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# Addressing Enforced Disappearances in Criminal Law: Legal and Procedural Perspectives from Ukraine and Bosnia and Herzegovina

## Abstract

The notion of enforced disappearance has been a serious violation of human right as the right to life and to liberty. The increase in the case of enforced disappearance in the society today and those of Ukraine and Bosnia and Herzegovina is in the increase and this crime is so rampant in these society. The objective and purpose of this paper is to show the extent that the crime of enforced disappearance has affected the population of Ukraine and Bosnia and Herzegovina, and how this crime has affected the criminal proceedings in most cases. In answering the above objective, it will be essential for us to look at an analytical research method, together with normative and comparative legal methods, in observing how the State of Ukraine and Bosnia and Herzegovina has been able to prosecute this offence in consonance with the criminal texts and other legal instruments that these states have enacted in handling the said crime in question. Based on that, one can say that through the State of Ukraine and Bosnia and Herzegovina has the relevant laws criminalizing the above crime, this crime commission continues to be on the increase as the devastating effects are disastrous and the loss of human life enormous. From this set, one is posed

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to find out what can really be done in ensuring that the population of Ukraine and those of Bosnia and Herzegovina should be safe and not deprived of their fundamental right to life, it therefore becomes the responsibility of those in charge of criminal justice should properly enhance the criminal process so that those responsible for these crimes should be prosecuted accordingly.

**KEYWORDS:** criminal proceedings, enforced disappearance, prosecuting, Ukraine, Bosnia and Herzegovina

## 1 | Introduction

As the analysis of numerous publications of various orientations shows, in recent years there has been a rather global and critical social problem in the world, which is even equated with a pandemic – enforced disappearance. And such a comparison is not accidental, since just as a pandemic is spontaneous in nature, negatively affecting human life and health, so enforced disappearance destroys the best stereotypes, causing various kinds of trauma. Unfortunately, both women and men, adolescents, and children suffer from enforced disappearance every day. Being an everyday evil, enforced disappearance constantly attracts the attention of the European community, which has taken significant steps to prevent and prevent this negative phenomenon, because the commission of this crime encroaches on a number of human rights and freedoms that are protected by national and international legislation. Common features of the criminal law policy of many states are the establishment of responsibility for enforced disappearance and detailed regulation of counteraction to this phenomenon in the norms of legislation, which was the result of the implementation of the provisions of the International Convention for the Protection of All Persons from Enforced Disappearance.

## 2 | Enforced disappearance as an international crime

Enforced disappearances are prohibited by the International Convention for the Protection of All Persons from Enforced Disappearance<sup>[1]</sup> (hereinafter referred to as the Convention), however, such facts are not only history, but also a sad and terrible present. In particular, as of 2021, it was recognized that since the beginning of the occupation of the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine) in 2014, 43 cases of enforced disappearances have been documented in Crimea. Most of the enforced disappearances took the form of kidnapping, where among the victims there were 39 men and 4 women.<sup>[2]</sup> Since the beginning of Russia's large-scale invasion of Ukraine, 303 cases of enforced disappearances have been recorded in Kherson region alone<sup>[3]</sup> (data as of 30 August 2022). As of 19 February 2023, the "Tribunal for Putin" initiative had recorded 1,000 cases that can be preliminarily qualified as enforced disappearances. Among the categories of persons who are abducted and illegally detained, former participants in the Anti-Terrorist Operation/Joint Forces Operation, their family members, rescuers, former or current police officers, war invalids; heads and officials of local governments, state authorities; participants and organizers of pro-Ukrainian rallies; journalists, entrepreneurs and media figures; priests, religious leaders; educators; heads of enterprises, farmers.<sup>[4]</sup>

The documented enforced disappearances committed by the Russian Federation are referred to in the Parliamentary Assembly Recommendation 2223 (2022) "Ending enforced disappearances on the territory of the Council of Europe."<sup>[5]</sup>

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<sup>1</sup> International Convention for the Protection of All Persons from Enforced Disappearance. International Convention for the Protection of All Persons from Enforced Disappearance.

<sup>2</sup> Information note. Published on March 31, 2021. Enforced disappearances in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine), temporarily occupied by the Russian Federation. <https://ukraine.un.org/sites/default/files/2021-03/UKR%20BN%20on%20Enforced%20dis%20Crimea%20.pdf>.

<sup>3</sup> Commissioner: Enforced disappearances have become the "calling card" of the Russian Federation. [https://ombudsman.gov.ua/news\\_details/upovnovazhenij-nasilnicki-zniknennya-stali-vizitivkoyu-rf](https://ombudsman.gov.ua/news_details/upovnovazhenij-nasilnicki-zniknennya-stali-vizitivkoyu-rf).

<sup>4</sup> Enforced disappearances on the territory of Ukraine since February 24, 2022. <https://t4pua.org/1428>.

<sup>5</sup> "Ending enforced disappearances on the territory of the Council of Europe" Parliamentary Assembly Recommendation 2223 (2022) (Reply adopted by the Committee of Ministers on 1 March 2023 at the 1458<sup>th</sup> meeting of the Ministers' Deputies).

According to the official statistics of the Prosecutor General's Office, 1,100 criminal proceedings were registered under Article 146-1 of the Criminal Code of Ukraine in 2022<sup>[6]</sup>; 2023<sup>[7]</sup> – 72; 2024<sup>[8]</sup> (January-July) – 20.

Having acceded to the International Convention for the Protection of All Persons from Enforced Disappearance in 2005, Ukraine's international obligation was to criminalize the relevant acts, to investigate them effectively, to conduct trials and to provide international legal assistance in this area. In particular, the Convention defines enforced disappearance as

to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

In the context of the above conventional definition, the key features of enforced disappearance include: 1) deprivation of liberty in any form; 2) state involvement (direct or indirect); 3) concealment of the fact of deprivation of liberty; 4) consequence: leaving a person without legal protection.

The Rome Statute of the International Criminal Court (hereinafter: the ICC RS) defines enforced disappearance as

the means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that the deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.<sup>[9]</sup>

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<sup>6</sup> Unified report on criminal offenses. [https://old.gp.gov.ua/ua/file\\_downloader.html?\\_m=fslib&\\_t=fsfile&\\_c=download&file\\_id=225262](https://old.gp.gov.ua/ua/file_downloader.html?_m=fslib&_t=fsfile&_c=download&file_id=225262).

