

Submission to the Committee on Enforced Disappearances: UKRAINE¹

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Ukrainian Legal Advisory Group (ULAG)², Human Rights Center ZMINA (ZMINA)³ and independent legal consultant Carolyn Edgerton⁴ provide this information to the Committee on Enforced Disappearances to assist in its preparation for consideration of the report of Ukraine (provided pursuant to Article 29 (1) of the Convention), scheduled to take place during the Committee's 27th Session, scheduled to take place from 23 September - 04 October 2024.

General observations

Ukrainian law enforcement agencies have been recording cases of disappearance and detention of civilians in their territory under Russian control since the 2014 occupation of the Crimean Peninsula⁵ and the outbreak of war in Donbas⁶. Following Russia's 24 February 2022 full-scale invasion of our country, these violations have continued in these and other areas. In the occupied territories, human rights activists and humanitarian volunteers; persons with military experience or who participated in operations in eastern Ukraine; those who serve in local government or law enforcement agencies, even those who only speak Ukrainian (among many others) are all at risk of disappearance⁷.

At the same time, there is a risk of enforced disappearances on the territory controlled by Ukraine, which is linked, in particular, to the targeting of persons who have allegedly cooperated with the Russian occupation authorities or served as representatives of the self-proclaimed 'Donetsk People's Republic' or the 'Luhansk People's Republic' as well as to the criminalisation of collaboration

¹ This submission is based on findings, presented in report "Enforced Disappearances: National Practice v. International Standards", prepared by the authors, who are part of the member organisations of Ukraine 5AM Coalition (ULAG, Zmina, MIHR): <https://ulag.org.ua/reports-and-materials/nasilnicki-zniknennya-nacionalna-praktika-v-miznarodni-standarti>.

² ULAG is a Ukrainian NGO focusing on conflict-related justice and protection of human rights. Most of the ULAG team have been involved in this field since 2014, continuously mastering our knowledge and practical skills in the realm of international criminal and international humanitarian law, in Ukraine and abroad. We do strategic litigation in domestic, foreign and international jurisdictions, legal analysis, advocacy, training and consultancy, as well as documentation of international crimes and development accountability infrastructure. Through these activities we identify, craft and implement solutions aimed at strengthening the capacity of the domestic justice system and improving its justice architecture in the long term. ULAG is a part of the Ukraine 5 AM Coalition.

³ The Human Rights Center ZMINA (ZMINA) has been working in the field of human rights protection in Ukraine since 2012. After the beginning of the large-scale Russian aggression against Ukraine ZMINA together with 38 other NGOs launched the Ukraine 5AM Coalition dealing with the documentation of war crimes and aiming at protecting victims of armed Russian aggression in Ukraine and bringing to justice top leadership of the Russian Federation and direct perpetrators of war crimes. ZMINA is based in Kyiv.

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⁵ Enforced disappearances in the autonomous republic of Crimea and the city of Sevastopol, Ukraine, temporarily occupied by the Russian Federation / UN HRMMU, 31 March 2021: <https://ukraine.un.org/en/123652-enforced-disappearances-autonomous-republic-crimea-and-city-sevastopol-ukraine-temporarily>.

⁶ Missing persons and victims of enforced disappearance in Europe / Council of Europe Commissioner for Human Rights, 2022, <https://rm.coe.int/missing-persons-and-victims-of-enforced-disappearance-in-europe-issue-/16806daa1c>.

⁷ Enforced disappearances and arbitrary detentions of active citizens during the full-scale armed aggression by Russia against Ukraine (February 2022 — June 2023) / N. Okhotnikova, O. Hnatiuk, B. Petruniok; edited by O. Sinyuk // Human Rights Centre ZMINA, 2023.: https://zmina.ua/wp-content/uploads/sites/2/2023/07/lost_people_eng_web_03.pdf

activities after 24 February 2022⁸. Initially, this risk is connected to low quality of national legislation, which defines authority of law enforcement agencies of Ukraine in time of threat for national security during anti-terrorist operation and martial law regime⁹.

Article 24 of the Convention: a definition of victim

Article 55 of the Criminal Procedural Code of Ukraine provides for and regulates the legal status of a victim in criminal proceedings. This concept is universal for all crimes¹⁰. At the same time, in the context of providing social protection, Ukrainian legislation envisages the following statuses that cover victims of enforced disappearances: a person deprived of liberty as a result of the armed aggression of the Russian Federation against Ukraine¹¹; family members of persons deprived of liberty as a result of the armed aggression of the Russian Federation against Ukraine¹²; persons who went missing under special circumstances¹³; a hostage,¹⁴ or a political prisoner of the Kremlin¹⁵.

