

Disappeared migrants and refugees: The relevance of the International Convention on Enforced Disappearance in their search and protection

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Analysis

Disappeared Migrants and Refugees

The Relevance of the International Convention on Enforced Disappearance in their search and protection

Grażyna Baranowska



The German Institute for Human Rights The Author

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This analysis reflects the views of the German Institute for Human Rights.



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Preface

The increasingly perilous journeys of migrants and refugees and the ever more rigid migration policies of States cause a particular risk for migrants to become victims of enforced disappearances. In its report on enforced disappearances in the context of migration, published in 2017, the UN Working Group on Enforced or Involuntary Disappearances (WGEID) left no doubt that this complex phenomenon should urgently be given adequate consideration: “States and the international community as a whole do not seem to be giving the necessary attention to this issue”.

In 2019, The UN Committee on Enforced Disappearances (CED) adopted its “Guiding Principles for the Search for Disappeared Persons”. They clearly flag the increased risk of enforced disappearance as a result of migration. They highlight the additional obstacles for the relatives of disappeared migrants and refugees related to possible undocumented status, language barriers, being in a country other than the one in which the disappearance occurred, and state authorities evading their responsibilities.

The latest resolution of the UN General Assembly on the protection of migrants, adopted in December 2019, recalls the obligation of States to protect the human rights of migrants under International Human Rights Law and, inter alia, calls upon them to cooperate to prevent migrant deaths and injuries, to identify those who have died or gone missing, and to facilitate communication with affected families.

Enforced disappearance of migrants and refugees has become a pressing human rights problem and must be taken more seriously by States than at present.

This study analyses relevant obligations arising from the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) with regard to disappeared migrants and refugees. It elaborates the Convention’s contribution to protect migrants and refugees from becoming victims of enforced disappearance and to support relatives in their search for disappeared migrants and refugees. The study also points to issues that would benefit from further interpretation by the CED to assist States in performing their obligations as best as possible.

Ten years have passed since the adoption of the ICPPED in 2010; for a long time enforced disappearances were thought to be a legacy of the past and confined to specific geopolitical regions. This was never true; enforced disappearances are not a relic of the past, but very much present and on the rise in all regions of the world. With regard to migrants and refugees, all States and in particular the State Parties to the ICPPED, have legal obligations for their protection and the prevention of human rights violations. Too often we can observe that those rightly claiming to be at the forefront of human rights protection become silent when it comes to human rights protection in the migration context. We therefore hope that this study will contribute to bridge one of the many gaps between human rights and migration policy.

Michael Windfuhr

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Summary

Deaths and disappearances on various migration routes are widely reported and yet there remains little information on the legal obligations of States in these cases. This analysis highlights State obligations with regard to disappeared migrants and refugees, as arising from the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED). It also points to issues that would benefit from additional interpretation by the Committee monitoring the implementation of the ICPPED.

While most migrants and refugees do not disappear by way of enforced disappearance, this study examines the criteria for classifying an enforced disappearance as set out in Article 2 of the ICPPED. The Convention defines enforced disappearance as the deprivation of liberty with the authorization, support, or acquiescence of a State, followed by a refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of this person.

In migration contexts, States at times cooperate in committing enforced disappearances or commit them in the territory of another State. The analysis proposes ways to assess State responsibility in such circumstances. The ICPPED furthermore obliges States to cooperate in investigating enforced disappearances, assist victims, and search for disappeared persons. These obligations require the undertaking of specific measures by States such as establishing competent authorities, developing cooperation agreements, and adopting specific instruments to ensure the effective participation of families from abroad.

A crucial factor in the context of migration is the realization of the obligation to ensure everyone the right to report alleged enforced disappearances to competent authorities, given that this may need to occur from abroad. When there are reasonable grounds to believe that an enforced disappearance has occurred, States are under obligation to undertake an ex officio investigation. This is also the case where an enforced disappearance has been committed by another State.

This study shows that the compliance with ICPPED obligations can help to prevent migrants and refugees from disappearing, and may greatly aid the search for them. One crucial mechanism to achieve this, is the cooperation between States in the measures enshrined in the Convention which are particularly relevant in the migration context.

1 Introduction

Every year thousands¹ of migrants and refugees disappear² on route to reach their destination country or in the country itself. This phenomenon has received increasing international attention, as evidenced by the inclusion of the topic in the Global Compact for Safe, Orderly and Regular Migration, adopted in December 2018³ and in the UN General Assembly resolution on protection of migrants in December 2019.⁴ If migrants or refugees disappear, their relatives are left without information on the fate of their loved ones. They are left behind and suffer severe psycho-social effects. While all families of disappeared persons suffer not knowing whether their loved ones are alive or dead, the relatives of disappeared migrants and refugees face additional obstacles in their search related to possible undocumented status, language barriers and being in a country other than the one in which the disappearance occurred.

These challenges are recognized in the “Guiding Principles for the Search for Disappeared Persons” (Guiding Principles) adopted by the Committee on Enforced Disappearances (CED) in April 2019. They stipulate that the search for disappeared persons should take into account the particular vulnerability of migrants.⁵ The Guiding Principles also note that the risk of enforced disappearance increases as a result of migration.⁶ This has been similarly stated by the Working

Group on Enforced or Involuntary Disappearances (WGEID) in its report on enforced disappearances in the context of migration, published in 2017.⁷

The goal of this study is to raise awareness of the problem of disappeared migrants and refugees, and to highlight relevant obligations arising from the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).⁸ It also points to issues that would benefit from further interpretation.

The ICPPED defines an ‘enforced disappearance’ as the deprivation of liberty with the authorization, support, or acquiescence of a State, followed by a refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of this person. While most migrants and refugees do not disappear by way of enforced disappearance, this study examines the criteria of enforced disappearance set out in Article 2 of the ICPPED.⁹

In what follows and after a brief introduction of terminology and the relevance of international humanitarian law for disappeared migrants and refugees, the study analyses State responsibility when more than one State is involved in enforced disappearances (chapter 2); and investigates which acts committed against migrants and refugees by non-state actors fall within Article 3 of the ICPPED

1 It is not possible to establish the exact number of disappeared migrants and refugees. The IOM Missing Migrant project recorded more than 30.000 border deaths globally. This only includes fatalities at international borders and explicitly excludes a number of instances (such as deaths and disappearances) that occurred after deportation or within refugee camps. Thus, the numbers cannot serve as overall information on how many migrants and refugees have disappeared. IOM, Missing Migrant Program (2020).

2 On terminology, see following section (1.1).

3 UN, General Assembly (2018).

4 UN, General Assembly (2020).

5 For more on the CED see Frouville (2020).

6 UN, Committee on Enforced Disappearances (2019), Principle 9.

7 UN, Working Group on Enforced or Involuntary Disappearances (2017).

8 For a proposal of a set of obligations states have toward disappeared migrants and refugees and their families (including the ICPPED) see the so-called Mytilini Declaration: Last Right (2018). The declaration is predominantly about the dignified treatment of the dead.

9 See Dulitzky (2019) on how the term enforced disappearance which has originated in Latin America encompasses many different instances of deprivation of liberty.

(chapter 3). In chapters 4–8, the study points to other obligations arising from the ICPPED, in particular in Article 16 (prohibition to expel, return, surrender, or extradite), Article 12.2 (obligation to undertake an ex officio investigation), Article 12.1 (right to report), Articles 14 and 15 (obligation to cooperate and afford greatest measure of mutual assistance), and Article 25 (particular protection provided to children). The conclusion in chapter 9 summarizes the main findings and highlights the areas which merit interpretative clarification by the CED.

