Exposing Covert Border Enforcement: Why Failing to Shift the Burden of Proof in Pushback Cases is Wrong

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Abstract

The paper analyses how the European Court of Human Rights (ECtHR or the Court) assesses evidence when states conceal border practices, such as pushbacks, comparing the Court’s approach in those cases to that in enforced disappearance cases. In both types of cases, states deny that the conduct – which would have violated human rights – has taken place and provide neither the applicants nor the Court with evidence. While surface examination of the relevant case law could suggest that the ECtHR shifts the burden of proof in the same way in both sets of cases, I demonstrate that the Court expects applicants in covert border enforcement cases to provide stronger evidence, which is then labelled as prima facie evidence. I argue that the burden of proof should be shifted in the same way in both scenarios, as the position of the victims and the availability of evidence is strikingly similar.

Keywords

burden of proof – prima facie evidence – border violence – pushback – enforced disappearance – shifting the burden of proof
1 Introduction

All states engage in border enforcement practices to regulate entrance into their territory and prevent irregular crossings of their borders. Some of these practices are concealed, in which case they can be referred to as ‘covert border enforcement’. I use this expression for a set of practices whereby states effectively prevent people from entering their territory, while denying that such practices take place. Examples of covert border enforcement practices are pushbacks, that is, returning persons who are trying to cross an international border or who have crossed one, without assessing their individual situation. Most pushbacks, as well as other covert border enforcement practices, violate the law in themselves,1 because, for example, they involve secret (unacknowledged) detention. Some states have tried to frame these practices as legal, at least under domestic law.2 By the very fact that they are covert, they are also more likely to result in other human rights violations, such as ill-treatment or torture. Due to the covert nature of the practices, bringing evidence is one of the many problems that potential applicants to human rights bodies face when attempting to denounce them.

The same challenge also applies to complaints related to enforced disappearances, which are deprivations of liberty conducted by state authorities that subsequently either refuse to acknowledge them or conceal the fate or

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1 The ECtHR has recently introduced exceptions to the prohibition of mass expulsions in pushback cases. The exceptions apply to immediate pushbacks over land borders when states provide applicants with genuine and effective means of legal entry. See, ND and NT v Spain [GC] 8675/15 and 8697/15 (ECtHR, 13 February 2020) and AA and Others v North Macedonia 55798/16 (ECtHR, 5 April 2022).

2 See, most notably, legal initiatives in Hungary and Poland, which grounded pushbacks in domestic law. Such laws are inherently incompatible with human rights law and EU law. See, in particular, Case C-808/18 Commission v Hungary [2020] ECR 1-8965. For the legislation in Poland, see, G Baranowska, ‘Pushbacks in Poland: Grounding the Practice in Domestic Law in 2021’ (2022) 41 Polish Yearbook of International Law 193. For a complex analysis of relevant legislation introduced in Poland in reaction to the influx of migrants at the Polish–Belarussian border in August 2021, see, W Klaus (ed), Beyond the Law: Legal Assessment of the Polish State’s Activities in Response to the Humanitarian Crisis on the Polish-Belarusian Border (Publishing House of ILS PAS 2022).
whereabouts of the disappeared person. In those cases, the direct evidence is in the hands of the state, which denies the very existence of the practice. With respect to the phenomenon of enforced disappearances, the European Court of Human Rights (ECtHR or the Court) has developed distinctive evidentiary tools without which the violation could not be effectively denounced by the Court. In particular, the ECtHR shifts the burden of proof from the applicant to the state when the former brings prima facie evidence of the violation.

This article argues that the Court should do the same in relation to covert border enforcement. A surface examination of the relevant case law suggests that this is already happening. However, upon closer inspection, it becomes apparent that the Court actually applies a substantially higher evidentiary threshold in border enforcement cases as compared to enforced disappearance ones. I demonstrate that the ECtHR expects applicants in covert border enforcement cases to provide the Court with stronger evidence, which is then labelled as prima facie evidence. Furthermore, the conduct of the state – for example, providing the Court with false or insufficient information – is not adequately taken into account in the ECtHR’s assessment.

I argue that the burden of proof should be shifted in the same way in covert border enforcement and enforced disappearance, as the position of the victims and availability of evidence is strikingly similar. Enforced disappearances are a particularly heinous crime of ‘extreme

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3 See, the definition in Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearances (adopted 6 February 2007, entered into force 23 December 2010) (ICPPED): ‘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’. The Rome Statute defines enforced disappearance more broadly, also encompassing disappearances at the hands of non-state actors (see, Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3).

4 See also, Dicle Ergin, who argues that circumstantial evidence in secret migration detention cases should suffice to shift the burden of proof (D Ergin, “Protection” or “Instrumentalization” of Refugees: Will the European Court of Human Rights Fill in the Gaps in Pushback Cases After the Greece/Turkey Border Events’, in The Informalisation of the EU’s External Action in the Field of Migration and Asylum. Global Europe: Legal and Policy Issues of the EU’s External Action, E Kassoti and N Idriz (eds), (TMC Asser Press 2022) 193).

seriousness’,6 as they deprive the disappeared person of all safeguards and keep their loved ones in uncertainty about the fate of the disappeared. While many people currently seem to accept the horrors that are happening at states’ external borders, the violations that are occurring in this context are of utmost seriousness. Between 2014 and August 2023, the International Organization of Migration has recorded over 58,000 persons that have died at borders or in migration.7 Some of those people drowned because border guards created mayhem at sea8 or due to states not engaging in rescue operations despite being capable of doing so.9 There is also widespread evidence that physical violence and ill-treatment are common during pushbacks,10 and that people are returned to countries where they become victims of enforced disappearance, torture, or slavery.11

Notwithstanding the aforementioned similarities, it must be noted that not all covert border enforcement practices are of the same serious nature as enforced disappearance. Covert border enforcement may include secret detention or result in deaths, but in other cases, such as not accepting claims for international protection, the same threshold of gravity is apparently not reached. However, even those cases can directly lead to grave human rights violations as evident in ECtHR judgments: for example, the father of a Chechen family which unsuccessfully tried to apply for asylum at the Polish–Belarusian border was subsequently detained in Russia and transferred to Chechnya.