<sup>7</sup> Unified report on criminal offenses. [https://old.gp.gov.ua/ua/file\\_downloader.html?\\_m=fslib&\\_t=fsfile&\\_c=download&file\\_id=241804](https://old.gp.gov.ua/ua/file_downloader.html?_m=fslib&_t=fsfile&_c=download&file_id=241804).

<sup>8</sup> Unified report on criminal offenses. [https://old.gp.gov.ua/ua/file\\_downloader.html?\\_m=fslib&\\_t=fsfile&\\_c=download&file\\_id=252860](https://old.gp.gov.ua/ua/file_downloader.html?_m=fslib&_t=fsfile&_c=download&file_id=252860).

<sup>9</sup> Rome Statute of the International Criminal Court. <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>.

As can be seen, there are two key differences between the above definitions: first, the special purpose (mental element), and second, the duration of the enforced disappearance, which is spelled out in the ICC RS. As Valentina Y. Tsviki points out, the differences in definitions are explained by the fact that in the Rome Statute the purpose of the definition of enforced disappearance is to determine the circumstances under which the ICC may consider acts of enforced disappearance as crimes against humanity and to prosecute the perpetrators. The nature of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance is different, as it guarantees the broadest possible protection against enforced disappearance, including every case of enforced disappearance, not only those that constitute a crime against humanity.<sup>[10]</sup>

Under the ICC RS, as a crime against humanity (i.e., if there is a relevant contextual element), the crime consists of two major alternative types of conduct — deprivation of liberty (Element 1(a) or Element 2(b)) and withholding of information (Element 1(b) or Element 2(a)). Thus, there are two primary ways in which a perpetrator may be involved in the enforced disappearance that would lead to responsibility for the crime (where the remaining elements are also satisfied):

- A perpetrator who arrested, detained or abducted one or more persons (Element 1(a)), where this conduct was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons (Element 2(a)) which the perpetrator knew would occur in the ordinary course of events (Element 3(a)).
- A perpetrator who refused to acknowledge the arrest, detention, or abduction, or to give information on the fate or whereabouts of such person(s) (Element 1(b)), where this conduct was preceded or accompanied by a deprivation of freedom (Element 2(b)) of which the perpetrator was aware (Element 3(b)).<sup>[11]</sup>

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<sup>10</sup> Valentyna Yaroslavivna Tsviki, *The International Legal Protection of Persons from Enforced Disappearances*. Thesis for Candidate of Sciences in specialty “International Law” (Odessa: National University «Odessa Law Academy», 2018), 199-200.

<sup>11</sup> Benchbook on the Adjudication of International Crimes under Ukrainian Domestic Law. 502. <https://globalrightscpliance.com/wp-content/uploads/2023/10/benchbookplusonplusinternationalpluscrimesplusadjudication.pdf>.

However, there are also common elements: such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization; and such refusal to acknowledge that the deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.<sup>[12]</sup>

When it comes to war crimes, Article 8 of the ICC RS does not include enforced disappearance, although such facts occur during armed conflicts, including in Ukraine, as emphasized above. However, Rule 98 of customary international humanitarian law<sup>[13]</sup> expressly prohibits enforced disappearances.

Thus, enforced disappearance is an international crime, the specifics of the elements of which are set out differently in the Convention and the ICC RS (in terms of the mental element, duration, contextual element); this crime is explicitly recognized as a crime against humanity in the ICC RS and the Convention and is not explicitly recognized as a war crime, although it is committed during armed conflicts. However, Article 147 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War recognizes the unlawful detention of a protected person as a serious violation of international humanitarian law, and such detention may be preceded by enforced disappearance.

### 3 | The crime of enforced disappearance: compliance of Ukrainian law with international instruments and practice

The Criminal Code of Ukraine (hereinafter: the CCU) criminalized enforced disappearances in 2018, recognizing that it is the arrest, detention, abduction or deprivation of liberty of a person in any other form committed by

<sup>12</sup> Benchbook on the Adjudication of International Crimes under Ukrainian Domestic Law, 504. <https://globalrightscompliance.com/wp-content/uploads/2023/10/benchbookpluseonplusinternationalpluscrimesplusadjudication.pdf>.

<sup>13</sup> Rule 98. Enforced Disappearance. <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule98>.

a representative of the state, including a foreign state, followed by a refusal to recognize the fact of such arrest, detention, abduction or deprivation of liberty of a person in any other form or concealment of information about the fate of such a person or his or her whereabouts.<sup>[14]</sup> As can be seen, the disposition does not explicitly mention a political organization or persons acting with the permission, support or consent of the state, nor does it specify the purpose (the absence of a purpose is also typical of the Convention). The crime is placed in the section “Criminal offenses against the will, honor and dignity of a person,” although the Convention explicitly states that the act is a crime against humanity. Most likely, this was done because there was no section on crimes against humanity in the CCU. According to Oleksandr Babikov, “this approach was probably due to the essential characteristics of enforced disappearance in Article 2 of the Convention, which refers to unlawful acts in the form of “abduction” and “deprivation of liberty.” Hence, the direct object of the criminal offense in Article 146-1 of the Criminal Code of Ukraine is the will of a person.”<sup>[15]</sup>

However, the ICC RS requires that the perpetrator intends to deprive the victim of legal protection for a prolonged period of time. This additional requirement (i.e., that the removal from the protection of the law is for a prolonged period of time is unique to the ICC Statute. The Working Group on Enforced Disappearances has recommended that “the definition of enforced disappearance provided for by the ICC Statute be interpreted by the national authorities in line with the more adequate definition provided for in Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.”<sup>[16]</sup>

It is noteworthy that the new Article 442-1 of the CCU provides for the crime of enforced disappearance as a crime against humanity. For the purposes of this article, enforced disappearance is defined as the arrest, detention, abduction or deprivation of liberty of a person in any other form, followed by a refusal to recognize the fact of such arrest, detention, abduction or deprivation of liberty of a person in any other form or concealment of information about the fate of such person or his or her whereabouts,

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<sup>14</sup> The Criminal Code of Ukraine. <https://zakon.rada.gov.ua/laws/show/2341-14#Text>.

<sup>15</sup> Oleksandr Babikov, “Enforced Disappearance: Problematic Issues of Criminal Liability” *Sud.ua*, (2020).

<sup>16</sup> Benchbook on the Adjudication of International Crimes under Ukrainian Domestic Law, 502-503. <https://globalrightscompliance.com/wp-content/uploads/2023/10/benchbookplusonplusinternationalpluscrimesplusadjudication.pdf>.

as well as refusal to recognize the fact of arrest, detention, abduction or deprivation of liberty of a person in any other form or concealment of information about the fate of such person or his or her whereabouts. As you can see, there is no purpose and duration, unlike the ICC RS. Perhaps this is explained by the arguments outlined above.

