**Comment on the** [**Draft Guiding Principles for the Search for Disappeared Persons**](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT/CED/GED/15/27939&Lang=en)

The draft guiding principles are, of course, a welcome addition to existing information and documents in relation to the CED. Please find below a few points of reflection in relation to the draft.

1. **General comments**

There are two general observations that might be usefully considered for future framing of the guiding principles.

The Principles do not appear to take fully into account the conceptualisation of the crime of enforced disappearance. Under international law the “not knowing what happened to family members” constitutes inhumane and degrading treatment. Refusing to give information forms part of the crime of enforced disappearance (Article 7(2)(i) of the Rome Statute). The “not knowing on behalf of [specifically] relatives” is integral to the overarching violation, the disappearance itself. An effective investigation will offer information on the primary violation which includes, in the crime element, the effect of disappearance on families and relatives. In other words, the search will help bring to an end the level of suffering associated with not knowing and with it that part of the crime. This general point is particularly relevant in relation to Principle 2, paragraph 3 where reference is made to secondary victimization of the family members and relatives without acknowledging the scope of the primary victimization giving rise to the duty of states to investigate.

Secondly, the Principles fail to acknowledge that the search and investigation for disappeared persons can only be meaningful if the results of the search are authoritatively reported. This is inherent in the reference “affirming the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to that end” as per the Convention’s preamble, reiterated in Article 24(2). The Principles (given the terms of the Convention) need to be compatible with the right to the truth. At a minimum, it is suggested, this involves a right to (a)(i) an authoritative investigation of both the events and politico-social structures that led to the atrocity and (ii) to the particular circumstances of an individual's suffering; (b) an authoritative reporting or communication of the results of these investigations. The right would also suggest that (c) an opportunity for victim involvement is given. Whilst these draft Principles make reference to (a)(i)(ii) and (c) the need for a report or communication that is authoritative is absent from the guiding principles. Principle 12, paragraph 1 speaks of “access to information” but not about communication of results. Yet this would appear to be an integral part of any search and investigation efforts – whether for humanitarian or criminal purposes.

1. **Comments to specific principles. Please indicate the principle and paragraph to which the comment is related (e.g. principle 5, paragraph 1);**

Following on from the first general point above, should Principle 2, paragraph 3 recognise that close relatives of those who disappeared may be victims in their own right on account of both their own closeness to the disappeared person and the indifference of the authorities?

From Principles and 6 and 7 the following questions arise:

With the extensive databases and the updating of information therein, what privacy rights will need to considered in maintaining, updating, sharing and communicating the information contained therein? In addition to confidentiality requirements, the Principles ought to refer to other human rights enjoyed by those affected.

In relation to the effectiveness of the investigation (Principle 6, paragraph 3): should there be a duty of state agencies to cooperate, subject to independently and juridically accepted limitation (i.e. national security or informant confidentiality)?

In terms of making the findings available, particularly where national security databases are concerned (Principle 6, paragraph 4) how are the demands of the individual victims balanced with possible (national) security concerns arising from sensitive data? And also the extent to which this can be related to the rights of victims to participate outlined in principle 12.

Under principle 9, if an investigation applies to current or previous state violations, then the principle of independence should include express reference to independence of the investigating process from the executive.

Principle 12, paragraph 2, speaks of rights of relatives. In line with the second general comment made above, it might be worth stressing again that the search and investigation is a duty of the state arising in response to the right of an individual whose protection has been breached. It follows, that there may also be a collective right to that information. The right to the truth is recognised in Article 24(3) and the preamble. This right includes a collective/public aspect (which, for example, justifies public promulgation of the investigative results) and should be reflected in the principles.

1. **If contributors want to propose additional text.**

Principle 13 is phrased curiously as “The search should be protected”. Paragraphs 1, 2 and 3 subsumed thereunder, however, would suggest that “The search should offer protective measures” to a number of stakeholders, namely the victims, witnesses and investigative staff. This may merely be a small translation issue.