

COMMENTS BY THE INTERNATIONAL COMMISSION ON MISSING PERSONS (ICMP) ON THE DRAFT GUIDING PRINCIPLES FOR THE SEARCH FOR DISAPPEARED PERSONS

International Commission on Missing Persons (ICMP) commends the efforts of the Committee on Enforced Disappearances (the Committee) in considering the issue of the obligation under the International Convention for the Prosecution of All Persons from Enforced Disappearances (the Convention) to search for and locate disappeared persons and preparing guiding principles that reflect good practice to assist States in enacting laws and regulations and in designing policies to meet their obligations.

ICMP salutes the efforts of the Committee to ensure a broad participatory consultation process toward the creation of these guiding principles, and welcomes the opportunity to participate in this process. ICMP would like to communicate the following observations regarding the Draft Guiding Principles for the Search of Disappeared Persons (Draft Guiding Principles) as contained in UN Doc. CED/C/15/2.

I. GENERAL COMMENTS

1.1. Applicability

As the scope of the Draft Guiding Principles for the search for disappeared persons is applicable to all cases of disappearance, and therefore goes beyond the specific obligations contained in the Convention it would be beneficial that a more specific clarification to that end is provided in the document.

1.2. Relationship to duties and international norms

The purpose of the Draft Guiding Principles that is reflected throughout the document's provisions could be defined in a way that does not confuse the relevant duty bearers as to what are the obligations arising from the State's obligation under the Convention and other relevant international instruments.

While guidelines on how these international obligations are essential to promote compliance with the obligations, it is important to make a clear distinction between duties and best practice.

II. SPECIFIC COMMENTS

2.1. New First Guiding Principle: The search for missing persons should be conducted regardless of the causes or the context of disappearance

- ICMP considers that while the differentiation of the causes and contexts of disappearance is central to strategies for prevention, investigation and punishment, it is essential to ensure that all missing persons cases are treated impartially and without discrimination. In this regard, the causes or contexts of disappearance must

not lead to unequal treatment or to the case or the rights of the families of the missing being ignored.

2.2. Draft Guiding Principle 1. The search for a disappeared person should be conducted under the presumption that he or she is alive

- The use of the term, “irrefutable evidence” in this draft principle may be in contradiction with the right to an effective investigation, to the extent that could be interpreted as requiring irrefutable evidence of death as a precondition to investigate a report of a missing person’s body.
- While noting the importance of this guiding principle, the proposal may be detrimental to fulfilling the duty of the State to search for those who are missing even when they may be dead. As drafted currently, this principle may be contrary to the right to effective investigation, which requires also the thorough and effective search for the missing in clandestine or mass graves.

2.3. Draft Guiding Principle 2. The search should be governed by a public policy

Reference to a public policy (see 2.1.) based on which different relevant authorities and other stakeholders would act through, inter alia, adoption of legislative and other regulatory and implementing acts and measures is welcomed. As search constitutes a dimension of an effective investigation, which in turn constitutes an important initial phase of the entire process for accounting for missing and disappeared persons, it would be appropriate to suggest to the state authorities to adopt a public policy that is not limited to cases of enforced disappearance. Rather, it should be applicable to all cases regardless of the presumption.

In view of the above, the main purpose of the public policy would be to extend beyond prevention (ref. 2.1). This is a key element, but by giving it priority, the current drafting could be interpreted as detrimental to efforts to address historic or current cases that have not been resolved. The statement contained in paragraph 2.1. must incorporate the fact that accounting for missing and disappeared persons is in fact the best guarantee for prevention and non-repetition.

In relation to 2.3., the Draft Guiding Principles must recommend that the public policy be comprehensive and cover all aspects of the process of accounting for missing and disappeared persons and consider survivors and victims as right-holders. Protection and assistance to victims is an important part but does not take precedence over other policy objectives that secure the rights of victims. In this regard, privileging protection and support to families should not detract from taking measures to realize the rights of families, including the right to justice, reparations, and effective remedy.

