numbers.<sup>319</sup>

Five core activities were stipulated for the MPI: (1) to document and maintain records of disappeared persons and burial sites, and request court orders to investigate these sites; (2) to participate in technical activities relating to the search, excavation, examination, identification and, where relevant, safekeeping of the remains of victims of disappearance; (3) to provide support to relatives of the disappeared and their associations, particularly in covering funeral costs; (4) to cooperate with neighboring countries in searching for the disappeared, and (5) to inform the public about the outcomes of investigations and progress made.<sup>320</sup>

Very few countries in the world can claim to have accurate records of the number of persons disappeared following armed conflict. In an effort to address this challenge, the **Central Records on Missing Persons (CEN)**, database, whose creation was mandated by the 2004 Law on Missing Persons, collates individualized records on victims of disappearance persons, including information relevant to locating them and clarifying their fate. As of February 2011, the CEN housed 12 separate databases of information on victims of disappearance, created by previous State and Entity level commissions and also containing data supplied by the ICRC and ICMP. Thorough review was needed to eliminate duplicate records and verify each entry. Accordingly, in January 2013, the ICMP launched the project 'Assistance in the gathering of information necessary for verification of the Central Records on Missing Persons (CEN)', aimed at training existing and additional MPI staff for this purpose. The project ran until the end of December 2013, at which point the MPI reported that it had verified the content of 16,300 out of a total of 34,463 individual records. Another 337 reported cases of disappearance were added to

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319 See ICMP Press Release (2005, August 5), 'Council of Ministers Formally Approves Missing Persons Institute', <https://www.icmp.int/press-releases/council-of-ministers-formally-approves-missing-persons-institute/>. Last accessed 31 December 2021.

320 These and other MPI core activities are enumerated in ICMP (n.d.), 'Locating and Identifying Missing Persons: A Guide for Families in Bosnia and Herzegovina', ICMP, pp. 6-7 (<https://www.icmp.int/wp-content/uploads/2014/08/locating-and-identifying-missing-persons-a-guide-for-families-in-bih.pdf>). Last accessed 31 December 2021.

the ICMP database as a result of the project.<sup>321</sup>

**Courts and prosecutors have meanwhile also been addressing the issue of disappeared persons, as part of war crimes trials.** Prior to 2003, the applicable criminal law and procedure was structured along inquisitorial lines.<sup>322</sup> In 2003, however, a new State-level Criminal Procedural Code in BiH shifted the criminal justice system toward an adversarial trial procedure, in which prosecutors assume a more central role. The new Criminal Code also established State-level jurisdiction over serious crimes including genocide, war crimes, and crimes against humanity. A Special Department for War Crimes was set up in 2005, primarily to collect evidence allowing domestic prosecution of war crimes, crimes against humanity and genocide committed between 1992 and 1995. **An important, but immensely challenging, part of this process involves locating and identifying the remains of victims of these crimes.**

BiH's progress on search and identification should be examined within the context of a developed policy framework that incorporates international standards for technical and administrative capacity. The result has been an interconnected institutional, legislative, and cooperative process, underpinned by the establishment of the Missing Persons Institute (MPI)<sup>323</sup>, the adoption of a Law on Missing Persons, and the creation of an inter-institutional Working Group to address the issue of unidentified human remains in the country's mortuaries.<sup>324</sup> **Importantly, all of this has been done under the auspices of domestic**

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321 Minimum information required for verifying a putative case of a disappeared person includes the person's first and last name, the name of one parent, place and year of birth, and the place, date, year and circumstances of the presumed disappearance. CEN entries often also contain other fields, such as DNA match reports or death certificates indicating whether a particular case has been resolved.

322 The inquisitorial system of criminal justice utilizes extensive pre-trial investigation, placing a premium on the ascertaining of truth before any person is charged and brought to trial. This process of investigation and scrutiny is often presided over by an investigating judge or magistrate. The adversarial system, by contrast, tends to proceed via confronting defense and prosecution versions of the facts, usually in a courtroom setting under the chairpersonship of an impartial judge.

323 As throughout the case study, the term 'missing person' actually refers to persons disappeared in the conflict context.

324 It should be noted that the Republika Srpska, one of the component entities of the BiH, has its own regulations mechanisms, including a separate Commission for Tracing Detained and Missing Persons. The Republika Srpska also has its own penal code, which does not typify enforced disappearance as such, although it does contain the criminal offence of 'illegal deprivation of liberty'. (The central BiH criminal code, by contrast, introduced the figure of enforced disappearance in 2015). Republika Srpska also has its own Institute for Forensic Medicine; and a specific law on DNA databases and the performing of DNA analysis.

