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Criminal Liability for the Crime of So-called Forced Disappearance in the Ukrainian Criminal Law (Article 146-1 of the Criminal Code of Ukraine)

Odpowiedzialność karna za przestępstwo tzw. wymuszonego zaginięcia w ukraińskim prawie karnym (art. 146-1 ukraińskiego Kodeksu karnego)

ABSTRACT

In the article, the authors analyzed the statutory elements of a relatively new type of crime in Ukrainian criminal law, namely the so-called enforced disappearance (Article 146-1 of the Criminal Code of Ukraine). The need to criminalize such an act resulted from Ukraine's accession on 17 June 2015 to the Convention for the Protection of All Persons from Enforced Disappearance (adopted in New York on 20 December 2006). Until then, the lack of appropriate regulation of the legal status of missing persons was a gap in Ukrainian legislation, and the need to eliminate it became particularly urgent in connection with the armed conflict in the Autonomous Republic of Crimea and eastern Ukraine. Immediately after the introduction of Article 146-1 to the Criminal Code of Ukraine, its

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application in practice did not become widespread (69 cases in 2020), and only after the full invasion of Ukraine by the Russian Federation did the number of identified crimes with this qualification increase (1,120 in 2022). The authors also point to other legal qualifications (than that under Article 146-1 of the Criminal Code of Ukraine) that are used in the conditions of hostilities taking place in the territory of Ukraine in cases of enforced disappearances (Article 115 the Criminal Code of Ukraine "Intentional homicide", Article 146 the Criminal Code of Ukraine "Illegal deprivation of liberty or abduction of a person", Article 147 the Criminal Code of Ukraine "Hostage-taking", Article 438 the Criminal Code of Ukraine "Violation of the laws and customs of war"). Due to the fact that Poland has ratified the Convention for the Protection of All Persons from Enforced Disappearance, the problem arises how to appropriately complement the Polish Criminal Code with a new type of crime, for which an analysis of the solutions adopted in Ukraine may be helpful.

Keywords: enforced disappearance; arrest; detention; abduction; deprivation of liberty; concealment

INTRODUCTION

Poland signed the International Convention for the Protection of All Persons from Enforced Disappearance (adopted in New York on 20 December 2006) on 25 June 2013, but it has not been ratified for many years. On 7 September 2022, the Commissioner for Human Rights (in Polish: *Rzecznik Praw Obywatelskich*) wrote to the Ministry of Foreign Affairs on this matter, pointing out that the Convention had not yet become part of Polish law (and this would of course be justified, as it extends the scope of human protection).[1] In response, the Ministry of Justice (and not the Ministry of Foreign Affairs) wrote that Polish law was essentially in line with the Convention, severely criminalizing acts of enforced disappearances, including instigation and aiding and abetting, hence the Ministry was not working on the ratification of the Convention. The Commissioner for Human Rights disagreed with the view that the ratification of the Convention was not necessary to protect the rights guaranteed by it, due to the insufficient role played by Polish law, pointing out, among other things, that due to non-ratification of the Convention, the UN Committee on Enforced Disappearances may not receive or consider applications from people from Poland or applications against Poland claiming that they are victims of State violations.[2] Scholars in the field also point out that "Polish law is not (…) entirely consistent with the Convention. It does not provide for the possibility of invalidating the adoption (with *ex tunc* effect), but only for its reversal (with *ex nunc* effect), and this excluding irreversible adoptions, nor does it provide

[1] Rzecznik Praw Obywatelskich, *Konwencja ONZ ws. ochrony wszystkich osób przed wymuszonym zaginięciem – kolejne wystąpienie Rzecznika*, 2.1.2023, https://bip.brpo.gov.pl/pl/content/konwencja-onz-wymuszone-zaginiecia-ochrona-ratyfikacja-rpo-ms (access: 1.3.2025).

[2] *Ibidem*.

for the liability of the superior".[3] It should also be pointed out that, *de lege lata*, under Polish criminal law, there is no provision penalising the conduct (action or omission) of a supervisor who, even inadvertently, allows that forced disappearance be committed by his subordinates. It is therefore good that the Polish Act of 27 September 2024 on the ratification of the International Convention for the Protection of All Persons from Enforced Disappearance, adopted in New York on 20 December 2006,[4] gave the consent to the President of the Republic of Poland's ratification of this Convention. This naturally entails an obligation to undertake legislative work in order to adapt, i.a., criminal law provisions to the requirements of the Convention. According to the explanatory memorandum in Sejm Paper No. 589, it is envisaged, among other things, to introduce into the Polish Criminal Code a new type of crime (enforced disappearance), which is to be placed in Chapter XXIII of the Criminal Code ("Offences against liberty") in Article 189b.[5]

It can be held that the fact of ratification of the Convention (and the prospect of penalisation of enforced disappearances in Polish criminal law) is a significant argument behind looking at how this issue has been addressed in Ukrainian law (which seems particularly interesting in the context of ongoing hostilities there, where cases of enforced disappearances seem to be almost daily occurrences).

Ukraine acceded to the Convention for the Protection of All Persons from Enforced Disappearance on 17 June 2015. Of course, the Convention tasked the Ukrainian legislature to legally regulate the issue of liability for cases of enforced disappearance. Before that, the lack of appropriate regulation of the legal status of missing persons had constituted a clear gap in the Ukrainian legislation in force, and the need to eliminate it became particularly urgent due to the armed conflict in the Autonomous Republic of Crimea and eastern Ukraine. The wounded, sick, detained, killed, and missing are all the persons affected by the conflict and have the right to respect and protection. This issue, associated with significant suffering for both individuals and society as a whole, has long-term consequences that will persist even after the conflict ends.[6]

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[3] P. Domagała, *Międzynarodowa Konwencja ONZ w sprawie ochrony wszystkich osób przed wymuszonym zaginięciem. Perspektywa polska*, Warszawa 2017, p. 452.

