

---

**ADiM BLOG**

**July 2023**

**ANALYSES & OPINIONS**

---

***What Role for the Convention against Enforced Disappearance in Times of Migrant Shipwrecks?***

***Carmelo Danisi***

Senior Research Fellow and Assistant Professor of International Law  
DSPS – University of Bologna

***Key words***

*ICED – Committee on Enforced Disappearances – Search and Rescue – Right to Life*

***Abstract***

*This blogpost analyses the provisional version of the very first General Comment to the International Convention for the Protection of All Persons from Enforced Disappearance (ICED), which the Committee on Enforced Disappearances (CED) decided to dedicate to the problem of enforced disappearance in the context of migration. Given the CED's focus on enforced disappearance during migrants' journeys, especially when they risk their lives at sea, here we question what role – if any – the ICED can specifically play in times of migrant shipwrecks and, in the affirmative, how it complements the obligations already emerged from other human rights treaties and areas of international law in case of distress at sea. While highlighting some key definitory problems, especially with regard to the existing difference between the concepts of enforced disappearance and disappeared/missing migrant, this blogpost advances some proposals for improving the CED's provisional General Comment before its upcoming adoption.*

## ***1. Introduction***

During its 24<sup>th</sup> session held in March 2023, the Committee on Enforced Disappearances (CED) released [the draft](#) of its very first General Comment, which is dedicated to «enforced disappearances in the context of migration». Given the need to adapt the International Convention for the Protection of All Persons from Enforced Disappearance (ICED) in light of current human rights challenges, the CED decided to assist States parties in implementing relevant obligations to prevent and respond to these crimes regardless of the nationality, origin or migratory status of the victims. The provisional General Comment follows a [2017 report by the Working Group on Enforced or Involuntary Disappearances](#) (WGEID) that had already identified a direct link between enforced disappearances and migration. The WGEID's 2017 report was addressed to the Human Rights Council and placed a strong focus on migrants' journeys. The report pointed to «the increasingly rigid migratory policies of States focused on deterrence» (e.g. para. 36) as a factor exposing migrants to a higher risk of becoming victims of enforced disappearances. It also blamed both the international community for not devoting the necessary attention to this specific issue and States for «transfer[ing] the blame elsewhere» (para. 81).

That is why this blogpost aims to analyse the CED's draft Comment by questioning what role – if any – the Convention can specifically play in times of migrant shipwrecks, thus complementing the obligations already emerged from other human rights treaties and areas of international law. To fully understand the potential impact of the current CED's interpretative activity, this blogpost starts with a brief overview of these “other” obligations in light of the latest shipwrecks in Italy and Greece (section II). It then analyses the current General Comment draft by highlighting some key definitory problems, especially with regard to the existing difference between the concepts of enforced disappearance and disappeared/missing migrant, and how the CED connects enforced disappearance with migrants' journeys, especially when they risk their lives at sea (section III). While answering its main question, the blogpost ends with some proposals to improve the CED's provisional General Comment in the context of migration before its upcoming adoption (section IV).

## ***2. Setting the stage for a comparison: a brief overview of international obligations protecting migrants in times of shipwrecks***

The need to clarify the potential contribution – if any – of the ICED in the context of migrants' journeys at sea lies in the dramatic events recently occurred in Italy and Greece. In fact, while Italy has still to ascertain what happened to the migrants who disappeared as a result of the [Cutro shipwreck](#), a separate event occurred in June 2023 [near Pylos](#), in Greece, added more than 500 people to the sad [count of missing persons](#) in the Mediterranean Sea. Irrespective of their specific circumstances, the dynamic of these events is not new: a series of omissions,

leading to delays in the assistance provided to people risking their lives, and actions based on disputable choices. But what is also very clear is the range of international obligations that apply in these scenarios, at least in connection with the law of the sea and certain human rights treaties, especially the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR).