**authorities, including domestic courts and prosecutors.** One recent detailed comparative study of the relationship between search and criminal investigations positively evaluates the “clearly defined and strongly interrelated” functions and mandates of relevant institutions in BiH, considering there to be “solid interplay” between search and criminal investigation.<sup>325</sup>

Even with these significant advances, the process has been fraught with political challenges. Recent disputes within the MPI should be understood in that context. These disputes have slowed down the verification process and are undermining its credibility. In addition, a lack of sufficient financial, technical, and human resources has limited the MPI’s capacity to advance the search and identification process. This concern was raised by the UN Committee on Enforced Disappearances in its observations on the periodic report submitted by Bosnia and Herzegovina in 2016. The Committee “[noted] with concern that the budget of the Missing Persons Institute has halved since its inception, despite the Institute gradually taking over the responsibilities of the [ICMP], and regrets that the [MPI] has not been provided with all the technology necessary to efficiently detect graves and exhume them... [and] that the appointment of the members of the Board of Directors has been pending since 2012”.<sup>326</sup> The CED went on to recommend that BiH, as a State party to the Convention, “provide the Missing Persons Institute with the financial, human and technological resources necessary to adequately fulfil its mandate and expedite the appointment of the members of the Board of Directors.”<sup>327</sup>

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325 Srovin Coralli, Ana (2021, June), ‘Coordination between the search and criminal investigations concerning disappeared persons Case studies on Bosnia and Herzegovina and Mexico’, Geneva: swisspeace, ‘Summary’ (front matter). See <https://www.swisspeace.ch/assets/publications/downloads/Reports/Coordination-between-the-search-and-criminal-investigations-concerning-disappeared-persons.pdf> . Last accessed 31 December 2021.

326 UN Committee on Enforced Disappearances (CED), ‘Concluding observations on the report submitted by Bosnia and Herzegovina under article 29(1) of the Convention’, UN Doc. Ref. CED /C/ BIH / CO/1, November 3, 2016, para. 19.

327 Idem., para. 20.

## 2.2 Serbia

**Serbia participated in four armed conflicts over the course of the 1990s. It has been established by courts that Serbian institutions played a part, during that time, in concealing the bodies of victims of atrocity crimes on Serbian territory.<sup>328</sup> It is therefore essential that Serbian institutions proactively take part in clarifying the fate of victims of disappearance who are still unaccounted for.<sup>329</sup> Victims' communities have high expectations of Serbian institutions, in proportion to the substantial participation in the 1990s conflicts, of armed actors directly or indirectly controlled by Serbia.<sup>330</sup> The process is however hampered by many factors. These include a lack of capacity and of adequate financial resources on the part of government agencies involved in tracing disappeared persons; the absence of political will; and a lack of determination to enhance regional cooperation in order to make the search process more efficient and effective.**

According to the ICMP, the remains of approximately 1,100 disappeared persons have been recovered in Serbian territory since 2000.<sup>331</sup> Many of them were found in the same five mass burial sites: in 2001 and 2002 human remains belonging to 800 Kosovan Albanians, victims of the 1998-99 conflict, were found in three separate burial sites almost 250 miles from current Kosovan territory.<sup>332</sup> In 2014, another burial site, containing the remains of 52 Kosovan Albanians, was found in the southern Serbian region near the border with Kosovo.<sup>333</sup> The most recent find, in November 2020, was in a nearby site, and contained what were later determined to be remains belonging to around 15 people, also Kosovan

328 See Humanitarian Law Center (2017), 'Dossier: The cover-up of evidence of crimes during the war in Kosovo: The concealment of bodies operation', Belgrade: HLC. Available at [http://www.hlc-rdc.org/wp-content/uploads/2017/01/Dosije\\_OPERACIJA\\_SKRIVANJA\\_TELA\\_eng.pdf](http://www.hlc-rdc.org/wp-content/uploads/2017/01/Dosije_OPERACIJA_SKRIVANJA_TELA_eng.pdf) , last accessed Feb. 28, 2022.

