



MASTER THESIS | MASTER'S THESIS

Titel | Title

Disappearing Rights and Silenced Voices: State Obligations Under International Law to Prevent and Address Enforced Disappearances in the Context of Migration

verfasst von | submitted by

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angestrebter akademischer Grad | in partial fulfilment of the requirements for the degree of
Master of Laws (LL.M.)

Wien | Vienna, 2026

Studienkennzahl lt. Studienblatt |
Degree programme code as it appears on the
student record sheet:

UA 999 079

Universitätslehrgang lt. Studienblatt |
Postgraduate programme as it appears on the
student record sheet:

Human Rights (LL.M.)

Betreut von | Supervisor:

Univ.-Prof. Dr. Michael Lysander Fremuth

ABSTRACT

Enforced disappearances in migration contexts represent a growing and urgent human rights concern, exacerbated by increasingly dangerous migration routes, restrictive state policies, and insufficient international coordination. Despite heightened documentation by civil society organizations and international monitoring bodies, prevention efforts remain fragmented and inadequate. This thesis examines the phenomenon of enforced disappearances affecting migrants and analyzes the corresponding obligations of States under international law, with particular emphasis on preventive duties. Drawing on international human rights law, international criminal law, refugee law, and migration law, the study evaluates the applicability and effectiveness of existing legal frameworks, including the International Convention for the Protection of All Persons from Enforced Disappearance. It further considers the evolving jurisprudence and interpretative guidance provided by international bodies, regional human rights courts, and treaty monitoring mechanisms.

ZUSAMMENFASSUNG

Das Verschwindenlassen im Kontext von Migration stellt ein wachsendes und dringendes menschenrechtliches Problem dar, das durch zunehmend gefährliche Migrationsrouten, restriktive staatliche Politiken und unzureichende internationale Koordinierung verschärft wird. Trotz verstärkter Dokumentation durch zivilgesellschaftliche Organisationen und internationale Überwachungsorgane bleiben Präventionsmaßnahmen fragmentiert und unzureichend. Diese Arbeit untersucht das Phänomen des Verschwindenlassens von Migrantinnen und Migranten und analysiert die entsprechenden völkerrechtlichen Verpflichtungen der Staaten, mit besonderem Schwerpunkt auf präventiven Pflichten. Auf Grundlage des internationalen Menschenrechtsschutzes, des internationalen Strafrechts, des Flüchtlingsrechts und des Migrationsrechts bewertet die Studie die Anwendbarkeit und Wirksamkeit bestehender Rechtsrahmen, einschließlich des Internationalen Übereinkommens zum Schutz aller Personen vor dem Verschwindenlassen. Darüber hinaus berücksichtigt sie die sich weiterentwickelnde Rechtsprechung und Auslegung internationaler Organe, regionaler Menschenrechtsgerichte sowie vertraglicher Überwachungsmechanismen.

A mi familia, por el apoyo y el cariño incondicional

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LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CED	Committee on Enforced Disappearances
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FIDH	International Federation for Human Rights
HRCttee	Human Rights Committee
HRC	Human Rights Council
ICC	International Criminal Court
IACtHR	Inter-American Court of Human Rights
ICCPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICCPR	International Covenant on Civil and Political Rights
ICL	International Criminal Law
IHRL	International Human Rights Law
IOM	International Organization for Migration
IRL	International Refugee Law
LGBTIQ+	Lesbian, Gay, Bisexual, Transgender, Intersex and Queer
MMC	Mixed Migration Centre
NSA	Non-State Actor
OAS	Organization of American States
OC	Advisory Opinion (Inter-American Court of Human Rights)
OHCHR	Office of the United Nations High Commissioner for Human Rights
UK	United Kingdom
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime
WGEID	Working Group on Enforced or Involuntary Disappearances

INTRODUCTION

The enforced disappearances of migrants has become an increasingly urgent human rights issue, one that is now being documented by civil society actors, including the media and non-governmental organizations. Yet, despite growing awareness, the international community continues to fall short in delivering a coordinated and effective response, particularly with respect to its prevention. As migration routes become more dangerous and state policies grow more restrictive, the risk that migrants may become victims of enforced disappearance rises considerably. In this regard, the United Nations Working Group on Enforced or Involuntary Disappearances (WGEID)¹ emphasized in a report the gravity of this issue,² warning that both states and the international community have failed to give this phenomenon the attention it urgently requires. Over the past decade, the WGEID has increasingly addressed individual cases involving persons who fled their countries of origin due to a credible risk of becoming victims of enforced disappearance. Similarly, the Committee on Enforced Disappearances (CED)³ has progressively expanded its engagement addressing this issue. In 2023, the CED issued General Comment No. 1 on enforced disappearance in the context of migration, which articulates States' obligations to prevent disappearances by addressing structural risk factors, including those affecting migrants, such as deprivation of liberty in unofficial sites, failures in cross-border cooperation, and gaps in data collection.⁴ Despite important normative advances, including the entry into force of the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED)⁵ on 23 December 2010, the prevention of enforced disappearances in contexts of migration, whether during their journeys or after arrival, continues to receive insufficient attention, both in the clarification of States' legal obligations to prevent this crime and in the development of coherent international policy responses.

¹ The Working Group on Enforced or Involuntary Disappearances (WGEID), established under Commission on Human Rights resolution 20 (XXXVI) (1980). Among the Working Group key functions are country visits which present in country-specific reports that set out findings, identify structural patterns of disappearance, and issue tailored recommendations to strengthen State compliance with international standards.

² UN Human Rights Council, Report of the Working Group on Enforced or Involuntary Disappearances on enforced disappearances in the context of migration, (28 July 2017) UN Doc A/HRC/36/39/Add.2 para. 81. <https://docs.un.org/A/HRC/36/39/Add.2> accessed 10 December 2025.

³ The Committee on Enforced Disappearances (CED), established under the International Convention for the Protection of All Persons from Enforced Disappearance, is responsible for monitoring its implementation by States Parties.

⁴ Committee on Enforced Disappearances, General Comment No. 1 on the Enforced Disappearance of Persons (26 October 2023) UN Doc CED/C/GC/1 paras 5- 15. <https://www.ohchr.org/en/documents/general-comments-and-recommendations/cedcgc1-general-comment-no-1-2023-enforced> accessed 4 September 2025.

⁵ International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3.

Background

Statistical evidence illustrates the significant scale of the current situation. According to the International Organization for Migration's (IOM) Missing Migrants Project, over 70,000 individuals have died or gone missing along international migration routes since 2014.⁶ In this scenario, the Mediterranean Sea remains the deadliest route, accounting for more than 32,000 recorded deaths.⁷ In the Americas, over 11,000 cases have been documented, while the African continent has witnessed more than 17,000, and Asia has recorded over 10,000 deaths and disappearances during migration.⁸ These figures are likely conservative estimates, as many disappearances go unrecorded along dangerous migration routes with minimal oversight or monitoring, such as the Darién Gap,⁹ the Sahara Desert,¹⁰ and the Bay of Benga,¹¹ particularly in cases involving human trafficking, migrant smuggling, or unofficial detention or transport. For instance, a joint report by the United Nations High Commissioner for Refugees (UNHCR), IOM, and the Mixed Migration Centre (MMC) indicates that fatalities in the Sahara Desert may exceed those in the Mediterranean, though they are harder to document due to the remote and clandestine nature of desert crossings.¹² Alarming 2023, just two years ago, was recorded as the deadliest year for migrants globally, with over 8,500 deaths, representing a 20 percent increase compared to previous years.¹³ It is important to remember that these figures do not simply represent statistics, they represent individuals whose lives have been lost or who remain unaccounted for. The failure to address this situation shows the urgent need to reinforce preventive frameworks under relevant legal instruments and to adopt coordinated, human rights-based measures that protect the lives and dignity of migrants compelled to traverse increasingly dangerous routes.

⁶ International Organization for Migration (IOM), *Missing Migrants Project*, <https://missingmigrants.iom.int/>, accessed 23 November 2025.

⁷ *ibid*

⁸ *ibid*

⁹ Caitlyn Yates and Juan Pappier, *How the Treacherous Darien Gap Became a Migration Crossroads of the Americas*, (Migration Policy Institute, 2023). <https://shorturl.at/iA90Q> accessed 10 October 2025

¹⁰ United Nations News, *Migrant deaths in Libyan desert 'wake-up call' for stronger protections* (Published 1 July 2022) <https://news.un.org/en/story/2022/07/1121832> accessed 10 October 2025

¹¹ United Nations News, *Deadly journeys through Bay of Bengal and Andaman Sea threaten 'tragic and fatal consequences'* (Published 19 August 2021), <https://news.un.org/en/story/2021/08/1098122> accessed 10 October 2025

¹² UNHCR, Mixed Migration Centre, IOM, *A Journey No One Cares if You Live or Die* (2024) <https://publications.iom.int/books/journey-no-one-cares-if-you-live-or-die> , accessed 12 September 2025.

¹³ International Organization for Migration, *Deadliest Year on Record for Migrants: Nearly 8,600 Deaths in 2023* (6 March 2024) <https://shorturl.at/qB9sB> accessed 10 October 2025.

Although international law does not currently provide a dedicated global framework specifically addressing the enforced disappearance of migrants, relevant obligations and protections can be found across various existing legal frameworks. For instance, the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) requires states to take preventive action, investigate suspected cases of disappearance, and provide reparations to victims and their families.¹⁴ Related legal obligations also arise from other core human rights instruments, including the rights to life¹⁵ and liberty,¹⁶ the prohibition of torture,¹⁷ and fundamental principles such as *non-refoulement*,¹⁸ as well as the duties to ascertain the fate and whereabouts of missing persons and to uphold the rights of their families and of the deceased.¹⁹

Within this framework, this thesis examines enforced disappearances in migration contexts and the corresponding legal obligations of States under international law, with particular emphasis on their prevention. This study aims to complement and build upon existing academic research by addressing key gaps through an analysis of international human rights law, international criminal law, refugee and migration law, and other relevant instruments, in order to evaluate how the enforced disappearance of migrants is currently addressed and how prevention efforts can be more effectively implemented under existing legal frameworks.

Chapter 1 provides an overview of the historical background and contemporary migration practices that affect migrants globally, including the structural and situational risk factors that heighten their vulnerability.

Chapter 2 outlines the existing international legal frameworks that protect the rights of migrants and examines the key global and regional instruments that define States' obligations to prevent and respond to enforced disappearances.

¹⁴ International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3, arts 1, 10, 24, 30.

¹⁵ International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) UNTS 999, art 6(1).

¹⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), Art 9.

¹⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) UNTS 1465, art 2.

¹⁸ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 33(1).

¹⁹ International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) UNTS 2716, arts 24–25.

Chapter 3 provides a legal analysis of existing instruments to assess the extent to which obligations under current human rights frameworks apply to enforced disappearances in migration contexts, and examines the duties of States to prevent this crime.

Scientific gap

While the crime of enforced disappearance is widely recognized under international human rights law, the preventive dimension of States' obligations, particularly in the context of migration, remains significantly underexplored and still tends to focus more on accountability than on preventive duties.²⁰ The research of this thesis has also been complemented by legal analyses from scholars such as Marina Kumskova,²¹ Jeremy Sarkin,²² and Banu Bargu²³ who have examined States' obligations under the International Convention for the Protection of All Persons from Enforced Disappearance, with a primary focus on accountability, legal definitions, and general State responsibilities. While their reflections have significantly strengthened understanding in these areas, these studies generally do not address how such obligations function in cross-border or migratory contexts, particularly regarding patterns of disappearance occurring during deportation, in detention, or along militarized migration routes.

The intersection of enforced disappearances with human rights, migrants, including refugees, and international criminal law also remains underdeveloped with only a limited number of studies addressing this area. For instance, a joint study by Valentina Azarova, Amanda Danson, and Itamar Mann²⁴ has advanced important theoretical insights in their respective fields, yet without exploring further the prevention of this crime under international legal obligations for States. By contrast, other scholars, such as Bernard Duhaime and Andréanne Thibault in "*Protection of Migrants from Enforced Disappearance: A Human*

²⁰ Lene Guercke, *State Obligations Relating to Disappearances Committed by Non-State Actors*, (Springer, 2025) <https://shorturl.at/yxDOy>, accessed 10 August 2025; Jeremy Sarkin, *Putting in place processes and mechanisms to prevent and eradicate enforced disappearances around the world*, (South African Yearbook of International Law, 2013), <https://journals.co.za/doi/abs/10.10520/EJC183050>, accessed 10 August 2025.

²¹ Marina Kumskova, *The Crime of Enforced Disappearance*, (E-International Relations, 2016), <https://www.e-ir.info/pdf/60509>, accessed 20 August 2025.

²² Jeremy Sarkin, Grażyna Baranowska, *Why enforced disappearances are perpetrated against groups as state policy: overlaps and interconnections between disappearances and genocide* (Católica Law Review, 2018), <https://journals.ucp.pt/index.php/catolicalawreview/article/view/9098>, accessed 10 September 2025.

²³ Banu Bargu, *Sovereignty as Erasure: Rethinking Enforced Disappearances* (Qui Parle, 2014), <https://www.jstor.org/stable/10.5250/quiparle.23.1.0035>, accessed 10 September 2025.

²⁴ Valentina Azarova, Amanda Danson Brown, Itamar Mann, *Disappeared Migrants and the Failures of Protection*, (Boston University International Law Journal, 40 B.U. Int'l. L., 2022) <https://heinonline.org/HOL/LandingPage?handle=hein.journals/builj40&div=8> p 159 accessed 17 September 2025.

Rights Perspective”²⁵ and Grazyna Baranowska in “*Preventing and Addressing Enforced Disappearances in the Context of International Migration*,”²⁶ have begun to bridge this gap, explicitly examining enforced disappearances in migration contexts and calling for more robust international legal responses, as well as the urgent need for an integrated approach. Other scholars, such as Estela Schindel²⁷ and a joint study of Diego F. Leal and Natalie L. Cadwalader²⁸, have further contributed to the study of this phenomenon, focusing on the prevention of enforced disappearances in the context of global mobility and border control.

At the international level, there is a substantial body of research on the rights of migrants and refugees. Nevertheless, significant gaps remain in understanding how these rights are protected in the context of evolving crimes, such as enforced disappearances. Existing scholarship, including the work of Agnès Callamard²⁹ (former UN Special Rapporteur on extrajudicial, summary, or arbitrary executions) and Manfred Nowak³⁰ (former UN expert on enforced disappearances), has focused primarily on accountability, legal definitions, and general State responsibilities. While these contributions have advanced the understanding of State obligations, they rarely examine how these obligations operate in cross-border or migratory contexts, particularly in relation to disappearances in the context of *non-refoulement*, deportation, arbitrary detention, or along high-risk migration routes. Their work, like the broader literature, tends to address these issues at a policy or normative level, leaving limited analysis of how enforced disappearance of migrants occurs in practice, and how legal prevention measures can be effectively implemented in transnational scenarios.

This thesis also examines the current situation by analyzing existing international norms, soft law, jurisprudence, and State practice, aiming to address the scientific gap regarding States’ legal obligations to respond to and prevent enforced disappearances in migratory

²⁵ Bernard Duhaime and Andréanne Thibault, *Protection of Migrants from Enforced Disappearance: A Human Rights Perspective*, (99(2), International Review of the Red Cross 545, 2017)

²⁶ Grazyna Baranowska, Working Papers, *Preventing and Addressing Enforced Disappearances in the Context of International Migration*, (Geneva Academy of International Humanitarian Law and Human Rights, 2019). <https://shorturl.at/Jv0oY> accessed 10 September 2025

²⁷ Estela Schindel, *Under-Researched, Transnational, Silent: Disappearances in Transit to Europe*, (University of Oxford, Border Criminologies Blog, 2020) <https://shorturl.at/e79rC> accessed 1 November 2025.

²⁸ Diego F. Leal and Natalie L. Cadwalader, *Enforced Disappearance as a Border Management Tool: The Case of Border Patrol Detentions of Immigrant and Asylum-Seeking Families in the United States* (Center for Migration Studies, 2024), <https://journals.sagepub.com/doi/full/10.1177/23315024241296839> accessed 10 October 2025.

²⁹ Agnès Callamard (Former Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions), Rep. on *Unlawful Death of Refugees and Migrants*, U.N. Doc. A/72/335 (2017).

³⁰ Manfred Nowak, UN Commission on Human Rights Report, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46 (8 January 2002) E/CN.4/2002/71

contexts. It identifies the instruments that establish these obligations, providing insights into the application of the definition of enforced disappearances to migration contexts and clarifying States' duties to prevent such crimes against migrants.

Legal research question and sub-questions

The primary research question guiding the thesis is: *How do international legal frameworks define and impose obligations to prevent enforced disappearances in migration contexts, and what mechanisms can be implemented to effectively respond to such crimes?*

This research question will be supported by the following set of sub-questions:

1. What are the principal international legal instruments for the protection on migrants and current mechanisms addressing enforced disappearance?
2. Under what conditions do the enforced disappearances of migrants qualify as enforced disappearances under international law?
3. What are the preventive obligations of States under international law, including in situations involving extraterritorial jurisdiction or cross-border disappearances?
4. What are the current conditions and factors that make migrants vulnerable to enforced disappearances?

Hypothesis

The main hypothesis of this thesis is that the application of international legal frameworks, including the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), the International Covenant on Civil and Political Rights (ICCPR), the Convention Against Torture (CAT), refugee law, and relevant regional human rights instruments, imposes binding obligations on States to prevent enforced disappearances in migration contexts.

This study further hypothesizes that, in migration contexts, enforced disappearances frequently result from restrictive border policies, bilateral or multilateral migration control or return agreements, aggressive immigration enforcement, or failures by authorities to act. In such situations, States' legal obligations to prevent disappearances extend not only within their territory but also extraterritorially, where State agents exercise direct authority or effective control over individuals.

Finally, while the legal standards defining some of these obligations are relatively well-established in international instruments, significant gaps in enforcement and implementation remain, largely due to political constraints, jurisdictional fragmentation, and limited access to effective remedies. This thesis hypothesizes that emerging practices grounded in international law, including the exercise of extraterritorial jurisdiction, the expanded application of the rights to life and security, and reinforced obligations under the principle of non-refoulement, can strengthen both compliance and preventive measures in addressing enforced disappearances of migrants.

Methodology

This study adopts a qualitative legal research methodology supported by comparative and case law-based approaches. It primarily involves an examination of international legal instruments, including the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture (CAT), the 1951 Refugee Convention and Protocols, and relevant regional human rights treaties such as the American Convention on Human Rights and the European Convention on Human Rights. Jurisprudence from international and regional human rights bodies, including the Human Rights Committee (HRCtee), the Inter-American Court of Human Rights (IACtHR), and the European Court of Human Rights (ECtHR), is examined to assess how States' obligations to address and prevent enforced disappearances are interpreted and applied, particularly in migratory contexts.

This thesis also draws on reports and thematic studies by UN Special Procedures, such as the Working Group on Enforced or Involuntary Disappearances and the Working Group on Arbitrary Detention, and others as well as findings from treaty bodies, the Committee on Enforced Disappearances, the Committee against Torture and international organizations to complement the legal analysis with practical insights. In addition, this study includes academic literature from international human rights law, international criminal law, and migration law to situate the legal discussion within broader normative and institutional developments. A critical perspective is adopted throughout to evaluate both the normative potential and the limitations of existing legal frameworks.

Research Objectives

This research aims to analyze the international legal frameworks that impose obligations on States to prevent enforced disappearances, with particular emphasis on the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) and the International Covenant on Civil and Political Rights (ICCPR), as well as the Convention against Torture (CAT), the 1951 Refugee Convention, and other relevant human rights and migration law instruments. It aims to clarify the conditions under which the disappearance of migrants qualifies as an enforced disappearance under international law, examining the legal thresholds for State involvement, direct or indirect responsibility, acquiescence, or failure to act, and how these thresholds apply in complex cross-border migration scenarios. Additionally, the study explores how other fundamental rights, particularly the right to life, the right to liberty and security of person, the prohibition of torture, and the principle of *non-refoulement*, interact with and reinforce the preventive obligations related to enforced disappearance.

A further objective is to examine how jurisdiction is established in relation to enforced disappearances, with particular attention to the extraterritorial application of State obligations in contexts such as border governance, immigration detention, pushbacks, search-and-rescue operations, and deportations. In these scenarios, the study aims to assess how international law regulates State conduct beyond their territory, especially in situations involving effective control or direct participation by State agents or other circumstances under which States may incur responsibility for disappearances that occur outside their territorial borders.

Ultimately, the study seeks to contribute to a more coherent understanding of how the prevention of enforced disappearance of migrants operates within international law, highlighting both the limitations of current frameworks and the opportunities for reinforcing State obligations, monitoring mechanisms, and human rights-based approaches capable of addressing the specific vulnerabilities of migrants.

CHAPTER I: ENFORCED DISAPPEARANCES IN THE CONTEXT OF MIGRATION

1.1 HISTORICAL BACKGROUND

Enforced disappearance has undergone significant normative and institutional development, often shaped by the practices of States. Historically, this crime has been utilized both as an explicit mechanism of repression, targeting political opposition, and as a concealed method of exerting control over civilian populations through fear and uncertainty. Manfred Nowak, in his former capacity as the independent expert appointed by the United Nations Commission on Human Rights(now replaced by the United Nations Human Rights Council) asked with analyzing the legal dimensions of enforced or involuntary disappearances, identifies the *Nacht und Nebel* (Night and Fog) decree issued by Adolf Hitler on 7 December 1941 as a foundational moment in the evolution of this crime.³¹ The decree authorized the secret abduction and transfer of individuals from occupied territories to Germany, deliberately erasing their presence and obstructing any information regarding their fate or whereabouts.

While its origins can be traced to earlier periods, including the Second World War, the practice of enforced disappearance took on distinct characteristics and reached unprecedented scale and visibility in Latin America during the Cold War.³² Within this context, it became a hallmark of state repression, widely used to silence political dissent and eliminate perceived threats to authoritarian regimes.³³ Although most prevalent under military dictatorships, the practice was not confined to such regimes; certain democratically elected civilian governments were also complicit in its use.³⁴ The systematic and widespread nature of disappearances in the region was so pronounced that international legal discourse, particularly in English, began incorporating the Spanish term *desaparecido* as a synonym for “missing person,” reflecting the practice’s association with Latin American state violence.

