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COALITION

ANALYTICAL REPORT

# Enforced Disappearances: National Practice v. International Standards





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Disappearances:  
National Practice v.  
International Standards**

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# List of abbreviations

- FSLA** – Free secondary legal aid
- URPTI** – Unified Register of Pre-trial Investigations
- ECtHR** – the European Court of Human Rights
- CC of Ukraine** – Criminal Code of Ukraine
- Convention** – International Convention for the Protection of All Persons from Enforced Disappearance
- CPC of Ukraine** – Criminal Procedure Code of Ukraine
- IACtHR** – the Inter-American Court of Human Rights
- MIA of Ukraine** – Ministry of Internal Affairs of Ukraine
  - IHL** – International humanitarian law
  - ICL** – International Criminal Law
  - ICC** – International Criminal Court
  - ICRC** – International Committee of the Red Cross
  - NIB** – National Information Bureau
  - NPU** – National Police of Ukraine
  - NGO** – Non-governmental organisation
  - PGO** – Prosecutor General’s Office of Ukraine
  - UN** – United Nations
  - PACE** – Parliamentary Assembly of the Council of Europe
- Register** – The Unified Register of Persons Missing in Special Circumstances
  - RF** – Russian Federation
  - SSU** – Security Service of Ukraine
  - JIT** – Joint Investigation Team
  - USA** – United States of America
- OHCHR** – Office of the United Nations High Commissioner for Human Rights

# Introduction

The issue of enforced disappearances has gained new urgency for Ukraine due to the ongoing armed conflict on its territory. Since 2014, with the occupation of the Crimean peninsula and the armed conflict within certain districts in the Donetsk and Luhansk regions, Ukrainian law enforcement agencies have recorded cases of disappearances and illegal detentions of persons in the territory under Russian control. Similar cases continue to be documented after the full-scale invasion of Ukraine by the RF. In fact, anyone can become a victim of enforced disappearance in an armed conflict. However, in the occupied territories, persons with an active civic or pro-Ukrainian position, with experience of military service or participation in the anti-terrorist operation in Eastern Ukraine, working in local government or law enforcement agencies, or simply speaking Ukrainian are at a higher risk<sup>1</sup>.

At the same time, the prosecution of persons cooperating with the occupation authorities in the territories controlled by the RF, representatives of the illegal armed groups of the self-proclaimed “Donetsk people’s republic” and “Luhansk people’s republic”, as well as the introduction of criminal liability for collaboration after 24 February 2022, created a risk that enforced disappearances could also be committed by the Ukrainian authorities. In particular, after the declaration of the anti-terrorist operation on the territory of Ukraine in 2014, a number of legal acts were adopted that regulated additional requirements for the preventive detention of persons related to the commission of unlawful acts<sup>2</sup>.

Despite the requirements of international law, Ukrainian legislation and law enforcement practice have used different approaches not only to guarantee the protection of the right to liberty and security of individuals, but also to investigate violations committed against that right to liberty and security. In the practice of investigating such facts in the context of the armed conflict after 2014, there have been various legal qualifications of enforced disappearances: both as general crimes and as violations of the laws and customs of war. Although the armed conflict has been going on for ten years, the justice system has not developed generalised and objective approaches to investigating these facts. Despite the public demand for justice for all violations, the priorities of the investigative bodies are focused on investigating cases committed by representatives of the RF and its agents, while other violations are generally ignored.

Instead, over the past ten years, Ukraine has taken an important step towards meeting international standards in the field of combating enforced disappearances. On

1 Enforced disappearances and arbitrary detentions of active citizens during the full-scale Russian armed aggression against Ukraine (February 2022 - June 2023) / N. Okhotnikova, O. Hnatiuk, B. Petruniok; edited by O. Syniuk // Human Rights Centre ZMINA, 2023: <http://surl.li/rtntvb>.

2 Law of Ukraine “On Amendments to the Law of Ukraine “On Combating Terrorism” on Preventive Detention of Persons Involved in Terrorist Activities in the Area of Anti-Terrorist Operation for a Period of More than 72 Hours” // Verkhovna Rada of Ukraine, No. 1630-VII of 12.08.2014: <https://zakon.rada.gov.ua/laws/show/1630-18#Text>. Instruction on the Procedure of Preventive Detention in the Area of Anti-Terrorist Operation of Persons Involved in Terrorist Activities and Special Regime of Pre-trial Investigation in the Conditions of Martial Law, State of Emergency or in the Area of Anti-Terrorist Operation // Decree of the Ministry of Internal Affairs of Ukraine, the Prosecutor General's Office of Ukraine, the Security Service of Ukraine // Verkhovna Rada of Ukraine, No. 1038/25815 of 27.08.2014: <https://zakon.rada.gov.ua/laws/show/z1038-14#Text>.

June 17, 2015, the Verkhovna Rada of Ukraine ratified the International Convention for the Protection of All Persons from Enforced Disappearance of 2006<sup>3</sup>. The Convention is an international instrument of the United Nations in the field of human rights protection, adopted by the UN General Assembly on December 20, 2006, No. A/RES/61/177 and entered into force on December 23, 2010<sup>4</sup>. Its signing was preceded by the Declaration on the Protection of All Persons from Enforced Disappearance, adopted by UN General Assembly Resolution 47/133 of December 18, 1992<sup>5</sup>, which is still in force today. The Declaration has become a set of principles for all states to prohibit enforced disappearances as defined in international human rights law and customary international law, and to provide reparations to victims of such acts.

According to the Convention, an enforced disappearance occurs when a person is arrested, detained, abducted against their will or otherwise deprived of their liberty by agents of the State or by a person or group of persons whose actions are in some way aided and abetted by the State. Such deprivation of liberty is accompanied by a refusal to acknowledge the deprivation of liberty of the individual person or by concealment of information about the fate or whereabouts of the disappeared person<sup>6</sup>. As a result of such behaviour, the disappeared person is not protected by the law, which makes it impossible for them to seek legal protection and guarantees as well as puts them in a situation of complete defenselessness. This, in turn, makes them vulnerable to other human rights violations, such as torture, sexual violence or even murder.

The purpose of this analysis is to examine Ukraine's capacity to ensure compliance with international law standards for the protection of victims of enforced disappearances. The principles and provisions set out in the International Convention for the Protection of All Persons from Enforced Disappearance, international human rights law, international humanitarian law and international criminal law are used as a general framework for the analysis.

By ratifying the Convention, Ukraine recognised the jurisdiction of the UN Committee on Enforced Disappearances. Therefore, the results of the study will be submitted to the Committee in accordance with Article 31 of the Convention for further processing and consideration as part of Ukraine's reporting on the implementation of the treaty.

In accordance with the stated goal, the objectives of the study are:

- To determine the understanding of the category of victims of enforced disappearances proposed at the level of national legislation of Ukraine and compare it with the relevant provisions of international law;

3 Law of Ukraine "On the Accession of Ukraine to the International Convention for the Protection of All Persons from Enforced Disappearance" // Verkhovna Rada of Ukraine, No. 525-VIII of 17.06.2015: <https://zakon.rada.gov.ua/laws/show/525-19#n2>. List of countries that have joined the Convention for the Protection of All Persons from Enforced Disappearance: [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=183&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=183&Lang=EN).

4 International Convention for the Protection of All Persons from Enforced Disappearance // Verkhovna Rada of Ukraine, Convention, International Document of 20.12.2006: [https://zakon.rada.gov.ua/laws/show/995\\_154#Text](https://zakon.rada.gov.ua/laws/show/995_154#Text); (UN website: <http://surl.li/rtnxp>).

5 UN General Assembly Resolution 47/133 of December 18, 1992 "Declaration on the Protection of All Persons from Enforced Disappearance" // Verkhovna Rada of Ukraine, International Document: [https://zakon.rada.gov.ua/laws/show/995\\_225#top](https://zakon.rada.gov.ua/laws/show/995_225#top); (UN website: <https://undocs.org/Home/Mobile?FinalSymbol=A%2FRES%2F47%2F133&Language=E&DeviceType=Desktop&LangRequested=False>).

6 Article 2 / International Convention for the Protection of All Persons from Enforced Disappearance // Verkhovna Rada of Ukraine, Convention, International Document of 20.12.2006: [https://zakon.rada.gov.ua/laws/show/995\\_154#Text](https://zakon.rada.gov.ua/laws/show/995_154#Text).



- To analyse data on the process of investigation of enforced disappearances by law enforcement agencies of Ukraine and their effectiveness in accordance with international law;
- To analyse the challenges for the justice system of Ukraine that impact the effectiveness of investigating the facts of enforced disappearances committed in the context of the armed conflict and bringing perpetrators to justice;
- To review other legal mechanisms for the protection of the rights of victims of enforced disappearances committed in the context of the armed conflict in Ukraine.

The study was conducted by the NGOs Ukrainian Legal Advisory Group<sup>7</sup>, Media Initiative for Human Rights<sup>8</sup>, and Human Rights Centre ZMINA<sup>9</sup> on behalf of the coalition of non-governmental organisations Ukraine 5AM<sup>10</sup>. The coalition unites the efforts of 38 NGOs in the field of protection of victims of armed aggression in Ukraine and bringing to justice the senior officials of the RF and direct perpetrators of the most serious international crimes.

## Research methodology

To achieve the aim of the study, the author analysed the current provisions of Ukrainian legislation for compliance with international law aimed at protecting victims of enforced disappearances and determining the standards for investigating such facts. Among the international norms, the provisions of international human rights law, international humanitarian law and international criminal law were used.

A separate research tool was the analysis of the practice of representing and protecting the interests of victims of enforced disappearances committed in the context of the armed conflict in Ukraine within the framework of justice processes at the national level. The Ukrainian Legal Advisory Group, Media Initiative for Human Rights, Human Rights Centre ZMINA have experience in documenting the consequences of the armed conflict that have occurred since 2014, interacting with public authorities to present identified problematic issues at the level of legislation and law enforcement practice, as well as representing victims in criminal proceedings at the national level.

In addition, the study used the results of an independent public opinion survey conducted by the Rating Sociological Group.

Audience: population of Ukraine aged 18 and older in all regions, except for the temporarily occupied territories of the Autonomous Republic of Crimea, Sevastopol, certain districts of Donetsk and Luhansk regions, as well as areas where Ukrainian mobile communication was not available at the time of the survey. The results were calculated using the latest data from the State Statistics Service of Ukraine. The sample is representative in terms of age, gender and settlement type. Sample population: 2000 respondents. Survey method: CATI (Computer Assisted Telephone Interviews). The error of representativeness of the survey with a confidence level of 0.95: no more than 2.2%.

7 Ukrainian Legal Advisory Group: <https://ulag.org.ua/uk>.

8 Media Initiative for Human Rights: <https://mipl.org.ua/>.

9 Human Rights Centre ZMINA: <https://zmina.ua/>.

10 Coalition of NGOs Ukraine 5AM: <https://www.5am.in.ua/>



# Legal status of victims of enforced disappearances

## 1.1. International standards

International law defines victims of enforced disappearances as persons who have suffered harm (including physical or mental/psychological trauma, emotional suffering, economic loss or substantial violation of their fundamental rights) individually or collectively by acts or omissions that constitute gross violations of international human rights law or serious violations of international humanitarian law.

Victims of enforced disappearances include:

- Missing persons;
- Nearest relatives or dependents of the directly disappeared person;
- Persons who have been harmed in the course of an intervention to assist victims in distress or prevent victimisation, and their nearest relatives<sup>11</sup>.

In addition, these persons should be considered victims regardless of whether the perpetrator of the offence has been identified, detained, prosecuted or convicted, and regardless of the family relationship between the perpetrator and the victim<sup>12</sup>. Guarantees for such persons, according to international standards, are an indispensable part of the right to an effective remedy for gross violations of international human rights law and serious violations of international law. Such remedies include: equal and effective access to justice; adequate, effective and prompt reparation; access to information on violations and mechanisms of reparation<sup>13</sup>.

In addition, the Convention guarantees victims of enforced disappearances the right:

- To know the truth about the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the missing person;
- To search for, locate and release missing persons, and in the case of death, to locate, identify and return their remains;

11 Principle V, paragraph 8 / UN General Assembly Resolution 60/147 of December 15, 2005 "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" // UN: <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation>.

12 Principle V, paragraph 9 / UN General Assembly Resolution 60/147 of December 15, 2005 "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" // UN: <http://surl.li/duttr>.

13 UN General Assembly Resolution 60/147 of December 15, 2005 "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" // UN: <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation>.

- To obtain prompt, fair and adequate reparation and compensation for the harm suffered by the victim, including compensation for material and non-pecuniary damage, as well as, where appropriate, such forms of compensation as restitution; rehabilitation; satisfaction, including restoration of honour and reputation; and a guarantee of non-repetition;
- To establish the legal status of victims of enforced disappearances and their legal protection, in particular in the areas of social protection, financial support, family law and property rights<sup>14</sup>.

International law imposes an obligation on states to investigate and identify the fate and whereabouts of a missing person; to search for and return the remains of missing persons in order to ensure an effective investigation (the remains of a missing person are evidence of what happened and provide detailed information about the treatment of the missing person, their fate and possible responsible persons or institutions); to ensure that the nearest relatives of the missing person know where the remains of their loved ones are, so that they can bury (rebury) the remains and/or complete the mourning process in accordance with their beliefs<sup>15</sup>.

International law obliges states to provide for effective mechanisms to guarantee the individual and collective dimensions of the right to the truth, including by informing both victims of enforced disappearances and society about what happened. The right to a remedy is understood in international law to mean the right to a prompt and effective judicial remedy as a means of establishing the whereabouts or health of persons deprived of their liberty; as well as the right to unimpeded access by national competent authorities to all places of detention; the compilation of centralised lists of all persons in detention; the obligation to conduct a full investigation into all alleged cases of disappearance; the obligation to examine the cases of persons allegedly responsible for acts of enforced disappearance; and the obligation to bring to justice those who are allegedly responsible for the acts of enforced disappearance. All persons involved in the investigation of cases of enforced disappearance should be protected from any form of ill-treatment, intimidation or retaliation. The statute of limitations for acts of enforced disappearance should be long and proportionate to the particularly grave nature of the offence.

Perpetrators of enforced disappearances are not subject to any special amnesty laws or other similar measures that could lead to impunity. It is also provided that victims of enforced disappearances must receive reparation and are entitled to appropriate compensation, including means to ensure their maximum possible rehabilitation<sup>16</sup>.

In particular, the ECtHR's case law on the understanding of a "remedy" requires that such measures should allow the competent authorities to both consider relevant

14 Article 24 / International Convention for the Protection of All Persons from Enforced Disappearance // Verkhovna Rada of Ukraine, Convention, International Document of 20.12.2006: [https://zakon.rada.gov.ua/laws/show/995\\_l54#Text](https://zakon.rada.gov.ua/laws/show/995_l54#Text).

15 *Gelman v. Uruguay (Fondo y reparaciones)* // IACtHR, Judgment of 24 February 2011, para. 258: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_221\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_221_ing.pdf). *Neira Alegria y others v. Perú (Reparations and Costs)* // IACtHR, Judgment, 19 September 1996, Serie C No. 29, para. 69: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_29\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_29_ing.pdf). *Ibsen Cárdenas e Ibsen Peña v. Bolivia (Reparations and Costs)* // IACtHR, Judgment, 1 September 2010, para. 214: <https://summa.cejil.org/es/entity/apb77go8ml56zuxr>. *Gomes Lund and others (Guerrilha do Araguaia) v. Brazil* // IACtHR, Judgment, 24 November 2010, para. 261: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_219\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_219_ing.pdf).

16 Resolution 47/133 of the UN General Assembly of December 18, 1992 "Declaration on the Protection of All Persons from Enforced Disappearance" // Verkhovna Rada of Ukraine, International Document: [https://zakon.rada.gov.ua/laws/show/995\\_225#top](https://zakon.rada.gov.ua/laws/show/995_225#top); (UN website: <https://undocs.org/Home/Mobile?FinalSymbol=A%2FRES%2F47%2F133&Language=E&DeviceType=Desktop&LangRequested=False>).

complaints of human rights violations and provide appropriate assistance<sup>17</sup>. A remedy is only effective if it is accessible and sufficient. It must be sufficient not only in theory, but also in practice<sup>18</sup>, and must be effective in practice and in law<sup>19</sup>, taking into account the individual circumstances of the case. However, its effectiveness does not depend on the certainty of a successful outcome for the applicant<sup>20</sup>.

Article 13 of the Convention does not require a specific form of remedy: states have a certain degree of discretion in how they fulfil their obligation, but the nature of the right at stake is relevant to the type of remedy that the state is obliged to provide<sup>21</sup>. Even if one remedy alone does not fully meet the requirements of Article 13, the combination of remedies provided for in domestic law may satisfy these requirements<sup>22</sup>. In assessing effectiveness, it is necessary to take into account not only the formal remedies, but also the overall legal and political context in which they operate, as well as the personal circumstances of the applicant<sup>23</sup>.

These measures may include out-of-court processes that complement the role of the judiciary, as well as the establishment of a truth commission or other investigative commission to establish the facts related to these violations in order to establish the truth and prevent evidence from disappearing<sup>24</sup>. States must take steps to ensure that information about human rights violations is made publicly available.

International law standards stipulate that victims of enforced disappearances must be informed of the progress and results of the investigation and have the right to participate in the investigation and trial of all those responsible for the crime, including the right to representation. Mechanisms to ensure these rights of victims must be effective<sup>25</sup>.

17 M.S.S. v. Belgium and Greece, ECtHR, Application No. 30696/09, judgement of January 21, 2011, para. 288: <https://hudoc.echr.coe.int/fre?i=001-103050>. Halford v. the United Kingdom // ECtHR, Application No. 20605/92, judgement of June 25, 1997, para. 64: <https://hudoc.echr.coe.int/?i=001-58039>.

18 McFarlane v. Ireland, ECtHR, Application No. 31333/06, judgement of September 10, 2010, para. 114: <https://hudoc.echr.coe.int/?i=001-100413>. Riccardi Pizzati v. Italy, Application No. 62361/00, Grand Chamber judgement of March 29, 2006, para. 38: <https://hudoc.echr.coe.int/?i=001-67442>.

19 El-Masri v. “the former Yugoslav Republic of Macedonia” // ECtHR, Application No. 39630/09, judgement of December 13, 2012, para. 255: <https://hudoc.echr.coe.int/eng?i=001-115621>. Kudła v. Poland, Application No. 30210/96, judgement of October 26 2000, para. 152: <https://hudoc.echr.coe.int/fre?i=001-58920>.

