

# Access to Justice for Unlawful Deaths and Enforced Disappearances

A Guide for Human Rights Defenders

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# **Access to Justice for Unlawful Deaths and Enforced Disappearances**

A Guide for Human Rights Defenders

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## **ABBREVIATIONS**

ACHPR	African Charter on Human and Peoples' Rights
ACHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACtHPR	African Court on Human and Peoples' Rights
API	Additional Protocol I to the Geneva Conventions
APII	Additional Protocol II to the Geneva Conventions
CAT	Committee Against Torture
CED	Committee on Enforced Disappearances
ECHR	European Convention on Human Rights
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
GA	United Nations General Assembly
GC	Geneva Conventions
GCI	I Geneva Convention
GCII	II Geneva Convention
GCIII	III Geneva Convention
GCIV	IV Geneva Convention
HRC	Human Rights Committee
HRDs	Human Rights Defenders
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
OAS	Organization of American States
OHCHR	Office of the United Nations High Commissioner for Human Rights
PTC	Pre-Trial Chamber of the International Criminal Court
RS	Rome Statute
UDHR	Universal Declaration of Human Rights
UN	United Nations
WGEID	Working Group on Enforced or Involuntary Disappearances

## INTRODUCTION

Unlawful killings involving a denial of the right to life and enforced disappearances constitute crimes under international law. Such violations may be deeply rooted in the history of different countries. Multiple challenges often arise after they have been committed in relation to the investigation and sanction of those responsible, which, if not addressed, may lead to effective structural impunity. Victims and human rights defenders typically face serious difficulties in accessing information and actively participating in investigative and judicial proceedings. In many States, they often suffer stigmatization or revictimization and even risk their lives or physical safety to fulfil their role as human rights defenders.

Against this backdrop, this guide seeks to provide accessible theoretical and practical legal tools that will help victims and human rights defenders address these phenomena and their consequences, promoting the prevention, investigation and criminal prosecution of these violations. To achieve this goal, the guide pays special attention to the obligations imposed by international human rights law on States. These are the obligations to prevent, investigate and punish those responsible for unlawful deaths and enforced disappearances, as well as the obligation of States to guarantee the rights of victims of these violations.

This guide consists of two sections. The first section provides a definition of potentially unlawful deaths and enforced disappearances, referring to several examples through case studies. This section aims to achieve a better understanding of the characteristics of these violations and create awareness of the variety of situations in which they may be committed. It also provides a detailed analysis of States' obligations in terms of the investigation, prosecution, sanction and effective remedy and reparations for these violations, with the aim of explaining to victims and human rights defenders the obligations States have and with which they are required to comply. The guide reviews these obligations of protection and the correspondence rights of victims.

The second section provides practical tools to assist the work of human rights defenders in cases of unlawful deaths and enforced disappearances. First, this section reviews the definition of a human rights defender and offers some concepts regarding their protection. Second, it provides an explanation of human rights campaigns and what they consist of, as well as some guidelines for their effective implementation. Third, the guide presents a roadmap at national and international levels of the initial steps human rights defenders should take when faced with an enforced disappearance or unlawful death. The most commonly faced legal and practical obstacles at the national level are identified and best practices to overcome them are surveyed. An overview of international human rights protection systems is included with the purpose of helping people who are dealing with these types of violations to identify the various international bodies in the field of human rights and understand their functions and the protection they may provide. Finally, the guide ends with a brief note on strategic litigation, explaining what this means, highlighting its current relevance and outlining some criteria that should be taken into account in deciding whether a particular case merits a litigious approach.

This document may usefully be supplemented by a number of Practitioners' Guides produced by the International Commission of Jurists, in particular: Practitioner's Guide No. 2 (The Right to a Remedy and Reparation for Gross Human Rights Violations, updated version); Practitioner's Guide No. 7 (International Law and the Fight against Impunity);



Practitioner's Guide No. 9 (Enforced Disappearances and Extrajudicial Executions: Investigation and Sanction); Practitioners' Guide No. 10 (Enforced Disappearances and Extrajudicial Executions: The Right of Family Members); and Practitioners' Guide No. 14 (Investigation and Prosecution of Potentially Unlawful Death).

## **PART ONE**

This part analyses the international obligations States have in relation to enforced disappearance and unlawful deaths. The text contains an introduction to the concepts of enforced disappearance and unlawful deaths. It also presents various examples of cases that have been heard by different international bodies such as the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR).

The international human rights framework as well as international criminal law and international humanitarian law (IHL) are considered. IHL may be applicable when crimes are committed in the context of an armed conflict that are considered crimes under international law. Finally, this first part closes with a description of the international obligations of States in relation to serious human rights violations.

### **A. UNLAWFUL DEATHS AND ENFORCED DISAPPEARANCES: DEFINITION**

This section provides definitions of enforced disappearance and unlawful death. These explanations are preceded by a brief reflection on the practical implications of the definitions of these crimes in general. It should be noted that this publication uses the term unlawful death as an umbrella term covering unlawful conduct that amounts to an arbitrary deprivation of the right to life under international human rights law.

Before setting out the definitions of unlawful death and enforced disappearance, it is worth asking why it is important to have legal definitions of these concepts and why it is necessary to use the appropriate definitions.

First, the definitions make it possible to identify with some precision which elements must be present for there to be a violation. In this way, it is possible to better identify which facts must be established in a particular case to meet those elements. Second, an appropriate definition makes it possible to differentiate them from other, similar, wrongful conduct. For example, it is important not to confuse an enforced disappearance with an arbitrary detention or abduction, although some of the same features may be present.

Definitions of unlawful death and enforced disappearance are found in international and national law and standards. Depending on the type of law, definitions of these violations may serve different functions. Definitions in international human rights treaties are essential for identifying the international obligations of States. For example, it is essential to pay attention to how enforced disappearance is defined in different treaties, such as the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) and the Inter-American Convention on Forced Disappearance of Persons. This is essential to understand the scope of international obligations that States have with regard to prevention, investigation, prosecution, sanction, remedy and reparations and the search for disappeared persons. In the same vein, international definitions are important in determining when a State violates or fails to comply with these obligations and can be held internationally responsible for such a violation.

Additionally, States have an obligation to adopt the necessary measures to bring their domestic legislation into line with international standards, including setting out

adequate criminal definitions and punishments of enforced disappearance and unlawful deaths.<sup>1</sup> International standards establish a minimum framework as to what must be implemented into domestic law. For example, international definitions serve as a model for the domestic criminalization of enforced disappearance and forms of unlawful death. This means that domestic standards must be consistent with the definition found in relevant treaties.

The definition of these violations in domestic law fulfils an additional function, which is related to their prohibition and the obligation to undertake criminal prosecution of those responsible. As a result, it is important that penalties assigned to enforced disappearance and unlawful deaths are proportionate to the gravity of the acts. Further, the definition of enforced disappearance and unlawful death in criminal codes should avoid conflation with other less serious crimes or crimes that do not reflect the true essence of the prohibited act. For example, in a case of 43 students who disappeared in 2014 in Ayotzinapa, Mexico, different international bodies demanded from the outset that, in compliance with international law and standards, these facts should be investigated as apparent cases of enforced disappearance. However, the federal courts insisted on investigating them as cases of organized crime, the unlawful exercising of public service against the administration of justice and kidnapping.<sup>2</sup> This State strategy sought to avoid the true dimension and seriousness of the violations that were perpetrated.

Finally, these violations may be defined for purposes other than criminal prosecution. Definitions could be used in the fields of civil or administrative law to meet different needs of victims. For example, clear definitions may be necessary to determine the scope of a truth commission or an entity responsible for searching for victims of enforced disappearance or to identify which people may be considered victims of these crimes in order to implement a reparation program. They may also be used to document and exposed situations of gross human rights violations in a country, for the purposes of achieving not just legal accountability, but political accountability as well.

## **B. UNLAWFUL DEATHS**

There is no single definition of unlawful death, because unlawful deaths may result from the violation of several primary obligations of international human rights law and international humanitarian law. The term “unlawful death” may also be used interchangeably with the term “unlawful killings”. To illustrate the variety of situations that could constitute this crime, some examples are provided from different jurisdictions.

### **B.1. Definition, characterization and source**

Under international human rights law, every person has an inherent right to life. The right to life is protected in numerous universal and regional human rights treaties.<sup>3</sup> For instance, Article 6.1 of the International Covenant on Civil and Political Rights (ICCPR) provides:

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<sup>1</sup> IACtHR. *Case of Goiburú et al. v. Paraguay*. Merits, Reparations and Costs. Judgment of September 22, 2006. Series C No. 153, para. 179.

<sup>2</sup> IACHR. *Final Report: Special Follow-up Mechanism on the Ayotzinapa Case*. OAS/Ser.L/V/II. Doc. 156. November 25, 2018, para. 41.

<sup>3</sup> See ACHR, art. 4; ICCPR, art. 6; AChHPR, art. 4; and Arab Charter on Human Rights, art. 5.

*"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."*

Additionally, in line with the language of ICCPR, there is also the right not to be "arbitrarily deprived of life". This means that not all taking of life by the will constitutes a violation. For instance, a killing might be justified as an act of self-defense or as necessary to protect the life of other. For a violation to occur, the deprivation of life must be "arbitrary". Under universal international human rights law, what constitutes "arbitrary" conduct has been established in detail in international jurisprudence. The most contemporary and authoritative interpretation of the question can be found in the Human Rights Committee's General Comment 36 on the right to life.<sup>4</sup>

According to General Comment 36, deprivation of life "involves intentional or otherwise foreseeable and preventable life-terminating harm or injury, caused by an act or omission. It goes beyond injury to bodily or mental integrity or a threat thereto".<sup>5</sup> The intentional deprivation of life is not arbitrary when "it is strictly necessary in order to protect life from an imminent threat".<sup>6</sup> In this regard, General Comment 36 establishes the following:

*"(...) in order not to be qualified as arbitrary under article 6, the application of potentially lethal force by a private person acting in self-defence, or by another person coming to his or her defence, must be strictly necessary in view of the threat posed by the attacker; it must represent a method of last resort after other alternatives have been exhausted or deemed inadequate; the amount of force applied cannot exceed the amount strictly needed for responding to the threat; the force applied must be carefully directed, only against the attacker; and the threat responded to must involve imminent death or serious injury. The use of potentially lethal force for law enforcement purposes is an extreme measure that should be resorted to only when strictly necessary in order to protect life or prevent serious injury from an imminent threat. It cannot be used, for example, in order to prevent the escape from custody of a suspected criminal or a convict who does not pose a serious and imminent threat to the lives or bodily integrity of others. The intentional taking of life by any means is permissible only if it is strictly necessary in order to protect life from an imminent threat."<sup>7</sup>*

The right to life is violated when an unlawful death occurs, when a person dies as a result of the conduct of the State or the conduct of a private individual acting with the support or acquiescence of the State, and in violation of domestic law or international law.<sup>8</sup>

One category of unlawful death is "extrajudicial executions" or "extra-legal executions," i.e., intentional executions committed by State agents or by non-State actors acting in connection with the State.<sup>9</sup>

State officials who might be involved in the commission of an unlawful death include members of the armed forces, police forces or specialized security forces<sup>10</sup> or

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<sup>4</sup> HRC, General Comment No. 36, Article 6: Right to life, CCPR/C/GC/36, 3 September 2019.

<sup>5</sup> Id., para 6.

<sup>6</sup> Id., para 12.

<sup>7</sup> Id., para 12.

<sup>8</sup> Regarding States' obligations on the right to life, see: HRC, General Comment No. 36, Article 6: Right to life, CCPR/C/GC/36, 3 September 2019, and Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016.

<sup>9</sup> Principles relating to the effective prevention and investigation of extra-legal, arbitrary or summary executions.

See also: International Commission of Jurists, Practitioners Guide No 9: Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction, 2015, pp. 64 to 66.

<sup>10</sup> Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016, p. 1, para. 2(a).

other public and political authorities<sup>11</sup>. In terms of the ways in which these agents may play a role in an unlawful death, they may act as direct perpetrators or as parties or superiors, for example.

Unlawful deaths may also be caused by individuals who are not part of a State agency, but who act under the direction of the State with its support, consent, authorization or acquiescence. Examples include deaths caused by "death squads," paramilitary groups, or private security companies hired by the State.<sup>12</sup>

Arbitrary executions are also a type of unlawful death<sup>13</sup>. This category of unlawful death includes deaths caused by the excessive, disproportionate or unlawful use of force by State agents, usually military or police, whether through the use of lethal weapons (firearms) or less lethal weapons.<sup>14</sup> These types of deaths include those occurring in police operations or the deaths of protesters in the context of protests as a result of the use of force by the police.<sup>15</sup>

Another group of cases of unlawful deaths are those committed against persons deprived of their liberty by State agents in a detention facility, either official or clandestine.<sup>16</sup> This could be a prison or prison facility, a private compound used by State agents to deprive people of their liberty or subject them to torture or extrajudicial execution,<sup>17</sup> or any other facility controlled or managed by the State where a person is deprived of their liberty regardless of the reason or motive. Examples include institutions for children or adolescents; institutions for the elderly; hospitals or psychiatric institutions; and centres for migrants or refugees.<sup>18</sup>

Another kind of unlawful death can be the use of the death penalty. The ICJ considers that the use of the death penalty is per se a violation of the right to life and the prohibition against cruel, inhuman or degrading punishment. The UN General Assembly has called in repeated resolutions for States to impose a moratorium on the

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<sup>11</sup> As an example of political authority, reference can be made to the criminal responsibility of Alberto Fujimori for the crimes against humanity perpetrated in the episodes known as Barrios Altos and La Cantuta. In this regard, see: IACHR. *Case of Barrios Altos and La Cantuta v. Peru. Oversight of compliance with the judgment*. Resolution of the Inter-American Court of Human Rights of May 30, 2018, para. 9.

<sup>12</sup> See: Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016, para. 2(a); Special Rapporteur on extrajudicial, summary or arbitrary executions, report on Civil and political rights, including issues related to disappearances and summary executions. Extrajudicial, summary or arbitrary executions, E/CN.4/2005/7, 22 December 2004, paras. 69-70.

<sup>13</sup> International Commission of Jurists, Practitioners Guide No 9: Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction, 2015, pp. 70 and f.f.

<sup>14</sup> *Id.*, pp. 76 to 79.

Standards on the use of lethal and less lethal weapons are contained in several international instruments: Principles on the Effective Prevention and Investigation of Executions, Principle 2; Code of Conduct for Law Enforcement Officials, art. 3(c); Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; Standard Minimum Rules for the Treatment of Prisoners, rule 54; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; IACHR. Principles and best practices on the protection of persons deprived of liberty in the Americas, principle XXIII.2.

As for less lethal weapons, while defined as those that have been designed not to cause death or permanent injury to the people against whom they are used, in many cases their use has resulted in death. An updated systematization of the standards for these weapons can be consulted at United Nations Human Rights Guidance on Less-Lethal Weapons in Law Enforcement. United Nations: New York, 2020, Available at: [https://www.ohchr.org/Documents/HRBodies/CCPR/LLW\\_Guidance.pdf](https://www.ohchr.org/Documents/HRBodies/CCPR/LLW_Guidance.pdf)

<sup>15</sup> HRC, General Comment No. 36, Article 6: Right to life, CCPR/C/GC/36, 3 September 2019, párr. 13 and 15.

See also: International Commission of Jurists, Practitioners Guide No 9: Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction, 2015, pp 73.

<sup>16</sup> Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016.

See also: International Commission of Jurists, Practitioners Guide No 9: Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction, 2015, pp. 74 to 77.

<sup>17</sup> For example, in Mexico there is the legal figure of "arraigo" that is a type of house arrest. This allows a court to order the deprivation of liberty of a person in places not intended for that purpose - such as private homes, hotels, or military facilities - to investigate crimes related to organized crime for a period of up to 80 days. See IACHR. *Situation of human rights in Mexico*. OAS/Ser.L/V/II. Doc. 44/15. December 31, 2015, paras. 313-317.

<sup>18</sup> Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016, para 2(b).

death penalty with a view to abolition.<sup>19</sup> The Human Rights Committee, while recognizing that the ICCPR does not outright prohibit the death penalty for States that are not party to its second Optional Protocol, has made clear that it may only be applied in very narrow situations and under the strictest conditions to avoid a violation of article 6.<sup>20</sup> The cumulative effect of these restrictions means that in practice the death penalty could rarely be applied without constituting an unlawful killing.

In times of armed conflict, unlawful deaths will also arise from violations of IHL, including those arising from violations of rules related to the conduct of hostilities. This issue is elaborated in section D of this chapter.

Finally, under international human rights law, States have an obligation not only to respect the rights, including the right to life of people under their jurisdiction, but also to protect against the conduct of “private persons or entities that would impair the enjoyment of rights”.<sup>21</sup> In these cases, even if the involvement of State agents in the relevant acts cannot be established, if the State is aware or should have been of the situation or context, it has a responsibility to take reasonable measures within its power to prevent further deaths from occurring. The concurrence of these two requirements is a requisite of the due diligence standard that has been developed by international jurisprudence and has made it possible to declare the international responsibility of States in such situations. It is therefore a relevant standard because it supports the principle that the State is not only responsible for the unlawful deaths directly caused by its agents, but also has a responsibility to manage situations of violence that come to its attention, adopting all possible measures to address that context.<sup>22</sup>

## B.2. Case examples

Some examples of real situations in which an unlawful death has occurred are set out in this section. In relation to the **involvement of State agents**, the following case is an example of where the death of the victim occurred as a result of the use of excessive force. In *Solomou et al. v. Turkey*, the European Court of Human Rights (ECtHR) condemned Turkey for violating the right to life of Solomos Solomou in the context of the conflict between Turkey and Cyprus. The victim was a Greek-Cypriot who, during a demonstration entered the security zone of a UN mission and climbed a flagpole with a Turkish flag, and was subsequently shot five times. The only investigation that was carried out was not an effective one, but was undertaken by the Cypriot police and the UN peacekeeping mission present in the area, which led to the drafting of a report. In the proceedings before the ECtHR, testimonies from victims and video and photographic evidence showing the perpetrators pointing their weapons at the demonstrator were decisive in proving that the shots were fired by Turkish military personnel and involved the use of excessive force.<sup>23</sup>

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<sup>19</sup> For instance, see: General Assembly, Resolution adopted by the General Assembly on 16 December 2020, A/RES/75/183, 28 December 2020.

<sup>20</sup> HRC, General Comment No. 36, Article 6: Right to life, CCPR/C/GC/36, 3 September 2019, para 32 to 51.

<sup>21</sup> HRC, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para 8.

<sup>22</sup> Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016, para. 2(c).

See also: HRC, General Comment No. 31, Nature of the general legal obligation imposed on States parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 8; Special Rapporteur on extrajudicial, summary or arbitrary executions, report on Civil and political rights, including issues related to disappearances and summary executions. Extrajudicial, summary or arbitrary executions, E/CN.4/2005/7, 22 December 2004, paras. 71-72; IACTHR. *Case of González et al. ("Cotton Field") v. Mexico. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 16, 2009. Series C No. 205, paras. 282-283.

<sup>23</sup> ECHR. *Solomou et al. v. Turkey*, no. 36832/97, paras. 69-73, 24 June 2008.

Cases of human rights violations committed by paramilitary groups, or private military or security companies, are illustrative of **extrajudicial executions committed by non-State actors who are not formally part of the State structure but who act with its acquiescence, authorization, or support**. In *Omeara Carrascal v. Colombia* before the Inter-American Court of Human Rights (IACtHR) involves the death of three people at the hands of paramilitary groups acting in collaboration or coordination with a State security body called the "National Anti-Kidnapping and Extortion Unit" (*Unidad Nacional Antisecuestro y Extorsión*, UNASE).<sup>24</sup> This case is notable because the murder of the victims occurred in a context of hostilities between the State and a paramilitary group. For the IACtHR, if a context of violence exists and the acquiescence or collaboration of the State is evidenced in a specific case, the State can be held responsible for the violation of the rights protected in the American Convention on Human Rights, including the right to life.

Regarding **deaths in State custody**, in *Noguera et al. v. Paraguay*, the IACtHR considered that the State has a special position as guarantor for people deprived of their liberty, which implies fulfilling a range of obligations including safeguarding their rights to life and physical safety.<sup>25</sup> This case deals with the death of Vicente Noguera, a recruit who was completing his military service.<sup>26</sup> The victim died while sleeping in the dormitory of a military establishment. Although the Court ruled inadmissible the evidence that the day before his death the victim had been subjected to training that included torture or other ill-treatment, it concluded that the State had not been able to prove compliance with its "obligation to guarantee the security of the alleged victim through mechanisms or routine medical examinations to determine his fitness and the monitoring of his state of health".<sup>27</sup> To reach this assumption, although the autopsies carried out on the victim concluded his death was due to a naturally occurring pneumonitis, the Court took into account a historical autopsy, which is a report on all of the autopsies previously carried out. The historical autopsy included the conclusion that the possibility of worsening a health situation as a result of excessive physical exercise could not be ruled out.<sup>28</sup>

An illustrative case of **deaths produced by armed non-State actors with a relative degree of internal organization** is the Bojayá Massacre in Colombia.<sup>29</sup> In the context of clashes between the Revolutionary Armed Forces of Colombia-People's Army (*Fuerzas Armadas Revolucionarias de Colombia- Ejército del Pueblo*, FARC-EP) and the United Self-Defence Forces of Colombia (*Autodefensas Unidas de Colombia*, AUC) paramilitary group, the FARC-EP launched a cylinder bomb that killed 70 civilians who were primarily afro-descendants and were sheltering in a church during a clash between the two armed groups.<sup>30</sup> The Inter-American Commission on Human Rights (IACHR) declared the case admissible, arguing that the State authorities, having been informed of the armed clashes in the days preceding the massacre, failed to adopt measures to protect the civilian population and to secure military control of the territory, which in turn facilitated the arrival of the non-State troops to the zone.<sup>31</sup>

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<sup>24</sup> IACtHR. *Case of Omeara Carrascal et al. v. Colombia. Merits, Reparations and Costs*. Judgment of November 21, 2018. Series C No. 368, paras. 71-98.

<sup>25</sup> IACtHR. *Case of Noguera et al. v. Paraguay. Merits, Reparations and Costs*. Judgment of March 9, 2020. Series C No. 401, para. 67.

<sup>26</sup> *Ibid.*, paras. 38-43.

<sup>27</sup> *Ibid.*, para. 75.

<sup>28</sup> *Ibid.*, paras. 57, 75.

<sup>29</sup> IACHR. *Delis Palacio Herrón et al. (Bojayá Massacre) v. Colombia*. Report No. 104/18, Petition 221-08. Report on Admissibility. OAS/Ser.L/V/II. Doc. 117, 20 September 2018.

<sup>30</sup> *Ibid.*, para. 2.

<sup>31</sup> *Ibid.*, paras. 3-4.

Finally, a case related to **deaths caused by private individuals** is *Nadia Alejandra Muciño Márquez and family v. Mexico*, which is currently before the IACHR. Nadia Muciño was alleged murdered in the presence of her three children by her partner and his brother.<sup>32</sup> The alleged murder took place despite the fact that the victim had previously reported acts of violence committed by her partner on numerous occasions to a range of State authorities.<sup>33</sup> In the internal investigation there were several acts of negligence in relation to the removal of the body, the chain of custody for the evidence collected and the preservation of the site, which was set on fire two days following the killing.<sup>34</sup> There was also a questionable dismissal of the children's statements as evidence as they were considered incapable of producing a structured and consistent account.<sup>35</sup> In this case, the IACHR recalled the general rule that "an investigation into the alleged violent death of a person must be conducted promptly to protect the interests of the victims and preserve the evidence."<sup>36</sup>

### C. ENFORCED DISAPPEARANCE

This section sets out the elements of enforced disappearance and refers to different cases that illustrate the diversity of situations in which this crime may occur.

#### C.1. Definition, characterization, and source

The International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) contains the contemporary universal definition of enforced disappearance. In the Convention, enforced disappearance is defined as:

"(...) the arrest, detention, abduction or any other form of deprivation of liberty by State agents or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places the affected person or group outside the protection of the law."<sup>37</sup>

This is a refinement of the earlier 1992 UN Declaration on the Protection of all Persons from Enforced Disappearance.<sup>38</sup> Similarly, Article II of the Inter-American Convention on Forced Disappearance of Persons defines enforced disappearances as follow:

"(...) *forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees*".

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<sup>32</sup> IACHR. *Nadia Alejandra Muciño Márquez and family vs. Mexico*. Report No. 94/18, Petition 1402-10. Report on Admissibility. OAS/Ser.L/V/II. Doc. 107, August 23, 2018, para. 1.

<sup>33</sup> *Ibid.*, para. 2.

<sup>34</sup> *Ibid.*, para. 3.

<sup>35</sup> *Ibid.*, para. 10.

<sup>36</sup> *Ibid.*, para. 12.

<sup>37</sup> ICPPED, art. 2.

<sup>38</sup> The declaration establishes: "[The UN General Assembly] Deeply concerned that in many countries, often in a persistent manner, enforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law (...)."



It should be noted that the leading global instrument setting out international standards on enforced disappearance is the ICPPED, which was adopted by consensus at the UN General Assembly in 2006, and now has 64 States Parties with a further 44 States having signed but not yet ratified, with the numbers increasing each year. The Convention builds on earlier standards, including the UN Declaration on the Protection of All Persons from Enforced Disappearance adopted by the UN General Assembly in 1992. The Declaration is not in itself legally binding, but it applies to all States.

Enforced disappearances are also effectively prohibited by the obligations contained in other treaties, particularly the International Covenant on Civil and Political Rights (ICCPR), and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Although enforced disappearance is not expressly mentioned in either treaty, any perpetration of an enforced disappearance inherently involves one or more acts that are prohibited by the relevant treaty. The international bodies mandated to supervise State compliance with these treaties (i.e. the Human Rights Committee and the Committee against Torture) have consequently developed extensive jurisprudence and guidance on the application of the more general treaty provisions to acts of enforced disappearance, including with regards to the right to life, the right to be free from torture and other cruel, inhuman or degrading treatment, the right to liberty and security, and recognition as a person before the law.

Enforced disappearance is not only a human rights violation, but also a crime under international law. Enforced disappearance is a permanent or continuous crime that continues to be committed the fate and whereabouts of the disappeared person has been established. If the person is alive, there is an obligation to bring the person under the protection of the law, either through release or custodial detention in line with human rights law. If the victim is dead, the obligation to search ends when their remains are located, scientifically identified and returned,<sup>39</sup> or their death is reconstructed with certainty and reliability, if it is established by all the available evidence that their remains cannot be recovered.<sup>40</sup>

The denial of provision of information, the provision of false information or otherwise engaging in a cover-up of the fate and whereabouts of the victim is an element of enforced disappearance, which makes it possible to distinguish this from other crimes such as kidnapping, illegal detention and extrajudicial execution.<sup>41</sup>

An enforced disappearance, in addition to be a human rights violation in its own right, is also always a violation of one or more other right, specifically: freedom from torture or cruel, inhuman or degrading treatment or punishment; the right to life; the right to liberty (freedom from arbitrary detention); and the right to recognition as a

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<sup>39</sup> Ibid., principle 7.3.

See: IACTHR. *Case of 19 Merchants v. Colombia. Merits, Reparations and Costs*. Judgment of July 5, 2004. Series C No. 109, paras. 155 and 18. In this case, even though there were reports that the bodies of the victims had been dismembered and thrown into a river, the IACHR concluded that the victims had been forcibly disappeared as more than 16 years had passed since the events occurred without the remains having been located and identified. IACTHR. *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, Reparations and Costs*. Judgment of September 1, 2010. Series C No. 217. This is another case related to remains that were located but not scientifically identified. However, the IACHR ruled that the whereabouts of Ibsen Cárdenas were definitively known when his remains were identified through DNA testing (paras. 91-92). In this judgment it was held that the State has an obligation to carry out actions aimed at the recovery and identification of the remains of disappeared persons (para. 219).

<sup>40</sup> Navarro, Susana, Pérez-Sales, Pau and Kernjak, Franx, *Global consensus on principles and minimum standards for psychosocial work in search processes and forensic investigations in cases of enforced disappearances, arbitrary or extrajudicial executions*. 2010, standard 4. Available at: <https://bit.ly/31nJ6oK>

<sup>41</sup> International Commission of Jurists, Practitioners Guide No 9: Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction, 2015. Available at: <https://bit.ly/3eP6Xkh>

person before the law. When practiced in a widespread or systematic manner against a civilian population, it may constitute a crime against humanity.

Many victims of enforced disappearance are simultaneously victims of unlawful death. Cases of enforced disappearance can also involve the execution of the disappeared persons, in secret and without prior judicial process, followed by the concealment of the body, with the aim of erasing all material traces of the crime and seeking impunity for those who committed it<sup>42</sup>. In this sense, there are also cases of enforced disappearances in prisons, especially in the context of unauthorized transfers and massacres.<sup>43</sup>

There are three constituent elements of the concept of enforced disappearance of persons: 1) the deprivation of liberty; 2) the refusal or neglect to provide information; and 3) the requirement that it be committed by an agent of the State or a private individual acting in connection with the State.<sup>44</sup> The essential characteristics of these elements are explained below.

### **C.1.1. Deprivation of liberty**

The enforced disappearance of persons constitutes multiple violations that begins with the deprivation of their liberty, in any form,<sup>45</sup> legal or illegal.<sup>46</sup> What is crucial for this requirement to be considered the first act of an enforced disappearance is the effect on a person's freedom in the broadest sense. This occurs when: a person is deprived of their liberty as a result of the application of a pre-trial arrest as a suspect in criminal proceedings; as a form of preventive administrative detention; as a result of serving a criminal sentence; carried out in the context of an extradition procedure;<sup>47</sup> carried out pursuant to capture in armed hostilities; carried out in connection with a migration situation; or carried out in a variety of illegal manners, as in the case of kidnappings, raids, or armed assaults in a closed area,<sup>48</sup> among other possibilities.

### **C.1.2. Denial of information**

Denial of information consists of the refusal or neglect to admit to or concealment of the deprivation of liberty, as well as the refusal or neglect to admit to, or concealment of, information about the fate and whereabouts of the victim. As indicated above, this is an indispensable element of an enforced disappearance.

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<sup>42</sup> IACtHR. *Case of Gonzalez Medina and Family Members v. Dominican Republic. Preliminary Objections, Merits, Reparations and Costs*. Judgment of February 27, 2012. Series C No. 240, para. 185; IACHR. *Case of Gudiel Álvarez et al. Merits, Reparations and Costs*. Judgment of November 20, 2012. Series C No. 253, para. 205.

<sup>43</sup> For example, see National Mechanism for Prevention and Fight Against Torture. *Mission report on prisons and detention centres in the State of Roraima*. SDH/PR. 2017, para. 174.

<sup>44</sup> International Commission of Jurists, Practitioners' Guide No 9: Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction, 2015, pp. 10 to 16. Available at: <https://bit.ly/3eP6Xkh>  
See also: Civil and political rights, specifically the issue of enforced or involuntary disappearances. Report by the Intersessional Open-ended Working Group to design a legally binding draft of a normative instrument for the protection of all persons from enforced disappearance. E/CN.4/2003/71. 12 February 2003, para. 33.

In addition, see the following judgments from the Inter-American Court of Human Rights: *Case of Radilla Pacheco v. Mexico. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 23, 2009. Series C No. 209, para. 140; *Case of Chitay Nech et al. Preliminary Objections, Merits, Reparations and Costs*. Judgment of May 25, 2010. Series C No. 212, para. 85; *Case of Gomes Lund et al ("Guerrilha do Araguaia") v. Brazil. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219, para. 95.

<sup>45</sup> IACtHR. *Case of Contreras et al. v. El Salvador. Merits, Reparations and Costs*. Judgment of August 31, 2011. Series C No. 232, para. 84.

<sup>46</sup> International Commission of Jurists, Practitioners Guide No 9: Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction, 2015.

<sup>47</sup> IACtHR. *Case of Wong Ho Wing v. Peru. Preliminary Objection, Merits, Reparations and Costs*. Judgment of June 30, 2015. Series C No. 297, para. 235.

<sup>48</sup> IACHR. *Juan Carlos Flores Bedregal and family members vs.* Report No. 60/18. Case 12.709. Report on the Merits, OAS/Ser.L/V/II.168 Doc. 70. May 8, 2018.

In practice, the failure to inform can be manifest in different ways and either through an action or omission. For example, the State authority may deny information without acknowledging the victim has been deprived of liberty, stating that there is no record of the victim's situation, or placing obstacles in the way of access to information or rapid reporting. It may also be the case that a State entity destroys information, or provides or produces false information. These events contribute to the permanent nature of the crime.<sup>49</sup> The State has an affirmative duty to make available the information, even in the absence of a request from a third party, such as the family or lawyer of the victim.

Therefore, to avoid the commission of this crime, it is necessary that the authority provides information about the event that led to the deprivation of liberty, as well as the current location of the person deprived of liberty. The relevant authorities must clarify whether the person has actually been deprived of their liberty; provide the exact current location of the person; and report whether they are alive or dead. If the victim has died, the State must provide information about the location of their remains, proceed to exhume or recover them, identify them through appropriate techniques and return them to their family members or other persons close to them.

### **C.1.3. Persons who are liable for commission of an enforced disappearance**

An enforced disappearance must be committed by a State agent or by a private individual acting with the authorization, support or acquiescence of the State. This means that it can be committed by a person who is not part of the State structure, but who acts with some link to the State. This requires a form of authorization, support or acquiescence in a variety of situations from a State agent or entity, including: the existence of a direct order from a public body to an individual; an effective contribution by the State to the commission of the crime; the agreement or consent of the State to the commission of the disappearance of an individual; or a situation in which the State, aware of the risk of committing an enforced disappearance, does not take reasonable steps to prevent it occurring.

The question as to whether a non-state actor, for example a member of an armed group, who has no link to the State can be held internationally responsible for an act of enforced disappearances is contested. The ICPED omitted this possibility from the jurisdiction of that treaty, although it was debated during the treaty negotiations. While there is no universal agreement on this issue, there is some authority when considering the question in the context of crimes humanity that a non-State organization can commit enforced disappearances when it has certain characteristics similar to a State, for example: effective control of territory; the presence of a responsible authority, command or hierarchical structure within the organization; or the ability to carry out a widespread or systematic attack against the civilian population.<sup>50</sup>

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<sup>49</sup> For example, in the case of the ECtHR, *Kurt v. Turkey*, the authorities indicated that the victim had been abducted by members of the Kurdistan Workers' Party (PKK) and not by State agents (ECtHR). *Kurt v. Turkey*, 25 May 1998, paras. 16-18, Reports of Judgments and Decisions 1998-III). In the HRC case *Yasoda Sharma v. Nepal*, the authority reported that the disappeared person had drowned in a river while escaping from a security operation (HRC. *Yasoda Sharma v. Nepal*. Communication No. 1469/2006, CCPR/C/94/D/1469/2006, October 28, 2008, para. 7.6) In another case from the same Committee, *Zohra Madoui v. Algeria*, it was reported that the victim's psychiatric problems had led him to abandon his home (HRC. *Zohra Madoui v. Algeria*, Communication No. 1495/2006, CCPR/C/94/D/1495/2006, 28 October 2008, para. 7.4). Meanwhile, in the case of the *Santa Barbara Peasant Community v. Peru*, the IACHR held that from the beginning of carrying out enforced disappearances, a series of cover-up mechanisms were deliberately activated including: the denial of the detentions; the use of dynamite on multiple occasions at the scene of the events as a mechanism to destroy evidence of what had occurred, to make the remains of the victims definitively disappear and to avoid revealing their fate (IACHR. *Case of the Peasant Community of Santa Bárbara v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 1, 2015. Series C No. 299, para. 145).

