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FORCED DISAPPEARANCES IN THE CONDITIONS OF ARMED CONFLICT: PECULIARITIES OF COMMISSION AND RESPONSIBILITY

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Abstract. The article is concerned on to the study of the peculiarities of the commission of enforced disappearance in Ukraine in the conditions of armed conflict and problematic issues that arise in practice in connection with the need to bring the perpetrators to criminal responsibility for the commission of the specified offense. The prerequisites for the criminalization of enforced disappearance have been considered. The reasons for the prevalence of enforced disappearances in the context of armed conflict have been identified and investigated. Statistical data on the number of enforced disappearances have been analyzed. Attention has been focused on the specifics of the perpetration of enforced disappearances during the war in Ukraine. The method of committing of enforced disappearances in the conditions of an armed conflict has been studied, the data on the categories of persons who become victims of this criminal offense have been analyzed. Possible places of violent disappearances, including during the so-called “filtering” have been considered. Attention has been dedicated to the main element of the objective side of enforced disappearance – the refusal to recognize the fact of deprivation of liberty and to inform about the fate and location of the victim. Certain problems of responsibility for enforced disappearance have been identified, including the causes of impunity for persons who commit enforced disappearances. A conclusion has been made regarding the presence of problematic issues that require legal resolution and the need to form an effective mechanism aimed at bringing to criminal responsibility persons committing crimes of enforced disappearance in order to avoid impunity.

Key words: enforced disappearance, missing persons, torture.

Introduction. Today enforced disappearance is one of the most brutal and dangerous crimes. First of all the specified criminal offense encroaches on the safety of humanity by causing harm to a specific person. As a result of this several fundamental human rights are violated.

Along with this it is worth noting that enforced disappearance is aimed not only at the disappeared, but also at other persons, starting with the closest relatives and ending with society as a whole. At the same time it is important that enforced disappearances are committed in direct connection with state policy and mostly by officials.

Given the fact that the criminal legal prohibition of enforced disappearance was enshrined in national legislation quite recently, many questions arise regarding the application of the relevant norm in practice. This issue is especially acute in view of the active phase of the armed conflict in Ukraine, because in this aspect it is practically not studied in the criminal law science.

The purpose of the article is to analyze the specifics of the commission of enforced disappearance in the context of armed conflict and the problems that arise when the perpetrators are brought to justice.

The task of the article is to highlight the features of enforced disappearance and issues of responsibility for this offense in wartime conditions.

The methods of analysis, comparison, generalization, as well as the statistical method have been applied in the research, which made it possible to obtain relevant results.

Prevalence of the practice of enforced disappearances in wartime conditions. Back on June 17, 2015, Ukraine joined the International Convention for the Protection of All Persons from Enforced

Disappearance (hereinafter referred to as the Convention) – an international legal act of a universal nature, which enshrines the right of a person not to be subjected to enforced disappearance (Law of Ukraine, 17.06.2015, No. 525-VIII).

In order to fulfill the international legal obligations assumed by Ukraine in accordance with the Law of Ukraine of July 12, 2018 No. 2505-VIII “On the Legal Status of Missing Persons” (Law of Ukraine, 12.07.2018, No. 2505-VIII) the current Criminal Code of Ukraine was supplemented by Art. 146-1 “Enforced disappearance”.

However, so far, despite the prevalence of enforced disappearances in Ukraine during the war, the guilty persons remain unpunished.

Since February 2014, our country has been in a state of undeclared war with the Russian Federation, which initially occupied and later annexed the Autonomous Republic of Crimea and the city of Sevastopol, and subsequently began carrying out armed aggression in certain areas of Donetsk and Luhansk regions. On April 14, 2014, the National Security and Defense Council of Ukraine announced the beginning of an Anti-Terrorist Operation (ATO) aimed at countering the activities of illegal Russian and pro-Russian armed groups; as of April 30, 2018, its format was changed to a Joint Forces Operation (JOF). The new phase of the armed aggression of the Russian Federation, which began on February 24, 2022, led to numerous casualties among military personnel and law enforcement officers, as well as among the civilian population, the occupation of part of the territory of Ukraine, and significant economic losses.

