

Protection of migrants from enforced disappearance: A human rights perspective

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Abstract

This article looks at the issue of enforced disappearances of migrants during their migratory journey or once they have reached their destination, a subject yet to be addressed in the literature. It examines how the legal and analytical framework provided by international human rights law and migration law applies to enforced disappearances of migrants. It then reviews the factors that contribute to this phenomenon in different contexts, including the disappearance of migrants for political reasons, those that take place in detention and deportation processes and those that take place within the context of migrant smuggling and trafficking.

Keywords: international law, human rights, enforced or involuntary disappearances, migration, United Nations.

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Introduction

In April 2011, forty-seven clandestine graves were discovered in the municipality of San Fernando in Tamaulipas, Mexico. They contained the remains of 193 people, including many missing migrants.¹ Today, the families of these victims are still seeking truth and justice, and it has not yet been established who was responsible for this tragedy.

While the disappearance of migrants² is a phenomenon that is increasingly being documented by civil society, particularly the media and human rights organizations, it seems that the international community has so far failed to respond satisfactorily to this crisis. The Working Group on Enforced or Involuntary Disappearances (WGEID or the Working Group),³ a Special Procedure of the United Nations (UN) Human Rights Council, submitted a thematic report to the Council on this subject in September 2017, in addition to its annual report.⁴ The WGEID had previously addressed the issue briefly in 2016 in an interim report published in its annual report⁵ and has had occasion, over the years, to deal with cases involving situations in which individuals had

- 1 Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc. 48/13, 30 December 2013, para. 23.
- 2 For the purposes of this article, the term “migrant” refers to any person outside the State of which he or she is a national, including refugees, asylum-seekers and people who migrate for economic or work- or climate-related reasons. On this subject, see Office of the United Nations High Commissioner for Refugees (UNHCR), “Mixed Migration”, available at: www.unhcr.org/mixed-migration.html (all internet references were accessed in October 2017). See also International Organization for Migration (IOM), “Glossary on Migration”, 2014, available at: www.iomvienna.at/sites/default/files/IML_1_EN.pdf.
- 3 See “Working Group on Enforced or Involuntary Disappearances”, available at: www.ohchr.org/EN/Issues/Disappearances/Pages/DisappearancesIndex.aspx. See also *Enforced or Involuntary Disappearances*, Fact Sheet No. 6/Rev.3, July 2009, available at: www.ohchr.org/Documents/Publications/FactSheet6Rev3.pdf.
- 4 The WGEID adopted a decision to conduct this study at its 105th Session in 2015. On this subject, see WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/30/38, 10 August 2015. The WGEID adopted its report at the beginning of 2017 and submitted it to the 36th Session of the Human Rights Council on 28 September 2017; see WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances on Enforced Disappearances in the Context of Migration*, UN Doc. A/HRC/36/39/Add.2, 28 July 2017.
- 5 WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/33/51, 28 July 2016, para. 46 ff.

emigrated from their country of origin to avoid becoming victims of enforced disappearance.⁶

This article, however, focuses specifically on enforced disappearances of migrants who go missing while in transit or once they have reached their destination, an issue yet to be explored in the literature. First, it examines how the legal and analytical framework provided by international human rights law, normally used to address “enforced disappearances”, applies to the situation of missing migrants. It then reviews the factors that contribute to enforced disappearances of migrants and, finally, looks at some of the different contexts in which they occur, including the abduction of migrants for political reasons, those that take place in detention and deportation processes and those that take place within the context of migrant smuggling and trafficking.

International law and the disappearance of migrants

This article therefore addresses the question of enforced disappearances of migrants within the meaning of international human rights law. It should be noted that the legal concept of “enforced or involuntary disappearance” is distinct from that of “missing”, as defined in international humanitarian law (IHL).⁷ Under IHL, a missing person is someone whose whereabouts are unknown as a result of armed conflict. In this regard, Additional Protocol I to the Geneva Conventions provides that the parties to an international armed conflict must facilitate the search for persons reported missing in this context, as soon as circumstances permit.⁸ Enforced disappearances, on the other hand, are governed by international human rights law and consist of

the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to

- 6 See, for example, the reports of the WGEID: UN Doc. E/CN.4/1985/15, para. 135; UN Doc. E/CN.4/1992/18/Add.1, para. 188; UN Doc. E/CN.4/1984/21, para. 102. See also UN Doc. E/CN.4/1492, Annex VIII, paras 1, 2.1, and Annex IX, p. 5. Missing people’s families and loved ones might also emigrate for economic reasons (families often suffer socioeconomic hardships following a disappearance; see WGEID, *Study on Enforced or Involuntary Disappearances and Economic, Social and Cultural Rights*, UN Doc. A/HRC/30/38/Add.5, 2015) or to continue searching for their missing loved one in the country where he or she disappeared. See, for example, UN Doc. E/CN.4/1985/15, para. 135. See also UN Doc. A/HRC/30/38/Add.5, paras 33–41; IOM, *Fatal Journeys: Tracking Lives Lost during Migration*, Geneva, 2014, p. 36.
- 7 On this subject, see Monique Crettol, Lina Milner, Anne Marie La Rosa and Jill Stockwell, “Establishing Mechanisms to Clarify the Fate and Whereabouts of Missing Persons: A Proposed Humanitarian Approach”, and the Q&A on the missing, in this issue of the *Review*.
- 8 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 33. See also Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 117: “Each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate.”

acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.⁹

There is no specific international instrument that deals with enforced disappearances of migrants. This question must therefore be examined in light of the various international legal instruments that cover enforced disappearances and those that govern the rights of migrants. At the universal level, the legal framework for enforced or involuntary disappearances is provided by two main instruments: the Declaration on the Protection of All Persons from Enforced Disappearance¹⁰ (the Declaration) and the International Convention for the Protection of All Persons from Enforced Disappearance¹¹ (ICPPED or the Convention).

The Declaration, the first instrument dealing specifically with enforced disappearance, was adopted by the UN General Assembly in 1992. It defines enforced disappearance and sets out the duties of States in terms of prevention, sanction and compensation. It contains provisions concerning the detention and release of people deprived of their liberty, which can lead to enforced disappearances if not carried out in accordance with international law.

