

# The 1949 Geneva Conventions

*A Commentary*

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**OXFORD**  
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Great Clarendon Street, Oxford, OX2 6DP,  
United Kingdom

Oxford University Press is a department of the University of Oxford.  
It furthers the University's objective of excellence in research, scholarship,  
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First Edition published in 2015

Impression: 1

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Published in the United States of America by Oxford University Press  
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data  
Data available

Library of Congress Control Number: 2015943520

ISBN 978-0-19-967544-9

Printed and bound by  
CPI Group (UK) Ltd, Croydon, CR0 4YY

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## A. Introduction

### I. Definition and phenomenon

- 1 The notion of ‘missing persons’—even though appearing in the First Additional Protocol to the Geneva Conventions (AP I)<sup>1</sup>—is not specifically defined by any legal instrument of international humanitarian law (IHL). Rather, the definition accrues from the various provisions dealing with the phenomenon, most notably from the ‘right of families to know the fate of their relatives’ as stipulated in Article 32 AP I. From these provisions it follows that persons are considered missing if their relatives or the Power on which they depend have no information on their fate and whereabouts.<sup>2</sup> While persons can go missing in various contexts, such as situations of internal violence or disturbances, and natural catastrophes,<sup>3</sup> the relevant rules of IHL apply only if the person is missing in connection with an armed conflict or a situation of occupation.<sup>4</sup> One specific and reoccurring instance where a person may go missing is that of an enforced disappearance. However, enforced disappearance is predominantly regulated in international human rights law (IHRL) and international criminal law, a fact to be remembered when discussing the concept of missing persons under IHL.<sup>5</sup> In the following, the term ‘enforced disappearance’ is used exclusively to denote the specific human rights violation or the criminal offence of enforced disappearance. By contrast, the more inclusive notions of ‘missing person’ or ‘to go missing’ refer to the broader concept, taking into account that in armed conflicts or situations of occupation the reasons for a person being unaccounted for are manifold.
- 2 Persons who have gone missing in a situation of armed conflict or occupation are either dead<sup>6</sup> or alive, and in the latter case deprived of their liberty by the enemy or free, but separated from their relatives by borders or frontlines.<sup>7</sup> In the past, it was mainly combatants who were at risk of going missing, the so-called ‘missing in action’. However, starting with the Second World War, civilians increasingly became caught up in the violence or were often the very target of violence. With civilians becoming the overwhelming majority of victims of armed conflicts,<sup>8</sup> the number of civilian missing increased as well.<sup>9</sup> Despite a

<sup>1</sup> Section III of Part II AP I.

<sup>2</sup> Sassòli/Bouvier/Quintin, at 206; see, e.g., Art 2 Law on Missing Persons of Bosnia and Herzegovina (Official Gazette of BiH, 9 November 2004), unofficial English translation provided by the International Commission on Missing Persons, available at <[http://www.ic-mp.org/wp-content/uploads/2007/11/lawmp\\_en.pdf](http://www.ic-mp.org/wp-content/uploads/2007/11/lawmp_en.pdf)> (hereinafter BiH Law on Missing Persons).

<sup>3</sup> See the broad definition of ‘missing person’ in Art 2 Model Law on the Missing (ICRC Advisory Service on International Humanitarian Law, *Guiding Principles/Model Law on the Missing*), available at <<http://www.icrc.org/eng/assets/files/other/model-law-missing-0209-eng-.pdf>>.

<sup>4</sup> CA 2. See also the relevant chapters of this volume, in particular Chs 1, 2, and 67.

<sup>5</sup> According to the definition provided in the International Convention for the Protection of All Persons from Enforced Disappearance of 2006 (ICED), ‘enforced disappearance’ essentially denotes arrest, detention, abduction, or any other form of deprivation of liberty committed by state actors or with the authorization, support, or acquiescence of the state, which is followed by a refusal to acknowledge the deprivation of liberty or by concealing the fate and whereabouts of the disappeared person. See, e.g., Art 2 ICED. The ICC Statute defines ‘enforced disappearance’ in similar terms: Art 7(2)(i). The main differences between the ICC Statute and Art 2 ICED are that the offence can also be committed by a ‘political organization’, and that the perpetrator must act with the intention of removing the victim from the protection of the law for a prolonged period of time.

<sup>6</sup> On the dead in armed conflicts, see also Ch 14 of this volume.

<sup>7</sup> M. Sassòli and M. Tougas, ‘The ICRC and the Missing’, 84 *IRRC* 848 (2002) 727, at 730; Sassòli/Bouvier/Quintin, at 206.

<sup>8</sup> UNICEF, ‘Patterns in conflict: Civilians are now the target’, available at <<http://www.unicef.org/graca/patterns.htm>>.

<sup>9</sup> S. Martin, ‘The Missing’, 84 *IRRC* 848 (2002) 723, at 724.

more complete and elaborate normative framework applying to persons who go missing during armed conflicts or situations of occupation,<sup>10</sup> recent conflicts have left thousands of persons unaccounted for.<sup>11</sup>

The phenomenon of missing persons displays its negative effects on various levels. First of all, the person who is unaccounted for, if alive, suffers because he or she is cut off from the outside world,<sup>12</sup> the most notable consequence of which is being unable to contact his or her family.

Furthermore, as is expressed by Article 32 AP I, which refers to the right of families to know the fate of their loved ones, the relatives of the missing person also suffer from the lack of information concerning the fate and whereabouts of their next of kin. For them, the absence of information principally has a psychological and emotional dimension, in that they 'endure the agony of not knowing whether family members were killed in the conflict or are still in detention or, if detained, have since died'.<sup>13</sup> It is often only the official notification of death that can close the circle of uncertainty and put an end to their false hope. Without this acknowledgement of the loss of life, the mourning process can seldom be initiated.<sup>14</sup> Being in possession of information about the fate of relatives is also of great legal and administrative significance. In many jurisdictions, only the legal consequences flowing from the death of a relative are regulated and the missing person has no legal status. Hence, relatives of persons who have gone missing cannot claim support, or are prevented from exercising rights in a number of matters, such as social welfare, inheritance, property rights, and marital and family law. In addition, economic hardship may arise if it is the primary breadwinner of the family who has gone missing. Ideally, states should adopt legislation governing the legal status of missing persons and the rights of family members.<sup>15</sup>

The issue of missing persons has a collective dimension as well. Parties to a (former) conflict may manipulate and exploit the issue of missing persons, to perpetuate hate and national or ethnic exclusion, or to rally support for their cause.<sup>16</sup> Furthermore, not establishing and making the fate and whereabouts of victims known may hinder reconciliation and sustainable peace. Therefore, as a general rule, clarifying the issue of missing persons to the extent possible is one of the objectives of truth and reconciliation commissions.<sup>17</sup>

<sup>10</sup> See section A.II of this chapter.

<sup>11</sup> As just one example, a total of 34,325 persons were reported missing to the ICRC following the conflicts in the former Yugoslavia in the 1990s: ICRC, 'Missing Persons in the Territory of Former Yugoslavia,' ICRC Field Newsletter (25 April 2008), available at <<http://www.icrc.org/eng/resources/documents/field-newsletter/serbia-missing-newsletter-010408.htm>>.

<sup>12</sup> HRCtee, *Sarma v Sri Lanka*, Comm No 950/2000, 16 July 2003, para 9.5.

<sup>13</sup> ECtHR, *Cyprus v Turkey*, Grand Chamber Judgment, 10 May 2001, para 157.

<sup>14</sup> A. Petrig, 'The War Dead and Their Gravesites', 91 *IRRC* 874 (2009) 341, at 351.

<sup>15</sup> ICRC, *Missing Persons: A Handbook for Parliamentarians* (No 17: ICRC and Inter-Parliamentary Union, 2009) (hereinafter ICRC Handbook), at 10–11; see Arts 8–10 Model Law on the Missing and related commentary; Arts 11–19 BiH Law on the Missing; Art 6 Law on Missing Persons of Kosovo (*Official Gazette of the Republic of Kosovo*, 14 September 2011), unofficial translation provided by the International Commission on Missing Persons, available at <<http://www.ic-mp.org/wp-content/uploads/2007/11/law-on-missing-persons-republic-of-kosovo.pdf>>; Art 24(6) ICED.

<sup>16</sup> Sassòli and Tougas, above n 7, at 727–8.

<sup>17</sup> Section 3 para 1(c) South African Promotion of National Unity and Reconciliation Act No 34 of 1995, cited by M. Crettol and A.-M. La Rosa, 'The Missing and Transitional Justice: The Right to Know and the Fight against Impunity', 88 *IRRC* 862 (2006) 355, at 356.

