

ICRC contribution to the General Comment on enforced disappearances in the context of migration

29 June 2022

1. General considerations

The ICRC is grateful for the opportunity to provide input to the CED's initiative to elaborate a general comment on enforced disappearances in the context of migration. We welcome the approach outlined in the concept note that looks at the issue in a holistic manner in terms of prevention, case resolution, and the rights and needs of affected families. We would like to highlight that the approach to missing migrants also needs to factor in the transnational and often transregional nature of migration. In order to be effective, efforts to both prevent and resolves cases of missing migrants, including as a consequence of enforced disappearance, require effective cooperation along migratory routes involving authorities and other stakeholders in countries of origin, transit and destination.

While the general comment focusses on the ICPPED, it may be useful to point out that obligations under international human rights law and other relevant bodies of law, more generally, are also of relevance. For instance, when it comes to non-refoulement, even if a State is not a party to the ICPPED, there are obligations under IHRL that prohibit the return of people to situations where they would be at risk, notably, of torture or other forms of ill-treatment or arbitrary deprivation of life.¹ Our below input references relevant obligations under international humanitarian law (IHL), applicable in armed conflicts.

2. IHL and enforced disappearance of migrants

In situations of international and non-international armed conflicts, international humanitarian law (IHL) contains relevant obligations that serve to prevent persons from going missing and from being forcibly disappeared as well as to clarify the fate and whereabouts of those who do². These rules are of relevance for migrants that live, or are in transit, in the territory of a State in which there is an armed conflict.³

¹ For more on the principle of non-refoulement in the context of migration, see: ICRC, *Note on migration and the principle of non-refoulement, 2018*, International Review of the Red Cross, available at: <https://international-review.icrc.org/sites/default/files/irrc-904-19.pdf>.

² For more information on how IHL protects victims of enforced disappearance and other missing persons and on how the ICRC's contributes to efforts to prevent and address enforced disappearances as part of its work, see: Ximena Londoño and Helen Obregón Gieseken, *Sustaining the momentum: working to prevent and address enforced disappearances*, 26 August 2021, available at: <https://blogs.icrc.org/law-and-policy/2021/08/26/sustaining-momentum-enforced-disappearances/>.

³ For more information on how IHL protects migrants in armed conflicts, including rules related to family unity and missing and dead migrants, see: Helen Obregón Gieseken, "The Protection of Migrants under International Humanitarian Law", International Review of the Red Cross (2017), 99 (1), 121–152, available at: https://international-review.icrc.org/sites/default/files/irrc_99_10.pdf.

Under IHL, the prohibition of enforced disappearance was identified as a rule of customary law in international and non-international armed conflicts.⁴ Although IHL treaties do not refer to “enforced disappearance” as such, enforced disappearance violates, or threatens to violate, a range of customary rules of IHL, notably the prohibition of arbitrary deprivation of liberty, the prohibition of torture and other cruel or inhuman treatment and the prohibition of murder. IHL obligations related to the registration of persons deprived of their liberty⁵ further support the duty to prevent enforced disappearances, and other rules, including on ICRC’s access to detainees⁶, can also contribute to preventing enforced disappearances. Extensive practice also indicates that the prohibition of enforced disappearance encompasses a duty to investigate alleged enforced disappearances. Finally, IHL also contains obligations on the investigation and prosecution of war crimes, including those resulting in persons going missing or being forcibly disappeared.⁷ Enforced disappearance consists of a number of war crimes.⁸

When persons go missing or are forcibly disappeared for reasons related to the conflict, IHL also requires that parties account for persons reported missing and provide families with any information it has on their fate.⁹ As the summary to this rule notes, this obligation is consistent with the prohibition of enforced disappearances. Practice also indicates it is motivated by the right of families to know the fate of their missing relatives.

It is important to recall that some IHL obligations continue even after conflict has ended or after a person has left the country in conflict. This is the case, for instance, of the obligation to clarify the fate and whereabouts of missing persons.

➔ **Recommendation:** The general comment could briefly recall that in situations of armed conflict, international humanitarian law applies and provides additional – and complementary – protection to migrants. The above section gives an overview of some of the protections provided by IHL that could be referenced, although it goes beyond the scope of the General Comment focusing on the ICPPED.

