

New technologies and enforced disappearances: opportunities and challenges for the protection of human rights

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New technologies and enforced disappearances have been part of the thematic study included in the annual report of the Working Group on Enforced and Involuntary Disappearances (WGEID) published in August 2023. Enforced disappearances present flagrant human rights violations where the families of disappeared persons are not familiar with the fate and whereabouts of their disappeared relatives. The use of new technologies¹ in cases of enforced disappearances may enhance human rights protection, facilitate the search for disappeared persons, and obtain evidence. However, new technologies can be used to prevent further investigations and obtain evidence, especially in cases where torture is committed by state actors and cases of enforced disappearances in the transnational context. This paper will analyze the positive and negative effects of the use of new technologies in enforced disappearances and will emphasize the importance of conducting an effective investigation and acknowledging the right to truth in these cases.

KEYWORDS: enforced disappearances, new technologies, information, disappeared person, human rights.

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¹ For the purpose of this article, the term ‘new technologies’ will be used and analyzed in light of the definition provided by the WGEID in their Report A/HRC/54/22.

Introduction

The enforced disappearances of people represent gross human rights violations and are considered as a crime against humanity. The cases of disappeared persons may remain open for years and decades, thus they are not subject to the statute of limitations. 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 places such person outside the protection of the law.¹ The victim is removed from the protection of the law and in many cases is subjected to torture. If we analyze this definition, it is clear that enforced disappearances are punished if they are conducted by state actors, although perpetrators may be also non-state actors, such as organized crime and armed or paramilitary groups.

The phenomena of enforced disappearances first emerged as a state practice during the Nazi era, but became widespread under the military regimes in Latin America during the 1960s and 1970s (Webber and Sherani, 2022). Governments would routinely abduct people, hold them in clandestine prisons, subject them to torture, and often execute them without trial. The bodies were frequently hidden or destroyed to eliminate any material evidence of the crime and to ensure the impunity of those responsible for these heinous acts. The broad objective of practicing enforced disappearances during this period was to dispose of political opponents secretly while evading domestic and international legal obligations. (Anderson, 2006). In that period, the military regimes of Argentina, Chile, Uruguay, Paraguay, Bolivia, Brazil, Ecuador, and Peru cooperated by sharing intelligence concerning political opponents as well as by seizing, torturing, and executing these persons in one another's territory. This transnational cooperation was called 'Operation Condor' and it was a meticulously devised mechanism that utilized advanced telecommunications systems and computerized profiling databases, in order to identify potential regime opponents and exert pressure on citizens and society. Its unique characteristics allowed for targeted and swift operations mainly carried out through abductions, torture, and eventual executions of individuals with absolute disregard for informing relatives of their fate (Kyriakou, 2012:4).

After 9/11 and the beginning of the 'War on Terror', extraordinary renditions as a form of enforced disappearances were conducted by the

² United Nations. (2010). International Convention for the Protection of All Persons from Enforced Disappearance, Article 2, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-all-persons-enforced>

Central Intelligence Agency (CIA). The purpose of the operations was to collect information about suspected terrorists while using different modus operandi which usually included abduction, and transfer from one or more countries to unknown and unregistered places of detention known as 'black sites'. Undoubtedly, these extraordinary renditions (which mostly included torture techniques while conducting interrogation) were performed using new technologies regardless of the possibility that fundamental human rights may be violated such as the right to life, prohibition of torture, deprivation of liberty, right to a fair trial and due process of law and many others.

Nowadays, the search for missing and disappeared persons is conducted within the framework of the Guiding principles for the search for disappeared persons (2019). These principles are based on the International Convention for the Protection of All Persons from Enforced Disappearance (ICCPED) and other relevant international instruments. They identify mechanisms, procedures, and methods for carrying out the legal duty to search for disappeared persons. These guiding principles seek to consolidate good practices in searching effectively for disappeared persons, arising from States' obligation to search.

New cases of enforced and involuntary disappeared people emerging from the latest developments in Ukraine and Israel are a clear indicator that perpetrators must be found and made accountable for their acts. In the search for disappeared persons, new technologies are immensely important and needed. New technologies could allow to identification of missing and disappeared persons and can ease the search. Gathering physical, testimonial, and documentary evidence with the use of new technologies can elevate investigations. The use of satellite imagery, social media, drones, but also DNA testing, and other sorts of hardware and software innovations can resolve pending or new cases of disappeared persons. However, the use of new technologies can also 'hide the dark side' if these technologies are used to sabotage ongoing investigation or avoid revealing the truth in cases of disappeared persons when they are committed by state actors, part of extraordinary renditions, incommunicado detentions i.e., enforced disappearances in the transnational context.