20 Kudła v. Poland, ECtHR, Application No. 30210/96, judgement of October 26, 2000, para. 157: <https://hudoc.echr.coe.int/fre?i=001-58920>.

21 Budayeva and Others v. Russia, ECtHR, Application No. 15339/02, etc., judgement of March 20, 2008, paras. 190-191: <https://hudoc.echr.coe.int/?i=001-85436>.

22 de Souza Ribeiro v. France // ECtHR, Application No. 22689/07, judgement of December 13 2012, para. 79: <https://hudoc.echr.coe.int/eng?i=001-115498>; Kudła v. Poland // ECtHR, Application No. 30210/96, judgement of October 26 2000, para. 157: <https://hudoc.echr.coe.int/fre?i=001-58920>.

23 Đorđević v. Croatia, ECtHR, Application No. 41526/10, judgement of July 24 2012, para. 101: <https://hudoc.echr.coe.int/?i=001-112322>. Van Oosterwijck v. the Kingdom of Belgium, ECtHR, Application No. 7654/76, judgement of November 6 1980, paras. 36-40: <https://hudoc.echr.coe.int/?i=001-57549>.

24 Independent study of best practices, including recommendations, to assist States in strengthening their domestic capacity to combat all aspects of impunity / Professor Diane Orentlicher // UN Doc. E/CN.4/2004/88: [https://ap.ohchr.org/documents/dpage\\_e.aspx?m=138](https://ap.ohchr.org/documents/dpage_e.aspx?m=138).

25 International Convention for the Protection of All Persons from Enforced Disappearance // Verkhovna Rada of Ukraine, Convention, International Document of 20.12.2006: [https://zakon.rada.gov.ua/laws/show/995\\_154#Text](https://zakon.rada.gov.ua/laws/show/995_154#Text); Resolution 47/133 of the UN General Assembly of December 18 1992 “Declaration on the Protection of All Persons from Enforced Disappearance” // Verkhovna Rada of Ukraine, International Document: [https://zakon.rada.gov.ua/laws/show/995\\_225#top](https://zakon.rada.gov.ua/laws/show/995_225#top).



## 1.2. Regulation under the national legislation of Ukraine

Despite the fact that the armed conflict in Ukraine has been going on for ten years and a large number of enforced disappearances have been recorded, there are still many unresolved issues at the legislative level regarding the protection of victims of such crimes. Even after the ratification of the Convention, no mechanisms were provided at the national level to implement the guaranteed rights of victims. In particular, in terms of the legal status of victims of enforced disappearances, this includes the creation of effective mechanisms for compensation for material and moral damage, appropriate ways to establish the truth and effective implementation of legal protection.

At present, different branches of law stipulate at the national level separate statutes that can be provided for this category of persons. In the criminal law, the provisions of Article 146-1 of the CC of Ukraine do not directly define the victim of this crime. According to this article, a victim may be a person who has been subjected to «arrest, detention, abduction or deprivation of liberty in any other form by a representative of the state, including a foreign state, followed by a refusal to acknowledge the fact of such arrest, detention, abduction or deprivation of liberty in any other form or concealment of information about the fate of such person or their whereabouts». However, the article does not specify that victims may also include family members of the disappeared person and persons who have suffered harm during interventions to assist the disappeared or prevent victimisation, as well as the nearest relatives of such persons<sup>26</sup>.

Article 55 of the CPC of Ukraine regulates the procedure for establishing the procedural status of a victim, which may be granted to:

- A natural person who has suffered moral, physical or property damage as a result of a criminal offence<sup>27</sup>;
- One person from among close relatives or family members (several persons may be recognised as victims upon a relevant petition) of the disappeared person, if the criminal offence resulted in the death of such person or they are in a condition that makes it impossible for them to submit a relevant statement of recognition as a victim<sup>28</sup>.

At the same time, the criminal procedure legislation stipulates that the investigator, prosecutor, and court have the right to recognise a person as a victim only with their written consent. In the absence of such consent, a person may, if necessary, be involved in criminal proceedings as a witness<sup>29</sup>.

The procedural status of the victim includes a number of rights within criminal proceedings, which mostly do not give them a leading role in the process<sup>30</sup>. The impor-

26 Principle V, paragraph 8 / UN General Assembly Resolution 60/147 of December 15 2005 “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law” // UN: <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation>.

27 Part 1 of Article 55 / Criminal Procedure Code of Ukraine // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17#n801>.

28 Part 6 of Article 55 / Criminal Procedure Code of Ukraine // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17#n801>.

29 Part 7 of Article 55 / Criminal Procedure Code of Ukraine // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17#n801>.

30 Article 56 / Criminal Procedure Code of Ukraine // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17#n801>.

tance of the victim lies, on the one hand, in the possibility of being a source of information necessary for the process, and, on the other hand, in the possibility of influencing the effectiveness of the prosecution. At the same time, as the practice of research on the consequences of the armed conflict in Ukraine shows, the involvement of victims' representatives in criminal proceedings can allow a party to effectively protect their interests in the process.

At the level of social and legal regulation, Ukrainian legislation has attempted to define an additional status for victims of enforced disappearances. Thus, Ukraine currently provides for the following statuses for this category of persons:

- A person deprived of liberty as a result of Russia's armed aggression against Ukraine<sup>31</sup>;
- Family members of persons deprived of their liberty as a result of Russia's armed aggression against Ukraine<sup>32</sup>;
- A person who went missing under special circumstances<sup>33</sup>;
- A hostage<sup>34</sup>;
- A political prisoner of the Kremlin<sup>35</sup>.

However, the unsystematic approach proposed by the legal acts on their legal regulation leads to the fact that the category of victims of enforced disappearances remains unregulated in full. This approach limits the possible legal guarantees of their protection provided by international human rights law and international humanitarian law. The scope of this category of persons under Ukrainian national law is narrower than under international law. The list of victims excludes persons who suffered harm during interventions to assist missing persons in distress or prevent victimisation, and the nearest relatives of such persons. However, if a criminal offence was committed against such persons (while they were providing assistance to a missing person or their relatives or while preventing victimisation), it will be investigated under the relevant article of the CC of Ukraine.

31 Article 2 / Law of Ukraine "On Social and Legal Protection of Persons Who Were Recognised as Deprived of Personal Liberty due to the Armed Aggression against Ukraine, and Their Family Members" // Verkhovna Rada of Ukraine, No. 2010-IX, 26.01.2022: <https://zakon.rada.gov.ua/laws/show/2010-20#Text>.

32 Part 3 of Article 2 / Law of Ukraine "On Social and Legal Protection of Persons Who Were Recognised as Deprived of Personal Liberty due to the Armed Aggression against Ukraine, and Their Family Members" // Verkhovna Rada of Ukraine, No. 2010-IX, 26.01.2022: <https://zakon.rada.gov.ua/laws/show/2010-20#Text>.

33 Article 1 / Law of Ukraine "On the Legal Status of Persons Missing in Special Circumstances" // Verkhovna Rada of Ukraine, No. 2505-VIII, 12.07.2018: <https://zakon.rada.gov.ua/laws/show/2505-19#top>.

34 Article 34 / Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12.08.1949 // Verkhovna Rada of Ukraine, Convention, International Document of 12.08.1949: [https://zakon.rada.gov.ua/laws/show/995\\_154#Text](https://zakon.rada.gov.ua/laws/show/995_154#Text).

Article 75(2)(c) / Additional Protocol I to the Geneva Conventions of 12.08.1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 08.06.1977 // Verkhovna Rada of Ukraine, Convention, International Document of 08.06.1977: [https://zakon.rada.gov.ua/laws/show/995\\_199#top](https://zakon.rada.gov.ua/laws/show/995_199#top)

Article 1 / Law of Ukraine "On Combating Terrorism" // Verkhovna Rada of Ukraine, No. 638-IV, 20.03.2003: <https://zakon.rada.gov.ua/laws/show/638-15#Text>.

35 Resolution No. 1900 of the Parliamentary Assembly of the Council of Europe (PACE) of 03.10.2012 "Definition of a political prisoner" // Parliamentary Assembly of the Council of Europe (PACE): <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19150&lang=en>.

The most comprehensive and adapted to the conditions of the conflict is currently the Law of Ukraine “On the Legal Status of Missing Persons”, which entered into force on August 2, 2018<sup>36</sup>. After Russia’s full-scale invasion of Ukraine, the name of the law was changed to the Law “On the Legal Status of Persons Missing under Special Circumstances”.

All versions of this law regulate issues related to the acquisition of the legal status of persons who went missing under special circumstances (including armed conflict, military operations, temporary occupation of part of the territory of Ukraine, natural or man-made emergencies), accounting, search and social protection of such persons and their family members. The law does not cover cases of enforced disappearances committed by agents of the state of Ukraine, both in the context of the armed conflict (for example, against persons suspected of collaboration or treason) and beyond. National legislation does not offer a universal approach and general standards to all facts that may occur within the jurisdiction of Ukraine. Instead, the focus of legal regulation shifts to victims affected by the Russian side. This approach will eventually require bringing these norms into line with international human rights and humanitarian law.

Despite the fact that the requirements of the Convention as an international treaty have the highest legal force in the system of sources of Ukrainian law, they need to be implemented in national legal acts for their proper implementation. Problems related to enforced disappearances are gaining publicity due to the ongoing armed conflict in Ukraine. This requires the creation of an appropriate framework for the protection of victims of these acts on an equal basis with victims of other crimes. The scale of the violations committed in Ukraine since 2014 has led to a situation where the investigation of certain crimes is prioritised over others. However, this cannot result in the limitation of the rights of certain categories of victims.

The status of victims of enforced disappearances should not be based solely on the responsibility of the RF and its agents for their actions on the territory of Ukraine. The task of national legislation is to ensure universal and equal guarantees for all victims of such acts, regardless of the perpetrator, as well as for their family members.

The amount of opportunities provided by the state at the level of social and legal guarantees may be limited due to the general condition of the state system and state budget limitations. This, in turn, can affect legislative initiatives and the formation of political will to further implement international human rights and humanitarian law standards into national legislation, and thus limit the possibilities of protection for victims, despite high expectations from the state.

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36 Law of Ukraine “On the Legal Status of Missing Persons // Verkhovna Rada of Ukraine, No. 2505-VIII, 12.07.2018: <https://zakon.rada.gov.ua/laws/show/2505-19#Text>.

## 2

# Qualification of enforced disappearances

## 2.1. International standards

Enforced disappearances in the context of human rights combine a set of guarantees that are violated by this action, including:

- The right to life (a person may be killed or their fate may be unknown);
- The right to security and dignity of the person;
- The right to freedom from arbitrary detention;
- The right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment;
- The right to humane conditions of detention; the right to legal personality;
- The right to a fair trial; the right to family life<sup>37</sup>.

The Convention defines enforced disappearances as a criminal offence that must be prosecuted by states in accordance with international law<sup>38</sup>. In addition, the Convention guarantees victims of enforced disappearances the right to access justice and full and effective reparation<sup>39</sup>. Its provisions emphasise that no one should be subjected to such acts, even in exceptional circumstances, such as a state of war or a threat of war, internal political instability or any other public emergency. In the context of armed conflict, enforced disappearances, in addition to the legal framework of human rights standards, are viewed through the prism of international humanitarian law and international criminal law.

International law standards allow enforced disappearances to be assessed as a crime with the following possible qualifications:

37 Case of Osorio Rivera and Family v. Peru // IACtHR, Judgment of 26 November 2013., Series C No. 274, para. 169: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_274\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_274_ing.pdf). Case of Narciso González Medina and Family v. Dominican Republic // IACtHR, Judgment of 27 February 2012, Series C No. 240, para. 185: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_240\\_ing1.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_240_ing1.pdf). Case of Gómez Palomino v. Peru // IACtHR, Judgment of 22 November 2005, Series C No. 136, Para. 92: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_136\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_136_ing.pdf). Case of Velásquez Rodríguez v. Honduras // IACtHR, Judgment of 29 July 1988, Doc. Cit., para. 155: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_04\\_esp.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_04_esp.pdf).

38 Article 4 / International Convention for the Protection of All Persons from Enforced Disappearance // Verkhovna Rada of Ukraine, Convention, International Document of 20.12.2006: [https://zakon.rada.gov.ua/laws/show/995\\_154#Text](https://zakon.rada.gov.ua/laws/show/995_154#Text).

39 Articles 3 and 24 / International Convention for the Protection of All Persons from Enforced Disappearance // Verkhovna Rada of Ukraine, Convention, International Document of 20.12.2006: [https://zakon.rada.gov.ua/laws/show/995\\_154#Text](https://zakon.rada.gov.ua/laws/show/995_154#Text).



## 1. Gross violation of human rights:

This approach to qualification is based on the nature of the violation itself and the guarantees they encroach upon. This qualification can be given to single acts committed against individuals that do not require the application of the systematic criterion. The characteristic features of such an act are as follows:

- Arrest, detention, abduction or any other form of deprivation of liberty;
- Such acts are committed by representatives of the state or a person or group of persons with the permission, support or consent of the state;
- The acts are accompanied by either a refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person;
- As a result of the act, the disappeared person is not protected by law;
- It is not required to prove that the perpetrator had a specific intention to deprive the disappeared person of legal protection<sup>40</sup>.

## 2. Violations of the laws or customs of war:

International humanitarian law treaties do not use the term “enforced disappearance”. However, such acts are viewed through the prism of norms and guarantees<sup>41</sup>, in particular, the prohibition of arbitrary deprivation of liberty<sup>42</sup>, prohibition of torture and other cruel or inhuman treatment<sup>43</sup>, prohibition of arbitrary deprivation of life<sup>44</sup>. In addition, in the context of international armed conflicts, broad requirements are imposed on the registration, visits and transfer of information regarding persons deprived of their liberty, which are aimed at preventing enforced disappearances. In non-international armed conflicts, parties must also take measures to prevent disappearances, among other things by registering persons deprived of their liberty<sup>45</sup>. At the same time, parties to an armed conflict should take all possible measures to identify persons reported missing as a result of the armed conflict and provide information to family members about their fate<sup>46</sup>.

And all persons who are affected by the armed conflict and are under the control of its party must be guaranteed respect for their family life, including the maintenance and preservation of ties between family members<sup>47</sup>. The characteristic features of such legal qualification are:

40 ENFORCED DISAPPEARANCES: Q & A // Amnesty International: <http://sur.li/rtoog>.

41 Rule 98 of the ICRC Rules of Customary International Humanitarian Law (Enforced disappearances are prohibited) / International Humanitarian Law Databases // ICRC: <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule98>.

42 Rule 99 of the ICRC Rules of Customary International Humanitarian Law (Arbitrary deprivation of liberty is prohibited) / International Humanitarian Law Databases // ICRC: <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule99>.

43 Rule 90 of the ICRC Rules of Customary International Humanitarian Law (Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited) / International Humanitarian Law Databases // ICRC: <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule90>.

44 Rule 89 of the ICRC Rules of Customary International Humanitarian Law (Murder is prohibited) / International Humanitarian Law Databases // ICRC: <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule89>.

45 Rule 123 of the ICRC Rules of Customary International Humanitarian Law (The personal details of persons deprived of their liberty must be recorded) / International Humanitarian Law Databases // ICRC: <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule123>.

46 Rule 117 of the ICRC Rules of Customary International Humanitarian Law (Each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate) // International Humanitarian Law Databases // ICRC: <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule117>.

47 Rule 105 of the ICRC Rules of Customary International Humanitarian Law (Family life must be respected as far as possible) / International Humanitarian Law Databases // ICRC: <http://sur.li/rtoop>.

- The content of the violation is enshrined in IHL (e.g., unlawful detention of a civilian and holding them hostage);
- The acts took place in the context of and were connected with an armed conflict (international or non-international);
- The victims have a protected status under IHL.

The content of these rules allows us to say that enforced disappearances are prohibited in armed conflict. Along with the norms of international humanitarian law, human rights guarantees continue to operate in time of war, which reinforce and supplement these rules and are interpreted in accordance with them<sup>48</sup>. Nevertheless, the Geneva Conventions relative to the Protection of War Victims of August 12, 1949, and their additional protocols do not define enforced disappearances as a separate war crime, nor do the provisions of the Rome Statute of the International Criminal Court. At the same time, a number of serious violations of international humanitarian law, such as violence against life and personality, hostage-taking, illegal deportation/forced displacement of civilians, etc.<sup>49</sup> fall under the concept of war crimes.

### **3. Crimes against humanity:**

In assessing the widespread or systematic practice of enforced disappearances, the Convention states that such acts should be qualified as crimes against humanity<sup>50</sup>. The Rome Statute of the ICC defines enforced disappearances as a form of such a crime among the list of acts<sup>51</sup>. The characteristic features of this legal qualification are:

- The acts are part of a widespread or systematic attack;
- The victims are civilians;
- The perpetrator must have been aware that they were committing the act as part of a widespread or systematic attack or intended to make such conduct as a part of the attack;
- The act is the arrest, detention or abduction of one or more persons, or the perpetrator refuses to acknowledge such fact or provide information about the fate or whereabouts of such person or persons;
- The perpetrator is a representative of the state or a political organisation, or acts with their permission, support or acquiescence.

48 Case of Hassan v. the United Kingdom // ECHR, appl. No. 29750/09, Judgement of 16 September 2014, Series C, para. 36: <https://hudoc.echr.coe.int/?i=001-146501>. Case of Georgia v. Russia // ECHR, Judgment of 28 April 2023, appl. No. 38263/08, Series C: <https://hudoc.echr.coe.int/?i=001-224629>.

49 Articles 32, 34, 49, 147 / Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12.08.1949 // Verkhovna Rada of Ukraine, Convention, International Document of 12.08.1949: [https://zakon.rada.gov.ua/laws/show/995\\_154#Text](https://zakon.rada.gov.ua/laws/show/995_154#Text). Articles 75, 85 / Additional Protocol I to the Geneva Conventions of 12.08.1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 08.06.1977 // Verkhovna Rada of Ukraine, Convention, International Document of 08.06.1977: [https://zakon.rada.gov.ua/laws/show/995\\_199#top](https://zakon.rada.gov.ua/laws/show/995_199#top).

50 Article 5 / International Convention for the Protection of All Persons from Enforced Disappearance // Verkhovna Rada of Ukraine, Convention, International Document of 20.12.2006: [https://zakon.rada.gov.ua/laws/show/995\\_154#Text](https://zakon.rada.gov.ua/laws/show/995_154#Text).

