**Consultation on draft General Comment No. 1 on Enforced Disappearances**

**in the context of Migration**

Anna Rahel Fischer, LL.M, Associate Researcher, Université du Québec à Montréal

Bernard Duhaime, Ad.E., Professeur titulaire à l’Université du Québec à Montréal

Lene Guercke, PhD, Independent Researcher

(2491 words)

*Introduction*

§ 1. Migrant disappearances result from their being forced onto dangerous migration routes and thus increasingly exposed to smuggling networks, as well as from illegal practices such as secret detention and summary rejection by border control personnel.[[1]](#footnote-1) They also stem from high levels of impunity that characterizes the criminal and forensic investigation and search efforts to clarify the circumstances of and establish the truth about these disappearances. In these contexts, migrants have oftentimes been pushed back into geographical areas such as the desert and the sea, which pose a foreseeable risk to their lives.[[2]](#footnote-2) Although there is increasing information on the number and scale of these cases of disappearances, there is little access to justice, truth and reparation, perpetuating the cycle of widespread impunity. While these practices do not constitute *enforced* disappearances *stricto sensu*, they have been considered to be tantamount to disappearances.[[3]](#footnote-3)

§ 2. This contribution considers the obligations of States Parties to the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) in relation to the various risk factors faced by migrants in transit from one country to another and the impact of repeated pushbacks on land and sea in contravention of the non-refoulement principle. In this context, we propose that if systematic impunity for migrant disappearances, in circumstances where the State “knew or had reason to know” of the risk of disappearance of migrants and should have taken appropriate measures to prevent such risk from materializing, raises to a certain level, such actions go beyond a mere violation of Article 3 of the ICPPED or a breach of due diligence, but could rather be qualified as “acquiescence” within the meaning of Article 2 of the ICPPED. Indeed, as the UN Working Group on Enforced or Involuntary Disappearances indicated in its 2017 Report on enforced disappearances in the context of migration, “systematic situations of impunity regarding the abduction and detention of migrants by private actors, including smugglers or traffickers, could be considered in certain circumstances as a form of acquiescence and, as such, constitute enforced disappearance.”[[4]](#footnote-4) Given the aim of the General Comment to assist States in developing policies to protect migrants, the latter should highlight what obligations state actors have in relation to the prevention of enforced disappearances in contexts of corruption, widespread violence and discrimination, and under which conditions a failure to act (both in preventing and responding to disappearances) constitutes acquiescence.

§ 3. The distinction between the concept of breaches of due diligence obligations and the concept of acquiescence in these cases is crucial because disappearances committed by non-state actors or as a result of omissions that place migrants in a dangerous situation resulting in their disappearance can be directly attributed to the State if the perpetrators act with the *authorisation, support or acquiescence* of a state actor as outlined in Article 2 ICCPED. This makes the disappearance an *enforced* disappearance under international law, thereby engaging the direct responsibility of the State, and results in specific obligations vis-à-vis victims, particularly with respect to reparations.

§ 4. These considerations are essential because of the frequent blurring between the boundaries of recommended *optional* practices of States and *legally binding* state obligations enshrined in treaty and customary law - some of which have acquired *jus cogens* status - in the context of migrant disappearances, including enforced disappearances. Highlighting the element of impunity in these cases, the specific vulnerability to which migrants are exposed,[[5]](#footnote-5) and the specific endangerment emerging from widely reported risks faced by migrants through *refoulement* and increasingly precarious migration routes,[[6]](#footnote-6) we suggest avenues for further elaboration of what the required preventive measures would need to entail in order to avoid acquiescing to a disappearance.

