de:border | migration justice collective and Legal Centre Lesvos comments on the Committee on Enforced Disappearances draft General Comment 1 on Enforced Disappearances in the Context of Migration

The de:border | migration justice collective is a group of scholar-activists (registered as a non-profit in the Netherlands, ANBI) mobilising law to resist and counter the systemic harms perpetrated against persons on the move, including those enshrined in and perpetrated through legal systems. Established in 2022, de:border's ongoing strategic litigation cases, complaints, research projects and investigations date back some five years. Our work challenges the normalization of border violence and pursues accountability and transformation of the rightlessness, discrimination and other socio-economic inequalities and injustices related to migration and its governance.

The Legal Centre Lesvos AMKE ("LCL"), is a civil non profit organization, registered in Mytilene, Greece, operating since May 2019. Between 2016 and 2019, LCL operated as "Legal Centre Lesbos" a grassroots organisation registered under Prism the Gift Fund Charity in the UK. The organisation provides free and individual legal support to migrants, and advocates for human rights and for equal access to legal and safe routes of migration in Lesvos, Greece and globally. We also work to document rights violations and advance the rights of migrants and refugees on the Greek island of Lesvos, and throughout Greece.

We offer comments drawing on our organisations' ongoing work and experiences documenting and advocating against border violence and abuses against migrants, legally representing cases before regional and international courts and other bodies. *de:border* also made a submission to the consultation held by the Committee around the concept note.[1]

I. Introduction

§1: Clarify that "migrants" is a broad category that *includes all persons crossing borders in an unauthorised manner* making them structurally vulnerable through racialising state policies of unprotection, abandonment, and endangerment operating at borders;[2] and that the lack of legal migration routes forces (mainly racialised) persons to take life-endangering, unauthorised migration pathways.

§2: Reference third countries, multinational agencies (e.g. Frontex), and private entities' shared responsibilities to redress disappearances and ensure they are not complicit in states parties' international law violations.

§4: Clarify that the term "crime" does not mean that state agents must act with specific intent to commit an (enforced) disappearance, and that it suffices that their actions are part of a law enforcement policy of removal of persons from recognition by and protection of the law.[3]

§7: Reference the criminalisation of illegalised entry used by state authorities to enforce hot pursuits against migrants and justify the "removal" of individuals on grounds of "prevention of departure", after arrival on their territory without any official record.[4]

§8: Expressly recognise that pushback policies are a structurally discriminatory form of group-based repression given the political interests underpinning migration control policies, and thus constitute a violation of the *jus cogens* prohibition of discrimination.

§9: Clarify that disappearance at borders is caused by concertedly implemented state policies to deny recognition and protection by law, including the right to access asylum, the rights to the investigation of disappearance under the Minnesota Protocol, and the last rights of the dead

[1] https://www.ohchr.org/sites/default/files/documents/hrbodies/ced/cfis/general-comment-1/csos/2022-07-20/de%20border%20migration%20justice%20collective_GCMigration_English.pdf
[2] Affecting both those seeking asylum and those with status, e.g. the case of a Frontex interpreter with status in the EU who was violently and illegally expelled by Greek authorities despite his status. The Greek government commissioned an audit by the NTA with no report as yet.
[3] In its 2017 report, the WGEID held that detention includes the "execution of deportation procedures" in a manner that routinely deprives individuals of due process protections to which they are entitled in the course of regular detention and deportation procedures. Hum. Rts. Council, Rep. of the Working Group on Enforced or Involuntary Disappearances on Enforced Disappearances in the Context of Migration on Its Thirty-sixth Session, ¶ 23, U.N. Doc. A/HRC/36/39/Add.2 (2017) [hereinafter WGEID Rep. in the Context of Migration], https://undocs.org/en/A/HRC/36/39/Add.2.
[4] See e.g. OLAF, Investigation of Frontex, Case No OC/2021/0451/A1, p. 102.