51 Article 7(1)(i) / Rome Statute of the International Criminal Court, 17.07.1998 // International Criminal Court: <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

## 2.2. Qualifications under the laws of Ukraine

### Article 146-1 of the CC of Ukraine

After the ratification of the Convention, Article 146-1 “Enforced Disappearance” was introduced into the Criminal Code of Ukraine:

#### Article 146-1

1. Arrest, detention, abduction or deprivation of liberty in any other form committed by a representative of a state, including a foreign state, followed by a refusal to acknowledge the fact of such arrest, detention, abduction or deprivation of liberty in any other form or concealment of information about the fate of such person or their whereabouts shall be punishable by imprisonment for a term of three to five years.
2. Issuance of an order or instruction to commit the acts referred to in part one of this article, or failure of a superior who has become aware of the commission of the acts referred to in part one of this article by his subordinates to take measures to stop them and failure to report the offence to the competent authorities shall be punishable by imprisonment for a term of five to seven years.<sup>52</sup>

In general, after the inclusion of Article 146-1 in the CC of Ukraine, its application in practice did not become widespread. Only after the full-scale invasion of Ukraine by the Russian Federation did the number of recorded offences with this qualification increase. The statistics of registered criminal proceedings and their outcomes published by the Prosecutor General’s Office contains the following data<sup>53</sup>:

Year	Registered proceedings	Notice of suspicion	Indictments	Proceedings closed
2018	-		-	-
2019	-	-	-	-
2020	69	3	3	4
2021	56	2	2	5
2022	1120	3	1	26
2023	72	2	2	5
2024 <sup>54</sup>	14	0	0	2

52 Article 146-1 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

53 On registered criminal offences and the results of their pre-trial investigation // Prosecutor General's Office: <https://gp.gov.ua/ua/posts/pro-zareyestrovani-kriminalni-pravoporushennya-ta-rezultati-yih-dosudovogo-rozsliduvannya-2>.

54 The data is for January and February 2024.

Compared to the approach enshrined in the Convention, the elements<sup>55</sup> of the crime of enforced disappearance under international law and national law have significant differences:

- 1. Object of the crime** - The CC of Ukraine defines the object of such a crime as the will of a person (personal freedom)<sup>56</sup>. At the same time, international law refers to “leaving a person without the protection of the law”<sup>57</sup>, as unlawful actions deprive a person of access to legal remedies and procedural guarantees that should be applied, which makes the person defenceless and outside the protection of the legal field;
- 2. Objective side** - When determining the objective side in both parts of Article 146-1 of the CC of Ukraine, the legislator proceeded from the provisions of Articles 2 and 6 of the Convention. However, in comparison with the standards, Article 146-1 of the CC of Ukraine does not provide for an indication of the construction of «leaving a person without the protection of the law» as a consequence of committing unlawful acts<sup>58</sup>; circumstances that may mitigate (assistance in returning the missing person alive, clarifying the circumstances of the enforced disappearance or identifying the perpetrators of the act of enforced disappearance) or aggravate (death of the missing person, commission of an act of enforced disappearance against pregnant women, minors, disabled persons or other particularly vulnerable persons) criminal liability;
- 3. Subjective side** - The legislator has determined the presence of the subjective side (mental element) - direct intent - as a mandatory component of the crime under Article 146-1 of the CC of Ukraine. That is, the perpetrators must be aware of the unlawful nature of their actions or omissions. However, international law does not require the mental element of an act. That is, it is not required that the perpetrator specifically intends to deprive the victim of the protection of the law;
- 4. Subject of the crime** - The CC of Ukraine provides for requirements for a special subject of this crime - a representative of the state, including a foreign one. The first version of the article contained a note that specified the possibility of prosecuting representatives of the RF and its controlled formations under this

55 The criminal law of Ukraine uses the terms element of a crime (or element of an offence)

56 The crime of “enforced disappearance” is included in Section III “Criminal offences against freedom, honour and dignity of a person” of the Special Part of the Criminal Code of Ukraine / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

57 Paragraph 3 of the Preamble / UN General Assembly Resolution 47/133 of December 18 1992 “Declaration on the Protection of All Persons from Enforced Disappearance” // Verkhovna Rada of Ukraine, International Document: [https://zakon.rada.gov.ua/laws/show/995\\_225#top](https://zakon.rada.gov.ua/laws/show/995_225#top); (UN website: <https://undocs.org/Home/Mobile?FinalSymbol=A%2F47%2F133&Language=E&DeviceType=Desktop&LangRequested=False>);

Article II / Inter-American Convention on Forced Disappearance of Persons of 09.06.1994 // International Criminal Court: <https://www.legal-tools.org/doc/7c67e0/pdf>;

Article 2 / International Convention on the Protection of All Persons from Enforced Disappearance // Verkhovna Rada of Ukraine, Convention, International Document of 20.12.2006: [https://zakon.rada.gov.ua/laws/show/995\\_154#Text](https://zakon.rada.gov.ua/laws/show/995_154#Text);

(UN website: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-all-persons-enforced>).

58 Article 6(1)(a) of the Convention requires States Parties, as a minimum, to take the necessary measures to bring to justice those involved in enforced disappearances in accordance with the five principles of criminal responsibility: “Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance”. This should include attempting, helping, assisting, facilitating, aiding or abetting the commission of the crime of enforced disappearance, as well as planning or conspiracy and inciting or inducing (encouraging). In addition, other principles of criminal responsibility applicable to the crime against humanity of enforced disappearance are recognised in Article 25 of the Rome Statute.



article<sup>59</sup>. However, in response to the full-scale invasion of Ukraine by the Russian Federation, this note was removed and combined with amendments to Article 127 of the CC of Ukraine, which criminalises torture<sup>60</sup>. At the same time, the focus on possible subjects remained the same. The provisions of the article do not provide for qualifying features for bringing to justice accomplices to the crime, as well as persons who incite to its commission. Therefore, for the relevant legal qualification, it is necessary to add references to the provisions of the general part of the CC of Ukraine.

In addition, Article 146-1 of the CC of Ukraine does not include in its parts liability for possible consequences of such an act. This means that causing harm or other violations (such as death) is not covered by Part 1 of this article and requires additional qualification as other crimes. For example, if the victim was inflicted with bodily harm, tortured, not provided with medical care, etc. The court must also take into account the consequences for the victim when imposing a sentence.

At the level of law enforcement practice, the judiciary has not yet been able to distinguish the offence of enforced disappearance from other related acts. The CC of Ukraine, before the inclusion of Article 146-1, already contained such acts as: Illegal imprisonment or abduction of a person (Article 146)<sup>61</sup>, hostage-taking (Article 147)<sup>62</sup>, taking a representative of the authorities or a law enforcement officer as a hostage (Article 349)<sup>63</sup>, taking a journalist as a hostage (Article 349-1)<sup>64</sup>, abuse of power or official

59 Note to Article 146-1 of the CC of Ukraine, introduced to the CC of Ukraine by the Law of Ukraine "On the Legal Status of Missing Persons" of 12.07.2018 No. 2505-VIII (<https://zakon.rada.gov.ua/laws/show/2505-19#n239>) and excluded from the said article by the Law of Ukraine "On Amendments to the Criminal Code of Ukraine on Improving Liability for Torture" of 01.12.2022 No. 2812-IX, (<https://zakon.rada.gov.ua/laws/show/2812-20#Text>):

**Note**

1. In this article, a representative of the state shall be understood as an official, as well as a person or group of persons acting with the permission, support or consent of the state.
2. Representatives of a foreign state in this article shall be understood as persons acting as civil servants of a foreign state or performing military service in the armed forces, police, state security, intelligence agencies, or persons holding positions in the said or any other state or local government bodies of a foreign state established in accordance with its legislation, or acting on the orders of such persons, as well as representatives of irregular illegal armed formations, armed gangs and mercenary groups, as defined in Article 3 of the Criminal Code of Ukraine.

60 Note to Article 127 of the CC of Ukraine (introduced to the said article of the CC of Ukraine on the basis of the Law of Ukraine "On Amendments to the Criminal Code of Ukraine on Improving Liability for Torture" of 01.12.2022 No. 2812-IX, <https://zakon.rada.gov.ua/laws/show/2812-20#Text>):

**Note**

1. Representatives of the state in this Article and Article 146-1 of this Code shall be understood as officials, as well as persons acting as officials, or acting at their instigation, or with their knowledge or tacit consent.
2. Representatives of a foreign state in this Article and Article 146-1 of this Code shall be understood as persons acting as civil servants of a foreign state or performing military service in the armed forces, police, state security, intelligence agencies, or persons holding positions in the said or any other state or local self-government bodies of a foreign state established in accordance with its legislation, or acting on the orders of such persons, as well as representatives of irregular illegal armed formations, armed gangs and mercenary groups formed, subordinated, controlled and financed by the Russian Federation, as well as representatives of the occupation administration of the Russian Federation, which includes its state bodies and structures functionally responsible for the management of the temporarily occupied territories of Ukraine, and representatives of self-proclaimed bodies controlled by the Russian Federation that have usurped the exercise of power in the temporarily occupied territories of Ukraine.

61 Article 146 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>

62 Article 147 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>

63 Article 349 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>

64 Article 349-1 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

position (Article 364)<sup>65</sup>, abuse of power or official authority by a law enforcement officer (Article 365)<sup>66</sup>, official negligence (Article 367)<sup>67</sup>, knowingly unlawful detention, bringing, house arrest or custody (Article 371)<sup>68</sup>, violation of the right to defence (Article 374)<sup>69</sup>, concealment of a crime (Article 396)<sup>70</sup>. Despite the fact that the provisions of these articles do not fully reflect the content of enforced disappearances under international standards, they can be used in legal qualification due to the competition of the provisions of the CC of Ukraine.

In order to distinguish Article 146-1 of the CC of Ukraine from related criminal offences, it is important to take into account that this article applies to both illegal deprivation of liberty and lawful detention, which, in case of further failure to disclose the fact of detention and failure to provide such information, will be considered illegal. In addition, Article 146-1 of the CC of Ukraine has a special subject: only representatives of the state are held liable for committing the crime.

The inclusion of Article 146-1 in the CC of Ukraine in the context of the ongoing armed conflict has determined further approaches to its application<sup>71</sup>. The wording of the article shifts the focus to the actions of representatives of a foreign state, namely the RF and its agents, on the territory of Ukraine. Instead of being universal and a tool for protecting persons from violent acts, the article is associated with crimes committed by the RF on the territory of Ukraine against the civilian population during the armed conflict. However, after 2014, Ukraine's actions also raised questions about the legality of the detention of individuals and the alleged commission of enforced disappearances.

This is evidenced by cases of enforced disappearances documented in OHCHR reports. Over the reporting period of February 1 - July 31, 2022, 31 cases of enforced disappearances committed by the Armed Forces of Ukraine in the territory controlled by the Government of Ukraine were reported. The SSU documented one such case: the victim was detained and tortured by the Russian Federation Armed Forces in the temporarily occupied territory of Zaporizhzhia region. After his release, he travelled to Zaporizhzhia to file a complaint, but was detained by unidentified persons near the SSU building, accused of collaborating with the Russian Federation Armed Forces, held in an apartment for a day and beaten. When the victim managed to escape, he was detained again by police and SSU officers. The victim was again held in an unknown room without any contact with the outside world, and later transferred to the SSU building and notified of suspicion of collaboration under Article 111-1 of the CC of Ukraine. The judge imposed a pre-trial restraint in the form of detention<sup>72</sup>.

65 Article 364 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

66 Article 365 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

67 Article 367 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

68 Article 371 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

69 Article 374 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

70 Article 396 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

71 Article 146-1 // Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

72 OHCHR report on the human rights situation in Ukraine February 1 - July 31, 2022, para. 46: <https://www.ohchr.org/sites/default/files/documents/countries/ua/2022-09-23/ReportUkraine-1Feb-31Jul2022-ua.pdf>

OHCHR also documented a number of cases of enforced disappearances committed by law enforcement agencies against civilians prosecuted for conflict-related crimes in Government-controlled territory<sup>73</sup>.

In another case, police detained a woman in the Donetsk region and handed her over to the SSU, who was accused of passing information to the Russian Armed Forces. In order to obtain a written confession, she was held at the police station for two days, tortured and deprived of access to the outside world<sup>74</sup>.

There was a case of enforced disappearance of a journalist who had been accused in a conflict-related criminal case since 2017. On March 27, 2022, he was detained on the street by several men in uniform. So far, his family's requests have not been answered about the fact of his detention or imprisonment. The NPU is investigating the case as an abduction<sup>75</sup>.

On April 10, 2022, the former head of Novoluhanske village, who had been accused in a conflict-related case since 2019, was detained. Unidentified persons pushed him into a car and took him away. The family still does not know the fate of the victim. The NPU is investigating the case as an abduction and does not consider the possibility of enforced disappearance by state agents<sup>76</sup>.

### ***Other articles of the CC of Ukraine***

In addition to Article 146-1 of the CC of Ukraine, in the context of the armed conflict on the territory of Ukraine, other legal qualifications are applied to the facts of enforced disappearances. In particular:

- Article 115 of the CC of Ukraine “Premeditated murder”<sup>77</sup> with a note in the URPTI that the act was committed during an armed conflict and the person’s whereabouts were not identified. This qualification can be applied to civilians in the occupied territories whose fate is unknown. In addition, since 2014, criminal proceedings have been registered with this qualification in cases of missing military personnel in the hostilities zone;
- Article 146 of the CC of Ukraine “Illegal deprivation of liberty or abduction of a person”<sup>78</sup> with a note in the URPTI that the act was committed during the armed conflict and the person’s whereabouts were not identified. This qualification has been applied since 2014 to detained civilians in the occupied territories, as well as to military personnel taken captive;

73 OHCHR report on the human rights situation in Ukraine February 1 - July 31, 2022, para. 105: <https://www.ohchr.org/sites/default/files/documents/countries/ua/2022-09-23/ReportUkraine-1Feb-31Jul2022-ua.pdf>.

74 OHCHR report on the human rights situation in Ukraine August 1, 2022 - January 31, 2023, para. 90: <http://surl.li/rtrfi>.

75 OHCHR Report on the detention of civilians in the context of the armed attack by the Russian Federation on Ukraine, February 24, 2022 - May 23, 2023, para. 132: <http://surl.li/rtrfrm>.

76 OHCHR Report on the detention of civilians in the context of the armed attack by the Russian Federation on Ukraine, February 24, 2022 - May 23, 2023, para. 133: <http://surl.li/rtrfrm>.

77 Article 115 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

78 Article 146 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

- Article 147 of the CC of Ukraine “Hostage-taking”<sup>79</sup>. In most cases, the relevant legal qualification was applied to detained civilians in the occupied territories;
- Article 438 of the CC of Ukraine “Violation of the laws and customs of war”<sup>80</sup>. It was most actively applied after February 24, 2022 in the regions affected by the armed conflict. Civilians in the non-government controlled areas are recognised as victims of unlawful detention. Furthermore, additional violations committed against the victim and falling within the meaning of violations of international humanitarian law are qualified under this article<sup>81</sup>.

Since the beginning of the armed conflict on the territory of Ukraine in 2014, the facts of enforced disappearances have been registered under Articles 115, 146, 147 of the CC of Ukraine. It was also common to come across a combination of Articles 115 and 146 of the CC of Ukraine in proceedings. In the future, for example, upon receipt of evidence of the victims’ stay in places of detention, evidence of physical and psychological violence against an illegally detained civilian in the occupied territories or the release of such a person, the proceedings could be re-qualified under Article 438 of the CC of Ukraine.

After the full-scale invasion of Ukraine by the RF, Article 438 of the CC of Ukraine became a tool for law enforcement agencies of Ukraine to document the consequences of the armed conflict<sup>82</sup>:

Year	Registered proceedings	Notice of suspicion	Indictments	Proceedings closed
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	60387	135	47	33
2023	60944	88	37	5
2024 <sup>83</sup>	4245	21	0	0

79 Article 147 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

80 Article 438 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

81 The conclusions are based on the results of representing the interests of victims of the armed conflict in Ukraine since 2014 in criminal proceedings at the national level.

82 On registered criminal offences and the results of their pre-trial investigation // Prosecutor General's Office: <https://gp.gov.ua/ua/posts/pro-zareyestrovani-kriminalni-pravoporushennya-ta-rezultati-yih-dosudovogo-rozsliduvannya-2>.

83 The data is for January and February 2024.

This approach to the application of Article 438 of the CC of Ukraine is based on the following reasons:

- the blanket structure of the article allows it to cover all “violations of the laws and customs of war provided for by international treaties ratified by the Verkhovna Rada of Ukraine”. Therefore, by referring to IHL treaties, criminal law allows for the registration of any violations, including those not explicitly defined as war crimes;
- currently, this article is the only one that takes into account the context of such crimes on the territory of Ukraine, namely the conditions of the armed conflict that facilitate the commission of crimes;
- it allows to analyse both individual facts of crimes and to qualify other acts committed against a person, such as hostage-taking, enforced disappearances, deportation/forced displacement of civilians;
- it is not subject to the requirements of the statute of limitations for investigations.

Through the prism of violations of international humanitarian law, the facts of enforced disappearances are perceived as illegal detention under Article 438 of the CC of Ukraine<sup>84</sup>. Relevant approaches are being formed at the level of law enforcement practice, which has been actively developing since February 24, 2022. For example, in the decision of the Grand Chamber of the Supreme Court of February 28, 2024, regarding the cassation review of a case containing a purely legal issue, the court provides the following arguments that there was an error in the qualification of the crime under Part 3 of General Criminal Article 146 of the CC of Ukraine (illegal deprivation of liberty or abduction of a person) instead of qualification under Article 438 of the CC of Ukraine: “Acts committed in the context of an armed conflict, which are covered by prohibitions established by international humanitarian law and constitute a serious violation of them, are qualified only under Article 438 of the CC of Ukraine and do not require additional legal assessment under other articles of this Code”. The Court also stated that in order to overcome the competition between the application of Article 438 of the CC of Ukraine and other criminal law provisions of this Code, it is necessary to take into account the content of the acts committed and identify whether they violate the customs and laws of war. Acts that, although committed within the framework of an armed conflict, are not covered by the prohibitions of IHL, should be qualified under other articles of the Special Part of the CC of Ukraine. In this case, the court found that the fact and manner of committing the crime were due to the situation of armed conflict, the conditions of occupation, the participation of the convicts in hostilities, the presence of weapons and the associated de facto power over the civilian population<sup>85</sup>.