3. Humanitarian consequences of migratory laws, policies and practices¹⁰:

Migrants go missing in a variety of circumstances, on land and at sea, in transit and destination countries, as they are detained, trafficked or stay in hiding for fear of arrest or deportation; at

⁴ ICRC, Customary IHL Database, Rule 98, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule98 (accessed 4 July 2022).

⁵ ICRC, Customary IHL Database, Rule 123, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule123 (accessed 4 July 2022).

⁶ ICRC, Customary IHL Database, Rule 124, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule124 (accessed 4 July 2022).

⁷ See, notably, ICRC, Customary IHL Database, Rule 158, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule158 (accessed 4 July 2022).

⁸ ICRC, Customary IHL Database, Rule 156 explanation, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156 (accessed 4 July 2022).

⁹ ICRC, Customary IHL Database, Rule 117, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule117 (accessed 4 July 2022).

¹⁰ See [ICRC Recommendations to Policy Makers on Missing Migrants and Their Families](#), 2017, pp 10-13.

borders; or upon return to their countries of origin. Enforced disappearance can occur in any of these circumstances.¹¹

Restrictive migration-related policies and practices, designed by states to prevent and deter foreign nationals from arriving on their territory, **tend to increase the risk of migrants going missing**. This means that states *can* minimize potential harmful impacts on migrants' rights and vulnerabilities, including as concerns enforced disappearance – by reviewing such policies and practices to ensure that these are in line with relevant international obligations and adequately factor in migrants' protection needs all along the route.

Measures such as border securitization, the adoption of restrictive admission and stay measures or blanket border closures without safeguards to protect individuals in need of international protection against refoulement often **compel migrants to take dangerous routes**, at times through countries experiencing armed conflict or other situations of violence, **or to rely upon criminal networks**, thus increasing their risk of falling victim to abuse, violence, exploitation and trafficking. This is particularly the case for many people seeking safety, family reunification or better opportunities abroad, who resort to irregular migration owing to lack of alternate options.

Migrants, notably in situations of armed conflict or other situations of violence, may become unaccounted for, *inter alia*, after being deprived of their liberty by states or armed groups. Trafficked migrants often go missing either because they cannot establish contact with their families or because they are killed or die due to the severe abuses suffered and their bodies are never retrieved or identified. In some cases, trafficked migrants may prefer not to establish contact with family members to shield them from the risk of intimidation and extortion by those holding them. Furthermore, in some countries affected by armed conflict or other situations of violence, from which migrants may flee or through which they may transit, state forces and armed groups may directly or indirectly support migrants' trafficking or smuggling networks as a means of financing. In armed conflicts, the existence of links between a party to the conflict and criminal groups involved in smuggling and/or trafficking of migrants means that containment policies may end up influencing conflict dynamics by indirectly benefitting criminal groups.

➔ **Recommendation:** As already highlighted in paragraph 7 of the concept note, the General Comment could recall that states' prerogative to regulate migration is not absolute. Emphasis should be put on the need to maintain legal avenues that allow asylum seekers to access international protection safely. The systematic rejection of all foreigners at the border in a manner that precludes the admission of individuals in need of international protection, without measures to protect them against refoulement, is incompatible with States' obligations under international refugee law and international human rights law and must therefore be avoided. The General Comment could also encourage states to consider humanitarian exceptions to travel

¹¹ E.g. the WGEID specifically notes that enforced disappearances of migrants could occur "[...] during the detention of migrants or the execution of deportation proceedings UN Working Group on Enforced or Involuntary Disappearances, "Enforced disappearances in the context of migration", 2017
<https://www.ohchr.org/EN/Issues/Disappearances/Pages/Migration.aspx>

restrictions, for instance, to allow access to lifesaving or otherwise critical medical care or family reunifications, notably when a person is highly dependent and requires help to conduct daily activities.