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7 <https://missingmigrants.iom.int/>.


According to his statements, he was secretly detained and beaten.\textsuperscript{12} As evident from ECtHR case law, as a consequence of covert border enforcement practices, persons were killed,\textsuperscript{13} disappeared,\textsuperscript{14} and ill-treated.\textsuperscript{15} Consequently, the two situations are similar enough to apply the same evidentiary threshold.

The argument unfolds in four sections. Section two explores the circumstances under which the ECtHR proceeds to shift the burden of proof from the applicant to the state in enforced disappearance cases. The third section identifies the different forms that factual disagreements between states and applicants concerning covert border enforcement can take in ECtHR proceedings. Section four compares the similarities and differences between covert border enforcement and enforced disappearance, arguing that the same evidentiary threshold should apply in both sets of cases. Section five then describes how the Court shifts the burden of proof differently in covert border enforcement cases. It shows that a higher evidentiary threshold is actually being applied, despite the Court claiming to be applying the same one.

The analysis related to enforced disappearance draws on research that I conducted previously,\textsuperscript{16} while for the covert border enforcement cases, I selected judgments and inadmissible decisions which demonstrated disagreements between states and applicants regarding the facts of the cases.\textsuperscript{17} From the group of the enforced disappearance and covert border enforcement cases, for an in-depth analysis, I selected those where both the state and applicant disagreed to the facts. These judgments and inadmissible decisions

\begin{footnotesize}
\begin{enumerate}
\item MK and Others v Poland 40593/17, 42902/17, and 43643/17 (ECtHR, 23 July 2020) paras 45–47.
\item MH and Others v Croatia 15670/18 and 43115/18 (ECtHR, 18 November 2021) para 7.
\item Hirsi Jamaa and Others v Italy [GC] 27765/98 (ECtHR, 23 February 2012) para 15.
\item RR and Others v Hungary 36337/17 (ECtHR, 2 March 2021) paras 57 and 65; MH and Others (n 13) para 204. See also, MK and Others (n 12) para 187, in which the ECtHR found it unnecessary to analyse the alleged violation of Article 3 on account of the applicants’ treatment by the Polish authorities during the border checks, as they were closely connected to the applicants’ lack of access to asylum procedures.
\item G Baranowska, Rights of Families of Disappeared Person: How International Bodies Address the Needs of Families of Disappeared Persons in Europe (Intersentia 2021) 66–79.
\item The initial selection was done through a HUDOC search of Article 4 Protocol 4 cases. Next, additional cases were added, in particular cases relating to events at state borders that raised Article 3 violations.
\end{enumerate}
\end{footnotesize}
were analysed for how the ECtHR assesses evidence brought forward by the applicants and states.18

2 Burden of Proof Shift

The ECtHR shifts the burden of proof from the applicant to the state when there is an acute differential access to information which advantages the state and leaves the applicant without evidence.19 It has done so first in enforced disappearance cases that can be seen as the catalyst for change in the ECtHR’s approach to the burden of proof.20 In this section, I introduce the ECtHR’s approach to establishing where the burden of proof lies and when/if it shifts.

The ECtHR maintains that it applies only one standard of proof: ‘beyond reasonable doubt’.21 According to the Court, such proof may follow from the coexistence of sufficiently strong, clear, and concordant inferences, or of similar unrebutted presumptions of facts, and by taking into account the conduct of the parties.22 In certain situations, such as in the cases of enforced disappearance and covert border enforcement, it is extremely difficult or even impossible for the applicants to provide such proof.23 Consequently, when adjudicating enforced disappearance cases, the ECtHR started to shift the

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18 Accepting the applicant’s version of the facts does not necessarily lead to finding a violation. This article does not analyse how the ECtHR assesses violations of the European Convention of Human Rights (eCHR or the Convention). For example, in ND and NT (n 1), the ECtHR accepted the applicants’ version of facts, but the Grand Chamber found that no violation of the Convention had occurred.

19 C Roberts, ‘Reversing the Burden of Proof Before Human Rights Bodies’ (2021) 25(10) The International Journal of Human Rights 1682, 1687–1688. There are also other instances in which the ECtHR shifts the burden of proof. For example, Moritz Baumgärtel demonstrates that the ECtHR has shifted the burden of proof to the state in certain contexts in consideration of the vulnerability of migrants. See, M Baumgärtel, ‘Facing the Challenge of Migratory Vulnerability in the European Court of Human Rights’ (2020) 38(1) Netherlands Quarterly of Human Rights 12, 24.


21 It was first established in Ireland v the United Kingdom 5310/71 (ECtHR, 13 December 1977) para 160.

22 Orhan v Turkey 25656/94 (ECtHR, 18 June 2002) para 264; Varnava and Others v Turkey [GC] 16064/90 and others (ECtHR, 18 September 2009) para 183.

23 For instance, because the state itself did not allow the applicant to record the events (see, for example, DA and Others v Poland 51246/17 (ECtHR, 8 July 2021) para 13), or states are not producing at the ECtHR evidence that they (should) have, such as video recordings made by securing cameras (see, for example, ND and NT (n 1) para 81).
burden of proof to the government when the applicant made a \textit{prima facie} case.\textsuperscript{24}

The ECtHR has highlighted that whether it will reverse the burden of proof in enforced disappearance cases depends on the details of the case, especially on the existence of sufficient circumstantial evidence.\textsuperscript{25} Only if the Court finds such evidence will the burden be transferred to the state, which will have to prove that no violation has occurred in order not to lose the case.\textsuperscript{26} The ECtHR also highlighted that the states’ obligation to present credible evidence concerning the person’s fate is particularly important when that person was disappeared during detention.\textsuperscript{27}

If events are exclusively known to the authorities, ‘strong presumptions of fact will arise in respect of injuries, death or disappearances occurring during such detention.’\textsuperscript{28} For instance, in enforced disappearance cases, the ECtHR has relied on testimonies of eyewitnesses concerning the events surrounding the disappearance and persons detained with the disappeared persons.\textsuperscript{29} In other cases, the state argued that the disappeared persons were taken away by an armed group not connected to the state. As special forces were found to have patrolled the area during the night that the disappearances occurred, the ECtHR found it highly unlikely that two different groups of uniformed men had patrolled the area in similar vehicles at the same time.\textsuperscript{30} Consequently, the ECtHR was willing to accept the applicants’ facts without direct evidence.