While strongly welcoming the point in 2.4., that the public policy should promote cooperation and collaboration among all State bodies in searching for disappeared persons, states would certainly benefit from extending such cooperation from and with international mechanisms established, among other things, to provide assistance to governments in fulfilling their obligations to conduct an effective investigation into all cases of disappearances and account for missing persons in general.

2.3.1. New Draft Guiding Principle under Principle 2.

- Public policies related to disappearances must be accompanied by financial resources to realize such public policies across all entities of the State with related responsibilities. While there is a reference to resources for effectiveness, under principle 6.2., reference to the assignment of regular budgetary allocations as part of a public policy and institutional development should be included under Draft Guiding Principle 2.

2.4. Draft Guiding Principle 5. The search should be exhaustive

Considering that criminal investigations are an essential component in ensuring the right to justice to victims of disappearance, and preserving the right to life, ICMP suggests adjusting the text to 5.1. as follows, in order to avoid the suggestion that criminal investigations could be in opposition to efforts to account for missing persons:

- The search for the disappeared person and the criminal investigation of the persons responsible for the disappearance should be mutually reinforcing. The criminal investigation should **incorporate and prioritize** ~~not take away from the urgency of~~ investigating the fate and whereabouts of the disappeared person, using appropriate staff and equipment.

2.5. Draft Guiding Principle 12. The search should be participatory

Financial assistance to families of the missing, for their independent work is essential to guarantee that the State meets its responsibilities and carries out its duties. While there is a reference to financial assistance to families of the missing under Principle 13., there is no reference to structural funding that is necessary for them to exercise their right of association and create victims' organizations. A participatory process of accounting for missing persons necessitates the existence of organized, constructive and effective organizations of families of the missing.

2.6. Draft Guiding Principle 13. The search should be protected

Collecting, combining and comparing data from various sources (including relatives of the missing person, and the missing person herself or himself, as well as from official records and from civil society organizations) constitute the core of effective missing persons investigations. Data relevant to missing persons often constitutes sensitive personal data. Articles 19 and 20 of the Convention, and the human right to privacy in relation to the processing of sensitive personal data requires establishing protections and controls for persons concerned by such data, i.e. data subjects. To ensure that such protections and controls are effective and in line with human rights obligations, best practice requires the regulation of the use of such data in line with data protection and good data governance principles, including the principle of data-subject control over their personal data. This would entail, among other things, defining the purpose of the processing of personal data, based on the consent of the data subjects, including genetic data for identification purposes as envisaged in the Draft Guiding Principles but also for criminal justice purposes. Providing more guidelines on such safeguards and referring to data protection principles and

obligations arising from the Convention but also from other relevant international instruments would seem to be appropriate.

2.7. New Draft Guiding Principle: Identification methods

- Proven scientific methods and strategies shall be utilized to conduct identifications. In particular, the means deployed must be capable of establishing the circumstances and whereabouts of missing persons.

III. ABOUT ICMP

ICMP is an independent, treaty-based international organization, headquartered in The Hague, the Netherlands, with more than 20 years of experience in 40 countries. It is the only international organization tasked exclusively to work on the issue of missing persons regardless of the circumstance or the context of their disappearance. It helps governments build rule-of-law institutions that successfully and impartially search for and identify missing persons, and it supports efforts to develop legislation to enable families of the missing to assert their rights. ICMP has assisted authorities in using advanced forensic techniques, including its pioneering use of modern DNA methods to locate and identify missing persons from a variety of circumstances in different parts of the world. ICMP maintains the world's only non-profit, high-throughput standing capacity to conduct large-scale, DNA-led human identification. ICMP also maintains advanced, specialized and bespoke data solutions to collect, store, protect and share data on missing persons securely. ICMP also responds to requests for documentation and expert testimony from international and domestic courts on matters related to war crimes, crimes against humanity, genocide and other crimes under international law.

The Agreement on the Status and Functions of the International Commission on Missing Persons

has been signed by nine countries and is open for accession by all states.