329 Humanitarian Law Center (2014), 'Transitional Justice in the process of Serbia's accession to the European Union', Belgrade: HLC, p. 14, available at: <http://www.hlc-rdc.org/wp-content/uploads/2014/06/POLICY-PAPER-eng-ff.pdf> , last accessed Feb. 28, 2022.

330 Humanitarian Law Center (2016), 'Transitional Justice in Serbia from 2013 to 2015', Belgrade: HLC, p. 5, available at [http://www.hlc-rdc.org/wp-content/uploads/2016/06/izvestaj\\_o\\_TP\\_2013-2015\\_eng.pdf](http://www.hlc-rdc.org/wp-content/uploads/2016/06/izvestaj_o_TP_2013-2015_eng.pdf), last accessed Feb. 28, 2022.

331 ICMP website, 'Republic of Serbia'. See <https://www.icmp.int/where-we-work/europe/western-balkans/republic-of-serbia/> . Last accessed 31 December 2021.

332 Clandestine graves are around 250 miles far from Kosovo.

333 Source: Humanitarian Law Center, see <http://www.hlc-rdc.org/?p=28016&lang=de> , last accessed Feb. 28, 2022.

Albanians.<sup>334</sup> It is widely believed by relevant international and local actors that the remains of up to 1,000 more Kosovan Albanians, still disappeared, are hidden in various clandestine burial sites across Serbia; and that the same may be true of several hundred Croat and Bosnian people who disappeared during the 1991-95 conflict.

While a proactive approach by Serbian institutions is certainly crucial for clarifying the fate of victims from other communities, the other States involved - Croatia, BiH, Kosovo – must also recover information regarding several categories of disappeared persons with connections to the Republic of Serbia. These are:

a) Serbian citizens who disappeared on the territory of the Republic of Croatia or on the territory of the Republic of Bosnia and Herzegovina;

b) Citizens of the Republic of Croatia or of the Republic of Bosnia and Herzegovina, originally from Serbian communities (Serbian by origin/ethnicity), whose families or relatives – mainly refugee families – today reside in Republic of Serbia; and

c) Citizens of Serbia who disappeared during the course of the conflict in Kosovo.

**Serbia has not yet passed a law which would specifically regulate the search process or the rights of relatives of victims of disappearance.**<sup>335</sup> International humanitarian law contains a range of applicable norms and standards which, inter alia, provide for the right of relatives to know what happened to disappeared family members, and establish that the parties to a conflict have a corresponding obligation to provide families with information they may hold concerning the disappeared.<sup>336</sup> Families of the disappeared in Serbia do have some limited access

334 Stojanovic, Milica and Xiorxhina Bami (2020, November 17), 'Suspected Mass Grave of Kosovo War Victims Found in Serbia' Website of Balkan Transitional Justice. See <https://balkaninsight.com/2020/11/17/suspected-mass-grave-of-kosovo-war-victims-found-in-serbia/>. Last accessed 31 December 2021.

335 Humanitarian Law Center (2016), 'Transitional Justice in Serbia...', op. cit., p. 63.

336 Inter alia, the 1977 Additional Protocol I to the Geneva Conventions; other sources of customary international humanitarian law, the European Convention on Human Rights and Fundamental

to entitlements under the terms of various pieces of domestic legislation (namely, the Law on the Rights of Civilian Victims of War, and the Law on the Basic Rights of War Veterans, Disabled War Veterans, Civilian Victims of War and Family Members of Fallen Combatants). However, it should be noted that **contrary to the terms of the relevant international conventions, family members of disappeared civilians are required to have their loved one declared as deceased in order to qualify for these entitlements.**<sup>337</sup>

The **UN Committee on Enforced Disappearances issued findings and recommendations in relation to Serbia in 2015.**<sup>338</sup> These highlight ongoing problems concerning the search for the disappeared. The Committee's recommendations included that Serbia should ensure that those found responsible for enforced disappearance are punished in a manner proportional to the seriousness of the offence; uphold and protect the rights of relatives of disappeared persons; adopt a comprehensive and gender-sensitive system of reparation; provide access to medical and psychological rehabilitation; provide for the rights of the families of the disappeared, provide the Office of the War Crimes Prosecutor with adequate human, technical and financial resources; suspend all civil servants and military personnel who are suspected of involvement in enforced disappearances, and conduct investigations into all allegations of intimidation and threats against witnesses to war crimes. **Significantly, the Committee also noted with concern that "more than 1,650 persons still remain listed as missing from the Kosovo conflict, many of whom might have been victims of enforced disappearance,"**<sup>339</sup> and recommended that Serbia "continue and intensify its

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Freedoms, the International Covenant on Civil and Political Rights, and the International Convention for the Protection of All Persons from Enforced Disappearance.