documented in the Mytilini Declaration for the Dignified Treatment of all Missing and Deceased Persons and their Families as a Consequence of Migrant Journeys.[5]

II. OBJECTIVES AND SCOPE OF THE GENERAL COMMENT

§11: Clarify that "urgent measures to prevent and respond" foremost include:

a. recognition of the application of the Convention to the context of formal *and* informal migration control policies, such as pushbacks; and
b. positive obligations for states to adopt proactive response measures including legal and institutional reforms and reparations both to i) ensure safe migration and prevent further disappearances and deaths, and ii) secure the rights of those who have perished and their grieving families.

§13: Set out avenues for support and redress for migrant families to be assisted in their searches by regional and international organisations and countries of origin and residence.

III. PREVENTIVE MECHANISMS

a. PROHIBITION OF SECRET DETENTION OF MIGRANTS

§15: Establish the consequences of systemic breaches of the prohibition of secret detention by affirming the presumption of reversal of the burden of proof onto the state that requires the initiation of an investigation and provision of access to effective remedies in all cases of disappearance resulting from the operation of certain policies in a context of organised impunity.

§15: Clarify that this prohibition extends to secret detention at sea, including on vessels of national coast guards' authorities or navy or on the migrants boats surveilled by state authorities; and include merchant vessels wrongfully instructed to disembark persons in unsafe locations contrary to states' obligations under the law of the sea.

§16: Clarify that all persons subject to the deprivation of liberty while or after crossing borders without authorisation should be given a right to access asylum procedures without delay, regardless of any circumstances concerning their entry.

b. DATA COLLECTION

§21: Clarify that states have positive obligations to take proactive responsive measures to engage in systematic data collection to end policies causing disappearance, e.g. secret detention, and establish infrastructure and procedures.

[5] http://lastrights.net/LR_resources/html/LR_mytilini.html

§22: Emphasise the role of international and regional organisations in relation to data collection, and make clear that search and tracing procedures should mirror existing systems in operation for all other missing persons, currently treated differently to illegalised migrants.

§23: Clarify that structural vulnerability and unprotection of persons crossing borders without authorisation are “structural failures” that amount to systemic breaches of the prohibition of disappearance and result in organised impunity.

§24: To document and analyse causes of disappearance, require states to cooperate with regional and international organisations (e.g., ICRC, ICMP, IOM and CoE); and recognize the work of and cooperate with independent experts, NGOs, CSOs and investigative groups in documenting the causes and conditions of disappearances in the context of migration.

c. POLICIES AND NON-CRIMINALISATION

§§24-25: Insist that safe and legal migration routes is critical to combating “smuggling networks”, whose role in enabling mobility and endangering persons crossing borders is created by the criminalization of migration as part of the “structural failure that enables such crimes”.

§25: Clarify that individual assessments cannot take place at borders, and that irrespective of their result, all persons found in distress have a right to be rescued; and that non-rescue policies endanger and abandon persons in violation of their rights to life and to be free from disappearance.

§25: Revise the use of the phrasing “intentionally failing” and to clarify that the failure to act diligently is not necessarily a deliberate act to refuse rescue, but rather a policy of non-rescue through dereliction of duty to rescue (omission) or through pushbacks or pullbacks that is often politically sanctioned and legally constructed and justified.

§25: Recognise that persecution and criminalisation of SAR groups and of smuggling and facilitation – particularly of migrants prosecuted for alleged ‘boat driving’ – are part of endangerment and abandonment policies of non-rescue and structural vulnerabilisation.

§28: In addition to requiring the decriminalisation of the saving of lives and the need to make changes to legislation accordingly, to explicitly require the non-criminalisation of migrants who are structurally forced to become ‘boat drivers’ by navigating the boat in conditions of distress to save the lives of those on board.

d. NON-REFOULEMENT AND THE PROHIBITION OF PUSHBACKS

§29: Clarify that externalisation arrangements maintained with unsafe third countries[6] with the intention to refoule and contain persons in their territory[7] amount to refoulement in breach of Art 16 – and further, that the justifications used by the EU and Member States to uphold the central role of Libyan actors and EU's support to their SAR zone constitute a legal exception intended to circumvent the prohibition of refoulement.