The paper will try to explain both sides of the use of new technologies in cases of enforced disappearances. Additionally, the point will be to emphasize that new technologies should be used to trace disappeared persons in order for their families to get the right to the truth, to prosecute and punish those responsible, and to enhance the cooperation between states by using new technologies in sharing information and good practices in the search for the disappeared persons. Finally, the paper will analyze the given recommendations from international bodies, such as the WGEID, and what should be undertaken by states in successfully resolving the cases of enforced disappearances and developing effective mechanisms for prosecuting and punishing which have shown as the main weaknesses in the battle against enforced disappearances.

New technologies and enforced disappearances in the spotlight of the WGEID

The WGEID was created 43 years ago² to assist the families of disappeared persons to ascertain the fate and whereabouts of their disappeared relatives, to assist States and monitor their compliance with the obligations deriving from the Declaration on the Protection of All Persons from Enforced Disappearance and provide States with assistance in the prevention and eradication of enforced disappearances.

At its 125th session,³ the WGEID announced the intention to conduct a thematic study on new technologies and enforced disappearances. It was planned that the study⁴ points out how new technologies: (a) are being used against human rights defenders and civil society organizations, including relatives of disappeared persons and their representatives, and what kind of protective strategies are or can be put in place; (b) can be effectively applied to facilitate the search for disappeared persons, ensuring that their fate and whereabouts are established promptly and in a reliable and secure manner; and (c) can be used to obtain evidence about the commission of enforced disappearance, bearing in mind that under international law the crime is, by its very nature shrouded in secrecy and, as such, poses formidable evidentiary obstacles to identifying and bringing perpetrators to justice.

To conduct a study, the WGEID decided that new technologies will refer to technological innovations that have occurred mostly over the past 20 years, including hardware and software innovations and information and communications technologies, encompassing satellite imagery, digital social networks, and online datasets, the use of artificial intelligence and the development of deep learning, as well as digital forensics and biodata.

The study⁵ analyses how new technologies are being used against relatives of disappeared persons, their representatives, human rights defenders, and civil society organizations and which protective strategies are or can be put in place; and can be effectively applied to facilitate the search for disappeared persons, ensuring that their fate and whereabouts are established promptly and in a reliable and secure manner; and can be used

³ Since its inception in 1980, the WGEID has transmitted a total of 60,703 cases to 112 States. The number of cases under active consideration that have not yet been clarified, closed or discounted stands at 47,774 in total of 97 States.

⁴ Communications transmitted, cases examined, observations made and other activities conducted by the Working Group on Enforced or Involuntary Disappearances, 125th session, 20-29 September 2021, available at: <https://digitallibrary.un.org/record/3970483>

⁵ Working Group on Enforced or Involuntary Disappearances, Report A/HRC/51/31, 12 August 2022, available at: <https://www.ohchr.org/en/documents/thematic-reports/ahrc5131-report-working-group-enforced-or-involuntary-disappearances>

to obtain evidence of the commission of enforced disappearance, bearing in mind that this international crime is by its own nature shrouded in secrecy and, as such, poses formidable evidentiary obstacles to identify and bring to justice perpetrators.

As a result of this conducted study, in its Annual report published in August 2023,⁶ the WGEID concludes that new technologies, in particular information and communication technologies, are frequently used to facilitate or conceal the communication of enforced disappearance, hinder the work of human rights defenders, but on the other side, new technologies can offer cost-effective solutions that have already proved useful. To achieve the positive impact of the use of new technologies, it is important to enhance the mutual cooperation between states, corporations, civil society organizations, and other relevant stakeholders.