## II. Applicable legal framework and its development

- 6 Various rules of IHL aim at preventing persons from going missing and ensuring that persons do not remain unaccounted for. However, these rules do not cover the situation where persons voluntarily abscond because they wish to sever all ties with their family or state.<sup>18</sup>
- 7 International humanitarian law had already begun addressing the issue of missing persons in the nineteenth century, albeit only with regard to combatants. For instance, the institution of a bureau of information for prisoners of war (POWs), to centralize information and answer enquiries about combatants in the hands of the enemy, was foreseen in the Hague Regulations of 1899 and 1907.<sup>19</sup> Moreover, the Oxford Manual on *The Laws of War on Land* of 1880 stipulates that the dead should not be buried until all articles on them serving to establish their identity have been collected.<sup>20</sup> Furthermore, the Geneva Conventions for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 1906 and 1929<sup>21</sup> respectively, set forth obligations pertaining to the identification of the dead, and the collection and forwarding of information on POWs.
- 8 The large-scale interment of civilians during the Second World War evidenced the need to adopt IHL rules in order to prevent civilians from going missing, and to elucidate their fate and whereabouts if persons nevertheless remain unaccounted for. Also, the existing rules of IHL obliging the enemy Power to account for combatants in its hands proved insufficient in many respects. These two shortcomings were, to some extent, remedied by the adoption of the four Geneva Conventions in 1949.<sup>22</sup>
- 9 Under the Geneva Conventions, missing persons are first of all entitled to the protection offered to the respective category of protected persons to which they belong. What is more, each Geneva Convention (GC) contains specific rules aimed at preventing persons from going missing, and to clarify their fate and whereabouts. Essentially, they stipulate that each party to the conflict must collect and record information on the identity and whereabouts of protected persons,<sup>23</sup> and centralize such information at the National Information Bureau (NIB),<sup>24</sup> which must be established by states party to the Geneva Conventions at the outbreak of hostilities or the commencement of a situation of occupation at the very latest.<sup>25</sup> For its part, the NIB is obliged to forward the said information either through the intermediary of the Central Agency,<sup>26</sup> or via the Protecting Power to the Power on which the protected person depends.<sup>27</sup> The NIB must also collect and forward specific documents and objects belonging to the protected person to the Power on which he or she depends.<sup>28</sup> In order to clarify the fate and whereabouts of specific

<sup>18</sup> Sassòli/Bouvier/Quintin, at 206. An exception constitutes Art 137 para 2 GC IV, stipulating that information should not be transmitted if it might be detrimental to the person concerned. On this situation, see MN 37–39.

<sup>19</sup> Art 14 Regulations concerning the Laws and Customs of War on Land, Annexed to Convention (II) with Respect to the Laws and Customs of War on Land (1899); Art 14 Hague Regulations.

<sup>20</sup> Art 20 *The Laws of War on Land* (Oxford: manual published by the Institute of International Law, adopted by the Institute of International Law, 1880).

<sup>21</sup> Arts 3 and 4 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (1906) [no longer in force]; Art 4 1929 GC I [no longer in force]; see Ch 34, MN 16–22, of this volume.

<sup>22</sup> GC I, GC II, GC III, and GC IV. <sup>23</sup> Arts 16 para 1 GC I; Art 19 para 1 GC II.

<sup>24</sup> Art 16 para 2 GC I; Art 19 para 2 GC II; Art 122 para 2 GC III; Art 136 para 2 GC IV.

<sup>25</sup> Art 122 para 1 GC III; Art 136 para 1 GC IV. <sup>26</sup> Art 123 GC III; Art 140 GC IV.

<sup>27</sup> Art 16 para 2 GC I; Art 19 para 2 GC II; Art 122 para 3 GC III; Art 137 para 1 GC IV; on the NIB and the Central Agency, see also Ch 53, section B.V, of this volume.

<sup>28</sup> Art 16 para 3 GC I; Art 19 para 3 GC II; Art 122 para 9 GC III; Art 139 GC IV.

protected persons, the Geneva Conventions stipulate that enquiries regarding a person reported missing must be answered by the NIB,<sup>29</sup> and provide for the setting up by way of agreement of bodies tasked with searching for dispersed POWs and internees.<sup>30</sup> Lastly, in order to prevent persons from going missing, each party to the conflict must issue identity cards to the persons under its jurisdiction who are at risk of becoming POWs.<sup>31</sup>

A section on missing and dead persons can be found in AP I, which notably extends the obligation to search for missing persons to persons not covered *ratione personae* by the Geneva Conventions, and reinforces the duty to furnish and exchange information on the missing and the dead in order to facilitate the search for them.<sup>32</sup> What is more, the rules of IHL pertaining to the missing are supplemented by IHRL, namely the right to know the truth about the fate and whereabouts of persons who have disappeared.<sup>33</sup>

The right to truth is also implicitly contained in Article 26 GC IV, which stipulates that the parties to the conflict must facilitate enquiries made by members of families dispersed as a result of armed conflict. It is expressly mentioned in Article 32 AP I stating that implementation of the rules on missing persons ‘shall be prompted mainly by the right of families to know the fate of their relatives’.

It has been contended that the obligation to search for missing persons under IHL<sup>34</sup> contributed to the development of a human right to truth.<sup>35</sup> Yet it was not until the International Convention for the Protection of All Persons from Enforced Disappearances (ICED) entered into force in 2010 that the right to truth was expressly recognized as an autonomous right in a binding human rights treaty<sup>36</sup> and not merely as a component of other human rights.<sup>37</sup>

The growing recognition of the right to know the truth under IHRL not only supplements IHL, which is of special importance in non-international armed conflicts (NIACs), but is cited in examples of state practice as a necessary component of a customary IHL rule requiring that parties to a conflict must take all feasible measures to account for persons reported missing and provide the families with information on the fate of missing persons.<sup>38</sup>

## B. Meaning and Application

What follows is a presentation of the core articles of the Geneva Conventions and AP I dealing with the issue of missing persons, that is, Article 16 GC I, Article 19 GC II, Articles 17, 119, 122, and 123 GC III, Articles 133 and 136–140 GC IV, and Articles 32 and 33 AP I. These rules are explained in the context of the different obligations in IHL to prevent persons from going missing and to account for persons reported missing in

<sup>29</sup> Art 122 para 7 GC III; Art 137 para 1 GC IV.

<sup>30</sup> Art 119 para 7 GC III; Art 133 para 3 GC IV.

<sup>31</sup> Art 17 para 3 GC III.

<sup>32</sup> ICRC Commentary APs, para 1222.

<sup>33</sup> This right has been developed by various domestic, regional, and international courts and bodies in recent decades, and is today a widely recognized concept in international law: see, e.g., OHCHR, *Study on the Right to Truth*, UN Doc E/CN.4/2006/91 (8 February 2006), especially as regards enforced disappearance; see, e.g., UNWGEID, ‘General Comment on the right to the truth in relation to enforced disappearance’, in HRCouncil, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc A/HRC/16/48 (26 January 2011).

<sup>34</sup> Art 33(1) API.

<sup>35</sup> OHCHR, *Study on the Right to Truth*, above n 33, paras 4–5.

<sup>36</sup> Art 24(2) ICED.

<sup>37</sup> On the right to truth, see also section D.I of this chapter and MN 66.

<sup>38</sup> ICRC CIHL Study, Rule 117, and vol II, Chapter 36, paras 143–95. See also Ch 14 of this volume.

situations of armed conflict or occupation. First, the IHL framework on missing persons contains important rules regarding the issuance of means of personal identification, most notably identity cards and discs. Correct identification is crucial for parties to the conflict properly to discharge their obligation to record and collect information relating to, inter alia, the identity of, state of health of, and measures taken against protected persons under their power. Furthermore, all four Geneva Conventions provide that the collected information shall be forwarded without delay to the NIB, which allows the information to be centralized and ultimately transmitted to the Power on which the protected persons depend. Lastly, IHL sets out an obligation to conduct investigative searches for persons who remain unaccounted for.

### I. Providing identity documents

- 15 The issuance of means of personal identification—notably identity cards<sup>39</sup>—is of considerable importance in preventing a person from going missing.<sup>40</sup> Correctly discharging the obligation to equip persons who risk becoming protected persons with identity documents, also facilitates the proper functioning of the authorities and bodies tasked by the Geneva Conventions—notably the NIB and the Central Tracing Agency (CTA)—to centralize and forward information about protected persons in the hands of the enemy to the Power on which they depend, and ultimately to the families. Identification is thus in the mutual interest of the parties to a conflict. The Geneva Conventions not only set forth what type of identification measures must be undertaken, but also provide a number of models by which a certain level of standardization can be reached, which, in turn, facilitates the task of establishing the identity of protected persons.<sup>41</sup>
- 16 Identity cards are the basic document by which the status and identity of a protected person may be established.<sup>42</sup> Each party to a conflict is therefore obliged to furnish ‘the persons under its jurisdiction who are liable to become prisoners of war’ with an identity card,<sup>43</sup> regardless of their nationality.<sup>44</sup> The identity card *must* bear the type of information which the prisoner is required to give when questioned.<sup>45</sup> It *may* contain additional information, such as a signature, fingerprints, the religious denomination of its holder, or a photograph, which makes it more difficult to exchange cards.<sup>46</sup>
- 17 Since identity cards and other means of identification must be issued at the outbreak of hostilities at the very latest, states party to the Geneva Conventions must have already established the necessary legal and institutional framework for the issuance of these

<sup>39</sup> Art 16 para 1(f) GC I; Art 19 para 1(f) GC II; Art 17 para 3 GC III.