§30: While lists of 'safe third / origin countries' should not be used as a substitute to individual assessments, the absence of formal procedures for asylum and deportation in line with international law, including a remedy of suspensive effect as required by ECtHR jurisprudence,[8] makes a third country presumptively unsafe for all persons (irrespective of their individual assessment).

§33: Clarify that the very definition of pushbacks considered and referred to by the Committee entails migrants being "summarily forced back" to the country from where they attempted to cross or crossed the border, and thus already requires that the state be in exclusive/direct control of the migrants' movement and whereabouts in the moment; and add that pushbacks entail deprivation of liberty regardless of "location and form of the deprivation of liberty", and that "the execution of deportation procedures" alone is a form of deprivation of liberty.[9]

§34: Since "execution of deportation procedures" is a form of deprivation of liberty, remove reference to "[p]ushbacks that do not involve deprivation of liberty" and clarify that all pushbacks *per se* "effectively remove the persons subjected to this treatment from any protection of the law and contribute to a risk of disappearance". The Committee should also clarify that the standard of "deliberate failure" in relation to "[SAR] at sea or on land" is presumptively established through the intentional operation of policies of unprotection, abandonment, and endangerment in borderlands.

§§33-34: Clarify that the responsibility is shared between all actors involved in pushbacks, and that states or international agencies[10] cannot deflect and obfuscate their role in enabling and maintaining such policies of disappearance.[11] The operation of aerial surveillance assets at sea by states and international agencies trigger obligations of rescue, and surveillance without rescue amounts to a structural disregard of the prohibition of disappearance.

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[6] See e.g., UNHCR, 'UNHCR Position on Returns to Libya (Update II)' (September 2018).
[7] As is the case e.g., between the EU, Member States and Libyan actors. This is the post Hirsi Jamaa regime in the Mediterranean (*Hirsi Jamaa and Others v. Italy [GC]* - 27765/09) where the Italian and Maltese authorities and Rescue Coordination Centres equip, train, support and enable in real time the interception and return by Libyan actors of migrants back to Libya challenging in the pending SS et al v Italy case.
[8] See e.g., *M.S.S. v. Belgium and Greece* [GC], §293.
[9] In its 2017 report, the WGEID held that detention includes the "execution of deportation procedures" in a manner that routinely deprives individuals of due process protections to which they are entitled in the course of regular detention and deportation procedures. Hum. Rts. Council, Rep. of the Working Group on Enforced or Involuntary Disappearances on Enforced Disappearances in the Context of Migration on Its Thirty-sixth Session, ¶ 23, U.N. Doc. A/HRC/36/39/Add.2 (2017) [hereinafter WGEID Rep. in the Context of Migration], https://undocs.org/en/A/HRC/36/39/Add.2.
[10] E.g., EU institutions, Frontex.
[11] E.g., by claiming remoteness, informality or difference in purpose through financial support to save lives.

§§34: Require states to take responsibility for shipwrecks or other cases of migrant deaths at borders – as opposed to assuming that the death were 'accidents' that do not require investigation[12] – and initiate investigations.

§29: Clarify that both direct and indirect pushback policies (e.g. policies of unprotection and endangerment) result in systemic breaches of the Convention and make explicit reference to states' obligations under the HRC's General Comment 36 on the right to life with regards to the extraterritorial impact of administrative decisions concerning border control on rights, such as externalisation arrangements enabling informal returns to third countries in which enforced disappearances are taking place (including through 'chain refoulement').

