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**Comments in response to the call for inputs in view of the special initiative marking the 30th anniversary of the Declaration on the Protection of All Persons from Enforced Disappearance'**

We are delighted to submit comments to this Study to mark the 30<sup>th</sup> anniversary of the Declaration on the Protections of All Persons from Enforced Disappearance. This submission is particularly concerned with **'Good practices and lessons learned concerning technical assistance and cooperation to promote the knowledge of the Declaration and enhance the existing legal framework and practices and promote ratification and acceptance of more recent legal instruments, and in particular of the International Convention on the Protection of All Persons from Enforced Disappearance'**. This contribution specifically addresses points 4 (the contribution to the development of international law on enforced disappearance) and 6 (influence in international jurisprudence on enforced disappearance) as per the Call guidance notes.

The Declaration has been instrumental in the creation of the International Convention for the Protection of All Persons from Enforced Disappearance. Article 24 (1) of the Convention, in turn, has provided important legal anchorage for:

- (1) The protection and investigation of mass graves; and**
- (2) The development of the right to the truth.**

These two elements form the substantive basis of this submission. In the following we highlight significance and influence for the progression of law, policy and jurisprudence.

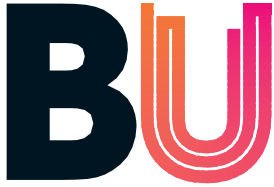
**(1) The Protection and Investigation of Mass Graves**

On December 10, 2020, the [Bournemouth Protocol on Mass Grave Protection and Investigation](#) (the Protocol) was published (also available in 11 translations). The Protocol offers a cohesive and universal set of rules, procedures and standards that relate to the full life cycle of the mass grave, for all actors that are engaged by the process(es). The life cycle comprises:

- Discovery and safe reporting;
- Protection of sites;
- Investigation;
- Identification;
- Return of human remains; and
- Justice aspects/measures.

The Protocol identifies and describes the many complexities, interactions, context-specificities and resources necessary to undertake an effective mass grave investigation, with a view to informing decision-makers prior to the initiation of such an endeavour.

Each section of the Protocol is rooted in international law, with provisions of the Convention on Enforced Disappearance providing crucial international human rights anchorage, thereby ensuring robust legal rationales for mass grave protection and appropriate exhumation.



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Article 24(1) of the Convention, with its requirement that State Parties 'locate, respect and return' human remains in case of death, is perhaps the most obvious rationale for mass grave search, protection and investigation, since the return of remains is contingent on the realisation of all these elements.

In addition, the Convention can be cited in support of the following requirements:

- The keeping of official records/registers in relation to all person deprived of their liberty (Article 17(3));
- Initiation of a search for the disappeared (including in mass graves) (Article 12(1) and 12(2));
- Access to information relevant to an investigation (Article 12(3));
- The importance of an independent and adequate and unhindered investigation that is capable of determining the events (Article 12(4));
- Identification efforts, including through exhumation (Article 15);
- Information provision to affected families (Article 18);
- Return of human remains to families (Article 24(3); and
- Importance of remedies (including compensation, restitution, rehabilitation and guarantees of non-repetition) (Article 24(4) and (5)).

Finally, the UN's Committee on Enforced Disappearances issued its [Guiding Principles for the Search for Disappeared Persons](#), which consolidates good practice in the conduct of an effective search. This, too, is an important development which has, in turn, informed the Bournemouth Protocol: the first instrument on mass graves to embody universal, common standards. This thereby reinforces the importance of searching for the disappeared, the need for proper and respectful investigations as well as a reassertion of the rights and needs of victims' families.

References in support:

- Klinkner, M. and Smith, E. 2020. The Bournemouth Protocol on Mass Grave Protection and Investigation.  
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- Klinkner, M. and Smith, E. 2021. Commentary to the Bournemouth Protocol on Mass Grave Protection and Investigation.  
[https://issuu.com/bournemouthuniversity/docs/11070\\_fmc\\_mass\\_graves\\_protocol\\_academic\\_co\\_mmentary](https://issuu.com/bournemouthuniversity/docs/11070_fmc_mass_graves_protocol_academic_co_mmentary)
- UN Committee on Enforced Disappearances. 2019. Guiding principles for the search for disappeared persons. CED/C/7.

