



Commentary on Access to Archives of Individual Cases of the Working Group on Enforced or Involuntary Disappearances.

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Introduction

Currently, the Working Group on Enforced or Involuntary Disappearances has no written Guidelines regulating archival access of individual cases of disappearances. One of the Working Group's primary tasks is to assist families in determining the fate or whereabouts of their family members who have reportedly disappeared. In that humanitarian capacity, the Working Group serves as a channel of communication between family members of victims of enforced disappearances, other sources reporting cases of disappearances, and the States concerned. In preparing these Guidelines, The Human Rights Clinic has drawn on law, jurisprudence, and policy from the United Nations, the Inter-American system, the European Union, the European Court of Human Rights, and prominent archival societies.

The Guidelines have been structured to facilitate access to information. The Human Rights Clinic has designed Guidelines on managing the Working Group's archives with certain restrictions using as an example, the International Council on Archives (ICA) Principles of Access to Archives along with the Technical Guidance on Managing Archives.¹ Focusing on the principle of maximum disclosure with the understanding that the Working Group has a duty to secure the right to truth, The Human Rights Clinic has balanced that with concerns of protecting the confidentiality of information. The Human Rights Clinic has devised limitations for specific categories of requestors. Finally, having regard to these general principles and limitations, the Human Rights Clinic has developed steps in determining access to the archives.

Maximum Disclosure

Maximum Disclosure is the over-riding principle of the Guidelines. Maximum disclosure means that information in the Working Group's possession must be made public, unless there are certain limited exceptions that are legitimate and necessary in a democratic society.² Access to information is grounded and derived from many human rights principles. This is an integral part

¹ Principles of Access to Archives –Technical Guidance on Managing Archives with Restrictions, INTERNATIONAL COUNCIL OF ARCHIVES-COMMITTEE ON BEST PRACTICES AND STANDARDS, http://www.ica.org/sites/default/files/2014-02_standards_tech-guidelines-draft_EN.pdf [hereinafter Principles of Access to Archives].

² See for instance, Organization of American States, Model Inter American Law on Access to Information, Art. 2, Jun. 2010 AG/RES 2607(XL-O/10).

of the right to freedom of expression under a variety of international and domestic frameworks. It is also implicated in a number of other human rights, including the right to truth and the right to remedy for rights violations. The right is expressly mentioned in Article 19 of the Universal Declaration of Human Rights³ and in Article 19 of the International Covenant on Civil and Political Rights.⁴

The UN General Assembly, in its first session, adopted resolution 59(I) recognizing freedom of information as a fundamental human right.⁵ This has implications for other rights including the right to truth and the right to a remedy, as well as being closely tied to principles of democracy and the rule of law. In the Inter-American system, the freedom of expression is contained in Article 13 of the American Convention on Human Rights.⁶ Access to information within the Council of Europe is found in Article 10 (Freedom of Expression) of the European Convention on Human Rights, which prohibits public authorities from restricting an individual's right to receive and impart information and ideas. In *Youth Initiative for Human Rights v. Serbia*, the European Court of Human Rights (ECtHR) held that the freedom to receive information embraces a general right of access to information.⁷ Within the European Union, Regulation 1049/2001 of the European Parliament and of the Council establishes a right to access to information.⁸ Specifically, regarding enforced disappearances and following the standards developed by the Working Group, the Inter-American Commission on Human Rights, the UN Human Rights Committee and the ECHR have agreed that denying victim's relatives information

³ Universal Declaration of Human Rights, Art. 19, Dec. 1948. Stating: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

⁴ International Covenant on Civil and Political Rights, Art. 19.2, Dec. 1966. Stating: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." The ICCPR foresees limitations to the exercise of this right, and thus continues: "3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals."

⁵ General Assembly: Resolution Adopted by the General Assembly, United Nations (Dec. 14, 1946), <http://www.un.org/documents/ga/res/1/ares1.htm>.

⁶ Organization of American States, American Convention on Human Rights art. 13, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

⁷ *Youth Initiative for Human Rights v. Serbia*, 20 Eur. Ct. H.R. (2013).

⁸ Regulation 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding Public Access to European Parliament, Council and Commission Documents, 2001 O.J. (L 145).

about a victim's fate constitutes cruel, inhuman and degrading treatment.⁹ Thus, the Working Group should preserve and protect archives as well as provide full access to the information.

Specific principles must be adopted in order to provide access to the Working Group's archives. There are generally accepted principles for access to archival documents in various international bodies.¹⁰ The Human Rights Clinic has produced a table that lists 19 institutions and explores the availability of archival documents using six categories.¹¹ While the UN has an archival and management system and clear directives on archival classification,¹² the Human Rights Clinic is aware of only one UN organization that has written policies and procedures for accessing its archives, the Office of the High Commissioner of Refugees (UNHCR).¹³

At present, the archived documents of the Working Group are made public only in certain circumstances.¹⁴ Information received by the Working Group is classified as "strictly confidential" under UN classification principles,¹⁵ meaning that information received from sources will only be shared with others if the consent of the source can be attained, and at all other times the information will remain classified. The Working Group aims to protect the confidentiality of victims, their families, and witnesses to enforced or involuntary

⁹ *Cfr.* Trujillo Oroza v. Bolivia, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 92, ¶ 114 (Feb. 27, 2002); Kurt v. Turkey, 1998-III Eur. Ct. H.R.133 (in which the court considered the situation of a mother who had suffered the "anguish of knowing that her son had been arrested and that there was a complete lack of official information regarding his fate". By virtue of that, the European Court considered that the State of Turkey had violated Article 3 of the European Convention on Human Rights). *See also* Special Rapporteur for Freedom of Expression, *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*, 286, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II.Doc.5 (2010) [hereinafter IACHR SPECIAL RAPPORTEUR REPORT 2010]:Tas v Turkey, Eur. Ct. H.R.(2015).