None of the above fully covers victims of enforced disappearances within the meaning of the Convention. Family members of the disappeared are excluded from protection.

In addition, the provisions of the Law of Ukraine "On the Legal Status of Missing Persons", which entered into force on 2 August 2018 (the title of the law was changed to the Law "On the Legal Status of Persons Missing under Special Circumstances")¹⁶, do not cover cases of enforced disappearance committed by state agents of Ukraine, both in the context of the armed conflict (e.g., against persons suspected of collaboration or treason) and beyond.

⁸ "You Don't Exist": Arbitrary Detentions, Enforced Disappearances, and Torture in Eastern Ukraine / Human Rights Watch, 2016: <https://www.hrw.org/report/2016/07/21/you-dont-exist/arbitrary-detentions-enforced-disappearances-and-torture-eastern>. REPORT ON THE HUMAN RIGHTS SITUATION IN UKRAINE / UN the Office of the High Commissioner for Human Rights, 24 March 2023: <https://www.ohchr.org/sites/default/files/documents/countries/ukraine/2023/23-03-24-Ukraine-35th-periodic-report-ENG.pdf>.

⁹ 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 for Preventive Detention in the Area of Anti-Terrorist Operation of Persons Involved in Terrorist Activities and the Special Regime of Pre-trial Investigation in the Conditions of Martial Law, State of Emergency or in the Area of Anti-Terrorist Operation // Order 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>.

¹⁰ 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>.

¹¹ Article 2 / Law of Ukraine "On Social and Legal Protection of Persons in respect of whom the fact of deprivation of personal liberty as a result of armed aggression against Ukraine and their family members has been established" // Verkhovna Rada of Ukraine, no. 2010-IX, 26.01.2022: <https://zakon.rada.gov.ua/laws/show/2010-20#Text>.

¹² Part 3 of Article 2 / Law of Ukraine "On Social and Legal Protection of Persons in respect of whom the fact of deprivation of personal liberty as a result of armed aggression against Ukraine and their family members has been established" // Verkhovna Rada of Ukraine, no. 2010-IX, 26.01.2022: <https://zakon.rada.gov.ua/laws/show/2010-20#Text>.

¹³ Article 1 / Law of Ukraine 'On the Legal Status of Persons Missing under Special Circumstances' // Verkhovna Rada of Ukraine, no. 2505-VIII, 12.07.2018: <https://zakon.rada.gov.ua/laws/show/2505-19#top>.

¹⁴ 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. Article 75(2)(c) / Protocol Additional 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.

¹⁵ 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>.

¹⁶ 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>.

¹⁷ Law of Ukraine 'On the Legal Status of Persons Missing under Special Circumstances' // Verkhovna Rada of Ukraine, no. 2505-VIII, 12.07.2018: <https://zakon.rada.gov.ua/laws/show/2505-19#Text>.

Articles 1-3, 12, 24 of the Convention: measures taken by the State party to guarantee the application of the Convention in areas not under its control

Despite the adoption of the Law "On the Legal Status of Persons Missing Under Special Circumstances", the activities of law enforcement agencies within formal criminal proceedings remain the only mechanism through which information about the fate of victims of enforced disappearance can be sought. These are limited to the ordering and conducting of investigative actions after receiving a notification of the criminal offence and opening of criminal proceeding.

The involvement of different law enforcement agencies in investigations is directly determined by the legal qualification of the offence. If the facts of enforced disappearance are qualified under Article 146-1 of the Criminal Code of Ukraine, the investigators of the National Police are responsible for conducting the investigation. If such acts are classified under Article 438 of the Criminal Code as violations of the laws and customs of war, the only authorised body for such investigations is the Security Service of Ukraine (although in practice investigators from the National Police and the State Bureau of Investigation also conduct these investigations).¹⁷

The investigation of enforced disappearances in the context of the Russia's war on Ukraine is complex. The collecting information as to the fate of victims is impacted by such things as: lack of access for law enforcement agencies to the territory on which the crime was committed (or where the victim was last seen alive); difficulty in (safely) communicating with victims and witnesses located in the occupied territories; the issue of security due to systemic shelling attacks by the Russian Federation (including those targeting investigation institutions and actors, by such things as "double-tappin" crime scenes, etc.), and the fact that information from open sources does not have the status of evidence in national courts. Some of these problems are related to the quality of national legislation and require amendments to existing provisions, in particular the Criminal Procedural Code of Ukraine.