## **(2) The development of the right to the truth**

Article 24 of the Convention, as an extension of the Declaration, remains the most authoritative and express codification of the right to the truth in international human rights convention law through Article 24(4) which grants victims:



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*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.*

Notwithstanding its limited membership, the treaty reflects the developments, over decades, of international law on the issue of enforced disappearance through international jurisprudence and declarations (International Commission of Jurists 2016; Organization of American States 1994). Before this codification, the right to know what happened to one's relatives had been litigated in the case-law of the Inter-American Court of Human Rights (*Velásquez Rodríguez v Honduras* 1988: para 181; Ferrer Mac-Gregor 2016). The work of intergovernmental bodies (including the UN Working Group on Enforced or Involuntary Disappearances and the Ad Hoc Working Group on Human Rights in Chile) also responded to the problem of enforced disappearances and the need of the families of the missing to know the fate or whereabouts of relatives or loved ones.

In addition, the right to the truth has now been extended into other areas of gross human rights violations, including torture and extrajudicial killings (Méndez and Bariffi 2011). When such a breach of human rights occurs, the onus is on the state to conduct an effective investigation into the events surrounding the violation and the individual circumstances of it. From case law, we know that this entails an investigation into the events that surrounded human rights violation and the individual human rights abuse themselves (e.g. *Massacres of El Mozote and other Places v El Salvador* 2012 para 297 and 298). The purpose and standards for such investigations were summarised, for example, in *Ituango Massacres v Colombia* 2006 (para 298). Investigations must seek to (a) identify the victim; (b) recover and preserve the probative material related to the death in order to contribute to any possible criminal investigation into those responsible; (c) identify possible witnesses and obtain witness-statements in relation to the investigation; (d) determine the cause, method, place and time of death, including patterns or practices that could have caused the death; and (e) distinguish between unlawful deaths and natural death, accidental death or suicide.

These investigations usually require victim involvement and findings must be reported (Méndez and Bariffi 2011; Klinkner and Davis 2020; Davis and Klinkner 2021). In that sense, the right to the truth is more than a state duty to investigate, since it also has a collective component affecting a society (e.g. Panepinto 2017). Article 24 of the Convention on Enforced Disappearance, itself a legislative application of the Declaration, has therefore been instrumental in the development of the right to the truth and the very significant, victim-focused human protections and duties it gives rise to.

#### References cited in support

- Davis, H. and Klinkner, M. 2021. Investigating across borders: the right to the truth in an European context. *The International Journal of Human Rights*. DOI: [10.1080/13642987.2021.1954619](https://doi.org/10.1080/13642987.2021.1954619)
- International Commission of Jurists. 2016. *Enforced Disappearance and Extrajudicial Execution: The Rights of Family Members*. Geneva: International Commission of Jurists.
- Klinkner, M. and Davis, H. 2020. *The right to the truth in international law*. Abingdon on Thames: Routledge.



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- Méndez, J. and Bariffi, F. 2011. Truth, Right to, International Protection' (2011) *Max Planck Encyclopedia of Public International Law* (online).
- Organization of American States, Inter-American Convention on Forced Disappearance of Persons, adopted 9 June 1994, entered into force 28 March 1996.
- Ferrer Mac-Gregor, E. 2016. The Right to the Truth as an autonomous right under the Inter-American Human Rights System *Mexican Law Review* 9(1): 121.
- Panepinto, A. 2017. The right to the truth in international law: The significance of Strasbourg's contributions' *Legal Studies* 37(4): 739.

**Cases cited in support:**

- *Ituango Massacres v Colombia* IACtHR Series C 148 (2006).
- *Massacres of El Mozote and other Places v El Salvador* IACtHR Series C 252 (2012).
- *Velásquez Rodríguez v Honduras* IACtHR Series C 4 (1988).