The secretive character of enforced disappearances, combined with the lack of institutional oversight, enabled the widespread use of extreme interrogation methods, including

³¹ Manfred Nowak, *Civil and political rights, including questions of disappearances and summary executions*, (8 January 2002) UN Doc E/CN.4/2002/71 para 7.

³² *ibid* para 8.

³³ Dulitzky, Ariel E., *The Latin-American Flavor of Enforced Disappearances*, (Chicago Journal of International Law: Vol. 19: No. 2, Article 3, 2019) pp 432-435

³⁴ Amnesty International, *Peru: Human Rights Violations and the Armed Conflict* (1991) <https://www.amnesty.org/en/documents/amr46/036/1991/en/> accessed 10 October 2025.

torture, often culminating in extrajudicial executions.³⁵ Beginning in the 1980s, the transition to democratic governance in several Latin American countries led to the establishment of truth commissions³⁶ and the deployment of United Nations missions tasked with uncovering the operational patterns and institutional complicity underlying enforced disappearances. These findings were further substantiated by the work of the United Nations Working Group on Enforced or Involuntary Disappearances (WGEID) and the early jurisprudence of the Inter-American Court of Human Rights.³⁷

In the aftermath of the widespread atrocities committed during this period, the international community increasingly acknowledged the potential of international law as a means to confront crimes perpetrated by state actors, or, at a minimum, to establish state responsibility for failing to prevent or address such violations when carried out by organized criminal groups.³⁸ This evolving recognition formed the basis for the development of legal obligations requiring states to determine the fate and whereabouts of disappeared persons under their jurisdiction and to conduct thorough investigations into the circumstances surrounding their detention and subsequent disappearance.

Since its inception, the Working Group on Enforced or Involuntary Disappearances has transmitted approximately 59,600 cases to 112 States,³⁹ documenting incidents across the Americas, Europe, Asia, and Africa. This widespread prevalence has transformed enforced disappearance from a primarily regional issue into a pressing international concern.

As will become clear in the discussion of the technical elements that define this crime, the distinguishing characteristic of enforced disappearance, and the source of its exceptional gravity, is that the State not only deprives an individual of their liberty, and often their life, but does so in a clandestine manner. No trace remains of the person or their fate. Most critically, there is often no possibility of proving that the person has been disappeared, a reality that

³⁵ Amnesty International, “Peru: Inter-American Court rules that the Peruvian courts should review the pardon granted to Fujimori”, (2018), <https://perma.cc/7SZG-QQZY>, accessed 10 August.

³⁶ See, for example, CONADEP, *Nunca Más* (Argentina 1984); Comisión Nacional de Verdad y Reconciliación, *Informe* (Chile 1991); United Nations, ONUSAL Report (19 February 1992); Comisión para el Esclarecimiento Histórico, *Memoria del Silencio* (Guatemala 1999); see also Priscilla B Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, (2nd edn, Routledge, 2011) pp 67–112.

³⁷ Nikolas Kyriakou, *An Affront to the Conscience of Humanity: Enforced Disappearances in the Case Law of the Inter-American Court of Human Rights* (Inter-Am. & Eur. Hum. Rts. J, 2014)

³⁸ Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (W. W. Norton & Company 2011) pp 33–72 and 99–131.

³⁹ Human Rights Council, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc A/HRC/51/31 (12 August 2022) <https://docs.un.org/en/A/HRC/51/31>, accessed 10 September 2025

becomes even more critical in the context of migration. This crime is deliberately structured to remove individuals from the protection of the law and the institutions mandated to safeguard them, leaving victims in a state of complete vulnerability and unable to access legal safeguards

1.1.1 Declaration on Enforced Disappearances

In response to the systemic and widespread practice of enforced disappearances, the United Nations adopted the Declaration on the Protection of All Persons from Enforced Disappearance by the General Assembly on 18 December 1992 through Resolution 47/133.⁴⁰ While non-binding, the Declaration represented a critical step in consolidating international norms against enforced disappearance, clearly articulating both the rights of individuals and the responsibilities of States and continues to serve as a valid reference for all States as a corpus of principles, with its provisions reflecting elements of customary international law on the subject. The Declaration established that any act of enforced disappearance constitutes an affront to human dignity⁴¹ and emphasized that no State shall practice, permit, or tolerate such acts.⁴²

This instrument drew on the experiences of decades of international concern, particularly in Latin America, in countries that faced systemic disappearances under military dictatorships, authoritarian regimes and where state-perpetrated disappearances were a prominent tool of repression in the 1970s and 1980s.

Although the Declaration identified the adoption of specific criminal legislation as a primary State obligation, its non-binding nature meant that only a limited number of States undertook concrete measures to implement its provisions.⁴³ Despite its shortcomings, the Declaration served as an inspiration for regional initiatives, including in the Americas. Mandated by the Organization of American States (OAS) General Assembly in 1987, the Inter-American Commission on Human Rights drafted in 1988 a project for the creation of a legally binding instrument in the region. This project underwent lengthy discussions and multiple modifications, which resulted in significant delays.⁴⁴ In June 1994, the OAS General Assembly

⁴⁰ Declaration on the Protection of All Persons from Enforced Disappearance, GA Res 47/133, UN Doc A/RES/47/133 (18 December 1992)

⁴¹ *Ibid* art 1

⁴² *Ibid* art 2

⁴³ UN Commission on Human Rights, Report, *Civil and Political Rights, Including Questions of: Disappearances and Summary Executions* (8 January 2002) E/CN.4/2002/71, paras 65–66 <https://docs.un.org/en/E/CN.4/2002/71> accessed 10 September 2025.

⁴⁴ *Ibid*

adopted the Inter-American Convention on the Forced Disappearance of Persons,⁴⁵ which became the first legally binding instrument on the subject, entering into force on 28 March 1996 following ratification by eight countries: Argentina, Panama, Uruguay, Costa Rica, Paraguay, Venezuela, Bolivia, and Guatemala. Currently, the instrument has been ratified by fifteen states.⁴⁶

1.1.2 International Convention for the Protection of All Persons from Enforced Disappearance

Building on the principles established in the 1992 Declaration, the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED)⁴⁷ was adopted by the UN General Assembly in 2006 and entered into force in 2010. Unlike the Declaration, the Convention is the first instrument that creates a legally binding framework, requiring States to prevent enforced disappearances,⁴⁸ criminalize such acts in domestic law,⁴⁹ and appropriate measures to investigate whenever they occur.⁵⁰

The Convention also established the Committee on Enforced Disappearances (CED),⁵¹ tasked with monitoring State compliance through periodic reports, issuing guidance and general recommendations, and considering individual communications when States have accepted its competence. Among other preventive provisions, which will be analyzed later, the Convention fosters international cooperation,⁵² including extradition and mutual legal assistance, to prevent and punish enforced disappearances.

1.1.3 Rome Statute of the International Criminal Court

The adoption of the Rome Statute of the International Criminal Court (ICC) on 17 July 1998⁵³ represents a further stage in the historical development of the international legal framework addressing enforced disappearance. Entering into force on 1 July 2002, the Rome

⁴⁵ Inter-American Convention on Forced Disappearance of Persons (adopted 9 June 1994, entered into force 28 March 1996) OAS Treaty Series No 68

⁴⁶ Namely, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay, and Venezuela.

⁴⁷ International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3

⁴⁸ *Ibid* art. 6(iii)

⁴⁹ *Ibid* art 4

⁵⁰ *Ibid* art 3

⁵¹ *Ibid* art 26

⁵² *Ibid* art 15

⁵³ Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3

Statute marked the first time that enforced disappearance was expressly codified as an international crime within a permanent international criminal tribunal.

The Rome Statute complemented the recognition previously established by the 1992 Declaration, which emerged from decades of growing international concern regarding the widespread use of this practice. In this context, the Statute contributed to strengthening international efforts to characterize enforced disappearance not only as a human rights violation but also as conduct capable of engaging individual criminal responsibility under international law.

As will be analysed in greater detail in a later chapter, the Rome Statute includes enforced disappearance among the acts that may constitute crimes against humanity. Article 7(1)(i) lists enforced disappearance as one of the prohibited acts when committed as part of a *widespread or systematic attack* directed against any civilian population. Article 7(2)(i) further defines enforced disappearance as the arrest, detention, or abduction of persons by, or with the authorization, support, or acquiescence of, a State or a political organization,⁵⁴ followed by a refusal to acknowledge the deprivation of liberty or to provide information concerning the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period.

This formulation built upon earlier international legal instruments, including the 1992 Declaration on the Protection of All Persons from Enforced Disappearance, while contributing to the progressive clarification of the elements of the crime within the framework of international criminal justice. The Rome Statute therefore represents an important historical development in the gradual consolidation of enforced disappearance as an internationally recognized crime.

1.2 CURRENT PRACTICES IN GLOBAL MIGRATION

As global patterns of human mobility grow increasingly complex, so too do the challenges faced by migrants, refugees, and other people on the move. The conditions that drive people to migrate are diverse, from internal armed conflict to generalized violence or other

⁵⁴ The reference to “political organizations” reflects the recognition that crimes against humanity, including enforced disappearance, may also be perpetrated by organized non-State actors exercising structured authority comparable to that of State institutions

serious human rights violations, persecution, poverty, lack of access to basic services which often intersect to create acute vulnerabilities.

In this regard, while enforced disappearance has traditionally been associated with contexts of internal repression by military or authoritarian governments, or with situations of armed conflict, as we have seen in the historical background, there is increasing recognition that this crime can also occur along migratory routes and within the context of border control operations.⁵⁵ Individuals on the move may be subjected to enforced disappearance when they are intercepted, detained *incommunicado*, or removed from the protection of the law without due process,⁵⁶ particularly in circumstances where their fate or whereabouts are deliberately concealed from their family members, legal representatives, or competent oversight authorities.

These current practices often compel individuals to resort to irregular or dangerous migratory routes. Along these routes, migrants may be exposed to exploitation, abuse, and human rights violations committed by both State and non-State actors, including organized criminal groups and human trafficking networks.⁵⁷ In most situations, their irregular migratory status, lack of documentation, language barriers, and fear of detention or deportation further hinder access to protection mechanisms and justice, creating an environment in which enforced disappearances can occur with impunity, often going unreported, undocumented, or unresolved.⁵⁸

⁵⁵ Office of the United Nations High Commissioner for Human Rights (OHCHR), Press Release, “*Migrants Face High Risk of Enforced Disappearance, UN Experts Warn*” (11 September 2017) <https://shorturl.at/AlaUu>, accessed 23 August 2025.

⁵⁶ Richard Luscombe, “*Detainees at ‘Alligator Alcatraz’ facing ‘harrowing human-rights violations’, new report alleges*” (The Guardian, 2025) <https://www.theguardian.com/us-news/2025/dec/04/alligator-alcatraz-human-right-violations-amnesty-report> accessed 4 December 2025.

⁵⁷ UN Network on Migration, “*Mapping the Landscape of the Smuggling of Migrants: An Overview of Key Concepts, Trends, Challenges and Areas for Action*” (2022) <https://shorturl.at/SybFG>, accessed 2 September 2025

⁵⁸ UN Committee on Enforced Disappearances, *General Comment No 1 on Enforced Disappearance in the Context of Migration*, (26 October 2023) UN Doc CED/C/GC/1 paras 2–3 <https://docs.un.org/CED/C/GC/1> accessed 2 September 2025

1.2.1 Pushbacks

One recurrent practice widely reported by civil society organizations⁵⁹ and international bodies, such as regional organizations⁶⁰, and criticized by UN human rights mechanisms⁶¹ for violating key international obligations, is the use of pushbacks at borders. The Special Rapporteur on the human rights of migrants, defined pushbacks as:⁶²

“various measures taken by States, sometimes involving third countries or non State actors, which result in migrants, including asylum seekers, being summarily forced back, without an individual assessment of their human rights protection needs, to the country or territory, or to sea, whether it be territorial waters or international waters, from where they attempted to cross or crossed an international border.”

These operations are typically undocumented and frequently involve abandoning migrants in isolated areas or at sea,⁶³ stripping them of communication tools or protection and result in the *de facto* transfer of individuals to territories where protection is weaker or where risks of disappearance are higher.

Pushbacks violate the principle of *non-refoulement*⁶⁴ and may directly or indirectly contribute to enforced disappearance.⁶⁵ In maritime contexts, States have been known to intercept migrant vessels, further transfer individuals to other jurisdictions (third State) without registration where there would be a real risk of such violations (chain refoulement), or leave them stranded at sea.⁶⁶ These actions blur lines of accountability but do not eliminate responsibility. International jurisprudence affirms that responsibility under human rights law

⁵⁹ Danish Refugee Council, *Protecting Rights at Borders VI: What We Do in the Shadows* (2023) <https://shorturl.at/jK1WD> accessed 10 November 2025; HRC47 Joint Advocacy Letter, *Calling for the Human Rights Council to Establish an Independent Monitoring Mechanism on Pushbacks* (IOR 40/4331/2021) <https://shorturl.at/B3a0S>, accessed 19 September.

⁶⁰ Council of Europe, Commissioner for Human Rights, *Pushed beyond the limits: Four areas for urgent action to end human rights violations at Europe's borders* (2022) <https://h7.cl/1kxwh> accessed 29 September 2025

⁶¹ UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants* UN Doc A/HRC/47/30 (12 May 2021); Committee on Enforced Disappearances, *Meeting Summary* (9th session, 2023); UN News, Meeting Summary, Special Rapporteur on Adequate Housing: Access to Housing is a Matter of Life and Death (2021) <https://shorturl.at/cS7VO> accessed 10 September 2025

⁶² UN Human Rights Council, “*Report of the Special Rapporteur on the Human Rights of Migrants*” (12 May 2021) A/HRC/47/30, para 34.

⁶³ Jafar Pouya, *Left to the Waves: The Perilous Reality of Migrant Pushbacks at Mediterranean Sea*, (Volume: 10 Issue: 1, 68, 2025) pp 71-79, <https://doi.org/10.70045/mejrs.1685985>

⁶⁴ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 33(1), establishing the principle of *non-refoulement*, which prohibits States from expelling or returning a refugee to territories where their life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion.

⁶⁵ See chapter III on the principle of *non-refoulement* & UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants*, (25 April 2024), UN Doc A/HRC/56/60 para 26.

⁶⁶ Council of Europe Parliamentary Assembly, *Resolution 1787 (2011) on Human Rights of Irregular Migrants* <https://h7.cl/1fGmO> accessed 23 November 2025.

may arise wherever the State exercises effective control, including in maritime zones, through cooperative migration control, such as on vessels under its flag or in extraterritorial detention centers.⁶⁷

Consequently, border governance policies must be subject to rigorous human rights scrutiny to ensure that enforcement measures do not facilitate or conceal enforced disappearances. For instance, under international human rights and refugee law, the principle of *non-refoulement* requires States not to return individuals to places where they risk serious harm, human rights violations, including the risk of disappearance, torture or ill-treatment.⁶⁸

The European Pushback Report highlights how this practice is widespread in the Mediterranean.⁶⁹ For instance, at the maritime border between Turkey and Greece, migrants have been intercepted by coastguards and pushed back, sometimes with fatal consequences such as shipwrecks.⁷⁰

In 2021, the Human Rights Committee (HRCttee) found Italy responsible for failing to respond promptly to a distress call and to dispatch a rescue vessel to assist migrants, among them children, who lost their lives due to the delay.⁷¹ Italy's continued cooperation with Libya and the Libyan Coast Guard has, in effect, allowed for the circumvention of the prohibitions on *refoulement* and collective expulsion. Since 2017, more than 60,000 migrants have been disembarked in Libya after being intercepted at sea,⁷² including in cases where private vessels were instructed to return them there, even though Libya is not recognized as a safe port for

⁶⁷ UN General Assembly, *interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Méndez, (7 August 2015) UN Doc A/70/303 para 42 <https://docs.un.org/en/A/70/303> accessed 23 November 2025; See also European Court of Human Rights (ECtHR), *Hirsi Jamaa and Others v Italy* App No 27765/09 (ECtHR, 23 February 2012) para 75; *Medvedyev and Others v France* App No 3394/03. (ECtHR, 29 March 2010) paras 85-88.

⁶⁸ UN Office of the High Commissioner for Human Rights, *The Principle of Non-Refoulement under International Human Rights Law* <https://h7.cl/1kxxS> accessed 20 November 2025.

⁶⁹ 11.11.11 et al, Report, *Pushed, Beaten, Left to Die: European Pushback Report 2024* (February 2025) <https://11.be/sites/default/files/2025-02/Pushbacks%20Report%202024.pdf> accessed 20 September 2025.

⁷⁰ Lucile Smith and Ben Steele, *Greek coastguard threw migrants overboard to their deaths, witnesses say* (BBC, 2024), <https://www.bbc.com/news/articles/c0vv717yvpeo>, accessed 20 November 2025.

⁷¹ UN Human Rights Committee (HRCttee), *Communication No 3042/2017* (28 April 2021) UN Doc CCPR/C/130/D/3042/2017 para 4, <https://docs.un.org/en/CCPR/C/130/D/3042/2017> accessed 10 September 2025

⁷² Human Rights Watch, 'EU shifting rescue responsibility to Libya risks lives' (Published on 19 June 2017) <https://h7.cl/1fWI-> accessed 6 September 2025.

disembarkation, given the well-documented risks of arbitrary detention, torture, enforced disappearance, sexual and gender-based violence, exploitation, and trafficking.⁷³

Other UN bodies have similarly reported that the lack of regional responsibility-sharing mechanisms in the Asia-Pacific, particularly regarding maritime movements in the Bay of Bengal and the Andaman Sea. This has resulted in delayed search and rescue operations, as well as the interception and pushback of boats carrying Rohingya refugees and asylum seekers.⁷⁴ These individuals are often left facing extreme dangers, including unseaworthy vessels, harsh weather conditions, lack of food and water, and physical or sexual abuse by smugglers. In 2020 alone, at least 200 people lost their lives under such conditions.⁷⁵

On land, reports from the Americas, including the United States, Mexico, Canada, and Trinidad and Tobago,⁷⁶ indicate pushback practices occurring alongside measures that prevent individuals from requesting international protection or during the pendency of their asylum claims. These practices are often supported by legislation that criminalizes irregular entry or denies protection to those crossing borders irregularly to seek asylum. In these cases, the operations are generally undocumented, and the absence of individual assessment procedures exacerbates the risk of disappearance of migrants.⁷⁷

While pushbacks can increase migrants' exposure to such violations, creating conditions in which disappearances and deaths are more likely, a State may be considered complicit through its failure to implement adequate preventive measures.⁷⁸ Regional human rights bodies, including the European Court of Human Rights (ECtHR)⁷⁹ and the Inter-American Court of

⁷³ HRC, *Investigation by the Office of the United Nations High Commissioner for Human Rights on Libya: detailed findings*, (23 January 2016) UN Doc A/HRC/31/CRP.3 para 246 <https://docs.un.org/en/A/HRC/31/CRP.3> accessed 10 September 2025

⁷⁴ UN News, *Deadly journeys through Bay of Bengal and Andaman Sea threaten 'tragic and fatal consequences'* (Published 19 August 2021) <https://news.un.org/en/story/2021/08/1098122> accessed 10 September 2025

⁷⁵ UNHCR, *Update on UNHCR's Operations in Asia and the Pacific* (Seventy-First Session, 2020) <https://www.unhcr.org/uk/excom/announce/5f6dee594/asia-andpacific.html?query=pushback> accessed 13 November 2025.

⁷⁶ Amnesty International, *"Americas: Pushback Practices and their Impact on the Human Rights of Migrants and Refugees"* AMR 01/3658/202 (2021), <https://h7.cl/1fGr6> accessed 15 October

⁷⁷ HRC, Report of the Special Rapp. on the Human Rights of Migrants, (28 April 2025) UN Doc A/HRC/59/49, para 6. <https://docs.un.org/en/A/HRC/59/49> accessed 10 September 2025.

⁷⁸ Benoît Duhaime and André Thibault, *'Protection of Migrants from Enforced Disappearance: A Human Rights Perspective'* (2017) 99 International Review of the Red Cross 569, 585, pp 576 – 577

⁷⁹ *Hirsi Jamaa and Others v Italy* App No 27765/09 (ECtHR, 23 February 2012) paras 74–75, 131–133; *MSS v Belgium and Greece* App No 30696/09 (ECtHR, 21 January 2011) paras 358–360, 366

Human Rights (IACtHR),⁸⁰ have affirmed that States cannot evade responsibility by outsourcing migration control or relying on third countries to carry out practices that would be unlawful if conducted directly by their own agents.

Pushbacks also directly engage the principle of *non-refoulement*, as they mostly involve the forced return or expulsion of individuals without assessing their risk of persecution, torture, or other serious harm. Under this principle, the Committee on Enforced Disappearances (CED) has recommended that States Parties to refrain from carrying out collective expulsions of migrants, especially those arriving by sea, on ships; ensure individual assessment of each migratory situation; and take into account the special protection needs of each individual.⁸¹ In such cases, obligations to prevent and address human rights violations may still apply if the outsourcing State exercises effective control or direction over the acts, or knowingly contributes to conduct that results in serious human rights abuses.⁸²

1.2.2 Detention Practices

While international standards hold that the administrative detention of migrants without valid documentation should be used only as a measure of last resort,⁸³ particularly given the significant impact that deprivation of liberty can have on the exercise of fundamental rights, it is, in practice, widely employed by many States.⁸⁴ Increasingly, detention has been reported to be used as a deterrent mechanism aimed at irregular migration, discouraging individuals from seeking asylum.⁸⁵ In some jurisdictions, domestic legal frameworks explicitly authorize the arrest and detention of undocumented migrants for the purposes of identity verification and to determine their immigration status.⁸⁶

⁸⁰ IACHR, *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection* (Advisory Opinion OC-21/14, 19 August 2014) Series A No 21, paras 80–81; IACHR, *The Institution of Asylum and its Recognition as a Human Right in the Inter-American System* (Advisory Opinion OC-25/18, 30 May 2018) Series A No 25, paras 223–224.

