

# Determining the fate of missing persons: The importance of archives for “dealing with the past” mechanisms

**Elisabeth Baumgartner and Lisa Ott**

Elisabeth Baumgartner and Dr Lisa Ott are Co-Heads of the Dealing with the Past Program at swisspeace.

Elisabeth Baumgartner coordinates the project Archives and Dealing with the Past, mandated and financed by the Swiss Federal Department of Foreign Affairs. She is a Swiss attorney at law who has previously worked for the International Committee of the Red Cross and the Office of the Prosecutor of the Special Court for Sierra Leone in Freetown. She teaches international criminal law at the University of Lucerne and was a member of the Swiss National Commission for the Prevention of Torture.

Dr Lisa Ott previously worked with the UN Office of the High Commissioner for Human Rights in Nepal and Colombia. She worked as a Research and Teaching Assistant at the University of Lucerne, where she also completed her PhD on enforced disappearance in international law.

## **Abstract**

*This article discusses the role of archives of transitional justice and “dealing with the past” (DWP) mechanisms when determining the fate of missing persons. The concept of dealing with the past, the terms “enforced disappearance” and “missing person”,*

and the specific role of archives in periods of transition are examined. Subsequently, specific questions and challenges related to access and use of archives by DWP mechanisms, including those mechanisms with a mandate to determine the fate of missing persons, are described. Many questions related to access to archives, information management and preservation of records are similarly applicable to DWP mechanisms in general and to specific mechanisms mandated to search for missing persons. The article provides some examples of States' obligations related to maintaining and providing access to archives that could assist in the search for missing persons under international law and policy. The article concludes by emphasizing the importance of the preservation and protection of archives relevant for dealing with the past. It further highlights the need to grant DWP mechanisms, especially those aimed at determining the fate of missing persons, access to those archives.

**Keywords:** dealing with the past, archives, missing persons/enforced disappearance, transitional justice.

.....

## Introduction

Archives play a crucial role in processes of transition, particularly in situations where societies go through processes that are commonly referred to as “transitional justice”<sup>1</sup> or “dealing with the past”.<sup>2</sup> Archives are a fundamental basis for the work of so-called “dealing with the past” (DWP) mechanisms, the institutions and measures that aim at helping societies to cope with a past which is marked by violence, dictatorship and massive human rights violations.

- 1 The United Nations (UN) define transitional justice as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.” *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, UN Doc. S/2004/616, 23 August 2004, available at: <http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/2004/616&Lang=E> (all internet references were accessed in July 2018). The International Centre for Transitional Justice (ICTJ) defines transitional justice as “the ways countries emerging from periods of conflict and repression address large scale or systematic human rights violations so numerous and so serious that the normal justice system will not be able to provide an adequate response.” See: [www.ictj.org/about/transitional-justice](http://www.ictj.org/about/transitional-justice). According to the *Stanford Encyclopaedia of Philosophy*, transitional justice is “a field of academic inquiry, as well as political practice, concerned with the aftermath of conflict and large-scale human rights abuses”. See: <https://plato.stanford.edu/entries/justice-transitional/>.
- 2 For a detailed discussion on the concept of dealing with the past, see swisspeace, *A Conceptual Framework for Dealing with the Past: Holism in Principle and Practice*, swisspeace Essential No. 03/2013, 2013, available at: [www.swisspeace.ch/fileadmin/user\\_upload/Media/Publications/Essentials/Essential\\_3\\_2013.pdf](http://www.swisspeace.ch/fileadmin/user_upload/Media/Publications/Essentials/Essential_3_2013.pdf); Jonathan Sisson, “A Conceptual Framework for Dealing with the Past”, *Dealing with the Past*, Politorbis No. 50, Federal Department of Foreign Affairs, Bern, 2010, pp. 11–16, available at: [www.eda.admin.ch/publikationen/fr/eda/schweizer-aussenpolitik/reihe-politorbis/archiv-politorbis/politorbis-50.html](http://www.eda.admin.ch/publikationen/fr/eda/schweizer-aussenpolitik/reihe-politorbis/archiv-politorbis/politorbis-50.html).

Depending on the national and at times international political context, a broad range of specifically established mechanisms and sometimes ordinary constitutional institutions contribute to this difficult task: DWP mechanisms thus include fact-finding and truth commissions; international, hybrid or domestic courts; reparations programmes; procedures to demobilize and reintegrate armed actors; and institutional reforms. As the search for missing persons is considered a fundamental part of dealing with the past, entities mandated to search for missing and forcibly disappeared persons are also considered DWP mechanisms.<sup>3</sup>

All DWP mechanisms both use and produce archives, which often contain relevant information related to the search for missing persons, irrespective of whether it is part of their mandate to determine the fate of missing persons. For instance, one of the first truth commissions, the National Commission on the Disappearance of Persons (Comisión Nacional sobre la Desaparición de Personas, CONADEP) in Argentina, had the mandate to clarify the fate of persons that were forcibly disappeared during the military regime between 1976 and 1983.<sup>4</sup> Other truth commissions with a broader mandate than CONADEP followed and carried out substantial, sometimes even forensic investigations into the fate of disappeared persons.<sup>5</sup> Those commissions produced important archives that can be used by subsequent bodies to further investigate missing persons cases.

This article argues that access to archives is crucial for the search for missing persons, and that therefore archives containing such information must be preserved for the future and must be accessible to mechanisms mandated to search for missing persons. After briefly presenting the basic concepts relevant to the topic, the article will discuss issues around access to archives (particularly State archives), analysis of archival information and how such archival material is used in DWP processes with a view to resolving missing persons cases. Subsequently, the international standards on missing and forcibly disappeared persons relevant for documentation and archives will be presented.

3 J. Sisson, above note 2, p. 14.

4 For the final report of the Commission, see CONADEP, *Nunca Más: Informe de la Comisión Nacional sobre la Desaparición de Personas*, 1984, available at: [www.desaparecidos.org/arg/conadep/nuncamas/](http://www.desaparecidos.org/arg/conadep/nuncamas/) (English version available at: [www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain\\_001.htm](http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain_001.htm)). See also Thomas C. Wright, *Impunity, Human Rights, and Democracy: Chile and Argentina, 1990–2005*, University of Texas Press, Austin, TX, 2014, pp. 27 ff.; Emilio Crenzel, “Argentina’s National Commission on the Disappearance of Persons: Contributions to Transitional Justice”, *International Journal of Transitional Justice*, Vol. 2, No. 2, 2008.

5 E.g. in Peru, where the mandate of the Truth and Reconciliation Commission was to investigate killings, torture, disappearances, displacement, employment of terrorist methods and other violations attributable to the State, the Shining Path and the Túpac Amaru Revolutionary Movement between May 1980 and November 2000, during the administrations of former presidents Fernando Belaúnde (1980–85), Alan García (1985–90) and Alberto Fujimori (1990–2000). See United States Institute of Peace (USIP) Truth Commissions Digital Collection, available at: [www.usip.org/publications/2001/07/truth-commission-peru-01](http://www.usip.org/publications/2001/07/truth-commission-peru-01).

In Guatemala, the Commission for Historical Clarification was tasked with investigating human rights violations and acts of violence that had occurred between January 1962 and 29 December 1996, during thirty-five years of conflict. See Joanna Crandall, “Truth Commissions In Guatemala And Peru: Perpetual Impunity And Transitional Justice Compared”, *Peace, Conflict and Development*, No. 4, April 2004, p. 5. It operated for two years from 1997 to 1999. See also: [www.usip.org/publications/1997/02/truth-commission-guatemala](http://www.usip.org/publications/1997/02/truth-commission-guatemala).

## Basic concepts

### Dealing with the past

In this article, the term “dealing with the past” is used rather than “transitional justice”, as it is broader and emphasizes that transition measures go beyond pure justice measures. The search for missing persons during and after conflict and dictatorial regimes is an important objective of judicial and non-judicial measures that help societies cope with atrocities that were committed in the past.<sup>6</sup> Coming to terms with past massive human rights violations and dictatorial systems, including enforced disappearances, is a huge challenge for the societies concerned and often takes several generations. Dealing with a painful past is part of a political and social transition process, which generally includes a number of different actors and mechanisms with diverse perceptions of “the past”.<sup>7</sup> It encompasses processes, mechanisms and institutions that help societies emerging from armed conflict or authoritarian regimes to deal with a legacy of human rights violations and violations of international humanitarian law (IHL).<sup>8</sup> It is argued that dealing with a past which is marked by massive violence should be a “necessary precondition for the establishment of the rule of law and the pursuit of reconciliation”.<sup>9</sup> The search for missing persons is often an important first step in such a process and the immediate priority for relatives and victims, the quest for justice being secondary in many contexts.<sup>10</sup> IHL and human rights law recognize that family members have an “imprescriptible right to be informed of

6 J. Sisson, above note 2, p. 14; Anne-Marie La Rosa and Monique Crettol, “The Missing and Transitional Justice: The Right to Know and the Fight against Impunity”, *International Review of the Red Cross*, Vol. 88, No. 862, 2006, available at: [www.icrc.org/en/international-review/article/missing-and-transitional-justice-right-know-and-fight-against-impunity](http://www.icrc.org/en/international-review/article/missing-and-transitional-justice-right-know-and-fight-against-impunity). See also Vasuki Nesiah, “Overcoming Tensions between Family and Judicial Procedures”, *International Review of the Red Cross*, Vol. 84, No 848, 2002, available at: [www.icrc.org/en/download/file/20255/irrc\\_848.pdf](http://www.icrc.org/en/download/file/20255/irrc_848.pdf).

