

## **General Allegation**

**132<sup>nd</sup> session (29 January – 2 February 2024)**

### **United States of America**

The Working Group received information from sources concerning obstacles encountered in the implementation of the Declaration on the Protection of all Persons from Enforced Disappearance (hereafter, ‘the Declaration’) in the United States of America.

1. The Working Group received alarming allegations related to enforced disappearance of migrants, refugees, and asylum-seekers, including women, pregnant women and children, and disabled persons seeking protection in the United States of America. The information gathered suggests that Customs and Border Protection (CBP), the U.S. Coast Guard, and other State agents have deprived migrants, refugees, and asylum-seekers of their liberty, subjecting them in *incommunicado* detention for days, placing them outside of the protection of the law and depriving them of fundamental rights, without ensuring that families, legal representatives or others persons with a legitimate interest have access to information about their fate or whereabouts. Notably, a deprivation of liberty followed by a refusal to acknowledge it or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law, regardless of the duration of the said deprivation of liberty or concealment, amounts to enforced disappearance.

### ***Allegations of Enforced Disappearance by Customs and Border Protection***

2. According to sources, in April 2023, the United States Government implemented new policies to facilitate the expedited removal of individuals detained by CBP agents. Under these new policies, immigration officials begun to conduct screenings of asylum-seekers in CBP custody, known as ‘credible fear interviews’ (hereafter, CFIs). The purpose of the CFIs is to determine if the asylum-seeker has a credible fear of returning to their country of origin.
3. The Working Group received information that CBP has no system for family members or legal representatives to locate or identify individuals held in custody by CBP. Additionally, CBP does not permit visits by legal representatives or family visits to detention centers. The absence of a system, according to sources, makes contact with the outside world virtually impossible, prevents persons with a legitimate interest from accessing information about migrants, refugees, and asylum-seekers in detention, and further impedes the determination of their fate and whereabouts.
4. At the same time, according to the information submitted to the Working Group, individuals held *incommunicado* must frequently persuade officials that they have a viable asylum claim, often without the assistance of an attorney or family members. Pursuant to

the new policies, asylum-seekers must demonstrate a “significant possibility” that their asylum claim will be successful before an immigration judge to avoid immediate deportation while in CBP custody. Deportation may expose them to the risk of enforced disappearance in their country of origin.

5. Furthermore, the Working Group was informed that, in accordance with CBP policy, individuals “should generally not be held for longer than 72 hours in CBP hold rooms or holding facilities.”<sup>1</sup> However, in one instance brought to the attention of the Working Group, CBP held two Cuban asylum-seekers *incommunicado* for nearly ten days, although they had signed representation agreements, and their attorneys made multiple requests for information about their clients’ whereabouts and asked to meet with them. Counsels only learned their clients’ location after their clients were deported and called the attorneys from Mexico, where they could face the risk of enforced disappearance.
6. Special concerns are related to children's situation. The Working Group was informed that CBP officials routinely separate families without providing separated family members with a way to contact or communicate with each other. One group offering legal services documented over 1,000 incidents of family separation while in CBP detention in California during a three-month period in 2023. Sources described several examples of family separation, where young children are separated from their parents. One example provided by sources to the Working Group involves an 11-year-old Colombian boy who was separated from his parents in 2022 and processed as an unaccompanied minor. In each of the examples provided, separated family members were unable to contact or obtain information about their loved one’s fate or whereabouts for days or weeks. This Working Group has underscored the torture and the emotional and psychological distress that uncertainty about the fate of a loved one generates for the family members of forcibly disappeared persons, especially when children are involved.<sup>2</sup>
7. Another example provided by sources to the Working Group involves an 18-year-old Venezuelan teenager with autism who was separated from his parents and three-month-old baby sister by Border Patrol in September 2023, despite his mother’s pleas to keep them together and documentation of his disability. She was told: “it doesn’t matter that he has autism, he is eighteen.” Two days later, the parents and the baby were released and were denied information on the whereabouts of their older son. Two additional days later, the parents received a phone call from their son, who informed them that he had been returned to Reynosa, Mexico, the city they had fled after their relatives had been kidnapped.
8. According to the information received, detainees are subjected to inhumane and degrading conditions causing considerable physical and psychological suffering. The sources described the death of a young girl in CBP custody after she was denied medical care and asylum-seekers abandoning their claims due to the detention conditions. The submission also referred to reports by human rights organizations that document the detention of men,

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<sup>1</sup> U.S. Customs and Border Protection, National Standard on Transport, Escort, Detention and Search, 14 (2015) <https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/cbp-teds-policy-october2015.pdf>

<sup>2</sup> See [A/HRC/45/13/Add.3](#), parr. 60; [A/HRC/30/38/Add.5](#), paras. 23-32.

women, and children, including infants, in frigid holding cells and 160 cases of misconduct and abuse of asylum applicants by CBP agents and other immigration officials.