\textsuperscript{25} \textit{Timurtas v Turkey} 23531/94 (ECtHR, 13 June 2000) paras 82–83; \textit{Çakıcı v Turkey} [GC] 23657/94 (ECtHR, 8 July 1999) para 85.

\textsuperscript{26} The Court has also repeatedly stated that the distribution of the burden of proof and the level of necessary persuasion depend on three aspects: (1) the specificity of the facts, (2) the nature of the allegations, and (3) the rights of the European Convention of Human Rights (ECHR) at stake (see, for example, \textit{El-Masri v The Former Yugoslav Republic of Macedonia} [GC] 39630/09 (ECtHR, 13 December 2012) para 151). However, from the case law of the ECtHR it is not clear how this is applied and what it means in practice.

\textsuperscript{27} \textit{Orhan} (n 22) para 326. For more on assessing the uncertain death of victims of enforced disappearance in ECtHR proceedings, see, Stirner (n 24) 317–234.

\textsuperscript{28} \textit{Orhan} (n 22) para 326.

\textsuperscript{29} \textit{Ruslan Umurov v Russia} 12712/02 (ECtHR, 3 July 2008) paras 87 and 96.

\textsuperscript{30} \textit{Khadzhialiyev and Others v Russia} 3013/04 (ECtHR, 6 November 2008) paras 87–88; \textit{Musayeva v Russia} 74239/01 (ECtHR, 26 July 2007) para 101. See also, Baranowska (n 16) 73–76.
Apart from circumstantial evidence, there are also other reasons that human rights bodies shift the burden of proof, such as when the individual violations that the applicants are alleging form a part of a systemic pattern of violations. However, the ECtHR does not do this, which has implications for enforced disappearance as well as for covert border enforcement cases. Shifting the burden of proof when a systemic pattern of violations occurs would make it significantly easier to substantiate a case in both situations, as there is abundance of evidence that the practices are widespread.

Under circumstances in which the direct evidence lies in the hands of the state and that state denies its involvement, ***prima facie*** evidence should suffice to shift the burden of proof. This appears to be the approach of the ECtHR when adjudicating covert border enforcement cases, as the Court invokes the enforced disappearance case law and evidentiary tools developed within

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32 The landmark case on domestic violence, *Volodina v Russia* 41261/17 (ECtHR, 9 July 2019), could be considered an exception to this rule, as the ECtHR argued that, ‘[o]nce a large-scale structural bias has been shown to exist, such as that in the above-mentioned cases, the applicant does not need to prove that she was also a victim of individual prejudice’ (para 114). For more on the judgment, see, RJA McQuigg, ‘The European Court of Human Rights and Domestic Violence *Volodina v. Russia*’ (2021) 10 International Human Rights Law Review 155. However, shifting of the burden of proof does not result from a systemic violation, as would be the case in enforced disappearance cases, but from the rules adopted by the ECtHR with regard to discrimination. In this context, the ECtHR had already established that statistics may be sufficient prima facie evidence in discrimination cases (*DH and Others v the Czech Republic* [GC] 57325/00 (ECtHR, 13 November 2007) para 188).

33 See, for example, reports provided to the ECtHR by NGOs (*ND and NT* (n 1) para 82; *Khlaifia and Others v Italy* [GC] 16483/12 (ECtHR, 15 December 2016) para 50) and domestic authorities (*MK and Others* (n 12) paras 109–114; *MH and Others* (n 13) para 103). See also, the involvement of the ombudswomen in the investigation in question (*inter alia* paras 33 and 65) and international bodies (*MA and Others v Lithuania* 59793/17 (ECtHR, 11 December 2018) para 112; *Hirsi Jamaa and Others* (n 14) para 203).
that case law. Yet, as I will show in section five, the Court requires a higher evidentiary threshold for this application in practice.

3 Disagreements About Covert Border Enforcement Practices in the ECtHR

In border enforcement cases brought before the ECtHR, states often disagree with the applicants on various facts. The state may contest that: (1) the events in question happened at all; (2) the applicants were involved in them (without contesting, however, that the events happened); or (3) the applicants had applied for asylum (whilst recognising the applicants were present in the non-contested events). In the below cases which illustrate these three groups, the state had denied the applicants’ version concerning one of these scenarios before the ECtHR, whereas the Court accepted the applicants’ version, which is why they fit the definition of covert border enforcement.