7 Briony Jones, Elisabeth Baumgartner and Sidonia Gabriel, *A Transformative Approach to Dealing with the Past*, swisspeace Essential No. 01/2013, 2013, available at: [www.swisspeace.ch/publications/essentials.html](http://www.swisspeace.ch/publications/essentials.html). Transitional justice and “dealing with the past mechanisms often have a tendency to seek closure through an end to direct violence and a desire to manage and somehow neutralise conflict within societies in transition.” Yet conflict transformation is concerned with conflict as part of society and human life, and academics therefore suggest that dealing with the past and transitional justice are part of social and political negotiations. Briony Jones, “Analysing Resistance to Transitional Justice: What Can We Learn from Hybridity?”, *Conflict and Society*, Vol. 2, No. 1, 2006.

8 The Swiss Ministry of Foreign Affairs and swisspeace, for instance, developed a framework based on the “principles against impunity” developed by legal scholar Louis Joinet in his influential 1997 report to the UN Commission on Human Rights. See Louis Joinet, *The Administration of Justice and the Human Rights of Detainees: Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)*, Final Revised Report Prepared Pursuant to Sub-Commission Decision 1996/119, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997 (Joinet Principles), available at: <https://undocs.org/E/CN.4/Sub.2/1997/20/Rev.1>. Professor Diane Orentlicher updated the principles in UN Docs E/CN.4/2005/102 and E/CN.4/2005/102/Add.1, 8 February 2005, available at: [www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/InternationalInstruments.aspx](http://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/InternationalInstruments.aspx).

9 J. Sisson, above note 2, p. 11.

10 Simon Robins, *Families of the Missing: A Test for Contemporary Approaches to Transitional Justice*, Routledge, New York, 2013; see also V. Nesiah, above note 6.

the fate and/or whereabouts of the disappeared person”.<sup>11</sup> While the task of a missing persons commission focuses on the search for individual persons, other DWP mechanisms, such as truth commissions, have a much broader mandate to investigate not only individual human rights violations but also the larger historical, political and conflict context in which they occurred.<sup>12</sup> Nevertheless, a number of truth commissions in the past had the explicit mandate to investigate the fate of missing persons.<sup>13</sup>

## Missing persons and victims of enforced disappearance

Different definitions of the term “missing persons” can be found in policy and practice.<sup>14</sup> Though there are both narrower and broader definitions of the term, this article uses the wide definition developed by the International Committee of the Red Cross (ICRC), whereby a “missing person” is

a person whose whereabouts are unknown to his/her relatives and/or who, on the basis of reliable information, has been reported missing in accordance with national legislation in connection with an international or non-international armed conflict, a situation of internal violence or disturbances, natural catastrophes or any other situation that may require the intervention of a competent State authority.<sup>15</sup>

This includes a range of different sub-groups, including persons who may have died as well as living persons and children separated from their families. For example, persons who may have been killed and unaccounted for in combat or in detention are considered missing because their families do not know where they are.

The applicable international and domestic legal framework varies depending on the context and specific case: while the norms and principles enshrined in IHL apply to situations in which persons have gone missing in the framework of international and non-international armed conflicts, the provisions set out in the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED)<sup>16</sup> envisage situations in which persons have

11 See Joint Principles, above note 8, Principle 3.

12 For a comprehensive overview, see Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd ed., Routledge, London and New York, 2011.

13 See the references cited in above note 5.

14 Derek Congram, “Missing Persons and Those Who Seek Them: Questions of Perspective and Place”, in Derek Congram (ed.), *Missing Persons: Multidisciplinary Perspectives on the Disappeared*, Canadian Scholars Press, Toronto, 2016. See also S. Robins, above note 10, pp. 19–22.

15 ICRC, “Guiding Principles/Model Law on the Missing”, in *The Domestic Implementation of International Humanitarian Law: A Manual*, 2015, Annex IV, available at: [www.icrc.org/eng/resources/documents/publication/pdvd40.htm](http://www.icrc.org/eng/resources/documents/publication/pdvd40.htm). See also Marie-Louise Tougas and Marco Sassòli, “The ICRC and the Missing”, *International Review of the Red Cross*, Vol. 84, No. 848, 2002, available at: [www.icrc.org/en/download/file/20255/irrc\\_848.pdf](http://www.icrc.org/en/download/file/20255/irrc_848.pdf). See also the article by Ximena Londoño and Alexandra Ortiz in this issue of the *Review*.

16 International Convention for the Protection of All Persons from Enforced Disappearance, UN Doc. A/RES/61/177, 20 December 2006 (entered into force 23 December 2010), available at: [www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx](http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx).

been subjected to enforced disappearance, whether in peacetime or in war. The ICPPED defines enforced disappearance as

arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.<sup>17</sup>

Under certain circumstances, enforced disappearances can also be committed by non-State actors.<sup>18</sup>

Many of the international principles aimed at preventing persons from going missing or determining the fate and whereabouts of persons were developed in the case law of international human rights monitoring bodies in cases of enforced disappearances<sup>19</sup> and enshrined in legal instruments addressing enforced disappearance.<sup>20</sup> As enforced disappearance is considered one of the most atrocious violations of human rights committed during armed conflicts or by repressive regimes,<sup>21</sup> it usually receives a great degree of attention in DWP processes. Notwithstanding, the families of persons who have gone missing for other reasons – for example, as a result of indiscriminate actions in combat – also have the right to know what happened to their loved ones and for the acts in question to be properly investigated.<sup>22</sup> Therefore, the analysis in this article refers to “missing persons” as the broader category of cases relevant in DWP processes. Where considerations are solely relevant to cases of enforced disappearance, this will be explicitly stated.

## Archives and dealing with the past

Archives, as long-term holders of information, can play an important role in DWP processes because they can form the basis for the creation – as well as the

17 ICPPED, Art. 2. For a more detailed discussion of this definition, see e.g. Lisa Ott, *Enforced Disappearance in International Law*, Intersentia, Mortsels, 2011, pp. 15 ff.

18 ICPPED, Art. 3. For a detailed analysis of these circumstances, see e.g. L. Ott, above note 17, pp. 200 ff.

19 For instance, Inter-American Court of Human Rights (IACtHR), *Velasquez Rodriguez v. Honduras*, Judgment, 29 July 1988, (Ser. C) No. 4 (1988), para. 155; European Court of Human Rights, *Kurt v. Turkey*, Judgment, 25 May 1998, *Reports 1998-III*, No. 74, para. 117; Human Rights Commission, *Nydia Erika Bautista de Arellano v. Colombia*, Communication No. 563/1993, 27 October 1995, para. 8.5.

20 See Declaration on the Protection of All Persons from Enforced Disappearance, adopted by UNGA Res. 47/133, 18 December 1992, available at: [www.un.org/documents/ga/res/47/a47r133.htm](http://www.un.org/documents/ga/res/47/a47r133.htm).

21 See e.g. the fifth preambular paragraph of the ICPPED: “Aware of the extreme seriousness of enforced disappearance, which constitutes a crime and, in certain circumstances defined in international law, a crime against humanity ...”. See also the third preambular paragraph of the Declaration on the Protection of all Persons from Enforced Disappearance, above note 20: “Considering that enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts is of the nature of a crime against humanity ...”.

22 See UNGA Res. 68/165, “Right to the Truth”, 18 December 2013, available at: [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/RES/68/165](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/RES/68/165).

contestation – of narratives within a society on what happened in the past. Scholars and practitioners assume that finding a commonly accepted narrative about past events enhances reconciliation, particularly if this narrative can be conveyed and communicated to younger generations.<sup>23</sup> Such narratives may change over time as a society’s or parts of a society’s perception of past injustices changes.<sup>24</sup> However, if the basis for the creation of narratives of the past does not exist anymore or is not accessible – for example, in the form of archives – there is an imminent danger that myths of the past will emerge, that past injustices will be denied or that history will be manipulated.<sup>25</sup>

The term “archive” describes “[m]aterials created or received by a person, family, or organization, public or private, in the conduct of their affairs and preserved because of the enduring value contained in the information they contain or as evidence of the functions and responsibilities of their creator”.<sup>26</sup> This definition highlights an aspect of particular relevance in DWP processes: archives are produced not only by State institutions but also by non-State actors, such as individuals or non-governmental organizations. Despite the definition referring to the elements of “enduring value” of the information and “evidence of the functions and responsibilities”,<sup>27</sup> when dealing with serious violations of human rights and IHL, it becomes clear that archives are not necessarily reliable custodians of a factual and presumably objective truth.<sup>28</sup> This is particularly true for enforced disappearances, which represent a particular category of missing persons, as described above. In cases of enforced disappearance, records often contain false information as cases were documented incorrectly in order to

23 Karina V. Korostelina, “Peace Education and Joint History Textbook Projects”, in Karina V. Korostelina and Simone Lässig (eds), *History Education and Post-Conflict Reconciliation: Reconsidering Joint Textbook Projects*, Routledge, London, 2013, pp. 19 ff.

24 Briony Jones and Ingrid Oliveira, “Truth Commission Archives as New Democratic Spaces”, *Journal of Human Rights Practice*, Vol. 8, No. 1, 2016.

25 Antonio González Quintana describes the unfortunate situation in Greece, “which used the documents of repressive bodies in the years immediately after the dictatorship for administrative tasks such as compensation and purging those responsible for repression. The archives were later destroyed, in accordance with new legislation, which judged it undesirable to keep references, in registries and public archives, to people who had been vindicated for activities or attitudes considered illegal in the previous regime. Though it enabled the purging of those responsible and the compensation of their victims, Greece has been left with no written history of the repression, preventing possible new ways of compensation.” Antonio González Quintana, *Archives of the Security Services of Former Repressive Regime*, Report Prepared for UNESCO on Behalf of the International Council on Archives, 1997, available at: <http://unesdoc.unesco.org/images/0014/001400/140074e.pdf>.

26 Richard Pearce-Moses, *A Glossary of Archival and Records Terminology*, Society of American Archivists, 2005, available at: <http://files.archivists.org/pubs/free/SAAGlossary-2005.pdf>.

