

## OHCHR SYRIA

### The Right to Know and Missing Persons in Syria

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After 11 years of violence and conflict in Syria, the decrease in hostilities and narratives of normalisation hide a grim reality that remains as pressing as ever: the need to address the tragedy of missing persons. This call has been increasingly made by [victim/survivor/family organisations](#), [Syrian civil society](#), [international institutions](#), and several Member States. The urgency of the situation was seen in Human Rights Council [Resolution 47/18](#) which focused on detention and enforced disappearances in Syria.

This momentum culminated with the General Assembly's adoption of [Resolution 76/228](#) on 24 December 2021. This resolution requested the Secretary-General to "conduct a study on how to bolster efforts, including through existing measures and mechanisms, to clarify the fate and whereabouts of missing people in the Syrian Arab Republic, identify human remains and provide support to their families". Among the set of solutions, the creation of a new entity dedicated to missing persons in Syria has been a key proposal, including by the UN [High Commissioner for Human Rights](#).

These discussions brought renewed attention to the right of the families of missing persons to know what happened, with some confusion or misunderstanding on the meaning and implications of this right. This paper aims at clarifying the definition and scope of the right to know under both international humanitarian law (IHL) and international human rights law (IHRL), and how it relates to violations and to families as victims in the context of Syria.

#### **The right to know under IHL and under IHRL**

There is a need to address a recurring confusion regarding the terminology. The "right to know" is often used as a generic expression regarding missing persons and their families. However this right has a different meaning, rationale and scope of application depending on whether it is considered under IHL or under IHRL. While IHL contains a right to know the fate and whereabouts of persons missing in relation to the armed conflict, international and regional human rights instruments and jurisprudence progressively recognised a "right to know the truth" about gross IHRL violations and serious IHL violations. The confusion may come in part from the fact that the former is often described as the origin for the development of the latter. Nevertheless, there may be overlaps in that both rights can be relevant for a particular case.

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It is crucial to ensure that the gender impact of missing persons is fully considered when addressing these rights. Women may go missing because they are specifically targeted due to their gender, for example due to the chilling effect this would have over a family and the shame associated with it. There are also additional challenges, with relatives less likely to report cases and search for them because of the stigma associated with possible sexual violence suffered by women missing. This stigma and related marginalisation also continues if women are found. In other cases when a male relative goes missing, it impacts the daily lives of spouses and children who may have to take on additional work in a context of social discrimination. Women in particular face such additional hardships such as obtaining needed civil documentation due to discriminatory laws that preclude them from travelling on their own with their children. States dealing with this issue should take such challenges into consideration and [adopt a gender-sensitive approach to ensuring the rights of the relatives](#).

### *The IHL right to know the fate and whereabouts of missing persons*

IHL only applies in times of armed conflict and to conduct sufficiently connected to the armed conflict, i.e., it only governs acts or issues that meet that requirement of “nexus” or link to the armed conflict. In short, for this right to be applicable, the case of a missing person must be linked to the armed conflict. Indicative factors to determine that link include perpetrator/victim affiliation to a party to the conflict or conformity of the act with the aims of such a party. When that linkage is made, the right to know the fate and whereabouts exists as soon as a person goes missing as a result of the conflict, irrespective of whether a violation occurred. It is also important to recall that IHL binds all parties to the conflict, be they States or non-State armed groups.

The “right of families to know the fate of their relatives” is contained in [article 32](#) of Additional Protocol I. It is one of the few references to an individual right under IHL, whereas other IHL norms are primarily framed as obligations of the parties to the conflict. Furthermore, this right must not only guide the parties to the conflict in their activities related to missing persons, but also those of the High Contracting Parties to this treaty as well as international humanitarian organisations. While Additional Protocol I only applies to international armed conflicts, the ICRC identified this right as [customary law](#) also applicable in non-international armed conflict, and interprets it as pre-existing Additional Protocol I. This right includes the [obligations](#) 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] ha[ve] on their fate”. In case of death, other [IHL rules](#) require the recovery, identification and dignified management of their remains.

Realising this right, including through recognising the status of those reported missing in domestic law through a declaration of absence, can greatly contribute to addressing legal issues faced by women when their male relatives are unaccounted for.

### *The IHRL right to know the truth about violations*

International human rights standards recognised the “right to know the truth”. It first developed through the jurisprudence of human rights bodies and courts like the Inter-American Court of Human

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Rights<sup>1</sup> in the context of enforced disappearances. This right then gradually extended, as stated by the [Human Rights Committee](#), to other gross human rights violations such as extrajudicial executions and torture, and to serious IHL violations. Its scope is then limited as it takes the form of the right for victims - including families - to know the truth about such violations.<sup>2</sup> While it was originally conceived as implicitly stemming from a wide range of other rights and obligations, such as the obligation of the State to investigate human rights violations, it acquired a status as a standalone right, as illustrated by the evolution of the jurisprudence of the European Court of Human Rights.<sup>3</sup> It has also been specifically reaffirmed in the [International Convention for the Protection of All Persons from Enforced Disappearance](#) (ICPED).

