

Practical, legal and psychological issues related to the protection of the dead in cases of enforced disappearance

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Abstract

Enforced disappearance and death – and, by extension, the protection of the dead – are related to each other, but this relationship is more nuanced and sensitive than it may initially seem. An automatic equation between the two, as well as the hasty application of presumptions, triggers significant – and often undesirable – practical, legal and psychological consequences. This article explores how this ambiguity is, to a certain extent, unavoidable, and must therefore be reflected in the interpretation of the core international obligations related to enforced disappearance, namely the search for the disappeared, including through inter-State cooperation; investigation aimed at identifying those responsible for the crime, followed by prosecution and sanction; and the provision of psychosocial support and reparations for the harm suffered.

Keywords: enforced disappearance, ambiguous loss, presumptions, certificate of absence, death.

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Introduction

The International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) is the only international human rights treaty that contains provisions dealing specifically with the treatment of the dead,¹ a subject that is regulated in greater detail under international humanitarian law² with regard to missing persons.³ The case law of regional human rights mechanisms and United Nations (UN) committees on cases of enforced disappearance often

- 1 International Convention for the Protection of All Persons from Enforced Disappearance, 2716 UNTS 3, 20 December 2006 (entered into force 23 December 2010) (ICPPED), Arts 15, 17(3)(g), 18(1)(g), 24(3).
- 2 See, in particular, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rules 112–116, available at: <https://ihl-databases.icrc.org/en/customary-ihl/rules> (all internet references were accessed in December 2024); Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950), Arts 15–17; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950), Arts 18–20, Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Arts 121–124; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Art. 16; Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Arts 32–34; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 269, 8 June 1977 (entered into force 7 December 1978), Art. 8. See also International Committee of the Red Cross (ICRC), *Humanity after Life: Respecting and Protecting the Dead*, Geneva, 2020. On the issue of missing persons, see also *Report of the Advisory Committee to the Human Rights Council on Best Practices in the Matter of Missing Persons*, UN Doc. A/HRC/AC/6/2, 22 December 2010.
- 3 The notion of “missing” is markedly broader than that of “forcibly disappeared”. The operational definition of a missing person used by the ICRC is “a person whose whereabouts are unknown to his/her relatives and/or who, on the basis of reliable information, has been reported missing in accordance with the national legislation in connection with an international or non-international armed conflict, a situation of internal violence or disturbances, natural catastrophes or any other situation that may

refers to the subject of the treatment of the dead. The issue has equally been addressed by Special Procedures of the Human Rights Council dealing with enforced disappearance and extrajudicial killings.⁴

It is therefore indisputable that enforced disappearance and death – and, by extension, the protection of the dead – are related to each other. However, this relationship is more nuanced and sensitive than one may initially think, and its interpretation carries significant practical, legal and psychological consequences.

Focusing on international human rights law and practice,⁵ this article aims to explore this “dangerous liaison”, holding that enforced disappearance cannot – and should not – be automatically equated to death, as this not only contradicts the very nature of the crime but also has profound psychological repercussions on relatives of the disappeared person, as well as considerable practical and legal ramifications. At the same time, ruling out entirely that the disappeared person may be dead and thus failing to adopt certain measures, including those related to the protection of the dead, is equally undesirable, as it could irreparably jeopardize the establishment of the truth. In this regard, the use of presumptions (of death or of life) and their implications will be analyzed, taking into account international human rights legal instruments and jurisprudence.

The article will then explore how the existing ambiguity should be reflected in the interpretation of the core international obligations related to enforced disappearance, namely the search for the disappeared, including through inter-State cooperation; the exhumation, identification, respect for and return of the mortal remains of the disappeared, where appropriate; investigation aimed at identifying those responsible for the crime, followed by prosecution and sanction; and the provision of psychosocial support and reparations for the harm suffered. The ensuing consequences in terms of the protection of the dead will also be considered.

The article offers conclusions on how to duly ensure the protection of the dead in cases of enforced disappearance without failing to acknowledge the specific features and nature of the latter, in order to avoid re-victimizing relatives,⁶ while interpreting international obligations in the way that is most conducive to ensuring respect for the rights to know the truth and to obtain justice and redress, and ultimately to achieving the eradication of this crime under international law.

require the intervention of a competent State authority”. ICRC, *Guiding Principles/Model Law on the Missing*, Geneva, 2009, Art. 2(1).

- 4 This article does not take into consideration practices developed under provisions of international humanitarian law that are nevertheless relevant, especially with regard to the treatment of the dead, the return of mortal remains and the issuing of certificates of absence.
- 5 In particular, see Morris Tidball-Binz, *Protection of the Dead: Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. A/HRC/56/56, 25 April 2024. See also Agnes Callamard, *Report on Human Rights Standards and Possible Steps towards the Respectful and Lawful Handling of Mass Graves: Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN Doc. A/HRC/75/384, 12 October 2020.
- 6 Eden Medina and Ilan Sandberg Wiener, “Science and Harm in Human Rights Cases: Preventing Revictimization of Families of the Disappeared”, *Yale Law Journal Forum*, Vol. 125, 2016.

Entangling (to the extent possible) the complex relationship between enforced disappearance and death

[D]eclarative statements such as “He is dead” are not precise. My father is both dead and alive. I do not have a grammar for him. He is in the past, present and future.
Hisham Matar⁷

It is undeniable that there are links – be they conceptual and hypothetical or material and factual – between the enforced disappearance and the death of a person. Enforced disappearance, *per se*, is characterized by a situation of ambiguity. By definition, forcibly disappeared persons are placed outside the protection of the law and their fate and whereabouts are unknown; hence, they could in fact be alive or dead. This grey area has been described as a “legal limbo” that turns the disappeared into a “non-person”.⁸

The impossibility of determining with certainty the fate of disappeared persons generates in their relatives (and, arguably, in an even broader group of people) a condition known as ambiguous loss, defined as “an unclear loss with no official verification of life or death and thus, no closure”⁹ and considered “the most stressful type of loss because there is no proof of finality”.¹⁰ In other words,

[w]ith death, there is legal and social clarity: a death certificate, rituals for mourning with others, and the opportunity to honour the lost person and dispose of their remains in one’s own way. With ambiguous loss, there is no proof of death and thus there are no markers of certainty about the fate of the lost person.¹¹

Ambiguous loss affects individuals, families and entire communities.¹² As recognized by international human rights mechanisms – albeit with different interpretative nuances – the impossibility of determining the fate and whereabouts of the disappeared person and the ensuing anguish and stress, along with the official indifference of authorities in the face of their suffering, make relatives of the disappeared persons victims in their own right of a treatment that may amount to torture or, at least, to inhuman or degrading treatment.¹³

7 Hisham Matar, *The Return: Fathers, Sons and the Land In Between*, Penguin, London, 2016, p. 167.

8 WGEID, “General Comment on the Right to Recognition as a Person before the Law in the Context of Enforced Disappearances”, paras 1–2, in *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/19/58/Rev.1, 2 March 2012, p. 10.