It should also be noted that Andriy V. Andrushko believes that the mere refusal to recognize the fact of deprivation of liberty or concealment of data on the fate of such a person or his/her whereabouts automatically means leaving the victim without the protection of the law, and therefore there is no need to reproduce the Convention provision verbatim in national legislation. It is also inappropriate to indicate that leaving a person without the protection of the law is a mandatory purpose of the act in question, since the perpetrator of enforced disappearance may pursue other goals, which should not deny the existence of the crime.<sup>[17]</sup> Indeed, in such situations, leaving a person without the protection of the law is not the ultimate goal in itself, but rather an intermediate goal and a de facto means of achieving the goal for which enforced disappearance was used, and there may be many such goals.

Researchers draw attention to the fact that the elements of the crime of “enforced disappearance” under international law and national law have significant differences, with all four elements.<sup>[18]</sup> To date, researchers have formulated detailed comments on each of the elements of this crime,<sup>[19]</sup> which relate to the crime under Article 146-1 of the CCU.

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<sup>17</sup> Andriy V. Andrushko, *Theoretical and Applied Principles of Preventing and Combating Crimes Against the Will, Honor and Dignity of a Person: A Monograph* (Kyiv: Vaite, 2020), 200

<sup>18</sup> Enforced disappearances: national practice vs. international standards, C.18-19. [https://mipl.org.ua/wp-content/uploads/2024/06/znyknennya\\_web.pdf](https://mipl.org.ua/wp-content/uploads/2024/06/znyknennya_web.pdf).

<sup>19</sup> Babikov, „Enforced disappearance: problematic issues of criminal liability”; Oleksandra Marin, “Criminal Liability for Enforced Disappearance in Criminal Law of Ukraine” *Visnyk of the Lviv University. Series Law*, 72 (2021): 122-130; Andrushko, *Theoretical and applied principles of preventing and combating crimes against the will, honor and dignity of a person: a monograph*, 560; S.I. Romashkin, “The object of the criminal offense according to art. 146-1 of the criminal code of Ukraine” *Juridical Scientific and Electronic Journal*, No. 9 (2022): C. 426-429; Oksana Valeriyivna Denisyuk, *Criminal Legal Characteristics of Enforced Disappearance*. Dissertation for Doctor of Philosophy in Specialty “Law” (Kyiv: National Academy of Internal Affairs, 2023); Anna Serhiyivna Politova, “Enforced Disappearance: Is There Room for Improvement?” *Scientific Perspectives*, No. 38 (2023): 515-528; Ihor Andriyovych Onyshkevych, *Criminal Liability for Enforced Disappearance in Ukraine*. Thesis for



The analysis of these studies allows us to cumulatively state the problems regarding the formulation of the norm under Article 146-1 of the CCU: questionable definition of the object of the crime from the standpoint of protected values; qualification in conditions of armed conflict; complex formulation of the disposition, which complicates the qualification of various manifestations of enforced disappearance; problematic formulation of Part 2 in relation to the theory of complicity in the commission of a criminal offense; limitations in formulating the subject of the crime and the problematic nature of the existing formulation; problematic determination of the moment when enforced disappearance is a completed crime; elements of the subjective side (purpose); demarcation with other components of offenses, for example, Articles 146, 147, 148, 149, 438, etc.

And this is also superimposed on different understandings in the Convention and the ICC RS, as well as Article 442-1 of the CCU.

A separate issue is the qualification of enforced disappearance in the context of international armed conflict, since, firstly, this crime is not recognized as a war crime by the ICC RS, secondly, it is specified in the Criminal Code of Ukraine as an ordinary crime and a crime against humanity, and thirdly, if enforced disappearances in number and nature do not have the contextual element of “acts when committed as part of a widespread or systematic attack directed against any civilian population” (Article 7 of the ICC RS), they will not fall under the crime against humanity.

As stated in the analytical report, through the prism of violations of international humanitarian law, the facts of enforced disappearances are perceived as illegal detentions under Article 438 of the CCU.<sup>[20]</sup> The notice of suspicion describes the forcible detention of civilians with refusal to recognize the deprivation of liberty and leaving the person without protection,<sup>[21]</sup> which reproduces the signs of enforced disappearance. The problem of qualification also lies in the fact that due to the provisions

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Doctor of Philosophy in specialty “Law” (Lviv: Lviv State University of Internal Affairs, 2024).

<sup>20</sup> Enforced disappearances: national practice vs. international standards, C.23. [https://mipl.org.ua/wp-content/uploads/2024/06/znyknennya\\_web.pdf](https://mipl.org.ua/wp-content/uploads/2024/06/znyknennya_web.pdf).

<sup>21</sup> Notification of suspicion to Zanevskiy Ya.V. dated 16.05.2024 in criminal proceedings No. 42022232240000025 dated 30.03.2022 under Part 2 of Article 28, Part 1 of Article 438 of the Criminal Code of Ukraine, as well as summonses to Zanevskiy Ya.V. to appear before the investigator on 21.05.2024, 22.05.2024 and 23.05.2024 (in Ukrainian and translated into Russian). [https://kherson.gp.gov.ua/ua/documents.html?\\_m=fslib&\\_t=fsfile&\\_c=download&file\\_id=248617](https://kherson.gp.gov.ua/ua/documents.html?_m=fslib&_t=fsfile&_c=download&file_id=248617).

of Article 438 of the CCU, it is impossible to refer to the norms of customary international humanitarian law, which explicitly prohibit enforced disappearances.

According to the authors of the Standards for the Investigation of War Crimes, the unlawful detention of a protected person (Article 147 of the Geneva Convention (IV)); the taking of prisoners [hostages] (civilians) (Article 147 of the Geneva Convention (IV)); illegal deportation or transfer [displacement] (Article 147 of the Geneva Convention (IV)) as serious violations of international humanitarian law correspond to ordinary crimes under Articles 146, 146-1, 147, 371 of the CCU.<sup>[22]</sup>

If we analyze the verdicts under Article 438 of the Criminal Code of Ukraine, we should recognize the uneven approaches of the court practice. In particular, when the defendants were charged with systematic abduction of persons (and further ill-treatment), the verdict also referred to the provisions of the Convention, certain provisions of the Geneva Conventions and Additional Protocol I. The court stated that in accordance with the requirements of Articles 31, 32 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, it is stipulated that no coercion of a physical or moral nature may be used against protected persons, in particular with a view to obtaining from them or from third parties any information; the use of any measures likely to cause physical suffering or to result in the destruction of protected persons in their power. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the need to treat a protected person, but also to any other ill-treatment by both civilian and military authorities.<sup>[23]</sup>

In another case, where the victim was detained by unidentified military personnel of the armed forces of the Russian Federation in the yard of his house, and then taken with other villagers to a pond, where he was interrogated, subjected to physical violence and threats of death, the wording of the charge did not contain information about enforced disappearance. The court stated that it considered the guilt of the accused PERSON\_3 to be proven in the commission of aiding and abetting other violations of

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<sup>22</sup> Guidelines “Standards for the Investigation of War Crimes. General part”, C. 26. [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). 2023.