¹⁰International Convention for the Protection of All persons from Enforced Disappearances art 24 2716 U.N.T.S 3 (Dec. 20 2016) [Hereinafter 'The International Convention']; *see also* Menzi L. Behrnd-Klodt & Peter J. Wosh, *Privacy and Confidentiality Perspectives: Archivists and Archival Records*, 2005.

¹¹ The six categories are (1) Access to Archives; (2) General Principle of Openness or Confidentiality; (3) Groups that have Access; (4) Limitations on Access; (5) Procedure to Access Archives; and (6) Duration of Time Limit on Access. *See* Appendix for detailed table.

¹² Overview of ARMS, United Nations Archives and Records Management Section,<https://archives.un.org/content/united-nations-archives-and-records-management-section> (last visited Apr. 30, 2016).

¹³Access Policy, UN High Commissioner for Refugees, <http://www.unhcr.org/3b03896a4.html> (last visited Apr. 30, 2016).

¹⁴ *See* Publications and Resources, United Nations Human Rights Office of the High Commissioner, <http://www.ohchr.org/EN/PublicationsResources/Pages/Publications.aspx> (last visited Apr. 30, 2016).

¹⁵ Email from Ugo Cedrangolo, Sec., Working Group on Enforced or Involuntary Disappearances, to Richard Bee, Student, Human Rights Clinic, Univ. of Texas Sch. of Law (Mar. 4, 2016).

disappearances.¹⁶ However, in order to be resolved, cases will be “transmitted” to the State concerned with a request to carry out investigations.¹⁷ This process is understood by those submitting cases to the Working Group, and therefore does not constitute a breach of confidentiality. It is important to note however, that while the Working Group values confidentiality, its Methods of Work has no clause outlining its position on the matter and furthermore, contains no mention of the word confidentiality.

The Methods of Work require that the Working Group transmits to States “all the available and relevant information received.”¹⁸ Similarly, Article 23 establishes that “all relevant information that a source or State submits on an outstanding case will be examined by the Working Group and transmitted to the State or source concerned for any observations that they may have or to provide additional details on the case.”¹⁹ The only specific reference to withholding information is contained in Article 17 of the Methods of Work regarding the identity of children in public documents unless the best interest of the child or the mandate of the Working Group requires otherwise. The Working Group also develops strategies for disseminating its work to States, all relevant United Nations bodies, other intergovernmental organizations, other relevant society organizations and families.²⁰

¹⁶ See Form to Submit a Communication on an Alleged Enforced or Involuntary Disappearance, Working Group on Enforced or Involuntary Disappearances, http://www.ohchr.org/Documents/Issues/Disappearances/Communication_form_E.doc (last visited Apr. 28, 2016) [Hereinafter ‘*Form to submit*’].

http://www.ohchr.org/Documents/Issues/Disappearances/Communication_form_E.doc.

¹⁷ Human Rights Council, Working Group on Enforced or Involuntary Disappearances, Methods of Work of the Working Group on Enforced or Involuntary Disappearances, ¶ 11, U.N. Doc. A/HRC/WGEID/102/2 (May 2, 2014). [Hereinafter ‘*Methods of Work*’].

¹⁸ *Methods of Work*, *supra* note 17, Article 14. ‘In order to enable States to carry out meaningful investigations, the Working Group provides them with all the available and relevant information received. In this regard, the Working Group urges sources to provide as much detail as possible concerning the identity of the disappeared person and the circumstances of the disappearance.’

¹⁹ *Methods of Work*, *supra* note 17, Article 23. ‘All relevant information that a source or State submits on an outstanding case will be examined by the Working Group and transmitted to the State or source concerned for any observations that they may have or to provide additional details on the case. The Chair-Rapporteur may authorize during intercessional periods the transmission of information that does not potentially lead to the clarification, closure or discontinuation of the case. Members will be updated at the next session on the information transmitted on the authorization of the Chair-Rapporteur for any decision that may need to be taken.’

²⁰ *Methods of Work*, *supra* note 17, Article 6. ‘The Working Group draws the attention of States, non-governmental organizations, families and other relevant stakeholders to general or specific aspects of the Declaration, recommends ways of overcoming obstacles to the realization of the Declaration and discusses with representatives of States, non-governmental organizations, families and other relevant

Remarkably, it should be noted that in the Working Group’s classification of an archived case, relatives or other interested parties have indicated that they wish to no longer pursue the case any further.²¹ On the other hand, clarified cases occur when the fate or whereabouts of disappeared persons are clearly established by various means.²² This means the source of the request will ideally have the information they were looking for. Confidentiality and the extent of disclosure may need to be reassessed if there is a request for access to information filed away in cases that have been clarified. The nature of harm to the victim, if still alive, source, witnesses, or other individuals may be increased or decreased as a result. Taking the above into account, the Guidelines below are listed along with reasoning for specific requestors.