<sup>40</sup> ICRC Advisory Service on International Humanitarian Law, *Means of Personal Identification*, available at <[http://www.icrc.org/eng/assets/files/other/means\\_of\\_personal\\_id\\_eng.pdf](http://www.icrc.org/eng/assets/files/other/means_of_personal_id_eng.pdf)>, at 1; Commentary on Art 11 Model Law on the Missing.

<sup>41</sup> ICRC, *Means of Personal Identification*, above n 40, at 1. <sup>42</sup> *Ibid.*

<sup>43</sup> Art 17 para 3 GC III. State parties are, in addition, required to issue specific identity cards for personnel of the armed forces carrying out special tasks, e.g. to persons accompanying the armed forces (Art 4(A)(4) and Annex IV.A. GC III; see also Art 40 paras 2 and 3 and Annex II GC I; Art 42 paras 2 and 3 and Annex GC II; Art 67(1)(c) AP I). They must also do so with regard to certain civilians, namely permanent or temporary staff of civilian hospitals, or civilian civil defence personnel (Art 20 paras 2 and 3 GC IV; Arts 18(3), 66(3), 79(3), and Annex I AP I). From the wording of some of these provisions it follows that the rationale behind this obligation is not to prevent these persons from going missing but to ensure that they receive the proper status and treatment when falling into the power of the enemy.

<sup>44</sup> Pictet Commentary GC III, at 161.

<sup>45</sup> Art 17 paras 1 and 3 GC III; Pictet Commentary GC III, at 161.

<sup>46</sup> *Ibid.*, at 161–2.

documents in peacetime.<sup>47</sup> Indeed, Common Article 2 recognizes that some of the provisions of the Geneva Conventions need to be implemented in peacetime, which notably include those regarding the taking of preparatory measures, such as those pertaining to identification.<sup>48</sup>

Another important means of identification is the issuance of identity discs to combatants, especially for later identification of dead persons buried by the enemy.<sup>49</sup> While the Geneva Conventions do not explicitly stipulate an obligation to issue such discs and do not describe a model identity disc,<sup>50</sup> different provisions refer to this additional means of identification.<sup>51</sup> However, the issuance of identity discs was generalized, at least in principle, during the XIIIth International Red Cross Conference in 1928.<sup>52</sup> Furthermore, in 1981, the International Conference of the Red Cross issued a Resolution on the wearing of identity discs, which urges parties to a conflict to take all necessary measures to provide members of their armed forces with an identity disc and to ensure that these discs are worn during service. In addition, the Resolution recommends that these discs, which should be made out of material resistant to battlefield conditions and be composed of two separable parts, contain all information necessary for a precise identification of the person wearing the disc.<sup>53</sup> 18

## II. Collecting and recording information

To prevent persons from going missing, and in any case to help to clarify their fate and whereabouts during an armed conflict or occupation, it is of prime importance that information relating to their identity and their state of health, as well as measures taken against them, is collected and recorded.<sup>54</sup> All four Geneva Conventions explicitly or implicitly contain an obligation to collect and record such information on the persons they protect.<sup>55</sup> With the adoption of AP I, the obligation to record was extended *ratione personae* to all those who were inadequately protected by the Geneva Conventions.<sup>56</sup> The obligation to record personal details of persons deprived of their liberty during an armed conflict or occupation is considered to have attained the status of customary international law.<sup>57</sup> 19

From the introductory words of Article 16 paragraph 1 GC I and Article 19 paragraph 1 GC II, it follows that the obligation to collect and record information is mandatory and not at the discretion of the parties to the conflict.<sup>58</sup> However, the obligation to collect and record information is not one of result but rather one of means.<sup>59</sup> This implies that 20

<sup>47</sup> Pictet Commentary GC III, at 161; ICRC Commentary APs, para 3972; Art 11(3) Model Law on the Missing; ICRC, *Means of Personal Identification*, above n 40, at 2.

<sup>48</sup> ICRC Commentary APs, para 149; Petrig, above n 14, at 363–5.

<sup>49</sup> See, e.g., Art 20 para 1 GC II.

<sup>50</sup> ICRC Commentary APs, Annex I, fn relating to para 3972.

<sup>51</sup> See, e.g., Arts 16 paras 1(f) and 3, 17 para 1, and 40 para 2 GC I; and Arts 19 paras 1(f) and 3, 20 para 1, and 42 para 2 GC II.

<sup>52</sup> ICRC, *The Geneva Conventions of August 12, 1949: Analysis for the Use of National Red Cross Societies* (Geneva: ICRC, 1950), vol I, at 19.

<sup>53</sup> Resolution I: Wearing of identity discs, in 'Resolutions of the XXIVth International Conference of the Red Cross', 63 *IRRC* 225 (November–December 1981) 318, at 318–19.

<sup>54</sup> ICRC Handbook, above n 15, at 18.

<sup>55</sup> See, e.g., Art 16 para 1 GC I; Art 19 para 1 GC II; Art 122 paras 2–7 GC III; and Arts 136 para 2 and 138 GC IV; see also Art 50 para 4 GC IV.

<sup>56</sup> Art 33(1) and (2) AP I; ICRC Commentary APs, para 1247.

<sup>57</sup> ICRC CIHL Study, Rule 123. <sup>58</sup> Pictet Commentary GC I, at 161.

<sup>59</sup> ICRC CIHL Study, vol I, at 426.

the obligation is fulfilled if a party to the conflict makes every possible effort and uses all means at its disposal to discharge the obligation—even if it ultimately fails to collect and record all information about each and every person in its hands. A party's use of its best effort to fulfil the obligation includes taking all necessary preparatory steps in good time, and even before the outbreak of hostilities.<sup>60</sup>

- 21 As regards sick, wounded, shipwrecked, or dead combatants, Article 16 paragraph 1 GG I and Article 19 paragraph 1 GC II explicitly stipulate that each party to the conflict shall record 'any particulars' assisting in the identification of such combatants who have fallen into its hands. When persons are picked up at sea, the obligation to collect and record information is based on GC II until they are landed.<sup>61</sup> The recording may take various forms, such as lists or card indexes, but must be sufficient to enable the keeping of an accurate account of POWs and ultimately to forward the information to the adverse Power.<sup>62</sup>
- 22 The obligation 'to record any particulars' that may assist in the person's identification<sup>63</sup> is complemented by a suggestive, rather than limited or imperative,<sup>64</sup> list of particulars which the records should, if possible, contain. The information can generally be obtained without questioning the person who falls into the hands of the enemy, who will often not be in a position to reply, since it is either contained in the identity card or is in the possession of the Detaining Power.<sup>65</sup>
- 23 The obligation to record must be discharged 'as soon as possible'.<sup>66</sup> While the wording allows the specificities of each case to be taken into account, the overarching principle of the provisions on missing persons—the right of families to know the fate of their relatives—suggests speedy fulfilment of the obligation.<sup>67</sup> In the context of naval warfare, it is argued that the information should be collected and recorded as soon as the persons concerned are taken on board the enemy Power's vessel.<sup>68</sup>
- 24 As regards POWs, the establishment of their identity immediately following capture is the first duty of the Detaining Power.<sup>69</sup> In addition, information must be collected pertaining to the individual POW's whereabouts, namely information on transfer, release, repatriation, escape, or admission to a hospital, and relating to his or her state, especially poor health or death.<sup>70</sup> Overall, the type and nature of information to be collected and recorded shall be such as to 'make it possible quickly to advise the next of kin concerned'.<sup>71</sup>
- 25 Certain information can be obtained from POWs only by questioning them—in a language they understand<sup>72</sup>—or by consulting their identity cards.<sup>73</sup> Against this background, POWs are obliged to show their identity cards upon request, which may in no case be taken away from them,<sup>74</sup> and to provide the Detaining Power with specific types of information.<sup>75</sup> The latter obligation, which is independent from the former,<sup>76</sup>

<sup>60</sup> Ibid; Pictet Commentary GC I, at 161.

<sup>61</sup> Pictet Commentary GC II, at 137–8; after they have been landed, GC I will apply to them.