In the verdict of the Zavodskiy District Court of Zaporizhzhia of January 2, 2024, the crimes committed by the accused against civilians, in particular their systematic abduction, are qualified under Article 438 of the CC of Ukraine, as they violate the laws and customs of war provided for in international treaties ratified by the Verkhovna Rada of Ukraine. The court also argues that all the contextual elements of a war crime are present, which are:

84 Supervised a filtration camp in Zaporizhzhia: a Russian FSB officer was served with a notice of suspicion // Portal of the Ministry of Internal Affairs, 24.01.2024: <https://mvs.gov.ua/news/kuruvav-filtraciinii-tabir-na-zaporiz-zhi-ogoloseno-pro-pidozru-pracivniku-rosiiskogo-fsb>. The occupying head of Nova Kakhovka will be tried for the abduction of another mayor from Kherson region // Kherson Regional Prosecutor's Office, 08.08.2023: <http://surl.li/rtrgr>.

85 Resolution of the Grand Chamber of the Supreme Court of 28.02.2024: <https://revestr.court.gov.ua/Review/117555176>.



- existence of an international armed conflict;
- the fact that the unlawful acts were committed in the context of the international armed conflict and are clearly linked to it;
- awareness by the accused of the actual circumstances of the existence of an international armed conflict, as evidenced by their service in the Russian Armed Forces and direct participation in the conflict<sup>86</sup>.

Contrary to other articles, the Prosecutor General's Office recommends applying Article 438 of the CC of Ukraine when qualifying the facts of enforced disappearances and illegal detentions, explaining that such an approach is justified by the fact that the crimes were committed in the context of armed conflict and are related to it<sup>87</sup>.

After 10 years of ongoing armed conflict on the territory of Ukraine, the issue of harmonisation of Ukrainian criminal legislation with international law is still relevant. Despite the fact that on March 2, 2022, the International Criminal Court opened an investigation into the situation in Ukraine<sup>88</sup>, the Rome Statute has not yet been ratified. This issue has not yet been prioritised in public policy making. Due to the lack of political will to make a decision, the process has been postponed until the end of the armed conflict<sup>89</sup>. The ratification process could become an incentive to make the necessary changes to the national legislation of Ukraine. In particular, to bring the norms of the CC of Ukraine in line with the understanding of the most serious international crimes.

Currently, crimes against humanity are not criminalised in Ukraine, and the understanding of such crimes does not meet international standards. Despite the adoption in 2021 of the draft law "On Amendments to Certain Legislative Acts of Ukraine on the Implementation of International Criminal and Humanitarian Law" (Reg. No. 2689), which provides for relevant changes, it was never signed by the President<sup>90</sup>. In 2022, the draft law "On Amendments to the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine" (Reg. No. 7290), which also concerns the implementation of the most serious international crimes, was registered, but has not yet been considered<sup>91</sup>.

86 The verdict of the Zavodskiy District Court of Zaporizhzhia of 02.01.2024: <https://reyestr.court.gov.ua/Review/116072492>.

87 Standards for the investigation of war crimes. General part / approved by the Protocol of the meeting of the Methodological Council of 16.03.2023 No. 3 and approved by the Prosecutor General on 28.04.2023 // JustGroup, 2023: [https://justgroup.com.ua/wp-content/uploads/2023/05/standart-rozsliduvannya\\_zagalna-chastyna.pdf](https://justgroup.com.ua/wp-content/uploads/2023/05/standart-rozsliduvannya_zagalna-chastyna.pdf). Standards for the Investigation of War Crimes. Unlawful deprivation of liberty and torture / approved by the Protocol of the meeting of the Methodological Council of 16.03.2023 No. 3 and approved by the Prosecutor General on 28.04.2023 // JustGroup, 2023: [https://justgroup.com.ua/wp-content/uploads/2023/05/standart-rozsliduvannya\\_katuvannya.pdf](https://justgroup.com.ua/wp-content/uploads/2023/05/standart-rozsliduvannya_katuvannya.pdf).

88 Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine // International Criminal Court, 02.03.2022: <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referals-39-states>.

89 On Approval of the Action Plan for the Implementation of the Recommendations of the European Commission Presented in the Report on Ukraine's Progress under the 2023 EU Enlargement Package / Resolution // Cabinet of Ministers of Ukraine, No. 133-p, 09.02.2024: <https://www.kmu.gov.ua/npas/pro-zatverdzhennia-planu-zakhodiv-z-vykonannia-rekomendatsii-ievropeiskoi-komisii-predstavlenykh-u-t90224>.

90 Draft Law on Amendments to Certain Legislative Acts of Ukraine on the Implementation of International Criminal and Humanitarian Law // Verkhovna Rada of Ukraine, No. 2689, 27.12.2019: [https://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=67804](https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67804).

91 Draft Law on Amendments to the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine // Verkhovna Rada of Ukraine, No. 7290, 15.04.2022: <https://itd.rada.gov.ua/billInfo/Bills/Card/39449>.

# 3

## Conditions for bringing to criminal liability

### 3.1. Role and tasks of investigative authorities

Pre-trial investigation bodies remain the main entity responsible for recording and investigating criminal offences committed on the territory of Ukraine. After the start of the armed conflict in 2014, and especially after the full-scale invasion of Russia on February 24, 2022, they are the main actors in the justice system responsible for timely documentation of these violations.

Article 214 of the Criminal Procedure Code of Ukraine establishes the obligation of the investigator/prosecutor to register reports of criminal offences or in case of their detection from any source in the URPTI<sup>92</sup>. Thus, on the one hand, the URPTI and data on registered criminal proceedings become a kind of summary of the scale of various violations committed in the context of the armed conflict, and on the other hand, an obligation to investigate these proceedings from the moment when information about them is recorded in accordance with the requirements of criminal procedure legislation.

The responsible body for conducting investigations into enforced disappearances is determined depending on the legal qualification under which such proceedings are conducted:

- If the act is classified under Article 146-1 of the CC of Ukraine or another general criminal article (for example, Articles 115, 146, 147 of the CC of Ukraine), the pre-trial investigation body is the National Police of Ukraine<sup>93</sup> by territorial distribution depending on the place of the crime<sup>94</sup>;
- At the same time, if the question of the responsibility of a representative of the state arises, and in the case of enforced disappearances, Article 146-1 of the CC of Ukraine provides for a special subject of the crime, then investigators of the State Bureau of Investigation are responsible for such an investigation. The CPC of Ukraine includes representatives of law enforcement agencies among the special subjects under their jurisdiction<sup>95</sup>. However, in practice, the investigation of enforced disappearances committed in the context of the armed conflict is dominated by the involvement of the NPU in investigative actions;

92 Article 214 / Criminal Procedure Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17#n801>

93 Part 1 of Article 216 / Criminal Procedure Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17#n801>.

94 Article 218 / Criminal Procedure Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17#n801>.

95 Part 4 of Article 216 / Criminal Procedure Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17#n801>.

- If the legal qualification under Article 438 of the Criminal Code of Ukraine is applied, the investigators of the Security Service of Ukraine are responsible for conducting the investigation<sup>96</sup>.

Challenges for investigative bodies as a result of the armed conflict have brought to the fore the issue of sufficient human resources among investigative bodies. The SSU, as the responsible entity for investigating violations of the laws and customs of war, does not have adequate resources to ensure that crimes are recorded and investigated on the ground. To solve this issue, amendments to the CPC of Ukraine introduced the possibility of creating interagency investigative teams, which allow investigators from different pre-trial investigation bodies to be involved in the same proceedings<sup>97</sup>. In practice, this tool has been actively used since mid-2022. However, this is a temporary solution, as such groups can be created only during martial law<sup>98</sup>. At the same time, investigations by different investigative bodies into similar facts lead to different practices based on the experience and priorities of each body.

If we consider the facts of enforced disappearances as a crime related to the life, health and personal integrity of a person, it should be noted that its investigation requires special skills of investigators. Investigating and recording circumstances, collecting evidence, and proving the damage caused requires specific experience and understanding of relevant national and international standards and human rights guarantees. Compared to other law enforcement agencies, only the investigators of the National Police of Ukraine can be distinguished by such specialisation, based on their jurisdiction. However, the SSU does not have the mandate to investigate violent crimes, and thus its investigators lack the necessary skills. Therefore, in practice, there is a risk that without the necessary training and study of relevant practice by SSU investigators, the investigation of enforced disappearances as violations of the laws and customs of war under Article 438 of the CC of Ukraine may differ from the required approaches.

### 3.2. Recording violations

International law enshrines three requirements for states when they receive reports of enforced disappearances:

- Accept statements on such facts from both individuals and legal entities (non-governmental organisations);
- Promptly and impartially examine reports and, if necessary, promptly conduct thorough and impartial investigations, as well as bring to justice those responsible for such enforced disappearances. Particular attention shall be paid to enforced disappearances of persons belonging to vulnerable groups, especially children, and enforced disappearances of women, as they may be particularly vulnerable to sexual violence and other forms of abuse;
- Take effective measures to protect complainants, witnesses, relatives of disappeared persons and their lawyers, as well as persons involved in the investigation, from any ill-treatment or intimidation as a result of reporting a crime or giving any

96 Part 2 of Article 216 / Criminal Procedure Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17#n801>

97 Part 4 of Article 39 / Criminal Procedure Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17#n801>.

98 Part 4 of Article 39 / Criminal Procedure Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17#n801>.

evidence. One measure of protection is the requirement that persons who may be involved in the offence of enforced disappearance be removed from any position of authority or power, direct or indirect, over complainants, witnesses and their families, as well as over those conducting the investigation.

Within the framework of pre-trial investigations, law enforcement agencies are able to take measures to identify the fate and whereabouts of missing persons. The activities of other bodies in this area are also tied to the investigation process. The criminal procedural legislation of Ukraine establishes general approaches to recording all violations of law.

Firstly, there is a 24 hour time limit within which the victim's/complainant's statement or report discovered by the investigator or prosecutor must be entered into the URPTI. From this point on, criminal proceedings are opened and pre-trial investigation is to be conducted<sup>99</sup>. Secondly, the legislation does not allow for refusal to register such a report<sup>100</sup>. If, however, the proceedings were not registered, the CPC of Ukraine provides for the possibility to appeal to the investigating judge, whose decision may provide for an obligation to initiate an investigation. Thirdly, an extract from the Unified Register of Pre-trial Investigations, which is provided to the applicant, is a confirmation of the registration of the proceedings<sup>101</sup>.

At the same time, the practice of recording criminal violations shows that pre-trial investigation bodies may violate the requirements of the CPC of Ukraine. For example, they unreasonably refuse to register applications and reports or consider applications within the timeframe and in the manner prescribed by the Law of Ukraine "On Citizens' Appeals"<sup>102</sup>. Investigative bodies, being unwilling to reload the URPTI and increase the number of proceedings, decided within 30 days (in violation of the deadlines) whether the application contained information about a crime or whether the appeal was related to another area of law or was insignificant. Such cases violate procedural guarantees for victims and negatively impact the effectiveness of the remedy. Appealing against such a decision in court and subsequent opening of proceedings does not guarantee that the investigation will be timely, impartial and of high quality.

The Ukrainian authorities still duplicate registration of criminal proceedings based on the same facts. This is due to the fact that the investigating authorities receive information from different sources, such as statements of the victim and information from open sources. In addition, information is entered into the URPTI by local authorities, and reports may be received by investigators in different regions, including at the place of the crime and at the place of residence of close relatives. And each of these bodies will be obliged to register such reports in the URPTI. The peculiarities of the register's functioning do not allow access to all the facts entered, only within a certain region or investigative body. In addition, investigations into the same facts may be initiated with preliminary

99 Article 214 / Criminal Procedure Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17#n801>.

100 Article 214 / Criminal Procedure Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17#n801>.

101 Article 214 / Criminal Procedure Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17#n801>.

102 The Law regulates the right of citizens to apply to state authorities, local self-government bodies, associations of citizens, enterprises, institutions, organisations regardless of ownership, media, officials in accordance with their functional duties with comments, complaints and proposals related to their statutory activities, applications or petitions for the exercise of their socio-economic, political and personal rights and legitimate interests and complaints about their violation, <https://zakon.rada.gov.ua/laws/show/393/96-%D0%B2%D1%80#Text>.

qualification under different articles of the CC of Ukraine, for example, 146-1 and 438. Therefore, the statistical information on registered criminal violations in the context of the armed conflict since 2014 needs to be verified for accuracy and systematised.

### 3.3. Limitation periods

The possibility of access to justice for victims of enforced disappearances is determined by the requirements of the limitation period, which regulates the period of time during which such investigations can take place. The assessment of the period of limitation and its application is directly linked to the severity of the crime committed and the nature of the norms violated. The facts of enforced disappearances are classified by international law as gross violations of human rights, because:

- They result in a continuous violation that lasts until the fate or whereabouts of the missing person is identified;
- The crime causes severe suffering to the families of victims, as they often have to wait years to learn the truth about the fate of the victim<sup>103</sup>.

Emphasising the gravity of the crime, the Convention stipulates that the maximum sentence for enforced disappearance is life imprisonment, as provided for in the Rome Statute of the ICC and the statutes of other international criminal courts<sup>104</sup>.

International law stipulates that the crime of enforced disappearance is not subject to a period of limitation in either criminal or civil proceedings<sup>105</sup>. The qualification of such acts as the most serious international crimes, in particular crimes against humanity, also provides for the non-application of limitation periods<sup>106</sup>. At the same time, the case law of the European Court of Human Rights and the Inter-American Court of Human Rights indicates that such human rights violations are of a long-term nature<sup>107</sup>.

103 ENFORCED DISAPPEARANCES: Q & A // Amnesty International: <https://www.amnesty.org/en/wp-content/uploads/2021/06/ior510102011en.pdf>.

104 Article 7 / International Convention for the Protection of All Persons from Enforced Disappearance // Verkhovna Rada of Ukraine, Convention, International Document of 20.12.2006: [https://zakon.rada.gov.ua/laws/show/995\\_154#Text](https://zakon.rada.gov.ua/laws/show/995_154#Text); Article 24 / Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute) // UN, 1993: [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf). Article 23 / Statute of the International Tribunal for Rwanda (ICTR Statute) // <http://surl.li/rtrkf>. UNTAET Regulation 2000/15 (establishing the Special Panels for Serious Crimes, Dili, East Timor) // UN, 06.06.2000, Sect. 10: <https://peacekeeping.un.org/sites/default/files/past/etimor/untaetR/Reg0015E.pdf>. Article 19 / Statute of the Special Court for Sierra Leone (Sierra Leone Statute) // UN, 2000: <https://www.refworld.org/legal/constinstr/unsc/2002/en/43606>. Article 38 / Cambodian Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 Oct. 2004 (NS/RKM/1004/006) (Cambodian Extraordinary Chambers Law): ([http://www.cambodiatribunal.org/sites/default/files/resources/Domestic\\_Cambodian\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](http://www.cambodiatribunal.org/sites/default/files/resources/Domestic_Cambodian_Law_as_amended_27_Oct_2004_Eng.pdf)).

105 International Convention for the Protection of All Persons from Enforced Disappearance // Verkhovna Rada of Ukraine, Convention, International Document of 20.12.2006: [https://zakon.rada.gov.ua/laws/show/995\\_154#Text](https://zakon.rada.gov.ua/laws/show/995_154#Text); (UN website: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-all-persons-enforced>)

Resolution 47/133 of the UN General Assembly of December 18 1992 "Declaration on the Protection of All Persons from Enforced Disappearance" // Verkhovna Rada of Ukraine, International Document: [https://zakon.rada.gov.ua/laws/show/995\\_225#top](https://zakon.rada.gov.ua/laws/show/995_225#top); (UN website: <https://undocs.org/Home/Mobile?FinalSymbol=A%2FRES%2F47%2F133&Language=E&DeviceType=Desktop&LangRequested=False>)

106 Article 29 "The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations." // Rome Statute of the International Criminal Court, 17.07.1998: <http://surl.li/ddban>.

107 Article III "This offence shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined." // Inter-American Convention on Forced Disappearance of Persons, Adopted at Belém do Pará, 09.06.1994: <https://www.oas.org/juridico/english/treaties/a-60.html>. Varnava and Others v. Turkey // ECHR, Grand Chamber Judgment of 18 September 2009, para. 139: <https://hudoc.echr.coe.int/eng?i=001-94162>. Velasquez Rodriguez v. Honduras // Inter-American Court of Human Rights, Judgment of 29 July 1988, para. 155: [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_04\\_esp.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_04_esp.pdf).



However, the Convention defines as a temporary measure the right of a state to apply limitation periods to crimes of enforced disappearance, except for those investigated as crimes against humanity<sup>108</sup>. At the same time, the state should ensure that the limitation periods for investigating enforced disappearances are applied at the level of the limitation periods for the most serious crimes provided for in its criminal and civil legislation, namely:

- Apply for the same period as for the most serious crimes under international law;
- Suspend for any period when victims of enforced disappearances cannot effectively seek justice or reparation;
- Start only from the moment the offence of enforced disappearance is terminated<sup>109</sup>.

The provisions of the Criminal Code of Ukraine link the requirements of the limitation period to the severity of the offence under the special part. The general rules for determining the severity of a crime are enshrined in Article 12 of the CC of Ukraine, according to which the nature of the act depends on the punishment that can be imposed for a particular crime<sup>110</sup>. At the same time, the severity of the crime may differ depending on the part of the article, since each subsequent part provides for qualifying features of the act.

The rules of Article 49 of the Criminal Code of Ukraine stipulate that the limitation periods for criminal prosecution are:

- For a minor offence - 5 years;
- For a grave crime - 10 years;
- For a particularly serious crime - 15 years<sup>111</sup>.

According to the CC of Ukraine, this period starts from the moment of committing a criminal offence (when it is considered completed) and ends before the verdict enters into force<sup>112</sup>. The limitation period includes:

- The period from the moment of committing the offence until the victim and/or law enforcement authorities detect the offence and register the criminal proceedings in the URPTI;
- The period of pre-trial investigation until the suspect is identified and notified of suspicion; the period of pre-trial investigation after the person is notified of suspicion;

108 Article 8 / International Convention for the Protection of All Persons from Enforced Disappearance // Verkhovna Rada of Ukraine, Convention, International Document of 20.12.2006: [https://zakon.rada.gov.ua/laws/show/995\\_154#Text](https://zakon.rada.gov.ua/laws/show/995_154#Text).