Outside of the Working Group, archival organizations provide standard definitions for confidentiality. The International Council on Archives (ICA) defines confidentiality as “the quality or property of privacy or secrecy attaching to certain information and/or records limiting access”²³ while the Society of American Archivists defines confidentiality as “the sensitive nature of certain information and to the certain circumstances surrounding its disclosure or protection.”²⁴ According to the United Nations Archives and Records Management Section (UN ARMS), documents and records entrusted to the UN should be classified in one of three categories; (1) strictly confidential, (2) confidential, and (3) unclassified.²⁵ Confidential

stakeholders how to solve specific problems in the light of the Declaration. It furthermore assists States by carrying out country visits, and assists States, non-governmental organizations, families and other relevant stakeholders by organizing seminars and providing similar advisory services. The Working Group also makes observations on the implementation of the Declaration to concerned States. It adopts general comments whenever it determines that the Declaration requires further clarification or interpretation in the context of international law. The Working Group also develops strategies for disseminating its work to States, all relevant United Nations bodies, other intergovernmental human rights institutions, national human rights institutions, non-governmental organizations, other relevant civil society organizations and families.

²¹ *Methods of Work*, *supra* note 17.

²² *Id.* at ¶ 26.

²³ Principles of Access to Archives, INTERNATIONAL COUNCIL OF ARCHIVES-COMMITTEE ON BEST PRACTICES AND STANDARDS 12, www.ica.org/sites/default/files/ICA_Access-principles_EN.pdf.

²⁴ Menzi L. Behrnd-Klodt & Peter J. Wosh, *Privacy and Confidentiality Perspectives: Archivists and Archival Records*, 2005.

²⁵ *Understanding Information Sensitivity*, UN ARMS, <https://archives.un.org/sites/archives.un.org/files/uploads/files/Quick%20Reference%20Information%20Sensitivity.pdf>.

documents include those documents whose unauthorized disclosure of information or material “could reasonably be expected to cause damage to the work of the United Nations.”²⁶

The most important factor in classifying portions of the Working Group’s documents and information as confidential is the request of the source—usually a family member of the victim or a non-governmental organization (NGO)—to remain confidential.²⁷ Additionally, a witness can request anonymity.²⁸ The nature of the confidentiality requests is clear. There is ample concern of retribution by a State or other actors that may bring harm to a victim, the victim’s family, or a witness, if their name is released in the archived documents. In order to allay any concerns about confidentiality, the Working Group should proceed to grant access to its archival information within the exceptions laid out in the Guidelines.

A. Victims and Family Members

Guidelines

(1) Family members shall continue to receive a summary of the communications between the Working Group and the State on their cases and the information provided by the State.

The Human Rights Clinic felt that a definition for victims and family members should not be applied here. While taking into consideration the evolution of international law as the Working Group does,²⁹ specifically, the definition of victim as provided in the International Convention for the Protection of All Persons from Enforced Disappearances³⁰, and a similar inference in the Declaration on the Protection of All Persons from Enforced Disappearances,³¹ a definition of family members proved to be too problematic to be inclusive of all eventualities with regard to

²⁶ *Id.* This includes harm to individuals and Member States as well as the UN.

²⁷ Question 5 asks if the source/author would like his or her identity kept confidential. *Form to Submit*, *supra* note 16.

²⁸ *Id.* Question 2 (h) allows witnesses to remain anonymous. (h) “If there are witnesses to the incident, please provide their names and relation to the victim. If they wish to remain anonymous, indicate if they are relatives, bystanders, or others. If there is evidence, please specify.”

²⁹ *Methods of Work*, *supra* note 17.

³⁰ *International Convention*, *supra* note 10.

³¹ Declaration on the Protection of All Persons from Enforced Disappearances GA. Res. 47(133) A, UN. Doc A/RES/47/133(Dec.18, 1992). [hereinafter ‘*The Declaration*’].

different cultures throughout the world. Therefore, definitions for the category were not included.

(2) In dealing with requests from victims for additional documents in the possession of the Working Group in its archives, such as annexes to State responses or full copies of responses from the State where they are not textually included in the data base, the Working Group will pay particular attention to the right to truth under the Declaration on the Protection of All Persons, except where overriding reasons of confidentiality exist.

(3) To ensure that Victims and family members are able to enforce this right to truth, the Working Group shall provide all available information that a source or State submits and transmit it to family members and victims to provide additional details on the case.

(4) In extremely exceptional circumstances where there are compelling reasons, the Working Group may deny access.

The Human Rights Clinic believes that it is vital that victims and family members are able to exercise their right to know the truth under the International Convention.³² With this comes a corresponding duty to provide full access to information. The Tshwane Principles on National Security and the Right to Information address the question of how to ensure public access to State information without jeopardizing legitimate efforts to protect people from national security threats.³³ These principles are based on international and national law practices and were drafted by 22 organizations and academic centers over a two-year period in a process that involved consulting more than 500 experts from over 70 countries around the world. They were developed in order to provide guidance to those engaged in drafting, revising or implementing relevant laws or policies.

Principle 10 on Categories of Information with a High Presumption or Overriding Interest in Favor of Disclosure asserts that “[i]n no circumstances may information be withheld on national

³² *International Convention*, *supra* note 10 Article 24(2).

³³ Open Society Foundation, Tshwane Principles on National Security and the Right to Information Principle 10(B), (June 12, 2013) [Hereinafter ‘*The Tshwane Principles*’].

security grounds that would result in the secret detention of a person, or the establishment and operation of secret places of detention, or secret executions. Nor are there any circumstances in which the fate or whereabouts of anyone deprived of liberty by, or with the authorization, support, or acquiescence of, the State may be concealed from, or otherwise denied to, the person's family members or others with a legitimate interest in the person's welfare."³⁴ The Inter-American Court and ECtHR both agree that denying victims' relatives information about a victim's fate constitutes cruel, inhumane, and degrading treatment.³⁵ Further, the International Council of Archives recommends that full access is given to victims of serious human rights abuses. It is imperative in cases of disappearances that family members have access as in the majority of cases the victim will not be able to access the file.