1.1 Terminology

As defined by the 1951 Refugee Convention, a refugee is a person unable or unwilling to return to his or her country of nationality due to a well-founded fear of being persecuted for reasons of ‘race’, religion, nationality, membership of a particular social group or political opinion.¹⁰ Refugees are entitled to specific international protection defined by international refugee law.¹¹

While the term ‘migrant’ is not defined in international law, in this study it concerns all persons outside of the State of which they are a citizen or national; or (in the case of a stateless person) out-

side their State of birth or habitual residence; and are not refugees.¹²

For the purpose of this study, a disappeared migrant or refugee is any person fitting the above-mentioned definitions, whose whereabouts or fate remain unknown. While there is no definition for such persons, many international organizations use the term ‘missing migrants’. The International Commission on Missing Persons (ICMP) and International Organization for Migration (IOM) run ‘missing migrant’ programs.¹³ The International Committee of the Red Cross (ICRC) uses the term ‘missing persons’ to refer to individuals whose whereabouts are unknown to their relatives and/or who, on the basis of reliable information, have been reported missing in accordance with national legislation in connection with an armed conflict, other situations of violence, disasters or any other situation that may require the intervention of a competent State authority.¹⁴ This description includes persons that have gone missing in the context of migration;¹⁵ as such, missing migrants are covered by ICRC’s response to missing persons.¹⁶

However, within the enforced disappearances framework, it is not the term ‘missing migrants’, but rather the term ‘disappeared migrant’ that is

10 UN, General Assembly (1950), Article 1 A (2). It is worth noticing that in certain regional systems, the term refugee has a broader definition. In particular the Convention Governing the Specific Aspects of Refugee Problems in Africa expands the term refugee also to “Every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality” (Article 2. Article 1 evokes the UN definition). OAU (1969). The Latin-American Cartagena Declaration on Refugees also widens the refugee definition and the EU – while reproducing the UN 1951 definition – provides for ‘subsidiary protection’, Costello (2016).

11 Fiddian-Qasmiyeh; Loescherl; Long; Sigona (2014).

12 UN, Office of the United Nations High Commissioner for Human Rights (2014), introduction, par. 10. The document refers explicitly to ‘international migrants.’

13 ICRC, IOM, EAAF (2019), pp. 2–4. See also Sarkin (2017).

14 ICRC (2009), p. 7.

15 The ICRC, like the rest of the International Red Cross and Red Crescent Movement, uses a deliberately broad description of “migrants” to include all people who leave or flee their habitual residence to seek safety or better prospects abroad. See IFRCRCS (2009), p. 2.

16 With respect to missing migrants, the ICRC, together with National Red Cross and Red Crescent Societies, works with authorities, communities, migrants and families to prevent families from becoming separated along migratory routes, help migrants and their families maintain contact, and facilitate communication between migrant families and relevant authorities, or other bodies, in order to search for and identify migrants who have gone missing. The ICRC also works to improve the collection, centralization and management of data about missing migrants at national and transnational levels. This includes enhancing the capacity of forensic services to recover, document, identify and ensure the traceability of the remains of dead migrants, in line with internationally accepted standards, including those related to data protection. see ICRC (2017).

predominantly used (see for example the WGEID report on enforced disappearances in the context of migration¹⁷ and the CED Guiding Principles).¹⁸ In its Concluding Observations, the CED uses both terms, although ‘disappeared migrants’ is used more frequently.¹⁹

The study follows the CED and WGEID with regard to using ‘disappeared’ rather than ‘missing’, but it slightly departs from their practice by mentioning both migrants and refugees. The WGEID report on enforced disappearances in the context of migration stipulates that it considers migrants to encompass asylum seekers and refugees.²⁰ While the CED Guiding Principles do not define the scope of the term ‘migrant’, it still predominantly uses ‘migrants’, and refers only twice to refugees.²¹ The choice to explicitly mention both migrants and refugees in this study was made to highlight the specific international protection provided to refugees, and to reflect the legal and policy complexities that both terms carry.

The differentiation between ‘missing’ and ‘disappeared’ is not as clear in some languages as it is in English. This is particularly the case in Spanish (*desapariciones* and *desapariciones forzadas*) and in French (*disparition* and *disparition forcée*). Consequently, there is no differentiation made between missing and disappeared migrants, as both tend to have the same translation – ‘migrantes desaparecidos’ in Spanish and ‘migrants portés disparus’ in French.

In this analysis, ‘disappeared migrants and refugees’ is used with regard to those whose wherea-

bouts or fate remain unknown. This broader term includes instances of enforced disappearances, disappearances committed by persons acting without State support, as well as any other situation in which a person vanishes. As mentioned above, the ICMP, ICRC and IOM refer to those persons as ‘missing migrants’. With regard to cases of enforced disappearances, this study uses ‘forcibly disappeared migrants and refugees’.

1.2 Disappeared Migrants and Refugees and International Humanitarian Law

International humanitarian law (IHL) treaties contain relevant rules that serve to prevent persons from going missing in situations of armed conflict and to clarify the fate and whereabouts of those who do.²² These include, for example, rules on registering persons deprived of their liberty and facilitating contact with families, which, although not specific to migrants and refugees, may also protect them.

Provisions relevant to preventing persons from going missing and facilitating the search have already been provided for in the four Geneva Conventions (GC) from 1949.²³ Those have been significantly reinforced in the 1977 Protocol Additional I relating to the protection of victims in international armed conflict (PA I) to the GC, which contains detailed provisions concerning the search for the missing, identifying the dead, and maintaining gravesites. It also foresees that all will be prompted in the implementation of the section

17 UN, Working Group on Enforced or Involuntary Disappearances (2017), par. 12, 45, 67–69 (the section is also titled ‘disappeared migrants’), 89 (a), 91 (b). The WGEID uses the term ‘disappearances’ also with regard to acts committed by non-state actors (par. 35, 37, 43). The term is thus applied in a broad way, to all migrants whose whereabouts remain unknown. Only in paragraph 45 does the WGEID state that it will be impossible to “ascertain the whereabouts of missing or potentially disappeared migrants” where bodies are not identified.

18 UN, Committee on Enforced Disappearances (2019), Principle 9, par. 4

19 ‘Disappeared migrants’ has been used in Concluding Observations with regard to Honduras (UN, Committee on Enforced Disappearances (2018)), Italy (UN, Committee on Enforced Disappearances (2019a)) and Mexico (UN, Committee on Enforced Disappearances (2015)), while ‘missing migrants’ is used in the same Concluding Observations to Honduras (2018) and Italy (2019).

20 UN, Working Group on Enforced or Involuntary Disappearances (2017), par. 5.

21 UN, Committee on Enforced Disappearances (2019), Principle 1, par. 2 and Principle 12, par. 3.

22 In IHL, the term ‘missing persons’ is used, yet not defined. IHL treaty law, however, applies to persons who went missing in connection with armed conflict. Sassòli (2019), p. 339; Petrig (2015), p. 258.

23 See, for example, UN, Geneva Convention I (1950), Art. 17; UN, Geneva Convention III (1950), Art. 120.4 (see also the obligation to furnish the persons under its jurisdiction who are liable to become POW with an identity card, art. 17); UN, Geneva Convention IV (1950), Art. 26. For more on the GC and missing persons, see Petrig (2015), pp. 257–276; ICRC (2015); ICRC (2019).

“mainly by the right of families to know the fate of their relatives” (Article 32, PA I).²⁴

Beyond treaty law, there are also rules of customary IHL relevant for missing and dead persons that apply in both international and non-international armed conflicts. Among these, notably, is the prohibition of enforced disappearances, the obligation to respect as far as possible family life, as well as the obligation of each party 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 it has on their fate.²⁵ With regard to enforced disappearances resulting from armed conflicts, States have obligations related to searching for those persons and providing information to their families both under the ICPPED and IHL. This has been explicitly highlighted in the ICPPED by including that it is without prejudice to provisions of IHL (Article 43).²⁶

Migrants and refugees living in or transiting through a State where armed conflict occurs are protected under IHL. IHL also protects therefore those that go missing as a result of the armed conflict.²⁷ States are obliged to facilitate the gathering of information of all missing persons, irrespective of their nationality or if their nationality is contested.²⁸ This clearly also includes migrants and refugees.

At the same time, however, the practical applicability of the specific obligation under Article 33 (the obligation to transmit relevant information about missing persons) is with regard to migrants and refugees very limited. For those obligations to be triggered, the person would need to be reported by an adverse party. Furthermore, according to the 1987 ICRC commentaries to PA I, State parties can request information only about persons who are nationals of that party, are in some other way linked to its territory, or are family members of one of the two categories.²⁹ This interpretation of PA I makes it extremely unlikely for these obligations to arise in regard to missing migrants, although it certainly is not impossible. At the same time, although IHL only applies in situations of armed conflict, these rules can provide relevant guidance beyond these situations and, as such, can be taken into account, as appropriate, when addressing preventive measures and deaths occurring outside of armed conflicts, such as in migration contexts.³⁰

24 UN, Protocol Additional I to the Geneva Convention (1977), Art. 32–34. Persons going missing as a result of non-international armed conflict are provided less protection in IHL treaty law. Nonetheless, Protocol Additional II relating to the protection of victims of non-international armed conflict also contains relevant provisions. In particular, Article 8 requires parties to a conflict to take all possible measures to search for the dead and the wounded, sick and shipwrecked, who should be collected. UN, Protocol Additional II to the Geneva Convention (1977).