Furthermore, the expanded securitization of borders can translate into a **systematic use of so called “pushbacks” at land and sea**, potentially in violation of international law, including the prohibition of collective expulsions and the principle of non-refoulement. The lack of admission of individuals in need of international protection and of access to fair and effective procedures to determine migrants’ individual protection needs increases **the risk of migrants being returned – either directly or indirectly – to unsafe environments**, especially in the context of armed conflicts and other situations of violence. This could also lead to a heightened risk of enforced disappearance – for example, as a result of being deprived of liberty by a party to the conflict upon return due to being perceived as supporting the enemy. **Extraterritorial processing** as a form of externalization of migration management to third countries could have the same effect. Extraterritorial processing can take either the form of a state transferring the responsibility for processing asylum claims to a third State or the form of a denial of entry or removal of asylum-seekers from the territory of a state to await the outcome of their claims in a third state. In the first case, if the third state does not have an adequate domestic framework in place and/or the required capacity to ensure fair and effective asylum procedures, the lack of such procedures could increase the risk of refoulement – in certain circumstances resulting in **enforced disappearance upon return**. In the second case, if asylum-seekers are kept in unsafe areas (e.g. affected by hostilities or controlled by armed groups) in the third state as they wait for protection, there could be a heightened risk of enforced disappearance. In both cases, asylum-seekers may also be subjected to administrative detention and, as such, may become exposed to the risk of enforced disappearance (on immigration detention, see more below in this section).

We also witness the emerging in some contexts of **policies and practices of forced return** to the country of origin of migrants, whose temporary protection or other residency permits have been terminated, even when their return may put them at risk of arbitrary deprivation of life and enforced disappearance, potentially in violation of the principle of non-refoulement. Finally, enforced disappearance upon return can become a concrete threat also when **the “voluntary” return of vulnerable migrants, including refugees, to a place of danger is induced by the lack of concrete options to integrate and find a sustainable solution** in the host country. This may occur, for example, due to policies and practices that create barriers for vulnerable migrants, including refugees, to access essential services and retrieve some self-sufficiency, or that place them systematically in camps in untenable conditions or in immigration detention thereby providing them no real alternative other than returning.

➔ **Recommendation:** The General Comment could recommend that states refrain from resorting to extraterritorial processing, especially when there are risks that the third state may return migrants in violation of the principle of non-refoulement. In any case, and in the event that States conclude transfer or readmission agreements to this end, the General comment could recall that the transferring State remains bound by its obligations under international refugee and human rights law, as applicable, in

particular the principle of non-refoulement. As such, the General comment could highlight the importance to respect the principle of non-refoulement. It could also ask states to refrain from creating circumstances which leave an individual who is protected by this principle with no real alternative other than returning to unsafe circumstances.

Current migration-related policies and practices are also characterised by an **increased systematic resort to immigration detention** as a tool to control and contain irregular migration. Systematically resorting to the detention of migrants – often as a deterrent or punishment and for prolonged periods – regardless of migrants’ personal circumstances, contradicts the very right of liberty and security of a person. Furthermore, material conditions of detention often raise strong humanitarian concerns, with overcrowding being a recurrent problem, along with unsanitary conditions and lack of access to adequate food and healthcare. Immigration detention also has deleterious impacts on migrants’ mental well-being – the uncertainty of the process and the fear of the future negatively impact detained migrants’ mental health, often exacerbating already existing physical or mental health issues related to traumatic experiences suffered prior to departure, in countries of origin, or along the route, in transit or destination countries. The longer the detention, the stronger the negative and long-lasting impact. This is even more problematic when it comes to certain categories of vulnerable migrants, such as children, victims of torture or trafficking, persons with mental/health disabilities and elderly people, for which the negative impacts have a magnifying effect.

Importantly, immigration detention could increase the risks of enforced disappearance, for instance if migrants are **not held in a recognized place of detention and duly registered**, if they are kept **without access to means of communication or are unable to establish contact with the outside world**, including family members or diplomatic or consular authorities.

→ **Recommendation:** The General Comment could highlight that detention for immigration-related reasons should always be a measure of last resort. Liberty should be the norm and, if there are grounds for deprivation of liberty, alternatives to detention should be considered first. It could further recall that a decision to detain can only be taken on the basis of an individual assessment, without discrimination of any kind; it must not be based on a mandatory rule for a broad category of persons. Furthermore, a periodic review of the justification of continued detention is also required by existing domestic and international law, including the ICPPED (e.g. article 17.2(d) and 17.3 ICPPED). As such, migrants must only be detained if their individual assessment has confirmed that the detention is considered necessary, reasonable and proportionate to a legitimate purpose.¹² When this is the case, the General Comment could urge states to ensure that detained migrants are duly registered and held in recognized facilities, and that they can exercise their right to remain in contact with their families, if they wish to do so. This may include access to means of communication, family visits, visits by the ICRC, or by community or spiritual leaders