The use of new technologies can be related to the right to the truth which belongs to the relatives of the disappeared persons, but also to those found alive, to find out why they have disappeared, subject to incommunicado detention, extraordinary rendition, or victim of smugglers, paramilitary groups and other perpetrators. In this connotation, it is important to emphasize that the right to truth includes two elements: on the one hand, the victims' families' right to know the fate or whereabouts of the disappeared person, and on the other, in the event of death, their right to the restitution and identification of their remains. Moreover, the right to the truth is both a collective and an individual right. Each victim has the right to know the truth about violations that affected him or her, but the truth also has to be told at the level of society as a vital safeguard against the recurrence of violations stated in Principle 2 of the Set of Principles for The Protection and Promotion of Human Rights through Action to Combat Impunity (Orentlicher, 2005). Regarding the right to know the fate or whereabouts of the disappeared person, the state has the obligation to quickly and effectively investigate cases of disappearances without a prior need for the families to file a complaint (Calvet Martinez 2020). The concept of the right to truth contains a new paradigm, which is the right for the victim and the public to know about the abuses if they are committed by the governments in cases of enforced disappearances in the transnational context. The lack of effective investigation is an important segment that allows the states to hinder the truth. In so far many reports, the WGEID concludes that states failed to learn lessons on how to prevent

⁶ Working Group on Enforced or Involuntary Disappearances. (2023). Report A/HRC/54/22/Add.5, available at: <https://www.ohchr.org/en/documents/thematic-reports/ahrc5422add5-new-technologies-and-enforced-disappearances-report-working>

⁷ Working Group on Enforced or Involuntary Disappearances, Report. (2023). A/HRC/54/22, available at: <https://www.ohchr.org/en/documents/thematic-reports/ahrc5422-enforced-or-involuntary-disappearance-report-working-group>

enforced disappearances as a result of transnational renditions. Distinct and sophisticated patterns of enforced disappearances are emerging due to a lack of accountability, effective investigation, judicial independence, and impartiality in states with fragile democracies or high rates of corruption. Impunity represents a major problem and gives states *carte blanche* for gross human rights violations (Stefanovska, 2021:68). States and other actors involved in cases of enforced disappearance should be found accountable for violation of numerous international conventions as well as bilateral cooperation agreements.

Impact from the use of new technologies in cases of enforced disappearances

Technologies can be used to facilitate or hinder and sabotage the investigations about disappeared persons. For States, it is important which path they will take: the one which protects human rights such as the right to life, prohibition of torture, right to liberty and security, right to privacy and data protection, and many more, or the other one to misuse new technologies in searches for disappeared people. States are those that need to choose the ‘right path’, because they can ensure that new technologies are used to enhance the protection of human rights rather than to use them for overreaching surveillance methods and to sabotage ongoing searches for missing and disappeared people. In this complex process, it is inevitable for states to respect human rights, establish and reinforce mutual cooperation, provide strict legal frameworks and regulations for the use of new technologies, and work towards the proper use of new technologies.

The existing court jurisprudence of the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) has shown that courts found that an act of enforced disappearance can amount to a violation of a person’s right to liberty and security, the right to life, the right to humane conditions of detention, and/or the right to freedoms from torture, cruel inhuman or degrading treatment or punishment (Anderson, 2006). They established that states have failed to protect victims of enforced disappearances and their families and failed to undertake adequate measures to punish those responsible for these acts. But, when it comes to the right to privacy and data protection, the situation is more complex, and more evidence is needed to establish such violations.

On the Internet, there is a growing volume of data that has been made public without the consent of the owners, such as information that has been hacked, leaked, exposed by security vulnerabilities, or posted by a third

party without proper permissions (Berkeley Protocol, 2022:14). These kinds of data can be misused in ongoing investigations for disappeared persons

The right to privacy is a fundamental human right. An important element of the right to privacy is the right to the protection of personal data, which has been articulated in various data protection laws. In particular, data protection and privacy laws are increasingly relevant in investigations that utilize digital information and communications technology. In the digital environment, informational privacy, covering information that exists or can be derived about a person, is of particular importance (ibid, para.61). However, even in these circumstances human rights should be respected. For example, a violation of the right to privacy is one of the few grounds on which judges may exclude evidence at the International Criminal Court. Privacy underpins and protects human dignity and other key values, such as freedom of association and freedom of expression. The ECtHR provides some of the strongest interpretations of privacy laws, with a quickly growing body of case law addressing digital rights issues. Numerous data protection laws and regulations help ensure the security of personal data such as Regulation 2016/679 of the European Parliament and of the Council of 27 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

Use of new technologies in the search for disappeared people

New technologies can be applied to facilitate the search for disappeared persons and at the same time to identify the perpetrators i.e., those who committed enforced disappearances. The use of technologies should be focused on reaching alive disappeared persons rather than mortal remains. Due to this, it is of utmost importance that the search must start at early stages of their disappearances including early tracking of digital traces and using of satellite imagery. The first hours and days after the persons' disappearances are crucial to obtain data. According to WGEID, there are cases where new technologies have been used to document the establishment of official or secret places of detention, locate torture sites, and identify mass graves or burial sites.