25 Henckaerts; Doswald-Beck (2008), Rule 98, 105 and 117.

26 See also Gaggioli (2013); Petrig (2015). On the interplay between IHL and international human rights law with regard to missing persons, see also La Vaccara (2019).

27 Obregón Gieseken (2017), in particular pp. 147–151 on the protection of missing and dead migrants by IHL.

28 Sandoz; Swinarski; Zimmermann (1987), par. 1251–1264.

29 If there is any controversy concerning the legitimacy of the request, the interest of the families and the humanitarian character of the problems should prevail. Sandoz; Swinarski; Zimmermann (1987), par. 1225–1227.

30 For such an argumentation, see Grant (2016), p. 5. The rules concerning humanitarian forensic action are especially relevant here. For a detailed account, see Gaggioli (2018).

2 Enforced Disappearances of Migrants and Refugees (Art. 2)

A migrant or refugee is forcibly disappeared when he or she is deprived of liberty by persons acting with the authorization, support, or acquiescence of a State, followed by a refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of this person (Article 2 ICPPED). While the ICPPED does not define the scope of ‘deprivation of liberty’, the wording points to a very wide interpretation of the term to include “arrest, detention, abduction or any other form of deprivation of liberty”.

This section starts with presenting specific challenges with regard to enforced disappearance of migrants and refugees and then analyzes State responsibilities when more than one State were involved in such enforced disappearances.

2.1 Enforced Disappearances

Deprivation of liberty of migrants and refugees has been called to be “one of the most opaque areas of public administration,”³¹ where major human rights violations are taking place.³² Such situations might violate several provisions of the ICPPED (for example those guaranteed under Art. 17).³³ However, for the deprivation of liberty to be considered an enforced disappearance it must be followed by a refusal to acknowledge it or by a concealment of the fate or whereabouts of the person.

A particular large number of migrants and refugees have been forcibly disappeared in Mexico.³⁴ As noted by the WGEID in its report after the country visit to Mexico, while they are primarily disappeared by criminal organizations, public officials from different sectors and from municipal, state and federal police forces had in some cases collaborated with the criminal organizations in the acts and hereby committed the offense of enforced disappearance.³⁵ In an effort to address the widespread problem, authorities in Mexico have established a number of mechanisms and commissions dealing specifically with instances of disappeared migrants and refugees.³⁶

The deprivation of liberty of the Turkish teacher Ayşe Erdoğan in Greece in May 2019 is an alleged deprivation of liberty which, if the details reported by the media are correct, would meet the requirement to fall within the definition of enforced disappearance. According to her statements, after entering Greece (where she wanted to apply for asylum) she was deprived of her liberty at a Greek police station for one day, and deported to Turkey. Her brother and lawyer went to the police station, but were informed that no one with that name was held at the station. Analyses of photos, videos, and WhatsApp messages seem to verify Erdoğan’s version, in particular that she was in fact at the said police station.³⁷ If these allegations are true, she was

31 UN, High Commission for Refugees (2014), p. 21.

32 Human Rights Watch (2013).

33 Article 17 prohibits secret detention and contains a number of specific measures States should take with regard to the deprivation of liberty, including guaranteeing persons deprived of liberty communication with family and council and keeping up-to-date official registers and records of persons deprived of liberty.

34 Trial International, Fundación para la Justicia y el Estado Democrático de Derecho (2018)

35 UN, Working Group on Enforced or Involuntary Disappearances (2011), par. 69.

36 Citroni (2017).

37 Spiegel (2020). For a similar situation from 2017, see the disappearance of the Turkish journalist Murat Capan, The New York Times (08.06.2017). See also UN, Working Group on Arbitrary Detention (2019), Section: ‘Pushbacks at the Greece-Turkey border’, where the Working Group states that it was informed about instances of such detention practices at the Evros river and is of the view that “detention of this purpose has no legal basis”. See also ‘secret sites for migrants in Greece’, The New York Times (10.03.2020)

forcibly disappeared. That Greek authorities secretly deprived migrants and refugees of their liberty before returning them to Turkey was also one of the findings of the 2019 report of the European Committee for the Prevention of Torture, although Greek authorities denied that such practice is taking place.³⁸

Similar cases were reported from Croatia, where migrants and refugees were allegedly deprived of their liberty, *inter alia*, in police stations, cars and vans.³⁹ A case is currently pending at the European Court of Human Rights (ECtHR) filed by three Syrian nationals alleging that they were deprived of their liberty by Croatian police and forcibly returned to Bosnia and Herzegovina.⁴⁰ Their alleged deprivation of liberty lasted for a couple of hours. However, there is no time-restriction to an enforced disappearance according to the ICPPED, and the reappearance of the forcibly disappeared person does not influence the attribution of the situation as an enforced disappearance.⁴¹

Thus, any form of deprivation of liberty of migrants and refugees, irrespective of its duration, that is subsequently followed by a refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the person, amounts to an enforced disappearance under the ICPPED.⁴² In trans-border situations, in particular when the migrant or refugee is travelling by themselves, there might be no one asking about the person deprived of its liberty, so it can be difficult to prove a refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of this person. Nevertheless, in an enforced disappearance case, the refusal to acknowledge the

deprivation of liberty can also occur after the person reappears.

Migrants and refugees are not always deprived their liberty in dedicated places, as they are also held in vehicles or at unofficial sites. A recent controversy arose with regard to so-called transit zones on Hungarian borders. The authorities insisted that those persons cannot be considered deprived of their liberty, as they were free to leave to Serbia.⁴³ This was upheld by the ECtHR, which ruled in November 2019 that the presence of the persons in the transit zones did not constitute a deprivation of liberty.⁴⁴ A contrary view was taken by the European Court of Justice in a judgment in May 2020, in which they ruled that placing third-country nationals permanently in a restricted and closed transit zone where their movements are limited and monitored and from which they cannot legally leave voluntarily constitutes a deprivation of liberty.⁴⁵

In other contexts, migrants and refugees disappear once they are released. For example, it was reported in 2020 that Nigerian⁴⁶ and Algerian⁴⁷ authorities deprive migrants and refugees of their liberty and then drop them in the desert, after which they disappear. Cases in which authorities do not refuse to acknowledge the deprivation of liberty, or do not conceal the fate or whereabouts of the disappeared persons, are not cases of enforced disappearance. They might however still be in violation of ICPPED provisions, such as the obligation to include in official registers the date and time of release of the detained person (Article 17.3 (h)).

38 CoE, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2019), par. 140–143.

39 Human Rights Watch (2018); Amnesty International (2019).

40 CoE, European Court of Human Rights (2020).

41 As confirmed by the CED, see UN, Committee on Enforced Disappearances (2016). This is the only view adopted by the CED in an individual communication. There are however substantial differences in how various international judicial bodies approach enforced disappearances. See for example: Nowak (2014).

42 Enforced disappearances are also included in the Statute of the International Criminal Court. The definition in the statute includes a temporal element that states that the deprivation of liberty must last “for a prolonged period of time” (Article 7.2 (i)). This is not included in any definition or interpretation of enforced disappearance in international human rights law. For more on the temporal element see: Citroni (2012). See also Giorgou (2013) on another added element in the Rome Statute definition namely the possibility of non-state actors to perform the act of enforced disappearance.

43 See for example UN, Working Group on Arbitrary Detention (2019a), par. 53.

44 CoE, European Court of Human Rights (2019).

45 EU, Court of Justice of the European Union (2020).

46 The New Humanitarian (2020), for similar accounts from 2018 see The New Humanitarian (2018).

47 Alarme Phone Sahara (2020).

A particular challenge within migration is that even though NGOs often ask for information about migrants or refugees deprived of liberty, some States still do not allow NGOs to obtain this kind of information, limiting thus de facto the possibility of establishing the fate and/or whereabouts. While the ICPPED does not explicitly require States to allow for organizations or associations to obtain information on persons deprived of their liberty, it obliges States to “guarantee the right to form and participate freely in organizations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims of enforced disappearance.” (Article 24.7). It could be argued, that to establish the circumstances and assist victims, NGOs should be able to obtain information on persons deprived of their liberty. Such an interpretation of the ICPPED would oblige States to ensure NGOs the right to acquire information about the deprivation of liberty.