<sup>23</sup> Judgment of January 02, 2024, case No. 332/441/23. <https://reyestr.court.gov.ua/Review/116072492>.

the laws and customs of war provided for in international treaties ratified by the Verkhovna Rada of Ukraine, which consisted of torture committed by prior conspiracy by a group of persons.<sup>[24]</sup> This is also typical of some other verdicts where victims were forcibly displaced.<sup>[25]</sup> However, in a situation where the defendants assaulted the victim, forced him into a minibus, tied the victim's hands with a clamp, and put a plastic bag over his head, and then illegally imprisoned him, the wording of the charge included torture and illegal detention, which constitutes a serious violation of the Convention relative to the Protection of Civilian Persons in Time of War, 1949, i.e. a violation of the laws and customs of war provided for in international treaties ratified by the Verkhovna Rada of Ukraine.<sup>[26]</sup>

It should be noted that the Standards for Investigation into Unlawful Deprivation of Liberty as a War Crime (Article 147 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War) consider as a feature: the qualification of unlawful deprivation of liberty of a civilian by a party to an armed conflict as a war crime differs from unlawful detention under national criminal law and necessitates the consideration of the following features: arbitrary detentions are strictly prohibited; detention may constitute a crime in the form of enforced disappearance if the fate of the detained person is unknown and if physical coercion is used during the deprivation of liberty of the person.<sup>[27]</sup>

Thus, enforced disappearance under the CCU has differences in definition in the Convention, the ICC RS (essentially, in all elements of the crime), and Article 442-1 of the CCU, which seems to raise even more questions about the application of the provisions of the CCU in the future, including in the context of international armed conflict. As a war crime, enforced disappearance is an element of unlawful deprivation of liberty, which should be clearly reflected in the verdict, in terms of the actual circumstances.

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<sup>24</sup> Judgment of July 05, 2024, case No. 485/1015/23. <https://reyestr.court.gov.ua/Review/120200633>.

<sup>25</sup> Judgment of November 24, 2022, case No. 729/574/22. <https://reyestr.court.gov.ua/Review/107481395>. Judgment of February 17, 2023, case No. 748/1824/22. <https://reyestr.court.gov.ua/Review/109074116>.

<sup>26</sup> Judgment of December 19, 2022, case No. 758/14216/21. <https://reyestr.court.gov.ua/Review/108048620>.

<sup>27</sup> Guidelines "Standards for the Investigation of War Crimes. Illegal deprivation of liberty and torture," (2023): 56. [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).

Qualification as an ordinary crime does not require taking into account the provisions of the ICC RS due to the absence of a contextual element.

## 4 | Peculiarities of proof in criminal proceedings under Article 146-1 of the Criminal Code of Ukraine

The basis of criminal procedural proof of crimes under Article 146-1 of the Criminal Code of Ukraine is the provisions of the Convention, which contain the state's obligations to investigate. The analysis of the Convention allows us to identify the following provisions that are relevant to the proof:

1. taking appropriate measures to investigate;
2. immediate, thorough and impartial investigation of enforced disappearances;
3. ensuring the presence of a person suspected of enforced disappearance, including by taking that person into custody;
4. application of the principle of *aut dedere aut judicare*;
5. ensuring the right to file a complaint about enforced disappearance;
6. initiation of proceedings without a complaint from the victim (in the form of public prosecution);
7. adequate resources for the investigation;
8. access of the investigating authorities to the place where the disappeared person may be;
9. ensuring the safety of victims and eliminating the risk of obstruction of criminal proceedings (each State Party shall ensure that persons suspected of having committed the crime of enforced disappearance are not able to influence the course of the investigation by means of pressure, intimidation or harassment of the complainant, witnesses, relatives of the disappeared person or their counsel, as well as persons participating in the investigation, in accordance with Article 12 of the Convention).

An effective investigation of enforced disappearances (the Convention specifies a prompt, thorough and impartial investigation) must meet the criteria based on the case law of the ECtHR, including Articles 2 and 3 of

the Convention for the Protection of Human Rights and Fundamental Freedoms. This was pointed out by the ECtHR, there is, however, an important distinction to be drawn in the Court's case-law between the obligation to investigate a suspicious death and the obligation to investigate a suspicious disappearance. A disappearance is a distinct phenomenon, characterised by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred. This situation is very often drawn out over time, prolonging the torment of the victim's relatives. It cannot therefore be said that a disappearance is, simply, an "instantaneous" act or event; the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation. Thus, the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation.

The specificity of enforced disappearances in the context of armed conflict was emphasized by the ECtHR in a number of Chechen cases against Russia. In the case of *Aslakhanova and Others vs. Russia*, the ECtHR noted that

in the context of disappearances that took place in Chechnya and Ingushetia between 1999 and 2006, the Court has previously identified the following common shortcomings of the criminal investigations: delays in the opening of the proceedings and in the taking of essential steps; lengthy periods of inactivity; failure to take vital investigative steps, especially those aimed at the identification and questioning of the military and security officers who could have witnessed or participated in the abduction; failure to involve the military prosecutors even where there was sufficient evidence of the servicemen's involvement in the crimes; inability to trace the vehicles, their provenance and passage through military roadblocks; belated granting of victim status to the relatives; and failure to ensure public scrutiny by informing the next of kin of the important investigative steps and by granting them access to the results of the investigation. In numerous such cases, the Court has noted that the combination of these factors had rendered the criminal investigations ineffective, and thus had rendered the domestic remedies, potentially available to the victims, futile.<sup>[28]</sup>

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<sup>28</sup> *Aslakhanova and Others vs. Russia* (Applications nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10). <https://hudoc.echr.coe.int/#%7B%22tabview%22%3A%22document%22%2C%22itemid%22%3A%22001-115657%22%7D>