<sup>50</sup> See International Criminal Court (ICC). Pre-Trial Chamber II. *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC-01/09-19, March 31, 2010, para.

#### C.1.4. Absence of the protection of the law

Finally, one of the effects that characterizes this crime is that the disappeared person is deprived of legal or judicial protection, as they cannot seek the protection of the law or take other steps that would allow them to recover their freedom, report the illegality or arbitrariness of the deprivation of liberty, or indicate where they are. This includes the inability to access legal representation and to have access to a judicial authority to challenge the lawfulness of the detention and the conditions of detention in cases where the person is arbitrarily detained. The absence of information about the disappeared person also renders ineffective any procedural actions or remedies that might be advanced by family members or others.

#### C.2. Examples of cases

Some examples of cases of enforced disappearance are presented below to highlight non-exhaustively a variety of situations in which it may occur.

An example of enforced disappearances committed by **non-state actors acting with a de facto link to the State** is the IACtHR's judgment *19 Merchants v. Colombia*. In this case, the Court held on enforced disappearances and extrajudicial executions committed by a paramilitary group against 19 merchants for allegedly engaging in business transactions with guerrillas.<sup>51</sup> The IACtHR considered that the Colombian legislation relating to the paramilitary groups that was in force at the time of the events promoted the organization of these groups. In addition, the IACtHR established that the State also provided logistical support to the paramilitary groups, which had permission to possess weapons.<sup>52</sup>

An important aspect of this case is the reference to the notions of "collaboration and acquiescence" to identify the close links between the paramilitary group and the State military authorities in the area where the events took place.<sup>53</sup> These notions were clarified in subsequent judgments from the IACtHR and are related to the concept of due diligence. In simple terms, the Court considered that the State could be held internationally responsible even if its entities or public officials did not directly engage in the conduct that formed the violation of a right. In the cases that involve paramilitarism, in order to determine the existence of a risk, the Court has assessed the characteristics of the context in which these organizations carry out their activities to determine whether the State was aware of this situation or should have been aware of it. On this basis, the Court has condemned the State for failing to adopt effective measures to prevent the commission of human rights violations when it could have done so.<sup>54</sup>

Finally, an emblematic case from the IACtHR that exemplifies the **responsibility of the State for enforced disappearances by non-State actors that are committed without a clear link to the State but are carried out within the framework of structural patterns of violence** is *González et al. ("Campo*

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93; ICC, SCP II. *Ruto et al. Decision on the Confirmation of Charges*, ICC-01/09-01/11-373, January 23, 2012, para. 185; ICC. SCP III. *Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire"*, ICC-02/11-14-Corr, November 15, 2011, para. 46; ICC. SCP I. *Katanga and Ngudjolo. Decision on the confirmation of charges*, ICC-01/04-01/07-717, September 30, 2008, para. 396.

<sup>51</sup> IACtHR. *Case 19 Merchants v. Colombia*. 2004, op. cit., para 85.

<sup>52</sup> *Ibid.*, paras. 84.a, 116, 118, 120, 121, 126, and 129-134.

<sup>53</sup> *Ibid.*, paras. 86.b, 127, 135, and 138.

<sup>54</sup> IACtHR. *Case of the "Mapiripán Massacre" v. Colombia*. Judgment of September 15, 2005. Series C No. 134, paras. 120 and 123; IACHR. *Case of the Massacre of Pueblo Bello v. Colombia*. Judgment of January 31, 2006, Series C No. 140, paras. 111-114, 123-130, 134, 138-140, 151, and reasoned opinion from Cançado Trindade, paras. 5-8.

*Algodonero*) v. Mexico. The case deals with the disappearance and death of three women in Ciudad Juárez (Mexico). In the process before the Court, a generalized context of violence against women in that city since 1993 was proven.<sup>55</sup> Among others, the generalized violence against women was a result of widespread drug trafficking, human trafficking of migrants, arms trafficking, the modification of family roles as a result of women's employment and local patriarchal idiosyncrasies.<sup>56</sup> The acts of violence were characterized by shared patterns of homicide. The victims were young, poor women, students or employees in local factories known as "maquiladoras".<sup>57</sup> In most cases these women were deprived of their liberty, tortured, sexually abused and then killed and abandoned in remote areas.<sup>58</sup>

The IACtHR concluded that since the filing of the reports of these disappearances with the domestic authorities, and given the context of violence in Ciudad Juarez, the State was aware of the risk that the women faced, and according to a standard of strict or reinforced due diligence, should have adopted all reasonable measures to find the victims alive, an obligation that it did not satisfactorily fulfil.<sup>59</sup> The Court referred to strict or enhanced diligence in relation to the special protection of women from human rights violations and gender-based violence. Based on this standard of strict or enhanced diligence, States must be extremely demanding with undertaking search and investigation activities when the disappeared persons are women. In the words of the Court:

*"Since this obligation of means is more rigorous, it requires that exhaustive search activities be conducted. Above all, it is essential that police authorities, prosecutors and judicial officials take prompt immediate action by ordering, without delay, the necessary measures to determine the whereabouts of the victims or the place where they may have been retained. Adequate procedures should exist for reporting disappearances, which should result in an immediate effective investigation. The authorities should presume that the disappeared person has been deprived of liberty and is still alive until there is no longer any uncertainty about her fate".*<sup>60</sup>

In this regard, the Court made it clear that in cases of enforced disappearances of women, the investigation and search must be carried out using particular methodologies that adopt a gender specific approach. Finally, it should be noted that this precedent is only applicable in the Inter-American Human Rights System. It has not yet been adopted in universal jurisprudence.

#### **D. INTERNATIONAL HUMANITARIAN LAW, CRIMES AGAINST HUMANITY, AND GENOCIDE**

Recognizing that unlawful deaths and enforced disappearances may be committed in the context of an armed conflict this section sets out the definition of an armed conflict and refers to the complexities of international humanitarian law in relation to the investigation of unlawful deaths and enforced disappearances in this context. It also looks at other context in which certain crimes under international law may take place, in times of war, and concludes with a brief reference to crimes against humanity and genocide.

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<sup>55</sup> IACtHR. *González et al. ("Cotton Field Case ") v. Mexico*. 2009, op. cit., paras. 114-121.

<sup>56</sup> *Ibid.*, paras. 113, 129.

<sup>57</sup> *Ibid.*, paras. 122-123.

<sup>58</sup> *Ibid.*, paras. 124-136.

<sup>59</sup> *Ibid.*, paras. 282-283.

<sup>60</sup> *Ibid.*, para. 283.

## D.1. Definition and classification of an armed conflict

International humanitarian law (IHL) is the set of rules and principles that apply during armed conflict and are intended to protect, on humanitarian grounds, persons in that context, including civilians and other persons who are not or are no longer taking a direct part in hostilities and to regulate the methods and means of combat.<sup>61</sup> It is set forth in a range of treaties, the leading instruments among these are the four Geneva Conventions of 1949 and their two additional Protocols of 1977. Parts of those instruments, particularly those identifying grave breaches of the Conventions and Protocols as war crimes, have also been absorbed into international criminal law, including the Rome Statute of the International Criminal Court.

It must be set out at the beginning that even in situations of armed conflict, where IHL applies, international human rights law continues to apply at the same time. As the UN Human Rights Committee put it in respect of the ICCPR:

*"(...) the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive".*<sup>62</sup>

Therefore, IHL will inform the content of human rights law. For instance, when a combatant kills another combatant in what would normally be an arbitrary deprivation of life and an unlawful death in times of peace, this may be non-arbitrary as long as it complies with IHL.

IHL distinguishes between international armed conflict, that is, conflict between States, and non-international armed conflict, that is, between government authorities and organized armed groups or between these groups within a State.<sup>63</sup> Non-international armed conflict may also include situations involving multiple States, but not fighting against each others, such as, for instance, where States may be invited or enter on the territory of another state to fight a non-international armed actor.

According to Common Article 2 of the 1949 Geneva Conventions, an international armed conflict occurs in the event of a declared war or an armed conflict between two or more States Parties. Furthermore, an international armed conflict also arises when there is a total or partial occupation of the territory of a State Party, even if such occupation meets with no military resistance.<sup>64</sup> Finally according to 1977 Additional Protocol I, international armed conflicts are those in which peoples struggle against colonial domination, foreign occupation and racist regimes.<sup>65</sup> The four Geneva Conventions and 1977 Additional Protocol I are all applicable to situations of international armed conflict.

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<sup>61</sup> International humanitarian law is based on numerous treaties, particularly the 1949 Geneva Conventions and its Additional Protocols, as well as other conventions and protocols covering specific aspects of the law of armed conflict. There is also a body of customary law that is binding on all States and parties in relation to conflicts.

<sup>62</sup> HRC, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para 11.

<sup>63</sup> TPIY. *Dusko Tadić (aka 'Dule')*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), Case No. IT-94-1, October 2, 1995, para. 70.

<sup>64</sup> International Commission of Jurists, Practitioners' Guide No 14: The investigation and prosecution of potentially unlawful death, 2019, pp. 140-141.

<sup>65</sup> Additional Protocol I to the Geneva Conventions. (API), art. 1.4.

See also: International Commission of Jurists, Practitioners' Guide No 14: The investigation and prosecution of potentially unlawful death, 2019, pp. 141.

In relation to non-international armed conflict, reference should be made to Common Article 3 of the four 1949 Geneva Conventions and Article 1 of 1977 Additional Protocol II to the 1949 Geneva Conventions (APII). Common Article 3 has been considered a "mini-treaty" applicable to all non-international armed conflicts because its purpose is to ensure a set of minimum guarantees in favour of persons not taking part in the hostilities. In order for this rule to apply, it is necessary for an armed conflict to have a certain degree of intensity and for the belligerent parties to have a certain degree of organization.

For its part, the APII attempts to define non-international armed conflicts with the following criteria: 1) it takes place in the territory of one of the States Parties; 2) one of the belligerent parties is the armed forces of a State; 3) the other party consists of dissident armed forces or organized armed groups.<sup>66</sup>

It is necessary to differentiate armed conflict from situations of internal disturbances or internal tensions, because IHL is not applicable to these types of situations, but instead the domestic law of States and international human rights law. These situations are not defined in IHL treaties, but often consist of internal disturbances resulting from acts of violence that do not meet the requirements for intensity and organization to be classified as an armed conflict.<sup>67</sup>

In this regard, it is worth mentioning the authoritative International Committee of the Red Cross Commentary to the 1949 Geneva Conventions by Jean Pictet. Although the Commentary does not attempt to define precisely the threshold of Common article 3, it identifies a number of indicators that, while not dispositive, are "useful as a means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection".<sup>68</sup> Among these are the degree of organization of the military force; whether there is an authority responsible for the acts of that force; whether the acts occur within a determinate territory; whether the armed group has the means of ensuring respect for the Geneva Conventions; and whether it acts as a de facto governing entity.<sup>69</sup>

In the light of the above, it has been established a flexible concept of armed conflict based on two criteria: the degree of organization of the belligerents and the intensity of the hostilities.<sup>70</sup> Organization is required because without it the belligerents could not carry out military operations. In terms of State armed forces, it is often presumed that they are organized. The following criteria are considered in determining whether non-State armed forces are classified as organized: command structure; disciplinary rules; facilities and barracks; control of territory; access to weapons and military equipment; ability to carry out, plan and coordinate military activities;

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<sup>66</sup> Organized armed groups must meet the following characteristics established in the APII: 1) be organized under the direction of a responsible command; 2) exercise control over part of the territory; 3) have the capacity to carry out sustained and concerted military operations; 4) have the capacity to implement the Protocol and comply with its provisions. These are factors that do not necessarily have to concur in a simultaneous manner, but instead are guiding criteria for evaluating each specific case.

<sup>67</sup> Vid. Inter-American Juridical Committee. *Guidelines for the regulation of the use of force and the protection of persons in situations of internal violence that do not reach the threshold of an armed conflict*. OAS/Ser.Q, CJI/doc.401/12 rev.4. 8 August 2012.

<sup>68</sup> ICRC, Pictet Commentary, Convention (IV) relative to the Protection of Civilian Persons in Time of War, at pp 35-36, available at: <https://bit.ly/3qeZWPa>

<sup>69</sup> Id.

<sup>70</sup> The International Criminal Tribunal for Rwanda (ICTR) has noted that the term "armed conflict" suggests the existence of hostilities between organized armed forces to a greater or lesser extent. See: ICTR. *Akayesu*, ICTR-96-4-T, Judgment of September 2, 1998, para. 620, and *Musema*, ICTR-96-13-A, Judgment of January 27, 2000, para. 248. See also: ICTY, *Dusko Tadić (aka 'Dule')*, Case No. IT-94-1, op. cit., para 70.

communication through "one spokesperson"; ability to participate in truce agreements or peace treaties.<sup>71</sup>

As mentioned above, the concept of intensity is required to differentiate an armed conflict from situations of internal disturbances or internal tensions. The International Criminal Tribunal for the Former Yugoslavia has defined a number of criteria for assessing this factor: the number, intensity, and duration of armed clashes; the type of weapons used; the number of people involved; the number of victims; the extent of material damage; the number of civilians displaced from the combat zone; and the intervention of the United Nations Security Council.<sup>72</sup>

Finally, it should be noted that the Minnesota Protocol applies to the investigation of all deaths potentially occurring in situations of internal disturbances and tensions, and in principle, in armed conflicts.<sup>73</sup>

## **D.2. Unlawful deaths in armed conflict**

The classification of the illegality of a death in the context of an armed conflict is very complex due to the set of rules that exist. IHL treaties establish an obligation to investigate the deaths of prisoners of war<sup>74</sup> and civilian internees.<sup>75</sup>

With respect to the belligerent parties, and in accordance with the principle of distinction, military attacks may only be directed against combatants or persons taking direct part in hostilities and not against the civilian population or other persons protected by IHL.<sup>76</sup> This principle also prohibits indiscriminate attacks, that is, armed actions that do not have the capacity to specifically hit military objectives.<sup>77</sup>

In accordance with the principle of proportionality, military attacks will be considered indiscriminate "when they are expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or both, which would be excessive in relation to the anticipated direct military advantage".<sup>78</sup> In accordance with principle of precaution, parties to a conflict must "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, incidental loss of civilian life".<sup>79</sup>

In relation to its application in the context of armed conflict, the Minnesota Protocol states that it should be applied whenever circumstances permit and in the event that the context prevents or restricts its application, it establishes the obligation to

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<sup>71</sup> ICTY, Trial Chamber I, *Ramush Haradinaj et al.*, Judgment, Case No. IT-04-84-T, 3 April 2008, para. 60.

<sup>72</sup> ICTY, *Ramush Haradinaj et al.*, op. cit., para 49.

<sup>73</sup> OHCHR. Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016, para. 20.

<sup>74</sup> III Geneva Convention (GCIII), art. 121.

See also: International Commission of Jurists, Practitioners' Guide No 14: The investigation and prosecution of potentially unlawful death, 2019, pp. 143.

<sup>75</sup> IV Geneva Convention (GCIV), art. 131.

See also: International Commission of Jurists, Practitioners' Guide No 14: The investigation and prosecution of potentially unlawful death, 2019, pp. 143.

<sup>76</sup> API, art. 48; and HENCKAERTS, JEAN-MARIE/DOSWALD BECK, Louise. *Customary International Humanitarian Law. Volume I: Rules*. Cambridge: Cambridge University Press, 2005, Rule 1, pp. 3 and ff.

See also: International Commission of Jurists, Practitioners' Guide No 14: The investigation and prosecution of potentially unlawful death, 2019, pp. 147-148.

<sup>77</sup> HENCKAERTS/DOSWALD BECK. *Customary International Humanitarian Law*, op. cit., Rule 11, pp. 37 and ff. and Rule 12, pp. 40 and f.f.

See: International Commission of Jurists, Practitioners' Guide No 14: The investigation and prosecution of potentially unlawful death, 2019, pp. 148-149.

<sup>78</sup> API, art. 51.2.B; HENCKAERTS/DOSWALD BECK. *Customary International Humanitarian Law*, op. cit., Rule 14, pp. 46 and ff.

See: International Commission of Jurists, Practitioners' Guide No 14: The investigation and prosecution of potentially unlawful death, 2019, pp. 150-153.

<sup>79</sup> API, art. 57 (ii).



register and explain this situation.<sup>80</sup> The Minnesota Protocol also mentions that when casualties are caused by an attack during the course of hostilities, a subsequent assessment should be made in order to determine the facts of the case.<sup>81</sup> If there are probable grounds to suspect that a war crime has been committed, the State must conduct a full investigation and prosecute those allegedly responsible.<sup>82</sup> Conversely, where a death is suspected or reported to have occurred due to a violation of IHL that does not constitute a war crime and there is no specific requirement in IHL for an official investigation, a further investigation should be carried out and, in any event, where evidence of wrongful conduct is identified, a full investigation<sup>83</sup> should be conducted.

### **D.3. "Disappeared" persons in armed conflict**

IHL regulates different areas related to missing persons.<sup>84</sup> The notion of "missing persons" in IHL is different to that of a victim of enforced disappearance. Missing persons are those for whom all information on their status and whereabouts has been lost due to war.<sup>85</sup>

This is not at all to say that prohibition against enforced disappearances under international human rights law does not continue to apply in time of armed conflict. It certainly does, but there are additional considerations to be taken into account under IHL.

The loss of information about an individual in the context of an armed conflict can occur for a wide range of reasons. For example, information on the whereabouts of certain persons who are victims of enforced displacement in the context of armed conflict may be lost. Information on prisoners of war may also be lost due to communications difficulties. Information on the situation of civilians residing in militarily occupied territory may be unknown. In all of these cases, although they are not enforced disappearances, they are classified as "missing persons" under IHL. However, if enforced disappearances occur in the context of an armed conflict, the victims of this crime will also be "disappeared persons" according to IHL. In the field of IHL, the notion of "missing persons" is broad and doesn't just cover cases of enforced disappearance, but also other situations where there is no information or contact.

Belligerent parties must comply with a number of international obligations in regard to missing persons. Among the most important of these is the requirement to take all possible measures to determine their whereabouts and provide their families with all available information about what happened to the missing persons.<sup>86</sup> IHL also includes detailed regulations on the registration of data on protected persons and procedures for transmitting information about them.<sup>87</sup>

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<sup>80</sup> Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016, para 20.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

About the obligation to investigate violations of International Humanitarian Law, see: I Geneva Convention (GCI), art. 49; II Geneva Convention (GCII), art. 50; GCIII, art. 129; GCIV, art. 146; API, art. 85; HENCKAERTS/DOSWALD BECK. *Customary International Humanitarian Law*, op. cit., Rule 158, pp. 607 and f.f.

In addition, see: International Commission of Jurists, Practitioners' Guide No 14: The investigation and prosecution of potentially unlawful death, 2019, pp. 147-148.

<sup>83</sup> Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016, para 20.

<sup>84</sup> See: International Commission of Jurists, Practitioners' Guide No 14: The investigation and prosecution of potentially unlawful death, 2019, pp. 144-145.

<sup>85</sup> See ICRC. *Families of Missing Persons in Nepal. A Study of their Needs*. ICRC: Kathmandu, 2009. p. I; and ICRC. *The Missing Persons. A Guide for Parliamentarians*. Geneva: ICRC, 2009, p. 13.

<sup>86</sup> Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016, para. 14.

See also: API, arts. 32-33; and HENCKAERTS/DOSWALD BECK. *Customary International Humanitarian Law*, op. cit., Rule 117, pp. 421 and f.f.

<sup>87</sup> GCI, Art. 16; GCII, Art. 19; GCIII, Arts. 70, 122.4; IAP, Art. 33.2(a); GCIV, Art. 138.

In the case of deceased persons, IHL imposes an obligation to search for and collect their bodies.<sup>88</sup> There is also an obligation to treat them with respect<sup>89</sup> and the mutilation<sup>90</sup> or dispossession of the bodies<sup>91</sup> is prohibited. There are several provisions on the treatment of dead bodies in relation to their burial.<sup>92</sup> For example, it is established that burials cannot be in common graves, but must be done individually.<sup>93</sup> As for the identification of human remains, the warring parties must identify the bodies of people from the opposing party that are in their possession.<sup>94</sup>

#### **D.4. Crimes against humanity and genocide**

Unlawful deaths and enforced disappearances can be committed in the context of crimes of an international nature such as genocide or crimes against humanity. Both types of international crimes have been criminalized in the Rome Statute of the International Criminal Court.

Genocide consists of acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group.<sup>95</sup> An example of a constitutive act of genocide is the "execution of members of the group".<sup>96</sup>

Along the same lines, Article 5 of the ICPED provides:

*"The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law."*

Both murder and certain other violations of the right to life and enforced disappearance are crimes which, when committed in the context set out in the Rome Statute, will constitute crimes against humanity.<sup>97</sup>

### **E. INTERNATIONAL OBLIGATIONS OF STATES**

This section is dedicated to explaining the international obligations that States must fulfil. First, it explains some general issues about the characteristics of these international obligations. Second, it lists the most important general obligations and explains what each consists of. Finally, it focuses on obligations to investigate and hold persons criminally accountable for human rights violations.

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<sup>88</sup> GCI, arts. 15 a 17; GCII, arts. 18 a 20; GCIV, art. 16; HENCKAERTS/DOSWALD BECK. *Customary International Humanitarian Law*, op. cit., Rule 112, pp. 406 and f.f.

<sup>89</sup> GCI, art. 17; GCIV, art. 130; API, arts. 33.4, 34; HENCKAERTS/DOSWALD BECK. *Customary International Humanitarian Law*, op. cit., Rule 115, pp. 414 and f.f.

<sup>90</sup> HENCKAERTS/DOSWALD BECK. *Customary International Humanitarian Law*, op. cit., Rule 113, pp. 409 and f.f.

<sup>91</sup> Id.

<sup>92</sup> CG, art 17; GCII, art. 20; GCIII, art. 120; API, art. 34; HENCKAERTS/DOSWALD BECK. *Customary International Humanitarian Law*, op. cit., Rule 115, pp. 414 and f.f. and Rule 116, pp. 417 and f.f.

<sup>93</sup> GCIV, art. 130.

<sup>94</sup> Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016.

See also: GCI, Art. 16; GCII, Art. 19-20; GCIII, Art. 120-122; GCIV, Art. 129-130; IPOA, Art. 34; HENCKAERTS/DOSWALD BECK. *Customary International Humanitarian Law*, op. cit., rule 116, pp. 417 and ff.

<sup>95</sup> Rome Statute, art. 6.

<sup>96</sup> Rome Statute, art. 6.a.

<sup>97</sup> Rome Statute, art. 7.1.a and art. 7.1.i.

## **E.1. Characterization, purpose and sources**

As all States in the international community have agreed that human rights “are the birthright of all human beings”.<sup>98</sup>

Human Rights are inalienable, meaning that their enjoyment cannot be conditioned on any reciprocal demands by States. In other words, States cannot demand any type of behaviour from individuals in order to protect their rights.

International human rights obligations are found in the nine principal universal treaties and their protocols, as well as a number of regional treaties. They can arise from generally accepted custom (customary international law), though all of customary international human rights law has been reflected in human rights treaties. Treaties contain precise language negotiated by States, which is further explained and interpreted by courts and treaty mechanism established for that purpose. However, not all States are party to all treaties, but many rights, including the right to life and the rights that underpin the prohibition of enforced disappearance, are part of customary international law.

The principal UN human rights treaties each have a mechanism consisting of a number of elected independent experts, who periodically review the compliance of States Parties with their treaty obligations, adjudicate individual complaints, and establish authoritative interpretation of the provisions of the treaties through the elaboration of General Comments. For purposes of this Guide, the most important treaty bodies are the UN Human Rights Committee, established under the ICCPR; the UN Committee against Torture, established under the Convention against Torture; and the Committee on Enforced Disappearance, established under the ICEPD.

At the Regional level in the Americas, the Inter-American Commission on Human Rights plays a similar, though distinct role in supervising the American Convention on Human Rights, and there is also the Inter-American Court of Human Rights which can render legally binding judgements.

The UN Human Rights Council also adopts periodic resolutions containing statements of law, policy and best practices on various human rights themes, including the right to life, arbitrary detention, torture and enforced disappearances. It also establishes a number of independent experts, known as “special procedures” on these themes, which also posit authoritative interpretations in these areas. Most relevant for this guide are the UN Special Rapporteur on extrajudicial, summary or arbitrary executions; the Special Rapporteur on torture; the Working Group on Enforced Disappearance; and the Working Group on Arbitrary Detention.<sup>99</sup>

## **E.2. Nature, categories and structure**

Human rights obligations for each right have been conceived as consisting of three mutually reinforcing dimensions: the obligation to respect, the obligation to protect<sup>100</sup> and the obligation to fulfil.

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<sup>98</sup> Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, Vienna, 14-25 June 1993, UN Doc. A/CONF.157/23, article 1.

<sup>99</sup> See: <https://www.ohchr.org/EN/HRBodies/SP/Pages/Welcompage.aspx>

<sup>100</sup> For example, the ICCPR (Article 2.1) and the regional human rights conventions (Article 1.1 OHCHR, Article 1 of the ECHR and Article 1 of the AChHPR) establish the obligation of State parties to “respect and ensure” the rights protected in these conventions.

The obligation to **respect** means that States must refrain from conduct which impairs the enjoyment of a right. For example, full respect for the right to life means that States must not arbitrarily deprive any person of their life.<sup>101</sup> For the right to defend human rights, the IACHR has reiterated the State's obligation to refrain from imposing obstacles that limit the work of human rights defenders.<sup>102</sup>

The obligation to **protect** requires States to prevent arbitrary interference with the enjoyment of a right. States must secure and protect rights by adopting the necessary measures to enable individuals to exercise their rights and ensuring that they are not infringed by third parties, specifically private and non-State actors, such as business enterprises or armed groups. It also requires strong regulation against private military and security companies.<sup>103</sup> In terms of the rights of human rights defenders, the IACHR has held that States "must establish a clear legal framework that provides for sanctions against companies that are involved in the criminalization, stigmatization, abuses and violations against those who defend human rights, including private security companies and contractors acting on behalf of the company involved".<sup>104</sup>

The obligation to **fulfil** implies the obligation of States to take appropriate steps to achieve the full realization of a right, including creating an enabling environment for such realization.

Taking this into account, obligations are sometimes classified into those that require either negative or positive obligations for the State. Negative obligations mean that the State has an obligation not to do something, not to violate the rights of individuals, such as refraining from torturing or arbitrarily killing. A positive obligation may entail, for example providing adequate infrastructure to allow for the fair administration of justice, such as fully functioning court system.

### **E.3. The right to an effective remedy and the obligation to investigate and sanction serious human rights violations amounting to crimes under international law**

States have an obligation to provide effective remedies and reparation for violations of human rights. It should be noted that the right to reparation is part of the right to an effective remedy enshrined in Article 2(3)(a) of the ICCPR.<sup>105</sup> In addition, Criminal sanction for certain violations is a form of reparation. This will be discussed at greater length in the section below on rights of victims.

International law prohibits unlawful deaths and enforced disappearances, and if these violations are committed, States have the obligation to hold perpetrators by prosecuting and sanctioning them, both as a direct State interest and in order to guarantee the rights of the victims. States are under a general obligation to prevent impunity, as reflected in the updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity. These Principles underline that "the

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<sup>101</sup> HRC, General Comment No. 36, Article 6: Right to life, CCPR/C/GC/36, 3 September 2019, para. 64.

<sup>102</sup> IACHR. *Towards a Comprehensive Policy for the Protection of Human Rights Defenders* OAS/Ser.L/V/II. Doc. 207/17. December 29, 2017, para. 25.

<sup>103</sup> HRC, General Comment No. 36, Article 6: Right to life, CCPR/C/GC/36, 3 September 2019.

<sup>104</sup> IACHR. *Report on Business and Human Rights: Inter-American Standards*. OAS/Ser.L/V/II IACHR/REDESCA/INF.1/19, November 1, 2019, para. 47.

<sup>105</sup> HRC, General Comment No. 31, Nature of the general legal obligation imposed on States parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 16.

duty of every State under international law to respect and to secure respect for human rights requires that effective measures should be taken to combat impunity".<sup>106</sup>

This basic obligation has been set out succinctly by the UN Human Rights Committee as follows:

*"Where ... investigations (...) reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations (...) may well be an important contributing element in the recurrence of the violations. When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity (see Rome Statute of the International Criminal Court, article 7)."*<sup>107</sup>

Impunity leads to the chronic repetition of human rights violations and the total defencelessness of victims and their families<sup>108</sup>, as well as denying their right to an effective remedy and reparation.<sup>109</sup> Moreover, the obligation to prosecute and punish serious human rights violations will also be directed preventing future similar crimes.

The obligation to provide justice in the form of prosecution and sanctions has been developed through the jurisprudence of international courts and supervisory bodies. The IACtHR and the Human Rights Committee have affirmed the obligation of States to investigate all human rights violations effectively and through competent authorities, as well as the obligation to sanction the perpetrators of these violations.<sup>110</sup>

Along the same lines, since the *McCann* case,<sup>111</sup> the European Court of Human Rights (ECtHR) has established the obligation of States to conduct effective official investigations and to bring to justice those responsible when victims have experienced serious violations, such as extrajudicial executions and enforced disappearances, stating that this obligation arises from the fact that people have been killed as a result of the use of force by, among others, agents of the State. Furthermore, the Court has added since the *Kurt v. Turkey* case that the concept of an effective remedy in Article 13 of the European Convention on Human Rights (ECHR) implies an effective investigation that "must be capable of leading to the identification and sanctions of those responsible".<sup>112</sup>

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<sup>106</sup> Updated set of principles for the protection and promotion of human rights through action to combat impunity, Preamble.

<sup>107</sup> HRC, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para 18.

<sup>108</sup> IACtHR. *Case of the "White Panel" (Paniagua Morales et al.) v. Guatemala. Background*. Judgment of 8 March 1998. Series C No. 37, para. 173.

<sup>109</sup> African Commission of Human and Peoples' Rights (ACHPR). *Case of Côte d'Ivoire Human Rights Movement (MIDH) v. Côte d'Ivoire*. Communication No. 246/2002. July 29, 2008, para. 97-98.

<sup>110</sup> For example, see IACtHR. *Case of Almonacid Arellano et al. vs. Preliminary Objections, Merits, Reparations and Costs*. Judgment of 26 September 2006. Series C No. 154, para. 119; IACtHR. *Case of Golburú et al. v. Paraguay*. 2006, op. cit., para. 164; HRC. *General Comment No. 7. Prohibition of torture or other cruel, inhuman or degrading treatment or punishment (Article 7)*. HRI/GEN/1/Rev.9 (Vol. I). 30 May 1982, para. 1; HRC. *Muteba v. Zaire*, Communication No. 124/1982, CCPR/C/22/D/124/1982, 24 July 1984, para. 13; HRC. *Dermitt v. Uruguay*. Communication No. 83/1981, CCPR/C/20/D/83/1981, 4 November 1983, para. 11.a; HRC. *Vicente Chaparro v. Colombia*. Communication No. 612/1995, CCPR/C/56/D/612/1995, 14 March 1996, para. 10.

<sup>111</sup> ECtHR. *McCann et al. v. the United Kingdom*, September 27, 1995, Series A no. 324, para. 161.

<sup>112</sup> ECtHR. *Kurt v. Turkey*, op. cit., para 140.

For its part, the IACHR has affirmed that the determination of reparations for serious human rights violations "whether determined through administrative or judicial channels (without being exclusive of either), does not exempt the State from its obligations related to the component of justice for the violations caused, which obliges the State to ensure the investigation and sanction of those responsible for these violations in accordance with what is established in international law."<sup>113</sup>

These obligations are an indispensable component for the implementation of human rights protection in national laws.<sup>114</sup> There also a suitable way to ensure accountability for violations perpetrated by the State or its agents<sup>115</sup> and a means of avoiding impunity.

### **E.3.1. Obligation to investigate: effectiveness, prompt, ex officio, independence and impartiality**

When it is suspected that a human rights violation has been committed, States have an obligation to conduct an effective investigation. The investigation must aim to "determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death".<sup>116</sup> Equally important, the investigation must "include an adequate autopsy, collection and analysis of all physical and documentary evidence and statements from witnesses".<sup>117</sup>

In its General Comment 36, which defines the scope of the obligation to protect the right to life under article 6 of the ICCPR, the Human Rights Committee set out that investigations for unlawful death "must always be independent, impartial, prompt, thorough, effective, credible and transparent".<sup>118</sup> Likewise, the Committee underlined that the "investigations and prosecutions of potentially unlawful deprivations of life should be undertaken in accordance with relevant international standards, including the Minnesota Protocol on the Investigation of Potentially Unlawful Death."<sup>119</sup>

Concerning enforced disappearances, Article 12 of the International Convention for the Protection of All Persons from Enforced Disappearance establishes that States have an obligation to "undertake without delay a thorough and impartial investigation" in the cases that "there are reasonable grounds for believing that a person has been subjected to enforced disappearance". Importantly, Article 12 sets out that this obligation to investigate exists "even if there has been no formal complaint".<sup>120</sup>

The obligation to investigate is linked to the prohibition of impunity or lack of proportional punishment. It has been understood that compliance with this obligation requires the development of criminal proceedings.<sup>121</sup> In relation to enforced

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<sup>113</sup> IACHR. *Truth, Justice and Reparations: Fourth Report on the Situation of Human Rights in Colombia*, OEA/Ser.L/V/II. Doc. 49/13. 31 December 2013, para. 467.

<sup>114</sup> ECtHR. *Hugh Jordan v. the United Kingdom*, No 24746/94, para 128, ECHR2001-III.

<sup>115</sup> ECtHR. *Kaya v. Turkey*, 19 February 1998, para. 85, *Reports of Judgments and Decisions* 1998-I.

<sup>116</sup> Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, para 9. See also: Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016, paras. 11 and 12.

<sup>117</sup> Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, para 9. See also: Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016, paras. 24 and f.f.