27 In archival science the term “evidential value” means that records which are considered authentic and reliable “are valuable as evidence of the origins, structure, functions, procedures and significant transactions of an institution or organization”. Further, some records are kept for their “informational value”, meaning that they “derive their value and are retained by archives for the information they contain as distinct from their evidential value”. Trudy Huskamp Peterson, *The Probative Value of Archival Documents*, swisspeace Essential No. 02/2014, 2014, p. 3, available at: [www.swisspeace.ch/publications/essentials.html](http://www.swisspeace.ch/publications/essentials.html).

28 Altanian Melanie, *Archives against Genocide Denialism?*, swisspeace Working Paper No. 1/2017, 2017, pp. 6–8, available at: [www.swisspeace.ch/fileadmin/user\\_upload/Media/Publications/SP\\_Working-Paper\\_1701-WEB.pdf](http://www.swisspeace.ch/fileadmin/user_upload/Media/Publications/SP_Working-Paper_1701-WEB.pdf).

disguise the true fate of the victim. The purpose of such fabrications is to ensure that relatives and authorities stop looking for the disappeared person or are misled in their search.<sup>29</sup> As Kaplan emphasizes,

the pervading view of archives as sites of historical truth is at best outdated, and at worst inherently dangerous. The archival record does not just happen; it is created by individuals and organizations, and used, in turn, to support their values and missions, all of which comprises a process that is certainly not politically and culturally neutral.<sup>30</sup>

In the field of dealing with the past, particularly in the search for missing persons, it becomes evident that archives are part of a political system, established and controlled by the regimes in power to enhance their position and to control – and if necessary to hide and manipulate – history and information about past events.<sup>31</sup> Despite these considerations, experiences of DWP mechanisms dating back to the Nuremberg Trials<sup>32</sup> and the truth commissions established in the 1980s in Latin America show that access to archives is crucial in the aftermath of gross human rights violations and serious breaches of IHL, in particular for mechanisms with a mandate to search for missing persons.<sup>33</sup> The right to know, to justice and to reparations, as well as guarantees of non-recurrence, can only be rendered if credible documentation of past violations exists.<sup>34</sup>

29 See IACtHR, *Velásquez-Rodríguez*, above note 19, para. 131, where the Court stated that “this type of repression is characterized by an attempt to suppress all information about the kidnapping or the whereabouts and fate of the victim”.

30 Elisabeth Kaplan, “We Are What We Collect, We Collect What We Are: Archives and the Construction of Identity”, *American Archivist*, Vol. 63, No. 1, 2000, p. 147. Similarly, see Verne Harris, *Archives and Justice: A South African Perspective*, Society of American Archivists, Chicago, IL, 2007, p. 13.

31 Joan M. Schwartz and Terry Cook, “Archives, Records, and Power: The Making of Modern Memory”, *Archival Science*, Vol. 2, No. 1–2, 2002. See also the description of how the military regime in Argentina falsified documentation necessary for its unlawful operations and massive human rights violations, in the commented edition of CONADEP’s *Nunca Más* report: *El Nunca Más y los crímenes de la dictadura*, Buenos Aires, 2006, pp. 142–143, available at: [http://librosycasas.cultura.gov.ar/wp-content/uploads/2015/11/LC\\_NuncaMas\\_Digital1.pdf](http://librosycasas.cultura.gov.ar/wp-content/uploads/2015/11/LC_NuncaMas_Digital1.pdf).

32 “The American prosecutors at Nuremberg decided the best evidence against Nazi war criminals was the record left by the Nazi German state itself. They wanted to convict Nazi war criminals with their own words. While the Germans destroyed some of the historical record at the end of the war and some German records were destroyed during the Allied bombing of German cities, Allied armies captured millions of documents during the conquest of Germany in 1945. Allied prosecutors submitted some 3,000 tons of records at the Nuremberg trial. More than a decade later, beginning in 1958, the United States National Archives, in collaboration with the American Historical Association, published 62 volumes of finding aids to the records captured by the US military at the end of the war. More than 30 further volumes were published before the end of the 20th century.” See US Holocaust Memorial Museum, “Combating Holocaust Denial: Evidence of the Holocaust Presented at Nuremberg”, *Holocaust Encyclopedia*, Washington, DC, available at: [www.ushmm.org/wlc/en/article.php?ModuleId=10007271](http://www.ushmm.org/wlc/en/article.php?ModuleId=10007271).

33 Emilio Crenzel, *Memory of the Argentina Disappearances. The Political History of Nunca Más*, Routledge, New York, 2012, pp. 4, 53, 25, 92.

34 IACtHR, *Blake v. Guatemala*, Judgment (Merits), 24 January 1998, para. 49.



## Access to and use of archives by DWP mechanisms

The importance of archives for the work of DWP mechanisms cannot be underestimated. Archives can provide invaluable information for determining the fate and whereabouts of missing persons, both for specific missing persons mechanisms and for other DWP mechanisms mandated to address missing persons issues.<sup>35</sup>

At the end of the Cold War, when many authoritarian regimes were dissolved and replaced by democratic systems, many societies in transition had to decide what should happen to the archives of the repressive regimes.<sup>36</sup> In many countries, there were intense discussions on whether these “archives of terror”<sup>37</sup> should be kept or destroyed.<sup>38</sup> Today it is widely accepted that destroying such archives would constitute another violation of the rights of victims and their families, and more largely of the entire society’s right to know.<sup>39</sup>

- 35 In Canada, the Indian Residential Schools Settlement Agreement (available at: [www.residential-schoolsettlement.ca/English.html](http://www.residential-schoolsettlement.ca/English.html)), which was signed in 2006 and approved by the courts in early 2007, mandated the Truth and Reconciliation Commission of Canada to, *inter alia*, identify sources and create as complete an historical record as possible of the Indian Residential Schools system and legacy, including the fate of missing children, which included in this context “both those who died at school and those whose fate after enrolment was unknown, at least to their parents”. See Truth and Reconciliation Commission of Canada, *Final Report of the Truth and Reconciliation Commission of Canada*, Vol. 4, Montreal, 2015, p. 5, available at: <http://nctr.ca/reports.php>; Alex Maass, “Perspectives on the Missing: Residential Schools for Aboriginal Children in Canada”, in D. Congram (ed.), above note 14.
- 36 For a general overview of the archives of former repressive States, see A. González Quintana, above note 25.
- 37 There is a UNESCO World Heritage collection entitled “Archives of Terror”. It is the documentary heritage submitted by Paraguay for inclusion in the Memory of the World Register in 2009 that encompasses the “official documents of police repression during the thirty-five years of Alfredo Stroessner’s dictatorship.” This archival collection is of particular interest for transitional justice in Latin America, since it contains “supporting evidence of Operation Condor activities as a part of a campaign of political repressions involving assassination and intelligence operations which was officially implemented in 1975 by the right-wing dictators of the Southern Cone of South America”. See: [www.unesco.org/new/en/communication-and-information/memory-of-the-world/register/full-list-of-registered-heritage/registered-heritage-page-1/archives-of-terror/](http://www.unesco.org/new/en/communication-and-information/memory-of-the-world/register/full-list-of-registered-heritage/registered-heritage-page-1/archives-of-terror/).
- 38 E.g. in Bulgaria and Germany: see Federal Commissioner for the Records of the State Security Service of the former German Democratic Republic (Bundesbeauftragte für die Stasi-Unterlagen, BSTU), *The “European Network of Official Authorities in Charge of the Secret Police Files”: A Reader on the Legal Foundations, Structures and Activities*, 2nd rev. ed., Berlin, 2014, p. 27, available at: [www.bstu.de/assets/bstu/de/Downloads/international\\_reader-europaisches-netzwerk\\_englisch.pdf](http://www.bstu.de/assets/bstu/de/Downloads/international_reader-europaisches-netzwerk_englisch.pdf). This publication gives a good overview of the situation in other former communist States and the existing archives of former State security agencies in Europe (pp. 7, 32). For Greece and other countries, see A. González Quintana, above note 25, p. 7.
- 39 Joint Principles, above note 8, Principle 14. A. González Quintana, above note 25, p. 10, underlines: “The right of the people to the integrity of their written memory ought to be unquestioned. If a community chooses to pardon as a means of achieving political transition, this must not result in the disappearance of the documentary heritage of the past. Nations have both a right and an obligation to preserve their memory by depositing it in their archives. Although one generation should be free to decide on the political processes for which they are responsible, they cannot choose for other generations: The right to choose the path to political transition precludes the right to destroy documents.”

## Access to archives

In practice, DWP mechanisms face many challenges with regard to the use of archives. Those who collect and safeguard important information for DWP processes, especially non-State actors, often lack the resources and expertise to archive and preserve such documentation in a professional and safe manner.<sup>40</sup> In addition, official documents that could be used as evidence by DWP mechanisms are often in danger, particularly when they remain in the hands of those who committed crimes. In many instances, important evidence has been destroyed,<sup>41</sup> or hidden from DWP mechanisms.<sup>42</sup> Destruction often occurs when regime changes are in sight and those holding relevant and potentially incriminating information realize that the archival material they had meticulously collected over decades could be used as evidence against them in judicial proceedings or by truth-seeking bodies.<sup>43</sup> Many if not most DWP mechanisms<sup>44</sup> face the problem that many relevant documents are not accessible during their temporary mandate, either because they have been destroyed or are not accessible for other reasons.<sup>45</sup> For instance, the Truth and Reconciliation Commission of Canada describes in detail the problem of obtaining access to State archives related to missing children in Indian Residential Schools.<sup>46</sup> Similarly, researchers accessing the archives of security forces often encounter difficulty because the related records management systems are set up in such a way that only members of the

40 Louise Bickford, Patricia Karam, Hassan Mneimneh and Patrick Pierce, *Documenting Truth*, ICTJ, 2009, available at: <https://ictj.org/sites/default/files/ICTJ-DAG-Global-Documenting-Truth-2009-English.pdf>.

41 At the end of the Cold War, when many Eastern European States underwent regime change, enormous amounts of archival material from State security institutions all over Europe were destroyed. For instance, there are estimations by the Czech Institute for the Study of Totalitarian Regimes and Security Services Archive that “approximately 30% of the documents” in State security archives in the Czech Republic were destroyed in 1989. BStU, above note 38, p. 27.