1. *Systematic Impunity in the Context of Migrant Disappearances*

§ 5. Addressing impunity in the context of disappearance of migrants is a key guiding principle of the Convention.[[7]](#footnote-7) Impunity reflects “the total lack of investigation, prosecution, capture, trial and conviction of those responsible“[[8]](#footnote-8) constituting a violation of rights *per se*.[[9]](#footnote-9) It also includes the lack of identification of human remains, of search operations and forensic investigations. Importantly, the failure of the judiciary to provide an adequate response to serious crimes leads to the creation of “fertile ground” for “the chronic repetition of human rights violations and the total defenselessness of the victims and their next of kin,” which therefore indicates a constant failure to prevent.[[10]](#footnote-10) Since the ICPPED’s preamble stipulates the combat of impunity as its central aim, the interpretation of the elements of definition of enforced disappearances may be expanded for the purpose of preventing impunity.[[11]](#footnote-11)

§ 6. The current situation of migrant disappearances demonstrates that impunity is a widespread phenomenon. The migration context is widely described as characterized by racialized forms of violence such as racial profiling,[[12]](#footnote-12) *de jure* and *de facto* situations of vulnerability,[[13]](#footnote-13) mental and physical torture and ill treatment,[[14]](#footnote-14) lack of prospects for redress and accountability for the violations of the rights of migrants, lack of effective and prompt investigation into these violations, lack of procedural safeguards,[[15]](#footnote-15) frequent situations of removal of the victim’s protection from the law[[16]](#footnote-16) owed to the clandestine (re-) expulsion from national territory executed by national and regional border police,[[17]](#footnote-17) and incommunicado detention in unofficial detention centers without access to legal counsel or interpreter.[[18]](#footnote-18)

§ 7. In particular, the conduct of *ex officio* investigations, as a procedural obligation provided for in international law after a disappearance has been reported, and the duty to provide information about persons deprived of liberty, are crucial obligations that are reportedly ignored in most cases of disappearance of migrants, despite being central to preventing violations of their rights.

§ 8. The Case *La Cantuta v. Peru* confirms that the context of “a generalized scenario of impunity,” considering the introduction of legal mechanisms that prevented investigations into grave human rights violations, therefore prolonging these, is relevant as a determinant of a breach of state obligations.[[19]](#footnote-19) Importantly, whether justice has been served within a reasonable time and whether interstate cooperation in investigations has occurred and been effective was considered to be among the elements necessary to combat impunity.[[20]](#footnote-20) The failure to identify human remains and the failure to search for such remains was found to contribute to perpetuating impunity.[[21]](#footnote-21) The Court also noted that impunity combined with non-compliance with protection and investigation obligations exacerbates the international responsibility of the State.[[22]](#footnote-22)

§ 9. In conclusion, according to regional jurisprudence and the overarching purpose of the ICPPED enshrined in its preamble, high levels of impunity, which contribute to the repetition and prolonging of grave human rights violations, should be considered as presenting an aggravating factor in establishing violations related to enforced disappearance, including in establishing whether the State has acquiesced in the violation of rights.

1. *Risk Awareness and Foreseeability*

§ 10. The basis for an attribution test for both acquiescence and due diligence is an assessment of the foreseeability of risk. In assessing whether the State knew or should have known of a real and imminent risk, regional Courts considered whether there was information in advance that served as evidence on the basis of which the State should have decided to take action.

§ 11. The test in the *Osman* case established that the right to life imposes a positive obligation on competent authorities to take preventive operational measures to protect a person whose life is endangered by the criminal acts of another person. For such an obligation to arise, it must be shown that the authorities knew or should have known of a real and imminent risk to the life of a particular person and that they failed to take measures within the scope of their powers which could reasonably have been expected to avoid that risk.[[23]](#footnote-23) Drawing on this test, the presence of officials handing individuals back to a dangerous situation while they had knowledge of the potential risk of infringements of the individual´s rights counted as an attribution test for acquiescence.[[24]](#footnote-24)Risk awareness has also been determined based on various reports outlining that the up-to-date policy methods for prevention have been ineffective.[[25]](#footnote-25)

§ 12. In addition, case law suggests that elements of structural marginalisation in situations where the State fails to monitor a region known for dangerous activities and natural hazards present indicators that should have triggered heightened vigilance and reason to be aware of potential harm.[[26]](#footnote-26) In the context of migration, the special position of state authorities as guarantors of rights controlling a particular geographical area where widespread violence against migrants as a particularly vulnerable group has been documented, or where dangerous conditions have been reported, suggests a heightened obligation of vigilance prompting a general state of awareness of the risk that disappearances can occur.

1. *Impunity and Acquiescence*

§13. While the aforementioned case law addressed due diligence violations, we submit that the prolonged nature of these violations, due to impunity, and their potential recurrence, which violate the State's obligation to prevent, raises the level of state involvement to a form of acquiescence.