[4] Journal of Laws 2024, item 1559.

[5] Sejm RP, X kadencja, *Rządowy projekt ustawy o ratyfikacji Międzynarodowej Konwencji w sprawie ochrony wszystkich osób przed wymuszonym zaginięciem, przyjętej w Nowym Jorku dnia 20 grudnia 2006 r.*, Druk nr 589, https://www.sejm.gov.pl/sejm10.nsf/druk.xsp?nr=589 (access: 1.3.2025).

[6] Verkhovna Rada of Ukraine, Explanatory Note to the Law of Ukraine No. 2505-VIII of 12 July 2018 "On the legal status of persons who have lost their lives", available in Ukrainian at http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=5435&skl=9 (access: 1.3.2025).

RESEARCH PART

After the ratification of the Convention, the Criminal Code of Ukraine (CCU) was supplemented with Article 146-1 "Enforced disappearance".[7] Part 1 of this article of CCU states as follows: "Arresting, detaining, abduction, or deprivation of liberty of a person in any other form committed by a representative of the state, including a foreign one, with subsequent refusal to acknowledge the fact of such arresting, detaining, abduction, or deprivation of liberty of a person in any other form or concealment of information about the fate or whereabouts of such a person – shall be punishable by imprisonment for a period of three to five years". The second part of this article considers the following act as a criminal offence: "Issuing an order or instruction to commit the acts referred to in the first paragraph hereof, or failure by a superior who became aware of the commission of the acts referred to in the first paragraph hereof, or by his subordinates, to take measures to prevent these acts, as well as failure to report the crime to the competent authorities, shall be punishable by imprisonment for a period of five to seven years".[8]

It should be noted that once Article 146-1 was incorporated into the CCU, its application in practice did not become widespread. It was only after the full-scale invasion of the Russian Federation into Ukraine that the number of identified crimes of that nature increased. The statistics of registered criminal proceedings and their outcomes published by the Office of the Attorney General contain the data as in Table 1.

Table 1. Number of offences under Article 146-1 CCU

Year	Number of registered proceedings	Number of proceedings in which charges were filed	Number of indictments brought	Number of concluded proceedings
2018	–	–	–	–
2019	–	–	–	–
2020	69	3	3	4
2021	56	2	2	5
2022	1,120	3	1	26
2023	72	2	2	5
2024	61	0	0	2

Source: Office of the Prosecutor General, *About registered criminal offences and the results of their pre-trial investigation*, available in Ukrainian at https://gp.gov.ua/ua/posts/pro-zareyestrovani-kriminalni-pravoporushennya-ta-rezultati-yih-do-sudovogo-rozsliduvannya-2 (access: 1.3.2025).

[7] Article 146-1 was introduced by the Act no. 2505-VII of 12 July 2018 (with amendments made by Act no. 2812-IX of 1 December 2022).

[8] Criminal Code of Ukraine, Law of Ukraine of 5 April 2001, No. 2341-III, available in Ukrainian at https://zakon.rada.gov.ua/laws/card/2341-14/conv (access: 1.3.2025).

As can be seen in Table 1, the number of cases under Article 146-1 CCU in the period 2020–2021 was small (69 and 56 cases), while it increased sharply in 2022 (which was undoubtedly related to the start of hostilities in February of that year). The decrease took place as soon as in the following year (and continued in 2024). It is difficult to make an authoritative analysis based on these data. It is possible that the first year of the war led to perceiving the disappearances as acts meeting the statutory criteria of the offence under Article 146-1 CCU, which, however, was not confirmed in the course of the proceedings. Hence, in the next years (2023–2024), the tendency to identify such cases under this article decreased dramatically.

It should be noted that in comparison with the approach set out in the Convention, the constructs of "enforced disappearance" in international law and Ukrainian law differ significantly.[9]

As regards the object of protection, the CCU specifies it as freedom of the individual (personal freedom). At the same time, international law points to the deprivation of a human being of legal protection, since, as a result of unlawful acts, he/she is deprived of access to legal remedies and procedural guarantees that should be applied, as a result of which the person becomes vulnerable and put outside the sphere of legal protection.[10] In this context, attention should be paid to enforced disappearance as a crime against humanity. First of all, it should be noted that enforced disappearance can be classified as a crime against humanity only if committed in a specific context.

The case law in this area has been developed by ad hoc international criminal tribunals, in particular in the judgment of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the case *Prosecutor v Kunarac and Others* (12 June 2002, IT-96-23 and 23/1-A[11]), in which the Appeals Chamber ruled that the necessary elements of crimes against humanity are as follows: (a) there must be an attack; (b) the attack must be directed against any civilian population; (c) the attack must be widespread or systematic; (d) the attack must be committed consciously. The same elements are reiterated in Article 7 of the Rome Statute of the International Criminal Court (ICC).[12] The UN Working Group on Enforced or

[9] Pursuant to Article 2 of the Convention for the purposes of this Convention, "enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

[10] A. Pavlyuk, Ye. Kapalkina, N. Okhotnikova, L. Smachylo, *Analitychnyy zvit. Nasyl'nyts'ki znyknennya: natsional'na praktyka v. Mizhnarodni standarty*, https://zmina.ua/wp-content/uploads/sites/2/2024/05/znyknennya_web.pdf (access: 23.8.2025).

[11] https://www.icty.org/x/cases/kunarac/cis/en/cis_kunarac_al_en.pdf (access: 1.2.2025).