337 See Article 24, para. 6 of the 2011 Law Ratifying the International Convention for the Protection of All Persons from Enforced Disappearance, published in the Official Gazette of the Republic of Serbia - International Treaties, no. 1/2011. See also Article 3, para. 2 of the Law on the Rights of Civilians Disabled by the War, which defines "a family member of a civilian victim of war" as a family member of a person who died in certain specified circumstances. As the definition does not include unconfirmed deaths, relatives of the missing cannot exercise their entitlement to monthly payments unless they accede to having their relative declared presumed dead. For a critique, see UN CED, 'Concluding observations...Serbia', CED/C/SRB/CO/1, March 16, 2015, paras. 25–26 and 29; and Humanitarian Law Center (2017), 'The legal and institutional framework in Serbia regarding the rights and needs of civilian victims of war' Belgrade: HLC, p. 12.

338 UN Committee on Enforced Disappearances (CED), 'Concluding observations on the report submitted by Serbia under article 29, paragraph 1, of the Convention', 29 March 2015, CED/C/SRB/CO/1.

339 UN CED, 'Concluding observations...Serbia', CED/C/SRB/CO/1, op. cit., para. 27.

efforts within the framework of the [UN] Working Group on Missing Persons with a view to achieving further progress in the search for missing persons and, in the event of death, the identification of their remains.”<sup>340</sup>

The **European Commission** issues reports assessing the progress made by Serbia towards meeting the political, economic, and administrative criteria for accession to the European Union. These reports include examination of the difficulties encountered in domestic prosecution of war crimes and in resolving the matter of disappeared persons.<sup>341</sup> In the 2016 Issue Paper ‘Missing persons and victims of enforced disappearance in Europe’, the Council of Europe Commissioner for Human Rights states that the “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 cooperation between former rival parties; and reprisals against relatives of missing persons and victims of enforced disappearance, human rights defenders and lawyers ]”.<sup>342</sup> The report also notes cases where the discovery of a burial sites did not trigger criminal proceedings.

Given the complexity and significance of the problem of disappeared persons across the entire territory of the former Yugoslavia, in June 2006 the Government of the Republic of Serbia established a **Commission on Missing Persons**, an interdepartmental government body comprised of a Chairman and representatives of 10 different State ministries or departments.<sup>343</sup> Since that date, the Commission has had primary responsibility for the search process.<sup>344</sup> Its mandate requires it to:

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340 UN CED, ‘Concluding observations... Serbia’, CED/C/SRB/CO/1, op. cit., para. 28.

341 See Annual Progress Reports of the European Commission for Serbia: ‘Serbia 2015 Report’, p. 20; ‘Serbia 2016 Report’, p. 24; ‘Serbia 2018 Report’, pp. 21-22. Available from the official web site of the Ministry for European Integration: <https://www.mei.gov.rs/eng/documents/eu-documents/annual-progress-reports-of-the-european-commission-for-serbia/>. Last accessed 31 December 2021.

342 Available at <https://rm.coe.int/missing-persons-and-victims-of-enforced-disappearance-in-europe-issue-/16806daa1c> Last accessed 31 December 2021.

343 Namely, the Ministry of Foreign Affairs, the Ministry of Defense, the Ministry of Interior, the Ministry of Justice and Public Administration, the Ministry of Labor and Social Policy, the Ministry of Finance and Economy, the Office of the War Crimes Prosecutor, the Office for Kosovo and Metohija, the Commissariat for Refugees of the Republic of Serbia and the Red Cross of Serbia.

344 UN CED ‘Consideration of reports submitted by States parties under article 29, paragraph 1, of the Convention - Reports of States parties due in 2013: Serbia’, UN Doc. Ref. CED/C/SRB/1, January 29, 2014, paras. 18-22.