In some instances, it might be difficult to establish the State involvement necessary to classify an event as an enforced disappearance. Proposed ways to assess necessary acquiescence will be analysed in section 2.2 (with focus on the responsibility of different States) and section 3 (with focus on non-state actors). While a disappearance might not always be considered an enforced disappearance if no State involvement has been established, a complete, independent, and impartial investigation needs to take place to rule out a potential enforced disappearance.⁴⁸

Main conclusion: Deprivation of liberty of migrants and refugees, if followed by a refusal to acknowledge it, or by concealment of the fate or whereabouts of the persons, is an enforced disappearance, irrespective of its duration and where it takes place.

2.2 Enforced Disappearances in Which More Than One State Was Involved

Sometimes more than one State is involved in the enforced disappearances of migrants and refugees. This poses practical challenges for family members (for example where to look for the forcibly disappeared person and where to file a report to); and leads to legal questions concerning State responsibility.

Every State that authorizes, supports, or acquiesces to an enforced disappearance commits the enforced disappearance; thus, more than one State can be responsible for the same enforced disappearance. If a State has not authorized, supported or acquiesced to the enforced disappearances it still can be held responsible; as aiding or assisting, directing or coercing another State to commit an internationally wrongful act also triggers international responsibility.⁴⁹

Examples of enforced disappearances in which more than one State was involved, include some of the enforced disappearances committed within Operation Condor; a multilateral counter-insurgency operation in South America between 1970 and 1980. The cooperation was based on written agreements; so, in this case there is no doubt about responsibility of States involved in the enforced disappearances.⁵⁰

In the last decade, Chinese authorities have repeatedly been accused of forcibly “repatriating” people they consider Chinese nationals (some of whom are citizens of other countries) from inter alia Hong Kong, Vietnam and Myanmar. Those alleged enforced disappearances may or may not be supported by the States in which they took place.⁵¹ To establish the responsibility of the State where it took place, it is necessary to establish whether it authorized, supported or acquiesced to the enforced disappearances; or assisted actions of Chinese authorities in any other way.

48 UN, Working Group on Enforced or Involuntary Disappearances (2011), par. 21.

49 See International Law Commission (2001), Articles 16–19; see also Deutsches Institut für Menschenrechte (2017).

50 Duhaime; Thibault (2017), pp. 576–577.

51 Foreign Policy (2018).

The alleged enforced disappearance of Trjnh Xuân Thanh, a former Vietnamese politician and businessman, in June 2017 by Vietnamese authorities in Germany, is an example of an instance in which the State where the alleged enforced disappearances occurred does not seem to be involved in the act. Trjnh Xuân Thanh, who was at that time seeking asylum in Berlin, was allegedly deprived of his liberty and repatriated to Vietnam. Seven days later, Vietnamese authorities issued a statement that he had turned himself in. While the politician confirmed this himself on television, his lawyer suggested that this might have been said under duress. German authorities accused the Vietnamese intelligence service and embassy of kidnapping him.⁵²

A well-known example of an enforced disappearance is the so-called extraordinary rendition of Hassan Mustafa Osama Nasr in 2003 by CIA agents in Italy. The Egyptian, who was granted asylum in Italy, was deprived of his liberty and transferred to Egypt. While Italian courts convicted the involved CIA agents, none of them served the sentence. The ECtHR, which stated earlier that the practice of abduction and detention of terrorist-suspects by the CIA amounted to enforced disappearances as defined in the ICPPED,⁵³ found Italy responsible for the violation of human rights norms.⁵⁴

When States cooperate to conduct an enforced disappearance, for example by transferring the person between authorities, there are no doubts about attributing responsibility to both States. However, as shown in the examples above, sometimes the enforced disappearance is conducted by authorities of one State on the territory of another State. When the State in which the disappearance occurred at least acquiesced to the deprivation of liberty conducted by another State, it is also re-

sponsible for committing the enforced disappearance. Circumstances in each situation should be analysed on a case-to-case basis to establish whether acquiescence has occurred. This study proposes to assess State involvement on the basis of whether relevant authorities knew of the disappearance knew – or should have known – of the enforced disappearance and failed to take measures within their powers which, judged reasonable, might have been expected to prevent the enforced disappearance.⁵⁵ The proposed test as such encompasses: 1) the possible knowledge of the deprivation of liberty, and 2) the possibility to prevent it.

However, even if no State responsibility has been established with regard to the State in which the enforced disappearance took place, there are a number of obligations from the ICPPED which still apply to that State. Each State should establish competence to exercise jurisdiction when an enforced disappearance is committed in any territory under its jurisdiction (Article 9.1 (a)). The State also needs to ensure that the alleged enforced disappearance can be reported to competent authorities who will undertake a prompt and impartial investigation; or (if there is reasonable grounds to believe that an enforced disappearance has occurred) undertake an investigation even if no formal complaint has been submitted (Article 12). ICPPED obligations also arise with regard to victims of enforced disappearances ('victims' being both the forcibly disappeared person and all that have suffered harm as a direct result of the enforced disappearance).⁵⁶ According to the ICPPED those obligations refer to "each State" and therefore are not limited to the State where the alleged enforced disappearance occurred. However, those obligations create a number of practical challenges

52 Deutsche Welle (2017).

53 CoE, European Court of Human Rights (2012), par. 240.

54 CoE, European Court of Human Rights (2016).

55 See the ECtHR approach with regard to the obligation to prevent a risk to life: CoE, European Court of Human Rights (2000), par. 86 and CoE, European Court of Human Rights (2009), par. 97–100. For more on the scope and context of the obligation to undertake preventive activities, see Vermeulen (2012), pp. 402–413.

56 Article 24 provides for a number of measures that need to be taken with regard to victims of enforced disappearance, including all those that suffered harm as a direct result of an enforced disappearance: provide the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation, and the fate of the forcibly disappeared person (24.2); provide the right to obtain reparation and prompt, fair, and adequate compensation (24.4); take appropriate steps with regard to the legal situation of forcibly disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law, and property rights (24.6); guarantee the right to form and participate freely in organizations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of forcibly disappeared persons, and to assist victims of enforced disappearance (24.7).

in migration contexts, namely the scope of obligation with regard to relatives of forcibly disappeared persons in other States. As those obligations are crucial within the migration context, it would be beneficial for the CED to take a clear stance on how they should be approached. For example: States should clearly regulate the legal situation of the disappeared persons whose fate has not been clarified, and that of their relatives, in fields such as social welfare, financial matters, family law and property rights (Article 24.6); and guarantee the right to form and participate freely in organizations and associations related to enforced disappearance (Article 24.7). Applying those two rights in States that were not responsible for an enforced disappearance does not appear to pose challenges. Furthermore, each State has to take appropriate measures to search for, locate and release disappeared persons; and, in the event of death, to locate, respect and return their remains (Article 24.3). This can also concern States that did not commit the enforced disappearances if, for example, they are in possession of evidence or witnesses are within their jurisdiction. If the State is involved in an investigation or search, relatives need to be informed about progress and results (Article 24.2).

Last but not least, within the increasing externalization of migration policies, some States are supporting and financing practices taking place in other States and carried out by other States.⁵⁷ When a migrant or refugee is forcibly disappeared by State authorities that are financed by another State, the question of the responsibility of the financing State arises. For example: in 2020 Italy renewed its agreement with the Libyan coastguard. With this agreement, Italy will continue to provide financial assistance to Libya to train the coastguard in migrant rescue operations. While it is not entirely clear how the financial assistance will exactly be used, there are very serious allegations of enforced disappearances occurring in the centers where the returned people are detained.⁵⁸ The IOM found in April 2020 that over half of the persons returned by the Libyan coastguard during 2020 remain unaccounted for.⁵⁹ Given that Italy is financing Libyan authorities, and these same authorities are for-

cibly disappearing migrants and refugees, Italy's responsibility for the enforced disappearance would need to be assessed. When using the above proposed test, it would need to be analysed whether the authorities knew (or should have known) of the enforced disappearances and failed to take measures within their powers, which, judged reasonable, might have been expected to prevent the enforced disappearance.⁶⁰

Main conclusion: All States that authorize, support or acquiesced to an enforced disappearance are responsible for the enforced disappearance; consequently, more than one State can be responsible for an enforced disappearance.

