

Enforced Disappearance and Extrajudicial Execution: The Rights of Family Members

A Practitioners' Guide



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The Rights of Family Members - A Practitioners' Guide

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Enforced Disappearance and Extrajudicial Execution: The Rights of Family Members

Practitioners' Guide No. 10

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TABLE OF CONTENTS

CHAPTER I: VICTIMS AND RIGHT-HOLDERS.....	5
1. The concept of victim	5
2. Individual and Collective Victims	8
3. Independence of the Concept of Victim Relative to the Perpetrators.....	11
4. Relatives as Victims of Enforced Disappearance	12
5. Relatives of Victims of Extrajudicial Execution.....	19
6. Survivors of Extrajudicial Executions as Victims	21
7. Impunity and the Relatives.....	23
CHAPTER II: RIGHT TO PROTECTION AND PREVENTION	27
1. Preliminary Considerations	27
2. Banning of Orders or Instructions.....	28
3. Principle of <i>Non-refoulement</i>	31
4. Prohibition of Secret Detention	37
5. Safeguards Relating to Deprivation of Liberty	40
a. Places of Detention	42
i. Official Places of Detention	43
ii. Control of Places of Detention	44
b. Official Detention Records.....	47
c. Inspection and Monitoring of Detention Centers	52
d. Information for Relatives and Other People	53
e. Safeguards on the Release of Detainees	56
6. Preventive Remedies	57
a. Urgent Preventive Remedy.....	57
b. Habeas Corpus	58
c. Remedy for Denial of Access to the Register of Detainees	62
7. Specific Preventive Measures on Extrajudicial Execution..	62
CHAPTER III: EFFECTIVE REMEDY AND THE RIGHT TO JUSTICE	65
1. General Considerations	65
2. Intangible and Non-derogable Nature of the Right to an Effective Remedy	69
3. Nature and Characteristics of Effective Remedy	70
a. Appropriate Remedy.....	72
b. Availability	73

c. Legally Binding and Enforceable	74
d. Accessibility	76
e. Duration of the Process	79
f. The Procedure and How it May Be Invoked	81
4. The Nature of Effective Remedy	83
5. Effective Remedy and Criminal Proceedings.....	87
CHAPTER IV: THE RIGHT TO INVESTIGATION	93
1. The Relatives' Right to Investigation.....	93
2. The Right to an Investigation and the Obligation to Investigate	98
3. Characteristics of the Investigation.....	101
4. Right to Participate in the Investigation	104
5. Right to Be Informed of Progress in the Investigation and Results.....	107
6. Right to Human Treatment, Care and Protection	110
CHAPTER V: THE RIGHT TO THE TRUTH	113
1. Preliminary Considerations	113
2. General Considerations	118
a. Right to the truth and state obligations.....	119
b. Autonomy of the right to the truth	122
c. An inalienable and imprescriptible right.....	125
d. An individual and collective right.....	127
3. The Right to Know the Victim's Fate or Whereabouts	129
4. The Right to the Truth and appropriation of children	132
CHAPTER VI: THE RIGHT TO REPARATION	135
1. General Considerations	135
2. Concepts of Reparation and Damages	144
3. Types of Reparation	146
a. Restitution	148
b. Compensation	151
c. Rehabilitation	152
d. Satisfaction.....	152
CHAPTER VII: PROTECTING THE RELATIVES' RIGHTS ..	157
1. Basic Considerations.....	157
2. The Relatives' Situation	158
3. International Norms and Standards	160
4. Declaration of Absence Due to Enforced Disappearance and Other Mechanisms	162

CHAPTER VIII: GUARANTEES OF NON-REPETITION	171
1. General Considerations	171
2. General Guarantees of Non-repetition	174
3. Specific Guarantees of Non-repetition	175
ANNEX I: DEFINITION OF VICTIMS	185
ANNEX II: RIGHT TO AN EFFECTIVE REMEDY	187
ANNEX III: RIGHT TO INVESTIGATION	197
ANNEX IV: RIGHT TO THE TRUTH	202
ANNEX V: RIGHT TO REPARATION	205
ANNEX VI: GUARANTEES OF NON-REPETITION	212

CHAPTER I: VICTIMS AND RIGHT-HOLDERS

“[I]t is hard to imagine a judicial system that protects the rights of victims and at the same time remains indifferent and passive toward flagrant crimes by those who have violated them,”

Theo van Boven, UN expert on the right to restitution, compensation and rehabilitation¹

1. The concept of victim

The concept of the victim of human rights violations is fundamental in determining who has the right to effective remedy, investigation, justice, truth, reparation and guarantees of non-repetition. However, it should be noted that the holders of these rights are not limited to the victims, and may include family members and other right-holders, such as the victim’s dependents. In reality, these categories often overlap. Therefore, sometimes persons who are not victims may be entitled to compensation because they have suffered injury and harm.²

Traditionally, case law and legal doctrine have distinguished two categories of victims: the “direct” victim and the “indirect” victim. The direct victim is the one whose fundamental rights have been violated—in other words, the holder of the rights that have been violated, whereas the “indirect” victim is one who has suffered injury or harm even though their personal human rights have not been violated.³ In this way, international case law on human rights has often distinguished between the victim and the injured or aggrieved party.

Most of the classic human rights treaties and instruments, as well as international criminal law, simply refer to the “victims” of

¹ UN Doc. E/CN.4/ Sub.2/1992/8, para. 5.5.

² For example, see the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle 20) and the *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* (Principle 31).

³ In this sense, Principle 2 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* distinguishes between the “direct victim” and others.

human rights violations and/or crimes under international law without more clearly describing who the victim is.⁴

The concept of the victim has been the result of a long process of developing case law and doctrine, and gradually it has been incorporated into different international instruments.⁵ In this context, the *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* (hereinafter *Principles on Reparation*) are relevant. These principles were adopted unanimously by the United Nations General Assembly⁶ and are used as a reference for international human rights proceedings and entities,⁷ human rights courts,⁸ and international criminal tribunals.⁹ The Preamble of the *Principles on Reparation* expressly states that “the Basic Principles and Guidelines contained herein do

⁴ See, for example: *International Covenant on Civil and Political Rights* (Article 9.5.); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Article 14.1.); *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (Article 9.2.); and *Inter-American Convention to Prevent and Punish Torture* (art. 9). In the field of international criminal law, see: *Rome Statute of the International Criminal Court* (Articles 75.1 and 85.); *Statute of the International Criminal Tribunal for the former Yugoslavia* (art. 22); and *the Statute of the International Criminal Tribunal for Rwanda* (art. 21).

⁵ See, inter alia: *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (Principles 1 and 2); *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* (art. 8); and *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 24).

⁶ Resolution No. 60/147 of December 16, 2005.

⁷ See, inter alia: Inter-American Commission on Human Rights, *Principal Guidelines for a Comprehensive Reparations Policy*, OEA/Ser/L/V/II.131 Doc 1 of February 19, 2008, para. 2; Committee against Torture, *General Comment No. 3 (2012): Application of Article 14 by States Parties*, CAT/C/GC/3 December 13, 2012, para. 6; *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/22/45 of January 28, 2013, para. 52.

⁸ See, inter alia: Inter-American Court of Human Rights, Judgment of August 23, 2013, *Case of García Lucero et al. v. Chile*, Series C No. 267, para. 186, and Judgment of November 24, 2010, *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Series C No. 219, para. 114; and European Court of Human Rights, Judgment of September 14, 2014, *Case of Mocanu et al. v. Romania*, Communications Nos. 10865/09, 45886/07 and 32431/08.

⁹ See, inter alia: International Criminal Court, decision of August 7, 2012, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06.

not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law.” Article 8 of the *Principles on Reparation* gives the definition of victim in the following terms:

“For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term ‘victim’ also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”

This definition encompasses both the “direct victim” and the “indirect victim,” and reflects the evolution of case law concerning the concept of the victim. Thus, according to Article 8 of the *Principles on Reparation*, the following are victims:

- The person whose human rights have been violated, or the direct victim;
- Members of the immediate family;
- The direct victim’s dependents; and
- Persons who have suffered harm in intervening to aid the victims in danger or to prevent victimization.

In this way, the traditional distinction between a “direct victim” and an “indirect victim” has lost relevance. In that vein and with reference to the definition in Article 8 of the *Principles on Reparation*, the Working Group on Enforced or Involuntary Disappearances (WGEID) has encouraged “States to apply the most comprehensive definition of ‘victim,’ with no distinction between direct and indirect victims.”¹⁰

¹⁰ *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/19/58/Rev.1 of March 2, 2012, para. 58.

2. Individual and Collective Victims

For a long time, international human rights law has recognized that persons may be the victims of human rights violations, both individually and collectively. In fact, the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*¹¹ and the *Principles on Reparation* define the victim as anyone who has suffered harm "individually or collectively."¹²

Thus, numerous human rights and/or individual freedoms may be exercised collectively. In particular the rights to freedom of expression, assembly, association and political rights are generally exercised collectively.¹³ It goes without saying that the collective exercise of political rights is equally protected under International Criminal Law. In fact "politically motivated persecution" or "persecution of a group or distinct community based on political motives" carried out as a "massive and systematic" practice or as "a widespread or systematic attack on the civilian population" constitutes a crime against humanity.¹⁴

¹¹ Adopted by Resolution No. 40/34 of the United Nations General Assembly, on November 29, 1985.

¹² Principle 1 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* and Article 8 of the *Principles on Reparation*.

¹³ Human Rights Committee: Views of July 7, 2000, *Case of J.G.A. Diergaardt et al. v. Namibia*, Communication No. 760/1997; Views of April 8, 1993, *Case of E.W. et al. v. Netherlands*, Communication No. 429/1990; Views of April 9, 1981, *Case of Aumeeruddy-Cziffra v. Mauritius*, Communication No. 035/1978; Views of March 23, 1994, *Case of Hertzberg et al. v. Finland*, Communication No. 431/1990; Views of April 3, 1989, *Case of Ibrahima Gueye et al. v. France*, Communication No. 196/1985; Views of November 3, 2004, *Case of Leirvåg, Jansen et al. v. Norway*, Communication No. 1155/2003; Views of July 21, 2003, *Case of Adrien Mundy Busyo et al. v. Democratic Republic of Congo*, Communication No. 933/2000; and Views of October 21, 2005, *Case of Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of Menzingen of the Third Order of St. Francis of Sri Lanka v. Sri Lanka*, Communication No. 1249/2004. See also, European Court of Human Rights: Judgment of January 30, 1998, *Case of United Communist Party of Turkey et al. v. Turkey*, Communication No.133/1996/752/951; Judgment of July 12, 2005, *Case of Güneri et al. v. Turkey*, Communication No. 42853/98, 43609/98 and 44291/98; Judgment of May 3, 2007, *Case of Backowski et al. v. Poland*, Communication No. 1543-1506; Judgment of October 2, 2001, *Case of Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, Communication No. 29221/95 and 29225/95, and Judgment of July 10, 1998, *Case of Sidiropoulos et al. v. Greece*, Communication No. 57/1997/841/1047.

¹⁴ See, inter alia: *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal* (Principle VI, c), by the International Law Commission of the United Nations; *Draft Code of Crimes against the Peace and Security of Mankind* (Article 18-e.) by the International Law

“[T]he execution of a union leader [...] not only restricts an individual’s freedom of association, but also the right and freedom of a specific group to associate freely, without fear or dread, meaning that the right protected by Article 16 has special scope and character. [...] The State must ensure that people may freely exercise their freedom of association without fear that they will be subject to any violence, otherwise, the ability of groups to organize to protect their interests could decrease. [...] [T]he execution of Pedro Huilca Tecse had a chilling effect on workers in Peru’s trade union movement and it limited the freedom of a given group to exercise that right.”

Inter-American Court of Human Rights¹⁵

Moreover, certain rights are naturally collective *per se*. Their holders are not contemplated as individuals, but rather because of belonging to groups and/or for being individual members of these groups. Thus, a number of international treaties and instruments exist that protect the collective rights of groups or communities. The main groups are “peoples”;¹⁶ indigenous peoples and communities of African descent;¹⁷ and “ethnic, religious or linguistic minorities.”¹⁸ Traditionally there has been controversy over whether the rights of “ethnic, religious or linguistic minorities” are “group rights” or the “rights of every individual within a group.” In this regard, in Peru, the Human Rights Committee has declared that “article 27 [of the *International Covenant on Civil and Political*

Commission of the United Nations; *Statute of the International Criminal Tribunal for Rwanda* (art 3.h.); *Statute of the International Criminal Tribunal for the former Yugoslavia* (art 5.g.); the *Rome Statute of the International Criminal Court* (art. 7); and *Statute of the Special Court for Sierra Leone* (Article 2-g).

¹⁵ Judgment of May 3, 2005, *Case of Huilca Tecse v. Peru*, Series C. No. 121, paras. 69, 77 and 78.

¹⁶ See, inter alia: *International Covenant on Civil and Political Rights* (art. 1), *International Covenant on Economic, Social and Cultural Rights* (art. 1); *United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples* (Article 2 of Resolution No. 1514 (XV) of the UN General Assembly, of December 14, 1960.); and the *African Charter on Human and Peoples’ Rights* (art. 21.2).

¹⁷ *UN Declaration on the Rights of Indigenous Peoples*, approved by Resolution No. 61/295 of the UN General Assembly, on September 13, 2007; and *Convention No. 169: Indigenous and Tribal Peoples Convention*, 1989, of the International Labour Organization.

¹⁸ See, inter alia: *International Covenant on Civil and Political Rights* (art. 27); *Convention on the Rights of the Child* (art. 30); and *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* (Resolution No.47/135 of the United Nations General Assembly of December 18, 1992).

Rights] establishes and recognizes a right that is conferred upon individuals belonging to minority groups and which is a distinct right, in addition to other rights that all people may enjoy under the Covenant.”¹⁹

Although enforced disappearances and extrajudicial executions are committed against individuals—either individually or collectively—violating their fundamental human rights, they may also be committed with intent to victimize a human group as such. In this context, while adopting the *Principles on Reparation*, the United Nations General Assembly noted that “contemporary forms of victimization, while essentially directed against persons, nevertheless [can] also be directed against groups of persons who are targeted collectively.”²⁰

In many cases it has been found that the enforced disappearance of indigenous leaders has been used “to punish” indigenous communities in their struggle to claim their rights as an indigenous people, such as the right to territory or to their own culture.²¹

“[T]he pattern of harassment against the population considered an ‘internal enemy’ [...] mostly of the Mayan people, was aimed at damaging not only the social foundations, but also their leaders, and social and political representatives. The motive within which the forced disappearance of Florencio Chitay Nech took place, as well as those of other members that exercised public charges, shows the clear intention of the State to dismantle all forms of political representation that threatened their ‘National Security Doctrine.’ [...] [T]he community was deprived of the representation of one of its leaders in the various forums of its social structure, and principally in access to the full exercise of the direct participation of an indigenous leader in the structures of the State, where the representation of groups in situations of inequality becomes a necessary prerequisite for the self-determination and the development of the indigenous communities within a plural and democratic State.”

Inter-American Court of Human Rights²²

¹⁹ Views of March 27, 2009, *Case of Ángela Poma Poma v. Peru*, Communication No. 1457/2006, para. 7.2.

²⁰ Paragraph 9 of the Preamble of the *Principles on Reparation*.

²¹ See, *inter alia*, Judgment of May 25, 2010, *Case of Chitay Nech et al. v. Guatemala*, Series C No. 212.

²² Judgment of May 25, 2010, *Case of Chitay Nech et al v. Guatemala*, Series C No. 212, para. 108, 113 and 116.

Furthermore, enforced disappearances and/or extrajudicial executions of trade union and social leaders not only aim to “eliminate” individuals, but also to intimidate the union or social organizations to which they belonged.²³ Thus, the Inter-American Court of Human Rights declared that the death threats and the subsequent extrajudicial execution of two union leaders “not only restricted the freedom of association of an individual, but also the right and freedom of a given group to associate freely without fear or dread, that is to say, it affected the mineworkers’ freedom to exercise this right.”²⁴ This has also been stated concerning the murder of members of political opposition parties.²⁵

3. Independence of the Concept of Victim Relative to the Perpetrators

Victim status is acquired through the violation of human rights, crime and/or harm. This principle is reaffirmed by the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, which states that “a person may be considered a victim [...] regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim.”²⁶ The *Principles on Reparation* are clearer when prescribing that “a person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.”²⁷

In this sense, the Inter-American Commission on Human Rights has stated that “Access to reparations for victims of crimes against humanity must never be subject exclusively to determination of the criminal liability of the perpetrators, or the prior disposal of

²³ See, *inter alia*, Judgment of July 10, 2007, *Case of Cantoral Huamaní and García Santa Cruz v. Peru*, Series C No. 167; Judgment of May 3, 2005, *Case of Huilca Tecse v. Peru*, Series C No. 121, para. 78; and Judgment of November 20, 2012, *Case of Gudiel Álvarez (“Military Journal”) v. Guatemala*, Series C No. 253, para. 222.

²⁴ Judgment of July 10, 2007, *Case of Cantoral Huamaní and García Santa Cruz v. Peru*, Series C No. 167, para. 147.

²⁵ Judgment of May 26, 2010, *Case of Manuel Cepeda Vargas v. Colombia*, Series C No. 213, para. 178.

²⁶ Principle 2.

²⁷ Article 9.

their personal goods, licit or illicit.”²⁸ In the same vein, and referring to the right to reparation, the Working Group on Enforced or Involuntary Disappearances has noted that “a broad definition of the victim, not linked to the establishment of the criminal liability and conviction of the accused, should be adopted.”²⁹

4. Relatives as Victims of Enforced Disappearance

The instruments and international jurisprudence have considered that, in addition to the missing person, that person’s family members are also victims of the crime of enforced disappearance per se. Certainly enforced disappearance creates great suffering for the family of the missing person, and uncertainty about the person’s fate or whereabouts.

“Enforced disappearance is one of the most serious forms of human rights violation, because it violates a series of fundamental rights, including the right to life, integrity, free development of the personality, personal liberty and security, presumption of innocence, due process, right to defense and effective recourse before the courts. Furthermore, on the one hand the rights of the missing person are violated and on the other, the victim’s relatives are denied the right to know the truth about what happened, the whereabouts of the victim, the receipt of remains and the process of grieving.”

Ombudsman of Peru³⁰

This fact was upheld by the UN General Assembly in its first resolution on disappearances, in 1978, stating that it is “deeply moved at the anguish and sorrow which such circumstances cause to the relatives of disappeared persons, especially to spouses, children and parents.”³¹ The recognition of the serious suffering

²⁸ *Principal Guidelines for a Comprehensive Reparations Policy*, OEA/Ser/L/V/II.131 Doc. 1 of February 19, 2008, para. 2.

²⁹ *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/22/45 of January 28, 2013, para. 51.

³⁰ *A dos años de la Comisión de la Verdad y Reconciliación*, Serie Informes Defensoriales, Informe Defensorial No. 97, Lima, September 2005, p. 219 (Original in Spanish, free translation).

³¹ Resolution No. 33/173, “Missing persons” of 20 December 1978. In the same vein see, for example, Resolutions No. 35/193 of December 15, 1980; 36/163 of December 16, 1981; 37/180 of December 17, 1982; 38/94 of December 16, 1983; 39/111 of December 14, 1984; 40/147 of December 13, 1985; 41/145 of 4 December 1986; 42/142 of December 7, 1987; 43/159 of 8 December 1988; 44/160 of 15 December 1989; 45/165 of December 18, 1990; 46/125 of December 17, 1991; 47/132 of December 18, 1992.

inflicted on relatives because of the enforced disappearance of a loved one, has been enshrined in the *Declaration on the Protection of All Persons From Enforced Disappearance* (hereafter the DED). In fact, it expressly states that "any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families."³²

A further development in the evolution of international law, the *International Convention for the Protection of All Persons from Enforced Disappearance* (Hereinafter the ICPED) uses a broad definition of the victim. The ICPED states that "victim means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance."³³ This provision in the ICPED, broader than the DED, reflects the content of article 8 of the *Principles on Reparation*. Note that during the process of drafting and negotiating the ICPED, "the delegations agreed to recognize that the notion of victim should not be restricted to disappeared persons only,"³⁴ and should encompass both relatives—including spouses, children, parents and siblings of the deceased—as well as "others who might be adversely affected by the disappearance."³⁵

International jurisprudence is unanimous in considering that the anguish and suffering caused to the family by the disappearance of a loved one and the continuing uncertainty over the person's fate and whereabouts are a form of torture or cruel and inhuman treatment. This has been stated on several occasions by the Human Rights Committee,³⁶ the European Court of Human

³² Article 1 (2).

³³ Article 24 (1).

³⁴ *Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, E/CN.4/2003/71 of 12 February 2003, para. 83.

³⁵ *Ibid.*

³⁶ See, inter alia: Views of July 21, 1983, Communication No. 107/1981, *Case of Maria del Carmen Almeida de Quinteros v. Uruguay*, para. 14; Views of March 25, 1996, Communication No. 542/1993, *Case of Katombe L. Tshishimbi v. Zaire*, para. 5.5; Views of March 25, 1996, Communication No. 540/1996, *Case of Ana Rosario Celis Laureano v. Peru*, para. 8.5; Views of July 16, 2003, Communication No. 950/2000, *Case of Jegatheeswara Sarma v. Sri Lanka*, para. 9.5; Views of March 30, 2006, Communication No. 992/2001, *Case of Louisa Bousroual v. Algeria*, para. 9.8; Views of August 10, 1994, Communication No. 449/1991, *Case of Mójica v. Dominican Republic*, para. 5.7; Views of March 30, 2006, Communication No.1196/2003, *Case of Boucherf v. Algeria*, para. 9.6; and Views of July 19, 2013, Communication No. 1865/2009, *Case of Mukunda Sedhai v. Nepal*, para. 8.4.

Rights,³⁷ the Inter-American Commission³⁸ and Court³⁹ of Human Rights and the WGEID.⁴⁰

"The family and friends of disappeared persons experience slow mental torture, not knowing whether the victim is still alive and, if so, where he or she is being held, under what conditions, and in what state of health. Aware, furthermore, that they too are threatened; that they may suffer the same fate themselves, and that to search for the truth may expose them to even greater danger."

Working Group on Enforced or Involuntary Disappearances⁴¹

The Inter-American Court of Human Rights has stated that suffering constitutes the "violation of the mental and moral integrity of the next of kin [...] compounded by the constant refusal of State authorities to provide information about the victim's

³⁷ See, inter alia, Judgment of May 25, Case No. 15/1997/799/1002, *Kurt v. Turkey*, paras. 130-134.

³⁸ See, inter alia, *Annual Report of the Inter-American Commission on Human Rights, 1977*, OEA/Ser.L/V/II.43, doc.21, corr.1, of April 20, 1978; *Annual Report of the Inter-American Commission on Human Rights, 1978*, OEA/Ser.L/II.47, doc. 13 rev. of June 29, 1979; *Report on the situation of human rights in Argentina, 1980*, OEA/Ser.L/V/II/49, doc. 19, p. 59; *Annual Report of the Inter-American Commission on Human Rights, 1980-1981*, OEA/Ser.L/V/II.54, doc.9 rev.1 of October 16, 1981; *Annual Report of the Inter-American Commission on Human Rights 1985-1986*, OEA/Ser.L/V/II.68, Doc. 8 rev. 1, p. 205 of September 26, 1986.

³⁹ See, inter alia: Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162, paras. 58, 123 et seq.; Judgment of November 22, 2005, *Case of Gómez Palomino v. Peru*, Series C No 136, para. 61; Judgment of May 30, 1999, *Case of Castillo Petruzzi et al. v. Peru*, Series C No. 57, para. 207; Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 113; Judgment of November 26, 2013, *Case of Osorio Rivera and Family Members v. Peru*, Series C No. 274, para. 227; Judgment September 22, 2002, *Case of Goiburú et al. v. Paraguay*, Series C No. 153, para. 97; Judgment of July 5, 2004, *Case of 19 Merchants v. Colombia*, Series C No. 109, para. 211; Judgment of November 25, 2000, *Case of Bámaca-Velásquez v. Guatemala*, Series C No. 70, para. 160; Judgment of January 24, 1998, *Case of Blake v. Guatemala*, Series C No. 36, para. 114; Judgment of May 25, 2010, *Case of Chitay Nech et al. v. Guatemala*, Series C No. 212, para. 220; Judgment of February 27, 2002, *Case of Trujillo Oroza v. Bolivia*, Series C No. 92, para. 114; and Judgment of November 23, 2009, *Case of Radilla Pacheco v. United States of Mexico*, Series C No. 209, para. 166.

⁴⁰ See, inter alia: Reports of the Working Group E/CN.4/1984/21, para. 172; E/CN.4/1985/15, para. 291; E/CN.4/1990/13, para. 339; and "General Comment on article 19 of the Declaration on the Protection of All Persons from Enforced Disappearances," E/CN.4/1998/43, para. 72.

⁴¹ Cited in: Inter-American Commission on Human Rights, Report No. 51/99 of April 13, 1999, *Case of Anetro Castillo Pezo et al. v. Peru*, Case Nos. 10.471 and others, para. 95.

whereabouts or to conduct an effective investigation into the facts of the case."⁴² The Court even has considered that the children and siblings of disappeared persons, who were not born when the disappearance occurred, may be considered victims of enforced disappearance. In this regard, the Court has stated that " the fact that they had to live in an environment of suffering and uncertainty owing to the failure to determine the whereabouts of the disappeared victims prejudiced the integrity of the children who were born and lived in this situation."⁴³

"In cases involving forced disappearance of people, it can be understood that the violation of the right to mental and moral integrity of the victim's next of kin is, precisely, a direct consequence of that event, which causes them severe suffering and is made worse by the continued refusal of state authorities to supply information on the victim's whereabouts or to conduct an effective investigation to elucidate the facts. [...] The facts of the instant case allow the conclusion that the violation of next of kin's personal integrity, as a consequence of the forced disappearance and extra-legal execution of the victims, flows from the situations and circumstances some of them had to go through, during and after said disappearance, as well as from the general context in which the events occurred. Many of these situations and their effects, fully understood in the complexity of the forced disappearance, will persist for as long as some of the verified factors prevail. The next of kin still present physical and mental sequels of the facts described above and the events have made an impact on their social and work relations and altered their families' dynamics."

Inter-American Court of Human Rights⁴⁴

The Court has stated that "this allows it to be presumed that the mental and moral integrity of the family members is harmed. [...] [T]his presumption is established *juris tantum* as regards mothers and fathers, children, spouses, and permanent companions, provided that this is in keeping with the specific circumstances of the case. [...] [T]his presumption is also applicable to the siblings of the disappeared victims, unless the specific circumstances of the

⁴² Judgment *Case of Gómez Palomino v. Peru*, Doc. Cit., para. 61.

⁴³ Judgment of November 20, 2012, *Case of Gudiel Álvarez ("Military Journal") v. Guatemala*, Series C No. 253, para. 287. See also, Judgment of August 31, 2011, *Case of Contreras et al. v. El Salvador*, Series C No. 232, para. 122.

⁴⁴ Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162, paras. 123 and 126.

case reveal otherwise.”⁴⁵ The Court has also noted that “the relatives of the disappeared victims are victims of the phenomena of forced disappearance, by which they are entitled to have the facts investigated and the responsible prosecuted and punished.”⁴⁶

The Inter-American Commission on Human Rights concluded that forced disappearance “also affects the entire circle of family and friends who wait for months and sometimes years for some news of the victim’s fate.”⁴⁷ The Commission has stated that “because of the nature of this practice, the victims are not only the persons that have disappeared, but also their parents, spouses, children and other family members, who are placed in a situation of uncertainty and anguish that goes on for many years.”⁴⁸

“An overview of the phenomenon of forced disappearance in Peru allows us to perceive that it affects not only the direct victims, the missing persons, but also their relatives, who have suddenly been forced to deal with a situation of abandonment and uncertainty that continued over time. It is the family circle that is hit hard by the sudden absence of a loved one. On the one hand, the despair, confusion caused by the arrest of the family member, and on the other hand the indifference or mistreatment from authorities, end up destabilizing the household”

Ombudsman of Peru⁴⁹

From its first reports, WGEID has found that enforced disappearance entails the violation of numerous rights of the family of the disappeared person, including the right to family life and several economic and social rights.⁵⁰ In light of its experience, WGEID has concluded that family members of disappeared persons are also the victims of the crime of enforced disappearance, as they are subject to an “agonizing uncertainty,” and this also applies to other relatives and dependents of the deceased, in such

⁴⁵ Judgment of November 26, 2013, *Case of Osorio Rivera and Family Members v. Peru*, Series C No. 274, para. 227.

⁴⁶ Judgment of September 22, 2009, *Case of Castro Anzualdo v. Peru*, Series C No. 202, para. 118.

⁴⁷ *Annual Report of the Inter-American Commission on Human Rights - 1978*, OEA/Ser.L/II.47, doc. 13 rev. 1, June 29, 1979, p. 23.

⁴⁸ *Annual Report of the Inter-American Commission on Human Rights, 1986-1987*, Doc. Cit., Chapter V, “II. American Convention on Forced Disappearance of Persons.”

⁴⁹ Defensoría del mPueblo, *La desaparición forzada de personas en el Perú (1980-1996)*, Series Informes Defensoriales, Informe No. 55, Lima, January 2012, p. 195 (original in Spanish, free translation).

⁵⁰ *Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/1492 of December 31, 1981, paras. 165 et seq.

a way that there is a widening circle of victims of disappearance.⁵¹ Along this line, WGEID has indicated that the anxiety and grief caused by the enforced disappearance of a family member constitutes “suffering that reaches the threshold of torture [...] and therefore] the State cannot restrict the right to know the truth about the fate and the whereabouts of the disappeared as such restriction only adds to, and prolongs, the continuous torture inflicted upon the relatives.”⁵² Also, WGEID has noted that “both the disappeared person and those who have suffered harm as a result of the disappearance are to be considered victims of the enforced disappearance and are therefore entitled to obtain reparation. [...] [Thus,] the term ‘victim’ also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.”⁵³

“Family members’ victimization becomes even greater when men, who mainly suffer the fate of enforced disappearances, were the head of household. Here, enforced disappearance of men results in entire families becoming victims of enforced disappearances. As the family structure is disrupted, women are negatively affected economically, socially and psychologically. The emotional upheaval is thus exacerbated by material deprivation, made more acute by the costs incurred should they decide to undertake a search for their love ones. Furthermore, they do not know when—if ever—their loved one is going to return. [...] Therefore, economic and social marginalization is frequently the result of an enforced disappearance. In such circumstances, several economic, social and cultural rights enshrined in the Universal Declaration of Human Rights and in other instruments, such as the rights to health, education, social security, property and family life are violated.”

Group Working on Enforced or Involuntary Disappearances⁵⁴

⁵¹ *Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/1990/13, 24 January 1990, para. 339.

⁵² “General Comment on the right to the truth in relation to enforced disappearances,” para. 4, *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/16/48 of January 26, 2011, para. 39.

⁵³ *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/22/45 of January 28, 2013, paras. 51 and 52.

⁵⁴ *General Comment on women affected by enforced disappearances, adopted by the Working Group on Enforced or Involuntary Disappearances at its 98th session (October 31 to November 9, 2012)*, A/HRC/WGEID/98/2 of February 14, 2013, para. 12.

The feeling of vulnerability that results from this practice not only affects families and persons close to the disappeared, but also extends to the communities to which the disappeared person belongs and to society itself. Rightly, WGEID has concluded that enforced disappearance also has devastating effects on the societies in which it takes place.⁵⁵ This same observation was made by the 24th International Conference of the Red Cross and Red Crescent, reminding that enforced disappearance not only causes great suffering to the families of the disappeared "but also to society."⁵⁶ Thus, the practice of enforced disappearance, which is characterized by creating a climate of fear, deeply affects the groups and communities to which the disappeared person and the family belong.

"Mr. Gómez-Palomino's sisters and brother have endured intense suffering to the detriment of their mental and moral integrity as a result of their brother's forced disappearance and the circumstances related to it, such as the search they carried out in hospitals, local police stations, detention centers and morgues, hoping to find him alive; the indifference and lack of information or support from government authorities in such search for the victim; the impossibility of giving their brother a decent burial according to their customs, as well as the inordinate delay in the investigation and possible punishment of those responsible for his disappearance, the effect of which is the impunity still attending the instant case."
Inter-American Court of Human Rights⁵⁷

Victim status for relatives of the disappeared person has also been reaffirmed in national case law. The Constitutional Tribunal of Peru has reiterated that "the enforced disappearance of persons entails the creation of a cruel sense of uncertainty for both the disappeared person and the family, who thereby become direct victims of this serious crime."⁵⁸ Colombia's Constitutional Court, in turn, has considered that, in accordance with international law, "relatives of victims of human rights violations such as, for example, the crime of enforced disappearance, have the right to

⁵⁵ UN Document E/CN.4/1985/15, para. 291.

⁵⁶ 24th International Conference of the Red Cross and Red Crescent, Manila 1981, Resolution II "Enforced or involuntary disappearances."

⁵⁷ Judgment of November 22, 2005, *Case of Gómez Palomino v. Peru*, Series C No. 136, para. 67.

⁵⁸ Judgment of 9 April 2004, Exp. No. 2798-04-HC/TC, Lima, *Case Gabriel Orlando Vera Navarrete* and Judgment of 12 August 2005, Exp.No. 4677-2005-PHC/TC, Lima, *Case Juan Norberto Rivero Lazo*.

be considered victims for all legal, constitutional and conventional effects." ⁵⁹ Furthermore, in accordance with the evolution of international law, the Court has ruled that relatives of disappeared persons are direct victims of the crime of enforced disappearance and have "the right to truth, justice and reparation, also recognized by national and international case law, inclusive as peremptory norms."⁶⁰

5. Relatives of Victims of Extrajudicial Execution

Relatives of the victims of extrajudicial execution are entitled to reparations as well as having the right to effective remedy and the truth, as the Special Rapporteur on extrajudicial, summary or arbitrary executions has noted repeatedly.⁶¹ The *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* reiterates that relatives of the victims of extrajudicial executions have the right to compensation.⁶² In this regard, the Inter-American Court of Human Rights has stated that the Court "assumes that the suffering and the death of a person cause non-pecuniary damage to that person's children, spouse or companion, parents and siblings, for which reason it is not necessary to prove this."⁶³

However in certain circumstances, relatives of those killed might themselves be victims of extrajudicial execution. In other words, they could be both "direct victims" and not only "indirect victims" or an injured party to the offense. In this sense, the Inter-American Court of Human Rights has stated that "the next of kin of the victims of human rights violations may, in turn, be victims [and] has found that the right to mental and moral integrity of the next of kin of victims has been violated because of the additional anguish they have suffered as a result of the particular circumstances of the violations perpetrated against their loved

⁵⁹ Judgment C-370/06 of 18 May 2006, para. 6.2.4.2.8.

⁶⁰ Judgment C-620/11 of 18 August de 2011.

⁶¹ See, *inter alia*, the reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions E/CN.4/1993/46 of December 28, 1992, para. 68; E/CN.4/1994/7 of 7 December 1993 para. 688; A/51/457 of October 7, 1996, para. 76; E/CN.4/1997/60 of December 24, 1996, paras. 46 and 47; E/CN.4/1998/68 of December 23, 1997, para. 54; A/55/288 of August 11, 2000, para. 48; and A/HRC/14/24 of May 20, 2010, paras. 56-58.

⁶² Principle 20.

⁶³ Judgment of July 8, 2004, *Case of the Gómez Paquiyauri Brothers v. Peru*, Series C No. 110, para. 197.

ones and because of the subsequent acts or omissions of State authorities with regard to the facts. [...] can presume harm to the mental and moral integrity of the immediate family of the victims of certain human rights violations by applying a *iuris tantum* presumption with regard to mothers and fathers, sons and daughters, spouses, and permanent companions, provided that this responds to the specific circumstances of the case.”⁶⁴

“The Court has examined the seriousness of the circumstances surrounding this case, particularly the manner in which he was arrested, the torture meted out to Mr. Bernabé Baldeón-García during his detention, the immediate burial of the body of the victim by the soldiers involved in his death, the deep bond of the family with Mr. Bernabé Baldeón-García as well as the obstacles that said family members encountered in their quest to uncover the truth. Based on such circumstances, the Court finds that the victim’s next of kin have experienced great suffering and impotence at the hands of the State authorities to the detriment of their mental and moral integrity as a result of the arrest, torture and subsequent extrajudicial execution of the victim.”

Inter-American Court of Human Rights⁶⁵

International human rights case law has identified several types of situations.

Thus, given the ways and circumstances under which extrajudicial executions have been committed (for example, the degree of cruelty in perpetrating the crime) and/or how the victim’s body is treated (such as public display of the corpse or abandoning the remains), the Court has considered that relatives are also victims of the incidents because their right to psychological and moral stability has been violated.⁶⁶

⁶⁴ Judgment of November 24, 2011, *Case of The Barrios Family v. Venezuela*, Series C No. 237, paras. 301 and 302.

⁶⁵ Judgment of April 6, 2000, *Case of Baldeón García v. Peru*, Series C No. 147, para. 129.

⁶⁶ See, inter alia: Judgment of April 6, 2000, *Case of Baldeón García v. Peru*, Series C No. 147, paras. 128 and 129; Judgment of July 10, 2007, *Case of Cantoral Huamaní and García Santa Cruz v. Peru*, Series C No. 167, paras. 112 et seq.; Judgment of November 19, 1999, *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala*, Series C No. 63, para. 174; Judgment of September 21, 2006, *Case of Servellón García et al. v. Honduras*, Series C No. 152, para. 129; Judgment of June 9, 2003, *Case of Juan Humberto Sánchez v. Honduras*, Series C No. 99, paras. 101 and 102; and Judgment of August 27, 2014, *Case of the Landaeta Mejías Brothers et al. v. Venezuela*, Series C No. 281, para. 279.

Furthermore, the Inter-American Court of Human Rights has ruled that when the victim is a minor extrajudicial execution creates profound suffering for the family and therefore, it considers that the parents and siblings of the person executed “can be considered the victims of cruel, inhumane and degrading treatment.”⁶⁷ In these cases, besides being entitled to the right to compensation as a relative of the person executed, the Court has declared that relatives are “direct victims” because of the violation of their right to mental and moral integrity.

"Not knowing the whereabouts of a loved one's remains, or what happened to him, is perhaps one of the most perversely subtle, but no less violent, ways to affect the consciousness and dignity of human beings."

Constitutional Tribunal of Peru⁶⁸

In cases of “secret” extrajudicial executions or those in which the families have not been told the exact location where their loved ones have been buried, the families are considered “direct victims” because of the intense and persistent suffering caused by these situations. Thus, in these cases, the Human Rights Committee has concluded that these situations constitute cruel and inhuman treatment of the families of those executed.⁶⁹

6. Survivors of Extrajudicial Executions as Victims

Survivors of extrajudicial executions—particularly collective killings (massacres)—have been considered as victims in the case law. In these cases, the Inter-American Court of Human Rights⁷⁰ and the

⁶⁷ Judgment of July 8, 2004, *Case of the Gómez-Paquiyaury Brothers v. Peru*, Series C No. 110, para. 118. See also: Judgment of November 19, 1999, *Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala*, Series C No. 63, para. 177; and Judgment of September 26, 2006, *Case of Vargas Areco v. Paraguay*, Series C No. 155, para. 95.

⁶⁸ Sentencia de 18 de marzo de 2004, Exp. No. 2488-2002-HC/TC, Piura, *Genaro Villegas Namuche*, párr. 16 de los Fundamentos.

⁶⁹ See, among others: Views of March 26, 2006, *Case of Sankara et al. v. Burkina Faso*, Communication No. 1159/2003; Views of April 3, 2003, *Case of Lyashkevich v. Belarus*, Communication No. 887/1999; Views of March 30, 2005, *Case of Khalilova v. Tajikistan*, Communication No. 973/2001; and Views November 16, 2005, *Case of Valichon Aliboev v. Tajikistan*, Communication No. 985/2001.

⁷⁰ Judgment of May 11, 2007, *Case of the Rochela Massacre v. Colombia*, Series C No. 163, paras. 127 and 128; Judgment of October 25, 2012, *Case of the Massacres of El Mozote and nearby places v. El Salvador*, Series C No. 252, para. 172-174 and 306.

European Court of Human Rights⁷¹ have declared that, by their nature, the incident posed a serious risk to the lives of the survivors and therefore constituted a violation of the right not to be arbitrarily deprived of life. The Human Rights Committee and the Inter-American Commission on Human Rights⁷² have concurred in cases of survivors of "individual" extrajudicial executions. In this regard, the Committee has noted that "the mere fact [of the] attack violates the right to life and not to be arbitrarily deprived of it."⁷³

"[T]he next of kin of the victims of certain human rights violations can, in turn, be victims. In this regard, in other cases, the Court has considered that the right to mental and moral integrity of the next of kin of victims has been violated based on the additional suffering they have endured as a result of the particular circumstances of the violations perpetrated against their loved ones and owing to the subsequent acts or omissions of the State authorities in relation to the facts."

Inter-American Court of Human Rights⁷⁴

In the case of the massacre of two judges and several judicial officials by a paramilitary group with the complicity of the army, which three judicial investigators, survived, the Inter-American Court of Human Rights considered that, given the way the crime was executed, the type of weapon used, and the victims' circumstance of complete defenselessness, the attack constituted "a threat to the life of all the 15 members of the Judicial Commission. The fact that three of them were only injured and not killed is merely fortuitous."⁷⁵

Similarly, in cases of survivors of massacres committed in conditions of extreme cruelty, the Court has considered that they may be victims if "said acts entail cruel, inhuman and degrading

⁷¹ Judgment of May 24, 2005, *Case of Acar and Others v. Turkey*, Communication Nos. 36088/97 and 38417/97, para. 77 and Judgment of December 20, 2004, *Case of Makaratzis v. Greece*, Communication No. 50385/99, paras. 51 and 55.

⁷² Report No. 59/99 of April 13, 1999, *Newton Coutinho Mendes v. Brazil*, Case 11.405.

⁷³ Views of March 25, 2002, *Case Luis Asdrúbal Jiménez Vaca v. Colombia*, Communication No. 859/1999, para. 7.3.

⁷⁴ Judgment of July 10, 2007, *Case of Cantoral Huamaní and García Santa Cruz v. Peru*, Series C No. 167, para. 112.

⁷⁵ Judgment of May 11, 2007, *Case of the Rochela Massacre v. Colombia*, Series C No. 163, para. 127.

treatment.”⁷⁶ Thus, in the case of the massacres of El Mozote and nearby places, the Court has considered that “the survivors and they have suffered profound grief and anguish as a direct result of the particular circumstances of the massacres, and also present mental and physical problems. The said circumstances include having heard the cries for help and, in some cases, having witnessed the acts of cruelty with which their family members were executed, as well as the fear caused by the extreme violence that characterized the massacres. In addition, the Court considers it especially serious that some of them had to gather up the bodies of their loved ones, which were burned and/or in an advanced state of decomposition and, in some case, incomplete, in order to bury them, without being able to give them proper burial in accordance with their traditions, values or beliefs.”⁷⁷

7. Impunity and the Relatives

Relatives of the victims of enforced disappearance and extrajudicial executions have the right to effective recourse, to have the incidents investigated seriously and effectively, to pursue criminal proceedings against those responsible for those crimes and to see them punished.⁷⁸ (See Chapter III “Effective Remedy and the Right to Justice” and IV “Right to Investigation”).

In this context, the Court has declared that impunity in cases of enforced disappearance and/or extrajudicial execution and the absence of effective investigation, and subsequent acts or omissions of the State concerning the events, caused deep suffering to the relatives of the victims of these crimes, which affect their mental integrity, thus violating their right to humane treatment, which is protected in Article 5 of the *American*

⁷⁶ Judgment of October 25, 2012, *Case of the Massacres of Mozote and nearby places v. El Salvador*, Series C No. 252, para. 174. See also: Judgment of November 24, 2009, *Case of the ‘Las Dos Erres’ Massacre v. Guatemala*, Series C No. 211, para. 217; Judgment of September 15, 2005, *Case of the ‘Mapiripán Massacre’ v. Colombia*, Series C No. 134, paras. 142 et seq.; Judgment of July 1, 2006, *Case of the Ituango Massacres v. Colombia*, Series C No. 148, para. 258 et seq.; and Judgment of January 31, 2006, *Case of the Pueblo Bello Massacre v. Colombia*, Series C No. 140, paras. 154 et seq.

⁷⁷ Judgment of October 25, 2012, *Case of the Massacres of Mozote and nearby places v. El Salvador*, Series C No. 252, para. 172.

⁷⁸ Judgment of August 16, 2000, *Case of Durand and Ugarte v. Peru*, Series C No. 68, para. 130.

Convention on Human Rights.⁷⁹ Thus, the Inter-American Court “has considered that the right to mental and moral integrity of the next of kin of victims has been violated based on the additional suffering they have endured as a result of the particular circumstances of the violations perpetrated against their loved ones and owing to the subsequent acts or omissions of the State authorities in relation to the facts.”⁸⁰

“[T]he Court deems that impunity is the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention, in view of the fact that the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives.”

Inter-American Court of Human Rights⁸¹

In this regard, the Inter-American Court has identified a number of parameters to determine the relatives' right to humane treatment: 1) the existence of close family kinship; 2) the particular circumstances of the relationship with the victim; 3) how the family became involved in the search for justice; 4) the State's response to the actions taken; 5) the context of a regime that hindered free access to justice, and 6) the relatives' constant uncertainty about the victim's fate or whereabouts.⁸²

⁷⁹ See, *inter alia*: Judgment of November 26, 2013, *Case of Osorio Rivera and Family Members v. Peru*, Series C No. 274, paras. 277 et seq.; Judgment of April 6, 2006, *Case of Baldeón García v. Peru*, Series C No. 147, paras. 128 et seq.; Judgment of July 10, 2007, *Case of Cantoral Huamaní and García Santa Cruz v. Peru*, Series C No. 167, paras. 112 et seq.; and Judgment of August 12, 2008, *Case of Heliodoro Portugal v. Panama*, Series C No. 186, paras. 163 et seq.

⁸⁰ Judgment of July 10, 2007, *Case of Cantoral Huamaní and García Santa Cruz v. Peru*, Series C No. 167, para. 112.

⁸¹ Judgment of July 8, 2004, *Case of the Gómez Paquiyauri Brothers v. Peru*, Series C No. 110, para. 148.

⁸² See, *inter alia*: Judgment of July 8, 2004, *Case of the Gómez Paquiyauri Brothers v. Peru*, Series C No. 110, para. 118; Judgment of November 22, 2005, *Case of Gómez Palomino v. Peru*, Series C No. 136, paras. 60 et seq.; Judgment of November 25, 2006, *Case of the Miguel Castro Castro Prison v. Peru*, Series C No. 160, paras. 335 et seq.; Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 123 et seq.; Judgment of July 10, 2007, *Case of Cantoral Huamaní and García Santa Cruz v. Peru*, Series C No. 167, paras. 112 et seq.; Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C, No. 202, paras. 105 et seq.; Judgment of November 26, 2013, *Case Osorio Rivera v. Peru*, Series C No. 274, paras. 228 et seq.; Judgment of August 12, 2008, *Case of Heliodoro Portugal v. Panama*, Series C No. 186, paras. 163 et seq.; Judgment of

"[T]he denial of justice to the victims of grave human rights violations, as in the case of a massacre, results in a series of problems, both individually and collectively. In this regard, it is evident that the victims of prolonged impunity suffer different infringements in their search for justice, not only materially, but also other suffering and damages of a psychological and physical nature and in their life projects, as well as other potential alterations to their social relations and to the dynamics of their families and communities. [...] [T]hese damages are intensified by the lack of support of the state authorities in an effective search and identification of the remains, and by the impossibility of properly honoring their dear ones. In view of this situation, the Court has considered the need to provide different types of reparation so as to fully redress the damages, therefore in addition to pecuniary measures, other measures such as satisfaction, restitution, rehabilitation, and guarantees of non-repetition have special relevance due to the gravity of the infringements and collective nature of the damage caused."

Inter-American Court of Human Rights⁸³

For example, the Inter-American Court has identified behaviors by States that contravene the relatives' right to humane treatment, such as: a lack of information for the relatives about the events in which their loved one was a victim; slanderous accusations made by the authorities about the victim, either in an official or unofficial capacity (for example, referring to the victim as a "terrorist" or "enemy of the nation") or the circumstances under which the human rights violation was committed; omissions by the authorities in the investigation and collection of evidence; full or partial loss or destruction of evidence and/or case files; the lack of investigation; and the absence of prosecution and/or punishment of perpetrators.

November 22, 2007, *Case of Albán Cornejo et al v. Ecuador*, Series C No. 171, paras. 46 et seq.; Judgment of November 25, 2000, *Case of Bámaca-Velásquez v. Guatemala*, Series C No. 70, paras. 163 et seq.; Judgment of May 11, 2007, *Case of the Rochela Massacre v. Colombia*, Series C No. 163, paras. 137 et seq.; Judgment of September 26, 2006, *Case of Vargas-Areco v. Paraguay*, Series C No. 155, paras. 96 et seq.; Judgment of September 22, 2006, *Case of Goiburú et al. v. Paraguay*, Series C No. 153, paras. 96 et seq.; Judgment of September 21, 2006, *Case of Servellón-García et al. v. Honduras*, Series C No. 152, paras. 128 et seq.; Judgment of October 25, 2012, *Case of the Massacres El Mozote and Nearby Places v. El Salvador*, Series C No. 252, paras. 172 et seq.

⁸³ Judgment of November 24, 2009, *Case of the "Las Dos Erres" Massacre v. Guatemala*, Series C No. 211, para. 226.

Furthermore, in cases where persons have died while in the custody of state institutions, the Court has held that the "feeling of uncertainty, frustration, anguish and powerlessness due to the lack of an adequate investigation into the acts [in which the family member died] [...] have caused a major alteration in the lifestyle of the victims and their social and family relations, seriously impairing the lifestyle of the family as a group and of each member individually."⁸⁴

⁸⁴ Judgment of September 26, 2006, *Case of Vargas-Areco v. Paraguay*, Series C No. 155, para. 96.