The Convention, adopted in 2006, “reiterates and in some respects improves and complements the principles set out in the Declaration in relation to the definition of disappearances, their criminalization at the national and international level and prevention, punishment and reparation”.¹² It makes protection against enforced disappearance a non-derogable right,¹³ stipulating that “[n]o exceptional circumstances whatsoever ... may be invoked as a justification for enforced disappearance”.¹⁴ Unlike the Declaration, the

9 International Convention for the Protection of All Persons from Enforced Disappearance, 2716 UNTS 3, 20 December 2006 (entered into force 23 December 2010) (ICPPED), Art. 2. See also the Preamble of the Declaration on the Protection of All Persons from Enforced Disappearance, UN Doc. A/RES/47/133, 18 December 1992. While the International Committee of the Red Cross (ICRC) has a mandate under AP I to assist in tracing people who have gone missing in the context of an international armed conflict (Art. 33, para. 3), it is the WGEID that performs this function in the UN in relation to victims of “enforced or involuntary disappearances”. See UN Commission on Human Rights, Resolution 20 (XXXVI), 29 February 1980. It is worth noting that, for a time, the WGEID excluded cases of disappearances occurring in the context of international armed conflicts from its mandate, but it later lifted this restriction on its methods of work and began to accept such cases. See Human Rights Council, UN Doc. A/HRC/WGEID/102/2, 7 February 2014, and Annex I to the report of the Economic and Social Council adopted on 14 November 2001, UN Doc. E/CN.4/2002/79. See also Federico Andreu-Guzman, “Le Groupe de travail sur les disparitions forcées des Nations Unies”, *International Review of the Red Cross*, Vol. 84, No. 848, 2002, p. 807; ICRC, *The Missing – Mechanisms to Solve Issues on People Unaccounted For*, Geneva, 19 December 2002, pp. 17, 155.

10 See above note 9.

11 See above note 9.

12 Olivier de Frouville, “La Convention des Nations Unies pour la protection de toutes les personnes contre les disparitions forcées: Les enjeux juridiques d’une négociation exemplaire”, *Droits Fondamentaux*, No. 6, 2006, p. 3 (*Review’s* translation).

13 *Ibid.*, p. 14. On the customary nature of the prohibition of enforced disappearance, see ICRC Customary Law Study, above note 8.

14 ICPPED, Art. 1(2).

Convention applies only to those countries that have ratified it, numbering fifty-eight to date.¹⁵

These two instruments make reference to the same concept of “enforced or involuntary disappearances” and concern (1) any person who has been abducted, arrested or detained (2) by agents of the State (or groups or individuals acting with the consent or acquiescence of the State), (3) with a refusal to acknowledge the deprivation of liberty of that person.

There are also other instruments that refer to the question of enforced disappearances, such as, at the regional level, the Inter-American Convention on Forced Disappearance of Persons,¹⁶ and the Rome Statute in international criminal law.¹⁷

Migrants’ rights are guaranteed by numerous norms of international law, enshrined in international human rights law and international migration law as well as in specific conventions. The International Covenant on Civil and Political Rights (ICCPR) stipulates that everyone is free to leave any country, including his or her own,¹⁸ and that an alien lawfully in the territory of a State party to the Covenant may only be expelled in pursuance of a decision reached in accordance with the law.¹⁹ It also provides that “[e]ach State ... undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the ... Covenant, without distinction of any kind”.²⁰ This provision confirms the principle of non-discrimination and stipulates that migrants are entitled to have their rights respected by the host State despite not being citizens.²¹ The Human Rights Committee has also stated that:

In general, the rights set forth in the [ICCPR] apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. Thus, the

15 See UN Treaty Collection, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&clang=_en.

16 Inter-American Convention on Forced Disappearance of Persons, OASTS 60, 9 June 1994 (entered into force 28 March 1996). See also O. de Frouville, above note 12, p. 2. It should be noted, however, that even before the adoption of these instruments, the term “enforced disappearance” had been defined, for example, in the case of *Velásquez Rodríguez v. Honduras*, tried by the Inter-American Court of Human Rights (IACtHR) in 1988: IACtHR, *Case of Velásquez Rodríguez v. Honduras*, Series C, No. 4, Judgment, 29 July 1988. See also Ophelia Claude, “A Comparative Approach to Enforced Disappearances in the Inter-American Court of Human Rights and the European Court of Human Rights jurisprudence”, *Intercultural Human Rights Law Review*, Vol. 5, 2010, p. 415.

17 Rome Statute of the International Criminal Court, 2187 UNTS 3, 17 July 1998, Art. 7(1)(i).

18 International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966 (entered into force 23 March 1976), Art. 12(2). Article 13(2) of the Universal Declaration of Human Rights also mentions this right.

19 ICCPR, Art. 13.

20 *Ibid.*, Art. 2(1).

21 With the exception of Article 25, which gives nationals the right to take part in the conduct of public affairs and to be elected. On this subject, see also Vincent Chetail, “The Transnational Movement of Persons under General International Law – Mapping the Customary Law Foundations of International Migration Law”, in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration*, Edward Elgar, Cheltenham, 2014, p. 66. See also IACtHR, *Case of Nadege Dorzema et al. v. Dominican Republic*, Judgment, 24 October 2012, para. 154; IACtHR, *Case of Vélez Loor v. Panama*, Series C, No. 218, Preliminary Objections, Merits, Reparations and Costs, Judgment, 23 November 2010.

general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.²²

The Convention relating to the Status of Refugees²³ and the Protocol relating to the Status of Refugees²⁴ deal specifically with the rights of refugees. One of the former's key principles is enshrined in Article 33(1), which stipulates that “[n]o ... State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”. The corollary to this obligation is that States must accept individuals who would be in danger if they returned to their country of origin. This principle of *non-refoulement* is a rule of customary international law²⁵ that must be observed by all States.²⁶

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted in December 1990, reaffirms that the human rights of migrants must be respected without discrimination, regardless of whether they have legal status or permanent residence in the country in which they are living. It also provides that all migrant workers have the right to leave any State, including their country of origin,²⁷ a right that is also guaranteed in the Convention on the Rights of the Child²⁸ and the International Convention on the Elimination of All Forms of Racial Discrimination.²⁹ The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment³⁰ prohibits States from expelling, returning or extraditing a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.³¹ Lastly, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime³² (also known as the Palermo Protocol), aims to combat human trafficking, a crime that many migrants fall victim to.

22 Human Rights Committee, General Comment 15, “The Position of Aliens under the Covenant”, UN Doc. HRI/GEN/1/Rev.1, 1994, paras 1–2, available at: www.refworld.org/docid/45139acfc.html.