[12] UNTS, vol. 2187. Pursuant to Article 7 (1) for the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack

Involuntary Disappearances stressed in its comments that the definition specified in Article 7 of the Rome Statute of the ICC reflects current international law and can therefore be used to interpret and apply the provisions of the Declaration on the Protection of All Persons from Enforced Disappearance. It should also be noted that the existence of enforced disappearances, which may constitute crimes against humanity, is subject to assessment by the Working Group according to the criteria listed in Article 7 of the Rome Statute of the ICC, as interpreted by international and hybrid courts.[13] Likewise, the provisions of Article 5 of the International Convention for the Protection of All Persons from Enforced Disappearance should be interpreted through the lens of the criteria for considering an act as a crime against humanity listed in Article 7 of the Rome Statute of the ICC. This means that several criteria must be met in order for enforced disappearance to constitute a crime against humanity.

Firstly, crimes against humanity, according to Article 7 (1) of the Rome Statute of the ICC, include any acts listed in Article 7, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. According to Article 7 (2) (a) of the Rome Statute of the ICC, the "attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. Each of the crimes against humanity, including enforced disappearance, must be "directed against any civilian population".

Secondly, enforced disappearance must be part of a widespread or systematic attack. This means that the act of enforced disappearance cannot be isolated or sporadic, but must form part of a more extensive attack or conduct. However, if the perpetrator is involved in only one enforced disappearance, such an act may

directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

[13] Working Group on Enforced or Involuntary Disappearances, *Compilation of General Comments on the Declaration on the Protection of All Persons from Enforced Disappearance*, https://www.ohchr.org/Documents/Issues/Disappearances/GeneralCommentsDisappearances_en.pdf (access: 1.3.2025).

still constitute a crime against humanity if it is part of a larger attack, provided that it is "widespread" or "systematic".[14]

Thirdly, in order to meet the necessary subjective element of a crime against humanity, the perpetrator must not only have an intention in relation to a specific act, but must also be aware that the crime is part of a widespread or systematic attack. The definition from the Rome Statute of the ICC adds a further subjective element: the perpetrator must intend to leave a person without "the protection of the law for a prolonged period of time" (Article 7 (2) (i)). This means that the constitutive elements of enforced disappearance as a crime against humanity are: (1) the commission of such an act as part of a widespread or systematic attack; (2) which is directed against any civilian population; (3) is committed knowingly; (4) is intended to leave the victims without legal protection for a prolonged period of time. It follows from the wording of Article 146-1 CCU that this is a generally-defined perpetrator offence (offence that may be committed by anyone), for the existence of which a single causal action is sufficient.

In view of the foregoing, the concept of enforced disappearance does not contain the elements of a crime against humanity, and therefore the claim that this act causes harm or poses a threat to the security of humanity is unfounded. Therefore, as rightly noted by I.A. Onyshkevych, Article 146-1 CCU in its current wording is appropriately placed in Chapter III of the Special Part of the CCU "Crimes against the will, honour and dignity of a person, and its object of protection corresponds to the title of the chapter".[15]

When defining the objective side in both parts of Article 146-1 CCU, the legislature relied on the provisions of Articles 2 and 6 of the Convention. However, compared to these provisions, Article 146-1 CCU does not provide for the requirement of "being without the protection of the law" as a consequence of the commission of unlawful acts. The circumstances that may mitigate the responsibility of the perpetrator of the offence of enforced disappearance (effectively contributing to the release of a missing person alive or enabling the clarification of cases of enforced disappearance or identification of the perpetrators of enforced disappearance) or aggravate it (death of the missing person, commission of an act of enforced disappearance against pregnant women, minors, disabled or other particularly vulnerable persons – Article 7 (2) of the Convention)[16] do not occur, either. Based on an analysis of the content of Article 146-1 CCU, it can be assumed that this

[14] Judgment of the International Criminal Tribunal for the former Yugoslavia of 17 December 2004 in case no. IT-95-14/2-A, available at https://www.refworld.org/cases,ICTY,47fdfb53d.html (accessed: 15.02.2025).

[15] I.A. Onyshkevych, *Kryminal'na vidpovidal'nist' za nasyl'nyts'ke znyknennya v Ukrayini*, Dysertatsiya, 2024, https://dspace.lvduvs.edu.ua/handle/1234567890/7487 (access: 23.8.2025), p. 65.

[16] A. Pavlyuk, Ye. Kapalkina, N. Okhotnikova, L. Smachylo, *op. cit.*, p. 18.

offence may be expressed in the following forms: 1) detention, arrest, abduction or deprivation of liberty of a person in any other form, combined with subsequent refusal to acknowledge the fact of performing these activities; 2) deprivation of liberty of a person, combined with further concealment of information on the fate or whereabouts of that person; 3) issuing an order or instruction of deprivation of liberty or refusal to acknowledge the fact of such deprivation of liberty or concealing information on the fate or whereabouts of that person; 4) failure by the superior, who became aware of the commission of a crime of deprivation of liberty of a person by a subordinate, to stop that, combined with failure to report the crime to the competent authorities; 5) failure by the superior, who became aware of the crime of deprivation of liberty of a person by a subordinate, to report the crime, combined with the subsequent refusal to acknowledge the fact of such deprivation of liberty or concealing information on the fate or whereabouts of such a person. At the same time, it should be noted that a necessary criterion for enforced disappearance is further refusal to acknowledge the fact of detention, arrest or deprivation of liberty of a human being in any other form, or concealing information about the fate or whereabouts of such a person. As regards arrest as one of the forms of implementation of the objective side of the offence in question, it should be noted that its characteristic feature in the context of enforced disappearance is that its use may be both lawful and unlawful. It is worth noting that Article 146 CCU refers to "unlawful" deprivation of liberty.[17] However, there is no relevant indication in part 1 of Article 146-1 CCU, which provides grounds for concluding that the norm covers both lawful and unlawful deprivation of liberty. It should be stressed that even if the arrest is completely lawful, for the offender's act to be classified under paragraph 1 of Article 146-1 CCU, the implementation of the second part of the provision under consideration will be decisive, i.e. refusal to recognise the fact of arrest or concealing information about the fate or whereabouts of such a person (which occurs following the application of arrest as a result of a court decision).