CHAPTER II: RIGHT TO PROTECTION AND PREVENTION

“The state’s power is not [un]limited; it is necessary that the State act ‘within the limits and pursuant to the procedures that permit both the preservation of public security as well as the fundamental rights of human beings’.”
Inter-American Court of Human Rights⁸⁵

1. Preliminary Considerations

Under international law, the State has the obligation to respect and ensure the right not to be arbitrarily deprived of life and not to be subjected to enforced disappearance.⁸⁶ The Inter-American Court of Human Rights has stated that the prohibition of enforced disappearances and/or extrajudicial executions is a peremptory norm of international law (*jus cogens*).⁸⁷ Under this legal obligation, the State must not only refrain from committing extrajudicial killings and/or enforced disappearances, but also must prevent these crimes from being committed. In this regard, the Human Rights Committee (HRC)⁸⁸ and the Inter-American Court⁸⁹ have stated that the obligation for prevention entails both negative and

⁸⁵ Judgment of November 25, 2006, *Case of the Miguel Castro Castro Prison v. Peru*, Series C No. 160, para. 240

⁸⁶ See, *inter alia*: *International Covenant on Civil and Political Rights* (Arts. 2.1 and 3.); *American Convention on Human Rights* (Arts. 1 and 2.) *Declaration on the Protection of All Persons from Enforced Disappearances* (Arts. 2 and 3); *International Convention for the Protection of All Persons from Enforced Disappearance* (Art. 1); *Inter-American Convention on Forced Disappearance of Persons* (Art I.); and *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle I)

⁸⁷ See, *inter alia*: Judgment of March 14, 2001, *Case of Barrios Altos v. Peru*, Series C No. 75; Judgment of July 8, 2004, *Case of the Gómez Paquiyauri Brothers v. Peru*, Series C No. 110, para. 128; Judgment of March 3, 2005, *Case of Huilca Tecse v. Peru*, Series C No. 121, para. 65; Judgment of 22 November 2005, *Case of Gómez Palomino v. Peru*, Series C No. 136, para. 92; Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 157; Judgment of September 22, 2009, *Case of Castro Anzualdo v. Peru*, Series C No. 202, para. 59; and Judgment of November 26, 2013, *Case of Osorio Rivera and Family Members v. Peru*, Series C No. 274, para. 112.

⁸⁸ See, *inter alia*: *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, paras. 3 and 6 and *General Comment No. 6, The right to life (article 6)*, para. 3.

⁸⁹ See, *inter alia*, Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162, paras. 170 et seq.

positive obligations. On the one hand, the State has the obligation not to adopt legislation, measures or policies that promote, encourage, tolerate or order enforced disappearances or extrajudicial executions (negative obligations). Moreover, the State has the obligation to adjust domestic law and the state apparatus and to adopt measures and behaviors to prevent these crimes from being committed (positive obligations). The formal adoption of administrative or judicial measures is not enough; in practice the State must act in accordance with these obligations.⁹⁰ This obligation includes diminishing or repealing laws, policies and practices that encourage or permit the commission of such crimes.⁹¹

The international corpus juris establishes a series of measures to be taken by States to prevent enforced disappearances and extrajudicial executions. Many of these measures not only aim to prevent the commission of these two crimes, but also to prevent other gross human rights violations such as torture, arbitrary detention and secret detention.

2. Banning of Orders or Instructions

One major aspect of prevention is the banning of orders or instructions that promote, incite or authorize the commission of enforced disappearances⁹² and/or extrajudicial executions.⁹³ This prohibition is meant for all public authorities—civilian, military or any other de jure or de facto authority. Given that enforced disappearance and extrajudicial execution are crimes under international law, this prohibition is absolute. As such it is not possible to invoke exceptional circumstances such as a state of war or threat of war, internal armed conflict, internal political

⁹⁰ Judgment of July 29, 1988, *Case of Velásquez Rodríguez v. Honduras*, Series C No. 4, para. 167 and Judgment of January 20, 1989, *Case of Godínez Cruz v. Honduras*, Series C No. 5, para. 176.

⁹¹ *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* (Principle 38).

⁹² *Declaration on the Protection of All Persons from Enforced Disappearances* (arts. 2.1 and 6); *International Convention for the Protection of All Persons from Enforced Disappearance* (arts. 1.2, 6.2 and 23.2); and *Inter-American Convention on Forced Disappearance of Persons* (arts. I.a, VIII and X).

⁹³ *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle 3).

instability or any other public emergency as justification for enforced disappearance and/or extrajudicial execution.⁹⁴

The prohibition is not limited to orders or instructions that superiors might give to subordinates. It applies to the issuing of laws or lower level regulations that order, promote, incite or authorize enforced disappearances and/or extrajudicial executions. In this regard, the Inter-American Court of Human Rights has stated that one kind of violation of the *American Convention on Human Rights* (ACHR) consists of the “adopt[ion of] provisions which do not conform to its obligations under the Convention.”⁹⁵ The Inter-American Court has stated that the obligation under article 2 of the ACHR implies, inter alia, “repealing rules and practices of any nature involving violations to the guarantees provided for in the Convention or disregarding the rights enshrined therein or hamper the exercise of such rights.”⁹⁶

Thus, in the case of the Colombian Defense Ministry directives that established a system of incentives and reward payments for “taking down guerrillas” and that led to incidents in which civilians were extrajudicially executed and then presented by the security forces as “combat casualties,” the Human Rights Committee has urged the State to discontinue such directives.⁹⁷ Furthermore, the Human Rights Committee has considered that legal norms that entail performing duties or obedience to superior orders, which exempt state agents from criminal and/or disciplinary sanction for extrajudicial executions that are committed during security operations, are incompatible with the obligations under the

⁹⁴ *Declaration on the Protection of All Persons from Enforced Disappearances* (art. 7); *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 1.2); *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions* (Principles 1 and 19); *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Principle 1); *Inter-American Convention on Forced Disappearance of Persons* (arts. I.a and X); and *Principles and Best Practices on Persons Deprived of Liberty in the Americas* (Principle I).

⁹⁵ *Advisory Opinion OC-13/93 of July 16, 1993, "Certain powers of the Inter-American Commission on Human Rights (arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights), Series A No. 13, para. 26.*

⁹⁶ Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 172.

⁹⁷ *Concluding Observations of the Human Rights Committee: Colombia, CCPR/C/COL/CO/6 of August 4, 2010, para. 14.*

ICCPR.⁹⁸ Furthermore, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has declared that States should “withdraw all general order to security forces to ‘shoot on sight’.”⁹⁹

The prohibition is closely related to: i) the impossibility of invoking obedience or compliance with superior orders or instructions to justify the commission of enforced disappearances and/or extrajudicial executions;¹⁰⁰ ii) the right and duty of every official not to obey such orders or instructions;¹⁰¹ iii) the obligation of every official who becomes aware that an enforced disappearance or extrajudicial execution may occur, to inform his superiors and, if necessary, the authorities or oversight or enforcement agencies;¹⁰² and iv) the State’s obligation to train and instruct officials in the prevention of enforced disappearance and extrajudicial execution.¹⁰³

This last obligation is not limited to military or police personnel. Effectively, as the *International Convention for the Protection of All Persons from Enforced Disappearance* (ICPED) specifies, it applies to all “law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved

⁹⁸ Views of March 31, 1982, Communication No. 45/1979, *Case of María Fanny Suárez de Guerrero v. Colombia*.

⁹⁹ *Extrajudicial, summary or arbitrary executions. Report of the Special Rapporteur, Asma Jahangir*, E/CN.4/2004/7, December 22, 2003, para. 96 (3).

¹⁰⁰ *Declaration on the Protection of All Persons from Enforced Disappearances* (art. 6.1); *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 6.2); *Inter-American Convention on Forced Disappearance of Persons* (art. VIII); *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle 19); *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Principle 26); and *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (Principles 22 and 27).

¹⁰¹ *Declaration on the Protection of All Persons from Enforced Disappearances* (art. 6.1); *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 23.2); *Inter-American Convention on Forced Disappearance of Persons* (art. VIII); *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle 3); and *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Principle 25).

¹⁰² *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 23.3) and *Code of Conduct for Law Enforcement Officials* (art. 8, comments).

¹⁰³ *Declaration on the Protection of All Persons from Enforced Disappearances* (art. 6.3); *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 23.1); *Inter-American Convention on Forced Disappearance of Persons* (art. VIII); *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle 3).

in the custody or treatment of any person deprived of liberty."¹⁰⁴ The Committee on Enforced Disappearances (CED) has stated that training and education should also be aimed at judges, prosecutors and other officials of the justice system.¹⁰⁵ In turn, the WGEID has noted that "[t]his training should include education about the consequences of enforced disappearances on women, among others, regarding sexual violence and steps that should be taken to prevent and respond to it."¹⁰⁶

The right and duty to disobey orders or instructions to commit the crimes of enforced disappearance or extrajudicial execution, as well as the duty to report about the possible commission of these crimes, must be protected in the State's legislation. Thus, States must not punish officials who refuse to carry out such orders, warn about the possible commission of these crimes or report them.¹⁰⁷

3. Principle of *Non-refoulement*

International law prohibits the expulsion, return, extradition or deportation of a person to a State where there is risk that the person might fall victim to enforced disappearance or extrajudicial execution.¹⁰⁸ This prohibition, known as the principle of *non-refoulement*, applies to all gross human rights violations.¹⁰⁹

¹⁰⁴ Article 23 (1).

¹⁰⁵ *Concluding Observations to: Germany*, CED/C/DEU/CO/1, 10 April 2014, para. 23; *Belgium*, CED/C/BEL/CO/1, 24 September 2014, para. 26; *Armenia*, 11 February 2015, para. 23; *Netherlands*, CED/C/NLD/CO/1, 10 April 2014, para. 31; *Mexico*, 11 February 2015, para. 37; *Paraguay*, CED/C/PRY/CO/1, 24 September 2014, para. 24; *Uruguay*, CED/C/URY/CO/1, 8 May 2013, para. 30; and *Serbia*, 5 February 5, 2015, para. 22.

¹⁰⁶ *General Comment on women affected by enforced disappearances, adopted by the Working Group on Enforced or Involuntary Disappearances at its 98th Session (31 October to 9 November 2012)*, A/HRC/WGEID/98/2 of 14 February 2013, para. 45.

¹⁰⁷ *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 23.2); *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Principle 25); and *Code of Conduct for Law Enforcement Officials* (art. 8, comment).

¹⁰⁸ *Declaration on the Protection of All Persons from Enforced Disappearances* (art. 8); *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 16); and *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle 5).

¹⁰⁹ See, inter alia: *American Convention on Human Rights* (art. 22.8); *Convention relating to the Status of Refugees* (art. 33); *Declaration on Territorial Asylum* (art. 3.1); *OAS Convention on Territorial Asylum* (art. IV); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (art. 3); *Inter-American Convention to Prevent and Punish Torture* (art. 13.4); *International*

Although, unlike the ACHR,¹¹⁰ the ICCPR does not expressly address the principle of *non-refoulement*, the HRC has declared that this principle is inherently enshrined in the ICCPR as a direct result of the prohibition of arbitrary deprivation of life and torture.¹¹¹

The principle of *non-refoulement* is a *jus cogens* norm, meaning one that it is mandatory and may not be repealed or restricted under any circumstances.¹¹² In this regard, the HRC has stated that, under this principle, “[n]o person, without any exception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he/she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment”¹¹³ or other gross violations of human rights.

The principle of *non-refoulement* also implies that the State must adopt all necessary measures to ensure that no person, including those who have been detained outside its territory, shall be moved to another country by transfer, rendition, extradition, expulsion, refoulement or other manner, if there are substantial reasons to believe that the person would be at risk of being subjected to enforced disappearance, extrajudicial execution or other gross violations of human rights.¹¹⁴

Convention against the Taking of Hostages (art. 9); *Inter-American Convention on Extradition* (art. 4); *Convention relating to the Status of Refugees* (art. 33); and *United Nations Model Treaty on Extradition* (art. 3).

¹¹⁰ Article 22 (8).

¹¹¹ See, inter alia: *General Comment No. 31*, Doc. Cit., para. 12 and *Concluding Observations of the Human Rights Committee to: United States of America*, CCPR/C/USA/CO/4, April 23, 2014, para. 13 and CCPR/C/USA/CO/3/Rev.1 of 18 December 2006, para. 16; *Canada*, CCPR/C/CAN/CO/5 of 20 April 2006, para. 15; *Ukraine*, CCPR/C/UKR/CO/6, of November 28, 2006, para. 9; *Morocco*, CCPR/CO/82/MAR, from December 1, 2004, para. 13; *Egypt*, CCPR/CO/76/EGY, of November 28, 2002, para. 16; *Uzbekistan*, CCPR/CO/83/UZB, on April 6, 2005, para. 12; and *Thailand*, CCPR/CO/84/THA, of July 8, 2005, para. 17.

¹¹² See, inter alia: *Report of the Special Rapporteur on Torture, Theo van Boven*, E/CN.4/2002/137 of February 26, 2002, para. 14; *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/4/41 of January 25, 2007, para. 497; and *Annual Report of the Inter-American Commission on Human Rights, 1984-1985*, OEA/Ser.L/V/II.66, Doc. 10 rev. 1 of October 1, 1985.

¹¹³ *Concluding Observations of the Human Rights Committee: Canada*, CCPR/C/CAN/CO/5 of 20 April 2006, para. 15.

¹¹⁴ *Concluding Observations of the Human Rights Committee: United States of America*, CCPR/C/USA/CO/3/Rev.1 of December 18, 2006, para. 16.

"The State party should adopt and implement laws guaranteeing respect for the principle of non-refoulement in cases involving risk of death, torture or ill-treatment not covered by the refugee definition, as well as ensures appropriate training for officials engaged in migration control."

Human Rights Committee¹¹⁵

The principle covers any involuntary removal of an individual from one country to another, regardless of the form it takes, what the procedure is called (deportation, expulsion, return, *refoulement*, extradition, transfer, etc.) or whether the procedure followed was legal or not.¹¹⁶

Thus, States must not ignore the prohibition against the practice of "rendition" or "extraordinary rendition," meaning the capture and transfer of suspects undertaken outside the parameters of the normal legal procedures for extradition, deportation, expulsion or transfer, and without proper safeguards of due process. It is worth mentioning that in the 1970s and 1980s, the military regimes of the Southern Cone made use of these practices as part of "Operation Condor," during which many people were disappeared and extrajudicially executed; having been captured in one country, their bodies were found in another. The Inter-American Court has described "Operation Condor" as the "systematic practice of 'State terrorism' at an inter-State level" and "in absolute contradiction to the principal objects and purposes of the organization of the international community established universally in the Charter of the United Nations, and the regional community in the Charter of the Organization of American States and the American Convention itself."¹¹⁷

Following the attacks in New York on September 11, 2001, and within the framework of the "global war on terrorism," many countries systematically and comprehensively embraced

¹¹⁵ *Concluding observations on the fifth periodic report of Peru, adopted by the Committee at its 107th session (11 to 28 March 2013)*, CCPR/C/PER/CO/5 of 29 April 2013, para. 18.

¹¹⁶ See, inter alia: Committee against Torture, Views of 5 June 2000, *Josu Arkauz Arana v. France*, Communication No. 063/1997 and *Conclusions and Recommendations to the UK*, CAT/C/CR/33/3 of 25 November 2004, para. 5 (e); and *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading punishment*, A/59/324 of September 1, 2004, para. 3.4.

¹¹⁷ Judgment of September 22, 2006, *Case of Goiburú et al. v. Paraguay*, Series C No. 153, para. 72.

“rendition.” This system of “extraordinary renditions” exhibited complete disregard for the principle of non-refoulement and basic international standards on imprisonment.¹¹⁸ These “extraordinary renditions” were usually accompanied by secret detention, which constitutes not only a violation of the right to personal liberty and security but may also imply multiple violations of human rights, including torture and in many cases enforced disappearance. Thus, the WGEID noted that these were incidents of “extraordinary renditions, which amount to enforced disappearances.”¹¹⁹

“All Governments should at all time refrain from expelling a person in circumstances where respect for his or her right to life is not fully guaranteed. Refoulement of refugees or of internally displaced persons to countries or areas where respect for their right to life is not fully guaranteed, as well as the closure of borders preventing the escape of persons trying to flee a country, should at all times be prohibited.”

Bacre Waly Ndiaye, Special Rapporteur on extrajudicial, summary or arbitrary executions¹²⁰

The effectiveness of the principle of non-refoulement means that the State must adopt legal measures or amend its legislation and procedures in order to guarantee this protection. Thus, the CED has declared that States must: i) include expressly in the domestic legislation, the prohibition of expulsion, refoulement, rendition or extradition when there are substantial reasons to believe that the person would be at risk of being subjected to enforced disappearance;¹²¹ ensuring that asylum procedures include an

¹¹⁸ In this regard, see: *Report of Robert K. Goldman, Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism*, E/CN.4/2005/103 of 7 February 2005, para. 54 and 55; International Commission of Jurists, *Legal Commentary to the ICJ Berlin Declaration: Counter-terrorism, Human Rights and the Rule of Law*, Geneva 2009; and *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, International Commission of Jurists, Geneva, 2009.

¹¹⁹ *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/13/31 of December 21, 2009, para. 646.

¹²⁰ *Report of the Special Rapporteur, Mr. Bacre Waly Ndiaye, submitted pursuant to resolution 1997/61 of the Commission on Human Rights*, E/CN.4/1998/68 of 23 December 1997, para. 128

¹²¹ *Concluding Observations to: Spain*, CED/C/ESP/CO/1 of 12 December 2013, para. 22; *Germany*, CED/C/DEU/CO/1 of 10 April 2014, para. 15; *Armenia*, on 11 February 2015, para. 17; *France*, CED/C/FRA/CO/1 of 8 May 2013, para. 27; and *Serbia* on February 5, 2015, para. 20.

appeal mechanism with a suspensive effect for a suitable period of grace, in the case of asylum applications that have received a negative decision;¹²² and ensuring that the appeal procedure against a decision to extradite, return or expel a person provides for a substantive review of the application when assessing whether there are grounds to believe that the applicant would be in danger of being subjected to enforced disappearance.¹²³

International instruments on enforced disappearance¹²⁴ set out detailed rules for determining whether or not a real risk exists that the person might become a victim of that crime. Likewise, international instruments and case law on the principle of non-refoulement—particularly in relation to torture¹²⁵—establish rules that are applicable to extrajudicial execution and enforced disappearance. Thus, among other factors, the State must evaluate:

- The specific situation of the person in question, which is a decisive element.
- The overall situation in the country to which the person would be sent. If there is a pattern of gross, systematic or mass violations of human rights or serious violations of international humanitarian law in that country, this would be considered as a very powerful argument in favor of the individual. However, the mere fact that these conditions do not exist does not mean that the individual is not at risk.¹²⁶

¹²² *Concluding Observations to: France*, CED/C/FRA/CO/ 1 of 8 May 2013, para. 27; and *Serbia*, on February 5, 2015, para. 20

¹²³ *Concluding Observations of the Netherlands*, CED/C/NLD/CO/1 of 10 April 2014, para. 23.

¹²⁴ *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 16) and the *Declaration on the Protection of All Persons from Enforced Disappearances* (art. 8).

¹²⁵ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (art. 3.2) and *Inter-American Convention to Prevent and Punish Torture* (art. 13).

¹²⁶ See, inter alia, the Views of the Committee Against Torture on the cases: *Núñez Chipana v. Venezuela*, Communication No. 110/1998 of 10 November 1998; *Mutombo v. Switzerland*, Communication No. 13/1993, of 27 April 1994; *Khan v. Canada*, Communication No. 15/1994, of November 15, 1994; *Tala v. Sweden*, Communication No. 43/1996, of November 13, 1996; and *Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, Communication No. 233/2003, of May 24, 2005.

- Threats from non-state actors and, in these cases, whether State authorities are able to provide adequate protection.¹²⁷
- The risks that exist in the country to which the person is being sent directly, as well as in "any State to which the author may subsequently be expelled, returned or extradited."¹²⁸

The HRC and the Committee against Torture have expressed serious reservations and criticisms about the use of what are known as "diplomatic assurances" in proceedings for extradition, expulsion, return or rendition, and they have reminded that States must fulfill the obligation to respect the principle of non-refoulement.¹²⁹ The HRC has declared that to return a person to a country where the person would be at risk being subjected to torture or other prohibited treatment, based solely on diplomatic assurances, and particularly when these do not include a mechanism to verify compliance, is a matter of international responsibility for the State that carries out the expulsion.¹³⁰ The Committee against Torture has made similar statements.¹³¹ In turn, the UN High Commissioner for Human Rights,¹³² the Special Rapporteur on Torture,¹³³ and the Independent Expert on the

¹²⁷ See, inter alia: Committee against Torture, Views of May 14, 1999, *Case of Sadiq Shek Elmig v. Australia*, Communication No. 120/1998; and Human Rights Committee, Views of March 9, 2004, *Case of Mansour Ahani v. Canada*, Communication No. 1051/2002.

¹²⁸ Committee against Torture, *General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications)*, para. 2.

¹²⁹ *Concluding Observations of the Human Rights Committee to: Sweden*, CCPR/CO/74/SWE, of April 24, 2002, para. 12; *Thailand*, CCPR/CO/84/THA, of July 8, 2005, para. 17; *Canada*, CCPR/C/CAN/CO/5 of 20 April 2006, para. 15; *Uzbekistan*, CCPR/CO/83/UZB, on April 6, 2005, para. 12; *United States of America*, CCPR/C/USA/CO/3/Rev.1 of 18 December 2006, para. 16; *Ukraine*, CCPR/C/UKR/CO/6, of November 28, 2006, para. 9; and *Morocco*, CCPR/CO/82/MAR, from December 1, 2004, para. 13. See also: Committee against Torture, Views of 20 May 2005, Communication No. 233/2003, *Case of Ahmed Hussein Mustafa Kamil Agiza v. Sweden*.

¹³⁰ Views of 25 October 2006, Communication No. 1416/2005, *Case of Mohammed Alzery v. Sweden*; and *Concluding Observations to Sweden*, CCPR/CO/74/SWE, of April 24, 2002, para. 12.

¹³¹ Views of 20 May 2005, Communication No. 233/2003, *Case of Ahmed Hussein Mustafa Kamil Agiza v. Sweden*, para. 13.4; and *Concluding Observations on the periodic reports combined third to fifth of the United States of America*, CAT/C/USA/CO/3-5 of 19 December 2014, para. 16.

¹³² E/CN.4/2006/94 of 16 February 2006, paras. 10 et seq. and 34.

¹³³ *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading punishment*, A/60/316, of August 30, 2005, para. 51.

protection of human rights and fundamental freedoms in the fight against terrorism,¹³⁴ have concluded that diplomatic assurances do not provide adequate safeguards to protect people from gross human rights violations, and they have reminded that States must respect, in all circumstances, the principle of non-refoulement. The CED has declared that States must take all necessary measures to ensure that diplomatic assurances are effectively assessed with great care and that these shall not ever be accepted when there are reasonable grounds to believe that the person would be in danger of being subjected to enforced disappearance.¹³⁵

4. Prohibition of Secret Detention

International bodies for the protection of human rights have long held the prohibition of secret detention (or “unacknowledged detention”), which is an important measure for preventing enforced disappearances and extrajudicial executions. This prohibition is closely linked to safeguards on detention and unofficial places of detention.

“States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, [...] through arbitrary deprivations of liberty. [...] The prohibitions against taking of hostages, abductions or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law.”
Human Rights Committee¹³⁶

Along this line, the WGEID has stated that “the constitutional, legal and regulatory framework, in particular in relation to the issue of the deprivation of liberty, be in full conformity with international standards in order to ensure that it does not give licence to secretly detain or disappear anyone, or that it does not lead in

¹³⁴ Report by Robert K. Goldman, Doc. Cit., para. 61.

¹³⁵ *Concluding Observations to: Germany*, CED/C/DEU/CO/1 of 10 April 2014, para. 17; *Spain*, CED/C/ESP/CO/1 of 12 December 2013, para. 22; and *Armenia*, of February 11, 2015, para.17.

¹³⁶ *General Comment No. 29: Derogations during a state of emergency* (art. 4), para. 11 and 13.

practice to circumstances where enforced disappearances could be perpetrated."¹³⁷

"[A]ll persons deprived of their liberty must be held in official places of detention and that unofficial and secret detention is a violation of international human rights law."

Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹³⁸

The HRC has maintained that secret detention and secret prisons violate detainees' right to benefit from the protection of domestic and international law, and in addition that these violate the rights of the detainees' families.¹³⁹ The Working Group on Arbitrary Detention (WGAD) has considered that secret detention is, per se, an aggravated form of arbitrary detention, which is prohibited by international human rights and international humanitarian law.¹⁴⁰ In their study on secret detention in the context of the fight against terrorism, several United Nations Special Rapporteurs and Working Groups concluded that secret detention is irreconcilably in violation of international human rights law, including during states of emergency and armed conflict. Likewise, it is in violation of international humanitarian law during any form of armed conflict.¹⁴¹ The experts concluded that "[e]very instance of secret detention also amounts to a case of enforced disappearance"¹⁴²

¹³⁷ *Report of the Working Group on Enforced or Involuntary Disappearances on its mission to Pakistan*, A/HRC/22/45/Add.2 of 26 February 2013, para. 91.

¹³⁸ *Eighth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, CAT/C/54/2 of March 26, 2015, para. 75.

¹³⁹ *Concluding Observations of the Human Rights Committee: United States of America*, CCPR/C/USA/CO/3/Rev.1 of 18 December 2006, para. 12.

¹⁴⁰ *Report of the Working Group on Arbitrary Detention: A collection of national, regional and international laws, regulations and practices related to the right to challenge the lawfulness of detention before court*, A/HRC/27/47 of June 30, 2014, para. 32; *Report of the Working Group on Arbitrary Detention*, A/HRC/16/47 of 19 January 2011, paras. 52-56; and Opinions Nos. 14/2009 (Gambia), 3/2009 (USA), 36/2008 (Saudi Arabia), 12/2006, 29/2006, 9/2006, 47/2005, 22/2004 and 8/1998.

¹⁴¹ *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, Martin Scheinin; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; the Working Group on Arbitrary Detention Represented by its Vice-Chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances Represented by its Chair, Jeremy Sarkin, A/HRC/13/42 of 19 February 2010, p. 2, Summary.

¹⁴² *Ibid.*, para. 28.

and that "secret detention amounts to an enforced disappearance, if resorted to in a widespread or systematic manner, such aggravated form of enforced disappearance can reach the threshold of a crime against humanity."¹⁴³

Although for several decades doctrine and international jurisprudence have developed this prohibition as a direct result of different international norms and standards on deprivation of liberty and judicial protection, the ICPED was the first treaty to enshrine the prohibition expressly.¹⁴⁴ Subsequently, the *Principles and Best Practices on Persons Deprived of Liberty in the Americas* also explicitly included this prohibition.¹⁴⁵

Thus, some kinds of administrative detention, or being kept incommunicado during prolonged detention, without the safeguards established by international law, may constitute secret detention. This is the case of administrative detention that is indefinite or goes on for prolonged periods without judicial process or judicial control.¹⁴⁶ In this regard, the CED has stated that it "observes with concern the existence of domestic regulations that make it possible for a person who has not been apprehended in the act of committing an offence to be placed in administrative detention [...] [and that] enforced disappearances that are now occurring are generally linked to arbitrary administrative detention."¹⁴⁷ The WGEID, in turn, has declared that being held incommunicado in prolonged and indefinite detention may amount to enforced disappearance if national authorities deny having the detainee in custody.¹⁴⁸

¹⁴³ *Ibid.*, para. 30.

¹⁴⁴ Article 17 (1) provides that "[n]o one shall be held in secret detention." During the drafting of the ICPED, government delegations agreed on the need to include a rule specifically prohibiting "secret places of detention and *incommunicado* detention." (Doc. E/CN.4/2003/71 of 12 February 2003, para. 82).

¹⁴⁵ Principle III (1).

¹⁴⁶ See, inter alia: *Report of the Working Group on Arbitrary Detention*, E/CN.4/2005/6 of 1 December 2004, para. 61; and *Report on the Practice of Administrative Detention*, E/CN.4/Sub.2/1990/29 of 24 July 1990, para. 63.

¹⁴⁷ *Concluding Observations to Argentina*, CED/C/ARG/CO/1 of 12 December 2013, para. 24.

¹⁴⁸ UN Docs.: E/CN.4/1435, of January 22, 1981, paras. 175 et seq.; E/CN.4/1492 of December 31, 1981, para. 158; and E/CN.4/1983/14 of 21 January 1983, para. 124.

5. Safeguards Relating to Deprivation of Liberty

Scrupulous observance of the international norms concerning the right to personal liberty and freedom from arbitrary detention¹⁴⁹ is essential for preventing enforced disappearance and extrajudicial execution.

“When a detention is not ordered or promptly supervised by a competent judicial authority, when a detainee is not fully informed of the reason for the detention, or when he or she has no access to legal counsel, and when the detainee’s relatives have been unable to locate him or her promptly, the legal rights of a detainee as well as his or her personal integrity are clearly jeopardized. The relationship between illegal or arbitrary detention and the violation of an individual’s other fundamental rights is not a function of circumstance. Rather, in some cases it may be the logical consequence of a relationship of dependency between the security forces, and administrative and judicial authorities. [...] [U]nlawful detentions were the first step leading to extrajudicial executions, forced disappearances, and the carrying out of individual acts or systematic practice of torture.”

Inter-American Commission on Human Rights¹⁵⁰

States must ensure that no one is arbitrarily deprived of freedom by any means—capture, arrest, detention, imprisonment, etc.—and that any deprivation of liberty may only be carried out in strict compliance with the conditions and procedures established by law, by the corresponding officials or persons authorized by law for that purpose, and under judicial control or supervision of lawfulness.¹⁵¹ Thus, any deprivation of liberty must comply with the following general principles: i) lawfulness (material and procedural); ii)

¹⁴⁹ *Universal Declaration of Human Rights* (arts. 3 and 9); *International Covenant on Civil and Political Rights* (art. 9); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (art. 16); *Convention on the Rights of the Child* (art. 37); *Declaration on the Human Rights of Individuals who are not Nationals of the Country in Which They Live* (art. 5.1); *American Declaration of the Rights and Duties of Man* (arts. I and XXV); and *American Convention on Human Rights* (art. 7).

¹⁵⁰ *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, Doc. Cit., paras. 123 and 124.

¹⁵¹ See, *inter alia*: Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., of October 22, 2002, Chapter III, B “Right to Personal Liberty and Security”; and *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, OEA/Ser.L/V/II. Doc. 64 of December 31, 2011.

legitimacy (purpose of the detention); iii) necessity and reasonableness of the detention; iv) proportionality; and v) protection of human rights, particularly the rights to personal security, against arbitrary detention and with the guarantee of effective judicial remedy.¹⁵² In addition to the above, international norms and standards require the following measures to prevent enforced disappearances and extrajudicial executions:

- National legislation should regulate which authorities may order deprivation of liberty, those that are authorized to carry out these orders, and the conditions under which such orders may be given;¹⁵³
- States must ensure strict control, including a clear chain of command over all officials responsible for apprehension, detention, arrest, custody, preventive detention, transfers and incarceration, as well as all officials authorized by law to use force and firearms.¹⁵⁴
- The ban on prolonged incommunicado detention and prolonged solitary confinement.¹⁵⁵

¹⁵² Ibid. See, inter alia, Inter-American Court of Human Rights: Judgment of 21 January 1994, *Case of Gangaram Panday v. Surinam*, Series C No. 16, para. 46-47; Judgment of July 8, 2004, *Case of the Gómez Paquiyauri Brothers v. Peru*, Series C No. 110, para. 83; Judgment of November 27, 2003, *Case of Maritza Urrutia v. Guatemala*, Series C No. 103, para. 65; Judgment of September 18, 2003, *Case of Bulacio v. Argentina*, Series C No. 100, para. 125; and Judgment of June 7, 2003, *Case of Juan Humberto Sánchez v. Honduras*, Series C No. 99, para. 78.

¹⁵³ *Declaration on the Protection of All Persons from Enforced Disappearances* (art. 12); *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 17.2); and *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle 2).

¹⁵⁴ Ibid.

¹⁵⁵ See, inter alia: Human Rights Committee, *General Comment No. 29*, Doc. Cit., para. 11 and 13; *General Comment No. 20: Article 7 (Prohibition of torture or other cruel, inhuman or degrading treatment or punishment)*, para. 6; *Concluding Observations to: Peru*, CCPR/C/79/Add.67, of 25 July 1996, paras. 23 and 24.; *Spain*, CCPR/C/79/ Add.61, of April 3, 1996, paras. 12 and 18; *Israel*, CCPR/C/79/Add.93, of 18 August 1998, paras. 20 and 21; *United States of America*, CCPR/C/USA/CO/3/Rev. 1, of December 18, 2006, para 12.; Inter-American Court of Human Rights, Judgment of July 29, 1988, *Case of Velásquez Rodríguez v. Honduras*, Series C No. 4, para. 156; Judgment of 12 November 1997, *Case of Suárez Rosero v. Ecuador*, Series C No. 35, paras. 90-91; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, Doc. Cit., paras. 211 and 213; *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 17.1); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principle 15); and *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (Principle I).

- The right of the detainee to communicate with the outside world, particularly with family members or a lawyer.¹⁵⁶

“One of the central elements for the prevention and elimination of this practice [enforced disappearance] is the adoption of effective measures to prevent such disappearance or, if applicable, when there is a suspect that a person has been made disappeared, to put an end to that situation immediately. In this sense, this duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights. Hence, the deprivation of liberty in legally recognized centers and the existence of detainees’ records constitute fundamental safeguards, inter alia, against forced disappearances. In the opposite sense, the implementation and maintenance of clandestine detention centers constitute per se a breach of the obligation to guarantee insofar as such situation directly affects the rights to personal liberty, humane integrity and life.”

Inter-American Court of Human Rights¹⁵⁷

a. Places of Detention

International standards require that detainees must be held in places that are official and publicly recognized as such, and that have oversight.¹⁵⁸ This safeguard seeks to prevent enforced

¹⁵⁶ Principles 15, 16 and 18 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*. While this right may be restricted in exceptional circumstances set forth by the law when a judge or other authority deems this necessary to maintain security and order, or when exceptional needs of the investigation so require, in all cases the detainee must have access to a lawyer within 48 hours of the time of arrest. *Concluding Observations of the Human Rights Committee: Israel*, CCPR/CO/78/ISR, para 13 and Principle 7 of the *Basic Principles on the Role of Lawyers*.

¹⁵⁷ Judgment of September 22, 2009, *Case of Castro Anzualdo v. Peru*, Series C No. 202, para. 63.

¹⁵⁸ *Declaration on the Protection of All Persons from Enforced Disappearances* (art. 10); *International Convention for the Protection of All Persons from Enforced Disappearance* (art 17.2.c); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principles 20 and 29); *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle 6); *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders - Bangkok Rules* (Rule 4); *Inter-American Convention on Forced Disappearance of Persons* (art. XI); and *Principles and Best Practices on Persons Deprived of Liberty in the Americas* (Principle III.1).

disappearances, extrajudicial executions and other human rights violations such as torture and arbitrary detention.¹⁵⁹

i. Official Places of Detention

The WGEID has stated repeatedly that “[u]nder no circumstances, including states of war or public emergency, can any State interests be invoked to justify or legitimize secret centres or places of detention which, by definition, would violate the *Declaration [on the Protection of All Persons from Enforced Disappearance]*, without exception.”¹⁶⁰ Also, the WGEID has stated that places of deprivation of liberty “must be official—whether they be police, military or other premises—and in all cases clearly identifiable and recognized as such.”¹⁶¹

Furthermore, international standards contain specific provisions for certain categories of people. So, as well as being kept separate from arrested men,¹⁶² “[w]omen prisoners shall be allocated, to the extent possible, to prisons close to their home or place of social rehabilitation, taking account of their caretaking responsibilities, as well as the individual woman’s preference and the availability of appropriate programmes and services.”¹⁶³ The WGEID has noted that “[s]trict compliance with international standards in relation to detained women is essential to the prevention of enforced disappearances. Holding women in detention in unofficial or secret places of detention is strictly prohibited. In those circumstances, women could be exposed to sexual and other abuses.”¹⁶⁴

Minors must be kept separate from adults and detained in separate institutions or areas separate from adult detainees—except when

¹⁵⁹ See, inter alia: Human Rights Committee, *General Comment No. 35*, Doc. Cit., para. 58; *General Comment No. 20*, Doc. Cit., para. 11; and *General Comment No. 21: Humane treatment of persons deprived of liberty* (art. 10), para. 6.

¹⁶⁰ “General Comment on article 10 of the Declaration on the Protection of All Persons from Enforced Disappearances” in *Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/1997/34 of 13 December 1996, para. 24. In the same vein, see also *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/13/31, December 21, 2009, para. 646; and E/CN.4/1992/18, para. 204 (d).

¹⁶¹ “General Comment on article 10 of the Declaration on the Protection of All Persons from Enforced Disappearances”, Doc. Cit., para. 24.

¹⁶² *Standard Minimum Rules for the Treatment of Prisoners* (Rule 8).

¹⁶³ *Bangkok Rules* (Rule 4).

¹⁶⁴ *General Comment on women affected by enforced disappearances*, Doc. Cit., para. 20.

considered in the best interests of the child¹⁶⁵ and preference should be given to “open” correctional institutions or educational establishments rather than “closed” and prison establishments.¹⁶⁶

“In order to reduce the likelihood of an enforced disappearance, States should ensure the child has prompt access to legal and other appropriate assistance, benefits from alternative measures to deprivation of liberty, and is reunited with their families. Every child deprived of liberty should have the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority. Parental and family involvement should be promoted, and accurate information on the detention of children and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information. In addition, the State should consider the specific needs of the child and ensure his or her right to maintain contact with family members through correspondence and visits.”

Working Group on Enforced or Involuntary Disappearances¹⁶⁷

Also, the WGEID has declared that in order to prevent enforced disappearances of children born in prison, States must take special measures to protect pregnant women who are in detention, record the women’s pregnancy in the official register of detainees and ensure that children born in these circumstances are registered immediately.¹⁶⁸

ii. Control of Places of Detention

Places of detention must be under the control of state authorities. This rule is based not only on express international norms, but also

¹⁶⁵ *International Covenant on Civil and Political Rights* (art. 10.2b); *American Convention on Human Rights* (art. 5.5); *Convention on the Rights of the Child* (art. 37.c); *Standard Minimum Rules for the Treatment of Prisoners* (Rule 8); and *United Nations Standard Minimum Rules for the Administration of Juvenile Justice, Beijing Rules* (Rule 13.4).

¹⁶⁶ *Convention on the Rights of the Child* (art. 40.4); *Beijing Rules* (Rule 19.1 and comment).

¹⁶⁷ *General Comment on children and enforced disappearances, adopted by the Working Group on Enforced or Involuntary Disappearances at its 98th session (31 October to 9 November 2012)*, A/HRC/WGEID/98/1 of 14 February 2013, para. 13.

¹⁶⁸ *General comment on children and enforced disappearances, Doc. Cit.*, para. 15.

the State's role in its "special position as guarantor"¹⁶⁹ of prisoners and persons in its custody.

"[W]hen the State does not exercise effective control of the prisons at the three fundamental levels mentioned, serious situations arise that put the life and integrity of prisoners and even third persons at risk."

Inter-American Commission on Human Rights¹⁷⁰

In this regard, the IACHR has stated that "the State, when depriving a person of liberty, assumes a specific and material commitment to respect and ensure his or her rights, particularly the rights to life and humane treatment. [...] The duty of the State to protect the life and ensure humane treatment for any person deprived of liberty includes the positive obligation to take all preventive measures to protect the prisoners from the attacks or attempted attacks by the State's own agents or third persons, including other prisoners."¹⁷¹ The Inter-American Court has made statements along the same line.¹⁷²

The Inter-American Court has stated that "the State, being responsible for detention centers, is the guarantor of these rights of the detainees, which involves, among other things, the obligation to explain what happens to persons who are under its custody. State authorities exercise total control over persons under their custody. The way a detainee is treated must be subject to the closest scrutiny, taking into account the detainee's vulnerability."¹⁷³ For its part, the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) has said that "the authorities and the prison administration must not abrogate their responsibility for what goes

¹⁶⁹ *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (Principle I).

¹⁷⁰ *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, Doc. Cit., para. 79.

¹⁷¹ *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, Coc. Cit., paras. 72 and 73.

¹⁷² Judgment of August 16, 2000, *Case of Durand and Ugarte v. Peru*, Series C No. 68, para. 78. In the same vein, see also: Judgment of April 6, 2006, *Case of Baldeón García v. Peru*, Series C No. 147, para. 120; Judgment of August 18, 2000, *Case of Cantoral Benavides v. Peru*, Series C No. 69, para. 87; and Judgment of 30 May 1999, *Case of Castillo Petruzzi et al. v. Peru*, Series C No. 52, para. 195.

¹⁷³ Judgment of September 18, 2003, *Case of Bulacio v. Argentina*, Series C No. 100, para. 126.

on in prisons. [...] [T]he effective control of any place where persons are deprived of their liberty by public authorities is and must remain the domain of the State."¹⁷⁴ Furthermore, the SPT has declared that the practice of preventive detention in "safe houses"—as part of "*arraigo*" in Mexico—without judicial oversight and under which the detainee has no clearly defined legal status, must be eliminated.¹⁷⁵

The obligation to control prisons, penitentiaries or detention centers, means that the State must: i) maintain security inside and outside the centers, including internal discipline; ii) ensure the personal safety of the detainees, their families, visitors and the people who work in these centers; iii) provide the basic elements necessary for life for the persons deprived of liberty; and iv) prevent crimes from being committed in or from within places of detention. In this regard, the IACHR has stated that "[i]t is not admissible under any circumstance for the prison authorities to limit themselves to external or perimeter surveillance, leaving the inside of the facilities in the prisoners' hands. When this happens, the State puts the prisoners at permanent risk, exposing them to violence in the prison and to the abuses of other more powerful prisoners or the criminal groups that run such prisons."¹⁷⁶

The State does not have unlimited power in fulfilling its obligation to ensure control, internal security, order and discipline in prison and detention facilities. The Inter-American Court has stated, "regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the State is not unlimited, nor may the State resort to any means to attain its ends. The State is subject to law and morality. Disrespect for human dignity cannot serve as the basis for any State action."¹⁷⁷

Finally, it is worth mentioning that the *Principles and Best Practices on Persons Deprived of Liberty in the Americas* provides that "[a]s

¹⁷⁴ Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Mexico, CAT/OP/MEX/1 of 31 May 2010, paras. 215 and 238.

¹⁷⁵ Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Mexico, CAT/OP/MEX/1 of 31 May 2010, paras. 215 and 238.

¹⁷⁶ Report on the Human Rights of Persons Deprived of Liberty in the Americas, Doc. Cit., para. 77.

¹⁷⁷ Judgment of January 19, 1995, *Case of Neira-Alegría et al. v. Peru*, Series C No. 20, para. 75.

a general rule, members of the Police or Armed forces shall be prohibited from exercising direct custody of persons deprived of liberty, unless it is a police or military institution."¹⁷⁸ In this regard, the IACHR¹⁷⁹ and the SPT¹⁸⁰ have recommended that prisons should be administered and guarded by civilian personnel, independent of the military and police forces.

"Detention in clandestine centers constitutes a particularly grave form of arbitrary deprivation of liberty. The activities of Government agents involved in such activities are completely beyond the bounds of the law and are incapable of being reviewed because of their secret nature. The Government agents involved in such cases must deny that any kidnapping occurred or that any secret place of detention exists to protect themselves and to maintain the secrecy of the detention center. The victim will generally have learned little about her place of detention or her captors and generally will not be able to identify them. Not only is it impossible for the victim to exercise legal rights while being detained, but also it is extremely difficult to challenge the detention afterwards even if the victim is released alive."

Inter-American Commission on Human Rights¹⁸¹

b. Official Detention Records

States must establish and maintain records of persons deprived of liberty.¹⁸² This obligation constitutes a measure to prevent

¹⁷⁸ Principle XX.

¹⁷⁹ *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, Doc. Cit., para. 193.

¹⁸⁰ *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Argentina*, CAT/OP/ARG/1 of 27 November 2013, para. 36.

¹⁸¹ *Dianna Ortiz v. Guatemala*, Case 10.526, Report No. 31/96, Inter-Am.C.H.R.,OEA/Ser.L/V/II.95 Doc. 7 rev. at 332 (1997). October 16, 1996, para. 113.

¹⁸² *Declaration on the Protection of All Persons from Enforced Disappearances* (art. 10.3); *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 17.3); *Standard Minimum Rules for the Treatment of Prisoners* (Rule 7); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principle 12); *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (Rule 21); *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders - Bangkok Rules* (Rule 3); *Inter-American Convention on Forced Disappearance of Persons* (art. XI); and *Principles and Best Practices on Persons Deprived of Liberty in the Americas* (Principle IX, 2).

enforced disappearances, extrajudicial executions, torture, arbitrary detention and other human rights violations.¹⁸³

The *Declaration on the Protection of All Persons from Enforced Disappearances* (DED), the ICPED, the *Inter-American Convention on Forced Disappearance of Persons* (IACFDP) and other international instruments¹⁸⁴ refer to the existence of records in detention centers. The WGEID has declared that the existence of "similar centralized registers"¹⁸⁵ is essential to "[h]elp in tracing the whereabouts of an individual who may have been deprived of liberty, since precise information is not always available on where such a person may have been taken, and this can be clarified with an up-to-date centralized register."¹⁸⁶ In the same sense, the CED has recommended the establishment of a computerized register of detainees.¹⁸⁷ In turn, the IACHR has emphasized the importance of "a centralized, technically organized, efficient, and accessible register."¹⁸⁸

"Keeping records of persons held in prisons, initial medical exams, and appropriate checks and protocols upon admission are not just sound penitentiary practices but also effective ways to protect the fundamental rights of detainees. For that reason, international human rights law regards them as essential measures to be implemented by States with all due diligence and seriousness."

Inter-American Commission on Human Rights¹⁸⁹

Furthermore, the Inter-American Court has set down measures to make the register of detainees effective: "i) continuous updating; ii) interconnection between the database of the register and any

¹⁸³ Inter-American Commission on Human Rights, *Report on the use of preventive detention in the Americas*, OEA/Ser.L/V/II. Doc. 46/13 of December 30, 2013 para. 301.

¹⁸⁴ See, inter alia, *Standard Minimum Rules for the Treatment of Prisoners* (Rule 7) and the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (Rule 21).

¹⁸⁵ The *Declaration on the Protection of All Persons from Enforced Disappearances* stipulates that these records must be kept (art. 10.3).

¹⁸⁶ "General Comment on article 10 of the Declaration on the Protection of All Persons from Enforced Disappearances," Doc. Cit., para. 27.

¹⁸⁷ *Concluding Observations to Argentina*, CED/C/ARG/CO/1 of 12 December 2013, para. 29 (b).

¹⁸⁸ *Report on the Use of Pretrial Detention in the Americas*, OEA/Ser.L/V/II. Doc. 46/13 of December 30, 2013 para. 298. Similarly see: *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, Doc. Cit. para. 261 (4).

¹⁸⁹ *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, Doc. Cit., para. 146.

other relevant databases, establishing a network that allows each detainee to be easily located; iii) guarantee that the register respects the requirements of access to information and privacy; and iv) an oversight mechanism to ensure that authorities comply with the requirement to update the register.”¹⁹⁰

While some of these international norms stipulate this obligation in a general sense, the ICPED regulates the keeping of these records in detail,¹⁹¹ specifying that these must contain at least the following information: i) identity of the detainee; ii) date, time and place where the person was deprived of liberty and the authority that enacted the deprivation of liberty; iii) authority that ordered the deprivation of liberty and the reasons for it; iv) authority overseeing the deprivation of liberty; v) place of imprisonment, date and time of admission and the authority responsible for the place; vi) details relating to the physical integrity of the detainee; vii) in case of death while in custody, the circumstances and cause of death and the location of the remains of the deceased; and viii) date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.

In addition to this information, the SPT¹⁹² has recommended that records of detainees include the following information: i) precise information about the place of custody and/or detention (e.g. cell number); ii) date and time of visits by relatives, lawyers or oversight bodies; iii) date and time when appointments with healthcare professionals are requested and fulfilled; iv) date and time the detainee first appeared before a judicial authority or other authority; v) record of complaints received. Also, to limit the risk of alteration of records, the SPT has recommended that prison staff should be trained in the keeping of these records, so that no blank spaces are left between entries.¹⁹³

¹⁹⁰ Judgment of November 26, 2010, *Case of Cabrera García and Montiel Flores v. Mexico*, Series C No. 220, para. 243.

¹⁹¹ Article 17 (3).

¹⁹² *Reports on field visits of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Kyrgyzstan*, CAT/OP/KGZ/1 of 28 February 2014, para. 67; *Benin*, CAT/OP/BEN/1, March 15, 2011, para. 64; *Paraguay*, CAT/OP/PRY/1 of 7 June 2010, para. 74; *Mexico*, CAT/OP/MEX/1 of 31 May 2010, para. 118; and *Honduras*, CAT/OP/HND/1 of 10 February 2010, para. 146.

¹⁹³ *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Mexico*, CAT/OP/MEX/1 of 31 May 2010, para. 171.

It is important to note that the *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* stipulates that records must record the following information: i) the number of children of the woman entering prison and personal information about them; ii) the name and age of each child; and iii) if not in the care of the mother, where they are living and under whose guardianship or custody.¹⁹⁴

"[C]omplying formally with this commitment by keeping some sort of record can never be sufficient; each register must be continuously updated so that the information that it contains covers all persons being held in the relevant centre or place of detention."
Working Group on Enforced or Involuntary Disappearances¹⁹⁵

Regarding the obligation to keep records of detainees, the CED has stated that:¹⁹⁶

- All persons deprived of liberty must be registered, immediately and without exception, in the records;
- The records must be updated accurately and promptly, and records should be subject to periodic checks.
- Standard protocols should be adopted at all detention centers—particularly in States with a decentralized federal structure and/or a decentralized prison and penitentiary service—to ensure that the records at each center are in full compliance with article 17 (3) the ICPED.
- A system of regular monitoring and inspection should be established to ensure that records are kept and updated in accordance with the provisions of the ICPED, and in cases when omissions, irregularities or inaccuracies occur, the officials responsible should be punished.

Article 22 of the ICPED establishes the obligation to punish the officials responsible for omissions, inaccuracies or irregularities in the registration of detainees. The punishment is for complete or partial breach of official duty. However, when said conduct takes place with the objective of committing enforced disappearance—

¹⁹⁴ Rule 3.1.

¹⁹⁵ "General Comment on article 10 of the Declaration on the Protection of All Persons from Enforced Disappearances," Doc. Cit., para. 27.

¹⁹⁶ *Concluding observations* to: *Argentina*, CED/C/ARG/CO/1 of 12 December 2013, paras. 27 and 29; *Germany*, CED/C/DEU/CO/1 of 10 April 2014, para. 19; *Armenia*, of February 11, 2015, para. 19; *Netherlands*, CED/C/NLD/CO/1 of 10 April 2014, para. 27; *Mexico*, of February 11, 2015, para. 35; and *Paraguay*, CED/C/PRY/CO/1 of 24 September 2014, paras. 20 and 22.

which means that the official is aware that the conduct contributes to the commission of the crime—the official should be prosecuted and punished as author or accomplice to the crime of forced disappearance, and not merely for simple omission or irregularity in the registration of the detainees.¹⁹⁷

"It is also essential that the authorities ensure that each detainee or prison inmate has been correctly identified and is in fact the person referred to in the arrest warrant or sentence. ... [and that] it is incumbent on all the authorities involved with the custody of a person to check and effectively ascertain that person's identity."