9 Pauline Boss, “Families of the Missing: Psychosocial Effects and Therapeutic Approaches”, *International Review of the Red Cross*, Vol. 99, No. 905, 2017, p. 521.

10 *Ibid.*

11 *Ibid.*, p. 522.

12 *Ibid.*, p. 524. See also Pauline Boss and Simon Robbins, “Names without Bodies and Bodies without Names – Ambiguous Loss and Closure after Enforced Disappearance”, in Maria Giovanna Bianchi and Monica Luci (eds), *Psychoanalytic, Psychosocial, and Human Rights Perspectives on Enforced Disappearance*, Routledge, London and New York, 2024; Muriel Katz, Manon Bourguignon and Alice Dermitzel (eds), *Rompere le silence d’État*, Antipodes, Lausanne, 2024, pp. 71–88, 107–236.

13 Gabriella Citroni, “Fifty Shades of Suffering? The Wavering International Jurisprudence on Relatives of Disappeared Persons as Victims of Human Rights Violations”, in M. G. Bianchi and M. Luci (eds), above note 12.

On the one hand, the circumstances described require us not to entirely discard the option of the death of the disappeared person and to interpret the State's obligations accordingly, including in terms of designing and carrying out policies and investigative or prosecutorial strategies. On the other hand, the same circumstances require us not to automatically equate enforced disappearance with death, in order to avoid unwanted consequences on multiple levels. On a psychological level, this forced equation would clash with the above-described ambiguous loss and, arguably, worsen the suffering of relatives. On a legal level, it would require applying presumptions (of death or life) in the absence of certainty, potentially leading to the qualification of a specific situation as death/homicide rather than enforced disappearance, triggering consequences such as the application of statutes of limitations.¹⁴

Similarly, if a disappeared person is formally qualified as dead, this will have ramifications for the recognition of his or her relatives as victims and their access to measures of psychosocial support and reparations. While, as already mentioned, it is relatively undisputed that relatives of disappeared persons are also victims (and therefore rights-holders),¹⁵ this is not always the case with regard to relatives of dead persons, who could therefore find themselves in a detrimental situation. A prime example of this unfortunate situation are the considerations put forward by the European Court of Human Rights (ECtHR) in the *Janowiec and Others v. Russia* case, whereby the Court rejected the applicants' claim to be victims of inhumane treatment simply because they (rationally) should have known that their disappeared loved ones were dead:

The Court's case-law ... has accepted that the suffering of family members of a "disappeared person" who have to go through a long period of alternating hope and despair may justify finding a separate violation of Article 3 [of the European Convention on Human Rights] on account of the particularly callous attitude of the domestic authorities to their quest for information. As regards the instant case, the Court's jurisdiction extends only to the period starting on 5 May 1998, the date of entry into force of the Convention in respect of Russia. The Court has found above that as from that date, no lingering uncertainty as to the fate of the Polish prisoners of war could be said to have remained. Even though not all of the bodies have been recovered, their death was publicly acknowledged by the Soviet and Russian authorities and has become an established historical fact. The magnitude of the crime committed in 1940 by the Soviet authorities is a powerful emotional factor, yet, from a purely legal point of view, the Court cannot accept it as a compelling reason for departing from its case-law on the status of the family members of "disappeared persons" as victims of a violation of Article 3 and conferring that status on the applicants, for whom the death of their relatives was a certainty.¹⁶

14 Gabriella Citroni, "The Pitfalls of Regulating the Legal Status of Disappeared Persons through Declaration of Death", *Journal of International Criminal Justice*, Vol. 12, No. 4, 2014.

15 In this sense, see ICPPED, above note 1, Art. 24(1).

16 ECtHR, *Janowiec and Others v. Russia*, Appl. Nos 55508/07, 29520/09, Judgment (Grand Chamber), 21 October 2013, para. 186.

In the reasoning of the ECtHR, since relatives must accept – including by virtue of the passing of time – that their loved ones are dead, they should overcome their emotions, irrespective of whether the mortal remains of their next-of-kin have not been duly located, exhumed, respected, identified and returned. Such an interpretation seems to leave very little space for the protection of and respect for the dead and would deprive a significant number of persons of a remedy, entailing obvious psychological and legal consequences.¹⁷

Equally heavy – and undesirable – implications are triggered by the fact that, in many countries, access to measures of psychosocial support or reparation for relatives of disappeared persons is made conditional upon obtaining a declaration of death (obviously based on a presumption), even in the absence of any certainty on the fate and whereabouts of the disappeared.

On a practical level, the actions undertaken and the strategies designed to search for a disappeared person will vary, quite significantly, depending on whether they are planned and conducted under the presumption that the person sought is alive or dead, with the latter requiring specific measures in terms of protection.

The scenarios described above show that the relationship between death and enforced disappearance is all but straightforward, and that certain assumptions – and presumptions – carry heavy consequences that warrant in-depth analysis and additional consideration. A first point to note in this regard is that because the disappeared person might in fact be dead, adequate measures to ascertain whether this is the case are required, and they shall be guided by international standards and an overarching protective aim. Secondly, when applying presumptions (of life or death) in cases of disappeared persons, the criteria set by the Inter-American Court of Human Rights (IACtHR) in its judgment on the *Radilla Pacheco v. Mexico* case are sound and deserve to be taken into account.¹⁸ In general terms, the IACtHR found that, in these cases, presumptions cannot be used to the detriment of the most vulnerable party – i.e., the relatives of the disappeared. Rather, the burden to validly invoke them falls upon the party that had the alleged control over the disappeared person and his or her fate – i.e., the State. In the specific case of *Radilla Pacheco*, the IACtHR referred to the presumption of death of a disappeared or missing person, finding that, in general, it is a presumption *iuris tantum* (i.e., a presumption of law alone, which is rebuttable) that admits evidence to the contrary. Moreover, the IACtHR held that

[a] presumption of this type must have at least the following elements in order to be made: a) there must be a fact or state of the situation, b) the non-existence of evidence that would allow to infer that said state of the situation is not so, c)

17 In the case of *K. K. and Others*, the UN Human Rights Committee (HRC) essentially followed the lead of the ECtHR in the *Janowiec* case. See HRC, *K. K. and Others v. Russia*, UN Doc. CCPR/C/127/D/2912/2016, Views of 11 May 2019; and see Grażyna Baranowska, “How Long Does the Past Endure? ‘Continuing Violations’ and the ‘Very Distant Past’ Before the UN Human Rights Committee”, *Netherlands Quarterly of Human Rights*, Vol. 41, No. 2, 2023.