The concurrence of provisions in the context of unlawful arrest may occur in the case of so-called "public-servant crimes". An arrest in the case of enforced disappearance can only happen through active action, as one cannot order an arrest on the basis of a court decision if no activities are undertaken.[18] Thus, as I.A. Onyshkevych rightly points out, the term "arrest" in part 1 of Article 146-1 CCU should be understood as a type of punishment (or preventive measures) applied lawfully (or not) under a final court ruling.[19]

[17] Article 146 CCU "Unlawful deprivation of liberty of abduction of a person".

[18] S.I. Romashkin, *Ob'yektyvna storona kryminal'noho pravoporushennya peredbachenoho st. 146-1 Kryminal'noho Kodeksu Ukrayiny*, "Naukovi perspektywy" 2023, no. 8, http://perspectives.pp.ua/index.php/np/article/view/6076/6110 (access: 23.8.2025), pp. 566–567.

[19] I.A. Onyshkevych, *op. cit.*, pp. 94–95.

As regards detention, it should be noted that in cases of lawful detention, enforced disappearance may take the following forms: 1) detention of a person when there are legal grounds for it, handing the person over to the appropriate authority, and subsequent disappearance of the person (the fact of detention is not recorded) or the person disappeared when being transferred to such authority (under the pretext of delivering them to such authority, the person is transferred to another location); 2) detention, based on an investigating judge's or court's decision, of a person who then disappears without a trace on the way to court or a pre-trial detention centre. The disappearance of a person after being brought to court cannot be ruled out, but this option is unlikely due to procedural complexity (although we may overestimate the importance of ensuring the rule of law in courts). In the case of unlawful detention, enforced disappearance may be committed in the following manner: staging of a lawful detention (preparation of fake documents, certificates, uniforms, etc.); completely unlawful detention (in the absence of grounds and/or authorization).[20] However, in this aspect, we agree with the conclusion presented by A.I. Onyshkevych, who has stated that it is not appropriate to distinguish cases of forced disappearance in the form of detention that occurred in violation of the established procedure, as such circumstances will not affect the qualification under Article 146-1 CCU.[21]

With regard to a form such as abduction, it should be noted that the elements of the offences provided for in Articles 146 and 146-1 CCU (in the form of kidnapping a person in the subjective aspect of offence) differ only in the presence in paragraph 1 of Article 146-1 CCU of a second element consisting in further refusal to acknowledge the fact of such kidnapping or concealing information about the fate or whereabouts of such a person. Deprivation of liberty in any other form is the last of the activities listed under the category of enforced disappearance (part 1 of Article 146-1 CCU). The phrase "in any other form" suggests that the catalogue of forms of deprivation of liberty presented in part 1 of Article 146-1 CCU is open, and thus the conduct of the perpetrator may have various forms. Again, it must be stated that deprivation of liberty can be carried out both lawfully and unlawfully. In addition to those already discussed above, legal forms of deprivation of liberty may also include: deprivation of liberty for a specific period (Article 63 CCU) and deprivation of liberty by a person acting in a circumstance of self-defence and defence of others (Article 36 CCU) or in a state of necessity (Article 39 CCU), keeping prisoners of war in captivity, etc., therefore, acts performed in accordance with the Constitution of Ukraine, Ukrainian law and applicable international agreements, for which the Verkhovna Rada of Ukraine has expressed its consent. The unlawful deprivation of liberty covers the unlawful detention of a person, which is manifested in the creation of artificial obstacles restricting the victim's freedom of spatial movement and choice of place of stay. As

[20] A. Pavlyuk, Ye. Kapalkina, N. Okhotnikova, L. Smachylo, *op. cit.*, p. 20.
[21] I.A. Onyshkevych, *op. cit.*, p. 97.

regards the second element of the objective side, it should be noted that the refusal to acknowledge the fact of the arrest, detention, abduction or deprivation of liberty of a person in any other form is understood as a statement that the arrest, detention, abduction or deprivation of liberty in any other form has not occurred, which can only be done by action. On the other hand, concealing information about the fate or whereabouts of a given person can be understood as a set of behaviours that prevent the identification (or finding the place of stay) of a missing person.[22]

The subjective side of the offence under paragraph 1 of Article 146-1 CCU covers only the deliberate nature of offence in the form of direct intent. This means that perpetrators must be aware of the unlawful nature of their actions or omissions. However, unlike in the Convention, it is not necessary for the perpetrator to have a specific intent to deprive the victim of legal protection. In the case of passivity of a supervisor who has become aware of behaviours specified in paragraph 2 of Article 146-1 CCU, his failure to act may be intentional or unintentional. On the other hand, combining intentional and unintentional forms of the subjective side within the statutory elements of one type of prohibited act may raise doubts.