Inter-American Commission on Human Rights¹⁹⁸

Records of the detainees must be made available to any judicial or other authority—such as ombudsmen—in addition to the family, legal representatives or other person with a legitimate interest. Furthermore, international norms¹⁹⁹ specify that any authority or institution that is authorized through any international legal instrument to which the State is party, shall also have access to places of detention and records.²⁰⁰

¹⁹⁷ In cases of enforced disappearance, as a crime that is complex in terms of determining the facts, the concealment of a person's fate or whereabouts may take several forms, such as by failing to register the records of detention or by altering or falsifying them. Therefore, article 22 of the ICPED clearly specifies that the punishment for omission or inaccurate information in the records is "without prejudice" to the obligation to punish the perpetrators and accomplices of the crime of enforced disappearance.

¹⁹⁸ *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, OEA/Ser.L/V/II. Doc. 64 of December 31, 2011, para. 149.

¹⁹⁹ *Declaration on the Protection of All Persons from Enforced Disappearances* (arts. 9.3 and 10.3); *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 17.3); and *Principles and Best Practices on Persons Deprived Freedom in the Americas* (art. XXIV).

²⁰⁰ See inter alia: *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* which establishes a system of regular visits by the SPT; several provisions under of the 1949 *Geneva Conventions* and their *Additional Protocols*, as well as the possibility available to any State party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law; the authority of field missions by the Committee on Enforced Disappearances (art. 33 of the ICPED), the Committee against Torture, Special Rapporteurs, Independent Experts and Working Groups of the United Nations; and the mandate and powers of the Inter-American Commission on Human Rights.

c. Inspection and Monitoring of Detention Centers

International standards specify measures to ensure inspection, supervision and control of detention centers and the situation of persons deprived of liberty.²⁰¹

States should establish a regular and periodic system for inspecting detention centers, managed and directed by a competent independent authority, other than the one that is directly responsible for the administration of places of detention.²⁰²

This system should be run by specially trained and experienced people, including medical personnel, with full guarantees of independence in the exercise of this function. Inspectors shall “be empowered to undertake unannounced inspections on their own initiative”²⁰³ and must have unrestricted access to:

- All areas in the places of detention.
- All people who are in places of detention, and they shall be allowed to interview detainees personally, privately and confidentially. It should be mentioned that the detained person has the right to communicate freely and in full confidentiality with persons who visit places of detention.²⁰⁴
- All information and documentation related to the establishment, and the detainees, including the detention records.

Moreover, independent of the abovementioned inspection system, States must ensure that any authority—legal or otherwise—who is

²⁰¹ *Declaration on the Protection of All Persons from Enforced Disappearances* (arts. 9.2, 10.3, 12, 13.2); *International Convention for the Protection of All Persons from Enforced Disappearance* (arts. 12.3 and 17.3); *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle 7); *Standard Minimum Rules for the Treatment of Prisoners* (Rule 55); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principle 29); *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders - Bangkok Rules* (Rule 25); *Inter-American Convention on Forced Disappearance of Persons* (art. X); and *Principles and Best Practices on Persons Deprived of Liberty in the Americas* (Principles IX.2 and XXIV).

²⁰² *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle 3); *Standard Minimum Rules for the Treatment of Prisoners* (Rule 55); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principle 29); and *Principles and Best Practices on Persons Deprived of Liberty in the Americas* (Principle XXIV).

²⁰³ *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle 7).

²⁰⁴ Principle 29 (2) of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.

in charge of an investigation into enforced disappearance and/or extrajudicial execution or determining the whereabouts of a person deprived of freedom, shall have unrestricted access to detention centers, including those under military jurisdiction, as well as the documentation and other relevant information, including detention records.²⁰⁵

d. Information for Relatives and Other People

The family's knowledge that a person has been detained and the place of detention, is key in preventing enforced disappearance and extrajudicial execution. International norms and standards prescribe a series of steps to ensure fundamental safeguards.

First, any person deprived of liberty has the right to notify or request that the competent authority notify forthwith, the family or other designated persons, of the arrest or detention.²⁰⁶ This right includes not only notification of the act of deprivation of liberty, but also the place where the person was detained and/or where he/she has been moved or transferred. In addition, there are specific considerations for certain categories of people. Thus, when a minor is arrested, the parents or guardian must be notified *ex officio* and immediately.²⁰⁷ A detainee who is a foreigner has the right to contact, without delay, the consular or diplomatic authorities of that person's State of origin or a State representing the interests of the State of origin.²⁰⁸ In all cases, the consular

²⁰⁵ *Declaration on the Protection of All Persons from Enforced Disappearances* (arts. 9.2, 9.3, 10.3, 13.2); *International Convention for the Protection of All Persons from Enforced Disappearance* (arts. 12.3 and 17.3); *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principles 10 and 11); *Inter-American Convention on Forced Disappearance of Persons* (art. X); and *Principles and Best Practices on Persons Deprived of Liberty in the Americas* (Principles IX.2 and XXIV).

²⁰⁶ *Standard Minimum Rules for the Treatment of Prisoners* (Rule 92) and *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principle 16).

²⁰⁷ *Standard Minimum Rules for the Treatment of Prisoners* (Rule 92); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principle 16); *UN Standard Minimum Rules for the Administration of the Juvenile Justice* (Rule 10.1). See also: Human Rights Committee, *General Comment No. 35*, Doc. Cit., para. 28 and Inter-American Court of Human Rights, Judgment of September 18, 2003, *Case of Bulacio v. Argentina*, Series C No. 100, para. 130.

²⁰⁸ *Vienna Convention on Consular Relations* (art. 36.1.b); *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 17.2.d); *International Convention on the Protection of the Rights of all Migrants Workers and*

authorities should be informed of the deprivation of liberty.²⁰⁹ Refugees and asylum seekers in detention have the right to advise this detention to the Office of the United Nations High Commissioner for Refugees and/or the national authority responsible for refugees and asylum²¹⁰.

"Notification to a next of kin or to a close relation is especially significant, for this person to know the whereabouts and the circumstances of the accused and to provide him with the appropriate assistance and protection. In case of notification to an attorney, it is especially important for the detainee to be able to meet privately with him, which is inherent to his right to benefit from a true defense."

Inter-American Court of Human Rights²¹¹

Second, the deprivation of liberty and the exact place of detention, including where the person has been taken, shall be reported immediately to the close relatives of the detainee, his/her representative or counsel, or any other person with a legitimate interest in such information.²¹² Thus, the WGEID has stated that "[i]t is therefore not enough for the detention to take place in an

Members of Their Families (art. 16.7); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principle 16); *Principles and Best Practices on Persons Deprived of Liberty in the Americas* (Principle V); and *Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live* (art. 10). See also: Inter-American Court of Human Rights, *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, Advisory Opinion OC-16/99 of October 1, 1999, Series A No. 16; *Report of the Working Group on Arbitrary Detention*: A compilation of national, regional and international laws, regulations and practices on the right to challenge the lawfulness of detention before court, A/HRC/27/47 of 30 June 2014, para. 37 et seq.; and *Concluding Observations on the report submitted by Paraguay under Article 29, paragraph 1, of the Convention*, CED/C/PRY/CO/1 of 24 September 2014, para. 20.

²⁰⁹ *Report on the visit to Mali of the Subcommittee on Prevention of Torture and Other Cruel, or Cruel, Inhuman or Degrading Treatment or Punishment*, CAT/OP/MLI/1 of 20 March 2014, para. 26.

²¹⁰ *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principle 16); United Nations High Commissioner for Refugees, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012; and Human Rights Committee, *General Comment No. 35*, Doc. Cit., para. 58.

²¹¹ Judgment of September 7, 2004, *Case of Tibi v. Ecuador*, Series C No. 114, para. 112.

²¹² *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle 6); and *Declaration on the Protection of All Persons from Enforced Disappearances* (art. 10.2).

officially recognized place; information on it must be made available to the persons mentioned in [the DED]. [...] [B]oth the lack of such information and any impediments to access to it must be considered violations of the Declaration.”²¹³ The SPT has recommended that “[a]ny institution, upon admission of persons deprived of their liberty, should officially notify their family (or at the request of the detainee another person) about their whereabouts,”²¹⁴ and that “[i]f possible, notification is to be made by telephone, with the date and time of the call being recorded in the register along with the name of the person notified.”²¹⁵

Third, the relatives of the person deprived of liberty, the representative or legal counsel, and any other person having a legitimate interest, have the right to have access to the detainee.²¹⁶ The ICPED provides that States must guarantee that right and should provide, as a minimum, access to information contained in the following registers: i) the authority that ordered the deprivation of liberty; ii) the date, time and place where the person was deprived of liberty and admitted to the place of detention; iii) the authority responsible for supervising detention; iv) the whereabouts of the person deprived of liberty, including, in the event of a transfer to another location, the destination and the authority responsible for the transfer; v) the date, time and place of release; vi) information concerning the state of health of the person deprived of liberty; and vii) in the event of death during detention, the circumstances and cause of death, and the location of the remains.²¹⁷

However, international norms and standards place limits on the application of these measures. In fact, the DED²¹⁸ allows limits on the rights of family members and others to meet with the detainee and have access to the register if the detainee so wishes. Similarly,

²¹³ “General Comment on article 10 of the Declaration on the Protection of All Persons from Enforced Disappearances,” Doc. Cit., para. 26.

²¹⁴ *Report on the visit to Kyrgyzstan*, CAT/OP/KGZ/1 of 28 February 2014, para. 46.

²¹⁵ *Report on the visit to: Argentina*, CAT/OP/ARG/1 of 27 November 2013, para. 21; and *Brazil*, CAT/OP/BRA/1 of 5 July 2012, para. 66.

²¹⁶ *Declaration on the Protection of All Persons from Enforced Disappearances* (art. 10.3); *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 18); *Inter-American Convention on Forced Disappearance of Persons* (art. XI); and *Principles and Best Practices on Persons Deprived of Liberty in the Americas* (Principles IX.2).

²¹⁷ Article 18.

²¹⁸ Article 10 (2).

the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* states that “[t]he competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require.”²¹⁹ However, in practice it has been demonstrated that in the crime of enforced disappearance these reasons have often been invoked in order not to provide said information and/or access to the register of detainees, and so as to conceal the fate or whereabouts of the disappeared person.

This issue was hotly debated during the drafting of the ICPED. Several government delegations said that the “the right not to be subjected to an enforced disappearance must take precedence over the right to privacy [...] [and] enforced disappearances could never be justified.”²²⁰ All the delegations agreed that it was necessary for “striking a better balance between the protection of persons from enforced disappearances on the one hand and the right to privacy and constraints imposed on States in the context of criminal investigations on the other hand.”²²¹ Thus, the ICPED established three successive safeguards: these rights may only be limited: i) “[o]nly where a person is under the protection of the law and the deprivation of liberty is subject to judicial control”; ii) “on an exceptional basis, where strictly necessary and where provided for by law”; and iii) “if the transmission of the information would adversely affect the privacy or safety of the person, hinder a criminal investigation, or for other equivalent reasons in accordance with the law.”²²² Also, the ICPED established that “in no case” may these limitations be accepted if they would constitute the conduct of enforced disappearance or secret detention.²²³

e. Safeguards on the Release of Detainees

Both the DED²²⁴ and the ICPED²²⁵ prescribe that States must take the necessary measures to ensure that a detainee is released

²¹⁹ Principle 16 (4).

²²⁰ *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, E/CN.4/2005/66 of 10 March 2005, para. 89.

²²¹ *Ibid.*, para. 92.

²²² Article 20 (1).

²²³ *Ibid.*

²²⁴ Article 11.

²²⁵ Article 21.

under conditions that allow verification to ensure that the release actually took place and that it was under conditions that safeguard the person's physical integrity and the full exercise of rights. This safeguard is not insignificant: in practice many cases have occurred in which people have gone missing or were executed immediately after leaving the place where they were detained.

"[I]n both Peru and other countries where enforced disappearances have taken place, there is information that the authorities advise that they have released the person who is alleged to be disappeared as a practice to hide the true fate or whereabouts of the detainee. [...] [In Peru] a variant of the enforced disappearances [...] consisted in issuing records of release with the signature falsified or obtained by torture, without the victim having been released. [...] [T]he Peruvian CVR has referred to the method of disappeared-appeared consisting in releasing detainees who the family members believed had disappeared and then, after signature of the release record, even attested by a lawyer, they were once again detained and disappeared definitively."

Inter-American Court of Human Rights²²⁶

Recording the release of detainees in the register or signing certificates of release are some of the mechanisms to implement this safeguard. However, they have proved inadequate. In fulfilling this obligation, the judicial system and national human rights institutions—such as ombudsmen—should play a central and active role.

6. Preventive Remedies

Independent of close relatives' right to effective remedy for the victims of enforced disappearance and/or extrajudicial execution (see Chapter III "Effective Remedy and the Right to Justice"), international law establishes several mechanisms to prevent these crimes.

a. Urgent Preventive Remedy

The DED²²⁷ and IACFDP²²⁸ establish the State's obligation to guarantee the right to prompt and effective legal remedy, for "determining the whereabouts or state of health of a person who

²²⁶ Judgment of November 26, 2013, *Case of Osorio Rivera and Family Members v. Peru*, Series C No. 274, para. 137.

²²⁷ Article 9.

²²⁸ Article X.

has been deprived of freedom, or of identifying the official who ordered or carried out such deprivation of freedom." This remedy doesn't seek to challenge the lawfulness of the detention, and is essentially preventive in nature: to prevent enforced disappearances and extrajudicial executions. Therefore, it is an expedited procedure, under which, the "competent judicial authorities shall have free and immediate access to all detention centers and to each of their units, and to all places where there is reason to believe the disappeared person might be found including places that are subject to military jurisdiction."²²⁹ This action may not be repealed, and its effective enforcement must be maintained even in exceptional circumstances, such as a state of war, threat of war, internal political instability or any other public emergency or state of emergency.

b. Habeas Corpus

International law thoroughly enshrines the right to a remedy to challenge the legality of any deprivation of liberty before a court of law.²³⁰ Regardless of what it is called in domestic law (habeas corpus, amparo, etc.), this remedy is an essential safeguard against enforced disappearance, extrajudicial execution, secret detention and other gross violations of human rights.²³¹ It is a

²²⁹ *Ibid.* See also: *Annual Report of the Inter-American Commission on Human Rights 1986-1987*, OEA/Ser.L/V/II.71 Doc 9 Rev. 1 of September 22, 1987, Chapter V, Point II "Inter-American Convention on Forced Disappearance of Persons".

²³⁰ *Universal Declaration of Human Rights* (art. 8); *International Covenant on Civil and Political Rights* (art. 9.4); *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 17.2.f); *Convention on the Rights of the Child* (art. 37.d); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (art. 16.8); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principle 32); *American Declaration of the Rights and Duties of Man* (art. XXV); *American Convention on Human Rights* (art. 7.6); and *Principles and Best Practices on Persons Deprived of Liberty in the Americas* (Principle V).

²³¹ See, inter alia: United Nations General Assembly, Resolution 34/178, *The right of amparo, habeas corpus or other similar legal remedies* of December 17, 1979; Committee against Torture, *General Comment No. 2: Implementation of article 2 by States Parties*, para. 13; *Report of the Working Group on Enforced or Involuntary Disappearances* (E/CN.4.1983/14, para. 141, E/CN.4.1986/18/Add.1, paras. 55-58, E/CN.4.1989/18/Add.1, para. 136, E/CN.4.1990/13, para. 346, E/CN.4.1991/20/Add.1, para. 167, E/CN.4.1991/20, para. 409, E/CN.4.1992/18, paras. 368-370, and E/CN.4.1993/25, para. 514); Inter-American Court of Human Rights, *Advisory Opinion OC-8/87 of January 30, 1987, "Habeas corpus in emergency situations,"* and *Advisory Opinion OC-9/87 of October 6, 1987, Judicial*

non-revocable right,²³² meaning that its effective force must be maintained in times of peace as well as in emergency situations or armed conflict.²³³

“[T]he habeas corpus remedy constitutes, among the indispensable judicial guarantees, the most suitable means to ensure freedom, oversee the respect for life and personal integrity of the individual, to ensure that the detainee is brought before the court in charge of verifying the legality of the detention, as well as to avoid disappearances or uncertainty about detention centers, and to protect the individual from torture or other forms of cruel, inhumane or degrading treatment.”

Inter-American Court of Human Rights²³⁴

The exercise of this resource is not limited to the person deprived of liberty or their legal representative. The ACHR provides that an appeal may be brought by “another person.”²³⁵ For its part, the ICPED requires that this resource should be guaranteed “to any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel.”²³⁶

This right exists with respect to all forms of deprivation of liberty, whether it results from the action of State agents or individuals acting under government authorization. Also, this law is applicable to judicial custody (either preventive prison or house arrest) and administrative detention (whether for reasons of security, the fight against terrorism, involuntary hospitalization, immigration,

Guarantees in States of Emergency, art. 27(2), 25 (8) American Convention on Human Rights); and *Report of the Working Group on Arbitrary Detention: A collection of national, regional and international laws*, Doc. Cit., paras. 6-48.

²³² *American Convention on Human Rights* (art. 27.2) and *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 17.2.f).

²³³ Human Rights Committee, *General Comment No. 29*, Doc. Cit., paras. 14 and 16; Working Group on Arbitrary Detention (Deliberation No. 9 in A/HRC/22/44, para 47; A/HRC/7/4, para 64; E/CN.4/2005/6, para 61; E/CN.4/1995/31, para 25.d); Subcommittee on Prevention of Torture, CAT/OP/HND/1, para. 137; Committee on Enforced Disappearances, CED/C/ESP/CO /1, para. 26; Special Rapporteur on Torture, A/57/173 of July 2, 2002, para. 18; Inter-American Court of Human Rights, *Advisory Opinion OC-8/87*, Doc. Cit., and *Advisory Opinion OC-9/87*, Doc. Cit.; and Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, Doc. Cit., para. 138.

²³⁴ Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 72.

²³⁵ Article 7 (6).

²³⁶ Article 17 (2.f).

extradition, vagrancy or drug addiction, and detention for educational purposes of minors who are offenders, etc.).²³⁷

“[H]abeas corpus being the most expeditious instrument for the protection of fundamental rights, it is the most effective instrument to counter an act of enforced disappearance, quickly verifying the legality of the detention and preventing disappearance from taking place. Thus, with habeas corpus [*habeas corpus instructivo* – Peru], the constitutional judge, based on the investigations into the whereabouts of the detained-disappeared person, also protects the right to the truth, recognized in articles 3 and 44 of the Peruvian Constitution, which derives directly from the principle of human dignity and translates into the possibility of discovering the circumstances of when, how and where the human rights violations were committed—as in the case of enforced disappearances. . . . habeas corpus [*habeas corpus instructivo*], therefore, is not only intended to locate the whereabouts of the victim, but also to safeguard the investigation of the case from adulteration or alteration of evidence about the possible perpetrators”

Constitutional Tribunal of Peru²³⁸

The remedy is judicial in nature and must be heard by an independent and impartial court that is established by law.²³⁹ In cases of involving civilians who are deprived of liberty, the competent court is within the ordinary jurisdiction.

The remedy is not limited to the initial act of deprivation of liberty (arrest, detention, imprisonment or detention) but to the entire period of detention, since it might have been “lawful at its inception but has become unlawful because [for example,] the individual has completed serving a sentence of imprisonment or the circumstances that justify the detention have changed.”²⁴⁰ Thus this remedy could be used at the outset of deprivation of liberty or at any time while the person is deprived of liberty.

²³⁷ Human Rights Committee, *General Comment No. 35*, Doc. Cit. para. 40.

²³⁸ Resolution of January 10, 2011, Exp. No. 06844-2008-PHC/TC, Ayacucho, *Alexi Avilez Gutierrez and another*, paras. 11 and 12. [Original in Spanish, free translation.]

²³⁹ See, *inter alia*: United Nations Human Rights Committee, *General Comment No. 35*, Doc. Cit., para. 45; Inter-American Court of Human Rights, Advisory Opinion No. OC-8/87, Doc. Cit.; and *Report of the Working Group on Arbitrary Detention: A collection of national, regional and international laws*, Doc. Cit., para. 17.

²⁴⁰ Human Rights Committee, *General Comment No. 35*, Doc. Cit., para. 43.

"[At any time the writ of habeas corpus may be brought, given that] the crime of enforced disappearance, which constitutes a crime of a permanent nature while the fate or whereabouts of the victim is not known, the remedy [of habeas corpus] may be invoked, because the absence of knowledge of the victim's whereabouts, despite the time that has passed, has violated the right to the truth."

Constitutional Tribunal of Peru²⁴¹

The procedure must be "simple and expeditious" and the remedy must be undertaken without delay and in accordance with due process. As noted by the IACHR, "[w]hether or not this remedy is effective in affording protection depends in large part on whether the petition seeking this remedy is acted on swiftly, thus making it a suitable and effective means of reaching a decision on a matter in as little time as possible."²⁴² If it is found that imprisonment was illegal, the court must order the immediate release of the detainee. In this context, international case law and doctrine have indicated that the remedy for the right to effectively challenge the legality of the detention may be invoked without limitation or restriction. In this sense, several issues have been identified that impact effectiveness, and even if the remedy is formally enshrined in the legislation, it may be illusory in practice. Among the considerations that may be mentioned: the suspension of the remedy in connection with certain crimes; restrictions on invoking the remedy, for example limiting it to a lack of legal grounds for detaining a person or gross violations of due process; the requirement that other remedies or procedures must first be exhausted; the requirement to name the place of detention in the remedy; unjustified rejection of the remedy; being held incommunicado in detention; and lengthy procedures or delays.²⁴³

²⁴¹ Judgment of July 2, 2004, Exp .No. 2529-2003-HC/TC, Lima, *Case Peter Cruz Chavez*. [Original in Spanish, free translation.]

²⁴² Report No. 41/99 of March 10, 1999, *Case 11.491, Minors in Detention (Honduras)*, para. 61.

²⁴³ See inter alia: Human Rights Committee (*General Comment No. 35*, Doc. Cit. paras. 46 and 47, and *Concluding Observations to Japan*, CCPR/C/79/ Add.102 of November 19, 1998, para. 24; *Dominican Republic*, CCPR/CO/71/DOM, of March 26, 2001); Inter-American Court of Human Rights (Judgment of July 29, 1988, *Case of Velásquez Rodríguez v. Honduras*, Series C No. 4, para 65; Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162; Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202; Judgment of November 12, 1997, *Case of Suárez Rosero v. Ecuador*, Series C No. 35); and *Report of the*

c. Remedy for Denial of Access to the Register of Detainees

The ICPED²⁴⁴ provides that the State must guarantee the right to “a prompt and effective judicial remedy” for the relatives of the detainee, the person’s representatives or counsel or any person with a legitimate interest, who has been denied access to the register of detainees, to obtain promptly information that is recorded there. The ICPED furthermore provides that the right to a remedy “may not be suspended or restricted in any circumstances.”

“While recognizing the legal significance of respect for the privacy of persons deprived of their liberty, the Committee regrets [...] that the information [the register of detainees] will not automatically be supplied to the relatives of a person deprived of liberty. Given that the ‘refusal to acknowledge the deprivation of liberty or [...] concealment of the fate’ of the disappeared person are components of enforced disappearance, the right of any person with a legitimate interest to collect and receive information on the fate of a person presumed disappeared must be recognized.”

Committee on Enforced Disappearances²⁴⁵

7. Specific Preventive Measures on Extrajudicial Execution

In addition to the above measures, international law strictly regulates and restricts the circumstances and conditions under which force and firearms may legitimately be used,²⁴⁶ and prescribes specific measures to prevent extrajudicial executions.

In systematizing these international norms and standards, the Inter-American Court has stated that the following principles should govern the use of lethal weapons by State agents:²⁴⁷

Working Group on Arbitrary Detention - Addendum: Report on the mission to Peru, E/CN.4/1999/63/Add.2 of 14 January 1999.

²⁴⁴ Article 20 (2).

²⁴⁵ *Concluding observations to the Netherlands, CED/C/NLD/CO/1 of 10 April 2014, para. 28.*

²⁴⁶ *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions; Code of Conduct for Law Enforcement Officials; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; Standard Minimum Rules for the Treatment of Prisoners; Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment; and Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.*

²⁴⁷ Judgment of November 25, 2006, *Case of the Miguel Castro Castro Prison v. Peru*, Series C No. 160, paras. 234 et seq.; Judgment of November 24, 2011, *Case of the Barrios Family v. Venezuela*, Series C No. 237, para. 49; Judgment of July 4, 2007, *Case of Zambrano Vélez et al. v. Ecuador*, Series C No. 166, paras. 81 et

- *Principle of exceptionality*. The use of lethal force should be exceptional and should only be used as a last resort, that is, force may only be used when all other means of control have been exhausted and failed.
- *Principle of legality*. The use of lethal force must be strictly regulated by law, for exceptional and restricted use.
- *Principle of legitimacy*. Lethal force may only be used when it is absolutely necessary for a legitimate purpose, such as to protect the right to life and personal integrity.
- *Principle of necessity and proportionality*. Lethal force should only be used when absolutely necessary and unavoidable to counter or repel a force or threat, and it should be proportional to the gravity of the danger or threat that it aims to counter.²⁴⁸
- *Principle of humanity*. In the use of firearms, damage and injury should be minimized and assistance should be provided to those injured or affected.
- *Principle of accountability*. Domestic law should establish mechanisms and procedures for independent oversight of the legality of the use of lethal force.

In addition, international norms and standards²⁴⁹ stipulate several measures to prevent extrajudicial executions:

- The State must ensure strict control, including a clear chain of command, over all officials authorized by law to use force and firearms.
- Legislation must regulate the use of firearms, specifying the circumstances under which officials are authorized to carry firearms and use them, the procedure for the use of firearms, and the types of weapons and ammunition allowed.
- Legislation must regulate the control, storage and distribution of firearms, as well as procedures to ensure that officials are accountable for the firearms and ammunition that they have been given.
- The State must set up a system to report whenever officials have used firearms in the performance of their duties.

seq.; and Judgment of July 5, 2006, *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela*, Series C No. 150, paras. 66 et seq.

²⁴⁸ *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Principle 9) and *Code of Conduct for Law Enforcement Officials* (art. 3, comments).

²⁴⁹ In particular, *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principles 2 and 4), and *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Principles 1, 11, 22).

- The State must ensure effective protection—judicial or otherwise—for individuals and groups who are at risk of extrajudicial execution, in particular those who have received death threats.

“[The obligation to guarantee the right to life] not only requires that a person not be deprived arbitrarily of his or her life (negative obligation) but also that the States adopt all the appropriate measures to protect and preserve the right to life (positive obligation), as part of their duty to ensure full and free exercise of the rights of all persons under their jurisdiction. This comprehensive protection of the right to life by the State does not involve only legislators, but all State institutions and those who must protect security, whether they are police or armed forces of the State.”

Inter-American Court of Human Rights²⁵⁰

²⁵⁰ Judgment of July 8, 2004, *Case of the Gómez Paquiyauri Brothers v. Peru*, Series C No. 110, para. 129.

CHAPTER III: EFFECTIVE REMEDY AND THE RIGHT TO JUSTICE

“All the States party to the American Convention have the duty to investigate human rights violations and to punish the perpetrators and accessories after the fact in said violations. And any person who considers himself or herself to be a victim of such violations has the right to resort to the system of justice to attain compliance with this duty by the State, for his or her benefit and that of society as a whole.”

Inter-American Court of Human Rights²⁵¹

1. General Considerations

Under international law, everyone has the right to an effective remedy before an independent and impartial authority in the event that their human rights have been violated, for the cessation of the violation, the restoration the violated rights, the reparation for damages, to know the truth about the circumstances, motives and perpetrators of the violation and to access to justice so that the facts do not go unpunished. In cases of extrajudicial execution and/or enforced disappearance, it will be family members of the victim who invoke the remedy, since the right to an effective remedy “includes not only the direct safeguard of vulnerable individuals but, also, the next of kin, who, owing to the specific circumstances and events of the case, are those who file the claim in the domestic order.”²⁵² The Inter-American Court of Human Rights has noted that “in cases of extrajudicial execution, the rights affected correspond to the deceased victim’s next of kin, who are the interested party in seeking justice and to whom the State must provide effective remedies to ensure access to justice, the investigation and eventual punishment of those responsible, if applicable, and comprehensive reparation of the consequences of the violations.”²⁵³

²⁵¹ The Inter-American Court of Human Rights, Judgment of August 29, 2002, *Case of the Caracazo v. Venezuela (Reparations and costs)*, Series C No. 95, para. 115.

²⁵² Judgment of March 1, 2005, *Case of the Serrano Cruz Sisters v. El Salvador*, Series C No. 120, para. 75.

²⁵³ Judgment of September 23, 2009, *Case of Garibaldi v. Brazil*, Series C No. 203, para. 116.

The State's correlative obligation to ensure effective remedies is not limited to violations of human rights committed by agents of the State—either through action or omission—but also encompasses crimes committed by private individuals or entities.²⁵⁴

“In regard to enforced disappearance and given that one of its objectives is to prevent the exercise of the appropriate legal remedies and procedural guarantees, if the victim itself cannot access the remedies available, it is fundamental that the next or kin or other people close to the person be able to access prompt and effective proceedings or judicial remedies.”

Inter-American Court of Human Rights²⁵⁵

The right to an effective remedy is a core element of international human rights law and is one of the most fundamental rights for the effective protection of other human rights.²⁵⁶ The Inter-American Court has declared that “the right to effective recourse to a competent national court or tribunal is one of the fundamental pillars not only of the American Convention [on Human Rights], but of the very rule of law in a democratic society in the terms of the Convention.”²⁵⁷ In the same vein, the Human Rights Committee (HRC) has declared that the State’s duty to uphold this right is “a treaty obligation inherent in the Covenant [on Civil and Political Rights] as a whole.”²⁵⁸

The Inter-American Court has indicated that the right to an effective remedy “is closely linked to the general obligation set forth in article 1(1) of that same Convention [*American Convention*

²⁵⁴ See, inter alia: Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, para. 8; Committee against Torture, *General Comment No. 2, Implementation of Article 2 by States Parties*; Inter-American Court of Human Rights, Judgment of September 15, 2005, *Case of the “Mapiripán Massacre” v. Colombia*, Series C No. 134, para. 111 et seq.

²⁵⁵ Judgment of February 24, 2011, *Case of Gelman v. Uruguay*, Series C No. 221, para. 185.

²⁵⁶ See, inter alia: *Report of the Special Representative of the Secretary-General on human rights defenders*, A/56/341, September 10, 2001, para. 9; *Report of the Special Rapporteur on violence against women, its causes and consequences*, E/CN.4/2002/83, January 31, 2002, para. 116.

²⁵⁷ Judgment of November 3, 1997, *Case of Castillo Páez v. Peru*, Series C No. 34, para. 82.

²⁵⁸ *General Comment No. 29: Derogations during a State of Emergency*, para. 14.

on *Human Rights*], which give the States Party the obligation to respect rights under domestic law, entailing the States' responsibility to design and legally establish an effective recourse, as well as to ensure due application of said recourse by its judicial authorities."²⁵⁹ In addition, the Court has declared that "[a]rticle 2 of the American Convention places the States Party under the obligation to establish, in accordance with their Constitutional procedures and the provisions of this Convention, such legislative or other measures as may be necessary for effective exercise of the rights and freedoms protected by this same Convention. Therefore, it is necessary to reaffirm that the obligation to adapt domestic legislation is, by its very nature, one that must be reflected in actual results."²⁶⁰

"[P]ursuant to the American Convention, the States Parties are obliged to provide effective judicial remedies to the victims of human rights violations (Article 25), remedies that must be substantiated in keeping with the rules of due process of law (Article 8(1)), all as part of the general obligation of States to ensure to all persons subject to their jurisdiction the free and full exercise of the rights recognized by the Convention (Article 1(1))."

Inter-American Court of Human Rights²⁶¹

The Inter-American Court has noted that "the inexistence of effective domestic remedies places the victim in a situation of defenselessness"²⁶² and "is itself a violation of the Convention [*American Convention on Human Rights*] by the State Party in which the remedy is lacking."²⁶³ Also, in cases of enforced disappearance and extrajudicial execution, "the lack of effective

²⁵⁹ Judgment of June 17, 2005, *Case of the Yakyé Axa Indigenous Community v. Paraguay*, Series C No. 125, para. 99.

²⁶⁰ *Ibid.*, para. 100.

²⁶¹ Judgment of November 20, 2014, *Case of Espinoza González v. Peru*, Series C No. 289, para. 237.

²⁶² Judgment of January 31, 2001, *Case of the Constitutional Court v. Peru*, Series C No. 71, para. 89.

²⁶³ Advisory Opinion OC-9/87, *Judicial Guarantees in States of Emergency (arts. 27(2), 25 and 8 American Convention on Human Rights)*, on October 6, 1987, Series A No. 9, para. 24.

remedies has been regarded by the Court as an additional source of suffering and anxiety for the victims and their next of kin."²⁶⁴

In cases of gross human rights violations, which constitute crimes under international law—such as enforced disappearance and extrajudicial execution—the absence or denial of the right to an effective remedy also constitutes a form of impunity. In effect, according to the *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (Principles against Impunity), “[i]mpunity arises from a failure by States to meet their obligations [...] to provide victims with effective remedies.”²⁶⁵

The right to an effective remedy is enshrined in treaties²⁶⁶ and international human rights instruments.²⁶⁷ While these instruments refer to this right in a general manner, the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for the Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (Principles on

²⁶⁴ Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 125 (e). See also, inter alia: Judgment of September 22, 2009, *Case of Castro Anzualdo v. Peru*, Series C No. 202, para. 113.

²⁶⁵ Principle 1.

²⁶⁶ See, inter alia: *International Covenant on Civil and Political Rights* (art. 2); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (art. 13); *International Convention on the Elimination of All Forms of Racial Discrimination* (art. 6); *International Convention for the Protection of All Persons from Enforced Disappearance* (arts. 8, 12, 17.2 f and 20.2); *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* (art 6.2); *American Convention on Human Rights* (arts. 24 and 25); *Inter-American Convention on Forced Disappearance of Persons* (art. X); and *Inter-American Convention to Prevent and Punish Torture* (art. 8).

²⁶⁷ *Universal Declaration of Human Rights* (art. 8); *Declaration on the Protection of All Persons from Enforced Disappearances* (arts. 8 and 13); *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principles 4 and 16); *Basic Principles and Guidelines on the Right to a Remedy and Reparation for the Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (arts. 2, 3, 11, 12, 13 and 14); *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (art. 9); *American Declaration of the Rights and Duties of Man* (art. XVIII); *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (Principles 4-7); *Vienna Declaration and Programme of Action* (art. 27); and *Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance* (arts. 13, 160-162 and 165).

Reparation)²⁶⁸ provides detailed requirements on the content and scope of the right and the corresponding obligations of the State.²⁶⁹

“The right to access justice implies the effective determination of the facts under investigation and, if applicable, of the corresponding criminal responsibilities in a reasonable time; therefore, considering the need to guarantee the rights of the injured parties, a prolonged delay may constitute, in itself, a violation of the right to a fair trial. Besides, because it is a forced disappearance, the right to access justice includes the determination of the fate or whereabouts of the victim.”

Inter-American Court of Human Rights²⁷⁰

In addition, effective remedy is closely linked to other rights. In the case of enforced disappearance and/or extrajudicial execution, the right to an effective remedy for the victim’s relatives is closely linked to their right to investigation, reparation and the truth. In terms of the latter, the right to an effective remedy is twofold: on the one hand, it refers to the right to know the truth about the circumstances, motives and perpetrators of the violation; and on the other hand, it refers to discovering the fate or whereabouts of the person who was disappeared, and possibly secretly executed and buried, so as to locate and restore the person or, in the case of death, the body or remains to the relatives.

2. Intangible and Non-derogable Nature of the Right to an Effective Remedy

Although not all international treaties specifically mention the right to a remedy as a non-derogable right,²⁷¹ it is one of the essential rights for the effective protection of other human rights, which must be guaranteed even in times of emergency.²⁷² The *American*

²⁶⁸ Adopted by the United Nations General Assembly through Resolution No. 60/147 of 16 December 2005.

²⁶⁹ Articles 2, 3, 11, 12, 13 and 14.

²⁷⁰ Judgment of September 22, 2009, *Case of Castro Anzualdo v. Peru*, Series C No. 202, para. 124.

²⁷¹ For example, article 4 of the *International Covenant on Civil and Political Rights*.

²⁷² See: Human Rights Committee: *General Comment No. 29*, Doc. Cit., para. 14; United Nations Commission on Human Rights, *Habeas Corpus*, E/CN.4/RES/1992/35 of 28 February 1992, para. 2; and Inter-American Court of Human Rights, Advisory Opinion OC-8/87, *Habeas Corpus in Emergency Situations* (arts. 27(2), 25(1) and 7(6) *American Convention on Human Rights*), on January

Convention on Human Rights (ACHR) prohibits the suspension of judicial guarantees that are essential for the protection of non-derogable rights.²⁷³ Also, the *International Convention for the Protection of All Persons from Enforced Disappearance* declares that habeas corpus is not derogable.²⁷⁴

The HRC has stated that the legal duty to provide remedies for any violation of the provisions of the *International Covenant on Civil and Political Rights* (ICCPR) "constitutes a treaty obligation inherent in the Covenant as a whole"²⁷⁵ and, therefore, must not be derogated. The Committee has stated that "[e]ven if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective."²⁷⁶

The Inter-American Court has reiterated that judicial remedies to protect non-derogable rights may not be suspended ever.²⁷⁷ In the same vein, the Inter-American Commission on Human Rights (IACHR) has stated that "the requirement that states respect and ensure fundamental human rights through judicial protection without discrimination is non-derogable. [...] [T]he right to judicial protection, and with it the obligation to respect and ensure fundamental human rights without discrimination, may not be suspended under any circumstances."²⁷⁸

3. Nature and Characteristics of Effective Remedy

Over time, the concept of an effective remedy has been interpreted and developed by the international human rights bodies.²⁷⁹ In general, the concept of an effective remedy defines a

30, 1987, Series A No. 8, para. 42; and *Advisory Opinion OC-9/87*, Doc. Cit., Operative paragraphs 2 and 3.

²⁷³ Article 27.

²⁷⁴ Article 17 (2. f).

²⁷⁵ *General Comment No. 29*, Doc. Cit., para. 14.

²⁷⁶ *Ibid.*

²⁷⁷ *Advisory Opinion OC-9/87* of October 6, 1987, Doc. Cit., para. 24.

²⁷⁸ *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116 Doc. 5 Rev. 1 Corr. of October 22, 2002, para. 343.

²⁷⁹ See in this regard: International Commission of Jurists: *The Right to a Remedy and to Reparation for Gross Human Rights Violations- Practitioners' Guide Series No.*

way to appeal to an independent authority that has the power to decide whether a human rights violation has taken place and to provide a remedy in the sense of ordering the cessation of the violation and/or reparation for damages done. Thus, the Inter-American Court has stated that “[a]n effective judicial remedy is one, which can produce the result for which it was conceived; in other words, the remedy must be capable of leading to an analysis by the competent court to establish whether there has been a human rights violation and of providing reparation.”²⁸⁰

However, in the case of enforced disappearance and/or extrajudicial execution, the notion of an effective remedy is not confined to reparation for damages and/or the cessation of the violation. Regarding the latter, it is worth mentioning that, contrary to enforced disappearance and death threats, in cases of extrajudicial execution the cessation of the violation of the right to life is a factual impossibility (See Chapter VI: The Right to Reparation). Thus, in cases of enforced disappearance and/or extrajudicial execution, an effective remedy must be conceived in terms of:

- Putting an end to the enforced disappearance, by releasing the missing person, or ending the death threats;
- Providing fair and adequate compensation to the families of the disappeared and/or extrajudicially executed person;
- Investigating the crime;
- Bringing those responsible for the crime to justice, for prosecution and punishment;
- Investigating the fate or whereabouts of the person who was disappeared and/or extrajudicially executed and secretly buried; and
- Obtaining the victim’s body or bones.

The effectiveness of the remedy depends on: a) appropriateness; b) availability; c) legal effects; d) accessibility; e) the duration of the process; f) the procedure and how it may be invoked.

2, ICJ, Geneva, 2006, Chapter III; and *International Law and the Fight against Impunity - Practitioners’ Guide Series No. 7*, ICJ, Geneva, 2015, Chapter IV.

²⁸⁰ Judgment of August 6, 2008, *Case of Castañeda Gutman v. Mexico*, Series C No. 184, para. 118.

a. Appropriate Remedy

The remedy must “give results or responses to the violations”²⁸¹ and, therefore, “must also be truly effective in determining whether there has been a violation of human rights and providing the means to remedy it.”²⁸²

To deal with human rights violations that constitute crimes according to international law and/or national legislation, the Inter-American Court has stated that the remedy must ensure that “among other things, those responsible for human rights violations will be tried”²⁸³ and it “confers to victims’ relatives the right to investigate their disappearance and death by State authorities, to carry out a process against the liable parties of unlawful acts, to impose the corresponding sanctions, and to compensate damages suffered by their relatives.”²⁸⁴

For its part, the HRC has traditionally considered that the ICCPR does not include provisions for the right of individuals to request that a State bring criminal charges against a person, even when it declared that “the State party duty-bound not only to conduct thorough investigations into alleged violations of human rights, particularly enforced disappearances and violations of the right to life, but also to prosecute, try and punish the culprits. Thus, the State party is therefore also under an obligation to prosecute, try and punish those held responsible for such violations.”²⁸⁵ However, more recently, in cases of enforced disappearance and extrajudicial execution, the Committee has concluded that the State has “an obligation to provide the authors with an effective

²⁸¹ Inter-American Court of Human Rights, Judgment of 6 December 2001, *Case of Las Palmeras v. Colombia*, Series C No. 90, para. 58.

²⁸² Inter-American Court of Human Rights: Judgment of 16 August 2000, *Case of Durand and Ugarte v. Peru*, Series C No. 68, para. 102. See also: Judgment of August 18, 2000, *Case of Cantoral Benavides v. Peru*, Series C No. 69, para. 164; Judgment of February 6, 2001, *Case of Ivcher Bronstein v. Peru*, Series C No. 74, para. 136; and Judgment of August 31, 2001, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Series C No. 79, para. 113.

²⁸³ Judgment of January 22, 1999, *Case of Blake v. Guatemala*, Series C No. 36, para. 63.

²⁸⁴ Judgment of August 16, 2000, *Case of Durand and Ugarte v. Peru*, Series C No. 68, para. 130.

²⁸⁵ Views of 10 July 2007, Communication No. 1327/2004, *Grioua v. Algeria*, para. 9.

remedy, including initiation and pursuit of criminal proceedings²⁸⁶ and that an effective remedy includes “the prosecution and punishment of those responsible.”²⁸⁷

“It is not possible to guarantee the right to truth, nor any other right, if there is no effective judicial protection. The right to effective judicial protection, recognized by our Constitution in article 139.3, is particularly relevant in cases of human rights violations, given its nature as a means of protecting rights and countering impunity. [...] [I]ndividual rights require mechanisms to safeguard them and ensure their full force.”

Constitutional Tribunal of Peru²⁸⁸

In the case of secret extrajudicial execution and/or undisclosed burial, the HRC has noted that an effective remedy includes determining the location where the victims are buried.²⁸⁹ Furthermore, in cases of enforced disappearance, the Committee has stated that an effective remedy includes “thorough and effective investigation into the disappearance and fate of the author's son, his immediate release if he is still alive.”²⁹⁰

b. Availability

The remedy must be enshrined, precisely and unambiguously, in domestic legislation. In this sense, the *Principles on Reparation*

²⁸⁶ Views of 8 July 2008, Communication No. 1436/2005, *Sathasivam and Saraswathi v. Sri Lanka*, para. 8; and Views of 20 March 2009, Communication No. 1418/2005, *Iskiyaev v. Uzbekistan*, para. 11.

²⁸⁷ Views of 17 March 2011, Communication No. 1458/2006, *González v. Argentina*, para. 11. See also: Views of 30 October 2008, Communication No. 1275/2004, *Umetaliev and Tashtanbekova v. Kyrgyzstan*, para. 11; Views of April 2, 2009, Communication No. 1447/2006, *Amirov v. Russian Federation*, para. 13; and Views of 28 October 2014, Communication No. 1966/2010, *Hero v. Bosnia and Herzegovina*, para. 11.

²⁸⁸ Judgment of March 18, 2004, File No. 2488-2002-HC/ TC Piura, *Case Genaro Villegas Namuche*, paras. 21 and 22 of Fundamentos. [Free translation.]

²⁸⁹ See, inter alia: Views of March 17, 2006, Communication No. 1044/2002, *Shukurova v. Tajikistan*, para. 10; Views of 28 March 2006, Communication No. 1159/2003, *Sankara v. Burkina Faso*, para. 14; Views of April 3, 2003, Communication No. 887/1999, *Lyashkevich v. Belarus*; Views of 30 March 2005, Communication No. 973/2001, *Khalilova v. Tajikistan*; Views of 16 November 2005, Communication No. 985/2001, *Aliboev v. Tajikistan*.

²⁹⁰ See, inter alia: Views of March 30, 2006, Communication No. 1196/2003, *Boucherf v. Algeria*, para. 11; Views of 30 March 2006, Communication No. 992/2001, *Bousroual v. Algeria*, para. 11; Views of 10 July 2007, Communication No. 1327/2004, *Grioua v. Algeria*, para. 9; and Views of 24 October 2007, Communication No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, para. 8.

states that “[o]bligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws.”²⁹¹ The Inter-American Court has stated that “the State’s obligation to provide a judicial remedy is not reduced to the mere existence of the courts or the formal proceedings or even to the possibility of having recourse to the courts. Rather, the State must adopt positive measures to ensure that the remedies that it provides through the judicial system are ‘truly effective to establish whether or not there has been a human rights violation and to provide reparation.’”²⁹² The Inter-American Court has also ruled that States should regulate “judicial recourses so that the individual has legal certainty and guarantees of his conditions of access.”²⁹³ Legal certainty refers not only to conditions of access, but also to the eventual possibility of a remedy.²⁹⁴ For its part, the IACHR has indicated that when the “theoretical possibility” of a remedy exists, for example, to make reparation for damages from human rights violations, which is “suggested by a collection of doctrines,” but has not been implemented through laws or in the jurisprudence of the nation’s highest courts, the remedy cannot be considered to be available.²⁹⁵

c. Legally Binding and Enforceable

The remedy must be applicable or enforceable. The ICCPR²⁹⁶ and the ACHR²⁹⁷ compel that the competent authorities must enforce every ruling in which the remedy is considered pertinent. In this regard, the Inter-American Court has declared that the State’s legal duty to ensure an effective remedy is not discharged merely by having developed and passed laws, but that it has the obligation “to assure [sic] duly implementation of said recourse by

²⁹¹ Article 12.

²⁹² Judgment of November 20, 2013, *Case of the Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, Series C No. 270, para. 404.

²⁹³ Judgment of August 6, 2008, *Case of Castañeda Gutman v. Mexico*, Series C No. 184, para. 110.

²⁹⁴ In this respect see Inter-American Court of Human Rights, Judgment of May 6, 2008, *Case of Yvon Neptune v. Haiti*, Series C No. 180, paras. 78 et seq.

²⁹⁵ Report No. 65/08 of 25 July 2008, Petition No. 460-00, *Victorio Spoltore* (Argentina), para. 31.

²⁹⁶ Article 2 (3.c).

²⁹⁷ Article 25 (2.c).

its judicial authorities.”²⁹⁸ Thus, as the Court has noted, the “proceeding must be designed to implement the protection of the right recognized in the judicial decision by the appropriate execution of that ruling.”²⁹⁹ In effect, “State responsibility does not end when the competent authorities issue the decision or judgment. The State must also guarantee the means to execute the said final decisions.”³⁰⁰

“[I]t is not sufficient that the remedies exist formally, but they must be effective. [...] [It is the State’s specific responsibility] to guarantee the measures to execute the respective decisions and final judgments issued by these competent authorities so that the rights declared or recognized are truly protected. This is because a judgment that is *res judicata* grants certainty in relation to the right or dispute examined in the specific case and, consequently, one of its effects is the obligation or need to comply with it. [...] Therefore, the effectiveness of judgments and judicial decision depends on their execution; otherwise, this would suppose the denial of the right involved.”

Inter-American Court of Human Rights³⁰¹

In this sense, the HRC has referred to an “effective and enforceable remedy.”³⁰² Thus, the Committee has stated that “in the pursuit of a claim under domestic law, the individual must have access to effective remedies, which implies that the administrative authorities must act in conformity with the binding decisions of national courts.”³⁰³ Thus, the Committee has

²⁹⁸ Judgment of August 16, 2000, *Case of Durand and Ugarte v. Peru*, Series C No. 68, para. 121.

²⁹⁹ Judgment of July 1, 2011, *Case of Chocrón Chocrón v. Venezuela*, Series C No. 227, para. 127.

³⁰⁰ Judgment of February 7, 2006, *Case of Acevedo Jaramillo et al. v. Peru*, Series C No. 144, para. 216.

³⁰¹ Judgment of November 20, 2013, *Case of the Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, Series C No. 270, para. 405.

³⁰² *General Comment No. 33: Obligations of States parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, para. 14; Views of 24 October 2005, *Case K.N.L.H. v. Peru*, Communication No. 1153/2003, para. 9; Views of 30 March 2006, *Case Bousroual v. Algeria*, Communication No. 992/2001, para. 12; Views of 31 October 2005, *Case Faure v. Australia*, Communication No. 1036/2001, para. 7.2; Views of 7 August 2003, *Case Kazantzis v. Cyprus*, Communication No. 972/2001, para. 6.6; and Views of 28 March 2006, *Case Bandajevsky v. Belarus*, Communication No. 1100/2002, para. 13.

³⁰³ Views of 29 March 2005, *Case Rudolf and Karl-Eugen Czernin v. Czech Republic*, Communication No. 823/1998, para. 7.4.

considered that "the inaction of the administrative authorities and the excessive delays in implementing the relevant courts' decisions are"³⁰⁴ a violation of the right to an effective remedy.

Also, the HRC has declared that administrative proceedings in which the decision of a State body (such as an Ombudsman's Office or National Human Rights Commission), is a recommendation that is not binding, may not be considered as an effective remedy.³⁰⁵ In this context, the Inter-American Court has noted that the remedy is illusory if, for example, "the Judiciary lacks the necessary independence to take an impartial decision, or in the absence of ways of executing the respective decisions that are delivered"³⁰⁶, or "a Contracting State's domestic legal system were to allow a final binding decision to remain inoperative to the detriment of one party."³⁰⁷

"[I]f the enforcement of rulings is left to the discretion of the Administration, the very notion of the rule of law is violated, and conditions for a regime of arbitrariness and unpredictability are created, contrary to constitutional principles such as the separation of powers and the autonomy of the judiciary. In addition, this blatantly contravenes the parties' right to equality, by subordinating the execution of the judgment to the will of one of them, paradoxically the losing party."