Challenges:

- How to assess acquiescence, when more than one State is involved in the enforced disappearance?
 - Proposed test: whether relevant authorities knew (or should have known) of the enforced disappearances and failed to take measures within their powers; which, if judged reasonable, might have been expected to prevent it.
- What are the obligations of the State, where the enforced disappearance occurred, when it was not involved in the act?
 - At least: 1) exercise jurisdiction when necessary, 2) allow for reporting or undertake ex officio investigation if there are reasonable grounds to do so, and 3) meet relevant obligations under Article 24.
- What are the obligations resulting from Article 24 in trans-border enforced disappearances (more than one State involved, victims in different States etc.)?
 - Each State shall take measures under Article 24 with regard to victims of enforced disappearances. The practical applicability in trans-border contexts would benefit from an interpretation by the CED.

57 Spijkerboer (2018); Costello; Mann (2020).

58 Info Migrant (2020).

59 IOM (2020).

60 On due diligence policies in the context of externalization of migration policies, see: Ferstman (2020); Deutsches Institut für Menschenrechte (2017), pp. 44-46.

3 Deprivation of Liberty by Non-State Actors (Art. 3)

The ICPPED obliges States to take appropriate measures to investigate acts defined under Article 2 of the ICPPED (enforced disappearances), committed by persons or groups of persons acting without the authorization, support, or acquiescence of the State. Persons responsible for such acts shall be brought to justice (Article 3).

For an act to fall within Article 3, the persons depriving the migrant or refugee of their liberty need to refuse to acknowledge the deprivation of liberty or conceal their fate or whereabouts. This excludes for example cases of abduction for ransom.⁶¹

Some disappearances of migrants and refugees by non-state actors are short-term, lasting for a couple of hours or days. The ICPPED does not clearly state whether the length of disappearances influences the possibility that an act can be considered to fall within Article 3. However, as Article 3 directly appeals to the definition in Article 2, it can be argued that per analogy to the CED's interpretation of Article 2, it also includes short-term deprivation of liberty.⁶²

Disappearances of migrants and refugees in Mexico are widespread and, as mentioned above, primarily committed by criminal organizations. The Inter-American Commission of Human Rights found that criminal groups were abducting entire

busloads of people in one Mexican municipality.⁶³ Mexican State authorities have been repeatedly accused of taking part in disappearances of migrants,⁶⁴ and the WGEID reminded in this context, that "a potential enforced disappearance may only be ruled out after a complete, independent and impartial investigation".⁶⁵ If a disappearance was committed by a non-state actor, Mexico is obliged to investigate the acts and bring those responsible to justice. However, if State involvement has been established, other ICPPED obligations arise, in particular with regard to the victims (Article 24).

Trafficking (the deprivation of liberty for the purpose of exploitation) falls within Article 3, when those responsible for the act refuse to acknowledge the deprivation of liberty or conceal the fate or whereabouts of the person.⁶⁶ In some cases, State authorities are involved in trafficking in persons, which then makes it an enforced disappearance. For example, in a 2019 report the UN Special Rapporteur on trafficking in persons identified corruption as one of the factors leading to the lack of investigations into trafficking in Nigeria.⁶⁷ It has been similarly reported that in Egypt and Sudan traffickers and local officers worked together to prey on Eritrean migrants and refugees, who are deceived and deprived of their liberty on their journeys or from refugees camps.⁶⁸

61 For instances of the deprivation of liberty of migrants for ransom, see IOM (2014), p. 122.

62 UN, Committee on Enforced Disappearances (2016).

63 Inter-American Commission on Human Rights (2013).

64 UN, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (2011), par. 29; see also UN, Committee on Enforced Disappearances (2015), par. 23.

65 UN, Working Group on Enforced or Involuntary Disappearances (2017), par. 21.

66 "[t]rafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation." UN, General Assembly (2001), Art. 3(a).

67 UN, Special Rapporteur on trafficking in persons, especially women and children (2019), par. 42, 62, 67.

68 IOM (2014), p. 121-122.

Deprivation of liberty by non-state actors can also be performed by employers.⁶⁹ Those practices can fall within Article 3 as well, when they are followed by a refusal to acknowledge the deprivation of liberty, or concealment of the fate or whereabouts of a person. Migrants and refugees are particularly vulnerable to such a situation. For example, the sponsorship-system (kafala) in place in some Gulf countries creates opportunities for such practices by requiring unskilled laborers to have an in-country sponsor responsible for their visa and legal status.⁷⁰ In consequence, many domestic workers are exploited and denied the possibility to contact their families. As a response to this practice, the Nepalese government adopted in 2017 a travel ban on female Nepalese citizens journeying to work in the Gulf countries. While this was aimed at protecting them from exploitation and abuse, it made Nepali women more vulnerable, as in effect they can reach Gulf countries only as undocumented workers, which makes them even more prone to be exploited by their employer.⁷¹ In this case, if domestic workers were made to disappear by their employers, the obligations to take appropriate measures to investigate such a deprivation of liberty and bring those responsible to justice would arise with regard to authorities of the country where this happened (in this case the Gulf countries). If the disappearance was authorized, supported, or acquiesced to by State authorities, it was an enforced disappearance. While the primary responsibility lies clearly with the country where the migrant worker was disappeared by the employer, the sending country (Nepal) is also under an obligation to investigate.

Main conclusions: States are obliged to investigate and bring to justice disappearances committed by non-state actors that are followed by a refusal to acknowledge the deprivation of liberty, or concealment of the fate or whereabouts of a person. When disappearances by non-state actors are authorized, supported or acquiesced to by State authorities, it becomes an enforced disappearance.

Challenges:

- Does Article 3 also include short-term disappearances?
 - It may be argued that, per analogy to Article 2, it also includes short-term disappearances.
- How to assess acquiescence of the State, when the disappearance was conducted by non-state actors?
 - Proposed test: whether relevant authorities knew (or should have known) of the disappearance committed by the non-state actor and failed to take measures within their powers, which, judged reasonable, might have been expected to prevent it.

⁶⁹ For more on different forms of deprivation of liberty by third parties, see: UN, Human Rights Committee (2014), par. 7.

⁷⁰ International Labour Organization (2015).

⁷¹ The Guardian (14.02.2020) indicates that Nepali male workers in the Gulf who can enter the countries legally are entitled to consular protection, including repatriation and subsidies if they become ill.

4 The Prohibition of Expulsions, Returns, Surrenders, or Extraditions (Art. 16)

The ICPPED prohibits expulsions, returns, surrenders, or extraditions to States where there are substantial grounds for believing that the person would be in danger of being subjected to an enforced disappearance (Article 16). Thus, the principle of non-refoulement (the prohibition to transfer a person from one State to another when there are substantial grounds for believing that the person would be in danger of being subjected to violations of certain fundamental rights) is enshrined in the ICPPED.⁷²

Enforced disappearances may also occur in the course of expulsions, returns, surrenders, or extraditions. When migrants and refugees are deprived of their liberty by State authorities (including through acquiescence) while being prevented from crossing a border, this can constitute an enforced disappearance if it is subsequently denied by authorities or the fate or whereabouts of the person are concealed. It is not relevant where the deprivation of liberty occurred or how long it lasted.

Enforced disappearances in the context of expulsions, returns, surrenders, or extraditions can also be attributed to more than one State. For example, families of ten persons who allegedly forcibly disappeared in 2007 in the territorial waters of Tunisia on their way to Italy submitted their cases to the WGEID. The cases were transmitted to Italian and Algerian authorities, but also to the European Border and Coast Guard Agency (Frontex).⁷³ Italy and Frontex sent replies, which the WGEID considered insufficient.⁷⁴ While each of the said States

and Frontex may have information on the disappeared persons, to find out whether there was a violation of the ICPPED, it is relevant to establish whether any of them has:

- authorized, supported, or acquiesced to depriving them of liberty, which can be regarded as an enforced disappearance (Article 2); or
- expelled, returned, surrendered, or extradited them to another State where there are substantial grounds for believing that they would be in danger of being subjected to an enforced disappearance (Article 16).

Involvement in each of these acts is a violation of the ICPPED. Thus, with regard to the same situation, depending on their involvement, a number of States could be held responsible for both violations, or one State could be responsible for conducting an enforced disappearance, and others for the violation of non-refoulement obligations. Additionally, aiding or assisting, directing, or coercing another State to commit an internationally wrongful act also triggers international responsibility.⁷⁵ Involvement and actions of all States need to thus be analysed closely to establish responsibility.