18 IACtHR, *Radilla Pacheco v. Mexico*, Ser. C, No. 209, Judgment, 23 November 2009.

the existence of a rule of presumption regarding the mentioned fact or state of the situation, and d) the conclusion of the presumption that can be reached after said analysis.¹⁹

The above suggests that, although the use of presumptions in these cases is certainly allowed, it shall be done with a *pro persona* perspective, thus allowing rebuttal.

Finally, entangled in the complex relationship between death and enforced disappearance is a State's obligation that is directly related to the individual and collective right to know the truth.²⁰ Principle 4 of the UN *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (UN Principles against Impunity), concerning "the victims' right to know", establishes that "irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstance in which violations took place and, in the event of death or disappearance, the victim's fate".²¹ This provision – at least ideally – seems to neatly distinguish death from disappearance, nevertheless holding that the right to know the truth, in both cases, requires the determination of the victim's fate. In reality, however, in the case of enforced disappearance, the right to know the truth requires precisely the determination of whether the person is alive or dead and, in the latter scenario, the adoption of all necessary measures – including in terms of protection and respect – to identify the remains and return them to the family.

In this regard, in its General Comment on the right to know the truth, the Working Group on Enforced or Involuntary Disappearances (WGEID) emphasized that

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.²²

In his report on the protection of the dead, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions acknowledged the existing link between enforced disappearance and death through the lens of the right to know the truth: "enforced disappearances ... infringe upon the right to know the truth about the fate and whereabouts of loved ones, and also impede the dignified treatment of the dead".²³ Moreover, recalling the jurisprudence of the IACtHR,

19 *Ibid.*, para. 46.

20 In this sense, see ICPPED, above note 1, Art. 24(2).

21 *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005 (UN Principles against Impunity), Principle 4.

22 WGEID, "General Comment on the Right to Truth in Relation to Enforced Disappearance", para. 6, in *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/16/48, 26 January 2011, p. 15.

23 M. Tidball-Binz, above note 5, para. 35.

the Special Rapporteur emphasized that “part of the right to the truth is the right of family members to know the fate of their loved one and the location of the remains if the victim is deceased”,²⁴ and that this right “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”.²⁵ Finally, focussing on cases of enforced disappearance where the victim is in fact dead, the Special Rapporteur aptly described the implications in terms of protection, in the sense that “because enforced disappearance prevents the possibility of a proper burial, this infringes upon the dignified treatment of the dead and the rights of the deceased’s family”.²⁶

It thus appears that, even if only through the application of presumptions, completely detaching death – and the protection of the dead – from enforced disappearance is not only impossible, but also undesirable. Likewise, entirely assimilating enforced disappearance with death is inaccurate and detrimental.

It is here held that the interpretation – and implementation – of the various State obligations in cases of enforced disappearance should be done in a way that adequately captures and reflects the uncertainty of the status of the disappeared, in order not to generate unwelcome – and sometimes irreparable – practical, legal and psychological consequences.

Searching for the disappeared

One of the areas where the ambiguity concerning the status of the disappeared is more evident is that of the search aimed at establishing their fate and whereabouts.

As mentioned above, the ICPPED is the first international human rights instrument which refers to States’ obligations with regard to the respect of the dead, and it does so mainly in two provisions related to the search for the disappeared.²⁷ Article 24(3) of the ICPPED requires States Parties to take all appropriate measures to search for, locate and release disappeared persons and, in the event of their death, to locate, respect and return their remains. Along the same lines, Article 15, which refers to the obligation of cooperation among States Parties, establishes that States Parties must

afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating

24 *Ibid.*, para. 11.

25 *Ibid.*, para. 36.

26 *Ibid.*, fn. 63.

27 Reference to the dead is made in two more provisions of the ICPPED, above note 1, namely Article 17(3)(g), which requires States Parties to make available to any judicial or competent authority, in the event of death of a person during the deprivation of liberty, the circumstances and cause of death and the destination of the remains; and Article 18(1)(g), which requires States Parties to guarantee access to the same information to any person with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel.

and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains.²⁸

This second provision is especially relevant in cases involving the disappearance – and potential death – of migrants, and the adoption of adequate measures – including to protect the dead – in this realm poses an additional layer of complexity, in view of the transnational dimension of the phenomenon.²⁹ The provision is similarly relevant in cases of persons disappeared in the context of international armed conflicts, also entailing a transnational dimension.

Both provisions essentially reflect the fact that the disappeared person could be either alive or dead. In the former scenario, States must search for the person and ensure his or her release. In the latter, they are expected to locate, exhume, respect, identify and return the mortal remains. In both cases, where appropriate, States are expected to cooperate among themselves in order to fulfil their obligations and to provide information on the fate and whereabouts of the persons concerned. The wording of the ICPPED thus seems to confirm that the search for the disappeared must be performed in both scenarios, taking all necessary measures to realize the pursued aim. In particular, where there are mortal remains that could belong to the disappeared persons, States must adopt all the measures directed at ensuring the protection of the dead and, indirectly, through them, also that of the living and their right to know the truth.

If the scenario considered in the ICPPED is essentially neutral, this is not the case, at least *prima facie*, for the *Guiding Principles for the Search for Disappeared Persons* (CED Guiding Principles) adopted by the Committee on Enforced Disappearances (CED) in 2019.³⁰ Principle 1 of the CED Guiding Principles takes a definite stance, which, if interpreted narrowly, could have far-reaching consequences. Pursuant to the principle, “the search should be conducted under the presumption that the disappeared person is alive, regardless of the circumstances of the disappearance, the date on which the disappearance began and when the search is launched”.

This principle speaks directly to the above-mentioned psychological implications for relatives of disappeared persons of considering – even in a merely hypothetical way – the disappeared as dead, and it echoes the legitimate demand of associations of relatives of disappeared persons across the globe to see those forcibly disappeared resurface alive.³¹ However, its implementation could be problematic in practice, bearing in mind that different techniques must be applied when searching for someone who is thought to be alive or when locating

28 ICPPED, above note 1, Art. 15.

29 On the unique obstacles in this process, see, among others, Tara Brian and Frank Laczko (eds), *Fatal Journeys: Identification and Tracing of Dead and Missing Migrants*, Vol. 2, International Organization for Migration, Geneva, 2016.

30 CED, *Guiding Principles for the Search for Disappeared Persons*, UN Doc. CED/C/7, 8 May 2019 (CED Guiding Principles).

