



GUIDANCE NOTE 1

MISSING PERSONS NATIONAL MECHANISMS: CONTEXTUALIZED APPROACH AND MANDATE



The mechanism should have a clear mandate that allows it to clarify the fate and whereabouts of missing persons and respond to the needs of their families in a comprehensive, efficient and sustainable manner.

This guidance note describes how contextual realities will influence the establishment, scope and functioning of national mechanisms dealing with missing persons. It explains the importance of a clear mandate and sets out key elements of such mechanisms, including their objectives, organizational set-up and relationship with other authorities and powers, legal status, and representation and participation of relevant constituencies.

1. WHO IS A MISSING PERSON?

The circumstances in which individuals go missing vary greatly. For instance, armed conflicts can cause mass displacements, which result in people going missing because they may lack adequate means of communication or they may become separated en route. Migrants may go missing when they are unable or choose not to establish contact with their families, including when they are detained. Members of state armed forces or non-state armed groups can go missing in action. Deceased individuals whose bodies are abandoned, buried in haste or mismanaged, making identification difficult or impossible, may also be reported missing. So may people who are captured, arrested or abducted and held incommunicado or in a secret location.

There is no legal definition of a missing person under international law. For the purpose of this guidance, “missing persons” is understood to mean individuals of whom their families have no news and/or who, on the basis of reliable information, have been reported missing as a result of an armed conflict or other situation of violence, or any other situation that may require the intervention of a competent state authority.⁴ This notion includes victims of enforced disappearances.

This definition of a missing person is not limited in time and contains no presumption of death. Hence, people are considered to be missing from the moment they are reported missing by their families, i.e. there is no waiting period before someone can be considered missing. Persons are no longer considered missing after their families have received sufficient, reliable and credible information on their fate and whereabouts.

2. NATIONAL MECHANISMS FOR MISSING PERSONS

For the purpose of these notes, the term “mechanism” refers to all institutions, commissions or other bodies and processes established by relevant authorities, with the humanitarian objective to provide individualized answers on the fate and whereabouts of missing persons and provide support to families of missing persons. Mechanisms may also pursue other objectives, including those linked to accountability or transitional justice.⁵ In all cases, efforts should be taken to ensure complementarity between the different objectives.

Mechanisms can be set up in situations of ongoing armed conflict and other situations of violence, in post-conflict contexts and even to address decades-old legacies.

National mechanisms tasked with searching for missing persons have been established in, *inter alia*, Bosnia and Herzegovina, Colombia, Croatia, El Salvador, Kosovo*, Lebanon, Mexico, Peru,

⁴ This definition is based on that in *Missing Persons: A Handbook for Parliamentarians*, ICRC, Geneva, 2009.

⁵ However, these objectives will not be further explored in this set of guidance notes, other than insofar as they relate to the search for the missing.

* Kosovo unilaterally declared its independence from Serbia on 17 February 2008. Its status remains disputed.

Serbia, South Africa, Sri Lanka and Ukraine. In addition, a number of mechanisms has been established to facilitate the coordination of search efforts between former parties to armed conflicts – for example, after the armed conflicts in Bosnia and Herzegovina, and between Croatia and Serbia; in Cyprus; after the 1998–1999 conflict in Kosovo; after the 1991 Gulf War and the armed conflict between Iran and Iraq; after the 1992–1993 conflict in Abkhazia; and after the 2008 armed conflict in South Ossetia. The guidance notes focus primarily on national mechanisms, even if they are also to a large extent relevant for coordination mechanisms.

3. A CONTEXTUALIZED APPROACH

The aforementioned mechanisms, including their mandates, operational approaches and the degree to which they have succeeded, differ considerably, reflecting the historical, political, socio-economic, cultural, legal and institutional realities in each context.

Key considerations that are likely to determine what a mechanism can set out to achieve and whether it can be effective include:

Institutional capacity

Searching for and identifying missing persons and responding to the needs of their families requires a broad range of capacities. The extent to which authorities have these capacities will be an important criterion when setting up a mechanism.

The mechanism must be adapted to the nature and scale of the caseload, the needs and expectations of the families, and the overall socio-economic, cultural, institutional, legal and political environment of the country.

Trust in institutions

Past events often dictate the level of trust in such authorities as the military, the judiciary, law enforcement and forensics institutions. In contexts of armed conflict and other situations of violence, the population, or parts of it, may not trust or may fear authorities. Where this is the case, cooperation of the population with, and confidence in the work of, the mechanism are likely to be affected.

Social and political cohesion and political will

Those responsible for persons going missing may or may not be in positions of power. Critical political constituencies may not support efforts to deal with the past, including with regard to the issue of the missing. In such situations, efforts to clarify the fate and whereabouts of missing persons tend to be more complex and sensitive, as are accountability processes.

If left unaddressed, these and other considerations risk limiting the scope of objectives pursued by a mechanism. They may also affect the level of autonomy of and the powers granted to a mechanism in terms of, for example, access to information, access to locations, or powers to compel witness testimony and ensure the confidentiality of information the mechanism receives. For this reason, those seeking to set up a mechanism should devise strategies to address these factors early on.