*MH and Others* v Croatia, a tragic case that involved a child hit and killed by a train around 300 meters from the border, offers an example of the first form of discrepancy. The application alleged that an Afghan woman and her six children, who had irregularly crossed the Serbian–Croatian border, had then been approached by the Croatian police. According to the applicants, the police ordered them to get into a vehicle and drove them back to the border, advising them to follow the train tracks back to Serbia. The Croatian authorities, by contrast, alleged that the family had never crossed into Croatia. The ECtHR accepted the version of the applicants, which was confirmed by witness statements, among other evidence.
The most well-known example of the second form of discrepancy is *ND and NT v Spain.*36 The fact that a group of people had been pushed back from the Spanish enclave of Melilla to Morocco on 13 August 2014 after they had successfully stormed the border fence was accepted by both parties. The Spanish government, however, disputed the presence of the two applicants in these events. When assessing this discrepancy, the ECtHR accepted that the failure by the Spanish authorities to register the identities of the persons concerned and to deal with each person individually had contributed to the applicants’ difficulties in providing evidence of their participation in the events. Accordingly, the Court found the *prima facie* evidence they presented, which Spain had not convincingly refuted, sufficient.37

The third form of discrepancy is illustrated in the case of *MK and Others v Poland,* where the state argued that a Chechen family that came to an official border crossing had not filed for asylum, despite evidence suggesting otherwise.38 The ECtHR accepted the applicants’ version, as it did in other cases in which it considered the applicants’ behaviour at the border consistent with claiming asylum.39

The above examples offer an opportunity to explain my use of the term ‘covert border enforcement’. Clearly, in the second case, the Spanish practice of returning persons who had stormed the fence between Morocco and Melilla, was hardly covert. However, because the persons had neither been individually identified nor registered – an omission which is itself a border enforcement decision –, the state could easily deny their involvement in the events and thus the applicants’ status as ‘victims’. This omission led to covering the outcomes of the practices and made it almost impossible for persons participating in

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36 In *ND and NT* (n 1), the ECtHR accepted the factual circumstances put forward by applicants; however, the Grand Chamber did not find a violation of the *ECHR*, as it found that Spain had provided genuine and effective means of legal entry, which the applicant failed use. Consequently, it ruled differently than the Chamber (*ND and NT v Spain 8675/15* and 8697/15 (ECtHR, 3 October 2017)). For a comparative analysis of both judgments, see Clara Bosch March, who argues that the GC judgment deviated from the Court’s case law in *ND and NT v Spain* (CB March, “Backsliding on the Protection of Migrants’ Rights? The Evaluative Interpretation of the Prohibition of Collective Expulsion by the European Court of Human Rights’ (2021) 35(4) Journal of Immigration Asylum and Nationality Law 315).

37 *ND and NT* (n 1) paras 80–88.

38 A copy of the application for international protection, which the state argued not to have been submitted at the border, was filed by the lawyer via email, fax, and ePUAP (*MK and Others* (n 12) paras 22, 35, 64). At one point, lawyers were present at the Polish side of the border, when they were trying to file the application (*MK and Others* (n 12) paras 11 and 54).

39 *MA and Others* (n 33) para 107.
those events to prove that they were in fact present during them. In the last cases, the incorrect rejection of international protection claims may be the result of misunderstandings or mistakes, but it may also constitute a border enforcement practice. Indeed, the above-mentioned ECtHR case contains abundant evidence that such actions were based on actual regular practices,\textsuperscript{40} which were not officially admitted, and thus also fit the category of covert border enforcement. In covert border enforcement cases, the states deny the facts, which makes bringing evidence to the ECtHR extremely difficult. This is one of the similarities to enforced disappearances, which will be explored in more detail in the following section.

4 Similarities and Differences with Enforced Disappearance Cases

Notwithstanding the differences between covert border enforcement and enforced disappearance cases, the evidentiary situation in both scenarios is the same and therefore should be treated as such by the ECtHR. In particular, the position of the victims and availability of evidence is strikingly similar. Consequently, evidentiary tools could be expected to be applied in a similar manner for both groups of cases. In subsection 4.1, I will briefly highlight the following similarities: that the facts underlying the case are in dispute, which is exacerbated by lack of documentation and power asymmetry between the parties. Those similarities, I argue, significantly influence how evidentiary challenges should be assessed. There are also differences (4.2) between enforced disappearance and covert border enforcement, in particular, the overall context in which the violations occurred and the access to digital evidence.\textsuperscript{41} I will show that those differences should be irrelevant for shifting the burden of proof.

\textsuperscript{40} Ibid para 174; \textit{Da and Others} (n 23) para 60 (‘systemic pattern of misrepresenting statements given by asylum seekers’). In milder words regarding Lithuania, see, ibid para 112.

\textsuperscript{41} Among the differences, I do not mention the responsibility for the human rights violations. This could be mentioned as one of the differences, as in enforced disappearances the state is clearly responsible for the underlying violation, while in covert border enforcement cases serious human rights violation might occur at a later point through another actor. This is, however, not relevant for the ECtHR case law analysis, as there are also obligations for states with regard to disappearances for which state authorities were not found to be responsible. See, Baranowska (n 16) 66–67.
4.1 **Similarities**

As I have demonstrated in section three, the denial of the facts in covert border enforcement comes in different forms. This is also true of enforced disappearance cases that have deprivation of liberty at their core. In some cases, state authorities have denied that the disappeared person had ever been detained by the state; in others, they maintained that the person had escaped detention or that the person was disappeared by other actors. What connects these two sets of case law is that the facts underlying the application are in dispute, which is particularly challenging from an evidentiary perspective.

Another shared characteristic is that they involve an action by the state which, in normal circumstances, would have produced a document. Both detention (which always happens in an enforced disappearance case) and expulsion are meant to be officially recorded. In cases where the state acts covertly, however, it will tend not to register these actions. The applicants are therefore not provided with documents. Thus, when they complain about the actions of the state they are unable to produce any documents, which raises a particular conundrum as these actions are normally expected to be 'documented'. The ECtHR has found in various cases that not documenting the practice and/or the practice itself have been of structural nature.