A few preliminary points on these obligations may serve as a comparison for the purpose of verifying whether the evolution now supported by the CED adds something new to the current framework when the requirements of the definition of enforced disappearance are duly satisfied (see section III, below). According to the law of the sea, there is no doubt that people in distress at sea should always be searched and rescued and brought to a place of safety (where “safety” must be interpreted in light of the rescued person’s specific needs according to a human rights-based reading of the relevant provisions of the law of the sea – for all references see, among many others, [here](#) and [here](#)). Most importantly, as already shown [elsewhere](#) with reference to the Cutro shipwreck, in a situation of distress at sea, relevant States cannot – consciously or otherwise – treat a search and rescue operation as a police intervention for the purpose of migration and border control. Indeed, given the history of shipwrecks taking place in the Mediterranean Sea, once Italy or Greece is informed of the presence of an undefinable boat at sea, either by Frontex, non-State entities or an individual, the relevant State is reasonably expected to predict a certain risk to life for the migrants concerned. Further, both the Human Rights Committee (HRC) and, despite [criticism](#), the European Court of Human Rights (ECtHR) have increasingly interpreted the right to life, as provided for respectively in Art. 6 ICCPR and Art. 2 ECHR, in a way that leaves little discretion to relevant States parties on how life at sea should be protected. Suffice here to recall that, according to the HRC, the right to life and the connected due diligence obligations under Art. 6 ICCPR apply in situations of distress at sea even where such an event occurs [outside the territorial jurisdiction of the State party in question](#). While physical contact or control over the individuals concerned is not a requirement under the ICCPR to this end, the right to life under Art. 6 indeed applies where the specific facts of the case give rise to a relationship of special dependency between States parties and people in distress at sea (see HRC, [A.S. and Others v. Italy](#), 2021, para. 7.8). Relevant factors for the emergence of such a relationship can certainly include the State’s knowledge of the situation of distress at sea and the capacity to act to prevent loss of life. Although the ECtHR has not gone so far as to state the extraterritorial application of the ECHR in the absence of physical contact *and* control over the individuals concerned yet ([Hirsi Jamaa et. al. v. Italy](#), 2012; [M.N. v. Belgium](#), 2021), in situations falling within the relevant state’s jurisdiction it has made it clear what the protection of the right to life – under both the substantive and the procedural standpoints – entails. In two recent judgments, dealing with cases of people drowned at sea or at the border (respectively, [Safi and Others v. Greece](#), 2022; [Alhowsais v. Hungary](#), 2023), the ECtHR remarked the following points. First, under its substantive limb, Art. 2 ECHR requires the provision of air-sea rescue facilities to assist

those in distress as well as the setting up of an appropriate regulatory framework to ensure the correct and speedily functioning of such operations. In the case of a chain of events triggered by a negligent act on the part of the state and which led to the loss of life, the State party is also required to have taken preventive measures if its authorities knew or ought to have known about a risk to life. This is a key feature of the recent shipwrecks taking place in the Mediterranean Sea, which incidentally do not put into question only such positive obligations but also negative duties under Art. 2 ECHR – if such shipwrecks are proven to be “forced”. Second, under the procedural standpoint, Art. 2 ECHR imposes a duty to carry out an investigation into any alleged failure on the part of the authorities to adopt appropriate measures to protect people in danger, both in connection with individual errors and the overall management of the search and rescue system. Hence, States parties must give proof of having deployed all reasonable efforts to gather the evidence and to establish the facts, including by collecting survivors’ testimonies in good faith. Interestingly, given the evolution of the procedural limb under the right to life as a separate set of obligations to its substantive standpoint, the duty to investigate may apply even in the absence of a spatial or personal jurisdiction over the people who lost their life if certain – not abstractly defined – “special features” emerge from the circumstances of the case (e.g. [H.F. et. al. v. France](#), 2022). In other words, procedural obligations apply when the authorities, despite fully realizing the likely consequences of their inaction beyond their territory and disregarding the powers vested in them, have failed to take measures that were necessary and sufficient to save lives. Third, it is worth mentioning that in the recent case of [Alhowais v. Hungary](#), the ECtHR also pointed out that «it cannot be accepted that any negligence or lack of foresight should be attributed to the victims», while making clear that – in principle – the planning and conduct of rescue operations may be subjected to heightened scrutiny by the Court itself.

### ***3. The CED’s provisional General Comment: definitory problems and potential relevance in the context of migrants’ journeys at sea***

Despite such an evolution, which overall requires relevant States to avoid any negligence in their choice of action in (known or presumed) situations of distress at sea, the reiteration of chains of omissions and actions leading to – avoidable – deaths and disappearances risks jeopardizing the effectiveness of the international law systems briefly recalled above when migrants are involved. In this context, the recent activity of the CED aims to clarify the specific international obligations that States parties have undertaken, regardless of the origin or migratory status of the victims, by ratifying the 2006 Convention for the Protection of All Persons from Enforced Disappearance. Whether or not it will eventually contribute to reinstalling humanity at sea in the Mediterranean area, it is worth mentioning that Italy and Greece – the two European coastal States involved in the shipwrecks recalled above – both