⁸¹ Committee on Enforced Disappearances (CED), *Concluding Observations on Italy* (10 May 2019) UN Doc CED/C/ITA/CO/1 para 27(b), (c), (e).

⁸² See Chapter III on Jurisdiction.

⁸³ UN Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on Deprivation of Liberty of Migrants* (2018) <https://www.refworld.org/legal/resolution/unwgad/2018/en/120413> accessed 23 October 2025.

⁸⁴ European Law Institute, *Detention of Asylum Seekers and Irregular Migrants and the Rule of Law: Checklists and European Standards* (Statement, September 2017) <https://shorturl.at/aHSnT> accessed 10 November 2025

⁸⁵ International Detention Coalition, *Does Detention Deter* (2015) <https://h7.cl/1kxDX> accessed 23 October 2025

⁸⁶ Inter-American Commission on Human Rights, *Country Report: United States – Immigration (Chapter IV.b)* paras 219–221 <https://h7.cl/1kxEm> accessed September 10 2025; see also Council of Europe: Parliamentary Assembly, Resolution 1933, *Management of mixed migration and asylum challenges beyond the European Union's eastern border* (25 April 2013) <https://h7.cl/1fGuC> accessed September 10 2025 ; United Nations General Assembly, Protection of migrants (22 December 2023) UN Doc A/RES/78/217 para 5, accessed 10 October 2025

Immigration detention not only undermines migrants' right to liberty,⁸⁷ but can also contribute to instances of disappearances.⁸⁸ According to UNHCR, immigration detention remains one of the most opaque sectors within public administration in certain countries, with only a few states having established independent oversight mechanisms for these facilities.⁸⁹

While some States cooperate with international organizations, by allowing regular access to detained asylum-seekers, others restrict such oversight and have been reported to engage in practices that expose migrant populations to violence.⁹⁰ The lack pervasive lack of transparency, absence of adequate detention protocols, or the failure to implement them, increases the risk of human rights abuses, including the enforced disappearance of migrants.⁹¹

For instance, a report by the International Federation for Human Rights (FIDH) highlights that Thailand lacks a comprehensive legal framework to address asylum cases, resulting in uncertain and inconsistent treatment of refugees and asylum-seekers, as well as prolonged periods of detention.⁹² While the Prevention and Suppression of Torture and Enforced Disappearance Act⁹³ represents a significant step forward, codifying the principle of *non-refoulement* and establishing legal and procedural safeguards against torture, ill-treatment, and enforced disappearance, including in immigration and deportation procedures, its implementation in migration contexts remains inconsistent.⁹⁴ As a result, migrants deprived of liberty continue to face heightened vulnerability to human rights abuses, including the risk of enforced disappearance

⁸⁷ See Chapter III on Right to Liberty; UN HRCtee, *General comment No. 35, Article 9* (Liberty and security of person), (16 December 2014) UN Doc. CCPR/C/GC/35 para. 3. <https://docs.un.org/en/CCPR/C/GC/35> accessed 10 September 2025

⁸⁸ HRC, Phenomenon of Migrants Going Missing or Subjected to Enforced Disappearance – Human Rights Analysis: *Report of the Special Rapporteur on the Human Rights of Migrants*, Gehad Madi, (28 April 2025) UN Doc A/HRC/59/49 paras 6-7 <https://docs.un.org/en/A/HRC/59/49> accessed 10 September 2025

⁸⁹ Association for the Prevention of Torture (APT) and UNHCR, *Monitoring Immigration Detention: Practical Manual* (2014) pp 19–25 <https://h7.cl/1fGuY> accessed 10 November 2025.

⁹⁰ HRC, *Report Submitted by NGOs on Immigration Detention*, (21 September 2022) UN Doc A/HRC/51/NGO/153, <https://docs.un.org/en/A/HRC/51/NGO/153> accessed 10 September 2025.

⁹¹ *Ibid*

⁹² Fédération Internationale des Ligues des Droits de l'Homme (FIDH), *Out of Sight: Human Rights Violations in Thailand's Immigration Detention Centres*, N° 833a (2024) <https://h7.cl/1kxFP> accessed 23 November 2025.

⁹³ Prevention and Suppression of Torture and Enforced Disappearance Act B.E.2565 (enacted 24 October 2022, in force 22 February 2023)

⁹⁴ Human Rights Watch (HRW), 'EU shifting rescue responsibility to Libya risks lives, *Recommendations to the Thai government*, p 40 (2017) <https://h7.cl/1fWI-> accessed 6 September 2025.

Similarly, international bodies have also pointed out that Libya does not possess a formal system for handling asylum requests.⁹⁵ Instead, migrants are detained by various actors, ranging from coastguards and border officials to soldiers, police, and even smugglers or traffickers. In these detention centers, migrants are frequently held without official registration or access to legal assistance. In other countries, such as Russia, a report describes police raids, arbitrary arrests, prolonged detention, and mass deportations for minor infractions targeting migrant communities where detainees often have no access to legal representation or translators and are unable to notify their families.⁹⁶

In this regard, it is important to recall that migrant detention, including transfer can, in certain circumstances, create conditions that lead to enforced disappearances.⁹⁷ Prolonged or *incommunicado* detention, lack of registration or notification procedures,⁹⁸ denial of access to lawyers or family members, and the absence of independent monitoring mechanisms significantly increase the risk that individuals may be deprived of their liberty without acknowledgement or oversight.⁹⁹

To illustrate the relevance of this concern, it is worth recalling that as early as 1992, the Declaration on the Protection of All Persons from Enforced Disappearance already affirmed that:¹⁰⁰

“[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.”

Furthermore, as the primary international instrument for the prevention of this crime, the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) in art. 17(1)¹⁰¹ provides that “[n]o one shall be held in secret detention” and that

⁹⁵ HRW, *Denial of the Right to Seek Asylum*, (2006) para IV <https://www.hrw.org/reports/2006/libya0906/4.htm> accessed 10 November 2025

⁹⁶ HRW, *Living in Fear and Humiliation: Rising Xenophobic Harassment and Violence towards Central Asian Migrants in Russia* (Published 17 March 2025) <https://shorturl.at/0986r> accessed 23 August 2025.

⁹⁷ See *Gelman v Uruguay* (Merits, Reparations and Costs) IACHR Series C No 221 (24 February 2011) para 132.

⁹⁸ CED, *Concluding observations on the report submitted by Italy under article 29 (1) of the Convention*, UN Doc (10 May 2019) CED/C/ITA/CO/1 para. 29 <https://docs.un.org/en/CED/C/ITA/CO/1> accessed 10 October 2025.

⁹⁹ CED, *Concluding observations on the report submitted by Honduras under article 29 (1) of the Convention* (4 July 2018) UN Doc CED/C/HND/CO/1 para. 29 <https://docs.un.org/en/CED/C/HND/CO/1> accessed 10 October 2025.

¹⁰⁰ UN Declaration on the Protection of All Persons from Enforced Disappearance, GA Res 47/133, UN Doc A/RES/47/133 (18 December 1992) art 11.

¹⁰¹ UN General Assembly, International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3. art 17(1).

places of detention must be officially recognized and supervised.¹⁰² Detainees must also be allowed to communicate with their families and, if they are foreign nationals, with their consular authorities in accordance with applicable international law,¹⁰³ ensuring that migrants are not placed outside the protection of the law.

At the regional level, the IACtHR has consistently affirmed that immigration detention must not serve a punitive purpose.¹⁰⁴ Rather, it may only be used when strictly necessary, and solely for the protection of fundamental rights. Any broader or indiscriminate use of detention risks constituting a misuse of the State's coercive authority.¹⁰⁵

A growing body of international and non-governmental organizations has also identified that irregular entry into a country does not, in itself, amount to a criminal offence and cannot legitimately justify detention.¹⁰⁶ The criminalization of undocumented migration exceeds the scope of lawful State action aimed at managing borders and migration flows.¹⁰⁷ While States retain sovereign discretion over entry and admission to their territory, detention of migrants should remain a narrowly applied exception, permissible only when essential to safeguarding overriding legal interests.

Ensuring respect for these recognitions is crucial, particularly because State policies, legislation, and practices often fail to recognize migrants as full bearers of rights, despite international commitments. As discussed in this sub-chapter, the criminalization of migration, followed by detention, transfer, or denial of legal recognition, significantly increases migrants' vulnerability to human rights abuses, including the risk of enforced disappearances.

¹⁰² *Ibid*, art 17(2)(c).

¹⁰³ *Ibid*, art 17(2)(d).

¹⁰⁴ Pacheco Tineo Family v Bolivia, Series C No 272 (IACtHR, Judgment, 25 November 2013) paras 131-132; Torres Millacura v Argentina, Series C 229 (IACtHR, Judgment, 26 August 2011) para 84; Barreto-Leiva v Venezuela Series C 206 (IACtHR, Judgment, 17 November 2009) paras 111-112; Chaparro Álvarez y Lapo Íñiguez v Ecuador Series C 172 (IACtHR, Preliminary Objections, 21 November 2007) para 103;

¹⁰⁵ *ibid*

¹⁰⁶ International Journal of Refugee Law, *Guidelines on International Protection No. 14: Non-penalization of refugees on account of their irregular entry or presence and restrictions on their movements in accordance with Article 31 of the 1951 Convention relating to the Status of Refugee* (Volume 37, Issue 2, 2025) pp 256-279 <https://doi.org/10.1093/ijrl/eeaf029> accessed 10 September 2025.

¹⁰⁷ OHCHR, Press Release, *UN Human Rights Chief urges UK to reverse 'deeply troubling' Public Order Bill* (Published 17 April 2023) <https://shorturl.at/cYtHg>, accessed 4 December 2025; see also OHCHR, Press Release, *Italy: Proposed new sea rescue law puts more lives at risk - Türk* (Published 16 February 2023) <https://shorturl.at/f5kmi> accessed 4 December 2025

1.3 RISK FACTORS

Current restrictive measures and the expanded use of immigration detention exacerbate migrants' fears. Faced with the threat of arrest and detention, many choose to undertake clandestine or alternative routes that they perceive as less risky but which, despite reduced State oversight, are often controlled by criminal organizations or trafficking networks. In the context of States' obligations to prevent enforced disappearances, recognition of the involvement of multiple actors and the roles they may play in contributing to such crimes is necessary for determining when a situation falls within a State's jurisdiction and, consequently, when the State has an obligation to prevent enforced disappearances.¹⁰⁸

1.3.1 The impact of non-state actors

It is important to recognize that a large share of migrant disappearances appear to result from migrant smuggling and human trafficking operations conducted by Non-State Actors (NSAs), often linked to organized criminal groups.¹⁰⁹ For many years, the Working Group on Enforced or Involuntary Disappearances (hereinafter *the Working Group*) has reported that numerous disappearances are allegedly perpetrated by non-State actors exercising Government-like functions or *de facto* control over territory and population.¹¹⁰

Although non-State actors are not formally parties to human rights treaties, they can still be bound by international humanitarian law, such as the Geneva Conventions, and may incur criminal responsibility under the Rome Statute for crimes against humanity or war crimes. Furthermore, when State authorities provide direct or indirect support, consent, or acquiescence to the actions of these actors, or collaborate with smugglers or traffickers, the State may incur obligations under international law to prevent enforced disappearances.¹¹¹

Direct participation, through active involvement by State authorities, or indirect participation, through support, facilitation, tolerance, or failure to intervene, may include supporting private smuggling networks by, for example, allowing undocumented migrants to

¹⁰⁸ See Chapter III on Jurisdiction

¹⁰⁹ IOM, Publication, *A Decade of Documenting Migrant Deaths (2014–2023)* (Missing Migrants Project, Published 26 March 2024) pp 17–18, <https://missingmigrants.iom.int/MMP10years>, accessed 1 November 2025; see also CED, *Concluding observations on the report submitted by Gabon under article 29 (1) of the Convention*, UN Doc (10 October 2017) CED/C/GAB/CO/1 para 20, <https://docs.un.org/en/CED/C/GAB/CO/1> accessed 10 September 2025

¹¹⁰ OHCHR, *Enforced Disappearances: Fact Sheet No. 6 (Rev. 4)* (New York and Geneva, 2023) pp 8–18, <https://www.ohchr.org/sites/default/files/documents/publications/Fact-sheet6-Rev4.pdf>, accessed 3 September 2025.

¹¹¹ ICPPED, art 2.

cross borders, issuing false documents, or deliberately disregarding unlawful activities.¹¹² Corruption and collusion with smugglers and traffickers are frequent features of these operations.¹¹³ In many cases, officials act for personal gain, whether through bribery or other benefits, rather than in accordance with official State policies.¹¹⁴ Such practices further blur the line between State and non-State involvement and increase the risk of migrants being subjected to serious human rights violations, including enforced disappearances.¹¹⁵

In the Americas, numerous cases have been documented in Mexico where individuals were detained by municipal, state, or federal police and subsequently handed over to criminal groups, or abducted in joint operations between police and these organizations.¹¹⁶ Likewise, in some cases, criminal groups have captured migrants with the knowledge or support of government officials, who provided protection and assistance to these illicit operations.¹¹⁷ In Asia, reports indicate that Rohingya and Bangladeshi migrants who disappeared in Thailand and Malaysia were seized by criminal gangs with the complicity of authorities.¹¹⁸ Similar patterns of corrupt complicity have been reported in Niger and other northern African countries.¹¹⁹

¹¹² Lene Guercke, *State Obligations Relating to Disappearances Committed by Non-State Actors*. In: *Failure of the State. Interdisciplinary Studies in Human Rights*, (Springer, vol 15, 2025), pp 157–170 <https://shorturl.at/4VZcg>, accessed 10 November 2025.

¹¹³ United Nations Office on Drugs and Crime (UNODC), *Corruption as a Facilitator of Smuggling of Migrants and Trafficking in Persons in the Bali Process Region, with a Focus on Southeast Asia* (ROSEAP, April 2021) https://www.unodc.org/roseap/uploads/documents/Publications/2021/Summary_Research_Brief_UNODC_corruption_research_FINAL_March_2021.pdf, accessed 20 October 2025.

¹¹⁴ International Bar Association (IBA), *Human Trafficking and Public Corruption A report by the IBA's Presidential Task Force Against Human Trafficking*, (September 2016) <https://www.ibanet.org/MediaHandler?id=E34FFA1D-8038-4AEC-A631-E0E2A7E0AD86> accessed 15 September 2025

¹¹⁵ HRC, *Report of the Working Group on Enforced or Involuntary Disappearances*, (30 July 2019) UN Doc A/HRC/42/40 para 94 <https://docs.un.org/en/A/HRC/42/40> accessed 10 September 2025.

¹¹⁶ Pablo Ferri, Alejandro Santos Cid and Beatriz Guillén, ‘Chiapas, territorio tomado’ (EL PAÍS, Published 14 April 2024) <https://elpais.com/mexico/2024-04-14/chiapas-territorio-tomado.html> accessed 20 November 2025.

¹¹⁷ Beatriz Guillén, *El pueblo mexicano que desaparece a los migrantes*, (EL PAÍS, Published 13 November 2025) <https://h7.cl/1fH1A>, accessed 20 November 2025; see also Belén Fernández, *In Mexico, enforced disappearance is a way of life*, (Al Jazeera, Published 28 March 2025) <https://www.aljazeera.com/opinions/2025/3/28/in-mexico-enforced-disappearance-is-a-way-of-life> accessed 10 November; Lizbeth Diaz, *Mexican armed forces facilitated Ayotzinapa disappearances: Panel*, (Al Jazeera, Published 25 July 2023) <https://www.aljazeera.com/news/2023/7/25/mexican-armed-forces-facilitated-ayotzinapa-disappearances-panel>, accessed 10 November 2025.

¹¹⁸ Human Rights Watch, *Thailand: Rohingya Found Dead During Escape from Myanmar* (Published 18 October 2024) <https://shorturl.at/13M1a> accessed 14 November 2025; Human Rights Watch, *Bangladesh: Spiraling Violence Against Rohingya Refugees* (Published 13 July 2023) <https://shorturl.at/pPUZF>, accessed 26 September 2025.

¹¹⁹ Global Initiative Against Transnational Organized Crime, ‘*Human Smuggling across Libya, Niger and Chad: Evolution amid conflict and political turmoil*’ (Published 11 October 2023) <https://globalinitiative.net/analysis/human-smuggling-libya-niger-chad/> accessed 10 November 2025.

In addition to cases where government officials are directly or indirectly implicated in the enforced disappearances of migrants, Article 3 of the ICPPED¹²⁰ mandates States Parties to investigate and prosecute disappearances perpetrated by non-State actors. In a report on enforced disappearances in the context of migration, the Working Group urged States to adopt migration policies that do not “(compel) migrants to resort to smuggling networks and thereby falling prey to trafficking networks, thus contributing to heightened risks of becoming victims of human rights violations”.¹²¹

Furthermore, in its General Comment No. 1 on enforced disappearances in migration contexts, the Committee urged States to adopt evidence-based policies that promote safe, regular, and orderly migration, including measures to combat migrant smuggling and human trafficking.¹²² The General Comment also emphasized the role of non-State actors in migrant disappearances and called on preventive action of States by taking coordinated action to address exploitation and trafficking, as well as the broader human rights violations associated with smuggling and corruption.¹²³

1.3.2 Discrimination and situations of vulnerability

When assessing a State’s obligation to prevent enforced disappearances, it is also important to consider that discrimination and existing structural inequalities significantly increase the risk of disappearance for certain groups of migrants.¹²⁴ Women, children, LGBTIQ+ persons, persons with disabilities, older persons, and stateless individuals often face overlapping forms of marginalization that render them particularly vulnerable in the context of migration.

¹²⁰ ICPPED, art 3.

¹²¹ HRC, *Report of the Working Group on Enforced or Involuntary Disappearances on Enforced Disappearances in the Context of Migration*, (28 July 2017) UN Doc A/HRC/36/39/Add.2, para 88(a) <https://docs.un.org/en/A/HRC/36/39/Add.2> accessed 20 August 2025; see also UN General Assembly, *Report of the Secretary-General on the Protection of Migrants*, (15 August 2017) UN Doc A/72/335 paras 9–13, <https://docs.un.org/en/A/72/335> accessed 10 September 2025.

¹²² UN CED, *General Comment No 1 (2023) on Enforced Disappearance in the Context of Migration*, (26 October 2023) UN Doc CED/C/GC/1, para 27. <https://docs.un.org/en/CED/C/GC/1> accessed 10 September 2025.

¹²³ *Ibid* para 28.

¹²⁴ UN CED, *Concluding Observations on Brazil*, (3 November 2021) UN Doc CED/C/BRA/CO/1 para 23(c) <https://docs.un.org/en/CED/C/BRA/CO/1> accessed 2 October 2025; *Concluding Observations on Mexico* (Recommendations, 16 May 2022) UN Doc CED/C/MEX/VR/1 para 39 [https://docs.un.org/en/CED/C/MEX/VR/1\(recommendations\)](https://docs.un.org/en/CED/C/MEX/VR/1(recommendations)) accessed 1 September 2025; UN Committee on Enforced Disappearances, *General Comment No 1 (2023) on Enforced Disappearance in the Context of Migration*, para 8 (a-d)

Migrants who belong to marginalized groups often fall through the cracks of protection systems. For example, migrant women and girls frequently face gender-based violence including sexual violence, trafficking, and forced labor, especially when traveling along irregular routes or while held in detention or unofficial shelters.¹²⁵ Consistent with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),¹²⁶ the CEDAW Committee has emphasized that States are obliged not only to refrain from committing discriminatory acts themselves, but also to prevent discrimination and gender-based violence committed by third parties, including private actors and criminal networks.¹²⁷ Despite these considerations, gender-disaggregated data on such deaths remains largely unavailable.¹²⁸

Unaccompanied or separated children constitute another group at heightened risk of enforced disappearances.¹²⁹ Many go missing during transit, in detention, or following deportation, particularly in contexts where States lack adequate registration and monitoring procedures.¹³⁰ Article 25 of the ICPPED¹³¹ mandates States Parties to prevent and punish the unlawful removal of children who are victims of enforced disappearance, children whose parent or legal guardian has been subjected to enforced disappearance, and children born while their mother is held in captivity due to enforced disappearance. In this regard, States Parties are required to take all necessary measures to locate and identify these children and ensure their return to their families of origin.

The Working Group has also emphasized that States must act in the best interests of the child in all measures aimed at preventing enforced disappearances.¹³² To complement this, the Committee on the Rights of the Child has highlighted that the detention of migrant children,

¹²⁵ UN Committee on the Elimination of Discrimination against Women, *General Recommendation No 38 on Trafficking in Women and Girls in the Context of Global Migration*, (20 November 2020) UN Doc CEDAW/C/GC/38 para 23, <https://docs.un.org/en/CEDAW/C/GC/38>, accessed 23 October 2025.

¹²⁶ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

¹²⁷ UN Committee on the Elimination of Discrimination against Women, *General Recommendation No 38 (on Trafficking in Women and Girls in the Context of Global Migration)* (20 November 2020) UN Doc CEDAW/C/GC/38 paras 24–26 <https://docs.un.org/en/CEDAW/C/GC/35> accessed 23 October 2025.

¹²⁸ Missing Migrant's Project, *ibid* (n82), p 3.

¹²⁹ HRC, Working Group on Enforced or Involuntary Disappearances, *General comment on children and enforced disappearances*, (14 February 2013) UN Doc A/HRC/WGEID/98/1 paras 1–2 <https://docs.un.org/en/A/HRC/WGEID/98/1> accessed 10 September 2025; see also CED, *Concluding Observations on Mexico* (5 March 2015) UN Doc CED/C/MEX/CO/1 para 23. <https://docs.un.org/en/CED/C/MEX/CO/1> accessed 1 September 2025.

¹³⁰ European Parliament, *Disappearance of migrant children in the EU* (Published 2022) <https://shorturl.at/ziis4> accessed 2 August 2025

¹³¹ ICPPED, art 25.