For comparison, in the decision *Palić vs. Bosnia and Herzegovina*, the ECtHR did not find a violation of the effectiveness of the investigation of enforced disappearances in the context of armed conflict, since

the domestic authorities made slow progress in the years immediately after the war, they have since made significant efforts to locate and identify persons missing as a consequence of the war and combat the impunity. To start with, Bosnia and Herzegovina has carried out comprehensive vetting of the appointment of police and judiciary [...] Secondly, the domestic Missing Persons Institute was set up pursuant to the Missing Persons Act 2004. It has so far carried out many exhumations and identifications; for example, in seven months of 2009 the Missing Persons Institute identified 883 persons. Thirdly, the creation of the Court of Bosnia and Herzegovina in 2002 and its War Crimes Section in 2005 gave new impetus to domestic prosecutions of war crimes. That court has so far sentenced more than 40 people. Moreover, the number of convictions by the Entity and District courts, which retain jurisdiction over less sensitive cases, has considerably increased. Fourthly, in December 2008 the domestic authorities adopted the National War Crimes Strategy which provides a systematic approach to solving the problem of the large number of war crimes cases. Lastly, domestic authorities contribute to the successful work of the international bodies set up to deal with disappearances and other serious violations of international humanitarian law committed in Bosnia and Herzegovina.<sup>[29]</sup>

It should be noted that the investigation of enforced disappearances in the context of armed conflicts has important specifics (we are talking about enforced disappearances related to it). The analytical study highlights the challenges of collecting evidence of enforced disappearances in the context of armed conflict: lack of access to the territory where the crime was committed by law enforcement agencies; threat to the safety of justice officials; difficulty in communicating with witnesses and victims; emphasis on the use of information from open sources; information collected by non-governmental organizations cannot be used as evidence in proceedings; difficulties in using operational and investigative information.<sup>[30]</sup> As for

<sup>29</sup> *Palić vs. Bosnia and Herzegovina* (Application no. 4704/04). [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-103526%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-103526%22]})

<sup>30</sup> Enforced disappearances: national practice v. international standards, C. 31-32. [https://mipl.org.ua/wp-content/uploads/2024/06/znyknennya\\_web.pdf](https://mipl.org.ua/wp-content/uploads/2024/06/znyknennya_web.pdf).

the penultimate call, it is noted that in practice it can be considered either as hearsay testimony of a representative of a non-governmental organization, but it will be of less value compared to a direct witness; or as contact details of witnesses or victims who need to be interrogated in a procedural manner; or as an appeal from citizens, the information in which should be verified within the framework of the proceedings.<sup>[31]</sup> It is worth noting that the Criminal Procedure Code of Ukraine allows obtaining things, documents, and information from individuals and legal entities in accordance with Article 93, and the category of “value” of evidence is not included in the Criminal Procedure Code of Ukraine. At the same time, it is obvious that measures will be taken to verify the reliability of such data.

Researchers have identified other problems in investigating enforced disappearances in the context of armed conflict: the conditions of the armed conflict itself; the lack of promptness in the actions of law enforcement officers (prompt response to appeals of relatives of missing persons; lack of timely and formulated investigative versions in criminal proceedings); formal nature without taking into account the specifics of the criminal offense); unjustified delays in conducting certain procedural, including investigative (search) actions, primarily with the appointment and conduct of examinations; insufficient diligence during investigative (search) actions; the lack of proper departmental control and prosecutorial supervision.<sup>[32]</sup> In such cases, it is important for victims to obtain information from the Unified Register of Missing Persons under Special Circumstances, which is a condition for their active participation in the investigation as a criterion of effectiveness. The procedural regime of proof under Article 146-1 of the CCU, in terms of thoroughness and appropriateness of the investigation, is conditioned by several important factors.

Firstly, the fact that the CPC of Ukraine, reproducing the provisions of the Convention, does not require a statement from the victims or other persons to initiate criminal proceedings on the fact of enforced disappearance. That is, the proceedings are carried out in the form of public prosecution, which affects the efficiency and thoroughness of the investigation at the initial stage. At the same time, the timeliness of the decision to

<sup>31</sup> Enforced disappearances: national practice vs. international standards, C.32. [https://mipl.org.ua/wp-content/uploads/2024/06/znyknennya\\_web.pdf](https://mipl.org.ua/wp-content/uploads/2024/06/znyknennya_web.pdf).

<sup>32</sup> Dmytro Mirkovets, Volodymyr Atamanchuk, Serhii Marko, Ihor Dubivka, Andriy Matsola, “Conceptual Problems of Investigation and Prevention of Enforced Disappearance of Persons in the Conditions of Armed Aggression” *Cuestiones Políticas*, No. 69 (2021): 68-69.



enter information into the Unified Register of Pre-Trial Investigations into Enforced Disappearances depends on: the time of the report of the criminal act, the completeness and reliability of the primary information received; establishment of the fact of disappearance; prompt and complete collection of the necessary materials.<sup>[33]</sup>

*Secondly*, because different parts of Article 146-1 of the CCU are crimes of different gravity, as reflected in the table below.

Part of Article 146-1 of the Criminal Code of Ukraine	Sanction	Type of the crime
Arrest, detention, abduction or deprivation of liberty of a person in any other form committed by a representative of a state, including a foreign one, followed by a refusal to recognize the fact of such arrest, detention, abduction or deprivation of liberty of a person in any other form or concealment of data on the fate of such a person or his or her whereabouts	shall be punishable by imprisonment for a term of three to five years	NON-GRAVE CRIME
Issuance of an order or instruction to perform the actions referred to in part one of this Article, or failure of a manager who became aware of the actions referred to in part one of this Article to take measures to stop them and to notify the competent authorities of the crime	shall be punishable by imprisonment for a term of five to seven years	GRAVE CRIME

Thus, under Part 1 of Article 146-1 of the CCU, covert investigative (detective) actions are excluded, except for the following: obtaining information from electronic information systems or its parts, access to which is not restricted by its owner, possessor or holder or is not related to overcoming the logical protection system; establishing the location of radio equipment (radio electronic means). Moreover, questions may arise in case of using confidential cooperation, which is also included in the list of covert investigative (detective) actions in the CPC of Ukraine, although the doctrine has a different position on this issue.<sup>[34]</sup> Obviously, such covert operations would make sense in a situation where data on a person's disappearance and whereabouts are being concealed, but they are impossible. It is also impossible to immediately initiate covert investigative (detective) actions in accordance with Article 250 of the CPC of Ukraine, since Part 1

<sup>33</sup> Yaroslav Mykhailovych Voitovych, *Methods of Investigating the Enforced Disappearance of a Person*. Thesis for Doctor of Philosophy in specialty "Law" (Kyiv: National Academy of Internal Affairs, 2021).