42 Verne Harris describes “large-scale and systematic sanitisation of official memory authorised at the highest levels of government” in South Africa, which mainly “targeted the records of the security establishment”. He continues: “Between 1990 and 1994 huge volumes of public records were destroyed in an attempt to keep the apartheid state’s darkest secrets hidden.” Verne Harris, “The Archival Sliver: Power, Memory, and Archives in South Africa”, *Archival Science*, Vol. 2, No. 1–2, 2002, p. 64.

43 In Germany for instance, employees of the former German Democratic Republic (GDR) Ministry of State Security followed official orders (*Vernichtungsbefehle*) to destroy large amounts of documents during the peaceful revolution in 1989–90. They wanted to destroy the evidence of unlawful acts and hide the identities of informants. Documents were shredded, burned, put in water or torn apart. When citizens started to occupy the offices of the State Security Service (Stasi) in December 1989, the destruction was stopped, and Germany now has an enormous archive that allows citizens to know what happened in the past, to find out who deserves compensation and to decide who should not be eligible for public office. More information on the work of the BStU, which preserves and protects the archives, is available at: [www.bstu.bund.de/EN/Home/home\\_node.html](http://www.bstu.bund.de/EN/Home/home_node.html).

44 See CONADEP, above note 31, p. 217: “La destrucción o emoción de la documentación que registró minuciosamente la suerte corrida por las personas desaparecidas, dispuesta antes de la entrega del gobierno a las autoridades constitucionales, dificultó la investigación encomendada a esta Comisión por el decreto constitutivo.”

45 See A. González Quintana, above note 25, p. 6, describing the lack of access of the Chilean truth commission to relevant archival material: “The Chilean experience is enlightening: those who had most to lose by the disappearance of the documents were the Chilean people and those with most to gain were the agents of the repression and those most responsible for it.”

46 Truth and Reconciliation Commission of Canada, above note 35, p. 5.

security service can understand and handle them.<sup>47</sup> This is particularly true for archives of repressive regimes.<sup>48</sup>

As a consequence of the difficulty involved in accessing official archives, many DWP mechanisms, including those concerned with the fate of missing persons, have had to rely on oral testimonies and on other sources, such as civil society archives. First-hand information collected from victims, survivors and witnesses<sup>49</sup> is an important basis for the work of most DWP mechanisms. These include mechanisms that are mandated to search for missing persons;<sup>50</sup> those conducting judicial investigations and prosecutions; mechanisms mandated to determine and provide reparations, restitution and compensation; disarmament, demobilization and reintegration programmes;<sup>51</sup> and mechanisms for conducting vetting processes. The Instance for Truth and Dignity (Instance Vérité et Dignité, IVD) in Tunisia, as an example, has collected 62,713 files from victims in Tunisia during its four-year mandate and carried out 49,637 hearings.<sup>52</sup> CONADEP in Argentina carried out meticulous inspections of clandestine detention places, together with witness interviews. These protocols were then compiled with other documentation about the detention centres, forming a “dossier” to be submitted to the courts.<sup>53</sup> However, only if such statements have been collected in a coherent manner and in accordance with certain standards can they be used by such mechanisms.<sup>54</sup>

As the design and implementation of any successful DWP initiative demands the gathering of relevant data, interesting developments can be noted

47 Gilda Waldman, “La ‘cultura de la memoria’: Problemas y reflexiones”, *Política y Cultura*, No. 26, January 2006, p. 19, available at: [www.scielo.org.mx/pdf/polcul/n26/n26a2.pdf](http://www.scielo.org.mx/pdf/polcul/n26/n26a2.pdf).

48 For example, the State Security Service in the former GDR developed a complicated archival system to hide information. The complicated records management system is described in several publications of the BStU, which safeguards and administers the records of the former State Security Service and makes them accessible. See, for instance, Roland Lucht, “Karteien, Speicher, Datenbanken: Kern des Informationssystems der Abteilung XII”, in Karsten Jedlitschka and Philipp Springer (eds), *Das Gedächtnis der Staatssicherheit: Die Kartei- und Archivabteilung des MfS*, Archiv zur DDR-Staatssicherheit, Vol. 12, Göttingen, 2015.

49 “The basis for our work has therefore been the statements made by relatives or by those who managed to escape from this hell, or even the testimonies of people who were involved in the repression but who, for whatever obscure motives, approached us to tell us what they knew.” CONADEP, above note 4. As another example, see the Impunity Watch, *We Struggle With Dignity: Victims’ Participation in Transitional Justice in Guatemala*, Research Report, May 2016, chap. 2, available at: [www.impunitywatch.org/docs/Victim\\_participation\\_Guatemala.pdf](http://www.impunitywatch.org/docs/Victim_participation_Guatemala.pdf).

50 For example in Argentina, where the NGO Equipo Argentino de Antropología Forense (Argentine Forensic Anthropology Team, EAAF), a scientific organization that applies forensic sciences to investigate serious human rights violations, collected numerous “oral testimonies about disappeared persons and the circumstances in which they were disappeared or killed” from “a number of sources, including relatives of the presumed victims, former prisoners, and former political activists targeted by the state during the dictatorship”. EAAF, *1998 Annual Report: Argentina*, 1998, p. 1, available at: <http://eaf.typepad.com/pdf/1998/01Argentina1998.pdf>. The EAAF “aims to recover and identify remains, return them to families and provide evidence in court proceedings”; see: [http://eaf.typepad.com/about\\_us/](http://eaf.typepad.com/about_us/).

51 See definition available at: <https://peacekeeping.un.org/en/disarmament-demobilization-and-reintegration>.

52 See the IVD website, available at: [www.ivd.tn/?lang=en](http://www.ivd.tn/?lang=en).

53 E. Crenzel, above note 4, p. 185.

54 Briony Jones and Sandra Rubli, *Archives for a Peaceful Future*, swisspeace Essential No. 01/2013, 2013, available at: [www.swisspeace.ch/publications/essentials.html](http://www.swisspeace.ch/publications/essentials.html).

with regard to how more recent mechanisms use archives in their work and how they plan the transfer of their own archives to permanent institutions in advance. Several mechanisms have been provided with a stronger legal basis for accessing and using the archives of other institutions than their predecessors.<sup>55</sup> The legal basis of a given mechanism – be it in a transitional justice law, in a presidential decree, or in any other form depending on the domestic legal framework – should provide for unlimited access to archives.

The so-called Joint Principles against impunity, drafted in 1996<sup>56</sup> and updated by Diane Orentlicher in 2005,<sup>57</sup> are considered to be a milestone in the conceptualization of transitional justice.<sup>58</sup> They recognize the importance of preserving archives and facilitating access in order to guarantee the right to know and to “enable victims and their relatives to claim their rights”. Moreover, the Joint Principles acknowledge that access to archives “should also be facilitated in the interest of historical research”, emancipating the right to truth from a narrow individual conception and giving it a collective sense.<sup>59</sup> Although the Joint Principles are considered to be soft law,<sup>60</sup> they are, at least partially, reflective of existing international “hard” law.<sup>61</sup>

Understanding what archives are available to be used in a DWP process is an essential first step in assembling information and material to be used by missing persons commissions, truth commissions, fact-finding bodies, tribunals and other mechanisms that help a society cope with a past troubled by violence, dictatorship and armed conflict. However, especially in contexts of transition, accessing archives containing relevant information regarding missing persons is usually not straightforward. For instance, access to State security archives has even been denied to State-sponsored truth-finding mechanisms tasked with addressing the fate of missing persons, such as the truth commission in Argentina, CONADEP,<sup>62</sup> or more recently in Peru, Guatemala and East

55 E.g. Article 40 of Tunisia’s Organic Law No. 2013-53 on Establishing and Organizing Transitional Justice, 24 December 2013 (entered into force 31 December 2013), available at: <https://tinyurl.com/yag19yek>.

56 Joint Principles, above note 8.

57 UN Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005; and see the accompanying reports by Diane Orentlicher: *Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity*, UN Doc. E/CN.4/2004/88, 27 February 2004; and *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, UN Doc. E/CN.4/2005/102, 18 February 2005.

58 Frank Haldemann and Thomas Unger, “Introduction”, in Frank Haldemann and Thomas Unger (eds), *The United Nations Principles to Combat Impunity: A Commentary*, Oxford University Press, Oxford, 2018, pp. 13 ff.

59 Joint Principles, above note 8. For more details, see Valentina Cadelo and Trudy Huskamp Peterson, “Principle 15: Measures for Facilitating Access to Archives”, in F. Haldemann and T. Unger (eds), above note 58, pp. 172 ff.

60 See F. Haldemann and T. Unger, above note 58, p. 14.

61 *Ibid.*, p. 15.

62 CONADEP in Argentina had a limited mandate, namely to investigate the fate of missing persons: Article 1 of Decree No. 187/83 limited its mandate to “clarify[ing] the facts related to the disappearance of persons that occurred in the country” (“Constituir una Comisión Nacional que tendrá por objeto esclarecer los hechos relacionados con la desaparición de personas ocurridos en el país”). See: [www.usip.org/files/file/resources/collections/commissions/Argentina-Charter.pdf](http://www.usip.org/files/file/resources/collections/commissions/Argentina-Charter.pdf).