§ 14. Such a more expansive understanding of acquiescence is premised on the assumption that States should not be able to deliberately turn a blind eye to massive rights violations where they were in a position to know about the risk that such violations could occur on the basis of the structural context in a particular geographical region.

§ 15. During its drafting process, the structure of the ICPPED drew heavily on the *1984 Convention Against Torture* (CAT).[[27]](#footnote-27) Within the framework of the latter, when state agents have reasonable grounds to believe that torture is committed, for instance by witnessing or foreseeing those circumstances, and fail to prevent those acts, they can be considered as “authors, *complicit* or otherwise responsible for consenting and acquiescing in such impermissible acts.”[[28]](#footnote-28) Many suggest that the interpretation of acquiescence under CAT encompasses that officials acquiesce to torture if they fail to meet their legal responsibility under international law to take effective preventive measures.[[29]](#footnote-29)

§ 16. The Inter-American Commission also considered that *prolonged* failure by a State to respond to activities by non-state actors (here: businesses) that threaten human rights and of which the State has knowledge, may constitute acquiescence. The latter arises if a fundamental part of the lack of State response as a guarantor takes place as a consequence of the absence or lack of sustained diligence in the investigation and eventual punishment for serious and repeated violations of human rights.[[30]](#footnote-30) Criteria that would have to be considered for establishing tolerance or acquiescence in cases of a *prolonged* failure to investigate are “the magnitude, seriousness, prolongation, and manifestations of the breach of the duties to prevent and investigate.”[[31]](#footnote-31)

§ 17. The foregoing illustrates that the failure to take preventive measures in situations of proven heightened risk that prolong grave human rights violations contributes as an element crucial to the finding of acquiescence. Given the analogy of the ICPPED to CAT and impunity as a risk for the recurrence of future crimes, the threshold for acquiescence should include scenarios of a “passive attitude” of governments towards serious violations by private actors or reported danger arising from geographical situations in contexts of widespread violence. Acquiescence, as proposed, should be determined by considering the position of control of the State as guarantor of rights in contexts where a prolonged failure to investigate amounts to a failure to prevent ongoing human rights violations and the position of the victim who belongs to a particularly vulnerable group or resides in a particularly dangerous area. Along these lines, laws that place migrants in avoidable abusive circumstances conducive to disappearances combined with deliberate inaction in the face of such circumstances when there is information about the likelihood of illegal acts, such as disappearances, should be considered strong indications that States are acting with acquiescence in the commission of migrant enforced disappearances.

1. *Migrants’ disappearances and human trafficking or smuggling*

§ 18. Migrants can become victims of disappearances in the context of migration as a result of human trafficking or smuggling. Given the ICPPED’s preventive character and the aim of the General Comment to assist States in developing policies to protect migrants, as well as the potential overlap between human trafficking and smuggling and the (enforced) disappearance of migrants, the *UN Convention against Transnational Organised Crime*[[32]](#footnote-32) and its Protocols on Human Trafficking[[33]](#footnote-33) and Smuggling[[34]](#footnote-34) can and should be considered as guidance to defining States’ obligations to prevent the disappearance of migrants. This approach has also been taken by the UNSR on Human Trafficking, who referred to the Trafficking Protocol in order to delineate the prevention obligations of States in relation to human trafficking. By defining the type of preventive measures States should take in relation to human trafficking or smuggling of migrants, the analysis of whether a State failed in its obligations to prevent can be facilitated.

§ 19. According to the UNSR on Human Trafficking[[35]](#footnote-35), measures to prevent human trafficking should include changing the root causes that make persons vulnerable to being trafficked; reducing demand for the type of work that trafficking victims are generally used for; fostering ‘safe migration’; awareness-raising measures, as well as data collection and constant evaluation of preventive policies.[[36]](#footnote-36) Additionally, States have obligations to prosecute perpetrators, which also constitutes a form of prevention.[[37]](#footnote-37) The Trafficking Protocol further obliges States to ensure that information is exchanged between relevant authorities (article 10).