<sup>118</sup> HRC, General Comment No. 36, Article 6: Right to life, CCPR/C/GC/36, 3 September 2019, para 28. See also: Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016, para. 22 and f.f.; Updated set of principles for the protection and promotion of human rights through action to combat impunity, principle 19.

<sup>119</sup> HRC, General Comment No. 36, Article 6: Right to life, CCPR/C/GC/36, 3 September 2019, para 27.

<sup>120</sup> See also: Declaration on the Protection of all Persons from Enforced Disappearance, article 13; Working Group on Enforced or Involuntary Disappearances, Report of the Working Group on Enforced or Involuntary Disappearances on standards and public policies for an effective investigation of enforced disappearances, A/HRC/45/13/Add.3, 7 August 2020, Para 11 and f.f.

<sup>121</sup> Updated set of principles for the protection and promotion of human rights through action to combat impunity, principle 19; HRC, General Comment No. 36, Article 6: Right to life, CCPR/C/GC/36, 3 September 2019, para 27.

disappearances, the Working Group on Enforced or Involuntary Disappearances (WGEID) has stressed that an effective criminal investigation “is crucial not only for upholding the right to justice, but also to fulfilling the obligation to search for the disappeared person and for the enjoyment of the right to the truth and reparation, as these rights are closely intertwined”.<sup>122</sup>

In the light of the above, in cases of enforced disappearances,<sup>123</sup> States have the obligation to initiate, ex officio and without delay, a credible, impartial, independent and effective criminal investigation that is not undertaken as a mere formality condemned in advance to be fruitless.<sup>124</sup>

The obligation to investigate ex officio means that the initiation of an investigation by the State should not depend on the procedural initiative of the victim or their relatives, nor on the private provision of evidence. Any public official who knows of or has learned of acts of enforced disappearance or unlawful death caused by State or private agents has an obligation to report it immediately<sup>125</sup> so that investigations can be initiated ex officio (on their own initiative) in fulfilment of the State's obligation to ensure public order.<sup>126</sup> This obligation remains as long as the facts surrounding the death or final fate of the disappeared person remain uncertain.<sup>127</sup> If there are indications that the person has died, all necessary tests must be carried out to establish their identity.<sup>128</sup>

This obligation also requires that initial investigative work is carried out promptly and credibly with appropriate care to protect the interests of justice for the victims and to preserve evidence.<sup>129</sup> This is related to the prohibition of undue hindrances or obstacles,<sup>130</sup> meaning that authorities must promptly carry out the actions and investigations that are essential and timely in order to clarify the fate of the victims,<sup>131</sup> such as, adequate management of the crime scene, treatment of the body, and preservation of evidence and its custody.

The above obligations are required because there is a risk and a negative impact from delayed actions and irregularities or omissions in the collection of evidence. In this regard, the WGEID has stated that “conduct prompt investigations is connected to the

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See also: IACtHR. *Case of Anzualdo Castro v. Peru. Preliminary Objection, Merits, Reparations and Costs*. Judgment of 22 September 2009. Series C No. 202, para. 125.

<sup>122</sup> Working Group on Enforced or Involuntary Disappearances, Report of the Working Group on Enforced or Involuntary Disappearances on standards and public policies for an effective investigation of enforced disappearances, A/HRC/45/13/Add.3, 7 August 2020, Para 3.

<sup>123</sup> A comprehensive summary of the duty to investigate in cases of enforced disappearances can be found at: International Commission of Jurists, Practitioners’ Guide 10: Enforced Disappearance and Extrajudicial Execution: the Right of Family Members, 2016, chapter IV; and International Commission of Jurists, Practitioners’ Guide 9, Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction, 2015.

All ICJ Practitioners’ Guides are available at: <https://www.icj.org/category/publications/practitioners-guides-series/>

<sup>124</sup> IACtHR. *Case of the Massacre of Pueblo Bello v. Colombia*. 2006, op. cit., para. 143.

<sup>125</sup> ECtHR. *Ergi v. Turkey*, 28 July 1998, para. 82, Reports of Judgments and Decisions 1998-IV; ECtHR. *Isayeva, Yusopva and Bazayeva v. Russia*, paras 208-209, 24 February 2005; IACHR. *Case of Anzualdo Castro v. Peru*. 2009, op. cit., para. 65.

<sup>126</sup> IACtHR. *Godínez Cruz v. Honduras. Background*. Judgment of 20 January 1989. Series C No. 5, para. 190.

<sup>127</sup> International Convention for the Protection of All Persons from Enforced Disappearance, article 24.6 and Declaration on the Protection of All Persons from Enforced Disappearance, article 13.6.

See also: Working Group on Enforced or Involuntary Disappearances, Report of the Working Group on Enforced or Involuntary Disappearances on standards and public policies for an effective investigation of enforced disappearances, A/HRC/45/13/Add.3, 7 August 2020, para 33 and 34; IACtHR. *Case of Velásquez Rodríguez v. Honduras. F*. 1988, op. cit., para 181.

<sup>128</sup> IACtHR. *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*. 2010, op. cit., para 82.

See, also: Committee on Enforced Disappearances, Guiding principles for the search for disappeared persons, principle 7.3.

<sup>129</sup> IACtHR. *Nadia Alejandra Muciño Márquez and family v. Mexico*, op. cit., para 12.

<sup>130</sup> IACtHR. *Case of the Landaeta Mejias Brothers et al. v. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of 27 August 2014. Series C No. 281, para. 218.

<sup>131</sup> IACtHR. *Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia*. 2014, op. cit., para. 480.

main objectives of finding the disappeared person alive and ensuring that sufficient evidence is obtained in order to establish the truth and identify the perpetrators".<sup>132</sup>

These requirements also mandate that investigations follow logical lines of enquiry and are carried out within reasonable timeframes.<sup>133</sup> As an example, the ECtHR has determined that the initiation of an investigation into deaths in prison due to the use of lethal weapons by riot control teams three months after the event constitutes a breach of the obligation to investigate in a timely manner. The ECtHR considered that the delay was excessive given the nature and scale of the events and held that the delay had created a substantial risk that important evidence could never be recovered.<sup>134</sup>

In relation to impartial investigation, the Human Rights Committee has expressly stated that thorough investigation of human rights violations must be carried out by "independent and impartial" bodies.<sup>135</sup>

A clear example of a biased investigation is one conducted at military or military headquarters, especially if those responsible belong to the armed forces or police, or when the hierarchical authorities of those involved initiate the proceedings, or when only administrative proceedings are conducted within the military or police institution.<sup>136</sup> In addition, in terms of impartiality, the IACtHR has recognised that the existence of a political climate with democratic weaknesses can also be an obstacle to independent and impartial investigations, especially when military authorities continue to maintain de facto power in a State.<sup>137</sup>

Concerning an effective investigation, the ECtHR has underlined that the main element is that it must be suitable for the identification and sanction of those responsible,<sup>138</sup> adding that failure to conduct an effective investigation constitutes a continuing violation of the obligation to protect the right that has been violated.<sup>139</sup> Even if the State has not participated in the violation of the right, the mere fact of not fulfilling its obligation to investigate amounts to a violation of the right.

Along the same lines, the 2016 Minnesota Protocol has specified the following minimum elements and parameters that meet the required investigative standards for an effective investigation of unlawful death:

*"(a) Identify the victim(s); (b) Recover and preserve all material probative of the cause of death, the identity of the perpetrator(s) and the circumstances surrounding the death; (c) Identify possible witnesses and obtain their evidence in relation to the death and the circumstances surrounding the death; (d) Determine the cause, manner, place and time of death, and all of the surrounding circumstances. In determining the manner of death, the investigation should distinguish between natural death, accidental death, suicide and homicide; and (e) Determine who was involved in the death and their individual responsibility for the death."*<sup>140</sup>

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<sup>132</sup> Working Group on Enforced or Involuntary Disappearances, Report of the Working Group on Enforced or Involuntary Disappearances on standards and public policies for an effective investigation of enforced disappearances, A/HRC/45/13/Add.3, 7 August 2020, para 12.

<sup>133</sup> IACtHR. *Case of Noguera et al. vs. Paraguay*. 2020, op. cit., paras. 82 and 83.

<sup>134</sup> ECtHR. *Kukhalashvili et al. v. Georgia*, no. 8938/07 and 41891/07, para. 132, 2 April 2020

<sup>135</sup> HRC, General Comment No. 36, Article 6: Right to life, CCPR/C/GC/36, 3 September 2019.

<sup>136</sup> ECtHR. *Kukhalashvili et al. v Georgia*, op. cit., para 132 and 133.

<sup>137</sup> IACtHR. *Case of the Moiwana Community v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of 15 June 2005. Series C No. 124, para. 153.

<sup>138</sup> ECtHR. *Ramsahai et al. v. the Netherlands*, no. 52391/99, 10 November 2005, para. 337.

<sup>139</sup> ECtHR. *Cyprus v. Turkey* [GC], no. 25781/94, para. 136, ECHR 2001-IV.

<sup>140</sup> Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016, para. 25.



Investigations that do not meet these requirements are not only a violation of the State's obligation to investigate, but also a determining factor in the systematic practice of human rights violations that leads to impunity for those responsible.

### **Due diligence**

In cases of enforced disappearance and potentially unlawful deaths, the Inter-American system has developed a standard of the obligation of investigation linked to carrying out "due diligence".<sup>141</sup>

The term due diligence refers to the concrete actions required from States to ensure human rights and protect people from violations of their rights in relation to the effectiveness of investigations. These actions involve the use of all available means to determine the truth of what happened and the identity of those responsible.<sup>142</sup> Furthermore, due diligence requires the use of appropriate criminal categories and the design of an investigation aimed at effectively guaranteeing the human rights involved.<sup>143</sup>

The IACtHR has stressed that due diligence in an investigation requires that all State authorities "collaborate in the collection of evidence, and (...) provide the judge in the case with all the information they require and refrain from acts that imply obstruction of the investigative process".<sup>144</sup>

The Inter-American system has established as essential "the prompt and immediate action of the fiscal and judicial authorities ordering timely and necessary measures aimed at determining the whereabouts of the victim or the place where they may be deprived of their liberty".<sup>145</sup> In the case of systematic violations, this includes analysing the context and the existence of patterns and determining the structures of those responsible.<sup>146</sup> Specifically, in relation to women, it has been indicated that the obligation includes searching for them from the first hours of their disappearance.<sup>147</sup> In cases of suspected gender-based executions, the State's obligation to investigate with due diligence "includes the obligation to order ex officio examinations and expertise to verify whether the execution had a sexual motive or whether some form of sexual violence occurred".<sup>148</sup>

### **E.4. Obligations of prosecution and proportionate punishment of all those responsible**

International law and standards make it compulsory for serious human rights violations to be prosecuted and punished in a proportionate manner.<sup>149</sup> In this regard,

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See also: IACtHR. *Case of Ortiz Hernández et al. v. Venezuela. Merits, Reparations and Costs*. Judgment of August 22, 2017. Series C No. 338, paras. 157 and 158; IACtHR. *Case of Carvajal Carvajal et al. v. Colombia. Merits, Reparations and Costs*. Judgment of 13 March 2018. Series C No. 352, para. 119.

<sup>141</sup> IACtHR. *Case of Miguel Castro Castro Prison vs. Merits, Reparations and Costs*. Judgment of 25 November 2006. Series C No. 160, para. 344; IACtHR. *Case of Véliz Franco et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs*. Judgment of 19 May 2014. Series C No. 277, para. 185; IACtHR. *Case of Espinoza Gonzales v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 20, 2014. Series C No. 289, para. 145.

<sup>142</sup> IACtHR. *Case of the La Rochela Massacre v. Colombia. Background, Reparations and Costs*. Judgment of 11 May 2007. Series C No. 163, para. 156.

<sup>143</sup> IACtHR. *Rio Negro Massacres v. Guatemala. Preliminary Exception, Merits, Reparations and Costs*. Judgment of 4 September 2012. Series C No. 250, para. 203.

<sup>144</sup> IACtHR. *Case of the Massacre of Las Dos Erres v. Guatemala. EPFRC*. 2009, op. cit., para 233.b.

<sup>145</sup> IACtHR. *Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia. EPFRC*. 2014, op. cit. para 479.

<sup>146</sup> IACtHR. *Case of Contreras et al. v. El Salvador*. 2011, op. cit., para 150; IACtHR. *Gonzalez et al Case ("Cotton Field") v. Mexico. EPFRC*. 2009, op. cit., 283.

<sup>147</sup> IACtHR. *González et al. ("Cotton Field Case ") v. Mexico*. 2009, op. cit., para 283.

<sup>148</sup> IACtHR. *Case of Velásquez Paiz et al. v. Guatemala. EPFRC*. 2015, op. cit., para 147.

<sup>149</sup> See: Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, para. 1; Updated set of principles for the protection and promotion of human rights through action to combat impunity, principle

for instance, the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions set out that:

*"Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences. Exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such executions. Such executions shall not be carried out under any circumstances including, but not limited to, situations of internal armed conflict, excessive or illegal use of force by a public official or other person acting in an official capacity or by a person acting at the instigation, or with the consent or acquiescence of such person, and situations in which deaths occur in custody. This prohibition shall prevail over decrees issued by governmental authority."*<sup>150</sup>

The ECtHR, following its case *X and Y v. the Netherlands*, has limited the concept of "punishment" to criminal law, stating that "effective deterrence is indispensable and can only be achieved by criminal law provisions".<sup>151</sup> International sources support the idea that, in addition to conducting a criminal trial and acting with due diligence to identify those responsible for violations, the State should impose sanctions on those who are guilty.<sup>152</sup> This entails imposing a penalty on all of the people who participate in the commission of a crime that involves unlawful death or enforced disappearance, regardless of the role they played or the legal classification of their participation.<sup>153</sup>

In terms of the obligation to punish, at least two questions arise: 1) What does it mean to punish? 2) Does the imposition of a sanction require effective punishment? Appropriate answers to these questions are found in the requirement that the punishment must be proportionate to the seriousness of the crime. The Office of the United Nations High Commissioner for Human Rights (OHCHR) has stated that while it is possible that there are mitigating circumstances for those responsible for serious human rights violations, the sentence must be proportional to the gravity of the crime.<sup>154</sup> It is the proportionality of the punishment of those responsible for serious human rights violations that acts as a general principle enshrined in various international provisions.<sup>155</sup>

Accordingly, the domestic law of States must respond rationally and proportionally to the seriousness of the events: "it is not acceptable to punish very serious events with very light penalties, such as "show" or fraudulent trials".<sup>156</sup> Thus, the State is obliged to impose on the person responsible for an unlawful act a penalty that is proportionate to the infraction of the law that occurred and the culpability with which they acted.<sup>157</sup>

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1, principle 19; HRC, General Comment No. 31, Nature of the general legal obligation imposed on States parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para 18; HRC, General Comment No. 36, Article 6: Right to life, CCPR/C/GC/36, 3 September 2019, para 27; and Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016, paras. 8 (C), 21 and 40.

<sup>150</sup> Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, para. 1

<sup>151</sup> ECtHR. *X and Y v. the Netherlands*, 26 March 1985, para. 27, Series A no. 91.

<sup>152</sup> UPRIMNY, Rodrigo, SÁNCHEZ Luz María and SÁNCHEZ, Nelson. *Justice For Peace. Atrocious Crimes, Right to Justice and Negotiated Peace*, Bogotá, Dejusticia 2014, pp. 61, available at: <https://www.dejusticia.org/publication/justicia-para-la-paz-crimenes-atroces-derecho-a-la-justicia-y-paz-negociada/>

<sup>153</sup> IACtHR. *Case of Garrido and Baigorria v. Argentina. Reparations and Costs*. Judgement of 27 August 1998. Series C No. 39, para. 74.

<sup>154</sup> OHCHR, Rule-of-Law Tools for Post-Conflict States: Amnesties, United Nations, 2009, pp. 34, available at: [https://www.ohchr.org/Documents/Publications/Amnesties\\_en.pdf](https://www.ohchr.org/Documents/Publications/Amnesties_en.pdf)

<sup>155</sup> For examples see the Geneva Conventions: GCIII, art. 129, GCIV, arts. 67 and 146. See ICCPED, art. 7.1; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, art. 4.2; *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons*, art. 2.2; *Inter-American Convention on Forced Disappearance of Persons*, art. III; *Rome Statute*, art. 77.1, art. 78.1, art. 82.2.a.

<sup>156</sup> IACtHR. *Goiburú et al. v. Paraguay*, FRC. 2006, op. cit. Judge Sergio García Ramírez, reasoned opinion, para. 7.

<sup>157</sup> IACtHR. *Case of the La Rochela Massacre v. Colombia*. FRC. 2007, op. cit., para 196.

#### E.4.1. Effective compliance with the sanction

States have an obligation to effectively sanction serious human rights violations. This implies that the obligation to sanction is not limited to a finding of guilt and the proportionality of the punishment, but also extends to its enforcement. This is because the enforcement of the punishment is related to one of the purposes of the obligation to effectively sanction: the non-repetition of the crimes. For this reason, compliance with the penalty cannot be illusory, since this would create a situation of impunity, which is prohibited by international law.

The IACtHR has held that the obligation to sanction includes compliance with the eventual sentence and with the terms in which it is decreed.<sup>158</sup> In addition, it has held that "the improper granting of [...] benefits may eventually lead to a form of impunity, particularly when it comes to the commission of serious human rights violations".<sup>159</sup>

On the other hand, States must not grant amnesties, nor establish statutory limitations or exemptions from responsibility with the objective of preventing or obstructing the investigation and punishment of those responsible for serious human rights violations.<sup>160</sup> Likewise, investigation and prosecution of human rights violations must take place within the civilian rather than the military justice system.<sup>161</sup>

In this regard, the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity establish that States should:

*"(...) adopt and enforce safeguards against any abuse of rules such as those pertaining to prescription, amnesty, right to asylum, refusal to extradite, non bis in idem, due obedience, official immunities, repentance, the jurisdiction of military courts and the irremovability of judges that fosters or contributes to impunity".<sup>162</sup>*

Along the same lines, in General Comment 31, the Human Rights Committee sets out that:

*"(...) where public officials or State agents have committed [such serious violations], the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties (...) and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility. Other impediments to the establishment of legal responsibility should also be removed, such as the defence of obedience to superior orders or unreasonably short periods of statutory limitation in cases where such limitations are applicable".<sup>163</sup>*

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<sup>158</sup> IACtHR. *Case of Rodríguez Vera et al. (Disappeared from the Palace of Justice) v. Colombia*. EPFRC. 2014, para. 460.

<sup>159</sup> See IACtHR. *Case of Cepeda Vargas v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 26 May 2010. Series C No. 213, paras. 152 and 153.

<sup>160</sup> Updated Set of principles for the protection and promotion of human rights through action to combat impunity, principle 22 and ff; HRC, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para 27; HRC, General Comment No. 36, Article 6: Right to life, CCPR/C/GC/36, 3 September 2019, para 27.

<sup>161</sup> Updated Set of principles for the protection and promotion of human rights through action to combat impunity, principle 22.

See also: IACtHR. *Case of Alvarado Espinoza and other v. Mexico*. Merits, Reparations and Costs. Judgment of 28 November 2018, Serie C No. 370, para 232; and Committee on Enforced Disappearances, Concluding observations on the report submitted by Spain under article 29, paragraph 1, of the Convention, 12 December 2013, para 15 and 16.

<sup>162</sup> Updated Set of principles for the protection and promotion of human rights through action to combat impunity, principle 22.

<sup>163</sup> HRC, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para 18.

Similarly, Article 16.2 of the Declaration on the Protection of all Persons from Enforced Disappearance lays down that alleged perpetrator of enforced disappearances should be “tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts”.<sup>164</sup>

As for the Inter-American Human Rights system, it has been insisted on the importance of sentences being served in the manner in which they were imposed in order to avoid the granting of prison benefits or pardons that would render the punishment illusory or remove the effects of the conviction, leading to impunity.<sup>165</sup> The IACtHR has held that for crimes committed against human rights, the State has an obligation to refrain from using mechanisms which “seek to (...) eliminate the effects of the sentence” and achieve an “undue granting of benefits in the execution of the sentence”.<sup>166</sup>

Finally, the IACtHR has also affirmed that:

*“[According to] International Criminal Law, in order to grant freedom to those convicted, it is necessary that, in addition to the health situation of the convicted person, other factors or criteria are taken into account such as: a considerable part of the prison sentence has been served and civil reparations imposed in the sentence have been paid; the conduct of the convicted person with regard to the clarification of the truth; the recognition of the seriousness of the crimes committed and their rehabilitation; and the effects that their early release would have at a social level and on the victims and their families”.*<sup>167</sup>

## F. VICTIMS' RIGHTS<sup>168</sup>

Access to justice requires the availability of effective remedies for any human rights violation. Remedies, to be effective, must be prompt, accessible, available before a competent, independent and impartial authority, and lead to cessation of the violation and to reparation.<sup>169</sup> Reparations include, as appropriate to the violation, compensation, guarantees of non-repetition, rehabilitation, restitution, and satisfaction.<sup>170</sup> Victims of human rights violations have also the right to know the truth about the circumstances in which the violations took place.<sup>171</sup>

At this point, it should be pointed out that although this document uses the term victim, human rights defenders tend to prefer the term survivor in cases of gender-based

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<sup>164</sup> See also: Working Group on Enforced or Involuntary Disappearances, Report of the Working Group on Enforced or Involuntary Disappearances on standards and public policies for an effective investigation of enforced disappearances, A/HRC/45/13/Add.3, 7 August 2020, para 40.

<sup>165</sup> See the following judgments from the IACtHR. *Case of Caracazo v. Venezuela. Reparations and Costs*. Judgment of 29 August 2002. Series C No. 95, para. 119; *Case of Molina Theissen v. Guatemala. Reparations and Costs*. Judgment of July 3, 2004. Series C No. 108, para. 83; *Case of 19 Merchants v. Colombia. FRC*. 2004, op. cit., para. 263; *Case of Gómez Paquiyauri Brothers v. Peru. Merits, Reparations and Costs*. Judgment of 8 July 2004. Series C No. 110, para. 232; *Case of Tibi v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 7, 2004. Series C No. 114, para. 259; *Case of Huilca Tecse v. Peru. Merits, Reparations and Costs*. Judgment of 3 March 2005. Series C No. 121, para. 108; *Case of Gutiérrez Soler v. Colombia*. Judgment of 12 September 2005. Series C No. 132, para. 97.

<sup>166</sup> IACtHR. *Barrios Altos Case and La Cantuta vs. Supervision of Compliance with Sentence*. 2018, para 38.

<sup>167</sup> *Id.*, para. 57.

<sup>168</sup> For more about Victims' rights, see: International Commission of Jurists, Practitioner's Guide No. 2 (The Right to a Remedy and Reparation for Gross Human Rights Violations, updated version), 2018. Available at: <https://bit.ly/3GZOUh0>

<sup>169</sup> See: ICCPR art. 2(3); ICED, art. 8,2 and 12.3 (a); and ACHR, art. 8, 25 y 63.

See also: HRC, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para 15 and 16; and Updated Set of principles for the protection and promotion of human rights through action to combat impunity, Principle 31 and ff.

<sup>170</sup> 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.

<sup>171</sup> Updated Set of principles for the protection and promotion of human rights through action to combat impunity, Principle 2 and ff.

violence. This is a way to reflect the agency, resilience and courage of women and girls who have suffered that kind of violence. For these human rights defenders, the term victim implies passivity and acceptance of violence. In some contexts, both terms are appropriate. On the one hand, the term survivor celebrates the individual. On the other hand, the term victim recognizes the broad system of gender-based discrimination that women and girls face.<sup>172</sup>

Victims of enforced disappearances and extrajudicial executions have human rights that States must guarantee. This section explains the notion of "victim" in relation to human rights standards. It also refers to the content of the rights that people can claim as victims of a human rights violation, specifically the rights to justice, truth and reparations and the right of access to information. Finally, the protection measures that could benefit victims and witnesses are addressed.

### **F.1. Concept of victim**

The concept of victim can be understood in different ways. A distinction can be made between the definition of a victim under the domestic law of States and that of a victim of a human rights violation under international law. In addition, regarding reparation, it should be noted that although there is a criminal law dimension, the right to justice of victims of human rights violations involves the State's responsibility to provide reparation. In other words, reparations are not only the responsibility of the individual perpetrator who is held criminally accountable.

In terms of the definition of victims in States' domestic law, there is a difference between the notion of a victim of a criminal offence and the way in which States' legal systems have regulated the rights of victims to participate in criminal proceedings. The victim of a criminal offence is the person against whom a crime regulated by criminal law is committed and who experiences the consequences of the crime. In turn, national criminal laws have established different figures to guarantee the participation of victims in legal proceedings. In this sense, the concepts of "complainant", "civil party" or "contributor" refer to persons who can assert some kind of power in legal proceedings.<sup>173</sup>

For international human rights law, the definition of a victim of a human rights violation is particularly relevant, given that victims are holders of the rights to reparation, investigation, truth and justice.<sup>174</sup> This means that the concept of victim must be defined in a broad way with the goal of covering the various situations in which people who suffer the violation of a human right might find themselves. A broad concept of victims includes:

*"(...) 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*

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<sup>172</sup> see: International Commission of Jurists, Practitioners' Guide No. 12: Women's Access to Justice for Gender-Based Violence, 2016, p. 3 y 4. Available at: <https://bit.ly/3bXVbT9>

<sup>173</sup> Due Process Foundation, op. cit., pp. 2-3.

<sup>174</sup> International Commission of Jurists, Practitioners' Guide No 10: Enforced Disappearance and Extrajudicial Execution: the Rights of Family Members, 2016, pp. 5. Available at: <https://bit.ly/3pRP7DB>

*who have suffered harm in intervening to assist victims in distress or to prevent victimization”.*<sup>175</sup>

In relation to enforced disappearance, the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) also provides a broad definition of victim. In this regard, Article 24.1 sets out that the concept of victim covers “the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.”

Accordingly, disappeared persons and those who suffer an unlawful death are victims. Additionally, relatives of these persons are also considered victims in view of the suffering caused to them by the disappearance or death of their loved one.<sup>176</sup> In relation to close relatives of victims, international jurisprudence has held that the suffering caused by an enforced disappearance or an unlawful death is tantamount to cruel and inhuman treatment or a form of torture.<sup>177</sup> For the same reason, the IACtHR has presumed the existence of internal emotional pain in persons close to the victim of an unlawful death or an enforced disappearance and has not required the fact to be proved. This presumption is relevant because it allows the inclusion of relatives and other people as victims without the need to present evidence to that effect.<sup>178</sup>

In many situations, by affecting one person who is member of a protected group, enforced disappearances and extrajudicial executions victimize the group as a whole. This has been found, for example, regarding members of indigenous peoples,<sup>179</sup> trade union leaders<sup>180</sup> and political representatives.<sup>181</sup> For instance, the IACHR has stated that the murder of an “indigenous or afro-descendant leader has a direct impact on the collective rights of the organisations they represent, increasing their situation of defencelessness and vulnerability”.<sup>182</sup>

## **F.2. Right to justice, truth and reparation**

### **F.2.1. Justice**

Concerning the victim of a crime, the idea of justice has been historically and culturally identified with the possibility of accessing criminal proceedings in which individual responsibility is established and the person responsible is punished. Criminal law is an instrument that contributes to measuring the legitimacy and effectiveness of a justice system.

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<sup>175</sup> 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, para 8. See also: Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Res. 40/34, 29 November 1985, para. 1.

<sup>176</sup> International Commission of Jurists, Practitioners’ Guide No 10: Enforced Disappearance and Extrajudicial Execution: the Rights of Family Members, 2016, pp. 5. Available at: <https://bit.ly/3pRP7DB>

<sup>177</sup> See HRC. *Jegatheeswara Sarma v. Sri Lanka*. Communication No. 950/2000. CCPR/C/78/D/950/2000. 31 July 2003, para. 9.5; ECtHR. *Kurt v. Turkey*, *op. cit.*, paras. 130-134; IACHR. *Radilla Pacheco v. Mexico*. 2009, párr. 166.

<sup>178</sup> IACtHR. *Case of Osorio Rivera and family members v. Peru*. 2013, *op. cit.*, para. 227, states that the presumption applies to mothers and fathers, daughters and sons, spouses, permanent companions and brothers and sisters.

<sup>179</sup> IACtHR. *Case of Chitay Nech et al. v. Guatemala. EPFRP*. 2010, *op. cit.*, paras. 108, 113 and 116, notes that the disappearance of Florencio Chitay, who was an ethnic Mayan Kaqchikel political representative, had weakened the political representation of his community.

<sup>180</sup> IACtHR. *Case of Huilca Tecse v. Peru*. FRC. 2005, *op. cit.*, paras. 69 and 78, concluded that the assassination of a trade union leader was carried out with the goal of intimidating workers in the trade union movement and to limit their freedom of association to engage in activities for their trade union.

<sup>181</sup> IACtHR. *Case of Gudiel Alvarez et al. (“Diario Militar”) v. Guatemala*. FRC. 2012, *op. cit.*, paras. 221-222, indicated that the disappearance of the 26 victims was intended to dismantle the organizations that the State considered “insurgent”.

<sup>182</sup> IACHR. *Human rights defenders and social leaders in Colombia*. OAS/Ser.L/V/II. Doc. 262. 6 December 2019, para. 67.

### F.2.1.1. Right of access to justice

The Universal Declaration of Human Rights (UDHR),<sup>183</sup> the ICCPR<sup>184</sup> and the ICPPED<sup>185</sup> establish the obligation of States to provide an effective remedy for human rights violations. The American Convention on Human Rights (ACHR) recognizes the individual's right to access justice, which implies having simple, adequate and effective procedural remedies for the protection and determination of rights.<sup>186</sup> This right represents a limit to the abuse of power by the State and is therefore one of the basic pillars of the rule of law.<sup>187</sup> It is an autonomous right, but at the same time it ensures the full exercising of other rights. Specifically, the right to an effective remedy implies that victims of human rights violations have access to an independent authority that can: (i) decide whether a human rights violation has occurred or is occurring; and (ii) order a reparation measure for the harm caused.<sup>188</sup>

In relation to serious human rights violations, such as extrajudicial killings and enforced disappearances, victims must have access to a criminal judicial remedy.<sup>189</sup> This is because disciplinary proceedings<sup>190</sup> are not adequate mechanisms.<sup>191</sup> In addition, minimum principles must be safeguarded in the criminal process: the processes and results of the investigation must be open to public scrutiny;<sup>192</sup> the victims must be assured of their participation;<sup>193</sup> the courts must be independent and impartial;<sup>194</sup> the basic guarantees of due process must be respected; the principle of reasonable time limits, the principle of adversarial proceedings<sup>195</sup> and the principle of proportionality of punishment must be observed; the remedies must be effective and the sentence must be effectively enforced.<sup>196</sup> Criminal proceedings must move forward dynamically on the basis of articulated and related investigations and without formalities that in themselves constitute obstacles to victims' access to justice.<sup>197</sup>

The victim of a serious human rights violation<sup>198</sup> must be guaranteed access to an effective judicial remedy in accordance with international law. For this to happen, States must:

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<sup>183</sup> UDHR, Art. 8.

<sup>184</sup> ICCPR, arts. 2.3 and 14.

<sup>185</sup> ICPPED, arts. 3 and 12

<sup>186</sup> ACHR, arts. 8 and 25.

<sup>187</sup> IACTHR. *Case of Ivcher Bronstein v. Peru*. Merits, Reparations and Costs. Judgment of 6 February 2001. Series C No. 74, para. 135.

<sup>188</sup> IACTHR. *Case of Castañeda Gutman v. Mexico*. Preliminary Objections, Merits, Reparations and Costs, Judgment of August 6, 2008, Series C No. 184, para. 118; ECtHR. *Nikitin et al. v. Estonia*, nos. 23226/16 and 6 others, para. 207, 29 January 2019.

<sup>189</sup> IACTHR. *Almir Muniz Da Silva vs.* Report No. 78/16. Petition 1170-09. Report on Admissibility. OAS/Ser.L/V/II. Doc. 86. 30 December 2016, para. 31; IACTHR. *Rodolfo David Piñeyro Ríos v. Argentina*. Report No. 20/17. Petition 1500-08. Report on Admissibility. OAS/Ser.L/V/II. Doc. 21. 12 March 2017, para. 5.

<sup>190</sup> Disciplinary proceedings are actions aimed at investigating and in some cases sanctioning certain behaviours or conduct of a person working in an institution due to their failure to comply with obligations, the violation of prohibitions, and abuses in the exercising of rights and powers. They are not criminal proceedings.

<sup>191</sup> IACTHR. *Rosalía Benavides Franco et al. vs.* Report No. 109/17. Petition 795-08. Report on Admissibility. OAS/Ser.L/V/II.164 Doc. 130. 7 September 2017, paras. 23-24.

<sup>192</sup> Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016, para. 32

<sup>193</sup> ICPPED, arts. 12 and 24.

<sup>194</sup> IACTHR. *Case of the Constitutional Court (Camba Campos et al.) v. Ecuador*. 2013, op. cit., paras. 143 and f.f.

<sup>195</sup> This principle guarantees that the activity of those who intervene in a process is reciprocally controlled through their own interventions by arguments, the production of evidence and the presentation of counter-evidence. The aim is to ensure that all who intervene in a judicial process have the same degree of participation and the same rights and guarantees.

<sup>196</sup> IACTHR. *Case of the La Rochela Massacre v. Colombia*. 2007, op. cit., paras. 193, 195.

<sup>197</sup> ECtHR. *Pérez de Rada Cavanilles v. Spain*, 28 October 1998, para. 49, *Reports of Judgments and Decisions* 1998-VIII; ECtHR. *RTBF v. Belgium*, no. 50084/06, para. 71, ECtHR 2011 (extracts).

<sup>198</sup> ECtHR. *Hugh Jordan v. the United Kingdom*, op. cit., para. 109; ACHPR. *General Comment No. 3 On The African Charter On Human And Peoples' Rights: The Right To Life (Article 4)*. November 4 - 8, 2015, para. 7.

*"(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."<sup>199</sup>*

To comply with the right to access justice, States must adopt special protocols and adapt judicial practices by implementing a gender perspective and taking into account the specific needs for certain victims, for example, children and adolescents, indigenous peoples, migrants, LGBTI persons, people with disabilities and other sectors of society.

Finally, it should be noted that the right to effective judicial protection is not exhausted by free access to a remedy and its implementation - but requires that a tribunal hands down a reasoned conclusion on the merits of the claim made by the victims. Among other rights this implies the right of the victim to obtain a reasoned judgment or decision.