The question arises about what kind of "competent authorities" should be notified. It is worth noting that scholars in the field of Ukrainian criminal law assume that not only the failure to notify the competent authority of the crime (under paragraph 1 of Article 146-1 CCU), but also the notification to a "non-competent" authority[23] constitutes the embodiment of elements of the crime under part 2 of Article 146-1 CCU.[24] In this respect, it is necessary to refer to the Ukrainian Law "On the legal status of missing persons in special circumstances", No. 2505-VIII of 12 July 2018.[25] Article 17 of this Law contains a list of authorities authorised to register and/or search for missing persons in special circumstances (including victims of enforced disappearances),[26]

[22] *Ibidem*, pp. 104–105.

[23] A.V. Andrushko, *Problemni aspekty ob'yektyvnoyi storony nasyl'nyts'koho znyknennya*, [in:] *Voyennyy konflikt i zlochynnist': sotsial'no-humanitarni, kryminal'no-pravovi ta kryminolohichni aspekty. Zbirnyk materialiv Trynadtsyatoyi mizhvuzivs'koyi naukovo-praktychnoyi konferentsiyi (m. Syevyerodonetsk, 30 zhovtnya 2020 roku)*, Syevyerodonetsk 2021, p. 146; M.I. Khavronyuk, [in:] *Naukovo-praktychnyy komentar Kryminal'noho Kodeksu Ukrayiny*, eds. M.I. Mel'nyk, M.I. Khavronyuk, Kyyiv 2019, p. 445.

[24] The investigation of the offence, under Article 146-1 CCU, in accordance with the provisions of Article 216 CCU, is entrusted to the National Police, and therefore incomplete reports by the investigative security bodies on enforced disappearance may indicate a failure to notify the competent authorities. See Criminal Procedure Code of Ukraine of 13 April 2012, available in Ukrainian at https://zakon.rada.gov.ua/laws/show/4651-17#n2054 (access: 7.2.2025).

[25] Available in Ukrainian at https://zakon.rada.gov.ua/laws/show/2505-19#n239 (access: 7.02.2025).

[26] These are the following authorities: Ministry of Defence of Ukraine; central executive body ensuring formation and implementation of state policy in the field of health care; central executive body implementing state policy on migration (immigration and emigration), including prevention of illegal (unlawful) migration, citizenship, registration of persons, refugees and other categories of

and, undoubtedly, these authorities are understood as competent within the meaning of Article 146-1 CCU. Consequently, the reporting of enforced disappearance to an authority other than listed may be considered as a failure to notify the competent authority. This is a questionable solution.[27] As rightly noted by I.Y. Onyshkevych, in order to avoid the problem related to determining the authority as competent, which directly affects the criminal-law classification of the offence, it is advisable to delete from the part 2 of Article 146-1 CCU the element "competent", so that the "failure to notify an authority of the offence" may be taken into consideration.[28]

It has already been mentioned that paragraph 1 of Article 146-1 CCU appeared due to the almost mechanical transposition of Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance and that part 2 of this article was a consequence of the implementation of the provisions of Article 6 of the Convention, which stipulates that the State Party shall take the necessary measures to hold the superior criminally responsible.

With regard to such a superior, the Convention expressly provides that he should be held criminally liable if he knew that subordinates under his effective authority and control were committing or intended to commit an offence of enforced disappearance or if he had deliberately ignored the obvious information about such fact. In other words, such a superior could act (or, on the contrary, refrain from taking any action) only with a direct intent. Applying the systemic interpretation of paragraph 2 of Article 146-1 CCU through the lens of Article 6 of the Convention, it can be concluded that a superior who has become aware of the commission of enforced disappearance by his subordinates may refrain from taking preventive action and refrain from reporting this crime to the competent authorities only with a direct intention. However, it should be kept in mind that the objective side of paragraph 2 of Article 146-1 CCU provides for two alternative variants of conduct. While in the case of the first part of the alternative ("the issuance of an order or instruction") only the deliberate nature of the offence in the form of direct intent is

migrants as defined by law; the central executive body implementing the state policy on the enforcement of criminal sentences and probation; the central executive body implementing the state policy on civil defence, the protection of the population and territories from emergencies and their prevention; the central executive body ensuring the formation and implementation of state regional policy and policy in the fields of construction, architecture, urban development, housing and municipal services; the central executive body implementing state policy on compliance with international humanitarian law throughout the territory of Ukraine; the central executive body implementing state policy in the field of state border protection; the National Guard of Ukraine; the National Police of Ukraine; the Security Service of Ukraine; prosecution units; local executive bodies.

[27] Doubts may arise whether it is reasonable to equate the concept of "failure to notify the competent authority" with the concept of "notification to the wrong authority". It is difficult to assess total passivity and misdirected activity on the same level. Nor can it be ruled out that there was an error on the part of the perpetrator, which must be taken into account in the legal assessment of the act.

[28] I.A. Onyshkevych, *op. cit.*, p. 115.

in place, the second part of the alternative ("failure by a superior who has become aware of the commission of the acts referred to in the first paragraph of this article, or his subordinates, to take measures to stop them, as well as failure to report the crime to the competent authorities") may also be an unintentional offence.[29]

Article 146-1 CCU specifies the requirements concerning the specific object of this crime – a representative of the state, including a foreign one. The first version of the article included a provision that defined the possibility of holding representatives of the Russian Federation and formations controlled by it liable under this article. However, in response to the full-scale invasion of the Russian Federation into Ukraine, this provision was removed and combined with amendments to Article 127 CCU, which recognizes torture as a crime. According to the note to Article 127 CCU, state representatives in this article and Article 146-1 CCU should be understood as officials, as well as individuals acting in the capacity of officials, regardless of whether these act on the initiative, knowledge, or with tacit consent of the former.