¹³² HRC, *Report of the Working Group on Enforced or Involuntary Disappearances*, (14 February 2013) UN Doc A/HRC/WGEID/98/1 para 12 <https://docs.un.org/en/A/HRC/WGEID/98/1> accessed 1 September 2025.

even for short periods, violates their rights and can never be justified solely on the basis of migration control.¹³³ Inadequate protections for migrant children, such as the failure to register their presence in detention,¹³⁴ can result in their disappearance and increase their vulnerability to marginalization, abuse, and exploitation, including forced labour or survival sex in exchange for passage, shelter, food, or money.¹³⁵

LGBTIQ+ migrants also face distinctive risks rooted in criminalization, social stigma, and systemic discrimination.¹³⁶ In countries where same-sex relationships are criminalized or where protection mechanisms fail to recognize persecution based on sexual orientation or gender identity, LGBTIQ+ individuals are often forced into hiding.¹³⁷ This lack of visibility and fear of exposure make them particularly vulnerable to exploitation and disappearance, especially when traveling alone or relying on informal networks. The Principles on the Application of International Human Rights Law in the Context of Sexual Orientation and Gender Identity (Yogyakarta Principles)¹³⁸ suggests that States must ensure protection from violence and discrimination based on sexual orientation and gender identity.¹³⁹ The failure to provide asylum procedures that recognize LGBTIQ+ claims or to offer safe detention alternatives for trans or non-binary individuals can contribute to their disappearance, particularly when deported to contexts where they face serious threats.¹⁴⁰

In all these cases, discriminatory practices intersect with migration control measures in ways that systematically undermine the liberty, safety, and visibility of migrants, particularly those belonging to socially, economically, or politically marginalized groups. These individuals

¹³³ UN Committee on the Rights of the Child, *Concluding Observations on Brazil*, (30 October 2015) UN Doc CRC/C/BRA/CO/2-4 para 35(a) <https://docs.un.org/en/CRC/C/BRA/CO/2-4> accessed 1 October 2025; UN General Assembly, *Report of the Secretary-General on the Human Rights of Migrants*, (20 July 2020) UN Doc A/75/183 para 26. <https://docs.un.org/en/a/75/183> accessed 10 September 2025

¹³⁴ UN Working Group on Enforced or Involuntary Disappearances, *General comment on children and enforced disappearances adopted by the Working Group on Enforced or Involuntary Disappearances at its ninety-eighth session (31 October – 9 November 2012)* (14 February 2013) A/HRC/WGEID/98/1 paras 14–15. <https://docs.un.org/en/A/HRC/WGEID/98/1> accessed 2 September 2025.

¹³⁵ UN General Assembly, *Violence against women migrant workers*, Report of the Secretary-General, (26 July 2019) UN Doc A/74/235 para 21. <https://docs.un.org/en/A/74/235> accessed 3 November 2025.

¹³⁶ OHCHR, Independent Expert on sexual orientation and gender identity, *LGBTI and Gender-Diverse Persons in Situations of Forced Displacement* <https://rb.gy/isjvpv> accessed 10 November 2025.

¹³⁷ *Ibid.*

¹³⁸ The Yogyakarta Principles, *Principles on the Application of International Human Rights Law in the Context of Sexual Orientation and Gender Identity* (2007)

¹³⁹ *Ibid.*, principle 31.

¹⁴⁰ See ILGA World (International Lesbian, Gay, Bisexual, Trans and Intersex Association), *Comments on the First Draft of the General Comment No. 1 on Enforced Disappearances in the context of Migration*, (2023) http://ilga.org/wp-content/uploads/2024/01/CED_enforced_disappearances_migration_2023.pdf accessed 10 September 2025

often experience a compounded vulnerability, where factors such as gender, age, ethnicity, legal status, and socioeconomic background overlap to create a heightened risk of enforced disappearance.¹⁴¹ When migrants go missing in such contexts, it is essential to recognize the intersectional nature of their vulnerability. Their risk does not stem from a single factor, but rather from the cumulative impact of overlapping forms of social, economic, and legal marginalization,¹⁴² which can include restricted access to justice, lack of documentation, language barriers, and discrimination by authorities or private actors. Such vulnerabilities are often exacerbated by migration control policies that prioritize border management and security over the protection of fundamental human rights, inadvertently facilitating conditions in which disappearances can occur with impunity.

As emphasized by OHCHR,¹⁴³ particular attention must be given to individuals or groups who are at an elevated risk of disappearance, including women, children, LGBTIQ+ persons, stateless individuals, and undocumented migrants. States, as parties to international human rights law, are therefore obligated to adopt preventive measures that are specifically tailored to these risks. This includes proactive monitoring, early-warning mechanisms, accessible reporting channels, and policies that address the structural inequalities contributing to vulnerability. Failure by States to implement such measures, or to adequately respond when disappearances occur, not only exacerbates the immediate harm suffered by affected individuals but also reinforces broader systemic patterns of marginalization, invisibility, and impunity. In this way, cycles of human rights violations are perpetuated, undermining the rule of law, eroding trust in public institutions, and entrenching social exclusion.

¹⁴¹ CED, *Concluding observations on the report submitted by Gabon under article 29, paragraph 1, of the Convention* (10 October 2017) UN Doc CED/C/GAB/CO/1 para 19 <https://docs.un.org/en/CED/C/GAB/CO/1> accessed 10 September 2025.

¹⁴² UN Committee on the Elimination of Discrimination against Women, *General Recommendation No 38 on Trafficking in Women and Girls in the Context of Global Migration* (20 November 2020) UN Doc CEDAW/C/GC/38 para 6. <https://docs.un.org/en/CEDAW/C/GC/38> accessed 1 October 2025.

¹⁴³ OHCHR, *Enforced Disappearances: Fact Sheet No. 6* (Rev. 4, 2023) pag 9.

CHAPTER II: EXISTING INTERNATIONAL LEGAL FRAMEWORKS

To date, there is no specific international legal instrument that addresses the enforced disappearances of migrants as a distinct category. Therefore, in order to assess States' obligations to prevent the crime of enforced disappearance, it is essential to interpret its legal definition to the specific, and often precarious, realities faced by individuals in migratory contexts. This requires recognizing the intersection of multiple legal regimes, particularly those that define and prohibit enforced disappearance.

2.1 CONCEPTUAL DEFINITIONS

The rights of migrants are protected under international legal norms, primarily derived from international human rights law as well as specific treaties and conventions. However, the level and nature of protection afforded to them often depend on legal status, whether as refugees, asylum seekers, stateless persons, or undocumented migrants.¹⁴⁴ Therefore, before applying the legal definition of enforced disappearance to migratory contexts, it is important to clarify some key terms commonly used in this field.

2.1.1 Migrants and Refugees

Although there is no universally agreed legal definition of the term migrant, the International Organization for Migration (IOM), defines *migrant* as¹⁴⁵:

“An umbrella term, not defined under international law, reflecting the common lay understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally defined, such as smuggled migrants; as well as those whose status or means of movement are not specifically defined under international law, such as international students.”

In broad terms, refugees may be included within this general understanding of migrants, insofar as they are also displaced from their usual place of residence. However, refugees are distinguished by the specific reasons behind their displacement. The primary and universally accepted legal definition of a refugee, applicable to States, is found in Article 1(A)(2) of the

¹⁴⁴ John Cerone, “*Migrant Protection Categories in International Law & Practice*” (Henry J. Leir Institute for Migration and Human Security, 2023) <https://www.leirbrief.org/migrant-protection-categories/> accessed 10 November 2025.

¹⁴⁵ IOM, *Key Migration Terms* <https://www.iom.int/key-migration-terms> accessed 2 September 2025.

1951 Convention relating to the Status of Refugees, as amended by its 1967 Protocol. A refugee is defined as a person¹⁴⁶:

“[...] who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”.

For the purposes of this study, a broad and inclusive approach will be adopted when addressing migrants in line with the definition provided by the Committee on Enforced Disappearances in its General Comment No. 1 enforced disappearances in the context of migration (2023):¹⁴⁷

“(…)[T]he term “migrants” is used to refer to persons who move away from their place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons, such as family reunification or moving away from international or non-international armed conflicts, persecution, discrimination, natural disasters, environmental degradation, the effects of climate change, difficult economic situations or high crime rates. (…)”

This inclusive understanding encompasses all persons on the move, including migrants, refugees, asylum seekers, stateless persons, and others, who may fall under different legal categories but whose displacement places them at heightened risk of human rights violations, particularly enforced disappearance.

It is also relevant to highlight that General Comment No. 1 recognizes the particular vulnerabilities faced by migrants and suggests the need to apply existing international instruments to prevent their enforced disappearance of migrants which:¹⁴⁸

“may arise from their personal characteristics or socioeconomic status, the circumstances in which they travel – including their undocumented status and language barriers – or the treatment or conditions that they face in countries of origin, transit and destination, including border areas. The universal human rights and fundamental freedoms of migrants must be respected, protected and fulfilled at all times. Although States have a sovereign prerogative to manage their borders and regulate access to their territories, they must do so in full compliance

¹⁴⁶ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 1.

¹⁴⁷ UN Committee on Enforced Disappearances, *General Comment No 1 on Enforced Disappearance in the Context of Migration*, (26 October 2023) UN Doc CED/C/GC/1 para 1 <https://docs.un.org/CED/C/GC/1> accessed 2 September 2025.

¹⁴⁸ *ibid*, para 2.

with their obligations under international law, in particular human rights law, international humanitarian law, international refugee law and the law of the sea.”

2.1.2 Definitions of Enforced Disappearances

As a starting point at the global level, the legal framework for addressing enforced or involuntary disappearances is grounded in the principles set forth by the United Nations Declaration on the Protection of All Persons from Enforced Disappearance, adopted by the UN General Assembly on 18 December 1992 (*hereinafter* “the Declaration”).¹⁴⁹ While the Declaration does not contain a formal, standalone definition of enforced disappearance, it offers a foundational instrument of soft law and the characterization of the practice by outlining key elements.

Subsequently, regional human rights frameworks have gradually developed to define and address the crime of enforced disappearance.¹⁵⁰ For example, the Inter-American Convention on Forced Disappearance of Persons,¹⁵¹ adopted on 9 June 1994 and entering into force on 28 March 1996, provides one of the earliest treaty-based definitions of this crime within the Americas:¹⁵²

“[En]forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.”

While the international community had these instruments in place to address enforced disappearances, both of them had limitations that hindered the provision of protection. Both the 1992 Declaration and the Inter-American Convention were pioneering efforts, yet neither was fully exhaustive. The Inter-American Convention, for instance, omits several crucial elements, including the right to compensation and rehabilitation for victims; the right to complain and

¹⁴⁹ UN Declaration on the Protection of All Persons from Enforced Disappearance, GA Res 47/133, UN Doc A/RES/47/133 (18 December 1992)

¹⁵⁰ In regions such as Europe, Africa, and the Arab world, enforced disappearance is addressed through the interpretation of general human rights provisions or broader regional instruments. For instance, the European Court of Human Rights and the African Commission on Human and Peoples’ Rights have recognized enforced disappearance as a violation of rights such as life, liberty, and protection from torture. However, these frameworks do not provide a dedicated or formal definition of enforced disappearance similar to the one found in the Inter-American Convention or the International Convention for the Protection of All Persons from Enforced Disappearance.

¹⁵¹ Inter-American Convention on Forced Disappearance of Persons (adopted 9 June 1994, entered into force 28 March 1996) OAS Treaty Series No 68

¹⁵² *Ibid*, art. II

report the crime, which entails the State's obligation to investigate; and the protection of witnesses, family members of the victims. Moreover, this regional instrument fails to address fundamental issues necessary to close gaps in impunity, such as the prohibition of amnesties for perpetrators.¹⁵³ On the other hand, the United Nations Declaration covers all key aspects outlined above,¹⁵⁴ but due to its nature, it does not impose binding obligations on States.

As a complementary effort by the international community to address this issue, the International Convention for the Protection of All Persons from Enforced Disappearance¹⁵⁵ (*hereinafter* the Convention or ICPPED) was adopted in 2006. Entered in force in 2010, the Convention is currently the most relevant instrument for addressing this crime. It builds upon the 1992 Declaration and regional instruments, responding to the urgent need to confront the grave human rights violations and persistent impunity associated with enforced disappearances worldwide.

It marked a significant milestone in international human rights law, as Article 2 provides the first authoritative, universal and legally binding definition of enforced disappearance, articulated through three cumulative and interdependent elements:¹⁵⁶

- (a) the arrest, detention, abduction, or any other form of deprivation of liberty;*
- (b) carried out by state agents or by individuals acting with the authorization, support, or acquiescence of the state; and*
- (c) followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, thereby placing them outside the protection of the law.*

Following its adoption, the body established under the Convention to oversee its implementation, the Committee on Enforced Disappearances (CED), has consistently emphasized that States Parties must adopt all necessary measures to align their domestic legal frameworks fully with the Convention's definition of enforced disappearance.¹⁵⁷ In several

¹⁵³ These gaps have been addressed over time through IACtHR jurisprudence, which has affirmed the State's duty to investigate, prosecute, and guarantee reparations and that amnesty laws for serious human rights violations are incompatible with the ACHR. See e.g., *Barrios Altos v Peru*, Merits, Series C No 75 (IACtHR, 14 March 2001).

¹⁵⁴ *Ibid* (n147) arts 13, 18 and 19

¹⁵⁵ International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3.

¹⁵⁶ *Ibid*, Art. 2.

¹⁵⁷ CED, *Concluding observations on the report submitted by Lithuania under article 29 (1) of the Convention* (16 October 2017), UN Doc CED/C/LTU/CO/1 para 12 <https://docs.un.org/en/CED/C/LTU/CO/1> accessed 10 September 2025; *Concluding Observations on Argentina* (12 December 2013) UN Doc CED/C/ARG/CO/1 para 13 <https://docs.un.org/en/CED/C/ARG/CO/1> accessed 10 September 2025; *Concluding Observations on the Netherlands* (10 April 2014) UN Doc CED/C/NLD/CO/1 para 15, <https://docs.un.org/en/CED/C/NLD/CO/1> accessed 2 October 2025.

instances, it has urged States to reform, review, or accelerate the revision of their criminal codes¹⁵⁸ to ensure that the national definition reflects, without limitation or distortion, the elements contained in Article 2 of the Convention.¹⁵⁹

In response, the Committee has provided specific guidance to ensure that national definitions neither exceed nor fall short of the Convention's scope.¹⁶⁰ In particular, it has recommended that the definition explicitly cover "*the arrest, detention, abduction, or any other form of deprivation of liberty by State agents or by persons or groups acting with the authorization, support, or acquiescence of the State,*"¹⁶¹ and that it include the obligation to provide information on both the fate and the whereabouts of the disappeared person.¹⁶²

Ensuring that national definitions of enforced disappearance align precisely with the Convention's scope is essential to preserving the coherence and effectiveness of the international protection regime. Definitions that fall short risk leaving certain forms of disappearance uncriminalized, creating impunity gaps and undermining States' preventive and investigative duties, while overly expansive definitions threaten legal certainty and distort the Convention's carefully constructed elements. This is particularly critical in migration contexts, where contemporary practices demand a faithful yet evolutive interpretation of the Convention's elements to adequately capture emerging forms of disappearance.

2.2 COMPLEMENTARY LEGAL REGIMES

Enforced disappearance is a complex, multidimensional violation that affects a broad range of rights, and as such, it falls within the intersection of various legal regimes. Therefore, the legal framework governing enforced disappearance does not exist in isolation under the ICPPED. Although the Convention is the only treaty specifically dedicated to enforced

¹⁵⁸ CED, *Concluding observations on the report submitted by Argentina under article 29, paragraph 1, of the Convention* (12 December 2013) UN Doc CED/C/ARG/CO/1 para 13 <https://docs.un.org/en/CED/C/ARG/CO/1> accessed 1 October 2025; *Concluding Observations on the Netherlands* (10 April 2014) UN Doc CED/C/NLD/CO/1 para 15 <https://docs.un.org/en/CED/C/NLD/CO/1> accessed 1 October 2025; *Concluding Observations on Senegal* (18 April 2017) UN Doc CED/C/SEN/CO/1 para 14, <https://docs.un.org/en/CED/C/SEN/CO/1> accessed 10 September 2025

¹⁵⁹ ICPPED, art 2.

¹⁶⁰ CED, *Concluding Observations on the Netherlands* (10 April 2014) UN Doc CED/C/NLD/CO/1 para 14; *Concluding Observations on Lithuania* UN Doc CED/C/LTU/CO/1 (16 October 2017), UN Doc CED/C/LTU/CO/1 para 11

¹⁶¹ CED, *Concluding Observations on Honduras* (4 July 2018) UN Doc CED/C/HND/CO/1 para 15 <https://docs.un.org/en/CED/C/HND/CO/1> accessed 2 October 2025; *Concluding Observations on Peru* (8 May 2019) UN Doc CED/C/PER/CO/1 para 15(a). <https://docs.un.org/en/CED/C/PER/CO/1> accessed 2 October 2025

¹⁶² CED, *Concluding Observations on Honduras* (4 July 2018) UN Doc CED/C/HND/CO/1 para 15 <https://docs.un.org/en/CED/C/HND/CO/1> accessed 2 October 2025

disappearances, it must be interpreted and applied in conjunction with other relevant instruments of international law. This includes, but it is not excluded to, international human rights law, international refugee law, international criminal law and regional instruments.

Each of these legal frameworks provides complementary protections, mechanisms, and obligations for States. Understanding these connections is essential for fully grasping the legal responsibilities of States in preventing enforced disappearances. It also highlights the importance of ensuring that migrants are not subjected to this crime, and that States implement measures that safeguard their rights, visibility, and access to justice.

2.2.1 International Human Rights Law (IHRL)

Enforced disappearance inherently violates a multitude of rights protected under international human rights law. Its definition under ICPPED art. 1 “*a deprivation of liberty (...) followed by the (...) concealment of the fate or whereabouts of the disappeared person*” means that it is not a single or isolated act, but rather a continuing violation that persists until the fate of the victim is clarified. This continuing nature¹⁶³ engages various international human rights instruments, including, the International Covenant on Civil and Political Rights (ICCPR or the Covenant)¹⁶⁴, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)¹⁶⁵ and regional human rights mechanisms.

Although the ICCPR is not a treaty specifically devoted to enforced disappearances, its provisions must be interpreted and applied in accordance with the concept of enforced disappearance as recognized under international law. In this regard, the ICCPR guarantees that:¹⁶⁶

¹⁶³ UN Commission on Human Rights, *Report of the Working Group on Enforced or Involuntary Disappearances* (12 February 2003) UN Doc E/CN.4/2003/71 para 44 <https://docs.un.org/en/E/CN.4/2003/71> accessed 10 September 2025; Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (13 February 2003) UN Doc E/CN.4/2005/66 para 44 <https://docs.un.org/en/E/CN.4/2003/71> accessed 2 October 2025; Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance, (2 February 2006) UN Doc E/CN.4/2006/57 para 113 and p 32 <https://docs.un.org/en/E/CN.4/2006/57> accessed 2 October 2025

¹⁶⁴ International Covenant on Civil and Political Rights (ICCPR) 1966, UNTS 999 (entered into force 23 March 1976).

¹⁶⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1984, UNTS 1465 (entered into force 26 June 1987).

¹⁶⁶ *Ibid*, art 2(1)

“[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”.

The preamble and other provisions of the ICCPR reflect the core principle of non-discrimination,¹⁶⁷ affirming that the Covenant’s protections extend to all individuals within a State’s jurisdiction, including those in vulnerable situations, such as migrants, asylum seekers, and stateless persons, regardless of their immigration status.

Under the same instrument, States are bound to uphold non-derogable rights¹⁶⁸ such as the right to life.¹⁶⁹ Article 6 of the ICCPR has been interpreted by the HRCttee as imposing both *negative* obligations, requiring States to refrain from arbitrary deprivation of life, and *positive obligations*, which oblige them to take active measures to protect life. In the context of migration, restrictive border measures, arbitrary detention, and aggressive immigration enforcement may place individuals at risk of disappearance, thereby engaging the State’s duty to prevent foreseeable threats to life.¹⁷⁰

The ICCPR also includes the right to liberty and security of the person,¹⁷¹ freedom from torture or cruel, inhuman or degrading treatment,¹⁷² and the right to recognition as a person before the law.¹⁷³ All of them, relevant in the context of enforced disappearances in migratory settings, denying them access to legal recognition, protection, and remedies, and making them particularly vulnerable to further human rights violations. It is important to note that Article 2 of the ICCPED is framed in broader terms than Article 9 of the ICCPR in this respect: While the ICCPR prohibits arbitrary arrest and detention, as well as the deprivation of liberty, the ICCPED addresses not only arrest and detention but also abduction and any other form of deprivation of liberty as potential elements of a disappearance.

Equally important is that Article 13 of the ICCPR complements Article 16 of the ICCPED, providing that *“everyone is free to leave any country, including his or her own,”*¹⁷⁴

¹⁶⁷ *Ibid*, art 16

¹⁶⁸ Non-derogable rights are fundamental human rights that cannot be suspended or limited, even in times of public emergency, as recognized under international human rights law. See e.g., ICCPR, art. 4(2)

¹⁶⁹ ICCPR, art 6

¹⁷⁰ *Ibid*

¹⁷¹ *Ibid*, art 7

¹⁷² *Ibid*, art 9

¹⁷³ *Ibid*, art 16

¹⁷⁴ *Ibid*, art 12(2).

and stipulating 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 law.*”¹⁷⁵

In this regard, the HRCtee has addressed situations involving so-called pushbacks and has emphasized that, where the life or safety of migrants is at risk, the principle of *non-refoulement* must be strictly upheld.¹⁷⁶

It is important to recall that the ICCPR entered into force in 1967, at a time when the international community lacked specific legal instruments to address or prosecute the crime of enforced disappearance, and even less so in migration contexts. As such, its provisions have played an important role in affording protection against this grave violation¹⁷⁷ until the adoption of more specialized treaties, such as the ICPPED.