<sup>62</sup> Pictet Commentary GC I, at 162. <sup>63</sup> Art 16 para 1 GC I; Art 19 para 1 GC II.

<sup>64</sup> Pictet Commentary GC I, at 162; Pictet Commentary GC II, at 139.

<sup>65</sup> Pictet Commentary GC I, at 162. <sup>66</sup> Art 16 para 1 GC I; Art 19 para 1 GC II.

<sup>67</sup> Pictet Commentary GC I, at 161. <sup>68</sup> Pictet Commentary GC II, at 139.

<sup>69</sup> Pictet Commentary GC III, at 156–7. <sup>70</sup> Art 122 paras 4–6 GC III.

<sup>71</sup> Introductory sentence of Art 122 para 4 GC III; Pictet Commentary GC III, at 576.

<sup>72</sup> Art 17 para 6 GC III. <sup>73</sup> Pictet Commentary GC III, at 157. <sup>74</sup> Art 17 para 3 GC III.

<sup>75</sup> Art 17 para 1 GC III; on the rationale behind this limitation, see Pictet Commentary GC III, at 156.

<sup>76</sup> Ibid, at 162.

is reinforced by a sanction: if POWs wilfully fail to provide the said information, or wilfully make incorrect statements, the privileges accorded to them by virtue of their rank or status<sup>77</sup> may be restricted. Since only wilful infringement of the rule triggers this sanction, a POW cannot be held liable if the lack of correctness of the statement is due to his or her physical or mental condition. In such cases, the Detaining Power is obliged to hand over the POW to the medical service and to establish his or her identity by means other than direct questioning.<sup>78</sup> The Detaining Power is prohibited from using physical or mental torture, or any other form of coercion in order to secure the information listed in Article 17 paragraph 1 GC III—and any other type of information—from the POW.<sup>79</sup>

As regards civilians, Article 136 paragraph 2 GC IV defines the circle of protected civilians<sup>80</sup> on whom information must be collected and later forwarded to the NIB. First of all, the obligation extends to civilians who are in custody for more than two weeks. Thereby, the nature of detention is irrelevant and can, for example, be detention for political reasons or for the (alleged) commission of an offence.<sup>81</sup> Furthermore, the obligation pertains to civilians who are subject to assigned residence or interned.

Among the information to be collected are the particulars that ‘make it possible to identify the protected person exactly and to advise his next of kin quickly’. This general indication guiding the collection of information is followed by a list of particulars, which shall allow for accurate identification of the person.<sup>82</sup> Even though some of this information can be obtained only from the protected persons, unlike POWs they are not required to provide certain particulars. Rather, the Detaining Power must try to secure the information from another source or abandon the attempt.<sup>83</sup> A refusal by the person in the hands of the enemy to share this information may notably be driven by fear that relatives will be subject to reprisals.<sup>84</sup>

In addition to identity particulars, the list includes the date, place, and nature of the action taken vis-à-vis the individual, and the address to which correspondence may be sent to him or her.<sup>85</sup> Furthermore, information relating to the person’s state of health must be collected. Lastly, the Detaining Power is explicitly obliged to collect information about any and all changes pertaining to protected persons, such as transfers, releases, repatriations, escapes, births, admittances to hospital, or death.<sup>86</sup> This is of utmost importance in order to ascertain the whereabouts of protected civilians.

### III. Forwarding of information, documents, and objects to the National Information Bureau

All four Geneva Conventions provide that the information collected and recorded shall be forwarded without delay to the NIB.<sup>87</sup> This allows for the centralizing of information on

<sup>77</sup> Regarding privileges accorded by virtue of status or rank, see, e.g., Arts 16, 39 para 3, 40, 44, 45, 49, 79 paras 2 and 3, 87 para 4, and 97 para 3 GC III.

<sup>78</sup> Art 17 para 5 GC III. <sup>79</sup> Pictet Commentary GC III, at 163. <sup>80</sup> Art 4 GC IV.

<sup>81</sup> Pictet Commentary GC IV, at 525–6.

<sup>82</sup> Art 138 para 1 GC IV.

<sup>83</sup> Art 31 GC IV prohibits exercising any coercion of a civilian to obtain information.

<sup>84</sup> Pictet Commentary GC IV, at 535. <sup>85</sup> Art 138 para 1 GC IV.

<sup>86</sup> Art 138 paras 1 and 2 GC IV.

<sup>87</sup> Art 16 para 2 GC I; Art 19 para 2 GC II; Art 122 para 3 GC III; and Art 136 para 2 GC IV. See also Art 50 para 4 GC IV.

protected persons,<sup>88</sup> and ultimately for the transmission of the information to the Power on which they depend.<sup>89</sup>

- 30 For sick, wounded, shipwrecked, and dead combatants, as well as for POWs, one and the same NIB is competent to receive, centralize, and transmit information collected and recorded.<sup>90</sup> The Power in whose hands protected persons are is free to choose the most appropriate means by which its military authorities may transmit the information to the NIB.<sup>91</sup> Even though this obligation must be discharged as soon as possible, it is argued that in naval warfare it is sufficient if the information is forwarded only once the naval unit is in port, i.e. once the persons have landed.<sup>92</sup> Such an interpretation accommodates the concern that a warship will try to limit its communication over the radio to a bare minimum.<sup>93</sup>
- 31 With regard to protected persons under GC IV, the parties to the conflict are required 'within the shortest possible period' to forward information to the NIB on measures taken vis-à-vis persons who are in their custody for more than two weeks, subject to assigned residence, or interned. Any changes pertaining to these persons must be communicated to the NIB promptly.<sup>94</sup>
- 32 In addition, the Power in whose hands protected persons are is obliged to forward certain documents to the NIB, such as death certificates or duly authenticated lists of the dead, last wills, or other documents of importance to the next of kin.<sup>95</sup> The Geneva Conventions also refer to certain objects that must be transmitted to the NIB, namely personal valuables left by protected persons, or money and articles of intrinsic or sentimental value found on dead combatants.<sup>96</sup>
- 33 Since the NIB plays a key role in preventing persons from going missing and resolving cases of persons unaccounted for,<sup>97</sup> it must be operational as soon as hostilities break out or a situation of occupation begins,<sup>98</sup> and cannot be improvised at that moment. Therefore, state parties should<sup>99</sup> lay the groundwork for its establishment in peacetime.<sup>100</sup> The Geneva Conventions do not contain any indication as to the nature, composition, or working methods of the NIB, or which body shall be responsible for running it.<sup>101</sup>

<sup>88</sup> Art 13(2) Model Law on the Missing; Pictet Commentary GC I, at 165.

<sup>89</sup> See section B.IV of this chapter.

<sup>90</sup> Art 16 para 2 GC I; Art 19 para 2 GC II; and Art 122 para 2 GC III. Pictet Commentary GC I, at 166.

<sup>91</sup> Pictet Commentary GC III, at 574–5.

<sup>92</sup> In application of Art 16 para 2 GC I in the case of wounded, sick, or shipwrecked combatants, or Art 122 para 2 GC III in the case of able-bodied persons.

<sup>93</sup> Pictet Commentary GC II, at 138–9.

<sup>94</sup> Art 136 para 2 GC IV.

<sup>95</sup> Art 16 para 3 GC I; Art 19 para 3 GC II; Arts 120 para 2 and 122 para 9 GC III.

<sup>96</sup> Art 16 para 3 GC I; Art 19 para 3 GC II; Art 122 para 9 GC III; Art 139 GC IV.

<sup>97</sup> In addition to centralizing information, it transmits it to the Power on which the protected persons depend (see section B.IV of this chapter) and plays a role in the search for protected persons reported missing (see section B.V).

<sup>98</sup> Art 122 para 1 GC III; Art 136 para 1 GC IV.

<sup>99</sup> M. Sassòli, 'The National Information Bureau in Aid of the Victims of Armed Conflicts', 27 *IRRC* 256 (1987) 6, at 14–15.

<sup>100</sup> See, e.g., Resolution 14 (National Information Bureau), adopted at the 25th International Conference of the Red Cross, which urges state parties to the GCs 'to consider taking such measures as may be necessary to institute their National Information Bureau in peacetime in order for it to fulfil its tasks as soon as possible at the outbreak of hostilities': see ICRC, *National Information Bureau (NIB)*, available at <<http://www.icrc.org/eng/resources/documents/misc/57jmdh.htm>>; see also Art 13(1) Model Law on the Missing and related commentary.

<sup>101</sup> Sassòli, above n 99, at 8.