Timor.<sup>63</sup> Denial of access to archives does not necessarily indicate that the records were destroyed,<sup>64</sup> but this is often provided as an excuse for denying access. Other reasons for denial include State security<sup>65</sup> or problems in document production.<sup>66</sup> DWP mechanisms are often not informed about the existence of relevant archives. Thus, in several contexts, military and police archives containing relevant information with regard to missing persons were discovered decades after the end of a dictatorship or an armed conflict, and after the truth commissions had ended its work, for instance in Paraguay,<sup>67</sup> Guatemala<sup>68</sup> and Argentina.<sup>69</sup>

As a result of the difficulties involved in gaining access to relevant State archives, accessing civil society archives was crucial for many truth commissions.<sup>70</sup> Truth commissions also tried to access the archives of third States. Accessing foreign records has proven difficult, in particular where the archives of security services were concerned.<sup>71</sup>

- 63 Trudy Huskamp Peterson, *Final Acts: A Guide to Preserving the Records of Truth Commissions*, Woodrow Wilson International Center for Scholars, Washington, DC, 2004, pp. 24 ff., available at: [www.wilsoncenter.org/sites/default/files/Petersonfinpdf.pdf](http://www.wilsoncenter.org/sites/default/files/Petersonfinpdf.pdf). For East Timor, see Commission for Reception, Truth and Reconciliation in East Timor (Comissão de Acolhimento, Verdade e Reconciliação de Timor-Leste, CAVR), *Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor*, 2013, chap. 7.2, available at: [www.chegareport.net/](http://www.chegareport.net/).
- 64 David Thomas, Simon Fowler and Valerie Johnson, *The Silence of the Archive*, American Library Association, 2017, pp. 10 ff., 101 ff.
- 65 See e.g. “Part 1: Introduction”, in CAVR, above note 63, available at: [www.etan.org/etanpdf/2006/CAVR/01-Introduction\\_CAVR.pdf](http://www.etan.org/etanpdf/2006/CAVR/01-Introduction_CAVR.pdf); P. B. Hayner, above note 12, pp. 228 ff.
- 66 Truth and Reconciliation Commission of Canada, above note 35.
- 67 In Argentina, thousands of files and documents dating back to the military dictatorship were found in 2013, thirty years after CONADEP had ended its work, in premises of the Navy. They contained important information regarding missing persons. “Listas negras y otros documentos secretos de la Junta Militar argentina”, *BBC Mundo*, 4 November 2013, available at: [www.bbc.com/mundo/ultimas-noticias/2013/11/131104\\_ultnot\\_argentina\\_documentos\\_regimen\\_militar\\_ao](http://www.bbc.com/mundo/ultimas-noticias/2013/11/131104_ultnot_argentina_documentos_regimen_militar_ao) and <http://mindef.gov.ar/archivosAbiertos/index.php>.
- 68 In Paraguay, about “700,000 documents forming a complete record of the activities of the Paraguayan secret police over three decades – a cache that became known as the Archive of Terror” – were discovered in 1995. They contain crucial information on missing persons and were used, *inter alia*, in criminal trials in Argentina in the Operation Condor case. See Simon Watts, “How Paraguay’s ‘Archive of Terror’ put Operation Condor in Focus”, *BBC World Service*, 22 December 2012, available at: [www.bbc.com/news/magazine-20774985](http://www.bbc.com/news/magazine-20774985). Today the “Archives of Terror” form part of the Museo de la Justicia at the Supreme Court in Asunción and of the UNESCO Memory of the World Program. More information is available at: [www.pj.gov.py/contenido/132-museo-de-la-justicia/334](http://www.pj.gov.py/contenido/132-museo-de-la-justicia/334) and [www.unesco.org/new/en/communication-and-information/memory-of-the-world/register/full-list-of-registered-heritage/registered-heritage-page-1/archives-of-terror/](http://www.unesco.org/new/en/communication-and-information/memory-of-the-world/register/full-list-of-registered-heritage/registered-heritage-page-1/archives-of-terror/). See also Katie Zoglin, “Paraguay’s Archive of Terror: International Cooperation and Operation Condor”, *University of Miami Inter-American Law Review*, Vol. 32, No. 1, 2001.
- 69 In Guatemala, a vast archive of the former National Police of Guatemala that was responsible for numerous serious human rights violations in the Guatemalan Civil War, including enforced disappearance, was discovered in 2005. For more information, see the website of the Archivo Histórico de la Policía Nacional, available at: <http://archivohistoricopn.org/>.
- 70 E.g. in East Timor, where the truth commission “issued a call to all persons and organisations in possession of relevant records to forward these materials to the CAVR”. See “Part 1: Introduction”, in CAVR, above note 63, para. 110, available at: [www.etan.org/etanpdf/2006/CAVR/01-Introduction\\_CAVR.pdf](http://www.etan.org/etanpdf/2006/CAVR/01-Introduction_CAVR.pdf).
- 71 *Ibid.*, paras 113 ff.; P. B. Hayner, above note 12, pp. 228 ff.; John Ciorciari and Jesse Franzblau, “Hidden Files: Archival Sharing, Accountability, and the Right to the Truth”, *Columbia Human Rights Law Review*, Vol. 46, No. 1, 2014, available at: <https://ssrn.com/abstract=2446205>.

## Special powers to access archives

There are examples of DWP mechanisms that have received special powers to access important State documents and archives, such as the South African Truth and Reconciliation Commission, which was provided with quasi-judicial subpoena powers,<sup>72</sup> and the Tunisian IVD.<sup>73</sup> The IVD<sup>74</sup> has unlimited “access to public and private archives” and can investigate human rights violations as stipulated in the law, “using all the means and mechanisms it deems necessary while ensuring the defense rights”.<sup>75</sup> The IVD can further carry out “inspections in private and public places as well as searches and confiscate documents, movables and tools used in relation to the violations [that are the] subject of its investigations”, and is therefore “empowered with the powers of judicial police taking into account the necessary procedural safeguards in this regards”.<sup>76</sup> Similarly far-reaching powers can be found in the constituting documents of other truth commissions. Article 8 of the Sierra Leone Truth and Reconciliation Commission Act (2000)<sup>77</sup> vested the Sierra Leonean Truth and Reconciliation Commission with specific powers, namely “to gather, by means it deems appropriate, any information it considers relevant” and “to request reports, records, documents or any information from any source, including governmental authorities, and to compel the production of such information”.<sup>78</sup> As another example, in Canada, the Ontario Superior Court of Justice determined in 2014 that the federal

72 T. Huskamp Peterson, above note 63, p. 25. A subpoena is a writ/order known in different Anglo-Saxon legal systems which is usually issued by a government agency, most often a court, to compel testimony by a witness or production of evidence under a penalty for failure. See “Subpoena”, *Wex*, Legal Information Institute, Cornell Law School, available at: [www.law.cornell.edu/wex/subpoena](http://www.law.cornell.edu/wex/subpoena).

73 According to Article 17 of Organic Law No. 2013-53, above note 55, the commission’s work “shall cover the period extending from 1 July 1955 up to the issuance of this law [2013]”. Further, Article 39 limits the tasks of the IVD to “holding private or public hearings for victims of violations”; “examin[ing] ... cases of enforced disappearance”, “establish[ing] a unified record of victims of violations”, “determin[ing] the responsibility of the organs of the State or any other parties for ... violations, clarify[ing] its reasons and propos[ing] the remedies that prevent the recurrence of such violations in the future”, and “develop[ing] a comprehensive individual and collective program for reparations for victims of violations”.

74 *Ibid.*, Art. 40, para. 1.

75 *Ibid.*, Art. 40, para. 3.

76 *Ibid.*, Art. 40, para. 10.

77 Truth and Reconciliation Commission Act 2000, *Supplement to the Sierra Leone Gazette*, Vol. 131, No. 9, 10 February 2000, available at: [www.sierra-leone.org/Laws/2000-4.pdf](http://www.sierra-leone.org/Laws/2000-4.pdf).

78 Further, the Sierra Leonean Truth and Reconciliation Commission also had the power “to visit any establishment or place without giving prior notice, and to enter upon any land or premises for any purpose which is material to the fulfilment of the Commission’s mandate and in particular, for the purpose of obtaining information or inspecting any property or taking copies of any documents which may be of assistance to the Commission, and for safeguarding any such property or document; (c) to interview any individual, group or members of organisations or institutions and ... to conduct such interviews, in private; (d) ... to call upon any person to meet with the Commission or its staff ...; (e) to require that statements be given under oath or affirmation and to administer such oath or affirmation; (f) to request information from the relevant authorities of a foreign country and to gather information from victims, witnesses, government officials and others in foreign countries; (g) to issue summonses and subpoenas as it deems necessary in fulfilment of its mandate; and (h) to request and receive police assistance as needed in the enforcement of its powers.” *Ibid.*, section 8(1).

government was required to compile all relevant documents with regard to missing children for the Truth and Reconciliation Commission.<sup>79</sup>

When institutions or organizations engage in the search for missing persons, the archives of previously existent DWP mechanisms are crucial, because they include public and confidential material that could contain relevant information as a starting point for further investigations or even an answer to unresolved cases.<sup>80</sup> As an example, in the Balkans, the ICRC received special access to the archives of the International Criminal Tribunal for the former Yugoslavia and other international organizations in its search for missing persons.<sup>81</sup> The Law on Missing Persons in Bosnia and Herzegovina even foresees punitive measures if access to information relevant for tracing a missing person is hindered.<sup>82</sup> For mechanisms specifically created to search for missing persons, the power to access archives or receive information from government or non-government archives is often not that explicit. For instance, the International Commission on Missing Persons (ICMP) – which is not a transitional justice mechanism in the narrow sense, but an international organization established by a multinational treaty in 2014, with the humanitarian mandate to locate and identify persons “missing [as a result of] conflict, human rights abuses, disasters, organized crime, irregular migration and other causes”, and to assist States in doing so<sup>83</sup> – has general powers to take “lawful action necessary to accomplish the purpose of the Commission”.<sup>84</sup> This general provision assumedly includes legal action to obtain access to archives. The question of whether these special powers are sufficient to grant access to State or private archives depends on the legal basis on which the ICMP operates in a specific context, mainly the agreements concluded with governments,<sup>85</sup> as well as the applicable domestic

79 Ontario Superior Court of Justice, *Larry Philip Fontaine et al. v. The Attorney General of Canada et al.*, 2014 ONSC 283, 14 January 2014; Truth and Reconciliation Commission of Canada, above note 35.