The right to truth is linked to the right to a remedy and may also be a form of reparation for victims of enforced disappearances.³⁶ Victims and their families are able to obtain redress and have the right to adequate compensation under the Declaration,³⁷ which the Working Group has the mandate to implement. Reparations come in the form of access to information regarding "the circumstances of the enforced disappearance, the progress and results of the investigation, and the fate of the disappeared person."³⁸ Access to information is an integral part of the right to a remedy recognized under international law for victims of violations of international human rights law and international humanitarian law.³⁹ That is, one of the rights of victims of grave violations is the right to a remedy for those violations of their human rights, and access to information may be such a remedy. For example, for family members of a victim of an enforced disappearance, information about the whereabouts and fate of their loved one is the paradigmatic remedy.

The Human Rights Clinic proposes that access will only be denied where "overriding reasons of confidentiality exist" or "in extremely exceptional circumstances where there are compelling

³⁴ *Id.*

³⁵ *Supra* note 9.

³⁶ INT'L. CTR. FOR TRANSNATIONAL JUSTICE, TRUTH SEEKING: ELEMENTS OF CREATING AN EFFECTIVE TRUTH COMMISSION (2013), <https://www.ictj.org/sites/default/files/ICTJ-Book-Truth-Seeking-Chapter1-2013-English.pdf>.

³⁷ *The Declaration*, *supra* note 31.

³⁸ *International Convention*, *supra* note 10.

³⁹ THEO VAN BOVEN, THE UNITED NATIONS BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO A REMEDY AND REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW (2010), http://legal.un.org/avl/pdf/ha/ga/ga_60-147/ga_60-147_e.pdf.

reasons.” The Human Rights Clinic recognized the importance of confidentiality to the successful work of the Working Group and therefore has built in a protection for necessary cases. This concerns complex situations such as if a family member is now working for the State or there are privacy concerns. Or, as another possible example, where a mother claims that her husband was kidnapped and then she was raped yet did not tell the child- if the child then seeks information 20 years later then the Working Group would not want to give this information. Another exceptional circumstance would be if someone provides names of the witness but asked that his or her name never be disclosed to anyone in the community or his or her family. In this case, the Working Group must protect the security and family of these individuals. The Working Group may over-ride this if the Working Group decided to redact specific portions.

(5) Consent of the person who filed the case is not required for a different family member unless the Working Group decides otherwise.

This is an aspect The Clinic discussed with many current and former members of the Working Group in interviews and other forms of correspondence, who seemed to come to this general consensus.⁴⁰

(6) All applicants will receive a reply to their requests in writing as soon as possible and in any case within 4 months. If the reply is wholly or partially negative, the applicant will be informed of the Working Group’s reasoning.

(7) Within one year of the date of the written notification of the refusal, applicants may request a review of that decision and shall have the ability to challenge this review.

(8) A denial of access will not bar applicants from filing a new application in the future where circumstances for the refusal may have changed.

⁴⁰ Interviews with Jeremy Sarkin, Bernard Duhaime, Henrikas Mickevicius, Oliver de Frouville and Correspondence with Ugo Cedrangolo and Houria Es-Slami. Conducted between February and April 2016.

The Human Rights Clinic felt it was important for an applicant to have reasons in case of refusal. This is similar to the procedure which takes place in many EU institutions.⁴¹ The Clinic felt that it was important not to bar applicants from filing a new application because circumstances in different situations could change rapidly. As such, they should not be denied access to their right to truth where there is no longer compelling reasons for doing so.

B. States

Guidelines

(1) The Working Group will continue sharing a summary of all the cases registered that the Working Group decides to transmit to States. It will also continue to provide a summary of all additional information received from the sources.

(2) For any additional information on documents in its possession, the Working Group has the authority to deny any request by or on behalf of a State if it does not have the consent of the source of the information and believes that sharing that information with the State may endanger the safety or privacy of any individual concerned. Otherwise, requests should be granted where possible.

(3) The Working Group may use factors such as (a) whether enforced disappearances continue to take place in that country; (b) time elapsed since the beginning of the disappearances; (c) whether the case has been clarified, discontinued, or archived; and (d) whether effective independent investigations are being conducted to decide whether disseminating information to the State may endanger safety.

In addition to the information automatically given to States under the Working Group's current practice,⁴² the Clinic proposes that access to the full extent of the archives on a specifically requested selection of cases may also be granted. This additional information may take the form of statements from witnesses, findings from third parties or any other form of information the

⁴¹ Council of Europe: Documents, Records and Archives, [http://www.coe.int/t/dgal/dit/ilcd/Source/DGA-DIT-IMD\(2011\)03rev_en_AccessDeclass.pdf](http://www.coe.int/t/dgal/dit/ilcd/Source/DGA-DIT-IMD(2011)03rev_en_AccessDeclass.pdf), (last visited May 1, 2016).

⁴² Procedures of the Working Group on Enforced or Involuntary Disappearances, <http://www.ohchr.org/EN/Issues/Disappearances/Pages/Procedures.aspx> ¶ 3 (last visited Apr. 29, 2016).

Working Group has archived, and may prove useful in helping States resolve cases of enforced or involuntary disappearances. As such, it may prove valuable in achieving the right to truth for victims, their families and society.

However, paragraph 2, which allows the Working Group to deny access to a State if it feels there may be danger to the safety of an individual, has been included to ensure that information which could endanger the safety of individuals or compromise investigations will not be given to States. In many cases,⁴³ the State requesting additional access to the archives may be the same one or a natural successor to the regime which is suspected in the disappearance. In any event, there may frequently be cases where the Working Group does not feel comfortable in allowing archival access to a State, and this guideline allows the protection of confidentiality.