This evidentiary challenge in both groups of cases is amplified by the power asymmetry between the applicant and the states in enforced disappearance and covert border enforcement cases. As stated by Judge Bonello in a concurring opinion to one of the first enforced disappearance cases, it is ‘[u]nacceptable that the applicant is told by a court of justice that he cannot win against the State, as he failed to produce evidence which the State had wrongly failed to produce.’ The evidence may exist but is not made available to the

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42 See, for example, Çakıcı (n 25) para 85.
43 See, for example, Kurt v Turkey 24276/94 (ECtHR 25 May 1998); Khadzhialiiev and Others (n 30) para 102.
44 For example, in mk and Others (n 12), the ECtHR called not processing claims for international protection to be ‘wider state practice’ and ‘consistent practice’ (para 208–210). Similarly, the ECtHR recognised that there was a practice of enforced disappearances in south-eastern Turkey in the first half of the 1990s (Er and Others v Turkey 23016/04 (ECtHR, 31 July 2012) para 77), and that the phenomenon of enforced disappearances was well known in Chechnya (Khasyeva v Russia 28159/03 (ECtHR, 11 June 2009) para 107). This, however, did not have the same evidentiary meaning as a ‘practice of enforced disappearance’ has at the IACtHR, as discussed in section two.
45 Tahsin Acar v Turkey [GC] 26397/95 (ECtHR, 6 May 2003) Concurring Opinion by Judge Bonello, para 9. In mh and Others (n 13), the Hungarian Helsinki Committee argued along similar lines: ‘Where the lack of documents proving that the applicants were indeed under the jurisdiction of the respondent State could be ascribed to the practice of the State’s authorities, the State should not be able to hide behind this pretext’ (para 267).
applicant, or the state may have never produced the documentation which could stand as evidence, such as records of detention or of the wish to file for asylum. In some cases, the state not only failed to produce evidence, but also intentionally falsified information. Realistically, the power asymmetry in access to information can only be addressed by the ECtHR’s approach to evidence.

4.2 Differences

Clearly, there are also differences between enforced disappearance and covert border enforcement cases decided by the ECtHR. The first significant difference concerns the overall political context of the defendant states. The enforced disappearance cases that led the Court to shift the burden of proof mostly arose in the context of the conflict in South-Eastern Turkey or those in Chechnya. The defendant states were known to be involved in systemic violations of core human rights, among them enforced disappearance, and they were highly uncooperative in the ECtHR proceedings. By contrast, the states in covert border enforcement cases are often not considered to engage in systematic violations of human rights. This difference, however, need not matter. The ECtHR has never stated that shifting the burden of proof should only be applied in connection with widespread human rights violations committed by a non-cooperative state during internal conflict. Furthermore,

46 While the ECtHR has not stated this explicitly, it is clear, for example, in MA and Others (n 33) and MK and Others (n 12) that state authorities have misrepresented the statements made by the applicants and thereby falsified the evidence.


49 See, section 5.3 for a more nuanced discussion on ‘cooperative’ states.

50 Such as Spain, Italy, or Poland. Of course, there are also cases concerning border violence directed against Turkey and Russia, however, none of the covert border enforcement judgments selected for this article – in which the state argued that the events did not occur – were directed against Turkey or Russia (for an example of a relevant case against Turkey in which the state and the applicant disagreed as to the facts underlying the violation, see, Akkad v Turkey 1557/19 (ECtHR, 21 June 2022)). In contrast, the majority of enforced disappearances cases were directed against those two countries and took place during very serious internal conflicts.
the ECtHR applied those tools in subsequent enforced disappearance cases, too, where the context was different.51

A second difference, which is more related to the advancement of technology than to the factual differences between the two groups of cases, is the access to digital evidence. Arguably, since modern technologies make it easier to provide the ECtHR with circumstantial evidence, the Court could consequently expect stronger evidence in current covert border enforcement cases compared to earlier enforced disappearance cases. In particular, the possession of mobile phones with geolocation capabilities gives victims of human rights abuses and civil society actors new means to provide proof of their presence in a certain area. However, pictures and videos have also been submitted as evidence in proceedings on enforced disappearance.52 Furthermore, destroying mobile phones is a standard practice during pushbacks,53 which, in many cases, makes it impossible for the victims to use that evidence. States have also undermined such evidence from video recordings provided by the applicants.54 Moreover, individual persons are usually not allowed to make their own recordings at border crossings, which also becomes apparent in ECtHR case law.55 Lastly, this kind of evidence – be it recorded by the applicants or civil society – is not considered by the Court to be direct evidence.

5 Shifting the Burden of Proof in Covert Border Enforcement Cases

This section shows that the ECtHR does not shift the burden of proof in covert border enforcement cases in the same way that it does for enforced disappearance. I first assess how the ECtHR approaches the shifting of the burden of proof (section 5.1) and then explore in more detail when it accepts that a prima facie case has been made in cases concerning covert border enforcement practices (section 5.2). These two issues are interlinked, as according to the ECtHR’s approach, an applicant must make a convincing

51 See, for example, El-Masri (n 26).
52 See, for example, Baysayeva v Russia 74237/01 (ECtHR, 5 April 2007) para 35.
53 Barker and Zajović (n 10).
54 See, ND and NT (n 1). In an application brought just two months after ND and NT, the ECtHR faced the same disagreement on facts regarding the fence storming in Melilla. The applicant provided video footage of the storming, on which the Spanish authorities argued that the applicant was not among the persons present. The case was ruled inadmissible because, among other reasons, the ECtHR found that did not provide credible evidence that his name corresponded to the identity of the person on the video. See, Doumbe Nnabuchi v Spain 19420/15 (ECtHR, dec, 1 June 2021) paras 28–29.
55 DA and Others (n 23) para 13.
prima facie case for the burden of proof to be shifted onto the state. I demonstrate that when the ECtHR has shifted the burden of proof in covert border enforcement cases, the applicants had in fact brought more than prima facie proof. This proof was therefore wrongly labelled prima facie. In the final subsection (section 5.3), I explore possible reasons behind the ECtHR’s higher threshold to covert border enforcement cases than to enforced disappearance cases.