The HRCtee¹⁷⁸ has also consistently recognized enforced disappearance as a grave violation of the rights enshrined in the ICCPR, particularly in cases where individuals are detained without legal safeguards and placed outside the protection of the law¹⁷⁹ and has clarified the scope of these protections, affirming that:¹⁸⁰

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

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment¹⁸¹ (The “Toture Convention”) reinforces and complements the protections afforded by the ICPPED and the ICCPR, as enforced disappearance is closely linked to the prohibition of torture, given the severe psychological and physical suffering it inflicts on both the victims and their families. Article 1 of the Convention defines torture as:¹⁸²

¹⁷⁵ *Ibid*, art 13

¹⁷⁶ See Chapter III *non-refoulment* principle

¹⁷⁷ See HRCtee, *Almeida de Quinteros v Uruguay*, No 107/1981, CCPR/C/19/D/107/1981 (21 July 1983), para 14

¹⁷⁸ See ICCPR, art. 28

¹⁷⁹ HRCtee, *General Comment No.36: Right to Life* (Article 6) (3 September 2019) UN doc CCPR/C/GC/36 para 57 <https://docs.un.org/en/ccpr/c/gc/36> accessed 10 September 2025.

¹⁸⁰ HRCtee, *General Comment No. 15: The Position of Aliens Under the Covenant* (11 April 1986) paras 1-2 <https://www.refworld.org/legal/general/hrc/1986/en/38724> Accessed 4 September 2025

¹⁸¹ Committee Against Torture, established under Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 Dec 1984, entered into force 26 June 1987) 1465 UNTS 85

¹⁸² *Ibid*, art 1.

“Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity (...)”

The UN body that monitors how States implement the Torture Convention, the Committee against Torture (CAT)¹⁸³, has interpreted the Convention as encompassing situations in which enforced disappearance, whether as a context or a method of torture, causes severe pain and suffering within the meaning of Article 1.¹⁸⁴ The Convention against Torture has also been interpreted in the context of migration, including issues such as pushbacks and the principle of *non-refoulement* in Article 3,¹⁸⁵ emphasizing the obligation of States to prevent, investigate, and punish acts of torture or cruel, inhuman, or degrading treatment or punishment, regardless of the individuals’ legal or immigration status.¹⁸⁶

In the case of *H.K. v. Australia*,¹⁸⁷ the Committee found that returning the complainant to his country of origin would expose him to a real, personal, and foreseeable risk of being subjected to torture, in violation of Article 3 of the Convention.¹⁸⁸ In reaching this conclusion, the Committee relied on a range of evidence, including country-specific reports indicating that Pakistani authorities, particularly intelligence agencies, have allegedly targeted ethnic Baloch individuals suspected of involvement in the Baloch nationalist movement through practices such as enforced disappearance. These reports noted that most victims appeared to have been singled out due to their presumed affiliation with Baloch political parties, nationalist movements, or student organizations.

Furthermore, individuals have reportedly been persecuted based on tribal affiliations, especially in cases where certain tribes, such as the Bugti or Mengal, were engaged in conflict

¹⁸³ *Ibid*, art 17.

¹⁸⁴ CAT, *Communication No 456/2011, Decision adopted by the Committee at its fifty-fourth session (20 April to 15 May 2015)*, (23 May 2015) UN Doc CAT/C/54/D/456/2011, para 6.6. <https://docs.un.org/en/CAT/C/54/D/456/2011> accessed 2 October 2025.

¹⁸⁵ Torture Convention, art. 3; see also CAT, *Communication No. 566/2013, Decision under Article 22 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (54th session)* (22 Oct. 2015) UN Doc CAT/C/55/D/566/2013 para 8.2 <https://digitallibrary.un.org/record/3993832?v=pdf> accessed 1 September 2025

¹⁸⁶ See Chapter III

¹⁸⁷ CAT, *H.K. v Australia Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 701/2015 (15 June 2017)* UN Doc CAT/C/60/D/701/2015 para 7.5, https://www.worldcourts.com/cat/eng/decisions/2017.05.10_HK_v_Australia.pdf accessed 10 September 2025

¹⁸⁸ *Ibid*, para 7.2

with Pakistan's armed forces. While the exact number of enforced disappearances attributed to security forces in the region remains unknown, Baloch nationalist groups claim the figures number in the thousands. In contrast, provincial authorities in Balochistan have publicly acknowledged approximately 1,000 cases on various occasions.¹⁸⁹

Other relevant international instruments, such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,¹⁹⁰ adopted in December 1990, reaffirms the principle that the human rights of migrants must be fully respected and protected without any form of discrimination, irrespective of whether migrants hold legal status or permanent residence in the country where they reside.¹⁹¹ This Convention explicitly affirms that all migrant workers have the right to leave any State, including their country of origin,¹⁹² a fundamental freedom that is similarly safeguarded under other international instruments, such as the Convention on the Rights of the Child¹⁹³ and the International Convention on the Elimination of All Forms of Racial Discrimination,¹⁹⁴ thereby reinforcing the universality and non-discriminatory character of human rights protections for migrants, including in relation to their protection against crimes such as enforced disappearances

2.2.2 International Refugee Law (IRL)

For the purposes of this study, and within the scope of the research, two additional widely ratified international human rights instruments that address enforced disappearances, including in the context of migration, have been selected for analysis.

International refugee law plays an important role in addressing the risks associated with enforced disappearance and provides additional tools to prevent this crime, particularly in the case individuals fleeing persecution or state repression. The 1951 Convention relating to the Status of Refugees and its 1967 Protocol¹⁹⁵ (the Refugee Convention) establish the legal basis

¹⁸⁹ *Ibid*, para 7.7.

¹⁹⁰ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 93

¹⁹¹ *Ibid*, art 7.

¹⁹² *Ibid*, art. 8

¹⁹³ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art 10.

¹⁹⁴ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195, art 5.

¹⁹⁵ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, para 146.

for international protection, defining a refugee as a person who has a well-founded fear of persecution on specific grounds.

In this regard, when enforced disappearance is systematically used as a tool of repression, especially by state authorities targeting individuals based on their race, religion, nationality, political opinion, or membership in a particular social group, it falls within the scope of “*persecution*” under the 1951 Convention.¹⁹⁶ In this context, the Committee on Enforced Disappearances (CED) has recommended that, in order to prevent the risk of being subjected to enforced disappearance, procedures for applying for refugee status be implemented in full accordance with the principle of *non-refoulement*¹⁹⁷ and that States expedite the establishment of a statutory asylum framework.¹⁹⁸

In such cases, the risk of enforced disappearance not only provides grounds for a claim to refugee status but also imposes clear legal obligations on receiving States to take preventive measures against the commission of this crime.¹⁹⁹ All asylum seekers, including those without valid travel documents or visas, should have unimpeded access to effective refugee status determination procedures, in full compliance with Article 16 of the Refugee Convention.

Complementing Article 3 of the CAT and central to IRL is the principle of *non-refoulement*, enshrined in Article 33(1) of the Refugee Convention, which provides that:²⁰⁰

“[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.”

As explained above, this provision imposes a binding obligation on States to refrain from returning individuals to a country where there are substantial grounds for believing that they would be subjected to torture or face a real risk of serious harm, including the risk of being subjected to enforced disappearance. This obligation is preventive and forward-looking; it is

¹⁹⁶ Guy S Goodwin-Gill, *The Refugee in International Law* (3rd edn, Oxford University Press, 2007) pp 3–4 <https://doi.org/10.1093/law/9780198808565.001.0001> accessed 2 October 2025.

¹⁹⁷ CED, *Concluding observations on the report submitted by Ecuador under article 29 (1) of the Convention*, (19 April 2017) UN Doc CED/C/ECU/CO/1 para 16 <https://docs.un.org/en/CED/C/ECU/CO/1> accessed 20 September 2025.

¹⁹⁸ CED, *Concluding observations on the report submitted by Tunisia under article 29 (1) of the Convention* UN (25 May 2016) Doc CED/C/TUN/CO/1 para 28 <https://docs.un.org/en/CED/C/TUN/CO/1> accessed 13 September 2025.

¹⁹⁹ *Ibid*, p 4.

²⁰⁰ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, art 33.

triggered not by the actual occurrence of harm, but by a credible threat thereof and provides a clear example of the convergence of tools under international human rights law that reinforce the prevention of this crime. However, it is important to distinguish between these two instruments:

The protection against *refoulement* under CAT is reinforced by the fact that the principle of *non-refoulement* is widely recognized as a rule of customary international law²⁰¹ in cases where the individual faces a real risk of torture or other forms of ill-treatment, conditions that include the risk of enforced disappearance. As such, this obligation applies to all States, regardless of whether they have ratified the Convention.²⁰²

By contrast, the principle of *non-refoulement* under international refugee law, while it may contribute to the prevention of enforced disappearance, particularly in the context of *pushbacks*, removal practices and in identifying the protection needs of at-risk individuals, has been described as “*progressively acquiring the character of a peremptory norm of international law*.”²⁰³ However, scholars continue to argue that *non-refoulement* under the 1951 Refugee Convention has not yet attained *jus cogens* status, in contrast to its absolute nature under the CAT, which is widely recognized as customary international law and binds all States without exception.²⁰⁴ Nonetheless, the international refugee law principle provides an important layer of protection against the risk of enforced disappearance and is an essential factor in prevention efforts.

2.2.3 International Criminal Law (ICL)

Another relevant instrument to consider regarding States’ obligations to prevent enforced disappearances is International Criminal Law (ICL). The Rome Statute of the International Criminal Court (ICC) explicitly recognizes enforced disappearance as a crime

²⁰¹ UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law*: Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93 (1994) <https://shorturl.at/LLYf5> accessed 2 October 2025.

²⁰² See Chapter III.

²⁰³ UNHCR, *Amicus Curiae Submission on the Interpretation of the 1951 Refugee Convention* (Refworld, 1994) para 40, <https://www.refworld.org/jurisprudence/amicus/unhcr/1994/en/20625> accessed 10 November 2025.

²⁰⁴ Janakan Muthukumar, *The Normative Context in Defining “Refugees”*, (Modern Diplomacy, 2019), <https://shorturl.at/am8UW> accessed 13 November 2025.

against humanity under Article 7(1)(i),²⁰⁵ when committed as part of a widespread or systematic attack against any civilian population.

This classification reflects the seriousness of enforced disappearance under international law. The ICC may exercise jurisdiction over such crimes when they are committed on the territory of a State Party, by a national of a State Party, or when a situation is referred by the UN Security Council.²⁰⁶ In this context, States Parties are required to cooperate fully with the ICC in the investigation and prosecution of such crimes.²⁰⁷

While the ICC has rendered judgments and secured convictions for various core international crimes, it has not yet done so for the crime of enforced disappearance as a standalone offence. However, the CED has constantly emphasized the imprescriptible character of enforced disappearance as a crime against humanity²⁰⁸ and has made specific recommendations, including: (a) reviewing the existing definition of enforced disappearance as a crime against humanity to ensure full conformity with Article 5 of the Convention;²⁰⁹ (b) criminalizing enforced disappearance as a crime against humanity, irrespective of the date on which the crime was committed;²¹⁰ (c) distinguishing enforced disappearance from other international crimes, such as enslavement, and establishing that it need not be preceded by abduction to constitute a crime against humanity.²¹¹

It is important to mention that the Rome Statute introduces a temporal element to the definition of enforced disappearance, stating in Art. 7(2)(i) that it involves:²¹²

“the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that

²⁰⁵ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 7(1)(i).

²⁰⁶ *Ibid*, art 13

²⁰⁷ *Ibid*, art 86

²⁰⁸ CED, *Concluding observations on the report submitted by Uruguay under article 29, paragraph 1, of the Convention, adopted by the Committee at its fourth session (8–19 April 2013)* (8 May 2013) UN Doc CED/C/URY/CO/1 para 14 <https://docs.un.org/en/CED/C/URY/CO/1> accessed 1 October 2025; *Concluding observations on the report submitted by Armenia under article 29, paragraph 1, of the Convention* (13 March 2015) UN Doc CED/C/ARM/CO/1 para 13, <https://docs.un.org/en/CED/C/ARM/CO/1> accessed 3 October 2025.

²⁰⁹ CED, *Concluding observations on the report submitted by Portugal under article 29 (1) of the Convention* (5 December 2018) UN Doc CED/C/PRT/CO/1 para 13 <https://docs.un.org/en/CED/C/PRT/CO/1> accessed 3 October 2025

²¹⁰ CED, *Concluding observations on the report submitted by Iraq under article 29 (1) of the Convention* (13 October 2015) UN Doc CED/C/IRQ/CO/1 para 14 <https://docs.un.org/en/ced/c/irq/co/1> accessed 1 October 2025.

²¹¹ CED, *Concluding observations on the report submitted by Senegal under article 29 (1) of the Convention* (18 April 2017) UN Doc CED/C/SEN/CO/1 para 18 <https://docs.un.org/en/CED/C/SEN/CO/1> accessed 4 October 2025.

²¹² Rome Statute, art 7(2)(i).

deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.”

This temporal requirement is a point of divergence from most international human rights instruments, such as the ICPPED, which define enforced disappearance without reference to any minimum duration of concealment. However, neither the Elements of Crimes²¹³ nor ICC case law specify the duration that constitutes a “prolonged period” for the purposes of Article 7(2)(i). This difference has been also widely debated among international legal scholars, some of whom argue that the ICC’s temporal criterion risks narrowing the scope of protection, especially in contexts where disappearances are brief but nonetheless severe and unlawful.²¹⁴

In short, the classification of enforced disappearance under the Rome Statute and other ICL instruments has reaffirmed that this crime may constitute a crime against humanity when committed as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack. This, however, does not mean that a single act of enforced disappearance ceases to be a crime or loses its character as a grave breach of international law. Even when committed in isolation, it engages a set of above-mentioned binding international obligations concerning its prevention and redress.

2.2.4 Regional Bodies

Regional bodies also play an essential role in supporting international law efforts to prevent enforced disappearances. The Inter-American Convention on the Forced Disappearance of Persons not only prohibits the practice of enforced disappearance,²¹⁵ but also obliges State Parties to recognise it as an offence under their domestic legal systems²¹⁶ and to ensure that the corresponding penalties are proportionate to its gravity.²¹⁷ The American Convention further establishes obligations to prevent,²¹⁸ prosecute,²¹⁹ and punish those responsible,²²⁰ whether they are public officials or private individuals acting with the authorization, support, or

²¹³ International Criminal Court, Elements of Crimes (ICC, 2011) <https://shorturl.at/gr1Oi> accessed 6 December 2025

²¹⁴ Gabriella Citroni, *When Is It Enough? Enforced Disappearance and the “Temporal Element”* (Droits fondamentaux, n° 9, janvier 2011 - décembre 2012) <https://shorturl.at/6nXtq> accessed 10 August 2025.

²¹⁵ Inter-American Convention on Forced Disappearance of Persons (adopted 9 June 1994, entered into force 28 March 1996) art I.

²¹⁶ *Ibid* art III

²¹⁷ *Ibid* (n214)

²¹⁸ *Ibid* art I(c)

²¹⁹ *Ibid* art VII

²²⁰ *Ibid* art I(b)

acquiescence of the State,²²¹ thereby reinforcing accountability and compliance with international human rights standards.

Regional human rights mechanisms, particularly the jurisprudence of the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECtHR), have also played a significant role in advancing the interpretation of enforced disappearance. Their case law, which will be further examined in the legal analysis in Chapter III, is highly relevant when assessing States' obligations to prevent this crime and related human rights violations under international law.

On the one hand, the IACtHR, given the longstanding prevalence of enforced disappearances in the region,²²² as discussed in the historical background, have developed robust legal standards and procedural tools specific to such cases.²²³ In its jurisprudence, the IACtHR has consistently held that enforced disappearance constitutes a multiple and continuous violation of several rights, including the rights to life, liberty, personal integrity, and judicial protection.²²⁴

In one of its most emblematic cases and first contentious case decided on enforced disappearance, *Velásquez-Rodríguez v Honduras*,²²⁵ the IACtHR articulated core principles that continue to shape international legal obligations in this area. The Court held that “[t]he State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction(...)”.²²⁶ Although the decision did not yet treat enforced disappearance as a separately codified offence under a treaty, it established that a State's obligation to prevent such

²²¹ *Ibid* art II

²²² Recently, in May 15, 2025, the IACtHR has also expressed their concerned about “*numerous reports concerning the indiscriminate use of immigration detention, incommunicado detention of migrants, and instances of short-term enforced disappearances in the context of involuntary or compulsory removal procedures.*” <https://shorturl.at/rfQ0J> accessed 10 June 2025

²²³ For example, the IACtHR has issued provisional measures, developed standards on the right to truth, and articulated the concept of “forced disappearance” as a distinct and autonomous human rights violation. See, e.g., *Velásquez Rodríguez v Honduras*, Judgment, Series C No 4, paras 166, 172, 174 (IACtHR, 29 July 1988); *Bámaca-Velásquez v Guatemala*, Judgment, Series C No 70 (IACtHR, 25 November 2000); *Radilla-Pacheco v Mexico*, Judgment, Series C No 209 (IACtHR, 23 November 2009)

²²⁴ See *Velásquez Rodríguez v Honduras*, Judgment, Series C No. 4 (IACtHR, July 29, 1988) paras. 166, 172, 174; *Barrios Altos v Peru*, Judgment, Series C No. 75, (IACtHR, March 14, 2001) paras. 41–44; *González et al. ("Cotton Field") v Mexico*, Judgment, Series C No. 205 (IACtHR, November 16, 2009) paras. 354–359; *Almonacid Arellano et al. v. Chile*, Judgment, Series C No. 154 (IACtHR, September 26, 2006), paras. 99–104.

²²⁵ *Velásquez-Rodríguez v Honduras*, Judgment, Series C No 4 (IACtHR 29 July 1988)

²²⁶ *Ibid*, para 174

acts arises not only from direct involvement, but also from a failure to exercise due diligence, affirming both negative and positive obligations to prevent enforced disappearances.

Among other cases, the IACtHR has adopted a progressive approach to the obligations of States regarding the prevention of enforced disappearances and its jurisprudence on reparations has been described as “by far, the most developed and creative”²²⁷. For instance, in *Blake v Guatemala*, the Court held that:²²⁸

“The circumstances of such disappearances generate suffering and anguish, in addition to a sense of insecurity, frustration and impotence in the face of the public authorities' failure to investigate. (...) Consequently, the Court considers that such suffering, to the detriment of the mental and moral integrity of Mr. Nicholas Blake's relatives, constitutes a violation by the State of Article 5 of the Convention in relation to its Article 1(1).”

Recognizing that the anguish and psychological suffering experienced by the relatives of a disappeared journalist, resulting from the State’s failure to provide information about his fate, constituted a violation of their right to humane treatment under Article 5 of the American Convention on Human Rights.²²⁹

Similarly, the European Court of Human Rights (ECtHR) has addressed numerous applications concerning enforced disappearances, consistently affirming that such acts constitute serious violations of Articles 2 (right to life),²³⁰ 3 (prohibition of torture),²³¹ 5 (right to liberty and security of person)²³² and 13 (right to an effective remedy)²³³ of the European Convention on Human Rights (ECHR).

The ECtHR has also developed a substantial body of jurisprudence clarifying States’ obligations to prevent exposure to ill-treatment or disappearance, particularly in cases involving the protection of migrants. In *Hirsi Jamaa and Others v Italy*,²³⁴ the Court condemned Italy for returning migrants intercepted at sea to Libya, highlighting that States’ extraterritorial actions

²²⁷ Working Group on Enforced or Involuntary Disappearances (WGEID), *Annual Report for 2012* (28 January 2013) UN Doc A/HRC/22/45 fn 15, <https://docs.un.org/en/A/HRC/22/45> accessed 1 October 2025

²²⁸ *Blake v Guatemala*, Judgment, Series C No 36 (IACtHR, 24 January 1998) paras 114 – 116.

²²⁹ American Convention on Human Rights (Pact of San José, Costa Rica) (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123.

²³⁰ *Öneryıldız v Turkey* (ECtHR, Grand Chamber, 30 November 2004) paras 71–73.

²³¹ *Iskandarov v Russia* App no 17185/05 (ECtHR, 23 September 2010) para 129; *Abdulkhakov v Russia* App no 14743/11 (ECtHR, 2 October 2012) para 243.

²³² *El-Masri v The Former Yugoslav Republic of Macedonia* (ECtHR, 13 December 2012) para 260.

²³³ *Varnava and Others v Turkey* (ECtHR, Grand Chamber, 18 September 2009) Apps nos 16064/90 et al.

²³⁴ *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012).

do not exempt them from their Convention obligations.²³⁵ Additionally, in *M.S.S. v Belgium and Greece*,²³⁶ the Court found that Belgium violated Article 3 by transferring the applicant to Greece under the Dublin II Regulation:

*“Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the effectiveness of a remedy within the meaning of Article 13 imperatively requires close scrutiny by a national authority, independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3, as well as a particularly prompt response; it also requires that the person concerned should have access to a remedy with automatic suspensive effect.”*²³⁷

In regard to the deprivation of liberty, the ECtHR has consistently held that enforced disappearance or arbitrary detention constitutes a serious violation of Article 5 of the European Convention on Human Rights. In *El-Masri v “The Former Yugoslav Republic of Macedonia”*,²³⁸ the Court found that the applicant’s abduction, detention, and transfer abroad by State agents violated Article 5, which shows the State’s positive obligations to protect individuals from unlawful detention and ensure accountability for violations. Similarly, in *Baysayeva v Russia*²³⁹ and *Gaysanova v Russia*,²⁴⁰ the Court recognized that the prolonged disappearance of individuals, often accompanied by the failure to investigate their fate, amounted to ongoing violations of Article 5 and created additional psychological suffering for relatives, implicating Article 3 as well. This jurisprudence is relevant for assessing the obligation of States to ensure that migrants, including asylum-seekers are not subjected to arbitrary detention or disappearance and that effective remedies and safeguards are in place to protect their fundamental rights.

As we have seen, in the context of enforced disappearance, the ECtHR has consistently recognized State obligations to prevent and respond to such violations. However, it generally confines itself to declaratory judgments and monetary compensation, truth-seeking remedies to the Committee of Ministers under Article 46 of the ECHR.²⁴¹ In *Varnava and Others v Turkey*, for example, the Court refrained from ordering direct measures to clarify the fate and whereabouts of the disappeared, stating that:

²³⁵ *Ibid.*, para 178

²³⁶ *M.S.S. v Belgium and Greece* Application no 30696/09 (ECtHR, Grand Chamber, 21 January 2011).