Representatives of a foreign state under Articles 127 and 146-1 CCU are understood to mean persons acting as state officials of a foreign state or serving with the armed forces, police, state security bodies, intelligence services, or persons holding positions in these or other central-government or local-government bodies of a foreign state established in accordance with its legislation or acting upon instruction of such persons, as well as representatives of irregular illegal armed formations, armed bands and mercenary groups created, subordinated to, managed and financed by the Russian Federation, as well as representatives of the occupation administration of the Russian Federation, comprising its state bodies and structures functionally responsible for the administration of the temporarily occupied territories of Ukraine, as well as representatives of self-proclaimed bodies controlled by the Russian Federation which have usurped the exercise of governmental function in the temporarily occupied territories.

Article 146-1 CCU does not provide for any liability for the possible consequences of such an act. This means that causing damage or other violations (such as death of a human being) is not covered by paragraph 1 of this article and needs to be additionally classified as other crimes (e.g. if the victim suffered physical injury, was tortured, was not provided with medical assistance, etc.). Furthermore, the court, when adjudicating, must take into consideration the consequences that will be borne by the victim. In practice, judicial bodies are still unable to distinguish the

[29] In Ukrainian criminal law, it is possible to combine intentional and unintentional forms of the subjective side within one offence, as the form of the subjective side of a specific offence is either explicitly provided for in the description part of the norm in the Special Part of the CCU (e.g. Article 115 CCU – intentional homicide), or in the absence of an explicit legislative decision, it is established by interpreting the elements of a specific offence, based on the statutory definitions of intentional and unintentional contained in Article 24 CCU. See O.O. Dudorov, M.I. Khavronyuk, [in:] *Kryminal'ne pravo: Navchal'nyy posibnyk*, ed. M.I. Khavronyuk, Kyyiv 2014, p. 194.

elements of the crime of enforced disappearance from other related offences. Even before the addition of Article 146-1, the CCU already contained such acts as unlawful deprivation of liberty or abduction (Article 146 CCU), hostage-taking (Article 147 CCU), taking a state official or a law enforcement officer hostage (Article 349 CCU), taking a journalist hostage (Article 349-1 CCU), abuse of power or official position (Article 364 CCU), abuse of authority or official powers by a law enforcement officer (Article 365 CCU), negligence of official duties (Article 367 CCU), deliberate unlawful arrest, forced escorting, house arrest or detention (Article 371 CCU), violation of the right of defence (Article 374 CCU), concealment of a crime (Article 396 CCU). Although the provisions of these articles do not fully reflect the content of the concept of enforced disappearances according to international standards, they can still be used in legal classification as a result of concurrence of the provisions of the CCU. To distinguish Article 146-1 CCU from related offences, it should be taken into account that this provision applies both to unlawful deprivation of liberty and to lawful detention which, if the fact of detention is still not acknowledged and the information is not provided, will be considered to be unlawful. Moreover, Article 146-1 CCU contains a special rule: only state representatives are held liable for the crime. The inclusion of Article 146-1 CCU in the context of the ongoing armed conflict has paved the way for a further approach to its application. The wording of the provision shifts the stress primarily to the actions of representatives of a foreign state, namely the Russian Federation and its agents, in the territory of Ukraine. Instead of being universal in nature and being used as a tool to protect individuals from acts of violence, in practice this provision is applied to crimes committed by representatives of the Russian Federation in the territory of Ukraine against civilians during the armed conflict. However, since 2014, there have also been questions about Ukraine's actions regarding the legality of detaining and possible enforced disappearances.[30] This is evidenced by cases of enforced disappearances documented in reports by the Office of the United Nations High Commissioner for Human Rights (OHCHR). In the reporting period from 1 February to 31 July 2022, a total of 31 cases of enforced disappearances committed by the Armed Forces of Ukraine in the territory controlled by the Government of Ukraine were recorded. The Security Service of Ukraine (SBU) recorded one case: the victim was detained and tortured by the Armed Forces of the Russian Federation in the temporarily occupied territory of the Zaporizhzhia Oblast. After release, the victim went to Zaporizhzhia to file a complaint, but was detained by unknown perpetrators near the SBU building, accused of collaboration with the Armed Forces of the Russian Federation, held for a day in his apartment and beaten. Once the victim managed to escape, he was again detained by the police and SBU officers. The victim was again detained in an unknown place, without contact with the outside world, and then transferred to the SBU building and informed of suspected

[30] A. Pavlyuk, Ye. Kapalkina, N. Okhotnikova, L. Smachylo, *op. cit.*, pp. 20–21.

collaborative activities under Article 111-1 CCU. He was detained on remand. The OHCHR has also documented a number of enforced disappearances committed by law enforcement agencies against civilians prosecuted in government-controlled territory for conflict-related crimes.[31] In another case, the police detained in the Donetsk Province a woman accused of passing information to the Russian Armed Forces and handed her over to the SBU. She was held at a police station for two days in order to obtain a written testimony, tortured and left without contact with the outside world.[32]

A case was reported of enforced disappearance of a journalist who, since 2017, had been charged in a criminal case related to the conflict. On 27 March 2022, he was detained on the street by a few uniformed men. To date, the family has not received answers to questions about his arrest or detention. The National Police of Ukraine is investigating the case as an abduction. On 10 April 2022, the former head of the village of Novoluhanske was detained, accused since 2019 in a case related to the conflict. Unknown perpetrators forced him into a car and took him away. The family still does not know the fate of the victim. The National Police of Ukraine is investigating the case, treating it as an abduction and is not considering the possibility of an enforced disappearance by state officers.