It is suggested that the NIB's independence vis-à-vis the state should not be too great since it is the latter's international responsibility to ensure that the NIB discharges its obligations properly.<sup>102</sup> To charge a body, which is part of the administration, with the task of running the NIB may be preferable to entrusting it to the National Society, since a state authority may have an easier time gathering information from uncooperative departments than a body outside the administration, and a Detaining Power may be reluctant to share information with a non-governmental authority due to security concerns. Members of the National Society working for the NIB may also be confronted with a dilemma as between their humanitarian duty and their duty as citizens of the Detaining Power. Lastly, outsourcing the running of the NIB may diminish the state party's sense of responsibility.<sup>103</sup> The duties of the NIB set out in GC III and GC IV may be assumed by two separate bodies or by one alone. In those cases where the NIB is run by a government authority, it may be preferable to assign two separate bodies, since the administrative units responsible for civilians under its power are generally not the same as those responsible for POWs.<sup>104</sup>

#### IV. Transmission of information to the power on which a person depends

The NIB is under an obligation immediately to transmit the information it receives by the most rapid means available to the Power on which the protected persons depend.<sup>105</sup> The Geneva Conventions envisage two channels by which the information may be forwarded to that Power: either through the intermediary of the Protecting Power, or via the Central Agency.<sup>106</sup> 34

The first option is of a rather theoretical nature, given that a Protecting Power has been designated in only five of the numerous armed conflicts that have broken out since the Second World War.<sup>107</sup> The usual method of forwarding information from the NIB to the Power on which the protected persons depend is via the Central Agency referred to in all four Geneva Conventions. In practice, it is the CTA of the International Committee of the Red Cross (ICRC), which is a permanent body working closely with National Societies, that plays the role of the central information agencies referred to in the Geneva Conventions.<sup>108</sup> Hence, the wording of Article 33(3) AP I, explicitly mentioning the CTA and referring to National Societies, better reflects the current institutional reality than the wording of the Geneva Conventions.<sup>109</sup> 35

<sup>102</sup> Ibid.      <sup>103</sup> Ibid, at 9.

<sup>104</sup> Ibid; thus, e.g., the NIB in the UK is split into two sections, the Prisoner of War Information Bureau (PWIB), run by the Ministry of Defence, and the Civilian Information Bureau (CIB), dealing with civilian internees within the UK national boundaries, which is run by the Home Office: ICRC Handbook, above n 15, at 18.

<sup>105</sup> Art 122 para 3 GC III and Art 137 para 1 GC IV; even absent a time requirement, Art 16 para 2 GC I and Art 19 para 2 GC II are interpreted this way: Pictet Commentary GC I, at 166, and Pictet Commentary GC II, at 141.

<sup>106</sup> Art 16 para 2 GC I, Art 19 para 2 GC II, and Art 122 para 3 GC III (referring to the Central Prisoners of War (Information) Agency); Art 137 para 1 GC IV (referring to the Central Information Agency in cases of civilians); as per Art 140 para 1 GC IV, these two agencies may be the same.

<sup>107</sup> Sassòli/Bouvier/Quintin, at 366; ICRC Commentary APs, para 1274; see Ch 27 of this volume.

<sup>108</sup> See Ch 49 of this volume; Sassòli, above n 99, at 11–12; ICRC, 'ICRC Protection Policy', 90 *IRRC* 871 (2008) 751, at 756.

<sup>109</sup> ICRC Commentary APs, para 1275.

- 36 In cases where combatants are in the hands of the enemy, the CTA forwards their information, documents, and objects to their country of origin and/or to the Power on which they depend.<sup>110</sup> For civilians, the receiving entity is either their country of origin and/or their country of residence.<sup>111</sup> From the wording of the relevant provisions—‘shall make it possible quickly to advise the next of kin concerned’<sup>112</sup> and ‘to advise his next of kin quickly’<sup>113</sup>—it follows that the state must forward the information, documents, and valuables to the families concerned as soon as possible.<sup>114</sup>
- 37 In some situations, the protected persons may consider it prejudicial to themselves or their relatives if information is forwarded to the Power on which they depend. For instance, a person who has fled his or her country due to persecution may prefer that his or her whereabouts remain unknown to the authorities of the state in question.<sup>115</sup> Furthermore, there may be situations where a protected person wishes to sever all links with his or her immediate family and relatives.<sup>116</sup>
- 38 Article 137 paragraph 2 GC IV takes this situation into account by providing an exception to the obligation of the NIB to forward information if it would be detrimental to the person concerned or his or her relatives. Yet even in such a case, the NIB must forward the information—with an indication of its confidential nature—to the CTA. However, the CTA is prohibited from transmitting the information to the Power on which the protected person depends.<sup>117</sup>
- 39 As regards combatants in the hands of the enemy, no similar provision exists in Geneva Conventions I, II, or III. Arguably, given the humanitarian character of the tasks assigned to the CTA, it should be possible for it to forward information to the family only and not to the authorities, as is the practice for information concerning civilians.<sup>118</sup> While the Power on which combatants depend may also have an interest in knowing the fate of its soldiers,<sup>119</sup> it is rather the individual who is at the centre of the Geneva Convention rules on the missing. As expressed by Article 32 AP I, activities implementing the rules on missing persons shall mainly be guided by the right of families to know the fate of their relatives. While this guiding principle may help solve the conflict of interest that arises when a person wishes for information to be given to his or her family alone, and not to the state authorities, it accentuates the conflict of interest when the combatant does not want information on his or her whereabouts to be shared with his or her next of kin. It is argued that in such situations, one might attempt to make the protected person understand the value of providing his or her family with the requisite information, yet such a course of action cannot be imposed on him or her.<sup>120</sup> This seems in line with the idea that actions taken in relation to missing persons should be prompted primarily,<sup>121</sup> but not exclusively, by the right of families to know the fate of their loved ones.

## V. Search for missing persons

- 40 As regards the search for protected persons, it is necessary to distinguish between two types of searches:

<sup>110</sup> Art 123 para 2 GC III; Sassòli, above n 99, at 12, fn 26.

<sup>111</sup> Art 140 para 2 GC IV.

<sup>112</sup> Art 122 para 4 GC III.

<sup>113</sup> Art 138 para 1 GC IV.

<sup>114</sup> Sassòli, above n 99, at 13.

<sup>115</sup> Pictet Commentary GC IV, at 531–2.

<sup>116</sup> Sassòli/Bouvier/Quintin, at 206.

<sup>117</sup> Art 137 para 2 GC IV, read together with Art 140 para 2 GC IV.

<sup>118</sup> Art 140 GC IV; Pictet Commentary GC IV, at 546.

<sup>119</sup> ICRC Commentary APs, para 1218.

<sup>120</sup> *Ibid.*, para 1219.

<sup>121</sup> See wording of Art 32 AP I.

- the search for casualties and their collection and evacuation, i.e. the physical search for persons by combing a certain area;<sup>122</sup> and
- searches of an investigative character, i.e. searches ranging from an enquiry into the whereabouts of a protected person to conducting a true investigation.<sup>123</sup>

While the physical search for persons is a precondition to collecting, recording, and forwarding information pertaining to their identity and whereabouts, and thus to preventing persons from going missing later on, the following considerations relate only to investigative searches.

While Article 33(1) AP I explicitly stipulates an obligation to search for persons who have been reported missing, the Geneva Conventions only implicitly contain such an obligation, providing that the NIB must reply to all enquiries about protected persons it receives,<sup>124</sup> which may sometimes necessitate a search.<sup>125</sup> Indeed, the idea that a satisfactory reply to a request can often be provided only after a careful search, is expressed by Article 122 paragraph 7 GC III, which obliges the NIB to take the necessary steps to receive information not yet in its possession but needed in order to answer an enquiry. Even absent an explicit counterpart in GC IV, the obligation to gather the necessary information is understood as being encompassed by the wording of Article 137 paragraph 1 GC IV, for otherwise it would be impossible to reply to *all* enquiries.<sup>126</sup> 41

A proposal to specify which individuals or entities may submit a request was rejected during the drafting process. From the retained wording, it is concluded that a broad spectrum of persons, institutions, and authorities may do so, notably the CTA but also private persons.<sup>127</sup> The NIB is only obliged to reply to enquiries sent to it concerning POWs<sup>128</sup> and persons protected by GC IV.<sup>129</sup> 42

The provisions setting out the obligation to reply to all enquiries do not contain any indication as to their application in time. However, among the provisions that apply in peacetime are those that regulate phenomena originating in or resulting from an armed conflict or occupation, but the effects of which extend beyond the conclusion of these situations. This criterion for applying an IHL provision in peacetime seems to be met regarding the search for persons who went missing in connection with an armed conflict or occupation and who are still missing even after these situations have ended.<sup>130</sup> This also follows from the fact that the drafters of Article 33(1) AP I, which pertains to the search for persons reported missing, did not retain a proposal explicitly stating that searches must be carried out without any time limit, because they considered this idea to be implicit in the provision.<sup>131</sup> 43

The obligation to search as set out in GC III and GC IV is limited in various respects, notably as to the categories of persons regarding whom a request may be submitted. Since these categories comprise only POWs and protected civilians, the obligation to reply to enquiries does not apply to combatants, for instance, who do not appear on lists of captured 44

<sup>122</sup> See, e.g., Art 15 GC I, Art 18 GC II, and Art 16 para 2 GC IV.