23 Convention relating to the Status of Refugees, 189 UNTS 137, 28 July 1951 (entered into force 22 April 1954).

24 Protocol relating to the Status of Refugees, 606 UNTS 267, 31 January 1967 (entered into force 4 October 1967).

25 UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, available at www.refworld.org/cgi-bin/txis/vtx/rwmain?docid=45f17a1a4.

26 V. Chetail, above note 21, pp. 37–38.

27 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 2220 UNTS 3, 18 December 1990, Arts 7, 8.

28 Convention on the Rights of the Child, 1577 UNTS 3, 20 November 1989, Art. 10.

29 International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195, 7 March 1966, Art. 5(d)(ii).

30 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984.

31 *Ibid.*, Art. 3.

32 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, 2237 UNTS 319, 15 November 2000, Preamble.

Although these norms each deal with specific issues and have their own scope of application, their overlapping and intersection give rise to a body of law covering prevention, investigation, sanction and reparation for enforced disappearances of migrants, resulting in a series of obligations, which are discussed further below.

Factors that contribute to enforced disappearances of migrants

A number of factors contribute to the occurrence of enforced disappearances of migrants. It is evident that migrants are generally exposed to situations that heighten their vulnerability.³³ They are often fleeing from armed conflicts or violence and suffer socioeconomic hardships and are frequently victims of discrimination.³⁴ The Working Group has repeatedly underlined the close relationship between these factors and enforced disappearances as a phenomenon.³⁵

Another factor is that crimes against migrants often go unpunished, in many cases because the victims lack effective access to justice or because they are reluctant to report the perpetrators for fear of jeopardizing their own position.³⁶ Furthermore, the fact that migrants sometimes travel without valid documents makes them, in a sense, “invisible” to the authorities, hampering efforts to prevent and investigate disappearances. This difficulty is further compounded by the lack of reliable data and statistics on migration and the disappearance of migrants.

As discussed at greater length below, it goes without saying that the security and immigration policies adopted by some States,³⁷ the militarization of borders and the criminalization of irregular migration put migrants in greater danger, increasing their vulnerability.³⁸ Lastly, the language and discourse used by some State authorities when referring to migrants – associating them with security threats and criminality – only serve to exacerbate this trend, exposing victims to greater risks of suffering violations and discrimination.³⁹

33 See IACtHR, *Vélez Loor*, above note 21. See also IACtHR, *Dorzema*, above note 21.

34 See IACtHR, *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, 17 September 2003.

35 See WGEID, *Study on Enforced or Involuntary Disappearances and Economic, Social and Cultural Rights*, UN Doc. A/HRC/30/38/Add.5, 9 July 2015. See also WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances: Mission to Mexico*, UN Doc. A/HRC/19/58/Add.2, 20 December 2011, para. 69. People living in poverty whose exercise of economic, social and cultural rights is curtailed are more likely to become victims of enforced disappearance.

36 See the references cited in note 35. See also IOM, above note 6.

37 See *Report of the Special Rapporteur on the Human Rights of Migrants*, UN Doc. A/65/222, 3 August 2010, para. 15. See also *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/71/384, 13 September 2016, para. 53.

38 *Report of the Special Rapporteur on the Human Rights of Migrants*, François Crépeau, UN Doc. A/HRC/20/24, 2 April 2012.

39 *Report of the Special Rapporteur on the Human Rights of Migrants*, above note 37, paras 19, 31. See also *Report of Special Rapporteur François Crépeau*, above note 38, paras 8, 13.

Enforced disappearances of migrants for political reasons

Emigration can sometimes be a way for political opponents to flee repression in their country of origin.⁴⁰ In some cases, however, this self-imposed exile does not ensure their safety because the State of origin continues to pursue them beyond its borders, enlisting the help of the host State.

Many migrants have become victims, in the host country, of enforced disappearances with a transnational component. In some cases, they were captured by agents of the State of origin in the host country, often with the consent or complicity of the latter, while in others they were captured by agents of the host State at the request of the State of origin, often using intelligence provided by the latter to identify and locate them. Frequently, individuals were secretly detained and tortured in the host country before being handed over to the State of origin, never to be seen again. Cross-border operations of this kind have sometimes been carried out under bilateral or multilateral agreements, with varying degrees of formality and secrecy.

One example is the large number of political opponents and refugees (including politicians and members of guerrilla groups, but also teachers, students, trade union leaders, etc.) who disappeared as a result of such practices in the period from 1970 to 1980 in South America, mainly Argentina, Bolivia, Brazil, Chile, Paraguay and Uruguay, which were countries that had adopted very repressive national security policies during the Cold War. Although these operations were initially carried out under bilateral counter-insurgency agreements,⁴¹ a multilateral agreement was signed in 1975 by these States under which they coordinated their actions in what has become known as Operation Condor.⁴² In many cases, the final outcome of these secret abductions was enforced disappearance. The conduct of Operation Condor has been the subject of a number of reports and decisions of the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights (IACtHR)⁴³ and the UN Human Rights Committee.⁴⁴ The Working Group has also dealt with many cases of enforced disappearances perpetrated in the context of this operation, specifically targeting migrants who had fled to other countries to escape repression at home – for example, the numerous Uruguayan refugees captured in

40 Matthew E. Price, *Rethinking Asylum: History, Purpose, and Limits*, Cambridge University Press, Cambridge, 2009.

41 On the subject of bilateral cooperation between Argentina and Paraguay, see, for example: <http://nsarchive.gwu.edu/NSAEBB/NSAEBB514/docs/Doc%2001%20-%20r186f1573%20-%201580.pdf>.

42 Francesca Lessa, "Justice Beyond Borders: The Operation Condor Trial and Accountability for Transnational Crimes in South America", *International Journal of Transitional Justice*, Vol. 9, No. 3, 2015; John Dinges, *The Condor Years: How Pinochet and His Allies Brought Terrorism to Three Continents*, New Press, New York, 2004; J. Patrice McSherry, *Predatory States: Operation Condor and Covert War in Latin America*, Rowman & Littlefield, Lanham, MD, 2005.

43 IACtHR, *Case of Gelman v. Uruguay*, Series C, No. 221, Merits and Reparations, Judgment, 24 February 2011; IACtHR, *Case of Goiburú et al. v. Paraguay*, Series C, No. 153, Merits, Reparations and Costs, Judgment, 22 September 2006, paras 61.5–61.8.

44 See, for example, Human Rights Committee, *Case of Sergio Ruben Lopez Burgos v. Uruguay*, Communication No. R.12/52, UN Doc. A/36/40, 6 June 1979.