Apart from Article 146-1 CCU in the circumstances of the armed conflict on the territory of Ukraine, in cases of enforced disappearances, legal classifications specified in other articles are also applied, especially Article 115 CCU "Intentional homicide" with a note in the Unified Register of Pre-trial Proceedings (ERPD) that the act was committed during an armed conflict and the whereabouts of the person have not been established. This designation can be applied to civilians who are in occupied territories and whose fate is unknown. Additionally, since 2014, criminal proceedings have been initiated with this classification, concerning the disappearances of soldiers in areas covered by hostilities: Article 146 CCU "Illegal deprivation of liberty or abduction of a person" with a note in the Unified Register of Pre-trial Proceedings that the act was committed during an armed conflict and the whereabouts of the person have not been established – this qualification has been applied since 2014 to detained civilians in the occupied territories, as well as to captured soldiers;[33] Article 147 CCU "Hostage-taking" (in most cases, this legal

[31] OHCHR Ukraine, *Report on the Situation of Human Rights in Ukraine from 1 February to 31 July 2022*, 27.9.2022, available in Ukrainian at https://www.ohchr.org/sites/default/files/documents/countries/ua/2022-09-23/ReportUkraine-1Feb-31Jul2022-ua.pdf (access: 7.2.2025).

[32] OHCHR Ukraine, *Report on the Situation of Human Rights in Ukraine from 1 August 2022 to 31 January 2023*, 24.3.2023, available in Ukrainian at https://www.ohchr.org/sites/default/files/documents/countries/ukraine/2023/23-03-24-Ukraine-35th-periodic-report-UA.pdf (access: 7.2.2025), p. 90.

[33] OHCHR Ukraine, *Detention of Civilians in the Context of the Russian Federation's Armed Attack on Ukraine from 24 February 2022 to 23 May 2023*, available in Ukrainian at https://www.ohchr.org/sites/default/files/2023-07/2023-06-27-Ukraine-thematic-report-detention-UKR.pdf (access: 10.2.2025), p. 133.

classification was applied to detained civilians in occupied territories); Article 438 CCU "Violation of the laws and customs of war". It began to be most frequently applied after 24 February 2022 with respect to regions covered by the armed conflict. Civilians living in territories not controlled by the Government of Ukraine are considered victims in the context of unlawful detention. Furthermore, additional violations committed against the victim that fall within the meaning of violations of international humanitarian law are classified under this provision.

CONCLUSIONS

Since the beginning of the armed conflict in the territory of Ukraine in 2014, cases of enforced disappearances have been recorded based on Articles 115, 146 and 147 CCU. Moreover, during proceedings, it was often possible to find a combination of Articles 115 and 146 CCU. In the future, e.g. having found evidence of the location of victims in detention places, evidence of physical and psychological violence against illegally detained civilians in occupied territories, or the release of such a person, ongoing proceedings may be reclassified based on Article 438 CCU. After the full-fledged Russian invasion of Ukraine, Article 438 CCU became a tool for Ukrainian law enforcement agencies, allowing them to document the effects of the armed conflict.[34]

Table 2. Number of offences under Article 438 CCU

Year	Number of registered proceedings	Number of proceedings in which charges were filed	Number of indictments brought	Number of concluded proceedings
2014	1	0	0	0
2015	4	0	0	0
2016	6	1	0	0
2017	14	5	0	1
2018	5	0	0	1
2019	12	3	0	1
2020	223	6	1	0
2021	172	13	7	0
2022	60,387	135	47	33
2023	60,944	88	37	5
2024	28,788	64	0	0

Source: Office of the Prosecutor General, *About registered criminal offences and the results of their pre-trial investigation*, available in Ukrainian at https://gp.gov.ua/ua/posts/pro-zareyestrovani-kriminalni-pravoporushennya-ta-rezultati-yih-do-sudovogo-rozsliduvannya-2 (access: 1.3.2025).

[34] A. Pavlyuk, Ye. Kapalkina, N. Okhotnikova, L. Smachylo, *op. cit.*, p. 22.

As can be seen in Table 2, between 2014 and 2019, the number of offences under Article 438 CCU was small (between 1 and 14 cases). The situation changed in 2020, when 223 offences were found, and a huge increase was recorded in 2022 (and 2023 as well) – more than 60,000 cases, which should undoubtedly be associated with the hostilities that have taken place in Ukraine since February 2022. However, it is not possible to logically explain the decrease recorded in 2024 (by more than one-half more than in the previous two years). There was, after all, still intense warfare going on, and there are no rational arguments (at least those available to us) to provide a rationale for such a change.

The practice, being implemented in Ukraine, of applying Article 438 CCU stems from the following reasons. The construction of the provision allows it to cover all violations of the laws and customs of war provided for in international treaties, the binding nature of which has been agreed to by the Verkhovna Rada of Ukraine. Therefore, referring to international humanitarian law treaties, the criminal legislation allows for the registration of all violations, including those that are not explicitly defined as war crimes. For the time being, this provision is the only one that takes into account the context in which such crimes are committed in the territory of Ukraine, namely the circumstances of an armed conflict conducive to the commission of crimes. It is also possible to classify under this provision other acts committed against a person, such as hostage-taking, enforced disappearances, deportation/forced relocation of civilians. In accordance with paragraph 5 of Article 49 CCU, this offence is not time-barred.

Looking through the lens of violations of international humanitarian law, facts of enforced disappearances are perceived as unlawful detentions within the meaning of Article 438 CCU. Relevant concepts are shaped at the level of law enforcement practice, which dynamically develops after 24 February 2022.[35] For example, in the ruling of the Grand Chamber of the Supreme Court of 28 February 2024 regarding solely a point of law, the Court presented the following arguments regarding the existence of an error in the classification of the crime under paragraph 3 of Article 146 CCU (unlawful deprivation of liberty or abduction) instead of classification under Article 438 CCU: "Acts committed in conditions of an armed conflict, which are covered by prohibitions established by the norms of international humanitarian law and constitute a serious violation of these, shall be classified only on the basis of Article 438 CCU and do not require additional legal assessment under other articles of this Code".