Ever since the occupation of Crimea in March 2014, Russia has been using enforced disappearances as a method of waging war, to intimidate and suppress resistance. Later, this practice became even more widespread in certain areas of Donetsk and Luhansk regions, but from February 24, 2022, the Russians began to really mass kidnap Ukrainians. Enforced disappearance is one of the most common crimes systematically committed by representatives of the aggressor state on the territory of Ukraine.

According to the report of the UN Monitoring Mission on Human Rights in Ukraine on the general situation with human rights in Ukraine as of as of January 31, 2023, 621 cases of enforced disappearances were documented (Report of the UN Secretary General and the Office of the UN High Commissioner for Human Rights, 2023). At a press conference in Kyiv on March 24, 2023, Matilda Bogner, head of the UN Human Rights Monitoring Mission in Ukraine, during the presentation of the 35th report of the Office of the UN High Commissioner for Human Rights on the human rights situation in Ukraine, reported, among other things, about conducting interviews with 127 civilians who were previously detained and then released; 90% of them reported that representatives of the Armed Forces of the Russian Federation and the Federal Security Service of the Russian Federation tortured and ill-treated them during detention, in some cases this included sexual violence. Five of these civilians were boys between the ages of 14 and 17 who disappeared due to violent actions by the Armed Forces of the Russian Federation, were ill-treated or tortured (Janowski K., 2023).

According to the information provided by the Main Investigative Department of the National Police of Ukraine in response to the request of the non-governmental organization “ZMINA Center for Human Rights”, from the beginning of the full-scale war of Russia against Ukraine until June 6, 2023, 16,000 criminal proceedings were initiated due to the illegal deprivation of liberty and the enforced disappearance of almost 8,800 civilians. In addition, 7,300 criminal proceedings were initiated for the disappearance of 10,200 people (Materialy Tsentru prav lyudyny ZMINA, 2023).

At the same time, according to the General Prosecutor's Office of Ukraine, in 2020, 69 criminal offenses under Art. 146-1 of the Criminal Code of Ukraine have been registered, while in 2021 – 56, in 2022 – 1120, and during 6 months of 2023 – 39 (Reports of the Office of the Prosecutor General of Ukraine).

Human rights organizations are constantly working to collect data on missing persons, in particular through direct contact with the families of the disappeared, as well as by sending information requests

to local self-government bodies which in some cases keep records of missing persons in their territorial communities better than state bodies.

According to the non-governmental organization “ZMINA Center for Human Rights” since February 24 in 2022, at least 311 cases of enforced disappearance of Ukrainians in the occupied territories were documented. Of that number, 181 people were released, but 118 are still missing or in Russian captivity. The largest number of missing Ukrainians was recorded in the occupied south of Ukraine: 119 people were abducted in the Kherson region, 90 in the Zaporizhia region. There are currently 27 cases of enforced disappearances in the occupied areas of the Kharkiv region (Materials of the online conference of the ZMINA Center for Human Rights, 2022).

The Kharkiv human rights group, together with its partners in the “Tribunal for Putin” (“T4R”) coalition, collected and entered into the initiative's database information on 2,858 enforced disappearances committed against 5,140 civilians in the period from February 24, 2022 to March 31, 2023.

According to their data, the largest number of enforced disappearances occurred at the beginning of the full-scale invasion of the territory of Ukraine. The organization's database recorded 759 cases of disappearance in March 2022, which is 26.7% of the total number of cases of disappearance. The number of recorded cases gradually decreased until it reached approximately 120–160 people per month in June–July 2022 (this number remained until mid-autumn 2022). After the de-occupation of part of the territory of Ukraine, namely the Kharkiv and Kherson regions, the number of enforced disappearances does not exceed 100 cases per month and continues to remain at this level until now (Information portal of the Kharkiv human rights group, 2022).

Thus since the beginning of the armed conflict different data have been published on the number of persons missing, as well as on the number of enforced disappearances. However, such information does not reflect the real situation. To date, it is impossible to name the exact number of persons who were abducted and moved to the territory of the aggressor state.