Proper use of new technologies in the testimony collection framework is of immense importance, due to the possibility of verification of evidence taken in the form of photographs, videos, or geolocation data. With the new technologies, state officials would be able to trace disappeared people, or to gain information which are crucial for tracing them. Once verified, this visual

data provides accompanying evidence, and the use of satellite imagery or digital mapping can narrow the search for missing and disappeared persons. Implementing the Berkeley Protocol is one step which can help with evidence produced via new technology. The Berkeley Protocol on Digital Open-Source Investigations (2022) identifies international standards for conducting online research of alleged violations of international criminal, human rights, and humanitarian law. The Protocol provides guidance on methodologies and procedures for gathering, analyzing, and preserving digital information in a professional, legal, and ethical manner. Lastly, the Berkeley Protocol sets out measures that online investigators can take to protect the digital, physical, and psychosocial safety of themselves and others, including witnesses, victims, and first responders (e.g. citizens, activists, and journalists), who risk their well-being to document human rights violations and serious breaches of international law.

Additionally, the digitalization of archival records can overcome barriers to accessing evidence. Moreover, facial and voice recognition also enable researchers to review audio-visual information produced in the past. The proper use of new technologies is crucial when it comes to archival documents. According to the Section on Archives and Human Rights – International Council of Archives, as digital preservation matures and digital records can now be retained for a long period of time, archivists are developing and uncovering metadata in digital content through forensic tools that can enable the validation, identification, analysis, interpretation, documentation, and presentation of digital information. These methods not only help with the long-term preservation of these documents but also with the discoverability of information held within them (SAHR, 2023).

The Border Violence Monitoring Network (BBVMN) notes the growing importance of surveillance and artificial intelligence technologies including drones and biometric identification systems, which are being used to automate the process of identifying and tracking the movement of migrants, including in pushback operations amounting to enforced disappearances at external EU borders (BVMN 2023). In this regard, it is important to note that the current formulation of the EU's Artificial Intelligence Act fails to establish minimum standards and meaningful safeguards against the detrimental use of new technologies.⁸

The use of facial recognition programmes, DNA tests, forensic science, and digitalization of records and evidence can foster the search for disappeared persons. The Office of the High Commissioner for Human

⁸ The Berkeley Protocol follows is continuation of two earlier United Nations protocols: the Minnesota Protocol on the Investigation of Potentially Unlawful Death (1991, updated in 2016), and the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1999, updated in 2004).

Rights has noted that “[f]orensic science is concerned with establishing facts, obtained through scientific means, which will be introduced as part of a criminal investigation as evidence in court, most commonly for the purpose of prosecuting crimes. It is also used, inter alia, to identify missing persons as a result of human rights violations or from multiple fatalities resulting from natural disasters. Forensic science is, therefore, one of the enabling tools to ensure the full implementation of the rule of law, and as such it needs to conform to the rule of law itself. (Andreu-Guzmán, 2015:236). Moreover, the use of artificial intelligence (AI) can help investigations by detecting biomarkers and preparing geospatial analysis and predictive analysis.

The potential of AI to resolve missing person cases is immense; however, it must be conducted with consideration for fundamental rights. For example, AI-based biometric recognition algorithms offer greater accuracy and efficiency in identifying individuals beyond facial recognition technology. As AI becomes more prevalent in law enforcement, balancing privacy concerns and public safety is a critical issue. While AI has the potential to enhance public safety, it can also lead to privacy violations and abuse of power. When it comes to the use of AI, it is important for the states to have developed a solid legal framework that will prevent possible misuse of AI and human rights violations.⁹

From practice, it can be noted that mutual cooperation or interoperability is what it lacks in cases where technologies can be effectively used in search of disappeared persons. Sharing data and information that allows clarifying the fate and whereabouts of the disappeared persons should be a top priority for states on bilateral and multilateral levels.

