



GUIDANCE NOTE 6

DOMESTIC LEGAL AND POLICY FRAMEWORKS DEALING WITH THE MISSING



A mechanism¹² must ensure an informed and appropriate response, which complies with international obligations and is compatible with the prevailing legal system. It is therefore important to have a good understanding of the domestic legal and policy framework. The establishment of the mechanism may require legal reforms to ensure the effectiveness of the system and to address any gaps and shortcomings.

1. ENSURING AN APPROPRIATE DOMESTIC LEGAL AND POLICY FRAMEWORK

Efforts to prevent and resolve cases of missing persons and address the needs of their families necessitate a multitude of legal provisions, policies and administrative processes and procedures. These pertain to such issues as the prevention of disappearance, the search for and identification of missing persons, the management of the dead, the needs of and support to families of missing persons and the ability of a mechanism to carry out its mandate.

Analysing existing domestic legal and policy frameworks (e.g. laws, regulations, procedures and policies) will help determine the extent to which they facilitate these objectives, whether they comply with relevant international legal obligations, standards and best practices and where gaps exist. An assessment will also help determine the extent to which existing provisions are properly applied in practice. This analysis can then inform recommendations for changes and additions to the legal and policy framework, including those required to ensure the functioning of a mechanism.

Some of the key areas to be considered in the analysis of the domestic legal and policy framework are listed and addressed in more detail in the [ICRC's Guiding Principles/Model Law on the Missing](#).

Relevant definitions, including of missing persons and their families

Providing definitions of terms such as “missing person” and “relatives of the missing person” in domestic law will facilitate a consistent and uniform interpretation of these terms.

The legal status of the missing and the related rights of missing persons and their families

Recognizing the legal status of a missing person at the domestic level is essential and has three main objectives: first, to recognize, by law, that a person is missing until his or her fate and whereabouts are clarified; second, to ensure the continuity of the legal personality of the sought person, to protect his or her civil and family rights; and third, to enable any legal or administrative claim submitted by families of missing persons to be processed, including when a declaration of death would normally/otherwise be required.

Measures to prevent people from going missing

When the relevant IHL and IHRL obligations are properly implemented, the national legal framework can also play a vital role in preventing people from going missing. It must protect certain specific human rights, such as: the right to life; the right to liberty and security of person; the right to respect for family life; the prohibition of torture, cruel, inhuman or degrading treatment or punishment; the prohibition of enforced disappearance; and the right to recognition as a person before the law. Furthermore, states must adopt identification measures to help prevent disappearances and facilitate search efforts in the event a person does go missing.

¹² For the purpose of these notes, the term “mechanism” refers to all national institutions, commissions and other bodies and processes established by relevant authorities that aim to provide individualized answers on the fate and whereabouts of missing persons, and provide support to families of missing persons. Beyond this humanitarian objective, mechanisms may pursue other objectives, including those linked to accountability or transitional justice. 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.



Reporting procedures and search processes

An analysis of the procedures for reporting a person as missing and how search processes are conducted by relevant authorities is key to assessing the legal framework.

Issues related to data management and the protection of personal data

Information relating to the missing person must be handled appropriately with respect to the privacy of that person and his/her family. Appropriate data protection rules and practices at the national level can ensure that all personal information remains sufficiently protected in terms of who has access and for what purpose, and that access to it is permitted when required for humanitarian reasons. Rules regarding data protection need to balance these potentially conflicting needs and will require an explicit or inherent flexibility in any measures, administrative or legal, that operate at the national level.

The management of the dead

Procedures need to be established for the search, recovery and treatment of the dead, including for unclaimed or unidentified bodies, as well as for restitution to families, issuance of the death certificate and death registration, and for burial and exhumation. The assessment of the legal framework needs to encompass all of these.

Criminal responsibility and prosecution

States must adopt the relevant legislation in order to ensure that crimes against missing persons and their families are criminalized under domestic law and that criminal proceedings can be initiated by the missing person or his/her legal representative, family members, interested parties or state authorities.¹³

¹³ Refer to (the forthcoming) Guidance Note 11 Coordination between the Search and Criminal Investigations.



INTERNATIONAL LEGAL FRAMEWORK ON THE MISSING

The primary responsibility for preventing persons from going missing and ascertaining what has happened in the case of those that do go missing lies with state authorities.

International humanitarian law (IHL), which applies in situations of armed conflict, contains rules that seek to prevent persons from going missing as a result of the conflict and to clarify their fate and whereabouts when they do (1). Notably, IHL requires parties to the conflict to take all feasible measures to account for persons reported missing as a result of armed conflict and to provide their family members with any information they have on their fate. IHL also requires the dead to be searched for, collected and evacuated, and all available information to be recorded before they are disposed of, with a view to identification. It also requires that those who have died during armed conflict be properly managed and their dignity protected, and that parties to an armed conflict must endeavour to facilitate the return of remains to families upon request (2). IHL also contains obligations regarding the investigation and prosecution of war crimes, including those resulting in persons going missing or being forcibly disappeared.