The right to the truth under IHRL primarily relates to States' obligations. It arises in cases of gross human rights violations or serious IHL violations. In the context of missing persons, it is relevant when someone goes missing in connection to a violation (e.g., when the act itself of going missing amounts to a violation such as enforced disappearances or when a person goes missing following a violation such as an arbitrary arrest or arbitrary detention). Furthermore, persons going missing as a result of a violation are at greater risk of being subjected to further violations such as torture, murder, or extrajudicial killing. This right means [knowing the full and complete truth](#) about all such violations.

### [Missing persons' families as human rights holders and victims](#)

The needs of the families and the manifold impacts of their relatives going missing are rightly put at the centre of the discussions on this issue. The need to know what happened is often described as one of their most urgent asks, together with seeking justice. They also identify pressing needs, particularly women who face legal, financial and emotional hardship as they strive to support and raise children on their own while leading the search for their missing loved ones.

While accurate, the term "needs" overlooks a key legal element: families can also be victims and many of their demands about knowing what happened and in facing the consequences of their missing relative(s), are not merely needs but the expression and [enjoyment of legal rights](#).

Victims have been [defined](#) as "persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law". They can also include "the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization". The [ICPED states](#) that "victim means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance".

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<sup>1</sup> IACHR, Report No. 136/99, Case 10.488 Ignacio Ellacuría et al.

<sup>2</sup> [Study on the Right to the Truth](#), OHCHR, E/CN.4/2006/91, 9 January 2006; [Right to the Truth](#), OHCHR, A/HRC/5/7, 7 June 2007; [Right to the Truth](#), OHCHR, A/HRC/12/19, 21 August 2009; and [Report of \[OHCHR\] on the seminar on experiences of archives as a means to guarantee the right to the truth](#), A/HRC/17/21, 14 April 2011. See also, ICJ, [Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction - A Practitioners Guide](#), 2015.

<sup>3</sup> See for example, ECtHR, *El-Masri v the Former Yugoslav Republic of Macedonia*, Application No 39630/09, Merits and Just Satisfaction, 13 December 2012 (Grand Chamber); *Al Nashiri v Poland*, Application No. 28761/11, Merits and Just Satisfaction, 24 July 2014; *Husayn (Abu Zubaydah) v Poland*, Application No. 7511/13, Merits and Just Satisfaction, 24 July 2014

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Families can indeed be victims when the act of their loved ones going missing amounts to a violation. They can also be victims if their own rights are violated. The UN Working Group on Enforced or Involuntary Disappearances has held that enforced disappearance amounts to the violation of other rights of the family of the disappeared person, including the right to family life and several economic and social rights, such as the right to an adequate standard of living and the right to education.<sup>4</sup> It also stated that the anguish suffered by family members “reaches the threshold of torture”<sup>5</sup> and that therefore “the State cannot restrict the right to know the truth about the fate and the whereabouts of the disappeared as such restriction only adds to, and prolongs, the continuous torture inflicted upon the relatives.”<sup>6</sup> The violation of the families’ right to know – whether under IHL or IHRL – would also make them victims.

### The right to know in the context of Syria

There are clearly situations in Syria where both the right to know the fate and whereabouts under IHL and the right to know the truth under IHRL will be applicable. Both should be considered in relation to the issue of missing persons. Victims in Syria – both survivors and families – have the right to know such information as:

- how the fact that someone went missing amounts to a violation or how a violation contributed to a person going missing, including its gender dimensions
- what happened to the missing person (are they alive and detained or have they died), including any further violation of their rights since they were reported missing
- where the missing person is or, if they have died, where are their remains
- when did the person go missing
- where did they go missing
- what were the circumstances that led to their going and/or remaining missing
- who was involved in their going missing
- has an investigation been undertaken, and if so, what are its status/findings
- if the person died, have their remains been returned to their family

Realising the right to know the truth forms an integral part of seeking victim/survivor-centric accountability. It is also closely linked to the Government of Syria’s duty to protect and guarantee human rights.<sup>7</sup> Finally, it helps ensure complementarity between various avenues contributing to that goal, as existing criminal accountability processes focus on establishing individual criminal responsibility, which certainly contributes to uncovering relevant information on missing persons, but can be done without always determining what happened to them.

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<sup>4</sup> Report of the Working Group on Enforced or Involuntary Disappearances, E/CN.4/1492, 31 December 1981, para. 165.

<sup>5</sup> General Comment on the right to the truth in relation to enforced disappearances, Report of the Working Group on Enforced or Involuntary Disappearances, A/HRC/16/48, 26 January 2011, para. 39. See also, Reports of the WGEID E/CN.4/1984/21, para. 172; E/CN.4/1985/15, para. 291; E/CN.4/1990/13, para. 339; and General Comment on article 19 of the Declaration on the Protection of All Persons from Enforced Disappearances, E/CN.4/1998/43, para. 72; and Human Rights Rights Committee, *Quinteros Almeida v Uruguay*, Communication No. 107/1981, 21 July 1983, para. 14.

<sup>6</sup> General Comment on the right to the truth in relation to enforced disappearances, op. cit., para. 39.

<sup>7</sup> Study on the right to the truth, E/CN.4/2006/91, 9 January 2006, para. 56.