²³⁷ *Ibid.*, para 293.

²³⁸ *El-Masri v “The Former Yugoslav Republic of Macedonia”* App no 39630/09 (ECtHR, Grand Chamber, 13 December 2012)

²³⁹ *Baysayeva v Russia* App no 74237/01 (ECtHR, 5 June 2007)

²⁴⁰ *Gaysanova v Russia* App no 40194/06 (ECtHR, 15 December 2016)

²⁴¹ European Convention on Human Rights, adopted 4 November 1950, ETS 5, Art 46.

“As regards the applicants’ views concerning the provision of an effective investigation, the Court reiterates the general principle that the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court’s judgment”²⁴²

Overall, ECtHR jurisprudence highlights both the strengths and limitations of regional human rights mechanisms in addressing enforced disappearances in migration contexts. While the Court clearly defines States’ normative obligations to prevent disappearances, protect migrants from ill-treatment, and ensure access to effective remedies, its approach to remedies is comparatively restrained.

While international and regional legal practices, as well as the main international human rights instruments, operate within distinct legal frameworks, their convergence has progressively shaped a coherent and evolving body of international law addressing the prevention of enforced disappearances, including in migration contexts. This chapter has outlined some of the most relevant, though not exhaustive, legal instruments that collectively protect a range of fundamental rights. To further contextualize enforced disappearances within the scope of this research, the following chapter will provide a legal analysis of these instruments in light of the current situation of enforced disappearances in migratory contexts, examining the challenges and legal implications that arise at the intersection of migration and enforced disappearance.

²⁴² Varnava and Others v Turkey App nos 16064/90, 16065/90 and others (ECtHR, Grand Chamber, 18 September 2009) para 222.

CHAPTER III: LEGAL ANALYSIS

3.1 ENFORCED DISAPPEARANCES UNDER INTERNATIONAL LAW

At present, the ICPPED constitutes the most comprehensive and universally applicable legal instrument addressing enforced disappearance. Its binding legal force, however, applies only to States that have ratified it, which undermines its capacity to prevent this crime for individuals along migratory routes crossing States with divergent treaty commitments. While 98 States have signed the Convention, only 77 had ratified it as of 2025,²⁴³ meaning that a significant number of States with high migration flows remain outside its legally binding obligations. This uneven participation weakens the Convention's protective mechanisms, particularly those requiring cross-border cooperation under Articles 12²⁴⁴ and 14.²⁴⁵ This limitation includes the requirement to put in place provisions on statutes of limitation and the obligation of States Parties to incorporate enforced disappearance as a specific offence within their domestic legal systems:²⁴⁶

“[e]ach State shall adopt effective legislative, administrative, judicial, or other measures to prevent and terminate acts of enforced disappearance within its jurisdiction.”

Article 35²⁴⁷ clarifies the temporal limitations of the Convention as well as the competence of the Committee on Enforced Disappearances (CED). The continuous nature of the crime means that certain obligations, particularly those related to prevention and investigation, remain active for as long as the fate or whereabouts of the disappeared person has not been clarified.²⁴⁸ However, the CED is prevented from examining individual communications concerning disappearances that commenced before the Convention entered into force for the State concerned, even when the disappearance continues to produce legal effects:²⁴⁹

“The Committee shall have competence solely in respect of enforced disappearances which commenced after the entry into force of this Convention. 2. If a State becomes a party to this Convention after its entry into force, the obligations of that State vis-à-vis the Committee shall

²⁴³ International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3. See UN Treaty Collection, Status-of-Treaties: IV-16 Convention

²⁴⁴ *Ibid.*, art. 12.

²⁴⁵ *Ibid.*, art. 14.

²⁴⁶ *Ibid.*, art 3.

²⁴⁷ *Ibid.*, art. 35.

²⁴⁸ *Ibid.*, art. 24(6)

²⁴⁹ *Ibid.*, Art. 35(1)(2)

relate only to enforced disappearances which commenced after the entry into force of this Convention for the State concerned.”

This gap often affects migrants who go missing along transnational routes, especially when their disappearance began in a State not party to the Convention or prior to ratification, which limits States’ obligations to prevent this crime.

Beyond temporal jurisdiction, the Convention also gives the CED with a set of important procedural and monitoring functions. These include the ability to receive and consider individual communications,²⁵⁰ examine inter-State complaints,²⁵¹ and request urgent actions for the immediate search and localization of disappeared persons.²⁵² The urgent action procedure,²⁵³ in particular, has proven to be one of the Convention’s most innovative contributions. It enables relatives, representatives, or any person with a legitimate interest to trigger an immediate response from the CED, compelling the concerned State to take all necessary measures to locate the disappeared person and clarify their fate. This mechanism is especially significant in migration contexts, where prompt action can mean the difference between life and death, and where families frequently face procedural obstacles when attempting to report a disappearance.

At the same time, the effectiveness of these mechanisms is necessarily conditioned by the extent to which States cooperate in good faith. States retain primary responsibility to conduct investigations,²⁵⁴ maintain official registries of persons deprived of liberty, including ensure prompt judicial oversight,²⁵⁵ and safeguard detainees against unacknowledged deprivation of liberty.²⁵⁶ The Convention makes explicit that no exceptional circumstances, including state of war or a threat of war, internal political instability or any other public emergency,²⁵⁷ may be invoked to justify enforced disappearance or derogate from the corresponding obligations. However, as discussed in Chapter I, the disappearances of migrants still frequently occur in contexts where States invoke exceptional or security-based

²⁵⁰ *Ibid*, Art. 31

²⁵¹ *Ibid*, Art. 32

²⁵² *Ibid*, Art. 30

²⁵³ *Ibid*, Art. 23(1)(c)

²⁵⁴ *Ibid*, art. 12(1-4)

²⁵⁵ *Ibid*, art. 17(3)

²⁵⁶ *Ibid*, art. 17(f)

²⁵⁷ *Ibid*, (n201) Art. 2.

justifications, such as the outsourcing of migration control, the use of informal detention sites, or expulsions at borders.

Based on this framework, two other core obligations reflected in the provisions of the ICPPED can be identified for the purposes of this thesis: first, States must criminalize enforced disappearance in domestic law and establish adequate institutional safeguards to promote and protect the right not to be subjected to it;²⁵⁸ second, and most importantly, the instrument sets out a comprehensive preventive framework²⁵⁹ that States Parties are required to operationalise to protect all persons under their jurisdiction, an obligation that extends to cross-border and extraterritorial situations.

3.2 TERRITORIAL JURISDICTION IN CROSS-BORDER CONTEXTS

As previously mentioned, enforced disappearances in migration contexts often occur across multiple jurisdictions, challenging the traditional notion of territorial jurisdiction.²⁶⁰ These trans-national dimensions present unique challenges for attributing obligations to prevent enforced disappearances. Migrants may be apprehended in one country, detained in another, and subsequently disappeared in a third, sometimes under formal agreements or informal arrangements between States.²⁶¹

Under Article 9(1) of the ICPPED, States Parties must establish jurisdiction over enforced disappearances occurring within their territory.²⁶² However, Article 6 further sets out a broader framework of obligations that extends beyond direct commission, requiring States to prevent, investigate and punish violations under the Convention whenever they exercise effective responsibility for, and control over, activities connected to the crime of enforced disappearance.²⁶³ The Convention also contemplates wider responsibilities, including situations in which acts are committed with the authorization, support, or acquiescence of the State.²⁶⁴

²⁵⁸ *Ibid*, Art. 4.

²⁵⁹ See ICPPED, Preamble and arts 6(iii), 12(4), 22, 23(a–c), 25(1)(a–b).

²⁶⁰ Grażyna Baranowska, *Disappeared Migrants and Refugees: The Relevance of the International Convention on Enforced Disappearance in their Search and Protection* (German Institute for Human Rights, 2020) pp 16–17.

²⁶¹ See UN Human Rights Council, ‘*Phenomenon of migrants going missing or subjected to enforced disappearance – human rights analysis*’, Report of the Special Rapporteur on the human rights of migrants, Gehad Madi, (28 April 2025) UN Doc A/HRC/59/49* para 78 <https://docs.un.org/en/A/HRC/59/49> accessed 10 September 2025; International Rescue Committee, “*Migration and Asylum: What is the Italy-Albania asylum deal?*” (Published 15 October 2024) <https://shorturl.at/0Xxe9> accessed 13 November 2025.

²⁶² ICPPED, Art. 9.

²⁶³ *Ibid*, Art. 6.

²⁶⁴ *Ibid*, Art. 2.

This framework recognizes that, in migratory contexts, multiple actors, including State authorities, non-State actors, and private contractors, may contribute to disappearances.

Other international human rights instruments have further reinforced the notion of extraterritorial obligations, a concept that remains among the most contested in international human rights law, particularly in relation to positive duties. Human rights bodies have adopted diverse, and often expansive, interpretations of when jurisdiction is triggered. For instance, the IACtHR has recognised extraterritorial jurisdiction in situations where a State exercises effective control over private activities abroad that result in human rights violations.²⁶⁵ Similarly, the Human Rights Committee has accepted that jurisdiction may arise where a State has the capacity to act to protect individuals with whom it maintains “a special relationship of dependency,” even when they are situated outside its territory.²⁶⁶

The ECtHR has generally adopted a restrictive approach to extraterritorial jurisdiction and has dismissed proposals to interpret jurisdiction as a mere cause-and-effect relationship.²⁶⁷ Instead, the Court has developed a series of context-specific tests to determine when such jurisdiction arises. These include assessing whether a State exercises control over a territory or over an individual;²⁶⁸ whether it performs public powers in another State with that State’s consent, invitation, or acquiescence;²⁶⁹ whether particular circumstances relating to procedural duties to investigate a violation are present;²⁷⁰ and whether the State is engaged in hostilities “in a context of chaos”.²⁷¹ Yet, despite these various formulations, the Court’s overall approach remains marked by ambiguity and inconsistency.

In such cases, the fragmentation of authority must not be allowed to shield States from their legal obligations. Under international law, particularly in migration contexts, a State’s responsibility extends beyond its territorial borders and may incur responsibility to prevent those acts committed extraterritorially, in particular when they exercise effective control over

²⁶⁵ Inter-American Court of Human Rights, *Advisory Opinion OC-23/17 on the Environment and Human Rights* (2017) para 104(h).

²⁶⁶ *A.S. and Others v Italy*, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3042/2017, (28 April 2021) UN Doc CCPR/C/130/D/3042/2017, para 7.8. <https://docs.un.org/en/CCPR/C/130/D/3042/2017> accessed 10 October 2025.

²⁶⁷ *Banković and Others v Belgium and Others* App no 52207/99 (ECtHR, December 2001) para 75.

²⁶⁸ *Al-Skeini and Others v the United Kingdom* App no 55721/07 (ECtHR, 7 July 2011) para 136.

²⁶⁹ *Ibid*, para 135

²⁷⁰ *Hanan v Germany* (Grand Chamber) App No 4871/16, (ECHR, 16 February 2021), paras 132–133

²⁷¹ *Georgia v Russia (II)* (Grand Chamber) App No 38263/08, (ECHR, 21 January 2021), paras 137–138

persons or territories,²⁷² or participate, actively or passively,²⁷³ in conduct that results in a violation of fundamental rights. In this regard, effective control may encompass various practices: maritime interceptions, deprivation of liberty in informal border facilities, and delegate coercive functions to third parties or extraterritorial operations conducted jointly with other States.²⁷⁴

3.2.1 Effective Control and Extraterritorial Obligations

Under jurisprudence of international human rights law, the scope of State obligations is determined not solely by territorial borders but by the existence of “effective control” over persons, territory, or conduct.²⁷⁵ A State exercises effective control when its agents, or actors operating under its instructions, exert factual authority over individuals or operations, even extraterritorially.²⁷⁶ This includes situations in which migrants are intercepted at sea, transferred between authorities²⁷⁷ or subjected to migration control measures carried out by private contractors.²⁷⁸ In such circumstances, the State’s human rights obligations, including the duty to prevent enforced disappearances, remain fully engaged.

Effective control may arise through *direct* action by State agents, such as immigration officials, border and coast guards, military personnel, or those overseeing detention, transfer, or deportation operations. Where these actors deprive migrants of liberty, as contemplated under Article 2(a) ICPPED, or act with the “authorization, support or acquiescence” of the State under Article 2(b), they satisfy the threshold for establishing jurisdiction and following preventive obligations. Art 6 also provides that the superior should be held accountable when he or she: “exercised effective responsibility for and control over activities which were

²⁷² UN General Assembly, *Torture and other cruel, inhuman or degrading treatment or punishment*, (7 August 2015) UN Doc A/70/303 para 42 <https://docs.un.org/en/A/70/303> accessed 1 October 2025.

²⁷³ *Ibid* (n221)

²⁷⁴ Bloom, Tendayi, *The Business of Migration Control: Delegating Migration Control Functions to Private Actors* (2015) 6 Global Policy 151–157. <https://h7.cl/1kKaJ> accessed 10 October 2025

²⁷⁵ See among others, *Loizidou v Turkey* (Merits) App no 15318/89 (ECtHR, 18 December 1996); *Medvedyev and Others v France* App no 3394/03 (ECtHR, 29 March 2010); *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012); Committee Against Torture (CAT), *Concluding Observations on the Second Periodic Report of the United States of America* (25 July 2006) UN Doc CAT/C/USA/CO/2 <https://docs.un.org/en/cat/c/usa/co/2> accessed 1 September 2025; *Fatou Sonko v Spain*, Communication No 368/2008 (20 February 2012) UN Doc CAT/C/47/D/368/2008 para 10.3 <https://juris.ohchr.org/casedetails/44/en-US> accessed 2 September 2025.

²⁷⁶ *Ibid*.

²⁷⁷ HRCttee, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life** (30 October 2018) UN Doc CCPR/C/GC/36 para 30 https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/CCPR_C_GC_36.pdf accessed 2 September 2025.

²⁷⁸ *Ibid*, paras 15-18

concerned with the crime of enforced disappearance;” Practices such as maritime pushbacks, confinement in transit or informal detention facilities, collective expulsions, and forced returns conducted by State agents constitute situations in which the State exercises sufficient authority to trigger its obligations under the ICPPED, including in extraterritorial contexts.

Effective control may also be exercised *indirectly*, not only when a State authority “knew, or consciously disregarded, information which clearly indicated that subordinates under his or her effective authority and control were committing or about to commit a crime of enforced disappearance,”²⁷⁹ or “failed to take all necessary and reasonable measures within his or her power to prevent or repress an enforced disappearance or to bring the facts to the competent authorities for investigation and prosecution,”²⁸⁰ but also when private actors or non-State groups, formally or informally entrusted with migration-control functions, exercise such authority. In this scenario, Article 6 of the ICPPED also sets out a broad framework of responsibility, encompassing omissions and failures to prevent foreseeable risks (“*about to commit*”) that may lead to enforced disappearances.

International jurisprudence of the HRCtee clearly provides that States cannot evade responsibility by outsourcing coercive powers or detention functions.²⁸¹ Therefore, even when disappearances are carried out by traffickers, militias, smugglers, or private contractors, State responsibility remains engaged where these actors operate with State knowledge, tolerance, complicity, or deliberate inaction.²⁸²

The doctrine of acquiescence is particularly relevant in migration settings characterized by widespread abuses. Acquiescence encompasses not only explicit approval but also tacit consent or wilful blindness. The Working Group on Enforced or Involuntary Disappearances observed that:²⁸³

²⁷⁹ ICPPED, art 6(b)(i)

²⁸⁰ ICPPED art 6(b)(iii)

²⁸¹ See Sergio Euben Lopez Burgos v Uruguay, Communication No. 52/1979 (29 July 1981) UN Doc. CCPR/C/OP/1 at 88; Lilian Celiberti de Casariego v Uruguay, Communication No. 56/1979, UN Doc. CCPR/C/OP/1 at 92 (1984); Mabel Pereira Montero v Uruguay, Communication No. 106/1981, UN Doc. CCPR/C/OP/2 at 136 (1990)

²⁸² HRCtee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (26 May 2004) CCPR/C/21/Rev.1/Add.13 para 8 <https://docs.un.org/en/ccpr/c/21/rev.1/add.13> accessed 1 October 2025; See also Velásquez Rodríguez v Honduras, Judgment, Series C No 4 (IACtHR, 29 July 1988) para 172.

²⁸³ HRC, *Report of the Working Group on Enforced or Involuntary Disappearances on Enforced Disappearances in the Context of Migration*, (28 July 2017) UN Doc A/HRC/36/39/Add.2 para 42 <https://docs.un.org/en/A/HRC/36/39/Add.2> accessed 9 November 2025.

“(….)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.”

Where authorities are aware of credible patterns of abuse, whether along migration routes, in border zones, or in detention settings, yet fail to intervene or take preventive measures, the State’s obligations to prevent enforced disappearances under human rights law and international criminal law are breached.

Regional jurisprudence confirms that these obligations apply extraterritorially whenever effective control is exercised. The ECtHR in *Hirsi Jamaa and Others v Italy* held that, even outside national territory, a State exercises jurisdiction when its agents exert authority over individuals, as occurs during interceptions at sea. The Court emphasized that although jurisdiction is typically territorial, it extends to exceptional circumstances where State agents exercise factual authority or power, making clear that collective expulsions at sea fall within the State’s human rights obligations.²⁸⁴

“(…) [t]he notion of “jurisdiction” is principally territorial and is presumed to be exercised on the national territory of States, the notion of expulsion is also principally territorial in the sense that expulsions are most often conducted from national territory. Where, however, as in the instant case, the Court has found that a Contracting State has, exceptionally, exercised its jurisdiction outside its national territory, it does not see any obstacle to accepting that the exercise of extraterritorial jurisdiction by that State took the form of collective expulsion.

Similar reasoning is reflected in the HRCtee’s longstanding jurisprudence, including *Lopez Burgos v Uruguay*²⁸⁵ and *Celiberti de Casariego v Uruguay*,²⁸⁶ which affirm that States cannot avoid ICCPR obligations by acting outside their territory whenever they exercise power or control over individuals.

In migration governance, the concept of effective control therefore reveals the true scope of States’ preventive obligations. Whether through direct operational control, joint actions with other States, offshore enforcement, or the delegation of coercive functions to private or foreign actors, States retain legal responsibility to prevent enforced disappearances. The fragmentation of authority characteristic of contemporary migration management cannot shield States from accountability: where their agents, instructions, resources, or omissions

²⁸⁴ *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012), para 178.

²⁸⁵ *Lopez Burgos v Uruguay*, Communication No R.12/52 (6 June 1979) UN Doc Supp No 40 (A/36/40) 176 (1981).

²⁸⁶ *Celiberti de Casariego v Uruguay*, Communication No R.13/56 (6 June 1979) UN Doc Supp No 40 (A/36/40) 185 (1981).

contribute to a situation in which migrants disappear, their obligations under the ICPPED and international human rights law remain fully engaged.

3.3 RIGHT TO LIBERTY

Although the right to liberty under ICCPR Article 9 is not absolute,²⁸⁷ according to the Covenant any deprivation of liberty must be based on grounds and procedures established by law. Art 9(1) requires that such deprivation must not be arbitrary and must be carried out in a manner consistent with the rule of law. Furthermore, the prohibition of arbitrary detention is absolute and constitutes a non-derogable norm of customary international law (*ius cogens*).²⁸⁸ It can never be justified, whether on grounds of national emergency, public security, or large movements of migrants or asylum seekers. This prohibition applies both within a State's territory and in situations where it exercises effective control.²⁸⁹

Migrants held in detention facilities face an elevated risk of prolonged administrative deprivation of liberty, often without effective access to administrative or judicial remedies.²⁹⁰ These deprivations of liberty often occur without judicial authorization, clear legal basis, or individualized assessments and disproportionately affect persons who have not committed any criminal offense.²⁹¹

In these contexts, where deprivations of liberty frequently occur in opaque, informal, or extraterritorial settings, the right to liberty is a fundamental norm under Article 2 of the ICPPED and recognized by all major international and regional human rights instruments.²⁹² The instruments presented under this section define clear and mutually reinforcing obligations requiring States to regulate any restriction of liberty and prohibit arbitrary, secret or

²⁸⁷ ICCPR, art 9: "(...) except on such grounds and in accordance with such procedure as are established by law"

²⁸⁸ HRCtee, Report, General comment No. 35 on Article 9, Liberty and security of person, (16 December 2014) CCPR/C/GC/35 para 66 <https://docs.un.org/en/CCPR/C/GC/35> accessed 10 September 2025.

²⁸⁹ HRC, Report of the Working Group on Arbitrary Detention (2 July 2018) UN Doc A/HRC/39/45, (I) para 8, p 32 <https://docs.un.org/en/A/HRC/39/45> accessed 3 October 2025.

²⁹⁰ *Ibid*, Annex, para 1.

²⁹¹ *Ibid*, para 10

²⁹² See art 3 Universal Declaration of Human Rights; art 9 ICCPR; art 16 Convention on the Rights of Migrant Workers; art 37(b)–(d) Convention on the Rights of the Child; art 14 Convention on the Rights of Persons with Disabilities; art 6 African Charter on Human and Peoples' Rights; art 7 American Convention on Human Rights; art 5 ECHR; art 14 Arab Charter on Human Rights; art 12 ASEAN Human Rights Declaration; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), 'General Comment No 5 (2021) on migrants' rights to liberty and freedom from arbitrary detention' (2021) CMW/C/GC/5.

incommunicado detention.²⁹³ The presense of forms of arbitrary detention that can be life-threatening, not only constitutes a violation of the right to liberty and security of the person,²⁹⁴ but also creates conditions conducive to enforced disappearance,²⁹⁵ as defined in Article 2 of the ICPPED.