80 Trudy Huskamp Peterson, *Temporary Courts, Permanent Records*, Woodrow Wilson Center for Scholars, 2008, available at: [www.wilsoncenter.org/sites/default/files/TCPR\\_Peterson\\_HAPPO02.pdf](http://www.wilsoncenter.org/sites/default/files/TCPR_Peterson_HAPPO02.pdf); a shorter version of this 146-page report was previously published under the same title by USIP in 2006, available at: [www.usip.org/sites/default/files/sr170.pdf](http://www.usip.org/sites/default/files/sr170.pdf).

81 Lina Milner, “The ICTY Legacy in Finding Missing Persons”, in Richard H. Steinberg (ed.), *Assessing the Legacy of the ICTY*, Martinus Nijhoff, Leiden and Boston, MA, 2011, p. 123.

82 Law on Missing Persons, *Official Gazette of Bosnia and Herzegovina*, No. 50/04, 9 November 2004, Art. 25, available at: <https://advokat-prnjavorac.com/legislation/Law-on-missing-persons.pdf>. This law foresees fines for “an official who blocks access to information to a family member of a missing person or to an institution in charge of tracing missing persons” or “who, without justified cause, delays or hinders making available the requested information”.

83 The treaty between the Netherlands, the United Kingdom, Sweden, Belgium and Luxembourg granted the ICMP, an organization that was “created at the initiative of US President Bill Clinton in 1996 at the G-7 Summit in Lyon, France”, a new legal status as “a treaty-based international organization with its own system of governance and international capacities”. Agreement on the Status and Functions of the International Commission on Missing Persons, 15 December 2014.

84 *Ibid.*, Art. 6.

85 In Iraq, for example, the ICMP has signed “an agreement with the four ministries engaged in addressing the missing persons’ process: the Ministry for Human Rights, the Ministries of Health in Baghdad and Erbil and the Ministry of Martyrs and Anfal Affairs”. See: [www.icmp.int/where-we-work/middle-east-and-north-africa/iraq/](http://www.icmp.int/where-we-work/middle-east-and-north-africa/iraq/). Ideally, such agreements contain clauses regarding access to government records and archives that are likely to support the search for missing persons.

legislation in this context, such as archive laws and freedom of information legislation. A careful analysis of the existing legal framework is therefore recommended, as well as the conclusion of agreements that grant access to State and non-State records and archives.

## Use, processing and handling of archival material

DWP mechanisms, including missing persons mechanisms, mostly have temporary mandates and limited capacities to process the large quantities of material that are needed to fully implement their mandates.<sup>86</sup> They face the immense task not only of gathering information on past human rights violations and breaches of IHL from victims and from other sources, including State and non-State archives, as described above, but also of processing this data and often of producing a report with recommendations. For instance, the South African Truth and Reconciliation Commission had the enormous task of processing 21,298 statements taken from victims, “containing 37,672 gross violations of human rights”.<sup>87</sup>

Model legislation regarding missing persons recommends that such information about missing persons is kept “in a centralized institution, to give a coherent overview of the scope of the problem, to assist with the location of the missing person and to give a reference point to other authorities, including foreign authorities”.<sup>88</sup> Such central registers should contain all the information that is relevant for the search for missing persons and should be kept according to international archival standards, in particular with regard to security, data protection and documentary preservation.<sup>89</sup> Special technical and legal provisions apply for DNA databases.<sup>90</sup> Ideally, these records should be kept in a

86 For example, the mandate of CONADEP in Argentina (see *El Nunca Más y los criminales de la dictadura*, above note 31); the CAVR in East Timor operated from 7 February 2002 to 31 October 2005 and covered the years 1974–99 (see: [www.usip.org/publications/2002/02/truth-commission-timor-leste-east-timor](http://www.usip.org/publications/2002/02/truth-commission-timor-leste-east-timor)); the Truth and Reconciliation Commission for Sierra Leone worked from 2002 to 2005 and covered the years 1991–99 (see: [www.sierraleonetrc.org/](http://www.sierraleonetrc.org/)). The length of the mandate of bodies with the specific humanitarian mandate of searching for missing persons differs. The Terms of Reference of the Committee on Missing Persons (CMP) in Cyprus, which was established in April 1981 by agreement between the Greek Cypriot and Turkish Cypriot communities under the auspices of the UN, does not provide a time limit (see: [www.cmp-cyprus.org/content/terms-reference-and-mandate](http://www.cmp-cyprus.org/content/terms-reference-and-mandate)); the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2071 (2014) in Nepal foresees in its Article 38 a mandate of “two years from the date of its constitution” (which has been extended in the meantime) for the Enforced Disappearances Enquiry Commission (see: <http://ciedp.gov.np/downloads.php>).

87 Gerald O’Sullivan, “The South African Truth and Reconciliation Commission: Database Representation”, in Patrick Ball, Herbert F. Spier and Louise Spier (eds), *Making the Case: Investigating Large Scale Human Rights Violations Using Information Systems and Data Analysis*, American Association for the Advancement of Science, 2000.

88 ICRC, “Guiding Principles and Model Law on the Missing”, Legal Factsheet, 28 February 2009, p. 32, available at: [www.icrc.org/en/document/guiding-principles-model-law-missing-model-law](http://www.icrc.org/en/document/guiding-principles-model-law-missing-model-law).

89 *Ibid.*, pp. 32, 40 ff.

90 Particularly since such information “is increasingly used in relation to criminal investigations”: see *ibid.*, p. 40.



governmental institution, as for example in Bosnia and Herzegovina at the Missing Persons Institute.<sup>91</sup>

The work of the Argentine Forensic Anthropology Team (Equipo Argentino de Antropología Forense, EAAF), as an NGO that uses forensic science to investigate serious human rights violations<sup>92</sup> – namely, enforced disappearance cases in Argentina and worldwide – with a humanitarian approach, shows how archives can be used in a systematic manner in the search for missing persons. In Argentina, the EAAF gained access to police archives through judicial measures in the late 1990s and used archival material systematically to identify persons who were disappeared during the military regime, using a humanitarian approach. It used numerous written sources that were established during the military dictatorship in the course of the bureaucratic procedures by the army and the police to disguise the thousands of cases of enforced disappearance in the years from 1976 to 1983. The EAAF created several databases where all the information collected from archives, reports and testimonies was entered (e.g. from death certificates of unidentified persons, testimonies from family members or former detainees, and police reports). “The death certificates were taken from the 1976, 1977 and 1978 registration books from the counties in the province of Buenos Aires that surround the Buenos Aires city limits”, and in total around 3,319 death certificates were entered in 1998 alone.<sup>93</sup> The fact that the police had accurately recorded the crimes they had committed and had archived this information systematically helped the EAAF to identify missing persons almost two decades later. The consequence of this is that the families of the victims can finally know what happened, receive the remains, carry out funeral rites and mourn their dead.<sup>94</sup>

Similarly, the Committee on Missing Persons (CMP) in Cyprus, established in April 1981 by an agreement between the Greek Cypriot and Turkish Cypriot communities under the auspices of the United Nations (UN), employs an archival team to guarantee the professional management and preservation of the documents and information obtained in the framework of the procedures to exhume and identify the bodies and to return the remains to the families.<sup>95</sup>

91 Law on Missing Persons, above note 82. See also *Agreement between the International Commission on Missing Persons (ICMP) and the Missing Persons Institute (MPI) Concerning Transfer of Missing Persons and Relatives Data To Become Part of the Missing Persons Institute’s Central Records*; Kirsten Juhl, “The Problem of Ethnic Politics and Trust: The Missing Persons Institute of Bosnia-Herzegovina”, *Genocide Studies and Prevention: An International Journal*, Vol. 4, No. 2, 2009, p. 240, available at: <http://scholarcommons.usf.edu/gsp/vol4/iss2/14>.

92 The EAAF “was established in 1984 to investigate the cases of at least 9,000 disappeared people in Argentina under the military government that ruled from 1976–1983. Today, the team works in Latin America, Africa, Asia and Europe.” See the EAAF website, available at: [www.eaaf.org/](http://www.eaaf.org/).

93 EAAF, *1998 Annual Report*, above note 50, p. 4.

94 “These procedures included writing a description of the find, taking photographs, fingerprinting the corpse, conducting an autopsy or external examination of the body, writing a death certificate, making an entry in the local civil registry, issuing a certificate of burial, and making an entry in the cemetery records. Through these procedures, the bureaucracy created a number of documents containing important information about the ‘disappeared’”. EAAF, *1999 Annual Report: Argentina, 1999*, available at: <http://eaaf.typepad.com/pdf/1999/03Argentina1999.pdf>, p. 8; EAAF, *1998 Annual Report*, above note 50, p. 2.

95 See the CMP website, available at: [www.cmp-cyprus.org/content/what-we-do](http://www.cmp-cyprus.org/content/what-we-do).

Linking professional physical archives with a functioning database that allows for quick access to pertinent information, both in digital and physical form, is a complex and time-consuming task that requires cooperation between different professionals, ranging from experts on the contexts to be investigated, to archivists and information technology experts.<sup>96</sup> Databases need to be tailored to the specific task of the mechanism in question. Thus, the means of establishing specific databases that allow for the collection, cross-checking and corroboration of information depend on the specific mandate of the mechanism in question. Organizations searching for the fate and whereabouts of missing persons use complex databases fed with information from a number of sources, including material collected in archives. In order to facilitate the identification of missing persons, not only forensic procedures should be documented, but also the work undertaken with family members and communities.