<sup>34</sup> Dmytro Talalai Serhii Saltykov, "Confidential Cooperation and Covert (Investigative) Activities" *Entrepreneurship, Economy and Law*, 8 (2020): 285-290.



of Article 146-1 of the CCU generally does not fall under the condition of saving lives and preventing the commission of a grave or especially grave crime, unless a real threat to a person's life is proved, but even here, only the location of radio equipment (radio electronic means) is established. There are no such restrictions under Part 2 of Article 146-1 of the CCU, and it is generally concluded that the following actions are typical: audio and video control of a person (Article 260 of the CPC of Ukraine), removal of information from transport telecommunication networks (Article 263 of the CPC of Ukraine), removal of information from electronic information systems (Article 264 of the CPC of Ukraine), establishment of the location of a radio electronic device (Article 268 of the CPC of Ukraine).<sup>[35]</sup>

Thirdly, there should be active interaction between pre-trial investigation bodies, operational units, NGOs, international institutions, the Main Directorate of Intelligence (hereinafter: MDI) and the Armed Forces of Ukraine (hereinafter: AFU), using the capabilities of electronic registers and the capabilities of international and foreign institutions (including the International Committee of the Red Cross). It is worth noting that the last four subjects are more typical of armed conflict.

During the investigation under Part 1 of Article 146-1 of the CCU, the following investigative (detective) actions should be carried out inspection of the scene; obtaining information from electronic information systems or its part, access to which is not restricted by its owner, possessor or holder or is not related to overcoming the logical protection system; establishing the location of radio equipment (radio electronic means); inspection of premises, things, documents and computer data; interrogation of victims and witnesses; after establishing the location of the person – searches, inspection of the premises (where the victim was held), things, documents and computer data; interrogation of the victim, suspect. These actions have specifics in martial law depending on the investigative situation, which is detailed in the doctrine, and it should be agreed that the primary and one of the most important investigative (detective) actions is to inspect the scene of the event – the place of the alleged abduction. During this procedural action, the last known location of the victim, their place of permanent or temporary residence, a vehicle owned or used by the person, as well as

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<sup>35</sup> Mykola Viktorovych Yeroshkin, *Specifics of Proving in Criminal Proceedings on Enforced Disappearance*. Thesis for Candidate Degree in Law in specialty criminal procedure and criminology; forensic examination; investigative activities (Mariupol: Donetsk Law Institute of the Ministry of Internal Affairs of Ukraine, 2020).

personal belongings and documents are subject to inspection.<sup>[36]</sup> This thesis is also quite relevant for enforced disappearances that are not related to armed conflict. If necessary, an expert should be involved. In particular, we are talking about fingerprinting, genetic identification, examination of telecommunication systems and facilities, forensic psychological examination in the event of the victim's release and identification of suspects to establish the victim's ability to give objective truthful testimony and to study the identity of the perpetrator and the motivation for his or her criminal actions,<sup>[37]</sup> forensic medical, biological, forensic examination of weapons and traces and the circumstances of their use, molecular genetic examination.<sup>[38]</sup>

## 5 | Enforced Disappearance: The State of Affairs in Bosnia and Herzegovina

The aggressive war in Bosnia and Herzegovina (1992–1995)<sup>[39]</sup> resulted with about 95 940 people killed<sup>[40]</sup>, “[...] concentration camps were set up, more than two million human beings were forced to internally displace or to seek refuge abroad, and thousands of women were subjected to rape or other forms of sexual violence [...]”.<sup>[41]</sup> Even thirty years from the establishment of the peace, many families did not manage to achieve the essence of the humanity to be granted, as they are still seeking for remains of

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<sup>36</sup> Yaroslav M. Voitovych, B.S. Kyrychuk, A.S. Bahatko, “Peculiarities of conducting investigative (search) actions during the investigation of the enforced disappearance of a person” *Uzhhorod National University Herald. Series: Law*, No. 81 (2024): 61. <https://doi.org/10.24144/2307-3322.2024.81.3.6>.

<sup>37</sup> Voitovych, *Methods of investigating the enforced disappearance of a person*, 227.

<sup>38</sup> Yeroshkin, *Specifics of proving in criminal proceedings on enforced disappearance*, 195.

<sup>39</sup> It ended with the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement), on 14 December 1995 in Paris.

<sup>40</sup> Mirsad Tokača, *Bosanska knjiga mrtvih: ljudski gubici u Bosni i Hercegovini 1991–1995* (Sarajevo: Istraživačko dokumentacioni centar, 2012), 107.

<sup>41</sup> Gabriella Citroni, “Faraway, So Close: Victims of Enforced Disappearance in Bosnia and Herzegovina and the Rights to Know the Truth, Justice and Reparation” *Droits fondamentaux*, No. 19 (2021): 4.

their beloved ones who have forcibly disappeared, thus still not found their peace. More precisely, according to Arnaut Haseljić<sup>[42]</sup> still about 8000 people are missing, while 24 000 have been located within individual and mass graves.<sup>[43]</sup> “The overwhelming majority of these persons were Muslims who disappeared during the “ethnic cleansing” of eastern Bosnia by Bosnian Serb forces.<sup>[44]</sup>” However, the fact is that many are still aspiring to learn the truth about their beloved ones. Only in the capital of Bosnia and Herzegovina, there are 620 missing persons, 75,81% Bosniaks, 5,48% Croats, 15,59% Serbs, and others.<sup>[45]</sup> Among those rates, 11,2% belongs to 65+ age group, while the majority is from 18-65 years of age.<sup>[46]</sup>

The fact is that the time gap of 30 years and 8000 still missing people bring pessimism among not only the secondary victims that the truth will be established, but also among the state institutions, since that very time flow naturally causes death of perpetrators, members of the victims families, including witnesses. All that seems to make the justice unachievable for them.

Regardless of the remaining number of cases of forcible disappearances, Bosnia and Herzegovina does have legislative and institutional mechanisms that deal with this very important issue. Initially three committees have been established with the aim to create lists of people who have been forcibly disappeared: the State Committee for War Prisoners Exchange (FBiH), the Committee for War Prisoners Exchange (RS) and Committee for War Prisoners Exchange (Croatian Community Herzeg Bosna).<sup>[47]</sup> Next, the prosecutions before the International Tribunal for Former Yugoslavia (ICTY), included indirect investigations over the cases of forcibly disappeared individuals.<sup>[48]</sup>

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<sup>42</sup> Meldijana Arnaut-Haseljić, “Prisilni Nestanci na Području Sarajeva 1992–1995” *Pregled: Časopis Za Društvena Pitanja*, No. 2 (2016): 2.