31 One of the historical advocacy claims of the Latin American Federation of Associations of Relatives of Disappeared Detainees – nowadays repeated worldwide – is “Vivos se los llevaron, vivos los queremos” (“They took them alive, we want them back alive”).

a burial site or a mass grave. The search strategy can vary significantly depending on the premises from which it moves. Although, for the reasons mentioned above (i.e., avoiding re-victimization of relatives and duly reflecting their legitimate demand to see their disappeared loved one return alive), the CED Guiding Principles set a general presumption of life to conduct the search, it is difficult to see how, in practice, this could be done when, for instance, searching, more than forty years later, for a person who was already seventy years old when the disappearance began, or for someone who was last seen where it is known that people were killed and there is a mass grave. Conversely, it would not make much sense to search for a dead person when the disappearance began just a few hours or days before or where the disappeared is a newborn or a child, especially in contexts where it is known that there has been a pattern of enforced disappearances of children, followed by the falsification of documents and, oftentimes, illegal adoptions.³² Hence, on the practical level, effective search strategies require those conducting the search to take into account the date on which the disappearance began or that on which the search commences and, in general, the circumstances of the disappearance, as these factors are crucial for assessing whether it is more appropriate to search for a person that is alive or a person that is dead, and to apply the most effective techniques.

There is therefore an – at least apparent – friction between the presumption that States are requested to apply and the measures to be taken in practice to ensure the effectiveness of the search. However, if the presumption set forth in Principle 1 of the CED Guiding Principles is regarded merely as *iuris tantum*, this allows the relevant parties to avoid the above-mentioned unwanted psychological consequences for relatives of the disappeared, while adapting the search strategy to the existing circumstances and therefore ideally avoiding equally undesired consequences on the practical level.

In a way, this is reflected across the rest of the CED Guiding Principles, wherein, besides the general rule set forth pursuant to Principle 1, other provisions seem to acknowledge that the disappeared might in fact be dead and that this should be duly taken into account when designing the search strategy, choosing the applicable techniques (including the use of specific new technologies)³³ and adopting measures to ensure the protection of the dead. In

32 See *Joint statement of the Committee on the Rights of the Child, the CED, the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, the Special Rapporteur on the Sale and Sexual Exploitation of Children Including Child Prostitution, Child Pornography and other Child Sexual Abuse Material, the Special Rapporteur on Trafficking in Persons, Especially Women and Children, and the WGEID on Illegal Intercountry Adoption*, UN Doc. CED/C/9, 29 September 2022, para. 15: “The State shall therefore play an active role in efforts to search for and locate missing children. For instance, States should create a DNA database that includes genetic samples for all cases of wrongful removal, enforced disappearance or falsification of identity that have been reported, with the specific purpose of re-establishing the identity of victims of illegal intercountry adoption. In implementing the right to the truth, States shall assist one another in searching for, identifying and locating victims of illegal intercountry adoption.”

33 See *New Technologies and Enforced Disappearances: Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/54/22/Add.5, 11 September 2023. Notably, paragraphs 26–45 of the report illustrate new technologies applicable to the search for the disappeared: while some

this sense, Principle 2(4), which requires the search to respect human dignity, deals explicitly with the treatment to be given to the remains of a disappeared person. Principle 8(8), meanwhile, focuses on the search for disappeared newborns or children, who must most likely be searched for on the assumption that they are alive:

The comprehensive search strategy for new-born and very young children should take into account the fact that their identity documents may have been altered and that they may have been taken from their families, given a false identity and handed over to a children's institution or another family for adoption. These children and adolescents, who may by now be adults, should be searched for, identified and have their identity restored.³⁴

The two principles that, departing from either a presumption of life or the assumption of death of the disappeared, explicitly reflect the unavoidable ambiguity that characterizes enforced disappearance, and that should be taken into account also when designing the search strategy, are Principles 3(3) and 7. The former refers to both "release" and "return of the remains" of the disappeared as equally possible outcomes of the search process. Principle 7, recalling the continuing nature of the obligation to search for the disappeared, spells out separately when such an obligation could come to an end:

2. If the disappeared person is found alive, the search may be considered as completed only when the person is again under the protection of the law; such protection shall also be ensured if the disappeared person is found deprived of liberty in a lawful detention centre.

3. If the disappeared person is found dead, the search may be considered as completed when the person has been fully identified in accordance with international standards and handed over to his or her family members or relatives in a dignified manner. When only partial remains have been found and identified, any decision to continue the search to locate and identify the missing remains should take into account the actual chances of identifying more remains and the needs expressed by the family members in the context of their cultural norms concerning funerals.³⁵

A similar approach can be found in Principle 22(b) of the UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*,³⁶ which refers to the search among the measures of satisfaction to which victims are entitled. It indicates that the search must focus on "the whereabouts" of the disappeared in general; "the identities" of the

would be effective irrespective of the actual status of the disappeared person, the usefulness and effectiveness of others would depend on whether the victim being searched for is presumed to be alive or dead.

34 CED Guiding Principles, above note 30, Principle 8(8).

35 *Ibid.*, Principle 7(2–3).

36 UNGA Res. 60/147, 15 December 2005.

children abducted; and “the bodies” of those killed, adding, with regard to the latter, that States must also provide “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”.

Without referring to the application of presumptions (be they *de iure* or *de facto*), this principle seems to capture the most sensible approach to the search for the disappeared: in general terms, the inescapable ambiguity of this situation requires a determination of the whereabouts of the disappeared in the first place. Then, once elements are acquired with regard to the fate of the disappeared, different measures should be adopted, including those related to the protection of the dead.

It is noteworthy that, in its jurisprudence on urgent actions pursuant to Article 30 of the ICPPED aimed at establishing the fate and whereabouts of the disappeared, the CED has undertaken an approach that reflects the natural ambiguity of the situation.³⁷ Article 30(3) of the ICPPED entrusts the CED with the power to request from States Parties the adoption of interim measures, with the aim of “locat[ing] and protect[ing] the person concerned”. The measures indicated to States Parties can vary, depending on the circumstances and the information submitted to the CED, and can aim at the protection of elements or pieces of evidence that could aid efforts to locate the disappeared person, including burial sites or mass graves (e.g., through the adoption of measures such as cordoning off the area).

In addition, Principle 7(4) of the CED Guiding Principles also foresees the – not infrequent – case in which the search does not yield concrete results and must end with a recognition of the impossibility of recovering the person:

If the disappeared person has not been found and there is credible evidence beyond a reasonable doubt of his or her fate or whereabouts, the search may be suspended when it is not physically possible to recover the person and once all obtainable information has been exhaustively analysed and all possible scenarios investigated. This decision should be taken in a transparent manner and requires the prior and informed consent of the family members or persons close to the disappeared person. A witness statement, uncorroborated accounts or an affidavit cannot be viewed as sufficient proof of death for ending the search.³⁸

Although Principle 7(4) is drafted in such a way as to reflect the fact that the disappeared could be either alive or dead, in practice, it would mostly apply in cases where there are enough elements to consider that the person is dead, but it is impossible to recover the remains (e.g., because they may have been incinerated or thrown into the ocean or some other large body of water).

37 See, among others, the CED’s latest *Report on Requests for Urgent Action Submitted under Article 30 of the Convention*, UN Doc. CED/C/26/2, 27 March 2024, which illustrates how the CED adapts the kind of measures and actions requested to States, essentially reflecting the reality that the disappeared might be alive or dead, and tailoring the recommendations depending on the circumstances.