At the same time, the National Information Bureau¹⁸, the Ukrainian Parliament Commissioner for Human Rights, the Working Group on Civilian Hostages at the Coordination Headquarters for the Treatment of Prisoners of War, and the Ministry of Internal Affairs¹⁹ all share certain competencies (sometimes overlapping) in various aspects of protection against enforced disappearances. Coordinating the work of these four bodies remains a challenge. For example, each of these bodies maintains databases with lists of victims, though they are not synchronised with each other and the number of people listed does not match. Coordination of their work needs to be improved and made more effective.

Articles 2, 4-5, 7 of the Convention: the offence of enforced disappearance is considered a minor crime

After Article 146-1 was incorporated into the Criminal Code of Ukraine, its application in practice did not become widespread. It was only after the full-scale invasion of Ukraine by the Russian Federation that the number of recorded offences with this qualification increased (69 proceedings

¹⁷ Article 216 / 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>.

¹⁸ Order 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, 17 March 2022.: <https://zakon.rada.gov.ua/laws/show/228-2022-%D1%80#Text>

¹⁹ 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 Question of Determining the Powers of Certain Bodies in the Field of Compliance with International Humanitarian Law on the Territory of Ukraine" // Verkhovna Rada of Ukraine, no. 975 of 12 September 2023: <https://zakon.rada.gov.ua/laws/show/975-2023-%D0%BF#Text>

were registered in 2020, 56 in 2021, 1120 in 2022, and 72 in 2023²⁰). But at the same time, such classification of offences has become rather an exception.

This is because the enforced disappearances in the context of the armed conflict on the territory of Ukraine are only registered as illegal detention and deprivation of liberty, violations of the laws and customs of war under Article 438 of the Criminal Code of Ukraine. The facts of the crime, the harms it causes to the victim, their families and others, its continuing nature are therefore not taken into account in criminal proceedings.

The wording of Article 438 of the Criminal Code of Ukraine, referring to “[...] Use of methods of the warfare prohibited by international instruments, or any other violations of rules of the warfare stipulated by international treaties, ratified by the Verkhovna Rada of Ukraine[...]” allows for the qualification of various acts as violations of the laws and customs of war. The crime of enforced disappearance often involves conduct which violates several other international humanitarian law prohibitions, such as torture and inhumane treatment, killing (and summary executions).

However, in Ukraine, there is a gap in legal certainty at the practical level that would allow the judiciary to properly assess the facts of enforced disappearances. Despite the fact that international criminal law also classifies enforced disappearance as a crime against humanity, the Criminal Code of Ukraine does not cover this type of crime in general. Although 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, was adopted in 2021, it was never signed by the President²¹. 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 addresses the implementation of the most serious international crimes, was registered, but has not yet been considered²².

Article 6 of the Convention: criminal responsibility of superiors

The Criminal Code of Ukraine offers limited possibilities to hold high-ranking officials accountable for enforced disappearances. Part 2 of Article 146-1 of the CCU provides for the criminal liability of individuals for issuing an order or directive to commit enforced disappearance and of superiors for failing to take appropriate measures when a subordinate commits the crime. While this may be argued to represent the principle of command responsibility, the Criminal Code of Ukraine does not contain the principle of command responsibility in its general articles (Section V). Until this is implemented, Part 2 of Article 146-1 can never be used. Instead, in the practice of investigations, the rules of complicity (Article 27 of the Criminal Code of Ukraine²³) or joint commission of a crime (Article 28 of the Criminal Code of Ukraine²⁴), are actively applied, replacing the principle of command responsibility.

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

²⁰ On registered criminal offences and results of their pre-trial investigation // Office of the Prosecutor General: <https://gp.gov.ua/ua/posts/pro-zareyestrovani-kriminalni-pravoporushennya-ta-rezultati-yih-dosudovogo-rozsliduvannya-2>.

²¹ 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.

²² 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>.

²³ Article 27 / Criminal Code of Ukraine // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

²⁴ Article 28 / Criminal Code of Ukraine // Verkhovna Rada of Ukraine, No. 2341-III, 05.04.2001: <https://zakon.rada.gov.ua/laws/show/2341-14/ed20240101#n313>.

commission of a crime, the general rules of complicity or joint commission of a crime lose the characteristics of the subject that indicate the nature of gross human rights violations and the gravity of the act. 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 left out of the investigation and criminal liability.