¹² ICRC, *ICRC Policy paper on immigration detention*, 2016, [icrc-policy-paper-migration-detention.pdf](https://www.icrc.org/publications-and-reports/icrc-policy-paper-migration-detention)

and local organizations who can help detainees re-establish and maintain contact with their families. As already mentioned in paragraph 21 of the concept note, the General Comment could also elaborate on consular notification as a basic procedural safeguard available to those detained in a foreign country (where consular relations exist). In this regard, it could emphasise that authorities must inform detained migrants of their right to communicate with their consular or diplomatic authorities and, if requested to do so by the detained migrant, they must inform the relevant diplomatic or consular authorities, without delay, of their detention.

4. Transnational cooperation in the search

In the sense of article 15 of the ICPPED, State parties must afford one another “the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains”. This cooperation can take different forms, from bilateral exchanges on specific cases to the establishment of transnational mechanisms to clarify the fate and whereabouts of missing migrants along a migration routes. Led by states, such mechanisms should involve a broad range of relevant stakeholders, including affected families, that can help in accessing and analyzing information, and provide technical expertise and resources. These mechanisms, e.g. by way of international agreements, should establish a shared understanding of the roles of different stakeholders as well as of search strategies and the identification process in accordance with international obligations, domestic frameworks, standards and best practices. The roles of different actors will determine inter alia the design of information-sharing pathways, while strategies and identification procedures will determine the type of information to be sought from different actors along a migratory route. Information sharing pathways can include existing international channels, e.g., consular and diplomatic authorities, or through direct contacts between specific institutions, such as forensic or law enforcement authorities or ministries of foreign affairs, as relevant.¹³

A precondition for effective international cooperation is the establishment of required capacities and authorities at domestic level to :

- Register cases and collect information (including the designation of national contact points for cases registration)
- Recover, document and identify deceased persons and collect information on unidentified persons, e.g. in hospitals, detention centers, or cases of unaccompanied minors.
- Harmonize and centralize the above information in national registers/databases.
- Where necessary, create a national mechanism that can coordinate the work of relevant authorities.

Both in national and international search efforts, it is important not to fragment caseloads but to ensure that relevant institutions register and process all cases of missing migrants, including those assumed to be cases of enforced disappearance, and centralize all relevant information in the same database(s). This will help avoid that incorrect investigative hypotheses preclude comparison of a case against all available information.

5. Participation of, and support to, families¹⁴

¹³ [Guidelines on coordination and information-exchange mechanisms for the search for missing migrants](#)

¹⁴ <https://www.icrc.org/en/publication/4578-guiding-principles-interaction-families-missing-migrants>

Families initiate search efforts and report cases of migrants going missing. They also hold information of critical importance to the search and investigation. For this reason, they should play a central role in search and investigation efforts including in their design and implementation¹⁵.

However, geographic distance, cultural/linguistic factors, and legal and administrative obstacles including the status of families who are themselves migrants (leading, for example, to fear of approaching the authorities if family members are in an irregular situation), pose particular challenges to affected families in terms of engaging with authorities and to authorities wanting to involve, and interact with, families. In this regard, states should respect the principle of non-discrimination and provide the same opportunities to all families of missing migrants irrespective, *inter alia*, of geographic origin or immigration status.

With regard to the proposal in the concept note “to regulate the legal situation of disappeared persons whose fate has not been clarified in a manner that enables their relatives to exercise their rights” we would like to reference the [ICRC’s 2009 Guiding Principles/Model Law on the Missing](#), which includes provisions in Article 8 (and Annex 1) for a certificate of absence.

¹⁵ Another example of practice is the [National Roundtable for the Search for Missing Persons](#), which has the purpose of being a space for coordination, exchange, and continuous updating of information, promotion of good practices, and follow-up with the participation of institutions of the Mexican State and other States, Mexican and international civil organizations, families of missing migrants, and social organizations specialized in assisting migrants in transit and searching for missing migrants.¹⁵ The roundtable will be a permanent space for articulation, exchange of information, and collaboration between families, civil organizations, international organizations, and Mexican and foreign State institutions, which will have the purpose of coordinating the efforts of all parties to promote the search for missing migrants, particularly in transit through the Mesoamerican migratory corridor.