The misuse of new technologies to facilitate enforced and involuntary disappearances

The new technologies can allow states to expand their surveillance capabilities to an unprecedented degree. The misuse of new technologies can be conducted in different forms such as: restrictions of the internet, social media, use of different spyware, satellites, drones, etc. Restrictions on internet access have an impact on the enjoyment of various human rights. Social media have also been used to conduct smearing campaigns and threaten human rights defenders including relatives of disappeared persons.

⁹ European Commission. (2021). Proposal for a Regulation of the European Parliament and of the Council - Laying Down Harmonized Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206>

¹⁰ AI and missing persons: innovative solutions to an age-old problem, <https://www.veritone.com/blog/ai-public-safety-missing-persons/>

The WGEID learned about cases where technologies were used to spy on relatives of disappeared persons, their representatives or associations, and human rights defenders. An especially worrisome development is that of the domestic or transnational use of spyware programmes such as Pegasus and Predator.¹⁰ Spyware is a form of malware that allows an operator to gain access to or hack a device and extract, modify, or share its contents. The use of spyware can lead to violations of the right to privacy, freedom of speech, life, liberty, and security. Evidence obtained through spyware can also be used against a target in torture and interrogations. Mercenary spyware facilitates enforced disappearances. It allows states to surveil and locate targets, find incriminating evidence, and spy on the associates of the forcibly disappeared person, making it more difficult to conduct investigations and prepare for legal proceedings in relation to the enforced disappearance (Munk School of Global Affairs & Public Policy, 2022:18). Using illegal surveillance spyware against civil society organizations and human rights defenders. This includes the illegal spyware Pegasus and Predator employed by European governments to monitor the communications and activities of these organizations involved in documenting enforced disappearances (BVMN 2023). The software Pegasus, currently used by at least 12 EU Member States is a highly invasive tool used to infiltrate an individual's mobile device without their knowledge. Once installed, it allows the invader to conduct real-time surveillance.¹¹

Spyware programmes can be acquired by Governments, mostly in a context that, in general, lacks independent oversight and sufficient regulation, especially with regard to the import, export, and use of such a technology. The Working Group noted in this study the applicable legislation of certain States and existing regional regulations and international arrangements that are aimed at subjecting the sale and transfer of technologies to stricter control.¹² While these are good practices, the applicable legal framework remains weak and fragmented and a thorough and independent scrutiny of the impact of these technologies on human rights should be put in first place.

The use of the above-mentioned surveillance technologies, as well as artificial intelligence solutions, drones, thermal imaging sensors, night-vision goggles, biometric identification systems, aerial surveillance towers, and specialized sensors for detecting mobile phone emissions and tracking devices should be carefully used and must be the subject of thorough and strict regulations.

¹¹ Working Group on Enforced or Involuntary Disappearances. (2023). Report A/HRC/54/22/Add.5 para.10-18.

¹² NDTV. 2022. 'Pegasus Spyware Maker NSO Group Has Contracts In 12 EU Countries: Report.' Available at: <https://www.ndtv.com/world-news/pegasus-spyware-maker-nso-group-has-contracts-in-12-eu-countries-report-3244072>

¹³ See the 1995 Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-use Goods and Technologies, as amended in 2013; and the Regulation (EU) No. 2021/821 of 20 May 2021 setting up a regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items.

The reports from international and civil society organizations show that some authorities have used a wide range of surveillance technologies including cellular network interception, satellite imagery, and data analysis to monitor the communication and movement of individuals (Privacy International 2023). States need to ensure that the use of new technologies complies with international human rights standards. Additionally, these allegations are a serious concern that must be recognized and addressed by states and the international community.