Ombudsman of Peru³⁰⁸

d. Accessibility

For persons to have the right to an effective remedy, they must "be genuinely able to file it"³⁰⁹ which implies "de jure and de facto

³⁰⁴ *Ibid.*, para. 7.5.

³⁰⁵ Views of 28 October 2002, *Case Mr. C. v. Australia*, Communication No. 900/1999, para. 7.3 and Views of 26 July 2004, *Case Madafferi v. Australia*, Communication No. 1011/2001, para. 8.4.

³⁰⁶ Judgment of February 6, 2001, *Case of Ivcher Bronstein v. Peru*, Series C No. 74, para. 137.

³⁰⁷ Judgment of February 7, 2006, *Case of Acevedo Jaramillo et al. v. Peru*, Series C No. 144, para. 219.

³⁰⁸ Defensoría del Pueblo, *Informe Defensoría No. 19, "Incumplimiento de Sentencias por parte de la Administración Estatal"*, Lima, October 1998, p. 5. [Original in Spanish, free translation.]

³⁰⁹ Inter-American Court of Human Rights, Judgment of August 6, 2008, *Case of Castañeda Gutman v. Mexico*, Series C No. 184, para. 106. In the same vein, see, *inter alia*: Judgment of 31 January 2001, *Case of the Constitutional Court v. Peru*, Series C No. 71, para. 90.

access to judicial guarantees and protections.”³¹⁰ This entails, as indicated in the *Principles on Reparation*, “[e]qual and effective access to justice; [... and] [a]ccess to relevant information concerning violations and reparation mechanisms.”³¹¹

The State's obligation to establish effective remedies in its legislation is not limited to passing laws and developing procedures. The State has the obligation to ensure that victims and/or their families have real access to these remedies. In this sense, the HRC has declared that “[s]uch remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person.”³¹² Thus, international instruments stipulate specific standards regarding children,³¹³ indigenous peoples,³¹⁴ people with disabilities³¹⁵ and foreigners.³¹⁶ However, vulnerability is not limited to certain categories of people, and the socio-economic condition of the victims and/or family members might constitute a real obstacle in terms of access to an effective remedy. Therefore the HRC has stated that when seeking a remedy to contest the deprivation of liberty, detainees should receive legal assistance.³¹⁷ In this sense, the *Principles on Reparation* stipulates that States should “[p]rovide proper assistance to victims seeking access to justice.”³¹⁸ For its part, the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* provides that States shall provide “proper assistance to victims throughout the

³¹⁰ Inter-American Commission on Human Rights, *Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/V/II.Doc. 68 of January 20, 2007, Chapter I, A, paras. 2 and 5.

³¹¹ Article 11.

³¹² *General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant*, para. 15.

³¹³ *Guidelines on Justice in matters involving child victims and witnesses of crime; Convention on the Rights of the Child* (art. 12); *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (art. 8).

³¹⁴ *Indigenous and Tribal Peoples Convention, 1989* (No. 169) (arts. 8, 9 and 12); *Declaration on the Rights of Indigenous Peoples* (arts. 5, 13.2 and 40).

³¹⁵ *Convention on the Rights of Persons with Disabilities* (arts. 12 and 13).

³¹⁶ *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (art. 16.8), and *Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live* (art. 5.c).

³¹⁷ *Concluding Observations of the Human Rights Committee: Poland*, CCPR/CO/82/POL December 2, 2004, para. 14 and *General Comment No. 35 Article 9 (Liberty and Security)*, para. 46. See also: *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principle 17).

³¹⁸ Article 12 (c).

legal process.”³¹⁹ Several countries have established systems to provide low-income victims of crime with legal aid and representation, such as Peru,³²⁰ Chile³²¹ and Panama.³²² In Guatemala, the Institute of Public Defense, offers state-funded free legal aid to victims of femicide and other forms of violence against women, for legal proceedings.³²³

The Inter-American Court has indicated that the right to an effective remedy is violated when “when the alleged victim is impeded from having access to a judicial recourse.”³²⁴ Furthermore, the Court has declared that even though a remedy is formally enshrined in the legislation, “[p]rocedural requirements can make the remedy of habeas corpus ineffective.”³²⁵ Thus, the Court has stated that “forced disappearance is a practice with the deliberate intention of removing the individual from the exercise of the pertinent legal remedies and procedural guarantees. This means that the person cannot exercise his right to be heard, the guarantee of judicial control of detention, and access to an effective remedy should his rights be violated.”³²⁶ In this context, the Court has stated that the requirement of securing a declaration that someone is a disappeared person prior to bringing criminal

³¹⁹ Principle 6 (c).

³²⁰ Law No. 29.360, “Ley de servicio de Defensa Pública,” of April 21, 2009.

³²¹ Law No. 17.995 of 1981 and Law No. 18.632 of 1987.

³²² Law No. 31, “De la Protección a las Víctimas del Delito,” of 28 May 1998, created the Department of Free Legal Aid for Victims of Crime.

³²³ Decree No. 22-2008, *Ley contra el Femicidio y otras Formas de Violencia Contra la Mujer* (art. 17).

³²⁴ Judgment of February 28, 2003, *Case of the “Five Pensioners” v. Peru*, Series C No. 98, para. 136; Judgment of February 6, 2001, *Case of Ivcher Bronstein v. Peru*, Series C No. 74, paras. 136 and 137; Judgment of August 31, 2001, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Series C No. 79, para. 113; and Advisory Opinion OC-9/87, *Judicial Guarantees in States of Emergency (arts. 27(2), 25 and 8 American Convention on Human Rights)*, October 6, 1987, Series A No. 9, para. 24.

³²⁵ Judgment of July 29, 1988, *Case of Velásquez Rodríguez v. Honduras*, Series C No. 4, para. 66; Judgment of January 20, 1989, *Case of Godínez Cruz v. Honduras*, Series C No. 5, para. 69; and Judgment of March 15, 1989, *Case of Fairén Garbí and Solís Corrales v. Honduras*, Serie C No. 6, para. 91.

³²⁶ Judgment of February 27, 2012, *Case of González Medina and Family v. Dominican Republic*, Series C No. 240, para. 190. See also: Judgment of May 25, 2010, *Case of Chitay Nech et al. v. Guatemala*, para. 100; and Judgment of September 1, 2010, *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*, Series C No. 217, para. 100.

charges constitutes an obstacle to accessing an effective remedy.³²⁷

In addition, the Inter-American Court has concluded that legislation that, for certain categories of persons or in connection with certain crimes, denies the possibility of a remedy such as habeas corpus to challenge the legality of deprivation of liberty, constitutes a violation of the right to an effective remedy and is contrary to the State's obligations to ensure the full and free enjoyment of rights, and the obligation to bring its domestic legislation into accordance with those principles, as enshrined in articles 1(1) and 2 of the ACHR.³²⁸ The HRC has made declarations along the same line.³²⁹ Thus, the Committee has stated that "[i]n order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant."³³⁰

e. Duration of the Process

To be effective, the remedy must be processed and resolved by the authorities within a reasonable time. However, in the case of preventive resources—such as habeas corpus (See Chapter II: The Right to Protection and Prevention, Section 6. Preventive Remedies)—international norms and standards require that cases should be dealt with quickly and resolved without delay.³³¹

³²⁷ *Ibid.*, para. 228.

³²⁸ Judgment of November 27, 2013, *Case of J. v. Peru*, Series C No. 275, para. 171; Judgment of 17 September 1997, *Case of Loayza Tamayo v. Peru*, Series C No. 33, paras. 51 to 55; Judgment of May 30, 1999, *Case of Castillo Petruzzi et al. v. Peru*, Series C No. 52, paras. 182 to 188; Judgment of August 18, 2000, *Case of Cantoral Benavides v. Peru*, Series C No. 69, paras. 166-170; and Judgment of 25 November 2005, *Case of García Asto and Ramírez Rojas v. Peru*, Series C No. 137, paras. 114 and 115.

³²⁹ See, inter alia: *Concluding Observations of the Human Rights Committee on: Peru*, CCPR/C/79/Add.8 of 25 September 1992, paras. 9 et seq.; *Nigeria*, CCPR/C/79/Add.64, para. 7; and *Albania*, CCPR/CO/82/ALB, on December 2, 2004, para. 9. See also: Views of 28 October 2005, Communication No. 1126/2002, *Carranza Alegre v. Peru*; Views of 26 October 1979, Communication No. 9/1977, *Santullo Valcada v. Uruguay*; Views of 29 July 1980, Communication No. 6/1977, *Millan Sequeira v. Uruguay*; and Views of 27 March 1981, Communication No. 37/1978, *Soriano de Bouton v. Uruguay*.

³³⁰ *General Comment No. 29*, Doc. Cit., para. 16.

³³¹ *International Covenant on Civil and Political Rights* (art. 9.4); *International Convention for the Protection of All Persons from Enforced Disappearance* (arts 17.2.f and 20.2); *Convention on the Rights of the Child* (art. 37.d); *International*

"The right to a reasonable timeframe for the process is a fundamental right, even when the scope of protection extends to more than one person. Thus, in the case of criminal proceedings, constitutional protection applies not only to the accused but also to the victim or civil party. Therefore it is possible that, when it is determined that the right of the accused to be tried within a reasonable time has been violated, then the right of the victim or civil party to obtain legal satisfaction within a reasonable time has also been affected. A situation such as this, which is the prolongation of the process beyond what is reasonable, could equally affect both parties and, if this is the case, the protection of the right of the victim or the civil party should also be considered."

Constitutional Tribunal of Peru³³²

International norms and standards do not establish what constitutes a reasonable amount of time. Some international instruments refer to a "prompt" remedy or "brief" procedure.³³³ International case law has been unanimous in considering that the right to an effective remedy implies the right to a prompt decision without undue delay.³³⁴

Moreover, the case law has identified several criteria for determining a reasonable time limit, which must be evaluated based on the specificities of the case, the kind of remedy and the nature of the human right that has been violated. Thus, the criteria

Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (art. 16.8); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principle 32); *Declaration on the Protection of All Persons from Enforced Disappearances* (art. 9); *American Convention on Human Rights* (art. 7.6); *Inter-American Convention on Forced Disappearance of Persons* (art. X); and *Principles and Best Practices on Persons Deprived of Liberty in the Americas* (Principle V).

³³² Judgment of August 10, 2010, Exp. No. 05350-2009-PHC/TC, Lima, *Julio Rolando Salazar Monroe*. [Free translation.]

³³³ See, inter alia: *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* (arts. 2, 14.); *American Convention on Human Rights* (art. 25.1); and *American Declaration of the Rights and Duties of Man* (art. XVIII).

³³⁴ Human Rights Committee: Views of November 4, 1988, Communication No. 203/1986, *Muñoz Hermoza v. Peru*, para. 11.3; Views of 28 October 1992, Communication No. 263/1987, *González del Río v. Peru*, para. 5.2; Views of 20 March 2007, Communication No. 1052/2002, *N.T. v. Canada*, para. 8.9; and Views of 19 March 2007, Communication No. 1320/2004, *Pimentel et al. v. Philippines*, para. 9.2 et seq.

that have been identified are: the complexity of the case; the procedural activity of the interested; the conduct of the judicial authorities; and the effects that delays in the process could have on the legal situation of the victim.³³⁵ Regarding the latter criterion, the Court has stated that “[i]f the passage of time has a relevant impact on the judicial situation of the individual, the proceedings should be carried out more promptly so that the case is decided as soon as possible.”³³⁶ In addition, a remedy may not be considered effective if the process exceeds the time limits established in domestic law.

“The right to effective judicial protection therefore requires that the judges direct the process in such a way that undue delays and hindrances do not lead to impunity, thus frustrating adequate and due protection of human rights.”

Inter-American Court of Human Rights³³⁷

f. The Procedure and How it May Be Invoked

The remedy must be handled in accordance with the rules of due process³³⁸ and the authorities must exercise due diligence. In this regard, the *Principles on Reparation* state that “[o]bligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws.”³³⁹

Due process involves, as the Inter-American Court has stated, that the families of the victims “must enjoy ample possibilities of being heard and participating in the related proceedings.”³⁴⁰ The Inter-

³³⁵ See, inter alia, Inter-American Court of Human Rights: Judgment of 26 November 2013, *Case of Osorio Rivera and Family Members v. Peru*, Series C No. 274, para. 201; Judgment of April 6, 2006, *Case of Baldeón García v. Peru*, Series C No. 147, para. 151; Judgment of November 27, 2008, *Case of Valle Jaramillo et al. v. Colombia*, Series C No. 192, para. 155; and Judgment of 10 October 2013, *Case of Luna López v. Honduras*, Series C No. 269, para. 189.

³³⁶ Judgment of November 27, 2008, *Case of Valle Jaramillo et al. v. Colombia*, Series C No. 192, para. 155.

³³⁷ Judgment of September 18, 2003, *Case of Bulacio v. Argentina*, para. 115.

³³⁸ See inter alia, Inter-American Court of Human Rights: Judgment of April 6, 2006, *Case of Baldeón García v. Peru*, Series C No. 147, para. 143; Judgment of May 25, 2010, *Case of Chitay Nech et al. v. Guatemala*, Series C No. 212, para. 190; Judgment of November 23, 2009, *Case of Radilla Pacheco v. Mexico*, Series C No. 209, para. 190; and Judgment of 24 November 2009, *Case of the “Las Dos Erres” Massacre v. Guatemala*, Series C No. 211, para. 104.

³³⁹ Article 12.

³⁴⁰ Judgment of April 6, 2006, *Case of Baldeón García v. Peru*, Series C No. 147, para. 146.

American Court has also stated that the remedy must be heard and ruled on by courts within the ordinary justice system and not by military courts, seeing as the latter is a functional jurisdiction whose authority is restricted to military offenses committed by military personnel in the line of duty.³⁴¹ In the same vein, the HRC has concluded that military courts are not an effective or appropriate remedy for victims of gross human rights violations and their families.³⁴²

“[W]hen the military courts assume jurisdiction over a matter that should be heard by the ordinary courts, the right to the appropriate judge is violated, as is, a fortiori, due process, which, in turn, is intimately linked to the right of access to justice.”

Inter-American Court of Human Rights³⁴³

Due diligence means that the authorities must, in a timely manner and without delay, enact the necessary and appropriate legal and other means so that the remedy achieves the purpose for which it was designed. Thus, in cases of enforced disappearance, extrajudicial execution and secret burial, due diligence also means undertaking essential actions and investigations promptly to clarify the fate or whereabouts of the victims and locate them.³⁴⁴ Similarly, concerning habeas corpus, the Inter-American Court has declared that due diligence requires that the authority undertake exhaustive investigative activities *motu proprio*. So if the judiciary system imposes an unreasonable burden of proof on the plaintiffs who bring the habeas corpus, and limits its action to formal communications with the authorities who might be behind the detention, and it accepts the response without doing any

³⁴¹ See International Commission of Jurists: *International Law and the Fight against Impunity - Practitioners' Guide Series No. 7*, ICJ, Geneva, 2015; and *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction - Practitioners' Guide Series No. 9*, ICJ, Geneva, 2015.

³⁴² Views of 29 July 1997, *José Vicente and Amado Villafañe Chaparro et al. v. Colombia*, Communication No. 612/1995; and Views of 13 November 1995, *Nydia Erika Bautista v. Colombia*, Communication No. 563/1993.

³⁴³ Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 142.

³⁴⁴ Judgment of September 22, 2009, *Case of Castro Anzualdo v. Peru*, Series C No. 202, para. 134; Judgment of November 26, 2013, *Case of Osorio Rivera and Family Members v. Peru*, Series C No. 274, para. 182; Judgment of February 27, 2012, *Case of González Medina and Family v. Dominican Republic*, Series C No. 240, para. 218; and Judgment of August 31, 2011, *Case of Contreras et al. v. El Salvador*, Series C No. 232, para. 145.

verification of what was said, the remedy becomes ineffective and illusory.³⁴⁵

4. The Nature of Effective Remedy

The ACHR provides that the remedy must be judicial,³⁴⁶ regardless of the nature of the human right that has been violated. In this regard, the Inter-American Court has stated that “‘amparo’ can be applied to all rights”³⁴⁷ through effective legal remedy. The Court has also stated that the ACHR “guarantees access to justice to all persons in order to protect their rights and that the States Parties have the obligation to prevent, investigate, identify and punish the perpetrators of or accessories to human rights violations.”³⁴⁸ In the same vein, the *Principles on Reparation* stipulates that victims of gross human rights violations have the right to “equal access to an effective judicial remedy.”³⁴⁹

“[T]he the victims of human rights violations and their next of kin have the right that these violations be heard and decided by a competent court, in accordance with due process of law and access to justice.”

Inter-American Court of Human Rights³⁵⁰

Similarly, international rules and standards govern certain resources as judicial remedies. This is the case of the remedies to: challenge the legality of detention (habeas corpus);³⁵¹ determine

³⁴⁵ Judgment of 14 October 2014, *Case of Rochac Hernández v. El Salvador*, Series C No. 285, para. 164, 167 and 169.

³⁴⁶ Article 25.

³⁴⁷ Advisory Opinion OC-8/87 of January 30, 1987, *Habeas Corpus in Emergency Situations (arts. 27(2), 25(1) and 7(6) of the American Convention on Human Rights)*, Series A No. 8, para. 32.

³⁴⁸ Judgment of February 27, 2002, *Case of Trujillo Oroza v. Bolivia*, Series C No. 92, para. 99.

³⁴⁹ Article 12.

³⁵⁰ Judgment of November 26, 2013, *Case of Osorio Rivera and Family Members v. Peru*, Series C No. 274, para. 188.

³⁵¹ *Universal Declaration of Human Rights* (art. 8); *International Covenant on Civil and Political Rights* (art. 9.4); *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 17.2.f); *Convention the Rights of the Child* (art. 37.d); *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (art. 16.8); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principle 32); *American Declaration of the Rights and Duties of Man* (art. XXV); *American Convention on Human Rights* (art. 7.6); and *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (Principle V).

the whereabouts of persons deprived of liberty, their state of health or identify the official who ordered the detention or carried it out;³⁵² or have access to the register of detainees.³⁵³

For its part, the ICCPR³⁵⁴ determines the nature of the remedy—judicial, administrative or otherwise—according to the nature of the right that has been violated and its effectiveness. The HRC, however, has repeatedly ruled that, in cases of enforced disappearance and/or extrajudicial execution, effective remedy must be of a judicial nature before an independent, impartial and competent court established by law,³⁵⁵ and includes the possibility to initiate criminal proceedings and to have those responsible prosecuted and punished.³⁵⁶ Thus, the HRC has concluded that “criminal investigation and consequential prosecution are necessary remedies for violations of human rights such as those protected by article 6 [of the ICCPR].”³⁵⁷

This does not preclude that, in addition to a judicial remedy, administrative resources or resources of another nature, might also be available in domestic law. In this sense, the *Principles on Reparation* states that “[o]ther remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law.”³⁵⁸ This is particularly relevant in terms of

³⁵² *Declaration on the Protection of All Persons from Enforced Disappearances* (art. 9) and *Inter-American Convention on Forced Disappearance of Persons* (art. X).

³⁵³ *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 20.2).

³⁵⁴ Article 2 (3) of the *International Covenant on Civil and Political Rights*. In the same sense, see article 13 of the *European Convention on Human Rights*.

³⁵⁵ See, inter alia: Views of 29 November 1989, *Case Birindwa ci Bithashwiwa and E. Tshisekedi wa Mulumba v. Zaire*, Communication No. 241/198, para. 14; Views of 13 November 1995, *Case Nydia Erika Bautista v. Colombia*, Communication No. 563/1993, para. 8.2; Views of 29 July 1997, *Case José Vicente and Amado Villafañe Chaparro et al. v. Colombia*, Communication No. 612/1995, para. 8.2.

³⁵⁶ See, inter alia: Views of 8 July 2008, Communication No. 1436/2005, *Sathasivam and Saraswathi v. Sri Lanka*, para. 8; Views of 20 March 2009, Communication No. 1418/2005, *Iskiyaev v. Uzbekistan*, para. 11; Views of 17 March 2011, Communication No. 1458/2006, *González v. Argentina*, para. 11; Views of 30 October 2008, Communication No. 1275/2004, *Umetaliev and Tashtanbekova v. Kyrgyzstan*, para. 11; Views of April 2, 2009, Communication No. 1447/2006, *Amirov v. Russian Federation*, para. 13; and Views of 28 October 2014, Communication No. 1966/2010, *Hero v. Bosnia and Herzegovina*, para. 11.

³⁵⁷ Views of 30 October 2008, Communication No. 1275/2004, *Umetaliev and Tashtanbekova v. Kyrgyzstan*, para. 9.2.

³⁵⁸ Article 12.

searching for and locating victims of enforced disappearance, execution, and secret burial.

“The right to access justice implies the effective determination of the facts under investigation and, if applicable, of the corresponding criminal responsibilities.”

Inter-American Court of Human Rights³⁵⁹

In this sense, the HRC has stated that in addition to a judicial remedy, “[a]dministrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies,”³⁶⁰ such as the Ombudsman’s Office and other national human rights institutions. In any case, the authority that hears and rules on the remedy must be independent, impartial and free from interference by the authorities against whom the complaint has been made.³⁶¹ Furthermore, in cases of enforced disappearance and extrajudicial execution, the Inter-American Court has stated that “[t]o guarantee the right of access to justice in the case of an extrajudicial execution, in which criminal proceedings play a vital role, other mechanisms, methods and proceedings available under domestic law may be useful or effective as complementary elements in order to establish the truth, determine the scope and dimensions of the State’s responsibility, and make integral reparation for the violations.”³⁶²

However, these do not replace a judicial remedy, they complement it. Both the HRC and the Inter-American Court have considered that remedies that are purely administrative and disciplinary may not be considered effective remedies in cases of gross human

³⁵⁹ Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 124.

³⁶⁰ See, inter alia: *General Comment No. 31*, Doc. Cit., para. 15; Views of 29 October 2014, Communication No. 2031/2011, *Ram Kumar Bhandari v. Nepal*, para. 8.9; Views of 30 October 2014, Communication No. 2132/2012, *Kamela Allioua and Fatima Zohra Kerouane v. Algeria*, para. 7.11; and Views of 17 March 2011, Communication No. 1458/2006, *González v. Argentina*, para. 9.4.

³⁶¹ *Declaration on the Protection of All Persons from Enforced Disappearances* (art. 13); *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle 11); and *Vienna Declaration and Programme of Action* (para. 27).

³⁶² Judgment of May 26, 2010, *Case of Manuel Cepeda Vargas v. Colombia*, Series C No. 213, para. 130.

rights violations.³⁶³ They have also considered that judicial remedies that only provide financial compensation for the damages suffered may not be considered an effective remedy per se,³⁶⁴ since "integral reparation [...] could not be limited to the payment of compensation to the victim's next of kin."³⁶⁵ (See Chapter VI: The Right to Reparation)

"Justice, to be such, must be opportune, and reach the desired or awaited *effet utile* with the action, and particularly dealing with cases of serious human rights violations, the principle of effectiveness of the investigation of the facts and the determination of the punishment of those responsible must prevail."

Inter-American Court of Human Rights³⁶⁶

Given the criminal nature of enforced disappearance and extrajudicial execution, the right to have access to a court with jurisdiction over criminal matters is an essential element—although not the only one—to uphold the right to an effective remedy. Although the right to compensation and locating the victim can be satisfied by other means, the right to justice and truth requires legal action and criminal proceedings.

³⁶³ Human Rights Committee (Views of 13 November 1995, *Case Nydia Erika Bautista v. Colombia*, Communication No. 563/1993, para 8.2; Views of 29 July 1997, *Case José Vicente and Amado Villafañe Chaparro et al. v. Colombia*, Communication No. 612/199, para 8.2; Decision of admissibility of 13 October 2000, *Case José Antonio Coronel et al. v. Colombia*, Communication No. 778/1997, para 6.4); Inter-American Court of Human Rights (Judgment of 31 January 2006, *Case of the Pueblo Bello Massacre v. Colombia*, Series C No. 140, para 203; and Judgment of July 1, 2006, *Case of the Ituango Massacres v. Colombia*, Series C No. 148, paras. 333 and 334).

³⁶⁴ *Ibid.* See also: Inter-American Court of Human Rights: Judgment of 11 May 2007, *Case of the Rochela Massacre v. Colombia*, Series C No. 163, para. 220; and Judgment of 27 November 2008, *Case of Valle Jaramillo et al. v. Colombia*, Series C No. 192, para. 167.

³⁶⁵ Judgment of May 26, 2010, *Case of Manuel Cepeda Vargas v. Colombia*, Series C No. 213, para. 139. In the same vein see the judgments: of September 15, 2005, *Case of the Mapiripán Massacre v. Colombia*, Series C No. 134, para. 214; of May 11, 2007, *Case of the Rochela Massacre v. Colombia*, para. 219; of July 1, 2006, *Case of the Ituango Massacres v. Colombia*, Series C No. 148, para. 339; and January 31, 2006, *Case of the Pueblo Bello Massacre v. Colombia*, Series C No. 140, para. 206.

³⁶⁶ Judgment of February 24, 2011, *Case of Gelman v. Uruguay*, Series C No. 221, para. 194.

5. Effective Remedy and Criminal Proceedings

As holders of the right to an effective remedy, victims of gross human rights violations, which constitute crimes under international law, and their families are entitled to access to criminal justice—meaning, before an independent, impartial and competent tribunal. Thus, family members have the right to bring charges against those responsible for the enforced disappearance and extrajudicial execution of their loved ones and to see the corresponding sanctions imposed, if appropriate.³⁶⁷

This has come about not only through the development of international human rights law, but it has also been gradually codified in international instruments.³⁶⁸ Thus, the *Principles against Impunity* stipulates that: “[a]lthough the decision to prosecute lies primarily within the competence of the State, victims, their families and heirs should be able to institute proceedings, on either an individual or a collective basis, particularly as *parties civiles* or as persons conducting private prosecutions in States whose law of criminal procedure recognizes these procedures. States should guarantee broad legal standing in the judicial process to any wronged party.”³⁶⁹

In this context, the Inter-American Court has indicated that during all stages of criminal proceedings (both investigative and trial) it must be ensured that the victims and/or their relatives have full access and capacity to act, and that they have ample procedural opportunities to make their claims and present evidence, to clarify the facts and punish those responsible, as well as to seek fair

³⁶⁷ See, inter alia, Inter-American Court of Human Rights, Judgment of August 16, 2000, *Case of Durand and Ugarte v. Peru*, Series C No. 68, para. 129 and Human Rights Committee, Views of 17 March 2011, Communication No. 1458/2006, *González v. Argentina*, para. 11.

³⁶⁸ *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography* (art. 8); *Rome Statute of the International Criminal Court* (arts. 68.3 and 75); *Rules of Procedure and Evidence of the International Criminal Court*; *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (art 6.2); *Internal Rules of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Democratic Kampuchea* (Rule 23); *Statute of the Special Tribunal for Lebanon* (arts. 17 and 28); and *Principles and Guidelines of the United Nations on Access to Legal Aid in Criminal Justice Systems* (Resolution No. 67/187 of the UN General Assembly of December 20, 2012).

³⁶⁹ Principle 19 (2).

compensation.³⁷⁰ The Inter-American Court has also noted that claims made by the victims and/or their families, as well as the evidence provided in criminal proceedings, should be analyzed fully and seriously by the judicial authorities, before ruling on the facts, responsibilities, penalties and reparation.³⁷¹ The United Nations Special Rapporteur on the administration of justice through military tribunals has stated that to “conduct inquiries and prosecute and try those charged [with gross violations of human rights,] [t]he authority of the civilian judge should also enable the rights of the victims to be taken fully into account at all stages of the proceedings.”³⁷² In this regard, the IACHR has considered that a lack of response from the judicial authorities to the petitions of the civil party constitutes a violation by the State of the right of family members to be heard and to have access to a legal remedy through effective criminal proceedings.³⁷³

Effective remedy must be upheld in the rules of due process and fair trial requirements.³⁷⁴ This entails, among others, the adversarial principle. Therefore, to ensure the right to an effective remedy in criminal justice cases of enforced disappearance and/or

³⁷⁰ See, *inter alia*: Judgment of August 16, 2000, *Case of Durand and Ugarte v. Peru*, Series C No. 68, para. 129; Judgment of July 1, 2006, *Case of the Ituango Massacres v. Colombia*, Series C No. 48, para. 296; Judgment of 19 November 1999, *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala*, Series C No. 63, para. 227; Judgment of December 6, 2001, *Case of Las Palmeras v. Colombia*, Series C No. 90, para. 59; Judgment of June 7, 2003, *Case of Juan Humberto Sánchez v. Honduras*, Series C No. 99, para. 186; Judgment of March 1, 2005, *Case of the Serrano Cruz Sisters v. El Salvador*, Series C No. 120, para. 63; Judgment of July 4, 2006, *Case of Ximenes Lopes v. Brazil*, Series C No. 149, para. 193, 278; and Judgment of February 2012, *Case of González Medina and Family v. Dominican Republic*, Series C No. 240, para. 207.

³⁷¹ Judgment of July 4, 2006, *Case of Ximenes Lopes v. Brazil*, Series C No. 149, para. 193 and Judgment of July 1, 2006, *Case of the Ituango Massacres v. Colombia*, Series C No. 48, para. 296.

³⁷² *Draft Principles on the Administration of Justice Through Military Tribunals. Report of the Special Rapporteur of the Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux, E/CN.4/2006/58 of 13 January 2006*, para. 32.

³⁷³ Report No. 3/98 of April 7, 1998, Case No. 11.221, *Tarcisio Medina Charry (Colombia)*, para. 102 and Report No. 29/92 (*Uruguay*), October 2, 1992, para. 41.

³⁷⁴ See, *inter alia*: Judgment of April 6, 2000, *Case of Baldeón García v. Peru*, Series C No. 147, para. 143; Judgment of July 10, 2007, *Case of Cantoral Huamaní and García Santa Cruz v. Peru*, Series C No. 167, para. 124; and Judgment of 25 November 2006, *Case of the Miguel Castro Castro Prison v. Peru*, Series C No. 160, para. 381.

extrajudicial execution, States must uphold the rights of the victims' relatives to:

- Bring criminal proceedings against the alleged perpetrators of these crimes;
- Receive general recognition of legal standing in criminal proceedings, independent of the legal form used for this purpose;³⁷⁵
- Present and request evidence, as well as to call witnesses and experts and hear from them;
- Have access to the case files, documentation and evidence;
- Question witnesses and experts, as well as the persons presented by the other party;
- Dispute or challenge evidence, testimony and expert opinions presented by the defense; and
- Challenge and appeal decisions by the judge or the court, including the final judgment or decisions.

The right of relatives to bring proceedings against those allegedly responsible for the forced disappearance and/or extrajudicial execution of loved ones implies that these respective proceedings and criminal trials shall take place within the ordinary criminal justice system. International instruments and standards forbid military courts from hearing cases of enforced disappearance and extrajudicial execution, as well as any other serious human rights violation committed by military or police personnel.³⁷⁶ The HRC,³⁷⁷ the Inter-American Court³⁷⁸ and the IACHR³⁷⁹ are unanimous in

³⁷⁵ For example, "civil party," "private prosecution" or "class action."

³⁷⁶ *Inter-American Convention on Forced Disappearance of Persons* (art. IX); *Declaration on the Protection of All Persons from Enforced Disappearances* (art. 16.2); *Updated Set of Principles for the Protection and Promotion of Human Rights through Combating Impunity* (arts. 22 and 29); and *Draft Principles Governing the Administration of Justice Through Military Tribunals* (art. 9).

³⁷⁷ See, *inter alia*: *Observations of the Human Rights Committee to: Peru*, CCPR/C/79/Add.8, September 25, 1992, para. 8; *Bolivia*, CCPR/C/79/Add.74, May 1, 1997, para. 11; *Colombia*, CCPR/C/79/Add.2, September 25, 1992, paras. 5 and 6, and CCPR/C/79/Add.76 of 5 May 1997, para.18; *Venezuela*, CCPR/C/79/Add.13, December 28, 1992, paras. 7 and 10; *Brazil*, CCPR/C/79/Add.66, 24 July 1996, para. 10; *Chile*, CCPR/C/79/Add.104, 30 March 1999, para. 9; *Dominican Republic*, CCPR/CO/71/DOM, April 26, 2001, para. 10; *Guatemala*, CCPR/CO/72/GTM, August 27, 2001, paras. 10 and 20; *El Salvador*, April 18, 1994, CCPR/C/79/ Add.34, para. 5; and *Ecuador*, August 18, 1998, CCPR/C/79/Add.92, para. 7.

³⁷⁸ See, *inter alia*: Judgment of August 16, 2000, *Case of Durand and Ugarte v. Peru*, Series C No. 68; Judgment of November 29, 2006, *Case of La Cantuta v. Peru*,

considering that military courts do not constitute an effective or appropriate remedy for the families of victims of gross human rights violations. The Inter-American Court has stated that “the military jurisdiction is not competent to investigate and, if applicable, prosecute and punish the perpetrators of alleged human rights violations; instead, those responsible must always be tried by the ordinary justice system. This conclusion applies [...] to all human rights violations.”³⁸⁰

“Civilian courts must therefore be able, from the outset, to conduct inquiries and prosecute and try those charged with such violations. The initiation by a civilian judge of a preliminary inquiry is a decisive step towards avoiding all forms of impunity.”

Emmanuel Decaux, Special Rapporteur of the United Nations Sub-Commission on the Promotion and Protection of Human Rights³⁸¹

International standards stipulate that States must provide appropriate assistance to the relative of the victims of gross human rights violations—including enforced disappearance and extrajudicial execution—who seek access to justice, and throughout the legal process.³⁸² This assistance is upheld, as indicated by the *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*,³⁸³ to “protect and safeguard the rights of the victims [...] in the criminal justice

Series C No. 162; Judgment of November 26, 2013, *Case of Osorio Rivera and Family Members v. Peru*, Series C No. 274.

³⁷⁹ See, *inter alia*: Report No. 55/01, *Aluisio Cavalcante and others (Brazil)*; Report No. 62/01, Case 11.654, *Riofrío Massacre (Colombia)*; Report No. 64/01, Case 11.712, *Leonel de Jesús Isaza Echeverry and Others (Colombia)*; Report No. 104/11 of July 22, 2011, Petition 12.336, *Elio Gelves Carrillo et al. (Colombia)*; Report No. 10/95, Case 10.580 (*Ecuador*); and Report No. 36/00, Case 11.101, *Caloto (Colombia)*.

³⁸⁰ Judgment of November 26, 2010, *Case of Cabrera García and Montiel Flores v. Mexico*, Series C No. 220, para. 198.

³⁸¹ *Draft Principles Governing the Administration of Justice Through Military Tribunals*, Doc. Cit., para. 32.

³⁸² *Basic Principles and Guidelines on the Right to a Remedy and Reparation for the Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (art. 12.c); *Declaration on Fundamental Principles of Justice for Victims of Crime and Abuse of Power* (Principle 6.c); and *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* (Guideline No. 7.a).

³⁸³ Resolution No. 67/187 adopted by the UN General Assembly on March 28, 2013.

process”³⁸⁴ and “prevent victimization and secondary victimization.”³⁸⁵

³⁸⁴ Paragraph 3 of the Introduction.

³⁸⁵ Guideline No. 7.a.

CHAPTER IV: THE RIGHT TO INVESTIGATION

“[T]he victims’ next of kin have the right - and the State has the duty - to have what happened to them effectively investigated by government authorities, that the alleged perpetrators be prosecuted and, if applicable, punished as due, and that the damages sustained by such next of kin be redressed.”

Inter-American Court of Human Rights³⁸⁶

1. The Relatives’ Right to Investigation

Experience shows that the relatives of persons who have been disappeared and/or extrajudicially executed play a key role in having the crime against their loved ones investigated and in the search for the person. In fact, they are the engine of the investigative process. This is not merely an option for the family, it is, first and foremost, a right enshrined and protected by international law. International human rights norms and standards recognize that relatives of the victims of enforced disappearance and/or extrajudicial execution have the right to investigation.³⁸⁷

This right of the family is closely linked to the State's obligation to investigate all enforced disappearances and/or extrajudicial executions³⁸⁸ as well as to guarantee an effective remedy to the

³⁸⁶ Judgment of 22 November 2005, *Case of Gómez Palomino v. Peru*, Series C No. 136, para. 79.

³⁸⁷ *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 24.2); *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle 16); *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Serious Violations of International Humanitarian Law* (arts. 11 c. and 12); and *Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime* (art. 20).

³⁸⁸ *International Convention for the Protection of All Persons from Enforced Disappearance* (arts. 3, 10 and 12); *Declaration on the Protection of All Persons from Enforced Disappearances* (art. 13); *Principles on the Effective Prevention and Investigation Extra-legal, Arbitrary and Summary Executions* (Principle 9) *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Serious Violations of International Humanitarian Law* (arts. 3.b and 4); *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* (Principle 19); and *Inter-American Convention on Forced Disappearance of Persons* (arts. I and IV). See, also, International Commission of Jurists: *International Law and the Fight Against*

families of the victims (See Chapter III: Effective Remedy and the Right to Justice). Thus, the Human Rights Committee (HRC) has stated that the State's obligation to guarantee the right to an effective remedy for the family entails conducting a thorough, effective and impartial investigation into the enforced disappearance and/or extrajudicial execution of the missing loved ones.³⁸⁹

"[I]t is the duty of all States, under any circumstances, to make investigations whenever there is reason to believe that an enforced disappearance has taken place on a territory under their jurisdiction."

*Vienna Declaration and Programme of Action*³⁹⁰

In this regard, the Inter-American Court of Human Rights has stated that "[t]he obligation to investigate and the corresponding right of the alleged victims or the next of kin is not only evident from the conventional [treaty-based] norms of international law that are binding for the State Parties, but also arise from domestic law regarding the obligation to investigate ex officio certain unlawful conduct, as well as from the norms that permit the victims or their next of kin to denounce or file complaints, evidence or petitions, or take any other measure in order to play a procedural role in the criminal investigation so as to establish the truth of the facts."³⁹¹

The violation of the obligation to investigate and/or ensure the relatives' right to an investigation constitutes a violation of the right to an effective remedy. It is also, in itself, a violation of the general duty of the State to ensure the full enjoyment of human

Impunity - Practitioners' Guide Series No. 7, ICJ, Geneva, 2015; and *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction - Practitioners' Guide Series No. 9*, ICJ, Geneva, 2015.

³⁸⁹ See, *inter alia*: Views of 30 October 2008, Communication No. 1275/2004, *Umetaliev and Tashtanbekova v. Kyrgyzstan*, para. 11; Views of 29 October 2014, Communication No. 2031/2011, *Ram Kumar Bhandari v. Nepal*, para. 10; Views of 17 March 2011, Communication No. 1458/2006, *González v. Argentina*, para. 11; Views of 30 October 2014, Communication No. 2132/2012, *Kamela Allioua and Fatima Zohra Kerouane v. Algeria*, para. 9; and Views of 25 March 2015, Communication No. 2054/2011, *Ernazarov v. Kyrgyzstan*, para. 11.

³⁹⁰ *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights (Vienna, 1993), para. 62.

³⁹¹ Judgment of February 24, 2011, *Case of Gelman v. Uruguay*, Series C No. 221, para. 188.

rights.³⁹² In this sense, the Special Rapporteur on extrajudicial, summary and arbitrary executions (Special Rapporteur on executions) has indicated that this obligation is “one of the main pillars of the effective protection of human rights.”³⁹³ It could also constitute a form of impunity, as specified in the *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* (Principles against Impunity): “[i]mpunity arises from a failure by States to meet their obligations to investigate violations [...]”³⁹⁴.

“[When] the competent authorities have failed to investigate or where military courts have discontinued a case and so barred the civilian courts from dealing with the matter, the Peruvian authorities should not be seen as having fulfilled their obligation under international law to carry out exhaustive, independent and impartial inquiries into complaints of human rights abuses.”

Special Rapporteur on extrajudicial, summary and arbitrary executions³⁹⁵

In this regard, the Working Group on Enforced or Involuntary Disappearances (WGEID) has indicated that amnesty laws and similar measures that have the effect of suspending or terminating the investigation of a disappearance when attempts to identify the perpetrators have failed, or have not been possible, violate article 13 (6) of the *Declaration on the Protection of All Persons from Enforced Disappearances* (DED).³⁹⁶ In addition, the WGEID has stated that “reconciliation between the State and the victims of

³⁹² See, inter alia: Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, para. 16; and Inter-American Court of Human Rights, Judgment of November 26, 2013, *Case of Osorio Rivera and Family Members v. Peru*, Series C No. 274, para. 178 and Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 65.

³⁹³ UN document E/CN.4/1993/46, para. 686.

³⁹⁴ Principle 1.

³⁹⁵ *Extrajudicial, Summary and Arbitrary Executions. Addendum: Report of the Special Rapporteur, Mr. B.W. Ndiaye, on his mission to Peru from May 24 to June 2, 1993*, E/CN.4/1994/7/Add. 2 of 15 November 1993, para. 124.

³⁹⁶ “General Comment on article 18 of the Declaration on the Protection of All Persons from Enforced Disappearance”, in *Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/2006/56, 2005, para. 49.

enforced disappearance cannot happen without the clarification of each individual case."³⁹⁷

The relatives' right to an investigation is also closely linked to their right to truth (See Chapter V: The Right to Truth). Thus, the WGEID has stated that "[t]he right to the truth in relation to enforced disappearances means the right to know about the progress and results of an investigation, the fate or the whereabouts of the disappeared persons, and the circumstances of the disappearances, and the identity of the perpetrator(s)."³⁹⁸

"It has been clearly decided by the international community that the relatives of missing persons have a right to know their whereabouts or fate; this can only mean effective investigations into each case."
Working Group on Enforced or Involuntary Disappearances³⁹⁹

In the case of enforced disappearance, secret extrajudicial execution and undisclosed burial, the relatives' right to an investigation takes on an additional dimension:

- To shed light on the crime and the circumstances under which it was committed, and identify the perpetrators, their motives and the extent of their involvement in the facts; and
- To clarify the fate and/or whereabouts of the missing or killed person, as well as locate the person and, in the case of death, to have the body or remains returned to the relatives.⁴⁰⁰

³⁹⁷ "General Comment on the right to the truth in relation to enforced disappearances," Preamble, *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/16/48, 2010.

³⁹⁸ "General Comment on the right to the truth in relation to enforced disappearances," General comment 1, *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/16/48, 2010.

³⁹⁹ *Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/1984/21 of 9 December 1983, para. 172.

⁴⁰⁰ See inter alia: *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 24.2); *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Serious Violations of International Humanitarian Law* (art. 22.c); *United Nations Guiding Principles on Internal Displacement* (Principle 16); *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* (Principle 4); *Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts* (art. 32); and *Rules of Customary International Humanitarian Law* (Rule 117). In the same vein, and in reference to the right to an effective remedy, see: *Declaration on the Protection of All Persons from Enforced Disappearances* (art. 9); *International*

In this regard, the United Nations High Commissioner for Human Rights has ruled that the relatives have a right to know “the fate and whereabouts of the victim,”⁴⁰¹ and therefore, the State is obliged to guarantee this right. Furthermore, the Inter-American Court has stated that “[t]he right to access justice implies the effective determination of the facts under investigation and, if applicable, of the corresponding criminal responsibilities. [...] Besides, because it is a forced disappearance, the right to access justice includes the determination of the fate or whereabouts of the victim.”⁴⁰² The HRC⁴⁰³ and the WGEID⁴⁰⁴ have made rulings along the same line.

“In order for a criminal investigation to be an effective recourse in order to ensure the right to access to justice of the alleged victims, as well as to guarantee the rights that have been abridged in the instant case, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof.”

Inter-American Court of Human Rights⁴⁰⁵

The Inter-American Court has also stated that when a victim’s remains are found, “additional circumstances must be determined, such as the probable cause of death,”⁴⁰⁶ in particular if the victim was executed extrajudicially. In other words, the State has a duty to pursue investigations along both lines. Undertaking actions to

Convention for the Protection of All Persons from Enforced Disappearance (art. 24.2); and *Inter-American Convention on Forced Disappearance of Persons* (art. X).

⁴⁰¹ *Study on the Right to the Truth. Report of the Office of the United Nations High Commissioner for Human Rights*, E/CN.4/2006/91 of 9 January 2006, para. 59.

⁴⁰² Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 124.

⁴⁰³ See *inter alia*: Views of March 30, 2006, Communication No. 1196/2003, *Boucherf v. Algeria*, para. 11; Views of 30 March 2006, Communication No. 992/2001, *Bousroual v. Algeria*, para. 11; Views of 10 July 2007, Communication No. 1327/2004, *Grioua v. Algeria*, para. 9; Views of March 26, 2006, *Sankara et al. v. Burkina Faso*, Communication No. 1159/2003, para. 14; and Views of 24 October 2007, Communication No. 1422/2005, *El Hassy v. Libyan Arab Jamahiriya*, para. 8.

⁴⁰⁴ “General Comment on the right to the truth in relation to enforced disappearances,” Doc. Cit., para. 5.

⁴⁰⁵ Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 123.

⁴⁰⁶ Judgment of November 14, 2014, *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, Series C No. 287, para 293.

search for and locate the victim does not exempt it from the obligation to investigate the crime in order to bring the perpetrators to justice.

2. The Right to an Investigation and the Obligation to Investigate

Independent of the relatives' right to investigate, and whether they exercise it or not, the State is obligated to investigate enforced disappearance and extrajudicial execution. International instruments stipulate that State authorities must undertake investigations *ex officio*, regardless of whether or not a formal complaint or charges have been brought.⁴⁰⁷ The Committee on Enforced Disappearances (CED) has reminded that States must "take all measures necessary to ensure that all cases of enforced disappearance are investigated in a complete, impartial, diligent and effective manner, even in the absence of a formal complaint."⁴⁰⁸

The State's duty to investigate these crimes, ascertain the fate or whereabouts of the victim and locate the person does not depend, in any way, on whether the family has exercised the right to investigation. In this regard, the Inter-American Court has stated that "the obligation to investigate the facts and punish those responsible for a crime which constitutes a violation of human rights is a commitment that arises from the American Convention, whether or not the parties in a case reach an agreement on this point. It is not the will of the parties, but the provisions of the American Convention that require the States Parties to investigate the facts, prosecute those responsible and eventually, if

⁴⁰⁷ See, *inter alia*: *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 12.2); *Declaration on the Protection of All Persons from Enforced Disappearances* (art. 13.1); *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle 9); *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (Rule 57); *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Serious Violations of International Humanitarian Law* (art 3.b and 4); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principle 34); and *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (Principle XXIII, 3).

⁴⁰⁸ *Concluding observations on: Argentina*, CED/C/ARG/CO/1 of 12 December 2013, para. 17; *Armenia*, on February 11, 2015, para. 15; *Paraguay*, CED/C/PRY/CO/1 of 24 September 2014, para. 18; *Spain*, CED/C/ESP/CO/1 of 12 December 2013, para. 12; and *Mexico*, on February 11, 2015, para. 28.

appropriate, convict those guilty and implement the penalties."⁴⁰⁹ For its part, the Inter-American Commission on Human Rights (IACHR) has said that this is "an international obligation of the state [that] cannot be renounced,"⁴¹⁰ and that compliance is part of "the imperative need to combat impunity."⁴¹¹

Similarly, when a remedy has been granted, such as the payment of compensation to the relatives, this does not mean that they waive their right to investigation nor does it exonerate the State from its obligation to investigate.⁴¹² In this respect the Inter-American Court has stated that "[t]he obligation to guarantee and ensure effective exercise is independent of and different from the obligation to make reparation. The difference lies in the following: the reparation [...] is an attempt to erase the consequences that the unlawful act may have had for the affected person, his family or close friends. Since the measure is intended to make reparations for a personal situation, the affected party has the right to waive that right. Thus, the Court could not object if an individual, particularly an adult, who was the victim of a human rights violation waived the compensation to which he or she was entitled. On the other hand, even though the aggrieved party may pardon the author of the violation of his human rights, the State is nonetheless obliged to sanction said author, except when the offense involved is prosecutable by a private party. The State's obligation to investigate the facts and punish those responsible does not erase the consequences of the unlawful act in the affected person. Instead, the purpose of that obligation is that every State party ensure, within its legal system, the rights and freedoms recognized in the Convention."⁴¹³ In turn, the Special Rapporteur on executions has stated that "[f]inancial or other

⁴⁰⁹ Judgment of March 3, 2005, *Case of Huilca Tecse v. Peru*, Series C No. 121, para. 105.

⁴¹⁰ *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000, para. 230.

⁴¹¹ Report No. 1/99, Case 10.480, *Lucio Parada Cea et al.*, (*El Salvador*), on January 27, 1999, para. 157.

⁴¹² See, inter alia: *Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions*, E/CN.4/1994/7 of 7 December 1993, paras. 688 and 711; Inter-American Commission on Human Rights, Report No. 36/96, October 15, 1996, Case 10.843 (Chile), para. 77; Inter-American Court of Human Rights, Judgment of 27 August 1998, *Case of Garrido and Baigorria v. Argentina*, Series C No 39, para.72.

⁴¹³ Judgment of August 27, 1998, *Case of Garrido and Baigorria v. Argentina (Reparations and Costs)*, Series C No 39, para. 72.

compensation provided to the victims or their families before such investigations are initiated or concluded, however, does not exempt Governments from this obligation."⁴¹⁴

The existence of legal measures—such as the declaration of absence in the case of enforced disappearance—to safeguard the rights of the missing person and the relatives (see Chapter VII: Protecting the Rights of the Family) does not imply that the relatives renounce the right to an investigation nor do they relieve the State of its obligation to investigate. The ICPEID states this expressly.⁴¹⁵ In this regard, the WGEID has stated that “parallel to the issuance of a system of declaration of absence as a result of enforced disappearance, States should continue to investigate all cases to determinate the fate and the whereabouts of the disappeared and to ensure accountability of those responsible for the commission of enforced disappearances. That is, such declaration should not interrupt or close the investigations to determine the fate or the whereabouts of the victim, but should allow his/her next-of-kin to exercise on their behalf certain rights.”⁴¹⁶

The obligation to investigate enforced disappearance and extrajudicial execution exists regardless of any circumstances, including states of emergency or armed conflict. In this regard the Inter-American Court has said that the obligation to investigate is considered to be *jus cogens*.⁴¹⁷ In turn, the Special Rapporteur on executions has stated that “[a]rmed conflict and occupation do not

⁴¹⁴ *Report of the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions*, A/51/457 of October 7, 1996, para. 76. In the same vein, see the reports of the Special Rapporteur, E/CN.4/1997/60 of 24 December 1996, para. 47 and E/CN.4/1998/68 of 23 December 1997, para. 54.

⁴¹⁵ Article 24 (6).

⁴¹⁶ “General Comment on the right to recognition of legal personality in the context of enforced disappearances,” para. 10, *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/19/58/Rev.1 of 2 March 2012. In the same vein, see: *General comment on children and enforced disappearances, approved by the Working Group on Enforced or Involuntary Disappearances at its 98th session (October 31 to November 9, 2012)*, A/HRC/WGEID/98/1 of 14 February 2013, para. 30; and *Report of the Working Group on Enforced or Involuntary Disappearances - Addendum: Mission to Guatemala*, A/HRC/4/41/Add.1 of 20 February 2007, paras. 72 and 100 (c).