### ***Allegations of Enforced Disappearance by U.S. Coast Guard and Military***

9. This Working Group also received allegations of “so called” short-term enforced disappearances committed by the U.S. Coast Guard or U.S. military. According to the information received, the U.S. military conducts maritime interception operations and detains migrants, refugees, and asylum-seekers on military ships and at an offshore detention center. The U.S. Coast Guard intercepts individuals attempting to migrate to the United States by sea. According to the submission received by the Working Group, in fiscal year 2022, the U.S. military and Coast Guard intercepted more than 12,000 Haitians and Cubans in this manner. According to the sources, agencies that intercept vessels have no system for family members or legal representatives to locate or identify persons deprived of their liberty and the detainees are not provided the opportunity to contact family or legal counsel. Under the Declaration, the definition of enforced disappearance includes situations when persons are detained and the authorities subsequently refuse to provide information about the whereabouts of those persons or conceal their fate or whereabouts regardless of the duration of the detention.
10. The Working Group was informed that the U.S. military and Coast Guard often detain migrants, refugees, and asylum-seekers in cramped, unhealthy conditions without access to adequate food, water, or medical attention, keeping them in *incommunicado* detention for hours or days, exposing them to the risk of enforced disappearance. According to the source, the U.S. military has commonly detained hundreds of migrants on crowded flight decks for days without access to adequate sanitation, shelter, or security and with no means to communicating with relatives about their whereabouts or wellbeing.
11. In 1993, the U.S. Supreme Court held in *Sale v. Haitian Centers Council, Inc.* that Haitians intercepted on the high seas could be repatriated by U.S. officials without any determination of their refugee status or protection needs. Sources informed the Working Group that detained individuals are visually inspected to determine if they have a credible fear, and most groups are returned to their country of origin without access to legal counsel. Such decisions violate the principle of *non-refoulement* and expose them to the risk of enforced disappearance.

### ***Allegations regarding “Remain in Mexico” and Title 42 program***

12. In other cases, according to the information submitted to the Working Group, thousands of migrants have been forced to stay in Mexico under the so-called “Remain in Mexico” program and Title 42 policy.<sup>3</sup> Sources provided the Working Groups with dozens of

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<sup>3</sup> The “Remain in Mexico” (officially called the Migrant Protection Protocols) program at the Mexico-United States border was first enacted in 2019 by the Trump administration and restarted by the Biden administration in 2021. The program requires certain asylum-seekers to wait in Mexico while their claims are adjudicated in US immigration courts. Between March 2020 and May 2023, Title 42, (a U.S. policy that prohibited the entry of non-citizens at U.S.

examples involving individuals who were returned to Mexico to stay in that country while their asylum applications were being processed in the United States, violating the principle of *non-refoulement*. These individuals were exposed to the risk of enforced disappearance and other crimes, such as torture, sexual violence and kidnaping, among others. According to the information received, some of them were detained by Mexican law enforcement agents, including immigration officials, and handed over to non-state actors who held them for ransom. Many of the cases presented by the sources concern children and pregnant women.

13. Finally, according to information received by the Working Group, there are no instances of investigations of *incommunicado* detention by U.S. authorities, which reportedly remain in impunity. Nor do the victims have access to an effective remedy available to obtain redress for the harms suffered while in detention.