<sup>43</sup> So far about 750 mass graves are found in Bosnia and Herzegovina. See: [www.aa.org](http://www.aa.org).

<sup>44</sup> Finucane, Brian. “Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War” *The Yale Journal of International Law*, Vol. XXXV (2010): 187.

<sup>45</sup> Ibidem, 10–11.

<sup>46</sup> Ibidem, 13.

<sup>47</sup> Ibidem, 3.

<sup>48</sup> The Tribunal adjourned its work in 2017, having 90 persons convicted. Its statute did not prescribed enforced disappearances as a sole criminal offence. See: [www.icty.org](http://www.icty.org).

In order to have a sustainable mechanism for seeking for missing persons, based on Article 7 of the Law on Missing Persons, in 2005 the Institute for Missing Persons has been established. The Institute for Missing Persons of Bosnia and Herzegovina holds the responsibility to conduct a non-discriminatory search for missing individuals and establish a comprehensive Central Registry of Missing Persons (CEN).

This effort is intended to restore dignity to the victims, provide closure to their families, and support the pursuit of justice while facilitating the reconciliation process. Furthermore, the Institute ensures the protection, proper documentation, and excavation of mass graves, while enabling the involvement of the families of the missing, as well as other relevant stakeholders, in its operations.<sup>[49]</sup>

People or institutions may submit tracing requests to the Institute.

### 5.1. Law on Missing Persons<sup>[50]</sup>

Brought by the Parliamentary Assembly of Bosnia and Herzegovina, in 2004, this Law according to Article 1 “establishes the principles for improving the tracing process, the definition of missing person, the method of managing the central records, realization of social and other rights of family members of missing persons, and other issues related to tracing missing persons from/in Bosnia and Herzegovina.” The Law<sup>[51]</sup> sets the right to know as one of the most important principles that should be obeyed. It concerns “the knowledge of the fate of their missing family members and relatives, their place of residence, or if dead, the circumstances and cause of death and location of burial [...]” The Law defines a missing person as

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<sup>49</sup> [www.ino.ba](http://www.ino.ba). [accessed: 21.02.2025].

<sup>50</sup> The Law is based on: The Convention on the Prevention and Punishment of the Crime of Genocide (1948), The Geneva Conventions I – IV on Protection of War Victims (1949), Additional Protocols I-II (1977), The European Convention on the Protection of Human Rights and Fundamental Freedoms (1950) and 13 Additional Protocols, The General Framework Agreement for Peace in BiH (Annex 7, Articles III and V), The Convention on the Rights of the Child (1989), The International Covenant on Civil and Political Rights and the UN Declaration on the Protection of All Persons from Enforced Disappearance (1992) (article 1).

<sup>51</sup> Article 3.

“a person about whom his family has no information and/or is reported missing on the basis of reliable information as a consequence of the armed conflict that happened on the territory of the former SFRY.”<sup>[52]</sup> This status is terminated on the date of identification.<sup>[53]</sup>

It also sets the responsibilities of authorities in Bosnia and Herzegovina, which consist of, but are not limited in obligation to provide information to families of missing persons and to give all necessary assistance to improve the tracing processes. The responsibility of all levels of authority in Bosnia and Herzegovina is

collecting and verifying all relevant information and facts, quoting all sources that have been checked in the process of establishing such information concerning the disappearance of a missing person, and consulting all official documents and materials within their respective institutions and submitting a written notification of the documents consulted and the findings to both the claimant and relevant institutions in charge of tracing missing persons.<sup>[54]</sup>

In the Chapter IV, the Law sets the rights of family members of missing persons, such are the prohibition of discrimination, right to financial support, including strict criteria for that support, rate (on monthly basis 25% of the average salary), termination of the support, establishment of the Fund for Missing Persons. Other rights are also set (article 18), such are burials/funerals, priority to the right to education and employment of children of missing persons, health protection, requesting marking of the place of burial and exhumation.

One of the most important elements prescribed by this law is establishing the Central Records.<sup>[55]</sup> That Record would consist of the records that are kept at local or entity levels, by associations of families of missing persons and other associations, Red Cross in BiH, and many others.<sup>[56]</sup> The Central Record includes “relevant information concerning the identity of a missing

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<sup>52</sup> This Law applies to the missing persons who disappeared from period 30/04/1991-14/02/1996.

<sup>53</sup> Article 9 (1).

<sup>54</sup> Article 5 (2) Law on Missing Persons.

<sup>55</sup> Article 21 of the Law on Missing Persons.

<sup>56</sup> Ibidem.

person, place and circumstances of disappearance, and other information important for tracing and determining the identity of a missing person.”<sup>[57]</sup>

## 5.2. Criminal Code

Another part of the legislative framework relevant to the forcibly disappeared persons is the Criminal Code of Bosnia and Herzegovina. The particular constitutional organization of the State, sets division of jurisdictions over criminal law issues among the State, entities and District, which resulted with having four positive criminal codes in Bosnia and Herzegovina: Criminal Code of Bosnia and Herzegovina, Criminal Code of Federation of Bosnia and Herzegovina, Criminal Code of Republika Srpska and Criminal Code of Brčko District BH. However, only the Criminal Code of Bosnia and Herzegovina prescribes a Chapter named Crimes against Humanity and Values Set by the International Law. It prescribes criminal offence Crimes against Humanity (art. 172), whose one of the acts is forcible disappearance (i), punishable with the heaviest sanctions: minimum ten years of imprisonment or long term imprisonment (20-45).<sup>[58]</sup> The same article provides definition of the forcible disappearance, and sets it as „the arrest, detention, or abduction of a person, by or with the permission, support, or consent of the state or a political organization, with the refusal to acknowledge such deprivation of liberty or to provide information about

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<sup>57</sup> Article 21 (3) of the Law on Missing Persons.