[M]onitor, study and prepare proposals for resolving the issue of missing persons; collect data and provide information on missing persons in armed conflicts and connected to armed conflicts in [the territory of the former Yugoslavia and Kosovo]; participate in executing obligations resulting from international treaties and agreements referring to the resolution of the issue of missing persons; coordinate the work of competent authorities and organizations in the search for missing persons, exhumations and identifications; establish cooperation with competent authorities, families of missing persons and associations to resolve the status issues of missing persons and humanitarian issues of their families.<sup>345</sup>

Via the Commission, based in Belgrade, Serbia continues to search for Serbian citizens disappeared in Croatia; missing Croatian citizens whose relatives currently reside in Serbia and have started a search process with the Commission in Belgrade; Serbian citizens disappeared on the territory of Bosnia and Herzegovina; and Serbian citizens disappeared in the context of the Kosovo conflict.<sup>346</sup> The ICMP has worked with the Commission since its inception, and previously (between 1996 and 2006) with its predecessors. The work has included assisting with the excavation of clandestine graves, and with the subsequent identification of remains of persons disappeared in relation to the Kosovo conflict.<sup>347</sup> Serbia's Commission on Missing Persons also has a bilateral agreement with its counterpart in Montenegro, aimed at facilitating more efficient resolution of the problem of disappeared persons.<sup>348</sup> The **Missing Persons Unit** at the Commissariat for Refugees and Migration of the Government of the Republic of Serbia meanwhile provides administrative and technical assistance to the Commission. This assistance includes keeping unique records of persons missing and/or disappeared during or in connection with armed conflict that took place in the former Yugoslavia between 1991 and 1995, and in Kosovo from 1998-2000; keeping records on remains that have been exhumed from individual and mass graves, whether identified or not; and covering various types of costs associated

345 Idem., para. 19.

346 ICMP website, 'Republic of Serbia', op. cit.

347 Idem.

348 The Protocol on Cooperation between the Commission on Missing Persons of the Government of the Republic of Serbia and the Commission on Missing Persons of the Government of Montenegro, signed in Belgrade on April 25, 2012.

with the search and identification process.<sup>349</sup> The small number of permanent employees however speaks to the Unit's limited capacity.

There is also an **Expert Group for Resolving the Cases of Persons Gone Missing on the Territory of the Former SFR**, set up to enhance cooperation between the State authorities involved in search and those investigating and prosecuting war crimes investigations and the main tasks include the collection, processing, exchange, and analysis of data concerning locations, events and disappeared person's cases.

The **Law on the Organization and Competence of Government Authorities in War Crimes Proceedings in Serbia** stipulates that all government authorities and organizations must, upon the request of the War Crimes Prosecutor or War Crimes Investigation Unit, "submit any document or other evidence in their possession, or communicate by other means the information that can help identify war crime offenders."<sup>350</sup> **Although top-ranking Serbian police and military commanders were tried by the International Criminal Tribunal for the former Yugoslavia, ICTY, and some mid- and lower- level perpetrators were tried by domestic war crimes courts, these prosecutions did not have a direct positive effect on the search for the disappeared. Moreover, and despite the existence of a National War Crimes Prosecution Strategy that declares a commitment to prosecuting those war crimes that will potentially lead to the clarification of the fate of the disappeared, only one of the domestic war crime trials carried out to date has resulted in the discovery of a mass burial site.** The content of relevant military and police archives is not generally made available to the public, despite recommendations to this effect from the UN Committee on Enforced Disappearances, the EU, other regional actors, and local and regional civil society organizations. The Ministry of Defense and the Ministry of Internal Affairs (MoI) often fail to comply with the provisions of the Law on Free Access to Information of Public Importance,<sup>351</sup> and often do not provide information or allow access to

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349 UN CED, 'Consideration of reports submitted ... Reports of States parties due in 2013: Serbia', op. cit., para. 21.

350 Law on Organization and Competence of Government Authorities in War Crimes Proceedings, Article 7, para. 4 (mo amended in 2015, originally promulgated in 2003, most recent amendment 2015). Published in the Official Gazette of the Republic of Serbia nos. 67/2003, 135/2004, 61/2005, 101/2007, 104/2009, 101/2011 and 6/2015. Translation available at <https://www.refworld.org/pdfid/4b56ce4d2.pdf>, last accessed 31 December 2021.

351 Law on Free Access to Information of Public Importance, published in the Official Gazette of the Republic of Serbia, nos. 120/2004, 54/2007, 104/2009 and 36/2010, Article 2.

documents related to the armed conflict.<sup>352</sup> These archives may prove crucial in tracing mass burial sites across Serbia, and it is therefore of vital importance that obstacles to accessing them be removed.