Argentina⁴⁵ and Paraguay⁴⁶ by the Uruguayan military authorities, by the local authorities or jointly by both. There was also the case of Argentine nationals captured in Peru by the Peruvian or Argentine military authorities.⁴⁷

The Working Group has examined reports of cross-border abductions of migrants who had taken refuge in various countries. For example, Uzbek migrants who had fled to Kazakhstan were reported to have been captured by the Uzbekistan authorities,⁴⁸ and Afghan refugees in Pakistan were allegedly abducted by people acting on behalf of the Pakistani authorities.⁴⁹ More recently, the Working Group received allegations that nationals of the Democratic People's Republic of Korea who had crossed the border into China to avoid persecution had been captured by Chinese officials and repatriated, after which some of them were subjected to enforced disappearance.⁵⁰ This practice has also been described by the commission of inquiry on human rights in the Democratic People's Republic of Korea.⁵¹

It could also be argued that some of the bilateral and multilateral operations carried out today against migrants as part of measures to counter terrorism fit into this category.⁵²

Enforced disappearances following the arrest and detention of migrants

Although the administrative detention of migrants entering a country without valid documents should be a measure of last resort, given that deprivation of liberty can

45 See WGEID, *Annual Report*, UN Doc. E/CN.4/1435, 1980, para. 152; WGEID, *Annual Report*, UN Doc. E/CN.4/1492, 1981, Annex VIII, para. 10.2; WGEID, *Annual Report*, UN Doc. E/CN.4/1984/21, 1983, para. 102; WGEID, *Annual Report*, UN Doc. E/CN.4/1985/15, 1984, para. 236; WGEID, *Annual Report*, UN Doc. E/CN.4/2002/79, 2001, para. 42; *ibid.*, para. 328; WGEID, *Annual Report*, E/CN.4/2003/70, 2002, paras 30, 293; WGEID, *Annual Report*, UN Doc. E/CN.4/2004/58, 2003, para. 41; *ibid.*, para. 308; WGEID, *Annual Report*, UN Doc. E/CN.4/2005/65, 2004, para. 61.

46 See, for example, WGEID, *Annual Report*, UN Doc. E/CN.4/1983/14, 1982, paras 91 ff.; WGEID, *Annual Report*, UN Doc. E/CN.4/1435, 1980, paras 156, 173.

47 See WGEID, *Annual Report*, UN Doc. E/CN.4/1435, 1980, para. 166.

48 See WGEID, *Annual Report*, UN Doc. E/CN.4/1995/36, 1994, para. 249; WGEID, *Annual Report*, UN Doc. E/CN.4/1996/38 and Corr. 1, 1995, para. 280.

49 See WGEID, *Annual Report*, UN Doc. E/CN.4/2002/79, 2001, para. 246; WGEID, *Annual Report*, UN Doc. E/CN.4/2004/58, 2003, para. 230; WGEID, *Annual Report*, UN Doc. A/HRC/4/41, 2006, para. 318.

50 See WGEID, *107th Session (14–18 September 2015): Post-Sessional Report*, UN Doc. A/HRC/WGEID/107/1, 2015, para. 25.

51 For a general account, see *Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, UN Doc. A/HRC/25/63, 7 February 2014.

52 On this subject, see Human Rights Council, UN Doc. A/HRC/13/42, 19 February 2010. This report was a joint study on global practices in relation to secret detention in the context of countering terrorism, undertaken by the special rapporteurs on the promotion and protection of human rights and fundamental freedoms while countering terrorism and on torture and other cruel, inhuman or degrading treatment or punishment, and the Working Groups on Arbitrary Detention and Enforced and Involuntary Disappearances. For a more general discussion, see Brian R. Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross, *Foundations of International Migration Law*, Cambridge University Press, New York, 2012, p. 134.

seriously curtail the exercise of fundamental rights,⁵³ it is increasingly used by a great number of States⁵⁴ as a way of deterring irregular immigration and discouraging asylum-seekers.⁵⁵ There are national laws in place that explicitly provide for migrants entering the country in an undocumented manner to be arrested and detained, so that the authorities can identify them and take a decision on their immigration status.

Many international and non-governmental organizations have emphasized that entering a country irregularly does not, under any circumstances, constitute a crime and should certainly not be considered a valid ground for detention.⁵⁶ Criminalizing irregular entry into a country exceeds the legitimate interest of States to control and regulate irregular migration.⁵⁷ The IACtHR has stated on several occasions that immigration detention should never be used as a punitive measure; it should only be employed when strictly necessary and as a means of protecting against attacks on fundamental rights. Any other use would constitute an abuse of the State's punitive powers.⁵⁸ Although States have broad powers to determine who they allow inside their borders, those wishing to enter should only be detained as an exceptional measure when fundamental interests are violated.⁵⁹

In addition to affecting migrants' right to freedom, immigration detention can also lead to disappearances. The lack of proper detention procedures or the failure to implement them can facilitate the commission of such crimes. The Office of the UN High Commissioner for Refugees (UNHCR) has observed that immigration detention is, in some countries, one of the most opaque areas of public administration, and few countries have established an independent monitoring mechanism for such detentions.⁶⁰ It has also been noted that some States do not collect disaggregated immigration detention data for certain groups, do not have statistics on the status of detained migrants or simply do not hold information on the number of asylum-seekers being held in detention.⁶¹

53 Inter-American Commission on Human Rights, OEA/Ser.L/V/II.Doc.46/15, 31 December 2015, p. 179. See also para. 383.

54 Office of the High Commissioner for Human Rights (OHCHR), UN Doc. A/HRC/33/67, 13 October 2016, para. 36; Inter-American Commission on Human Rights, OEA/Ser.L/V/II Doc 48/13, 30 December 2013, p. 179; UNHCR, Association for the Prevention of Torture (APT) and International Detention Coalition (IDC), *Monitoring Immigration Detention: Practical Manual*, 2014, pp. 5–20; UNHCR and Alice Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants*, April 2011, p. 1.

55 UNHCR and A. Edwards, above note 54, p. 1.

56 *Ibid.*; Inter-American Commission on Human Rights, OEA/Ser.L/V/II.Doc.46/15, 31 December 2015.

57 Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), "General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families", UN Doc. CMW/C/GC/2, 28 August 2013, para. 24; UNHCR and A. Edwards, above note 54, p. 3.