§ 20. Section III of the Smuggling of Migrants Protocol lists prevention measures, which include gathering of information (article 10), measures relating to border control (article 11) and the verification of documents (articles 12-13), training of authorities (article 14), as well as measures to raise awareness and to address the root causes of smuggling, that is, socioeconomic realities that push people to migrate and seek out smugglers (article 15). Further, States should adopt ‘appropriate’ measures to protect migrants from violence (article 16(2)). Article 18 establishes obligations regarding the return of migrants.

*V. Recommendations*

§ 21. Based on this analysis, the *General Comment No. 1 on Enforced Disappearances in the context of Migration* by the CED should:

1. elaborate on the meaning of systematic impunity for disappearances, including enforced disappearances, in the context of migration, as proposed in the WGEID report (A/HRC/36/39/Add.2), and its relationship to acquiescence;
2. clarify what obligations arise in terms of preventive measures to be taken by States to avoid direct liability for the enforced disappearance of migrants.

In this context it is recommended that:

* To avoid liability based on acquiescence, States should generally assess the magnitude, seriousness, prolongation, and manifestations of the breach of the duties to prevent and investigate. States have an obligation of monitoring a reportedly dangerous situation. If *ex officio* investigations, criminal prosecutions of perpetrators, and forensic identification are generally not conducted on a routine basis into reported incidents of migrant disappearances, state involvement may amount to acquiescence.
1. See FAJ against Greece, Communication to the Human Rights Committee (August 2021); available at: <https://www.humanrights360.org/wp-content/uploads/2021/09/Communication-to-the-United-Nations-Human-Rights-Committee-in-the-case-of-Faj-against-Greece.pdf>. [↑](#footnote-ref-1)
2. See Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales on the means to address the human rights impact of pushbacks of migrants on land and at sea, 12 May 2021, A/HRC/47/30. [↑](#footnote-ref-2)
3. WGEID, A/HRC/36/39/Add.2 para 42. [↑](#footnote-ref-3)
4. Ibid. [↑](#footnote-ref-4)
5. General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36 (30 October 2018) para. 23. [↑](#footnote-ref-5)
6. Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, Agnes Callamard, on “Unlawful death of refugees and migrants”, (15 August 2017) UN Doc A/72/335 2. [↑](#footnote-ref-6)
7. ICPPED, Preamble. [↑](#footnote-ref-7)
8. *Paniagua Morales et al. v. Guatemala* IACHR Series C No. 37 (8 March 1998) para. 173. [↑](#footnote-ref-8)
9. *Myrna Mack Chang* *v. Guatemala* (Reasoned Opinion of Judge Cançado Trindade IACHR (25 November 2003) Series C No. 101 para. 10; See also Bámaca-Velásquez v. Guatemala IACtHR (2000), para. 211; Serrano-Cruz Sisters v. El Salvador IACtHR (2005), para. 60. [↑](#footnote-ref-9)
10. See also Villagrán-Morales et al. (The “Street Children”) v. Guatemala IACtHR (1999), para. 139; Bámaca- Velásquez v. Guatemala IACtHR (2000), para. 211; Serrano-Cruz Sisters v. El Salvador IACtHR (2005), para. 60; UN Doc CCPR/C/SR.1519 para. 44; A/HRC/45/13/Add.4, paras. 7–8 and 17. [↑](#footnote-ref-10)
11. UNCommHR ‘Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher’UN Doc. E/CN.4/2005/102/Add.1 (5 February 2005) ‘Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher’(5 February 2005) UN Doc E/CN.4/2005/102/Add.1; UNHRC Res 7/12 (27 March 2008) UN Doc A/HRC/Res/7/12 §4 (d); § 5(c); § 6 (a) (d) (e). Under Article 31(2) of the 1969 Vienna Convention on the Law of Treaties, an international convention’s preamble sets out the possible dimensions of interpretation of its provisions. [↑](#footnote-ref-11)
12. FAJ against Greece, para. 16. [↑](#footnote-ref-12)
13. Inter-American Commission, “Juridical Condition and Rights of Undocumented Migrants,” advisory opinion OC-18/03 of September 17, 2003, requested by the United Mexican States, (hereafter advisory opinion on migrants) paras. 112-13. [↑](#footnote-ref-13)
14. Case of M.S.S. v. Belgium and Greece, European Court of Human Rights, no. 30696/09, judgment 21 January 2011, para 232. [↑](#footnote-ref-14)
15. See A.H. against Serbia and North Macedonia and A.H. against Serbia, European Court of Human Rights, nos. 60417/16 and 79749/16 (judgment pending). [↑](#footnote-ref-15)
16. Hirsi Jamaa and Others, European Court of Human Rights, no. 27765/09, 23 February 2012. [↑](#footnote-ref-16)
17. Human Rights Committee, *Boucherf v Algeria*, Communication No. 1196/2003, 30 March 2006, para 9.2. [↑](#footnote-ref-17)
18. FAJ against Greece, para 147. [↑](#footnote-ref-18)
19. *La Cantuta v. Peru* (Merits, Reparations, and Costs) IACHR Series C No. 162 (9 November 2006), para. 92. [↑](#footnote-ref-19)
20. *La Cantuta v. Peru,* para. 160. [↑](#footnote-ref-20)
21. *La Cantuta v. Peru,* para. 230-35. [↑](#footnote-ref-21)
22. *La Cantuta v. Peru,* para. 116. [↑](#footnote-ref-22)
23. , Case of Osman v. The United Kingdom, European Court of Human Rights, No. 23452/94, Judgment of October 28, 1998, paras. 115 and 116. [↑](#footnote-ref-23)
24. El-Masri v. the former Yugoslav Republic of Macedonia [GC], European Court of Human Rights, no. 39630/09, 13 December 2012, para. 206. [↑](#footnote-ref-24)
25. *González et al (‘Cotton Field’) v. Mexico* (preliminary objection, merits, reparations and costs) IACHR Series C No. 205 (16 November 2009), para. 273. [↑](#footnote-ref-25)
26. See Case of Budayeva and others v. Russia, (Judgment), European Court of Human Rights, App. No. 15339/02, (20 March 2008), para. 24; Case of Öneryildiz v. Turkey (Judgment), European Court of Human Rights, App. No. 48939/99 (30 November 2004) para. 98. See also Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v. Brazil, IACHR Series C No. 407 (21 June 2021) para. 138; Case of the Hacienda Brasil Verde Workers v. Brazil, IACHR Series C No. 318 (20 October 2016) para. 341. [↑](#footnote-ref-26)
27. UNCommHR (Nowak), `Civil and Political Rights, including Questions of Disappearances and Summary Executions’ Report submitted by Mr. Manfred Nowak (8 January 2002) UN Doc E/CN.4/2002/71