The Court also found that in order to eliminate the concurrence between the application of the provisions of Article 438 CCU and other provisions of the CCU, the content of the committed acts should be taken into account and it should be identified whether they violated war customs and laws. Acts that are not prohibited by

[35] *Ibidem*, pp. 23–24.

the provisions of international humanitarian law, albeit committed during an armed conflict, should be classified based on other provisions of the Special Part of the CCU. The Court recognized that the fact and manner of committing the mentioned crime were conditioned by the situation of armed conflict, circumstances of the occupation, the involvement of the convicted in military activities, their possession of weapons, and related actual power over the civilian population.[36]

In the judgment of the Zaporizhzhia District Court of 2 January 2024,[37] the crimes committed by the accused against the civilian population, particularly their systematic abduction, were classified under Article 438 CCU, as they violated the laws and customs of war set out in international treaties, to which the Verkhovna Rada of Ukraine has given its binding consent. The court also argued by demonstrating the existence of all the elements of a war crime, namely: existence of an international armed conflict; undertaking actions that are unlawful in the circumstances of an international armed conflict and clearly related to it; awareness by the accused of the actual events related to the existence of an international armed conflict, as confirmed by their service in the Armed Forces of the Russian Federation and their particular role in the conflict.

Unlike other regulations, the Office of the Attorney General recommends the application of Article 438 CCU when classifying forced disappearances and unlawful detentions, arguing that these acts were committed in the circumstances of and in relation to an armed conflict.

It should also be noted that in criminal law, the provisions of Article 146-1 CCU do not directly define the victim of this crime. According to this provision, a person who has been subjected to "an arrest, detention, abduction, or any other form of deprivation of liberty by a representative of the state, including of a foreign state, followed by the refusal to acknowledge the fact of such an arrest, detention, abduction or any other form of deprivation of liberty of a person, or concealment of the fate or whereabouts of such a person" may be considered a victim. The provision does not specify, however, that family members of the missing person and persons affected during intervention to help the missing person or prevent victimisation, as well as immediate relatives of such persons, may also be victims.

As can be seen, the challenges associated with the armed conflict taking place in the territory of Ukraine, on one hand, expand the scope of guarantees for the protection of victims of enforced disappearances, and on the other hand, confirm

[36] Decision of the Grand Chamber of the Ukrainian Supreme Court of 28 February 2024 in case no. 415/2182/20, available in Ukrainian at https://reyestr.court.gov.ua/Review/117555176 (access: 8.2.2025).

[37] Judgment of the Zavodsk District Court of Zaporizhzhia of 2 January 2024 in case no. 332/441/23, available in Ukrainian at https://reyestr.court.gov.ua/Review/116072492 (access: 8.2.2025).

the need to implement the provisions of international humanitarian law and international criminal law into Ukraine's legislation (an aspect of which is criminal liability for enforced disappearance). Considering that Poland has finally ratified the International Convention for the Protection of All Persons from Enforced Disappearance (adopted in New York on 20 December 2006), the issue of supplementing the Polish Criminal Code with relevant legal solutions (and above all, creating a new type of crime penalising enforced disappearance) arises, for which the analysis of Ukrainian solutions and experiences may be helpful.

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ABSTRAKT

W artykule autorzy dokonali analizy ustawowych znamion stosunkowo nowego typu przestępstwa w ukraińskim prawie karnym, jakim jest tzw. wymuszone zaginięcie (art. 146-1 u.k.k.). Konieczność kryminalizacji takiego czynu wynikała z faktu przystąpienia Ukrainy w dniu 17 czerwca 2015 r.

do Konwencji o ochronie wszystkich osób przed wymuszonym zaginięciem (przyjętej w Nowym Jorku 20 grudnia 2006 r.). Do tego czasu brak odpowiedniego uregulowania statusu prawnego osób zaginionych stanowił lukę w ustawodawstwie Ukrainy, a potrzeba jej wyeliminowania stała się szczególnie pilna w związku z konfliktem zbrojnym w Autonomicznej Republice Krymu i na wschodzie Ukrainy. Bezpośrednio po wprowadzeniu art. 146-1 do u.k.k. jego stosowanie w praktyce nie stało się powszechne (69 spraw w 2020 r.), dopiero po pełnej inwazji Federacji Rosyjskiej na Ukrainę liczba stwierdzonych przestępstw z tą kwalifikacją wzrosła (1120 w 2022 r.). Autorzy wskazują również na inne (poza art. 146-1 u.k.k.) kwalifikacje prawne, które są stosowane w warunkach konfliktu zbrojnego na terytorium Ukrainy w przypadkach wymuszonych zaginięć (art. 115 u.k.k. „Umyślne zabójstwo", art. 146 u.k.k. „Nielegalne pozbawienie wolności lub uprowadzenie człowieka", art. 147 u.k.k. „Branie zakładników", art. 438 u.k.k. „Naruszenie praw i zwyczajów wojennych"). Z uwagi na fakt ratyfikacji przez Polskę Konwencji o ochronie wszystkich osób przed wymuszonym zaginięciem pojawia się problem odpowiedniego uzupełnienia kodeksu karnego o nowy typ przestępstwa, w czym może być pomocna analiza rozwiązań przyjętych w Ukrainie.

Słowa kluczowe: wymuszone zaginięcie; aresztowanie; zatrzymanie, uprowadzenie; pozbawienie wolności; zatajenie