Paragraph 3 has been put in place to give the Working Group a guide as to some of the factors to consider when deciding whether to deny additional access to States. The factors mentioned are not to be considered exclusive, and if there are any issues that the Working Group feels are important enough to decline access, then they have ultimate final discretion. The reason these two factors have been chosen here is because they represent considerations that can be taken into account in every case of a request. The Working Group will have access to case specific information as well as knowledge of the political situation in each country and will therefore be in a good position to make a judgment as to whether the current State presents a risk.

The other factors (time elapsed since disappearance, whether the case has been resolved and presence of effective parallel investigation) are based upon UN principles of information sensitivity, classification and handling⁴⁴ which suggest that information should be publically accessible (and therefore accessible by States) after 20 years for “confidential” documents and reviewed after 20 years for “strictly confidential” documents. Due to the extremely sensitive information that the Working Group often handles, an exact time limit on confidentiality would be inappropriate, opting instead for the approach of “strictly confidential” files, but the date of

⁴³Annual Report of the Working Group on Enforced or Involuntary Disappearances 01/28/2013 at page 19.

⁴⁴ UN Secretary General Bulletin on Information Sensitivity, Classification and Handling ¶ 4.3, https://archives.un.org/sites/archives.un.org/files/ST_SGB_2007_6_eng.pdf (Feb. 12, 2007) [Hereinafter ‘*Bulletin on Information Sensitivity*’].

the case, as well as whether it has been resolved, should factor into the Working Group's decision.

(4) Personal information including names and addresses of sources or witnesses shall be redacted unless the Working Group decides otherwise.

This allows for further information to be granted without compromising the Working Group's quest for confidentiality. The Clinic has been informed by former Working Group member Jeremy Sarkin that having the principle of confidentiality as fundamental to the work of the Working Group allows it to be more effective in information collection and in performing its role of helping locate the disappeared.⁴⁵ Redacting all personal information would help ensure that this confidentiality is not breached. This would ensure that, even without the consent of the source, it would still be possible for some non-personal information to be accessed.

(5) States will receive a reply to their request in writing as soon as possible and in any case within 4 months. If the reply is wholly or partially negative, the State will be informed of the Working Group's reasoning.

(6) Within one year of the date of the written notification of refusal, States may request a review of that decision.

(7) States refused access will not be barred from filing a new application in the future where circumstances for the refusal may have changed.

C. Truth Commissions and Courts

Guidelines

(1) The Working Group will share the same information with Truth Commissions and Courts that it shares with States in its regular communications with them, as they are State institutions. Broader access will be granted with the following requirements:

⁴⁵ Telephone Interview with Jeremy Sarkin, Former Member, U.N. Working Group on Enforced or Involuntary Disappearances (Mar. 7, 2016).

(2) *With permission of the victim, family members, or legal representative, the information can be made available. If permission cannot be obtained because of the volume of cases or other reasons, the Working Group will grant access under the following conditions:*

(a) No member of a Truth Commission or Court will make any reference to the authors of the communications or victims of human rights violations by name or any other way that would enable their identification (unless the name has already been published by the Working Group). Personal information including names and addresses of sources may be redacted unless the Working Group decides otherwise.

(b) The Truth Commission or Court will collect information only in relation to documents specified in the application for clearance to access restricted records and/or its annexes.

(c) If the Truth Commission or Court realizes the need to access additional documents from the Working Group's archives, the Working Group will work to facilitate access applying the aforementioned principles. If the Truth Commission or Court wishes to make copies of some or all of the documents, the Working Group will consider the content to ensure confidentiality of the material.

Truth Commissions, investigative bodies “established to look at and report on a pattern of abuses by a repressive regime,”⁴⁶ are afforded the same treatment as States in terms of the basic information they receive. States currently receive all relevant information submitted by sources after a review by the Working Group.⁴⁷ It is important that Truth Commissions receive information in a timely manner as they are focused on “producing a report within an allotted time.”⁴⁸ Similar treatment is afforded to Courts dealing with the investigation and prosecution of those who are accused of a human rights violation, including enforced disappearances. This approach reflects the practice of the Working Group in relation to Truth Commissions and expands it to Courts.

⁴⁶ TRUDY HUSKAMP PETERSON, FINAL ACTS: PRESERVING THE RECORDS OF TRUTH COMMISSIONS 1 (2005).

⁴⁷ *Methods of Work*, *supra* note 17.

⁴⁸ *Id.*

On the other hand, because Truth Commissions and Courts are external organizations and not UN bodies, the Working Group balances the goal of maximum disclosure with concerns of confidentiality by requiring consent from families or legal representatives coupled with the promise of non-disclosure of sensitive information such as the names of authors of communications or the victims.⁴⁹ This approach allays concerns of dealing with States that may be transitioning from an “authoritarian to a more democratic rule,”⁵⁰ which is common for Truth Commissions.

(3) If the Working Group has reason to believe, based on credible and detailed allegations, that an institution’s motives are hostile to the victim or victim’s family members, it may deny the request.

The first sentence of paragraph 1 addresses the concern that some Truth Commissions or Courts may not be acting in the best interests of the victim, victim’s family, or other sources of information. In this case, the Working Group may decide what, if any information may be transmitted and in some cases, there may be an outright denial of a request to access the Working Group’s archives. Consistent with the Methods of Work, credible and detailed information is required to perform the assessment.

(4) All applicants will receive a reply to their request in writing as soon as possible and in any case within 4 months. If the reply is wholly or partially negative, the applicant will be informed of the Working Group’s reasoning.