para. 45. [↑](#footnote-ref-27)
28. CAT ‘General Comment 2, Implementation of Article 2 by States Parties’ (23 November 2007) UN Doc CAT/C/GC/2/CRP 1/rev.4 para 18. [↑](#footnote-ref-28)
29. See Jon Bauer, “Obscured by `willful Blindness`: States Preventive Obligations and the Meaning of Acquiescence under the Convention against Torture” Columbia Human Rights Review (5 May 2021); Robert McCorquodale and Rebecca La Forgia, ‘Taking Off the Blindfolds: Torture by Non-State Actors’ (2001) 1 Human Rights Law Review 189. [↑](#footnote-ref-29)
30. American Commission on Human Rights and REDESCA (Special Rapporteurship on Economic, Social,

Cultural and Environmental Rights), ‘Business and Human Rights: Inter-American Standards’ (Organization of

American States 2019) OEA/Ser.L/V/II, CIDH/REDESCA/INF.1/19, para. 79. [↑](#footnote-ref-30)
31. Ibid. para. 78. [↑](#footnote-ref-31)
32. United Nations Convention against Transnational Organized Crime 2000 (2225 UNTS 209). [↑](#footnote-ref-32)
33. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000 (2237 UNTS 319). [↑](#footnote-ref-33)
34. Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime 2000 (2241 UNTS 507). [↑](#footnote-ref-34)
35. Ezeilo, Joy. Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children (2010)

UN Doc. A/65/288 para 18. [↑](#footnote-ref-35)
36. Ibid., paras 65-81. [↑](#footnote-ref-36)
37. Ibid., para. 20. [↑](#footnote-ref-37)