<sup>58</sup> One of the notable cases prosecuted for forced disappearances as an act is the case Mitar Rašević and Savo Todović who were responsible for guarding the KP Dom prison in Foča between 1992 and 1994, a facility used to detain Bosnian Muslim civilians during the ethnic cleansing campaign in the region controlled by the Republika Srpska. Between 1992 and 1994, at least two hundred detainees were taken from the camp under the guise of prisoner exchanges or fruit picking, but were instead transferred to the Bosnian Serb military and military police, where they were subsequently killed. Despite efforts by the detainees' families to locate the missing individuals, the defendants and Bosnian Serb authorities provided no information on their fates, and their remains were later found in mass graves in the Foča area. See: Finucane, “Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War”. More information on individualization of sanctions see in Rokaj, I., & Konini, I. (2024). *A comparative prospective on the individualization of criminal sentencing*. *Law & Social Bonds*, 6(54). <https://doi.org/10.36128/PRIW.VI54.859>.

the fate or whereabouts of such persons, with the intention of removing them from legal protection for an extended period of time.”<sup>[59]</sup>

Apart of prescribing the forcible disappearance as an act of the Crimes against Humanity, the Criminal Code prescribes it also as a sole criminal offence, named Forcible Disappearance. It is prescribed with Article 190a. The criminal offence is consists of three forms.

In the basic form,<sup>[60]</sup> it the acts consist of ordering or the instigating, or with the explicit or tacit consent, “arresting, detaining, or otherwise depriving a person of their freedom of movement and refusing to acknowledge that the person has been deprived of their liberty or concealing information about the person’s fate or location, thereby placing them outside the protection of the law.” The acts of this criminal offence are set as alternatives. The perpetrator may be public official in the institutions of Bosnia and Herzegovina or any other person acting in the capacity of a public official in the institutions of Bosnia and Herzegovina. Passive subject may be any person, regardless of all potential discriminatory characteristics such as ethnics, nationality, gender, age, etc. Object of protection is humanity. Intent is a punishable type of guilt. The sanction prescribed for this criminal offence is imprisonment of at least eight years (special minimum is eight and general maximum is twenty years).

The second form refers to the same potential perpetrator, who ordered or instigated or gave explicit consent or knew and tacitly agreed with the commission of the criminal act prescribed in the first paragraph.

The third form of the criminal offence, prescribed in Article 190a (3) sets the command responsibility, and prescribes it as follows:

Whoever, as a superior, knew or consciously ignored the information that their subordinate had committed the criminal act described in paragraph (1) of this article or was about to commit it, and was responsible and had control over the actions related to the commission of the criminal act described in paragraph (1) of this article, and failed to take all necessary and reasonable measures within their power to prevent or hinder the commission of the criminal act described in paragraph (1) of this article or to submit the matter to state authorities for investigation and prosecution [...]

<sup>59</sup> Article 172 (2) h of the Criminal Code of Bosnia and Herzegovina.

<sup>60</sup> Article 190a (1) of the Criminal Code of Bosnia and Herzegovina.

It is visible that this form is setting *delicti omissi*, and incriminates failing to take all necessary and reasonable measures within their power to prevent or hinder the commission of the basic form of the criminal offence, although they knew it or consciously ignored it. The sanction prescribed is also at least eight years.

Final provision of this article (4), sets facultative legal basics for mitigating the punishment for the case that person committed the act of this criminal offence per order of the government or the superior. However, should a person refuse to commit the order act, that would release them of the punishment (obligatory legal basis for release of punishment. In this way the legislator tends to motivate potential perpetrators to refusal (thus prevention).

c) Recommendations of the Committee for Enforced Disappearance (2017) to the State of Bosnia and Herzegovina, together with naming a number of satisfying efforts of the State to deal with the Enforced Disappearances, such as incrimination of the Enforced Disappearance as a sole criminal offence, establishing the Missing Persons Institute, and overall, for solving 2/3 of the missing persons reports,<sup>[61]</sup> the Committee at the same time offers recommendations in order to improve the processes. Some of them are: providing the Prosecutorial Office of Bosnia and Herzegovina and the Institute with the financial and human resources to investigate/ work on the cases related to missing persons; expediting the processes of verification of the data in the Central Record of the Missing Persons, providing psychological help to families, establishing the State Strategy, preventing amnesty or pardoning for this criminal offence, and many others.

## 6 | Conclusion

The existing differences between the definition of enforced disappearance under Article 146-1 of the CCU, the Convention, the ICC RS (in fact, all elements of the crime), and Article 442-1 of the CCU will cause problems in the application of the provisions of the Criminal Code of Ukraine in the context of international armed conflict. If enforced disappearance is

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<sup>61</sup> "Concluding Remarks on the Report Submitted by Bosnia and Herzegovina, Article 29 (1) of the Convention." Committee for Enforced Dissapearance, 2017.



an element of a war crime as illegal deprivation of liberty, this should be clearly reflected in the verdict in terms of the actual circumstances<sup>[62]</sup>.

The investigation of enforced disappearances under Part 1 of Article 146-1 of the CCU has limitations that affect its effectiveness, namely, the conduct of the entire complex of covert investigative (search) actions and the immediate start of their conduct in accordance with Article 250 of the CPC of Ukraine. These restrictions should be eliminated by clarifying the sanction of this part of the article. There are no such restrictions under Part 2 of Article 146-1 of the CCU. Therefore, the effectiveness of the investigation under Part 2 of Article 146-1 of the CCU shifts to the proper efforts of investigators and prosecutors to establish the facts and circumstances of enforced disappearance, including the organization of cooperation between operational units, NGOs, international institutions, the Ministry of Defense of Ukraine, the Main Intelligence Directorate, the Armed Forces of Ukraine. However, *prima facie*, one can argue that there are problems with such investigations, given that the Unified State Register of Court Decisions does not contain any verdicts under this Article.

The state of affairs in Bosnia and Herzegovina confirms that the forcible disappearance is not part of criminal law history, but the criminal offence that had been perpetrated in the recent war in Bosnia and Herzegovina, whose consequences are noted by the families of the missing persons. Although there are legislative and institutional mechanisms to tracing the missing persons, and preventing the forcible disappearance to be committed, still there are about 8000 cases of missing persons being unsolved, and with the flow of time, the chances to solve them are decreasing. The legislative, criminal law framework follows the international standards in prescription of forcible disappearance as an act of war crimes against humanity, but also as a sole criminal offence, setting heavy punishments for their perpetrators with the intention to prevent future events in special and general level. Bosnia and Herzegovina regulated the tracing processes through *lex specialis* Law on Missing Persons, as well established the Institute for Missing Persons. The fact that 24000 cases are managed with these mechanisms, sets Bosnia and Herzegovina as a positive example dealing with this critical criminal offence and the tracing processes that may be used in Ukraine as well.

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<sup>62</sup> See Łukasz Kułaga, „Inicjatywa dotycząca specjalnego trybunału ds. zbrodni agresji przeciwko Ukrainie – wyzwania i perspektywy” *Prawo i Więź*, no. 4 (2022): 72-75. <https://doi.org/10.36128/priw.vi42.538>.

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