14. The Working Group would like to bring to the Government's attention the following provisions of the Declaration, which are directly related to the present allegation:

*Article 2*

- 1. No State shall practise, permit or tolerate enforced disappearances.*
- 2. States shall act at the national and regional levels and in cooperation with the United Nations to contribute by all means to the prevention and eradication of enforced disappearance.*

*Article 3*

*Each State shall take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction.*

*Article 7*

*No circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances.*

*Article 8*

*1. No State shall expel, return (refouler) or extradite a person to another State where there are substantial grounds to believe that he would be in danger of enforced disappearance.*

*2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.*

*Article 9*

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land borders based on public health concerns, also impeded access to asylum procedures and the identification of potential international protection needs, which may be contrary to the State's international obligations), allowed U.S. immigration officials to quickly remove migrants from the United States on the grounds of preventing the spread of COVID-19.

*1. The right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of persons deprived of their liberty and/or identifying the authority ordering or carrying out the deprivation of liberty is required to prevent enforced disappearances under all circumstances, including those referred to in article 7 above.*

*2. In such proceedings, competent national authorities shall have access to all places where persons deprived of their liberty are being held and to each part of those places, as well as to any place in which there are grounds to believe that such persons may be found.*

*3. Any other competent authority entitled under the law of the State or by any international legal instrument to which the State is a party may also have access to such places.*

#### *Article 10*

*1. Any person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention.*

*2. Accurate information on the detention of such persons and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information unless a wish to the contrary has been manifested by the persons concerned.*

*3. An official up-to-date register of all persons deprived of their liberty shall be maintained in every place of detention. Additionally, each State shall take steps to maintain similar centralized registers. The information contained in these registers shall be made available to the persons mentioned in the preceding paragraph, to any judicial or other competent and independent national authority and to any other competent authority entitled under the law of the State concerned or any international legal instrument to which a State concerned is a party, seeking to trace the whereabouts of a detained person.*

#### *Article 11*

*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 their rights are assured.*

#### *Article 12*

*1. Each State shall establish rules under its national law indicating those officials authorized to order deprivation of liberty, establishing the conditions under which such orders may be given, and stipulating penalties for officials who, without legal justification, refuse to provide information on any detention.*

*2. Each State shall likewise ensure strict supervision, including a clear chain of command, of all law enforcement officials responsible for apprehensions, arrests, detentions, custody, transfers and imprisonment, and of other officials authorized by law to use force and firearms.*

### Article 13

1. Each State shall ensure that any person having knowledge or a legitimate interest who alleges that a person has been subjected to enforced disappearance has the right to complain to a competent and independent State authority and to have that complaint promptly, thoroughly and impartially investigated by that authority. Whenever there are reasonable grounds to believe that an enforced disappearance has been committed, the State shall promptly refer the matter to that authority for such an investigation, even if there has been no formal complaint. No measure shall be taken to curtail or impede the investigation.

2. Each State shall ensure that the competent authority shall have the necessary powers and resources to conduct the investigation effectively, including powers to compel attendance of witnesses and production of relevant documents and to make immediate on-site visits.

3. Steps shall be taken to ensure that all involved in the investigation, including the complainant, counsel, witnesses and those conducting the investigation, are protected against ill-treatment, intimidation or reprisal.

4. The findings of such an investigation shall be made available upon request to all persons concerned, unless doing so would jeopardize an ongoing criminal investigation.

5. Steps shall be taken to ensure that any ill-treatment, intimidation or reprisal or any other form of interference on the occasion of the lodging of a complaint or during the investigation procedure is appropriately punished.

6. An investigation, in accordance with the procedures described above, should be able to be conducted for as long as the fate of the victim of enforced disappearance remains unclarified.

### Article 19

*The victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible. In the event of the death of the victim as a result of an act of enforced disappearance, their dependents shall also be entitled to compensation.*

15. The prohibition of enforced disappearance has attained the status of *jus cogens*, and as provided in article 7 of the Declaration, no circumstances whatsoever may be invoked to justify enforced disappearances. In accordance with article 10 of the Declaration, States must ensure that accurate information on the detention of persons and their place or places of detention, including transfers, is made promptly available to their family members, their counsel or any other persons having a legitimate interest in the information.

16. Moreover, the Working Group would like to bring to the attention of your Excellency's Government the obligations spelled out in its thematic report on enforced disappearances in the context of migration, as well as in the Guiding Principles for the Search for Disappeared Persons and, in particular, in Principles 4 and 9, which respectively establish that the search should follow a differential approach, especially when women, girls and children are concerned, and should take into account the particular vulnerability of

migrants. We also recall the general comments on [women affected by enforced disappearances](#) and on [children and enforced disappearances](#).