## 2.3 Kosovo

**Twenty years have passed since the end of the Kosovo conflict. In that time, significant efforts have been made to locate and identify disappeared persons. Field operations have resulted in the recovery of human remains in both Kosovo and Serbia.** On the other hand, the rate of discovery of clandestine burial sites has declined precipitously since 2005, despite significant efforts by the international community: over 1,600 persons known to have disappeared remain unaccounted for. There is moreover a pressing issue of historical misidentification. Prior to 2002, recovered remains were generally identified by traditional methods, including visual identification. A (more accurate) DNA-led identification process was introduced in 2001, when **ICMP began to provide DNA testing and matching. This innovation has been critical to the process of reliably identifying the disappeared,**<sup>353</sup> but errors made under the previous identification regime have inescapably had a lasting legacy. If and when a body misidentified under the pre-2002 regime was returned to relatives, members of the family that incorrectly received the remains were not routinely asked to provide DNA reference samples. This means that if the actual remains of their family member are later located, these will remain unidentified, as there will be no match in the reference database. Meanwhile, the family to whom the misidentified person actually belonged will never find a match either, even if they have since provided DNA reference samples, because their relative has already been buried under someone else's name.

As a consequence of government structures put in place after the conflict, the process of locating and identifying disappeared persons has proceeded differently in Kosovo and neighboring Serbia. **In Kosovo, the task of locating and recovering disappeared persons was initially undertaken by the International Criminal Tribunal for the former Yugoslavia, ICTY, which operated in Kosovo from 1999 to 2000. The primary technical responsibility initially rested with the United Nations Interim Administration Mission in Kosovo (known as 'UNMIK'), and**

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352 Humanitarian Law Center (2016) 'Access to documents related to crimes against international law in the possession of Serbian institutions: State Secret Prevails over Right to the Truth' Belgrade: HLC, available at: [http://www.hlc-rdc.org/wp-content/uploads/2016/04/Pristup\\_dokumentima\\_o\\_zlocinima\\_eng.pdf](http://www.hlc-rdc.org/wp-content/uploads/2016/04/Pristup_dokumentima_o_zlocinima_eng.pdf), last accessed Feb. 28, 2022.

353 Sarkin et. al. (2014) 'Bosnia i Hercegovina, Missing persons....' op. cit.

**after 2008 was taken on by the European Union Rule of Law Mission in Kosovo ('EULEX').** What sets the process in Kosovo apart from its neighbors in the Western Balkans is that Kosovo has exercised much more limited active engagement and operational participation in the process. Kosovo's domestic State institutions have at best only passively taken ownership of the issue. There has been a certain amount of gradual handover of competencies from the international community – as represented by EULEX – to domestic authorities, with local prosecutors, for example, today in charge of issuing orders for the exhumation of clandestine burial sites in Kosovan territory. **EULEX nevertheless continues to retain an executive mandate in relation to disappeared persons.**

**The separate but related question of international recognition of Kosovo as a State has also had an impact:** with 116 diplomatic recognitions received so far, the matter **has exerted a chill factor in relations between Kosovo and Serbia, which does not recognize Kosovo as an independent State. This has set back the cause of developing bilateral cooperation to address the issue of disappeared persons, although the two countries have in recent years arrived at several key agreements, with mediation from the UN, US, or EU.**

The engagement of the ICMP in the process in Kosovo began in 1999. It focused on building capacity to account for the disappeared in both Serbia and Kosovo, aiming to support robust, accurate responses while ensuring transparency and upholding human rights standards. The ICMP has supported efforts to improve dialogue between Serbia and Kosovo, and has promoted the strengthening of engagement of relatives of victims as a key element in the process. Relatives have been assisted to assert their rights and hold the authorities to account: although exhausted after years of searching for answers, families of the disappeared continue to play an active role, including lobbying the authorities to provide answers. In 2003, the ICMP signed an agreement with UNMIK to assist with DNA-based identifications, continuing, once responsibility was transferred to EULEX, to provide DNA testing and matching for the purposes of identification.

A Law on Missing Persons, setting out the rights of families and the obligations of the authorities, has been adopted in Kosovo, though its implementation is incomplete. Families of the disappeared can also access entitlements under the so-called 'Law on Martyrs', although under the terms of this law, families of disappeared veterans (ex-combatants) receive larger payments than families of disappeared civilians.