Paragraph 2 represents the overarching goal of the Guidelines, to promote maximum disclosure. Further, the Working Group strives to maintain dialogue, coordination, and cooperation with national institutions which may include Truth Commissions and Courts.⁵¹ As such, requestors should receive a reason as to why their request was denied.

⁴⁹ Letter dated Mar. 7, 2014 from the Chair-Rapporteur of the Working Group on Enforced or Involuntary Disappearances to the President of the National Truth Commission of Brazil, U.N. Doc. G/SO 217/1/ (Mar. 7, 2014).

⁵⁰ PETERSON, *supra* note 46.

⁵¹ *Methods of Work*, *supra* note 17, at 7.

D. UN Bodies

Guidelines

(1) In keeping with established Methods of Work, the Working Group will continue to cooperate and coordinate with the Human Rights Council, its special procedures, relevant organs, offices, and specialized agencies and funds of the United Nations, providing the same information communicated to States.

(2) In discussing with other UN bodies, the Working Group will always stress the need for reciprocity in terms of access to archives.

It is important for the Working Group to maintain a positive relationship through open communication with UN bodies. To this end, the Working Group cooperates, coordinates, and sometimes consults with the various UN bodies named in paragraph 1. This is also in line with the only other UN body who has a written archival access policy, the UNHCR, who shares its archives with staff members of UN bodies engaged in official work that require the use of its records.⁵² As the Working Group may refer cases or allegations to other UN bodies, there is an expectation that reciprocity will be granted to the Working group.

E. Committee on Enforced Disappearances

Guidelines

(1) The Working Group will continue cooperating and coordinating with the Committee on Enforced Disappearances.

(2) When exchanging information and coordinating action, the Working Group respects the different mandates and roles of the two bodies.

(3) If a case, allegation, or other document received by the Working Group contains information relevant to the Committee, the information will be referred to it, if appropriate. In making its determination, the Working Group will consider the wishes of the family.

⁵² Access Policy, Archives, U.N. High Comm'r for Refugees, at 1, <http://www.unhcr.org/3b03896a4.html>.

The Working Group and Committee on Enforced Disappearances (CED) share similar mandates. The CED has the authority to receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of violations by States that have ratified the International Convention for the Protection of all Persons from Enforced Disappearance.⁵³ Because the Working Group and CED share similar mandates, the Guidelines distinguish it from other UN bodies who may request information.

F. UN Commission of Inquiry and Other Investigative Bodies

Guidelines

With consent from the victim, family members, or legal representative, the information contained in the Working Group's archives can be shared with a UN Commission of Inquiry or similar bodies whilst it is still confidential. If consent cannot be obtained because of the volume of cases or other reasons, the Working Group will grant access under the conditions and procedures listed in C. Truth Commissions and Courts.

UN Commissions of Inquiry are often used to “respond to serious violations of... international human rights”⁵⁴ which may include enforced or involuntary disappearances. To assist in this role, it may seek to use the information possessed in the archives of the Working Group. Due to the UN mandated nature of a Commission of Inquiry, it is unlikely that disclosing information to this institution will lead to direct risks to individuals involved. However, the Clinic has decided to propose guidelines similar to those of Truth Commissions, and therefore request consent of the sources involved in order to use personal information. The rationale behind this is that, even though the Commission of Inquiry may not pose any direct risks, including personal information in official documents may lead to an indirect risk to the source involved.

⁵³ *Introduction*, Committee on Enforced Disappearances, <http://www.ohchr.org/EN/HRBodies/CED/Pages/CEDIndex.aspx> (last visited Apr. 28, 2016).

⁵⁴ *Introduction to workings of the U.N. Commission of Inquiry*, U.N. COMMISSION OF INQUIRY, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/COIs.aspx> (last visited Apr. 29, 2016).

However, if the consent requested cannot be gathered, these guidelines also give the Working Group the flexibility to pass on information to Commissions of Inquiry, as long as the personal data of those involved is protected. This allows the Commission of Inquiry to have information which it may find extremely useful in solving cases of enforced disappearances, whilst not sacrificing the confidentiality of the Working Group's procedures.

G. Non-governmental organizations and National Human Rights Institutions (NHRI)

Guidelines

Restriction: Documents are generally restricted for 20 years.

(1) In general, the Working Group will share only a list of cases.

(2) If the NHRI is acting as an investigative institution, it may receive additional information following the same procedures as that of Truth Commissions and Courts.

In keeping with its Methods, the Working Group develops strategies for dissemination of its work with non-governmental organizations (NGOs).⁵⁵ Considered a relevant stakeholder, NGOs submit information about individual cases of enforced or involuntary disappearances.⁵⁶ While NGOs do play an important role in communicating information to the Working Group, a request of archival information is restricted for 20 years. NGOs are not States or Courts or UN bodies, all of which share mandates that may require action to a specific request to or from the Working Group. An NGO is welcome to have a list of cases but no other detailed information will be provided.

If a National Human Rights Institution (NHRI) is identified as an investigative institution, then additional information would be provided as the institution would be considered similar to States, Courts, or UN bodies. NHRIs are different from NGOs. They are State institutions but operate in an autonomous capacity from the State, have powers to investigate cases of enforced disappearances, and play a role similar to Truth Commissions and Courts. The Working Group has seen examples of this in Peru and Morocco.

⁵⁵ *Methods of Work*, *supra* note 17, at 2.

⁵⁶ *Methods of Work*, *supra* note 17, at 3.