38 CED Guiding Principles, above note 30, Principle 7(4).

The WGEID has frequently been confronted with this kind of situation and has set standards in this regard. In its report on its country visit to Peru, it emphasized that, in cases where clarification is difficult or impossible to attain (for instance, when the body of the disappeared person, for various reasons, cannot be found or recovered), “the State still has an obligation to investigate until it can determine by presumption the fate or whereabouts of the person”.³⁹ In its General Comment on the right to know the truth, the WGEID added that

[t]here is an absolute obligation to take all the necessary steps to find the person, but there is no absolute obligation of result. Indeed, in certain cases, clarification is difficult or impossible to attain, for instance when the body, for various reasons, cannot be found. A person may have been summarily executed, but the remains cannot be found because the person who buried the body is no longer alive, and nobody else has information on the person’s fate. The State still has an obligation to investigate until it can determine by presumption the fate or whereabouts of the person.⁴⁰

This has eventually been reflected in the criteria applied by the WGEID itself to clarify cases registered pursuant to its humanitarian procedure (i.e., the registration and communication to States of cases of enforced disappearance with the purpose of establishing the fate and whereabouts of a person):

[A] case can also be clarified if the State concerned, after conducting an independent, impartial, thorough and effective investigation and search activities, provides reliable information that demonstrates that there are no possible means to establish the whereabouts of the person, but produces detailed information on the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.⁴¹

In both cases, the chosen phrasing adequately reflects the fact that the disappeared person could equally be alive or dead, and that it falls upon the State to take all necessary measures to elucidate what happened, preserve evidence and, in the case of impossibility of recovering the person (or his or her mortal remains), at least to collect elements that allow the State to presume (*de facto*) the fate of the disappeared.

Exhumation, identification, respect for and return of the mortal remains of the disappeared

I envy the finality of funerals. I covet the certainty. How it must be to wrap one’s hand around the bones, to choose how to place them, to be able to pat the patch

39 WGEID, *Report on the Country Visit to Peru*, UN Doc. A/HRC/33/51/Add.3, 8 July 2016, para. 23.

40 WGEID, above note 22, para. 5.

41 WGEID, *Revised Methods of Work*, UN Doc. A/HRC/WGEID/1, 14 February 2023, para. 28.

of earth and sing a prayer.

Hisham Matar⁴²

Having established that, in designing the strategies and policies to search for disappeared persons it is necessary to bear in mind that the disappeared could be alive or dead, and measures and responses should be tailored around the circumstances and directed at establishing the exact fate of the person (at least by presumption), this section reflects upon State obligations when it is actually known, or inferred, that the disappeared is dead.⁴³

In this realm, the treatment inflicted on the dead is inherent to the violations both against the disappeared and against his or her loved ones. On the one hand, certain conducts (e.g., incineration, mutilation of the body, throwing the remains into the ocean or any other body of water) are directly related to one of the constitutive elements of the crime – i.e., the concealment of the fate and whereabouts of the disappeared. On the other hand, the lack of respect vis-à-vis mortal remains, and the ensuing impossibility of recovering, honouring and mourning them, is a way to prolong the uncertainty and the suffering of the relatives of the disappeared (and, in certain cases, of entire communities), also bearing in mind cultural customs and specific beliefs.

In the *Blake v. Guatemala* case before the IACtHR,⁴⁴ the relatives of Mr Blake knew – from witnesses – that, after having been captured by members of a paramilitary group, he was brutally killed and his body was incinerated. Nevertheless, in the eyes of his relatives, Mr Blake was a victim of enforced disappearance and the IACtHR dealt with him as such, although his fate (i.e., the killing and incineration of his mortal remains) was known. In this regard, the Court noted that

the burning of Mr. Nicholas Blake's mortal remains to destroy all traces that could reveal his whereabouts is an assault on the cultural values prevailing in the Guatemalan society, which are handed down from generation to generation, with regard to respecting the dead. The burning of the victim's remains by members of the civil patrol on the orders of a member of the Guatemalan army increased the suffering of Mr. Blake's relatives.⁴⁵

Accordingly, the IACtHR found that this amounted to a violation of Article 5 of the American Convention on Human Rights (right to humane treatment) with regard to Mr Blake's relatives. In its well-established jurisprudence, the IACtHR has consistently maintained this approach, treating as enforced disappearances cases where the fact that the victim had been killed was known, but the remains had not been located. In subsequent judgments, the Court has also analyzed the

42 H. Matar, above note 7, p. 35.

43 For a comprehensive analysis of this subject, see Grażyna Baranowska, "Advances and Progress in the Obligation to Return the Remains of Missing and Forcibly Disappeared Persons", *International Review of the Red Cross*, Vol. 99, No. 905, 2017.

44 IACtHR, *Blake v. Guatemala*, Judgment (Merits), Series C, No. 36, 24 January 1998.

45 *Ibid.*, para. 115. And in general, see paras 114–116.

consequences on entire (usually indigenous) communities of the impossibility, in cases of enforced disappearance and massacres, of locating, exhuming and respecting the mortal remains of the victims, finding a violation, besides Article 5, of Article 12 (freedom of conscience and religion) of the American Convention with regard to the entire community.⁴⁶

A similar approach is followed by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, who has also held that, where relatives know that their disappeared loved one is dead but cannot obtain certainty and closure through the restitution of mortal remains, the

lack of identification results in a body becoming a missing person. This not only harms families and deprives them of their right to mourning and closure, but also has legal implications and can hinder criminal investigations in cases of potentially unlawful death.⁴⁷

The ECtHR has found that only when the uncertainty as to the fate of the disappeared person lasts for a long time (without ever clarifying what “a long time” exactly means) can the case be regarded as an enforced disappearance.⁴⁸ For its part, the Human Rights Committee has dealt with cases where the remains of the disappeared person have not been located, exhumed and returned to the family as executions and not as enforced disappearances.⁴⁹ In the case of *Milan Mandić v. Bosnia and Herzegovina*, while the Committee found violations of the International Covenant on Civil and Political Rights, the chosen legal qualification of the case led to a more restrictive approach, as noted in the partially dissenting opinion of Mr Víctor Rodríguez Rescia:

What I do not agree with in these Views is that the case has been treated as an execution and not as a forced disappearance of the victim; that would also have given rise to a violation of articles 7 and 16 of the Covenant, read in conjunction with article 2 (3), with respect to the victim and other rights relating to the author (arts. 17 and 23, read in conjunction with art. 2 (3)). In addition, there would have been an increase in the redress to be determined, apart from the question of locating the remains of the disappeared person to undertake his exhumation and return so that his relatives could organize a dignified burial.

...