IV. THE OBLIGATION TO SEARCH AND INVESTIGATE

§35: Acknowledge that effective investigation "fundamental to ending this heinous crime and preventing its re-occurrence" should focus beyond "prosecute and punish the perpetrators", on policy and legal reforms. It is important that the Committee takes note of the reasons why states have not done so either in specific cases or at appropriate scale.[13] For each border death, states should take all measures to reconstruct the event, including testimonies from survivors and radar and satellite imagery.

§35 may give the wrong impression that the reasons why such investigations have not been opened is due to limitations on means of reporting by families living abroad. Make clear that the main obstacle to such investigations (as to contextual analysis of the causes of disappearances) is the denial of the facts and of access to justice and remedies in the bordering state. It is key to note, as the Committee has in §35, the scale and systemic nature of different policies of disappearance and its reversal of the burden of proof onto the state triggering its *ex officio* investigative obligations (also under the procedural limb of Art 6 ICCPR and Art 2 ECtHR).

§36: Hold that there is an absence of a proactive response of an appropriate scale by states and international organisations to the policies that cause disappearance. This includes:

c. laws, procedures and infrastructure to conduct searches in forests, mountains and rivers and seas;
d. collecting information about arrivals in a systematic, thorough and transparent manner;
e. establishing and resourcing public bodies and procedures to function as focal contact points for families that would accompany through trauma-informed support their search, to ensure it is comprehensive and continuous until any information about the whereabouts and fate of the person is found;

[12] Instead of assuming that the death was not caused by criminal activity, and is an 'accident' that does not require investigation but merely signing a burial permit (often without budget for burial). In this context, burial is then seen as "an act of benevolence, rather than an act of justice of moral obligation on the part of the state, and unrelated to the obligation of the authorities to inform relatives of the death". See above "WGEID Rep. in the Context of Migration'.
[13] These reasons go far beyond the absence of reporting mechanisms for families living far away, but rather commence with the lack of recognition of the absence of safe migration routes and the parallel criminalisation and punishment of persons crossing borders without authorisation.

f. mass DNA collection – both of families searching for loved ones and those who perished in borderlands – into centralised databases given the large number of missing persons and of unidentified bodies throughout Europe.

§39: The regionalisation of the response in relation to the reporting mechanisms and investigations between countries of destination, transit and origin must be extended to a larger scale because disappearance in the context of migration are in most cases transnational, and to enable states to assume shared responsibility and prevent deflection of responsibility for search and investigation.

§38: Make clear that in no situation should the burden of proof in relation to the location and circumstances of the disappearance lie on (potentially grieving) families far away, and that such systematic practices of pushbacks result in the reversal of the burden of proof onto the state.[14] The Committee should require states to adopt laws and procedures that ensure that families do not bear the burden of proof in relation to the in/direct disappearance of their loved ones, but rather that these practices trigger the administrative duties to initiate a search.[15]

States parties shall take all necessary measures to establish their competence to exercise jurisdiction over enforced disappearances that occurred outside their territories, as provided for in Art 9 of the Convention.[16]

§38: Consider revising the importance of criminal prosecution of perpetrators and the resources that such processes entail, as well as the fact that human rights courts and bodies have held criminal remedies not to amount to sufficient either individual or general remedies for the serious human rights violations experienced during pushbacks, which is especially true of such acts when properly considered as enforced disappearance.[17] The Committee should thus explicitly also mention other forms of legal recourse, including under civil and administrative law – which especially in civil law jurisdictions maintains a high standard of proof that should be revised.

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[14] Especially where such direct and indirect factors conditioning disappearance are in operation where the person is likely to have perished.

[15] This reversal was adopted and developed by courts and international bodies including the Inter-American Court of Human Rights in *Velásquez-Rodríguez v. Honduras*. See *Velasquez-Rodriguez v. Honduras*, Merits, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988), para 148. See also, Claudio M. Grossman & Catherine Walker, *Disappearances*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2021), p 15-16 https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e778. Where the Court developed a "reasonableness" test for shifting the burden of proof from the individual to the State, whereby "once a pattern of disappearances has been proven, the link between the individual case and the pattern could be proved through circumstantial evidence." and held that the victims cannot provide direct proof of the violation, especially since the investigation (and ultimately punishment) depends on State and government action."