<sup>123</sup> ICRC Commentary APs, paras 1224 and 1233.

<sup>124</sup> Art 122 para 7 GC III and Art 137 para 1 GC IV; see also Art 26 GC IV.

<sup>125</sup> Pictet Commentary GC III, at 578. In other cases, the NIB may already be in possession of the relevant information, e.g., a death certificate that may be forwarded to the family concerned: Sassòli, above n 99, at 13.

<sup>126</sup> Pictet Commentary GC IV, at 530–1.

<sup>127</sup> Ibid, at 531.

<sup>128</sup> Art 122 para 7 GC III.

<sup>129</sup> Art 137 para 1 GC IV.

<sup>130</sup> Regarding Arts 33 and 74 AP I, see ICRC Commentary APs, para 149.

<sup>131</sup> Ibid, para 1239.

or deceased persons,<sup>132</sup> or to civilians who fail to meet the definition of a protected person in Article 4 GC IV. In comparison, the obligation to search stipulated in Article 33(1) AP I has a much broader personal scope of application, in that it relates to ‘persons who have been reported missing by an adverse Party’. While the wording of the provision requires only that the request stems from an adverse party, it is argued that this party must possess a genuine interest in enquiring into the fate and whereabouts of a person because, for instance, the missing person or his or her relatives is/are its national(s) or resident(s). In cases where the legitimacy of a request is contested, the interests of the families, i.e. their right to know, should prevail and the request be followed up.<sup>133</sup>

- 45 Furthermore, the Geneva Convention provisions intended to account for persons reported missing are limited in that they envisage only one specific way of obtaining information about the fate of a missing person—to address an enquiry to the NIB, which, in turn, is obliged to answer it. By comparison, the rather open-ended wording of Article 33(1) AP I allows for more leeway in determining the most appropriate way to account for a person who has gone missing, and it is addressed to the state in general and not only to the NIB, which may even be a non-governmental organization.<sup>134</sup> Lastly, unlike the Geneva Conventions, Article 33(1) AP I explicitly stipulates the duty of the requesting state to furnish and exchange information concerning missing persons, which facilitates the search. Overall, Article 33(1) AP I adds an important protective layer to the Geneva Conventions’ provisions pertaining to the search for missing persons.
- 46 A more general obligation to search for missing persons arguably exists by virtue of customary international law. For example, Rule 117 of the ICRC Customary International Humanitarian Law Study stipulates that each party to the conflict ‘must take all feasible measures to account for persons reported missing as a result of armed conflict’. This notably encompasses the obligation to search for missing persons and to provide the relatives with relevant information about them.<sup>135</sup> A general obligation to investigate the fate and whereabouts of missing persons, and to inform their relatives accordingly, may also be derived from IHRL.<sup>136</sup>
- 47 Various mechanisms and institutions exist that are designed to prevent persons from going missing, or which are tasked with processing and resolving cases of missing persons. They include the NIB and CTA, which derive their mandate directly from the Geneva Conventions. Furthermore, the Geneva Conventions provide for the setting up of bodies by way of agreement, in order to search for dispersed POWs and civilian internees. Thus, in order to assure the repatriation of POWs with as little delay as possible, parties to the conflict shall establish, by way of agreement, commissions tasked with the purpose of searching for dispersed POWs.<sup>137</sup> Meanwhile, in order to realize the goal that interment shall cease as soon as possible after the close of hostilities,<sup>138</sup> which is predicated on knowledge of who is interned where, GC IV stipulates that committees tasked with searching for dispersed internees may be set up.<sup>139</sup> While the provision pertaining to POWs is couched in more mandatory language than that pertaining to civilians, both provisions make the creation of such bodies dependent on an *agreement* between the respective parties, which is not always easy to reach given that their relationship is often marked by

<sup>132</sup> Ibid, paras 1188 and 1229.

<sup>133</sup> Ibid, paras 1225–7.

<sup>134</sup> See MN 33.

<sup>135</sup> For relevant state practice, see ICRC CIHL Study, vol II, Chapter 36, paras 1–94.

<sup>136</sup> See section D.I of this chapter.

<sup>137</sup> Art 119 para 7 GC III.

<sup>138</sup> Art 133 para 1 GC IV.

<sup>139</sup> Art 133 para 3 GC IV; Pictet Commentary GC IV, at 516.

animosity and distrust. However, practice demonstrates that—often in pursuance of a peace agreement—tracing bodies are established by way of agreement, and that their mandate *ratione personae* is often wider than that pertaining to dispersed POWs and internees.<sup>140</sup>

The United Nations Working Group on Enforced or Involuntary Disappearances 48 deserves mention as an example of an international body<sup>141</sup> facilitating the search for missing persons not rooted in IHL.<sup>142</sup> Its mandate is, inter alia, of a humanitarian nature in that it assists families in determining the fate or whereabouts of relatives who have disappeared. To this end, the Working Group receives reports submitted by the relatives of missing persons, directly or indirectly, and transmits them to the governments concerned.<sup>143</sup> It acts on a purely humanitarian basis, serving as a channel of communication between relatives of missing persons and the government concerned. Hence, its activities are not conditional on the ratification of a specific treaty by the respective states.<sup>144</sup> Furthermore, the Working Group's role ends when the fate or whereabouts of the missing person are clearly established, and it is not part of its mandate to establish responsibility for the disappearance.<sup>145</sup> Until recently, the mandate of the Working Group did not extend to disappearances occurring in international armed conflicts (IACs) given the competence of the ICRC in these situations.<sup>146</sup> However, in 2011, it decided to deal with all enforced disappearances, regardless of the type of armed conflict in which they arise. The Working Group's methods of work were amended accordingly, and went into effect on 1 January 2012.<sup>147</sup>

Lastly, the emergency procedure to seek and find a disappeared person established 49 under the ICED bears mention. A request for urgent action may be filed with the Committee on Enforced Disappearance<sup>148</sup> by any person who has a legitimate interest in the disappeared person. If the request to seek and find a specific person is in line with certain criteria, the Committee requires the respective state party to provide it with information on the person being sought. The Committee is competent to issue recommendations to the state, including the taking of necessary measures to locate and protect the person being sought. The Committee transmits information obtained by the state to the requesting party.<sup>149</sup>

<sup>140</sup> See, e.g., the Working Group on the Process of Tracing Persons Unaccounted for in Connection with the Conflict on the Territory of Bosnia and Herzegovina set up pursuant to the Dayton Peace Agreement: T. Blumenstock, 'Legal Protection of the Missing and Their Relatives: The Example of Bosnia and Herzegovina', 19 *LJIL* (2006) 773, at 779.

<sup>141</sup> National tracing bodies are not mentioned here; but see, e.g., Art 7 BiH Law on Missing Persons.

<sup>142</sup> Its original mandate derives from HRCComm, Res 20 (XXXVI) Question of Missing and Disappeared Persons (29 February 1980); since then, its mandate has been constantly renewed, most recently in 2011 for three years with HRCouncil, Res 16/16: Enforced or Voluntary Disappearances, UN Doc A/HRC/RES/16/16 (12 April 2011).

<sup>143</sup> HRCouncil, *Report of the Working Group on Enforced and Involuntary Disappearances*, UN Doc A/HRC/19/58/Rev.1 (2 March 2012) (hereinafter Report of the UNWGEID (2012)), Annex 11, para 2.

<sup>144</sup> OHCHR, *Enforced or Involuntary Disappearances: Fact Sheet, No 6 (Rev 3)*, available at <<http://www.ohchr.org/Documents/Publications/FactSheet6Rev3.pdf>>, at 12–13.

<sup>145</sup> *Ibid.*, at 15.

<sup>146</sup> HRCouncil, *Report of the Working Group on Enforced and Involuntary Disappearances*, UN Doc A/HRC/16/48 (26 January 2011) Annex I, para 11.

<sup>147</sup> Report of the UNWGEID (2012), above n 143, para 4.

<sup>148</sup> On the Committee on Enforced Disappearances, see also MN 54.

<sup>149</sup> Art 30 ICED.