⁴¹⁷ See *inter alia*: Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 157; Judgment of September 22, 2009, *Case of Anzaldo Castro v. Peru*, Series C No. 2002, para. 59; Judgment of July 8, 2004, *Case of the Gómez Paquiyauri Brothers v. Peru*, Series C No. 110, para. 112.

discharge the State's duty to investigate and prosecute human rights abuses. [...] The State obligation to conduct independent and impartial investigations into possible violations does not lapse in situations of armed conflict and occupation. [...] Regardless of the circumstances, however, investigations must always be conducted as effectively as possible and never be reduced to mere formality."⁴¹⁸ Therefore, and a fortiori, because of the non-derogable nature of the right to an effective remedy (see Chapter III: Effective Remedy and the Right to Justice), the relatives' right to investigation may not be denied in times of times of emergency or armed conflict.

3. Characteristics of the Investigation

The characteristics and requirements for the investigation are specified in international norms and standards, and they have been refined through the case law by courts, international human rights agencies and proceedings.⁴¹⁹ In this sense, international law establishes the framework within which the State must fulfill its obligation to investigate, as well as the scope and characteristics of the relatives' right to investigation. Thus, family members have the right to full and effective investigations, by an impartial body, carried out with due diligence and good faith, without delays or unjustified stalling.

"[T]he right of the victim's next of kin to know what happened to him and, if appropriate, where his remains are, represents a fair expectation that the State must satisfy with all the means available to it."

Inter-American Court of Human Rights⁴²⁰

In the case of enforced disappearance, extrajudicial execution or secret graves, the relatives' right to an investigation remains in effect until the victim's whereabouts has been established and where the person or the remains are located. This is directly linked to the State's obligation to investigate until the fate or the whereabouts of the victim has been established, as has been

⁴¹⁸ *Extrajudicial, Summary or Arbitrary Executions. Report of the Special Rapporteur, Philip Alston*, E/CN.4/2006/53 of 8 March 2006, paras. 36 and 37.

⁴¹⁹ See: International Commission of Jurists, *International Law and the Fight against Impunity - Practitioners' Guide Series No. 7*, ICJ, Geneva, 2015 and *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction - Practitioners' Guide Series No. 9*, ICJ, Geneva, 2015.

⁴²⁰ Judgment of November 26, 2013, *Case of Osorio Rivera and Family Members v. Peru*, Series C No. 274, para. 179.

declared by the Inter-American Court,⁴²¹ the WGEID,⁴²² and the CED.⁴²³ In this respect, the CED has stated that this obligation remains in effect “regardless of the time that has elapsed since they [the disappearances] took place.”⁴²⁴ In this context, the *Principles against Impunity* states that “[i]rrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate.”⁴²⁵

“[C]ompliance with the obligation to investigate must include the obligation to initiate, ex officio and immediately, a genuine, impartial and effective investigation, using all available legal means, and involving every State institution. [...] All these requirements, together with criteria of independence and impartiality also extend to the non-judicial bodies responsible for the investigation prior to the judicial proceedings, conducted to determine the circumstances of a death and the existence of sufficient evidence. In the absence of these requirements, the State cannot subsequently exercise effectively and efficiently its authority to bring charges and the courts cannot conduct the judicial proceedings that this type of violation calls for.”

Inter-American Court of Human Rights⁴²⁶

Consequently, as the Inter-American Court has stated,⁴²⁷ the obligation to investigate the fate and whereabouts of the victim, and therefore the relatives’ corresponding right to an investigation for this purpose, exists regardless of the findings of a criminal

⁴²¹ See, inter alia: Judgment of November 26, 2013, *Case of Osorio Rivera and Family Members v. Peru*, Series C No. 274, para. 179 and Judgment of July 29, 1988, *Case of Velásquez Rodríguez v. Honduras*, Series C No. 4, para. 181.

⁴²² “General Comment on the right to the truth in relation to enforced disappearances,” Doc. Cit., para. 4.

⁴²³ *Concluding observations on the report submitted under Article 29, paragraph 1, of the Convention to: Argentina*, CED/C/ARG/CO/1 of 12 December 2013, para. 17; *Armenia*, on February 11, 2015, para. 15; *Paraguay*, CED/C/PRY/CO/1 of 24 September 2014, para. 18; *Spain*, CED/C/ESP/CO/1 of 12 December 2013, para. 12; and *Mexico*, on February 11, 2015, para. 28.

⁴²⁴ *Concluding observations on the report submitted under Article 29, paragraph 1, of the Convention to: Spain*, CED/C/ESP/CO/1 of 12 December 2013, para. 12; and *Mexico*, on February 11, 2015, para. 28.

⁴²⁵ Principle 4.

⁴²⁶ Judgment of 10 July 2007, Judgment of July 10, 2007, *Case of Cantoral Huamani and García Santa Cruz v. Peru*, Series C No. 167, paras. 130 and 133

⁴²⁷ See, inter alia: Judgment of July 29, 1988, *Case of Velásquez Rodríguez v. Honduras*, Series C No. 4, para. 181.

investigation meant to clarify the crime and identify those responsible, with the aim of prosecution.

The relatives' right to an investigation presumes that this will be done by an independent and impartial body. As indicated in Chapter III: Effective Remedy and the Right to Justice, although in a criminal case the investigation should be undertaken or supervised by a judicial body, an investigation that aims to determine the fate, whereabouts or location of the victim may be conducted by a non-judicial authority. Nonetheless, in the latter case, the investigative authority must have independence and impartiality. In this regard, the Inter-American Court has reminded that "[i]n order for a death investigation to be effective, it is essential that the persons in charge of such investigation be independent, de jure and de facto, of the ones involved in the case. This requires not only hierarchical or institutional independence, but also actual independence."⁴²⁸

Also, as has been noted by the HRC,⁴²⁹ the CED,⁴³⁰ the WGEID,⁴³¹ the Special Rapporteur on executions,⁴³² the IACHR⁴³³ and the Inter-American Court,⁴³⁴ the body in charge of the investigation should be civil, not military.

⁴²⁸ Judgment of 6 April 2006, *Case of Baldeón García v. Peru*, Series C No. 147, para. 95. See also, Judgment of August 16, 2000, *Case of Durand and Ugarte v. Peru*, Series C No. 68, paras. 125 and 126.

⁴²⁹ See, *inter alia*: *Concluding Observations of the Committee on Human Rights to: Colombia*, CCPR/C/79/Add.76 of 5 May 1997, paras. 19 and 23 and CCPR/CO/80/COL of 26 May 2004, para. 9; and *Bolivia*, CCPR/C/79/Add.74 of 1 May 1997, para. 34.

⁴³⁰ See, *inter alia*: *Concluding Observations to: Netherlands*, CED/C/NLD/CO/1 of 10 April 2014, para. 19; *Argentina*, CED/C/ARG/CO/1 of 12 December 2013, para. 23; and *Mexico*, on February 11, 2015, para. 26.

⁴³¹ See, among others, United Nations documents E/CN.4/1994/26, para. 86; E/CN.4/1990/13, para. 22; and E/CN.4/1992/18, para. 367.

⁴³² UN Doc. E/CN.4/1995/111, paras. 86, 185 and 119.

⁴³³ See, *inter alia*: *First Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.83, Doc 31, March 12, 1993, para. 24; *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, Doc 59 rev, June 2, 2000, paras. 100, 238 and 244; *Report on the Situation of Human Rights in Brazil*, OEA/Ser.L/V/II.97 Doc 29 Rev.1 of 29 September 1997, para. 86; *Report on the Situation of Human Rights in Mexico*, OEA/Ser.L/V/II.100, Doc 7 rev. 1 of September 24, 1998, paras. 35 and 339; and *Fifth Report on the Situation of Human Rights in Guatemala*, OEA/Ser.L/V/II.111, Doc. 21 rev., April 6, 2001, paras. 33 and 63.

⁴³⁴ See, *inter alia*: Judgment of November 26, 2013, *Case of Osorio Rivera and Family Members v. Peru*, Series C No. 274, paras. 189 and 190; Judgment of

"[W]henever [...] a judicial body is entrusted with the task of deciding on the start of such inquiry and proceedings, it must respect the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1[ICCPR], and the principles of impartiality, fairness and equality of arms implicit in this guarantee."

Human Rights Committee⁴³⁵

4. Right to Participate in the Investigation

The right to an investigation includes the relatives' right to make a complaint or report to initiate an investigation and to be informed of the progress and results.⁴³⁶ However, the right to investigation is not limited to these two aspects. As the Inter-American Court has noted, this right implies that the relatives should have full access and capacity to act at all stages and levels of the investigation, to make their claims and to present evidence, to clarify the facts and to punish those responsible, as well as seek fair reparation.⁴³⁷ In the same vein, the HRC has declared that "the authorities investigating enforced disappearances must give the families a timely opportunity to contribute their knowledge to the investigation."⁴³⁸

The CED has urged States to ensure that their legislation allows "the victims of enforced disappearance to participate fully in judicial proceedings relating to the investigation of such an

February 27, 2012, *Case of Narciso González Medina v. Dominican Republic*, Series C No. 240, paras. 215 et seq. ; and Judgment of August 31, 2010, *Case of Rosendo Cantú et al. v. Mexico*, Series C No. 216, para. 161.

⁴³⁵ Views of 28 March 2006, Communication No. 1159/2003, *Sankara v. Burkina Faso*, para. 12.4.

⁴³⁶ *International Convention for the Protection of All Persons from Enforced Disappearance* (arts. 12 and 24); *Declaration on the Protection of All Persons from Enforced Disappearances* (art. 13); *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary or Summary Executions* (Principle 9 et seq.); and *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Serious Violations of International Humanitarian Law* (arts. 3.c, 11 and 12).

⁴³⁷ See, *inter alia*: Judgment of 8 July 2004, *Case of the Gómez Paquiyauri Brothers v. Peru*, Series C No. 110, para. 231; Judgment of 6 April 2006, *Case of Baldeón García v. Peru*, Series C No. 147, paras. 93 and 146; Judgment of March 3, 2005, *Case of Huilca Tecse v. Peru*, Series C No. 121, para. 107; and Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 183.

⁴³⁸ Views of 28 October 2014, Communication No. 1966/2010, *Hero v. Bosnia and Herzegovina*, para. 9.6. See also, Views of 28 October 2014, Communication No. 1979/2010, *Kozljak v. Bosnia and Herzegovina*, para. 9.6.

offence.”⁴³⁹ It has also declared that the State must “ensure that the search [for the victim] is carried out by the competent authorities with the participation of relatives of the disappeared person.”⁴⁴⁰ The WGEID, in turn, has stated that “the relatives of the victims should be closely associated with an investigation into a case of enforced disappearance”⁴⁴¹ and that “States must ensure the full access and capacity to act of the next of kin of the victims in every stage of the investigation and prosecution of those responsible.”⁴⁴²

“[T]he families of victims of alleged extrajudicial, summary or arbitrary executions must be notified of all inquiries carried out by the police or the courts, their progress, as well as any decisions taken. Their right to participate as civilian parties in criminal proceedings, as set out in the relevant procedural legislation, must be fully ensured in practice.”

Special Rapporteur on extrajudicial, summary and arbitrary executions⁴⁴³

Although the relatives have the right to participate in the investigation, the WGEID has noted that this may not be interpreted to mean that this entails “the obligation of victims and their relatives to obtain and provide evidence,”⁴⁴⁴ since “[i]n accordance with article 13 of the Declaration, States are obliged to initiate an ex officio investigation into enforced disappearances and

⁴³⁹ *Concluding observations on the report submitted by Uruguay under article 29, paragraph 1, of the Convention*, CED/C/URY/CO/1 of 8 May 2013, para. 22.

⁴⁴⁰ *Concluding Observations on México*, 11 February 2015, para. 41 (b). [Original in Spanish, free translation].

⁴⁴¹ “General Comment on the right to the truth in relation to enforced disappearances,” para. 3, *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/16/48, 2010. Along the same line, see: *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/7/2 January 10, 2008, para. 163.

⁴⁴² *General Comment on children and enforced disappearances, adopted by the Working Group on Enforced or Involuntary Disappearances at its 98th session* (October 31 to November 9, 2012), A/HRC/WGEID/98/1 of 14 February 2013, para. 37.

⁴⁴³ *Extrajudicial, Summary and Arbitrary Executions. Addendum: Report of the Special Rapporteur, Mr. B.W. Ndiaye, on his mission to Peru from May 24 to June 2, 1993*, E/CN.4/1994/7/Add. 2 of 15 November 1993, para. 96.

⁴⁴⁴ *Report of the Working Group on Enforced or Involuntary Disappearances - Addendum: Mission to Mexico*, A/HRC/19/58/Add.2 of 20 December 2001, para. 100.

conduct that investigation in a serious manner."⁴⁴⁵ The WGEID has stated that "[t]hese investigations should be assumed as a State obligation, and should not be deemed the responsibility of the victim's family."⁴⁴⁶ In the same vein, the Inter-American Court has stated that the authorities should undertake to investigate as part of their own legal duty, and not merely as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the public authority.⁴⁴⁷

"The State, or any other authority, should not undertake the process of identification of the remains, and should not dispose of those remains, without the full participation of the family and without fully informing the general public of such measures."

Working Group on Enforced or Involuntary Disappearances⁴⁴⁸

The right to investigation also implies the relatives have the right to challenge, before a judicial body, the decision that is made at the end of the investigation by the authority in charge. This decision might be whether or not to prosecute the suspects, to close the investigation, or to suspend or terminate the search for the victim. In this respect, the CED has urged States to ensure that their domestic law grants "any person who reports an enforced disappearance the right to challenge the legal merits of the decision of the prosecutor not to investigate or prosecute cases."⁴⁴⁹

⁴⁴⁵ *General Comment on women affected by enforced disappearances, adopted by the Working Group on Enforced or Involuntary Disappearances at its 98th session (October 31 to November 9, 2012), A/HRC/WGEID/98/2 of 14 February 2013, para. 27.*

⁴⁴⁶ *General Comment on children and enforced disappearances, adopted by the Working Group on Enforced or Involuntary Disappearances at its 98th session (October 31 to November 9, 2012), A/HRC/WGEID/98/1 of 14 February 2013, para. 37.*

⁴⁴⁷ Judgment of November 22, 2005, *Case of Gómez Palomino v. Peru*, Series C No. 136, para. 77; Judgment of April 6, 2006, *Case of Baldeón García v. Peru*, Series C No. 147, para. 93; Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 123; and Judgment of November 26, 2013, *Case of Osorio Rivera and Family Members v. Peru*, Series C No. 274, para. 178.

⁴⁴⁸ "General Comment on the right to the truth in relation to enforced disappearance", Doc. Cit., para. 6.

⁴⁴⁹ *Concluding observations on the report submitted under Article 29, paragraph 1, of the Convention to: France, CED/C/FRA/CO/1 of 8 May 2013, para. 25.*

The right to participate in the investigation implies that the relatives may to:

- Have access to information relevant to the investigation;
- Participate in hearings held during the investigation;
- Present evidence and testimonies;
- Request the attendance of witnesses;
- Request expert opinion and second opinions;
- Attend exhumations and excavations of graves;
- Ensure, in the case of death of the victim, that a doctor or other qualified person is present at the autopsy;⁴⁵⁰ and
- Appeal decisions by the authority in charge of the investigation, either made during the course of the process or a decision to conclude the investigation.

“When the relatives have appointed legal representatives, forensic and psychosocial experts, their participation shall be ensured in all the investigations into the whereabouts of their loved ones.”

*International Consensus on Principles and Minimum Standards in Search Processes and Forensic Investigations in Cases of Enforced Disappearances, Arbitrary or Extrajudicial Executions*⁴⁵¹

5. Right to Be Informed of Progress in the Investigation and Results

Independently of their right to participate in the investigation, family members have the right to receive information on progress and results of the investigation.⁴⁵² In this regard, the HRC has stated that the State’s obligation to ensure an effective remedy implies providing the family with detailed information on the results of the investigation.⁴⁵³ The HRC has also declared that

⁴⁵⁰ *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle 16).

⁴⁵¹ Recommendation No. 3.4 [Original in Spanish, free translation].

⁴⁵² *International Convention for the Protection of All Persons from Enforced Disappearance* (art 24.2.); *Declaration on the Protection of All Persons from Enforced Disappearances* (art.13 4); *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions* (Principles 16 and 17); and *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Serious Violations of International Humanitarian Law* (arts. 11.c and 24).

⁴⁵³ See, inter alia: Views of 10 July 2007, Communication No. 1327/2004, *Grioua v. Algeria*, para. 9; Views of 30 October 2014, Communication No. 2132/2012, *Kamela Allioua and Fatima Zohra Kerouane v. Algeria*, para. 9; and Views of 30 October 2014, Communication No. 2083/2011, *Kroumi v. Algeria*, para. 11.

"information regarding the progress of the investigation must be made promptly accessible to the families"⁴⁵⁴ and that "authorities investigating enforced disappearances must give the families [...] information regarding the progress of the investigation [...] promptly."⁴⁵⁵

"Providing general information on procedural matters, such as the fact that the matter has been given to a judge for examination, is insufficient and should be considered a violation of the right to the truth. The State has the obligation to let any interested person know the concrete steps taken to clarify the fate and the whereabouts of the person. Such information must include the steps taken on the basis of the evidence provided by the relatives or other witnesses. While the necessities of a criminal investigation may justify restricting the transmission of certain information, there must be recourse in the national legislation to review such a refusal to provide the information to all interested persons. This review should be available at the moment of the initial refusal to provide information, and then on a regular basis to ensure that the reason for the necessity that was invoked by the public authority, to refuse to communicate, remains present."

Working Group Enforced or Involuntary Disappearances⁴⁵⁶

International standards⁴⁵⁷ and case law⁴⁵⁸ stipulate that the results of investigations must be made public. However, the publication of some aspects of the investigation—such as the identity of witnesses or information sources—could jeopardize the prosecution and punishment of the perpetrators, therefore it is possible that these might not be revealed if doing so would hamper the

⁴⁵⁴ Views of 28 October 2014, Communication No. 1979/2010, *Kozljak v. Bosnia and Herzegovina*, para. 9.6.

⁴⁵⁵ Views of 28 October 2014, Communication No. 1966/2010, *Hero v. Bosnia and Herzegovina*, para. 9.6.

⁴⁵⁶ "General Comment on the right to the truth in relation to enforced disappearances," Doc. Cit., para. 3.

⁴⁵⁷ See, inter alia, Principle 17 of the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*.

⁴⁵⁸ See, inter alia: Inter-American Court of Human Rights, Judgment of March 3, 2005, *Case of Huilca Tecse v. Peru*, Series C No. 121, para. 107; Judgment of April 6, 2006, *Case of Baldeón García v. Peru*, Series C No. 147, para. 200; Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 183; and Judgment of November 26, 2013, *Case of Osorio Rivera and Family Members v. Peru*, Series C No. 274, para. 245. See also: Working Group on Enforced or Involuntary Disappearances, *General Comment on Children and Enforced Disappearances*, Doc. Cit., para. 37; and *Concluding Observations of the Human Rights Committee: Guatemala*, CCPR/C/79/ Add.63.

investigation of a criminal case in progress.⁴⁵⁹ However, this option may not be used to deny the victim and the family's basic rights during the investigation. In this regard, the WGEID has stated that this possibility should "interpreted narrowly. Indeed, the relatives of the victims should be closely associated with an investigation into a case of enforced disappearance. The refusal to provide information is a limitation on the right to the truth. Such a limitation must be strictly proportionate to the only legitimate aim: to avoid jeopardizing an ongoing criminal investigation. A refusal to provide any information, or to communicate with the relatives at all, in other words a blanket refusal, is a violation of the right to the truth."⁴⁶⁰

In any case, these restrictions may only be temporary, used for a legitimate purpose (to safeguard the integrity of the investigation), ordered by a competent authority, based on grounds contemplated by law, and may be judicially appealed by the relatives. Furthermore, in all cases and circumstances:

- Relatives of victims of enforced disappearance, secret extrajudicial execution or secret burial have the right to be informed about the progress and results of the investigation on the fate and whereabouts of their loved ones;⁴⁶¹
- Victims, relatives and legal representatives have the right to request and submit evidence or raise objections to it;
- Victims, relatives and legal representatives shall be informed of the results of the investigation, the decision of whether or not to prosecute the alleged perpetrators, and they may judicially challenge that decision.

It is worth mentioning that in cases of secret extrajudicial execution or when the relatives have not been informed of their loved ones' exact place of burial, the HRC has concluded that these situations constitute cruel or inhuman treatment for the relatives

⁴⁵⁹ See: Article 13 (4) of the *Declaration on the Protection of All Persons from Enforced Disappearances*; Principle 17 of the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*; and Principle 34 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*.

⁴⁶⁰ "General Comment on the right to the truth in relation to enforced disappearances," Doc. Cit., para. 3.

⁴⁶¹ Article 24 (2) of the *International Convention on the Protection of All Persons from Enforced Disappearance* and Principle 4 of the *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*.

of the executed person.⁴⁶² In addition, the Inter-American Court has stated that continued denial of information about the fate or whereabouts of a disappeared person constitutes cruel or inhuman treatment for the relatives.⁴⁶³

6. Right to Human Treatment, Care and Protection

During the investigation, the relatives must be treated with humanity and respect for their dignity and human rights. To this end, the authorities must take appropriate measures to ensure their physical and psychological well-being and privacy.⁴⁶⁴ Usually, the investigation will have strong psychological impact on the relatives. Therefore, the investigating authorities must take appropriate measures so that the investigation activities that involve the relatives do not give rise to new traumas or revictimization. In this sense, the *International Consensus on Principles and Minimum Standards for Psychosocial Work in Search Processes and Forensic Investigations in Cases of Enforced Disappearances, Arbitrary or Extrajudicial Executions* states that “[a]ll actions undertaken in cases of enforced disappearances, arbitrary or extrajudicial executions and forensic investigations, must promote the ethical and legal recognition of the victims and their families as rights holders, fostering their informed participation in all stages of the process.”⁴⁶⁵ Likewise, the investigations must take into account cultural, ethnic, and linguistic factors, as well as the gender and sexual orientation of

⁴⁶² See, among others: Views of March 26, 2006, *Case Sankara et al. v. Burkina Faso*, Communication No. 1159/2003; Views of 3 April 2003, *Case Lyashkevich v. Belarus*, Communication No. 887/1999; Views of 30 March 2005, *Case Khalilova v. Tajikistan*, Communication No. 973/2001; Views of 16 November 2005, *Case Valichon Aliboev v. Tajikistan*, Communication No. 985/2001; and Views of 3 April 2003, *Case Mariya Staselovich v. Belarus*, Communication No. 887/1999.

⁴⁶³ Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 113 and Judgment of 29 November 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 125.

⁴⁶⁴ See, inter alia: *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Serious Violations of International Humanitarian Law* (Principle 10); *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (arts. 4, 6, 14, 15, 16 and 17); *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* (Principle 10); *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*; and *International Consensus on Principles and Minimum Standards for Psychosocial Work in Search Processes and Forensic Investigations in Cases of Enforced Disappearances, Arbitrary or Extrajudicial Executions*.

⁴⁶⁵ Ethical Principle on “Victims as Rights Holders.”

the victims and the relatives, and adopt working methods and a differentiated approach according to these specificities.

During the investigation, the relatives have the right to receive legal aid, social assistance, and medical, psychological and psychosocial care—including care from social workers and mental health professionals and reimbursement for expenses—as well as translation services when needed.⁴⁶⁶

“[The State must] especially ensure that all State agents refrain from making public statements that might discredit, stigmatize or endanger the relatives of disappeared persons or human rights defenders working to combat enforced disappearances and assist victims.”

Committee on Enforced Disappearances⁴⁶⁷

International norms and standards⁴⁶⁸ stipulate that the authorities must take measures to protect against any act or threat of violence, intimidation, abuse or reprisals against relatives of victims when they report the disappearance or extrajudicial execution of their loved one, are involved in the investigation or if they are attacked because of the investigation, even if they are not participating in it. This obligation is not limited to the duty to protect against attacks and threats, but also entails taking actions with due diligence in order to prevent them. Indeed, as the Inter-American Court has noted, when the State becomes aware of a situation of real and immediate risk to an individual, it must take

⁴⁶⁶ *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Serious Violations of International Humanitarian Law* (arts. 10, 12 and 24); *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* (Principle 10); *International Consensus on Principles and Minimum Standards for Psychosocial Work in Search Processes and Forensic Investigations in Cases of Enforced Disappearances, Arbitrary or Extrajudicial Executions* (Standards 8 and 9).

⁴⁶⁷ *Concluding Observations: Mexico*, February 11, 2015, para. 31 (c). [Original in Spanish, free translation.]

⁴⁶⁸ *International Convention for the Protection of All Persons from Enforced Disappearance* (arts. 12.1 and 18.2); *Declaration on the Protection of All Persons from Enforced Disappearances* (art 13.3); *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* (Principle 15); *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* (Principle 10); *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Serious Violations of International Humanitarian Law* (art. 12.b); and *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime* (arts. 32 et seq.).

reasonable steps to prevent or avert that risk.⁴⁶⁹ The Inter-American Court has also stated that “whether a person requires protection measures and what those measures should be is the State’s obligation, and this must not be limited to requiring the victim to apply to ‘the competent authorities,’ without knowing which authority can best address the situation, since it is the State’s responsibility to establish measures of coordination between its institutions and officials for this purpose.”⁴⁷⁰

This obligation is twofold: to protect the life and safety of the person and to guarantee the effectiveness of the investigation. Thus, the Inter-American Court has stated that “to comply with the obligation to investigate within the framework of the guarantees of due process, the State must take all necessary measures to protect [...] the victims’ next of kin from harassment and threats which are designed to obstruct the proceedings, prevent a clarification of the events of the case, and prevent the identification of those responsible for such events.”⁴⁷¹ The relatives’ right to protection measures is not limited to the period of the investigation. If risks persist, protective measures should be extended beyond the period of the investigation, even after the criminal proceedings have taken place.⁴⁷²

⁴⁶⁹ Judgment of 10 October 2013, *Case of Luna López v. Honduras*, Series C No. 269, paras. 123 et seq. ; and Judgment of November 14, 2014, *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, Series C No. 287, paras. 523, 526 and 527.

⁴⁷⁰ Judgment of 10 October 2013, *Case of Luna López v. Honduras*, Series C No. 269, para. 127.

⁴⁷¹ Judgment of May 11, 2007, *Case of the Rochela Massacre v. Colombia*, Series C No. 163, para. 171.

⁴⁷² *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Serious Violations of International Humanitarian Law* (art. 12.b); and Inter-American Court of Human Rights, Judgment of November 14, 2014, *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, Series C No. 287, para. 526.

CHAPTER V: THE RIGHT TO THE TRUTH

“[T]he right to the truth, although not expressly recognized in our Constitution, is a fully protected right, derived primarily from the state’s obligation to protect fundamental rights and tutela protection measures. [...] Without prejudice to constitutionally protected provisions for right to the truth, it is also of constitutional rank because it is a concrete expression of the constitutional principles of human dignity, democratic and social rule of law and the republican way of government.”

Constitutional Tribunal of Peru⁴⁷³

1. Preliminary Considerations

Relatives of enforced disappeared and/or extrajudicially executed persons have the right to the truth, meaning the right to know the truth about the circumstances in which their loved one was victimized, the identity of the perpetrators, the extent of their participation in the facts and the motives. The right to the truth has another facet in cases of enforced disappearance, secret extrajudicial execution, and secret burial of victims: the relatives’ right to know the fate or whereabouts of the victim. Furthermore, in cases of children who have been abducted or taken from disappeared parents during their captivity, the right to the truth also entails the right of the child to know his true identity.

The right to the truth has been the result of a long process of evolution in international human rights case law, and norms and standards in international law.⁴⁷⁴ Rooted in international humanitarian law,⁴⁷⁵ a real international human rights *corpus juris*

⁴⁷³ Judgment of March 18, 2004, File No. 2488-2002-HC/TC Piura, *Case Genaro Villegas Namuche*, paras. 13 and 15 of Fundamentos. [Free translation.]

⁴⁷⁴ In this respect see: International Commission of Jurists. *International Law and the Fight Against Impunity - Practitioners’ Guide No. 7*, ICJ, Geneva, 2015, Chapter VII: “The Right to the Truth”.

⁴⁷⁵ See, inter alia: International Conferences of Paris and Berlin, 1867 and 1869; Article 32 of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts*; Resolution II of the *24th International Conference of the Red Cross and Red Crescent* (Manila, 1981); and Resolution XIII of the *25th International Conference of the Red Cross and Red Crescent Societies* (1986).

on the right to the truth has emerged. The right to the truth has evolved from the right of the relatives to know the fate of their loved ones who disappeared during armed conflicts, to the right to know the fate and whereabouts of missing loved ones who were disappeared, executed in secret or secretly buried,⁴⁷⁶ and subsequently the right of victims and their relatives to know the full and complete truth about gross human rights violations that have been committed, the specific circumstances, the identity of those responsible, the perpetrators, and the motives. This international *corpus juris* has been systematized by the Office of the United Nations High Commissioner for Human Rights⁴⁷⁷ and the Inter-American Commission on Human Rights (IACHR).⁴⁷⁸

In the field of international human rights norms and standards, the following instruments have marked milestones in the recognition of the right to the truth: *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* (Principles against Impunity),⁴⁷⁹ *Basic Principles and*

⁴⁷⁶ See the United Nations General Assembly, Resolutions No. 3220 (XXIX) of 6 November 1974, Assistance and Cooperation in Accounting for Persons who are Missing or Dead in Armed Conflicts; No. 33/173 of 20 December 1978; No. 34/179 and No. 35/188 on the situation of human rights in Chile; No. 35/193 of 15 December 1980, No. 36/163 of 16 December 1981, No. 37/180 of 17 December 1982, No. 38/94 of 16 December 1983, No. 39/111 of 14 December 1984, No. 40/147 of 13 December 1985, No. 41/145 of 4 December 1986, No. 42/142 of 7 December 1987, No. 43/159 of 8 December 1988, No. 44/160 of 15 December 1989, No. 45/165 of 18 December 1990, No. 46/125 of 17 December 1991; and No. 47/132 of 18 December 1992. See also the resolutions on enforced disappearances by the General Assembly of the Organization of American States, AG/RES. 618 (XII-0/82) of 1982, AG/RES. 666 (XIII-0/83) of 1983, AG/RES. 742 (XIV-0/84) of 1984, AG/RES. 950 (XVIII-0/88) of 1988, AG/RES. 1022 (XIX-0/89) of 1989 and AG/RES. 1044 (XX-0/90) of 1990.

⁴⁷⁷ *Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights*, E/CN.4/2006/91 of 9 January 2006; *Right to the Truth, Report of the Office of the High Commissioner for Human Rights*, A/HRC/5/7 of 7 June 2007; *Right to the Truth, Report of the Office of the High Commissioner for Human Rights*, A/HRC/12/19 of August 21, 2009; and *Report of the Office of the United Nations High Commissioner for Human Rights, seminar on experiences of archives as a means to guarantee the right to the truth*, A/HRC/17/21 of April 14, 2011.

⁴⁷⁸ *The Right to Truth in the Americas*, OEA/Ser.L/V/II.152 Doc. 2 of 13 August 2014.

⁴⁷⁹ See Principles 2, 3, 4 and 5 (E/CN.4/2005/102/Add.1 of February 8, 2005). The first version was adopted in 1997 by the United Nations Sub-Commission on the Promotion and Protection of Human Rights (E/CN.4/Sub.2/1997/ Rev.1, Annex I.) and at the recommendation of the former Commission on Human Rights (See Resolution No. 2003/72 of 25 April 2003). The Inter-American Court and the

Guidelines on the Right to a Remedy and Reparation for the Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Principles on Reparation),⁴⁸⁰ *Guiding Principles on Internal Displacement*,⁴⁸¹ and *International Convention for the Protection of All Persons from Enforced Disappearance* (ICPED).⁴⁸²

“Under international law, the State [of Peru] has the obligation to ensure access to truth, justice, compensation and, ultimately, dignity for victims. Measures effectively promoting a climate of impunity constitute serious impediments to efforts made to consolidate democracy and to promote respect for human rights.”
Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism⁴⁸³

It is worth mentioning that prior to the adoption of the ICPED, during the process of drafting the *Declaration on the Protection of All Persons from Enforced Disappearance* (DED), several government delegations insisted, unsuccessfully, that this instrument should include a clause on the right to the truth. In contrast, right from the start of the drafting of the ICPED, the vast majority of government delegations agreed that it was essential that the new treaty must explicitly recognize and protect the right to the truth.⁴⁸⁴

Commission cite the first version in a number of judgments and reports. See Judgments: November 27, 1998, *Case of Castillo Páez v. Peru*, Series C No. 43; February 22, 2002, *Case of Bámaca Velásquez v. Guatemala*, Series C No. 91; and February 27, 2002, *Case of Trujillo Oroza v. Bolivia*, Series C No. 92. Reports: No.136/99, Case 10.488, *Ignacio Ellacuría, S.J. et al.* (El Salvador), December 22, 1999; No. 37/00, Case 11.481, *Monsignor Oscar Arnulfo Romero y Galdámez* (El Salvador), April 13, 2000; No. 45/00, Case 10.826, *Manuel Mónago Carhuaricra and Eleazar Mónago Laura* (Peru), 13 April 2000; No. 44/00, Case 10.820, *Américo Zavala Martínez* (Peru), April 13, 2000; No. 43/00, Case 10.670, *Alcides Sandoval and others* (Peru), April 13, 2000; and No. 46/00, Case 10.904, *Manuel Meneses Sotacuro and Félix Inga Cuya* (Peru), April 13, 2000.

⁴⁸⁰ Articles 22 (b) and 24.

⁴⁸¹ Principle 16 (1 and 2) (E/CN.4/1998/53/Add.2 of 11 February 1998).

⁴⁸² Paragraph 8 of the Preamble and article 24 (2).

⁴⁸³ *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin. Addendum: Mission to Peru*, A/HRC/16/51/Add.3 of December 15, 2010, para. 17.

⁴⁸⁴ See, inter alia: *Report of the Inter-sessional Open-ended Working Group to elaborate a draft legally binding instrument for the protection of all persons from enforced disappearance*, E/CN.4/2005/66 March 10, 2005, paras. 104 et seq.

Resolutions on the right to the truth by the United Nations General Assembly,⁴⁸⁵ the former Commission on Human Rights,⁴⁸⁶ and the Human Rights Council,⁴⁸⁷ as well as the General Assembly of the Organization of American States (OAS)⁴⁸⁸ have explicitly enshrined this right for the relatives of victims of gross human rights violations.

"[T]he right to the truth is one of the pillars of the mechanisms of transitional justice, defined as "the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation."

Inter-American Commission on Human Rights⁴⁸⁹

The right to the truth has long been upheld in international doctrine and case law on human rights, for example by the Working Group on Enforced or Involuntary Disappearances (WGEID),⁴⁹⁰ Human Rights Committee (HRC),⁴⁹¹ IACHR,⁴⁹² and

⁴⁸⁵ Resolution No. 65/196, "Proclamation of 24 March as the International Day for the Right to the Truth Concerning Gross Human Rights Violations and for the Dignity of Victims," of December 21, 2010; and Resolution No. 68/165, "Right to the Truth," of December 18, 2013.

⁴⁸⁶ Resolution No. 2005/66, "Right to the Truth," of April 20, 2005.

⁴⁸⁷ Resolutions No. 9/11 of September 18, 2008, No. 12/12 of 1 October 2009 and No. 21/7 of 27 September 2012.

⁴⁸⁸ Resolution No. AG/RES. 2175 (XXXVI-O/06), AG/RES. 2267 (XXXVII-O/07), AG/RES. 2406 (XXXVIII-O/08), AG/RES. 2509 (XXXIX-O/09), AG/RES. 2595 (XL-O/10), AG/RES. 2662 (XLI-O/11); AG/RES. 2725 (XLII-O/12), AG/RES. 2800 (XLIII-O/13); and AG/RES. 2822 (XLIV-O/14).

⁴⁸⁹ *The Right to Truth in the Americas*, OEA/Ser.L/V/II.152 Doc. 2 of 13 August 2014, para. 48

⁴⁹⁰ See, inter alia: reports of the Working Group on Enforced or Involuntary Disappearances: E/CN.4/1435, of January 22, 1981, para. 187; E/CN.4/1492 of December 31, 1981, para. 5; E/CN.4/1983/14 of 21 January 1984, para. 134; E/CN.4/1984/21, paras. 171 and 159; E/CN.4/2006/56 ("General Comment on article 18 of the Declaration"); and A/HRC/16/48 of 26 January 2011, para. 30, pp. 10-18 ("General Comment on the right to the truth in relation to enforced disappearance").

⁴⁹¹ Views of 21 July 1983, *Case Maria del Carmen Almeida de Quinteros and Elena Quintero Almeida (Uruguay)*, Communication No. 107/1981, para. 14; Views of 25 March 1996, Communication No. 542/1993, *Case Katombe L. Tshishimbi (Zaire)*, para. 5.5; and Views of 25 March 1996, Communication No. 540/1996, *Case Ana Rosario Celis Laureano (Peru)*, para. 8.5; Views of 16 July 2003, *Case Sarma (Sri Lanka)*, Communication No. 950/2000, para. 9.5; Views of 26 March 2006, *Case Sankara and others (Burkina Faso)*, Communication No. 1159/2003; Views of 3 April 2003, *Case Lyashkevich (Belarus)*, Communication No. 887/1999; Views of 30 March 2005, *Case Khalilova (Tajikistan)*, Communication No. 973/2001; and Views of 16 November 2005, *Case Valichon Aliboev (Tajikistan)*, Communication No.

Inter-American Court of Human Rights.⁴⁹³ In recent years this has also been reaffirmed by the Committee against Torture⁴⁹⁴ and the United Nations Office of the High Commissioner for Human Rights (OHCHR).⁴⁹⁵

Latin American courts and tribunals have expressly reaffirmed the right to the truth. For example, the Constitutional Tribunal of Peru,⁴⁹⁶ the Constitutional Court⁴⁹⁷ and the Supreme Court⁴⁹⁸ of Colombia, the Supreme Court of El Salvador,⁴⁹⁹ and the National Court for Federal Criminal and Correctional Matters of Argentina.⁵⁰⁰ Colombia's Constitutional Court has considered that, according to the evolution of international law, relatives of disappeared persons

985/2001. See also *Concluding Observations of the Human Rights Committee to: Algeria*, CCPR/C/79/Add.95 of 18 August 1999; *Uruguay*, CCPR/C/79/Add.90 of 8 April 1998; *Guatemala*, CCPR/C/79/Add.63, of April 3, 1996; and *Brazil*, CCPR/C/BRA/CO/2 of 1 December 2005.

⁴⁹² See among others: *Annual Report of the Inter-American Commission on Human Rights 1985-1986*, OEA/Ser.L/V/II.68, Doc. 8 rev. 1 of 28 September 1986, p. 205.

⁴⁹³ See, inter alia: Judgment of November 25, 2000, *Case of Bámaca Velásquez v. Guatemala*, Series C No. 70; Judgment of March 14, 2001, *Case of Barrios Altos v. Peru*, Series C No. 75; Judgment of July 8, 2004, *Case of Gómez-Paquiyaui Brothers v. Peru*, Series C No. 110; Judgment of November 22, 2005, *Case of Gómez Palomino v. Peru*, Series C No. 136; Judgment of April 6, 2006, *Case of Baldeón García v. Peru*, Series C No. 147; Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202; and Judgment of 24 November 2010, *Case of Gomes Lund et al. ("Araguaia Guerrillas") v. Brazil*, Series C No. 219.

⁴⁹⁴ *General Comment No. 3, Implementation of article 14 by States parties*, para. 16; and *Concluding observations on the combined fifth and sixth periodic reports of Peru, adopted by the Committee at its forty-nine session (29 October - 23 November 2012)*, CAT/C/PER/CO/5-6, Januar 21, 2013, para. 16.

⁴⁹⁵ Office of the High Commissioner for Human Rights: *Study on the Right to the Truth*, E/CN.4/2006/91 of 9 January 2006; *Right to the Truth*, A/HRC/5/7 of 7 June 2007; *Right to the Truth*, A/HRC/12/19 of August 21, 2009; and *Report on the seminar on experiences of archives as a means to guarantee the right to the truth*, A/HRC/17/21 of April 14, 2011.

⁴⁹⁶ Judgment of March 18, 2004, File No. 2488-2002-HC/TC Piura, *Case Genaro Villegas Namuche*; and Judgment of July 2, 2004, File No. 2529-2003-HC/TC, Lima, *Case Peter Cruz Chávez*.

⁴⁹⁷ See, among others: Judgment T-249/03, 2003, C-228, 2002; C-580/02; C-875 2002; C-370/06; C-454/06; C-516/07; C-209/07; C-516/07; C-208/08; and C-260/11.

⁴⁹⁸ See among others: Supreme Court of Justice, Criminal Chamber, Decision on appeal, of July 11, 2007, *Case Orlando César Caballero Montalvo / Tribunal Superior de Antioquia*.

⁴⁹⁹ Supreme Court of Justice, Constitutional Chamber, Judgment 665-2010 of February 5, 2014.

⁵⁰⁰ National Court for Federal Criminal and Correctional Matters of Argentina, *Case María Elena Amadio*, Rol 07/04-P.

have the “right to truth, justice and reparation, also recognized by national and international law, inclusive as *jus cogens* norms.”⁵⁰¹

2. General Considerations

The right to the truth has been defined as the right to know the full, complete and public truth about gross human rights violations and crimes against international law, the specific circumstances, and the identity, extent of involvement and motives of those responsible for these crimes.⁵⁰² The General Assembly of the OAS has described the importance of the right to the truth for “ensuring the right of victims of gross violations of human rights and grave breaches of international humanitarian law, and of their families and society as a whole, to know the truth regarding such violations to the fullest extent practicable, in particular the identity of the perpetrators, the causes and facts of such violations, and the circumstances under which they occurred, in order to contribute to ending impunity and to promoting and protecting human rights.”⁵⁰³

“This right [to the truth] translates into the possibility of knowing the circumstances of when, how and where these occurred, and the motives that drove the actors. The right to the truth is, in this sense, a collective, inalienable legal right.”

Constitutional Tribunal of Peru⁵⁰⁴

While systematizing the *corpus juris* on the subject, the OHCHR has concluded that “[t]he right to the truth implies knowing the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the

⁵⁰¹ Judgment C-620/11 of August 18, 2011 [Review of constitutionality of Law 1418 of 1 December 2010, which approving “the International Convention for the Protection of All Persons from Enforced Disappearance,” adopted in New York on December 20, 2006].

⁵⁰² See, inter alia: Resolution No. 68/165, “Right to the Truth,” United Nations General Assembly of December 18, 2013, para. 10 of the preamble; Resolution 2005/66, “Right to the Truth,” former United Nations Commission on Human Rights, of April 20, 2005, paras. 8 and 12 of the preamble; Resolution No. 9/11 “Right to the truth,” Human Rights Council, para. 10 of the preamble; and Resolution AG/RES 2800 (XLIII-O/13), “Right to the truth,” OAS General Assembly, June 5, 2013, para. 1.

⁵⁰³ Resolution AG/RES. 2800 (XLIII-O/13), “Right to the Truth,” June 5, 2013, para. 1.

⁵⁰⁴ Judgment of March 18, 2004, File 2488-2002-HC/TC [Original in Spanish, free translation].

reasons for them.”⁵⁰⁵ In the same vein, the IACHR has declared that the right to the truth entails “the right of the victims and their family members to know the truth about the events that led to serious violations of human rights, and the right to know the identity of those who played a role in those violations.”⁵⁰⁶ The WGEID has held that “[t]he right to the truth in relation to enforced disappearances means the right to know about the progress and results of an investigation, the fate or the whereabouts of the disappeared persons, and the circumstances of the disappearances, and the identity of the perpetrator(s).”⁵⁰⁷

a. Right to the truth and state obligations

The right to the truth is closely related to the State’s obligation to: investigate enforced disappearances and extrajudicial executions, as well as any gross violation of human rights; prosecute and punish those responsible for these crimes; and provide reparation to the relatives of the victims. Thus, the right to the truth is closely associated with the general duty of the State to address gross human rights violations.⁵⁰⁸ In this sense, in systematizing the *corpus juris* on the issue, the OHCHR has concluded that “[t]he right to the truth is closely linked to the State’s duty to protect and guarantee human rights and to the State’s obligation to conduct effective investigations into gross human rights violations and serious violations of humanitarian law and to guarantee effective remedies and reparation.”⁵⁰⁹ For its part, the Committee against Torture,⁵¹⁰ the IACHR⁵¹¹ and the Inter-American Court⁵¹² have stated that the fulfillment of the right to the truth is a form of

⁵⁰⁵ *Study on the Right to the Truth*, E/CN.4/2006/91, Doc. Cit., para. 59.

⁵⁰⁶ *The Right to Truth in the Americas*, Doc. Cit., para. 70.

⁵⁰⁷ “General comment on the right to the truth in relation to enforced disappearance,” para. 1, in *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/16/48 of 26 January 2011, para. 39.

⁵⁰⁸ See, inter alia: *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* (Principle 1); Inter-American Commission on Human Rights, Report No. 136/99 of December 22, 1999, *Ignacio Ellacuría, S.J. et al.* (El Salvador), para. 221; and Inter-American Court of Human Rights, Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202.

⁵⁰⁹ *Study on the right to the truth*, E/CN.4/2006/91 of 9 January 2006, para. 56.

⁵¹⁰ *General Comment No. 3*, Doc. Cit. paras. 16 and 17.

⁵¹¹ *The Right to Truth in the Americas*, Doc. Cit., paras. 122 et seq.

⁵¹² See, inter alia: Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 118; and Judgment of 16 November 2009, *Case of González et al. (“Cotton Field”) v. Mexico*, Series C No. 205, para. 450.

reparation. In this context, it is worthwhile reminding that the Principles on Reparation states that “[v]erification of the facts and full and public disclosure of the truth [... and] [t]he search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed,”⁵¹³ constitute a form of reparation, in the form of satisfaction.

“The State’s main obligations under the right to the truth are mainly procedural and include: the obligation to investigate until the fate and the whereabouts of the person have been clarified; the obligation to have the results of these investigations communicated to the interested parties [...]; the obligation to provide full access to archives; and the obligation to provide full protection to witnesses, relatives, judges and other participants in any investigation.”

Working Group on Enforced or Involuntary Disappearances⁵¹⁴

The right to the truth, however, is an independent right, which the state has the duty to ensure. Therefore, the State’s legal duty to guarantee the right to the truth, as stated by the IACHR, “creates an obligation upon States to clarify and investigate the facts, prosecute and punish those responsible.”⁵¹⁵

The obligation to guarantee the right to the truth implies that the authorities must take certain measures and actions, and that they shall refrain from others. In this sense, the Inter-American Court has stated that “investigation must be conducted using all available legal means and it must be aimed at discovering the truth and at the pursuit, capture, prosecution and eventual punishment of all the masterminds and perpetrators of the facts.”⁵¹⁶ Furthermore, the Inter-American Court has stated that the guarantee of the right to the truth “requires from the State the procedural determination of the patterns of joint action and of all those who participated in various ways in said violations and their corresponding responsibilities.”⁵¹⁷ Similarly, the Inter-American Court has held that the State must ensure that relatives may

⁵¹³ Article 22 (b and c).

⁵¹⁴ “General Comment on the right to the truth in relation to enforced disappearance”, Doc. Cit., para. 5.

⁵¹⁵ *The Right to Truth in the Americas*, Doc. Cit., para. 70.

⁵¹⁶ Judgment of November 26, 2013, *Case of Osorio Rivera and Family Members v. Peru*, Series C No. 274, para. 178.

⁵¹⁷ Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 119.

“participate in procedural terms in the criminal investigation to establish the truth of the facts.”⁵¹⁸

Furthermore, as the IACHR⁵¹⁹ has noted, in upholding the duty to ensure the relatives’ right to the truth, States must:

- Adopt legislation that guarantees the right to the truth, and abolish provisions that, directly or indirectly, undermine or violate this right;
- Eliminate all legal and de facto obstacles that impede undertaking and/or pursuing the investigation and legal prosecution of human rights violations;
- Ensure that enforced disappearances and extrajudicial executions are investigated by independent and impartial authorities and/or the ordinary criminal courts, not military courts; and
- Ensure that relatives have access to “information in a State’s records that pertains to serious human rights violations, even if those records are held by security agencies or military or police units.”⁵²⁰

“[T]he two ‘amnesty laws’ as adopted by the Peruvian Congress in 1995, are in violation of the State’s obligations under the international Covenant on Civil and Political Rights. [...] [I]t is the obligation of the State to investigate violations of human rights. Furthermore, such laws deprive victims of such violations of their rights of knowing the truth as well as of their right to compensation. In addition, he considers that the adoption of such laws constitutes an interference with the judicial power entrusted in the courts.”
Special Rapporteur on the independence of judges and lawyers⁵²¹

In the same vein, the Committee on Enforced Disappearances (CED) has stated that the State’s domestic law must incorporate provisions that enshrine and protect the right to the truth.⁵²²

⁵¹⁸ Judgment of August 31, 2010, *Case of Rosendo Cantú et al. v. Mexico*, Series C No. 216, para. 176.

⁵¹⁹ *The Right to Truth in the Americas*, Doc. Cit.

⁵²⁰ *Ibid.*, para. 110.

⁵²¹ *Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy. Addendum: Report on the mission to Peru*, E/CN.4/1998/39/Add.1 of 19 February 1998, “V. Conclusions and Recommendations. Amnesty laws and impunity”, para. 1.

⁵²² *Concluding observations on the report submitted under Article 29, paragraph 1, of the Convention*, to: *Argentina*, CED/C/ARG/CO/1 of 12 December 2013, para. 35; *France*, CED/C/FRA/CO/1 of 8 May 2013, paras. 34 and 35; *Armenia*, on February

Amnesties and similar measures that prevent the investigation of gross human rights violations—as well as being incompatible with the State's obligation to prosecute and punish the perpetrators of these crimes⁵²³—are contrary to the State's obligation to guarantee the right to the truth. The WGEID,⁵²⁴ HRC,⁵²⁵ OHCHR,⁵²⁶ IACHR⁵²⁷ and the Inter-American Court⁵²⁸ have made declarations along this line. Therefore, States must refrain from adopting these kinds of amnesties and measures and/or, when appropriate, repeal them and leave them without legal effects.

b. Autonomy of the right to the truth

International case law and doctrine have stressed that the right to the truth is directly related to the rights to protection under the law, to an effective remedy, to an investigation, to not to be subjected to torture or inhuman acts, to the protection of the family, to the special protection for children, to information and to reparation. The Special Rapporteur on the independence of judges and lawyers has stated that “[i]n the implementation of the right to the truth, the right to justice plays a prominent part, since it ensures a knowledge of the facts through the action of the judicial authority, responsible for investigating, evaluating evidence and bringing those responsible to trial. The right to justice in turn implies the right to an effective remedy, which means the possibility of claiming rights before an impartial and independent tribunal established by law, while ensuring that perpetrators are tried and punished in the course of a fair trial, and it entails fair compensation for victims. So from the point of view of the right to

11, 2015, para. 27 (b); and *Netherlands*, CED/C/NLD/CO/1 of 10 April 2014, paras. 32 and 33.