[16] Especially when there is no access to justice in the country where the disappearance took place and a link with the country of jurisdiction (e.g. Italy in relation to Libya).

[17] See e.g., UN HRC, General Comment No. 31 [80] on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004) CCPR/C/21/Rev.1/Add. 1326 and see UN HRC, *Weiss v. Austria* (15 May 2003) para. 8.2 (emphasis added). Similarly, within the ECHR framework, see, e.g., *König v. Germany*, App No 6232/ 73 (ECHR 28 June 1978); *Eckle v. Germany*, App No 8130/ 78 (ECHR 15 July 1982). For commentary and reflection on equivalent EU law standards applicable in the asylum context, see Moreno-Lax, Accessing Asylum in Europe (Oxford University Press, 2017) ch 10, especially pp. 414-415 and 439-444.

§41: Require standardised procedures and budgets for post-mortem care for migrants;[18] explicitly refer to the obligation to exhume mass grave locations based on a systematic analysis, especially where exhumation would provide identification procedures not methodically followed before burial (e.g. DNA collection).[19] This is also the case of other open areas suspected to have become mass graves, including forests, mountains, rivers, and certain parts of the sea.

§40: Add that the accompaniment and support of families searching for their loved ones should be trauma-informed and extended to family and other loved ones; and enable reporting by family members who are migrants in other states parties irrespective of migration status.

V. VICTIMS' RIGHTS

§42-47: Add that a situation of organised impunity in the state party in which victims' rights are structurally denied, and the state party is unwilling and unable to redress breaches of the Convention, may result from systemic disregard for states' preventive obligations, including with regards to the mismanagement of disappeared migrants and unidentified bodies.

§42-47: Emphasise that the scale and systemic nature of breaches of the Convention demands systemic redress, including legislative and administrative reforms, which offers a basis for furthering a transformative reparations agenda critical to fully redress bordering regimes that cause large scale disappearances.

VI. TRAINING AND COOPERATION

§48: Emphasise states' positive obligations to cooperate with regional and international organisations to establish transnational mutual cooperation infrastructure, standardised approaches to data collection, reporting, searches, identification, and common arrangements with diplomatic missions; and address regional and relevant international organisations directly to avoid initiatives by individual states that would likely result in fragmented and fractured approaches that defeat the purpose of ensuring cooperation from investigation to repatriation.

§48: Training should also be provided to judges and legislatures to ensure that appropriate legal reforms are undertaken to provide remedial avenues, tracing infrastructure, and accompaniment for families searching for loved ones.

§§49-50: Require state reporting to the Committee on:

g. implementation plans in relation to laws, institutional developments and practice in these areas.

[18] Interview with the UNHCR in Iosif Kovras, Simon Robins, Death as the border: Managing missing migrants and unidentified bodies at the EU's Mediterranean frontier, Political Geography (2016) p 42.
[19] As required by the Minnesota Protocol. This is the case with cemeteries in border areas in which tombs are marked by numbers, absent maps of the graves that would enable exhumation. Ibid, 44. If an unidentified body is buried in a common grave it becomes almost impossible to identify it with the passage of time.

h. cooperation with regional and international organisations to provide models and support in developing and implementing mechanisms, protocols and guidelines.
i. call upon international organisations to be transparent about the current limitations on their work due to limited cooperation by states in relation to statistical information and contextual analysis (e.g. IOM) cooperation with regards to individual searches (e.g. ICRC), and focal points for families (e.g. ICMP), given the absence of accountability for non-cooperation and its consequence of harbouring and supporting state policies of organised impunity.