Obligation to investigate in cases of enforced disappearances

Investigations are an important mechanism to prevent impunity in cases of enforced disappearances. Impunity encourages the committing of and repetition of crimes, inflicts additional suffering on victims, and has adverse effects on the rule of law and public trust in the justice system. The Committee on Enforced Disappearances has upheld the rules enshrined in Article 12 of the ICPPED as elements of the duty to investigate: the right of any individual to report the facts to the competent authorities; the duty to conduct without delay a thorough, impartial, complete, diligent and effective investigation, even if there has been no formal complaint, where there are reasonable grounds for believing that a person has been the victim of an enforced disappearance; the appropriate and effective protection of the complainant, witnesses, relatives of the disappeared person, and their defense counsel, as well as of those who participate in the investigation, against all ill-treatment or intimidation as a consequence of the complaint or of any evidence given; and the effective and timely access by the authorities involved in the investigation to documentation and other relevant information, as well as to any place where there are reasonable grounds for the authorities to believe that the disappeared person may be, with prior judicial authorization if necessary (Galvis Patino, 2021:37). According to Article 9 from ICPPED, States parties are under an obligation to investigate thoroughly allegations of enforced disappearance until the fate of the disappeared person has been clarified taking into account the continuous nature of the offence. States parties must also establish their competence to exercise jurisdiction over the offence of enforced disappearance, including when persons accused of having committed the crime abroad are present in any territory under their jurisdiction.

The obligation to investigate can consist of three elements: (1) to find the disappeared person alive, (2) to provide the right to truth and whereabouts of

the disappeared person and (3) to identify the perpetrators and punish them in accordance to the law. In this connotation, effective investigation implies several components such as: the investigation must lead to the identification and punishment of those responsible; reasonable steps must be undertaken in order to secure evidence, the investigation must be prompt; the investigators must be independent; the investigation must be able to determine of whether the force was used and if that force was/was not justified and many more (*Bazorkina v. Russia*, app.no.69481/01, §117-119). The Court reiterates that an “effective investigation” should be “capable of leading to” the identification and – if appropriate- punishment of those responsible (see *Labita v. Italy*, no. 26772/95, § 131, ECHR 2000-IV, and *Jeronovičs v. Latvia*, app.no. 44898/10, § 103). However, the effective investigation may imply also the application of new technologies in contemporary circumnutates. This means that if some new technology was not available several years or decades ago and now is available, it can be used to accelerate the investigation and to locate the enforced person alive or his/her remains. Using new technologies in cases of enforced disappearances may result in a positive manner and may lead to some traces and evidence that would not be possible to find without their use.

In order to conduct a prompt and effective investigation, several preconditions should be fulfilled on which the effectiveness of the investigation depends such as: the criminalization of enforced disappearances in national laws, access to relevant information, autonomy and independence of the authorities in charge of the investigation, coordination of authorities in charge of the search – on a national and international level in cases with transnational context, technical expertise of forensic investigators, use of sophisticated technology for search of disappeared persons and many more. Effective investigation ensures that perpetrators of enforced disappearance, including those who order, solicit, induce the commission of, attempt to commit, are accomplices to, or participate in an enforced disappearance are prosecuted and sanctioned (Council of Europe, 2016). This means that no statutory limitation shall apply to crimes against humanity, irrespective of the date of their commission.

If we analyze the right to conduct an effective investigation *de jure*, it is inevitable to conclude that there can be many obstacles to the effective investigation such as the statute of limitation, principle of *ne bis in idem*, prohibition of amnesties, pardons, and other similar measures. The obligation to investigate is obligatory for the States, but while conducting the investigation, investigators should bear in mind the obligation not to violate other human rights such as the right to a fair trial, right to respect for private and family life, right to personal integrity, right to the truth and many others.

Jurisprudence of the ECtHR and IACtHR in cases of enforced disappearances

It took years before the first case of enforced disappearance reached an international tribunal i.e., the IACtHR. The case of *Velásquez Rodríguez v Honduras* is the first judgment and first thorough analysis of the case of enforced disappearance. The case concerned Manfredo Velásquez, a student at the National Autonomous University of Honduras, who was violently detained without a warrant for his arrest by members of the National Office of Investigations and G-2 of the Armed Forces of Honduras. According to the petitioners, several eyewitnesses reported that Manfredo Velásquez and others were detained and taken to the cells of the Public Security Forces Station where he was “accused of alleged political crimes and subjected to harsh interrogation and cruel torture (IACHR Series C No 4.1988, §3). The Court established that the phenomenon of disappearances is a complex form of human rights violation that must be understood and confronted integrally. Moreover, the forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee. According to the Court, the duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains (ibid, §150,155 and 158). Due to these reasons, the Court found Honduras responsible for the involuntary disappearance of Angel Manfredo Velásquez Rodríguez and the violation of the right to personal liberty, right to human treatment, and right to life, all guaranteed with the Inter-American Convention on Human Rights. Years later, in the case of *Goiburú et al. v. Paraguay*, the IACtHR stated that prohibiting acts of enforced disappearance and the related duty to investigate them and punish perpetrators should be considered a jus cogens norm.