⁵²³ In this respect see, International Commission of Jurists. *International Law and the Fight Against Impunity - Practitioners' Guide No. 7*, Doc. Cit., Chapter VIII: “Amnesties and Similar Measures”.

⁵²⁴ “General Comment on the right to the truth in relation to enforced disappearance,” Doc. Cit.

⁵²⁵ See, *inter alia*: Views of 19 July 1994, *Case Hugo Rodríguez v. Uruguay*, Communication No. 322/1988.

⁵²⁶ *Study on the right to the truth*, E/CN.4/2006/91 of 9 January 2006, para. 60.

⁵²⁷ See, *inter alia*: *The Right to Truth in the Americas*, Doc. Cit., paras. 22, 39 (3), 63 and 87 et seq.

⁵²⁸ See, *inter alia*: Judgment of March 14, 2001, *Case of Barrios Altos v. Peru*, Series C No. 75; Judgment of September 26, 2006, *Case of Almonacid Arellano et al. v. Chile*, Series C No. 154, paras. 112 and 114; Judgment of November 24, 2010, *Case of Gomes Lund et al. (“Araguaia Guerrillas”) v. Brazil*, Series C No. 219; and Judgment of 24 February 2011, *Case of Gelman v. Uruguay*, Series C No. 221.

justice, truth is both a requisite for determining responsibilities and the first step in the process of reparation. Due legal process is the means of attaining the lofty values of truth and justice. From this point of view, the independent and impartial administration of justice is an extremely valuable tool for achieving the right to the truth.⁵²⁹

"The right to the truth about gross human rights violations and serious violations of humanitarian law is an inalienable and autonomous right, recognized in several international treaties and instruments as well as by national, regional and international jurisprudence and numerous resolutions of intergovernmental bodies at the universal and regional levels."

UN High Commissioner for Human Rights⁵³⁰

Initially, the IACHR based the right to the truth on the rights to legal protection and to information.⁵³¹ The Inter-American Court has considered that "the right to the truth of the relatives of victims of serious human rights violations is framed within the right to access to justice"⁵³² (articles 8 and 25 of the American Convention on Human Rights). For its part, the HRC has linked the right to the truth to the right to an effective remedy and reparation.⁵³³

However, as the result of the evolution of case law and legislation, international law has recognized the right to the truth as an autonomous right. As such, in its first report in 1981, the WGEID reaffirmed the autonomous nature of the right to the truth for

⁵²⁹ Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, E/CN.4/2006/52 of 23 January 2006, para. 17.

⁵³⁰ *Study on the right to the truth, Report of the Office of the United Nations High Commissioner for Human Rights*, E/CN.4/2006/91 of 9 January 2006, para. 55.

⁵³¹ Report No. 1/99 of January 27, 1999, Case 10.480, *Lucio Parada Cea et al.*, paras. 148 et seq.

⁵³² Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 118. In the same vein see, inter alia: Judgment of March 14, 2001, *Case of Barrios Altos v. Peru*, Series C No. 75, para. 48; and Judgment of 29 November 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 222.

⁵³³ See, *inter alia*: Views of 17 March 2011, Communication No. 1458/2006, *González v. Argentina*; Views of 29 October 2014, Communication No. 2031/2011, *Ram Kumar Bhandari v. Nepal*; Views of 25 March 2015, Communication No. 2054/2011, *Ernazarov v. Kyrgyzstan*; Views of 30 October 2008, Communication No. 1275/2004, *Umetaliev and Tashtanbekova v. Kyrgyzstan*; Views of 30 October 2014, Communication No. 2083/2011, *Kroumi v. Algeria*; and Views of 28 October 2014, Communication No. 1966/2010, *Hero v. Bosnia and Herzegovina*.

relatives of the victims of enforced disappearance.⁵³⁴ The OHCHR⁵³⁵ and the IACHR⁵³⁶ have also upheld the autonomous nature of the right to the truth. The *Principles against Impunity*,⁵³⁷ *Principles on Reparation*,⁵³⁸ and ICPEd⁵³⁹ and resolutions by intergovernmental bodies⁵⁴⁰ have confirmed the autonomous nature of the right to the truth.

“Every society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future. Moreover, the family members of the victims are entitled to information as to on what happened to their relatives. Such access to the truth presupposes freedom of speech, which of course should be exercised responsibly; the establishment of investigating committees whose membership and authority must be determined in accordance with the internal legislation of each country, or the provision of the necessary resources, so that the judiciary itself may undertake whatever investigations may be necessary. [...] The Commission considers that the observance of the principles cited above will bring about justice rather than vengeance, and thus neither the urgent need for national reconciliation nor the consolidation of democratic government will be jeopardized.”

Inter-American Commission on Human Rights⁵⁴¹

⁵³⁴ *First Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/1435, of January 22, 1981, para. 187. See also, among others; Reports: E/CN.4/1492 of December 31, 1981, para. 5; E/CN.4/1984/21 of 9 December 1983, para. 171; E/CN.4/2006/56 of 27 December 2005; and A/HRC/16/48 of 26 January 2011 (“General Comment on the right to the truth in relation to enforced disappearance”), para. 39, p. 13 et seq.).

⁵³⁵ *Study on the right to the truth, Report of the Office of the United Nations High Commissioner for Human Rights*, E/CN.4/2006/91 of 9 January 2006, para. 50; and *Right to the Truth, Report of the Office of the High Commissioner for Human Rights*, A/HRC/5/7 of 7 June 2007, para. 85.

⁵³⁶ See, inter alia: Report No. 1/99, of January 27, 1999, Case No. 10.480, *Lucio Parada Cea et al. (El Salvador)*, paras. 147-154.

⁵³⁷ Principle 4.

⁵³⁸ Article 24.

⁵³⁹ Paragraph 8 of the Preamble and article 24 (2).

⁵⁴⁰ See, inter alia: Resolution No. 65/196 of 21 December 2010 and No. 68/195 of 18 December 2013 of the United Nations General Assembly; Resolutions No. 9/11 and 12/12 of the United Nations Human Rights Council; and Resolution No. AG/RES. 2175 (XXXVI-O/06), AG/RES. 2267 (XXXVII-O/07), AG/RES. 2406 (XXXVIII-O/08), AG/RES. 2509 (XXXIX-O/09), AG/RES. 2595 (XL-O/10), AG/RES. 2662 (XLI-O/11) and AG/RES. 2725 (XLII-O/12) of the OAS General Assembly.

⁵⁴¹ *Annual Report of the Inter-American Commission on Human Rights: 1985-1986*, OEA/Ser.L/V/II.68, Doc. 8 rev. 1 September 28, 1986, Chapter V.

In this context, the *Principles against Impunity* states that “[i]rrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate.”⁵⁴² In this regard the Constitutional Tribunal of Peru has considered that “although the right to the truth entails other fundamental rights, such as life, liberty and personal security, among others, it has a standalone configuration, its own quality, which distinguishes it from the other fundamental rights to which it is linked, both because of the object protected, and the telos which its recognition aims to achieve.”⁵⁴³

c. An inalienable and imprescriptible right

The *Principles against Impunity* has characterized the right to the truth as an “inalienable right”⁵⁴⁴ and an “imprescriptible right to know the truth about the circumstances in which violations took place.”⁵⁴⁵ In this regard, the Special Rapporteur on the independence of judges and lawyers, has said that “[t]he importance of the effects implied by this right [to truth] and the fundamental nature of the rights affected, such as the right to life or to physical and moral integrity, give it its qualities of being inalienable, as well as non-derogable and imprescriptible.”⁵⁴⁶ In systematizing the *corpus juris* on the right to the truth, the OHCHR has concluded that this right is inalienable.⁵⁴⁷

The OHCHR has stated that given “its inalienable nature and its close relationship with other non-derogable rights, such as the right not to be subjected to torture and ill-treatment, the right to the truth should be treated as a non-derogable right. Amnesties or similar measures and restrictions to the right to seek information must never be used to limit, deny or impair the right to the truth. The right to the truth is intimately linked with the States’

⁵⁴² Principle 4.

⁵⁴³ Judgment of March 18, 2004, File No. 2488-2002-HC/TC, Piura, *Case Genaro Villegas Namuche*, paragraph 14 of the Fundamentals [Original in Spanish, free translation].

⁵⁴⁴ Principle 1.

⁵⁴⁵ Principle 4.

⁵⁴⁶ “Administration of justice and the right to the truth”, in *Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despou*, E/CN.4/2006/52 of 23 January 2006, para. 62.

⁵⁴⁷ *Study on the right to the truth*, E/CN.4/2006/91, Doc. Cit., para. 50.

obligation to fight and eradicate impunity."⁵⁴⁸ National courts have upheld the inalienable nature of the right to the truth.⁵⁴⁹

"Knowledge of the circumstances in which human rights violations were committed and, in case of death or disappearance, the fate that befell the victim, is, by its very nature, imprescriptible. Even if a long time has elapsed since the date when the crime was committed, persons directly or indirectly affected by a crime of that magnitude are always entitled to know who the mastermind was, when and where it was perpetrated, how it happened, why it took place, where the remains are, among other things."

Constitutional Tribunal of Peru⁵⁵⁰

This characterization as an inalienable and imprescriptible right is of vital importance to distinguish the right to the truth from the right to information, since these are two different rights.⁵⁵¹ In this regard, the WGEID has stated that "[t]he right to the truth in relation to enforced disappearances should be clearly distinguished from the right to information, and in particular the right of the relatives or other persons with a legitimate interest, their representatives or their legal counsel, to obtain information on a person who is deprived of his liberty. The right to information on the person detained, together with the non-derogable right of habeas corpus, should be considered central tools to prevent the occurrence of enforced disappearances."⁵⁵² Although the right to request information might be critical to the realization of the right to the truth, both are separate and independent rights, since the right to freedom of information may be restricted for certain reasons under international law⁵⁵³—except in cases of habeas corpus—while the right to the truth, given its inalienable nature

⁵⁴⁸ *Study on the right to the truth*, E/CN.4/2006/91, Doc. Cit., para. 60.

⁵⁴⁹ See, among others: Peru, Constitutional Tribunal, Judgment of March 18, 2004, File No. 2488-2002-HC/TC, Piura, *Case Genaro Villegas Namuche*; Colombia, Constitutional Court, Judgment C-370/06 of 18 May 2006; El Salvador, Supreme Court of Justice, Constitutional Chamber, Judgment 665-2010 of February 5, 2014; and Argentina, National Court for Federal Criminal and Correctional Matters, Case *María Elena Amadio*, Rol 07/04-P.

⁵⁵⁰ Judgment of March 18, 2004, File 2488-2002-HC/TC. Doc. Cit. [Original in Spanish, free translation].

⁵⁵¹ *Study on the right to the truth*, E/CN.4/2006/91, Doc. Cit., para. 43.

⁵⁵² "General Comment on the right to the truth in relation to enforced disappearance," Doc. Cit., para. 2.

⁵⁵³ *Study on the right to the truth*, E/CN.4/2006/91, Doc. Cit., para. 43.

and the scope of its application, may not be suspended under any circumstances.⁵⁵⁴

d. An individual and collective right

As with relatives' rights, the right to the truth has a collective dimension, as stipulated in the *Principles against Impunity*,⁵⁵⁵ the resolutions of the OAS General Assembly,⁵⁵⁶ and international human rights doctrine and case law.⁵⁵⁷

"[The right of the next of kin of victims to know what happened and the identity of the State agents responsible for the respective facts [...] benefits not only the next of kin of the victims, but also society as a whole, because, by knowing the truth about such crimes, it can prevent them in the future."

Inter-American Court of Human Rights⁵⁵⁸

Along this line, the OHCHR has concluded that "[t]he right to the truth also has a societal dimension: society has the right to know the truth about past events concerning the perpetration of heinous crimes, as well as the circumstances and the reasons for which aberrant crimes came to be committed, so that such events do not reoccur in the future."⁵⁵⁹ In this regard, the OHCHR has stated that, in its collective dimension, the right to the truth "is closely linked to the rule of law and the principles of transparency, accountability

⁵⁵⁴ *Ibid.*, para. 44.

⁵⁵⁵ Principles 2 and 3.

⁵⁵⁶ See, *inter alia*, Resolution AG/RES. 2800 (XLIII-O/13), "Right to the Truth," of June 5, 2013, para. 1.

⁵⁵⁷ See, *inter alia*: Inter-American Commission on Human Rights, Report No. 136/99 of December 22, 1999, Case 10.488, *Ignacio Ellacuría et al. (El Salvador)*, para. 224. See also: Inter-American Court of Human Rights: Judgment of 22 September 2009, *Case of Anzaldo Castro v. Peru*, Series C No. 2002, para. 119; Judgment of 25 October 2012, *Case of the Massacres of El Mozote and nearby places v. El Salvador*, Series C No. 252, para. 298; Judgment of January 31, 2006, *Case of the Pueblo Bello Massacre v. Colombia*, Series C No. 140; Judgment of July 4, 2006, *Case of Ximenes Lopes v. Brazil*, Series C No. 149; Judgment of September 22, 2006, *Case of Goiburú et al. v. Paraguay*, Series C No. 153; Judgment of 24 November 2010, *Case of Gomes Lund et al. ("Araguaia Guerrillas") v. Brazil*, Series C No. 219; Judgment of February 24, 2011, *Case of Gelman v. Uruguay*, Series C No. 221; and Judgment of August 31, 2011, *Case of Contreras et al. v. El Salvador*, Series C No. 232. Working Group on Enforced or Involuntary Disappearances, "General Comment on the right to the truth in relation to enforced disappearance," Doc. Cit.

⁵⁵⁸ Judgment of July 5, 2004, *Case of the 19 Merchants v. Colombia*, Series C No. 109, paras. 258 and 259.

⁵⁵⁹ *Study on the right to the truth*, E/CN.4/2006/91, Doc. Cit., para. 58.

and good governance in a democratic society. Together with justice, memory and reparation, it constitutes one of the mainstays of action to combat impunity for grave human rights violations and breaches of international humanitarian law.”⁵⁶⁰ In this regard Louis Joinet, the independent expert appointed to develop the *Principles against Impunity*, noted that “[t]his is not simply the right of any individual victim or closely related persons to know what happened, a right to the truth. The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a ‘duty to remember,’ which the State must assume, in order to guard against the perversions of history that go under the names of revisionism or negationism; the knowledge of the oppression it has lived through is part of a people's national heritage and as such must be preserved. These, then, are the main objectives of the right to know as a collective right.”⁵⁶¹

“The Nation has the right to know the truth about unfair and painful incidents or events caused by multiple forms of state and non-state violence. [...] The right to the truth is, in that sense, a collective, inalienable legal right.”

Constitutional Tribunal of Peru⁵⁶²

The Inter-American Court has held that “every person, including the next of kin of the victims of grave violations of human rights, has the right to the truth. Therefore, the next of kin of the victims and society as a whole must be informed of everything that has happened in connection with said violations.”⁵⁶³ Furthermore, the Court has upheld “the right to know the truth represents a necessary effect for it is important that a society knows the truth about the facts of gross human rights violations. This is also a fair expectation that the State is required to satisfy, on the one hand, by means of the obligation to investigative human rights violations

⁵⁶⁰ *Right to the truth. Report of the Office of the High Commissioner for Human Rights*, A/HRC/5/7 of 7 June 2007, para. 83.

⁵⁶¹ *Question of the impunity of perpetrators of human rights violations (civil and political). Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119*. E/CN.4/Sub.2/1997/20/Rev.1 of 2 October 1997, para. 17.

⁵⁶² Judgment of March 18, 2004, File No. 2488-2002-HC/TC, Piura, *Case Genaro Villegas Namuche*, paragraphs 8 and 9 of the Fundamentals [Original in Spanish, free translation].

⁵⁶³ Judgment of November 25, 2003, *Case of Myrna Mack Chang v. Guatemala*, Series C No. 101, para. 274.

and, on the other hand, by the public dissemination of the results of the criminal and investigative procedures.”⁵⁶⁴

The IACHR has held that “[e]very society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future.”⁵⁶⁵

3. The Right to Know the Victim’s Fate or Whereabouts

In cases of enforced disappearance, secret extrajudicial execution and secret burial, the right to the truth has a special dimension: to know the fate and whereabouts of the victim.⁵⁶⁶

“The State party [Peru] should redouble its efforts to ensure that the serious human rights violations perpetrated during the armed conflict between 1980 and 2000, including those involving sexual violence, do not go unpunished. [...] [And it] should take appropriate measures to expedite the judicial investigations and the process of exhuming, identifying and returning remains to the next of kin of the victims.”

Human Rights Committee⁵⁶⁷

This aspect of the right to the truth is rooted in article 32 of the *Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts* (Protocol I) and it constitutes a “general principle” of international humanitarian law,⁵⁶⁸ according to which, families have the fundamental right to know the fate of their loved ones. The International Committee of the Red Cross has concluded that the obligation of the parties to the conflict to take all feasible steps to identify the fate of persons missing as a result of armed conflict, and to inform the relatives of all the information in this regard, is a

⁵⁶⁴ Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 2002, para. 119.

⁵⁶⁵ *Annual Report of the Inter-American Commission on Human Rights 1985-1986*, OEA/Ser.L/V/II.68, Doc. 8 rev. 1 of 28 September 1986, p. 205.

⁵⁶⁶ Article 24 (2) of the *International Convention for the Protection of All Persons from Enforced Disappearance* and Principle 4 of the *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*.

⁵⁶⁷ *Concluding observations on the fifth periodic report of Peru, adopted by the Committee at its 107th session (11 to 28 March 2013)*, CCPR/C/PER/CO/5 of 29 April 2013, para. 11.

⁵⁶⁸ This norm’s nature as a “general principle” was reiterated and upheld by the 25th International Conference of the Red Cross and Red Crescent (1986) in Resolution 13.

rule of customary international law that is applicable both to international and internal armed conflicts.⁵⁶⁹

"[T]he continued deprivation of the truth regarding the fate of a disappeared person constitutes cruel, inhumane and degrading treatment against close next of kin. It is clear, for this Tribunal, the connection of the next-of-kin's suffering with the violation of the right to truth [...] which enlightened the complexity of the forced disappearance and the multiple effects it produced."

Inter-American Court of Human Rights⁵⁷⁰

The HRC,⁵⁷¹ WGEID,⁵⁷² IACHR⁵⁷³ and Inter-American Court⁵⁷⁴ have unanimously concluded that the denial of information about the fate or whereabouts of a disappeared person or the place of burial of victims of extrajudicial execution, constitutes a form of cruel and inhuman treatment for the relatives. In this regard, the

⁵⁶⁹ Rule 117, in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, International Committee of the Red Cross, Cambridge University Press, 2009, p. 421.

⁵⁷⁰ Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 113.

⁵⁷¹ See, *inter alia*: Views of: July 21, 1983, Communication No. 107/1981, *Case María del Carmen Almeida de Quinteros v. Uruguay*; March 25, 1996, Communication No. 542/1993, *Case Katombe L. Tshishimbi v. Zaire*; March 25, 1996, Communication No. 540/1996, *Case of Ana Rosario Celis Laureano v. Peru*; July 16, 2003, Communication No. 950/2000, *Case Jegatheeswara Sarma v. Sri Lanka*; March 26, 2006, Communication No. 1159/2003, *Case Sankara et al. v. Burkina Faso*; April 3, 2003, Communication No. 887/1999, *Case Lyashkevich v. Belarus*; 30 March 2005, Communication No. 973/2001, *Case Khalilova v. Tajikistan*; November 16, 2005, Communication No. 985/2001, *Case Valichon Aliboev v. Tajikistan*; and April 3, 2003, Communication No. 887/1999, *Case Mariya Staselovich v. Belarus*.

⁵⁷² See, *inter alia*: reports of the Working Group E/CN.4/1984/21, para. 172; E/CN.4/1985/15, para. 291; E/CN.4/1990/13, para. 339; and "General Comment on article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance," E/CN.4/1998/43, para. 72.

⁵⁷³ See, *inter alia*: *Annual Report of the Inter-American Commission on Human Rights, 1977*, OEA/Ser.L/V/II.43, Doc. 21, corr. 1, of April 20, 1978; *Annual Report of the Inter-American Commission on Human Rights, 1978*, OEA/Ser.L/II.47, Doc. 13 rev., of June 29, 1979; *Report on the situation of human rights in Argentina, 1980*, OEA/Ser.L/V/II/49, Doc. 19, p. 59; *Annual Report of the Inter-American Commission on Human Rights 1980-1981*, OEA/Ser.L/V/ II.54, Doc. 9 rev. 1 of 16 October 1981; *Annual Report of the Inter-American Commission on Human Rights 1985-1986*, OEA/Ser.L/V/II.68, Doc. 8 rev. 1, p. 205 of September 26, 1986.

⁵⁷⁴ See, *inter alia*: Judgment of November 22, 2005, *Case of Gómez Palomino v. Peru*, Series C No. 136; Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202; and Judgment of 29 November 2006, *Case of La Cantuta v. Peru*, Series C No. 162.

Declaration on the Protection of All Persons from Enforced Disappearance (DED) expressly states that “[a]ny act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families.”⁵⁷⁵

Thus, the WGEID has stated that “the right of the relatives to know the truth of the fate and whereabouts of the disappeared persons is an absolute right, not subject to any limitation or derogation. No legitimate aim, or exceptional circumstances, may be invoked by the State to restrict this right. This absolute character also results from the fact that the enforced disappearance causes ‘anguish and sorrow’ [...] suffering that reaches the threshold of torture, [...] [Therefore] the State cannot restrict the right to know the truth about the fate and the whereabouts of the disappeared as such restriction only adds to, and prolongs, the continuous torture inflicted upon the relatives.”⁵⁷⁶

In this context, the *Principles against Impunity* describe this right as an “inalienable right.”⁵⁷⁷ This is directly related to the State’s obligation to investigate and clarify the fate and/or whereabouts of the disappeared or executed person.⁵⁷⁸ Along the same line, the CED has stated that “it is a standing obligation of the State party [...] to establish the truth regarding the circumstances of enforced.”⁵⁷⁹ For its part, the IACHR has noted that “the family members of the victims are entitled to information as to on what happened to their relatives.”⁵⁸⁰

⁵⁷⁵ Article 1 (2).

⁵⁷⁶ “General Comment on the right to the truth in relation to enforced disappearance”, Doc. Cit. para. 4.

⁵⁷⁷ Principle 4.

⁵⁷⁸ See, *inter alia*: Inter-American Court of Human Rights, Judgment of 26 November 2013, *Case of Osorio Rivera and Family Members v. Peru*, Series C No. 274, para. 179; Working Group on Enforced or Involuntary Disappearances, “General Comment on the right to the truth in relation to enforced disappearance”, Doc. Cit. para. 4; and the Committee on Enforced Disappearances, *Concluding Observations to Argentina*, CED/C/ARG/CO/1 of 12 December 2013, para. 17; *Armenia*, on February 11, 2015, para. 15; *Paraguay*, CED/C/PRY/CO /1 of 24 September 2014, para. 18; *Spain*, CED/C/ESP/CO/1 of 12 December 2013, para. 12; and *Mexico*, on February 11, 2015, para. 28.

⁵⁷⁹ *Concluding observations on the report submitted by Argentina under Article 29, paragraph 1, of the Convention*, CED/C/ARG/CO/1 of 12 December 2013, para. 34.

⁵⁸⁰ *Annual Report of the Inter-American Commission on Human Rights: 1985-1986*, OEA/Ser.L/V/II.68, Doc. 8 rev. 1 September 28, 1986, Chapter V.

"The right to know the truth about the fate and the whereabouts includes, when the disappeared person is found to be dead, the right of the family to have the remains of their loved one returned to them, and to dispose of those remains according to their own tradition, religion or culture. The remains of the person should be clearly and indisputably identified, including through DNA analysis. The State, or any other authority, should not undertake the process of identification of the remains, and should not dispose of those remains, without the full participation of the family and without fully informing the general public of such measures. States ought to take the necessary steps to use forensic expertise and scientific methods of identification to the maximum of its available resources, including through international assistance and cooperation."

Working Group on Enforced or Involuntary Disappearances⁵⁸¹

Although, when there is an ongoing criminal investigation, certain aspects may not be disclosed (see Chapter IV: "The Right to Investigation"), the WGEID has stated that this limitation "must be strictly proportionate to the only legitimate aim: to avoid jeopardizing an ongoing criminal investigation. A refusal to provide any information, or to communicate with the relatives at all, in other words a blanket refusal, is a violation of the right to the truth."⁵⁸²

4. The Right to the Truth and appropriation of children

In cases of "abduction" and/or "appropriation" of children who are taken away from parents who are the victims of enforced disappearance, the right to the truth also entails the children's right to know their true identity⁵⁸³ and the right of the relatives to know their fate and whereabouts.⁵⁸⁴ This serious criminal

⁵⁸¹ "General Comment on the right to the truth in relation to enforced disappearance", Doc. Cit. para. 6.

⁵⁸² *Ibid.*, para. 3.

⁵⁸³ Inter-American Court of Human Rights, Judgment of February 24, 2011, *Case of Gelman v. Uruguay*, Series C No. 221; Judgment of August 31, 2011, *Case of Contreras et al. v. El Salvador*, Series C No. 232; and Judgment of March 1, 2005, *Case of the Serrano Cruz Sisters v. El Salvador*, Series C No. 120. See also: Working Group on Enforced or Involuntary Disappearances, "General comment on the right to the truth in relation to enforced disappearance," Doc. Cit.; *General comment on children and enforced disappearances, adopted by the Working Group on Enforced or Involuntary Disappearances at its 98th session (October 31 to November 9, 2012)*, A/HRC/WGEID/98/1 of 14 February 2013. Also see Article 25 of the *International Convention for the Protection of All Persons from Enforced Disappearance*.

⁵⁸⁴ *General comment on children and enforced disappearances*, Doc. Cit., para. 23.

practice⁵⁸⁵ applies to various situations. These include the “abduction” of children born during the captivity of a disappeared woman, or cases in which the child is disappeared with the parents and then “appropriated” or given up for “adoption” under another identity.⁵⁸⁶

“[M]any of the disappeared children were registered under false information or had their personal data altered. The effects of this are twofold: on the one hand, for the children whom were appropriated, it makes it impossible to find their family and learn their biological identity—and in some cases their own nationality—and, on the other, for the family of origin, whom are prevented from exercising the legal remedies to re-establish the child’s biological identity and the family ties and end the deprivation of liberty. That situation only ceases when the truth about the identity is revealed and the child victims are guaranteed the legal and real possibility of re-establishing their true identity and, where appropriate, the family ties, with the pertinent legal consequences.”

Working Group on Enforced or Involuntary Disappearances⁵⁸⁷

In this regard, the ICPED protects “their right [of child victims of such practices] to preserve, or to have reestablished, their identity, including their nationality, name and family relations as recognized by law.”⁵⁸⁸ Also, the *Convention on the Rights of the Child* protects “the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference,”⁵⁸⁹ as well as the right of children not to be separated from their parents, and when this takes place at the order of a state authority, the parents have the right to be informed of the child’s whereabouts.⁵⁹⁰

The Inter-American Juridical Committee has stated that the “right to identity is consubstantial to the attributes and human dignity. [...] [I]t is a fundamental human right *erga omnes* as an expression of a collective interest of the overall international

⁵⁸⁵ Article 20 (1 and 3) of the *Declaration on the Protection of All Persons from Enforced Disappearance* and article 25 (1) of the *International Convention for the Protection of All Persons from Enforced Disappearance*.

⁵⁸⁶ See in this respect: *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction - Practitioners’ Guide Series No. 9*, ICJ, Geneva, 2015.

⁵⁸⁷ *General comment on children and enforced disappearances*, Doc. Cit., para. 16.

⁵⁸⁸ Article 25 (4).

⁵⁸⁹ Article 8.

⁵⁹⁰ Article 9.

community that does not admit derogation or suspension in cases provided in the American Convention on Human Rights."⁵⁹¹

"[T]he abduction of children by State agents in order for them to be illegitimately delivered and raised by another family, modifying their identity and without informing their biological family about their whereabouts, [...] constitutes a complex act that involves a series of illegal actions and violations of rights to conceal the facts and impede the restoration of the relationship of the minors of age and their family members."

Inter-American Court of Human Rights⁵⁹²

The WGEID declared that "the families of the disappeared and the child have an absolute right to know the truth about the child's whereabouts."⁵⁹³ The WGEID has also stated that the right to the truth means that "the falsity of the adoption should be uncovered."⁵⁹⁴ In this context, the DED⁵⁹⁵ and the ICPED⁵⁹⁶ prescribe that States that recognize a system of adoption, or other form of placement or guardianship, must establish legal procedures to review the adoption, placement or guardianship proceedings for these children and, when appropriate, annul any adoption, placement or guardianship that originated with an enforced disappearance. However, both the DED and the ICPED make the best interests of the child the condition for the adoption of the child by the child's closest relatives. In this regard, the WGEID has stated that it "tries to ensure a balance [...]. This balance, taking into consideration the best interest of the child, does not prejudice the right to know the truth of the family of origin or the child's whereabouts."⁵⁹⁷

⁵⁹¹ "Opinion on the scope of the right to identity," Resolution CJI/doc. 276/07 rev. 1 of 10 August 2007, para. 12.

⁵⁹² Judgment of February 24, 2011, *Case of Gelman v. Uruguay*, Series C No. 221, para. 120.

⁵⁹³ *General comment on children and enforced disappearances*, Doc. Cit., para. 23.

⁵⁹⁴ "General Comment on the right to the truth in relation to enforced disappearance," Doc. Cit. para. 7.

⁵⁹⁵ Article 20 (2).

⁵⁹⁶ Article 25 (4).

⁵⁹⁷ "General Comment on the right to the truth in relation to enforced disappearance," Doc. Cit. para. 7.

CHAPTER VI: THE RIGHT TO REPARATION

"[R]eparations are not simply an exchange mechanism, something akin to either a crime insurance policy or an indemnification system that provides benefits to victims in the wake of a violation of their rights. In order for something to count as reparation, as a *justice* measure, it has to be accompanied by an acknowledgment of responsibility and it has to be linked, precisely, with truth, justice, and guarantees of non-recurrence [... and] recognizing the distinctive contribution that reparations can make to victims does not justify, either legally or morally, asking them –or anyone else—to trade off amongst the different justice initiatives. The effort, say, to make impunity for perpetrators more acceptable, by offering to victims 'generous' reparations, is therefore unacceptable."

Pablo de Greiff, Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence⁵⁹⁸

1. General Considerations

Relatives of disappeared and/or extrajudicially executed persons have the right to reparation. This right is closely linked to the State's obligation to make reparation.⁵⁹⁹ The *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* (Principles against Impunity) reminds about this specifically, providing that "[a]ny human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries."⁶⁰⁰

⁵⁹⁸ *Report by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, A/69/518 of 14 October 2014, para. 11.*

⁵⁹⁹ In this regard, see: International Commission of Jurists. *International Law and the Fight Against Impunity - Practitioners' Guide No. 7*, ICJ, Geneva, 2015, Chapters III and IV.

⁶⁰⁰ Principle 31.

However, it should be noted that fulfilling the right to reparation does not exonerate the State of its obligations to investigate, prosecute and punish those responsible, uncover the truth and protect the relatives. Thus, in terms of the obligation to investigate and guarantee the relatives' right to an investigation, as the Special Rapporteur on extrajudicial, summary or arbitrary executions (Rapporteur on Executions) has reminded: "[f]inancial or other compensation provided to the victims or their families before such investigations are initiated or concluded, however, does not exempt Governments from this obligation."⁶⁰¹

"The relatives, therefore, have the right to integral reparation, comprising compensation measures for serious damage caused, and measures of individual and community satisfaction and dignity, including acts of moral and symbolic reparation."

Ombudsman of Peru⁶⁰²

It should also be noted that the relatives' right to reparation is not the same as their right to protection and assistance (see Chapter VII: Protection of Relatives' Rights). The Working Group on Enforced or Involuntary Disappearances (WGEID) has emphasized this point in stating that: "measures intended to help relatives to cope with the consequences of the absence of the disappeared person are assimilated to measures of reparation. [...] Measures that provide for social assistance do not, however, prejudice the obligation of the State to provide reparation to victims as a consequence of the violation of their rights."⁶⁰³ The WGEID has also noted that the acceptance of such aid does not imply that the relatives waive their right to reparation.⁶⁰⁴

The right to reparation for relatives of disappeared and/or extrajudicially executed persons is explicitly enshrined in various

⁶⁰¹ *Report by the Special Rapporteur, Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights resolution 1993/71, E/CN.4/1994/7 of 7 December 1993, para. 711.*

⁶⁰² *La desaparición forzada de personas en el Perú (1980-1996)*, Serie Informes Defensoriales, Informe No. 55, Lima, January 2012, p. 23. [Original in Spanish, free translation.]

⁶⁰³ *Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/22/45 of 28 January 2013, para. 50.*

⁶⁰⁴ "General Comment on the right to recognition as a person before the law in the context of enforced disappearances," para. 9, *Report of the Working Group on Enforced or Involuntary Disappearances, HRC/19/58/Rev.1 of March 2, 2012.*

international instruments.⁶⁰⁵ Although the *International Covenant on Civil and Political Rights* (ICCPR) has no express provision on the right to reparation, and mentions it only in cases of arbitrary deprivation of liberty and judicial error,⁶⁰⁶ the Human Rights Committee (HRC) has stated that the obligation to make reparation derives from the general obligation to ensure an effective remedy⁶⁰⁷ and applies to all the rights protected by the Covenant.⁶⁰⁸ The HRC has stated that “[w]ithout reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, [...] is not discharged.”⁶⁰⁹ Also, while the *American Convention on Human Rights* (ACHR) refers to “fair compensation”⁶¹⁰ and “compensatory damages”⁶¹¹ in cases judged by the Inter-American Court of Human Rights (Inter-American Court), the Court has declared that the obligation to make reparation “embodies a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility. When an unlawful act occurs which can be attributed to a State, this gives rise immediately to its international responsibility for violating the international norm, with the consequent obligation to cause the consequences of the violation to cease and to repair the damage caused.”⁶¹² Along this line, the International Committee of the Red

⁶⁰⁵ *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 24); *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (art. 11); and *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* (Principle 20).

⁶⁰⁶ Articles 9 (5) and 14 (6).

⁶⁰⁷ Article 2 (3).

⁶⁰⁸ *General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13 of 26 May 2004, para. 16.

⁶⁰⁹ *Ibid.*

⁶¹⁰ Article 63 (1).

⁶¹¹ Article 68 (2).

⁶¹² Judgment of March 3, 2005, *Case of Huilca-Tecse v. Peru*, Series C No. 121, para. 87. In the same vein see, inter alia: Judgment of November 22, 2005, *Case of Gómez Palomino v. Peru*, Series C No. 136, para. 112; Judgment of April 6, 2006, *Case of Baldeón García v. Peru*, Series C No. 147, para. 175; Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 200; Judgment of July 10, 2007, *Case of Cantoral Huamaní and García Santa Cruz v. Peru*, Series C No. 167, para. 156; Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 170; Judgment of November 26, 2013, *Case of Osorio Rivera and Family Members v. Peru*, Series C No. 274, para. 235; and Judgment of April 17, 2015, *Case of Cruz Sánchez et al. v. Peru*, Series C No. 292, para. 451.

Cross (ICRC) has concluded that the State's obligation to make reparation for violations of international humanitarian law is "a norm of customary international law applicable in both international and non-international armed conflicts."⁶¹³

The WGEID has stated that "[t]he right to reparations is a well-established and basic human right, which is enshrined in universal and regional human rights treaties."⁶¹⁴ In turn, the Rapporteur on Executions has noted that "recognition of the right of victims or their families to receive adequate compensation is both a recognition of the State's responsibility for the acts of its organs and an expression of respect for the human being."⁶¹⁵

"[T]he issue of State responsibility comes into play when a State is in breach of the obligation to respect internationally recognized human rights. Such obligation has its legal basis in international agreements, in particular international human rights treaties, and/or in customary international law, in particular those norms of customary international law which have a peremptory character (*jus cogens*)."

Theo van Boven, Independent Expert on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms⁶¹⁶

Although international treaties and instruments put more emphasis on the obligation to make reparation rather than the right to reparation, international case law and doctrine have developed an extensive corpus juris on the latter. This body of law has been systematized and codified in the *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*⁶¹⁷ (Principles on Reparation). It is important to note, as stated expressly in the Preamble of this instrument, that these principles "do not entail

⁶¹³ Rule 50, in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, Doc. Cit., p. 537.

⁶¹⁴ *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/22/45 of 28 January 2013, para. 48.

⁶¹⁵ *Report by the Special Rapporteur, Mr. Bacre Waly Ndiaye*, Doc. Cit., para. 711.

⁶¹⁶ *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, E/CN.4/Sub.2/1993/8 of 2 July 1993, para. 41.

⁶¹⁷ Resolution No. 60/147 of the United Nations General Assembly, of December 16, 2005.

new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law.”⁶¹⁸

“Wherever violence erupts, many innocents are victimized. Ayacucho is no exception. Already steeped in misery due to poverty, disease and lack of opportunity, the Quechuan Indians, alienated from the rest of the nation, became caught in the vortex of the warring parties. Today, with so many husbands and sons dead or missing, traditionally large families have become destitute, living in pathetic conditions, without proper food or health care. The terror of which they have become the victims has left scars that will take generations to fade - if they ever do.”

Working Group on Enforced or Involuntary Disappearances⁶¹⁹

It should be noted that, in keeping with the *Principles on Reparation* and the *Principles against Impunity*,⁶²⁰ the *International Convention for the Protection of All Persons from Enforced Disappearance* (ICPED)⁶²¹ has provisions on the right to reparation. As the WGEID has noted, the ICPED is the first treaty to enshrine expressly the right to reparation.⁶²² In this context, the International Criminal Court has ruled that “the right to reparations is a well-established and basic human right, that is enshrined in universal and regional human rights treaties, and in other international instruments, including the UN Basic Principles [on Reparation].”⁶²³

The right to reparation for the relatives of disappeared and/or extrajudicially executed persons entails the State’s obligation to provide, in its domestic legislation, laws and procedures for this. In

⁶¹⁸ Preamble.

⁶¹⁹ *Report on the visit to Peru by two members of the Working Group on Enforced or Involuntary Disappearances (17 to 22 June 1985)*, E/CN.4/1986/18/Add.1. 8 January 1986, para. 112.

⁶²⁰ Principles 31-34.

⁶²¹ Article 24.

⁶²² *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/22/45 of January 28, 2013, para. 49.

⁶²³ Decision establishing the principles and procedures to be applied to reparations, August 7, 2012, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, para. 185.

this regard, the Committee on Enforced Disappearances (CED) has declared that States must ensure that their legal systems:⁶²⁴

- Contain a definition of the victim that is in accordance with what is set forth by the ICPED, and that includes the relatives as well as any person who has suffered direct harm as the result of an enforced disappearance, without requiring that this also be personal;
- Enshrine a system of integral reparation for all of the relatives, which includes prompt, fair and adequate compensation and measures of rehabilitation, satisfaction and guarantees of non-repetition;
- Not make the right to reparation contingent on the prior existence of criminal proceedings or rulings;
- Not make the right to reparation contingent on the existence of evidence of death of the missing person or statements of presumption of death, and,
- Not limit the right to reparation to disappearances that took place during a specific time period.

"It is sometimes contended that as a result of passage of time the need for reparations is outdated and therefore no longer pertinent. [...] [T]he application of statutory limitations often deprives victims of gross violations of human rights of the reparations that are due to them. The principle should prevail that claims relating to reparations for gross violations of human rights shall not be subject to a statute of limitations. In this connection, it should be taken into account that the effects of gross violations of human rights are linked to the most serious crimes to which, according to authoritative legal opinion, statutory limitations shall not apply. Moreover, it is well established that for many victims of gross violations of human rights, the passage of time has no attenuating effect; on the contrary, there is an increase in post-traumatic stress, requiring all necessary material, medical, psychological and social assistance and support over a long period of time."

Theo van Boven, Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms⁶²⁵

⁶²⁴ *Concluding observations to: Argentina*, CED/C/ARG/CO/1, of 12 December 2013, para. 35; *Uruguay*, CED/C/URY/CO/1, of May 8, 2013, para. 32; *Armenia*, of 11 February 2015, para. 25; *Spain*, CED/C/ESP/CO/1, of 12 December 2013, para. 30; *France*, CED/C/FRA/CO/1, of 8 May 2013, para. 35; *Netherlands*, CED/C/NLD/CO/1, of 10 April 2014, para. 33; *Paraguay*, CED/C/PRY/CO/1, of 24 September 2014, para. 26; and *Serbia*, of February 5, 2015, paras. 24 and 25.

For its part, the HRC has declared that States must ensure that their legal systems do not make the relatives' right to seek reparation contingent on securing a death certificate for the victim.⁶²⁶

An important aspect of the legal measures that States must ensure is the question of a statute of limitations on reparation, when this is sought through civil or administrative proceedings, rather than criminal proceedings. In this regard, the *Principles on Reparation* stipulates that "statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law,"⁶²⁷ such as enforced disappearance and extrajudicial execution. The *Principles against Impunity*, in turn, stipulates that "[w]hen it does apply, prescription shall not be effective against civil or administrative actions brought by victims seeking reparation."⁶²⁸

Although the *Declaration on the Protection of All Persons from Enforced Disappearance* (DED) only addresses the issue of statute of limitations in criminal cases,⁶²⁹ the WGEID "emphasizes the fact that, as civil responsibility of the State is generated by the seriousness of the crime of enforced disappearance, the passing of time should not be an obstacle for the progress of civil demands through the application of statutes of limitations."⁶³⁰ Along the same line, the Committee against Torture has maintained that "[o]n account of the continuous nature of the effects of torture, statutes of limitations should not be applicable as these deprive victims of the redress, compensation, and rehabilitation due to them. For many victims, passage of time does not attenuate the harm and in some cases the harm may increase. [...] States parties shall ensure that all victims of torture or ill-treatment, regardless of when the violation occurred or whether it was carried

⁶²⁵ *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, E/CN.4/Sub.2/1993/8 of 2 July 1993, para. 135.

⁶²⁶ Views of 28 October 2014, *Case Hero v. Bosnia and Herzegovina*, Communication No. 1966/2010, para. 11.

⁶²⁷ Article 6.

⁶²⁸ Principle 23. See also Principle 32.

⁶²⁹ Article 17 (2 and 3).

⁶³⁰ *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/22/45 of 28 January 2013, para. 58.

out by or with the acquiescence of a former regime, are able to access their rights to remedy and to obtain redress."⁶³¹ In addition, the CED has urged States to guarantee the right to reparation regardless of when the enforced disappearance was committed.⁶³²

Furthermore, in reference to the scope of the right to reparation, the *Principles against Impunity* reiterates the "inalienable" nature of the relatives' right to be informed of the fate and/or whereabouts of the disappeared person and, when death has occurred.⁶³³ In discussing the right to reparation, the WGEID has reiterated that it is "imprescriptible" in nature.⁶³⁴

The WGEID has stressed that it is important that reparation must take gender and cultural factors into account.⁶³⁵ In this sense, the WGEID has stated that "[r]eparation is particularly important for women victims, due to the fact they are often victims of enforced disappearance and gender-based violence. Reparation requires recognition of women's rights as equal citizens, acknowledgement of the harm suffered, as well as a concrete contribution towards the victim's recovery."⁶³⁶

"The State party should implement the recommendations of the Truth and Reconciliation Commission in order to halt the consequences of violence and break with the impunity of the past. With respect to reparations, the State party should pay due attention to gender aspects and to the most vulnerable groups, especially indigenous peoples, who have borne the brunt of the violations."

Committee against Torture⁶³⁷

Whereas the right to compensation for the relatives originates in the commission of an illegal act -that is, the enforced

⁶³¹ *General Comment No. 3 (2012): Application of Article 14 by States parties*, para. 40.

⁶³² *Concluding observations on the report submitted by Paraguay under Article 29, paragraph 1, of the Convention*, CED/C/PRY/CO/1 of 24 September 2014, para. 26.

⁶³³ Principle 34.

⁶³⁴ *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/22/45 of 28 January 2013, para. 54.

⁶³⁵ *Ibid.*, para. 67.

⁶³⁶ *General comment on women affected by enforced disappearances adopted by the Working Group on Enforced or Involuntary Disappearances at its ninety-eighth session (31 October – 9 November 2012)*, A/HRC/WGEID/98/2 of February 14, 2013, para. 39.

⁶³⁷ *Conclusions and recommendations of the Committee against Torture: Peru*, CAT/C/PER/CO/4, 25 July 2006, para. 21.

disappearance and/or extrajudicial execution of a loved one- and criminal proceedings might eventually lead to reparation, the realization of this right is not subordinate to or conditional upon the identification, prosecution and punishment of the perpetrators and other participants in the enforced disappearance and/or extrajudicial execution. In this sense, the *Principles on Reparation* provides that “[a] person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim,”⁶³⁸ and therefore is entitled to reparation, and that “[i]n cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.”⁶³⁹ The *Principles against Impunity*, in turn, stipulates that “[a]ny human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator.”⁶⁴⁰

The WGEID has stated that reparation must not be contingent on the determination of responsibility and criminal conviction of the perpetrators and other participants in the case of enforced disappearance.⁶⁴¹ In the same vein, the CED has urged States to guarantee the right to compensation for the relatives, regardless of whether the crime of enforced disappearance is criminally prosecuted.⁶⁴² For its part, the Inter-American Commission on Human Rights (IACHR) has stated that “[a]ccess to reparations for victims of crimes against humanity must never be subject exclusively to determination of the criminal liability of the perpetrators, or the prior disposal of their personal goods, licit or illicit.”⁶⁴³

⁶³⁸ Article 9.

⁶³⁹ Article 15.

⁶⁴⁰ Principle 31.

⁶⁴¹ *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/22/45 of 28 January 2013, para. 51; and *Report of the Working Group on Enforced or Involuntary Disappearances. Addendum: Mission to Mexico*, A/HRC/19/58/Add.2 of 20 December 2011, para. 109.

⁶⁴² *Concluding observations to: Spain*, CED/C/ESP/CO/1 of 12 December 2013, para. 30; and *Serbia*, of February 5, 2015, para. 26.

⁶⁴³ *Principal Guidelines for a Comprehensive Reparations Policy*, OEA/Ser/L/V/II.131 Doc. 1 of February 19, 2008, para. 2.

2. Concepts of Reparation and Damages

As the Inter-American Court has noted, “[r]eparations [...] consist of the measures intended to mitigate or eliminate the effects of the violations that have been committed”⁶⁴⁴ and “[t]heir nature and amount depend on the characteristics of the violation and, at the same time, on the pecuniary and non pecuniary damage caused.”⁶⁴⁵ The Court has also stated that “comprehensive reparation of the abridgment of a right protected by the Convention cannot be restricted to payment of compensation to the next of kin of the victim.”⁶⁴⁶ In the same vein, the WGEID has indicated that the right to compensation for relatives of disappeared persons is not limited to financial compensation and must entail measures of “reparation which may remove the consequences of the enforced disappearance”⁶⁴⁷, such as restitution, rehabilitation and satisfaction. The Committee against Torture has also stated that “[t]he comprehensive reparative concept therefore entails restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.”⁶⁴⁸

“Reparations is a generic term that covers all of the various ways a State can redress the international responsibility it has incurred (*restitutio in integrum*, indemnization, satisfaction, assurances of guarantees that the violations will not be repeated, and others).”
Inter-American Court of Human Rights⁶⁴⁹

⁶⁴⁴ Judgment of March 3, 2005, *Case of Huilca-Tecse v. Peru*, Series C No. 121, para. 89. In the same vein see, inter alia: Judgment of November 22, 2005, *Case of Gómez Palomino v. Peru*, Series C No. 136, para. 114.

⁶⁴⁵ Judgment of April 6, 2006, *Case of Baldeón García v. Peru*, Series C No. 147, para. 177. In the same vein see, inter alia: Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 202.

⁶⁴⁶ Judgment of September 15, 2005, *Case of the Mapiripán Massacre v. Colombia*, Series C No. 134, para. 214.

⁶⁴⁷ “General Comment on article 19 of the Declaration,” in *Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/1998/43 of 12 January 1998, para. 75. In the same vein see: *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/22/45 of 28 January 2013, para. 53.

⁶⁴⁸ *General Comment No. 3: Implementation of Article 14 by States parties*, para. 2.

⁶⁴⁹ Judgment of November 27, 1998, *Case of Castillo Páez v. Peru*, Series C No. 43, para. 48.

The *Principles against Impunity* requires that “[t]he right to reparation shall cover all injuries suffered by victims.”⁶⁵⁰ In this sense, when defining the concept of victim, the *Principles on Reparation* specifies that damages include physical or mental injury, emotional suffering, economic loss or substantial impairment of the victim’s fundamental rights.⁶⁵¹ The concept applies to any damage suffered by the relatives because of the enforced disappearance or extrajudicial execution of a loved one. Thus, it covers material and non-material damage. It also pertains to physical, mental, moral and economic damage. Material damage, as noted by the Inter-American Court refers to “the loss or impairment of the victims’ income [including family], the expenses incurred as a result of the facts and the monetary consequences thereof bearing a causal link to the facts”⁶⁵² of the enforced disappearance and/or extrajudicial execution. Non-pecuniary damages are those that are not financial in nature.⁶⁵³

“[N]on pecuniary damage can include the suffering and hardship caused to the direct victim and his next of kin, the harm of objects of value that are very significant to the individual, and also changes, of a non pecuniary nature, in the living conditions of the victim or his family.”

Inter-American Court of Human Rights⁶⁵⁴

In this regard, the Inter-American Court has stated that “[s]ince it is not possible to assign the non-pecuniary damage a precise monetary equivalent, it may only be compensated by the payment of a sum of money for the full reparation of the victim or the assignment of goods or services, [...] as well as the execution of acts or works of a public nature or repercussion, which have effects such as recovering the memory of the victims and commitment to the efforts to ensure that human rights violations do not happen again.”⁶⁵⁵

⁶⁵⁰ Principle 34.

⁶⁵¹ Article 8.

⁶⁵² Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 213.

⁶⁵³ *Ibid.*, para. 216.

⁶⁵⁴ Judgment of 10 July 2007, *Case of Cantoral Huamaní and García Santa Cruz v. Peru*, Series C No. 167, para. 175.

⁶⁵⁵ Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 218.