- 50 Mechanisms and institutions tasked with processing and resolving cases of missing persons increasingly rely on information technology and electronic tools for collecting, storing, and analysing data relating to persons who are unaccounted for. Thus, for instance, more than 50 institutions—among them NIBs—work with the Ante-Mortem/Post-Mortem database developed by the ICRC.<sup>150</sup> The development of forensic science, most notably in the field of DNA-based identification, has also opened up new avenues in the search for missing persons. The International Commission on Missing Persons, for instance, which operates a DNA human identification facility, identified over 17,000 persons who went missing in the conflicts taking place in the former Yugoslavia, by matching DNA profiles of missing persons with those of family members.<sup>151</sup> While DNA-based identification methods greatly enhance the likelihood that persons do not remain unaccounted for, the processing of this very sensitive data may involve data protection issues. Absent any binding rules on protecting genetic data in international law,<sup>152</sup> the issue is mainly governed by domestic law and general human rights norms relating to privacy, non-discrimination, or human dignity.<sup>153</sup>

### C. Relevance in Non-International Armed Conflicts

- 51 Neither Common Article 3 nor AP II contains explicit provisions relating to missing persons. Yet even absent such rules, various obligations aimed at preventing persons from going missing in NIACs, or to clarify the fate and whereabouts of persons who have gone missing in a NIAC, exist by virtue of customary IHL and IHRL.
- 52 The obligation to record personal details of persons deprived of their liberty is said to be a norm of customary international law applicable in NIACs.<sup>154</sup> What is more, various binding human rights instruments contain an obligation to record details of persons deprived of their liberty, which contributes to the prevention of enforced disappearances specifically.<sup>155</sup> As regards the centralized collection of information and the forwarding of such information to families, it bears mentioning that the NIB may also assume this task in the case of a NIAC.<sup>156</sup> Also, the CTA's activities extend to NIACs.<sup>157</sup>
- 53 As regards the search for missing persons, Article 8 AP II is not applicable because the provision pertains to physical searches rather than to those of an investigative nature.<sup>158</sup> However, the obligation to take all feasible steps to account for persons reported missing, and to inform families of their fate and whereabouts, is arguably a customary IHL rule.<sup>159</sup> What is more, that states must clarify and investigate cases of persons who are

<sup>150</sup> ICRC Resource Centre, 'The Ante-Mortem/Post-Mortem Database, An Information Management Application for Missing Persons/Forensic Data' (September 2012), available at <<http://www.icrc.org/eng/assets/files/2013/ampm-database-information-sheet-icrc-2012.pdf>>, at 2.

<sup>151</sup> International Commission on Missing Persons, 'About Us', available at <<http://www.ic-mp.org/about-us/>> and 'DNA analysis: Only Way in Identification Process' <<http://www.ic-mp.org/activities/technical-assistance/dna>>.

<sup>152</sup> For soft law, see International Declaration on Human Genetic Data (adopted 16 October 2003), Records of the General Conference (UNESCO), 32nd Session, vol I: Resolutions, Ch IV, at 39–48.

<sup>153</sup> ICRC, *Missing People, DNA Analysis and Identification of Human Remains* (2nd edn, Geneva: ICRC, 2009), available at <[http://www.icrc.org/eng/assets/files/other/icrc\\_002\\_4010.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_4010.pdf)>, at 39.

<sup>154</sup> ICRC CIHL Study, Rule 123, and vol I, at 439.

<sup>155</sup> Art XI para 2 Inter-American Convention on Forced Disappearance of Persons (1994); Art 17(3) ICED.

<sup>156</sup> ICRC Handbook, above n 15, at 31; Art 13(1) Model Law on the Missing.

<sup>157</sup> ICRC Protection Policy, above n 108, at 756.

<sup>158</sup> ICRC Commentary APs, para 4648, which refers to provisions on physical searches discussed at MN 40.

<sup>159</sup> See ICRC CIHL Study, Rule 117; on its application in NIACs, see *ibid*, vol I, at 421.

unaccounted for, and impart information about their fate and whereabouts to their families, is clearly required by virtue of various human rights norms. Further, regarding enforced disappearances specifically, the right to know the truth is explicitly stipulated in Article 24(2) ICED.<sup>160</sup>

## D. Legal Consequences of a Violation

### I. State responsibility

As mentioned, enforced disappearances are an important—albeit not the sole—reason for persons going missing in situations of armed conflict or occupation.<sup>161</sup> When the ICED was adopted in 2006, a distinct and autonomous human right not to be subjected to enforced disappearance was created, one which had never existed before at the universal level, and the violation of which may engage state responsibility. The Committee on Enforced Disappearances, the monitoring body of the ICED, assumes the two rather traditional roles of receiving and examining individual and inter-state communications concerning enforced disappearances.<sup>162</sup> Moreover, it has also the power to bring the practice of widespread or systematic enforced disappearances to the attention of the United Nations (UN) General Assembly, after seeking information on the matter from the state.<sup>163</sup>

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Relatives of persons who are unaccounted for have a right to know the fate and whereabouts of their next of kin. Various domestic,<sup>164</sup> regional, and international courts and human rights bodies have, by virtue of different human rights norms, affirmed the existence of a positive obligation of the state to account for the fate and whereabouts of persons who went missing due to acts amounting to enforced disappearance specifically or because of other state conduct.

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At the universal level, the United Nations Human Rights Committee (HRCttee) has construed a positive obligation of the state to investigate cases of persons who are unaccounted for by virtue of a series of rights. In its General Comment on the right to life, it held that states should establish 'effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right of life'.<sup>165</sup> Furthermore, the continuing uncertainty as to the fate or whereabouts of a missing person due to the absence of a full investigation into his or her disappearance causes anguish and stress on the part of relatives that may amount to inhuman treatment.<sup>166</sup> Moreover, the failure to conduct a thorough and effective investigation into the whereabouts and fate of a person, or inadequately to share information gathered from such an investigation, is in violation of the right to an effective remedy.<sup>167</sup>

<sup>160</sup> On the right to truth, see sections A.II and D.I of this chapter and MN 66.

<sup>161</sup> See MN 1.

<sup>162</sup> Arts 31–32 ICED.

<sup>163</sup> Art 34 ICED. On its competence regarding the emergency procedure to seek and find disappeared persons, see MN 49.

<sup>164</sup> See, e.g., the case law of the Human Rights Chamber for Bosnia and Herzegovina discussed in Blumenstock, above n 140, at 780–92.

<sup>165</sup> Art 6 ICCPR (1966); HRCttee, *General Comment 6: The Rights to Life (Art 6)* (30 April 1982), para 4; see also HRCttee, *Bousroual v Algeria*, Comm No 1085/2002, 15 March 2006, paras 9.10–9.11.

<sup>166</sup> Art 7 ICCPR; HRCttee, *Quinteros v Uruguay*, Comm No 107/1981, 21 July 1983, para 14; HRCttee, *Sarma v Sri Lanka*, above n 12, para 9.5; HRCttee, *Bousroual v Algeria*, above n 165, para 9.8.

<sup>167</sup> Art 2(3) ICCPR; HRCttee, *Sarma v Sri Lanka*, above n 12, para 11; HRCttee, *El Hassy v The Libyan Arab Jamahiriya*, Comm No 1422/2005, 24 October 2007, para 6.9.

- 57 At the regional level, the European Court of Human Rights has established a positive obligation of the state to investigate the facts surrounding the fate and whereabouts of a person who has disappeared, and to bring such facts to the attention of the victim's relatives by virtue of various rights. The absence of a prompt and effective investigation into an arguable claim that a person had been taken into custody and had not been seen since was found to be in breach of the procedural dimension of the right to liberty.<sup>168</sup> Furthermore, the procedural dimension of the right to life requires state authorities 'to conduct an official investigation into an arguable claim that a person, who was last seen in their custody, subsequently disappeared in a life-threatening context'.<sup>169</sup> The ongoing failure to provide the requisite investigation—an obligation that potentially exists as long as the fate of the person who is unaccounted for is unknown—constitutes a continuing violation of the right to life.<sup>170</sup> Lastly, the Court has found that a failure on the part of state authorities to investigate the fate and whereabouts of a person who disappeared may amount to inhuman treatment of the missing person's relatives, who are kept in the dark as to the fate of their next of kin and who suffer the anguish of uncertainty.<sup>171</sup>
- 58 The Inter-American Court of Human Rights affirmed a duty to investigate cases of missing persons, which continues as long as there is uncertainty about the fate of the person who has disappeared, and to inform the relatives accordingly.<sup>172</sup> The Court decided that a lack of effective investigation to ascertain the fate of a person who is unaccounted for, and a failure to provide information, generates feelings of insecurity, frustration, and impotence, in addition to suffering and anguish, which may violate the right to mental and moral integrity of the next of kin.<sup>173</sup> In addition, it found that by virtue of the rights to a fair trial and judicial protection, relatives have a right to have disappearances investigated effectively, and a right to seek and receive information.<sup>174</sup> What is more, the Court held that the right to freedom of thought and information protects not only the expression of opinions, but also the right to seek, receive, and impart information and ideas of all kinds, notably where disappearances are concerned.<sup>175</sup>
- 59 For its part, the African Commission on Human and Peoples' Rights decided that the refusal to inform the family if and where an individual is held, amounts to inhuman treatment of the family concerned.<sup>176</sup>

<sup>168</sup> Art 5 ECHR (1950); ECtHR (GC), *Cyprus v Turkey*, above n 13, para 150; ECtHR, *Palić v Bosnia and Herzegovina*, Judgment, 15 February 2011, para 79; ECtHR, *Imakayeva v Russia*, Judgment, 9 February 2007, para 171; ECtHR, *Bazorkina v Russia*, Judgment, 11 December 2006, para 146.