58 IACtHR, *Vélez Loor*, above note 21, para. 170.

59 Inter-American Commission on Human Rights, OEA/Ser.L/V/II.Doc.46/15, 31 December 2015, p. 179; see also para. 383.

60 UNHCR, APT and IDC, above note 54, p. 21.

61 Global Detention Project, *The Uncounted: Detention of Migrants and Asylum Seekers in Europe*, 17 December 2015, p. 18. See also Alice Edwards, "The Optional Protocol to the Convention Against Torture and the Detention of Refugees", *International and Comparative Law Quarterly*, Vol. 57, No. 4, 2008, p. 809; UNHCR and A. Edwards, above note 54, p. 41.

Furthermore, while some States do cooperate with UNHCR and grant access to asylum-seekers on a regular basis, others do not.⁶² This lack of transparency can result in human rights violations, including enforced disappearances of migrants.

Opaque immigration detention procedures also make it difficult to obtain accurate data and document specific cases. In spite of this, various bodies have identified practices that can give rise to enforced disappearances. For example, civil society organizations have reported that Thailand does not have an adequate legal framework in place to deal with asylum cases, making the stay of refugees and asylum-seekers in the country uncertain.⁶³ Procedures seem to vary from one case to another, and this leaves detainees more vulnerable to human rights violations, including enforced disappearances. Similarly, in Russia, it has been reported that police carry out raids in places frequented by migrants, and that those arrested and detained typically have no access to legal counsel or translators and are not allowed to inform their families of their situation.⁶⁴ International organizations have also indicated that Libya has no framework to deal with asylum claims,⁶⁵ and that various actors are involved in detaining migrants there (coastguard, border officials, soldiers, police officers, smugglers, traffickers, etc.). State officials and non-State actors often take migrants to detention centres where there is no formal registration and no access to lawyers.⁶⁶

These examples illustrate how immigration control measures can lead to the disappearance of migrants when they do not take into account the obligations that States have under the Declaration and the Convention, particularly the requirements to hold migrants deprived of their liberty in officially recognized places of detention, to formally register their detention and to ensure that they have access to justice.

While these immigration control practices do not always constitute an enforced disappearance *stricto sensu*, as defined in international law, they do make migrants more vulnerable to it and may trigger State responsibility. In this regard, it is worth noting that the drafters of the Convention included provisions aimed at preventing enforced disappearances that require the States Parties to keep an up-to-date official register of all persons detained and transferred, with details of the place of detention where they are being held.⁶⁷ It is also specified that “[all] persons deprived of liberty must be *released in a manner permitting reliable verification that they have actually been released* and, further, have been released in *conditions in which their physical integrity and ability fully to exercise*

62 UNHCR and A. Edwards, above note 54, p. 41.

63 Human Rights Watch, *Ad Hoc and Inadequate: Thailand’s Treatment of Refugees and Asylum Seekers*, September 2012, p. 1; Global Detention Project, “Thailand Immigration Detention Profile”, available at: www.globaldetentionproject.org/countries/asia-pacific/thailand#_ftnref13.

64 Human Rights Watch, “Russia: Mass Detention of Migrants”, 8 August 2013, available at: www.hrw.org/news/2013/08/08/russia-mass-detention-migrants.

65 IOM, above note 6, p. 113.

66 *Ibid.*, pp. 123–130; United Nations Support Mission in Libya (UNSMIL) and OHCHR, *Detained and Dehumanised: Report on Human Rights Abuses against Migrants in Libya*, 13 December 2016.

67 ICCPED, Art. 17(3).

their rights are assured".⁶⁸ Detained migrants who have not been duly registered or are released without their safety being ensured or their rights guaranteed clearly run a greater risk of becoming a victim of enforced disappearance. Furthermore, the Convention provides that "[n]o one shall be held in secret detention"⁶⁹ and that places of detention must be officially recognized and supervised. Detainees must be allowed to communicate with their families and ensured access to legal remedies, which avoids migrants being placed outside the protection of the law. All these safeguards apply to the detention of migrants.

Compliance with these obligations is of paramount importance considering that the policies, laws and practices of States often do not recognize migrants as full rights holders (in spite of their international obligations under instruments such as the ICCPR), which makes migrants all the more vulnerable to human rights violations, including enforced disappearances.⁷⁰

Lastly, many States have adopted increasingly restrictive immigration policies in recent years, forcing migrants without the proper documents to choose migration routes that are dangerous⁷¹ because they are partly controlled by criminal gangs or trafficking networks.⁷² As mentioned above, the restrictive policies introduced by States and the increased use of immigration detention heighten the fears of irregular migrants who, rather than risk arrest and detention, prefer to take their chances on clandestine routes – and these routes, while having the “advantage” of less State monitoring, tend to be controlled by criminal groups.

Enforced disappearances in the context of deportations and pushbacks

Migrants can also be subjected to enforced disappearance once they have reached their destination or while they are in transit, particularly when the authorities decide to deport them to their country of origin or another country. Migrants are sometimes deported without the proper procedures and registration. In some cases, migrants intercepted by agents of the State are handed directly back to the authorities of the country of origin. The WGEID has come across cases of this kind over the years. In 1981, for example, it dealt with a case in which twenty-six nationals of El Salvador disappeared after being arrested by the Honduran security forces. Five of them were handed over directly to the authorities of El Salvador. Another, a Salvadorian refugee living in a refugee camp in Honduras,

68 Declaration on the Protection of All Persons from Enforced Disappearance, Art. 11 (emphasis added). See also ICPPED, Art. 17(3)(h).

69 ICPPED, Art. 17(1).

70 Inter-American Commission on Human Rights, OEA/Ser.L/V/II Doc 48/13, 30 December 2013, p. 13.

71 *Ibid.*, p. 207; UNHCR and A. Edwards, above note 54, p. 2.

72 WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/33/51, 28 July 2016, para. 67; Human Rights Council, *Situation of Migrants in Transit*, UN Doc. A/HRC/31/35, 27 January 2016, para. 64. See also UNHCR, *The Sea Route to Europe: The Mediterranean Passage in the Age of Refugees*, Geneva, 1 July 2015, p. 7; International Crisis Group, *Easy Prey: Criminal Violence and Central American Migration*, Latin America Report No. 57, 2016, p. 10.

was forcibly returned to El Salvador following a raid on the camp by the Salvadorian army.⁷³ Similarly, in 1996, the Working Group received a case in which an Ethiopian refugee had disappeared after being arrested at a camp in Djibouti by the Djiboutian police and handed over to the Ethiopian authorities.⁷⁴ The Working Group has also examined cases involving Algerian migrants, known as *harragas*, who reportedly disappeared in Tunisian territorial waters while attempting to reach Italy by boat in 2007. These alleged disappearances occurred in the context of incidents in which *harragas* had been captured by the Tunisian coastguard in similar circumstances.⁷⁵