Even though most of the rights declared violated in this communication on the basis of an extrajudicial execution might be similar if it had been recognized that

46 IACtHR, *Río Negro Massacres v. Guatemala*, Judgment, Series C, No. 250, 4 September 2012, paras 154–165.

47 M. Tidball-Binz, above note 5, para. 31.

48 See, among others, ECtHR, *Janowiec*, above note 16, para. 186; ECtHR, *Timurtas v. Turkey*, Appl. No. 23531/94, Judgment, 13 June 2000, paras 82, 84. See also G. Baranowska, above note 17, pp. 107–108.

49 See, for example, HRC, *Milan Mandić v. Bosnia and Herzegovina*, UN Doc. CCPR/C/115/D/2064/2011, Views of 5 November 2015.

the violations occurred as a result of a forced disappearance, there are differences of substance, and also with regard to the redress which should be determined. The forced disappearance exists and is a continuing crime owing to the fact that the victim's remains have not been found. This has been clearly stated by the norms and the specialized jurisprudence on the subject, which indicates that a forced disappearance shall be considered as continuing and permanent until such time as the fate or whereabouts of the victim have been established; consequently, until the whereabouts of missing persons have been determined or their remains duly located and identified, the appropriate legal treatment for this situation is that of a forced disappearance of persons.⁵⁰

These reflections confirm that the automatic equation of enforced disappearance to death, even when it is probable that the disappeared person is in fact dead, fails to reflect the complexity and ambiguity of the existing situation and can generate – besides a psychological trauma for the relatives of the disappeared – detrimental legal consequences. To prevent this outcome, full acknowledgment of the ambiguous nature of enforced disappearance is necessary, along with the adoption of measures that, bearing in mind that the victim may in fact be dead, allow for the location, exhumation, protection and respect of the dead, and, where feasible, the return of mortal remains to the family. This “balancing” exercise has ramifications also on the practical level, including the incorporation of a psychosocial approach in forensic work⁵¹ and the application of international standards developed for the protection and treatment of the dead.⁵²

A final question worth examining is whether the return of the mortal remains can be regarded as an autonomous right of relatives of disappeared persons,⁵³ leaving aside instances, already dealt with above, where recovery of mortal remains is not physically possible – for instance, because they have been incinerated.

50 *Ibid.*, Partially Dissenting Opinion of Mr Rodríguez Rescia, paras 1, 5.

51 Morris Tidball-Binz, “The Value and Need for Incorporating a Psychosocial Approach to Forensic Case-Work in Cases of Extra-judicial, Summary or Arbitrary Executions, Including Those Who Do Not Survive Enforced or Involuntary Disappearances”, in M. G. Bianchi and M. Luci (eds), above note 12. See also Soren Blau, “Our Resilient Bodies: The Role of Forensic Science and Medicine in Restoring the Disappeared to History”, in Jennifer Heath and Ashraf Zahedi (eds), *Book of the Disappeared: The Quest for Transitional Justice*, University of Michigan Press, Ann Arbor, MI, 2023.

52 See, among others, the Bournemouth Protocol on Mass Graves Protection and Investigation, 2020, available at: www.bournemouth.ac.uk/research/projects/mass-grave-protection-truth-justice. See also the Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016, available at: www.ohchr.org/sites/default/files/Documents/Publications/MinnesotaProtocol.pdf. For the specific case of migrants, see the Mytilini Declaration for the Dignified Treatment of all Missing and Deceased Persons and their Families as a Consequence of Migrant Journeys, 2018, available at: <https://missingpersons.icrc.org/library/mytilini-declaration-dignified-treatment-all-missing-and-deceased-persons-and-their>. And see the ICRC *Guiding Principles for the Dignified Management of the Dead in Humanitarian Emergencies and to Prevent Them Becoming Missing Persons*, Geneva, 2021, available at: www.icrc.org/en/publication/4586-guiding-principles-dignified-management-dead-humanitarian-emergencies-and-prevent.

53 Michelangelo Scalabrino, *In margine all'Antigone di Sofocle oggi: Il diritto alla sepoltura e alla restituzione del corpo nel diritto internazionale dei diritti dell'uomo: il rispetto di una “legge superiore”*, Rapidcentro, Murcia, 2019. See also G. Baranowska, above note 43, pp. 715–726.

Principle 2(4) of the CED Guiding Principles subsumes the return of mortal remains to the obligation to search for the disappeared. The acknowledgement of the State's obligation suggests the existence of a corresponding human right:

The body or remains of a disappeared person should be handed over to the family members under decent conditions, in accordance with the cultural norms and customs of the victims, with respect at all times for the fact that they are the mortal remains of a person, and not objects. The return should also involve the means and procedures needed to ensure a dignified burial consistent with the wishes and cultural customs of the families and their communities. When necessary, and if family members so wish, States should cover the cost of transferring the body or remains to the place chosen by the family members for burial, even if the transfer is to or from another country.⁵⁴

Conversely, Principle 34 of the UN Principles against Impunity explicitly subsumes the identification and return of mortal remains to the family of the disappeared within their right to reparation:

[I]n the face 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.⁵⁵

Irrespective of whether it is a corollary of the – ongoing – obligation to search for the disappeared or of the – equally ongoing – obligation to provide reparation to victims of enforced disappearance, it thus seems that the location, exhumation,⁵⁶ identification, respect for and return of the mortal remains of disappeared persons is a fundamental human right of relatives. In this regard, the WGEID provides the following indications:

[T]he 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 [their] available resources, including through international assistance and cooperation.⁵⁷

54 CED Guiding Principles, above note 30, Principle 2(4).

55 UN Principles against Impunity, above note 21, Principle 34.

56 The present article does not cover the potential obstacles posed to these operations – and to exhumation in particular – in certain contexts or under certain legal regimes, such as, for instance, Islamic law. On the latter, see Ahmed Al-Dawoody, "Management of the Dead from the Islamic Law and International Humanitarian Law Perspectives: Considerations for Humanitarian Forensics", *International Review of the Red Cross*, Vol. 99, No. 905, 2017.

57 WGEID, above note 22, para. 6.

However, international human rights jurisprudence on this aspect remains divergent. Indeed, in one specific case, the ECtHR recognized that the State should ensure the location and exhumation of presumed burial sites and referred to relevant measures to be undertaken (e.g. collection, storage and identification of remains and, where necessary, systematic matching through up-to-date genetic databanks).⁵⁸ However, the ECtHR did not explicitly recognize the obligation of the State to return the mortal remains to the families.

In the already mentioned *Janowiec* case, where only partial exhumations of the mortal remains buried in various mass graves had been conducted,⁵⁹ and relatives therefore claimed that their loved ones were to be considered as forcibly disappeared, far from regarding the lack of comprehensive exhumations as a violation of the State's obligations, the ECtHR looked at this as a circumstance that would allow relatives to presume the death of their loved ones – and therefore, as explained above, to strip them of their status as victims in their own right.⁶⁰ Accordingly, the ECtHR did not even consider ordering as a measure of reparation the completion of the exhumations, or the identification or return of the mortal remains.