5.1 Shifting the Burden of Proof
In covert border enforcement cases, the ECtHR explicitly states that it shifts the burden of proof. However, this has been done differently than in enforced disappearance cases – I argue that the Court has labelled evidence that was more than prima facie proof as such. MH and Others v Croatia is an interesting example of this. In this pushback case, which involved a child hit and killed by a train during the pushback, the ECtHR decided that the applicants brought forward sufficient prima facie evidence to shift the burden of proof. This was criticised by Judge Wojtyczek in his partly dissenting and partly concurring opinion. While he agreed with the version of events as established by the majority of Judges in MH and Others v Croatia, he stated that in this case the applicants provided the ECtHR with more than prima facie evidence. I support this assessment, as I will explore in more detail in the subsequent section.

Judge Wojtyczek further argued that, in cases involving the illegal crossing of a border, the burden of proof should not be shifted. In his opinion, in such cases the principles governing the burden of proof should be distributed in a more equitable manner. He reasoned that it might be impossible for states to refute allegations of pushbacks and, consequently, that applicants would need to provide more than prima facie evidence in certain circumstances.

56 ND and NT (n 1) para 85; MH and Others (n 13) paras 269–273. In this paper, I analyse the burden of proof in substantiating the facts on which the allegations are based. However, the burden of proof in the analysed cases was also applied to other matters, for example for showing that the applicants did have genuine and effective access to procedures for legal entry is on the state. See, MH and Others (n 13) para 296–303; ND and NT (n 1) para 212–217; Shahzad v Hungary 12625/17 (ECtHR 8 July 2021) paras 53–67.
57 MH and Others (n 13) para 273.
58 Ibid Partly Dissenting and Partly Concurring Opinion of Judge Wojtyczek, paras 2.3 and 2.5.
59 Judge Wojtyczek does not use the term ‘pushback’, but talks about ‘cases involving illegal crossing of a border’ (para 2.3).
60 Ibid paras 2.3.
I disagree with Judge Wojtyczek’s assessment that shifting the burden of proof in cases involving the illegal crossing of a border should require more than *prima facie* evidence. It might be difficult to refute the allegation of irregular entry into the country, but it would be considerably easier for states to refute them if they would not engage in covert border enforcement practices. In many ECtHR applications, reliable reports show that the state is secretly engaged in the exact practices raised in the relevant applications to the Court. The reasoning of Judge Wojtyczek seems to stem from the conception that EU states currently face exceptional situations with migration. Notably, in enforced disappearance cases in which the ECtHR applied evidentiary tools in a less stringent way, as I argue below, states claimed that it was impossible to conduct investigations due to the post-conflict situation or exceptional circumstances. In those cases, the ECtHR ruled that states were able to conduct effective investigations. Illegal crossings of an EU border do not appear to complicate the collection of evidence or the performance of investigations any more than exceptional circumstances during or after armed conflicts.

### 5.2 Making a Prima Facie Case

Compared with the enforced disappearance cases, the evidence presented by applicants in covert border enforcement cases is stronger. It consists of many different elements: reports confirming that the practice alleged in the application is widespread in the country, together with circumstantial evidence concerning their individual situation, including photographs, video material, and witness statements. By contrast, the ECtHR reversed the burden of proof in enforced disappearance cases based on testimonies of eyewitnesses or because the events occurred in an area within the exclusive control of the state and it found *prima facie* evidence that the state may

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61 See, for example, *Hirsi Jamaa and Others* (n 14) para 203; *MK and Others* (n 12) para 174.
62 *MH and Others* (n 13) Partly Dissenting and Partly Concurring Opinion of Judge Wojtyczek, para 3. The ECtHR itself has numerous times stated that it recognises the challenges EU states are faced with due to recent migratory flows. See, for example, *Iliyas and Ahmed v Hungary* [GC] 47287/15 (ECtHR, 21 November 2019) para 155; *Khlifa and Others* (n 33) paras 179, 185, and 241.
63 *Mahmut Kaya v Turkey* 22535/93 (ECtHR, 28 March 2000) paras 107–108; *Ipek v Turkey* 25760/94 (ECtHR, 17 February 2004) para 171; *Bazorkina v Russia* 69481/01 (ECtHR, 27 July 2006) para 121; *Baysayeva* (n 52) para 127. For a more detailed analysis, see, Baranowska (n 16) 64–66.
64 *MK and Others* (n 12) para 208; *DA and Others* (n 23) para 60.
65 *MA and Others* (n 33) para 18.
66 *ND and NT* (n 1) para 27.
67 *MH and Others* (n 13) para 11.
68 *Ruslan Umarov* (n 29) paras 87 and 92.
be involved. I argue that the ECtHR expects applicants in covert border enforcement cases to provide the Court with stronger evidence, which it has labelled as *prima facie* evidence. To demonstrate this, I will shortly discuss two judgments in which the applicants brought forward sufficient evidence. One of the cases is the aforementioned *MH and Others v Croatia*, in which the denial by the state of one pushback case and proven practice of summary expulsions was not enough to establish two other instances of pushbacks. In *MA and Others v Lithuania* the clear evidence was criticised in a three to four judgment by dissenting Judges.

In *MH and Others v Croatia* the applicants alleged three instances of pushbacks, but the ECtHR found two of them to be unsubstantiated. With regard to the substantiated one, the applicants presented strong evidence: domestic proceedings were conducted into the death of the child, which occurred during the pushback. Based on the domestic proceedings, the ECtHR could observe that the authorities had never verified the police allegations that no surveillance recordings were available from the border and that the police did not inspect signals from the applicants’ phones or police cars. Although this was labelled as *prima facie* evidence by the ECtHR, it should actually be considered as sufficient proof.

Recognising that this pushback happened as described by the applicants means recognising that Croatia has provided the ECtHR with false information. However, this did not influence the high evidentiary threshold applied with regard to the remaining two pushbacks. At the same time, the ECtHR recognised many reports which supported the practice of summary expulsions from Croatia. In my opinion, those two factors – false information to the ECtHR in the very same case and a proven practice of the alleged act – are very important factors to be considered when assessing evidence. It would be reasonable to assess this as *prima facie* evidence and shift the burden of proof to the state in the two remaining pushback allegations, but the ECtHR did not do so.