Other types of cases have also been documented by various civil society and international organizations. In southern Spain, for example, Spanish border officials have reportedly intercepted large numbers of migrants and handed them directly over to Moroccan border officials, without following the procedures required to ensure that their rights were respected.⁷⁶ A law was passed in 2014 to deal with “illegal immigration”, establishing a special regime for Ceuta and Melilla and authorizing summary expulsions in these territories.⁷⁷ Therefore, migrants attempting to scale the fences along Spain’s southern border can be arrested by the Spanish police and handed over to the Moroccan police without the Spanish authorities providing an effective asylum process.⁷⁸ It is important to note that the principle of *non-refoulement* prohibits States from returning migrants to their country of origin if they are likely to be exposed to the risk of human rights violations, including enforced disappearances. Any deportation must be the subject of an individual assessment in order to avoid such risks.⁷⁹ In connection with this issue, the Working Group expressed concern, following a visit to Spain in 2013, at claims that migrants had been expelled without formal procedures being followed, which prevented case-by-case consideration of whether they might have been at risk of enforced disappearance following deportation, as required by Article 8 of the Declaration.⁸⁰

73 WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN.4/1492, 31 December 1981, para. 155.

74 WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN.4/2006/56, 27 December 2005, para. 232.

75 WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances*, Post-Sessional report, UN Doc. A/HRC/WGEID/112/1, 25 July 2017.

76 Comisión de Observación de Derechos Humanos (CODH), *Vulneraciones de derechos humanos en la frontera sur – Melilla*, July 2014, p. 15. See also IOM, above note 6, p. 130.

77 Global Detention Project, “Spain Immigration Detention Profile”, 2016, available at: www.globaldetentionproject.org/countries/europe/spain.

78 European Centre for Constitutional and Human Rights, *Spanish-Moroccan Land Border in Melilla – a Lawless Zone of Automatic Expulsions*, 2015, p. 1; Commissioner for Human Rights, Council of Europe, *Third Party Intervention by the Council of Europe Commissioner for Human Rights*, CommDH (2015)26, 2015, para. 11, available at: <https://rm.coe.int/16806dac25>. See also IOM, above note 6, pp. 130–131.

79 European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, Case No. 27765/09, Judgment, 2012; Inter-American Commission on Human Rights, *The Haitian Centre for Human Rights et al. v. United States*, Case No. 51/96, 1996, paras 167–177.

80 WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances: Mission to Spain*, UN Doc. A/HRC/27/49/Add.1, 2 July 2014, para. 54.

Similar practices have also been documented by human rights organizations at the border between Morocco and Algeria. Migrants intercepted by immigration officials are reported to have been taken to remote desert areas, forced to cross the border and then left there to survive on their own without food or water.⁸¹ Numerous other cases of this kind have been documented in different parts of the world, involving officials taking migrants to remote places and releasing them without ensuring their safety.⁸²

These examples illustrate how practices of this kind might not comply with the *non-refoulement* obligation and the duty that States have to ensure the right of “[a]ll persons deprived of liberty [to] be released in a manner permitting reliable verification that they have actually been released and, further, have been released in conditions in which their physical integrity and ability fully to exercise their rights are assured”.⁸³

Another measure that can lead to the disappearance of migrants is the widespread and well-documented practice of “pushbacks”.⁸⁴ This “technique”, which consists of preventing migrants from crossing a border by forcibly returning them, before they even reach their destination, to the previous country of transit or to the country of origin they are fleeing from, denies them the legal protection to which they are entitled under international human rights law, asylum law⁸⁵ and the principle of *non-refoulement*.⁸⁶

Numerous cases of pushbacks have been documented by civil society organizations. For example, boatloads of migrants arriving at the sea border between Turkey and Greece have been intercepted by the coastguard and pushed back towards Turkey,⁸⁷ sometimes resulting in shipwreck.⁸⁸ Similarly, on the land border between Turkey and Bulgaria, migrants were reportedly intercepted, taken back across the border and released without food, while others intercepted after crossing the Bulgarian border were forced to head straight back to Turkey.⁸⁹ In the majority of cases, there were no registration procedures in place and migrants were denied the opportunity to make an asylum claim.⁹⁰

81 Human Rights Watch, *Abused and Expelled: Ill-Treatment of Sub-Saharan African Migrants in Morocco*, February 2014, p. 26.

82 See, for example, American Civil Liberties Union of San Diego & Imperial Counties and Mexico’s National Commission of Human Rights (Maria Jimenez), *Humanitarian Crisis: Migrant Deaths at the US–Mexico Border*, 2009, p. 29. See also Human Rights Watch, *Containment Plan: Bulgaria’s Pushbacks and Detention of Syrian and Other Asylum Seekers and Migrants*, 28 April 2014, p. 17.

83 Declaration on the Protection of All Persons from Enforced Disappearance, Art. 11 (emphasis added). See also ICPPED, Art. 17(3)(h).

84 UN General Assembly, *Human Rights of Migrants*, UN Doc. A/71/285, 4 August 2016.

85 Oxfam, *A Dangerous Game: The Pushback of Migrants, including Refugees, at Europe’s Borders*, April 2017, p. 4.

86 European Court of Human Rights, *Jamaa*, above note 79, paras 77–134.

87 See European Union Agency for Fundamental Rights, *Annual Report 2014 – Fundamental Rights: Challenges and Achievements in 2014*, 2014, pp. 87–88; Amnesty International, *Greece: Frontier of Hope and Fear – Migrants and Refugees Pushed Back at Europe’s Border*, 2014; Pro Asyl, *Pushed Back: Systematic Human Rights Violations against Refugees in the Aegean Sea and at the Greek–Turkish Land Border*, 2014.

88 Pro Asyl, above note 87, pp. 27–28; Amnesty International, above note 87, p. 15.

89 Human Rights Watch, above note 82, pp. 2–17.

90 *Ibid.*, p. 3.

Following a visit to Turkey in 2016, the Working Group expressed concern about information it had received regarding the high number of mass returns of Syrian refugees by the Turkish State and the use of violence by border guards to prevent Syrian nationals from crossing the border into Turkey.⁹¹ It observed that the Syrian situation increased the likelihood of enforced disappearances occurring and exposed the refugees who were returned to Syria to greater risk of suffering human rights violations.⁹²

Although it may not be accurate to equate pushbacks with enforced disappearances *stricto sensu*, there is no question that this practice makes migrants vulnerable and more likely to become victims of enforced disappearances. Moreover, it could trigger the responsibility that States have under the Convention and the Declaration, which, it must be remembered, prohibit States from returning migrants to a country where there are substantial grounds for believing that they would be in danger of enforced disappearance, and require States to release them in a manner permitting reliable verification that they have actually been released and ensuring their physical safety and ability to fully exercise their rights.