In this way, damage is not limited to that caused by the enforced disappearance and/or extrajudicial execution in themselves. The concept of damage also includes material and moral damage and all "substantial impairment of their fundamental rights"⁶⁵⁶ suffered by the relatives because of subsequent acts or omissions by the State concerning the enforced disappearance and/or extrajudicial execution. For example, the Inter-American Court has found that "victims of prolonged impunity suffer different infringements in their search for justice, not only materially, but also other suffering and damages of a psychological and physical nature and in their life projects, as well as other potential alterations to their social relations and to the dynamics of their families and communities. [...] [T]hese damages are intensified by the lack of support of the state authorities in an effective search and identification of the remains, and by the impossibility of properly honoring their dear ones. In view of this situation, the Court has considered the need to provide different types of reparation so as to fully redress the damages [...]."⁶⁵⁷

3. Types of Reparation

The *Principles on Reparation* stipulates that the right to reparation includes, according to "the circumstances of each case, [...] the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition."⁶⁵⁸ In the same vein, the ICPED prescribes that the right to reparation shall include "prompt, fair and adequate compensation,"⁶⁵⁹ as well as other measures such as restitution, rehabilitation, satisfaction and guarantees of non-repetition.⁶⁶⁰ Similarly, the *Principles against Impunity* states that "[t]he right to reparation shall cover all injuries suffered by victims; it shall include measures of restitution, compensation, rehabilitation, and satisfaction as provided by international law."⁶⁶¹

⁶⁵⁶ Article 8 of the *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*.

⁶⁵⁷ Judgment of November 24, 2009, *Case of the Las Dos Erres Massacre v. Guatemala*, Series C No. 211, para. 226.

⁶⁵⁸ Article 18.

⁶⁵⁹ Article 24 (4).

⁶⁶⁰ Article 24 (5).

⁶⁶¹ Principle 34.

These types of reparation are not mutually exclusive and usually they are cumulative. As stipulated in the *Principles on Reparation*, reparation should be “proportional to the gravity of the violations and the harm suffered”⁶⁶² and take into account “the circumstances of each case”⁶⁶³ in order to be “full and effective.”⁶⁶⁴ In this regard, in accordance with the specifics of each case, the type of violation and the damages caused, the Inter-American Court has stated that, in order to make comprehensive reparation, different types of reparation should be granted, such as financial compensation, restitution, rehabilitation and satisfaction.⁶⁶⁵ In the same vein, the HRC has stated that, depending on the circumstances, in addition to compensation “reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.”⁶⁶⁶ For its part, the WGEID has declared that “financial compensation is not sufficient in itself and should be normally associated with other forms of reparation.”⁶⁶⁷ Thus, the WGEID has noted that “even if monetary compensation is provided for cases of enforced or involuntary disappearances, reparation must be comprehensive, which includes restitution, rehabilitation, satisfaction, and the restoration of dignity and reputation, as well as guarantees of non-repetition.”⁶⁶⁸

⁶⁶² Article 15.

⁶⁶³ Article 18.

⁶⁶⁴ *Ibid.*

⁶⁶⁵ Judgment of November 26, 2013, *Case of Osorio Rivera and Family Members v. Peru*, Series C No. 274, para. 236; Judgment of December 3, 2001, *Case of Cantoral Benavides v. Peru*, Series C No. 88, paras. 79-81; and Judgment of April 17, 2015, *Case of Cruz Sánchez et al. v. Peru*, Series C No. 292, para. 452.

⁶⁶⁶ *General Comment No. 31*, Doc. Cit., para. 16. Along this line, see the reparations ordered by the Human Rights Committee in its Views: of October 28, 2014, *Case Hero v. Bosnia and Herzegovina*, Communication No. 1966/2010, para. 11; of October 30, 2014, *Case Kroumi v. Algeria*, Communication No. 2083/2011, para. 10; and October 29, 2014, *Case Ram Kumar Bhandari v. Nepal*, Communication No. 2031/2011, para. 10.

⁶⁶⁷ *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/22/45 of 28 January 2013, para. 56.

⁶⁶⁸ *Report of the Working Group on Enforced or Involuntary Disappearances, Adición: Informe de seguimiento a las recomendaciones hechas por el Grupo de Trabajo sobre las misiones a Guatemala y Honduras*, A/HRC/16/48/Add.2 17 February 2011, para. 7 [Original in Spanish, free translation].

Even though guarantees of non-repetition are considered as measures of reparation - as indicated by the *Principles on Reparation*, ICPEd, and case law - the *Principles against Impunity*⁶⁶⁹, doctrine on transitional justice of the United Nations Secretary-General⁶⁷⁰ and the High Commissioner for Human Rights,⁶⁷¹ have addressed this issue separately from the right to reparation. The reports by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence⁶⁷² have also made observations in this sense. Along this line, the issue of guarantees of non-repetition are addressed in Chapter VIII of this Guide.

a. Restitution

Regarding this type of reparation (*restitutio in integrum*) the *Principles on Reparation* stipulates, in general, that "[r]estitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property."⁶⁷³

By definition, this type of reparation is not applicable in the case of extrajudicial execution, since it is impossible to bring the murdered

⁶⁶⁹ The principles addressing the issue of guarantees of non-repetition (Principles 35-38) are separate from the right to reparation (Principles 31-34).

⁶⁷⁰ See, *inter alia*: *The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General*, S/2004/616 of August 23, 2004; and *Uniting our strengths: Enhancing United Nations support for the rule of law. Report of the Secretary-General*, A/61/636-S/2006/980, of December 14, 2006.

⁶⁷¹ See, *inter alia*: *Study by the Office of the United Nations High Commissioner for Human Rights on human rights and transitional justice activities undertaken by the human rights components of the United Nations system*, E/CN.4/2006/93 of February 7, 2006; *Human rights and transitional justice. Report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/4/87 of 23 December 2006; and *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General. Analytical study of human rights and transitional justice*, A/HRC/12/18 of 6 August 2009.

⁶⁷² *Report by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, Pablo de Greiff, A/HRC/21/46 of August 9, 2012 and *Report by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, Pablo de Greiff, A/69/518 of 14 October 2014.

⁶⁷³ Article 19.

person back to life. However, it is applicable to the relatives, concerning the damages they have suffered. Often, as the result of stigmatization or retaliation for their fight for justice and truth, the relatives lose their jobs, are forced to leave their homes or lose their social security benefits when they are associated with the victim of extrajudicial execution.

In cases of enforced disappearance, restitution is one possible form of reparation and essentially it consists of restoring the freedom of the disappeared person who is returned alive and restored to society. Moreover, this is an obligation of the State, as declared in the ICPED that prescribes that “[e]ach State Party shall take all appropriate measures to search for, locate and release disappeared persons.”⁶⁷⁴ In this regard, the WGEID has stated that even in these events, “full restitution is normally not possible [...], owing to the irreversible nature of the harm, [and] other forms of reparation, such as compensation and rehabilitation, should complement restitution. [...] [E]ven when restitution is possible, reparation measures to return the victim to the status quo ante may need to remedy and address prior situations of discrimination and/or vulnerability.”⁶⁷⁵

Similarly, restitution measures are crucial in cases of “abduction” and/or “appropriation” of children who are taken from parents who are the victims of enforced disappearance. These measures consist essentially of the restoration of the child’s true biological identity and the ties to the biological family. In this regard, *the Convention on the Rights of the Child*,⁶⁷⁶ the ICPED⁶⁷⁷ and international jurisprudence⁶⁷⁸ reaffirm the right of children who are victims of this practice to preserve, understand and recover their true

⁶⁷⁴ Article 24 (3).

⁶⁷⁵ *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/22/45 of 28 January 2013, para. 55.

⁶⁷⁶ Articles 7 and 8.

⁶⁷⁷ Article 25 (4).

⁶⁷⁸ Inter-American Court of Human Rights: Judgment of 24 February 2011, *Case of Gelman v. Uruguay*, Series C No. 221; Judgment of August 31, 2011, *Case of Contreras et al. v. El Salvador*, Series C No. 232, and Judgment of March 1, 2005, *Case of the Serrano Cruz Sisters v. El Salvador*, Series C No. 120. Working Group on Enforced or Involuntary Disappearances: “General Comment on the right to truth regarding enforced disappearances,” A/HRC/16/48 of January 26, 2011; *General Comment on children and forced disappearances, adopted by the Working Group on Enforced or Involuntary Disappearances at its 98th session (October 31 to November 9, 2012)*, A/HRC/WGEID/98/1 of 14 February 2013.

identity, including nationality, name and family relations. In these cases, the WGEID has stated that restitution includes “recovery of identity”⁶⁷⁹ for the victim. Also, the WGEID has noted that “[i]n cases where children victims of enforced disappearance have had their identity altered, States should adopt measures to facilitate their subsequent obtention of proper documentation and pertinent corrections in all relevant registries.”⁶⁸⁰ The Inter-American Court⁶⁸¹ has made statements along the same line. The HRC, in turn, has considered that unjustified delays in establishing the true legal identity of the child and issuing the relevant identity documents constitute a violation of article 24 (2) of the ICCPR, “which is designed to promote recognition of the child's legal personality.”⁶⁸²

“[M]any of the disappeared children were registered under false information or had their personal data altered. The effects of this are twofold: on the one hand, for the children whom were appropriated, it makes it impossible to find their family and learn their biological identity—and in some cases their own nationality—and, on the other, for the family of origin, whom are prevented from exercising the legal remedies to re-establish the child’s biological identity and the family ties and end the deprivation of liberty. That situation only ceases when the truth about the identity is revealed and the child victims are guaranteed the legal and real possibility of re-establishing their true identity and, where appropriate, the family ties, with the pertinent legal consequences.”

Working Group on Enforced or Involuntary Disappearances⁶⁸³

This measure for restitution of identity may, as appropriate, entail the review and annulment of any adoption, placement or guardianship arrangement that originated as the result of an enforced disappearance, according to the DED⁶⁸⁴ and the ICPED.⁶⁸⁵

⁶⁷⁹ *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/22/45 of 28 January 2013, para. 55.

⁶⁸⁰ *General Comment on children and Enforced Disappearances*, adopted by the Working Group on Enforced or Involuntary Disappearances at its 98th session, Doc. Cit., para. 31.

⁶⁸¹ Judgment of August 31, 2011, *Case of Contreras et al. v. El Salvador*, Series C No. 232, para. 195.

⁶⁸² Views of 3 April 1995, *Case Mónaco de Gallicchio, on her behalf and on behalf of her granddaughter Ximena Vicario v. Argentina*, Communication No. 400/1990, para. 10.5.

⁶⁸³ *General Comment on children and Enforced Disappearances*, Doc. Cit., para. 16.

⁶⁸⁴ Article 20 (2).

⁶⁸⁵ Article 25 (4).

However, both the DED and the ICPED make this contingent on the best interests of the child, or the approval of the adopted child's next of kin. In this regard, the WGEID has stated that this "tries to ensure a balance. [...] This balance, taking into consideration the best interest of the child, does not prejudice the right to know the truth of the family of origin or the child's whereabouts."⁶⁸⁶ For its part, the CED has stated that the procedures to review adoption, placement or guardianship, must guarantee the right of children, if capable of forming his or her own views, to be heard and freely express these views.⁶⁸⁷

b. Compensation

The *Principles on Reparation* states, in general, that "[c]ompensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as: a) Physical or mental harm; b) Lost opportunities, including employment, education and social benefits; c) Material damages and loss of earnings, including loss of earning potential; d) Moral damage; e) Costs required for legal or expert assistance, medicine and medical services and psychological and social services."⁶⁸⁸ For its part, article 19 of the DPPED states that "[t]he victims of acts of enforced disappearance and their family [...] shall have the right to adequate compensation, [...] In the event of the death of the victim as a result of an act of enforced disappearance, their dependants shall also be entitled to compensation."

In this regard, the WGEID has emphasized that "compensation should be full and 'adequate,' namely, proportionate to the gravity of the human rights violation (such as the period of disappearance or the conditions of detention) and to the suffering of the victim and the family [...] and that] monetary compensation should be applied in a broad sense and must be given for any damage resulting from an enforced disappearance, such as physical or

⁶⁸⁶ "General Comment on the right to the truth in relation to enforced disappearances", Doc. Cit. para. 7.

⁶⁸⁷ *Concluding observations on the report under Article 29, paragraph 1, of the Convention*, to: *Uruguay*, CED/C/URY/CO/1, dated May 8, 2013, para. 36; *France*, CED/C/FRA/CO/1 of 8 May 2013, para. 37; and *Netherlands*, CED/C/NLD/CO/1 of 10 April 2014, para. 39.

⁶⁸⁸ Article 20.

mental harm, lost opportunities, material damages and loss of earnings, harm to reputation and costs required for legal or expert assistance."⁶⁸⁹ Also, with reference to the scope of article 19 of the DPPED, the WGEID has said that "[t]he right to adequate compensation for acts of enforced disappearance under [that standard] shall be distinguished from the right to compensation for arbitrary executions. In other words, the right of compensation in relation to an act of enforced disappearance shall not be made conditional on the death of the victim."⁶⁹⁰

c. Rehabilitation

Although it does not define rehabilitation, the *Principles on Reparation* states that this includes "medical and psychological care as well as legal and social services."⁶⁹¹ The DPPED, in turn, states that "victims of acts of enforced disappearance and their family [...] have the right to [...] the means for as complete a rehabilitation as possible."⁶⁹² The WGEID has noted that "[r]ehabilitation is an essential component of reparation. [...] The particular circumstances and needs of each victim must be taken into account when providing psychological or psychiatric treatment. The treatment may be individual, collective or a family one."⁶⁹³ This type of reparation also includes measures for vocational and social rehabilitation.

d. Satisfaction

The *Principles on Reparation* sets forth an illustrative list of measures of satisfaction, sometimes called symbolic reparation (see Annex V). Furthermore, international case law -particularly that of the Inter-American Court- has defined different types of satisfaction, which generally consist of non-pecuniary measures. Thus, for this type of reparation, the Inter-American Court has mentioned "performing acts or implementing projects with public recognition or repercussion, such as broadcasting a message that officially condemns the human rights violations in question and makes a commitment to efforts designed to ensure that it does not

⁶⁸⁹ *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/22/45 of 28 January 2013, paras. 57 and 58.

⁶⁹⁰ "General Comment on article 19 of the Declaration," Doc. Cit., para. 74.

⁶⁹¹ Article 21.

⁶⁹² Article 19.

⁶⁹³ *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/22/45 of 28 January 2013, paras. 59 and 60.

happen again. Such acts have the effect of restoring the memory of the victims, acknowledging their dignity, and consoling their next of kin."⁶⁹⁴

"[T]he search for the truth, including the obligation to investigate the facts and to identify, prosecute and, where appropriate, punish those responsible, is also a form of satisfaction for the victims."
Working Group on Enforced or Involuntary Disappearances⁶⁹⁵

One measure of satisfaction is "[a]n official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; [...] [And] [j]udicial and administrative sanctions against persons liable for the violations."⁶⁹⁶ In this regard, in cases of enforced disappearance and/or extrajudicial execution, the Inter-American Court has stated that although "a judgment constitutes per se a form of reparation,"⁶⁹⁷ the suffering inflicted on the relatives also requires other measures of reparation, such as compensation for non-pecuniary damages.⁶⁹⁸ For its part, among other measures of satisfaction, the WGEID has mentioned "a public apology, including acknowledgement of the facts and acceptance of responsibility, for instance through a public ceremony or act; and commemorations and tributes to the victims."⁶⁹⁹

Another kind of measure of satisfaction is the building of memorials. Both the Inter-American Court⁷⁰⁰ and the WGEID⁷⁰¹ have emphasized how these types of measures contribute to the

⁶⁹⁴ Judgment of March 3, 2005, *Case of Huilca-Tecse v. Peru*, Series C No. 121, para. 96.

⁶⁹⁵ *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/22/45 of 28 January 2013, para. 62.

⁶⁹⁶ Article 22 (d) and (f) of the *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*.

⁶⁹⁷ Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 219.

⁶⁹⁸ *Ibid.* See also, *inter alia*: Judgment of March 3, 2005, *Case of Huilca-Tecse v. Peru*, Series C No. 121, para. 97.

⁶⁹⁹ *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/22/45 of January 28, 2013, para. 63.

⁷⁰⁰ See, *inter alia*: Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 236; Judgment of July 5, 2004, *Case of the 19 Tradesmen v. Colombia*, Series C No. 109, para. 273; Judgment of January 31, 2006, *Case of the Pueblo Bello Massacre v. Colombia*, Series C No. 140, para. 278.

⁷⁰¹ *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/22/45 of January 28, 2013, para. 64.

collective social recognition of the violations that were committed, social repudiation and condemnation of these violations, ensure the remembrance of the victims, and their role as a preventive measure. However, this type of measure cannot be decided and implemented unilaterally by state authorities: it must entail agreement and consultation with the relatives, otherwise it could become a source of re-victimization. Thus, when a memorial of a collective forced disappearance was stored temporarily in the same military unit to which the perpetrators belonged, without previously informing and consultation with the relatives, the Inter-American Court found that the incident was re-victimizing and unacceptable.⁷⁰²

"The uncertainty that the relatives of victims of enforced disappearance have suffered, and continue to suffer because of not knowing the final fate of their loved ones, is an offense to their dignity that must be restored."

Ombudsman of Peru⁷⁰³

In this context, the WGEID has warned that "States should adopt a comprehensive legal framework for reparation programmes, including the issue of memorials, with a view to avoiding re-victimization and further violations of the right to dignity. Legislation should set out the criteria and the process for the establishment of such memorials, taking into account the potential controversies that may arise out of conflicting memories from different groups in society. The establishment and maintenance of memorial sites is a responsibility of the State, with the close participation of the relatives of the disappeared and other parties concerned."⁷⁰⁴

The *Principles on Reparation* stipulates that measures of satisfaction must include "[t]he search for the whereabouts of the disappeared [...] 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

⁷⁰² *Resolution Monitoring Compliance with Judgment, Case of the 19 Merchants v. Colombia*, of June 26, 2012.

⁷⁰³ *La desaparición forzada de personas en el Perú (1980-1996)*, Serie Informes Defensoriales, Informe No. 55, Lima, January 2012, p. 22. [Original in Spanish, free translation.]

⁷⁰⁴ *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/22/45 of January 28, 2013, para. 64.

the cultural practices of the families and communities.”⁷⁰⁵ The *Principles against Impunity*, in turn, stipulates in the right to reparation, that “[i]n the case of forced disappearance, the family of the direct victim has an imprescriptible right to be informed of the fate and/or whereabouts of the disappeared person and, in the event of decease, that person’s body must be returned to the family as soon as it has been identified, regardless of whether the perpetrators have been identified or prosecuted.”⁷⁰⁶ In this regard, the Inter-American Court has stated that “[t]he right of the next of kin to know the location of the mortal remains of the victims is in itself a measure of reparation and gives rise to expectations that must be fulfilled by the State.”⁷⁰⁷

“The Court has established that the whereabouts of the mortal remains of the [...] victims in this case are unknown. [...] This circumstance and continuation of impunity in this regard constitute a source of extraordinary humiliation and suffering of their next of kin. [...] [D]elivery of the mortal remains is in itself an act of reparation as it leads to restore the dignity of the victims, to honor the value of their memory to those who were their beloved ones, and to allow them to adequately bury them. [...] The State must, therefore, locate, exhume, identify by means of undoubtedly suitable techniques and instruments, the remains of the victims . [...]The costs of the ensuing burial, in the place chosen by the next of kin, must be covered by the State. [...] The State must, also, locate, exhume, identify and deliver to the next of kin the remains of those persons whose deaths were not attributed to the State [...] but whose next of kin also have the right to know their whereabouts.”

Inter-American Court of Human Rights⁷⁰⁸

This measure of reparation, applicable both to enforced disappearance and extrajudicial executions and secret burial, is closely linked to the relatives’ right to an investigation and truth. In this regard, the WGEID has stated that “[t]he right to know the truth about the fate and the whereabouts includes, when the disappeared person is found to be dead, the right of the family to have the remains of their loved one returned to them, and to

⁷⁰⁵ Article 22 (c).

⁷⁰⁶ Principle 34.

⁷⁰⁷ Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 231.

⁷⁰⁸ Judgment of August 29, 2002, *Case of the Caracazo v. Venezuela*, Series C No. 95, paras. 121, 123, 124 and 125.

dispose of those remains according to their own tradition, religion or culture."⁷⁰⁹

"All the teams involved in the process of searching for disappeared persons and forensics investigations must, above all, ensure that no further harm is inflicted on victims, and must promote actions of a reparatory nature. The purpose and ultimate goal of all actions must be to fulfil the expectations of the victims and their families, and to generate actions aimed at their inclusion and participation in the search processes, forensic investigation and return of their loved ones without re-traumatization."

*International consensus on principles and minimum standards for psychosocial work in search processes and forensic investigations in cases of enforced disappearances, arbitrary or extrajudicial executions*⁷¹⁰

International norms and standards prescribe the conditions for how mortal remains must be delivered.⁷¹¹ The body or the skeletal remains of the identified victim must be returned to the families after the investigation has been completed. In this regard, the WGEID has stated that the delivery must take place "regardless of whether the perpetrators have been identified or prosecuted."⁷¹² Additionally, the Inter-American Court has stated that although the body of the victim must be handed over to the relatives, this must be done "on condition that they cannot be cremated and may be exhumed for new autopsies."⁷¹³ The delivery must with dignity for the deceased and avoiding re-victimize the relatives. In this sense, the Inter-American Court has stated that "mortal remains deserve to be duly respected for the special relevance that the victims bear to their next of kin."⁷¹⁴

⁷⁰⁹ "General Comment on the right to truth regarding enforced disappearances", Doc. Cit. para. 6.

⁷¹⁰ Principle of "Do no harm".

⁷¹¹ *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions; Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary executions; and International consensus on principles and minimum standards for psychosocial work in search processes and forensic investigations in cases of enforced disappearances, arbitrary or extrajudicial executions.*

⁷¹² *Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/22/45 of January 28, 2013, para. 54.*

⁷¹³ Judgment of November 16, 2009, *Case of González et al. ("Cotton Field") v. Mexico*, Series C No. 205, para. 305.

⁷¹⁴ Judgment of November 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 231.

CHAPTER VII: PROTECTING THE RELATIVES' RIGHTS

"[E]nforced or involuntary disappearances constitute the most comprehensive denial of human rights in our time, bringing boundless agony to the victims, ruinous consequences to the families, both socially and psychologically, and moral havoc to the societies in which they occur. It is indeed a gruesome form of human rights violation that warrants the continued attention of the international community."

Working Group on Enforced or Involuntary Disappearances⁷¹⁵

1. Basic Considerations

Enforced disappearance places the individual outside the protection of the law.⁷¹⁶ This violates the right to recognition as a person before the law,⁷¹⁷ one of the most essential human rights and a prerequisite for the effective enjoyment of all rights and freedoms. The Working Group on Enforced or Involuntary Disappearances (WGEID)⁷¹⁸ has found that the specific nature of enforced disappearance has the effect of suspending the disappeared person's exercise of all rights, and places the victim in a situation of legal uncertainty in terms of recognition before the law. In this regard, the Inter-American Commission on Human Rights (IACHR) has reminded that "[w]hen a disappearance is carried out, the fundamental protections established by law are circumvented and the victim is left defenseless. For the victim, the consequence of

⁷¹⁵ *Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/1985/15 of 23 January 1985, para. 291.

⁷¹⁶ *Declaration on the Protection of All Persons from Enforced Disappearance* (Third preambular paragraph); *Inter-American Convention on Forced Disappearance of Persons* (art. II); and *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 2). See also: *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction*. Practitioners' Guide Series No. 9, ICJ, Geneva, 2015, Chapter I.

⁷¹⁷ See, inter alia: *Universal Declaration of Human Rights* (art. 6); *International Covenant on Civil and Political Rights* (art. 16); *American Declaration of the Rights and Duties of Man* (art. XVII); *American Convention on Human Rights* (art. 3). See also: "General comment on the right to recognition as a person before the law in the context of enforced disappearances," *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/19/58/Rev.1, 2 March 2012, para. 2.

⁷¹⁸ *Report of the Working Group on Enforced or Involuntary Disappearances - Addendum: Best practices on enforced disappearances in domestic criminal legislation*, A/HRC/16/48/Add.3 of 28 December 2010, para. 29.

an enforced disappearance is to be denied every essential right deemed to inhere in the very fact of being human. In this way, the act of enforced disappearance violates the right of the individual under Article 3 of the American Convention 'to recognition as a person before the law.'"⁷¹⁹

"Families of the missing have many needs, including the need to know what happened; the need for recognition and commemoration; the need for economic, financial, psychological and psychosocial support; the need for protection against security threats; and the need for access to justice. Furthermore, as a result of gaps in legislation and administrative obstacles, families often lack access to social benefits and pensions and are prevented from exercising their rights under property and family law. The range of needs and multidimensional impact of a missing family member requires a holistic response."

UN Secretary-General⁷²⁰

The Inter-American Court of Human Rights has declared that "in cases of forced disappearance of persons, the victim is placed in a situation of legal uncertainty that prevents, impedes or eliminates the possibility of the individual to be entitled to or effectively exercise his or her rights in general, in one of the most serious forms of non-compliance with the State's duties to respect and guarantee human rights."⁷²¹ This situation, which may be described as true legal limbo,⁷²² extends beyond the disappeared person and affects the relatives with deep and dire consequences.

2. The Relatives' Situation

From its beginnings, in the early 1980s, the WGEID has noted that the practice of enforced disappearance entails a situation in which "a wide range of human rights of the victim himself and of his family may be denied or infringed. These include civil and political

⁷¹⁹ Report No. 11/98 of April 7, 1998, Case No. 10.606, *Samuel de la Cruz Gómez (Guatemala)*, para. 57. In the same vein, see: Report No. 55/99 of April 13, 1999, Case 10.815 and others, *Juan de la Cruz Núñez Santana and Others (Peru)*, para. 111; and Report No. 56/98 of April 13, 1999, Case No. 10.824 and others, *Eudalio Lorenzo Manrique and Others (Peru)*, para. 110.

⁷²⁰ *Missing persons. Report of the Secretary General*, A/69/293 of 11 August 2014, para. 63.

⁷²¹ Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 101.

⁷²² Judgment of November 26, 2013, *Case of Osorio Rivera and Family Members v. Peru*, Series C No. 274, para. 170.

rights as well as economic, social and cultural rights."⁷²³ Therefore, the WGEID has stressed that "various human rights of the members of the family of a missing or disappeared person may also be infringed by that person's enforced absence. Their right to a family life may be seen as the principal right involved but other rights of an economic, social and cultural nature can also be directly affected; for example, the family's standard of living, health care and education may all be adversely affected by the absence of a parent."⁷²⁴ In 1983, the WGEID concluded, in terms of the relatives of the disappeared person, that "[a] review of the economic, social and cultural rights guaranteed by the various international human rights instruments shows that many of them are denied to a greater or lesser extent by enforced or involuntary disappearances."⁷²⁵

Furthermore, the WGEID has stated that "[a]s it is men who are usually the direct victims of enforced disappearances, it is the wives, mothers and children who often bear the consequences of the enforced disappearances and who are the persons most affected. The Working Group calls upon States to provide sufficient support to those affected by enforced disappearances."⁷²⁶ Similarly, the WGEID has declared that "[i]n the case of enforced disappearances of the children's parents, many of the child rights, including economic, social and cultural ones, are affected. In many occasions, children are prevented from exercising their rights due to the legal uncertainty created by the absence of the disappeared parent. This uncertainty has many legal consequences, including effects on: the right to identity, the guardianship of underage children, the right to social allowances and management of property of the disappeared person. In those circumstances, many obstacles are created to children with regard to the enjoyment of their rights, including their right to education, health, social security and property."⁷²⁷

⁷²³ *Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/1435 of 22 January 1981, para. 184.

⁷²⁴ *Ibid.*, para. 187.

⁷²⁵ *Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/1983/14 of 21 January 1983, para. 133.

⁷²⁶ *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/13/31 of 21 December 2009, para. 655.

⁷²⁷ *General comment on children and enforced disappearances, adopted by the Working Group on Enforced or Involuntary Disappearances at its ninety-eighth*

"Family members' victimization becomes even greater when men, who mainly suffer the fate of enforced disappearances, were the head of household. Here, enforced disappearance of men results in entire families becoming victims of enforced disappearances. As the family structure is disrupted, women are negatively affected economically, socially and psychologically. The emotional upheaval is thus exacerbated by material deprivation, made more acute by the costs incurred should they decide to undertake a search for their love ones. Furthermore, they do not know when—if ever—their loved one is going to return, which makes it difficult for them to adapt to the new situation. In some cases, national legislation may make it impossible to draw a pension or receive other means of support in the absence of a death certificate. Therefore, economic and social marginalization is frequently the result of an enforced disappearance. In such circumstances, several economic, social and cultural rights enshrined in the Universal Declaration of Human Rights and in other instruments, such as the rights to health, education, social security, property and family life are violated."

Group Working on Enforced or Involuntary Disappearances⁷²⁸

3. International Norms and Standards

The need to protect the rights of relatives of disappeared persons and the State's duty to take concrete steps to safeguard them, have undergone a major shift in the WGEID's doctrine since the 1980s. In examining the legal basis for these measures that aim to help families cope with the consequences of the absence of the disappeared person, the WGEID has reminded that "[e]veryone has the right to social security and the State has the duty to provide the family with the widest possible protection."⁷²⁹ In the same vein, given that the relatives of disappeared persons find themselves without legal protection for their rights, the Inter-American Court of Human Rights has reminded that, in accordance with article 2 of the *American Convention on Human Rights*, "States Parties are under the obligation to adopt legislative or

session (31 October to 9 November 2012), A/HRC/WGEID/98/1 of 14 February 2013, para. 7.

⁷²⁸ *General Comment on women affected by enforced disappearances, adopted by the Working Group on Enforced or Involuntary Disappearances at its ninety-eighth session (31 October to 9 November 2012)*, A/HRC/WGEID/98/2 of 14 February 2013, para. 12.

⁷²⁹ *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/22/45 of 28 January 2013, para. 50.

other measures required to make the rights and liberties protected by said Convention effective.”⁷³⁰

Despite being a crucial issue, neither the *Declaration on the Protection of All Persons from Enforced Disappearance* nor the *Inter-American Convention on Forced Disappearance of Persons* explicitly addresses this issue. Nor does the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* address this issue, even though in cases of secret execution and/or clandestine burial, relatives of the victims may find themselves in a situation similar to the relatives of the disappeared.

It was only in 2006, with the adoption of the *International Convention for the Protection of All Persons from Enforced Disappearance* (ICPED) that created the first specific norm in a legally binding instrument on the matter of legal safeguards to protect the rights and legal situation of the disappeared and their relatives. Specifically, article 24 (6) of the ICPED provides:

“Without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, each State Party shall take the appropriate steps with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights.”

Paragraph 6 of article 24 was introduced by the Mexican delegation during the drafting and negotiation of the Convention, inspired by the WGEID’s recommendations in this matter.⁷³¹

It should be noted that the Advisory Service on International Humanitarian Law of the International Committee of the Red Cross (ICRC) has developed the *Guiding Principles / Model Law on the Missing*,⁷³² which addresses this issue among others. These *Guiding Principles* are not limited to enforced disappearance, and

⁷³⁰ Judgment of July 3, 2004, *Case of Molina Theissen v. Guatemala*, Series C No. 108, para. 89.

⁷³¹ See: *Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance. Chairperson-Rapporteur: Mr. Bernard Kessedjian (France)*, E/CN.4/2003/71 of 12 February 2003, paras. 84 and 88.

⁷³² Document available at: <https://www.icrc.org/en/document/guiding-principles-model-law-missing-model-law>.

they may be applied to different kinds of “disappearance” situations in which the relatives do not know the fate and whereabouts of their loved one.⁷³³ In 2012, the General Assembly of the Organization of American States recommended that States take into account these *Guiding Principles* as a reference when designing procedures to meet the relatives’ needs.⁷³⁴

4. Declaration of Absence Due to Enforced Disappearance and Other Mechanisms

In most countries, domestic legislation in civil matters includes the legal concept of the declaration of absence for presumption of death.⁷³⁵ Generally, the main aim of this legal concept is to safeguard the rights and interests of the absent person, rather than to protect the relatives’ rights and resolve the situation that has resulted from the enforced disappearance of a loved one. In addition, as the Committee on Enforced Disappearances (CED) has noted, the declaration of absence and presumed death is based on a factual assumption—that the victim is dead—which does not correspond to the situation of enforced disappearance and disregards the ongoing nature of that crime.⁷³⁶ And there is another factor—one that is perhaps more serious: it leads to a new victimization of family by having to “accept” the death of their missing loved one, while in reality that person’s fate and whereabouts has not been clarified. In this regard, the ICRC has found that when domestic legislation does not contemplate the legal concept of absence due to disappearance, “many families—in order to get a death certificate or certificate of presumption of death—have had to make the decision to declare their loved ones dead instead of reporting their disappearance, which causes them to feel a deep sense of guilt.”⁷³⁷ The WGEID has found something

⁷³³ For example: who are missing following a natural disaster; people detained or imprisoned, in the context of an armed conflict, without the detention having been registered; or internally displaced persons whose whereabouts and condition are not known.

⁷³⁴ Resolution AG/RES. 2717 (XLII-O/12), “Persons Who Have Disappeared and Assistance to Members of Their Families,” of June 4, 2012.

⁷³⁵ Depending on the domestic legislation, this mechanism might have a different name, such as: presumption of death from absence, legal presumption of death, declaration of death in absentia.

⁷³⁶ *Concluding observations on: Paraguay*, CED/C/PRY/CO/1 of 24 September 2014, para. 29; and *the Netherlands*, CED/C/NLD/CO/1 of 10 April 2014, para. 34.

⁷³⁷ *Guatemala - Los familiares de las personas desaparecidas: un compromiso de todos - Estudio del Comité Internacional de la Cruz Roja (CICR) sobre la situación*

similar.⁷³⁸ In addition, domestic law often establishes a timeframe for the declaration of presumption of absence due to death, disregarding the ongoing nature of enforced disappearance.⁷³⁹ Therefore, the CED has concluded that measures that are based on the presumption of the victim's death are not the most appropriate to safeguard the rights of disappeared persons and their relatives.⁷⁴⁰

"Enforced disappearances entail the denial of the disappeared person's legal existence and, as a consequence, prevent him or her from enjoying all other human rights and freedoms. [...] The disappeared is de facto deprived of his or her domicile. His/her properties become frozen in a legal limbo since no one, not even the next-of-kin, may dispose of that patrimony until the disappeared appears alive or is declared dead, that is a 'non-person.'"

Working Group on Enforced and Involuntary Disappearances⁷⁴¹

International human rights courts and bodies have encouraged States to include in their domestic legislation a legal figure that specifically protects the rights of the relatives of disappeared persons.⁷⁴² The UN General Assembly has called upon States to take appropriate measures regarding the legal situation of relatives of disappeared persons, "in fields such as social welfare, financial matters, family law and property rights."⁷⁴³ In addition, the General Assembly of the Organization of American States has

de las familias de las personas desaparecidas a raíz del enfrentamiento armado en Guatemala, ICRC, Guatemala, February 2010. [Original in Spanish, free translation.]

⁷³⁸ *Report of the Working Group on Enforced or Involuntary Disappearances. Addendum: Mission to Bosnia and Herzegovina*, A/HRC/16/48/Add.1 28 December 2010, para. 46.

⁷³⁹ *Concluding observations on the Netherlands*, CED/C/NLD/CO/1 of 10 April 2014, para. 34.

⁷⁴⁰ *Concluding observations on: Paraguay*, CED/C/PRY/CO/1 of 24 September 2014, para. 29; and *the Netherlands*, CED/C/NLD/CO /1 of 10 April 2014, para. 34.

⁷⁴¹ "General comment on the right to recognition as a person before the law in the context of enforced disappearances," in *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/19/58/Rev.1, 2 March 2012, para. 2

⁷⁴² See, inter alia: *Missing persons. Report of the Secretary-General*, A/69/293 of 11 August 2014, para. 64; and Inter-American Court of Human Rights, Judgment of July 3, 2004, *Case of Molina Theissen v. Guatemala (Reparations and Costs)*, Series C No. 108, para. 89.

⁷⁴³ Resolution No. 61/155, "Missing persons," of 19 December 2006 (para. 10). In the same sense see Resolution No. 63/183, "Missing persons," of 18 December 2008 (para. 10); No. 65/210, "Missing persons," of 21 December 2010 (para. 11); No. 67/177, "Missing persons," of 20 December 2012 (para. 11); and No. 68/184, "Missing persons," of 18 December 2014 (para. 13).

urged States “to address the legal situation of missing persons and its effect on that of family members, to proceed to adopt the necessary domestic legal framework to recognize and address the legal and practical difficulty and hardship faced by the missing person and his or her family members, including the legal framework needed to authorize a “declaration of absence” for persons who are presumed to have disappeared.”⁷⁴⁴

Although article 24 (6) the ICPED does not stipulate a specific legal form, the CED has repeatedly recommended that States incorporate into their domestic legislation the figure of a *declaration of absence due to enforced disappearance*.⁷⁴⁵ The CED has urged States to include “specific legal provisions establishing a procedure to obtain a declaration of absence by reason of enforced disappearance that adequately address the legal situation of disappeared persons and that of their relatives in areas such as social welfare, financial matters, family law and property rights.”⁷⁴⁶ In the same vein, the Inter-American Court of Human Rights issued a ruling that ordered Guatemala to establish in its domestic legislation “an expedite [*sic*] procedure to allow statement of absence and presumption of death due to forced disappearance,

⁷⁴⁴ Resolution AG/RES. 2651 (XLI-O/11), “Persons Who Have Disappeared and Assistance to Members of Their Families,” of June 7, 2011 (para. 3). In the same vein, see Resolutions: AG/RES. 2717 (XLII-O/12) of June 4, 2012 (para. 3); AG/RES. 2794 (XLIII-O/13) of June 5, 2013 (para. 3); and AG/RES. 2864 (XLIV-O/14) of June 5, 2014 (para. 3). Furthermore, although without explicit reference to a “declaration of absence,” since 2005 the General Assembly has urged States to consider “enacting, as applicable, domestic laws that recognize the situation of the families of disappearance victims, taking into account the specific needs and particular interests of women heads of household and children, including the consequences of disappearances on property management, child custody, parental rights, and marital status.” (Resolutions AG/RES. 2416 (XXXVIII-O/08) of June 3, 2008 (para. 7); AG/RES. 2134 (XXXV-O/05) of June 7, 2005 (para 8); AG/RES 2231 (XXXVI-O/06) of June 6, 2006 (paragraph 5); AG/RES. 2295 (XXXVII-O/07) of June 5, 2007 (para. 7); AG/RES. 2513 (XXXIX-O/09) of June 4, 2009 (para. 8); and AG/RES. 2594 (XL-O/10) of June 8, 2010 (para. 8)).

⁷⁴⁵ See, *Concluding observations on: Germany*, CED/C/DEU/CO/1 of 10 April 2014, para. 27; *the Netherlands*, CED/C/NLD/CO/1 of 10 April 2014, para. 35; *Paraguay*, CED/C/PRY/CO/1 of 24 September 2014, para. 30; *Mexico*, of 11 February 2015, para. 43; and *Serbia*, of 5 February 2015, para. 30.

⁷⁴⁶ *Concluding observations on Germany*, CED/C/DEU/CO/1 of 10 April 2014, para. 27.

for purposes of parentage, inheritance and reparation as well as other related civil effects."⁷⁴⁷

Likewise, the WGEID has recommended that States incorporate into their domestic legislation the figure of the declaration of absence due to enforced disappearance.⁷⁴⁸ In this sense, the WGEID has declared that "[u]ntil the fate and whereabouts of the disappeared person are ascertained, States should put in place a mechanism, as temporary measure, of presumption of death or preferably a certificate of absence for reasons of enforced disappearance."⁷⁴⁹

"'Declarations of absence by reason of enforced disappearance' are particularly important in cases where children become victims because of the disappearance of one or both of their parents. These allow children access to any State benefits that would be available if their parents were deceased, without being forced to declare a parent dead and bringing an end to any State obligations to investigate the enforced disappearance. In order to properly secure a child's best interest, especially their development, there cannot be any obstacles discouraging them or their parents from claiming benefits."

Working Group on Enforced or Involuntary Disappearances⁷⁵⁰

Several countries have adopted a declaration of absence due to enforced disappearance as the specific denomination and procedure for cases of enforced disappearance. These countries include: Peru,⁷⁵¹ Argentina,⁷⁵² Brazil,⁷⁵³ Chile,⁷⁵⁴ Colombia⁷⁵⁵ and

⁷⁴⁷ Judgment of July 3, 2004, *Case of Molina Theissen v. Guatemala (Reparations and Costs)*, Series C No. 108, para. 89.

⁷⁴⁸ See, inter alia: *Report of the Working Group on Enforced or Involuntary Disappearances - Addendum: Mission to Mexico*, A/HRC/19/58/Add.2 of 20 December 2011, para. 86.

⁷⁴⁹ *General Comment on women affected by enforced disappearances, adopted by the Working Group on Enforced or Involuntary Disappearances at its ninety-eighth session (31 October to 9 November 2012)*, A/HRC/WGEID/98/2 of 14 February 2013, para. 18.

⁷⁵⁰ *General comment on children and enforced disappearances, adopted by the Working Group on Enforced or Involuntary Disappearances at its ninety-eighth session (31 October to 9 November 2012)*, A/HRC/WGEID/98/1 of 14 February 2013, para. 30.

⁷⁵¹ Law No. 28.413 "que regula la ausencia por desaparición forzada durante el periodo 1980-2000" [that regulates absence due to enforced disappearance during the period 1980-2000], of November 24, 2004.

⁷⁵² Law No. 24.321 of June 8, 1994, known as *Ley de Ausencia por Desaparición Forzada* [Law on Absence Due to Enforced Disappearance].

Uruguay.⁷⁵⁶ However, some of the laws—such as those of Peru, Argentina, Brazil, Chile and Uruguay—are limited to a certain period of time, meaning that they refer to cases of enforced disappearance that were committed during a certain timeframe. In this regard, the CED has declared that the possibility of obtaining a declaration of absence due to forced disappearance should not be restricted to enforced disappearances committed during a period in the country's history, and that the family should have the right to request such a statement irrespective of when this serious criminal act was committed.⁷⁵⁷ The WGEID has made declarations along the same line, stating that the law on the declaration of absence due to enforced disappearance "should be applicable to any enforced disappearance, including those that may occur in the future."⁷⁵⁸

The ICPED and international human rights case law and doctrine have spelled out the nature of the measures to safeguard the rights of the missing person and their relatives—such as the *Declaration of absence due to enforced disappearance*—as well as some of the conditions and standards that govern them so that they shall fulfill their purposes and not be manipulated for illegitimate ends.

The *Declaration of absence due to enforced disappearance* and similar measures aim to clarify the legal situation of the disappeared person and protect the person's rights and as well as those of the relatives, particularly in terms of social welfare,

⁷⁵³ Law No. 9.140/95 of December 4, 1995.

⁷⁵⁴ Law No. 20377, "Sobre Declaración de Ausencia por Desaparición Forzada de Personas" [On Declaration of Absence Due to Enforced Disappearance of Persons] enacted on September 10, 2009.

⁷⁵⁵ Law No. 1531 "por medio de la cual se crea la acción de Declaración de ausencia por desaparición forzada y otras formas de desaparición involuntaria y sus efectos civiles" [Which creates the action of declaration of absence due to enforced disappearance and other forms of involuntary disappearance and their civil effects] of May 23, 2012.

⁷⁵⁶ Law No. 17.894, "Personas cuya desaparición forzada resultó confirmada por el Anexo 3.1 del Informe Final de la Comisión para la Paz - Declaración de ausencia" [People whose enforced disappearance was confirmed in Annex 3.1 of the Final Report of the Commission for Peace - Declaration of absence] enacted on September 19, 2005.

⁷⁵⁷ See in this sense: *Concluding observations on Argentina*, CED/C/ARG/CO/1 of 12 December 2013, paras. 38 and 39.

⁷⁵⁸ *Report of the Working Group on Enforced or Involuntary Disappearances. Addendum: Mission to Argentina*, A/HRC/10/9/Add.1 5 January 2009, para. 30. [Original in Spanish, free translation.]

financial matters, family law, guardianship and custody, and property rights. The WGEID has described these as “measures intended to help relatives to cope with the consequences of the absence of the disappeared person.”⁷⁵⁹

“Domestic law should first clarify the legal situation of missing persons, including through provisions for the person to be declared absent or missing so that the families of missing persons become eligible to social and financial benefits, without forcing them to declare the missing relative dead.”

UN Secretary-General⁷⁶⁰

Consequently, these types of measures may not be considered as effective remedy in cases of enforced disappearance (see Chapter III: Effective Remedy and the Right to Justice), although their purpose is to clarify the legal situation of the disappeared person and to safeguard the rights of both the disappeared person and the relatives. These measures are not meant to clarify an enforced disappearance, discover the fate or whereabouts of the disappeared person, or prosecute and punish the perpetrators, as the Inter-American Court of Human Rights has noted.⁷⁶¹ Along this line, the Court has stated that, given the nature and aims of the *Declaration of absence due to enforced disappearance* and similar measures, these measures may not be considered as a remedy that must be exhausted prior to turning to international bodies or procedures.⁷⁶²

The WGEID, the CED and the Secretary-General of the United Nations have pointed out that declarations of absence due to enforced disappearance should not presume the death of the missing person or force families to declare their missing loved one dead.⁷⁶³

⁷⁵⁹ *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/22/45 of 28 January 2013, para. 50.

⁷⁶⁰ *Missing persons. Report of the Secretary-General*, A/69/293 of 11 August 2014, para. 64.

⁷⁶¹ Judgment of May 28, 1999 (Preliminary Objections), *Case of Durand and Ugarte v. Peru*, Series C No. 50, para. 35.

⁷⁶² *Ibid.*

⁷⁶³ See, inter alia: *Concluding observations on Paraguay*, CED/C/PRY/CO/1 of 24 September 2014, para. 29; *Concluding Observations on the Netherlands*, CED/C/NLD/CO/1 of 10 April 2014, para. 34; and *Missing persons. Report of the Secretary-General*, A/69/293 of 11 August 2014, para. 64.

"Enforced disappearances also entail violations of the rights of other persons, including the next-of-kin and others connected to the disappeared persons. Family members are prevented to exercise their rights and obligations due to the legal uncertainty created by the absence of the disappeared person. This uncertainty has many legal consequences, among others on the status of marriage, guardianship of under age children, right to social allowances of members of the families and management of property of the disappeared person."

Working Group on Enforced or Involuntary Disappearances⁷⁶⁴

Furthermore, given their nature and purpose, these measures do not release the State from its obligation to investigate an enforced disappearance and discover the fate or whereabouts of the disappeared person. In this sense article 24 (6) of the ICPED requires that measures to protect the rights and legal situation of the relatives shall be enacted by the State "without prejudice to their efforts to determine the fate of persons missing."⁷⁶⁵ The WGEID has stated in this regard that "[i]n parallel to the issuance of a system of declaration of absence as a result of enforced disappearance, States should continue to investigate all cases to determinate the fate and the whereabouts of the disappeared and to ensure accountability of those responsible for the commission of enforced disappearances. That is, such declaration should not interrupt or close the investigations to determine the fate or the whereabouts of the victim, but should allow his/her next-of-kin to exercise on their behalf certain rights."⁷⁶⁶

Although these types of measures might appear similar to some kinds of reparation, the WGEID has stated that under a declaration of absence due to enforced disappearance, "[m]easures that

⁷⁶⁴ "General comment on the right to recognition as a person before the law in the context of enforced disappearances," *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/19/58/Rev.1, 2 March 2012, para. 5.

⁷⁶⁵ The United Nations General Assembly has made declarations in the same sense and regarding all cases of disappearances, in Resolution 61/155, "Missing persons," of 19 December 2006, para. 10. See also: *General comment on children and enforced disappearances, adopted by the Working Group on Enforced or Involuntary Disappearances at its ninety-eighth session (31 October to 9 November 2012)*, A/HRC/WGEID/98/1 of 14 February 2013, para. 30.

⁷⁶⁶ "General comment on the right to recognition as a person before the law in the context of enforced disappearances," *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/19/58/Rev.1, 2 March 2012, para. 10. In the same vein see the WGEID reports A/HRC/7/2/Add.1 of 26 October 2007, para. 59 and A/HRC/16/48/Add.2 of 17 February 2011, p. 48.

provide for social assistance do not, however, prejudice the obligation of the State to provide reparation to victims as a consequence of the violation of their rights.”⁷⁶⁷ Thus, the WGEID has stated that these measures do not relieve the State of its obligation to provide reparation to victims as a result of the violation of their rights, nor should the “acceptance of financial support for members of the families should not be considered as a waiver of the right to integral reparation for the damage caused by the crime of enforced disappearance.”⁷⁶⁸

The WGEID has stated that the declaration of absence due to enforced disappearance “should allow the appointment of a representative of the disappeared person, with the mandate to exercise his/her rights and obligations for the duration of his/her absence, in his/her interests and those of his/her next-of-kin. The latter should be allowed to manage temporarily the disappeared person’s properties, for as long as the enforced disappearance continues, and to receive due assistance from the State through social allowances.”⁷⁶⁹

The CED has insisted that measures and procedures to define the legal situation of missing persons must accurately reflect the complexity of the phenomenon of enforced disappearance, and consider in particular the ongoing nature of enforced disappearance.⁷⁷⁰ The CED has declared that such measures should also apply to the relatives in cases of enforced disappearance that have been committed in locations outside of their areas of jurisdiction.⁷⁷¹

⁷⁶⁷ *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/22/45 of 28 January 2013, para. 50.

⁷⁶⁸ “General comment on the right to recognition as a person before the law in the context of enforced disappearances”, Doc. Cit., para. 9.

⁷⁶⁹ *Ibid.*

⁷⁷⁰ See: *Concluding observations on: Germany*, CED/C/DEU/CO/1 of 10 April 2014, para. 27; *the Netherlands*, CED/C/NLD/CO/1 of 10 April 2014, para. 35; *Paraguay*, CED/C/PRY/CO/1 of 24 September 2014, para. 30; *Mexico*, of 11 February 2015, para. 43; and *Serbia*, of 5 February 2015, para. 30.

⁷⁷¹ *Concluding observations on the report submitted by Belgium under Article 29, paragraph 1, of the Convention*, CED/C/BEL/CO/1 of 24 September 2014, paras. 27 and 28.

CHAPTER VIII: GUARANTEES OF NON-REPETITION

“Since the same causes produce the same effects, three measures need to be taken in order to avoid victims having to endure new violations affecting their dignity: a) Disbandment of parastatal armed groups [...]; b) Repeal of all emergency laws, abolition of emergency courts and recognition of the inviolability and non-derogability of habeas corpus; and c) Removal from office of senior officials implicated in serious violations.”

Louis Joinet, Expert on the question of the impunity of perpetrators of human rights violations.⁷⁷²

1. General Considerations

In international law, guarantees of non-repetition have a twofold meaning. On the one hand, they are an essential element of the right to reparation for victims of serious human rights violations, including enforced disappearance and extrajudicial execution, and their families. On the other, they are a key part of the legal duty to prevent gross human rights violations (duty to respect) and to ensure that these do not take place again (duty to guarantee).