H. Other Parties

This category of requestors is reserved for all those whom the Working Group does not consider to fit in any of the other categories. These include private researchers who seek to access the archives for personal or professional use, as well as any other institution not fitting into an above category. This group will have access to all public documents of the Working Group, and these Guidelines apply only to archived information which otherwise would not be made public. The thinking behind allowing this increased access in certain cases is that additional publicity (from published research, etc.) may lead to increased political pressure and prompt States to act. This is similar to the rationale of the European Court of Human Rights⁵⁷ in making much of their findings public.

Guidelines

(1) For all other parties, documents are generally classified and thus unavailable to persons in this category for 20 years. However, with permission of the victim, family members or legal representative, the information can be made available to third party researchers upon request before the expiration of the closed period. After 20 years, the documents will be reviewed to establish whether they should remain confidential. If they are to remain confidential, they should be reviewed again every 5 years.

Paragraph 1 is taken from the official UN Secretary General Bulletin on Information Sensitivity, Classification and Handling, which recommends that for “strictly confidential”⁵⁸ information such as that contained in the Working Group archives, a review after 20 years should take place. As part of that review, the Working Group may seek the consent of the original source to make the information no longer confidential. However, if the Working Group cannot reach the source and finds that there is no longer any requirement for the information to remain

⁵⁷ “50 Questions about the workings of the ECHR,” EUROPEAN COURT OF HUMAN RIGHTS, http://www.echr.coe.int/Documents/50Questions_ENG.pdf at q30 stating how the ECHR often holds public hearings (last visited Apr. 29, 2016).

⁵⁸ *Bulletin on Information Sensitivity*, *supra* note 44.

confidential, perhaps due to a clarification of the case or other change in circumstance, the archive should be free to access for all.

In order to address the difficulty of contacting sources after the 20 year restriction, Working Group member Bernard Duhaime suggested that consent be obtained—allowing later access—when initially collecting information from sources.⁵⁹ This would reduce many issues related to future communications and release of archived information. The Clinic suggests however that requests for unclassified archives are still made through the normal procedure, as then the Working Group will be able to keep a record of those who have accessed the information.

(2) Personal information including names of sources should be redacted unless consent from every individual mentioned can be established.

(3) If a party seeks access to the archives in order to conduct statistical research, and therefore has access to no personal information whatsoever such as names of witnesses or sources, consent from the sources shall not be required.

These recommendations help to ensure that access can be granted to the archives for those who wish to conduct research without being exposed to any intimate details of the case. Such research may include academic studies into the quantity of enforced disappearances in various countries, or any other purely quantitative analysis of the information in the Working Group's archives. Granting access in these cases will not lead to any breach of the confidentiality principle that is so key to the Working Group's work, and therefore does not need to be subject to the same controls as any disclosure of personal details.

Allowing access to researchers may also prove to be beneficial, as the research conducted may be able to lead to political pressure to solve cases, or at least a certain degree of heightened public awareness. As such, if no personal information risks being revealed it seems hard to justify limiting access to researchers.

⁵⁹ Telephone Interview with Bernard Duhaime, Member, U.N. Working Group on Enforced or Involuntary Disappearances (Apr. 7, 2016).

(4) If the Working Group has reason to believe that dissemination of the information may obstruct the discharge of its mandate or cause danger to the safety of any person, it may refuse the request at any time.

(5) All applicants will receive a reply to their request in writing as soon as possible and in any case within 4 months. If the reply is wholly or partially negative, the applicant will be informed of the Working Group's reasoning.

This is a way of safeguarding the interests of confidentiality and the success of the Working Group. The members of the Working Group are experts in their field and are best placed to establish whether a request for archival access poses a threat to either an individual or a case, and on those bases they are free to decline any request. This will give the Working Group powers similar to those it currently holds in establishing whether access can be granted on a case by case basis.⁶⁰ However, under this system any request that is declined would have to be justified with a reason – and if the information is no longer classified then that reason would have to be backed up with evidence. This allows the Working Group a level of discretion in protecting the valuable right to confidentiality, but also ensures a fair and transparent process for any unsuccessful requestor.

Access to Additional Information in the File

(1) When conveying information on a certain case to States, the Working Group should ensure that it transmits as much information as it can within the bounds of confidentiality.

(2) In order to maximize the effectiveness of archival access in resolving cases, all new archived information should be stored in a digital format if possible, so as to make potential access easier in the future.

⁶⁰ *Access and Declassification*, U.N. ARCHIVES AND RECORDS MANAGEMENT SECTION, <https://archives.un.org/content/access-and-declassification> (last visited Apr. 29, 2016).

The Working Group currently, as part of its Methods of Work for standard cases, sends a summary of its information on each individual case file to the State concerned so that the State can “carry out investigations.”⁶¹ Whilst not directly related to archival access, The Clinic suggests that the Working Group transmits whatever information it can to the States, including all information it has received from consenting sources. The rationale behind this is simple. The more information that is possessed by States with regard to the cases, the more effective States will be in investigating the disappearance.

This system will of course be limited by a number of factors. The first of these, as The Clinic understands through conversation with current and former Working Group members,⁶² is the difficulty in sending documents to the State if those documents are not in digitized form. The costs, both economic and labor, that would be required in order to either copy all of the information on a particular group of cases each time it was requested would be prohibitive, as would that of digitizing all current documents. As a result of this, The Clinic suggests that all further information that comes into the Working Group from sources be stored electronically in addition to physically. Having an electronic database similar to that of the European Court of Human Rights would allow easier transmission of initial information to States, as well as easier transmission of archived information to all requestors in the future. This process would help ensure that the cost of travel to Geneva is not a reason that prevents individuals from having access to the right to truth.

In addition, the Working Group retains the right to refuse to grant access to any requestor if there is a risk posed to the safety of individuals. This includes when a State is requesting information, and as such applies here.