**Kosovo also has its own national Commission on Missing Persons.** The capacity of this body, set up in 2006, is however limited, and it receives only passive political support from domestic authorities. Its competence to cooperate with local and international institutions and with families of the disappeared is moreover compromised by the fact that the country's Law on Forensic Medicine assigns this same role to the Institute of Forensic Medicine. The Commission has however established a Central Register of Missing Persons (known as CEN), containing data on active disappearance case. Entry of data from closed cases is currently in progress, in order to further complete the register. The ICRC maintains a provisional list of people disappeared in circumstances related to conflict events in Kosovo, with entries agreed on by the authorities in Serbia and Kosovo.

The ICMP has on file 700 unmatched DNA profiles, i.e., DNA profiles obtained from post-mortem samples taken from recovered remains, which have not yet found a match among the genetic reference samples provided by families still searching for over 1,600 disappeared individuals. It is highly probable that this mismatch is the result of erroneous identifications made in the period 1999-2002, a time when identification could be and were still made from context, including, at times, on the basis of clothing, personal effects and other artefacts. These identification methods have a relatively high margin of error. Families have repeatedly asked the Kosovo and Serbian authorities for an open and transparent process to systematically address the shared question of misidentifications, a reality that has occurred in both settings and clearly needs to be urgently addressed. The Kosovan authorities have also claimed to have no information on disappearances potentially connected to former combatant group the Kosovo Liberation Army: government officials here as in the rest of the former Yugoslavia can be reticent over any issue that may connect members of today's political elite to past war crimes. This makes them less than keen to reveal information that may be necessary for finding people who disappeared.<sup>354</sup>

## **2.4 Efforts by Civil Society Organizations (CSOs)**

As mentioned previously, and as is the case in other regions, the families of the disappeared have had a central role in the search for victims of disappearance victims. This is especially true in Bosnia, but is also the case in Serbia and Kosovo. Today, associations of families of the disappeared often express the view that the

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<sup>354</sup> Huszka, Beáta (2020, January) 'The power of perspective: Why EU membership still matters in the Western Balkans', European Council on Foreign Relations Policy Brief ECFR/314.

main impediment to an efficient search process for the remaining disappeared is a lack of political will. They see evidence of this in the ever-slower pace of new finds, exhumations, and identification. Associations of victims from Serbia and Kosovo both support the idea that the issue of disappeared persons should be included in ongoing dialogue toward the normalization of relations between the two States.<sup>355</sup>

Civil society organizations (CSOs) across the region have also dedicated themselves tirelessly to reporting on the issue of disappeared persons, and keeping it on the public agenda. Commemoration initiatives take many forms, and have included marking burial sites where remains have been found; art installations; truth-telling initiatives and related publications; reporting on possible locations of burial sites; preserving the culture of remembrance; serving as a bridge between divided communities and promoting reconciliation; using court documentation to file criminal complaints against possible perpetrators of enforced disappearances; creating coalitions and organizing public hearings; and fighting for media attention on the subject through advocacy and community work.

In 2006, representatives of prominent non-governmental organizations, associations of relatives of the disappeared, and victims' groups from all the post-Yugoslav countries launched **a campaign for the establishment of a regional fact-finding commission or truth commission. The campaign called itself the 'Initiative for RECOM'**, where RECOM refers to a 'regional commission for the establishment of facts about war crimes and other serious violations of human rights committed in the former Yugoslavia between January 1, 1991 and December 31, 2001'.<sup>356</sup> At the group's first forum, its members voted to press for a region-wide approach to establishing the facts about war crimes, given that the conflict took place on the territory of several countries and victims and perpetrators, in most cases, do not currently live in the same country. Over the following few years, the Initiative evolved into the 'Coalition for RECOM', prompting the most comprehensive social debate ever undertaken in the region. The consultation

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355 Sources include the online comment pieces and articles 'Nestali na Kosovu nemaju nacionalnu pripadnost' ['The missing in Kosovo do not have a nationality'], *Vesti Online*, March 24, 2014, available (in Serbian) at: <http://www.vesti-online.com/Vesti/Srbija/391299/Nestali-na-Kosovu-nemaju-nacionalnu-pripadnost>; and "Rasvetliti sudbine nestalih na KiM" ['To solve the destiny of the missing persons in KiM'], *B92*, March 17, 2015, available (in Serbian) at: [http://www.b92.net/info/vesti/index.php?yyyy=2015&mm=03&dd=17&nav\\_category=640&nav\\_id=969762](http://www.b92.net/info/vesti/index.php?yyyy=2015&mm=03&dd=17&nav_category=640&nav_id=969762), last accessed 31 December 2021.