The second example, *MA and Others v Lithuania*, concerns a case in which the applicants argued that they had submitted a claim for international protection, while the state denied this. The three dissenting Judges disagreed with the majority on evidence assessment, stating that the ECtHR did not even establish that the applicants had ever submitted a claim for international protection. Quite to the contrary, it was strong evidence. One of the pieces of evidence included the applicants’ own police allegations that were not verified by the authorities.

69 Varnava and Others (n 22) para 184. See also, Baranowska (n 16) 73–76.
70 *MH and Others* (n 13) paras 155 and 269–275.
71 Ibid para 103.
evidence submitted to the ECtHR was the refusal of entry decisions issued to the family by Lithuanian border authorities. In the space for their signature, the parents wrote ‘asul’ in Cyrillic script (аэуль). The dissenting Judges argued that, given that the applicant’s surname started with the letter ‘A’, the border guards had no reason to suspect that this word was not their surname. Furthermore, the applicants had provided the ECtHR with a picture of a train ticket and an asylum claim. According to the dissenting Judges, the picture could not be regarded as evidence of a request submitted to the authorities.72

The word ‘asul’ on the refusal decisions and providing the ECtHR with a picture of a train ticket and asylum claim is a very strong indication that the applicants had tried to claim asylum. As the state denied that such a request was made and the authorities did not record the request, the question arises what additional evidence an applicant in a similar situation could bring forward. In short, the threshold of evidence proposed by those three dissenting Judges is extremely high.

5.3 Reasons for a High(er) Threshold in Covert Border Enforcement Cases

The ECtHR could have several reasons to apply the evidentiary tools developed for enforced disappearance with a higher evidentiary threshold when adjudicating cases concerning covert border enforcement. In this section, I explore three possible reasons: the ECtHR’s deferential attitude toward states’ border practices, (non)-cooperation with the ECtHR, and the European Convention on Human Rights (ECHR or Convention) violations involved.

Firstly, the higher threshold in covert border enforcement cases can be situated in a broader trend of the ECtHR’s deferential attitude toward states’ border practices, which many view to leave gaps in human rights protection.73 As such, the Court may give states more latitude to deal with covert border enforcement than with enforced disappearance. In fact, some of the concurring

opinions to the ECtHR judgments indicate this position. The ECtHR itself has also repeatedly pointed out the difficult situation in which states have found themselves due to the migration influx. The second possible reason for a higher threshold is the (non)-cooperation of states with the ECtHR. In enforced disappearance cases, the ECtHR has recognised repeatedly that states have not cooperated with the Court. This acknowledgment is demonstrated by the fact that the Court found in over one-third of the enforced disappearance judgments a violation of Article 38 of the ECHR, which obliges states to provide all necessary facilities to allow the Court to undertake an effective investigation. This does not hold for covert border enforcement cases, in which the ECtHR has generally been satisfied with states’ responses. Thus, one possible explanation could be that the state has to satisfy a higher evidentiary threshold when the Court finds the state uncooperative; along similar lines, if the state is seen to cooperate, the Court is more likely to endorse the state’s version of events.

Such an approach could be understood from the point of view of the ECtHR, as the cooperation of states is necessary for the Court’s proceedings. However, the distinction between cooperative and non-cooperative states is not an obvious one. In enforced disappearance cases, the ECtHR has drawn inferences from the states’ uncooperativeness, namely when they did not provide the Court with requested documents. The ECtHR has not adopted the same approach in covert border enforcement cases. In one of the cases, the applicants argued that the governments’ inability to respond to a request from the ECtHR about facts constituted a breach of Rule 44C. This rule is applied by the ECtHR when a defendant state fails to participate effectively in the Court’s proceedings.

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74 MH and Others (n 13) Partly Dissenting and Partly Concurring Opinion of Judge Wojtyczek, para 2.3; MA and Others (n 33) Joint Dissenting Opinion of Judges Ravarani, Bošnjak, and Paczolay, paras 7–8. See also, ND and NT (n 1) Concurring Opinion of Judge Pejchal, who argues that the ECtHR should not have heard the case, arguing – among others – that the case should have been lodged at the African Court on Human and Peoples’ Rights.

75 RR and Others (n 15) para 88; Iliyas and Ahmed (n 62) para 155; Khlaifia and Others (n 33) para 179, 185, and 241.

76 S Jötten, Enforced Disappearances und emrk (Duncker & Humblot 2012) 22; Baranowska (n 16) 78–80.

77 While the ECtHR did find the violation of Article 34 (the right to individual applications) of the Convention in a few relevant cases, this did not concern evidentiary issues. See, MK and Others (n 33) paras 221–238 (non-compliance with interim measures) and MH and Others (n 13) para 305–336 (non-compliance with interim measures and restriction of contact between applicants and chosen lawyer). The contact with the lawyer in the former case could obviously have influenced the evidence produced by the applicant, but this was not considered as such by the ECtHR.

78 Orhan (n 22) para 274.
in the proceedings and was introduced in response to conduct of states in enforced disappearance cases.\textsuperscript{79} In the case in which the applicants raised a breach of Rule 44, the Court failed to address this issue.\textsuperscript{80} Additionally, the judgments suggest that in covert border enforcement cases, the ECtHR could have asked states for additional evidence (e.g., recordings from borders and border crossings).\textsuperscript{81} Thus, the assessment of 'cooperativeness' might have been different had the ECtHR requested more documents from the states.