#### **F.2.1.2. The role of victims in the judicial process**

International human rights standards and principles establish the right of victims to participate in judicial mechanisms, a right derived from the rights of access to justice and to an effective remedy.<sup>200</sup> The IACtHR has reiterated that victims "should have ample opportunity to be heard and to act in the respective proceedings".<sup>201</sup>

The right of access to justice is embodied in a series of procedural guarantees for victims, including the following powers: (i) access to files and relevant information for the case; (ii) provide evidence at the appropriate procedural stage; (iii) challenge decisions or acts of authority that prevent or obstruct the full exercising of their rights;<sup>202</sup> and (iv) appeal against judgements.

To put it in another way, the right to access justice implies the right to have justice served, including the right to participate in criminal proceedings for crimes committed against them,<sup>203</sup> which includes full and effective access to investigative documents,<sup>204</sup> as well as the ability to act during all stages and instances of the investigation and judicial proceedings.

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<sup>199</sup> 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, para 12.

<sup>200</sup> Human Rights Council. Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-repetition, Pablo de Greiff. A/HRC/27/56. 27 August 2014, para. 92.

<sup>201</sup> IACtHR. *Case of Fernández Ortega et al. v. Mexico*. Preliminary Objection, Merits, Reparations and Costs. Judgement of 30 August 2010, Series C No. 215, para. 192; IACtHR. *Case of Gomes Lund et al ("Guerrilha do Araguaia") v. Brazil*. 2010, op. cit. 139.

<sup>202</sup> ECtHR. *Hugh Jordan v. the United Kingdom*, op. cit., para. 122.

<sup>203</sup> Constitutional Court of Colombia. Sentence C-370/06, para. 6.2.3.2.1.7.

<sup>204</sup> ECtHR. *Oğur v. Turkey* [GC], no. 21594/93, para. 92, ECHR 1999-III.



It is essential that criminal proceedings guarantee victims and their representatives the possibility of being a participant or interested party in the criminal proceedings so that they can defend their interests, especially in those cases where the public prosecutor's office does not necessarily share interests identical to the victim. This situation is especially evident when the public prosecutor's office uses inappropriate criminal typology. For example, when it investigates acts constituting enforced disappearance under the figure of kidnapping, with their interests going in the opposite direction of the victims.<sup>205</sup> Other examples are cases in which the prosecutor's office rejects a request to investigate torture;<sup>206</sup> and in cases of violent deaths, where the investigating authority's hypothesis is suicide and the victim's relatives allege alleged irregularities in the prosecution of those responsible,<sup>207</sup> especially when eyewitness testimonies are dismissed.<sup>208</sup> Other examples can occur when the investigating authority omits certain medical examinations of victims;<sup>209</sup> when they engage in discriminatory, stereotyped and re-victimizing behaviour, for example, by discrediting the testimony of victims;<sup>210</sup> or when they conduct investigations many years after the killing or disappearance without establishing the facts or punishing those responsible.<sup>211</sup>

Subsequently, the State must ensure that victims and their representatives have the ability to participate in the criminal process, recognizing their legitimacy to promote investigations, request proceedings and appeal sentences absolving the convicting person, guaranteeing their right to simple and quick judicial remedies to dispute decisions made by authorities and the protection of their rights throughout the judicial process.

It is important to take into account that the proper conduct of investigations and judicial proceedings is an obligation for States and as such should not be conditioned or dependent on the procedural actions of the victim. This means that in "procedural regimes in which victims or their relatives may have the right to intervene in criminal proceedings, the exercising of their rights is not obligatory but optional, and in no acts as a substitute for State activity".<sup>212</sup>

In the same vein, and with respect to the burden of proof and the cases of crimes of a clandestine nature, such as enforced disappearance, the IACtHR has stated that the State must provide the necessary information as it is the State that has "control over the means to clarify events that have occurred within its territory. Therefore, any attempt to place the burden of proof on the victims or their relatives is a departure from the State's obligation under Article 2 of the American Convention and Articles I b) and II of the Inter-American Convention on Forced Disappearance".<sup>213</sup>

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<sup>205</sup> IACHR. *Final Report: Ayotzinapa Special Follow-Up Mechanism*. OAS/Ser.L/V/II. Doc. 156. 25 November 2018, paras. 40 and ff.

<sup>206</sup> IACtHR. *Blue Red Marin et al. Vs. Peru*. Preliminary Exceptions, Merits, Reparations and Costs. Judgment of 12 March 2020. Series C No. 402, para. 206.

<sup>207</sup> ECtHR, *Sergey Shevchenko v. Ukraine*, no. 32478/02, para. 56, 4 April 2006.

<sup>208</sup> IACtHR. *Nadia Alejandra Muciño Márquez and family v. Mexico*, *op. cit.*, para 4.

<sup>209</sup> IACtHR. *Women Victims of Sexual Torture in Atenco v. Mexico*. Preliminary Exception, Merits, Reparations and Costs. Judgment of 28 November 2018. Series C No. 371, para. 310.

<sup>210</sup> *Id.*

<sup>211</sup> IACHR, Report No. 57/13. Petition 12.229. Admissibility. Digna Ochoa et al. Mexico. 16 July 2013, para. 55.

<sup>212</sup> IACtHR. *Amanda Graciela Encaje and family vs.* Report No. 33/18. Petition 377-08. Report on Admissibility. OAS/Ser.L/V/II.168 Doc. 43. 4 May 2018, para. 12.

<sup>213</sup> IACtHR. *Case of Gómez Palomino vs.* Merits, Reparations and Costs. Judgment of 22 November 2005. Series C No. 136, para. 106.

## F.2.2. Truth

The right to truth is a university recognized right, affirmed by the UN Human rights Council in several Resolutions.<sup>214</sup> The right to the truth is as self-standing human right, as well as being related to other rights.<sup>215</sup> Principle 2 of the Updated Set of principles for the protection and promotion of human rights through action to combat impunity establish the inalienable right to know the truth. In this regard, principle 2 sets out:

*"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".*

In the same vein, the Principles to Combat Impunity establish that the right to the truth implies the States' duty to take measures "to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations".<sup>216</sup> Similarly, States should "ensure the independent and effective operation of the judiciary, to give effect to the right to know".<sup>217</sup>

The Principles also mention that the right to truth might require that States adopt non-judicial measures, such as the creation of a truth commission.<sup>218</sup> In relation to victims, the Principles determine that they 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".<sup>219</sup>

The ICPPED has expressly enshrined this right in Article 24.2, prescribing that "[e]ach 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".

The right to truth "empowers the victim, their relatives and the general public to seek and obtain all relevant information concerning the commission of the alleged violation, the fate and whereabouts of the victim and, where appropriate, the process by which the violation was officially authorized".<sup>220</sup>

The right to truth has a double dimension. On the one hand, it is a right of victims understood in a broad sense, because for them it is indispensable to know what happened

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<sup>214</sup> See for instance: Human Rights Council, Right to the truth, A/HRC/RES/12/12, 12 October 2009 and Human Rights Council, Right to the truth, A/HRC/RES/21/7. 10 October 2021.

<sup>215</sup> Working Group on Enforced or Involuntary Disappearances, General comment on the right to the truth in relation to enforced disappearance, page 12 and ff. Available at: Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/16/48, 26 January 2011.

See also: The Office of the United Nations High Commissioner for Human Rights, Study on the right to the truth, E/CN.4/2006/91, 8 February 2006, para 21.

<sup>216</sup> Updated Set of principles for the protection and promotion of human rights through action to combat impunity, principle 3.

<sup>217</sup> Id., principle 5.

<sup>218</sup> Id., principle 5.

<sup>219</sup> Id., principle 4.

<sup>220</sup> Human Rights Council. *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-repetition*, Pablo de Greiff. A/HRC/24/42. 28 August 2013, para. 20.

in relation to the violations they suffered.<sup>221</sup> On the other hand, society as a whole must also know the circumstances surrounding the commission of human rights violations.<sup>222</sup>

International jurisprudence has also held that the right to truth is related to the right of access to justice and judicial guarantees.<sup>223</sup> In relation to enforced disappearances, according to the IACtHR, preventing relatives from knowing the truth about what happened to the disappeared person constitutes a form of cruel and inhuman treatment and is a violation of the right to personal integrity.<sup>224</sup>

The right to truth is also a form of reparation.<sup>225</sup> It is a measure of satisfaction because it “admits the importance and value of people as individuals, victims and rights holders”.<sup>226</sup> It also provides a guarantee of non-repetition because it helps to ensure that the human rights violations that are revealed will not be committed again in the future.<sup>227</sup> Additionally, the right to the truth is intimately connected to the right of victims to access information, which will be discussed below.<sup>228</sup>

The State can satisfy the right to truth in several ways. The judicial investigation of the facts and the condemnation of those responsible is one way of complying with this right.<sup>229</sup> Convictions contribute to the reconstruction of what happened as they are based on facts that have been proven through the application of the formalities of the judicial process.

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<sup>221</sup> IACHR. *Right to the Truth in the Americas*, OAS/Ser.L/V/II.152 Doc.2, 13 August 2014, para. 14; IACHR. *Ignacio Ellacuría, S.J.; Segundo Montes, S.J.; Armando López, S.J.; Ignacio Martín Baró, S.J.; Joaquín López y López, S.J.; Juan Ramón Moreno, S.J.; Julia Elba Ramos; and Celina Mariceth Ramos v. El Salvador*. Report No. 136/99. Case 10.488. Background Report. 22 December 1999, para. 224; IACtHR. *Case of Myrna Mack Chang v. Guatemala. Merits, Reparations and Costs*. Judgement of 25 November 2003. Series C No. 101, para. 274; IACtHR. *Case of Tibi v. Ecuador*. 2004, op. cit., para 257.

<sup>222</sup> HRC. *Study on the right to truth*, E/CN.4/2006/91, op. cit. *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/16/48, op. cit. *Right to the Truth in the Americas*, op. cit., paras. 15, 81-82; IACHR. *Ignacio Ellacuría, S.J.; Segundo Montes, S.J.; Armando López, S.J.; Ignacio Martín Baró, S.J.; Joaquín López y López, S.J.; Juan Ramón Moreno, S.J.; Julia Elba Ramos; and Celina Mariceth Ramos v. El Salvador*, op. cit. *Case of Bámaca Velásquez v. Guatemala. Background*. Judgement of 25 November 2000. Series C No. 70, Reasoned Opinion of Judge A. A. Cançado Trindade, para. 30; IACtHR. *Case of Bámaca Velásquez v. Guatemala. Reparations and Costs*. Judgement of 22 February 2002. Series C No. 91, para. 77; IACtHR. *Case of Trujillo Oroza v. Bolivia. Reparations and Costs*. Judgment of February 27, 2002. Series C No. 92, para. 114.

<sup>223</sup> See IACHR. *Right to the Truth in the Americas* cit. *Civil and political rights, in particular issues related to disappearances and summary executions*. Report submitted by Mr. Manfred NOWAK, independent expert on the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46 at its 58th session. E/CN.4/2002/71, 8 January 2002, para. 79; HRC, *Study on the right to truth*, E/CN.4/2006/91, op. cit., paras. 23, 25, 42, 56 and 57; IACtHR. *Case of Bámaca Velásquez v. Guatemala. F. 2000*, op. cit., reasoned opinion of Judge A. A. Cançado Trindade, paras. 30 and 32; IACtHR. *Case of Bámaca Velásquez v. Guatemala. CR. 2002*, op. cit., para. 75; IACtHR. *Case of the Massacre of Pueblo Bello v. Colombia*. 2006, op. cit., para. 219; IACtHR. *Case of Blanco Romero et al. v. Venezuela*. 2005, op. cit., para. 62.

<sup>224</sup> IACHR. *Right to the Truth in the Americas*, op. cit., para 11; *Case of Bámaca Velásquez v. Guatemala. F. 2000*, op. cit., para. 165; IACtHR. *Case of Anzaldo Castro v. Peru*. 2009, ci. 113; IACtHR. *Case of Gelman v. Uruguay. Merits and Reparations*. Judgement of 24 February 2011. Series C No. 221, para. 133; IACtHR. *Case of González Medina and family members v. Dominican Republic*. 2012, op. cit., para. 270; IACHR. *Case of Radilla Pacheco v. Mexico*. 2009, op. cit., para. 123.

<sup>225</sup> 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, para 22 (b) and 24.

See also: IACHR. *Right to the Truth in the Americas*, op. cit., para. 124; IACHR. *Ignacio Ellacuría, S.J.; Segundo Montes, S.J.; Armando López, S.J.; Ignacio Martín Baró, S.J.; Joaquín López y López, S.J.; Juan Ramón Moreno, S.J.; Julia Elba Ramos; and Celina Mariceth Ramos v. El Salvador*, op. cit. para. 224; IACtHR. *Case of the Massacre of Pueblo Bello v. Colombia*. 2006, op. cit., para. 219.

<sup>226</sup> IACHR. *Right to the Truth in the Americas*, op. cit. *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-repetition*, A/HRC/24/42, op. cit., para 30.

<sup>227</sup> IACHR. *Right to the Truth in the Americas*, op. cit., para. 124; IACtHR. *Monsignor Oscar Arnulfo Romero and Galdámez, v. El Salvador*. Report No. 37/00. Case 11.481. Report on the Merits. 13 April 2000, para. 148.

<sup>228</sup> IACHR. *Right to the Truth in the Americas*, op. cit., para 80.

<sup>229</sup> IACtHR. *Case of Blanco Romero et al. v. Venezuela*. 2005, op. cit. 62; I/A Court H.R., para. Case of the *Massacre of Pueblo Bello v. Colombia*. 2006, op. cit., para. 219; IACtHR. *Lucio Parada Cea, Héctor Joaquín Miranda Marroquín, Fausto García Funes, Andrés Hernández Carpio, José Catalino Meléndez and Carlos Antonio Martínez v. El Salvador*. Report No. 1/99. Case 10.480. Report in depth. 27 January 1999, para. 149.

Another way to address this right is through the establishment of truth commissions<sup>230</sup>, i.e. "official, temporary, non-judicial fact-finding bodies to investigate human rights or humanitarian law abuses that have been committed over a number of years".<sup>231</sup> The duration, mandate, membership and powers of truth commissions vary from case to case. In general, after conducting an investigation into certain human rights violations, they produce a report accounting for the violations that is publicly disseminated. It is important to clarify that the reconstruction of the truth by means of such a mechanism does not exempt the State from carrying out a judicial investigation to punish those responsible.<sup>232</sup>

### F.2.3. Reparation<sup>233</sup>

Every victim of a human rights violation has the right to reparation,<sup>234</sup> which, as noted above, includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The State has an obligation to ensure this right.<sup>235</sup> In addition, "when it is determined that a natural or legal person or other entity is obliged to provide reparations to a victim, the responsible party must provide reparations to the victim or compensate the State if it has already provided reparations to the victim".<sup>236</sup>

The right to reparation and the correlative obligation of the State to provide reparations have been enshrined in the main international human rights treaties of the universal system and regional protection systems, as well as in relevant declaratory instruments. For instance, on 16 December 2005, the United Nations General Assembly adopted by consensus Resolution 60/147 endorsing 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.

In the Inter-American system, Article 63.1 of the American Convention on Human Rights (ACHR) provides:

*"If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."*

Interpreting this provision, the IACtHR has held that "any violation of an international obligation that has produced damage entails the obligation to provide adequate reparations and that this provision reflects a customary rule that constitutes

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<sup>230</sup> The fundamental requirements for such Commissions have been set out in Principles 6-13 of the Updated set of principles for the protection and promotion of human rights through action to combat impunity.

<sup>231</sup> Updated set of principles for the protection and promotion of human rights through action to combat impunity.

<sup>232</sup> Ibid., Principle 4; HRC. *Study on the right to truth*, E/CN.4/2006/91, op. cit., paras. 10, 42, 45, 56 and 57; IWGDD. *General Comment on the right to truth in relation to enforced disappearances*, A/HRC/16/48, op. cit. *Case of Castillo Páez v. Peru. Merits*. Judgment of 3 November 1997. Series C No. 34, para. 90.

<sup>233</sup> For more information about reparation, see: International Commission of Jurists, Practitioners' Guide No 2: The right to a remedy and reparation for gross human rights violations (Revised Edition), 2018.

<sup>234</sup> ICPPED, art. 24.4 and Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016, para. 10. See also: Updated set of principles for the protection and promotion of human rights through action to combat impunity, principle 31.

In relation to extrajudicial executions, see: Principles relating to the effective prevention and investigation of extra-legal, arbitrary or summary executions.

<sup>235</sup> International Commission of Jurists, Practitioners' Guide No 10: Enforced Disappearance and Extrajudicial Execution: the Rights of Family Members, 2016, pp. 141 to 143.

See also: Updated set of principles for the protection and promotion of human rights through action to combat impunity.

<sup>236</sup> 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.

one of the fundamental principles of contemporary international law on State responsibility".<sup>237</sup>

In terms of international humanitarian law, it should be noted that the State's obligation to provide reparations for violations of international humanitarian law is a customary rule applicable to both international and non-international armed conflicts.<sup>238</sup>

Every victim of a violation of a human right is entitled to full reparations. The guiding principle of reparations is to return the victim to the position they were in before the violation was committed. When this is not possible, the negative consequences caused by the violation must be repaired.<sup>239</sup>

Remedies and reparations may be administrative in the first instance, but where reparations are obtained in an administrative setting, victims must still be able to make a judicial claim<sup>240</sup>. For example, in relation to the Chilean context, the IACtHR noted that compensation awarded through administrative channels does not exclude the right of victims to claim compensation through judicial channels. Therefore, both types of reparations, administrative and judicial, are complementary and not exclusive.<sup>241</sup>

As it is not possible in all cases to completely eliminate the negative consequences of human rights violations, comprehensive reparations must include various measures, both material and symbolic.<sup>242</sup> Thus, the full satisfaction of the right to reparation must be achieved through the following measures: restitution; compensation; rehabilitation; satisfaction and guarantees of non-repetition.<sup>243</sup>

**Restitution** measures involve restoring, as far as possible, the situation that existed before the violation occurred.<sup>244</sup> In cases of potentially unlawful death and enforced disappearance where the victim has died, restitution in these terms is

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<sup>237</sup> IACtHR. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs*. Judgment of 21 July 1989. Series C No. 7, para. 25; IACHR. *Girón et al. v. Guatemala. Preliminary Objection, Merits, Reparations and Costs*. Judgement of 15 October 2019. Series C No. 390, para. 124; IACtHR. *Case of Acevedo Buendía et al ("Retired and Redundant Employees from the Office of the Comptroller") v. Peru. Preliminary Objection, Merits, Reparations and Costs*. Judgment of July 1, 2009. Series C No. 198, para. 108.

<sup>238</sup> HENCKAERTS/DOSWALD-BECK. *Customary International Humanitarian Law. Volume I: Rules*, op. cit., Rule 150, pp. 537 and ff.

<sup>239</sup> IACtHR. *Case of Velásquez Rodríguez v. Honduras*. CR. 1989, op. cit. para. 26; IACtHR. *Case of Trujillo Oroza v. Bolivia*. CR. 2002, op. cit., para. 61; IACtHR. *Cantoral Benavides v. Peru*. CR. 2001, op. cit., para. 41.

<sup>240</sup> See: International Commission of Jurists, ICJ 17th World Congress: The ICJ Declaration and opening speeches, 11-12 December 2012, para 6. Available at: <https://bit.ly/3bYiwV5>

<sup>241</sup> IACtHR. *Case of Ordenes Guerra et al. v. Chile. Merits, Reparations and Costs*. Judgment of 29 November 2018. Series C No. 372, paras. 97 and 123; IACHR. *Case of García Lucero et al. v. Chile. Preliminary Objection, Merits and Reparations*. Judgment of August 28, 2013. Series C No. 267, paras. 190-192; Committee against Torture (CAT). *General Comment No. 3 (2012). Implementation of Article 14 by States parties*, CAT/C/GC/3, 13 December 2012, paras. 17 and 20.

<sup>242</sup> IACtHR. *Osorio Rivera and family members vs. Preliminary Objections, Merits, Reparations and Costs*. Judgment of 26 November 2013. Series C No. 274, para. 236; IACtHR. *Case of the Constitutional Court (Camba Campos et al.) v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgement of 28 August 2013. Series C No. 268, para. 244.

<sup>243</sup> Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016, para. 10.

See also: Updated set of principles for the protection and promotion of human rights through action to combat impunity, principle 34; 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; HRC, General Comment No. 31, Nature of the general legal obligation imposed on States parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 16.

On enforced disappearance, see: ICPPED, art. 24.5; Human Rights Council. Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development; Working Group on Enforced or Involuntary Disappearances, Report, A/HRC/22/45, 28 January 2013, paras. 46 and ff; IACtHR. *Case of the Massacre of Las Dos Erres v. Guatemala*. 2009, op. cit., para. 226; IAC. *Case of Gorioitía v. Argentina. Preliminary Objection, Merits, Reparations and Costs*. Judgment of 2 September 2019. Series C No. 382, para. 60.

<sup>244</sup> International Commission of Jurists, Practitioners' Guide No 10: Enforced Disappearance and Extrajudicial Execution: the Rights of Family Members, 2016, pp. 148. Available at: <https://bit.ly/3pRP7DB>  
See also: 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.

impossible.<sup>245</sup> In the case of an enforced disappearance of a person who is alive, restitution would be achieved by releasing the person and ensuring adequate legal protection.<sup>246</sup>

**Compensation** refers to the payment of a sum of money to compensate for any economically assessable damage, whether material or moral, in a manner that is proportional to the gravity of the violation and the circumstances of the case.<sup>247</sup> Material damage includes the loss or detriment of the victim's income, as well as the expenses incurred as a result of the violation and economic consequences that have a causal link with the violation.<sup>248</sup> Moral damage must consider "those harmful effects of the events of the case which are not of an economic or patrimonial nature and cannot therefore be assessed in monetary terms. Moral damage can include both the suffering and distress caused to direct victims and their relatives, and the impairment of very significant values for people and other disturbances that cannot be measured in monetary terms".<sup>249</sup>

**Rehabilitation** includes measures to provide medical, psychological and social care that will support victims to recover from the violation of a human right.<sup>250</sup> This care should be provided free of charge, by specialized professionals and be accessible to victims.<sup>251</sup>

The measures of **satisfaction** involve the recognition of the victim's dignity and the symbolic dimension of reparations. Some examples include: the carrying out of acts of recognition of the State's responsibility;<sup>252</sup> the installation of commemorative plaques in significant places, such as the premises where a victim was detained before their disappearance;<sup>253</sup> the publication of the sentence and its dissemination in the media;<sup>254</sup> measures to commemorate and pay homage to the victims;<sup>255</sup> the search for disappeared persons, exhumations in the presence of their relatives and the handing over and identification of the remains.<sup>256</sup>

Finally, **guarantees of non-repetition** are measures that aim to prevent the recurrence of human rights violations. They have a public scope and impact and often

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<sup>245</sup> International Commission of Jurists, Practitioners' Guide No 10: Enforced Disappearance and Extrajudicial Execution: the Rights of Family Members, 2016, pp. 148. Available at: <https://bit.ly/3pRP7DB>  
See also: Working Group on Enforced or Involuntary Disappearances, Report, A/HRC/22/45, 28 January 2013.

<sup>246</sup> ICPPED, art. 24.3.

See also: International Commission of Jurists, Practitioners' Guide No 10: Enforced Disappearance and Extrajudicial Execution: the Rights of Family Members, 2016.

<sup>247</sup> 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, para. 10; and Declaration on the Protection of All Persons from Enforced Disappearance, art. 19.

See also: International Commission of Jurists, Practitioners' Guide No 2: The right to a remedy and reparation for gross human rights violations (Revised Edition), 2018, pp. 174.

<sup>248</sup> IACtHR. *Case of Bámaca Velásquez v. Guatemala*. CR. 2002, op. cit., para. 43.

<sup>249</sup> IACtHR. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and Costs*. Judgment of 26 May 2001. Series C No. 77, para. 84; IACHR. *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and Reparations*. Judgment of June 27, 2012. Series C No. 245, para. 318.

<sup>250</sup> International Commission of Jurists, Practitioners' Guide No 10: Enforced Disappearance and Extrajudicial Execution: the Rights of Family Members, 2016, pp. 152.

See, also: 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, para. 21; Declaration on the Protection of All Persons from Enforced Disappearance, art. 19; and Working Group on Enforced or Involuntary Disappearances, Report, A/HRC/22/45, 28 January 2013.

<sup>251</sup> IACtHR. *Case of Gomes Lund et al ("Guerrilha do Araguaia") v. Brazil*. 2010, op. cit., para. 269.

<sup>252</sup> IACtHR. *Case of Gelman vs. Uruguay*. 2011, op. cit., para. 22.e.

<sup>253</sup> Id., para. 267.

<sup>254</sup> IACtHR. *Case of Chitay Nech et al. v. Guatemala*. 2010, op. cit. 245.

<sup>255</sup> IACtHR. *Case of Cepeda Vargas v. Colombia*. 2010, op. cit., paras. 227-233.

<sup>256</sup> 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, para. 22.c; Updated set of principles for the protection and promotion of human rights through action to combat impunity; IACtHR. *Case of La Cantuta v. Peru. Merits, Reparations and Costs*. Judgment of 29 November 2006. Series C No. 162, para. 231.

seek to resolve structural problems that do not just benefit victims but also other groups in society. Some examples include: the requirement to bring domestic legislation into line with international standards;<sup>257</sup> education and training on human rights for public officials;<sup>258</sup> improvement of prison conditions; guaranteeing the right of access to information under State control; implementation of a national awareness campaign; and measures to make the remedy of *habeas corpus*<sup>259</sup> effective in cases of enforced disappearance.

While the investigation and sanction of potentially unlawful deaths and enforced disappearances are international obligations irrespective of their reparative purpose, they are also forms of reparation in themselves.<sup>260</sup>

### F.3. The right to access information

The right to access information is the right to seek and receive information held by the State which the State is obliged to provide, unless there are exceptional grounds for refusing or limiting access.<sup>261</sup> It is a right of all persons<sup>262</sup> and does not require a direct interest or personal involvement to request and obtain information held by the State.<sup>263</sup>

In the Tshwane Principles on National Security and the Right to Information, it is established that in cases of gross human rights violations and infractions to international humanitarian law, including crimes under international law, there is “an overriding public interest in disclosure of information”.<sup>264</sup> Therefore, information about these violations “may not be withheld on national security grounds in any circumstances”.<sup>265</sup>

The obligation to provide information is incumbent on all public authorities regardless of their nature or the type of functions they perform.<sup>266</sup> This right may be exercised in relation to any information held by the State, whatever its form.<sup>267</sup>

The State must fulfil a series of obligations in order to satisfy the right to access information: 1) it must respond in a timely, complete, suitable and accessible manner to

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<sup>257</sup> 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.

<sup>258</sup> *Id.*, para. 23.e.

<sup>259</sup> *Habeas corpus* is a judicial remedy that seeks to protect any citizen from arbitrary arrest and detention. It provides the guarantee of a detained person being able to appear immediately and publicly before a judge to determine whether or not the arrest was in accordance with the law and whether it should be maintained or interrupted. Similarly, because it requires the presence of the detained person, it provides clarity about where they will be detained in the future.

<sup>260</sup> Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016, paras. 1, 8.c, 9.

See also: Working Group on Enforced or Involuntary Disappearances, Report, A/HRC/22/45, 28 January 2013; and IACtHR. *Case of Cantoral Benavides v. Peru. Reparations and Costs*. Judgment of December 3, 2001. Series C No. 88, para. 68.

<sup>261</sup> IACtHR. *Claude Reyes et al. v. Chile*. Background, Reparations and Costs. Judgment of 19 September 2006, Series C No. 151, para. 77.

<sup>262</sup> ACHR, Art. 13; ACHPR, Art. 9; ECHR, Art. 10 (ECtHR case law has interpreted the right to access information to be inferred from the provisions of this rule, even though it refers to freedom of expression. See *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, paras. 126-133, 149-156, 8 November 2016); ICCPR, Art. 19 (the HRC has interpreted the right of access to information as being enshrined in this provision, even though it is dedicated to freedom of expression. See *General Comment No. 34. Article 19. Freedom of opinion and freedom of expression* CCPR/C/GC/34. 12 September 2011, paras. 18-19).

<sup>263</sup> IACtHR. *Claude Reyes et al. v. Chile*. FRP. 2006, op. cit., para. 77; IACHR. *Annual Report of the Inter-American Commission on Human Rights 2009. Report of the Office of the Special Rapporteur for Freedom of Expression*. OAS/Ser. L/V/II. IV, para. 16-17; IACHR. *Access to information, violence against women and the administration of justice in the Americas*. OAS/Ser.L/V/II.154 Doc.19. 27 March 2015, para. 73.

<sup>264</sup> Tshwane Principles, principle 10 A (I).

<sup>265</sup> *Id.*

<sup>266</sup> IACHR. *Annual Report of the Inter-American Commission on Human Rights 2009, op. cit. Principles on the Right of Access to Information*. CJI/RES. 147 (LXXIII-O/08). 7 August 2008, principle 2.

<sup>267</sup> HRC. *General Comment No. 34, op. cit. para. 18*; IACHR. *Annual Report of the Inter-American Commission on Human Rights 2009. Report of the Office of the Special Rapporteur for Freedom of Expression, op. cit.*, chapter IV, paras. 21-22; *Principles on the Right of Access to Information, op. cit.*, principle 3.

requests for information that are made;<sup>268</sup> 2) it must regulate a procedure that fulfils this right;<sup>269</sup> 3) there must be an effective judicial action or appeal for the review of refusals to provide information;<sup>270</sup> 4) it must provide the public with the maximum amount of information *ex officio* (active transparency);<sup>271</sup> 5) it must implement and adapt a regulation on access to information that is consistent with international standards;<sup>272</sup> and 6) it must implement a culture of transparency.<sup>273</sup>

While the right to access information is not an absolute right, its limits must meet a number of requirements:<sup>274</sup> 1) cases in which information can be refused must be regulated by law;<sup>275</sup> 2) the objectives that justify refusal of access must be legitimate and applied in an exceptional manner;<sup>276</sup> 3) a standard of necessity must be met, so that limitations on access to information must be made as lightly as possible;<sup>277</sup> 4) the principle of proportionality must be respected, so that the benefit sought must outweigh the harm caused by restricting access to information.<sup>278</sup>

For the investigation and identification of those responsible for a potentially unlawful death or an enforced disappearance, access to archives held by the State may be indispensable. States cannot classify information as secret or confidential when it is necessary for the investigation of human rights violations.<sup>279</sup> In this type of investigation, especially when the information is required by courts of justice, States must ensure access to police archives and detention records,<sup>280</sup> military archives and historical memory archives.<sup>281</sup> Furthermore, States have an obligation to create, preserve and safeguard

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<sup>268</sup> IACHR. *Annual Report of the Inter-American Commission on Human Rights 2009. Report of the Office of the Special Rapporteur for Freedom of Expression*, op. cit., chapter IV, para 24; and IACHR, *Access to information, violence against women and the administration of justice in the Americas*, op. cit., para 69, 71.

<sup>269</sup> HRC. *General Comment No. 34*, op. cit. para. 19; IACTHR. *Gomes Lund et al ("Guerrilha do Araguaia") v. Brazil*. 2010, op. cit., para. 231; IACTHR. *Claude Reyes et al. v. Chile*. FRP. 2006, op. cit., para. 163; IACHR. *Annual Report of the Inter-American Commission on Human Rights 2009. Report of the Special Rapporteurship on Freedom of Expression*, op. cit., chapter IV, para. 27; *Principles on the Right of Access to Information*, op. cit., principle 5.

<sup>270</sup> HRC. *General Comment No. 34*, op. cit. para. 19; IACTHR. *Gomes Lund et al ("Guerrilha do Araguaia") v. Brazil*. 2010, op. cit., paras. 228, 231; IACTHR. *Claude Reyes et al. v. Chile*. FRP. 2006, op. cit., para. 137; *Principles on the Right of Access to Information*, op. cit., principle 8; IACHR. *Annual Report of the Inter-American Commission on Human Rights 2009. Report of the Office of the Special Rapporteur for Freedom of Expression*, op. cit., chapter IV, para 26, 29; IACHR. *Access to information, violence against women and the administration of justice in the Americas*, op. cit., para 71, 72.

<sup>271</sup> HRC. *General Comment No. 34*, op. cit. para. 19; IACHR. *Annual Report of the Inter-American Commission on Human Rights 2009. Report of the Office of the Special Rapporteur for Freedom of Expression*, op. cit., chap. IV, paras. 32-34; *Principles on the Right of Access to Information*, op. cit., principles 1 and 4.

<sup>272</sup> IACTHR. *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*. 2010, op. cit., para. 228; IACTHR. *Claude Reyes et al. v. Chile*. FRP. 2006, op. cit., para. 163; IACHR. *Annual Report of the Inter-American Commission on Human Rights 2009. Report of the Special Rapporteurship on Freedom of Expression*, op. cit., chapter IV, paras. 39 and f.f.; *Principles on the Right of Access to Information*, op. cit., principle 1 and 5.

<sup>273</sup> IACHR. *Annual Report of the Inter-American Commission on Human Rights 2009. Report of the Office of the Special Rapporteur for Freedom of Expression*, op. cit., chapter IV, para 38; *Principles on the Right of Access to Information*, op. cit., principle 10.

<sup>274</sup> IACTHR. *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*. 2010, op. cit., para. 229; IACHR. *Annual Report of the Inter-American Commission on Human Rights 2009. Report of the Office of the Special Rapporteur for Freedom of Expression*, op. cit., Chapter IV, para 45.

<sup>275</sup> IACHR. *Annual Report of the Inter-American Commission on Human Rights 2009. Report of the Office of the Special Rapporteur for Freedom of Expression*, op. cit., chapter IV, paras. 49-51; *Principles on the Right of Access to Information*, op. cit. *Magyar Helsinki Bizottság v. Hungary* [GC], op. cit., para 182 and ff.

<sup>276</sup> For example, the ACHR, in Article 13, refers to respect for the rights of others, national security, public order, public health or morals. See IACTHR. *Claude Reyes et al. v. Chile*. FRP. 2006, op. cit., para. 90; IACHR. *Annual Report of the Inter-American Commission on Human Rights 2009. Report of the Office of the Special Rapporteur for Freedom of Expression*, op. cit., chapter IV, para 52.

<sup>277</sup> IACHR. *Annual Report of the Inter-American Commission on Human Rights 2009. Report of the Office of the Special Rapporteur for Freedom of Expression*, op. cit., chapter IV, para 53.

<sup>278</sup> ECTHR. *Magyar Helsinki Bizottság v. Hungary* [GC], op. cit., para 196 and f.f.; IACHR, *Annual Report of the Inter-American Commission on Human Rights 2009. Report of the Office of the Special Rapporteur for Freedom of Expression*, op. cit. chapter IV, para 53.

<sup>279</sup> IACHR. *Annual Report of the Inter-American Commission on Human Rights 2009. Report of the Office of the Special Rapporteur for Freedom of Expression*, op. cit. *Gomes Lund et al ("Guerrilha do Araguaia") v. Brazil*. 2010, op. cit., paras. 202, 211, 230.