4. THE NEED FOR A LEGAL BASIS

A mechanism requires a mandate, usually provided through the adoption of the relevant legal framework.

The mandate should be provided in the domestic legal framework that establishes the mechanism. Additional to the mandate, other critical elements that should be set out in the legal basis establishing the mechanism include the objectives to be pursued by the mechanism, its structure, governance and functions, its powers and status (including that of its staff) and its resourcing. Furthermore, the legal framework should include, as appropriate, provisions regarding the representation and participation of different constituencies, including families of missing persons.



National missing persons mechanisms that have been created pursuant to a law include:

Mexico: the General Law on the Forced Disappearance of Persons, Disappearances Committed by Individuals and the National Search System came into effect in 2018, establishing the National Search Commission.

Ukraine: the Commission on Missing Persons in Special Circumstances was established based on the Law of Ukraine On the Legal Status of Missing Persons 2018.

In some circumstances, other procedures have been used:

The **South African** Missing Persons Task Team was established in terms of the recommendations of South Africa's Truth and Reconciliation Commission, which stated that government should set up a task team in the National Prosecuting Authority to continue investigating the fate and whereabouts of those who disappeared in political circumstances between 1960 and 1994, and to recover their remains, where possible.

5. KEY ELEMENTS OF A MANDATE

In line with the above, the following elements should be considered:

a. Objectives

The objectives of a mechanism should include, but need not be limited to, the following issues:

i) *Who is the mechanism looking for?*

A mandate should set out the jurisdiction/caseload of a mechanism. It can be formulated either broadly or with reference to a specific armed conflict or event, time period, region or geographic area, the manner of disappearance or any combination of these. It must be kept in mind that the line between different caseload of missing persons is often not a clear one. It is essential, therefore, that the mandates of different authorities involved are clear, without overlap, and that standard operating procedures (SOPs) are put in place to articulate issues such as jurisdiction, process and exchange of information, among others.



Bosnia and Herzegovina

Law on Missing Persons, Article 2 – Definitions

1. "A missing person is a person whose family is without news of him/her and/or who is reported as unaccounted for, on the basis of reliable information, owing to armed conflict that occurred on the territory of the former Socialist Federal Republic of Yugoslavia. This Law shall apply to persons who went missing in the period from 30 April 1991 to 14 February 1996."*

Ukraine

Law of Ukraine On the Legal Status of Missing Persons, Article 3 – Scope of the Law

"This law covers the public legal relations connected with obtaining the legal status of missing persons in situations of an armed conflict, hostilities, domestic insurgency, emergency situations of natural or man-made disasters, other events that can cause mass death of people, as well as of the persons missing as a result of any other circumstances."*

* Unofficial translations

ii) **What does the mechanism aim to do?**

The mandate of a mechanism should spell out, as a minimum, the powers and functions required to clarify the fate and whereabouts of missing persons and to serve and assist their families.



Colombia: Decree establishing the Missing Persons Search Unit

Article 5, *inter alia*, sets out the following functions and powers:*

- Gather all the information necessary for the search for, location and identification of missing persons and establish the list of missing persons.
- Design and implement a national plan and corresponding regional plans for the search for, location, recovery, identification and dignified delivery of the remains of missing persons.
- Coordinate and advance, with the technical support of the National Institute for Legal Medicine and Forensic Sciences (INMLCF) and other public entities, search processes, location, recovery, identification and dignified return of the remains of missing persons.
- Guarantee the participation of the relatives of missing persons in the search for, location, recovery, identification and dignified return of remains.
- Promote interinstitutional coordination in terms of guidance and psychosocial care for the families of missing persons.
- Deliver to the next of kin a detailed official report of the information that has been obtained about what happened to the missing persons.
- Deliver to the Commission for the Clarification of the Truth, Coexistence and Non-Repetition detailed reports of the information obtained on what happened to the persons considered missing.
- Report publicly and periodically (at least every six months) on activities relating to the search for, location, recovery, identification and return of remains.

* Unofficial translations





El Salvador: [Decree No. 45 of 6 October 2004](#) creating the Interinstitutional Commission for the Search for Missing Children as a Consequence of the Armed Conflict in El Salvador – Article 3*

- a) Investigate *ex officio* or at the request of any person and receive information about the disappearances of girls and boys.
- b) Promote the victims' right to the truth, by promoting procedures to search for disappeared children.
- c) Ensure the preservation and defence of the right to identity of the persons who were victims of disappearances.
- d) Inspect documentary records or files of state institutions belonging to the Executive Branch. [...]
- e) Promote the guarantee of restitution of family relationships between the person who was disappeared as a child and their biological family.
- f) Promote coordination with public institutions and the participation of private, national and international organizations. [...]
- g) Request before the competent authority precautionary measures of protection to guarantee the rights of child victims of disappearance, as well as to preserve relevant information that is in danger of being altered, destroyed or hidden.
- h) Maintain permanent communication with the conglomerate of victims of child disappearance in order to know their needs and problems, and to provide them with comprehensive assistance. [...]
- i) Conduct national awareness campaigns and educational processes on the rights of victims of child disappearance.
- j) Produce periodic public reports on the result of the Commission's work.
- k) Promote the victims' rights of access to justice, transferring to the attorney general of the Republic and to the competent authorities the pertinent information on criminal offences that come to the Commission's attention in the exercise of its mandate.