It is worth emphasizing that by the Order of the Ministry of Internal Affairs of Ukraine No. 535 dated August 29, 2022, the Regulation on the Unified Register of Persons Disappeared Under Special Circumstances was approved (Order of the Ministry of Internal Affairs of Ukraine No. 535 dated 29.08.2022). Since May 2023 this Register finally became operational. It allows accumulating data on missing persons under special circumstances. Among the shortcomings, cooperation between the various institutions involved in the search process has not yet been fully established, due to which part of the coordination takes place in manual mode (Discussion materials of public organizations, 2023).

So we can talk about the positive dynamics of the settlement of issues related to missing persons under special circumstances, taking into account the fact that the legislation of Ukraine is developing in accordance with the norms of international law, not only balancing the system of concepts and the creation of relevant bodies, but also the procedures for searching for missing persons in Ukraine, including during the war.

Peculiarities of enforced disappearances during armed conflict. Every enforced disappearance begins with the deprivation of the victim's freedom. Most people disappear under unknown circumstances. At the same time, it is quite difficult to establish the exact date of a person's disappearance. This especially applies to temporarily occupied territories, where it is impossible to find out the exact circumstances why a person suddenly disappeared, stopped communicating. The lack of any connection with the temporarily occupied territories makes it impossible to obtain accurate information about committed criminal offenses.

Most of the victims of enforced disappearances are abducted from their homes. This indicates a clear intention to kidnap those people who, in fact, disappeared, and excludes the factor of chance. At the same time, enforced disappearances are complex in nature: they are usually

combined with searches, family intimidation, destruction of property, seizure of cash, valuables and equipment.

At the same time people who are at work, on the street, at public transport stops on the way, at mass events, crossing roadblocks are also subjected to violent disappearances. Unlike those who disappeared at home, these are random people who become victims of a coincidence of circumstances, the behavior of the occupiers, the order to “round up everyone”, etc.

Some people disappear during the evacuation, trying to leave the temporarily occupied territories. If such people arouse suspicion during an inspection or search on the way out of the temporarily occupied territory, they may end up in filtration camps or be immediately accused of committing actions that their occupiers consider illegal.

It should also be noted that special attention is paid to personal signs of people. They are searched during personal searches, stripped, and if they find a tattoo that includes any national Ukrainian symbols, symbols of individual units of the Armed Forces of Ukraine, etc., the person will almost certainly be detained. Even if it does not have such symbols, but the Russian military cannot understand the meaning of the tattoo, the person can also be detained.

Arbitrary detention, torture, ill-treatment, psychological pressure, sexual violence and threats thereof, enforced disappearances – such a list of war crimes committed by Russia against Ukrainians is reported in the Office of the UN High Commissioner for Human Rights. The armed forces of the Russian Federation and affiliated armed groups commit illegal actions against Ukrainians, in particular, during the so-called “filtering” (Coverage of the Security Council meeting, 2022). “Filtering” is carried out in special “filtration camps”, which are similar to “concentration camps” created by Russian troops in temporarily occupied Ukrainian territories, as well as directly in Russia. The exact number of “camps” where Ukrainians are kept is currently unknown. In July 2022, the deputy head of the US mission to the OSCE, Courtney Ostrian, announced the discovery of at least 18 “filtration camps” created for the detention and forced deportation of Ukrainians to Russia (Solomon E., 2022). In August, researchers from Yale University published a report in which they counted at least 21 “filtration camps” where Russia illegally detains Ukrainians – and this is only in the territory of the Donetsk region (Fact sheet of Yale school of public health, 2022).

During the so-called “filtering” Russian occupation forces and representatives of illegal armed groups take passports from Ukrainian citizens, check mobile phones, conduct personal searches (including forcing them to completely undress) and interrogate them. The UN has documented that Russian forces committed war crimes against Ukrainians believed to be connected to the Armed Forces of Ukraine or state institutions, and generally against people with a pro-Ukrainian position and those who did not pass the check for loyalty to Russia (News of U.S. Department of State, 2022).