A more nuanced approach was adopted later in *Durand and Ugarte* where the Court founded the duty to investigate the concomitant application of Articles 8(1) and 25 (1) ACHR. From *Durand and Ugarte* onwards the Court remained faithful to this interpretation with just one exception in the case of *Blake v. Guatemala* in which the Court considered that Article 8 ACHR had been indeed violated and that the relatives of the disappeared had a right to have his disappearance and death effectively investigated and those responsible prosecuted (Kyriakou, 2012:162). If we analyze the jurisprudence of the IACtHR, it can be observed that the Court in many cases upholds the positive measures enshrined in Article 1 ACHR. This means that states within the jurisdiction of the Inter-American system are obliged to respect

human rights and freedoms, but also to ensure all persons subject to their jurisdiction the free and full exercise of those rights and freedoms without any discrimination.

A similar notion to the obligation to undertake positive measures by the States is defined in the European Convention on Human Rights (ECHR) in Article 1 which enshrines the obligation for the Contracting Parties to secure to everyone within their jurisdiction the rights and freedoms defined in the ECHR. The Court has consistently held that where the State is required to take positive measures, the choice of means is in principle a matter that falls within the Contracting State's margin of appreciation. However, this margin of appreciation is not unlimited and the Court reserves the power to review whether or not the State has complied with its obligations under the Convention.

Kurt v. Turkey is the Court's first judgment concerning a case of enforced disappearance. Mrs Koçeri Kurt submitted an application before the Court on her behalf and on behalf of her son, who, she alleged has disappeared in circumstances engaging a responsibility of Turkey (ECtHR, 1998: *Kurt v. Turkey*, 15/1997/799/1002). In the judgment, the Court found violation of Article 3 (prohibition of torture), Article 5 (deprivation of liberty), and Article 13 (right to an effective remedy). The Court established that Turkey failed to comply with the obligations arising from the ECHR and that under Article 5 it was obliged to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since. Having regard to these considerations, the Court concluded that the authorities have failed to offer any credible and substantial explanation for the whereabouts and fate of the applicant's son after he was detained and that no meaningful investigation was conducted. (ibid, § 124, 128). In the landmark 2012 judgment of *Aslakhanova and Others v. Russia*, the ECtHR stated that it felt compelled to provide some guidance on certain measures that must be taken by the Russian authorities due to their systemic failure to investigate disappearances. Moreover, the Court mentioned the large-scale forensic and scientific work on the ground, including the location and exhumation of presumed burial sites, and the collection, storage, and identification of remains and, where necessary, systematic matching through up-to-date genetic databanks (ECtHR 2012, app.no 2944/06, 8300/07, 332/08, 42509/10, §221).

These findings were later reiterated in the case of *Cyprus v. Turkey* where the duty to investigate was related to Article 5 ECHR and was considered as a duty for the respondent states. There were cases where the Court established that a certain method of investigation was not employed, resulting in a violation of human rights. For example, in the case of *Nachova and Others v. Bulgaria*, the Court states that „the authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may

be indicative of a racially induced violence” (ECtHR, app.no.43577/98 and 43579/98, §156-159). In other cases, the Court considered that the use of new technologies is sufficient to point out to illegal treatment in case of enforced disappearance. In the case of *S.T and Y.B v. Russia*, the Court considered that a video posted on YouTube is a valid proof of the ill-treatment to which a disappeared person has been subjected after being deprived of liberty (ECtHR app.no.4125/20, § 22).

If we analyze the Strasbourg jurisprudence, it is inevitable to observe that the Court delivered judgments in several cases of secret detention and extraordinary rendition that amounted to enforced disappearances.

For example, in the case of *El-Masri v. Macedonia*, the Court established that there was a lack of effective investigation by the Macedonia authorities when the CIA agents using sophisticated technologies abducted El-Masri without a warrant for extradition and with the knowledge of Macedonian authorities (ECtHR, 2012: *El-Masri v. Macedonia*). El-Masri was kept against his will for 23 days in a hotel in Skopje due to a suspicion of being a member of al-Qaeda. He was filmed by a video camera and instructed to say that he had been treated well and had not been harmed. He was beaten severely, blindfolded, and hooded. He was put in a civilian aircraft by the CIA used for extraordinary renditions. El-Masri was mostly unconscious during the flight to Afghanistan. He was subjected to capture shock treatment by the CIA in their facility in Afghanistan called “Salt Pit”.¹³ After being constantly interrogated during his four month captivity and when it was not established that he was a terrorist or had a connection to al-Qaeda, he was transferred and left in Albania.