For its part, in the *Massacres of El Mozote* case, the IACtHR found that the lack of adequate and comprehensive exhumations directed at identifying all those buried in multiple mass graves and returning their remains to their loved ones amounted *per se* to a violation of their fundamental human rights, including the right to know the truth.⁶¹ In the words of the IACtHR in another case, exhumations are an obligation of the State, and their carrying out bears consequences in terms of the duration of enforced disappearance:

[T]he acts that constitute forced disappearance are permanent in nature for as long as the victim's whereabouts are unknown or his remains are not found. However – particularly in relation to the latter aspect – the Court has reiterated that it is not merely a matter of finding the remains of a certain person but that this, logically, must be accompanied by tests or analyses that make it possible to prove that, in fact, those remains correspond to that person. Therefore, in cases of presumed forced disappearance in which there are indications that the alleged victim has died, the determination of whether a forced disappearance existed and has ceased, and when the remains have been located, necessarily involves establishing, in the most reliable manner, the identity of the individual to whom the remains belong. In this regard, the relevant authorities must proceed to the prompt exhumation of the mortal remains so that these may be examined by a competent professional. Such exhumation must be carried out in a manner that protects the integrity of the

58 ECtHR, *Aslakhanova and Others v. Russia*, Appl. Nos 2944/06 *et al.*, Judgment, 18 December 2012, paras 223–228.

59 ECtHR, *Janowiec*, above note 16, paras 20, 40.

60 *Ibid.*, para. 154.

61 IACtHR, *The Massacres of El Mozote and Nearby Places v. El Salvador*, Judgment, Series C, No. 252, 25 October 2012, paras 262, 331–334.

remains in order to establish, to the extent possible, the identity of the deceased person, the date of death, the manner and cause of death, and the existence of possible injuries or signs of torture. Until the remains are duly located and identified, the forced disappearance continues to be executed.⁶²

In light of similar considerations, in the *El Mozote* case, the IACtHR ordered the State, as a measure of reparation, to

review the information available on possible interment or burial sites, which must be protected to preserve them, in order to initiate, systematically and rigorously and with the adequate human and financial resources, the exhumation, identification and, when appropriate, return of the remains of those executed to their next of kin.⁶³

Finally, the IACtHR emphasized how the exhumation of remains is not only essential to clarify the fate and whereabouts of the disappeared, thus putting an end to the suffering of their relatives, but is also instrumental in providing

useful information to clarify the facts, because they provide details of the treatment that the victims received, the way in which they were executed, and the *modus operandi*. Similarly, the place where the remains are found may provide valuable information on the perpetrators or the institution to which they belonged.⁶⁴

The adequate protection of the dead, along with their respect and related operations (including exhumation and identification), is therefore essential in disambiguating the fate of the disappeared and, as such, has reverberations on the legal qualification of the events and their corresponding investigation.

Investigation, prosecution and sanction

The legal qualification of the events weighs significantly on the conduct of investigations, the pressing of charges, and the prosecution and ultimately the sanction (or lack thereof) of perpetrators.

Enforced disappearance is a complex and continuous crime that, as noted by the IACtHR since its first judgment on the subject, must be understood and confronted in an integral manner.⁶⁵ Recognizing the continuous nature of the offence has obvious consequences on the application of statutes of limitations for criminal proceedings, which will not run until after the fate and whereabouts of the disappeared person have been established with certainty.

62 IACtHR, *The Peasant Community of Santa Barbara v. Peru*, Judgment, Series C, No. 299, 1 September 2015, para. 165.

63 IACtHR, *El Mozote*, above note 61, op. para. 6, and for detailed indications on how to proceed, paras 331–334.

64 *Ibid.*, para. 331.

65 IACtHR, *Velásquez Rodríguez v. Honduras*, Judgment, Series C, No. 4, 29 July 1988, para. 150.

As of today, only a few States comply with the obligation to codify enforced disappearance as a standalone crime under domestic law.⁶⁶ More States reproduce the definition of enforced disappearance as a crime against humanity enshrined in the Rome Statute of the International Criminal Court, which applies only to enforced disappearances committed as part of a widespread or systematic attack against any civilian population and would not encompass isolated instances.

The majority of States do not codify enforced disappearance as such, and would therefore refer to offences such as illegal deprivation of liberty, abuse of power, kidnapping, unlawful detention or, in some cases, torture or homicide. However, while these offences may form part of a type of enforced disappearance, none of them are sufficient to cover all the elements of enforced disappearance. Moreover, some of these offences are not continuous in nature and, as such, would be subjected to the application of statutes of limitations, thus facilitating impunity of perpetrators. Countries that find themselves in this situation will necessarily have to investigate cases of enforced disappearance using other offences, and besides the potential legal consequences in terms of prescription, there would be also practical and psychological implications similar to those described above for the search for the disappeared.⁶⁷

For countries that have the standalone crime of enforced disappearance, relevant to this contribution are the criteria used to determine when such an offence should be used, instead of homicide or arbitrary execution, for the purposes of investigation and prosecution, bearing in mind that in many circumstances, both illegal conducts occur (e.g., the victim of an enforced disappearance is killed during captivity).

In general, for the reasons illustrated in the previous sections, enforced disappearance cannot be subsumed under the crime of homicide, nor is the latter an integral part of enforced disappearance. This means that both crimes should be investigated and the perpetrators of both must be prosecuted and sanctioned.⁶⁸

In cases where the respondent States have insisted – in the absence of the mortal remains of the victims – in having the underlying conducts qualified as homicide instead of enforced disappearance, the IACtHR has set forth useful criteria to distinguish the conducts:

[O]ne of the characteristics of forced disappearance, unlike extrajudicial execution, is the State's refusal to acknowledge that the victim is under its control and to provide information in this regard, for the purpose of creating

66 WGEID, *Study on the Thirtieth Anniversary of the Declaration on the Protection of All Persons from Enforced Disappearance*, UN Doc. A/HRC/51/3/Add.3, 31 August 2022, paras 49, 61.

67 For concrete examples of instances where this has happened, see G. Citroni, above note 14, pp. 793–795.

68 An example of the negative legal consequences depending on the qualification of the underlying crime can be found in Special Panels for Serious Crimes within the District Court of Dili, East Timor, *The Prosecutor v. Rusdin Maubere*, Case No. 23/2003, Judgment (Trial Chamber), 5 July 2004, pp. 22–23, where the Court held that, for the crime of enforced disappearance to be applied, it would be necessary that the victim “is and continues [to be] alive”, while, if it is known – or presumed – that the disappeared is dead, even in the absence of the mortal remains, the only possible legal qualification would be homicide. This is a typical case of error due to the lack of acknowledgment of the complex relationship between enforced disappearance and death.

uncertainty as to his or her whereabouts, life or death, and to cause intimidation and suppression of rights. This Court has recognized that forced disappearance has frequently included the execution of detainees, in secret and without trial, followed by the concealment of the body to erase the material traces of the crime and to ensure the impunity of those who committed it. In this sense, the Court has heard cases in which the existence of more or less evidence of the death of the victims did not alter its classification as an enforced disappearance.