356 See <http://www.recom.link/en/sta-je-rekom/>, last accessed Feb. 28, 2022.

process included 6,700 representatives of civil society, among them, human rights organizations, victims, relatives of victims including the disappeared, refugees, former combatants, prisoners' associations, lawyers, artists, writers, journalists, and other prominent individuals. All were invited to express suggestions and views on the mandate of a future commission. A total of 128 local and regional meetings were held, alongside a series of eight international Forums for Transitional Justice. The views expressed were crafted into a Draft Statute, adopted by the Coalition Assembly in November 2014. According to the Draft Statute, RECOM is envisaged as an intergovernmental committee, to be established by all the States now constituted on the territory of the former Yugoslavia. It is to be tasked with investigating all allegations of war crimes and other serious human rights violations in connection with the conflict; listing the names of all victims of the conflict and of crimes pertaining to it, and collating information about burial sites, camps, and other sites used for detention. By the end of 2014, more than 580,000 people from all over the former Yugoslavia had signed to support the establishment of RECOM. The campaign is however ongoing, as not all of the States concerned have accepted the idea<sup>357</sup>. The Coalition is still active in advocating for the setting up of RECOM, in parallel to its other activities implementing truth-telling, justice and memorialization dimensions of transitional justice.

### **3. CONCLUSIONS ON THE SEARCH FOR THE DISAPPEARED IN THE FORMER YUGOSLAVIA**

A number of elements of the Western Balkans' experience as regards creating search mechanisms that can serve as valuable lessons, both positive and negative, for other regions confronting a history of disappearances – both for the successes of the region as well as missed opportunities. No other post-conflict region has achieved such a high rate of resolution in cases of disappearance<sup>358</sup>. International and local actors both agreed at the outset on the importance of establishing the MPI as a State institution. The creation of the MPI, an outcome of 14 years of international and national level cooperation, was a landmark achievement which provides an important model of one possible transitional justice mechanism.

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<sup>357</sup> See more at: <https://www.recom.link/en/sta-je-rekom/>

<sup>358</sup> Sarkin, Jeremy, et. al. (2014) 'Bosnia i Hercegovina, Missing persons from the armed conflicts of the 1990s: A Stocktaking'. Sarajevo: ICMP, available at: [https://www.icmp.int/wp-content/uploads/2014/12/StocktakingReport\\_ENG\\_web.pdf](https://www.icmp.int/wp-content/uploads/2014/12/StocktakingReport_ENG_web.pdf).

In BiH, the ICMP played a central role, particularly from 2001, in building BiH's institutional, administrative, scientific and technical capabilities. It also assisted institutions in Croatia, Serbia and Kosovo over identification and in other fields. In addition, courts and prosecutors in BiH have been addressing the issue of disappeared persons as part of war crimes trials, attempting to make the location and identification of remains, an important part of the trial process. Finally, the Law on Missing Persons in BiH has filled in many previously existing legal gaps, although implementation is still lacking. However, on the whole relatives of disappeared persons in BiH have had effective legal and political recourse to ensure that search is carried out by the authorities in a transparent and accountable manner. The relevant institutions initiated a consultative process with the families of the disappeared.

In Serbia, the search process has been hampered by insufficient capacity and inadequate financial resources, but above all, by an absence of political will to improve the efficiency and efficacy of search, especially when the disappeared victims are of other ethnicities. The prosecution of some high-level police and military commanders by the ICTY, and some mid- and lower- level perpetrators by domestic war crime courts, did not translate into improved results in the search for the disappeared, and Serbia has not yet passed a dedicated law to regulate the search process or the rights of families.

Kosovo has shown only limited signs of active engagement and participation, and its institutions cannot be said to have taken full domestic ownership of the process. While a Law on Missing Persons does exist, there has not yet been effective implementation of the rights it establishes for families, and the obligations it sets down for the authorities. Despite the attrition caused by years of searching, relatives in Kosovo continue to be active.

Finally, civil society region-wide has been active in commemoration, and has led the way in campaigning for a region-wide commission to deal with the legacy of conflict. The proposal drew wide support from grassroots groups and civil society organizations in all of the countries involved, but has not yet managed to secure the support of all governments that would need to be involved, in spite of the promise of European Union support and funding.



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