* Unofficial translations

iii) What is the term of the mandate granted to the mechanism?

A mechanism's mandate may be ad hoc and limited in time, indefinite – until the fate and whereabouts of the missing are clarified – or provide for the establishment of a permanent body. In practice, the time required to investigate a given caseload is often grossly underestimated at the outset. Care therefore needs to be taken to avoid unrealistic expectations.



- The [Decree](#) establishing the Missing Persons Search Unit (Unidad de Búsqueda de Personas dadas por Desaparecidas) in **Colombia** grants it a 20-year mandate, which can be extended (Article 1).
- In **Kosovo**, the Governmental Commission on Missing Persons has been formed for an undetermined time frame. Its work will end when its mandate is completed, as determined by [Law No. 04/L-023](#) on Missing Persons 2011 and Regulation No. 15/2012 on the Work of the Government Commission on Missing Persons (10/07/2012).

b. Organizational set-up and coordination with other institutions

The search for and identification of missing persons, and addressing the needs of their families are complex and potentially sensitive processes and might require the involvement and collaboration of judicial, investigative and forensics systems, as well as other entities and stakeholders. These may include non-state actors, both domestic and international, who may have specific resources and expertise to bring to the mechanism's work.

An evaluation should assess the capacity, both technical and political (including trust and independence), of existing institutions and processes to pursue the above objectives.

A decision must then be taken as to whether these capacities can be strengthened to address the gaps identified, providing they are properly coordinated, or whether it is necessary to create new structures under the mechanism.

The mandate and objectives of the mechanism should reflect the gaps identified, ensure coordination and avoid overlap and duplication of tasks with, and optimize the knowledge, experience, capacities and resources of the existing institutions.

These considerations will inform the shape and role of a future mechanism, be it a commission with a coordinating role, a unified registry able to centralize and process all information on missing persons and unidentified human remains, a specialized unit to deal with a specific caseload, or a separate institution with a broad range of capacities. It is also necessary to clearly set out and articulate its relationship and interaction with other authorities and institutions. In this regard, it should generally be assumed that the higher a mechanism is positioned in a state structure, the higher the chances of it succeeding in fulfilling its mandate.



The **Colombian** Missing Persons Search Unit has developed an [organigram](#) of its organizational set-up.

Lebanon – Law 105 on Missing and Forcibly Disappeared Persons*

Article 7 – Obligation of Exchange and Cooperation:

“The competent authorities shall exchange information pertaining to determining the fate and identity of missing and forcibly disappeared persons and shall submit such information to the Commission. In order to improve the search for missing and forcibly disappeared persons, the competent authorities in Lebanon shall cooperate with the International Committee of the Red Cross (ICRC), the [United Nations’] Office of the High Commissioner for Human Rights (OHCHR), the Commission, the Lebanese Red Cross, or with any other humanitarian organization, in accordance with their respective mandates.”

Kosovo – Law on Missing Persons*

Article 8 (1) – Governmental Commission on Missing Persons:

“[The] Commission is a governmental body that heads, supervises, harmonizes and coordinates activities with local and international institutions, cooperates with institutions and international organizations and other stakeholders with regard to clarification of the fate of missing persons as a result of the 1998–1999 war, regardless of their ethnic background, religion or military or civil status.”

* Unofficial translations

c. **Specific powers and legal status of the mechanism and its staff**

Searching for missing persons often requires having access to restricted information, to witnesses, including state officials, and to physical locations, for the purpose of carrying out searches. Mechanisms may also wish to provide confidentiality to witnesses or have compulsive powers, e.g. to obtain witness testimony or access to information. Finally, the work of mechanisms and their staff may need to be protected from interference, including by other state institutions.



Peru: Law on the Search for Missing Persons during the 1980–2000 Period of Violence*
Obligation of cooperation and protection of information – Article 13: “The Ministry of Justice and Human Rights will require the information it deems necessary for the purposes of this Law from public entities and competent private companies, which must provide timely cooperation or assistance in the provision of same.”

* Unofficial translations

d. **Issues of representation and participation**

The representation and participation of relevant constituencies – not only families of missing persons but also political, ethnic or religious groups, state institutions or civil society – may be critically important to ensure the legitimacy of and trust in the work of a mechanism.



Bosnia and Herzegovina

The Missing Persons Institute’s Advisory Board represents the interests of the members of families of missing persons. The Advisory Board consists of six members, who are appointed based on proposals made by registered Associations of Families of Missing Persons in Bosnia and Herzegovina. Appointment procedures provide for ethnic and gender equality.