During individual interviews, former prisoners say that they were beaten with hands, feet, butts, hammers, sticks, and metal pipes, and electric current was used in order to cause maximum suffering. Traces of stab and cut wounds remain on the bodies of those released. As one of the methods of abusing exhausted prisoners, performing physical exercises in an excessive amount is used; also practice keeping people in inhumane, unsanitary conditions, without proper medical treatment, without providing sufficient food and drinking water, without access to fresh air, in overcrowded cells (Miroshnychenko V., 2023)

According to the Kharkiv human rights group, a high percentage of the victims of enforced disappearances are former military personnel – former ATO participants, law enforcement officers, border guards, rescuers, etc. Another large group of the missing are pro-Ukrainian volunteers, activists, journalists, those who took part in mass events against the occupation or even did not take part, but seemed dangerous to the occupiers. The third largest category of victims of enforced disappearances are officials of state authorities and local self-government bodies. There are also specific categories of victims of enforced disappearances. They are Crimean Tatars, teachers,

farmers, managers of agricultural enterprises, priests, doctors (Information portal of the Kharkiv human rights group, 2022).

There is no unequivocal answer to the question of who is at risk of becoming a victim of enforced disappearance. Here, as in the case of the missing, the vast majority of the disappeared are ordinary residents of populated areas, it is impossible to establish clear motives for their abduction by the Russian military. They did not express their civic position actively, did not work in state structures or religious organizations. The reason for the persecution of citizens in the occupied territories can be anything, any act of real or imagined disobedience.

It is also worth noting that the tendency of violent disappearances for men is twice as high as for women – 3,204 men (62% of the total number of disappeared) and 1,776 women (34%). At the same time, the number of missing children was 160 (4%) (Ovdiyenko H., 2023). The main reason for the prevalence of acts of enforced disappearance against men is their warning of anti-Russian resistance, which representatives of the Russian occupation authorities are trying to prevent.

A mandatory element according to the definition of enforced disappearance under both international law (Convention, 2006) and national legislation is the refusal to acknowledge the fact of deprivation of liberty and to inform about the fate and location of the victim. In this way, enforced disappearance actually differs from many related crimes. After the disappearance, the victim's relatives have no opportunity to obtain information either from the local occupation authorities or from Russian official bodies. Confirmation of the presence of the missing person under the control of the Russian authorities may take place after months (and in some cases even after a year) from the moment of disappearance. However, even this confirmation does not contain information about the whereabouts and state of health of the missing person. Therefore, the relatives of the victims still have no idea whether the missing person is alive, in what condition he is, and whether violence is being used against him. In response to requests, Russian state authorities do not provide specific answers or do not respond at all. For their part, the Ukrainian state authorities do not have the tools to force the Russian side to provide timely and truthful information, since the Russian side does not fulfill its international obligations (Ovdiyenko H., 2023).

Individual causes of impunity for persons who commit enforced disappearances. To this date in Ukraine, in the conditions of war, the problem of bringing perpetrators of enforced disappearances to criminal responsibility is quite acute. Despite the large number of cases of enforced disappearances that occur in the context of armed conflict, not a single verdict in criminal proceedings under Art. 146-1 of the Criminal Code of Ukraine is absent. With rulings of local courts in the vast majority of criminal proceedings regarding the perpetration of enforced disappearances indicate that data on their perpetration were entered into the Unified Register of Pretrial Investigations as early as 2018–2020. However, the pre-trial investigation in these proceedings is still not over.

Given the lack of witnesses, as well as information about the probable reasons for detention, it is very difficult to trace the fate of people who have become victims of enforced disappearance. As a result of the commission of the specified criminal offense, the family members do not have information about the location of the victims, their state of health, etc. for a long time. If there are witnesses of such violations, they are mostly intimidated and do not want to testify, especially when they themselves are still in the temporarily occupied territories or they have relatives there. Thus, it is difficult to persuade them to communicate with law enforcement agencies. In addition, it is quite difficult to investigate criminal offenses committed in the temporarily occupied territories, since there is no access to them, and therefore to the scene of the incident, witnesses, etc. An investigation that is conducted remotely is significantly limited in resources and therefore cannot be effective. Even after the de-occupation of the territories, the traces of committed criminal offenses in many cases are almost impossible to recover, and the witnesses, if not intimidated, have long since left the territory and live abroad.