<sup>280</sup> IACHR. *Annual Report of the Inter-American Commission on Human Rights 2009. Report of the Office of the Special Rapporteur for Freedom of Expression*, op. cit., chapter IV, para 74.

<sup>281</sup> Id., chapter IV, para 77-78, 80.



these sources of information and are prohibited from tampering with, manipulating or destroying them.<sup>282</sup>

#### **F.4. Protection of victims and witnesses**

Concerning the protection of victims and witnesses, principle 10 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 reads as follows:

*"Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation."*

In many countries, domestic law may protect a number of victims' rights within the criminal process.<sup>283</sup> Among these are the rights to medical and psychological care, the right to the protection of identity and personal data and the right to request necessary measures for the protection of their rights.

States must guarantee all necessary means to protect complainants,<sup>284</sup> victims, witnesses and judicial officers against harassment and threats.<sup>285</sup> Included in the protection mechanisms are the State's obligation to remove all those potentially involved in extrajudicial, arbitrary or summary executions from any position of control or power, either direct or indirect.<sup>286</sup>

Certain patterns of violence and threats, in addition to endangering the physical safety and lives of victims, can obstruct the progress of the process by intimidating the various actors involved, which stops them from collaborating in the search for the truth.<sup>287</sup> This means that the safety of victims must be guaranteed from the moment a person seeks information about a dead or disappeared person<sup>288</sup> "during and after the judicial, administrative or other proceedings".<sup>289</sup> Protective measures include the provision of permanent police protection and issuing restraining orders and protection against possible perpetrators.<sup>290</sup>

On this issue, the European Parliament established by means of a Directive that the States Parties have the obligation to provide victims with assistance, support and protection, by providing for measures that prevent their revictimization, intimidation or reprisals through coordinated and respectful actions, especially taking into account the

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<sup>282</sup> IACHR. *Annual Report of the Inter-American Commission on Human Rights 2009. Report of the Office of the Special Rapporteur for Freedom of Expression, op. cit.*, chapter IV, para 74-75, 77, 83-89; and Updated set of principles for the protection and promotion of human rights through action to combat impunity, principle 3.

<sup>283</sup> For example, Israel, Law 5761-2001; Mexico, General Law on Victims 2013; Colombia, Victims and Land Restitution Act 2011; Kenya, Victim Protection Act 2014; England and Wales, Code of Practice for Victims 2013.

<sup>284</sup> AG. *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Promotion and protection of the right to freedom of opinion and expression A/70/361*. 8 September 2015, para. 28; IACHR. *Special Rapporteurship on Freedom of Expression. Joint Declaration on Access to Information and on Legislation Regulating Secrecy*. 6 December 2004.

<sup>285</sup> IACTHR. *Case of Myrna Mack Chang v. Guatemala*. 2003, op. cit., para 199.

<sup>286</sup> Minnesota Principles of 1989, principle 15.

<sup>287</sup> IACTHR. *Case of the La Rochela Massacre v. Colombia*. 2007, op. cit., para 170.

<sup>288</sup> Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016, para 36.

<sup>289</sup> 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, para 12.b.

<sup>290</sup> HRC, General Comment No. 36, Article 6: Right to life, CCPR/C/GC/36, 3 September 2019, para 23.

characteristics of the victim.<sup>291</sup> The Directive also includes the obligation to protect the privacy of victims by preventing the publication of images of the scene of the crime or the victim, details of their private life and medical or migration records.<sup>292</sup>

Lack of trust in government institutions, abuse and systematic discrimination experienced by victims from particularly vulnerable groups can deter them from seeking justice and reparations.<sup>293</sup> As a result, addressing investigations and prosecutions by building trust and developing comprehensive protection mechanisms is crucial.

The IACtHR has stressed the importance of victims having "measures that aim to reduce their physical and psychological suffering". Along the same lines, the Minnesota Protocol on the Investigation of Potentially Unlawful Death highlights the importance that, from the moment that forensic investigations are initiated, State authorities should act with awareness of possible emotional and other disorders that actions on the body of the deceased may cause and should take steps to minimize them.<sup>294</sup> In addition, interviews with victims and witnesses should be conducted properly, both to obtain reliable information and to prevent victims and witnesses from being exposed to risk situations<sup>295</sup> and negative effects.<sup>296</sup>

Protection programs must be in place and investigators are obliged to provide protection for people giving evidence against acts of intimidation or threats as a result of having provided information. Possible measures include protection of the identity of the person interviewed, physical protection, relocation and assignment to an effective witness protection program.<sup>297</sup>

It is also crucial that protective measures are adopted to ensure the presence of victims and witnesses at the trial hearings, taking into account the date and location of the trial. It is essential that victims have legal representatives, interpreters at the State's expense or that the expenses incurred for this process are reimbursed. During the course of the proceedings and the conduct of the hearings, the courts should allow victims to make statements by video conference, unnecessary questions about their private lives should be avoided and appropriate measures should be taken to avoid direct contact with the accused.<sup>298</sup>

In addition, certain regional collaborative efforts on criminal matters, such as the Caribbean Community (CARICOM) Justice Protection Program, seek to ensure that victims and witnesses of serious crimes have adequate video access to testify and identify suspects, seeking to harmonize legislation and the use of remote video evidence.<sup>299</sup>

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<sup>291</sup> Directive 2012/29/EU of the European Parliament and of the Council, 25 October 2012, Art. 18, para. 52.

<sup>292</sup> *Id.*, para. 54.

<sup>293</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on her mission to El Salvador. A/HRC/38/44/ADD.2. 12 July 2018, para. 75.

<sup>294</sup> Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016, para. 157.

<sup>295</sup> *Id.*, para. 84.

<sup>296</sup> *Id.*, para. 85.

<sup>297</sup> Minnesota Protocol on the Investigation of Potentially Unlawful Death, 2016, para. 86.

<sup>298</sup> Directive 2012/29/EU of the European Parliament and of the Council, 25 October 2012, para. 53.

<sup>299</sup> Caribbean Community (CARICOM). *Agreement Establishing the Regional Justice Protection Programme*. 1999.

## PART TWO

The second part of this Guide is aimed at equipping human rights defenders and victims with the practical knowledge required to address the crimes of enforced disappearance and unlawful deaths. It starts with a definition of human rights defender. Second, it sets out the key elements of a human rights campaign. Third, it presents a roadmap for seeking justice for cases of enforced disappearance or unlawful death. The roadmap looks at opportunities at the national, regional and universal levels. The national roadmap identifies the most common obstacles to accountability for these violations. It also provides practical recommendations for overcoming them. In relation to the universal international and regional level, basic information is presented on protection systems and mechanisms. Fourth, and finally, information is presented about the use of strategic litigation.

### A. HUMAN RIGHTS DEFENDER: DEFINITION AND ROLE

This first section provides a definition of human rights defender and explains their role. It also unequivocally shows that the defence of people's rights is in itself a right. This provides a basis for self-identification by human rights defenders and may make their protection more effective.

In addition, the section mentions the main risks faced by defenders in the exercising of their tasks and the international protection obligations incumbent on States that provide minimum tools to contribute to their protection.

#### A.1 Definition of a human rights defender

The necessary protection and carrying out of the work of human rights defenders requires knowledge of the concept that defines them. This facilitates and allows for the correct self-identification of those who are defending rights and/or leading processes aimed at protecting rights and freedoms so that they can demand suitable defence of their role from State authorities and protection from attacks against them and their work.

The concept of the human rights defender (HRD) has been recognized by all States at the UN General Assembly by the adoption of Resolution 53/144 of what is commonly called the Declaration on Human Rights Defenders. The full name of the Declaration is the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*.

Although the Declaration is not a legally binding instrument, its principles and rights are based on human rights legally binding instruments. Concerning its content, the OHCHR has mentioned that the Declaration:<sup>300</sup>

- *Identifies human rights defenders as individuals or groups who act to promote, protect or strive for the protection and realization of human rights and fundamental freedoms through peaceful means.*

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<sup>300</sup> OHCHR, Declaration on Human Rights Defenders, Available at: <https://www.ohchr.org/en/issues/srhrdefenders/pages/declaration.aspx>

- *Recognizes the key role of human rights defenders in the realization of the human rights enshrined in the Universal Declaration of Human Rights and legally binding treaties and in the international human rights system.*
- *Represents a paradigm shift: it is addressed not just to States and to human rights defenders, but to everyone. It emphasizes that there is a global human rights movement that involves us all and that we all have a role to fulfil in making human rights a reality for all.*

The concept of a human rights defender is as broad as the nature of their task. It has been explained by the UN Special Rapporteur on Human Rights Defenders as being "any person who, individually or in association with others, acts or wishes to act to promote, protect or pursue the protection and realization of human rights and fundamental freedoms at local, national, regional or international levels".<sup>301</sup>

A human rights defender is defined by the work they carry out.<sup>302</sup> This role can be undertaken in a professional capacity, whether paid or unpaid by the State or civil society and can arise as an expression of personal or social engagements, which can be permanent, occasional or spontaneous. Similarly, a human rights defender can be of any age or gender and, obviously, can also be part of another group of specially protected people, such as indigenous peoples, LGBTI people, religious or ethnic minorities, women or people with disabilities.

The rights and freedoms they defend are broad in nature. While this guide has referred to the protection of rights to life and liberty, it can also include a wide range of rights such as economic, social and cultural rights.

Similarly, the activities through which the work of defending human rights is carried out can be varied, ranging from artistic and cultural expressions to litigation, scientific development and social protest. Historically, and at a global level, indigenous leaders, people of African descent, relatives of executed or disappeared persons, social and community leaders, jurists, journalists and educators have shaped what the defence of human rights represents.

## **A.2. The right to defend human rights**

The Declaration on Human Rights Defenders in its first article establishes that "everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels".<sup>303</sup>

The Inter-American system recognizes that this right includes the capacity to freely and effectively promote and defend human rights<sup>304</sup> and considers it a vehicle for the realization of these rights.<sup>305</sup> In return for this right, States have the obligation to

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<sup>301</sup> AG. *Report of the Special Rapporteur on the situation of human rights defenders*. A/73/215. 23 July 2018, para. 15.

<sup>302</sup> IACtHR. *Human Rights Defender et al. v. Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 28 August 2014. Series C No. 283, para. 129.

<sup>303</sup> AG. *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* A/RES/53/144. 8 March 1999, available at: [https://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration\\_sp.pdf](https://www.ohchr.org/Documents/Issues/Defenders/Declaration/declaration_sp.pdf)

<sup>304</sup> IACHR. *Second Report on the Situation of Human Rights Defenders in the Americas* OAS/Ser.L/V/II. Doc 66. December 31, 2011, para. 16.

<sup>305</sup> IACtHR. *Escaleras Mejía et al. vs. Honduras*. Judgment of 26 September 2018. Series C No. 361, paras. 56-61.

allow the free exercising of the defence of human rights, for example, by guaranteeing the conditions in which defenders can freely exercise their role.<sup>306</sup>

### **A.3. Special situation of risk and criminalization**

Among the main obstacles to the work of a human rights defender are the risks to their own human rights, including their life, freedom and personal safety. For example, human rights defenders may be exposed to criminal investigation and prosecution for their work, affecting their rights to access justice and receive judicial guarantees.

In many cases, HRDs live in situations with perennial and high-level risk of harassment or persecution. This includes being persecuted by authorities or private persons or entities who resort to various repressive and sometimes criminal actions to silence them. Depending on the region, this type of repression takes the form of surveillance, threats and intimidation, smear campaigns organized by mass media outlets, prohibitions on either leaving or returning to the country, harassment in the workplace, arbitrary arrests and detention, ill-treatment and unlawful death. In some cases, these actions extend to their families or close associates.

These threats and attacks undermine the ability of defenders to exercise their right to defend human rights. The Inter-American Commission on Human Rights (IACHR) has frequently reiterated that the death of a defender has a direct impact on “the collective rights of the organizations they represent, enhancing their situation of defenselessness and vulnerability”.<sup>307</sup>

It is therefore essential that States adopt measures that provide protection for defenders. These measures must be proportionate to the risks they face. In this regard, Article 12.2 and 12.3 of the Declaration on Human Rights Defenders provides:

*“2. The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.*

*3. In this connection, everyone is entitled, individually and in association with others, to be protected effectively under national law in reacting against or opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in violations of human rights and fundamental freedoms, as well as acts of violence perpetrated by groups or individuals that affect the enjoyment of human rights and fundamental freedoms.”*

In addition, the design and implementation of these measures should take into account that the violation of the right to defend human rights and the rights of a defender also affects the community they defend as a whole, creating an intimidating effect.

Recently the IACHR and its Special Rapporteur on Economic, Social, Cultural and Environmental Rights have stated that States are obliged to identify possible patterns of

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<sup>306</sup> IACtHR. *Human Rights Ombudsman et al. v. Guatemala*, *op. cit.*, para 142.

<sup>307</sup> IACHR. Annual Report 2018. Chapter V. Follow-up to the recommendations made by the IACHR in the Report on Truth, Justice and Reparation: Fourth Report on the Situation of Human Rights in Colombia, para. 204, available at: <http://www.oas.org/en/iachr/docs/annual/2018/docs/IA2018cap.5CO-en.pdf>

attacks, aggressions and obstacles faced by defenders from companies and economic agents, and to prevent and, if necessary, punish them.<sup>308</sup>

Another obstacle that impedes the exercise of human rights advocacy is the effective criminalization of human rights defenders and their work, i.e. the misuse and unfounded use of the law, including criminal law, against human rights defenders. On many occasions, in addition to having an intimidating effect, it seeks to stigmatize them and their work<sup>309</sup> in order to prevent or “chill” them from exercising their right to defend human rights.<sup>310</sup>

Finally, regarding the mechanisms that HRDs can use to defend themselves in situations of risk and criminalization, as well as their right to defend human rights, it is important to note the actions and complaints they can make to international bodies, for example to the United Nations Special Rapporteur on the Situation of Human Rights Defenders.<sup>311</sup> It is also essential that they consider, within their protection and reporting strategy, requests for urgent action from non-government organizations that are specialized in the defence and protection of human rights defenders.<sup>312</sup> Finally, it should be kept in mind that protecting a human rights defender contributes to the empowerment of a community.

## **B. CAMPAIGNS TO MONITOR, DOCUMENT AND REPORT ON THE VIOLATION OF HUMAN RIGHTS<sup>313</sup>**

This section provides general ideas on the impact of reporting and promotion campaigns that contribute to the defence of human rights. It also contains useful tools for their creation and design with the goal of effectively fulfilling their objectives.

### **B.1. Objectives**

The emergence of new technologies has facilitated access to information in ways that have never been seen before in contemporary history. The classic paradigm of the television boom, “active transmitter-passive receiver”, has undergone a radical turnaround in the internet era, which has been extended even further by the emergence of social networks.

This reality poses new and accelerated challenges in the fight against information control exercised by some “big tech” information conglomerates and individual business enterprises. For this reason, learning how to use new technologies and preparing for the process of updating them are essential tasks in the struggle for truth and justice, even more so for human rights organizations around the world.

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<sup>308</sup> IACHR. *Report on Business and Human Rights: Inter-American Standards*. OAS/Ser.L/V/II. 1 November 2019, para. 47.

<sup>309</sup> IACHR. *Criminalisation of human rights defenders*. OAS/Ser.L/V/II. Doc. 49/15. 31 December 2015, para. 79.

<sup>310</sup> IACHR. *Second Report on the Situation of Human Rights Defenders in the Americas* OAS/Ser.L/V/II. Doc 66. December 31, 2011, paras. 76-88.

<sup>311</sup> The website of the Rapporteurship is available at:

<https://www.ohchr.org/en/issues/srhrdefenders/pages/srhrdefendersindex.aspx>

The filing of a complaint with the Rapporteur’s Office is explained at:

<https://www.ohchr.org/EN/HRBodies/SP/Pages/Communications.aspx>

The e-mail address to which complaints can be sent is: [urgent-action@ohchr.org](mailto:urgent-action@ohchr.org)

<sup>312</sup> Examples include the websites of Front Line Defenders, available at: <https://www.frontlinedefenders.org/> and World Organisation Against Torture, available at: <https://www.omct.org/en/what-we-do/human-rights-defenders>

<sup>313</sup> We thank Marcela Cornejo, a journalist with experience in human rights and social movements in Chile and Venezuela, for her contribution to this section.

A painful example of this reality was the impact caused by the dissemination of the image of Alan Kurdi, a three-year-old Kurdish boy, who was lying drowned and face down on the coasts of Turkey,<sup>314</sup> a victim of the desperate attempt made by his family to flee from Syria. The impact of this image on people made the migration crisis visible and put the reality of thousands of people fleeing armed conflict and hunger in their countries on the front pages of newspapers, news bulletins and social networks around the world. The communications campaign that accompanied this image activated a network of support and help for the victims of these conflicts. It also generated governmental pronouncements on the consequences of various migration surges that are currently occurring in different parts of the world.

Another paradigmatic example is the disappearance of 43 students from the "Raúl Isidro Burgos" Rural Teacher Training School in Ayotzinapa, which occurred on 26 September 2014 in the State of Guerrero in Mexico. These young people were travelling in a five-bus caravan to Mexico City to participate in the annual memorial ceremonies for the 1968 Tlatelolco Student Massacre. Travelling to the event they were attacked by local police in Iguala. The result of this police action was the disappearance of 43 students, six dead, one student in a coma and several injured.

National and international visibility was achieved thanks to videos and audio of the police attacks that were uploaded to social networks. Local and national organizations reported the atrocities, and the alleged participation of State agents and irregular armed groups present in the area. This action put pressure on the local, regional, and then the federal government to initiate an investigation that adhered to international standards.

A second determining factor in the investigations of the situation disappearance of the 43 students that contributed to the visibility of the case was the participation and commitment of journalists who succeeded in keeping the case on the news agenda of the mass media. They also provided new insights into the case, continually putting pressure on the authorities to adopt measures and make adjustments to the investigation. Seven years after the suspected enforced disappearance of the 43 students, without truth and justice having been achieved, the case remains active in Mexican society.

Another relevant example comes from the Philippines, the first country in Asia to provide for the specific crime of enforced disappearance in domestic law. In December 2012, the Philippines passed a law against enforced or involuntary disappearances that has a maximum penalty of life imprisonment without parole. The law treats enforced disappearance as a continuous crime and has the same sanction for the person higher up the chain of command who is involved in its commission as for the perpetrator.<sup>315</sup> The adoption of this crime into law, with these elements, was not taken by political authorities on their own initiative. As is typical with advances in the protection of human rights, the criminalization of enforced disappearance was the result of a process of persistent campaigning and advocacy by civil society actors, specifically families of disappeared persons<sup>316</sup> and HRDs who succeeded in placing the crime on the legislative agenda and it

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<sup>314</sup> BBC World. *The story behind the dramatic photo of Alan, the drowned boy in Turkey*. 6th September 2015, available at: [https://www.bbc.com/mundo/noticias/2015/09/150905\\_internacional\\_migrantes\\_foto\\_alan\\_impacto\\_eqn](https://www.bbc.com/mundo/noticias/2015/09/150905_internacional_migrantes_foto_alan_impacto_eqn)

<sup>315</sup> ACNUDH. Philippines passes landmark law criminalizing enforced disappearances, available at: <https://www.ohchr.org/en/newsevents/pages/philippinespassescriminalizingenforceddisappearances.aspx>

<sup>316</sup> The voices of victims and human rights defenders can be heard in the following campaign video, broadcast in March 2012 and available at: [https://www.youtube.com/watch?v=pNY8OovO7f0&feature=youtu.be&ab\\_channel=HumanRightsWatch](https://www.youtube.com/watch?v=pNY8OovO7f0&feature=youtu.be&ab_channel=HumanRightsWatch)

was finally approved. Another success was achieving compulsory civil society participation for the design of regulations of the law.

The mass media, such as television and radio, both public and private stations, do not typically publicize the realities described above through their reporting. The mass media's coverage of the violation of human rights has improved thanks to pressure exerted from social networks, by journalists and researchers and civil society organizations through communications campaigns. A positioning strategy is essential to provide visibility for human rights violations in mass media coverage and ensure that action is taken.

## **B.2. How to manage a campaign on human rights violations**

Below are some actions that might be usefully implemented in the context of a campaign. The management of a campaign is extremely important for the effective publicization of what happened and how it affects a particular community or a group of people. Several points must be considered to ensure good communication management that helps you achieve the intended objectives.

One of the first actions is the collection of as much relevant information as possible (photos, testimony, video, audio, etc.). It is essential that the information is verified and validated with real, accurate and verifiable sources. The emergence of so-called *fake news* has had a negative and harmful effect on documentation of human rights violations. If a photograph or video does not correspond with the event that is reported, it can lead to critics of the veracity of the entire campaign.

The first and central element for implementing a communication campaign is **to define the objective and target audience of the campaign**. Once all of the information mentioned above has been collected, the objective to achieve has to be specifically identified. This definition will guide the communication actions that will follow.

It is possible to identify different scenarios. If one wishes to *publicize an event* that has violated the human rights of a person, a community or an organization -for example, a case of enforced disappearance, extrajudicial killing, arbitrary detention, torture- one should use communication actions that will publicise the event in a rapid and timely manner.

If the goal is to *call for a specific action* -for example, a signature campaign, a demonstration, a mass letter to the authorities, a sit-in, etc.- the communication actions should promote these objectives. Another case may involve publicly addressing *an institution or body* and demanding a response or a legal or investigative action, such as a field visit, from public authorities, or, for example a National Human Rights Institution. In this case, communication actions include other elements.

It should be noted that sometimes a campaign will have several objectives, such as drawing attention to a violation, or situation, calling on the State authorities to take certain actions, and seeking legal reform in the medium to long-term.

For each of the above scenarios, it is essential to identify who should be approached. In the first scenario, if one wish to *publicize an event that involved the violation of rights*, the campaign should first address media outlets and then the relevant national or international authorities and organizations, if appropriate.



In the second case, if one wants to *call for an action*, the message will be directed to a specific sector from which is expected to take action: if it is a demonstration, the people expected to attend the demonstration; if it is a campaign to get signatures on a petition, it is crucial to connect with the organizations and people who would be interested in signing it.

In the third case, if a *public inquiry* is demanded, letters and messages should be sent to the authorities, institutions or persons from whom an opinion, statement or position is expected.

Another important consideration is to establish **the primary message of the campaign**, i.e. the information to transmit must be defined. This is essential so that those who receive the message (the public or target audience) clearly understand what the campaign is trying to achieve and have the elements to decide whether they support it and wish to join.

For example, in the first case, if the objective is to make an event visible through the media, it must be generated a clear, brief and high-impact message. It is essential that it can be understood by anyone who reads it.

In the second case, if a call for participation in an action is required, the message must include as much information as possible about the activity and why people should participate. If it is a signature campaign, the slogan of the campaign and the petition for support should also be very precise using a simple and accessible format for membership (for example using a platform such as *Google Forms*).

In the third case, if the actions of an authority are to be questioned, a clear and precise written text -letter, statement or communication- must be prepared, accompanied by supporting documentation if necessary. This is vital because this action must be accompanied by a social network campaign where the text needs to be easily read in the relevant format.

The next step is the identification of the **platform** that should be used to implement the campaign. To decide this, it should be considered the specific characteristics of each platform and how the message can be transmitted to achieve the greatest impact. Some of the characteristics of the most widely used platforms are presented below:

- **Websites.** In the case of organizations, it is important to have a website that is administered and managed by the organization itself. The information contained on a website allows information to be permanently available and can be used to access information for similar events that were previously reported. In addition, a website allows the inclusion of reports, files, news, partner websites or other sites of interest, videos, images and audio. The current platforms for designing websites are increasingly comprehensive and user-friendly in their design, administration and management.
- **Facebook.** This is still the social network with the largest number of users in the world. It is a network that aims to create communities. At present, Facebook allows the creation of a Fanpage (page of followers) for an organization, which is a very efficient way to generate campaigns, promote activities and make calls for participation and support. Most of the users of this platform are between 25 and

34 years old.<sup>317</sup> It should be highlighted that the use of Facebook requires precaution. As has been documented, Facebook has been used to “harass others, make false claims, and incite violence”.<sup>318</sup>

- **Twitter.** This is an open social network that is characterized by being highly politicized and responsive to news events. It is the social network most used by government institutions and political actors. More than 50% of its users are between 25 and 44 years old.
- **Instagram.** This is an open social network, owned by Facebook, currently considered the fastest growing social network. Originally focused on images, it has expanded to new options such as featured stories, videos, live broadcasts, etc. 38% of its users are between 16 and 24 years old.

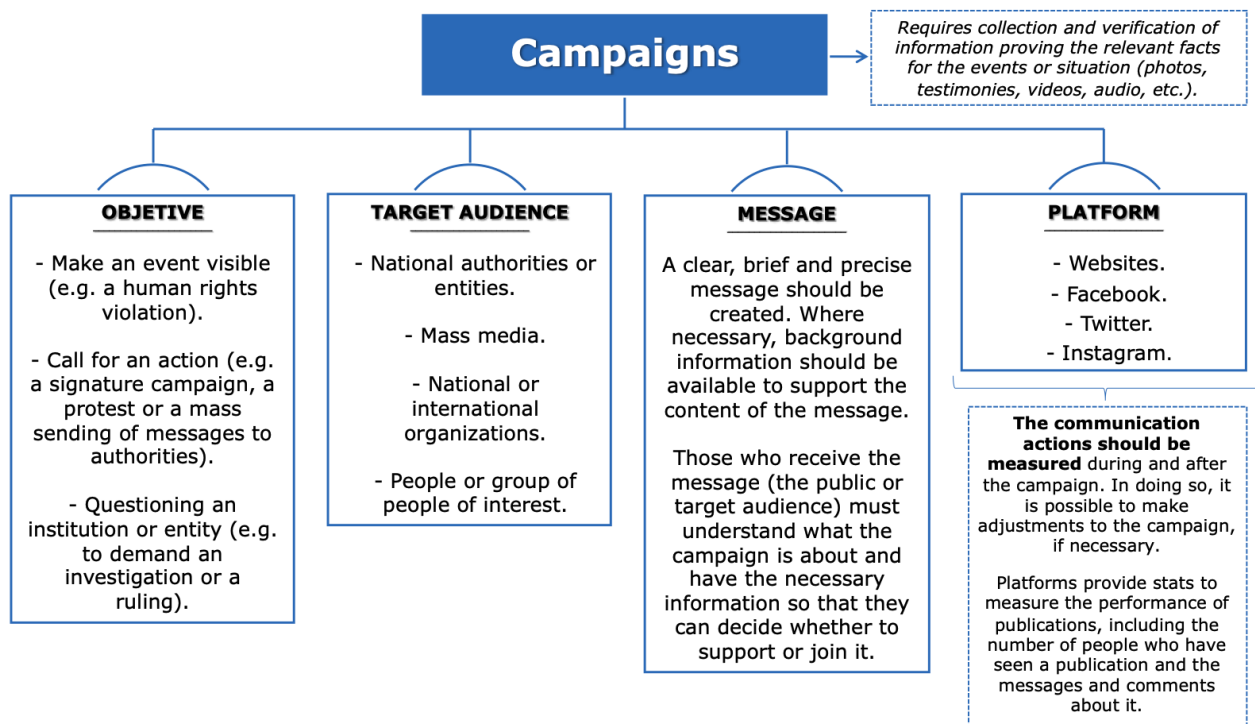
It is important to remember that social networks are subject to usage policies that are specific for each platform. User accounts can be reported, attacked by *bots* (ghost accounts) or censored by the platforms themselves if they violate privacy and use policies. They are also prone to mining of user data for commercial purposes and, in some cases, State surveillance. For an organization or individual, it is important that an account is “validated”, that is, that the certification process of the user's data is conducted with the social network. This enables increased options for the internal management of each platform.

Finally, another relevant recommendation for carrying out a campaign is to **measure** the communications actions that have been implemented. Statistically measuring the impact of the campaign on the selected platforms is a fundamental action during and after the process. Each platform offers different options for measuring the response to publications. For example, it is possible to measure the reach, which means how many users saw a publication. It is also possible to measure the interaction of users with these publications, mentions made about the campaign (#hashtags and @mentions) and the messages and comments made about them. A timely review of the response to the campaign allows for enhancement or refocusing the campaign being implemented. Subsequent measurement allows for the identification of formats and messages that had either an increased or decreased impact on users. This information is useful for publicizing new reports or updates on the topic of the campaign.

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<sup>317</sup> We are social, Digital in 2020, sheet 108, available at: <https://wearesocial.com/digital-2020>

<sup>318</sup> Amnesty International, Global: Facebook giving powerful users free rein to harass others, make false claims, and incite violence, 13 September 2021, available at: <https://bit.ly/3H0m86n>



Graph 1. Source: own elaboration

### B.3. Example of a campaign

To achieve a better understanding of the different elements of a campaign and their interaction with a case, a fictitious example is provided below, but it is related to a real context.

<b>Facts:</b> Arrest and subsequent disappearance of young environmental activist, Kennet Ukala (24), in KwaZulu-Natal, South Africa, where the Fuleni open-cast coal mining project is operating. Kennet was arrested during a demonstration near the mine, then transported in a police vehicle to the city where he never arrived. The local police have no record of his arrest or his entry to the police centre.				
<b>Initial Objective</b>	<b>Making the event visible</b>			
<b>Target Audience</b>	Traditional/alternative media. National and international human rights organizations. National and international environmental organizations.			
<b>Message</b>	"We alert the national and international community about the arrest of the environmental leader Kennet Ukala by the South African police, and his subsequent disappearance following a demonstration against the two coal mines in the area. Using the slogan ' <i>Leave the coal in the hole</i> ', the demonstrators in the area are trying to halt the voracious extractive economy.			
<b>Platform</b>	<b>Website</b>	<b>Twitter</b>	<b>Facebook</b>	<b>Instagram</b>
<b>Collect: Images/ Testimonial videos</b>	Article/ statement with details of the arrest, context in which it occurred, details of the place where he was	For this social network the message must be precise and clear. You must use hashtags and mention the entities or	This social network should be aimed at environmental activists, youth and general user communities.	For this social network you must upload images/ videos of the arrest and use hashtags and mentions.
<b>The images and videos of the arrest</b>				

<p><b>support the posts on social networks.</b></p> <p><b>Produce short 50-second videos with testimonies about the arrest to be uploaded to social networks.</b></p>	<p>transferred, statements from witnesses of the arrest, etc.</p> <p>This article/ statement will be sent by email to media, especially digital media, and will include the spokesperson's contact number in case an interview is required.</p>	<p>institutions you want to contact.</p> <p>In this case, for example, @UNHumanRights, @UN_SPExperts, @achpr_cadhp.</p> <p>It can be posted photos, short videos and the link to the article on the website.</p>	<p>Fanpages from environmental and human rights organizations should be contacted.</p> <p>It can be posted photos, short videos and the link to the article on the website.</p>	<p>This report can be uploaded to <i>Instagram Stories</i>. The campaign can request photos or videos of the arrest from other users who were there. A survey can be carried out related to the event.</p>
<p><b>Measuring impact</b></p>	<p>Measure the visits to the website in a given period.</p>	<p>Measure account and post statistics including interactions and reach.</p>	<p>Measure account and post statistics including interactions and reach.</p>	<p>Measure account and post statistics including interactions and reach.</p>

#### **B.4. Do campaigns affect justice, reparations and truth?**

There are currently different views on the impact of social networks on the construction of public opinion. Beyond a statistical look at this impact or the influence that social networks can exert, what is relevant from the perspective of organizations or people who report human rights violations is their limited access to the traditional media and the need to break this silence and publicize human rights reports.

It is not unknown for large media corporations to play a decisive role in building public opinion. Entertainment, news-style and programming schedules are all linked to the editorial focus of each media outlet. For most of these media outlets, there is little reporting on human rights issues and limited spaces for reporting on human rights violations.

Access to new digital platforms, such as social networks, becomes important as they themselves are replicators of information and have the potential to act as a “pressure cooker” by deciding on the agenda of traditional media outlets.

For victims of human rights violations and their relatives, and for society as a whole, it is important that the first public exposure of the violations is effective, impactful and achieves its expected reach. In addition, follow-up actions can result in pressure being exerted by social networks and the media on institutional and judicial bodies that can, in turn, help to achieve truth and justice.

Despite the above, it should be highlighted that digital platforms have also been used for misinformation campaigns and political manipulation. On some occasions, these platforms have facilitated the commission of human rights violations and abuses. They

have also made possible the violation of the users' privacy, including victims of human rights violations.<sup>319</sup>

## **C. ROADMAP FOR SEEKING JUSTICE IN THE EVENT OF AN ENFORCED DISAPPEARANCE OR UNLAWFUL DEATH**

This section presents the national and international actions that human rights defenders and/or victims of enforced disappearance and extrajudicial, arbitrary or summary executions can take in the search for truth, justice and reparations. The section on the national level identifies a number of main obstacles, followed by practical recommendations for overcoming them. The regional and international level section covers the various avenues offered by the international system for the protection of human rights and describes how to identify and use them.

### **C.1. Steps to be taken at national level**

Within the framework of possibilities for seeking justice at the domestic level, the most frequent obstacles are detailed below along with the stages in which they often occur. The final part of the section describes the actions that can contribute to overcoming these obstacles. The main examples reflect the experiences of dozens of human rights defenders and the relatives of victims who have shared their stories. Consequently, the section outlines the most common experiences that human rights defenders and victims face at the domestic level.

#### **C.1.1. Main and recurrent obstacles in internal judicial processes**

One of the main tools to ensure access to justice in a timely and effective manner for cases of enforced disappearances and unlawful deaths is to be clear about obstacles that may exist to the defence of the human rights in addressing these crimes, as well as those rights that may also be affected during the processes of reporting, investigation and trial.

Having some understanding and clarity about the most common obstacles faced by HRDs, victims and their family members assists those seeking justice to be prepared and develop case and campaign strategies to overcome them. The identification of obstacles results in the design of more effective strategies that involve less revictimization. With this objective in mind, the following is a compilation of some of the impediments and challenges that can often be identified in the reporting, investigation and litigation of cases of enforced disappearance and unlawful deaths. These have been collected from different practical experiences.

It is important to mention at the outset that many of them are related to the insufficient incorporation of international human rights law and standards into domestic law, policy and practice.