### Archives as part of the legacy of DWP mechanisms

DWP mechanisms necessarily collect, produce and use archival material from the beginning of their mandate. The collected and created records relate both to their administrative procedures and to their substantive work, including investigations, adjudication, truth-seeking, truth-telling, reparations and memorialization. They usually receive large amounts of material, for instance in the form of submissions by direct victims or family members, and they create their own records.<sup>97</sup> Other records may include written and oral forms of testimony from victims, witnesses, experts and accused perpetrators; the minutes of public hearings and meeting notes; and reports and recommendations.<sup>98</sup> The final outputs of DWP mechanisms, including judgments of tribunals, published final reports of truth commissions, conclusions and recommendations, reparation decisions, and similar outcome documents, often consist of several hundred pages, which also belong to the records created by the mechanisms. Despite their length, these final and published documents usually present a very condensed version of what is contained in the wealth of archival material that has been collected and produced by such mechanisms.<sup>99</sup>

The amount of material which DWP mechanisms receive and collect from individuals, non-governmental institutions and State bodies is enormous. These records can be of various types, including paper and electronic documents in different formats and styles, audio and video recordings, photographs, maps, artefacts and even artistic objects. Since such mechanisms typically investigate serious human rights violations and breaches of IHL, the records contain a lot of personal and sensitive information regarding the identity of victims and their families, presumed perpetrators, informants and witnesses. As these records constitute the basis upon which judgments and findings are rendered, the fate of

96 Sonia Zambrano, "The Guatemalan Commission for Historical Clarification", in P. Ball, H. F. Spierer and L. Spierer (eds), above note 87, p. 288.

97 T. Huskamp Peterson, above note 63.

98 T. Huskamp Peterson, above note 80 (2008 version).

99 *Ibid.*, pp. 10–11.

missing persons is investigated, recommendations are formulated and reparation decisions are taken, their professional appraisal and preservation is crucial.<sup>100</sup> This is particularly important because tribunals, courts, truth commissions and reparations programmes establish social, institutional and individual responsibilities and decide upon the future of individuals. In addition, the work of such mechanisms is by its nature contested and controversial, particularly in contexts where those responsible for human rights violations are still in power.

## State obligations relevant for archives and missing persons

The international legal framework on enforced disappearance and missing persons reflects the fact that archives play an important role in both the prevention of disappearances and the search for missing persons. In addition, keeping records and providing access to archives are crucial means of implementing the right of family members and society to know about the fate of missing persons. The relevant international instruments, as well as the jurisprudence and domestic legislation, entail three principles which have far-reaching implications for the use of archives: firstly, the right to report when a person has gone missing and the respective duty of the authorities to investigate such reports; secondly, the duty to keep records of places of detention; and thirdly, the duty to provide access to the archives.

### Right to report and duty to investigate missing persons cases

Both IHL and international human rights law include detailed provisions regarding States’ duties to report and investigate missing persons cases. These provisions involve creating and maintaining records, and sometimes even require archival research.

Most of the IHL rules concerning the missing are related to the clarification of the fate and whereabouts of persons in the hands of the enemy or those killed on the battlefield.<sup>101</sup> During international armed conflicts, Articles 32–34 of Additional Protocol I to the 1949 Geneva Conventions (AP I) stipulate the right of families to know the fate of their relatives and oblige the parties to the conflict to “search for the persons who have been reported missing by an adverse Party” and to “transmit all relevant information concerning such persons in order to facilitate such searches”. Analogous duties have been found applicable under customary law during non-international armed conflicts: the ICRC Customary Law Study establishes that “each party to the conflict must take all feasible measures to account for persons

100 B. Jones and S. Rubli, above note 54, pp. 12–13; B. Jones, E. Baumgartner and S. Gabriel, above note 7, p. 31.

101 See Geneva Convention I (GC I), Arts 16–17; Geneva Convention II (GC II), Arts 19–20; Geneva Convention III (GC III), Arts 122–124; Geneva Convention IV (GC IV), Arts 136–141; Additional Protocol I (AP I), Arts 33–34; Additional Protocol II (AP II), Art. 8; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rules 112, 116, 117, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>.

reported missing as a result of armed conflict and must provide their family members with any information it has on their fate”.<sup>102</sup>

The ICPPED sets out the responsibility of States to “ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities, which shall examine the allegation promptly and impartially and, where necessary, undertake without delay a thorough and impartial investigation”.<sup>103</sup> This provision can be interpreted as implying that the respective authorities also have to create files when individuals allege that an enforced disappearance has occurred. Such files can provide relevant information in determining the fate and whereabouts of missing persons. In addition, a proper investigation into a disappearance case necessarily requires archival research, meaning investigations both into archives that are still in use – so-called active or intermediary archives – and into archives that are no longer in active use. As a consequence, paragraph 3 of said provision expressly states that the authorities must have “access to the documentation and other information relevant to their investigation”.<sup>104</sup>

## Duty to keep archives of places of detention

Proper record-keeping – particularly in the context of places of detention, due to the vulnerability of detainees – is an important element of the prevention of enforced disappearances, and can assist in clarifying the fate of a person in the event that he or she does go missing. This basic rule to protect persons deprived of their liberty in armed conflict derives both from treaty law<sup>105</sup> and from customary IHL applicable in international and non-international armed conflicts, and states that “personal details of persons deprived of their liberty must be recorded”.<sup>106</sup> This rule is usually also contained at the domestic level in military manuals<sup>107</sup> and national legislation.<sup>108</sup> Under IHL, there is also a requirement to keep archives related to the dead.<sup>109</sup>

102 ICRC Customary Law Study, above note 101, Rule 117.

103 ICPPED, Art. 12(1).

104 *Ibid.*, Art. 12(3)(a).

105 Article 33 of AP I (available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/470-750040?OpenDocument>) foresees specific reporting obligations with regard to “persons who have been detained, imprisoned or otherwise held in captivity for more than two weeks as a result of hostilities or occupation, or who have died during any period of detention”, and persons who “have died in other circumstances as a result of hostilities or occupation”. Such information may be transmitted directly or through the Central Tracing Agency of the ICRC or National Red Cross and Red Crescent Societies. Further, parties to the conflict shall facilitate “arrangements for teams to search for, identify and recover the dead from battlefield” (paras 1–3).

106 ICRC Customary Law Study, above note 101, Rule 123.

107 *Ibid.*, Vol. 2: *Practice*, Practice relating to Rule 123, available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_cha\\_chapter37\\_rule123](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter37_rule123).

108 *Ibid.*

109 “Moreover, in order to prevent loss of information, each party to an armed conflict has the obligation to record all available information relating to the dead and the personal details of persons deprived of their liberty (GC I, Art. 16; GC II, Art. 19; GC III, Arts 120–121; GC IV, Arts 129–131; CIHL Rules 116 and 123).” ICRC, *Missing Persons and Their Families*, Factsheet, 31 December 2015, available at: [www.icrc.org/en/document/missing-persons-and-their-families-factsheet](http://www.icrc.org/en/document/missing-persons-and-their-families-factsheet).

Similarly, States party to the ICPPED are under the obligation to “assure the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty”.<sup>110</sup> Further, such records must “be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose”.<sup>111</sup> Registers must contain at a minimum the identity of the person deprived of liberty, the date, time and place where the person was deprived of liberty, and the identity of the authority that made the arrest. The information must also include the authority that ordered the deprivation of liberty and the grounds on which it was ordered, as well as the authority responsible for supervising the deprivation of liberty.

The most important information for the search for persons who go missing in detention is the indication of the place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty, the authority responsible for the place of deprivation of liberty, the date and time of release or transfer to another place of detention, the destination of the transfer, and the authority responsible for the transfer, as well as, in the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains.<sup>112</sup> Article 22 of the ICPPED provides for the State’s responsibility to “take the necessary measures to prevent and impose sanctions for” the “[f]ailure to record the deprivation of liberty of any person, or the recording of any information which the official responsible for the official register knew or should have known to be inaccurate”. Such punitive provisions are important to ensure the implementation of the obligation to document detention.

## Duty to provide access to archives

It is widely recognized today that States are obliged to provide access to information related to past IHL and human rights violations both on the basis of the “right to know”<sup>113</sup> and within the larger framework of remedies for human rights violations. The ICPPED thus states that States Parties shall guarantee to any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel, access to at least the following information:

- (a) The authority that ordered the deprivation of liberty;

110 ICPPED, Art. 17(3).

111 *Ibid.*

112 *Ibid.*, Art. 18.

113 Joinet Principles, above note 8; V. Cadelo and T. Huskamp Peterson, above note 59, pp. 173 ff. For IHL, see “Commentary on Article 33 of the first Additional Protocol to the 1949 Geneva Conventions”, in ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1987, paras 1271 ff., available at: <https://tinyurl.com/ybb87epf>; ICRC Customary Law Study, above note 101, Rule 117. See also Principle 6 of the Principles of Access to Archives of the International Council on Archives (available at: [www.ica.org/en/principles-access-archives](http://www.ica.org/en/principles-access-archives)), which states: “Institutions holding archives ensure that victims of serious crimes under international law have access to archives that provide evidence needed to assert their human rights and to document violations of them, even if those archives are closed to the general public.”

- (b) The date, time and place where the person was deprived of liberty and admitted to the place of deprivation of liberty;
- (c) The authority responsible for supervising the deprivation of liberty;
- (d) The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer;
- (e) The date, time and place of release;
- (f) Elements relating to the state of health of the person deprived of liberty;
- (g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains.<sup>114</sup>

In order to “balance between the protection of persons from enforced disappearances on the one hand and the right to privacy and constraints imposed on states in the context of criminal investigations on the other hand”,<sup>115</sup> this right to information can be restricted only under certain conditions: it must be guaranteed that the person deprived of liberty remains under the protection of the law, and that the restriction is of an exceptional nature, is strictly necessary and is provided for by the law.<sup>116</sup> The right to a remedy to obtain this information cannot be restricted.<sup>117</sup>

Underlining the importance of correct procedure when collecting and processing personal information, the ICCPED also highlights that the privacy rights of the persons concerned have to be respected: personal information, including medical and genetic data, which is collected and/or transmitted within the framework of the search for a disappeared person shall not be used or made available for purposes other than the search for that person.<sup>118</sup> The ICCPED does not provide specific access rules for missing persons mechanisms or other DWP mechanisms, but in the ambit of soft law, a number of international instruments do address these specific questions, as described below.