The practice of “pushbacks” (preventing persons from crossing a border by forcibly returning them)⁷⁶ has become frequent, as evidenced at Australian⁷⁷ and at European Union borders.⁷⁸ A State preventing persons within their jurisdiction from crossing from a country in which there are substantial

⁷² ICRC (2018).

⁷³ UN, Working Group on Enforced or Involuntary Disappearances (2017a), par. 93–94.

⁷⁴ UN, Working Group on Enforced or Involuntary Disappearances (2017b), par. 122–123.

⁷⁵ International Law Commission (2001), Articles 16–19.

⁷⁶ Oxfam (2017).

⁷⁷ Kalpouzos (2020).

⁷⁸ CoE, Parliamentary Assembly (2019); CoE, European Court of Human Rights (2018).

grounds to believe that they would be in danger of being subjected to enforced disappearances, constitutes a violation of Article 16. For example, Syria can be currently regarded as a country with an extraordinarily high level of likelihood of enforced disappearances.⁷⁹ A State preventing persons within their jurisdiction from entering from Syria, therefore, could be regarded as a violation of the ICPPED.

The CED has not yet made reference to so-called “chain-refoulement” (the transferring of a person from one State to another where there is a risk that the receiving authorities would transfer the person to a third State in violation of the principle of non-refoulement).⁸⁰ However, the prohibition of such practices is included in the non-refoulement principle;⁸¹ and other UN treaty bodies have explicitly stated that this practice is in violation of a State’s legal obligations.⁸² Consequently, it can be argued that Article 16 prohibits States to transfer persons to a State where there is a risk of further transfer to a third State in which they will face a threat of enforced disappearance.

The principle of non-refoulement also prohibits transfer of individuals where the fundamental rights violation emanates from non-state actors, and where authorities in the State of return were unable or unwilling to protect those persons.⁸³ A Human Rights Watch report, for example, identifies that deported Salvadorans who resided in the US for an extended period of time face several unique risks once back in El Salvador, including disappearance by criminal groups.⁸⁴ While the CED has not yet taken a stance on this issue, based on the general interpretation of non-refoulement obligation,⁸⁵ if demonstrated that El Salvadoran authorities are unable or unwilling to protect, Article 16 would prohibit a transfer to El Salvador of Salvadorans who resided in the US for

an extended period of time and are as such in danger of being disappeared by criminal groups.

Main conclusions: Every deprivation of liberty in the context of expulsions, returns, surrenders, and extraditions is an enforced disappearance when followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the person (irrespective of the duration and place of deprivation of liberty).

While the CED has not explicitly positioned itself with regard to chain-refoulement and refoulement to States where persons would be in danger of disappearances by non-state actors, the interpretation of the principle of non-refoulement points to the fact, that those instances are also prohibited under Article 16.

Challenges:

- How to assess the responsibility under the ICPPED when different States are involved in expulsions, returns, surrenders, or extraditions?
- The involvement of each authorities in:
 - 1) the alleged enforced disappearance;
 - and/or 2) breach of non-refoulement obligation, needs to be thoroughly assessed, to establish responsibility. Each State can be responsible for both.

79 Syrian Network for Human Rights (2019).

80 ICRC (2018).

81 Droege (2008).

82 UN, Human Rights Committee (2004), par. 12; UN, Committee against Torture (1997), par. 2.

83 ICRC (2018).

84 Human Rights Watch (2020), pp. 37, 53, 86.

85 Droege (2008); UN, High Commission for Refugees (2000).

5 Obligation to Undertake an Investigation (Art. 12.2)

States shall undertake investigations where there are reasonable grounds to believe that an enforced disappearance occurred, including in cases where no formal complaint has been filed. The obligation is particularly relevant in migration contexts, as the possible undocumented status and lack of family and friends in the State where the enforced disappearance occurred increases the likelihood that no-one reports it.

The ICPPED requires States to undertake ex officio investigations when there are “reasonable grounds” to believe that an enforced disappearance occurred. While the CED has not yet elaborated on how those reasonable grounds should be assessed and what factors should be considered, the CED Guiding Principles for the search for disappeared persons can be used as a reference point. The Guiding Principle require States to conduct the search under the presumption that the person is alive and that the search should begin without delay.⁸⁶ It is of utmost relevance to initiate an investigation as soon as reasonable grounds arise, as the first days after a disappearance are crucial both for the investigation (to secure evidence, hear witnesses) and for the re-appearance of the disappeared person.⁸⁷ The Guiding Principles further state that the search should be initiated “as soon as the competent authorities become aware, by any means, or have indications that a person has been subjected to disappearance” (Principle 6, par. 1). This understanding of the requirement to undertake a search can also be applied to assess “reasonable grounds” to undertake ex officio investigations under Article 12.2.

While the investigation into an enforced disappearance should be conducted under the presumption that the person is alive (as is the case when searching for persons), the obligation to undertake an investigation is also prompted when unmarked graves are discovered. This is important, as remains belonging to migrants and refugees are less likely to be identified.⁸⁸ Unless circumstances clearly indicate other reasons (for example, that the person died due to natural causes) there are reasonable grounds to believe that an enforced disappearance occurred. Examples here are the mass graves of Burmese discovered in Thailand and Malaysia;⁸⁹ and graves found in Mexico containing migrants and refugees from various Central and South American countries.⁹⁰

Within the ex officio investigation, States might need to reach out to families in their countries of origin. This can be necessary, for example with regard to vulnerable families from rural areas. While no State undertook such measures in an organized and broad manner, there are some local initiatives that have proven successful. For example, in 2014 an Italian police officer set up a Facebook page in cooperation with the local Syrian community to reach families of migrants whose remains were found, with the aim to identify them and inform the families about their fate. Those efforts enabled the identification of the found remains. At the same time the use of social media can in certain situations threaten the safety of family members left behind, and such a method needs to comply with data protection regulations.⁹¹

86 UN, Committee on Enforced Disappearances (2019), Principle 1, Principle 6.

87 On the „crucial early days” see also CoE, European Court of Human Rights (2005), par. 139.

88 Kovras; Robins (2016).

89 Deutsche Welle (2015).

90 Citroni (2017).

91 Wired (2017). For more on the social media approach to access families of missing migrants, see IOM (2019), pp. 33–34.

Main conclusion: The obligation to undertake an investigation ex officio is particularly relevant in cases concerning migrants and refugees.

Challenges:

- How should “reasonable grounds” to believe that an enforced disappearance occurred, which triggers an Article 12.2 ex officio investigation, be assessed?
- The CED’s Guiding Principles could serve as an indicator, and as such the investigation should be initiated “as soon as the competent authorities become aware, by any means, or have indications that a person has been subjected to disappearance”.

6 The Right to Report (Art. 12.1)

Persons reporting an alleged enforced disappearance in the context of migration are in a vulnerable situation due to various factors, including language and knowledge barriers and the fact that they often are in a different country than the country in which the enforced disappearance took place.

The State obligation to ensure the right to report is not limited to persons whose legal status is regulated. This is extremely relevant in the migration context, for the status of some of the forcibly disappeared and/or the person who wishes to report the enforced disappearance might not be documented. Article 12.1 requires States to ensure the right to report to all of them. The right to report shall be granted to “any individual who alleges that a person has been subjected to enforced disappearance”. It is therefore not restricted to family or those who have suffered as a direct result of an enforced disappearance.

The ICPPED obliges States to ensure the right of any individual who alleges that a person has been subjected to enforced disappearance to report alleged enforced disappearances to ‘competent authorities.’ Thus, ‘competent authorities’ can apply to:

- State(s) that committed the enforced disappearance and/or are the State in which the alleged enforced disappearance occurred, and;
- the State of residence of the reporting persons.

However, the arising obligation will differ in each situation.