The latest Strasbourg jurisprudence shows that cases of enforced disappearance with extraterritorial transfers were still present in Europe (*Nasr and Ghali v. Italy*, *Al Nashiri v. Romania*, and *Aby Zubaydah v. Lithuania*). This practice should be eradicated and effective investigations should be performed in order to learn the truth about the victims of enforced disappearance and to punish those responsible.

The possibility to assess, verify, and ultimately admit evidence collected through technologies depends on the capability of each court and the skills and knowledge of the personnel.¹⁵ For example, the International Criminal Court in the case *Prosecutor v. Al-Werfalli*, issued an arrest warrant based primarily on evidence collected from social media posts.

¹⁴ Salt Pit is a CIA run facility, a brick factory north of the Kabul business district that was used by the CIA for detention and interrogation of some high-level terror suspect. For more see ECtHR, 2012: *El-Masri v. Macedonia*, app.no 39630/09, § 24).

¹⁵ *Supra* note 10, § 52

Concluding remarks

The rapid development of technologies is a concerning trend with which states need to deal in order to prevent possible abuses of human rights such as: internet shutdowns, spyware programmes, targeted and mass surveillance, and other technologies that undermine the search for disappeared persons. New technologies if properly used, can contribute towards: (1) locating disappeared persons, (2) easing the investigations, (3) providing accountability and fights against the impunity of perpetrators, (4) enhancing the cooperation and interoperability between states and finally and most importantly (5) protect human rights from infringements and provide the right to truth to the relatives of disappeared persons or to the victims.

States are obliged to take all necessary measures to prevent cyberattacks, disinformation, using malwares, and espionage for purposes contrary to international human rights standards. These obligations for States derive from international human rights law and international criminal law. States need to take adequate measures to investigate, prosecute, and hold accountable individuals, companies, and states for human rights violations related to the use of new technologies. This means that states also need to adopt a proper legal framework that will provide for the use of new technologies in the search for missing and disappeared persons at the early stages of an enforced disappearance. Any kind of misuse of these technologies should be sanctioned by national laws and international conventions. The relationship between new technologies and human rights in the context of enforced disappearances is often ambivalent. The use of new technologies should be supported by an adequate legal framework that will determine the use of such technologies and also prescribe sanctions for possible human rights violations. A strict legal framework should be adopted for the use of artificial technology but also for surveillance technologies and followed by proper oversight mechanisms. An obligation for sanctioning human rights violations should arise before any violation. Different kinds of new technologies should be encompassed in the national legislation, despite the existing international mechanisms.

The use of the Berkeley Protocol will help investigators, legal professionals, human rights defenders, and states as a general to develop and implement effective procedures for documenting and verifying violations of international human rights law and international humanitarian and criminal law, making the best use of digital open-source information, so that those who are responsible for such violations can be fairly brought to

justice. Additionally, the Guiding principles for the search for disappeared persons will 'guide' States on which standards they need to abide and apply while searching for the disappeared persons.

It is highly important to stress that new technologies can offer cost-effective solutions that are likely to have a relevant point. As the WGEID has pointed out in their study – the subject of analysis in this paper, alone, new technologies are incapable of solving all the existing problems, and therefore traditional approaches and techniques to documenting, monitoring, and reporting should not be abandoned and cannot be entirely replaced by digital material and new technologies. Instead, complementarity between the two strategies should be pursued and promoted. For this to happen in practice, it is important for the states to show true willingness to criminalize enforced disappearances in their national laws, conduct effective criminal investigations, and apply sufficient financial, human, and technical resources in the search for disappeared persons. Additionally, what can be of immense importance is the cooperation between states which is lacking at the moment and that must be changed immediately. This cooperation should be conducted on two levels: (1) domestically i.e., nationally among the borders of a state and includes collaboration between state institutions, corporations, civil society organizations, journalists, etc., and (2) internationally, collaboration between states within the established and ratified human rights instruments.

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