Despite the narrow definition of the exceptions to the right to information in the ICCPED, in practice the problem remains that States do not want to reveal certain information, arguing its relation to State security.<sup>119</sup> As referred to above, many truth commissions have thus had difficulties accessing records concerning State security.<sup>120</sup> Therefore, domestic policies on freedom of information and access to public information are highly relevant in this regard. Although issues of

114 ICCPED, Art. 18(1).

115 Commission on Human Rights, *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, UN Doc. E/CN.4/2005/66, 10 March 2005, para. 92.

116 ICCPED, Art. 20(1).

117 *Ibid.*, Art. 20(2).

118 *Ibid.*, Art. 19.

119 P. B. Hayner, above note 12, pp. 227 ff.

120 Truth and Reconciliation Commission of South Africa, *Truth and Reconciliation Commission of South Africa Report*, Vol. 1, 1998, chap. 8, section 104, available at: [www.justice.gov.za/trc/report/finalreport/Volume%201.pdf](http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf); Chilean National Commission on Truth and Reconciliation, *Informe de la Comisión Nacional de Verdad y Reconciliación*, Vol. 1, 1991, p. 5, available at: <http://bibliotecadigital.indh.cl/bitstream/handle/123456789/170/tomo1.pdf?sequence=1>; CONADEP, above note 4, p. 273.

State security as well as access to information and freedom of information very much depend on domestic legislation and the context in which DWP mechanisms operate, international standards such as the Global Principles on National Security and the Right to Information (Tshwane Principles),<sup>121</sup> the Model Inter-American Law on Access to Public Information<sup>122</sup> and the 2009 Council of Europe Convention on Access to Official Documents<sup>123</sup> provide orientation.

The Tshwane Principles were developed by experienced academics and practitioners. They were not adopted within the UN system, but were developed in consultation with UN, Organisation of American States (OAS) and African Union Special Rapporteurs on freedom of expression. They are not legally binding but aim at providing

guidance to those engaged in drafting, revising, or implementing laws or provisions relating to the state’s authority to withhold information on national security grounds or to punish the disclosure of such information.

They are based on international (including regional) and national law, standards, good practices, and the writings of experts.<sup>124</sup>

The Tshwane Principles underline that there are “some categories of information” that

are of particularly high public interest given their special significance to the process of democratic oversight and the rule of law, including categories related to missing persons. Accordingly, there is a very strong presumption, and in some cases an overriding imperative, that such information should be public and proactively disclosed.<sup>125</sup>

They go on to state that principally, there is

an overriding public interest in disclosure of information regarding gross violations of human rights or serious violations of international humanitarian law, including crimes under international law, and systematic or widespread violations of the rights to personal liberty and security. Such information may not be withheld on national security grounds in any circumstances.<sup>126</sup>

121 The Tshwane Principles have been drafted by seventeen organizations and five academic centres throughout Africa, the Americas, Europe and Asia based on conversations and information provided by more than 500 experts from more than seventy countries, including government and former government officials and military officers, at meetings around the world over a two-year period. Global Principles on National Security and the Right to Information (Tshwane Principles), 12 June 2013, available at: [www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles](http://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles).

122 Organisation of American States (OAS), Model Inter-American Law on Access to Public Information, AG/RES. 2607 (XL-O/10), 8 June 2010, para. 44, available at: [www.oas.org/en/sla/dil/docs/Access\\_Model\\_Law\\_Book\\_English.pdf](http://www.oas.org/en/sla/dil/docs/Access_Model_Law_Book_English.pdf).

123 Council of Europe Convention on Access to Official Documents, CETS No. 205, 18 June 2009, available at: [www.coe.int/en/web/conventions/full-list/-/conventions/treaty/205/signatures?p\\_auth=VjubcSkv](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/205/signatures?p_auth=VjubcSkv). So far, nine states have ratified this convention; ten ratifications are necessary for it to enter into force.

124 Tshwane Principles, above note 121, p. 5.

125 *Ibid.*, Principle 10.

126 See the references cited in above note 91.

This type of documentation often entails material that is relevant to clarifying the fate and whereabouts of missing persons, in particular cases of enforced disappearance. With a view to DWP processes in States undergoing political transitions, Principle 10 of the Tshwane Principles notes that “a successor government should immediately protect and preserve the integrity of, and release without delay, any records that contain such information that were concealed by a prior government”.<sup>127</sup> This principle is very important in the search for missing persons in general and in particular regarding enforced disappearance, as especially in the latter cases the information is often systemically concealed.

The Model Inter-American Law on Access to Public Information, which was adopted in 2010 by the General Assembly of the OAS,<sup>128</sup> is based on the principle of maximum disclosure, “so that all information held by public bodies is complete, timely, and accessible, subject to a clear and narrow regime of exceptions set out in law that are legitimate and strictly necessary in a democratic society”.<sup>129</sup> The Model Inter-American Law is clear that the exceptions to disclosure “do not apply in cases of serious violations of human rights or crimes against humanity”.<sup>130</sup> This leads to the conclusion that investigations into enforced disappearance cases, whether by a judicial investigation, truth commission or missing persons mechanism, could not be impeded by referring to the exceptions for disclosure. This does not cover all missing persons cases, however.

The organs of the Inter-American system have highlighted the importance of access to information and to archives, emphasizing “that victims and their relatives, as well as the society as a whole, have the right to access information on serious violations of human rights in the archives of the State”, even those of the security sector.<sup>131</sup> In the case of *Gomes Lund et al. v. Brazil*, the Inter-American Court of Human Rights (IACtHR) held that

it is essential that, in order to guarantee the right to information, the public powers act in good faith and diligently carry out the necessary actions to assure the effectiveness of this right, particularly when it deals with the right to the truth ... in cases of gross violations of human rights.<sup>132</sup>

The most important finding of the Court in this case was that it is not the institution accused of committing mass human rights violations that should decide whether or not the information exists, and whether or not to make it public. Similarly, a State

127 Tshwane Principles, above note 121, Principle 10(A)(3).

128 Model Inter-American Law on Access to Public Information, above note 122. The Model Inter-American Law was drafted by the OAS Department of International Law, in cooperation with the Inter-American Juridical Committee, the Special Rapporteur for freedom of expression of the Inter-American Commission on Human Rights, the Department of State Modernization and Effective Public Management, member States, and civil society.

129 *Ibid.*, Art. 2.

130 *Ibid.*, Art. 2.

131 Inter-American Commission on Human Rights, *Access to Information, Violence against Women, and the Administration of Justice in the Americas*, OAS/Ser.L/V/II.154, Doc. 19, 2015, p. 28, available at: [www.oas.org/en/iachr/reports/pdfs/Access-information.pdf](http://www.oas.org/en/iachr/reports/pdfs/Access-information.pdf).

132 *Ibid.*, para. 36. See also J. Ciorciari and J. Franzblau, above note 71, pp. 27 ff.



cannot release itself from its obligations simply by alleging that the required information on mass human rights violations committed in the past was destroyed. On the contrary, the State has the obligation to search for such information by all possible means.<sup>133</sup>

The Council of Europe Convention on Access to Official Documents is the “first binding international legal instrument to recognise a general right of access to official documents held by public authorities”. It also provides a list of exemptions for access to information, but at the same time narrows the scope for abuse by imposing a strict public interest test.<sup>134</sup> Further, it requires that State officials “preserve and organize records, process requests for information promptly, provide reasons for any refusal, and make available a review procedure by a court or ‘another independent and impartial body established by law’”.<sup>135</sup> Although the Convention does not refer specifically to mechanisms tasked with the search for missing persons, it nevertheless applies and is important, since it obliges States Parties to take the necessary measures in their domestic law to give effect to the provisions set out in the Convention.<sup>136</sup> As Article 3 of the Convention proposes the “balancing of interests” when assessing requests to access public information, the interest of finding information about missing persons will most probably prevail.<sup>137</sup>

The instruments above should serve domestic authorities as examples of good practice with regard to access to information in general, and access to records containing information related to the fate of the missing in particular. They should be taken into consideration when specific laws relating to, and agreements with mechanisms tasked with the search for missing persons are drafted.

## Conclusions

During times of internal violence or armed conflict, but also in other contexts, many persons go missing or are forcibly disappeared. These cases are of major importance in DWP processes. Documentation and archives of different sources can provide crucial elements in the search for and establishment of the fate of those who are missing. This is critical for the victims who are still alive and for the family members of the victims. However, it is not only the next of kin of the missing persons who have the right to know what happened to their loved ones, but also their community and society as a whole.

133 IACtHR, *Gomes Lund et al. (“Guerrilha do Araguaia”) v. Brazil*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 24 November 2010, Series C, No. 219, para. 211, available at: [www.corteidh.or.cr/docs/casos/articulos/seriec\\_219\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_219_ing.pdf).

134 See information on the website of the Council of Europe at [www.coe.int/en/web/conventions/full-list/-/conventions/treaty/205](http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/205) and J. Ciorciari and J. Franzblau, above note 71.

135 J. Ciorciari and J. Franzblau, above note 71, p. 28.

136 Council of Europe Convention on Access to Official Documents, above note 123, Art. 2, para. 2.

137 See *Explanatory Report to the Council of Europe Convention on Access to Official Documents*, CETS 205, 18 June 2009, para. 38, available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d3836>.

In practice, DWP mechanisms, including those focusing on missing persons, encounter difficulties in gaining access to archives. In addition, they sometimes have to work with archives which have not been handled properly or have been partly destroyed. Nevertheless, archives remain critical to the work of DWP mechanisms, and the international standards are clear that authorities have to document, in a detailed manner, information which helps to prevent persons from going missing. This information should only be classified in exceptional circumstances.

In conclusion, the important role of archives in dealing with the past and in particular in the framework of the search for missing persons should be taken into consideration more carefully. This is only possible if State agencies and international organizations, as well as non-governmental bodies such as human rights and victims' organizations and other civil society actors holding such archives, guarantee their preservation and safeguard. It is also crucial that the mechanisms investigating the fate of missing persons are given privileged and timely access to archives containing information that could support the search for missing persons.