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<sup>319</sup> See, for instance: International Commission of Jurists, Facebook, Twitter and social media in times of COVID 19 and #BlackLivesMatter, 10 de junio de 2020. Disponible en: <https://bit.ly/3om99nD> y International Commission of Jurists, Why Myanmar needs to stop prosecuting people over Facebook posts, 23 de octubre de 2015. Disponible en: <https://bit.ly/3kouwE8>

### **C.1.1.1 Access to justice and obstacles in the early stages of investigations**

A key obstacle relates to the fact that the alleged violation might need to be reported to State authorities who may be directly or indirectly linked to those responsible. In many jurisdictions, there may be real or perceived risks to reporting, and the prospect of doing so will often generate fear and distrust among victims. The potential for discriminatory responses, sometimes involving stereotyping from authorities that receive the initial report of a crime represent an initial obstacle that causes re-victimization, fear and often prevents complainants from persisting with the action of reporting the violation. Depending on the procedure applicable in a given jurisdiction, the complaint may be taken to the very authority to whom the complaint is against, which may compound the fear and risk.

Another obstacle may be the lack of timely investigations or any investigation at all. As noted above, one of the key requirements of an effective investigation is promptness. The need for a prompt investigation is particularly compelling in cases of suspected disappearance because the first hours may be crucial to locating the person and possibly preventing torture or ill-treatment or even an extrajudicial execution. In different contexts, there is often a lack of urgent action in the initial search by the responsible authorities. Stigmatizing responses are often given to relatives, and State agents tend to hold victims responsible for the fact that a person is missing or claim that there was a high probability that the crime was going to happen. Sometimes, however, the response from authorities recognizes the possibility that an immediate search may prevent crimes from being committed against the victim.

Once at least prima facie evidence for an apparent enforced disappearance or death has been established, the criminal justice process can be long, complicated, and frustrating for the victims. In addition to delays in the judicial system, each stage that requires the presence of the relatives or complainants can be revictimizing. It is often the case that investigations, sometimes without well-founded reasons, require that victims repeatedly share their knowledge of the events. In addition, criminal justice systems generally lack appropriate psychosocial support for victims and their families.

### **C.1.1.2. Procedural impetus and evidence**

Sometimes, there is a lack of impetus for the investigation from prosecutors, the courts or other investigative bodies as most of the evidence is generated by the complainant, who –as has already been indicated– often feels challenged by the system. The evidence provided by State agents is sometimes given greater legitimacy, even when State authorities are allegedly involved in the reported events. In addition, on some occasions, the evidence gathered by State investigators focuses on requesting reports from State institutions. Sometimes, they do not go to the crime scene or carry out an independent investigation.

There is also sometimes a lack of coordination between the various State bodies in charge of the investigation, which contributes to delays in the process. There is also sometimes a lack of proper protocols for the search of disappeared persons and for exhuming, identifying and handing over their remains to relatives.

In many contexts, there is an absence of a specialized State institution to assist in the search for missing persons and to ensure the proper conduct of initial investigative

steps, the removal of the body and the securing of important physical sites, such as the location of a meeting between the victim and the suspects, as well as the death or crime scene. Sometimes there is also no specific autopsy protocol. A lack of awareness of international standards, including the Istanbul<sup>320</sup> and Minnesota protocols, regularly occurs among the different authorities involved in investigations of serious human rights violations.

The assessment of experts' reports by judges reports also creates challenges. It is not just the lack of adequate reports but also the lack of knowledge of judges about forensic sciences, which often makes it difficult for them to identify if a report has all the information needed.

The absence of DNA databased, the deficiency or lack of complete records of people in detention, the alteration or destruction of evidence, the lack of records of burial sites specifying the details of the circumstances in which burials take place and the lack of public policies on the obtaining, storage and safeguarding of forensic evidence, may also present formidable obstacles to establishing the truth about what happened.

### **C.1.1.3. Impunity**

The Updated set of principles for the protection and promotion of human rights through action to combat impunity defines impunity as:

*"(...) the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims."*<sup>321</sup>

Impunity systematically manifests itself in multiple dimensions. These include, among others: investigations that do not take place or, if they do, are inadequate; agencies that do not share information and background data; corruption in the justice sector; a lack of independence and impartiality among justice sector actors including prosecutors and judges; and light or insignificant sentences for perpetrators of serious human rights violations.

Regulatory obstacles that make access to justice difficult can also generate impunity. Examples of this are the absence of adequate rules for the prosecution of certain crimes and the existence of criminal charges that do not reflect the real dimension of the human rights violations. In certain countries, there is no specific crime of enforced disappearance persons while in other countries there is no aggravating circumstance that take into account the place or conditions of death, such as death in the custody of the State.

There are also legal obstacles related to the sanctioning of those responsible for these acts. These include amnesty laws and the granting of pardons. The absence of judges, police and prosecutors who are specialized in human rights violations is another problem that can lead to impunity. Other legal obstacles include the use of prescription,

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<sup>320</sup> This instrument contains international guidelines that are applicable for the assessment of people who claim to have suffered torture and ill-treatment and can be used to investigate cases of this nature and communicate the results to judicial and other investigative bodies. See: OHCHR. Istanbul Protocol. Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. New York-Geneva: United Nations, 2004, available at: <https://www.ohchr.org/documents/publications/training8rev1en.pdf>

<sup>321</sup> Updated set of principles for the protection and promotion of human rights through action to combat impunity, Definitions, A. Impunity.

"amnesty, right to asylum, refusal to extradite, non bis in idem, due obedience, official immunities, repentance, the jurisdiction of military court"<sup>322</sup> and other similar legal mechanisms that impair an adequate investigation.

Finally, from a judicial point of view, appropriate precautionary measures are often not taken at the initial stages of the investigation. For example, preventive measures are not decreed to ensure the presence of the alleged perpetrator during all stages of the criminal process.

#### **C.1.1.4. Access to information and evidence**

There is often inadequate access to government information. Information on the situations in prisons, hospitals, units or police stations is often not accessible. Accessing lists of detainees, ammunition expenditure in police actions and lists of officers on duty in a police precinct is often a difficult task. It is not uncommon for authorities to claim that the information was destroyed due to disasters such as fires or floods or because its destruction was ordered by internal regulations. Another common obstacle is that access to this information is prohibited or limited, even for judicial bodies, due to intelligence or national security regulations.

#### **C.1.1.5. Harassment, criminalization and threats to victims, witnesses, complainants and human rights defenders**

On many occasions, HRDs, including lawyers, campaigners and justice officials,<sup>323</sup> as well as victims or people who play a crucial role in the reporting or prosecution of cases of enforced disappearances and extrajudicial executions – experience reprisals for their work. This regularly occurs in cases where those responsible are State agents or criminal actors acting in the framework of an illicit association, such as criminal gangs or organized crime groups. The situation is even more delicate when the crimes are committed in an enclosing area.

Attacks against human rights defenders or their families or friends include physical violence, including sexual violence, and even killings. There are also attacks on property, surveillance and a range of threats. Where these events are not properly investigated, victims and their families may feel a powerful feeling of insecurity. Instead of taking protective action against these practices, many State authorities act to stigmatize defenders and victims and sometimes even initiate unfounded legal proceedings against them. This type of action generally constitutes what is called the "criminalization" of HRDs.

The frequent refusal by State authorities to acknowledge the magnitude or real characteristics of the reported events is also a common obstacle, especially when State agents claim that the reported events or occurrences are isolated or are not relevant.

#### **C.1.1.6. Lack of adequate funding**

In many jurisdictions, there is a lack of appropriate funding for public interest litigation that would contribute to the suitable representation of victims and the effective exercising of their right to be heard. This negatively affects their chances of being present

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<sup>322</sup> Updated set of principles for the protection and promotion of human rights through action to combat impunity, Definitions, Principle 22.

<sup>323</sup> IACHR. *Second Report on the Situation of Human Rights Defenders in the Americas* OAS/Ser. L/V/II. Doc. 66. December 31, 2011, para. 349.



in legal proceedings. This is particularly difficult for victims who live in isolated areas and who lack the economic resources to travel and attend court hearings. These difficulties are aggravated for those living in territories with armed conflicts.

Another frequent obstacle is the lack of comprehensive reparation measures for victims, including the lack of measures related to psychosocial support. It should be mentioned that on some occasions victims are required to provide death certificates to receive pensions and other types of State benefits. The lack of resources for entities devoted to the construction of historical memory and the lack of policies that reflect the magnitude of serious human rights violations and their permanent and trans-generational impacts are also obstacles in the search for justice.

### **C.1.2. Key criteria for dealing with obstacles in a specific case**

This section seeks to provide some practical advice that will help address and overcome some of the obstacles set out above.

#### **C.1.2.1. Documenting the facts**

It is essential to document the facts and context surrounding any alleged serious human rights violation. The collection and preservation of information is important for a variety of purposes, including advocacy and campaigns as set out above. Documentation may also be used as evidence in legal proceedings. In this regard, the preservation of documentation will allow the facts to be reconstructed before judges and other triers of fact. In addition, information compiled over a period of time can be subsequently analysed to obtain a more complete picture of the issues at stake.<sup>324</sup>

It is possible to collect videos, photographs, audio files, documents, social media posts, and any other source of evidence that may be useful in proving that violations took place and who can be linked to them. If possible, evidence should be backed up on multiple platforms to guard against loss. There are specialized applications for mobile phones that provide a simple and effective way to capture photos and videos and can be used to document and investigate crimes.<sup>325</sup>

It is also advisable to obtain witnesses of what happened and to record, as far as possible, a make portrait sketches of those responsible. Similarly, as much data as possible should be collected about the victim, such as a description of their clothing and medical details, as this information could be useful if their body is found. Additionally, it is indispensable to respect the confidentiality and identity of witnesses and demand that this is respected by the authorities in charge of the investigation.

It is also recommended to write an account of the events to not forget important details. A victim's or even a witness' account can be expanded, refined or modified over time. Memories can emerge weeks and months after a traumatic experience. Therefore, it is advisable to recommend victims write and rewrite their experience as long as the writing process gives them tranquillity.

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<sup>324</sup> HURIDOCs. *What is monitoring*. Human rights monitoring and documentation series, vol. 1, 2003, p. 13, available at: <https://www.huridocs.org/wp-content/uploads/2010/08/whatismonitoring-eng.pdf>

<sup>325</sup> See, for example, EyeWitness to Atrocities, available at: <https://play.google.com/store/apps/details?id=com.camera.easy&hl=en>

Finally, it is recommended as a best practice that after transcribing interviews or preparing handwritten notes, these should be saved in an electronic format.

#### **C.1.2.2. Reporting**

In general, after evaluating the risks and the context, it is recommended that the facts of the case are reported as quickly as possible to a State authority as well as to an independent National Human Rights Institution (NHRI), giving priority to the one that seems most objective. For example, in some States, reporting a crime directly to the public prosecutor's office may be safer than reporting it to the police. In some countries, reporting to the courts is allowed through actions such as an amparo action or *habeas corpus*. The speed of reporting is extremely important for cases of enforced disappearances.

Depending on the context, it may be advisable to seek advice from a human rights NGO or NHRI or other legal counsel before reporting a crime. This may be relevant for taking measures to ensure the safety of the complainants and/or victims if they remain in danger.

In other contexts, public reports through the press or social networks and even before international bodies can help attract publicity, generate pressure on State agencies, and provide greater protection for victims and those reporting crimes. If these sorts of campaigns are carried out, they should be simple and direct, seeking to raise awareness among the general public and encourage their participation through various means and actions, such as signing letters or attending public demonstrations. However, security risks that can be generated by publicity related to the case should always be assessed.

#### **C.1.2.3. Relations with internal and international bodies**

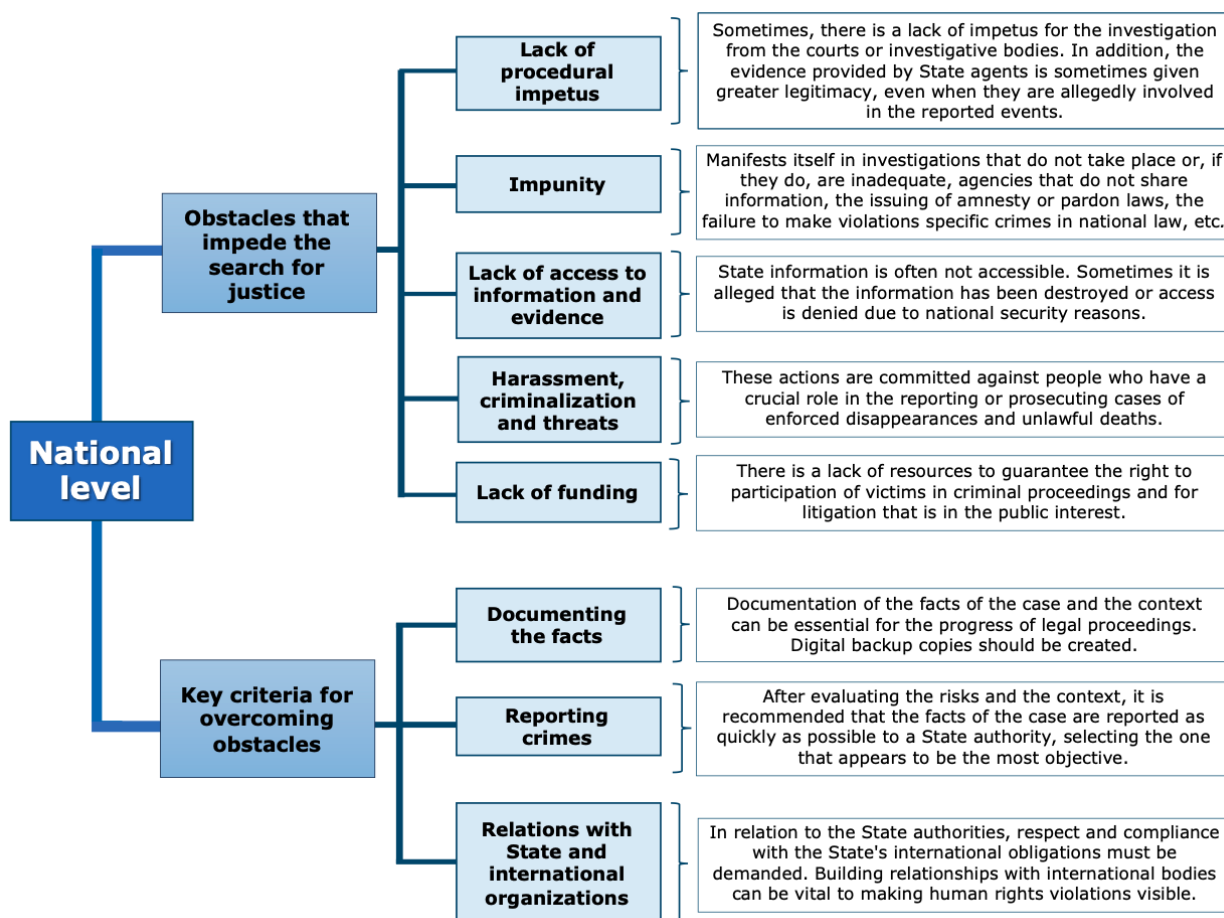
In many countries, there is a lack of knowledge of international human rights law and standards persists within State entities, especially those in charge of criminal investigations.

In some cases, State bodies perceive international law, standards and mechanisms as intrusions. An effective strategy to address this issue can involve emphasizing the concept of international legal obligations for States, as well the general obligation of international cooperation in the area of human rights, including under the UN Charter. Specifically, these include the obligations to respect and guarantee rights for victims and to investigate, prosecute and punish those responsible for serious human rights violations. When requesting information from State agencies, it is important to insist that one is exercising the right to access information, or emphasize that the victim belongs to a specially protected group to demand guarantees for the investigation of the crime or its prioritization.

It is very important to try to build a relationship with international bodies, including the OHCHR, the UN human rights treaty bodies and Special Procedure Mechanisms, and international NGOs. They can help make human rights violations visible. There is a strong belief that national justice works best when international eyes monitor the action of the State, especially in cases where it has been a long time since the crime was committed and there is still inaction and impunity from the State.

In addition, field visits can be requested from UN human rights mechanisms and international NGOs. These visits or missions to verify the reported events are carried out through monitoring tasks that are based on international law and standards.<sup>326</sup> In the case of a field visit by the OHCHR or other UN authority or independent expert like a Special Rapporteur, it may be necessary to request an invitation for the visit from the government.

The visits usually culminate in analytical reports containing conclusions and recommendations.<sup>327</sup> The reports can contribute to providing visibility and credibility to the reported events that are the reason for the visit, as well as to measure the magnitude of the violation and highlight contexts or problems with structural violations of rights.



Graph 2. Source: own elaboration.

## C.2. Steps to be taken at the international level

In order to provide concrete tools for the case where a HRD, a victim, a relative or a person close to the victim, wishes to submit the case of an enforced disappearance

<sup>326</sup> For example, see Raoul Wallenberg Institute of Human Rights and Humanitarian Law-International Bar Association's Human Rights Institute. *Guidelines on International Human Rights Fact-Finding Visits and Reports by Non-Governmental Organisations (The Lund-London Guidelines)*. 2015, available at: [https://www.ibanet.org/Fact\\_Finding\\_Guidelines.aspx](https://www.ibanet.org/Fact_Finding_Guidelines.aspx) This text combines guidelines for international human rights fact-finding missions and reports by non-governmental organisations.

<sup>327</sup> As an example, see: International Commission of Jurists, *Human Rights and the Rule of Law in a Federal Nepal: Recommendations from an ICJ High-Level Mission*, 2020, available at: <https://www.icj.org/nepal-high-level-mission-urges-law-and-policy-reform-to-achieve-human-rights-accountability-and-strengthen-justice-sector-institutions-icj-report/>

This ICJ report on the situation in federal Nepal incorporates the findings of a High-Level Mission undertaken by the ICJ in December 2019, urging the Government of Nepal to adopt substantial reforms to ensure that the wide range of constitutional and political reforms being implemented in the country provide for accountability and access to justice.

or unlawful death to one of the existing international protection mechanisms, a number of basic questions on the functioning of the international human rights protection systems will be addressed below. The objective of this section is to explain some practical considerations on the initial steps that a HRD should take to submit a complaint or communication to an international protection mechanism. In that sense, this guide does not attempt to explain in detail the technical considerations about the procedures that apply to each mechanism. That information is available on publicly accessible official websites.

With this objective in mind, it first identifies the international protection systems and explains what they consist of. Then, reference will be made to the existing protection mechanisms in the universal and the inter-American. Finally, although it is not strictly speaking an international system for the protection of human rights, the competence of the International Criminal Court (ICC) will be explained.

### **C.2.1. International protection systems: what do they consist of and what are they?**

The State is primarily obliged to respect and guarantee human rights and to implement these into national law, including by providing mechanisms for their protection and promotion at the domestic level. The international community also has an important role to play. Through the regulation and implementation of international protection systems the international community has promoted the protection of human rights, specified the imposition of obligations on States and structured control and monitoring mechanisms for actions by States, some of which even allow for the declaration of international responsibility.<sup>328</sup>

In addition to the UN system, international systems for the protection of human rights are operative in four regions. Each operates within the framework of one or more international organization. The following is a summary of those systems:

- 1) **The universal system**, which is positioned within the United Nations (UN). It is the only international protection system that can be applied to all States, regardless of their geographical location.
- 2) **Regional systems** that are positioned in the context of regional international organizations. There are currently four regions with operative systems, three of which have adjudicative mechanisms for cases handled by certain bodies:
  - i) **The European system for the protection of human rights**, which operates within the framework of the Council of Europe, which has 47 Member States. Cases in this system are heard by the European Court of Human Rights (ECtHR). In addition, for the 27 States of the EU, there is the European Union Agency for Fundamental Rights which advances the European Charter of Fundamental Rights.
  - ii) **The African human rights protection system**, which operates within the African Union. It has a judicialized mechanism for cases heard by the African Commission on Human Rights (ACHPR) and the African Court on

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<sup>328</sup> DÍEZ DE VELASCO, Manuel. *Institutions of public international law*. Madrid: Tecnos, 2015, pp. 664.

Human and Peoples' Rights.

- iii) **The Inter-American human rights system**, which operates within the Organization of American States (OAS). The cases that are prosecuted in this system are heard by the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR).
- iv) **The League of Arab States (LAS) human rights system**, which includes the Arab Human Rights Committee, established to supervise the Arab Charter on Human Rights.

Although each of these systems have their own specific structures, they also share a number of common characteristics, with the exception of the Arab system, which is the newest system and remains underdeveloped. They examine compliance by States with the fulfilment of their international obligations in relation to the protection and guarantee of human rights. These systems are responsible for the control and oversight of the activities of States.<sup>329</sup>

International human rights systems are intended to be complimentary to and mutually reinforcing with domestic systems. In order to activate some, though not all, of the protection mechanisms of these systems it may be necessary to fulfil a series of prerequisites called admissibility requirements. The fulfilment of these requirements is indispensable for an individual complaint, grievance or communication to be admitted before some of the international human rights judicial or non-judicial mechanism. While the admissibility requirements vary for each protection mechanism, the usual requirements are that domestic remedies have been exhausted in accordance with the national legal system, the case has been submitted within a period of time after the decision terminating the domestic remedies and the case has not previously been submitted to the same or another international mechanism.

Exhausting domestic remedies is required so that the victim or their representative can first claim the violation of a right before the judicial authorities of the State in which the event occurred in accordance with the procedural rules regulated in national law. This means that the victim must undertake all of the actions, procedures and procedural remedies that are available and reasonably applicable to their specific case. In the event that the State fails to provide a satisfactory response through domestic remedies -for example, if it fails to investigate, sanction or provide reparations to the victim- the requirement of exhaustion will have been met. Following this, it will be possible to file a complaint or claim with an international institution when all other admissibility requirements are met. The concept inherent in the exhaustion of domestic remedies is related to the fact that the State is first and foremost obliged to respect and protect human rights so that when a violation is committed, it is the State itself that is primarily responsible for responding, investigating and sanctioning those responsible and providing reparations to the victims. Many mechanisms, however, will waive the requirement of exhaustion of domestic remedies where it determines that use of those remedies would be unduly prolonged or unlikely to bring effective relief.

The systems and their adjudicated bodies are regulated in international treaties negotiated and agreed by States under the auspices of the respective international organisations. These treaties must be ratified or acceded to by States in order to be

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<sup>329</sup> DÍEZ DE VELASCO, *op. cit.*, pp. 664-665; PASTOR RIDRUEJO/ACOSTA ALVARADO, *op. cit.*, pp. 18-19.

binding, which means that political pressure is very important to encourage their ratification or accession. These treaties enumerate the particular human rights that fall within their jurisdiction.

To verify whether a specific case of enforced disappearance or unlawful death can be brought before an international mechanism, the first thing that must be done is to identify the relevant international treaty or treaties that have been ratified or acceded to by the State in whose jurisdiction the events occurred. As explained in the following section, it is now easy to check the list of States that are party to a treaty by consulting the website of the international organization that is supervising the treaty.

To bring a case before any international mechanism, it is essential to gather relevant background information and evidence, especially if an individual communication, complaint or grievance will be used. This involves accurately reporting the events and clearly identifying the victims and possible perpetrators. As most individual complaint mechanisms require compliance with certain admissibility requirements, it is very important to collect evidence to demonstrate that these requirements are met.

For example, in relation to the exhaustion of domestic remedies, it may be useful to send copies of the records of judicial or administrative proceedings conducted at the domestic level and even copies of the national regulations that apply to these proceedings. If an exception to the exhaustion rule applies for the case, it is necessary to gather the background information to prove this exception. For instance, if there are no judicial proceedings that comply with the rules of due process, background information must be provided to prove this, such as reports from international bodies or NGOs, academic articles and case law.

In order to comply with the rules related to deadlines, it is essential to accurately identify which decision exhausted the domestic processes. It also must be indicated whether the case has been submitted to another international protection entity. If the case has been considered as part of a general review before another entity, it may be necessary to clarify this to avoid the reviewing body interpreting that there might be a duplication of procedures.

If the mechanism allows for awarding reparations it is important to gather all of the necessary background information to prove the damage caused by the enforced disappearance or unlawful death. It is also essential to provide information that demonstrates how the lives of victims have been affected by these violations. It should be tried to collect background information and evidence of each damaging event and negative consequence.

Finally, it is necessary to clarify that the international protection mechanisms from the universal human rights system can be applied to a case in any State in the world. These treaties are open to ratification or accession by States that are members of the UN. The treaties contained in the mechanisms of the regional systems can only be ratified or acceded to by the member States of the international organization that operates each respective system.

### **C.3. Universal system**

In the universal system, it is possible to identify two types of human rights protection mechanisms: treaty mechanisms and UN Charter-based mechanisms, based

primarily under the auspices of the UN Human Rights Council. The first part of this section is dedicated to a broad explanation of how both categories of mechanisms operate. In addition, it is mentioned mechanisms that specifically address enforced disappearances and unlawful deaths. In that regard, this section explains the most relevant aspects of each of those mechanisms.

### **C.3.1. Treaty mechanisms: the Treaty bodies (Committees)**

In the universal system there are nine principal human rights treaties, many containing also optional protocols, which are in force aimed at protecting different human rights. These international instruments enshrine specific rights and oblige States to fulfil a number of obligations related to the protection, of these rights, as explained in the first part of the Guide.

Oversight of the fulfilment of these obligations is entrusted to a Committee, often referred to as a human rights treaty body, which is an international body consisting of specified number of independent experts that are elected by the States Parties to the treaty. Usually, the Committees are established by the treaty, and it is their responsibility to monitor compliance. They can therefore only exercise their powers to supervise the performance States that are party to the treaty they are monitoring. The table below shows the human rights treaties in the universal system, the ratification status of each of them and the respective Committee that monitors them.

<b>1. International Convention on the Elimination of All Forms of Racial Discrimination (1966)</b>	
Link to the text of the treaty	<a href="https://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx">https://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx</a>
State parties	<a href="https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&amp;mtdsg_no=IV-2&amp;chapter=4">https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&amp;mtdsg_no=IV-2&amp;chapter=4</a>
Committee that oversees compliance	Committee on the Elimination of Racial Discrimination (CERD)
Link to the Committee's website	<a href="https://www.ohchr.org/en/hrbodies/cerd/pages/cerdindex.aspx">https://www.ohchr.org/en/hrbodies/cerd/pages/cerdindex.aspx</a>
<b>2. International Covenant on Economic, Social and Cultural Rights (1966)</b>	
Link to the text of the treaty	<a href="https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx">https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx</a>
State parties	<a href="https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&amp;mtdsg_no=IV-3&amp;chapter=4&amp;clang=en">https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&amp;mtdsg_no=IV-3&amp;chapter=4&amp;clang=en</a>
Committee that oversees compliance	Committee on Economic, Social and Cultural Rights (CESCR)
Link to the Committee's website	<a href="https://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx">https://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx</a>
Optional Protocol on a communication procedure (2008)	<a href="https://www.ohchr.org/en/professionalinterest/pages/opcescr.aspx">https://www.ohchr.org/en/professionalinterest/pages/opcescr.aspx</a>
<b>3. International Covenant on Civil and Political Rights (1966)</b>	
Link to the text of the treaty	<a href="https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx">https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx</a>

State parties	<a href="https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&amp;mtdsg_no=IV-4&amp;chapter=4&amp;clang=en">https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&amp;mtdsg_no=IV-4&amp;chapter=4&amp;clang=en</a>
Committee that oversees compliance	Human Rights Committee (HRC)
Link to the Committee's website	<a href="https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx">https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx</a>
Optional Protocol on a communication procedure (1966)	<a href="https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx">https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx</a>
Second Optional Protocol on the abolition of the death penalty (1989)	<a href="https://www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx">https://www.ohchr.org/EN/ProfessionalInterest/Pages/2ndOPCCPR.aspx</a>

#### **4. Convention on the Elimination of All Forms of Discrimination against Women (1979)**

Link to the text of the treaty	<a href="https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx">https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx</a>
State parties	<a href="https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&amp;mtdsg_no=IV-8&amp;chapter=4&amp;clang=en">https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&amp;mtdsg_no=IV-8&amp;chapter=4&amp;clang=en</a>
Committee that oversees compliance	Committee on the Elimination of All Forms of Discrimination against Women (CEDAW)
Link to the Committee's website	<a href="https://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx">https://www.ohchr.org/en/hrbodies/cedaw/pages/cedawindex.aspx</a>
Optional Protocol on a communication procedure (1999)	<a href="https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCEDAW.aspx">https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCEDAW.aspx</a>

#### **5. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)**

Link to the text of the treaty	<a href="https://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx">https://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx</a>
State parties	<a href="https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&amp;mtdsg_no=IV-9&amp;chapter=4&amp;clang=en">https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&amp;mtdsg_no=IV-9&amp;chapter=4&amp;clang=en</a>
Committee that oversees compliance	Committee against Torture (CAT)
Link to the Committee's website	<a href="https://www.ohchr.org/en/hrbodies/cat/pages/catin dex.aspx">https://www.ohchr.org/en/hrbodies/cat/pages/catin dex.aspx</a>
Optional Protocol on the creation of a Subcommittee on Prevention of Torture (2002)	<a href="https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx">https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx</a>

#### **6. Convention on the Rights of the Child (1989)**

Link to the text of the treaty	<a href="https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx">https://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx</a>
State parties	<a href="https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&amp;mtdsg_no=IV-11&amp;chapter=4&amp;clang=en">https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&amp;mtdsg_no=IV-11&amp;chapter=4&amp;clang=en</a>
Committee that oversees compliance	Committee on the Rights of the Child (CRC)
Link to the Committee's website	<a href="https://www.ohchr.org/en/hrbodies/crc/pages/crcindex.aspx">https://www.ohchr.org/en/hrbodies/crc/pages/crcindex.aspx</a>



Optional Protocol on the involvement of children in armed conflict (2000)	<a href="https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPACCRC.aspx">https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPACCRC.aspx</a>
Optional Protocol on the sale of children, child prostitution and child pornography (2000)	<a href="https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx">https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx</a>
Optional Protocol on a communication procedure (2011)	<a href="https://treaties.un.org/doc/source/signature/2012/CTC_4-11d.pdf">https://treaties.un.org/doc/source/signature/2012/CTC_4-11d.pdf</a>

#### **7. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)**

Link to the text of the treaty	<a href="https://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx">https://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx</a>
State parties	<a href="https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&amp;mtmsg_no=IV-13&amp;chapter=4&amp;clang=en">https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&amp;mtmsg_no=IV-13&amp;chapter=4&amp;clang=en</a>
Committee that oversees compliance	Committee on Migrant Workers (CMW)
Link to the Committee's website	<a href="https://www.ohchr.org/EN/HRBodies/CMW/Pages/CMWIndex.aspx">https://www.ohchr.org/EN/HRBodies/CMW/Pages/CMWIndex.aspx</a>

#### **8. Convention on the Rights of Persons with Disabilities (2006)**

Link to the text of the treaty	<a href="https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx">https://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx</a>
State parties	<a href="https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&amp;mtmsg_no=IV-15&amp;chapter=4&amp;clang=en">https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&amp;mtmsg_no=IV-15&amp;chapter=4&amp;clang=en</a>
Committee that oversees compliance	Committee on the Rights of Persons with Disabilities (CRPD)
Link to the Committee's website	<a href="https://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx">https://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx</a>
Optional Protocol on a communication procedure	<a href="https://www.ohchr.org/EN/HRBodies/CRPD/Pages/OptionalProtocolRightsPersonsWithDisabilities.aspx">https://www.ohchr.org/EN/HRBodies/CRPD/Pages/OptionalProtocolRightsPersonsWithDisabilities.aspx</a>

#### **9. International Convention for the Protection of All Persons from Enforced Disappearance (2006)**

Link to the text of the treaty	<a href="https://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx">https://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx</a>
State parties	<a href="https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&amp;mtmsg_no=IV-16&amp;chapter=4&amp;clang=en">https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&amp;mtmsg_no=IV-16&amp;chapter=4&amp;clang=en</a>
Committee that oversees compliance	Committee on Enforced Disappearances (CED)
Link to the Committee's website	<a href="https://www.ohchr.org/EN/HRBodies/CED/Pages/CEDEIndex.aspx">https://www.ohchr.org/EN/HRBodies/CED/Pages/CEDEIndex.aspx</a>

To fulfil the oversight and monitoring functions, each Committee exercises different powers.<sup>330</sup> All Committees undertake the supervision of periodic reports that States must submit on the compliance with their obligations under the treaty. After reviewing the reports, the Committees will issue analytical observations and

<sup>330</sup> On the Committees' functions, see: International Commission of Jurists, Treaty Bodies. Available at: [https://www.youtube.com/watch?v=KstnqLieD\\_k](https://www.youtube.com/watch?v=KstnqLieD_k)

recommendations. There is here an opportunity for CSOs to submit to the Committees their own reports, sometimes referred to as “alternative reports” or “shadow reports” which gives their own assessments as to the performance of the State on parts or all of the treaty. Often times the Committee will use these reports as one of the primary bases on which they question the States and formulate their observations and recommendations. While these NGO submissions are in writing, the Committees often hold sessions prior to the review of a State’s report where NGOs can brief Committee Members directly on a State’s human rights performance, and provide information on violations.

All of the Committees, except for the Committee on Migrant Workers, have the competency to receive individual complaints, known as “communications”. Through this mechanism, victims or their representative may make submissions on specific violations of a human right guaranteed in a treaty. However, the Committees only have competency to receive communications in regard to States that have explicitly recognized their competency to do so.

For some treaties, like the ICCPR, the ICESCR, the CRC, the CRPD, and the CEDAW, this will be by ratifying or acceding to the Optional Protocols established for communications mechanisms. For others, like the UNCAT, the CERD, the ICED, it will be making a declaration when ratifying or acceding to the main treaty.

Individual communications trigger a quasi-judicial procedure that may end with a decision by the respective Committee declaring that the State has violated its obligations and made recommendations for the cessation of a human rights violation and for reparations. The procedure is typically undertaken in two parts. One is to determine whether the communication meets the admissibility requirements, and the second, if the requirements are met, is a determination on the merits. This is not a judicial procedure because the Committees do not have the power to enforce these decisions. However, they can monitor the level of compliance with decisions. In addition, each Committee submits a public annual report to the UN General Assembly, where it can refer to the level of compliance by States in terms of the recommendations that it has imposed. The decisions contain legal analysis which often triggers the development of international jurisprudence on the area under consideration.

In addition, the decisions demonstrate the authoritative interpretations that the Committee makes of the treaty it oversees. If States intend to comply in good faith with the treaty, they have ratified they should implement the recommendations contained in the decisions.

It is therefore clear that individual communications or complaints are a useful tool that victims or their representatives can use. However, in many instances this will not be possible because a State has not recognized the competence of the Committee to receive and consider the complaint. In addition, depending on the characteristics of the case, it may be necessary to analyse possible alternatives and submit a case to a Committee with competence over the State in whose jurisdiction the event occurred. To make this decision, it is suggested that the case law on individual communications of the Committees with jurisdiction over the case is studied beforehand.<sup>331</sup>

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<sup>331</sup> The database containing the Committees' jurisprudence can be consulted at: <https://juris.ohchr.org>

If an extrajudicial execution is alleged, the main body that will have competency will be the Human Rights Committee. If the victim is under 18, the CRC will also have competency. Eventually, the case can be presented before the CEDAW.