Steps in Determining Access

The way in which the guidelines have been structured has been written in conformity with the purposes of facilitating access to information. Using the International Council on Archives

⁶¹ *Supra* note 17.

⁶² *Supra* note 40.

Principles of Access to Archives with their Technical Guidance on Managing Archives with Restrictions,⁶³ The Clinic has designed guidelines on managing the Working Group's archives with certain restrictions, focusing on the principle of balancing the right to truth, maximum disclosure, and the principle of the Working Group, to protect confidentiality of information. The various steps provide for both strict refusals and conditional refusals.⁶⁴

3. The Working Group should only deny access where there is a well founded reason and should provide an explanation with the specific grounds in which it is denied. If not:

4. All records which are restricted should be reviewed on an item-by-item basis by the Working Group for possible declassification after 20 years. Those not declassified at that time shall be further reviewed every 5 years thereafter. Where no review takes place documents will be presumed public.

The Human Rights Clinic proposes that there is a formality of declassification of documents. The Tshwane Principles suggest that it is good practice to institute a formal system of classification to individually review documents for classification in order to reduce arbitrariness, personal discretion, and excessive withholding.⁶⁵ This classification consists of reviewing and marking records containing sensitive information to indicate who may have access to the information and how the record is to be handled.

According to the Inter-American Commission's Special Rapporteur on Freedom of Expression, "No information may remain classified indefinitely. The presumptive maximum period of classification on national security grounds should be established by law."⁶⁶ Any exceptions regime should set forth a reasonable time period. Once that time period expires, the information must be made available to the public. In this sense, material can only be kept confidential while there is a certain and objective risk that, were the information revealed, one of the interests that

⁶³ International Council of Archives, *supra* note 1.

⁶⁴ Wilhelm Peekhaus, South Africa's Promotion of Access to Information Act: An Analysis of Relevant Jurisprudence, 4 J. OF INFO. POLICY 570, 583 (2014).

⁶⁵ *The Tshwane Principles*, *supra* note 33, Principle 11.

⁶⁶ *The Tshwane Principles*, *supra* note 33, Principle 16.

Article 13.2 of the Convention orders protected would be disproportionately affected.⁶⁷

This guideline is in conformity with the United Nations Secretary-General's bulletin.⁶⁸ After researching various comparable institutions and discussing with former and current members of the Working Group, the Clinic felt that this time period was most appropriate. Many Institutions throughout the world classify documents and have time limits as to declassifications. Other comparable United Nations Groups impose a similar 20-year declassification rule. The United Nations Access to Archives policy is to declassify all "confidential" information after 20 years, and review "strictly confidential" information after 20 years, and then re-review every 5 years.⁶⁹ The UN High Commissioner of Refugees allows disclosure of documents after 20 years, but individual case files are restricted for 75 years.

However, there are differences since for enforced disappearances, the experience shows that in most situations people are released or executed where as refugees tend to still be alive in which many conflicts can persist for decades. The Clinic understands that enforced disappearances are continuous crimes but privacy and security concerns are not the same. In Europe, in general the ECHR imposes 30 years⁷⁰ after a file is closed but can be altered by a reasoned decision by the Registrar of the Court. The Council of Europe's documents which are classified 'secret,' are declassified 30 years later.⁷¹ It seems best that the Working Group classifies its archives and imposes potential declassification where possible. The International Council of Archives promoted a 'culture of openness' which includes restrictions for a limited duration.⁷² Therefore, Step 4 seems most appropriate for the Working Group.

⁶⁷ IACHR Special Rapporteur Report 2010 at 316.

⁶⁸ *Bulletin on Information Sensitivity*, *supra* note 44.

⁶⁹ *Declassification of Documents*, UNITED NATIONS ARCHIVES AND RECORD MANAGEMENT SECTION ¶4.3, https://archives.un.org/sites/archives.un.org/files/ST_SGB_2007_6_eng.pdf.

⁷⁰ Access to Case files Practical Arrangements, EUROPEAN COURT OF HUMAN RIGHTS, http://www.echr.coe.int/Documents/Practical_arrangements_ENG.pdf.

⁷¹ COUNCIL OF EUROPE, Documents, Records and Archives, http://www.coe.int/t/dgal/dit/ilcd/Texts/Access_en.asp (last visited Apr. 28, 2016).

⁷² *Supra* note 1; *see also* Code of Ethics, INTERNATIONAL COUNCIL OF ARCHIVES, www.ica.org/sites/.../ICA_1996-09-06_code%20of%20ethics_EN.pdf.

Summary

Tasked with the mandate of assisting families of disappeared persons locate the whereabouts of their loved ones, the Working Group deals with regular requests for access to its archives. Until now, however, the Working Group lacked Guidelines to respond to these requests. Because of this, The Human Rights Clinic has presented its basis for recommending specific Guidelines using examples from national and international archival institutions including UN ARMS, ICA, and SAA.

While taking into account the confidential nature of the documents and information under the Working Group's care, The Human Rights Clinic aims to promote the right to truth affirmed in the *International Convention* through maximum disclosure. However, the balanced approach of confidentiality and maximum disclosure is not without obstacles. Concerns for safety to individuals prompts questions of the length of time information should be stored before it is even considered for retrieval.

Incorporating a set of Guidelines in the Working Group's evaluations of requests for disclosure will provide the Working Group with consistency and balance. The designation of categories of requestors also allows the Working Group to make decisions on the degree of disclosure without having to engage in additional fact finding as to an individual's or group's motives. In sum, these Guidelines will assist the Working Group in performing its duties to help victims who have the inalienable right to truth, justice, and reparation.