The problem of migrant smuggling and trafficking

It is important to recall that a significant proportion of migrant disappearances seem to be the result of migrant smuggling and trafficking operations carried out by private or non-State actors,⁹³ often as part of organized criminal

91 WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances on Its Mission to Turkey*, UN Doc. A/HRC/33/51/Add.1, 27 July 2016, para. 55.

92 *Ibid.*, para. 56. See also *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/24/46, 16 July 2013, paras 67–74.

93 It should be noted that “[s]muggling of migrants’ shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State ... of which the person is not a national or a permanent resident” for the purposes of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime, UNGA Res. 55/25, Annex III, UN General Assembly Official Records, 55th Session, Supp. No. 49, UN Doc. A/45/49, Vol. 1, 2001. The term “[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”. See Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, UNGA Res. 25, Annex II, UN General Assembly Official Records, 55th Session, Supp. No. 49, UN Doc. A/45/49, Vol. 1, 2001, Art. 3(1). See also K. Kangaspunta and A. Guth, “Trafficking in Persons: Trends and Patterns”, in Organisation for Economic Cooperation and Development (OECD), *Illicit Trade: Converging Criminal Networks*, OECD Publishing, Paris, 2016. It should be noted that it is often the case that at some point along the way migrant smuggling turns into migrant trafficking: “What starts out as a simple transaction involving a person seeking the services of a smuggler may end up with the migrant being deceived, coerced or exploited somewhere along the line, given the often unequal power relationships between smugglers and migrants. Therefore a smuggled migrant may quickly and unwillingly become a trafficked person.” See IOM, *Migrant Smuggling Data and Research: A Global Review of the Emerging Evidence Base*, 2016, p. 6. See also Inter-American Convention on International Traffic in Minors, OEA/Ser.K/XXI.5, CIDIP-V/doc.36/94 rev. 5, 79 OASTS, 18 March 1994; Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, UNGA Res. 54/263, Annex II, UN General Assembly Official Records, 54th Session, Supp. No. 49, UN Doc. A/54/49, Vol. 3, 2000.

activities.⁹⁴ In fact, more and more migrants are putting themselves in the hands of smugglers or taking more dangerous routes, which are often controlled by organized criminal gangs, to avoid the more restrictive controls established as a result of the harsher immigration policies adopted by States in recent years.⁹⁵ Although in some cases disappearances occurring as a result of smuggling or trafficking do not involve State actors – and do not therefore constitute enforced or involuntary disappearances in the strict sense of the term – in many others they are perpetrated with the *support (direct or indirect), consent or acquiescence* of agents of the State, rendering them “enforced disappearances” within the meaning of the Convention and Declaration.

Sometimes, agents of the State (such as border and immigration officials, police, port authorities, embassy and consulate employees or members of the armed forces) can be smugglers or traffickers themselves, organizing the smuggling or trafficking of migrants, facilitating undocumented migration or enabling the stay of irregular migrants.⁹⁶ At other times, they are indirectly involved in migrant smuggling and trafficking activities carried out by private actors, facilitating operations, allowing undocumented migrants to enter, providing fraudulent documents or simply turning a blind eye.⁹⁷ Migrant smuggling and trafficking activities are often carried out with the involvement or collaboration of corrupt State officials, and corruption and collusion are generally a critical part of such operations.⁹⁸ When migrants disappear either during their journey or at their destination as a result of being smuggled or trafficked, the direct or indirect involvement of government officials in these activities renders the incident an enforced disappearance within the meaning of the Convention and Declaration and can trigger the responsibility of the States concerned. It should also be noted that, in the vast majority of cases, corrupt officials are acting not in accordance with State policies or measures but in their own interests.

Various examples of this have been documented by international organizations and civil society. In Africa, networks have been detected that take migrants from Eritrea to Sudan, Ethiopia⁹⁹ and Egypt.¹⁰⁰ Likewise, in Libya, there have been reports of government officials being directly involved or collaborating in smuggling and trafficking operations that take migrants to Europe or Sudan.¹⁰¹

94 On this subject, see Christine Bruckert and Colette Parent, *Trafficking in Human Beings and Organized Crime: A Literature Review*, Community, Contract and Aboriginal Policing Services Directorate, Royal Canadian Mounted Police, 2002.

95 On this subject, see UNHCR, above note 72, p 7. See also WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/33/51, 28 July 2016, para. 67; Human Rights Council, above note 72; IOM, above note 93, p. 271.

96 On this subject, see UN Office on Drugs and Crime, *Issue Paper: Smuggling of Migrants by Sea*, Vienna, 2011, p. 20.

97 *Ibid.* See also IOM, above note 93, pp. 7, 62.

98 IOM, above note 93, pp. 7, 9, 271.

99 *Ibid.*, 2016, p. 63.

100 IOM, above note 6, p. 121.

101 See, for example, *ibid.*, p. 14; IOM, above note 93, pp. 63, 91; Human Rights Watch, *Pushed Back, Pushed Around: Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, 2009, pp. 53, 70, 73; UNSMIL and OHCHR, above note 66, pp. 12, 19.

Similar claims have been made in relation to Niger and elsewhere in the northern part of the continent.¹⁰² In the Americas, several instances of enforced disappearance have been reported in Mexico, when migrants have either been captured by municipal, state or federal police and then handed over to criminal organizations or abducted jointly by members of the police and criminal organizations.¹⁰³ In other instances, criminal organizations have reportedly captured migrants with the support, consent or acquiescence of government officials,¹⁰⁴ who provided assistance and protection for the operations.¹⁰⁵ In Asia, it has been reported that Rohingya and Bangladeshi migrants, who went missing in Thailand and Malaysia, were captured by criminal gangs with the complicity of the authorities.¹⁰⁶

In addition to cases in which government officials are directly or indirectly involved in enforced disappearances of migrants, abductions originally carried out by private actors can be attributed to the State if government officials authorize or acquiesce to those actions *a posteriori*, even when a significant period of time has elapsed since the actual abduction.¹⁰⁷ Systematic situations of impunity in cases of missing migrants, owing to omissions by the State or the lack or inadequacy of investigations or legal proceedings, could also be considered a form of implicit authorization or acquiescence by the State within the meaning of the