17. The Working Group would be grateful for your Excellency's Government cooperation and observations on the following questions:

- a) Please provide any additional information and any comment on the allegations mentioned above.
- b) Please provide information on the measures adopted to ensure that no migrants, refugees, or asylum-seekers are held in *incommunicado* detention without the means to communicate with legal experts, family members, or any other person having a legitimate interest to have access to information on their fate and whereabouts.
- c) Please provide information on whether official, up-to-date, registers of all persons deprived of their liberty are maintained in every place of detention and the measures taken to ensure that relatives of persons deprived of their liberty, their counsel, or any other person having legitimate interest have access to the information contained in such registers.
- d) Please provide detailed information on the legal grounds for maintaining migrants, refugees, and asylum-seekers in *incommunicado* detention by CBP, the U.S. military or the U.S. Coast Guards.
- e) Please provide information on the measures adopted to ensure that any person deprived of liberty by CBP, the U.S. military, or the U.S. Coast Guard is authorized to communicate with, and be visited by, his or her family, counsel or any other person a legitimate interest, including consular authorities.
- f) Please provide detailed information on the measures adopted to ensure that those detained by CBP, the U.S. military, or the U.S. Coast Guard who are detained in inhumane conditions have access to medical assistance and care, food, and clean water. Also, please provide information on special measures taken for women, pregnant women, children, and disabled persons. Moreover, kindly inform on the measures taken to ensure that they are not subject to torture, abuses or any gross human rights violations and that allegations in this regard, are subject to prompt, independent, impartial, through and effective investigations and those responsible are prosecuted and sanctioned.
- g) Please provide detailed information on the measures adopted to ensure that civil society organisations aiming at assisting persons deprived of their liberty by CBP, the U.S. military, or the U.S. Coast Guard are regularly granted access to the detention centres and that their activities are not subjected to arbitrary or unlawful interferences and restrictions.
- h) Please provide detailed information on the measures adopted to ensure that persons deprived of their liberty in facilities managed by CBP, the U.S. military, or the U.S. Coast Guard are entitled to take proceedings without delay before a court to determine the

lawfulness of their deprivation of liberty and to challenge decisions of transfer, expulsion or extradition that may expose them to the danger of enforced disappearance, in contravention of the principle of *non-refoulement*.

- i) Please provide detailed information on how your Government ensures that any person having knowledge or legitimate interest, who alleges that a person has been subjected to enforced disappearance is able to lodge a complaint to a competent and independent State authority. Furthermore, please inform on how your Excellency's Government ensures that enforced disappearances are promptly, thoroughly, independently and impartially investigated, even if there has been no formal complaint.
- j) In case migrants and asylum-seekers are deported or transferred without the opportunity of presenting before the U.S. authorities a complaint for the violations suffered during their detention or during their *refoulement* to their country or another country, please provide information if the United States embassies or consulates have any special mechanism for receiving these complaints from the country where the person has been deported or relocated.
- k) Please provide detailed information on the measures taken to cooperate with other States, including the States of origin, transit or destination of migrants, refugees and asylum-seekers, in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and respecting and returning their remains. In particular, kindly provide information on the measures taken to ensure that foreign persons deprived of their liberty in the United States are allowed to communicate with their consular authorities.
- l) Please provide detailed information on how the family of a refugee, an asylum-seeker or a migrant who has been detained by US authorities is able to obtain information about his or her relatives' fate and whereabouts from the country of origin or the country where it is located.
- m) Please provide information on the measures taken to search and find disappeared persons – in particular migrants, refugees and asylum-seekers – in line with the Guiding Principles for the Search for Disappeared Persons.
- n) Please provide information on the measures taken to guarantee that any person who commits, orders, solicits, or induces the commission of, attempts to commit, is an accomplice to, or participates in an enforced disappearance, is held criminally responsible.
- o) Please provide detailed information on the applicable legislation and the measures undertaken to ensure that any victim of enforced disappearance (thus including the disappeared person and any other person having suffered direct harm) obtains adequate compensation and integral reparation, including measures of rehabilitation and satisfaction, for the harm suffered.



18. The Working Group requests your Excellency's Government to provide a response to the above questions within 60 days. The text of the general allegation will be published along with the Working Group's post-session report and on its website, where also any response received by your Government will be uploaded.