ratified the Convention in 2015.<sup>1</sup>

Following a wide [consultation process](#), the provisional version of the General Comment addresses a preliminary definitory problem. In fact, the main difficulty for building a significant role for the ICED in the context of migration lies in the key distinction between a “victim of disappearance”, as defined by the Convention itself, and a missing/disappeared migrant. It is reminded that, according to Art. 2 ICED, an “enforced disappearance” is considered to be «the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law». According to Art. 3 of the same Convention, an enforced disappearance can also be carried out by non-state actors if these have acted without the authorization, support or *acquiescence* of a State party, thus raising obligations for the latter in terms of investigation and prosecution. Instead, based on the definition used by the International Organisation for Migration (IOM), the provisional General Comment refers to missing migrants as those who «have died in transportation accidents, shipwrecks, violent attacks, or due to medical complications during their journeys» (para. 4). Hence, being them two different concepts, a missing migrant can also be a victim of enforced disappearance *only when* the requirements of the above definition are satisfied. Yet, according to the CED, some States’ practices and migration policies may well have a role in the overlap of these two distinct notions. In fact, the provisional General Comment identifies the criminalization of migrants and those who assist them as a factor that *indirectly* contributes to the enforced disappearance of migrants. Other factors, including immigration detention, pushbacks and chain-pushbacks on land or at sea, collusion between State authorities and human traffickers and a «*systematic failure to search and rescue*» (para. 6), may even *directly* lead to the same result. In this sense, the CED seems to echo, even if in a less pronounced way, what the Working Group on Enforced or Involuntary Disappearances had already stated in its 2017 [report](#) (para. 43): «there is little doubt that should a person disappear as a consequence of being smuggled or trafficked, the participation – either direct or indirect – of State officials in these criminal activities renders [it] an enforced disappearance for which the State is internationally responsible». Indeed, for the Working Group, while States’ practices that prevents migrants from approaching their coast or disembarking and causes migrants to be abandoned by smugglers off their coast do not fall *per se* within the notion of “enforced disappearance”, such practices are “tantamount to” enforced disappearances if they make the finding or the identification of missing migrants very difficult (para. 44).

Without fully grasping such definitory ambiguities at the very end, the CED’s provisional General Comment then enlists measures that States should adopt to prevent and react to

---

<sup>1</sup> In the Mediterranean area, it is worth noting that, whereas Malta ratified the Convention in 2015 and Tunisia in 2011, Turkey or Libya have not joined it yet (status of ratifications as of 5 July 2023, available at <https://treaties.un.org>).

enforced disappearances in the context of migration, some of which specifically refer to migrants in transit at sea. In light of the Convention's inherent preventive nature, four types of preventive mechanisms are indicated. First, the CED emphasizes the prohibition of the "secret detention" of migrants, which extends to the deprivation of liberty by non-State actors acting with the support, authorization or *acquiescence* of the State party (para. 15-20). Second, it recalls the obligation to collect data on missing and disappeared migrants, including evidence for identifying whether an enforced disappearance has occurred, as well as to record data on the handling of people in the context of irregular border crossings (para. 21-24). In this respect, according to the CED, States parties are required to also carry out a «contextual analysis» to identify the «*structural failures*» behind cases of enforced disappearances (para. 24). Third, the CED insists on the adoption of policies aiming to foster regular and safe migration and the consequential need to stop any criminalization of migrants or people who assist them, including those involved in search and rescue operations (para. 25-28). It is worth noting that, alongside such indications, the CED highlights the obligation to end practices of «*intentionally failing to act diligently to rescue migrants at sea*» (para. 25). Fourth, by relying on Art. 16(1) of the Convention, the CED reiterates the principle of *non-refoulement* in connection with the specific risk of exposing a person to enforced disappearances, which applies both when the State party exercises effective control over such a person and when it externalizes migration management to third countries (para. 29-34). While the obligation to carry out individual assessments irrespective of any "safe" countries list is also reiterated, it is significant what the CED emphasizes in connection with pushbacks and other collective expulsions: when these involve «the deprivation of liberty of migrants and the concealment of their fate», they *clearly* amount to enforced disappearances. Yet, even when they do not include any deprivation of liberty, collective expulsions contribute to the risk of exposing individuals to such disappearances. Hence, the CED urges States parties to refrain, in particular, from indirect pushbacks that «*result from a deliberate failure to search and rescue at sea or on land*» (para. 34).