<sup>169</sup> Art 2 ECHR; ECtHR, *Palić v Bosnia and Herzegovina*, above n 168, para 63. See also ECtHR (GC), *Cyprus v Turkey*, above n 13, paras 131–2; and ECtHR (GC), *Varnava and others v Turkey*, Judgment, 18 September 2009, para 148.

<sup>170</sup> ECtHR (GC), *Varnava and others v Turkey*, above n 169, para 148.

<sup>171</sup> Art 3 ECHR; see, e.g., ECtHR (GC), *Cyprus v Turkey*, above n 168, paras 156–7; ECtHR, *Kurt v Turkey*, Judgment, 25 May 1998, paras 130–4; ECtHR, *Timurtaş v Turkey*, Judgment, 13 June 2000, paras 91–8; ECtHR, *Bazorkina v Russia*, above n 168, paras 137–42; ECtHR (GC), *Varnava and others v Turkey*, above n 169, para 200.

<sup>172</sup> IACtHR, *Case of Velásquez-Rodríguez v Honduras*, Judgment (Merits), 29 July 1988, para 181.

<sup>173</sup> Art 5(1) ACHR (1969); IACtHR, *Gomes Lund et al ('Guerrilha do Araguaia') v Brazil*, Judgment (Preliminary Objections, Merits, Reparations, and Costs), 24 November 2010, paras 241–3.

<sup>174</sup> Arts 8(1) and 25 ACHR; IACtHR, *Blake v Guatemala (Blake case)*, Judgment, 24 January 1998, para 97; IACtHR, *Case of Bámaca-Velásquez v Guatemala*, Judgment (Reparations and Costs), 22 February 2002, paras 74–6; *Gomes Lund et al*, above n 173, para 212.

<sup>175</sup> Art 13 ACHR; *Gomes Lund et al*, above n 173, paras 196–202 and 212.

<sup>176</sup> Art 5 ACHPR, 27 June 1981; ACHPR, *Amnesty International and others v Sudan*, Comm Nos 48/90, 50/91, 89/93 (1999), para 54.

## II. Criminal responsibility

In cases where a national legislature has criminalized acts amounting to a systematic and deliberate denial of the right to know the fate of one's relative, criminal liability may arise under domestic law for a failure to fulfil the obligations relating to the search for missing persons. As regards missing persons in general, the Model Law on the Missing stipulates that states shall adopt legislation in order to criminalize acts amounting to such conduct, notably the unjustified refusal by an official to provide data on a missing person, the undue or delayed provision of information on a missing person, the intentional provision of false and unverified data, and the systematic and deliberate denial of the right to inform relatives of one's capture, arrest, address, and state of health, and to exchange news with relatives in detention.<sup>177</sup> 60

Such provisions may, for instance, be found in the Law on Missing Persons of Bosnia and Herzegovina of 2004. An official is liable to a fine if he or she blocks access to information by a relative or an institution in charge of tracing, delays or hinders, without justified cause, the availability of the requested information, or delivers incorrect or outdated information, thus hindering a search or making it impossible to trace a person.<sup>178</sup> Interestingly enough, the BiH Law on Missing Persons goes beyond criminal responsibility of natural persons and provides for institutions or competent authorities to be held criminally liable if they impede access to information, be it a relative's access or that of an institution tasked with tracing missing persons, or if they enable any form of discrimination against family members of a person reported missing.<sup>179</sup> 61

In the context of state responsibility, we concluded that the systematic and persistent failure to search for missing persons, and the resulting continued uncertainty about their fate, may amount to 'inhuman treatment' of the relatives of missing persons.<sup>180</sup> Inhuman treatment, in turn, is an act listed as a grave breach in the Geneva Conventions if committed against protected persons.<sup>181</sup> Hence, the persistent and systematic failure to search for missing persons arguably qualifies as a grave breach if a Power could find the missing person, has control over the relatives who are protected persons, and deliberately chooses not to search for the person who went missing in order to inflict suffering on his or her relatives. 62

Turning now to the narrower concept of enforced disappearances specifically, the ICED 63 obliges state parties to criminalize the failure to record instances of deprivation of liberty and the recording of false information. Hence, the Convention requires legislation criminalizing a failure to prevent persons from disappearing by duly recording certain information. Furthermore, the refusal to provide information on the deprivation of liberty or the provision of inaccurate information must carry a criminal sanction. In addition, states must impose sanctions for the delay or obstruction of two specific remedies—the judicial remedy to obtain certain information regarding a person deprived of his or her liberty, and the right have the lawfulness of detention reviewed by a court—both of which are granted to persons who have a legitimate interest in such information.<sup>182</sup>

<sup>177</sup> Arts 24 and 25 Model Law on the Missing.

<sup>178</sup> Art 25 para 1 BiH Law on Missing Persons.

<sup>179</sup> Art 25 para 2 BiH Law on Missing Persons.

<sup>180</sup> See MN 56, 57, and 59; see also ICRC Report, *The Missing and their Families, Summary of the Conclusions arising from Events Held Prior to the International Conference of Governmental and Non-Governmental Experts (19–21 February 2003)*, available at <[http://www.icrc.org/eng/assets/files/other/icrc\\_themissing\\_012003\\_en\\_10.pdf](http://www.icrc.org/eng/assets/files/other/icrc_themissing_012003_en_10.pdf)>, at 29.

<sup>181</sup> Art 50 GC I; Art 51 GC II; Art 130 GC III; Art 147 GC IV.

<sup>182</sup> Art 22 ICED.

- 64 Enforced disappearance is among the punishable acts that may amount to a crime against humanity when committed as part of a widespread or systematic attack against the civilian population. While the definition of ‘crimes against humanity’ of the International Criminal Court (ICC) Statute includes enforced disappearance in the list of punishable acts,<sup>183</sup> the International Criminal Tribunal for the former Yugoslavia (ICTY) Statute does not. However, the ICTY stated in dicta that enforced disappearance may amount to inhuman treatment, which is among the punishable acts of the crime against humanity definition of the ICTY Statute.<sup>184</sup> The ICED simply states that the widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law.<sup>185</sup>

### E. Critical Assessment

- 65 In 1949, the adoption of the Geneva Conventions’ provisions on the missing constituted a major step forward as regards the protection of persons at risk from disappearing and the ascertainment of their fate—especially for civilians. And yet the whole of the population of countries in conflict does not come within the protective ambit of these rules. This shortcoming of the Geneva Conventions *ratione personae* is accentuated by the fact that over the last decades, civilian populations have increasingly become the target of violence, and sometimes control over a civilian population is itself at stake in conflicts.
- 66 An important normative development pertaining to the issue of missing persons took place in 1977 with the adoption of AP I, which is today rather widely ratified. Not only does one find the idea of the right of families to know the fate of their relatives expressly mentioned for the first time in a multilateral treaty, but one also finds IHL rules on missing persons applied to an enlarged circle of persons. In addition, domestic, regional, and international courts and human rights bodies have developed the right to truth in relation to disappearances, with considerable resolve. Hence, as regards IACs, a solid body of norms aimed at preventing persons from going missing and clarifying cases of persons who have disappeared exists today. Also in NIACs, despite the silence of treaty-based IHL in respect of the missing, a number of obligations requiring that persons are accounted for flow from IHRL and customary IHL.
- 67 These normative developments and the current state of law regarding missing persons in armed conflict stands in stark contrast to the notable number of persons who have disappeared in more recent conflicts. This demonstrates that the prevention of disappearances and the search for missing persons is not an issue solely predicated on law and the completeness of the legal framework; it is rather an issue highly influenced by political and humanitarian choices, in particular those of the parties to the conflict. Hence, if the rules on the missing are to overcome their aspirational character, it seems necessary to work towards the dissemination of these rules and convince parties to the conflict that it is in their mutual interest to comply with them.

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<sup>183</sup> Art 7(1)(i) ICC Statute.

<sup>184</sup> ICTY, *The Prosecutor v Zoran Kupreškić et al*, Trial Chamber Judgment, IT-95-16-T, 14 January 2000, para 566 (dicta).

<sup>185</sup> Art 5 ICED.