In the event of an enforced disappearance, an individual communication or complaint could be submitted to the Committee on Enforced Disappearances. However, this mechanism may not be applicable if the State under whose jurisdiction the disappearance occurred is either not party to the ICPPED or has not recognized its competency to consider individual communication under article 31. Very few States have done so.

Enforced disappearances are also always violations of one or more articles of the ICCPR. Therefore, it is possible to consider submitting a communication to the Human Rights Committee. A communication under the UNCAT and the CEDAW may be also an option.

### **C.3.1.1. Human Rights Committee**

The Human Rights Committee is in charge of monitoring the ICCPR. The ICCPR is an international instrument that protects several rights that are affected as a result of the commission of unlawful deaths and enforced disappearances. These include: the right to life (Article 6); the right not to be subjected to torture or cruel, inhuman or degrading or punishment (Article 7); the right to personal liberty and security (Article 9); and the right to a fair trial (Article 14), and the right to recognition as a person before the law (article 16).

As mentioned above, when the Committee is evaluating the periodic report of a State party on its compliance with the obligations of the ICCPR, it can receive information from civil society. Additionally, the Committee can consider communications from individuals if the State is a party to the First Optional Protocol to the ICCPR. This Protocol establishes the communications procedure. According to article 2 of the Protocol, "individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration". When a communication is presented on behalf of a third party, their consent must be obtained, unless the author of the communication can "justify acting on their behalf without such consent".<sup>332</sup>

Article 5 of the Protocol sets out that it is not necessary to exhaust all available domestic remedies if "the application of the remedies is unreasonably prolonged". Article 5 also establishes that the Committee cannot consider a case if the matter is being "examined under another procedure of international investigation or settlement". Additionally, during the communication procedure, the Committee can request additional information or clarifications for the author of the communication. For instance, it can request more information on steps taken to exhaust domestic remedies or evidence of a human right violation.<sup>333</sup>

Once the Committee receives a communication, it requests the State Party concerned to submit a written reply to the communication. The State has six months to submit its reply. The author of the communication can submit a reply to the State's

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<sup>332</sup> HRC, Rules of procedure of the Human Rights Committee, CCPR/C/3/Rev.12, 4 January 2021, rule 91.

<sup>333</sup> Id., Rule 90.

answer. After that, the State can also submit a rejoinder. On an exceptional basis, the Committee can authorize additional written submissions.<sup>334</sup>

When the Committee determines that a communication is admissible, the Committee will decide on the merits of the communication. The Committee's decision on the merits is known as "Views". The Views will be transmitted to the author of the communication and the State Party concerned.<sup>335</sup>

At any time, before the Committee hands down a decision on the merits, the Committee "may request that the State party concerned take on an urgent basis such interim measures as the Committee considers necessary to avoid possible actions which could have irreparable consequences for the rights invoked by the author".<sup>336</sup> The Committee can also request protection measures in favour of individuals who "might suffer acts of intimidation or reprisals as a result of the submission of the communication or cooperation with the Committee".<sup>337</sup>

The Committee will not receive a communication that "(a) concerns a State which is not a party to the Optional Protocol; (b) is not in writing; or (c) is anonymous".<sup>338</sup>

### **C.3.1.2. Committee on Enforced Disappearances**

The international body responsible for monitoring the fulfilment of the international obligations arising from the International Convention for the Protection of All Persons from Enforced Disappearance is the Committee on Enforced Disappearances,<sup>339</sup> which has the power to receive individual communications and implement urgent actions.

#### Individual communications or complaints

Individual communications or complaints are complaints submitted to the Committee by or on behalf of one or more persons who are victims of enforced disappearance. For the Committee to consider an individual communication, the State must be party Convention and recognized the competence of the Committee to examine this type of complaint.<sup>340</sup>

The communication must be submitted in writing and must detail the identity of the victim and the person signing the communication. There is a form available online to be used as a template. The form can be submitted by either e-mail or fax.<sup>341</sup>

The communication must satisfy a group of admissibility requirements that include:

- i. It cannot be anonymous;

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<sup>334</sup> Id., Rule 92

<sup>335</sup> Id., Rule 102.3.

<sup>336</sup> Id., Rule 94.1.

<sup>337</sup> Id., Rule 95.

<sup>338</sup> Id., Rule 88.3.

<sup>339</sup> The website for this Committee is available at: <https://www.ohchr.org/EN/HRBodies/CED/Pages/CEDIndex.aspx>

<sup>340</sup> The requirement of the recognition of competence is regulated in Article 31 of the Convention.

In order to know whether a State has made this recognition of competence, you should consult the declarations it has made together with the ratification status. This information is available at:

[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-16&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en)

<sup>341</sup> Committee on Enforced Disappearances. *Guide for submitting an individual communication or complaint to the Committee*. CED/C/5. 29 April 2014, pp. 4. Available at:

[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CED/C/5&Lang=sp](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CED/C/5&Lang=sp)

The e-mail address to which it can be sent is petitions@ohchr.org, the fax number is +41 22 917 90 22.

- ii. It cannot constitute an abuse of the right to submit such communications or be incompatible with the provisions of the Convention;
- iii. The case cannot be dealt with by another international body of review; and
- iv. Domestic remedies must have been exhausted. This rule does not apply if the appeal procedures exceed reasonable time limits or if no remedies are available at a national level.

The communication may include a request for precautionary measures of protection in serious and urgent cases and for protective measures for the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as those participating in the investigation.<sup>342</sup> It should be noted that the final decisions or opinions adopted by the Committee are made public.

### Urgent actions

Urgent action is a request by the Committee to a State to immediately take all necessary measures to search for and locate a disappeared person and to investigate their alleged disappearance.<sup>343</sup>

A request for urgent action can be made to the Committee by any person with a legitimate interest by sending an e-mail.<sup>344</sup> This request must include all available information on the disappearance and, at a minimum, must provide the following information:<sup>345</sup>

- i. Identity of the missing person.
- ii. Date and circumstances of their disappearance and, if information is available, the possible perpetrators of their disappearance.
- iii. Actions taken to report the disappearance to one of the relevant State bodies.

In order for the Committee to register an urgent action, the alleged disappearance must meet the following requirements:<sup>346</sup>

- i. It must have occurred after the signing of the Convention by the State where the urgent action is required.
- ii. It must have been previously reported to one of the relevant national authorities when this is possible.
- iii. It must not have resulted in urgent action by the Working Group on Enforced or Involuntary Disappearances.

The person requesting urgent action may ask the Committee to indicate a provisional measure on the State for serious and urgent cases in order to prevent irreparable harm to a person or to facilitate the location of the disappeared person.<sup>347</sup> In addition, the person requesting urgent action may request that the Committee implement

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<sup>342</sup> Committee on Enforced Disappearances. *Guide for submitting an individual communication or complaint to the Committee, op. cit.*, para 4.1.

<sup>343</sup> Committee on Enforced Disappearances. *Urgent actions*. Available at:

[https://www.ohchr.org/Documents/HRBodies/CED/CED\\_leaflet\\_A4\\_EN.pdf](https://www.ohchr.org/Documents/HRBodies/CED/CED_leaflet_A4_EN.pdf)

<sup>344</sup> Urgent actions can be sent to the following email address: [petitions@ohchr.org](mailto:petitions@ohchr.org)

Details on how to submit this type of request can be found at the Committee on Enforced Disappearances. *Guide for submitting a request for urgent action to the Committee*. CED/C/4. 29 April 2014, available at:

[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CED/C/4&Lang=sp](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CED/C/4&Lang=sp)

<sup>345</sup> Committee on Enforced Disappearances. *Urgent actions*, op. cit.

<sup>346</sup> Id.

<sup>347</sup> Committee on Enforced Disappearances. *Guide for the submission of an urgent action petition to the Committee, op. cit.*, para 3.1.

protection measures for the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as those participating in the investigation.<sup>348</sup>

### **C.3.2. Protection mechanisms of the UN Human Rights Council**

The Human Rights Council is an intergovernmental body of the United Nations. The Human Rights Council is responsible for strengthening the promotion and protection of human rights worldwide and making recommendations on these issues.<sup>349</sup> It was established by the UN General Assembly in 2006 under Resolution 60/251, as predecessor institution to the former UN Human Rights Commission.<sup>350</sup> The Council, which reports to the UN General Assembly, meets in Geneva for a total of 10 weeks during three sessions per year. It consists of 47 United Nations Member States, with representation distributed proportionally from five regions, and elected by the General Assembly.<sup>351</sup> Its powers include conducting the Universal Periodic Review and establishing mechanisms of independent experts.

#### **C.3.2.1 Universal Periodic Review**

The Universal Periodic Review (UPR) is a process by which all UN Member States can have their human rights performance assessed in a "peer review" format by other Members States, and undertake commitment on how to improve that performance.

It also seeks to identify areas in which States require assistance in human rights implementation. The UPR is conducted primarily on the basis of an analysis State's performance against standards set out in the Charter of the United Nations, the Universal Declaration of Human Rights and the human rights treaties to which the concerned State is a party. United Nations Member States are subject to this review roughly every four and a half years.<sup>352</sup>

Through this mechanism, each State declares the measures it has taken to improve the human rights situation in its territory and fulfil its human rights obligations. The ultimate goal of this mechanism is to improve the human rights situation in all countries and address human rights violations wherever they occur. The review for each State is based on three documents:

- i. A national report prepared by the State.
- ii. A compilation of United Nations information on the State under review prepared by OHCHR.
- iii. A summary of information submitted by other stakeholders including representatives of civil society, also prepared by OHCHR.<sup>353</sup>

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<sup>348</sup> Id., para 3.2.

<sup>349</sup> Regarding the Human Rights Council, see: International Commission of Jurists, *The Human Rights Council and its Special Procedures*. Available at: <https://www.youtube.com/watch?v=-SuO9f-T5Rw>

<sup>350</sup> Information about the Commission, which no longer exists, is available at: <https://www.ohchr.org/EN/HRBodies/CHR/Pages/CommissionOnHumanRights.aspx>

<sup>351</sup> This information is available at: <https://www.ohchr.org/SP/HRBodies/HRC/Pages/AboutCouncil.aspx>  
The current members can be seen at: <https://www.ohchr.org/SP/HRBodies/HRC/Pages/Membership.aspx>

<sup>352</sup> CONNORS, Jane y SCHMIDT Markus, "United Nations", in MOECKLI, DANIEL/SHAH, SANGEETA/SIVAKUMARAN, Sandesh (eds.). *International Human Rights Law*. 2a ed. Oxford: Oxford University Press, 2014, p. 363.

<sup>353</sup> See: Human Rights Council. *3rd UPR cycle: contributions and participation of "other stakeholders" in the UPR*. Available at: <https://www.ohchr.org/EN/HRBodies/UPR/Pages/NgosNhris.aspx>; OHCHR. *Practical Guide for Civil Society. Universal Periodic Review*, pp. 2., available at: [https://www.ohchr.org/Documents/AboutUs/CivilSociety/Universal\\_Periodic\\_Review\\_SPA.pdf](https://www.ohchr.org/Documents/AboutUs/CivilSociety/Universal_Periodic_Review_SPA.pdf)

The review itself takes place in Geneva at a session of the Working Group on the Universal Periodic Review, which consists of the 47 member States of the Human Rights Council and other observer States.

The review consists of a three-and-a-half-hour interactive dialogue between the State under review, and member States of the Human Rights Council and observer States. Following this dialogue, the Working Group prepares a report, which contains a summary of the dialogue, recommendations to the State to improve human rights protection and the responses provided by the State. At the following plenary session of the Human Rights Council an outcome document for the UPR is adopted. This document contains the report from the Working Group and the position of the State under review in regard to the recommendations received.

For the adoption of this document, a dialogue occurs in the Human Rights Council regarding the UPR. This dialogue lasts one hour and is divided equally between the State under review, other States and other interested actors, such as national human rights institutions and observers from NGOs. States that have been previously reviewed through the UPR sometimes provide an update on their progress with implementing the commitments made and the recommendations accepted as a result of their review.<sup>354</sup>

The UPR process provides for the participation of all relevant stakeholders, including NGOs, national human rights institutions, regional organizations, and other intergovernmental organizations. These stakeholders can submit written information for the report. Accredited stakeholders can also attend the Working Group session and make oral presentations during regular sessions of the Human Rights Council when the results of State reviews are being considered.<sup>355</sup>

Interested parties should follow the technical guidelines for submitting written contributions and comply with the respective deadlines.<sup>356</sup> A "UPR Online Submission Registration System" is available for this purpose.<sup>357</sup> Any acts of intimidation or retaliation for cooperation in the context of the UPR should be reported immediately to the UPR Secretariat<sup>358</sup> as well as to the OHCHR Retaliation Team.<sup>359</sup>

### **C.3.2.2. Commissions of inquiry and similar investigative mechanisms**

Independent investigative mechanisms, which may be constituted as commissions of inquiry or independent fact-finding missions. They are increasingly used to respond to emergent crisis situations involving widespread or systematic human violations and sometimes serious violations of international humanitarian law (IHL). These international investigative mechanisms are usually established by the Human Rights Council. They may

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<sup>354</sup> OHCHR. *Practical Guide for Civil Society. Universal Periodic Review, op. cit.* page 2. For more information about the UPR: OHCHR. Maximizing the use of the Universal Periodic Review at country level. Practical Guidance. Available at: [https://www.ohchr.org/Documents/HRBodies/UPR/UPR\\_Practical\\_Guidance.pdf](https://www.ohchr.org/Documents/HRBodies/UPR/UPR_Practical_Guidance.pdf)  
More detailed information on the UPR is available at: *Maximizing the use of the Universal Periodic Review at country level. Practical Guidance*, available at: [https://www.ohchr.org/Documents/HRBodies/UPR/UPR\\_Practical\\_Guidance.pdf](https://www.ohchr.org/Documents/HRBodies/UPR/UPR_Practical_Guidance.pdf)

<sup>355</sup> Human Rights Council. *3rd UPR cycle: contributions and participation of "other stakeholders" in the UPR*, op. cit.

<sup>356</sup> Human Rights Council. *Universal Periodic Review (Third Cycle): Information and guidelines for relevant stakeholders' written submissions*. Available at: <https://www.ohchr.org/EN/HRBodies/UPR/Pages/NgosNhris.aspx>

<sup>357</sup> Available at: <https://uprdoc.ohchr.org>

In case of technical problems when using the online system, it is possible to contact the following e-mail address: [uprsubmissions@ohchr.org](mailto:uprsubmissions@ohchr.org)

<sup>358</sup> This information can be sent to [uprreprisals@ohchr.org](mailto:uprreprisals@ohchr.org)

<sup>359</sup> This information can be sent to [reprisals@ohchr.org](mailto:reprisals@ohchr.org)

also be established by the Security Council, the General Assembly, the General Secretariat and the OHCHR.<sup>360</sup>

The work of these mechanisms is to carry out an investigation into a situation and to produce and disseminate a report.<sup>361</sup> The work, if it has an appropriately resourced and reasonably expansive mandate, can be effective for strengthening the protection of human rights in many ways. For instance, by providing an authoritative record of serious violations; inducing changes in the internal laws of States, contributing to accountability processes and supporting the implementation of guarantees of non-repetition, reparation and justice policies.<sup>362</sup>

The mandate, the status of the research, the experts and independent experts appointed and designated to the entity and the circumstances surrounding the creation and operation of each committee and mission<sup>363</sup> are distinct for each mechanism. Sometimes the mandate covers the whole country and sometimes only part of it. Many commissions/missions were given a very general mandate to investigate allegations of violations of human rights and/or international humanitarian law. Other mandates included specific incidents or events.<sup>364</sup> For example, the Commission of Inquiry for Côte d'Ivoire (2004) was mandated to investigate alleged human rights violations that occurred during a single demonstration in Abidjan on 25 March 2004.<sup>365</sup>

There have been mechanisms mandated to identify perpetrators or those responsible for violations in order to promote accountability processes.<sup>366</sup> For example, in the case of the Syrian Arab Republic (2011), there was a request to "identify those responsible with a view to ensuring that the perpetrators of violations, including those constituting crimes against humanity, are held accountable".<sup>367</sup>

Each of the mechanisms begins with a complex process of selecting staff and ensuring the delivery of funding.<sup>368</sup> Once this preliminary stage is completed, the mechanism is deployed to the field to collect information, following protocols on collection, chain of custody, analysis, public disclosure and protection of persons at risk.<sup>369</sup>

The investigations typically conclude with a final public report that gives an account of the current situation being analysed and contains recommendations.<sup>370</sup> The implementation of recommendations depends on the political will of the State to which they are addressed, and the capacity of other States and civil society engage in successful advocacy. In general, the UN body that dictates the mandate of the mechanism usually

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<sup>360</sup> UN. *Research Guides*. Available at: <https://libraryresources.unog.ch/c.php?q=462695&p=3162764>

The list of commissions/missions can be reviewed at: <https://libraryresources.unog.ch/factfinding/chronolist>

<sup>361</sup> OHCHR. *Commissions of inquiry and fact-finding missions on international human rights and humanitarian law. Guidance and practice*. New York/Geneva: OHCHR, 2015, pp. 14 to 16, available at:

[https://www.ohchr.org/documents/publications/coi\\_guidance\\_and\\_practice.pdf](https://www.ohchr.org/documents/publications/coi_guidance_and_practice.pdf)

<sup>362</sup> OHCHR. *Commissions of inquiry and fact-finding missions on international human rights and humanitarian law. Guidance and practice, op. cit.*, pp. 7-8.

<sup>363</sup> UN. *Research Guides, op. cit.*

<sup>364</sup> OHCHR. *Commissions of inquiry and fact-finding missions on international human rights and humanitarian law. Guidance and practice, op. cit.*, pp. 10-11.

<sup>365</sup> The information about the International Independent Commission of Inquiry on the Situation of Human Rights in Côte d'Ivoire can be reviewed at: <https://libraryresources.unog.ch/factfinding/africa#s-lq-box-wrapper-11490281>

<sup>366</sup> OHCHR. *Inquiry Commissions and Fact-finding Missions on Human Rights and International Humanitarian Law. Guide and Practice, op. cit.* pp. 11-16.

<sup>367</sup> Human Rights Council, Situation of human rights in the Syrian Arab Republic, S-17/1, para. 13, available at: [https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/ResS17\\_1.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/ResS17_1.pdf)

<sup>368</sup> OHCHR. *Inquiry Commissions and Fact-finding Missions on Human Rights and International Humanitarian Law. Guide and Practice, op. cit.* pp. 19-33.

<sup>369</sup> *Id.*, pp. 36-98.

<sup>370</sup> *Ibid.*, pp. 99-111.



implements some form of monitoring. For example, the OHCHR may be asked to submit periodic reports to the Human Rights Council on the human rights situation in the concerned country.<sup>371</sup>

Civil society organizations are important actors in these mechanisms, because they can provide invaluable information. In the follow-up stage, they can invoke the report and its recommendations as an advocacy tool to pressure the State to address the violations and to implement accountability measures.<sup>372</sup>

### C.3.2.3. Special Procedures

Probably the most critical and consequential work of the Human Rights Council is carried out by the Special Procedures. The Special Procedures consist of independent experts who work *pro bono* on human rights issues. At the time of this writing, there were 44 Special Procedures mechanisms covering specific thematic areas, and 11 covering specific country situations, details of which are available on the OHCHR website.<sup>373</sup> The title of these mechanisms, which may consist of a single expert or a collective working group of experts, vary, but the most common are: Special Rapporteur, Special Representative, Independent Expert and Working Group.

The functions of these experts are determined by the mandate given to them by the Human Rights Council. They are generally tasked with gathering information, conducting analysis and preparing analytic reports, using international human rights instruments as a framework. Most special procedures undertake two to three country visits a year and produce reports on the situations that are the subject of their mandate as they apply to the country visited. The experts are assisted by OHCHR staff members, who will typically liaise with NGOs and will carry out the day-to-day operations of the mandate.

The work of these experts is public, and the exercising of their functions does not require the consent of the concerned State. However, to conduct a visit, it will be necessary to secure an invitation from the State concerned. Their methodology effectiveness lies in pressure by exposing State conduct, including violations. They also may engage in more cooperative forms of dialogue and assistance. The reports produced may provide valuable tools for civil society to use in their advocacy efforts at the domestic level.

There are two kinds of public special procedures. The first is **country procedures**, which may deal with general human rights issues in a State<sup>374</sup>, though they mandated to examine particular issues identified as a matter of concern by the Council. The establishment of country Special Rapporteur requires that the country have a particularly serious chronic or urgent human rights situation, and that enough Council Members support their creation in the face of what is usually fierce defensive lobby to avoid their creation by the concerned State and its allies. The second kind of special procedures are **thematic procedures**, which deal with the analysis of a specific human rights issue.<sup>375</sup>

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<sup>371</sup> Ibid., pp. 112-116.

<sup>372</sup> Ibid, p. 116.

<sup>373</sup> See: <https://spinternet.ohchr.org/ViewAllCountryMandates.aspx?Type=TM>

<sup>374</sup> For the list of these procedures see: <https://spinternet.ohchr.org/ViewAllCountryMandates.aspx?lang=en>

<sup>375</sup> For the list of these procedures see: <https://spinternet.ohchr.org/ViewAllCountryMandates.aspx?Type=TM&lang=en>

Of critical importance for NGOs wishing to engage with special procedures is that they operate on the basis of information they receive from a variety of sources, but principally NGOs and victims. This information can relate to general laws, policies and practices in the State concerned. But many special procedures mandates also receive and consider information on individual cases and violations. The submission of communications for these purposes does not require that the alleged victim has exhausted domestic remedies, nor that the State is Party to any treaty.

For such a communication to be accepted for processing, it must be accompanied by the following information:

- i. Identification of the victim.
- ii. Identification of the perpetrators of the violation if known, as well as any information on the actors involved, including information on non-state actors, if relevant.
- iii. Identification of the persons or entities making the communication if they are not the victim.
- iv. Date, place and detailed circumstances of the incident. The submitted information may relate to alleged violations that have already occurred, are occurring or are about to occur.
- v. If it is being filed about particular named victims, permission to submit the case should be obtained by the alleged victim.

Once this information is received, the country or thematic mechanisms can approach States to request information, request them to initiate an investigation, ask them to bring those responsible to justice or take preventive measures. On this point, it should be highlighted that the Working Group on Arbitrary Detention enjoys a quasi-judicial competency, and can rule on violations related to arbitrary detention and write opinions explaining their reasoning.

While these UN experts do not have the power to enforce States to comply with these recommendations, the purpose of communications is to put pressure on States, draw their attention to a problem involving human rights violations or provide more visibility to this type of problem. In addition, the Special Procedures report the results of the communications to the Human Rights Council.<sup>376</sup>

For the topic under discussion, the relevant special procedures are Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, and Working Group on Arbitrary Detention. In addition, it is also important the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence.

#### **C.3.2.3.1. Working Group on Enforced or Involuntary Disappearances**

Established in 1980, this Working Group does not have an adjudicative function. Its main function is to assist the families of missing persons to find out their fate and whereabouts. The Working Group seeks to create communication channels between

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<sup>376</sup> See OHCHR. *Communications*. Available at: <https://www.ohchr.org/en/hrbodies/sp/pages/communications.aspx>  
See also: OHCHR. *Submission of information to the Special Procedures*. Available at: <https://spsubmission.ohchr.org>  
The e-mail address to which these communications can be sent is [urgent-action@ohchr.org](mailto:urgent-action@ohchr.org)

States and families for the investigation of specific cases of enforced disappearance. With the adoption of the *Declaration on the Protection of All Persons from Enforced Disappearance* by the General Assembly in 1992,<sup>377</sup> the Working Group was given the role of monitoring compliance with the provisions of the Declaration as well as providing assistance to States for its implementation.

The Working Group is not a treaty body. Therefore, it can exercise its functions with any UN Member State without the need for that State to have ratified any of the related treaties.

As part of its role, the Working Group receives and examines reports on cases of alleged or suspected enforced disappearances submitted by relatives or human rights organizations acting on their behalf and shares them with the relevant Governments, requesting that they carry out inquiries and report back on the results.

In the event that an enforced disappearance occurs, any person or organization that has the prior consent of relatives of the disappeared person can send a request to the Working Group by e-mail.<sup>378</sup> It is important to note that in order to send this request it is not necessary to have exhausted domestic remedies, nor is it necessary for the State, in whose jurisdiction the events occurred to be party to any treaty.<sup>379</sup> It is also possible for the applicant to request that the Working Group keep the request confidential, which could serve as a protection measure.<sup>380</sup>

If the events occurred during the three months preceding receipt of the Working Group's report the Working Group can make direct urgent appeals to the State through its Minister of Foreign Affairs.<sup>381</sup>

Cases of intimidation, persecution or reprisals against relatives of disappeared persons, witnesses to disappearances or their families, members of family organizations, NGOs or human rights defenders are shared with the relevant governments, requesting that they take measures to protect the fundamental rights of the persons concerned. Situations that require immediate intervention are shared with Foreign Ministers through their Permanent Representatives to the UN in Geneva.<sup>382</sup>

### **C.3.2.3. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions**

Among the powers of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions<sup>383</sup> are to visit countries. The Rapporteur can make two to three visits per year to countries with the aim of analysing the situation of the protection of the right to life

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<sup>377</sup> Available at: <https://www.ohchr.org/en/professionalinterest/pages/enforceddisappearance.aspx>

<sup>378</sup> GTDFI. *Practical Information: the Working Group on Enforced or Involuntary Disappearances (WGEID) in a Nutshell*, pp. 2, available at: [https://www.ohchr.org/Documents/Issues/Disappearances/how\\_to\\_use\\_the\\_WGEID.pdf](https://www.ohchr.org/Documents/Issues/Disappearances/how_to_use_the_WGEID.pdf)

The email address to which these requests can be sent is: [wgeid@ohchr.org](mailto:wgeid@ohchr.org)

The form to submit a communication on a missing person is available from the Working Group's website at: <https://www.ohchr.org/SP/Issues/Disappearances/Pages/Visits.aspx>

An official video explaining the Working Group's procedures is available at: <https://vimeo.com/359262861/6b0b6281da>

<sup>379</sup> GTDFI. *Practical Information: the Working Group on Enforced or Involuntary Disappearances (WGEID) in a Nutshell*, op. cit., p. 2.

<sup>380</sup> Id.

<sup>381</sup> ACNUDH. *Working Group on Enforced or Involuntary Disappearances-Procedures*. Available at: <https://www.ohchr.org/EN/Issues/Disappearances/Pages/Procedures.aspx>

<sup>382</sup> ACNUDH. *Working Group on Enforced or Involuntary Disappearances-Procedures*, op. cit.

<sup>383</sup> Human Rights Council. *Resolution adopted by the Human Rights Council on 22 June 2017 35/15. Mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions*. A/HRC/RES/35/15. 11 July 2017, para. 7.

and proposing a series of recommendations.<sup>384</sup> In addition, information on specific cases of extrajudicial, summary or arbitrary executions or other issues affecting the right to life may be sent to the Special Rapporteur.<sup>385</sup>

Examples of cases that could be reported include: death threats; imminent fear of extrajudicial executions; deaths in custody; deaths resulting from torture; deaths caused by the excessive use of force; attacks by death squads or State agents; violations of the right to life during an armed conflict; return of persons to places where their right to life might be affected; obstacles that impede the exercising of the right to asylum for people whose lives are in danger in their country of origin; abuses in death penalty cases and the failure to investigate, punish and remedy violations of the right to life.<sup>386</sup>

Information on the following issues should be included in the complaint:<sup>387</sup>

- i. Incident (date, place, description of circumstances in which it occurred, and the reasons for fearing that people's lives are in danger due to cases involving imminent violations of the right to life).
- ii. Victims of the incident (individualisation, number, profession and activities).
- iii. Alleged perpetrators (reasons for suspicion; specify whether or not they are agents of the State; information on the State body from which the perpetrators are affiliated with, e.g. their hierarchical organisation; connections between the perpetrators and situations involving human rights violations or tolerance of these violations).
- iv. Source of the complaint (name and full address of the organisation or individual making the complaint).
- v. Measures taken by victims and their families (complaints lodged and bodies that they are submitted to). If it has been decided not to make a formal complaint, it is advisable to include an explanation of the reasons for this decision.
- vi. Measures taken by the authorities to investigate the alleged violation of the right to life and to protect people under threat (if complaints have already been lodged; measures taken by relevant bodies; status of investigations at the time of the complaint).
- vii. National legislation related to the protection of the right to life (identification of the types of crime; existence of causes of impunity regulated by national law; explanation of the regulation of judicial procedures).

Upon receipt of reliable information, the Special Rapporteur may transmit the allegations to the States concerned by means of an urgent appeal or a letter of allegation.<sup>388</sup> The urgent appeals aim to prevent the commission of imminent executions by calling on the State to ensure the effective protection of potential victims and to carry out a full and independent investigation.<sup>389</sup>

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<sup>384</sup> OHCHR. *Visits*. Available at: <https://www.ohchr.org/EN/Issues/Executions/Pages/CountryVisits.aspx>

<sup>385</sup> OHCHR. *Complaints-Model questionnaire*. Available at: <https://www.ohchr.org/SP/Issues/Executions/Pages/Complaints.aspx>

<sup>386</sup> OHCHR. *Questionnaire template*. Available at: <https://www.ohchr.org/SP/Issues/Executions/Pages/ModelQuestionnaire.aspx>

<sup>387</sup> OHCHR. *How to submit information to the Special Rapporteur or request their intervention*. Available at: <https://www.ohchr.org/SP/Issues/Executions/Pages/Information.aspx>

The model questionnaire is available from OHCHR. Model questionnaire, op. cit.

Complaints can be sent to [urgent-action@ohchr.org](mailto:urgent-action@ohchr.org)

<sup>388</sup> OHCHR. *Complaints-Model Questionnaire*, op. cit.

<sup>389</sup> Id.

Cases of executions that do not require immediate action are submitted to States by the Rapporteur together with a request for information on the situation, the investigations carried out, the criminal or disciplinary sanctions imposed, and the reparations granted to victims.<sup>390</sup> General allegations are also submitted to governments, for example, information about situations of impunity.<sup>391</sup> In these cases, more specific information is often requested from the State.

All communications sent and received are confidential during the exchange of information. However, the Rapporteur will include the outcome of the procedures that have been concluded in their annual report to the United Nations Human Rights Council.<sup>392</sup>

### **C.3.2.3.3 Working Group on Arbitrary Detention**

The Working Group on Arbitrary Detention, created in 1991, investigates cases of arbitrary deprivation of liberty “imposed arbitrarily or inconsistently with the international standards set forth in the Universal Declaration of Human Rights, or the international legal instruments accepted by the States concerned”.<sup>393</sup> Its mandate covers “deprivation of liberty either before, during or after the trial, as well as to deprivation of liberty in the absence of any kind of trial (administrative detention)”.<sup>394</sup>

To fulfil its mandate, the Working Group can send urgent appeals to States. The urgent appeals can be used in the following cases:

- “(a) In cases in which there are sufficiently reliable allegations that a person is being arbitrarily deprived of his or her liberty and that the continuation of such deprivation constitutes a serious threat to that person’s health, physical or psychological integrity or even to his or her life;*
- (b) In cases in which, even when no such threat is alleged to exist, there are particular circumstances that warrant an urgent action.”<sup>395</sup>*

In addition, it is also possible to submit a communication before the Working Group. Through the communication procedure, the Working Group examines individual complaints and renders an opinion on whether or not a deprivation of liberty was arbitrary. When necessary, the Working Group can make recommendations to the State concerned.<sup>396</sup>

The submission of a communication should have the following requirements:<sup>397</sup>

- i. Be submitted in writing.
- ii. Indicate the circumstances of the arrest or detention and the information to identify the person detained and their legal status. Among others, it should be mentioned the date and place of the detention, the identity of those who allegedly carried out the detention, the reasons given for the deprivation of liberty, the legislation applied, and the use of internal remedies.
- iii. Indicate the reasons why the deprivation of liberty is considered arbitrary.

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<sup>390</sup> Id.

<sup>391</sup> Id.

<sup>392</sup> Id.

<sup>393</sup> Id.

<sup>393</sup> OHCHR. Working Group on Arbitrary Detention. About the mandate. Available at:

<https://www.ohchr.org/en/issues/detention/pages/wgadindex.aspx>

<sup>394</sup> OHCHR. About arbitrary detention. Available at:

<https://www.ohchr.org/EN/Issues/Detention/Pages/AboutArbitraryDetention.aspx>

<sup>395</sup> Working Group on Arbitrary Detention, Methods of work, A/HRC/36/38, 13 July 2017, para 22.

<sup>396</sup> Id. para 17 to 20.

<sup>397</sup> Id., A. Submission of communications to the Working Group.

The communication can be submitted by “the individuals concerned, their families or their representatives.”<sup>398</sup> The communication also can be “transmitted by Governments and intergovernmental and non-governmental organizations as well as by national institutions for the promotion and protection of human rights”.<sup>399</sup> In addition, the Working Group might take up cases on its own initiative.<sup>400</sup>

Finally, the Working Group can also pay visits to countries “with the aim of better understanding the situation of deprivation of liberty in the country and the underlying reasons for arbitrary detention”.<sup>401</sup>

#### **C.4. Inter-American system**

The main bodies of the Inter-American human rights system are the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR). The IACHR consists of seven commissioners who are experts in human rights and are elected by the General Assembly of the Organisation of American States (OAS).<sup>402</sup> The IACtHR is consists of seven judges who are experts in human rights and are elected by the States Parties to the American Convention on Human Rights (ACHR).<sup>403</sup>

The Commission has jurisdiction over all of the Member States of the OAS.<sup>404</sup> However, the Court can only exercise its jurisdiction over States that, in addition to being members of the OAS, have ratified the ACHR and recognize its jurisdiction.<sup>405</sup>

Among the protection mechanisms that exist in this system, attention should be paid to the judicial case system, particularly the filing of a complaint, and some measures that can be implemented by the IACHR, primarily precautionary measures and thematic reports.

Cases of enforced disappearances and unlawful death can be brought to the attention of the IACHR by filing a complaint against the allegedly responsible State. In fact, both of these illegal acts can affect the human rights that are guaranteed in the American Declaration of the Rights and Duties of Man and the ACHR.

There is also a human rights treaty specifically dedicated to enforced disappearances: the Inter-American Convention on Forced Disappearance of Persons.<sup>406</sup> If States violate their obligations under these treaties, it is possible to file a complaint against the responsible State under the case system before the IACHR and the IACtHR.<sup>407</sup>

In addition, there are a number of inter-American treaties that are currently in force and violations of these can be shared with the system’s entities. These treaties are listed below:

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<sup>398</sup> Id., para 12.

<sup>399</sup> Id., para 12.