In international human rights law, guarantees of non-repetition might appear indistinguishable from the duty to prevent violations (see Chapter II: Right to Protection and Prevention). Effectively, as part of the duty to prevent human rights violations, States must adopt measures to prevent them from being committed. In this regard, when ordering reparation in the form of guarantees of non-repetition, the Inter-American Court of Human Rights has reminded that “the State must prevent the repetition of human rights violations [...] and, to this end, adopt any necessary legal, administrative or other type of measures to avoid similar events happening again, in compliance with its obligation to prevent violations of, and to guarantee, the fundamental rights recognized by the American Convention. In particular, and in accordance with Article 2 of the Convention, the State has the obligation to adopt

⁷⁷² *Question of the impunity of perpetrators of human rights violations (civil and political)*. Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, E/CN.4/Sub.2/1997/20/Rev.1 of 2 October 1997, para. 43.

the necessary measures to give effect to the rights and freedoms recognized in the Convention."⁷⁷³

"[T]he State has a duty to fight impunity by resorting to all legal means available, as impunity fosters the chronic repetition of human rights violations and renders victims and their next of kin completely defenseless."

Inter-American Court of Human Rights⁷⁷⁴

A number of international instruments specifically enshrine guarantees of non-repetition as part of the right to reparation. For example: *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* (Principles on Reparation)⁷⁷⁵ and *International Convention for the Protection of All Persons from Enforced Disappearance* (ICPED).⁷⁷⁶

International case law and doctrine have upheld the concept that the right to reparation includes guarantees of non-repetition. Therefore, even though the *International Covenant on Civil and Political Rights* (ICCPR) contains no express provision on guarantees of non-repetition, the Human Rights Committee (HRC) considers that these are part of the right to reparation, which "can involve [...] guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations."⁷⁷⁷ It is also absent from the *American Convention on Human Rights* (ACHR), but the rulings of Inter-American Commission on Human Rights (IACHR)⁷⁷⁸ and the Inter-American Court⁷⁷⁹ have upheld the concept. Similarly, although the *Declaration on the Protection of All Persons from Enforced*

⁷⁷³ Judgment of November 25, 2013, *Case of the Pacheco Tineo Family v. Plurinational State of Bolivia*, Series C No. 272, para. 265.

⁷⁷⁴ Judgment of April 6, 2006, *Case of Baldeón-García v. Peru*, Series C No. 147, para. 168.

⁷⁷⁵ Article 23.

⁷⁷⁶ Article 24 (5).

⁷⁷⁷ See, inter alia: *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13 of 26 May 2004, para. 16.

⁷⁷⁸ See, inter alia. *Principal Guidelines for a Comprehensive Reparations Policy*, OEA/Ser/L/V/II.131 Doc 1 of February 19, 2008, para. 1.

⁷⁷⁹ See, inter alia: Judgment of November 27, 1998, *Case of Loayza Tamayo v. Peru*, Series C No 42, para. 85; and Judgment of May 11, 2007, *Case of the Rochela Massacre v. Colombia*, Series C No. 163, para. 221.

Disappearance (DPPED) does not expressly address this type of reparation, the Working Group on Enforced or Involuntary Disappearances (WGEID) has declared that guarantees of non-repetition are part of the right to comprehensive reparation.⁷⁸⁰

“All victims of enforced disappearances and their relatives have the right to full reparation, which includes compensation, satisfaction, restitution, rehabilitation and guarantees of non-repetition.”
Working Group on Enforced or Involuntary Disappearances⁷⁸¹

Even when guarantees of non-repetition have been considered as measures for reparation, as the *Principles on Reparation*, the ICPED and case law have indicated, the *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* (Principles against Impunity),⁷⁸² doctrine on transitional justice by the U.N. Secretary-General,⁷⁸³ the High Commissioner for Human Rights⁷⁸⁴ and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence,⁷⁸⁵ have addressed this issue separately from the right to reparation.

⁷⁸⁰ *Informe del Grupo de Trabajo sobre las Desapariciones Forzadas o Involuntarias – Adición: Informe de seguimiento a las recomendaciones hechas por el Grupo de Trabajo sobre las misiones a Guatemala y Honduras*, A/HRC/16/48/Add.2 of 17 February 2011, para. 7 [Available in Spanish only.]; *Report of the Working Group on Enforced or Involuntary Disappearances - Addendum: Mission to Mexico*, A/HRC/19/58/Add.2 of 20 December 2011, para. 60.

⁷⁸¹ *Report of the Working Group on Enforced or Involuntary Disappearances - Addendum: Mission to Mexico*, A/HRC/19/58/Add.2 of 20 December 2011, para. 60.

⁷⁸² The principles on the issue of guarantees of non-repetition (Principles 35-38) are separate from the right to reparation (Principles 31-34).

⁷⁸³ See, inter alia: *The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General*, S/2004/616 of 3 August 2004; and *Uniting our strengths: Enhancing United Nations support for the rule of law. Report of the Secretary-General*, A/61/636-S/2006/980 of 14 December 2006.

⁷⁸⁴ See, inter alia: *Study by the Office of the United Nations High Commissioner for Human Rights on human rights and transitional justice activities undertaken by the human rights components of the United Nations system*, E/CN.4/2006/93 of 7 February 2006; *Human rights and transitional justice. Report of the Office of the United Nations High Commissioner for Human Rights*, A/HRC/4/87 of 23 December 2006; and *Annual Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General. Analytical study on human rights and transitional justice*, A/HRC/12/18 of 6 August 2009.

⁷⁸⁵ *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, Pablo de Greiff, A/HRC/21/46 of 9 August 2012; *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, Pablo de Greiff, A/69/518 of 14 October 2014; and

"The right to the truth is both a collective and an individual right. Each victim has the right to know the truth about violations that affected him or her, but the truth also has to be told at the level of society as a 'vital safeguard against the recurrence of violations.'" Working Group on Enforced or Involuntary Disappearances⁷⁸⁶

2. General Guarantees of Non-repetition

Guarantees of non-repetition consist of measures that the State must adopt to ensure that violations similar to those that have occurred do not take place in the future. In this regard, the WGEID has stated that "[t]he right to non-repetition requires that States remedy not only existing instances of enforced disappearances, but adopt measures to eradicate the circumstances that permitted the disappearances to occur, and which may permit similar events to occur again in the future. This is vital not only to protect the safety of victims in the future, but also to prevent more people and women in particular from becoming victims at all."⁷⁸⁷ These measures are of a different type: they might involve structural changes to the state apparatus; the adoption, amendment or repeal of legislation and/or public policy; the modification or elimination of State practices, among others.

The *Principles on Reparation*⁷⁸⁸ and *Principles against Impunity*⁷⁸⁹ set forth a non-exhaustive catalog of guarantees of non-repetition (see Annex No. VI). Both of these international instruments emphasize measures to ensure: i) civilian oversight of military, security and intelligence forces; ii) the existence of effective judicial remedies; and iii) the independence of the judiciary. The *Principles on Reparation* also stipulates as a guarantee of non-repetition, "[r]eviewing and reforming laws contributing to or

Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, A/HRC/30/42 of 7 September 2015.

⁷⁸⁶ "General Comment on the right to the truth in relation to enforced disappearances," Preamble, *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/16/48 of 26 January 2011.

⁷⁸⁷ *General comment on women affected by enforced disappearances adopted by the Working Group on Enforced or Involuntary Disappearances at its ninety-eighth session (31 October – 9 November 2012)*, A/HRC/WGEID/98/2 of 14 February 2013, para. 40.

⁷⁸⁸ Article 23.

⁷⁸⁹ Principle 35 et seq.

allowing gross violations of international human rights law and serious violations of international humanitarian law.”⁷⁹⁰ In turn, the *Principles against Impunity* indicates that one of the general principles of the guarantee of non-repetition is the “[t]he repeal of laws that contribute to or authorize violations of human rights and/or humanitarian law and enactment of legislative and other measures necessary to ensure respect for human rights and humanitarian law, including measures that safeguard democratic institutions and processes.”⁷⁹¹ Furthermore, the *Principles against Impunity* stipulates as a guarantees of non-repetition: the demobilization and dismantling of parastatal or paramilitary armed groups;⁷⁹² the demobilization and rehabilitation of child soldiers;⁷⁹³ and the removal of public officials who have been involved in human rights violations.⁷⁹⁴

“States shall ensure that victims do not again have to endure violations of their rights. To this end, States must undertake institutional reforms and other measures necessary to ensure respect for the rule of law, foster and sustain a culture of respect for human rights, and restore or establish public trust in government institutions. Adequate representation of women and minority groups in public institutions is essential to the achievement of these aims. Institutional reforms aimed at preventing a recurrence of violations should be developed through a process of broad public consultations, including the participation of victims and other sectors of civil society.”

*Updated Set of principles for the protection and promotion of human rights through action to combat impunity*⁷⁹⁵

3. Specific Guarantees of Non-repetition

The guarantees of non-repetition in the *Principles on Reparation* and *Principles against Impunity* are general in nature and meant to be applied to any gross human rights violation. But when addressing enforced disappearance and extrajudicial execution, international case law has determined that States must adopt specific guarantees of non-repetition concerning these two crimes.

⁷⁹⁰ Article 23 (h).

⁷⁹¹ Principle 35 (b).

⁷⁹² Principle 37.

⁷⁹³ Ibid.

⁷⁹⁴ Principle 36.

⁷⁹⁵ Principle 35.

Although the HRC has normally limited itself to reminding States of their obligation to take measures to prevent the recurrence of human rights violations in the future, it has specified some guarantees of non-repetition for national authorities to adopt in various cases. The HRC has urged States to modify their legislation to ensure that: i) the perpetrators of enforced disappearance are prosecuted and punished, in situations where this crime is not explicitly defined in domestic criminal law;⁷⁹⁶ ii) relatives of disappeared persons have access to the investigation of the crime of enforced disappearance;⁷⁹⁷ and iii) relatives of the victims of enforced disappearance are not required to obtain death certificates for the victim as a condition to receive social benefits and relief.⁷⁹⁸ In addition, the HRC has urged States to dismiss officials who have been implicated in serious human rights violations and not give civil service jobs to people who have been involved in such violations in the past.⁷⁹⁹ The WGEID, in turn, "emphasizes that the full realization of the right to truth and justice are essential elements to ensure non-repetition"⁸⁰⁰ of enforced disappearance.

Without a doubt, the Inter-American Court has been the most prolific in requiring specific guarantees of non-repetition in cases of enforced disappearance and/or extrajudicial execution. In terms of legislation, the Court has ordered the following measures:

- Codify enforced disappearance as a distinct offense in national criminal law, in accordance with the definition established by international law.⁸⁰¹ The Court has also declared that "[w]hile

⁷⁹⁶ Views of 29 October 2014, *Case Ram Kumar Bhandari v. Nepal*, Communication No. 2031/2011, para. 10; Views of 29 October 2014, *Case Basnet v. Sri Lanka*, Communication No. 2051/2011, para. 10.

⁷⁹⁷ Views of 28 October 2014, *Case Hero v. Bosnia and Herzegovina*, Communication No. 1966/2010, para. 11; and Views of 28 October 2014, *Case Kozljak v. Bosnia and Herzegovina*, Communication No. 1970/2010, para. 11.

⁷⁹⁸ Views of 28 October 2014, *Case Hero v. Bosnia and Herzegovina*, Communication No. 1966/2010, para. 11.

⁷⁹⁹ See inter alia: *Concluding Observations of the Human Rights Committee: Peru*, CCPR/C/79/Add.67 of 25 July 1996, para. 20; *Argentina*, CCPR/CO/70/ARG of 3 November 2000, para. 9; *Bolivia*, CCPR/C/79/Add.74 of 1 May 1997, para. 15; *Chile*, CCPR/C/CHL/CO/5 of 17 April 2007, para. 9; and *Guatemala*, CCPR/C/79/Add.63 of 3 April 1996, para. 26.

⁸⁰⁰ *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/22/45 of 28 January 2013, para. 65.

⁸⁰¹ See, inter alia: Judgment of November 24, 2010, *Case of Gomes Lund et al. (Guerrilla do Araguaia) v. Brazil*, Series C No. 219, para. 287; and Judgment of

complying with this measure, the State should adopt all the actions that guarantee the effective prosecution, and where necessary, punishment of the facts which make up the crime of enforced disappearance by means of the existent measures in place in domestic law."⁸⁰²

- Criminalize the "'sale' of children, so that the act of surrendering a child in exchange for remuneration or any other compensation, for any purpose or in any form, is a criminal offense in accordance with international standards."⁸⁰³
- Ensure that the national definition of the crime of enforced disappearance in accordance with the definition of this crime that has been established under international law.⁸⁰⁴ The Court has stated that "so long as that criminal law [defining the crime of forced disappearance] is not correctly adapted, the State continues failing to comply with Articles 2 of the American Convention and III of the International Convention for the Protection of All Persons from Enforced Disappearance."⁸⁰⁵
- Ratify the *Inter-American Convention on Forced Disappearance of Persons*.⁸⁰⁶
- Adopt the legislative, administrative or other measures necessary to strengthen the legislation on access to

August 12, 2008, *Case of Heliodoro Portugal v. Panama*, Series C No. 186, para. 259.

⁸⁰² See, inter alia: Judgment of November 24, 2010, *Case of Gomes Lund et al. (Guerrilla do Araguaia) v. Brazil*, Series C No. 219, para. 287.

⁸⁰³ Judgment of April 27, 2012, *Case of Fornerón and daughter v. Argentina*, Series C No. 242, para. 177.

⁸⁰⁴ Judgment of November 22, 2005, *Case of Gómez Palomino v. Peru*, Series C No. 136, para. 149; Judgment of November 26, 2013, *Case of Osorio Rivera and Family Members v. Peru*, Series C No. 274, para. 271; Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, paras. 66 and 165; Judgment of September 22, 2006, *Case of Goiburú et al. v. Paraguay*, Series C No. 153, paras. 179 and 180; Judgment of November 28, 2005, *Case of Blanco Romero et al. v. Venezuela*, Series C No. 138, para. 105; Judgment of November 23, 2009, *Case of Radilla Pacheco v. Mexico*, Series C No. 209, para. 344.

⁸⁰⁵ Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 167. See also: *Case of Gómez Palomino v. Peru. Monitoring Compliance with Judgment*. Order of the Court of July 1, 2009, paras. 29-32.

⁸⁰⁶ See, inter alia: Judgment of November 24, 2010, *Case of Gomes Lund et al. (Guerrilla do Araguaia) v. Brazil*, Series C No. 219, para. 287.

information, in accordance with Inter-American standards for the protection of human rights.⁸⁰⁷

- Adopt legislation that establishes a procedure for a declaration of absence in cases of enforced disappearance.⁸⁰⁸
- Amend domestic legislation so that appeals for remedies that detainees may file will be decided by a judicial authority, in accordance with the provisions of article 7.6 of the *American Convention on Human Rights*.⁸⁰⁹
- Amend domestic legislation on states of emergency and suspension of guarantees in accordance with the *American Convention*.⁸¹⁰
- Amend legislation to make the military criminal justice system compatible with international standards, prevent it from usurping the jurisdiction of the ordinary justice system, and ensure that it is competent to hear cases on enforced disappearance, extrajudicial execution and other human rights violations.⁸¹¹
- Bring domestic legislation into accord with the *American Convention*, incorporating international standards on the use of force by law enforcement officials, according to the principles of legality, proportionality, necessity and exception, as well as the criteria on differentiated and progressive use of force.⁸¹²

⁸⁰⁷ See, inter alia: Judgment of November 24, 2010, *Case of Gomes Lund et al. (Guerrilla do Araguaia) v. Brazil*, Series C No. 219, para. 293.

⁸⁰⁸ Judgment of July 3, 2004, *Case of Molina Theissen v. Guatemala*, Series C No. 108, para. 91.

⁸⁰⁹ Judgment of November 21, 2007, *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*, Series C No. 170, para. 268.

⁸¹⁰ Judgment of July 4, 2007, *Case of Zambrano Vélez et al. v. Ecuador*, Series C No. 166, para. 154.

⁸¹¹ Judgment of November 23, 2009, *Case of Radilla Pacheco v. United Mexican States*, Series C No. 209, para. 349; Judgment of July 4, 2007, *Case of Zambrano Vélez et al. v. Ecuador*, Series C No. 166, para. 154; Judgment of August 30, 2010, *Case of Fernández Ortega et al. v. Mexico*, Series C No. 215, para. 240; Judgment of November 26, 2010, *Case of Cabrera García and Montiel Flores v. Mexico*, Series C No. 220, para. 235; Judgment of August 31, 2010, *Case of Rosendo Cantú et al. v. Mexico*, Series C No. 216, para. 223; Judgment of July 5, 2006, *Case of Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela*, Series C No. 150, para. 144 (d).

⁸¹² Judgment of October 24, 2012, *Case of Nadege Dorzema et al. v. Dominican Republic*, Series C No. 251, para. 273; Judgment of July 5, 2006, *Case of Montero*

- Abolish rules and laws that have the effect of isolating people from legal protection and/or preventing them from exercising the right to a simple and effective remedy.⁸¹³

“[T]he State must prevent further violations of human rights such as the ones committed in the instant case and it must therefore adopt all legal, administrative and other measures necessary to prevent further occurrence of similar facts, pursuant to its obligations to prevent and guarantee the fundamental rights protected under the American Convention.”

Inter-American Court of Human Rights⁸¹⁴

It is worthwhile mentioning that the Inter-American Court has issued two warnings about legal reforms that address guarantees of non-repetition. On the one hand, the Court has warned that States must not merely propose relevant laws, but also ensure their prompt passage and entry into force, under the domestic legislative process.⁸¹⁵ Second, the Court has warned that “not only the suppression or issuing of the regulations within the domestic legislation guarantee the rights enshrined in the American Convention, pursuant with the obligation included in Article 2 of that instrument. The development of State practices leading to the effective observance of the rights and liberties enshrined in the same is also required. Therefore, the existence of a regulation does not guarantee in itself that its application will be adequate. It is necessary that the application of the regulations or their interpretation, as jurisdictional practices and a manifestation of the state’s public order, be adjusted to the same purpose sought by Article 2 of the Convention.”⁸¹⁶

Aranguren et al. (Detention Center of Catia) v. Venezuela, Series C No. 150, para. 144.

⁸¹³ Judgment of December 3, 2001, *Case of Cantoral Benavides v. Peru*, Series C No. 88, paras. 73 and 74.

⁸¹⁴ Judgment of July 4, 2007, *Case of Zambrano Vélez et al. v. Ecuador*, Series C No. 166, para. 153.

⁸¹⁵ Judgment of November 24, 2010, *Case of Gomes Lund et al. (Guerrilla do Araguaia) v. Brazil*, Series C No. 219; Judgment of November 23, 2009, *Case of Radilla Pacheco v. Mexico*, Series C No. 209, para. 344.

⁸¹⁶ Judgment of November 23, 2009, *Case of Radilla Pacheco v. Mexico*, Series C No. 209, para. 338. See also: Judgment of May 30, 1999, *Case of Castillo Petrucci et al. v. Peru*, Series C No. 52, para. 207; Judgment of July 4, 2006, *Case of Ximenes Lopes v. Brazil*, Series C No. 149, para. 83, and Judgment of September 26, 2006, *Case of Almonacid Arellano et al. v. Chile*, Series C No. 154, para. 118.

In terms of searching for, locating and identifying disappeared persons, children victims of “abduction” and/or “appropriation”, and victims of extrajudicial execution and secret burial, the Court has ordered the following measures as guarantees of non-repetition:

- Creation of government agencies or departments to search for, locate and identify the victims of enforced disappearance.⁸¹⁷
- Creation of websites to search for minors who have been removed and retained illegally.⁸¹⁸
- Creation of genetic databases to identify missing persons or their remains, as well as to determine and clarify the relationship and identity of missing children.⁸¹⁹
- Establishment and implementation of protocols for the collection and recording of missing persons' remains.⁸²⁰

“Given that education on human rights within the Armed Forces is crucial in order to guarantee the non-repetition . . . the Court finds it pertinent to order the State to implement, within a reasonable time, permanent programs on human rights and international humanitarian law in the training schools of the Armed Forces, including, specifically, issues relating to the enforced disappearance of persons and control of conformity with the Convention.”

Inter-American Court of Human Rights⁸²¹

Another guarantee of non-repetition ordered by the Inter-American Court as a remedy has been to provide human rights training to State officials. Along this line, the Court has ordered States to adopt and implement:

- Permanent training programs on human rights and international humanitarian law to members of the Armed Forces and the

⁸¹⁷ Judgment of November 29, 2012, *Case of Garcia and Family Members v. Guatemala*, Series C No. 257, para. 221.

⁸¹⁸ Judgment of March 1, 2005, *Case of the Serrano Cruz Sisters v. El Salvador*, Series C No. 120, para. 189; and Judgment of November 24, 2009, *Case of the “Las Dos Erres” Massacre v. Guatemala*, Series C No. 211, paras. 271 et seq.

⁸¹⁹ Judgment of July 3, 2004, *Case of Molina Theissen v. Guatemala*, Series C No. 108, paras. 90 and 91, Judgment of November 16, 2009, *Case of González et al. (“Cotton Field”) v. Mexico*, Series C No. 205, para. 512.

⁸²⁰ Judgment of February 24, 2011, *Case of Gelman v. Uruguay*, Series C No. 221, para. 275.

⁸²¹ Judgment of November 26, 2013, *Case of Osorio Rivera and Family Members v. Peru*, Series C No. 274, para. 274.

National Police.⁸²² The Court has specified that these programs must include regulations that place restrictions on the use of force—including in situations of armed conflict—and limits on obeying orders, and should be addressed to all members of the State's security forces, including the leadership.⁸²³

- Permanent training programs on international standards for legal protection of human rights aimed at prosecutors and judges, including those of the military criminal courts.⁸²⁴
- Training programs on the *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol)* for physicians who work in official detention centers, forensic and legal medicine officials, and prosecutors and judges.⁸²⁵

Regarding these kinds of measures, the Inter-American Court has stated that "it is crucial that human rights education programs are implemented effectively within the security forces [...] Such programs must be reflected in results of action and prevention that demonstrate their effectiveness, regardless of the fact that they must be evaluated by suitable indicators."⁸²⁶ The Court has also stated that training, in the form of a continuing education program, should be extended for a considerable period of time to meet the objectives.⁸²⁷ The Inter-American Court has emphasized that these programs must have a gender perspective, which means "not only a process of learning the norms, but must also teach all officials to recognize the existence of discrimination against women, and the

⁸²² Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 240; Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 193; Judgment of November 26, 2013, *Case of Osorio Rivera and Family Members v. Peru*, Series C No. 274, para. 274; Judgment of November 20, 2014, *Case of Espinoza Gonzáles v. Peru*, Series C No. 289, paras. 236 and 327.

⁸²³ Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 240.

⁸²⁴ Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 241; and Judgment of July 4, 2007, *Case of Zambrano Vélez et al. v. Ecuador*, Series C No. 166, para. 158.

⁸²⁵ Judgment of September 12, 2005, *Case of Gutiérrez Soler v. Colombia*, Series C No. 132, para. 110.

⁸²⁶ Judgment of October 25, 2012, *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, Series C No. 252, para. 368.

⁸²⁷ Judgment of November 20, 2014, *Case of Espinoza Gonzáles v. Peru*, Series C No. 289, para. 326. See also: Judgment of November 16, 2009, *Case of González et al. ("Cotton Field") v. Mexico*, Series C No. 205, para. 540.

impact on women of stereotyped ideas and assessments in relation to the scope and content of human rights."⁸²⁸ In this regard, and with reference to guarantees of non-repetition, the WGEID has stated that "[p]articularly in societies where violence against women in general, and enforced disappearances in particular, are embedded in deep inequality roots, States need to take measures to overcome those disparities as a preventive measure."⁸²⁹

In cases of persons deprived of liberty, the Inter-American Court has ordered the following measures as guarantees of non-repetition:

- Create a primarily civilian agency to oversee prisons.⁸³⁰
- Modernize and update arrest records and cross-reference these with other databases to easily locate the whereabouts of detainees.⁸³¹
- Establish "an efficient procedure or system to file petitions before competent, impartial and independent authorities for the investigation of complaints on human rights violations filed by inmates, in particular, on illegal use of force exerted by state agents."⁸³²

On the subject of use of lethal force and extrajudicial executions, the Inter-American Court has ordered the following measures as guarantees of non-repetition:

- Adopt the policies and strategies on the use of force that are enshrined in the United Nations *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*.⁸³³

⁸²⁸ Judgment of November 20, 2014, *Case of Espinoza Gonzáles v. Peru*, Series C No. 289, para. 326. See also: Judgment of November 16, 2009, *Case of González et al. ("Cotton Field") v. Mexico*, Series C No. 205, para. 540.

⁸²⁹ *General comment on women affected by enforced disappearances adopted by the Working Group on Enforced or Involuntary Disappearances at its ninety-eighth session (31 October – 9 November 2012)*, A/HRC/WGEID/98/2 of 14 February 2013, para. 40.

⁸³⁰ Judgment of July 5, 2006, *Case of Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela*, Series C No. 150, para. 144.

⁸³¹ Judgment of November 26, 2010, *Case of Cabrera García and Montiel Flores v. Mexico*, Series C No. 220, para. 243.

⁸³² Judgment of July 5, 2006, *Case of Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela*, Series C No. 150, para. 144.

⁸³³ Judgment of April 17, 2015, *Case of Cruz Sánchez et al. v. Peru*, Series C No. 292, para. 470; Judgment of July 5, 2006, *Case of Montero-Aranguren et al.*

- Train state agents “to familiarize them with the laws on allowable use of firearms and ensure that they have the proper training so that in the event that they must decide whether to use them, they will have the judgment to do so.”⁸³⁴
- Strengthen “its capability to monitor and to require accountability from police agents involved in episodes when force is used, in accordance with the international standards.”⁸³⁵

In terms of criminal investigations and proceedings, the Inter-American Court has ordered States to:

- Adopt measures to ensure that officers conducting criminal investigations, as well as the families of the victims, have computer access to organized national security files.⁸³⁶
- Adopt and implement investigation procedures in accordance with international standards, such as the *United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions* and the *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.⁸³⁷
- Provide investigative agencies with sufficient human, financial, logistical and scientific resources so that they are adequately able to examine any kind of evidence, scientific or otherwise.⁸³⁸

(*Detention Center of Catia*) v. *Venezuela*, Series C No. 150, para. 75; and Judgment of August 27, 2014, *Case of the Landaeta Mejías brothers et al. v. Venezuela*, Series C No. 281, para. 126.

⁸³⁴ Judgment of April 17, 2015, *Case of Cruz Sánchez et al. v. Peru*, Series C No. 292, para. 470 [Free translation]. See also: Judgment of August 29, 2002, *Case of the Caracazo v. Venezuela*, Series C No. 95, para. 143; and Judgment of August 27, 2014, *Case of the Landaeta Mejías brothers et al. v. Venezuela*, Series C No. 281, para. 126.

⁸³⁵ Judgment of August 27, 2014, *Case of the Landaeta Mejías brothers et al. v. Venezuela*, Series C No. 281, para. 312.

⁸³⁶ Judgment of August 31, 2011, *Case of Contreras et al. v. El Salvador*, Series C No. 232, para. 212; and Judgment of February 24, 2011, *Case of Gelman v. Uruguay*, Series C No. 221, para. 282.

⁸³⁷ Judgment of April 17, 2015, *Case of Cruz Sánchez et al. v. Peru*, Series C No. 292, para. 474; Judgment of November 22, 2004, *Case of Carpio Nicolle et al. v. Guatemala*, Series C No. 117, para. 135; Judgment of September 12, 2005, *Case of Gutiérrez Soler v. Colombia*, Series C No. 132, paras. 109 and 110; and Judgment of November 16, 2009, *Case of González et al. ("Cotton Field") v. Mexico*, Series C No. 205, para. 502.

⁸³⁸ Judgment of April 17, 2015, *Case of Cruz Sánchez et al. v. Peru*, Series C No. 292, para. 474.

- Establish security systems and measures to protect judicial authorities, prosecutors, witnesses, legal officials and their relatives.⁸³⁹

"[F]urther to its duty to investigate and, if appropriate, punish the guilty parties, the State is required to remove all obstacles –both factual and legal– contributing to impunity, and use all available means to expedite the investigation and the relevant proceedings, thus preventing the recurrence of acts [...]. The State may not rely upon any domestic law or regulation to justify its failure to comply with the Court's order to investigate and, if appropriate, criminally punish the parties responsible [...]. Particularly, [...] the State may never apply amnesty laws –which will produce no effects in the future [...], raise the statute of limitations, non-ex post facto nature of criminal laws or *res judicata* defenses, or rely upon the principle of double jeopardy [...], or resort to any other similar measure designed to eliminate responsibility in order to escape its duty to investigate and punish those responsible. Accordingly, as the case may be, the relevant investigations need to be opened against all parties investigated, convicted, or acquitted or whose cases were dismissed, in a military criminal proceeding."

Inter-American Court of Human Rights⁸⁴⁰

Finally, it is worthwhile mentioning that the Inter-American Court has repeatedly emphasized that the best guarantee to ensure that incidents are not repeated in the future, is to eradicate impunity and punish those responsible for enforced disappearances and extrajudicial executions.⁸⁴¹

⁸³⁹ Judgment of November 25, 2003, *Case of Myrna Mack Chang v. Guatemala*, Series C No. 101, para. 277; and Judgment of May 11, 2007, *Case of the Rochela Massacre v. Colombia*, Series C No. 163, para. 297.

⁸⁴⁰ Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 226.

⁸⁴¹ See, inter alia: Judgment of April 6, 2006, *Case of Baldeón García v. Peru*, Series C No. 147, paras. 168 and 195; Judgment of November 29, 2006, *Case of La Cantuta v. Peru*, Series C No. 162, para. 226; Judgment of July 10, 2007, *Case of Cantoral-Huamaní and García-Santa Cruz v. Peru*, Series C No. 167, para. 190; Judgment of September 22, 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 182; and Judgment of November 26, 2013, *Case of Osorio Rivera and Family Members v. Peru*, Series C No. 274, para. 176.

ANNEX I: DEFINITION OF VICTIMS

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

1. "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.
2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.
3. The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.

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

8. For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.
9. A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted,

or convicted and regardless of the familial relationship between the perpetrator and the victim.

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

Article 24

1. For the purposes of this Convention, "victim" means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.

ANNEX II: RIGHT TO AN EFFECTIVE REMEDY***Universal Declaration of Human Rights***

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

International Covenant on Civil and Political Rights

Article 2

3. Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 9 (4)

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Article 14 (1)

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...]

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

Article 17 (2)

Without prejudice to other international obligations of the State Party with regard to the deprivation of liberty, each State Party shall, in its legislation: [...]

(f) Guarantee that any person deprived of liberty or, in the case of a suspected enforced disappearance, since the person deprived of liberty is not able to exercise this right, any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person's release if such deprivation of liberty is not lawful.

Article 20

1. Only where a person is under the protection of the law and the deprivation of liberty is subject to judicial control may the right to information referred to in article 18 be restricted, on an exceptional basis, where strictly necessary and where provided for by law, and if the transmission of the information would adversely affect the privacy or safety of the person, hinder a criminal investigation, or for other equivalent reasons in accordance with the law, and in conformity with applicable international law and with the objectives of this Convention. In no case shall there be restrictions on the right to information referred to in article 18 that could constitute conduct defined in article 2 or be in violation of article 17, paragraph 1.

2. Without prejudice to consideration of the lawfulness of the deprivation of a person's liberty, States Parties shall guarantee to the persons referred to in article 18, paragraph 1, the right to a prompt and effective judicial remedy as a means of obtaining without delay the information referred to in article 18, paragraph 1. This right to a remedy may not be suspended or restricted in any circumstances.

Convention on the Rights of the Child

Article 37

States Parties shall ensure that: [...]

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

Article 16 (8)

Migrant workers and members of their families who are deprived of their liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful. When they attend such proceedings, they shall have the assistance, if necessary without cost to them, of an interpreter, if they cannot understand or speak the language used.

Article 18 (1)

Migrant workers and members of their families shall have the right to equality with nationals of the State concerned before the courts and tribunals. In the determination of any criminal charge against them or of their rights and obligations in a suit of law, they shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions

Principle 4

Effective protection through judicial or other means shall be guaranteed to individuals and groups who are in danger of extra-legal, arbitrary or summary executions, including those who receive death threats.

Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

Principle 23

Persons affected by the use of force and firearms or their legal representatives shall have access to an independent process, including a judicial process. In the event of the death of such persons, this provision shall apply to their dependants accordingly.

Declaration on the Protection of all Persons from Enforced Disappearance

Article 9

1. The right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of persons deprived of their liberty and/or identifying the authority ordering or carrying out the deprivation of liberty is required to prevent enforced disappearances under all circumstances, including those referred to in article 7 above.

2. In such proceedings, competent national authorities shall have access to all places where persons deprived of their liberty are being held and to each part of those places, as well as to any place in which there are grounds to believe that such persons may be found.

3. Any other competent authority entitled under the law of the State or by any international legal instrument to which the State is a party may also have access to such places.

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

Principle 32

1. A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

2. The proceedings referred to in paragraph 1 of the present principle shall be simple and expeditious and at no cost for detained persons without adequate means. The detaining authority shall produce without unreasonable delay the detained person before the reviewing authority.

Principle 33

1. A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.
2. In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present principle, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.
3. Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.
4. Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the complainant shall be entitled to bring it before a judicial or other authority. Neither the detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint.

***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***

2. If they have not already done so, States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by:
 - (a) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;
 - (b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;
 - (c) Making available adequate, effective, prompt and appropriate remedies, including reparation, as defined below;

(d) Ensuring that their domestic law provides at least the same level of protection for victims as that required by their international obligations.

3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, *inter alia*, the duty to:

(a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;

(b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;

(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; [...]

11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:

(a) Equal and effective access to justice; [...]

12. A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:

(a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;

(b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from

intimidation and retaliation, as well as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims;

(c) Provide proper assistance to victims seeking access to justice;

(d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law.

13. In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.

14. An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.

American Declaration of the Rights and Duties of Man

Article XVIII

Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.

Article XXV

[...]Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.

American Convention on Human Rights

Article 7 (6)

Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his

release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

Article 8 (1)

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

Article 25

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

- a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
- b. to develop the possibilities of judicial remedy; and
- c. to ensure that the competent authorities shall enforce such remedies when granted.

Inter-American Convention on Forced Disappearance of Persons

Article X

In no case may exceptional circumstances such as a state of war, the threat of war, internal political instability, or any other public emergency be invoked to justify the forced disappearance of persons. In such cases, the right to expeditious and effective judicial procedures and recourse shall be retained as a means of determining the whereabouts or state of health of a person who

has been deprived of freedom, or of identifying the official who ordered or carried out such deprivation of freedom.

In pursuing such procedures or recourse, and in keeping with applicable domestic law, the competent judicial authorities shall have free and immediate access to all detention centers and to each of their units, and to all places where there is reason to believe the disappeared person might be found including places that are subject to military jurisdiction.

Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas

Principle V

Due process of law

Every person deprived of liberty shall, at all times and in all circumstances, have the right to the protection of and regular access to competent, independent, and impartial judges and tribunals, previously established by law. [...]

All persons deprived of liberty shall have the right, exercised by themselves or by others, to present a simple, prompt, and effective recourse before the competent, independent, and impartial authorities, against acts or omissions that violate or threaten to violate their human rights. In particular, persons deprived of liberty shall have the right to lodge complaints or claims about acts of torture, prison violence, corporal punishment, cruel, inhuman, or degrading treatment or punishment, as well as concerning prison or internment conditions, the lack of appropriate medical or psychological care, and of adequate food.

Principle VII

Petition and response

Persons deprived of liberty shall have the right of individual and collective petition and the right to a response before judicial, administrative, or other authorities. This right may be exercised by third parties or organizations, in accordance with the law.

This right comprises, amongst others, the right to lodge petitions, claims, or complaints before the competent authorities, and to receive a prompt response within a reasonable time. [...]

Persons deprived of liberty shall also have the right to lodge communications, petitions or complaints with the national human

rights institutions; with the Inter-American Commission on Human Rights; and with the other competent international bodies, in conformity with the requirements established by domestic law and international law.

ANNEX III: RIGHT TO INVESTIGATION***International Convention for the Protection of All Persons from Enforced Disappearance***

Article 12

1. Each State Party shall ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities, which shall examine the allegation promptly and impartially and, where necessary, undertake without delay a thorough and impartial investigation. Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation, are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given. [...]

4. Each State Party shall take the necessary measures to prevent and sanction acts that hinder the conduct of an investigation. It shall ensure in particular that persons suspected of having committed an offence of enforced disappearance are not in a position to influence the progress of an investigation by means of pressure or acts of intimidation or reprisal aimed at the complainant, witnesses, relatives of the disappeared person or their defence counsel, or at persons participating in the investigation.

Article 18

1. Subject to articles 19 and 20, each State Party shall guarantee to any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel, access to at least the following information:

- (a) The authority that ordered the deprivation of liberty;
- (b) The date, time and place where the person was deprived of liberty and admitted to the place of deprivation of liberty;
- (c) The authority responsible for supervising the deprivation of liberty;
- (d) The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of

deprivation of liberty, the destination and the authority responsible for the transfer;

(e) The date, time and place of release;

(f) Elements relating to the state of health of the person deprived of liberty;

(g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains.

2. Appropriate measures shall be taken, where necessary, to protect the persons referred to in paragraph 1 of this article, as well as persons participating in the investigation, from any ill-treatment, intimidation or sanction as a result of the search for information concerning a person deprived of liberty.

Article 24

2. Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard. [...]

6. Without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, each State Party shall take the appropriate steps with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights.

7. Each State Party shall guarantee the right to form and participate freely in organizations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims of enforced disappearance.

Declaration on the Protection of all Persons from Enforced Disappearance

Article 13

1. Each State shall ensure that any person having knowledge or a legitimate interest who alleges that a person has been subjected to enforced disappearance has the right to complain to a competent and independent State authority and to have that complaint promptly, thoroughly and impartially investigated by that

authority. Whenever there are reasonable grounds to believe that an enforced disappearance has been committed, the State shall promptly refer the matter to that authority for such an investigation, even if there has been no formal complaint. No measure shall be taken to curtail or impede the investigation. [...]

3. Steps shall be taken to ensure that all involved in the investigation, including the complainant, counsel, witnesses and those conducting the investigation, are protected against ill-treatment, intimidation or reprisal.

4. The findings of such an investigation shall be made available upon request to all persons concerned, unless doing so would jeopardize an ongoing criminal investigation.

5. Steps shall be taken to ensure that any ill-treatment, intimidation or reprisal or any other form of interference on the occasion of the lodging of a complaint or during the investigation procedure is appropriately punished.

6. An investigation, in accordance with the procedures described above, should be able to be conducted for as long as the fate of the victim of enforced disappearance remains unclarified.

Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions

Principle 11

In cases in which the established investigative procedures are inadequate because of lack of expertise or impartiality, because of the importance of the matter or because of the apparent existence of a pattern of abuse, and in cases where there are complaints from the family of the victim about these inadequacies or other substantial reasons, Governments shall pursue investigations through an independent commission of inquiry or similar procedure. Members of such a commission shall be chosen for their recognized impartiality, competence and independence as individuals. In particular, they shall be independent of any institution, agency or person that may be the subject of the inquiry. The commission shall have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided for under these Principles.

Principle 15

Complainants, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation. Those potentially implicated in extra-legal, arbitrary or summary executions shall be removed from any position of control or power, whether direct or indirect. over complainants, witnesses and their families, as well as over those conducting investigations.

Principle 16

Families of the deceased and their legal representatives shall be informed of, and have access to any hearing as well as to all information relevant to the investigation, and shall be entitled to present other evidence. The family of the deceased shall have the right to insist that a medical or other qualified representative be present at the autopsy. When the identity of a deceased person has been determined, a notification of death shall be posted, and the family or relatives of the deceased shall be informed immediately. The body of the deceased shall be returned to them upon completion of the investigation.

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

Principle 34

Whenever the death or disappearance of a detained or imprisoned person occurs during his detention or imprisonment, an inquiry into the cause of death or disappearance shall be held by a judicial or other authority, either on its own motion or at the instance of a member of the family of such a person or any person who has knowledge of the case. When circumstances so warrant, such an inquiry shall be held on the same procedural basis whenever the death or disappearance occurs shortly after the termination of the detention or imprisonment. The findings of such inquiry or a report thereon shall be made available upon request, unless doing so would jeopardize an ongoing criminal investigation.

***United Nations Rules for the Protection of Juveniles
Deprived of their Liberty***

Rule 57

Upon the death of a juvenile during the period of deprivation of liberty, the nearest relative should have the right to inspect the death certificate, see the body and determine the method of disposal of the body. Upon the death of a juvenile in detention, there should be an independent inquiry into the causes of death, the report of which should be made accessible to the nearest relative. This inquiry should also be made when the death of a juvenile occurs within six months from the date of his or her release from the detention facility and there is reason to believe that the death is related to the period of detention.

ANNEX IV: RIGHT TO THE TRUTH

International Convention for the Protection of All Persons from Enforced Disappearance

Preamble

Affirming the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end,

Article 24

2. Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.
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.

Updated Set of principles for the protection and promotion of human rights through action to combat impunity

Principle 2. The inalienable Right to the Truth

Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.

Principle 3. The Duty to Preserve Memory

A people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State's duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.

Principle 4. The Victims' Right to Know

Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate.

Principle 5. Guarantees to give effect to the Right to Know

States must take appropriate action, including measures necessary to ensure the independent and effective operation of the judiciary, to give effect to the right to know. Appropriate measures to ensure this right may include non-judicial processes that complement the role of the judiciary. Societies that have experienced heinous crimes perpetrated on a massive or systematic basis may benefit in particular from the creation of a truth commission or other commission of inquiry to establish the facts surrounding those violations so that the truth may be ascertained and to prevent the disappearance of evidence. Regardless of whether a State establishes such a body, it must ensure the preservation of, and access to, archives concerning violations of human rights and humanitarian law.

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

22. *Satisfaction* should include, where applicable, any or all of the following: [...]

(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; [...].

24. States should develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which

victims may have a right of access. Moreover, victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.

ANNEX V: RIGHT TO REPARATION***International Convention for the Protection of All Persons from Enforced Disappearance***

Article 24

4. Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.

5. The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as:

- (a) Restitution;
- (b) Rehabilitation;
- (c) Satisfaction, including restoration of dignity and reputation;
- (d) Guarantees of non-repetition.

Article 25

1. Each State Party shall take the necessary measures to prevent and punish under its criminal law:

- (a) The wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance;
- (b) The falsification, concealment or destruction of documents attesting to the true identity of the children referred to in subparagraph (a) above.

2. Each State Party shall take the necessary measures to search for and identify the children referred to in paragraph 1 (a) of this article and to return them to their families of origin, in accordance with legal procedures and applicable international agreements.

3. States Parties shall assist one another in searching for, identifying and locating the children referred to in paragraph 1 (a) of this article.

4. Given the need to protect the best interests of the children referred to in paragraph 1 (a) of this article and their right to preserve, or to have re-established, their identity, including their nationality, name and family relations as recognized by law, States Parties which recognize a system of adoption or other form of placement of children shall have legal procedures in place to review the adoption or placement procedure, and, where appropriate, to annul any adoption or placement of children that originated in an enforced disappearance.

5. In all cases, and in particular in all matters relating to this article, the best interests of the child shall be a primary consideration, and a child who is capable of forming his or her own views shall have the right to express those views freely, the views of the child being given due weight in accordance with the age and maturity of the child.

Convention on the Rights of the Child

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Declaration on the Protection of all Persons from Enforced Disappearance

Article 5

In addition to such criminal penalties as are applicable, enforced disappearances render their perpetrators and the State or State authorities which organize, acquiesce in or tolerate such disappearances liable under civil law, without prejudice to the international responsibility of the State concerned in accordance with the principles of international law.

Article 19

The victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible. In

the event of the death of the victim as a result of an act of enforced disappearance, their dependents shall also be entitled to compensation.

Article 20

1. States shall prevent and suppress the abduction of children of parents subjected to enforced disappearance and of children born during their mother's enforced disappearance, and shall devote their efforts to the search for and identification of such children and to the restitution of the children to their families of origin.

2. Considering the need to protect the best interests of children referred to in the preceding paragraph, there shall be an opportunity, in States which recognize a system of adoption, for a review of the adoption of such children and, in particular, for annulment of any adoption which originated in enforced disappearance. Such adoption should, however, continue to be in force if consent is given, at the time of the review, by the child's closest relatives. [...]

Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions

Principle 20

The families and dependents of victims of extra-legal, arbitrary or summary executions shall be entitled to fair and adequate compensation within a reasonable period of time.

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

IX. Reparation for harm suffered

15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international

humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.

16. States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.

17. States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.

18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

19. *Restitution* should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.

20. *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;

(c) Material damages and loss of earnings, including loss of earning potential;

(d) Moral damage;

(e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

21. *Rehabilitation* should include medical and psychological care as well as legal and social services.

22. *Satisfaction* should include, where applicable, any or all of the following:

(a) Effective measures aimed at the cessation of continuing violations;

(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations;

(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;

(d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;

(e) Public apology, including acknowledgement of the facts and acceptance of responsibility;

(f) Judicial and administrative sanctions against persons liable for the violations;

(g) Commemorations and tributes to the victims;

(h) Inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.

Updated Set of principles for the protection and promotion of human rights through action to combat impunity

Principle 31. Rights and Duties arising out of the Obligation to make Reparation

Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator.

Principle 32. Reparation Procedures

All victims shall have access to a readily available, prompt and effective remedy in the form of criminal, civil, administrative or disciplinary proceedings subject to the restrictions on prescription set forth in principle 23. In exercising this right, they shall be afforded protection against intimidation and reprisals.

Reparations may also be provided through programmes, based upon legislative or administrative measures, funded by national or international sources, addressed to individuals and to communities. Victims and other sectors of civil society should play a meaningful role in the design and implementation of such programmes. Concerted efforts should be made to ensure that women and minority groups participate in public consultations aimed at developing, implementing, and assessing reparations programmes. Exercise of the right to reparation includes access to applicable international and regional procedures.

Principle 33. Publicizing Reparation Procedures

Ad hoc procedures enabling victims to exercise their right to reparation should be given the widest possible publicity by private as well as public communication media. Such dissemination should take place both within and outside the country, including through consular services, particularly in countries to which large numbers of victims have been forced into exile.

Principle 34. Scope of the Right to Reparation

The right to reparation shall cover all injuries suffered by victims; it shall include measures of restitution, compensation, rehabilitation, and satisfaction as provided by international law.

In the case of forced disappearance, the family of the direct victim has an imprescriptible right to be informed of the fate and/or whereabouts of the disappeared person and, in the event of decease, that person's body must be returned to the family as soon as it has been identified, regardless of whether the perpetrators have been identified or prosecuted.

**Inter-American Convention on Forced Disappearance of
Persons**

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.

ANNEX VI: GUARANTEES OF NON-REPETITION

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

23. *Guarantees of non-repetition* should include, where applicable, any or all of the following measures, which will also contribute to prevention:

- (a) Ensuring effective civilian control of military and security forces;
- (b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
- (c) Strengthening the independence of the judiciary;
- (d) Protecting persons in the legal, medical and health-care professions, the media and other related professions, and human rights defenders;
- (e) Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security forces;
- (f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises;
- (g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
- (h) Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.

Updated Set of principles for the protection and promotion of human rights through action to combat impunity

Principle 35. General Principles

States shall ensure that victims do not again have to endure violations of their rights. To this end, States must undertake institutional reforms and other measures necessary to ensure respect for the rule of law, foster and sustain a culture of respect

for human rights, and restore or establish public trust in government institutions. Adequate representation of women and minority groups in public institutions is essential to the achievement of these aims. Institutional reforms aimed at preventing a recurrence of violations should be developed through a process of broad public consultations, including the participation of victims and other sectors of civil society.

Such reforms should advance the following objectives:

- (a) Consistent adherence by public institutions to the rule of law;
- (b) The repeal of laws that contribute to or authorize violations of human rights and/or humanitarian law and enactment of legislative and other measures necessary to ensure respect for human rights and humanitarian law, including measures that safeguard democratic institutions and processes;
- (c) Civilian control of military and security forces and intelligence services and disbandment of parastatal armed forces;
- (d) Reintegration of children involved in armed conflict into society.

Principle 36. Reform of State Institutions

States must take all necessary measures, including legislative and administrative reforms, to ensure that public institutions are organized in a manner that ensures respect for the rule of law and protection of human rights. At a minimum, States should undertake the following measures:

- (a) Public officials and employees who are personally responsible for gross violations of human rights, in particular those involved in military, security, police, intelligence and judicial sectors, shall not continue to serve in State institutions. Their removal shall comply with the requirements of due process of law and the principle of non-discrimination. Persons formally charged with individual responsibility for serious crimes under international law shall be suspended from official duties during the criminal or disciplinary proceedings;
- (b) With respect to the judiciary, States must undertake all other measures necessary to assure the independent, impartial and effective operation of courts in accordance with international

standards of due process. Habeas corpus, by whatever name it may be known, must be considered a non-derogable right;

(c) Civilian control of military and security forces as well as of intelligence agencies must be ensured and, where necessary, established or restored. To this end, States should establish effective institutions of civilian oversight over military and security forces and intelligence agencies, including legislative oversight bodies;

(d) Civil complaint procedures should be established and their effective operation assured;

(e) Public officials and employees, in particular those involved in military, security, police, intelligence and judicial sectors, should receive comprehensive and ongoing training in human rights and, where applicable, humanitarian law standards and in implementation of those standards.

Principle 37. Disbandment of Parastatal Armed Forces / Demobilization and social reintegration of Children

Parastatal or unofficial armed groups shall be demobilized and disbanded. Their position in or links with State institutions, including in particular the army, police, intelligence and security forces, should be thoroughly investigated and the information thus acquired made public. States should draw up a reconversion plan to ensure the social reintegration of the members of such groups.

Measures should be taken to secure the cooperation of third countries that might have contributed to the creation and development of such groups, particularly through financial or logistical support.

Children who have been recruited or used in hostilities shall be demobilized or otherwise released from service. States shall, when necessary, accord these children all appropriate assistance for their physical and psychological recovery and their social integration.

Principle 38. Reform of Law and Institutions contributing to Impunity

Legislation and administrative regulations and institutions that contribute to or legitimize human rights violations must be repealed or abolished. In particular, emergency legislation and courts of any kind must be repealed or abolished insofar as they infringe the fundamental rights and freedoms guaranteed in the

Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Legislative measures necessary to ensure protection of human rights and to safeguard democratic institutions and processes must be enacted.

As a basis for such reforms, during periods of restoration of or transition to democracy and/or peace States should undertake a comprehensive review of legislation and administrative regulations.

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