Among the main problems that arise today in the investigation of enforced disappearances, it is worth mentioning:

failure to enter information about a criminal offense into the Unified Register of Pretrial Investigations;

incorrect definition of responsibility;

lack of efficiency in the actions of law enforcement officers;

lack of thoroughness during investigative (search) actions;

lack of access by investigators to the crime scene (if it is about the occupied territory);

ineffective informational interaction between various bodies of pre-trial investigation;

improper procedural management of pre-trial investigations.

The competence of the National Police of Ukraine to investigate cases of enforced disappearances is questionable. Given the essence of this criminal offense aimed at the safety of humanity, such liability should be determined by the security investigative bodies, which would undoubtedly affect the effectiveness of the pre-trial investigation.

Along with this it should be noted that not only the problems related to the investigation of enforced disappearances are the reason for the impunity of the persons who committed them. In practice, quite a lot of questions arise in connection with the application of the criminal law norm, which provides for responsibility for enforced disappearance. Such questions primarily concern the debatable nature of the definition of the object of the criminal offense, the forms of the objective party, the special subject, the qualification of the enforced disappearance committed in complicity, as well as combined with the commission of other criminal offenses. At the same time, it is worth noting that the existing problems related to the construction of the article itself. 146-1 of the Criminal Code, taking into account that the specified norm competes with a number of articles of the Law of Ukraine on criminal liability, including, in particular, Articles 146, 147, 148, 149, 151, 349, 349-1, 365, 371, 426 of the Criminal Code, in practice complicate the process of qualification of the committed act.

It is also important to ensure the criminal prosecution of persons who currently hold leading (in particular, higher) positions in the authorities of the so-called “DNR”, “LPR”, as well as those involved in the forcible disappearance of officials of bodies (services, divisions) of state power, units of the Armed Forces, law enforcement agencies and special services of the aggressor state and bringing them to criminal responsibility.

In addition, as can be seen from the construction of Art. 146-1 of the Criminal Code of Ukraine, the legislator did not provide qualifying or particularly qualifying features in it, which, in our opinion, would be appropriate to change by enshrining in Part 3 the provisions that provide for responsibility for committing enforced disappearance repeatedly, or with a prior conspiracy by a group of persons, or if it caused serious consequences, with an appropriate punishment. Given the increased public danger of the committed act, this will ensure a fair measure of punishment for violators.

Thus, the above needs special attention of the legislator for the formation of an effective mechanism aimed at bringing to criminal responsibility persons guilty of crimes of enforced disappearance, including the direct managers of those persons who committed acts related to the enforced disappearance of a person.

Conclusions. Today Russian troops, security forces and Russian-controlled armed formations are committing acts of enforced disappearance against the civilian population in the territories that were or remain occupied on a large scale, grossly violating the provisions of both international law and national legislation of Ukraine. At the same time, cases of torture, ill-treatment, and the use of physical and psychological pressure on victims of enforced disappearances are systematic.

It is worth emphasizing that acts of enforced disappearance are carried out within the framework of state policy, and therefore anyone can become a victim of enforced disappearance, regardless of gender and status.

The legislation of Ukraine is currently developing in many directions in accordance with the norms of international law, including due to the need to register persons who have disappeared under special circumstances. At the same time, the practice of enforced disappearances in Ukraine still remains virtually unpunished. This is related both to the problems of the application of the criminal legal norm, which provides for responsibility for enforced disappearance, and to the ineffectiveness of the investigation of this criminal offense, caused, first of all, by its specificity in the conditions of an armed conflict, associated with the lack of access to the place of its commission – temporarily occupied territories, as well as insufficient information, absence or intimidation of witnesses.

Many issues necessary for the formation of an effective basis for effective criminal legal counteraction to acts of enforced disappearance still need to be resolved, in particular, the final determination of the object of enforced disappearance, establishing the liability of the specified criminal act as a criminal offense against the safety of humanity by security investigative bodies, supplementing of Art. 146-1 of the Criminal Code of Ukraine with qualifying features, which, in our opinion, will contribute to the effective investigation of this offense and bringing the guilty to justice with the appointment of a fair measure of punishment for what has been committed.

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