109 Article 8(1) / International Convention for the Protection of All Persons from Enforced Disappearance // Verkhovna Rada of Ukraine, Convention, International Document of 20.12.2006: [https://zakon.rada.gov.ua/laws/show/995\\_154#Text](https://zakon.rada.gov.ua/laws/show/995_154#Text).

110 A minor offence is an act (action or inaction) provided for by this Code, for which the basic penalty is a fine of not more than ten thousand tax-free minimum incomes or imprisonment for a term not exceeding five years. A grave crime is an act (action or inaction) provided for by this Code, which is punishable by a fine of not more than twenty-five thousand tax-free minimum incomes or imprisonment for a term not exceeding ten years. A particularly grave crime is an act (action or inaction) provided for by this Code, for which the main punishment is a fine of more than twenty-five thousand tax-free minimum incomes, imprisonment for a term exceeding ten years or life imprisonment. // Parts 4-6 of Article 12 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

111 Article 49 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

112 Article 49 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

- The time for the defence to review the pre-trial investigation materials;
- Time for the defence to familiarise itself with the pre-trial investigation materials;
- The period after the completion of reviewing the pre-trial investigation materials and before the indictment is submitted to the court;
- Preliminary hearing and trial in the court of first instance;
- The period established by law for appealing the verdict (30 days);
- Appeal proceedings (in case of appealing the verdict)<sup>113</sup>

The CC of Ukraine provides for periods that interrupt and suspend the limitation period; as well as a list of crimes in the investigation of which the limitation period does not apply.

Article 146-1 of the CC of Ukraine combines several types of offences: the act under Part 1 is a minor offence<sup>114</sup> and the act under Part 2 is a serious offence<sup>115</sup>. Therefore, the period of limitation for the acts qualified under Part 1 of the article is 5 years, while those qualified under Part 2 may be investigated within 10 years. At the same time, those acts that are qualified under Article 438 of the CC of Ukraine are not limited by the period of limitation<sup>116</sup>.

In the case of application of Article 146-1 of the CC of Ukraine, as well as other general articles that investigate the facts of enforced disappearances (e.g., Articles 115, 146, 147, etc. of the CC of Ukraine), in practice, there may be difficulties in meeting the requirements of the Convention. The national legislation of Ukraine does not provide for separate rules for calculating the statute of limitations for cases of enforced disappearances, which may limit the access of victims to justice. In addition, enforced disappearances are classified as minor crimes under the CC of Ukraine, which reduces the perception of the social danger of this act and does not allow the use of general rules to protect the interests of victims.

In practice, the qualification of enforced disappearances under Article 146-1 of the CC of Ukraine may cause a number of problems. Firstly, the limitation period will require prompt investigation. Given that enforced disappearances can be a long-term violation, it will be necessary to close such proceedings due to the expiry of the limitation period before the perpetrators are identified and the case is brought to court. Secondly, the armed conflict in Ukraine has been going on for ten years and it is still difficult to describe the scale of the alleged crimes committed in the occupied territories. It is difficult to predict when such facts may be discovered. Therefore, in practice, the qualification of enforced disappearances under Article 146-1 of the CC of Ukraine becomes unjustified due to the short period of limitation provided for in this article. Thirdly, in order to avoid

113 Articles 214, 219, 290, 297-1 to 297-5, 314 / Criminal Procedure Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17#n801>.

114 Sanction under part 1 of Article 146-1 of the CC of Ukraine establishes a punishment in the form of imprisonment for a term of three to five years. / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

115 Sanction under part 2 of Article 146-1 of the CC of Ukraine establishes a penalty of imprisonment for a term of five to seven years. / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

116 Limitation period does not apply in the case of crimes against the foundations of national security of Ukraine, as provided for in Articles 109-114-2, torture, as provided for in part three of Article 127, against peace and security of mankind, as provided for in Articles 437-439 and part one of Article 442 of this Code. // Part 5 of Article 49 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: [https:// zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313](https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313).

the limitation period, the most practical solution for law enforcement agencies is to qualify enforced disappearances under Article 438 of the CC of Ukraine and investigate them through the prism of IHL violations. At the same time, the absence of crimes against humanity in Ukrainian legislation significantly limits the ability to investigate such cases as systemic.

In addition, a separate aspect of limiting the timeframe for investigating enforced disappearances was the requirements of the Criminal Procedure Code of Ukraine. Article 219 of the CPC of Ukraine set clear limits on the timeframe for pre-trial investigation, which began to run from the moment the information was entered into the URPTI. However, after amendments at the end of 2023, these restrictions were cancelled for all types of crimes<sup>117</sup>. Currently, the limitations on the investigation timeframe relate to the obligation to complete the pre-trial investigation within two months from the date of notification of a person of suspicion of committing a crime<sup>118</sup>.

### 3.4. Challenges in evidence collection

The CPC of Ukraine defines testimonies, physical evidence, documents, and expert opinions as sources of evidence in criminal proceedings<sup>119</sup>. The circumstances of the armed conflict forced law enforcement agencies to review the practice and the possibility of applying the requirements of criminal procedure legislation. Obtaining evidence in criminal proceedings has become the biggest challenge for investigations. The investigation of enforced disappearances in the context of the armed conflict in Ukraine is characterised by the following circumstances that affect the ability to collect evidence:

- *Lack of access to the territory where the crime was committed* - in the case of events in the occupied territories, the main source of information about the violations committed is the testimony of victims and witnesses. The investigator and prosecutor, given the impossibility of examining the crime scene themselves, formulate a general idea from the words of eyewitnesses, trying to assemble a map of events through these fragments;
- *Threat to the security of justice officials* - systemic attacks by the Russian Federation are often directed against law enforcement officials. They can take the form of targeted attacks on justice infrastructure or be associated with repeated attacks after investigators have arrived at the scene of a crime. Over the past two years, the issue of personal security has become one of the challenges for law enforcement officials;
- *Difficulty in communicating with witnesses and victims* - the presence of persons in the occupied territories, their internal displacement within Ukraine or travelling abroad due to the dangers of the armed conflict affects the ability to conduct investigative actions with them and obtain testimony. Within the territory of Ukraine, an investigator may send an order to interrogate a person at their place of residence, but if the person is abroad, only a request for international

117 Law of Ukraine On amendments to the Criminal Procedure Code of Ukraine and other legislative acts of Ukraine on strengthening the independence of the Specialized Anti-Corruption Prosecutor's Office // Verkhovna Rada of Ukraine, No. 3509-IX, 08.12.2023: <https://zakon.rada.gov.ua/laws/show/3509-20#n14>.

118 Part 3 of Article 219 / Criminal Procedure Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17#n801>.

119 Article 84 / Law of Ukraine On amendments to the Criminal Procedure Code of Ukraine and other legislative acts of Ukraine on strengthening the independence of the Specialized Anti-Corruption Prosecutor's Office // Verkhovna Rada of Ukraine, No. 3509-IX, 08.12.2023: <https://zakon.rada.gov.ua/laws/show/3509-20#n14>.

legal assistance can be considered, which may take a long time to be considered. If the person is in the occupied territory, the investigator can only communicate with them via telephone or video, and their testimony cannot be recorded in the interrogation protocol in accordance with the requirements of the CPC of Ukraine. In addition, if the victim or witness is located in the occupied territory, disclosure of their personal data in the course of the proceedings may pose a risk to such a person. At the same time, possible investigative actions with victims and witnesses are not limited to interrogation, problems may arise when appointing and conducting examinations, identification and other possible investigative actions;

- *Emphasis on the use of information from open sources* - the range of digital content in the public domain that reflects the events of the armed conflict in Ukraine may also be relevant to the investigation of enforced disappearances. In addition to directly recording this data in criminal proceedings, investigators must verify it, properly store it and draw it up in accordance with international standards. The CPC of Ukraine does not provide for specific requirements for working with information from open sources, so in practice there are often cases when such data is not supported by other evidence and becomes the basis for forming legal positions in proceedings;
- *Information collected by non-governmental organisations cannot be used as evidence in proceedings* - the basic rule of evidence collection under the CPC of Ukraine is that information must be drawn up in accordance with the criminal procedure legislation by an authorised person (investigator or prosecutor). Data collected by third parties and submitted to the investigation requires proper procedural processing and verification. Therefore, in practice, it can be considered either as hearsay evidence from an NGO representative, but it will be of lesser value than a direct witness; or as contact details of witnesses or victims who need to be questioned in a procedural manner; or as an appeal from citizens, the information in which should be verified within the framework of the proceedings.

In terms of investigating enforced disappearances, much attention is also paid to the work of law enforcement officers. With the report of a disappearance, an operational search case of the «search» category may be opened for persons who went missing under special circumstances, including in connection with an armed conflict, hostilities, riots within the state or in connection with natural or man-made emergencies or other events that may cause mass deaths, until their whereabouts, burial place or location of the remains are found<sup>120</sup>. In practice, the information obtained by such units will not have the status of evidence in the proceedings until it is processed in accordance with the requirements of the CPC of Ukraine. However, problems arise with the possibility of disclosing restricted data or intelligence information that cannot actually be used as evidence, even if it contains information about the fate of the missing person.

Investigations of enforced disappearances require an understanding of human rights standards and international humanitarian and criminal law among justice agencies. At the same time, the limits of their application in practice will depend on the legal qualification of the investigation - Article 146-1 or Article 438 of the CC of Ukraine. Accordingly, the requirements for investigating these cases as violations of the laws and customs of war will differ from investigating enforced disappearances as general criminal acts. Given that Ukraine is establishing cooperation with national jurisdictions

120 Law of Ukraine "On Operational Investigative Activity" // Verkhovna Rada of Ukraine, No. 2135-XII, 18.02.1992: <https://zakon.rada.gov.ua/laws/show/2135-12#Text>

of other countries and other justice mechanisms, including the ICC, in investigating the consequences of the armed conflict, it is critical that the collected evidence meets international standards. The provisions of the CPC of Ukraine need to implement international standards to ensure effective cooperation.

### 3.5. Trial in absentia

International law provides for the possibility of considering trials *in absentia*. However, when using this procedure, it is necessary to observe the standards established by the right to a fair trial, including:

- The court should postpone the trial if the defendant's personal presence is mandatory or there are reasons to believe that they will face obstacles to appear;
- During the trial in absentia, evidence should be collected by ordinary means, and the defence should have the right to influence this process;
- A judgement delivered in absentia should be communicated to the accused in accordance with the rules for the service of summonses, and the period of appeal should not begin before the person convicted has received effective notice of the judgement, unless it is established that the person has deliberately sought to avoid justice;
- Anyone whose case has been tried in absentia should be able to appeal against the judgement by any means available to them if they had been present;
- A person whose case was tried in absentia and who was not served with a summons in the proper form should have a legal remedy that allows them to review the case on both questions of law and fact<sup>121</sup>.

International courts have unanimously emphasised that the state is obliged to use all available means to ensure that a suspect is properly informed of criminal proceedings against them. This is reflected in the decisions of the European Court of Human Rights (Sanader v Croatia<sup>122</sup>, Sejdovic v Italy<sup>123</sup>, Stoyanov v Bulgaria<sup>124</sup>), the UN Human Rights Committee (Mbenge v Zaire)<sup>125</sup> and the International Criminal Court (the case against Saif Al-Islam Gaddafi)<sup>126</sup>. *In absentia* proceedings can only be considered lawful and fair if they meet the guarantees established by international law.

The CPC of Ukraine provides for the procedure of consideration of a case in the absence of the suspect/accused, which begins with the issuance of a ruling by the investigating judge on conducting a special pre-trial investigation. Such proceedings can be

121 On the criteria governing proceedings conducted in the absence of the accused / Resolution // Committee of Ministers of the Council of Europe, No(75)11, 19.01.1973: <https://rm.coe.int/09000016804f7581>.

122 Case of Sanader v. Croatia // ECHR, Appl. 66408/12, Judgement 06 July 2015: <https://hudoc.echr.coe.int/?i=001-151039>.

123 Case of Sejdovic v. Italy // ECHR, Appl. 56581/00, Judgement 01 June 2006: <https://hudoc.echr.coe.int/?i=001-72629>.

124 Case of Stoyanov v. Bulgaria // ECHR, Appl. 39206/07, Judgement 30 April 2012: <http://surl.li/rtrpq>.

125 The decision of the UN Human Rights Committee in the case of Daniel Monguya Mbenge v. Zaire (Communication No. 16/1977, 1990), where the UN Human Rights Committee concluded that the mere publication of information about a trial in the media is not sufficient to satisfy the requirement of adequate notice set out in Article 14 of the International Covenant on Civil and Political Rights: [https://www.worldcourts.com/hrc/eng/decisions/1983.03.25\\_Mbenge\\_v\\_Zaire.htm](https://www.worldcourts.com/hrc/eng/decisions/1983.03.25_Mbenge_v_Zaire.htm).

126 Decision on the "Admissibility Challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute" / In the case of Prosecutor v. Saif Al-Islam Gaddafi, Situation in Libya // ICC, 05.04.2019: [https://www.icc-cpi.int/CourtRecords/CR2019\\_01904.PDF](https://www.icc-cpi.int/CourtRecords/CR2019_01904.PDF).



conducted only in respect of a person who has acquired the status of a suspect. However, a person can acquire this status only when all appropriate measures have been taken to serve them with a notice. According to the CPC of Ukraine, the suspect and the accused are properly informed by sending notices to the last known place of residence or stay and mandatory publication in the mass media of national distribution and on the official website of the PGO. From the moment of publication of the summons in the mass media of the national sphere of distribution and on the official website of the PGO, the suspect is considered to be properly acquainted with its content<sup>127</sup>.

The publication of notifications on the official websites of the relevant state bodies creates a risk not only for the proper notification of the suspect/accused, but also of the victims, as their data is placed in the public domain. Law enforcement agencies also inform suspects by sending messages to their phone numbers or their relatives, through personal pages on social media, etc. However, in some cases, the receipt of such messages and confirmation of the ownership of mobile numbers are not properly reflected in the criminal proceedings, which may affect the admissibility of such evidence.

The processes are also complicated by the long-awaited and understandable severance of diplomatic relations between Russia and Ukraine, which deprives Ukraine of the opportunity to inform a person of criminal proceedings opened against them by requesting international legal assistance and other legal means. The absence of regular communication with the Russian Federation also makes it impossible to send notifications of criminal proceedings. Notification by serving a summons on the suspect's lawyer may raise questions, as the lawyer in such cases is often sent through the system of free legal aid centres and does not have a legal aid agreement with the client, and therefore no possibility to properly communicate with and inform them.

Judicial control over special pre-trial investigations also raises certain issues. Given the scale of the crimes and the number of criminal proceedings, the ongoing hostilities and systematic shelling of the territory of Ukraine, investigating judges, when deciding on such proceedings, often believe that there is no need to check whether a person has left for the territory of the Russian Federation, is on the international wanted list or is hiding from the investigating authorities. Failure to establish the above facts within specific criminal proceedings may lead to further review of the legality of the appointment of such proceedings.

At the trial stage, the presiding judge asks the parties to the proceedings for their opinion on whether to grant the prosecutor's request for a special procedure *in absentia*. However, this is a formal action of the court, because even if the victim refuses, the court will decide in favour of the prosecution.

One of the key problems of the national legislation of Ukraine is the possibility of appealing against court decisions delivered *in absentia*. The CPC of Ukraine still does not regulate the issue of granting the accused the right to appeal against the verdict in a case that was considered in their absence. At the same time, judging by the position of the Supreme Court on this issue, such an opportunity for a person arises from the general provisions guaranteeing the right to appeal decisions (verdicts)<sup>128</sup>. As a result, the lack of legal certainty on this issue creates additional risks for the recognition of a violation of

127 Article 297-5 / Criminal Procedure Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17#n801>.

128 Resolution of the Supreme Court of February 28, 2024 in case No. 753/14148/21: <https://reyestr.court.gov.ua/Review/117442733>.

the rights of the defence, which is key and has particularities in cases considered in special proceedings. It will also have a negative impact on victims who are going through the difficult processes of criminal proceedings, investigations, media attention and constant memories of trauma.

Given that justice for the consequences of the armed conflict on the territory of Ukraine is mostly focused on representatives of the RF and persons controlled by it, most criminal proceedings on such facts are carried out in the absence of the suspect/accused (*in absentia*). This approach is due to the fact that Ukraine cannot find and detain such persons, as they are located on the territory not controlled by it or in the RF. At the same time, victims do not have the opportunity to choose the procedure under which criminal proceedings will be considered in relation to crimes against them or to influence the position of the prosecution.

Justice agencies thus respond to the public demand for justice for the most serious international crimes. At the same time, especially after February 24, 2022, much attention is paid to statistics on registered criminal proceedings, notices of suspicion, proceedings sent to court, and received verdicts. Various authorities have introduced the practice of regularly updating and publishing such information on their portals, and the practice of considering cases *in absentia* has become a tool that allows to show changes in such indicators over the past two years.

### 3.6. Liability of management and complicity in the commission of an offence

Given that the responsibility for enforced disappearances lies with the state, the study of such facts raises questions about the actions of not only the direct perpetrators, but also senior officials. Such actions require the involvement of state resources and may also be a manifestation of a systemic policy. Therefore, the provisions of criminal law should provide for the possibility of bringing such persons to justice in an objective and independent manner.

The Convention establishes the obligation of States Parties to take the necessary measures to bring to justice those responsible for enforced disappearances, in particular the superior officer who:

- Knew that subordinates under their actual power and control had committed or intended to commit the crime of enforced disappearance, or deliberately ignored obvious information indicating this;
- Was actually responsible for and exercised effective control over the activities with which the offence of enforced disappearance was connected;
- Failed to take all necessary and reasonable measures within their power to prevent or stop the commission of the act of enforced disappearance or to refer the matter to the competent authorities for investigation and prosecution<sup>129</sup>.

In addition, participation in enforced disappearances can take different forms, which will further affect the degree of responsibility of the individual:

129 Article 6 / International Convention for the Protection of All Persons from Enforced Disappearance // Verkhovna Rada of Ukraine, Convention, International Document of 20.12.2006: [https://zakon.rada.gov.ua/laws/show/995\\_154#Text](https://zakon.rada.gov.ua/laws/show/995_154#Text).

1. Committing an offence individually, jointly with or through another person, regardless of whether that person is subject to criminal liability;
2. Giving an order to commit a crime;
3. Complicity in the commission of a crime in the form of incitement, inducement, aiding, assisting, encouraging, planning, persuasion, connivance, active concealment, and giving consent;
4. Attempt to commit a crime;
5. Preliminary agreement to commit a crime;
6. Assisting in the commission or attempted commission of enforced disappearance by a group of persons acting with a common purpose;
7. Aiding and abetting the commission or attempted commission of enforced disappearance in another way<sup>130</sup>.