Lastly, another possible reason for a lower threshold in enforced disappearance cases is the gravity of the alleged violations. The ECtHR has highlighted that, when the allegation concerns violations of Article 2 (right to life) and Article 3 (prohibition of torture and ill-treatment) \textsc{echr}, it must apply a more stringent scrutiny to the state's account of events, owing to the alleged violations' grave nature.\textsuperscript{82} There is in fact a difference in the \textsc{echr} provisions raised in the two groups of cases. In most enforced disappearance cases, Article 2 and Article 3 are invoked.\textsuperscript{83} In covert border enforcement cases, most of the applicants refer to the risk of torture after being returned to another country (Article 3) and invoke the prohibition of collective expulsion (Article 4 of Protocol 4) and the right to an effective remedy (Article 13).\textsuperscript{84}

As in covert border enforcement cases, Article 2 and Article 3 are not as often raised as in enforced disappearances, this could be the reason for the distinction in the assessment of evidence. However, if this is the reason for a higher evidentiary threshold, the ECtHR would also need to consider whether the covert border enforcement cases are not in fact also violations of a grave nature. During pushback practices brought to the ECtHR, persons have been killed,\textsuperscript{85} and others went missing or died shortly after becoming victims of

\begin{itemize}
\item \textsuperscript{79} ECtHR, \textit{Rules of the Court} (2023) Rule 44C, para 1. See also, Stirner (n 24) 395–398. However, see also, Bicknell (n 20) 175–176, who argues that Rule 44C is rarely invoked in practice, even when the ECtHR actually shifts the burden of proof and relies on circumstantial evidence.
\item \textsuperscript{80} Nd and nt (n 1) para 57.
\item \textsuperscript{81} Ibid. para 81 (the applicants contended that the government did not produce video recordings made by security cameras); \textit{Khlaifia and Others} (n 33) (accepting that the records were destroyed during a fire, which Judge Serghides in particular critiques in a dissenting opinion).
\item \textsuperscript{82} \textit{Orhan} (n 22) para 352.
\item \textsuperscript{83} As well as the rights to liberty and security (Article 5 \textsc{echr}), to a fair trial (Article 6 \textsc{echr}), and to an effective remedy (Article 13 \textsc{echr}).
\item \textsuperscript{84} In some cases, the applicants also refer to ill-treatment (Article 3 \textsc{echr}) by border authorities and the right to liberty and security (Article 5 \textsc{echr}).
\item \textsuperscript{85} MH and Others (n 13) para 7.
\end{itemize}
refoulement.\textsuperscript{86} Applicants have also alleged Article 3 violations because of maltreatment at the hands of border guards and officials.\textsuperscript{87} Consequently, covert border enforcement practices are often themselves violations of grave nature or result in thereof.

6 Conclusion

Covert border enforcement is widespread on EU borders, with the ECtHR being the main judicial body to which victims of such violations can turn.\textsuperscript{88} The violations concerned are extremely difficult to prove, as all the direct evidence lies in the hands of the state, which denies the existence of this practice (to varying degrees). When adjudicating such cases, in addition to assessing the evidence, the Court needs to consider that the applicants are at a significant disadvantage with regard to bringing evidence.

In approaching covert border enforcement practices, the ECtHR has invoked evidentiary tools developed for enforced disappearance. Those applications are similar in respect of evidentiary issues, as challenges with proving the issues in question ensue from the state’s conduct. In covert border enforcement practices, disagreements on the facts show three forms of divergence. Disagreements can occur about whether the events at stake happened at all; selected pushback cases, such as \textit{MH and Others v Croatia}, are examples of this approach. Alternatively, the state might admit that the events have occurred, but without the applicants’ involvement. \textit{ND and NT v Spain}, concerning the storming of a border wall, is an example of such a strategy. Finally, states can deny that the applicants applied for asylum, as exemplified in \textit{MK and Others v Poland}.

When assessing the evidence in covert border enforcement cases, the ECtHR invoked the case law on enforced disappearances and stated that it shifted the burden of proof to the state when the applicants could present \textit{prima facie} evidence. However, I demonstrate that in practice the ECtHR expects

\textsuperscript{86} Hirsi Jamaa and Others (n 14) para 15–17. For other judgments on refoulement and chain refoulement, see, Iliyas and Ahmed (n 62); \textit{TZ and Others v Poland} 41764/17 (ECtHR, 13 October 2022).

\textsuperscript{87} Khlaifia and Others (n 33) para 136; Iliyas and Ahmed (n 62) para 183; \textit{RR and Others (n 15) paras 57 and 65}; \textit{MH and Others (n 13) para} 204.

\textsuperscript{88} The other judicial bodies that can be approached are the United Nations (UN) treaty bodies. However, for many reasons (including the non-binding nature of their views), the UN treaty bodies are less often approached than the ECtHR. For examples of relevant UN treaty bodies views, see, United Nations Human Rights Committee, ‘A.S., D.I., O.I. and G.D. v Italy’ (n 9); United Nations Committee on the Rights of the Child, ‘D.D. v. Spain’ (15 May 2019) CRC/C/80/D/4/2016.
applicants in such cases to provide the Court with stronger evidence, which is then labelled as *prima facie* evidence. As the position of the victims and availability of evidence is strikingly similar, I argue that the burden of proof should be shifted in the same way for both groups of cases.

Importantly, the conduct of the state – for example, its influence over the documentation or recordings needed for evidence – is not sufficiently taken into account in the ECtHR’s assessment in covert border enforcement cases. Assessing the conduct of states during ECtHR proceedings, I conclude that providing the ECtHR with false information and a proven practice of the alleged act should be assessed as *prima facie* evidence and shift the burden of proof to the state.

In enforced disappearance cases, the ECtHR has recognised that the secret nature of the practices increases the suffering of applicants. Evidently, secrecy also characterises covert border enforcement, in which the conduct of the state and its denial of the practice do not only make it difficult – or impossible – to prove violations, but also leave the victims abandoned and helpless. In its current practice, the ECtHR fails to acknowledge this particular harm suffered by applicants.

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89 *El-Masri* (n 26) para 203. In this case concerning a German citizen’s abduction and handover to the CIA, the ECtHR explicitly stated that the abduction and detention amounted to enforced disappearance (para 240).