3.3.1 Secret detention under international law

Secret detention, regardless of its duration, meets the definitional elements of an enforced disappearance under Article 2 of the ICPPED²⁹⁶ when it involves deprivation of liberty by State agents (or those acting with State authorization, support, or acquiescence), followed by the refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the person. Article 17 of the ICPPED²⁹⁷ also explicitly prohibits secret detention, establishing a substantive element of the State's duty to prevent enforced disappearances. Additionally, ICPPED Article 18 further requires that State parties to:²⁹⁸

“Subject to articles 19 and 20, guarantee to any person with a legitimate interest [...], such as relatives of the person deprived of liberty, their representative or their counsel, access to at least the following information: [...] The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer”;

imposing clear obligations on States to ensure that any person with a legitimate interest, such as family members, legal representatives, or counsel, has access to essential information about a migrant deprived of liberty.²⁹⁹ This includes the person's exact whereabouts, the authority responsible for the detention, and any transfer to another location. These safeguards serve a preventive function, by allowing external oversight that reduces the risk of disappearance, torture, or unlawful removal, and to challenge the lawfulness of the detention.

²⁹³ N Rodley, *The Treatment of Prisoners Under International Law* (Clarendon Press, Oxford 1987) p 264: [A person] who is unable to communicate with the world outside the place of detention. Normally a prisoner, once taken into custody, may be expected to be allowed to have contact with a lawyer, with family members, with a doctor, and possibly with others too(...)One who is held *incommunicado*, then, is one who is denied access to all of these.

²⁹⁴ *Ibid*(284), Annex, para 2

²⁹⁵ *Mojica v Dominican Republic* (HRCttee, 15 July 1994) UN Doc CCPR/C/51/D/449/1991, para 5.4 <https://juris.ohchr.org/casedetails/400/en-US>; *Yamina Guezout and Others v Algeria* (HRCttee, 19 July 2012) UN Doc CCPR/C/105/D/1753/2008, paras 8.4, 8.7. <https://hrlibrary.umn.edu/undocs/1753-2008.html> accessed 5 November 2025.

²⁹⁶ ICPPED, art.2

²⁹⁷ *Ibid*, art. 17

²⁹⁸ *Ibid*, art. 18

²⁹⁹ *Ibid*, art. 17(f)

Other bodies such as the HRCtee have also emphasizes that secret detention exposes migrants to a heightened risk of torture and ill-treatment, engaging additional non-derogable obligations under the ICCPR³⁰⁰ and CAT,³⁰¹ affirming that:³⁰²

“Secret detention amounts to enforced disappearance, regardless of duration, including during transfer between detention facilities or during deportation, as well as in cases of deprivation of liberty by non-State actors with the support, authorization or acquiescence of the State. Moreover, secret detention exposes migrants to the risk of torture and other cruel, inhuman or degrading treatment or punishment”

Complementing this, the CED’s General Comment No. 1 emphasizes the preventive dimension of the prohibition of secret detention, extending to situations in which migrants are deprived of liberty by non-State actors acting with State support, authorization, or acquiescence, reinforcing the link between secret, arbitrary detention and enforced disappearance:³⁰³

“The prohibition of secret detention under article 17 of the Convention is especially important for the prevention of cases of disappearance, and extends to situations in which migrants are deprived of their liberty by non-State actors acting with the support, authorization or acquiescence of the State”

International jurisprudence³⁰⁴ also establishes that immigration detention should only be used as a measure of last resort, must be necessary and proportionate,³⁰⁵ and must be subject to continuous reassessment,³⁰⁶ in line with instruments such as Articles 9 (right to liberty and

³⁰⁰ ICCPR, art. 7

³⁰¹ CAT, *Concluding observations on the initial report of Mauritania* (18 June 2013) UN Doc CAT/C/MRT/CO/1, para 11 <https://docs.un.org/en/CAT/C/MRT/CO/1> accessed 1 November 2025; CAT, *Concluding observations on the second periodic report of Yemen* (25 May 2010), UN Doc CAT/C/YEM/CO/2/Rev.1 paras 12-13. <https://www.refworld.org/policy/polrec/cat/2010/en/73491> accessed 4 November 2025.

³⁰² HRC, Phenomenon of migrants going missing or subjected to enforced disappearance – human rights analysis, Report of the Special Rapporteur on the human rights of migrants, Gehad Madi (28 April 2025) UN Doc A/HRC/59/49 para 18 <https://docs.un.org/en/A/HRC/59/49> accessed 5 October 2025.

³⁰³ CED, *General Comment No 1*, General comment No. 1 (2023) on enforced disappearance in the context of migration (26 October 2023) para 21 <https://www.ohchr.org/en/documents/general-comments-and-recommendations/cedcgc1-general-comment-no-1-2023-enforced> accessed 5 October 2025.

³⁰⁴ It is important to note that the ECtHR has established that detention under Article 5(1)(f) ECHR is not subject to a strict necessity test. In *Chahal v United Kingdom*, the Court clarified that immigration detention need only occur “with a view to deportation”, provided that it is carried out in good faith and maintained only for the period during which removal proceedings are pursued with due diligence. This approach was reaffirmed in *Saadi v United Kingdom* and subsequent jurisprudence.

³⁰⁵ HRCtee *General Comment No 35: Article 9 (Liberty and Security of Person)* (16 December 2014) UN Doc CCPR/C/GC/35 para 19; UN Committee Migrant Workers, *General comment No. 5 (2021) on migrants’ rights to liberty and freedom from arbitrary detention* (23 September 2021) UN Doc CMW/C/GC/5 paras 21 and 45. <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-5-2021-migrants-rights-liberty> accessed 10 September 2025.

³⁰⁶ UN Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on Deprivation of Liberty of Migrants* (7 February 2018) para 20 <https://www.refworld.org/legal/resolution/unwgad/2018/en/120413> accessed 4 October 2025; Communication No. 1324/2004, *Shafiq v. Australia* UN Doc CCPR/C/88/1324/2004 (31 October 2006), para. 7.2 <https://juris.ohchr.org/casedetails/1308/en-US> accessed 5 September 2025.

security) and 14 (right to equality before courts and tribunals and to fair trial) of the ICCPR and corresponding regional human rights treaties.

For instance, In *Yrusta v Argentina*,³⁰⁷ the CED found that the authorities' failure to inform the family of a detainee's transfer violated the right to know the truth regarding the circumstances, progress, and outcome of the enforced disappearance. Similarly, in *Mojica v Dominican Republic*,³⁰⁸ the HRCtee emphasized that the circumstances of enforced disappearance are intrinsically linked to violations of the prohibition of torture and other cruel, inhuman, or degrading treatment, which expresses the intersection between the right to liberty and other human rights:

*"(...) circumstances surrounding Rafael Mojica's disappearance, including the threats made against him, give rise to a strong inference that he was tortured or subjected to cruel and inhuman treatment. (...) Aware of the nature of enforced or involuntary disappearances in many countries, the Committee feels confident to conclude that the disappearance of persons is inseparably linked to treatment that amounts to a violation of article 7."*³⁰⁹

Incommunicado detention is another form of deprivation of liberty that heightens migrants' vulnerability to enforced disappearance and constitutes, by its very nature, a violation of Article 9(3) of the ICCPR.³¹⁰ Depending on its duration and accompanying circumstances, *incommunicado* detention may also breach other provisions of the Covenant, including Articles 6, 7, 10, and 14.³¹¹

When it comes to territorial jurisdiction and the right to liberty, The HRCtee has clarified that Article 9 of the ICCPR applies extraterritorially when a State exercises power or effective control over a person:³¹²

"When private individuals or entities are empowered or authorized by a State party to exercise powers of arrest or detention, the State party remains responsible for adherence and ensuring adherence to article 9. It must rigorously limit those powers and must provide strict and effective

³⁰⁷ *Yrusta v Argentina* (11 March 2016) UN Doc CED/C/10/D/1/2013 para 10.6 <https://juris.ohchr.org/casedetails/2141/en-US> accessed 10 September 2025

³⁰⁸ *Barbarín Mojica v Dominican Republic* UN Doc CCPR/C/51/D/449/1991 (15 July 1994)

³⁰⁹ *Mojica v Dominican Republic*, Communication No 449/1991, (10 August 1994) UN Doc CCPR/C/51/D/449/1991 para 5.7 <https://juris.ohchr.org/casedetails/400/en-US> accessed 4 September 2025.

³¹⁰ *Medjnoune v Algeria*, Communication No 1297/2004, (9 August 2006) UN Doc CCPR/C/87/D/1297/2004 para 8.7 <https://docs.un.org/en/CCPR/C/87/D/1297/2004> accessed 2 September 2025; *Mojica v Dominican Republic*, Communication No 449/1991, UN Doc CCPR/C/51/D/449/1991 (10 August 1994) para 5.7.

³¹¹ *Berzig v Algeria*, Communication No 1781/2008 (18 January 2012) UN Doc CCPR/C/103/D/1781/2008 paras 8.4, 8.5, 8.8 [CCPR/C/103/D/1781/2008](https://juris.ohchr.org/casedetails/484/en-US) accessed 3 October 2025; *Lafuente Peñarrieta v Bolivia* (Plurinational State of), Communication No 176/1984 (02 Nov 1987) UN Doc CCPR/C/OP/2 para 16 <https://juris.ohchr.org/casedetails/484/en-US> accessed 5 October 2025.

³¹² HRCtee, *General Comment No 35: Article 9 (Liberty and Security of Person)* (16 December 2014) UN Doc CCPR/C/GC/35

control to ensure that those powers are not misused, and do not lead to arbitrary or unlawful arrest or detention. It must also provide effective remedies for victims if arbitrary or unlawful arrest or detention does occur.”

In *C v Australia*,³¹³ the HRCtee held that detention must always be reasonably justified, proportionate, and accompanied by adequate safeguards, even in the case of an irregular migrant. State control over migrants, even within national territory, and failure to protect their life and dignity may amount to human rights violations. In this case, the applicant’s detention, which was neither periodically reviewed nor otherwise justified, violated Article 9(1) of the ICCPR, and the absence of a genuine judicial review, including the possibility of release, violated Article 9(4).

Regional human rights bodies, including the ECtHR and the IACtHR, have also developed consistent jurisprudence affirming that States bear positive obligations to prevent enforced disappearances, particularly in contexts where individuals are at heightened risk, such as irregular migration. For instance, the ECtHR has held a violation of Article 5 (Right to liberty and security) of the European Convention in *Çakıcı v Turkey*,³¹⁴ in which the Court stated that where a person is last seen in the custody of State agents, the burden shifts to the State to provide a credible and verifiable account of their fate. The Court has affirmed that the failure to disclose the place of detention, maintain proper detention records, or enable communication with the outside world creates conditions conducive to enforced disappearance and triggers State responsibility.³¹⁵

In *El-Masri v The Former Yugoslav Republic of Macedonia*,³¹⁶ the Court further emphasized that practices such as *incommunicado* detention, unlawful transfers, or holding individuals in secret facilities violate the State’s procedural obligations to safeguard personal liberty and prevent disappearances,³¹⁷ obligations that apply with particular force in migration contexts.

³¹³ *C. v Australia*, Communication No 900/1999 (13 November 2002) CCPR/C/76/D/900/1999 para 4.23 https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=CCPR%2FC%2F76%2FD%2F900%2F1999&Lang=en accessed 5 October 2026.

³¹⁴ *Çakıcı v Turkey* App no 23657/94 (ECtHR, 8 July 1999) 27 EHRR 247.

³¹⁵ *Ibid.*

³¹⁶ *El-Masri v The Former Yugoslav Republic of Macedonia* App no 39630/09 (ECtHR, 13 December 2012) 57 EHRR 25.

³¹⁷ *Ibid.*

Similarly, the Inter-American Court held that State's obligations include not only refraining from secret detention but also ensuring traceability, oversight, and immediate access to information in *Velásquez Rodríguez v Honduras*.³¹⁸

“(...) the intent or motivation of the agent who has violated the rights recognized by the Convention is irrelevant - the violation can be established even if the identity of the individual perpetrator is unknown. What is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible (...)”

Taken together, regional jurisprudence and international instruments establish a clear and consistent legal standard under which international human rights law defines enforced disappearance as an act involving the deprivation of liberty and subsequent concealment, and imposes positive obligations on States to prevent such acts. These obligations are particularly stringent in migration contexts, where individuals are at heightened risk of unregistered detention, opaque transfers, and restricted communication. To comply with these duties, States must ensure that detention procedures are transparent, that individuals have meaningful access to information regarding their status and rights, and that effective external oversight mechanisms are in place.

3.4 RIGHT TO LIFE

The right to life is protected in all major human rights instruments, including ICCPR,³¹⁹ ECHR,³²⁰ ACHR³²¹ which impose a combination of negative and positive obligations³²² on states to protect, and fulfil this right for individuals under their jurisdiction.

In contemporary human rights jurisprudence, the right to life is not limited to the prohibition of intentional killings, but it includes an obligation on states to take reasonable, preventive measures to protect life whenever authorities knew or ought to have known of a real and immediate risk.³²³ These obligations have gradually expanded through jurisprudence to

³¹⁸ *Velásquez Rodríguez v Honduras* (IACtHR, Judgment of 29 July 1988) Series C No 4, para 173.

³¹⁹ ICCPR, Art 2.

³²⁰ ECHR, Art 2.

³²¹ ACHR, Art. 4

³²² General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life (30 October 2018) UN Doc CCPR/C/GC/36 p 70 https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/CCPR_C_GC_36.pdf accessed 5 October 2025

³²³ *Kindler v Canada*, Communication No 470/1991, UN Doc CCPR/C/48/D/470/1991, paras 13.1–13.2.

apply to an increasingly wide set of state activities, including migration management and border control, where state action or inaction directly affects the life and safety of individuals.

The preventive duties under the right to life are particularly present where the State exercises effective control over persons, even outside its territory. A report of the Special Rapporteur on the human rights of migrants, Felipe González Morales States concluded that:³²⁴

“States are required to take all reasonable precautionary steps to protect life and prevent excessive violence, and have committed to cooperate internationally to save lives and prevent migrant deaths and injuries, in accordance with international law. The loss of life at international borders has been a tragic consequence of States increasingly relying on militarization, extraterritorial border control and deterrence to attempt to control migration.”

Interceptions at sea, desert border surveillance, and the use of deterrence-based strategies may expose migrants to predictable dangers, and human rights law does not permit a state to insulate itself from responsibility by invoking the discretionary nature of migration control. Instead, states retain a duty to organize their border practices in a manner that minimizes foreseeable risk.³²⁵

3.4.1 Foreseeable risk of life

The assessment of a “real risk” must consider both the broader human rights context in the destination country³²⁶ and the specific circumstances of the individual, and it should be grounded in an evaluation of the conditions and threats present at the time the removal is planned.³²⁷ This assessment is particularly important under the preventive dimension of enforced disappearances of migrants, as it allows States to identify and mitigate foreseeable risks before they result in the deprivation of liberty or concealment of persons, ensuring that individuals are not placed in situations where their fundamental rights could be violated.

³²⁴ HRC, *Report eport on means to address the human rights impact of pushbacks of migrants on land and at sea - Report of the Special Rapporteur on the human rights of migrants*, (12 May 2021) UN Doc A/HRC/47/30 para 44 <https://docs.un.org/en/A/HRC/47/30> accessed 2 September 2025.

³²⁵ Definition of Foreseeable Risk (Legal Information Institute, Cornell Law School), <https://shorturl.at/jPY6r>, accessed 10 November 2025.

³²⁶ *Omar Othman v the United Kingdom*, Application no. 8139/09, (ECtHR, 17 January 2012), para. 187; *Hirsi Jaama and others v. Italy*, Application No. 27765/09, (ECtHR, 23 February 2012), para. 117; *Sufi and Elmi v the United Kingdom*, Applications No. 8319/07, 11449/07, (ECtHR, 28 June 2011), paras. 293-296

³²⁷ *Chahal v the United Kingdom*, Application No. 70/1995/576/662, (ECtHR, 15 November 1996) para. 86; If expulsion has already occurred, then the enforcement mechanism will evaluate the facts as they were known or should have been known by the expelling State at the time of removal. See *Al-Saadoon and Mufdhi v the United Kingdom*, Application No. 61498/08, (ECtHR, 2 March 2010) para. 149.

The ECtHR has long taken a protection stance regarding this practice. For instance, in *Osman v. UK*, the Court held that Article 2 ECHR required authorities to take “measures within the scope of their powers which, judged reasonably, might have been expected to avoid”³²⁸ a real and immediate risk to life. A similar approach in the preventive dimension of the right to life has become especially significant at international borders. The HRCtee has made clear that the duty to protect life “extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life. [Therefore] States parties may be in violation of article 6 even if such threats and situations do not result in loss of life”.³²⁹

Similarly, the ECtHR in *Hirsi Jamaa and Others v. Italy*³³⁰ held that maritime interception operations must be conducted in a manner that does not expose individuals to real and known dangers, affirming that migration control cannot be exercised in a way that undermines ECHR Article 2 obligations.³³¹ Interceptions at sea, desert border patrols, and deterrence-based practices such as pushbacks regularly place migrants in situations of acute danger, from drowning to exposure to violence, yet no human rights body accepts the argument that states may prioritize migration enforcement over the protection of life. Rather, states must ensure that operational decisions, including refusal to rescue are compatible with their duties under the right to life.

3.4.2 Extraterritorial application

In migration contexts, this principle has direct implications for enforced disappearances, as it shows that States cannot evade responsibility for arbitrary deprivation of life or for failing to investigate disappearances merely because they occur extraterritorially. By framing the right to life through the lens of effective control as we have seen in previous chapters, IHRL aligns with core preventive and investigative duties under Article 2 of the ICCPR and Articles 1–4 of the ICCPED, which require States to prevent and investigate enforced disappearances.

³²⁸ *Osman v United Kingdom* App no 23452/94 (ECtHR, 28 October 1998) 29 EHRR 245, para 116.

³²⁹ General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life (30 October 2018) UN Doc CCPR/C/GC/36 para 7; See also *Chongwe v Zambia* (CCPR/C/70/D/821/1998), para. 5.2 and *İlhan v Turkey* application No. 22277/93, (ECtHR, judgment of 27 June 2000,) paras. 75–76; *Rochela massacre v Colombia*, (IACtHR, judgment of 11 May 2007), para. 127.

³³⁰ *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012)

³³¹ *Ibid*, para 111

To further exemplify this principle under the right to life, in *Al-Skeini v UK*³³² and *Hirsi Jamaa v Italy*,³³³ ECtHR held that a State's jurisdiction for human rights obligations arises when its agents exercise "authority and control" over individuals, including during maritime interceptions. This principle is directly linked to Article 2 of the ECHR (Right to Life), as it extends a State's duty to protect life beyond its territorial borders. Accordingly, when migrants are intercepted at sea or otherwise come under State control, the State is required to take all feasible measures to ensure their safety and preserve life. In migration contexts, this has profound implications for enforced disappearances, as it affirms that States must prevent arbitrary deprivation of life, ensure effective protection of vulnerable migrants, and investigate any cases where individuals go missing under State control.

The IACtHR, in Advisory Opinion OC-21/14,³³⁴ similarly held that state agents operating extraterritorially remain bound by the ACHR when exercising authority over migrants at sea. States cannot avoid responsibility for foreseeable risks to life simply by conducting migration control operations in international waters or in foreign territorial waters. Whenever border authorities intercept, board, redirect, or otherwise control the movement of individuals, they bear obligations under the right to life to ensure that their actions do not expose individuals to lethal danger. The HRCttee has also clarified that States must take all appropriate measures to prevent foreseeable threats to life, including when persons are in the custody or under the control of State agents extraterritorially.³³⁵

Overall, while the precise contours of extraterritorial obligations to prevent enforced disappearances under the right to life remain developing, it is clear that States cannot evade responsibility for foreseeable threats to life, including the risk of disappearances, merely because individuals are outside national territory. Jurisprudence from the ECtHR, IACtHR, HRC, and CED consistently show that effective control triggers binding preventive and investigative duties, reinforcing the understanding that extraterritoriality does not absolve States of their core human rights obligations.

³³² *Al-Skeini and Others v United Kingdom* App nos 55721/07, 55799/07, 55800/07, 55801/07, 55802/07 (ECtHR, 7 July 2011)

³³³ *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012)

³³⁴ Advisory Opinion OC-21/14, Requested by the Republic of Colombia, Jurisdiction and Admissibility of the Inter-State Case concerning the Environment and Human Rights (IACtHR, 2014), para 221

³³⁵ HRCttee, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life* (30 October 2018) UN Doc CCPR/C/GC/36 para 63 https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/CCPR_C_GC_36.pdf accessed 4 October 2025.

3.4.3 Duty to investigate

Under the ICPPED, the CED clarifies that the duty to investigate³³⁶ is central to the State's obligations to prevent enforced disappearances:³³⁷ when a person disappears under a State's authority or effective control, this could include during migration control, detention, or interception operations, the State must take all necessary measures to clarify the fate and whereabouts of the individual. Investigations must be thorough, impartial, and timely,³³⁸ and failure to act might constitute a violation of the prohibition of enforced disappearance.

Article 12 of the ICPPED³³⁹ further reinforces this preventive dimension by requiring States to ensure that any person with a legitimate interest can submit a complaint, that competent authorities examine such complaints without delay, and that individuals involved in reporting or assisting investigations are protected against ill-treatment or intimidation. Meanwhile, Article 24(6)³⁴⁰ explains the continuing nature of this duty, requiring States to persist in their efforts until the fate and whereabouts of the disappeared person have been fully clarified. These provisions highlight that effective investigative mechanisms are not merely procedural guarantees but essential safeguards to prevent individuals, particularly migrants, from being placed outside the protection of the law.

Along the same lines, the ECtHR has held that applying statutes of limitations to investigations into enforced disappearances is incompatible with the State's duty to investigate violations of the right to life. In *Aslakhanova and Others v Russia*, the Court recognised enforced disappearance as a continuing crime so long as the fate and whereabouts of the victim remain unknown, meaning the obligation to investigate persists until the case is resolved.³⁴¹ Accordingly, the Court found that statutory-limitation periods may not be applied to such

³³⁶ ICPPED, art 3.

³³⁷ *Yrusta v Argentina*, Communication No 1/2013 (11 March 2016) CED/C/10/D/1/2013 para 8.7 <https://juris.ohchr.org/casedetails/2141/en-US> accessed 2 October 2025; *Berrospe Medina v Mexico* Communication No 4/2021 (March 2023) CED/C/24/D/4/2021 para 7.5 https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CED%2FC%2F24%2FD%2F4%2F2021&Lang=en accessed 2 October 2025.