Obligations of States that committed the enforced disappearance and/or where the alleged enforced disappearance occurred

As persons reporting the enforced disappearance of migrants and refugees often encounter a number of challenges and barriers, States need to first and foremost ensure that such enforced disappearances can be reported with ease. While States must safeguard mechanisms that enable reporting, they enjoy a wide discretion with regard to the means. Article 12 does not oblige a person wishing to report to enter the State where the disappearance took place and as such reporting needs to be made possible from the country of residence.⁹² The ICPPED does not require States to set up a procedure that allows reporting from abroad, but this would be hugely beneficial in migration contexts. A good practice was implemented by Mexican authorities, which have been collecting complaints concerning forcibly disappeared migrants and refugees through Mexican consulates and embassies in Honduras, El Salvador, and Guatemala.⁹³

Obligations of reporting in persons’ States of residence

The State of residence of persons who wish to report an enforced disappearance that occurred in another State can realize the obligation under Article 12.1 in two ways. First, it can receive the report and pass it on to the State, where the alleged enforced disappearances occurred. Second, it can take measures to ensure that the State where the enforced disappearance occurred makes it possible to report, for example through diplomatic channels. The same holds true if more than one State is alleged to be involved in the enforced disappearance. Those obligations are underlined by

⁹² While this concerns the effective participation in search processes and not the reporting of alleged disappearances for the purposes of investigation, the CED Guiding Principles require States to “ensure the effective participation in search processes, from their countries of residence”. UN, Committee on Enforced Disappearances (2019), Principle 9, par. 4.

⁹³ Citroni (2017), pp. 755-756.

Article 15 which obliges States to cooperate with each other and afford one another the greatest measure of mutual assistance in the search and with view to assisting victims of enforced disappearance.

In the context of migration, persons reporting might not know exactly in which country the migrant or refugee was forcibly disappeared if the disappearance occurred at a border, within a transnational operation or en route. For persons wishing to report such an enforced disappearance, it would be easiest to report it to one State – for example the State of residence – who would then pass on the reports to the States that are allegedly involved, and inform the persons reporting on the progress. As this can be crucial for exercising the right to report enforced disappearances in migration context, but carries practical challenges, it would be beneficial for the CED to clarify State obligations in the context of Article 12 and 15 in such a situation.

Main conclusion: States that have committed an enforced disappearance and/or States in which an alleged enforced disappearance occurred must make it possible to report it for all persons, including those without regulated legal status and persons living outside its borders.

States in which persons wishing to report an alleged enforced disappearance reside, must make it possible to report it.

Challenge:

- The obligations in cases when persons wishing to report do not know which State(s) committed the alleged enforced disappearance are not clear.

7 The Obligation of States to Cooperate and Afford Greatest Measure of Mutual Assistance (Art. 14, 15)

The ICPPED requires State parties to cooperate and afford one another the greatest measures of mutual assistance in:

- criminal proceedings brought in respect of an offence of enforced disappearance (Article 14.1);
- assisting victims of enforced disappearance;
- searching for, locating, and releasing forcibly disappeared persons; and,
- in the event of death, exhuming, identifying, and returning their remains (Article 15).

The obligation to cooperate and afford one another the greatest measure of mutual assistance with view to assisting victims of enforced disappearance (Article 15) is broad in scope and can entail different actions. As the ICPPED recognizes that any individual who suffered harm as a direct result of enforced disappearance is a victim thereof (Article 24.1), this obligation includes also those who suffered as a direct result of enforced disappearances of migrants and refugees. The scope the cooperation and mutual assistance takes depends on the needs and particular circumstances; but, as argued above, this must include assistance by the State of residence in reporting the alleged enforced disappearance (Article 12.1).

While the ICPPED does not specify the form of the cooperation and assistance under Article 14 and 15, the CED’s Guiding Principles specify how cooperation and assistance are supposed to be ar-

ranged with regard to the search in migration contexts. According to the Guiding Principles, States should “develop cooperation agreements and establish competent authorities to allow for effective coordination in the search for disappeared persons at each stage of migration”.⁹⁴ The cooperation should ensure rapid and secure exchange of information and documentation. Additionally, States should adopt specific instruments to ensure effective participation of families of forcibly disappeared persons from their country of residence, which also requires cooperation between the State of residence and the State(s) where the search is taking place.

Thus, three specific obligations concerning cooperation and mutual assistance with regard to searches in migration contexts arise from the Guiding Principles; namely the obligation to:

- establish competent authorities;
- develop cooperation agreements; and
- adopt specific instruments to ensure the effective participation of families from abroad.

These same three obligations should also be met by States in order to:

- enable their cooperation in criminal proceedings;
- assist victims; and
- return remains in the case of death.

⁹⁴ UN, Committee on Enforced Disappearances (2019), Principle 9, par. 3.

A crucial part of cooperation and mutual assistance lies in sharing information: this is key to establishing the fate of enforced disappeared migrants and refugees.⁹⁵ Thus, in the case of enforced disappearances within migration contexts, sharing information should be at the center of cooperation between States. In doing so, States need to ensure the safety of the victims of the enforced disappearances, complainants and witnesses (Articles 12, 19).⁹⁶

Because both Article 14 and 15 explicitly refer to ‘State Parties’, States are not obliged to cooperate with and afford greatest measure of mutual assistance to States that are not parties to the ICPPED. However, some obligations to cooperate with States that are not parties to the ICPPED in the context of disappeared migrants and refugees arise on the basis of other provisions. For example, ensuring the right to report (Article 12.2) is not limited to enforced disappearances that occur in a State Party to the ICPPED. Similarly, re-establishing identity, nationality, name, and family relations of forcibly disappeared children and children of forcibly disappeared parents or legal guardians in trans-border contexts will require cooperation with other States. This cooperation is not restricted to State Parties of the ICPPED (Article 25.4). Thus, with regard to specific issues, States are obliged to cooperate with States that are not State Parties to the ICPPED.

Main conclusions: States are obliged to cooperate and afford one another the greatest measure of mutual assistance in enforced disappearance cases in: 1) criminal proceedings; 2) assisting victims of enforced disappearance; 3) searching for, locating, and releasing forcibly disappeared persons; 4) in the event of death - exhuming, identifying, and returning remains.

Challenges:

- What form should cooperation and affording the greatest measure of mutual assistance take?
- While the ICPPED does not specify specific measures, the CED’s Guiding Principles can serve as a basis. States should therefore: 1) establish competent authorities; 2) develop cooperation agreements; 3) adopt specific instruments ensuring the effective participation of families from abroad.

⁹⁵ ICRC, IOM, EAAF (2019).

⁹⁶ UN, Committee on Enforced Disappearances (2019). See also Principle 9, par. 3.

8 Particular Protection Provided to Children (Art. 25)

States shall take measures to prevent and punish under criminal law the wrongful removal of children who are subjected to enforced disappearances or whose parents or legal guardians are subjected to enforced disappearances. They shall also take measures to search for and identify such children, as well as assist one another in searching, identifying and locating the children. Additionally, States should have procedures to review adoptions or placement procedures and annul those that originated in an enforced disappearance. In all cases, the best interest of the child must be considered (Article 25).

The enforced disappearance of children or parents in migration contexts poses particular practical and legal challenges. For example, when a family member is forcibly disappeared and the family is further separated by an international border, preserving or re-establishing the identity, including their nationality, name and family relations of children (Article 25.4) requires cooperation and assistance between States.

The CED's Guiding Principles specify that States should develop and carry out search actions and plans that take into account the extreme vulnerability of disappeared children. They also should take specific coordinated measures to prevent disappearances of unaccompanied children. Importantly, according to the Guiding Principles, where there is doubt as to the individual's age, it should be assumed they are a minor.⁹⁷ This is particularly relevant given that there are accounts in which authorities have decided in migration contexts to classify children as adults; resulting in the children being excluded from additional protection.⁹⁸

Children travelling from Central and Southern America to the US and migrant children being detained in the US have received particular attention in recent years, due to the dire situation and the huge number of affected children.⁹⁹ While authorities often choose to place such children in detention centers, the UN Global Study on Children Deprived of Liberty argues that migration-related detention of children should be prohibited.¹⁰⁰ In 2019, US border authorities apprehended 76,020 unaccompanied migrants, as well as 473,682 "family units" (a group consisting of children with at least one adult family member).¹⁰¹ The children, including infants and toddlers, were detained and often separated from their families.¹⁰²

Children also go missing on other migration routes. Kazem Othman, for example, a Syrian refugee residing in Germany, reported that his son disappeared after the boat on which he crossed from Turkey to Greece capsized. Subsequently, he was contacted by persons alleging that the child was adopted in Greece and they provided him with a picture. He was still searching for his son when he reported this.¹⁰³

States are obliged to annul any adoption or placement of children that originated in an enforced disappearance (Article 25.4). Thus, if the circumstances preceding the adoption amount to an enforced disappearance (including if the enforced disappearance took place in another country) States are obliged to annul the adoption.

