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Contribution to the **Draft guiding principles for the search for disappeared persons**

CED/C/15/2

The guiding principles are a very useful and well-considered document. It is especially beneficial that the principles relate also to acts committed by non-state actors (Principle 6, par. 1), and to State obligations arising after finding disappeared persons both alive and dead (par. Principle 11, par 2 and 3).

I would recommend the CED to consider following aspects:

**Strengthening State obligations when the search for disappeared persons results not from an immediate disappearance, but when the search is conducted as part of investigations into mass or clandestine graves.**

As the CED has itself noted, the guiding principles were developed in response to “urgent actions”, which concern seeking a disappeared person as a matter of urgency. Therefore the guidelines mostly apply to immediate searches. Nevertheless, for many different reasons, searches are sometimes conducted decades after the disappearance. As the Inter-American Court of Human Rights has stated explicitly, the obligation to search for the remains of missing persons continues many years after the disappearance, regardless of the perceived probability of success in the search. [[1]](#footnote-1)  Nevertheless, such a situation poses a number of difficulties for the families of disappeared, that could be tackled within by the Guiding Principles.

(1) State authorities have justified a lack of action to investigate the fate of the disappeared persons with the fact that criminal investigation cannot be or have already been performed. In some cases, the absence of evidence, such a body, is used as evidence of absence for criminal responsibility. The Guiding Principles should therefore clearly recommend that States conduct searches for disappeared persons irrespective of any parallel criminal investigations. A sentence could be added to **Principle 5 par. 1**: “*The search for the disappeared persons should be initiated and carried out effectively, irrespective of the criminal investigation*”.

(2) States should return the remains of disappeared persons to their family members regardless of the length of time since the disappearance occurred. As this is often not done when mass of clandestine graves are discovered, the CED could consider encouraging States to do so, by adding an additional sentence to **Principle 11, par. 3**. “*This applies also to situations when the remains of victims are discovered in mass or clandestine graves*”.

**Strengthening State obligations with regard to transnational enforced disappearances.**

This should especially concern support for the families of the disappeared, access to the investigation and the ability of victims to participate in the proceedings, which are particularly problematic when the families are residing in another country.[[2]](#footnote-2)

The CED could consider:

* adding a Principle concerning transnational enforced disappearances, or
* adding this aspect to relevant parts of the Guiding principles (Principle 12, Principle 13 – all paragraphs, Principle 14, Principle 15 – 2 and 3 paragraph). So far, such a comment is included in Principle 8 par 3.

Because of the problem of missing migrants, the CED might consider stating, that the obligations apply irrespectively of the legal status of the person in the State where he or she disappeared.

**Returning the remains of disappeared persons**

The CED could consider including in **Principle 15 par. 4**, that States should cover the costs of transferring the remains of disappeared persons to the place of choice of their relatives, including to another country, when this is the wish of the family. The Inter-American Court of Human Rights has taken such an approach.[[3]](#footnote-3)

**Protecting women searching for the disappeared**

As recognized by the Working Group on Enforced or Involuntary Disappearances, women are at the forefront of the search for the disappeared.[[4]](#footnote-4) The Principles acknowledge that disappeared women are a particular vulnerable group and the search needs to be conducted with a gender-perspective (Principle 14 par 3). Nevertheless, this is also true for women searching for disappeared persons, who might have decreased access to public services compared to men and are in many countries at increased risk of gender related violence. [[5]](#footnote-5) The Principles could recognize that, by including additional paragraphs / sentences to Principle 12 and Principle 13.

**In sum, I would propose adding additional text to following original principles:**

* **Principle 5 par. 1**: The search for the disappeared person and the criminal investigation of the persons responsible for the disappearance should be mutually reinforcing. The criminal investigation should not take away from the urgency of investigating the fate and whereabouts of the disappeared person using appropriate staff and equipment. The search for the disappeared persons should be initiated and carried out effectively, irrespective of the criminal investigation.
* **Principle 11, par. 3**. If the disappeared person is found dead, the search shall be considered as completed when his or her remains have been fully identified and handed over to his or her family members or relatives in a dignified manner. When the identification of remains is partial, any decision to discontinue the search to locate and identify the missing remains should take into account the actual chances of identifying more remains and the needs expressed by the family members in the context of their cultural norms concerning funerals. Any decision to continue the search requires the prior and informed consent of the family members. This applies also to situations when the remains are discovered in mass or clandestine graves
* **Principle 15 par. 4**: The remains of a disappeared person should be handed over to the family members under decent conditions, in accordance with the cultural norms and customs of the victims and with respect at all times for the fact that they are the mortal remains of a person, and not objects. The return of remains should also involve the means and procedures needed to ensure a dignified burial consistent with the cultural customs of the families who receive them. The States should cover the costs of transferring the remains of disappeared persons to the place of choice of their relatives, including to another country, when this is the wish of the family.

I would also recommend developing on two issues, either trough a separate Principle or by mainstreaming it into existing Principles:

* Strengthening State obligations with regard to of transnational enforced disappearances.
* Protecting women searching for the disappeared

1. IACtHR, The 19 Merchants v. Columbia, Judgment (Merits, Reparation and Costs), 5 July 2004, paras 270–271. [↑](#footnote-ref-1)
2. For pracitical examples see G. Citroni, *The first attempts in Mexico and Central America to address the phenomenon of missing and disappeared migrants*, 2018 International Review of the Red Cross 99 (2). [↑](#footnote-ref-2)
3. The Inter-American Court of Human Rights has included those issues in its reparations: see IACtHR, Bamaca-Velasquez v. Guatemala, Judgment (Reparations and Costs), 22 February 2002, para. 82 ; IACtHR, Caracazo v. Venezuela, Judgment (Reparations and Costs), 29 August 2002, para.  124; IACtHR, Juan Humberto Sánchez v. Honduras, Judgment (Preliminary Objections, Merits, Reparations  and Costs), 7 June 2003, para.  187. [↑](#footnote-ref-3)
4. General comment on women affected by enforced disappearances adopted by the Working Group on Enforced or Involuntary Disappearances at its ninety-eighth session (31 October – 9 November 2012), A/HRC/WGEID/98/2, preamble. [↑](#footnote-ref-4)
5. P. Dewhirst, A. Kapur, *The Disappeared and Invisible: Revealing the Enduring Impact of Enforced Disappearances on Women*, International Center for Transitional Justice, 2015, 24. [↑](#footnote-ref-5)