As expected, the upcoming General Comment focuses, then, on procedural obligations, especially to search and investigate on actual or presumed cases of enforced disappearance (section IV). More specifically, it recognizes that, with disappearances often unreported in the context of migration, States parties should initiate search and investigation autonomously as soon as they become aware of a potential case of disappearance, even if this occurred outside their territory (see the terms established by Art. 9 ICED). Among many other aspects, we may recall here that such investigations are required to be impartial and independent and should continue until the whereabouts of the disappeared people are known, including by identifying and returning any remains that are found. For the CED, appropriate attention needs to be paid to the relatives of disappeared migrants. Indeed, they should be able to access information during the entire investigation process (para. 40), to get the necessary psychosocial and logistical support, and they "*must*" be provided «with effective and quick access to humanitarian visas and temporary residence permits» to facilitate the investigation (my italics;

see para. 44). Finally, States parties have the obligation to provide victims with reparation, which is meant broadly to include also rehabilitation, prompt and adequate compensation, as well as guarantees of non-repetition (section V). The latter may certainly be connected with the recommendation that concludes the provisional version of the General Comment: States parties are invited to accept the CED's competence to receive individual and inter-State complaints, as established in Art. 31 and Art. 32 ICED. In this respect, it worth noting that neither Italy nor Greece [accepted such a competence](#), thus preventing the CED from considering cases in the context of migration. While inter-State complaints of systemic violation of the right to life under the other human rights treaties mentioned above are unlikely, there is no reason why any other State party to the ICED could not raise a complaint before the CED against a State party that systematically fails to fulfil its obligations in the context of migration, should the CED have the competence to receive such a complaint. An individual or inter-State complaint would be also an occasion for the CED to clarify the aspects that the first General Comment, if ever adopted as it stands now, seems to leave ambiguous or open, including whether a systematic failure to search and rescue at sea may also amount *per se* to a violation of the ICED given the various elements in this respect emerging from the current draft.

#### **4. Conclusion**

There is no doubt that our initial question can be answered in the affirmative: there is a role for the ICED in the context of migration, even when migrants travel at sea. The CED's decision to dedicate its first General Comment to enforced disappearances concerning migrants is therefore *per se* welcome and timely. If finally adopted as it currently stands, the CED's first General Comment would have at least the merit of bringing the focus onto the risk of exposing migrants to enforced disappearances as a result of States parties' migratory policies. It highlights the specific obligations binding these States by adopting a victim-oriented approach, especially in terms of requiring reparations to be sensitive to their needs and the rights to which families are entitled. Most importantly, in light of the shipwrecks that recently occurred in the Mediterranean Sea, the CED identifies a «systematic failure to search and rescue» as a factor *directly* contributing to migrants' enforced disappearance, as defined in the Convention itself. Therefore, although it does not really add any ground-breaking obligation to save migrants' life during their journeys across the sea, it suggests an interpretation of the ICED that complements the international obligations recalled in section II: at the very end, all require States to plan *effective* search and rescue operations as a key preventive measure. Moreover, it strengthens the *procedural obligations to investigate and prosecute* by requiring States parties to specifically verify the circumstances of the deadly shipwrecks for – at least – excluding cases of enforced disappearance, even when these might have occurred outside States parties' territory (see Art. 9 ICED), and for the identification of human remains. Of course, given the ambiguities due to the ICED's original scope and nature, there is room for

improvement on the current draft and to raise stronger arguments for a significant role of the ICED in the context of migration. To name a few examples beyond the definitory problems, the CED could expand on the question of attribution of conduct leading to enforced disappearances of migrants during their journeys and on the role of “acquiescence” when enforced disappearances are the result of the conduct of non-State actors, such as smugglers and traffickers, thus elaborating on the nature of preventive measures – even at sea – that States parties must adopt to exclude such an acquiescence. The revision prior to its final adoption could also address international cooperation in connection with the issue of complicity (Art. 16 of the Draft Articles on the Responsibility of States for International Wrongful Acts) in enforced disappearances, something that is particularly pertinent not only when migrants go missing at sea but also in light of renewed cooperation between Tunisia and some European States in the field of migration given the strong evidence available against [Tunisia’s wrongful practices](#). To conclude, whether revised or not, the CED’s provisional General Comment certainly lays the groundwork for a less fragmented implementation of the applicable international law framework – the law of the sea and the ICCPR/ECHR included – to protect migrants in transit on land and at sea. It is perhaps another drop in the bucket, yet a promising one.

#### SUGGESTED READINGS

B. DUHAIME, T. ANDREANNE, *Protection of Migrants from Enforced Disappearance: A Human Rights Perspective*, in *International Review of the Red Cross*, 2017, 99 (2), pp. 569 ss.

L. OTT, *Enforced Disappearance in International Law*, 2011, Cambridge.

**To cite this contribution:** C. DANISI, *What Role for the Convention against Enforced Disappearance in Times of Migrant Shipwrecks?*, ADiM Blog, Analyses & Opinions, July 2023.