

PICUM Submission to the Committee on Enforced Disappearances

General comment No. 1 on enforced disappearances in the context of migration

June 2022

The Platform for International Cooperation on Undocumented Migrants (PICUM) was founded in 2001 as an initiative of grassroots organisations. Now representing a network of 164 organisations working with undocumented migrants in 31 countries, PICUM has built a comprehensive evidence base regarding the gap between international human rights law and the policies and practices existing at national level. With twenty years of evidence, experience and expertise on undocumented migrants, PICUM promotes recognition of their fundamental rights, providing an essential link between local realities and the debates at policy level.

PICUM welcomes the opportunity to provide inputs to the Committee on Enforced Disappearances for its General comment No. 1 on enforced disappearances in the context of migration. Our submission follows the structure of the Concept Note adopted by the Committee at its 22nd session in April 2022 outlining the issue, objectives and possible scope of the General Comment.

I. Introduction

Paragraph 1 refers to different reasons for which people move between countries. We recommend adding a reference to family reasons. In paragraph 2, we recommend stressing the importance of state action to prevent migrants from going missing, in particular through the establishment of state-led search and rescue (SAR) mission and the end of any form of criminalisation of humanitarian work, including through disproportionately onerous administrative burdens. In paragraph 3, we suggest deleting the words “triggered by massive migration movements”, which could be read as partially justifying the increased number of human rights violations and which could foster xenophobic sentiments based of unfounded fears of “massive” arrivals.

II. Objectives of the General comment

We do not have any comment on this section.

III. The scope of the General Comment

a) Obligation to investigate

With regard to the *right to report*, we welcome the clarification that this is not restricted to family members. In many countries, it is difficult for NGOs to file complaints on behalf of individuals who they suspect are victims of pushbacks and / or arbitrary detention. We suggest that the Committee could explicitly refer to the right of non-governmental organisations to report instances of enforced disappearances.

Another problem often faced in the context of migration is that victims and witnesses face deportations or pushbacks before they can report a violation, or while the procedure is ongoing. This strongly undermines any attempt towards accountability and reparation. To prevent this, victims and witnesses in the context of enforced disappearances should be granted a right to stay on the territory, at the very minimum until the ending of the proceedings.

A central tenet of the right to report is protection from retaliation. This applies both to the victim and to other witnesses. In some cases, individuals and members of civil society organisations face judicial harassment because they have publicly denounced pushbacks, or undertaken legal actions in this regard. This has been increasingly the case in the EU [over the past years](#). In other cases, people submitting complaints might fear retaliation when the authorities in charge of receiving the complaint are, or are perceived as, being the same authorities who are in charge of evaluating their asylum application; taking decisions over their detention or return; or managing the detention centre. In these cases, people might fear presenting a complaint because they are afraid this will affect their asylum application or lead to worsened detention conditions.

In order to prevent this, some important safeguards can be introduced:

- Firstly, as also [recommended](#) by the EU Ombudsperson in relation to the EU border agency Frontex's complaints mechanism, there should be the possibility to present anonymous complaints. NGOs should also be allowed to present complaints on behalf of anonymous applicants as well as collective complaints.
- Secondly, it is essential that the authority in charge of receiving and handling complaints is [independent](#). Civil society organisations should also be involved and be able to submit information.
- Thirdly, states should [protect](#) human rights defenders and people defending migrants rights from any form of criminalisation; monitor any form of judicial and other forms of harassment against human

rights defenders and NGOs; and dedicate adequate funding to civil society organisations which provide legal and other forms of assistance to victims.

We also recommend including a reference to the right to an effective remedy, as enshrined by art. 8.2 ICCPED, and clarifying that individuals should have the right to appeal against the outcome of a complaint on instances of enforced disappearances.

At the EU level, in the last decade and a half, the budget dedicated to the European Border and Coast Guard Agency (Frontex) has [increased](#) by 13,200%, from 6 million euro in 2005, to an average of 800 million euro an year. However, this has not been accompanied by sufficient developments in terms of [accountability](#), and Frontex has been involved in hundreds of [pushbacks](#). We recommend clarifying, in the General Comment, the principle of direct responsibility of any supranational entity which might be involved in enforced disappearances, jointly with the national authority involved.

b) Prohibition of secret detention of migrants

Secret detention and [detention in non-official places](#) are widespread in the EU. [Secret detention](#) is often implemented in [police cells](#) or even [garages](#) in relation to push backs, both at the EU external borders and [within the Schengen area](#). In paragraph 18, we recommend clarifying that art. 17.1 applies to any form of secret detention independent of its length, and that detaining people incommunicado even for a few hours is a violation of this article.

We also recommend clarifying that by virtue of art. 17.2.d, people in immigration detention should have the right to be visited by their families as well as to communicate with their consular authorities. In fact, the right to communicate with the authorities should not be considered as a substitute for the right to communicate with family members.

In order to guarantee the full and meaningful respect of the different rights enshrined in article 17, we also recommend clarifying that people should have the right to interpretation by a professional interpreter. The practice of relying on other people in detention to facilitate communication is in breach of the right to confidentiality and should not be considered as an equivalent to the right to interpretation.

c) Non-refoulement

We welcome the clarification that adherence to the principle of non-refoulement must be explicitly incorporated into national legislation, and that the analysis of this principle entails a consideration of all relevant facts and serious violations of human rights before someone is returned. We recommend clarifying that the consideration of the principle of *non-refoulement* is [broader](#), in its scope, than the right to asylum, and that therefore it should be assessed separately in each individual case (see [PICUM](#) and [ECRE](#)).

We also agree that lists of “safe countries” should not be used as an alternative to individual assessment. In this regard, we would like to highlight that individual assessment should also be carried out before any transfers within the internal borders of the European Union. Recent legislative [proposals](#) by the European Commission would permit the return of people (including children) within the internal Schengen Area [without any individual assessment](#) and without any possibility to seek appeal with suspensive effect. Since transfers under the [proposed Schengen Borders Code](#) would be automatic, this would amount to considering all countries belonging to the Schengen Area as safe countries and would therefore be in breach of art. 16 ICCPED.

d) Pushbacks

We welcome the decision of the Committee to dedicate a section to the issue of pushbacks, which is becoming increasingly [widespread](#) in the European region. We suggest clarifying that all pushbacks are in violation of art. 2 ICCPED, as they systematically [entail](#) the abduction of a person by agents of the State or persons acting with the acquiescence of the State followed by refusals to acknowledge their fate or whereabouts.

e) Victims' rights

Under paragraph 33, we recommend adding that these legal measures should, inter alia, include, where relevant, the [issuance of residence permits](#) and access to appropriate victim support services before, during and for an appropriate time after proceedings.

Under paragraph 34, we suggest clarifying that states should adopt and implement measures aimed at facilitating the issuance of visas for family members who are investigating into the enforced disappearance of their relatives, as well as other measures to facilitate their participation in the proceedings and the search for information.

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