97 UN, Committee on Enforced Disappearances (2019), Principle 4, par. 2; Principle 8, par. 8; Principle 9, par. 1.

98 Human Rights Watch (2018a).

99 UN, UNICEF (2016); Inter-American Commission on Human Rights (2015).

100 Nowak (2019). See also: UN, General Assembly (2019), par. 56–60 for migration related detention of children. See also: CoE, European Court of Human Rights (2006).

101 U.S. Customs and Border Protection (2019).

102 An Associated Press investigation revealed that deported parents may lose their children to adoption in the US; Associated Press (09.01.2018).

103 ICMP (2018).

9 Conclusions

As this analysis has shown, every deprivation of liberty of migrants and refugees, if followed by a refusal to acknowledge the deprivation of liberty; and/or a concealment of the fate or whereabouts of the persons, is an enforced disappearance, irrespective of its duration and where it takes place. In trans-border situations, in particular when migrants or refugees are travelling alone, there might be no-one asking about the persons deprived of liberty and so it can be difficult to prove a refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of these persons. However, when the authorities deny that the persons have been deprived of their liberty after they were released, this also would constitute an enforced disappearance.

Although NGOs may ask for information about a migrant or refugee deprived of liberty, some States do not allow NGOs to obtain this information. This de facto limits possibilities to establish the fate and/or whereabouts of a disappeared migrant or refugee. It could be argued that to establish the circumstances and assist victims (Article 24.7), NGOs should be able to obtain information on persons deprived of their liberty.

A necessary element for classifying an event as an enforced disappearance is to establish State responsibility for a disappearance. The ICPPED foresees that this can take the form of authorization, support, or acquiescence. It is challenging to establish acquiescence in migration contexts, in particular when they are committed by non-state actors (Article 3), and when more than one State is involved. To assess whether acquiescence has taken place, this study proposes to test whether relevant authorities knew, or should have known, of the enforced disappearance and failed to take measures within their powers, which, judged reasonable, might have been expected to prevent the enforced disappearance.

When more than one State is involved in an enforced disappearance, questions concerning State responsibility arise. Every State that authorizes, supports or acquiesces to an enforced disappearance commits the enforced disappearance; thus, more than one State can be responsible for the same enforced disappearance. This can occur in various circumstances- for example: 1) when more States cooperate in the enforced disappearances; or 2) when one State commits enforced disappearances on the territory of another State or as part of the externalization of migration policies. Circumstances in each situation should be analysed on a case-to-case basis to establish whether acquiescence has taken place. When no State responsibility has been established, a State in which another State committed an enforced disappearance has still a number of obligations. These obligations include: 1) exercising jurisdiction when necessary; 2) allowing for reporting or undertaking ex officio investigations; and 3) applying relevant obligations under Article 24.

Migrants and refugees are also disappeared by non-state actors. When such disappearances are followed by a refusal to acknowledge it or by concealment of the fate or whereabouts of the persons, States are obliged under the ICPPED to investigate the acts and bring those responsible to justice. This should also include instances of short-term deprivation of liberty. When States authorized, supported or acquiesced to such disappearances, they become enforced disappearances and additional obligations under the ICPPED arise.

The principle of non-refoulement is enshrined in the ICPPED with its prohibition of expulsions, returns, surrenders, or extraditions to States where there are substantial grounds for believing that the person would be in danger of being subjected to an enforced disappearance. When more than one State is involved in the act, State responsibility under the ICPPED should be assessed with re-

gard to all states. The CED has not yet specifically referred to chain-refoulement and the prohibition of transferring individuals to a State where there are substantial risks that the person would be in danger of being subjected to disappearances by non-state actors. However, these practices are enshrined in the non-refoulement principle.

States are under an obligation to undertake an *ex officio* investigation when there are reasonable grounds to believe that an enforced disappearance occurred. This is particularly relevant in migration contexts. It is essential to interpret “reasonable grounds”. This study proposes basing the test on the CED’s Guiding Principles. They state clearly how and when the search for a forcibly disappeared person should be initiated: “as soon as the competent authorities become aware, by any means, or have indications that a person has been subjected to disappearance”.¹⁰⁴ While the investigation into an enforced disappearance should be conducted under the presumption that the person is alive (as is the case when a search is undertaken), the obligation to undertake an investigation is also prompted when unmarked graves are discovered.

States shall also ensure the right to report alleged enforced disappearances to competent authorities. This creates obligations for: 1) the State which committed the enforced disappearance and/or in which the enforced disappearance occurred; 2) the State in which the person wishing to report resides. Importantly, the right to report needs to be ensured to all persons, irrespective of their legal status in that State. While States enjoy a wide discretion with regard to how obligations are to be met, States in which the alleged enforced disappearance took place must make it possible to report from abroad. The obligation to ensure a right to report can be realized by the State of residence in two ways: 1) the State can receive the report and pass it on to the authorities of the State(s) where the alleged enforced disappearance occurred; 2) the State can take measures to ensure that the State (or States) where the enforced disappearance occurred makes it possible to report. In the context of migration, persons

reporting might not know exactly in which country the migrant or refugee was forcibly disappeared, which poses a challenge to the State of residence to ensure the right to report.

The ICPPED requires State parties to cooperate and afford one another the greatest measures of mutual assistance in a number of instances: 1) in criminal proceedings brought in respect of an offence of enforced disappearance (Article 14.1); 2) in assisting victims of enforced disappearances; 3) in searching for, locating and releasing forcibly disappeared persons; and, 4) in the event of death - exhuming, identifying, and returning their remains (Article 15). While the ICPPED does not specify the form of cooperation and assistance under Article 14 and 15, CED’s Guiding Principles specify how cooperation and assistance should be arranged with regard to the search. Building on these specifications three measures can be identified: 1) the establishment of competent authorities; 2) the development of cooperation agreements; and 3) the adoption of specific instruments ensuring the effective participation of families from abroad.

Furthermore, States have particular obligations with regard to forcibly disappeared children and children of forcibly disappeared legal guardians. When the family of a forcibly disappeared person is separated by an international border, the search and re-establishment of a child’s identity requires international cooperation.

There are a number of uncertainties arising from the ICPPED with regard to forcibly disappeared migrants and refugees that need to be approached on a case-by-case basis or be clarified by the CED. First, a recurring question is how to assess acquiescence of State involvement. This assessment would then classify a certain act by a non-state actor as an enforced disappearance or make a State also responsible for the enforced disappearance committed by another State. While this study proposes a test, indications or guides by the CED would be useful in migration contexts and beyond. A second issue closely connected to the latter, is the establishment of the responsibility of different

¹⁰⁴ UN, Committee on Enforced Disappearances (2019), Principle 6, par. 1.

States where more than one State was involved in the enforced disappearance. While the actions of each State have to be analyzed closely (also in the light of the ILC Draft Articles on States Responsibility for Internationally Wrongful Acts), overarching guidelines would be useful. Third, States are obliged to ensure rights of all individuals who have suffered harm as the direct result of an enforced disappearance as enshrined in Article 24. These rights are crucial, as the families of forcibly disappeared migrants and refugees are in a particular vulnerable situation. However, the realization of those obligations precipitates particular challenges in migration contexts.

Fourth, the rights of migrants and refugees could be strengthened by the CED: a clear stance on chain-refoulement and the refoulement to States where there are substantial reasons to believe that the person would be in danger of being subjected to disappearance by non-state actors would serve this purpose. Fifth, it would be useful for the CED to elaborate on how States should understand “reasonable grounds” to believe that an enforced disappearance occurred, thereby triggering an obligation to undertake an ex officio investigation. This study proposes a test based on the Guiding Principles to assess “reasonable grounds”. Sixth, and lastly, in migration contexts some persons might not know to which State to report an enforced disappearance. It would be beneficial if the CED clarified how obligations in the context of Article 12 and 15 would arise in such a situation.

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Abbreviations

CED	Committee on Enforced Disappearances	ICRC	International Committee of the Red Cross
CIA	Central Intelligence Agency	IFRCRCS	International Federation of Red Cross and Crescent Societies
CoE	Council of Europe	IHL	International humanitarian law
ECtHR	European Court of Human Rights	IOM	International Organization for Migration
GC	Geneva Conventions	NGOs	Non-governmental organisations
ICMP	International Commission on Missing Persons	PA I	Protocol Additional I (to the Geneva Conventions) relating to the protection of victims in international armed conflict
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance	WGEID	Working Group on Enforced or Involuntary Disappearances

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