<sup>400</sup> Id., para 13.

<sup>401</sup> Id., para 25.

<sup>402</sup> For the members of the Inter-American Commission, see: <http://www.oas.org/en/iachr/mandate/composition.asp>

<sup>403</sup> Statute of the IACHR, October 1979, Art. 9.

For the members of the Inter-American Court, see: <https://www.corteidh.or.cr/composicion.cfm?lang=en>

<sup>404</sup> The list of States that have ratified the Charter of the Organization of American States can be found at: <https://www.cidh.oas.org/Basicos/Spanish/CartaOEArat.htm>

<sup>405</sup> The list of States that have ratified the ACHR can be found at: [https://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm)

<sup>406</sup> Available at: <http://www.oas.org/juridico/english/treaties/a-60.html>

<sup>407</sup> *Inter-American Convention on Forced Disappearance of Persons*, art. XIII.

<b>1. American Convention on Human Rights "Pact of San José" (1969)</b>	
Link to the text of the treaty	<a href="http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm">http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm</a>
State parties	<a href="http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm">http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm</a>

<b>2. Inter-American Convention to Prevent and Punish Torture (1985)</b>	
Link to the text of the treaty	<a href="http://www.oas.org/juridico/english/treaties/a-51.html">http://www.oas.org/juridico/english/treaties/a-51.html</a>
State parties	<a href="http://www.oas.org/juridico/english/sigs/a-51.html">http://www.oas.org/juridico/english/sigs/a-51.html</a>

<b>3. Inter-American Convention on Forced Disappearance of Persons (1994)</b>	
Link to the text of the treaty	<a href="http://www.oas.org/juridico/english/treaties/a-60.html">http://www.oas.org/juridico/english/treaties/a-60.html</a>
State parties	<a href="http://www.oas.org/juridico/english/sigs/a-60.html">http://www.oas.org/juridico/english/sigs/a-60.html</a>

<b>4. Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, "Convention of Belém do Pará" (1994)</b>	
Link to the text of the treaty	<a href="http://www.oas.org/juridico/english/treaties/a-61.html">http://www.oas.org/juridico/english/treaties/a-61.html</a>
State parties	<a href="https://www.oas.org/juridico/english/sigs/a-61.html">https://www.oas.org/juridico/english/sigs/a-61.html</a>

<b>5. Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (1999)</b>	
Link to the text of the treaty	<a href="http://www.oas.org/juridico/english/treaties/a-65.html">http://www.oas.org/juridico/english/treaties/a-65.html</a>
State parties	<a href="http://www.oas.org/juridico/english/sigs/a-65.html">http://www.oas.org/juridico/english/sigs/a-65.html</a>

<b>6. Inter-American Convention against Racism, Racial Discrimination and Related Intolerance (2013)</b>	
Link to the text of the treaty	<a href="http://www.oas.org/en/sla/dil/inter_american_treaties_A-68_racism.asp">http://www.oas.org/en/sla/dil/inter_american_treaties_A-68_racism.asp</a>
State parties	<a href="http://www.oas.org/en/sla/dil/inter_american_treaties_A-68_racism_signatories.asp">http://www.oas.org/en/sla/dil/inter_american_treaties_A-68_racism_signatories.asp</a>

<b>7. Inter-American Convention against All Forms of Discrimination and Intolerance (2013)</b>	
Link to the text of the treaty	<a href="http://www.oas.org/en/sla/dil/inter_american_treaties_A-69_discrimination_intolerance.asp">http://www.oas.org/en/sla/dil/inter_american_treaties_A-69_discrimination_intolerance.asp</a>
State parties	<a href="http://www.oas.org/en/sla/dil/inter_american_treaties_A-69_discrimination_intolerance_signatories.asp">http://www.oas.org/en/sla/dil/inter_american_treaties_A-69_discrimination_intolerance_signatories.asp</a>

<b>8. Inter-American Convention on the Protection of Human Rights of Older Persons (2015)</b>	
Link to the text of the treaty	<a href="http://www.oas.org/en/sla/dil/inter_american_treaties_A-70_human_rights_older_persons.asp">http://www.oas.org/en/sla/dil/inter_american_treaties_A-70_human_rights_older_persons.asp</a>
State parties	<a href="http://www.oas.org/en/sla/dil/inter_american_treaties_A-70_human_rights_older_persons_signatories.asp">http://www.oas.org/en/sla/dil/inter_american_treaties_A-70_human_rights_older_persons_signatories.asp</a>

### C.4.1. The submission of an individual complaint or petition

In this section, the basic information that must be included to file an individual complaint or petition with the IACHR will be summarized. No reference will be made to the judicial proceedings before the IACtHR.<sup>408</sup> Reports of violations of any of the rights protected by the international instruments in the inter-American system may be presented to the IACHR by any person or group<sup>409</sup> without the consent of the victim.<sup>410</sup> However, it is advisable to seek the consent of the victim. There is a portal on the IACHR website to file a complaint.<sup>411</sup>

To file a complaint with the IACHR, the following admissibility requirements must be met:

#### Formal requirements

The complaint must meet certain formal requirements such as identifying the complainant, describing the facts, meeting admissibility requirements and identifying the rights that have been violated.<sup>412</sup>

#### Exhaustion of national remedies

Before submitting a complaint to the IACHR it is necessary to have used the procedural mechanisms regulated by national law.<sup>413</sup> There are some cases in which this requirement does not apply:<sup>414</sup>

- i. If the minimum rules of due process for the protection of the right or rights that are alleged to have been violated do not apply to the domestic law of the State.<sup>415</sup>
- ii. If the alleged offender has not been allowed access to or has been prevented from exhausting domestic remedies.<sup>416</sup>
- iii. If there is an unjustified delay in the decision.<sup>417</sup>

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<sup>408</sup> On the legal proceedings before the Court, see:

[https://www.corteidh.or.cr/sitios/libros/todos/docs/ABCCorteIDH\\_2020\\_eng.pdf](https://www.corteidh.or.cr/sitios/libros/todos/docs/ABCCorteIDH_2020_eng.pdf)

<sup>409</sup> ACHR, art. 44.

<sup>410</sup> IACHR. Resolution N° 59/81. Case 1954. Uruguay. 16 October 1981. Available at:

<https://www.cidh.oas.org/annualrep/81.82eng/Uruguay1954bis.htm>

<sup>411</sup> Available at: <http://www.oas.org/en/iachr/portal/>

<sup>412</sup> Rules of procedure of the Inter-American Commission on Human Rights, art. 28.

<sup>413</sup> ACHR, art. 46.1.a; Rules of Procedure of the Inter-American Commission on Human Rights, art. 31.1.

<sup>414</sup> ACHR, art. 46.2; Rules of Procedure of the Inter-American Commission on Human Rights, art. 31.2.

<sup>415</sup> See: IACtHR. *Exceptions to the exhaustion of domestic remedies*. Advisory Opinion OC-11/90 of 10 August 1990, para. 24. In this opinion, the IACHR affirms that the notion of due process must be interpreted in light of Article 8 of the ACHR, which in its first paragraph establishes a series of guarantees for all types of judicial proceedings, namely the right to a fair hearing within a reasonable time period by a competent, independent and impartial tribunal that has been previously established by law. Furthermore, paragraph 2 of this law establishes some minimum guarantees for the framework of criminal proceedings. For example, Article 8(2)(d) and (e) states that the accused has the right to defend themselves in person or through legal assistance of their own choosing and, if they fail to do so, has the inalienable right to have legal assistance provided by the State, whether paid or unpaid and in accordance with domestic law. For example, this advisory opinion indicates that it would constitute a violation of due process if a person were forced to defend themselves and a person before the Court does not having the financial means to pay for a lawyer (paras. 25-27).

<sup>416</sup> IACtHR. *Exceptions to the exhaustion of domestic remedies*. Advisory Opinion OC-11/90 of 10 August 1990, paras. 32 and 33. In this opinion, the IACHR points out that a generalised situation of fear would lead to lawyers not providing legal assistance due to their fear of reprisals is an example of this exception.

<sup>417</sup> IACtHR. *Sisters Serrano Cruz v. El Salvador*, Preliminary Objections, Judgment of 23 November 2004, para. 140. In this judgment, the IACtHR considered that this exception was made in respect of a complaint of enforced disappearance from which almost eight years had passed since the first complaint was filed with the authorities in El Salvador without having definitively established the events that took place.



### Six-month deadline

In accordance with this requirement, the complaint must be submitted within six months of the exhaustion of domestic remedies.<sup>418</sup> If the petitioner claims that they could not exhaust domestic remedies, and if they meet one of the above-mentioned criteria for exceptional cases but are unable to meet the six-month deadline, the petition must be submitted within a "reasonable time". The Commission will consider the date on which the alleged violation of rights occurred and the circumstances of each case.<sup>419</sup>

### No duplication of procedures

The Commission will not consider a request if the case:<sup>420</sup>

- i. Is part of settlement proceedings that are pending before an international governmental body to which the relevant State is a party; or
- ii. Substantially reproduces another pending petition or that has been already examined and decided upon by the Commission or another international body to which the relevant State is a party.

If the complaint meets all of the admissibility requirements, the IACHR will examine its merits. If the IACHR determines at the substantive stage that the State has breached its obligations, it will issue a preliminary report, also called an "Art. 50 Report" (in relation to Art. 50 of the ACHR), making recommendations to the State and establishing a deadline for compliance. If the State does not comply, the IACHR has two alternatives. The first consists of issuing a final substantive report with new recommendations that the State must comply with within the indicated time frame. The other path that the IACHR can follow is refer the case to the IACtHR. This decision must be made based on the consideration of the following criteria:<sup>421</sup>

- i. The position of the petitioner.
- ii. The nature and gravity of the violation.
- iii. The need to develop or clarify the jurisprudence of the system.
- iv. The possible effect of the decision on the legal systems of the Member States

This means that victims may not take their cases directly to the IACtHR. However, if the case is indeed referred to the IACtHR, the petitioners have the right to exercise a number of powers and rights before the IACtHR.

#### **C.4.2. IACHR precautionary measures**

The IACHR has the authority to hear requests for precautionary measures, which can also be adopted by the IACHR's own initiative.<sup>422</sup> These measures are for serious and urgent situations that present a risk of irreparable harm to persons or the subject matter of a petition or case pending before the Inter-American system's entities. The analysis carried out by the IACHR is based on the facts presented and is not a full legal analysis. In relation to a case of enforced disappearance or unlawful death, it is possible to request the IACHR implement precautionary measures. It is the IACHR that decides whether to

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<sup>418</sup> IACHR, art. 46.1.b.

<sup>419</sup> Rules of Procedure of the Inter-American Commission on Human Rights, art. 33.2.

<sup>420</sup> IACHR, arts. 46.1.c and 47.d; Rules of Procedure of the Inter-American Commission on Human Rights, art. 33.

<sup>421</sup> IACHR. Rules of Procedure of the Inter-American Commission on Human Rights, art. 45.

<sup>422</sup> See *Information sheet to request precautionary measures from the Inter-American Commission on Human Rights*. Available at: [http://www.oas.org/es/cidh/docs/pdfs/2020/FactSheets\\_MedidasCautelares-EN.pdf](http://www.oas.org/es/cidh/docs/pdfs/2020/FactSheets_MedidasCautelares-EN.pdf)  
Requests for precautionary measures can be entered on the website at: <http://www.oas.org/en/iachr/portal/>

make a request to the relevant State to adopt precautionary measures<sup>423</sup> for persons and/or communities that are alleged to be at risk.

The IACHR's precautionary measures are different from provisional measures, which are measures issued by the IACtHR. Provisional measures can be adopted in cases that are extremely serious and urgent when it is necessary to avoid irreparable damage to persons. Provisional measures are primarily preventative.<sup>424</sup> However, the IACtHR can only receive requests for provisional measures from the IACHR. In exceptional cases it may hear requests made by victims, alleged victims or their representatives regarding contentious cases that are before the IACtHR. These requests must be related to the subject matter of the case.<sup>425</sup>

### **C.4.3. Thematic Reports**

Like the UN Human Rights Council, the IACHR has established number of thematic Rapporteurs that aim to address human rights situations around particular themes. Some provide assistance to persons from certain marginalized or disadvantaged groups, and peoples who may be exposed to human rights violations because of their situation of vulnerability, for example resulting from historical discrimination they have experienced. Each mandate is headed by an IACHR Commissioner. Its main function is to monitor specific problems in the region. If a case of enforced disappearance or unlawful death is related to the subject matter of a specific Rapporteurship it is possible to send the information to their Commissioner.<sup>426</sup>

### **C.5. International Criminal Court**

On 17 July 1998 the *Rome Statute of the International Criminal Court* was adopted, to provide for a forum for criminal prosecutions for aggression, genocide, war crimes and crimes against humanity where States are unable or unwilling to initiate investigations and prosecutions in their domestic systems. This international treaty makes a number of significant contributions in the fight against impunity.

The Rome Statute (RS) establishes and regulates the International Criminal Court (ICC) as a permanent court. The ICC has personal jurisdiction in the following cases:

- i. Over alleged perpetrators who have committed crimes on the territory of the State that is party to the Rome Statute<sup>427</sup> or has accepted the Court's jurisdiction.
- ii. Over alleged perpetrators who are nationals of a State that is Party to the Rome Statute.<sup>428</sup>
- iii. Over alleged perpetrators of cases that have been the subject of a referral by the UN Security Council.

The activation of ICC jurisdiction can take occur in three situations:<sup>429</sup>

- i. If a State Party refers a situation to the Prosecutor in which crimes under the RS appear to have been committed.

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<sup>423</sup> *Rules of Procedure of the Inter-American Commission on Human Rights*, art. 25.

<sup>424</sup> IACtHR. *Molina Theissen v. Guatemala*. Request for Provisional Measures and Oversight of Compliance with Judgment. 3 September 2020, para. 12.

<sup>425</sup> For the details, see *Rules of Procedure of the Inter-American Court of Human Rights*, available at: <https://corteidh.or.cr/reglamento.cfm?lang=en>

<sup>426</sup> The list of reports is available at: <http://www.oas.org/en/iachr/mandate/rapporteurships.asp>

<sup>427</sup> Rome Statute, Art. 12(2)(a).

<sup>428</sup> Rome Statute, Art. 12(2)(b).

<sup>429</sup> Rome Statute, Art. 13.

- ii. If the Security Council, acting under Chapter VII of the Charter of the United Nations, refers a situation to the ICC Prosecutor in which one or more of the crimes established in the RS appear to have been committed.
- iii. If the ICC Prosecutor has initiated an investigation into a crime based on their own initiative.

This means that victims cannot activate the ICC's jurisdiction. However, they can send information about the commission of relevant crimes to the ICC Prosecutor.<sup>430</sup>

In accordance with the principle of complementary actions, the ICC's jurisdiction may be exercised only when a State is unable or unwilling to prosecute alleged perpetrators of crimes included in the treaty.<sup>431</sup> The States Parties that have the obligation in first instance to bring perpetrators to justice.

The ICC's jurisdiction is limited to four categories of crimes: war crimes, genocide, crimes against humanity and aggression. A brief description of each of them is made below.

### **C.5.1. War Crimes**

War crimes are those crimes that are committed in the context of and in connection with an armed conflict. Article 8 of the RS establishes the war crimes over which the ICC has jurisdiction.

Most of the war crimes that cover the RS are grave breaches of the 1949 Geneva Conventions (Article 8(2)(a)). Some examples are murder (Article 8.2.a.i) and torture (Article 8.2.a.ii).

Other serious violations of the laws and customs of international armed conflicts, as established by international law, including 1977 Additional Protocol I of the Geneva Conventions, are also included in the RS (Article 8(2)(b)). Some examples are:

- i. Intentionally directing attacks against the civilian population or against civilians not taking a direct part in hostilities (Article 8(2)(b)(1)).
- ii. Intentionally directing attacks against civilian objectives, i.e. objectives that are not military objectives (Article 8.2.b.ii).

In relation to non-international armed conflicts, the RS refers to violations of Common Article 3 of the Geneva Conventions (Article 8(2)(c)), for example, "attacks on life and limb, in particular murder in all its forms, mutilation, cruel treatment and torture" (Article 8(2)(c)(i)).

Finally, the RS criminalizes other serious violations of the laws and customs applicable in armed conflict that are not of an international character within the established framework of international law (Article 8.2.e). Some examples are:

- i. Intentionally directing attacks against the civilian population or against civilians not taking a direct part in hostilities (Article 8(2)(e)(i)).

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<sup>430</sup> Information can be sent to: [otp.informationdesk@icc-ICC.int](mailto:otp.informationdesk@icc-ICC.int)

<sup>431</sup> Rome Statute, arts. 1 and 17.

- ii. Attacking or bombing, by any means, towns, villages, houses or buildings that are not defended and are not military objectives (Article 8(2)(e)(ii)).

### **C.5.2. Genocide**

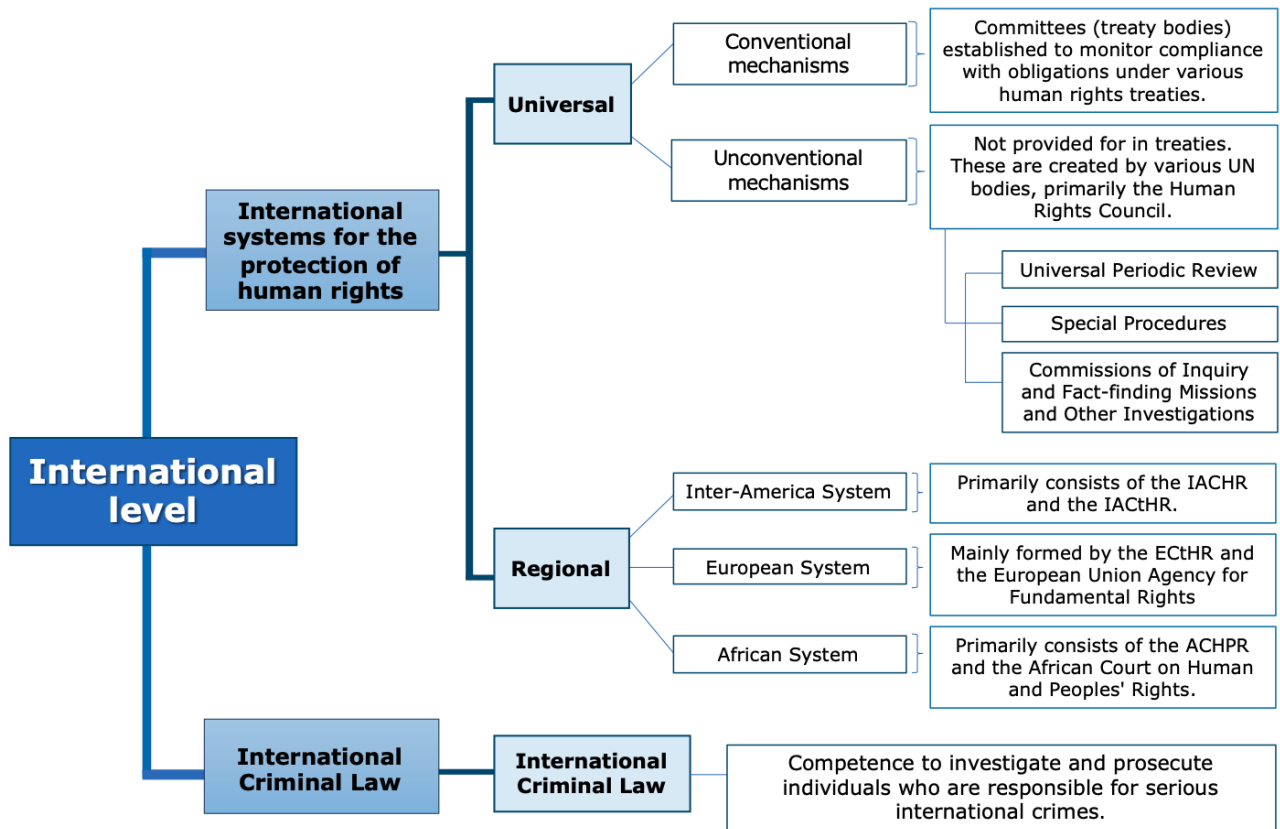
The ICC has jurisdiction to prosecute the crime of genocide under Article 6 of the RS. The definition of the RS reflects the definition contained in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. The RS establishes that genocide is a crime committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, by means of the commission of one of the following acts:

- i. Execution of group members.
- ii. Serious injury to the physical or mental integrity of the members of the group.
- iii. Intentional subjection of the group to conditions of existence that would result in its physical destruction, in whole or in part.
- iv. Measures to prevent births within the group.
- v. Forced transfer of children from the group to another group.

### **C.5.3. Crimes against humanity**

The ICC also exercises jurisdiction over crimes against humanity. According to Article 7 of the RS, these crimes include any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population:

- i. Murder.
- ii. Extermination.
- iii. Slavery;.
- iv. Deportation or forced transfer of the population.
- v. Imprisonment or other serious deprivation of physical liberty in violation of the fundamental rules of international law.
- vi. Torture.
- vii. Rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization and any other form of sexual violence of comparable gravity.
- viii. Persecution of a group or collective with a separate identity based on political, racial, national, ethnic, cultural, religious, gender or other grounds universally recognised as unacceptable under international law in connection with any act referred to in Article 7 of the Statute and any crime within the jurisdiction of the Court.
- ix. Enforced disappearance of persons.
- x. Apartheid crime;.
- xi. Other inhumane acts of a similar nature intentionally causing great suffering or serious injury to physical integrity or mental or physical health.



Graph 3. Source: own elaboration.

## D. STRATEGIC LITIGATION

In light of the various practical elements included in the second part of this document, this section will provide elements for consideration to contribute to a general understanding of what strategic litigation means and involves, including criteria that will support the design of a suitable strategy to address a particular case or situation.

### D.1. Characterization

Strategic litigation in human rights are actions that are carried out through the processing of a specific case before national and international courts or quasi-judicial bodies with the aim of achieving progressive development of law and jurisprudence or other significant structural changes or modifications concerning the protection and guarantee of human rights.<sup>432</sup> In addition to pursuing the protection of the rights of the victims of a specific case, strategic litigation is often aimed at situations involving repeated or specific violations against the same group. It focuses on obtaining structural modifications for the protection of rights that form part of the specific case. If a favourable resolution is obtained, this will not just protect the rights of the victims in the case, but also those of other people in a similar situation.<sup>433</sup> For this reason, strategic litigation is also sometimes referred to as "impact litigation" or "public interest litigation".<sup>434</sup>

Strategic litigation is often designed and undertaken by NGOs, university law clinics, law firms and human rights defenders.<sup>435</sup> It can also be used by certain State

<sup>432</sup> Child Rights Information Network (CRIN). *A guide to strategic litigation: an introduction*. London: CRIN, n.d., p. 2; GUTIÉRREZ CONTRERAS, Juan Carlos (Coord). *Strategic Litigation in Human Rights. A model for building*. Mexico City: Mexican Commission of the Defence and Promotion of Human Rights. A. C., p. 15.

<sup>433</sup> DUFFY, Helen. *Strategic Human Rights Litigation. Understanding and Maximising Impact*. Oxford: Hart, 2018, p. 3; GUTIÉRREZ CONTRERAS, op. cit., pp. 15, 25.

<sup>434</sup> DUFFY, op. cit., pp 3.

<sup>435</sup> DUFFY, op. cit., pp. 3, 18-19.

bodies, such as public prosecutors' offices, ombudsmen's offices and human rights institutions.

Strategic litigation's means and objective may be different from case litigation where there may be one or more specific victims whose rights have been affected.<sup>436</sup> In the latter, the main purpose of the litigation is to respond to the needs of the victim(s). This need usually consists of obtaining a favourable judgment that allows their rights to be remediated. This occurs in accordance with the characteristics of the particular case without necessarily having any effect on other cases.

Although strategic litigation and case litigation are two different notions, they are not always mutually exclusive.<sup>437</sup> For example, the favourable resolution of a case by a national or international court may have a wider impact without necessarily being planned strategically in advance.

## **D.2. Criteria for deciding to strategically litigate a case**

It will not always be easy to know from the outset whether a case should be strategically pursued. The factors that should be taken into consideration when making this decision are varied. Some basic issues will be addressed below to assist victims and HRDs to identify the main problems and questions related to a case when deciding whether to strategically litigate.

### **D.2.1. Objective**

The objective to be achieved through the litigation of a case and the possibility of achieving it should be clearly identified. The objectives of strategic litigation are very diverse and depend on each situation. Among the most recurrent objectives are: the progressive development of interpretation of a legal norm through new jurisprudence; to achieve the incorporation or implementation of international human rights standards into domestic law, policy or practice;<sup>438</sup> the modification of domestic legislation<sup>439</sup> or public policy;<sup>440</sup> the promotion of compliance with domestic regulations that are in force but not applied;<sup>441</sup> the activation of a jurisprudential trend on a matter;<sup>442</sup> the obtaining of reparation measures and guarantees of non-repetition;<sup>443</sup> promoting the investigation, sanction and accountability of those responsible and the deactivation of causes of impunity;<sup>444</sup> raising awareness of a human rights problem that is invisible;<sup>445</sup> promoting knowledge, skills and education of judges, members of parliament and public officials on certain standards;<sup>446</sup> strengthening the independence of the courts of justice;<sup>447</sup> obtaining recognition of the status of victims;<sup>448</sup> and giving victims the opportunity to be heard.<sup>449</sup>

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<sup>436</sup> CRIN, op. cit., pp. 2.

<sup>437</sup> DUFFY, op. cit., p. 10.

<sup>438</sup> GUTIÉRREZ CONTRERAS, op. cit., p. 15.

<sup>439</sup> CRIN, op. cit., p. 34; DUFFY, OP. CIT., pp. 60; GUTIÉRREZ CONTRERAS, OP. CIT., p. 16.

<sup>440</sup> DUFFY, op. cit., p. 63.

<sup>441</sup> CRIN, op. cit., p. 34; DUFFY, op. cit., pp 60.

<sup>442</sup> DUFFY, op. cit., p. 61.

<sup>443</sup> DUFFY, op. cit., pp. 52-57, 58.

<sup>444</sup> DUFFY, op. cit., pp. 57-58, 65-67.

<sup>445</sup> CRIN, op. cit., p. 35; GUTIÉRREZ CONTRERAS, op. cit., p. 15 and 16.

<sup>446</sup> CRIN, op. cit., p. 35.

<sup>447</sup> DUFFY, op. cit., pp. 67-69.

<sup>448</sup> DUFFY, op. cit., pp. 50-51, citing as an example the program of extraordinary renditions implemented by the United States following the September 11 attacks.

<sup>449</sup> DUFFY, op. cit., pp. 51-52.

### **D.2.2. Time considerations**

A number of issues of a temporary nature need to be assessed. These include the time at which the action is brought, problems relating to the limitation period of actions or offences, the time taken by the court to issue a final decision (including all possible appeals), the time that has elapsed since the offences were committed and the possibility of applying for any urgent provisional or precautionary measures, particularly if these are necessary for the protection of the victim.<sup>450</sup>

### **D.2.3. Victims and claimants**

The victims of the case and the persons on whose behalf the legal action is to be brought must be defined. It should also be considered whether there are any procedural regulations regarding the definition of a victim and the persons with legal capacity to file a complaint, suit or lawsuit. At the forefront of all of these considerations must be the interests of the alleged victims or claimants, and the informed consent, with all due regard for any security issues or vulnerability that may come from the action.

The advantages of presenting the action in the name of an organization should be assessed, provided that it is procedurally feasible. Consideration whether it will be a "class action" or similar collective action, in jurisdictions where such actions are possible, or an individual action. If it is a collective action, it should be decided whether it will be filed on behalf of all the victims or only some of them, and if the latter, the criteria by which the victims will be chosen should be decided.<sup>451</sup>

### **D.2.4. Respondents**

Another issue to be assessed is the subject of the litigation and to whom it is directed.<sup>452</sup> This will depend on the nature of the action. A criminal complaint, for example, is usually directed against individuals, unlike a civil and/or administrative lawsuit which could be directed against either legal persons, such as businesses, or the State, or natural persons.

In cases where enforced disappearances or unlawful deaths are committed by State agents, criminal proceedings could be initiated against these agents, in jurisdictions where criminal complaints may be initiated by individuals. If the legal system allows it, it is possible to file a complaint in generic terms against those responsible. The command structure of such an entity should be considered and the facts studied to determine which persons were involved in the commission of the crime.

It may also be important to assert an administrative or civil claim to pursue the right to an effective remedy and compensation and other forms of reparation. Such claims could be directed against the State or some of its organs and possibly against the responsible officials.

In the event that there has been participation by individuals or companies, it will also be possible to file criminal complaints and possibly civil lawsuits against individuals. In these situations, it is important to analyse the possibility of proceeding with some kind

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<sup>450</sup> CRIN, op. cit., pp. 5-10.

<sup>451</sup> For these issues, see: CRIN, op. cit., pp. 11 ff.

<sup>452</sup> For these problems, see: CRIN, op. cit., pp. 15-18; DUFFY, op. cit., p. 11.

of judicial action against the company as a legal entity. In some jurisdictions companies may be held criminally liable, or their officers may be held so.

#### **D.2.5. Risks**

There are a number of potential risks associated with strategic litigation. These include the possibility that “bad” retrograde jurisprudence will emerge from a poorly chosen case; that the litigants will be subject to hefty court costs and legal fees, which is particularly heightened when proceeding against companies that may have very “deep pockets”.

There is also the possibility of individuals taking legal action alleging libel or slander against the individuals and entities that initiated the proceedings.

#### **D.2.6. Court**

There may be multiple possibilities as to which jurisdiction to proceed in any given case, including issues of the court or quasi-judicial body, and the venue. The choice of the court will depend on the nature of the claim or complaint and the rules of jurisdiction. These rules generally consider the place where the acts were committed and the domicile of the victim, the perpetrator, or the defendants. The selection of the court involves a number of practical issues that need to be taken into account, including the individual judges that may sit on the court and how they usually resolve the type of case that it is presented.<sup>453</sup> There are also logistical issues that need to be considered, for example, the distance between the court and the place of residence of the defenders and the victims. This is because these types of circumstances can affect the process.

If it is established that it would be optimal to bring a case before an international body, such as a UN treaty body or a regional non-judicial mechanism such as the Inter-American Commission or the African Commission, it should be considered the effectiveness of possibly unenforceable non-judicial decisions. In addition, the question of exhaustion of domestic remedies will arise. If it is considered that remedies will likely be ineffective in the national jurisdiction, but they must be exhausted nonetheless, this will also be a factor in determining what domestic court in which to bring them.

#### **D.2.7. Financing**

Consideration must be given as to how the case will be financed and whether one has sufficient logistics and human resources capacities. This may involve evaluating the possibility of establishing a partnership with an organization that has more experience in handling strategic litigation.<sup>454</sup> In this event, the terms of the partnership should be precisely stipulated, and the victim should be consulted to make this decision.

Another potential route in many jurisdictions will be the possibility of securing pro bono representation, where the legal fees and much of the work will be assumed by qualified lawyers experienced in navigating the procedural and jurisprudential rules and practices in a particular jurisdiction. Some law firms are known for providing such services. In some cases, they may cover the legal fees but not any court costs.

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<sup>453</sup> CRIN, *op. cit.*, p. 22.

<sup>454</sup> GUTIÉRREZ CONTRERAS, *op. cit.*, p. 32.



### **D.2.8. Context and specific situation of the victim**

One factor that must be considered when choosing a case for strategic litigation is the context of the human rights violations in which they occur.<sup>455</sup> Attention should be paid to the institutional and private actors that may be involved in the violations or abuses; the existence of repeated patterns of behaviour in the commission of the offences; the existence of mass, systematic and widespread violations of human rights; the internal organizational structure of the State forces that may have been involved in those violations; the political situation in force at the time of the events; the specific local context of the place where the crimes were committed; the existence of some kind of social or armed conflict; the existence of an authoritarian government; the existence of plans, programs, policies and regulations aimed at the persecution of certain types of people; and the characteristics of the victims involved in the case, paying special attention to the victimization of minorities or vulnerable groups.

Setting out the context to the violations will, for certain kinds of cases, be of great importance to demonstrate that the case being prosecuted is not an isolated event, but the repetition of a type of violation that has been occurring for a period of time and that could continue to occur in the future if the same circumstances continue. Strategic litigation is often directed at changing structural issues or systematic practices.

In addition, it may be necessary to identify the connection between the victim of the case with the general context.<sup>456</sup> This means comprehending the background of the victim's life story, their membership of a vulnerable group or the existence of previous threats against them. It is of the utmost importance to identify whether, in addition to the person with whom contact has been made, any other people related to the person may also have been affected by the context, especially focusing on family members and members of the community or group to which the person belongs.

### **D.2.9. Documentation and testing**

As much as possible, the context and the particular situation of the victim should be documented and established.<sup>457</sup> This means collecting all the reasonably obtainable documentary sources that can prove the existence of a structural situation of violence. These include, for example, reports from national human rights bodies, such as NHRIs and ombudspersons, State bodies and international organizations; jurisprudence and files from national and international courts and non-judicial mechanisms; State and civil society archives; NGO reports; press kits; internal regulations; scientific studies; academic articles; and statistical information.

In addition, the facts of the case should, where feasible, be reconstructed and documented. This should consider the period of time during which they occurred, what they consisted of and the identification of persons who may have been involved in their commission. Documentation of the case can take place through written sources; records from detention or incarceration facilities; audio and video recordings; statements from victims, relatives, witnesses and perpetrators; forensic examinations, especially those related to the analysis of the crime scene such as exhumations, autopsies, the ascertainment of injuries and the identification of the remains of the victims; written, radio, audio-visual and digital press releases; and information contained in online social networks.

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<sup>455</sup> GUTIÉRREZ CONTRERAS, op. cit., p. 26

<sup>456</sup> GUTIÉRREZ CONTRERAS, op. cit. pp. 29.

<sup>457</sup> GUTIÉRREZ CONTRERAS, op. cit., pp. 16.

There is an ethical obligation of the organizations or individuals representing persons whose cases will be strategically litigated to maintain a victim-centred approach. When starting the process, it is necessary to inform victims that their case will be used as part of a broader strategy to achieve changes that may go beyond their particular individual interests. They should be informed of and be in agreement with the broader objectives through handling their case and the decisions that will be made during the judicial process. Victims must give their informed consent for initiating this type of litigation because this reduces their risk of being instrumentalized for purposes unrelated to the manner in which they choose to exercise their rights.

In addition, entities that carry out this type of litigation must try to foresee the negative consequences and risks that could affect victims as a result of the strategic litigation, including, critically, security concerns and inform them of this possibility and adopt measures to prevent these consequences or risks from materializing. If it is determined that there is a particularly high-security risk and no feasible means of affording necessary protection to the victim, the case should not be brought irrespective of their consent.

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