When qualifying the facts of enforced disappearances as the most serious international crimes, the participation of actors can be revealed through the principle of command responsibility. According to this principle, military commanders and civilian superiors can be held accountable for the unlawful acts of their subordinates committed within their effective control, provided that they knew or could have known about the commission of these crimes, failed to fulfil their duties to prevent the commission of the crime and bring their subordinates to justice<sup>131</sup>. Another form of committing the most serious international crimes is giving an order, which requires proof of direct intent to commit the offence and that the person was vested with authority over the direct perpetrator<sup>132</sup>.

Instead, the Criminal Code of Ukraine offers limited opportunities to bring senior officials to justice for international crimes. The provisions of the Convention focus on the basic principles of accountability for various perpetrators of enforced disappearances, based on their role in the commission of the crimes. However, when implementing its principles into national legislation, Ukraine has limited itself to Article 146-1 of the CC of Ukraine. The forms of enforced disappearances were ignored by the legislator. In contrast to the introduction of qualifying features of the crime that can determine the degree of responsibility for the act, the only way to qualify the involvement of different persons in the commission of the crime is to apply the general rules of the CC of Ukraine.

Article 27 of the Criminal Code of Ukraine enshrines the general rules of complicity, which include the following forms:

- **Perpetrator** - a person who, in complicity with other subjects of a criminal offence, directly or through the use of other persons who are not subject to criminal liability for the offence in accordance with the law, committed a criminal offence;
- **An organiser** - a person who organised the commission of a criminal offence (criminal offences) or supervised its preparation or commission. An organiser is also a person who formed or led an organised group or criminal organisation, or a person who provided financing or organised concealment of the criminal activity of an organised group or criminal organisation;

130 No impunity for enforced disappearances: Checklist for effective implementation of the International Convention for the Protection of All Persons from Enforced Disappearance // Amnesty International, 09.11.2011: <https://www.amnesty.org/en/documents/ior51/006/2011/en/>.

131 Article 28 // Rome Statute, 1998: <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

132 Article 25 // Rome Statute, 1998: <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>.

- **An instigator** - a person who, by persuasion, bribery, threat, coercion or other means, persuaded another accomplice to commit a criminal offence;
- **An aider and abettor** - a person who, by advice, instructions, provision of means or tools or removal of obstacles, facilitated the commission of a criminal offence by other accomplices, as well as a person who promised in advance to hide the person who committed the criminal offence, tools or means of committing the criminal offence, traces of the criminal offence or items obtained by criminal means, to purchase or sell such items or otherwise contribute to the concealment of a criminal offence<sup>133</sup>.

The CC of Ukraine also allows for additional qualifications of joint commission of a crime by several perpetrators: committed by a group of persons (two or more persons); committed by prior conspiracy by a group of persons (two or more persons); committed by an organised group (three or more persons); committed by a criminal organisation (five or more persons)<sup>134</sup>.

Such an approach to the qualification of enforced disappearances negates the guarantees enshrined in the Convention. When studying the role of perpetrators of different levels during the commission of a crime under the general rules of complicity or joint commission of a crime, the characteristics of the subject that indicate the nature of gross human rights violations and the grave nature of the act are lost. This approach does not properly assess these acts in terms of their increased level of public danger. This creates a risk that some of the perpetrators of enforced disappearances are in fact beyond investigation and criminal liability.

In addition, bringing military commanders and civilian superiors to justice is a problematic issue in the practice of investigating enforced disappearances committed in the context of armed conflict. Despite the initiatives to amend the CC of Ukraine to introduce command responsibility under draft laws No. 2689 and No. 7290, they have not received support from the parliament. Although customary international law is not explicitly covered by the disposition of Article 438 of the CC of Ukraine, this does not prevent customary norms from being taken into account in practice when interpreting international treaties, in particular in the context of command responsibility<sup>135</sup>.

### 3.7. Mitigating factors

In addition to the requirements that define the nature of the crime of enforced disappearance itself, the Convention establishes factors to be taken into account when determining sentencing. Article 7 of the Convention provides for factors that may have an impact on the mitigation of punishment. They can be applied to persons who:

133 Article 27 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

134 Article 28 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

135 According to part one of Article 15 of the Law of Ukraine "On International Treaties of Ukraine" Ukraine has confirmed its commitment to strictly adhere to the generally recognised principles and norms of international law, as proclaimed in Article 18 of the Constitution of Ukraine, which was once pointed out by the High Specialised Court of Ukraine for Civil and Criminal Cases and explained that a generally recognised rule of international law should be understood by the courts as a rule of conduct accepted and recognised by the international community of states as a whole as legally binding. No. 13 "On the Application of International Treaties of Ukraine by Courts in the Administration of Justice": <https://zakon.rada.gov.ua/laws/show/v0013740-14#Text>.

- Effectively contribute to the return of the missing person alive;
- Provide an opportunity to clarify the circumstances of enforced disappearances;
- Identify the perpetrators of enforced disappearance<sup>136</sup>.

At the same time, international standards for the study of the most serious international crimes stipulate that when deciding whether to apply mitigating factors in proceedings against a person, it is necessary to take into account the behaviour of the convicted person after the act, including any efforts of the person to compensate the victims and any cooperation with the court<sup>137</sup>.

In this aspect, the Criminal Code of Ukraine contains general provisions that apply when deciding on the mitigation of punishment to all articles of the special part.

If these provisions are analysed in terms of their possible application to enforced disappearances, the following circumstances may be relevant:

- Confession, sincere repentance or active assistance in solving a criminal offence;
- Voluntary compensation for the damage caused or elimination of the damage caused;
- Providing medical or other assistance to the victim directly after the commission of a criminal offence;
- Committing a criminal offence under the influence of a threat, coercion or due to material, official or other dependence;
- Performing a special task to prevent or disclose the criminal activity of an organised group or criminal organisation, combined with the commission of a criminal offence<sup>138</sup>.

Despite the fact that these circumstances are of a general nature, their interpretation in practice will affect the correlation of these conditions with the requirements of the Convention in cases of enforced disappearances. Currently, the approaches to investigating these cases by the Ukrainian judicial system are not developed, given the qualification of facts committed in the context of armed conflict under both Article 146-1 of the CC of Ukraine and Article 438 of the CC of Ukraine. Their provisions do not explicitly provide for specific circumstances that may mitigate the punishment. Therefore, the extent to which

136 Article 7 / International Convention for the Protection of All Persons from Enforced Disappearance // Verkhovna Rada of Ukraine, Convention, International Document of 20.12.2006: [https://zakon.rada.gov.ua/laws/show/995\\_154#Text](https://zakon.rada.gov.ua/laws/show/995_154#Text).

137 Article 77 // Rome Statute ICC, 1998: <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>. Rule 145(2) (b) // Rules of Procedure and Evidence of the International Criminal Court: <https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf>. Article 24 / Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY Statute) // UN, 1993: [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf). Article 23 / Statute for the International Tribunal for Rwanda (ICTR Statute) // <https://www.ohchr.org/en/instruments-mechanisms/instruments/statute-international-criminal-tribunal-prosecution-persons#:~:text=Additional%20Protocol%20II-,The%20International%20Tribunal%20for%20Rwanda%20shall%20have%20the%20power%20to,thereto%20of%208%20June%201977>. UNTAET Regulation 2000/15 (establishing the Special Panels for Serious Crimes, Dili, East Timor) // UN, 06.06.2000, Sect. 10: <https://peacekeeping.un.org/sites/default/files/past/etimor/untaetR/Reg0015E.pdf>. Article 19 / Statute of the Special Court for Sierra Leone (Sierra Leone Statute) // UN, 2000: <https://www.refworld.org/legal/constr/unsc/2002/en/43606>. Article 38 / Cambodian Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 Oct. 2004 (NS/RKM/1004/006) (Cambodian Extraordinary Chambers Law): ([http://www.cambodiatribunal.org/sites/default/files/resources/Domestic\\_Cambodian\\_Law\\_as\\_amended\\_27\\_Oct\\_2004\\_Eng.pdf](http://www.cambodiatribunal.org/sites/default/files/resources/Domestic_Cambodian_Law_as_amended_27_Oct_2004_Eng.pdf)).

138 Article 66 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.



their application in investigating cases of enforced disappearances will be in line with international standards remains within the jurisdiction of the courts.

### 3.8. Aggravating factors

In addition to the possibilities for mitigation, international standards for the investigation of enforced disappearances include aggravating factors. In this regard, the Convention pays attention to the characteristics of the victim. Thus, aggravating factors in determining the punishment are the death of the disappeared person or the commission of an act of enforced disappearance against pregnant women, minors, people with disabilities or other particularly vulnerable persons<sup>139</sup>. International criminal law approaches also pay attention to such factors:

- Any relevant previous convictions for crimes under international law or of a similar nature;
- Abuse of power or position;
- Committing the offence in a particularly vulnerable state of the victim;
- Committing the offence with particular cruelty or in the presence of multiple victims;
- Committing an offence for any motive related to discrimination on the grounds of sex, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, property or other status;
- Other circumstances not listed above, but similar in nature to mentioned above<sup>140</sup>.

The Criminal Code of Ukraine provides for a broader and more exhaustive list of aggravating factors that are common to all specialised crimes. These include, in particular:

- Repeated offences and recidivism;
- Committing a criminal offence on the grounds of racial, national, religious hatred or discord or on the grounds of sex;
- Committing a criminal offence in connection with the performance of the victim's official or public duty;
- Grave consequences caused by the offence;
- Committing a criminal offence against an elderly person, a person with a disability or a person in a helpless state, or a person suffering from a mental disorder, in particular dementia, or mental retardation, as well as committing a criminal offence against a minor child or in the presence of a child;
- Committing a crime with particular cruelty<sup>141</sup>.

139 Article 7 / International Convention for the Protection of All Persons from Enforced Disappearance // Verkhovna Rada of Ukraine, Convention, International Document of 20.12.2006: [https://zakon.rada.gov.ua/laws/show/995\\_L54#Text](https://zakon.rada.gov.ua/laws/show/995_L54#Text)

140 Article 21, paragraph 3 // Rome Statute of the International Criminal Court, 17.07.1998 // International Criminal Court: <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>. Rule 145(2)(b) // Rules of Procedure and Evidence of the International Criminal Court: <https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf>.

141 Article 67 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

This list also includes the circumstance of committing a crime using the conditions of martial law or a state of emergency, or other events<sup>142</sup>. In the context of enforced disappearances committed in the context of armed conflict, it is unclear how this circumstance can affect the study of these cases, since the connection of such an act with armed conflict is a condition for the application of legal qualification under Article 438 of the CC of Ukraine. It is important to take into account that martial law was introduced in Ukraine only on February 24, 2022<sup>143</sup>, and before that, this circumstance could be considered only in the context of the anti-terrorist operation since 2014<sup>144</sup> or the joint forces operation since 2018<sup>145</sup> in certain regions of Ukraine.

At the same time, the articles of the CC of Ukraine that qualify the facts of enforced disappearances provide for additional circumstances that aggravate the punishment:

- Issuing an order or instruction to take action<sup>146</sup>;
- Failure of a superior, who became aware of the actions of their subordinates, to take measures to stop them and to notify the competent authorities of the crime<sup>147</sup>;
- Combining an act (violation of the laws and customs of war) with intentional murder<sup>148</sup>.

The inclusion of these circumstances as qualifying features under parts of the articles of the CC of Ukraine automatically increases the gravity of such a crime and increases the possible punishment that can be applied in this case. At the same time, there is no requirement to duplicate these circumstances with general requirements under the CC of Ukraine in the legal qualification of the act.

However, in practice, questions may arise when analysing the very content of the violation. For example, when qualifying under Article 146-1 of the CC of Ukraine, the death of a person caused by enforced disappearance can be qualified either with reference to an aggravating factor or with additional qualification under Article 115 of the CC of Ukraine «Intentional murder». Under these conditions, the latter option may lose the context of the death of a person through enforced disappearance, since it is necessary to prove that the perpetrator intended to cause death to the person when committing such an act. A similar situation will arise when qualifying enforced disappearance as a

142 Article 67 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

143 The President signed a decree on the introduction of martial law in Ukraine, the Verkhovna Rada approved it // President of Ukraine, 24.02.2022: <https://www.president.gov.ua/news/prezident-pidpisav-ukaz-pro-zaprovadzhennya-voyennogo-stanu-73109>.

144 On the Decision of the National Security and Defence Council of Ukraine of 13 April 2014 “On urgent measures to overcome the terrorist threat and preserve territorial integrity of Ukraine” / Decree // President of Ukraine, No. 405/2014, 14.04.2014: <https://www.president.gov.ua/documents/4052014-16886>.

145 Law of Ukraine “On the peculiarities of State policy on ensuring Ukraine’s State sovereignty over temporarily occupied territories in Donetsk and Luhansk regions” // Verkhovna Rada of Ukraine, No. 2268-VIII, 18.01.2018: <https://zakon.rada.gov.ua/laws/show/2268-VIII#Text>. On the Decision of the National Security and Defence Council of Ukraine of 30 April 2018 “On a large-scale anti-terrorist operation in Donetsk and Luhansk regions” / Decree // President of Ukraine, No. 116/2018, 30.04.2018: <https://www.president.gov.ua/documents/1162018-24086>.

146 Part 2 of Article 146-1 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

147 Part 2 of Article 146-1 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

148 Part 2 of Article 438 / Criminal Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

violation of the laws and customs of war under Article 438(2) of the CC of Ukraine, which will require proof of a special intent to cause death.

### 3.9. Cooperation with other countries

The provisions of the Convention pay considerable attention to the mechanisms of cooperation between states in the investigation of enforced disappearances. In particular, the state's obligations should include:

- Taking suspects into custody to decide on their transfer or extradition<sup>149</sup>;
- Conducting a preliminary investigation or inquiry, the results of which allow to solve the issue of extradition<sup>150</sup>;
- The possibility of a detained person to contact the representative office of the state of their citizenship or the state of their habitual residence<sup>151</sup>;
- The possibility of prosecution by the competent authorities, if the issue of transfer or extradition of the detained person is not resolved<sup>152</sup>;
- The possibility of extraditing such persons<sup>153</sup>;
- Mutual legal assistance in the investigation of such facts<sup>154</sup>;
- Assistance in providing aid to victims of enforced disappearances, in searching for, locating or releasing missing persons, and in case of death - in exhumation, identification of the missing persons and return of their remains<sup>155</sup>.

Ukrainian legislation defines general conditions for international legal cooperation with other states that can be used in criminal proceedings. These provisions are common to all categories of crimes and do not contain any specifics depending on their type. Such cooperation may include the service of documents, certain procedural actions, extradition of persons who have committed a criminal offence, temporary transfer of persons, transfer of criminal prosecution, transfer of convicted persons and execution of sentences<sup>156</sup>. In addition, other forms of international legal cooperation may be provided for by treaties valid for Ukraine<sup>157</sup>.

149 Part 1 of Article 10 / International Convention for the Protection of All Persons from Enforced Disappearance // Verkhovna Rada of Ukraine, Convention, International Document of 20.12.2006: <http://surl.li/kjsxb>.

150 Part 2 of Article 10 / International Convention for the Protection of All Persons from Enforced Disappearance // Verkhovna Rada of Ukraine, Convention, International Document of 20.12.2006: <http://surl.li/kjsxb>.

151 Part 3 of Article 10 / International Convention for the Protection of All Persons from Enforced Disappearance // Verkhovna Rada of Ukraine, Convention, International Document of 20.12.2006: <http://surl.li/kjsxb>.

152 Article 11 / International Convention for the Protection of All Persons from Enforced Disappearance // Verkhovna Rada of Ukraine, Convention, International Document of 20.12.2006: [https://zakon.rada.gov.ua/laws/show/995\\_154#Text](https://zakon.rada.gov.ua/laws/show/995_154#Text).

153 Article 13 / International Convention for the Protection of All Persons from Enforced Disappearance // Verkhovna Rada of Ukraine, Convention, International Document of 20.12.2006: [https://zakon.rada.gov.ua/laws/show/995\\_154#Text](https://zakon.rada.gov.ua/laws/show/995_154#Text).

154 Article 14 / International Convention for the Protection of All Persons from Enforced Disappearance // Verkhovna Rada of Ukraine, Convention, International Document of 20.12.2006: [https://zakon.rada.gov.ua/laws/show/995\\_154#Text](https://zakon.rada.gov.ua/laws/show/995_154#Text).

155 Article 15 / International Convention for the Protection of All Persons from Enforced Disappearance // Verkhovna Rada of Ukraine, Convention, International Document of 20.12.2006: [https://zakon.rada.gov.ua/laws/show/995\\_154#Text](https://zakon.rada.gov.ua/laws/show/995_154#Text).

156 Article 542 / Criminal Procedure Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17#n801>.

157 Article 542 / Criminal Procedure Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17#n801>.

In practice, especially in the context of the armed conflict, assistance from other countries has become an additional tool for the Ukrainian judiciary to strengthen investigations at the national level. In addition to attracting international technical assistance for the purchase of technical equipment, vehicles and software requested by the Ukrainian side, investigators and prosecutors in proceedings use the possibility of applying for international legal assistance from other countries<sup>158</sup>. During the investigation, requests are made to other countries for certain procedural actions, clarification of the data of persons or their search. However, the bureaucratic procedures related to the translation, approval, sending and consideration of such requests do not meet the promptness of the requirements. In particular, at the stage of investigation, requests for international legal assistance are made through the Department of International Legal Cooperation of the Prosecutor General's Office, which actually carries the entire load of technical issues.

Another tool is the possibility of creating joint investigative teams with different countries. In particular, such groups may be created to investigate one criminal proceeding in which the interests of several states are affected, with one of them taking the lead. At the same time, such activities should clearly define the subject and objectives of the investigation, as well as the jurisdiction that will further consider the case in court<sup>159</sup>.

On March 25, 2022, after the start of the full-scale invasion of Ukraine by the Russian Federation, a joint investigation team was established with the support of Eurojust to investigate the most serious international crimes committed in Ukraine, which currently includes the national authorities of seven states: Ukraine, Lithuania, Poland, Estonia, Latvia, Romania and Slovakia. The JIT also includes the Prosecutor's Office of the International Criminal Court, Europol and the US Department of Justice. The JIT was established to strengthen cooperation between the states involved to effectively investigate international crimes committed on the territory of Ukraine, bring perpetrators to justice and enhance cooperation with the ICC on cases that may be referred to it.