- 102 See, for example, Tim Cocks and Edward McAllister, “Africa’s Population Boom Fuels ‘Unstoppable’ Migration to Europe”, *Reuters*, 13 October 2016, available at: www.reuters.com/article/us-europe-migrants-africa-analysis-idUSKCN12D1PN. See also IOM, “IOM Learns of ‘Slave Market’ Conditions Endangering Migrants in North Africa”, 11 April 2017, available at: www.iom.int/news/iom-learns-slave-market-conditions-endangering-migrants-north-africa.
- 103 Comisión Nacional de los Derechos Humanos, *Informe de Actividades 2009, 2010*, pp. 14, 26, 30; Comisión Nacional de los Derechos Humanos, *Informe de Actividades 2011, 2012*, p. 28. See also CMW, *Consideration of Reports Submitted by States Parties under Article 74 of the Convention, Concluding Observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families: Mexico*, UN Doc. CMW/C/MEX/CO/2, 2011, paras 29, 49.
- 104 See Comisión Nacional de los Derechos Humanos, *Informe de Actividades 2009, 2010*, pp. 15, 26, 30; Comisión Nacional de los Derechos Humanos, *Informe de Actividades 2011, 2012*, pp. 27–33. See also Foundation for Justice and the Rule of Law, *Disappeared Migrants: The Permanent Torture*, Mexico City, 2014, p. 7, available at: <http://fundacionjusticia.org/cms/wp-content/uploads/2014/09/Disappeared-migrants.pdf>.
- 105 These include the case of the migrants who went missing in San Fernando, Tamaulipas, in 2011, which received wide media coverage; see Foundation for Justice and the Rule of Law, above note 104, p. 5. See also Inter-American Commission on Human Rights, OEA/Ser.L/V/II Doc 48/13, 30 December 2013, p. 81; CMW, above note 103, para. 29; Comisión Nacional de los Derechos Humanos, *Informe especial sobre los casos de secuestro en contra de migrantes*, 2009, p. 14.
- 106 On this subject, see Fortify Rights, “Myanmar: Authorities Complicit in Rohingya Trafficking, Smuggling”, 2014, available at: www.fortifyrights.org/publication-20141107.html. See also Kathleen Newland, “Irregular Maritime Migration in the Bay of Bengal: The Challenges of Protection, Management and Cooperation”, *Issue in Brief*, No. 13, IOM and Migration Policy Institute, 2015, available at: http://publications.iom.int/system/files/pdf/mpi-iom_brief_no_13.pdf.
- 107 Enforced disappearance is a continuing crime that ends only when the disappearance itself is resolved – that is, when the victim is located or the State provides a satisfactory explanation as to his or her fate. On this subject, see WGEID, “General Comment on Enforced Disappearance as a Continuous Crime”, available at: www.ohchr.org/Documents/Issues/Disappearances/GC-EDCC.pdf.

Declaration and Convention.¹⁰⁸ Additionally, the failure to conduct investigations and adopt appropriate measures to identify the remains of migrants found in common graves or at sea, for example, contributes to impunity and in itself constitutes an obstacle to tracing migrants who are still missing.¹⁰⁹

Conclusion

Enforced or involuntary disappearances of migrants are sadly an increasingly common occurrence, and the international community has so far failed to deal with them satisfactorily. The thematic study conducted by the WGEID, submitted to the UN Human Rights Council in September 2017, will undoubtedly be of great interest to States and civil society, including the families of missing people and organizations that defend migrants' rights.¹¹⁰

In fulfilment of its mandate to assist States in meeting their obligations under the Declaration,¹¹¹ the Working Group report formulates specific recommendations on preventing and punishing enforced disappearances and ensuring adequate reparation, where appropriate. These recommendations take into account the transnational nature of the disappearance of migrants and the obstacles faced by the families of missing migrants in exercising their right to truth and justice.

When studying the phenomenon of enforced disappearances of migrants and seeking ways to prevent and combat it, States must look at the root causes of the problem. These include increasingly restrictive government policies and the progressive militarization of borders, which put migrants in vulnerable situations, exposing them to heightened risks of human rights violations, including enforced disappearances. States must also crack down on criminal organizations that carry out migrant smuggling and trafficking operations.

States must do more to prevent disappearances by increasing transparency in immigration detention and deportation procedures, guaranteeing respect for migrants' rights to legal safeguards and ensuring that migrants are never returned to countries where they would be in danger of human rights violations.

States must also deliver on ensuring more effective implementation of the rights of the families of missing migrants in their pursuit of truth and justice, which

108 On the subject of the impunity of those responsible for the disappearance of migrants in Mexico, for example, see WGEID, *Mission to Mexico*, above note 35, para. 69. See also CMW, above note 103, paras 29, 31. See also Foundation for Justice and the Rule of Law, above note 104, p. 6.

109 See, for example, IOM, *Fatal Journeys*, Vol. 2: *Identification and Tracing of Dead and Missing Migrants*, Geneva, 2016, pp. 20, 33, 36. See also CMW, above note 103, paras 29, 31.

110 Readers are invited to consult this report for further information on the conclusions and recommendations formulated by the WGEID; see WGEID, *Report of the Working Group on Enforced or Involuntary Disappearances on Enforced Disappearances in the Context of Migration*, UN Doc. A/HRC/36/39/Add.2, 28 July 2017.

111 OHCHR, "Enforced or Involuntary Disappearances: Commission on Human Rights Resolution: 2004/40", 19 April 2004, available at: www.ohchr.org/Documents/Issues/Disappearances/E-CN.4-RES-2004-40.pdf.

is hampered by distance, administrative complications and language barriers. Given the transnational nature of the crime of enforced disappearance of migrants, it is crucial for governments to enhance inter-State cooperation in the areas of prevention, investigation and punishment and in reparation processes for victims.¹¹²

It will be interesting to see whether, in the near future, other UN Special Procedures and international organizations will undertake studies similar to the one conducted by the WGEID in response to the migration crisis that has gripped different regions across the globe.¹¹³

112 Some civil society organizations and the Inter-American Commission on Human Rights have stressed the importance of inter-State cooperation in this area and have documented the obstacles facing migrants and their families in their pursuit of the truth. See Inter-American Commission on Human Rights, OEA/Ser.L/V/II Doc 48/13, 30 December 2013, pp. 75 ff. See also Foundation for Justice and the Rule of Law, above note 104, p. 19.

113 See, for example, Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions, *Unlawful Death of Refugees and Migrants*, UN Doc. A/72/335, 2017.