[In such cases,] the element that characterized the act as a forced disappearance was precisely the actions taken by the State agents after killing the victims: that is, measures aimed at hiding what had really happened or erasing all traces of the bodies to prevent their identification or to prevent their fate and whereabouts from being established.⁶⁹

These criteria should also be considered by domestic authorities in deciding how to qualify the events, bearing in mind the ramifications that this will have on the applicable statutory regulations. Indeed, the fact that in certain countries relatives of disappeared persons have obtained court decisions or certificates declaring their loved ones dead, while the fate and whereabouts of their loved ones has remained uncertain, might also lead to relevant changes in the legal qualification of the conduct for the purposes of ongoing investigations and proceedings.

Reparations and psychosocial support conditional upon the declaration of death of the disappeared

It is the dead, not the living, who make the longest demands.

Sophocles⁷⁰

Another area where the negative consequences of the undue and fictitious equation between enforced disappearance and death and the casual application of presumptions are especially problematic is that of psychosocial support and measures of reparation.⁷¹ At the domestic level, access to these measures has often been made conditional upon obtaining a certificate or a declaration of death of the disappeared person.

Having to declare a loved one dead, despite not knowing his fate or whereabouts, in order to obtain financial support or redress or to settle administrative, family and welfare matters is the quintessential denial of the nature of enforced disappearance – so much so that it has been recognized as a form of inhumane and degrading treatment for the relatives of the disappeared.⁷² International

69 IACtHR, *Santa Barbara*, above note 62, paras 163–164.

70 Sophocles, *Antigone*, 442 BC.

71 G. Citroni, above note 14.

72 See, among others, HRC, *Rizvanović v. Bosnia and Herzegovina*, UN Doc. CCPR/C/110/D/1997/2010, Views of 21 March 2014, para. 9.6.

human rights mechanisms, including the WGEID and the CED,⁷³ have expressed themselves against this practice, indicating that States should not require certificates of (presumed) death, but rather certificates of “absence by reason of enforced disappearance”, which would have similar legal effects and would allow the authorities to regulate social welfare, financial matters, family law and property rights⁷⁴ while acknowledging the real nature of the underlying events and avoiding undesirable psychological and legal consequences.

Both the WGEID and the CED have also clarified that the expedition of certificates or declarations of absence by reason of enforced disappearance shall not interrupt or close the search activities and the investigations to determine the fate and whereabouts of victims and to identify those responsible for the crime. On the contrary, no matter how administrative, family, financial, social welfare and reparation issues have been settled, States shall continue to investigate all cases to determine the fate and whereabouts of the disappeared and to ensure accountability of those responsible for the commission of enforced disappearances. Moreover, the WGEID has held that “as a general principle, no victim of enforced disappearance shall be presumed dead over the objections of the family”.⁷⁵

Finally, a reflection on the relationship between the victims’ right to reparation and the death of the disappeared person is in order. Pursuant to Article 24(4–5) of the ICPPED, the right to adequate measures of reparation is granted to all victims, thus including the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance. Accordingly, relatives of the disappeared person are entitled to receive reparation for the harm suffered (including compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition) irrespective of whether the disappeared is alive or dead. The wording of Article 19 of the 1992 Declaration on the Protection of All Persons from Enforced Disappearance⁷⁶ could appear slightly more problematic:

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

73 See, among others, WGEID, above note 8, paras 6–10; *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/22/45, 28 January 2013, p. 9, para. 50; CED, *Concluding Observations on Cambodia*, UN Doc. CED/C/KHM/CO/1, 1 March 2024, para. 58; CED, *Concluding Observations on Mauritania*, UN Doc. CED/C/MRT/CO/1, 29 September 2023, para. 50; CED, *Concluding Observations on Costa Rica*, UN Doc. CED/C/CRI/CO, 31 March 2023, para. 39.

74 Pursuant to Article 24(6) of the ICPPED, above note 1, States Parties are under an obligation to adopt adequate measures in this regard. The provision establishes that this is “without prejudice to the obligation to continue the investigation until the fate of the disappeared has been clarified.”

75 WGEID, above note 22, para. 5. A similar stand was taken by the Advisory Committee of the Human Rights Council in its progress report on best practices on the issue of missing persons, highlighting that “missing persons should be presumed to be alive until their fate has been ascertained. The foremost right of a missing person is that of search and recovery. A person should not be declared dead without sufficient supporting evidence.” *Progress Report of the Human Rights Council Advisory Committee on Best Practices on the Issue of Missing Persons*, UN Doc. A/HRC/14/42, 22 March 2010, para. 60.

76 UNGA Res. 47/133, 18 December 1992.

of the victim as a result of an act of enforced disappearance, their dependents shall also be entitled to compensation.

While the first part of the provision recognizes that both the disappeared persons and their families are entitled to obtain redress, the second sentence seems to make compensation for dependants of the disappeared conditional upon the death of the latter. This reading of the provision would be contradictory and, as noted by the WGEID, Article 19 of the Declaration must be interpreted taking into account the developments in international law. In this sense, the WGEID

does not differentiate between direct and indirect victims, but rather considers 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.⁷⁷

The WGEID has added that “social allowances and/or measures of reparation should not be made conditional on the requirement that the relatives of the disappeared person produce a death certificate”.⁷⁸

Conclusion

But I will bury him; and if I must die, I say that this crime is holy: I shall lie down with him in death, and I shall be as dear to him as he to me.

Sophocles⁷⁹

Enforced disappearance brings with it an inescapable ambiguity that is its constitutive trait. Admittedly, death may be the fate of a disappeared person, but the two cannot and shall not be automatically equated, especially only by virtue of casual presumptions or assumptions, as this generates undesirable practical, legal and psychological consequences, including spoiling the search activities, triggering the prescription of criminal proceedings and re-traumatizing relatives of the disappeared person.

A fine balancing exercise is therefore required in the interpretation of States' core obligations in cases of enforced disappearance and the ensuing rights, including by adopting adequate measures to protect the dead, in case death is in fact the fate of the disappeared person. In this regard, the case law of the IACtHR, compared to that of other international human rights mechanisms, is certainly more progressive, and it is worth taking it as a reference in the best interest of victims.

If, indeed, the disappeared person is dead, the State must take all measures to locate, exhume, respect, identify and return the mortal remains, as a means to allow relatives to learn the truth, perform the last rituals, commence the mourning process and, ultimately, to put an end to the enforced disappearance as such.

⁷⁷ *Report of the Working Group on Enforced or Involuntary Disappearances*, above note 73, para. 51.

⁷⁸ *Ibid.*, para. 50.

⁷⁹ Sophocles, above note 70.