There are many expectations from the work of this joint investigation team that may not be met. Its activities can be an effective tool for the exchange of information between states, including on the facts of enforced disappearances, information on the fate of victims, and alleged perpetrators of crimes. However, the focus of the group's work, according to open sources, is quite broad, so without setting specific priorities for such cooperation, most facts may be lost among the whole range of violations. In addition, the willingness of other countries to take over criminal proceedings within their national jurisdictions is unclear, which could potentially relieve the Ukrainian justice system.

In addition, the provisions governing Ukraine's cooperation with the International Criminal Court were introduced to the CPC of Ukraine after February 24, 2022<sup>160</sup>. Despite the fact that Ukraine has not yet ratified the Rome Statute of the ICC and has not joined the Court's system, these provisions define the procedure for transferring information to the ICC and the terms of cooperation. In particular, the provisions determine the possibil-

158 Article 541 / Criminal Procedure Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17#n801>.

159 Article 571 / Criminal Procedure Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17#n801>.

160 Section IX / Criminal Procedure Code of Ukraine (as of 14.03.2024) // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17#n801>.

ity of access to the crime scenes by the Court's representatives and Ukraine's obligation to provide information upon the ICC's request. At the same time, these provisions leave broad powers to the Prosecutor General's Office as the body responsible for cooperation at the stage of the ICC investigation and give it the right to decide what access the Court's investigators and prosecutors will have on site<sup>161</sup>.

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161 Article 624 / Criminal Procedure Code of Ukraine // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2078>.



## 4 Effectiveness of guarantees for victims of enforced disappearances

### 4.1. Responsible authorities and coordination between them

In addition to the obligation to continue investigations until the fate of the disappeared person is clarified, Article 24 of the Convention requires States Parties to provide for in law and take appropriate measures in practice to determine the legal status of such persons and their relatives in areas such as social security, financial matters, family law and property rights. This means that states should establish mechanisms at the national level to determine the legal personality of disappeared persons. States should also provide procedures for issuing, upon request of relatives, other interested persons or the competent authority, a document declaring a person missing if that person has been missing for a certain period of time. A representative shall be appointed under judicial or administrative control to protect the interests and needs of the missing person and their dependents. Among other things, it gives the representative the right to protect the rights of the missing person and manage their property and assets in their interests. Such a mechanism also entitles the dependents of the disappeared person to financial assistance in the form of a cash payment from the assets of the disappeared person, if state assistance is not available. It should also entitle the relatives and dependants of the disappeared person to claim assistance and social benefits according to their specific needs<sup>162</sup>. States parties should establish effective procedures and conditions for declaring the death of a missing person, including the date of death and the consequences of such a declaration.

Article 24 of the Convention requires that States Parties effectively guarantee the right to establish and freely participate in organisations and associations concerned with establishing the circumstances of enforced disappearances and the fate of missing persons, as well as with assisting victims of enforced disappearances. This right is recognised in other international legal norms and standards. It also provides for the protection of those involved in these organisations, if necessary<sup>163</sup>. States parties must guarantee the right to associations seeking to investigate the circumstances of enforced disap-

162 Missing persons, A Handbook for Parliamentarians, // ICRC // 2009, pp. 50 – 53.; <http://surl.li/rtzmw>

163 Article 20 / Universal Declaration of Human Rights // Resolution, United Nations General Assembly, No. 217 A of 10.12.1948. <https://www.un.org/en/about-us/universal-declaration-of-human-rights>; Article 22 / International Covenant on Civil and Political Rights (ICCPR) // Resolution, General Assembly of the United Nations, No. 2200A (XXI) of December 16, 1966 (entered into force on March 23, 1976), [https://zakon.rada.gov.ua/laws/show/995\\_043#Text](https://zakon.rada.gov.ua/laws/show/995_043#Text), <http://surl.li/bszje>

pearances and the fate of missing persons, to provide assistance to victims of enforced disappearances, and to protect those involved in such associations.

The issue of enforced disappearances is defined in the mandate of a number of state bodies in Ukraine. Their powers are related either to the protection of the rights of individuals within the territory of Ukraine or to the challenges that arose after the start of the armed conflict in 2014 and intensified after February 24, 2022. The main role is played by:

- 1. *The National Information Bureau*** is a special body created by the Government of Ukraine in the context of international armed conflict, which, in accordance with the Geneva Conventions of 1949<sup>164</sup>, collects and summarises data on prisoners of war, dead, missing, and civilians illegally detained by the opposing party and transmits such information to law enforcement agencies, international humanitarian missions (ICRC), and organisations for the purpose of negotiating their release and/or transfer. The NIB maintains a register of defenders of Ukraine, which contains data on missing, captured, servicemen and civilians. The NIB centralises information on protected persons who have been captured by the opposing party to the conflict and informs families about the fate of their loved ones. This body was established on 17.03.2022 (after Russia's full-scale invasion of Ukraine) on the basis of the State Enterprise «Ukrainian National Centre for Peacebuilding», which is managed by the Ministry of Reintegration of the Temporarily Occupied Territories<sup>165</sup>.
- 2. *The Ukrainian Parliament Commissioner for Human Rights*** is an official who exercises parliamentary control over the observance of constitutional rights and freedoms of a person and citizen to protect the rights of everyone on the territory of Ukraine and within its jurisdiction on a permanent basis, including the right to liberty, which is violated in cases of abduction of civilians. In particular, it is the Ombudsman who communicates with Tetiana Moskalkova, the Russian Federation Commissioner for Human Rights, exchanging information in accordance with the established procedure on persons held in places of detention or whose whereabouts have not been established. On January 13, 2023, the Commissioner personally handed over the first list of Ukrainian civilian hostages to Moskalkova at a meeting in Ankara, Turkey. The list included the names of two thousand people who were included under the age criterion of 65+ and who have significant illnesses.
- 3. *Working Group on Civilian Hostages in the Coordination Headquarters for the Treatment of Prisoners of War*** - In May 2023, the Ukrainian Parliament Commissioner for Human Rights reported that a separate working group had been established in the Coordination Headquarters to deal with civilian hostages. This group is headed by a representative of the Commissioner for Human Rights, Oleksandr Kononenko. In total, during the period of the headquarters' work, 2279 citizens, including 142 civilians, have been returned to Ukraine, and communication with the Russian side on this issue is ongoing.

164 Article 122 / Geneva Convention (III) on the Treatment of Prisoners of War of 12.08.1949 // Verkhovna Rada of Ukraine, Convention, International Document of 12.08.1949: [https://zakon.rada.gov.ua/laws/show/995\\_153#Text](https://zakon.rada.gov.ua/laws/show/995_153#Text). Article 136 / Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12.08.1949 // Verkhovna Rada of Ukraine, Convention, International Document of 12.08.1949: [https://zakon.rada.gov.ua/laws/show/995\\_154#Text](https://zakon.rada.gov.ua/laws/show/995_154#Text).

165 Decree of the Cabinet of Ministers of Ukraine "On Determining the State Enterprise Performing the Functions of the National Information Bureau" // Verkhovna Rada of Ukraine, No. 228-p, March 17, 2022: <https://zakon.rada.gov.ua/laws/show/228-2022-%D1%80#Text>

**4. The Ministry of Internal Affairs of Ukraine** – according to the relevant law, it is the internal affairs bodies that are responsible for receiving applications and further investigating reports of abduction or disappearance of civilians. Therefore, it is the responsibility of the Ministry to take practical measures aimed at establishing the fate of victims of enforced disappearances<sup>166</sup>. For this purpose, the MIA established **the Department for Missing Persons under Special Circumstances of the MIA (Secretariat of the Commissioner for Missing Persons under Special Circumstances)**<sup>167</sup>. The tasks of the Department (the Ombudsman’s Secretariat) are:

- Ensuring the development and implementation of the MIA’s state policy on compliance with IHL throughout Ukraine in terms of coordinating the search for persons missing in special circumstances and other related issues in accordance with the Law of Ukraine “On the Legal Status of Missing Persons under Special Circumstances”;
- Ensuring the activities of the Commissioner for Missing Persons under Special Circumstances;
- Ensuring the functioning of the Unified Register of Persons Missing in Special Circumstances<sup>168</sup>.

The Department also includes the position of Commissioner for Persons Missing in Special Circumstances. This is an official of the MIA who is vested with the authority to coordinate the search for persons missing under special circumstances and to resolve other related issues in accordance with the Law of Ukraine “On the Legal Status of Persons Missing under Special Circumstances”.

Given the existence of four separate bodies dealing with the legal status of victims of enforced disappearances, the biggest challenge in practice is to ensure effective cooperation between them. Coordination between these bodies needs to be improved. For example, each of them maintains databases with lists of victims, which are not synchronised with each other, so the number of people registered does not match. Some families report that they have received notifications about the absence of information about a person in the Unified Register of Persons Missing in Special Circumstances, while information about the same person was in the NIB.

166 Since October 1, 2023. The Ministry of Internal Affairs of Ukraine became the main body coordinating the search for Ukrainians missing under special circumstances. The function on missing persons was transferred from the Ministry of Reintegration to the Ministry of Internal Affairs, the Ministry of Defence and the Coordination Headquarters for the Treatment of Prisoners of War. / On determining the powers of certain bodies in the field of compliance with international humanitarian law throughout Ukraine / Resolution // Cabinet of Ministers of Ukraine, No. 975, 12.09.2023: <https://zakon.rada.gov.ua/laws/show/975-2023-%D0%BF#Text>.

167 On Approval of the Regulation on the Ministry of Internal Affairs of Ukraine / Resolution // Cabinet of Ministers of Ukraine, No. 878, 28.10.2015: <https://zakon.rada.gov.ua/laws/show/878-2015-%D0%BF#n10>. Resolution of the Cabinet of Ministers of Ukraine “On the Issue of Determining the Powers of Certain Bodies in the Field of Compliance with International Humanitarian Law throughout Ukraine” // Verkhovna Rada of Ukraine, No. 975 of 12 September 2023: <https://zakon.rada.gov.ua/laws/show/975-2023-%D0%BF#Text>.

168 Office of the Commissioner for Persons Missing in Special Circumstances (Secretariat of the Commissioner for Persons Missing in Special Circumstances) // Portal of the Ministry of Internal Affairs of Ukraine: <https://mvs.gov.ua/uk/struktura/upravlinnia-z-pitan-osib-zniklix-bezvisti-za-osoblivix-obstavin-sekretariat-upovnovazhenogo-z-pitan-osib-zniklix-bezvisti-za-osoblivix-obstavin>.

## 4.2. Introduction of the Unified Register of Persons Missing in Special Circumstances

Despite the fact that the Law of Ukraine “On the Legal Status of Missing Persons” of 2018 provided for the creation of a Unified Register of Persons Missing under Special Circumstances, it was actually created only in 2022. On May 2, 2023, it was launched. The Unified Register of Persons Missing in Special Circumstances is an electronic database designed to store, protect, process, use and disseminate information about persons missing in special circumstances, their unidentified remains, the presence or absence of a court decision to declare them missing, missing or dead, as well as other data used to ensure the registration of missing persons for the purpose of their search<sup>169</sup>. The Register is kept by the Ministry of Internal Affairs of Ukraine.

The National Police of Ukraine, the Security Service of Ukraine, the National Guard of Ukraine, the Commissioner for Persons Missing in Special Circumstances, the Ministry of Defence of Ukraine, the Ministry of Health of Ukraine, the Office of the Prosecutor General, the State Migration Service of Ukraine, the Department for the Execution of Criminal Sentences, interregional departments for the execution of criminal sentences of the Ministry of Justice, authorised probation authorities, the State Judicial Administration of Ukraine, the State Emergency Service of Ukraine, the Ministry of Community and Territorial Development of Ukraine, the State Border Guard Service of Ukraine, the Expert Service of the Ministry of Internal Affairs of Ukraine, local executive authorities are involved in filling the Register with information.

In practice, it is problematic that this Register includes both servicemen who disappeared while performing combat missions or in respect of whom there is unconfirmed information about injury or death (but neither the wounded nor the body of the deceased is found), and civilians, civilians who disappeared, in particular, after the shelling of a settlement or whose contact was lost because their place of residence was controlled by a party to the armed conflict, or if there is no confirmed information about their death or detention. The Register also includes all cases when contact with a person (military or civilian) is lost and there are grounds to believe that they have disappeared as a result of natural or man-made emergencies. The Register also includes civilians who have been victims of enforced disappearances or arbitrary detention, but there is no separate database for such cases.

In addition, the status of such information and its further use is not regulated. Given that each authorised body has its own database for recording information, the Register should accumulate this data. The issue of its interaction with the URPTI and the data established as a result of the investigation is also open, as according to the requirements of the CPC of Ukraine, such data cannot be disseminated. The same applies to the possibility of transferring information from the Register to criminal proceedings.

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169 On Approval of the Regulation on the Unified Register of Persons Missing in Special Circumstances / Order // Ministry of Internal Affairs of Ukraine, No. 535, 29.08.2022: <https://zakon.rada.gov.ua/laws/show/z0998-22#Text>.

### 4.3. Compensation for damage in criminal proceedings

The requirements of the International Covenant on Civil and Political Rights stipulate the obligations of state parties:

- To ensure that any person whose rights and freedoms have been violated has an effective remedy, even when the violation has been committed by persons acting as officials;
- To ensure that the right to a remedy is established for any person who requires such a remedy by the competent judicial, administrative or legislative authorities or any other competent authority provided for by the legal system of the State and to develop the possibilities of judicial remedy;
- To ensure that remedies are enforced by the competent authorities when granted<sup>170</sup>.

Among other things, the Convention provides for the obligation of states to establish the same statute of limitations for both criminal proceedings and civil tort claims, regardless of whether they are brought in civil proceedings or in criminal proceedings<sup>171</sup>. If national law does apply a statute of limitations to the crime of enforced disappearance, the Convention demands that the following requirements be met:

- The limitation periods for civil actions should be at least as long as the criminal limitation periods and should start from the moment the crime of enforced disappearance ceases;
- The remedy must be “effective”<sup>172</sup>.

This provides that the limitation period should be suspended if the remedies are ineffective or inaccessible during this period. However, if the remedy is no longer effective, the limitation period for acts of enforced disappearance is suspended until the remedy is reinstated<sup>173</sup>.

In accordance with the Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Principle 23), in order to guarantee the right to an effective remedy, no limitation periods should apply to criminal, civil or administrative actions brought by victims seeking reparation for harm suffered<sup>174</sup>. As the limitation periods do not apply to the crime against humanity of enforced disappearance, they do not apply to criminal or civil proceedings in which victims of enforced disappearance have the right to seek an effective remedy.

170 International Covenant on Civil and Political Rights // Verkhovna Rada of Ukraine, 16.12.1966: [https:// zakon.rada.gov.ua/laws/show/995\\_043#Text](https://zakon.rada.gov.ua/laws/show/995_043#Text).

171 Article 8 and Article 24 / International Convention for the Protection of All Persons from Enforced Disappearance // Verkhovna Rada of Ukraine, 20.12.2006: [https://zakon.rada.gov.ua/laws/show/995\\_154#Text](https://zakon.rada.gov.ua/laws/show/995_154#Text).

172 Article 8(2) / International Convention for the Protection of All Persons from Enforced Disappearance // Verkhovna Rada of Ukraine, 20.12.2006: [https://zakon.rada.gov.ua/laws/show/995\\_154#Text](https://zakon.rada.gov.ua/laws/show/995_154#Text).

173 Article 17(2) / UN General Assembly Resolution 47/133 of December 18, 1992 “Declaration on the Protection of All Persons from Enforced Disappearance” // Verkhovna Rada of Ukraine, International Document: [https://zakon.rada.gov.ua/laws/show/995\\_225#top](https://zakon.rada.gov.ua/laws/show/995_225#top).

174 Report of the independent expert to update the Set of principle to combat impunity / Diane Orentlicher // UN Economic and Social Council, E/CN.4/102/Add.1, 08.02.2005: <http://daccess-ddsny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>.



The CPC of Ukraine provides for the right of victims of violent crimes to file a civil lawsuit for compensation for damages within the framework of criminal proceedings<sup>175</sup>. The main requirement for filing a claim is that the person has suffered material and/or moral damage<sup>176</sup>. The claim itself may be filed against the suspect, accused, or against a natural or legal person who is legally liable for the damage caused by the actions of the suspect, accused, or insane person who committed a socially dangerous act<sup>177</sup>. The requirements of the criminal procedural legislation of Ukraine restrict the time limit for filing such a claim to the moment of the beginning of the trial<sup>178</sup>.

This legal mechanism is common to all facts of criminal offences. Although the legal requirements limit the time period for filing such a claim during criminal proceedings, the provisions do not provide for exceptions and special procedures for certain crimes. Therefore, even if during the trial of the case it becomes known that other persons have been harmed or such persons decide to take an active part in the proceedings, the possibility of using this mechanism will be lost for them.

When assessing the effectiveness of this method of compensation for victims of enforced disappearances, one should take into account the following factors: whether it is real, not just theoretical; whether it is accessible to the relevant person; whether it is able to restore the use of the violated right; whether it ensures the effectiveness of the court decision<sup>179</sup>. Given the set of problems that arise during the investigation of enforced disappearances committed in the context of the armed conflict on the territory of Ukraine, it is difficult to call the consideration of a civil claim within the criminal process an effective remedy for victims.

Firstly, victims in criminal proceedings may not receive information about the progress of the case and its transfer to court. Both the investigation and the prosecutor's office fail to establish effective communication with victims. As a result, victims may miss the deadline for going to court and lose the opportunity to use this mechanism. In 2022, the Coordination Center for Victims and Witnesses Support<sup>180</sup> was established within the Prosecutor General's Office to provide comprehensive information support at all stages of criminal proceedings<sup>181</sup>. However, it is not yet possible to assess the effectiveness of its work, as the centre began to function actively only in early 2024.

Secondly, investigations of crimes committed in the context of armed conflict are quite lengthy. The provisions of the CPC of Ukraine do not limit law enforcement agencies in terms of the timeframe for investigations. At the same time, most proceedings on enforced disappearances do not move forward because the investigating authorities are

175 Article 127 / Criminal Procedure Code of Ukraine // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2078>.

176 Article 128 / Criminal Procedure Code of Ukraine // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2078>.

177 Article 128 / Criminal Procedure Code of Ukraine // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2078>.

178 Article 128 / Criminal Procedure Code of Ukraine // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2078>.

179 Report of the Special Rapporteur on the Independence of Judges and Lawyers // Human Rights Council, A/HRC/8/4, 13.05.2008: <http://daccess-ddsny.un.org/doc/UNDOC/GEN/G08/134/14/PDF/G0813414.pdf?OpenElement>.