International human rights law (IHRL) contains rules and standards that are relevant to prevent persons from going missing and clarifying the fate and whereabouts of missing persons not only in connection with armed conflict but also in connection with natural disasters or migration. It also contains rules related to the investigation and prosecution of gross violations of human rights. The 2006 **International Convention for the Protection of All Persons from Enforced Disappearance** is the first universal treaty to include specific obligations for States Parties to prevent and protect against enforced disappearance. In the case of alleged or suspected enforced disappearance, states must take all appropriate measures to search for, locate and release disappeared persons, as well as to investigate acts of enforced disappearance and bring those responsible to justice (3). Finally, states must take appropriate measures to uphold each victim's right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation, and the fate of the disappeared person (4).

Rules relevant to searching for missing persons and to ensuring proper management of the dead and protection for their dignity can be found in other bodies of law. For instance, international disaster response law contains relevant provisions and standards relating to forensic activities and the management of the dead.

States are required to adopt and apply measures at the domestic level to fulfil their obligations under international law.

- 1 See the [Missing Persons and their Families](#) factsheet issued by the ICRC Advisory Service on IHL.
- 2 See the [Humanity after Life: Respecting and Protecting the Dead](#) factsheet issued by the ICRC Advisory Service on IHL.
- 3 [International Convention for the Protection of all Persons from Enforced Disappearance \(ICPPED\)](#). See Article 24, which also states that in the event of death, States Parties shall take all appropriate measures to locate, respect and return their remains; Article 3; and Article 15, providing that States Parties shall cooperate with each other and shall afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains.
- 4 [International Convention for the Protection of all Persons from Enforced Disappearance \(ICPPED\)](#). See Article 24.



ICRC Advisory Service

The ICRC's Advisory Service on IHL helps states implement IHL at the national level. With a global network of legal advisers, it provides guidance to national authorities on specific domestic implementation measures needed to meet their IHL obligations and it supports the work of national IHL bodies established to facilitate IHL implementation domestically. To this end, it provides legal advice and technical support, it facilitates the exchange of information on national measures of implementation, and it helps with capacity-building upon the specific request of national authorities and other actors concerned.

The ICRC's Advisory Service works closely with national governments – taking into account their specific needs, political systems and legal traditions – with a view to all states adopting IHL treaties and other relevant instruments, and putting in place comprehensive national legislation. To this end, it can also support authorities when they are assessing the compatibility of their domestic legal and policy framework with international law and standards, including with regard to the missing persons file.

2. PROVIDING A LEGAL BASIS FOR THE WORK OF A MECHANISM

If, after assessing the national legal and policy framework, the institutional framework and the needs of the families the authorities conclude that there is a need to establish a national mechanism or to adapt the existing mechanism's mandate, the domestic legal framework may need to be reformed to ensure that the mechanism is able to exercise its mandate and meet its objectives while ensuring complementarity with other existing institutions. To ensure complementarity, this may require delineating and clarifying the roles of different actors involved in the missing persons file, including, for instance, those involved in the search for missing persons and the investigation of crimes resulting in persons going missing.

To ensure the success of the mechanism, it is important to take measures to establish it in the domestic legal framework at the proper level (preferably at the highest possible level, such as in the law) to facilitate its stability and the cooperation of relevant actors with the mechanism.

The following are some important aspects to be included in the domestic legal framework establishing the mechanism:

- The mechanism should have a clear mandate setting out its scope of application (e.g. to clarify the fate and whereabouts of missing persons and to respond to the needs of their families).
- The mechanism should be granted the necessary resources. This includes ensuring that the mechanism has a budget and sustainable source of financing.
- Indicate the composition and structure of the mechanism and how its members are selected: they may comprise members of government bodies, representatives of civil society, representatives of the families of missing persons and, wherever pertinent, representatives of the National Red Cross and Red Crescent Societies.
- The mechanism should have clear tasks and competencies/powers, such as:
 - coordinating, supporting and supervising the process of searching for and identifying missing persons and informing the families accordingly
 - receiving and registering cases of missing persons from families and relevant authorities
 - accessing, collecting and analysing appropriate information on the circumstances of the disappearance and the fate and whereabouts of a missing person, and providing this information the applicant and relevant authorities while ensuring data protection
 - carrying out, or requesting the relevant authorities to carry out, any measures necessary to search for missing persons and verify information
 - delineating the roles and respective responsibilities of all relevant institutions involved in the search for and clarification of cases of missing persons
 - accessing all sites/locations where missing persons or their remains are presumed to be and protecting gravesites

- obtaining from relevant governmental and non-governmental entities, including from the judiciary, all relevant information that may help clarify the fate and whereabouts of missing persons. This could include information on circumstances in which persons went missing, names of witnesses and of those responsible, information on persons who died, were wounded or detained, an unidentified bodies registry, or documentation at cemeteries or burial places
- taking measures to respond to the needs of relatives and ensuring support – for instance, regarding mental health, economic (e.g. burial costs, participation in commemorative events), legal and administrative needs, as required, and keeping the families and communities abreast of the process and the results achieved.