Enforced disappearance is one of the core international crimes, yet the legislative gap in the Criminal Code of Ukraine which is described above means victims will never be able to have those most responsible for the violations held accountable. Therefore, amendments to the general part of the Criminal Code of Ukraine are required in order for the State to fully, and meaningfully comply with its Convention-related obligations.

While there were initiatives to amend the Criminal Code of Ukraine to introduce command responsibility under draft laws No. 2689 and No. 7290, they were not supported by the parliament. Although customary international law is not directly covered by the disposition of Article 438 of the Criminal Code of Ukraine, this does not hinder the practical application of customary rules for the interpretation of treaties, including with regard to the responsibility of commanders²⁵.

In addition, the amendments to Article 146-1 of the Criminal Code of Ukraine as of 01.12.2022 shifted the focus from the formulation of the body of the crime to the actions of representatives of a foreign state, namely the Russian Federation and its agents, on the territory of Ukraine²⁶. This approach almost completely ignores the risk of enforced disappearances committed by agents of Ukraine, which has increased significantly due to the ongoing armed conflict.

Article 8 of the Convention: statute of limitations

Article 146-1 of the Criminal Code of Ukraine combines several types of crimes: the act under part 1 of the Article is a minor offence, while the act under part 2 of the Article is a grave offence. Therefore, the statute of limitations for the acts under part 1 of the Article amounts to 5 years, while those under part 2 of the Article may be investigated for 10 years. At the same time, those acts that are classified under Article 438 of the Criminal Code of Ukraine are not limited by the statute of limitations.

In practice, in the context of the armed conflict, the qualification of enforced disappearances under Article 146-1 of the Criminal Code of Ukraine may give rise to a number of challenges. Firstly, the limitation of the statute of limitations will require prompt investigation. Given that enforced disappearances is a continuing crime, the statute of limitations may force the closure of the case before the crime is concluded, 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

²⁵ According to part 1 of Article 15 of the Law of Ukraine "On International Treaties of Ukraine" Ukraine has confirmed its commitment to strictly adhere to the universally 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 universally 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.// Paragraph 15 of the Resolution of the Plenum of the High Specialised Court of Ukraine for Civil and Criminal Cases of 19.12.2014 No. 13 "On the Application of International Treaties of Ukraine by the Courts in the Delivery of Justice": <https://zakon.rada.gov.ua/laws/show/v0013740-14#Text>.

²⁶ Law of Ukraine "On Amendments to the Criminal Code of Ukraine on Increasing Liability for Torture" // Verkhovna Rada of Ukraine, № 2812-IX, 01.12.2022: <https://zakon.rada.gov.ua/laws/show/2812-20#n22>.

disappearances under Article 146-1 of the Criminal Code of Ukraine becomes inappropriate due to the short statute of limitations provided for in this article.

Thirdly, in order to avoid limitation of the statute of limitations, the most practical solution for law enforcement agencies is to qualify enforced disappearances under Article 438 of the Criminal Code of Ukraine and to investigate them through the prism of violations of international humanitarian law as arbitrary detention. As noted above, this approach does not address the gravity of the crime, (among others).

Meanwhile, the domestic legislation of Ukraine does not contain provisions on crimes against humanity, limiting its ability to adequately address systematic cases that have been recorded thus far over the 10 years of the ongoing armed conflict. The only available mechanisms for Ukraine to assess the facts of enforced disappearance as crimes against humanity are through the International Criminal Court (recognised as a court of “last resort”) and investigations by separate states under the principle of universal jurisdiction. This may deprive victims of their right to an effective remedy, under Article 8 of the Convention.

Articles 11-12, 24 of the Convention: right to fair trial

Given that justice regarding the consequences of the armed conflict on the territory of Ukraine is mainly focused on representatives of the Russian Federation 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 Russian occupied and controlled or in the Russian Federation. At the same time, victims are left without 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.

The Criminal Procedural Code of Ukraine provides for a special procedure for such proceedings, but its certain aspects contradict the requirements of the right to a fair trial. Firstly, ensuring proper notification about the process. Publication of notices on the official websites of the relevant state bodies create a risk not only for proper notification of the suspect/accused, but also for the those disappeared, as their data is made public. Law enforcement agencies also inform suspects by sending messages to their phone numbers or those of their relatives, through personal accounts on social media, etc. But in practice, these tools are not sufficient to guarantee that a person is notified. Secondly, ensuring the right to a retrial. Such a provision is not provided for in the procedure for conducting a special trial in absentia, which creates a risk of violating the rights of the accused.