180 On the organisation of the work of the prosecutor's office on supporting victims and witnesses of war crimes and other international crimes / Decree of the Prosecutor General // Prosecutor General's Office, No. 103, 11.04.2023: <https://zakon.rada.gov.ua/laws/show/v0103905-23#Text>.

181 Become a part of the team of the Coordination Centre for Victims and Witnesses: recruitment for vacant positions announced // Prosecutor General's Office, 27.06.2023: <https://www.gp.gov.ua/ua/posts/stan-castinoyu-komandi-koordinaciinogo-centru-pidtrimki-poterpilix-i-svidkiv-ogoloseno-nabir-na-vakantni-posadi>.

limited in their ability to collect evidence and do not have access to the place of commission of crimes in the occupied territory. As a result, such investigations can last for years, which only deepens the suffering of not only the victims but also their families.

Thirdly, the prospect of enforcing a court decision to satisfy a civil claim is rather low. In particular, currently 75% of criminal proceedings on violations of the laws and customs of war are conducted *in absentia*. Even if a court passes a verdict and it enters into force, it does not guarantee that the perpetrator will be detained and the judgement will be enforced. In other cases, regarding cases against real defendants, it is sometimes impossible to recover compensation for damage in practice. At present, courts only consider violations committed by representatives of the Russian Federation and their agents who do not have property within the jurisdiction of Ukraine that can be subject to recovery.

Nevertheless, the mechanism of compensation for victims of enforced disappearances committed in the context of the armed conflict on the territory of Ukraine through the filing of a civil claim should not be rejected as completely ineffective. Despite the problems with its implementation within Ukrainian jurisdiction, such a solution may have implications for other justice mechanisms. Discussions are currently ongoing regarding the possibility of obtaining compensation for victims, but no final decisions have been made that would determine the grounds and amounts of such compensation or their calculation.

#### 4.4. Other compensation mechanisms

Since 2014, solutions have been sought to ensure adequate compensation for victims of the armed conflict in Ukraine. In the context of the events in Crimea and certain districts in Donetsk and Luhansk regions, there have been no initiatives that have received support for their implementation since 2014. Therefore, in practice, individual applications by victims to the European Court of Human Rights have become a way to report violations committed by both Ukraine and the RF and to raise the issue of possible compensation for the damage caused. The cases of enforced disappearances covered Articles 2 “Right to Life”, 3 “Prohibition of Torture”, 5 “Right to Liberty and Security of Person” of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>182</sup>. However, after the PACE decision to expel Russia from its membership<sup>183</sup>, it is an open question how the judgements delivered by the Court will be implemented.

After Russia’s full-scale invasion of Ukraine, discussions on finding solutions intensified. The greatest achievement of these discussions was the decision to establish a Register of Damage caused by the Russian Federation’s aggression against Ukraine, in accordance with the UN General Assembly Resolution of November 14, 2022<sup>184</sup>. At the Summit of Heads of State and Government of the Council of Europe, held in May 2023,

182 Convention for the Protection of Human Rights and Fundamental Freedoms // Verkhovna Rada of Ukraine, 04.11.1950: [https://zakon.rada.gov.ua/laws/show/995\\_004#Text](https://zakon.rada.gov.ua/laws/show/995_004#Text).

183 PACE President on Russia’s exclusion from the Council of Europe: ‘sad but necessary’ // PACE, 16.03.2022: <https://pace.coe.int/en/news/8640/pace-president-on-russia-s-exclusion-from-the-council-of-europe-sad-but-necessary->

184 Furtherance of remedy and reparation for aggression against Ukraine / Resolution // UN GA, A/RES/ES-11/5, 14.11.2022: [https://rd4u.coe.int/documents/358068/372244/A\\_RES\\_ES-11\\_5.pdf/079afc90-b392-a0ab-43ad-41409c7e8aa4?t=1708702069853](https://rd4u.coe.int/documents/358068/372244/A_RES_ES-11_5.pdf/079afc90-b392-a0ab-43ad-41409c7e8aa4?t=1708702069853).

the general principles for the establishment of a special compensation mechanism for Ukraine and the statute of the Register were approved<sup>185</sup>.

Among the key points related to the functioning of the Register of Damages in terms of protecting victims of enforced disappearances committed in the context of the armed conflict in Ukraine, the following should be noted:

- The Register will collect facts of violations after February 24, 2022 as a result of the armed aggression of the Russian Federation;
- The violation must be committed within the territory of Ukraine within its internationally recognised borders, including territorial waters;
- Applicants may be, among others, natural persons;
- Applications can be submitted in person or through a representative;
- Applications must relate to the damage, loss or harm caused<sup>186</sup>.

In addition, the following categories of violations were identified as eligibility criteria for the Register: loss of life, torture and sexual violence, as well as bodily harm; forced displacement and internally displaced persons; loss of property and income, as well as other forms of economic loss; damage to critical infrastructure and other state facilities; damage to historical and cultural heritage; damage to the environment and others<sup>187</sup>. Currently, the first category of victims to be included in the register is those whose residential real estate was damaged or destroyed<sup>188</sup>.

Unfortunately, the facts of enforced disappearances have not yet been included in the list of priority categories of violations in the Register of Damage. Given that its work is just being launched and the published list of criteria is not exhaustive, the prospect of including the facts under investigation remains open. At the same time, only the victims of the full-scale Russian invasion of Ukraine have been given a chance to further consider the possibilities of compensation for damage within the compensation mechanism. Instead, the victims of crimes that took place since 2014 in Crimea and Donbas have been ignored.

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185 On the Establishment of an Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine / Resolution // Committee of Ministers of the Council of Europe, CM/Res(2023)3, 12.05.2023: <http://surl.li/rRAYj>. Reykjavik Declaration // 4th Summit of Heads of State and Government of the Council of Europe, 17.05.2023: <http://surl.li/rtzqp>.

186 On the establishment of an Extended Partial Agreement on the Register of Damages Caused by the Aggression of the Russian Federation against Ukraine / Resolution // Committee of Ministers of the Council of Europe, CM/Res(2023)3, 12.05.2023: <http://surl.li/rRAYj>.

187 Applications and submission procedure // Register of damages for Ukraine: <https://rd4u.coe.int/uk/claims-and-process>.

188 The Council is preparing to open the submission of applications to the Register of Damages for Ukraine // 01.03.2024: <https://rd4u.coe.int/uk/-/the-board-prepares-for-the-opening-of-submission-of-claims-to-the-register-of-damage-for-ukraine-1>.

## 5 Victims' expectations of justice processes

During the ten years of the ongoing armed conflict, many issues remain unresolved, both in terms of building relationships with victims of gross human rights violations and the most serious international crimes, and in terms of the state's overall approach to overcoming the consequences of the conflict and developing appropriate domestic policies. The administration of justice, as well as the level of legal protection and social support for victims, must meet their expectations. In particular, the results of national surveys show that 75% of the population consider the fair punishment of war criminals to be a priority in war crimes justice, and 21% emphasise the importance of providing compensation to victims<sup>189</sup>. In addition, 59% of respondents state that they do not know anything about the legal assistance provided by the Ukrainian justice system to victims of war crimes<sup>190</sup>.

The justice process is complicated for victims. Mechanisms and legal procedures are primarily aimed at state bodies and are incomprehensible to victims and witnesses. The peculiarities of legal qualification of acts and their impact on the course of the process, the peculiarities of certain procedural actions, the requirements for the involvement of the victim and multiple interrogations create a risk of re-traumatisation for the person who has experienced or, in the case of families of disappeared persons, continues to experience negative experiences.

The national law of Ukraine enshrines the right of victims to participate in all stages of pre-trial and court proceedings where they are recognised as victims or involved as witnesses. Unfortunately, the approaches of the Ukrainian judiciary are shaped in such a way that the victim's representative in the proceedings is often perceived as a defence lawyer. In practice, the participation of a representative makes it possible to facilitate communication between the judiciary and the victim, to ensure that the victim is effectively informed about the progress of the proceedings.

Nevertheless, victims have the right to representation on a general basis and at their own expense<sup>191</sup>. According to national law, the state establishes benefits for primary and secondary legal aid (including payment of fees for a lawyer, victim's representative, at the pre-trial and trial stages of proceedings) only for a clearly defined category of persons, which does not include persons with the status of victims of enforced disappearance<sup>192</sup>.

189 Legal protection of victims of war crimes committed by Russia // Rating, 23-26.12.2022: [https://ratinggroup.ua/files/ratinggroup/reg\\_files/rg\\_ukraine\\_justice\\_022023.pdf](https://ratinggroup.ua/files/ratinggroup/reg_files/rg_ukraine_justice_022023.pdf).

190 Legal protection of victims of war crimes committed by Russia // Rating, 23-26.12.2022: [https://ratinggroup.ua/files/ratinggroup/reg\\_files/rg\\_ukraine\\_justice\\_022023.pdf](https://ratinggroup.ua/files/ratinggroup/reg_files/rg_ukraine_justice_022023.pdf).

191 Article 56 / Criminal Procedure Code of Ukraine // Verkhovna Rada of Ukraine, No. 4651-VI, 13.04.2012: <https://zakon.rada.gov.ua/laws/show/4651-17/conv#n2078>.

192 Law of Ukraine "On Free Legal Aid" // Verkhovna Rada of Ukraine, No. 3460-VI, 02.06.2011: <https://zakon.rada.gov.ua/laws/show/3460-17#Text>.

Investigating a significant number of facts related to the consequences of the armed conflict on the territory of Ukraine as the most serious international crimes requires the application of relevant standards in practice. Due to the lack of understanding of the application of international law and standards by the participants in the process, there is a tendency to focus on national legislation, which in many respects is not based on victim-centred approaches. For example, multiple interrogations of victims, usually initiated by different pre-trial investigation bodies; frequent changes of investigators and prosecutors in the proceedings, each of who starts communicating with the victim from the very beginning; and the appointment of forensic examinations long after the crime has occurred.

In addition, the quality of national legislation and the incomplete implementation of the Convention's requirements for investigating enforced disappearances creates a risk that some of the crimes committed may not receive proper justice. For example, if enforced disappearances are classified under Articles 115, 146, 146-1, 147 of the CC of Ukraine, which are subject to statutes of limitations, there is a risk that such proceedings will be closed and never be subject to a trial. This problem is most relevant for cases of disappearances in the occupied territory of Crimea, as well as Donetsk and Luhansk regions, since February 2014. The proceedings opened at the beginning of the armed conflict in 2014, which were not qualified under Article 438 of the CC of Ukraine, are to be closed soon, as the time limits for such investigations and prosecution are expiring. This will violate the victims' right to an effective remedy.

Another situation arises when investigating the ongoing detention of civilians by Russian representatives in places of illegal detention without procedural registration of such persons and without providing them with guarantees of effective remedies. The results of the investigation of such facts by Ukrainian law enforcement agencies focus on suspicions and indictments issued in absentia. The quality of the provisions of Ukrainian national legislation and the current practice raises doubts as to whether this is an effective remedy. The perpetrator is free and may not even be aware that criminal proceedings have been opened against him or her and that he or she may be found guilty. In such a situation, victims of enforced disappearances formally receive recognition of their violated rights and possibly a decision on some compensation for the damage caused to them, but this does not guarantee the actual administration of justice and the actual implementation of the court decision: the perpetrator is free, the convicted person does not comply with the decision on compensation, and there are no mechanisms to guarantee the fulfilment of victims' rights.

The overall context of the conditions of the armed conflict and the consideration of cases within the national justice system poses a challenge to the objectivity and impartiality of these processes<sup>193</sup>. For a long time, the level of trust in the justice system has been low among the population of Ukraine. In particular, among the factors that, in the opinion of the surveyed population, affect the effectiveness of the law enforcement system of Ukraine are corruption (59%), public distrust of law enforcement officers (29%), their unprofessionalism (24%) and lengthy investigation of cases (21%). At the same time, 65% of respondents believe that Ukraine's law enforcement system is effective in investigating Russia's war crimes. The judicial system has a similar figure (60%),

193 Research "Justice for international crimes due to aggression of the Russian Federation: the position of judges, veterans, and the request of the population of Ukraine" // Ukraine SAM Coalition, Institute for Peace and common ground, Association for the Development of Judicial Self-Government of Ukraine, Space of Opportunities and Sociological Group Rating, July 2023: <http://surl.li/rtztx>



and the reasons for its inefficiency include corruption (65%), public distrust of the courts (36%), lengthy case consideration (21%) and unprofessionalism of judges (15%)<sup>194</sup>.

The independence and impartiality of investigating authorities, prosecutors and judges is a guarantee that their decisions will comply with international standards, in particular that such decisions will ensure the right to defence of the accused, adversarial proceedings, equal opportunities for the parties to provide evidence to the court. A proper pre-trial investigation and trial minimise the risks of a case being reviewed, appealed and sentences overturned due to improper examination of evidence, bias and incompleteness of the investigation, as well as the establishment of possible violations of human rights by Ukraine in the ECtHR in the future.

In addition to the results of criminal proceedings, after the ratification of the Convention, the collective dimension of the right to establish the truth is actually lost in Ukraine's approaches to investigating the facts of enforced disappearances. Consideration of criminal proceedings allows for the exercise of the individual right to know the truth about the circumstances of an enforced disappearance and the fate of a person, as well as the ability to search, receive and disseminate information for this purpose. Victims have the opportunity to interact in this process by filing petitions (e.g., a petition to get acquainted with the case file or a petition to conduct investigative (search) actions) or to search for the necessary information on their own and then attach it to the criminal proceedings. However, the burden of collecting information in general, researching the situation and identifying problematic issues has remained in the hands of international and non-governmental organisations since 2014.

The measures initiated by the state to collect information in the register and establish various authorised bodies do not take into account the specifics of enforced disappearances. The special needs of victims and their families and the need to develop a mechanism for establishing the whereabouts of missing persons have been ignored since the ratification of the Convention. Since the decision to terminate the bilateral treaties between Ukraine and the Russian Federation, no opportunities have been found to build a dialogue between the parties to address issues related to the protection of victims of the armed conflict. Accordingly, all issues related to the search for and location of missing persons and their fate, their release and return to the territory controlled by Ukraine, and the transfer of remains in cases of death of a missing person are subject to a negotiation process between the parties to the armed conflict, which is influenced by various factors (political, economic, military). This process is lengthy, unstable and in practice demonstrates Russia's disregard for international law. In particular, the Russian Federation does not allow representatives of independent humanitarian and monitoring missions (e.g. ICRC, UN bodies) to enter the territories it occupies, which could mediate between the parties and testify to the real humanitarian situation on the ground, and record the observance of the rights of protected persons in the occupied territories.

Also, the facts of enforced disappearances committed on the territory controlled by Ukraine remain the biggest problematic issue for Ukraine. Without denying the importance of holding the RF accountable for violations committed in the context of the armed conflict, the issue of other gross human rights violations should not be ignored. While various justice mechanisms and their priorities focus on the accountability of the RF and

194 Ukrainian Legal Advisory Group and the Sociological Group Rating conducted a national survey (published at the end of February 2023, conducted at the end of December 2022, 2000 people were interviewed): [https://ratinggroup.ua/research/ukraine/pravoviy\\_zahist\\_postrazhdalih\\_v\\_d\\_vo\\_nnih\\_zlochyn\\_v\\_ros\\_23-26\\_grudnya\\_2022.html](https://ratinggroup.ua/research/ukraine/pravoviy_zahist_postrazhdalih_v_d_vo_nnih_zlochyn_v_ros_23-26_grudnya_2022.html).

its agents, Ukraine, for its part, must guarantee respect for human rights for all persons under its control.

For the victims of enforced disappearances, Ukraine's active position on these issues, discussion of initiatives and proposals aimed at protecting their rights should be a manifestation of the attention that has been lacking throughout the ten years of the armed conflict. This approach will allow the victims' voices to be heard and draw attention to the issue of enforced disappearances.

# Conclusions and recommendations

The ratification of the Convention for the Protection of All Persons from Enforced Disappearance imposed an obligation on Ukraine to bring its national legislation in line with the requirements of international law. Despite the decisions taken, the practice of investigating enforced disappearances at the national level contains problematic issues that need to be resolved. In addition, the challenges posed by the ongoing armed conflict in Ukraine, on the one hand, expand the range of protection guarantees that victims of enforced disappearances need, and on the other hand, highlight the need to implement the provisions of international humanitarian law and international criminal law into Ukrainian legislation.

The results of the study allowed to identify a number of problematic issues related to the protection of victims of enforced disappearances in Ukraine. According to the analysis, the key role in the effectiveness of law enforcement practice is played by the quality of the relevant legislation regulating the legal mechanisms available to victims of enforced disappearances, both in the criminal and socio-legal aspects. With this in mind, the authors of the report have developed a list of recommendations:

1. To amend Article 146-1 of the Criminal Code of Ukraine to allow for the appropriate gravity of the criminal offence and to provide for special circumstances that aggravate and mitigate the punishment when bringing to justice for enforced disappearances;
2. To provide in the provisions of Article 49 of the Criminal Code of Ukraine for the non-application of the statute of limitations for criminal liability for enforced disappearances, which are classified under Article 146-1 of the CC of Ukraine, taking into account the standards of international law;
3. To include crimes against humanity among the acts criminalised under the Criminal Code of Ukraine in accordance with generally accepted norms of international law;
4. To amend the provisions of the Criminal Procedure Code of Ukraine regulating the procedure for conducting a special pre-trial investigation and trial *in absentia* in accordance with the requirements of the right to a fair trial. In particular, they regulate the proper notification of the suspect/accused of criminal proceedings and the possibility of reviewing court decisions;
5. To provide in Article 216 of the Criminal Procedure Code of Ukraine for investigators of the National Police of Ukraine additional jurisdiction over criminal offences under Article 438 of the Criminal Code of Ukraine;
6. To bring the provisions of the Criminal Procedure Code of Ukraine defining the procedure for collecting evidence in line with the requirements of international criminal law in the investigation of the most serious international crimes;
7. To bring in line with the provisions of the Convention the understanding of victims of enforced disappearances under the national legislation of Ukraine;
8. To amend the methodology for conducting DNA examinations within criminal proceedings and to provide for the possibility of using new technological tools and their results.







## Ukraine 5AM Coalition

A coalition of human rights organisations that collect and document war crimes and crimes against humanity committed during the Russian armed aggression in Ukraine