³³⁸ CED, *Concluding observations*, (5 March 2015) UN Doc CED/C/MEX/CO/1 paras 24–28 <https://docs.un.org/en/CED/C/MEX/CO/1> accessed 4 September 2025; *Concluding observations* (4 July 2018) UN Doc CED/C/HND/CO/1 para 29(f) <https://docs.un.org/en/CED/C/HND/CO/1> accessed 5 October 2025.

³³⁹ ICPPED, art 12.

³⁴⁰ ICPPED, art. 24.

³⁴¹ *Aslakhanova and Others v Russia* (ECtHR, 2013) App nos 2944/06 and 8300/07 (and others), para 237

crimes, because doing so would undermine the very purpose of the right to life and the duty to investigate and prosecute those responsible.³⁴²

The HRCttee in *Bousroual v Algeria*, dictated that the inherent gravity of enforced disappearances as violations of multiple human rights, including the right to life under Article 6 of the ICCPR.³⁴³ The case involved the disappearance of an individual taken into State custody, whose fate remained unknown due to the State's failure to provide credible information regarding detention, transfer, or release. The Committee held that this lack of transparency constituted a violation of the right to life, not only substantively but also procedurally, as the State did not fulfill its continuing obligation to investigate the circumstances of the disappearance.³⁴⁴ *Bousroual* therefore reinforces the principle that States must maintain effective investigative mechanisms to ensure protection and prevent individuals from being placed outside the protection of the law and subjected to enforced disappearances.

In brief, when it comes to the right to life, the legal framework that protects it imposes far-reaching substantive and procedural obligations on states engaged in border control, including the duty to prevent foreseeable risks, the responsibility to protect individuals under their effective control extraterritorially, and the obligation to investigate deaths or disappearances linked to state conduct. Taken together, these obligations, reinforced by the guarantees enshrined in the ICPPED, establish a robust legal framework against which the lawfulness of State migration practices must be evaluated. Border operations that place migrants in situations of foreseeable risk, obscure their whereabouts, or render them effectively untraceable raise serious concerns under both the right to life and the prohibition of enforced disappearance.

3.5 PRINCIPLE OF NON-REFOULMENT

Another principle that reinforces the obligation of States to prevent enforced disappearances in the context of migration is the aforementioned principle of *non-refoulement*. Although originally developed in refugee law,³⁴⁵ this principle has evolved into a broader

³⁴² *Ibid*; see also ECtHR, *Association 21 December 1989 and Others v Romania* App nos 33810/07 and 18817/08 (2011) para 194.

³⁴³ *Bousroual v Algeria*, Comm. No 1723/2007 (30 March 2006) UN Doc CCPR/C/86/D/992/2001 para 9.2 <https://juris.ohchr.org/casedetails/1268/en-US> accessed 20 October 2025.

³⁴⁴ *Ibid*, paras 5.6; 9.4; 9.11; 9.12; See also *Katwal v Nepal*, Communication No 2000/2010 (1 April 2015) UN Doc CCPR/C/113/D/2000/2010 para 11.3. <https://juris.ohchr.org/casedetails/1921/en-US> accessed 4 October 2025.

³⁴⁵ 1951 Convention Relating to the Status of Refugees, art 33(1)

human rights norm, applying to all persons regardless of legal status, under instruments such as the CAT,³⁴⁶ the ICCPR,³⁴⁷ and regional human rights treaties.³⁴⁸ This sub-section analyses the principle of *non-refoulement* in contexts where pushbacks and similar practices may legally constitute enforced disappearances, thereby triggering preventive obligations under international law when the State exercises effective control over the individuals and their fate or whereabouts remain unknown.

The Special Rapporteur on the human rights of migrants, Felipe González Morales, addressing the human rights impact of pushbacks of migrants on land and at sea, stated that:³⁴⁹

“[The principle of] Non-refoulement is a fundamental principle of international human rights and refugee law prohibiting all forms of removal and transfer of any individual, regardless of their status, when there are substantial grounds for believing that the individual would be at risk of irreparable harm, such as death, torture or cruel, inhuman or degrading treatment or punishment, persecution, enforced disappearance or other serious human rights violations, in the place to which they are to be transferred or removed, or of further transfer to a third State where there would be a real risk of such violations.

It is therefore reasonable to affirm that nowadays *non-refoulement* constitutes a general human rights obligation, one that applies irrespective of whether an individual has been formally recognized as a refugee. In this regard, international human rights law further clarifies the link between *non-refoulement* and the risks of enforced disappearance. Article 16 of the ICCPED³⁵⁰ obliges States to refuse expulsion, return (*refoulement*), or forcible removal or extradition where there are substantial grounds for believing that a person would face a risk of enforced disappearance. The CED has consistently emphasized, in its review of State reports,³⁵¹ that this principle must be strictly respected in all cases and without exception. It applies to all forms of transfer, including informal removals and returns, where individuals may be at risk of

³⁴⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art 3.

³⁴⁷ ICCPR, arts 6–7, HRCtee, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life* (30 October 2018) UN Doc CCPR/C/GC/36 https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/CCPR_C_GC_36.pdf accessed 4 October 2025; CCPR General Comment No. 20: *Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (10 March 1992) <https://www.refworld.org/legal/general/hrc/1992/en/11086> accessed 4 September 2025.

³⁴⁸ ECHR, arts 2-3; ACHR, arts 4–5.

³⁴⁹ HRC, *A/HRC/47/30: Report on means to address the human rights impact of pushbacks of migrants on land and at sea - Report of the Special Rapporteur on the human rights of migrants* (12 May 2021), UN Doc A/HRC/47/30 para 41 <https://www.ohchr.org/en/documents/thematic-reports/ahrc4730-report-means-address-human-rights-impact-pushbacks-migrants> accessed 4 October 2025.

³⁵⁰ ICCPED, art 16.

³⁵¹ CED, Concluding observations on the report submitted by Slovakia under article 29 (1) of the Convention (24 October 2019), UN Doc CED/C/SVK/CO/1 paras 14–15; Concluding Observations on Peru, (8 May 2019) UN Doc CED/C/PER/CO/1 paras 22–23

being subjected to enforced disappearance.³⁵² The Committee has further urged States to explicitly incorporate this prohibition into domestic law and to carry out individualized risk assessments prior to any return or removal procedure.³⁵³

Under certain circumstances, the principle of *non-refoulement* has been recognised as customary international law, supported by widespread State practice and *opinio juris*, and it is widely acknowledged to be a norm of customary international law³⁵⁴, which therefore possess a non-derogable character. For instance, under the CAT, the obligation of *non-refoulement* must be strictly applied and has been affirmed as a peremptory norm of general international law (*jus cogens*) insofar as it concerns the risk of torture.³⁵⁵ Article 3 CAT explicitly prohibits a State from expelling, returning (“refouler”), or extraditing any individual to another State where there are “substantial grounds for believing that he would be in danger of being subjected to torture.”³⁵⁶

A core characteristic of the principle under the CAT is its absolute nature. Unlike other forms of protection against removal, *non-refoulement* under Article 3 admits no exceptions, even in cases involving national security or public order concerns, consistently affirming that the prohibition is non-derogable. Under this understanding, in migration contexts the *jus cogens* character of *non-refoulement* makes clear that States cannot justify practices such as pushbacks or informal removals from their jurisdiction to places where individuals face a real risk of torture or arbitrary deprivation of life.

When such practices are carried out where State exercises authority or effective control over the persons concerned (including indirect involvement as explained above), pushbacks may not only constitute breaches of *non-refoulement* but may also amount to enforced

³⁵² CED, Concluding Observations on Austria (6 July 2018) UN Doc CED/C/AUT/CO/1 paras 20–21; Concluding Observations on Gabon (10 October 2017) UN Doc CED/C/GAB/CO/1 paras 30–31.

³⁵³ CED, Concluding Observations on Niger (5 May 2022) UN Doc CED/C/NER/CO/1 para 27(a); Concluding Observations on Mongolia (30 September 2021) UN Doc CED/C/MNG/CO/1 paras 30–31.

³⁵⁴ UNHCR, *Global consultations on international protection: Ministerial Meeting of the States Parties to the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees (12-13 December 2001)- Declaration of the States Parties to the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/MMSP/2001/9, adopted on 13 December 2001, paragraph 4 of which indicates: “Acknowledging the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of non-refoulement, whose applicability is embedded in customary international law;” See also 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*, published on 26 January 2007, paras 14-16

³⁵⁵ M Alvi Syahrin, *The Principle of Non-Refoulement as Jus Cogens: History, Application, and Exception in International Refugee Law*, Immigration Polytechnic, Jakarta, pp 67–74.

³⁵⁶ CAT, art 3

disappearances where the individuals' fate or whereabouts remain unknown or their lives are placed at risk. In the same vein, the HRCtee has also clarified that this obligation applies to any form of removal, whether by extradition, expulsion, or deportation, wherever there are substantial grounds for believing that an individual faces a real risk of irreparable harm under Articles 6 or 7.³⁵⁷

3.5.1 Regional application

At the regional level, the principle of *non-refoulement* and the increasing scrutiny of pushback practices provide an important framework for assessing States' obligations to prevent enforced disappearances in migration contexts. For instance, the ECtHR has long applied Articles 2 and 3 ECHR in cases such as *Safi and Others v Greece*, where the Court found that the Greek authorities failed to protect the lives of migrants during maritime pushback operations and did not conduct an effective investigation into the deaths that occurred. While this case did not involve an enforced disappearance in the strict sense, it illustrates how pushback practices can give rise to disappearance situations, where individuals are placed at risk of death and their fate may remain unknown.

In *Soering v. United Kingdom*, the ECtHR also established that States may be held responsible for foreseeable risks of serious harm to individuals they transfer to another country. The applicant, facing extradition to the United States, argued that he would be exposed to the "death row phenomenon," constituting inhuman or degrading treatment under Article 3 ECHR. The Court held that the UK would violate its obligations if it extradited him, as the risk of severe harm in the receiving State was foreseeable. Other cases in the ECtHR's jurisprudence, from *Chahal v United Kingdom*,³⁵⁸ or *M.S.S. v Belgium and Greece*³⁵⁹ to *Saadi v Italy*,³⁶⁰ have consistently established that States cannot remove or return individuals to countries where there is a real and foreseeable risk of serious harm,³⁶¹ including torture, inhuman or degrading treatment, or arbitrary deprivation of life. In the context of this study, it is important to acknowledge this line of authority, which is directly relevant to migration contexts, as it

³⁵⁷ HRC, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13 para 12 <https://docs.un.org/en/ccpr/c/21/rev.1/add.13> accessed 12 September 2025; see also *A.H.G. v Canada*, Communication No 2091/2011 (25 March 2015) UN Doc CCPR/C/113/D/2091/2011 para 10.4. <https://juris.ohchr.org/casedetails/1926/en-US> accessed 1 September 2025.

³⁵⁸ *Chahal v United Kingdom*, 23 EHRR 413 (ECtHR, Grand Chamber, 15 November 1996)

³⁵⁹ *M.S.S. v Belgium and Greece*, App no 30696/09 (ECtHR, Grand Chamber, 21 January 2011)

³⁶⁰ *Saadi v Italy*, App no 37201/06 (ECtHR, Grand Chamber, 28 February 2008)

³⁶¹ See *Paposhvili v Belgium*, App no 41738/10, (ECtHR, 13 December 2016)

confirms that States retain extraterritorial responsibility for individuals under their effective control and must take preventive measures to safeguard their rights.

In the Inter-American system, the IACtHR has affirmed that violations of the *non-refoulement* principle may engage multiple rights, including the Right to Humane Treatment,³⁶² the Right to Life,³⁶³ Right to Personal Liberty,³⁶⁴ the Right to a Fair Trial,³⁶⁵ as well as obligations under the Inter-American Convention to Prevent and Punish Torture,³⁶⁶ including Article 13(4),³⁶⁷ among others. Article 22(8) of the ACHR explicitly enshrines the prohibition of refoulement, providing that:³⁶⁸

“In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.”

Under this clause, the IACtHR has consistently interpreted this obligation expansively and in harmony with the absolute ban on torture and ill-treatment under Article 5 ACHR. In *Pacheco Tineo Family v Bolivia*,³⁶⁹ the Court affirmed that the *non-refoulement* principle applies irrespective of a person’s migratory status or alleged threats to national security, highlighting that³⁷⁰

“the right of any alien, and not only refugees or asylees, to non-refoulement is recognized, when his life, integrity and/or freedom are in danger of being violated, whatsoever his legal status or migratory situation in the country where he is”

In certain cases, the IACtHR has further clarified that the non-derogable character of non-refoulement reflects a norm of *ius cogens*, recognizing that situations in which a person faces a real and imminent risk of serious physical harm can, under certain circumstances, inflict such intense moral anguish that they amount to psychological torture.³⁷¹

³⁶² American Convention on Human Rights, 1144 UNTS 123, art 5 (1969) (“ACHR”).

³⁶³ ACHR, art 4

³⁶⁴ ACHR, art 7

³⁶⁵ ACHR, art 8

³⁶⁶ Inter-American Convention to Prevent and Punish Torture, OAS Treaty Series No 67, adopted 9 December 1985.

³⁶⁷ *Ibid*, Art. 13(4): Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.

³⁶⁸ ACHR, art 22(8)

³⁶⁹ *Pacheco Tineo Family v Bolivia*, Series C No 272 (IACtHR, 26 November 2013)

³⁷⁰ *Ibid*, para 135

³⁷¹ See *Ximenes Lopes v Brazil*, Series C No 149 (IACtHR, 7 July 2004) para 126; *Cantoral Benavides v Peru*, Series C No 95 (IACtHR, 18 August 2000) para 102; *Bayarri v Argentina*, Series C No 105 (IACtHR, 30 October 2001) para 81; *Miguel Castro Castro Prison v Peru*, Series C No 160 (25 November 2006) para 272.

In summary, under the ECtHR, ACtHR, and other quasi-jurisdictional bodies, the principle of *non-refoulement* assumes a critical legal significance in migration contexts. Although situated immediately after the recognition of the individual right to seek and receive asylum, its scope extends beyond traditional refugee law. The prohibition of refoulement under these instruments provides both protective and preventive safeguards for vulnerable migrants, including those at risk of enforced disappearance, particularly when their right to life or personal liberty is threatened.

3.5.2 Individual or preliminary assessment

A fundamental element of the principle of *non-refoulement* is the requirement that States conduct an individualized or preliminary assessment of the risks faced by each migrant prior to any removal, expulsion, or deportation. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment considered in this regard “*summary rejection of migrants without individualized risk assessment [...] including through [...] border closures or ‘pushback’ operations*” to be in breach with States’ *non-refoulement obligation*”³⁷²

In *Pacheco Tineo Family v. Bolivia*, the IACtHR emphasized ³⁷³

“[c]onsequently, when an alien alleges before a State that he will be in danger if he is returned, the competent authorities of that State must, at the very least, interview that person and make a prior or preliminary assessment, in order to determine whether or not this danger exists if he is deported.”

Similarly, as observed in the ECtHR cases analyzed above,³⁷⁴ the Court has held that the principle of *non-refoulement* requires an individualized assessment of risk and access to effective remedies with automatic suspensive effect. In the same vein, individual communications under the ICCPR³⁷⁵ and the CAT, Article 3, also mandate an individualized

³⁷² HRC, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (23 November 2018) UN Doc A/HRC/37/50 para 78 https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/37/50 accessed 5 September 2025; HRC, *Report of the Special Rapporteur on the human rights of migrants on means to address the human rights impact of pushbacks of migrants on land and at sea* (12 May 2021) UN Doc A/HRC/47/30 para 104 <https://docs.un.org/en/A/HRC/47/30> accessed 4 October 2025.

³⁷³ *Pacheco Tineo Family v Bolivia*, Series C No 272 (IACtHR, 26 November 2013) para 136

³⁷⁴ The ECtHR in *M.S.S. v Belgium and Greece* emphasized that systemic deficiencies in asylum procedures render removal unlawful, underscoring the requirement that States ensure border practices do not deprive individuals of substantive or procedural protection. Moreover, prevailing international law confirms that the physical reception of migrants by another State does not absolve the sending State of responsibility. What matters is whether the sending State *exercised control* contributing to foreseeable risks, including violations of the right to life, deprivation of liberty, or exposure to disappearance.

³⁷⁵ See *A.H.G. v Canada*, the HRCtee reiterated that States must conduct individualized risk assessments prior to any removal and maintain procedural safeguards to prevent foreseeable violations of life or protection from torture.

determination based on all relevant circumstances. This creates respecting minimum procedural guarantees, providing the individual with the opportunity to explain why they should not be expelled, and refraining from return if a genuine risk is established.

Although no individual communications have yet been submitted under ICPPED Article 16 (which demands evaluation of disappearance risks), the CED has repeatedly emphasized that States must explicitly incorporate this requirement into domestic law and carry out rigorous, individualized risk assessments prior to any return or removal procedure.³⁷⁶

Within this context, pushback operations, by definition, circumvent these procedural safeguards: individuals are denied any assessment of risk, opportunity to seek asylum, or documentation that could support later investigation. Consequently, such practices systematically violate the procedural obligations inherent in *non-refoulement*. Taken together, the presented jurisprudential and normative developments illustrate that individualized assessment is a central procedural safeguard of *non-refoulement*, linked to the prevention of enforced disappearances in migration contexts. Without such assessments, States risk violating both substantive and procedural obligations under international human rights law, including the right to life, freedom from torture, and exacerbates the risk that pushbacks will result in exposure to serious harm, including enforced disappearance.

To sum up this chapter, international and regional human rights framework establishes that States bear extensive obligations to prevent enforced disappearances and protect the right to liberty, right to life, particularly in migration contexts. Instruments such as the ICPPED, ICCPR, ECHR, and ACHR, alongside jurisprudence from the CED, ECtHR, HRCtee, and IACtHR, converge on several key principles: 1) *first*, that enforced disappearance constitutes a continuing crime, triggering persistent investigative and preventive duties; 2) *second*, that extraterritorial State control, including direct, indirect, or delegated authority over individuals, engages human rights obligations to prevent enforced disappearances; and 3) *third*, that procedural safeguards such as effective investigation and access to information are essential to preventing disappearances, especially in migration contexts.

³⁷⁶ E.L.A. v France, Communication No 3/2019, UN Doc CED/C/19/D/3/2019; and see Concluding Observations cited above, para 27(b) for Niger; UN Doc CED/C/CHE/CO/1 (Switzerland) paras 23–24; UN Doc CED/C/ITA/CO/1 (Italy) paras 26–27; UN Doc CED/C/PER/CO/1 (Peru) paras 22–23; UN Doc CED/C/AUT/CO/1 (Austria) paras 20–21; UN Doc CED/C/GAB/CO/1 (Gabon) paras 30–31.

Pushbacks, informal and arbitrary detention, and other coercive migration-control measures undermine these obligations by creating situations in which migrants are placed outside legal protection, their whereabouts obscured, and their lives exposed to foreseeable risks. In this situations, the principle of *non-refoulement* further reinforces these duties, obligating States to assess risks individually and prevent transfers that may result in serious harm, torture, or disappearance.

Taken together, this legal framework demonstrates that State accountability extends beyond territorial borders and formal, traditional detention contexts. States cannot rely on statutory limitations, jurisdictional gaps, or operational outsourcing to evade responsibility. Despite the clarity of these obligations, several structural and legal limitations limit their reach and effectiveness. Not all States have ratified key instruments such as the ICPPED, leaving significant protection gaps and uneven standards of accountability. Jurisdictional challenges arise when assessing State responsibility for acts occurring extraterritorially or through delegated authority, complicating enforcement and remedies. While the parallel operation of the ICCPR, ECHR, ACHR, and ICPPED can enrich the protective framework, by layering complementary guarantees and providing multiple procedural entry points, it also risks producing fragmentation, conflicting jurisprudence, and gaps in coverage that undermine consistent implementation.

In the migration context, this fragmentation becomes especially acute: contemporary practices such as maritime and land pushbacks, the outsourcing of migration control to third States or private actors, and complex mixed-migration dynamics expose the limitations of existing treaty regimes designed for more conventional scenarios. This presents an opportunity to advance the interpretive authority of supervisory bodies in order to safeguard coherence across regimes. In migration contexts, where individuals are particularly vulnerable, the effective implementation of these obligations is critical: preventive and protective measures must operate cohesively to safeguard life and prevent enforced disappearances.

CONCLUSION

The phenomenon of enforced disappearances in migration contexts requires a rethinking of how international human rights law conceptualizes this crime, which differs from the traditional understanding that is often limited in scope, jurisdiction, and application. Whether occurring in transit, in detention, or following deportation, enforced disappearances in migration contexts give rise to specific and binding State obligations aimed at protecting migrants' rights.

As demonstrated throughout this thesis, these cases are not isolated incidents. They frequently arise from State practices, whether through direct or indirect involvement, or through tacit acquiescence, particularly when States exercise effective control over individuals within their territory or under their jurisdiction. Despite current limitations, including gaps in ratification, uneven application of extraterritorial jurisdiction, and the prioritization of securitization over the protection of human life and liberty, international human rights instruments provide an evolving legal framework.

These instruments must be interpreted as expanding the scope of State duties to prevent enforced disappearances. Their existence and application affirm that legal protections for all persons, including migrants and people on the move, are firmly established under international law, including norms of *jus cogens*, which create non-derogable obligations that States cannot disregard. Accordingly, States Parties to these treaties are obliged to comply with the interpretations provided by international, regional, and quasi-judicial bodies, ensuring that no migrant falls outside the reach of legal protection. The fight against enforced disappearances of migrants must be grounded in a legal framework that is responsive, inclusive, and fundamentally human-rights oriented, upholding the principle that every individual is entitled to protection, regardless of status or circumstance.

Finally, while this research provides an analysis of State obligations and the legal frameworks governing enforced disappearances in migration contexts, it remains open to further development. Other related rights and dimensions, such as economic, social, and cultural rights, were not addressed here due to the scope and length of this study. These areas represent avenues for future research, which could complement and expand upon the legal and practical insights presented in this thesis.

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