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Historical background and key elements of crime accordingly to International Convention for the Protection of all Persons from Enforced Disappearance

Історичні передумови прийняття та основні елементи міжнародного злочину відповідно до Міжнародної Конвенції про захист усіх осіб від насильницьких зникнень

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Abstract

Today, the act of enforced disappearance is represented as the most serious violations of people's rights. Enforced disappearances are particularly common in countries where domestic conflicts occur. With the essential objective of stopping and preventing the practice of international and national enforced disappearances, most countries since the 1950s had begun to discuss international and regional tools for such interference. The crucial measure to prevent enforced disappearance was to sign the Convention for the Protection of All Persons from Enforced Disappearance at the international level, which represented and established an absolute right of person not to be subjected to violent disappearance. This article will describe the main ideas of the 2006 Convention together with the key description of the crime, will analyze some problems of practical application of the Convention, and last, but not least, will discuss the prospects for the implementation of the 2006 Convention. To achieve this purpose, were used: Dialectical, historical, formal, logical, deductive, statistical, hermeneutical, comparative and logical-legal methods.

Key words: abduction, Enforced disappearance, legal protection, international convention 2006, international human rights law, national ratification of Convention, state crime.

Анотація

Сьогодні насильницьке зникнення є одним із найжорстокіших порушень прав людини. Насильницькі зникнення особливо поширені в країнах, де виникають внутрішньодержавні конфлікти. Маючи єдину мету зупинити та запобігти практиці насильницьких зникнень більшість країн починаючи з 1950-х обговорювали міжнародні та регіональні механізми міжнародно-правового захисту осіб. Найважливішим кроком для запобігання насильницьким зникненням було підписання Міжнародної конвенції про захист усіх осіб від насильницького зникнення, яка запровадила нове абсолютне право людини не піддаватися насильницьким зникненням. У статті проаналізовано основні положення Конвенції 2006 року та особливості її практичного виконання та питання подальшої імплементації. Метою статті є дослідження міжнародно-правового документу – Конвенції 2006 р. та здійснено аналіз основних зобов'язань держав відповідно до Міжнародної конвенції про захист усіх осіб від насильницького зникнення стосовно подальшої ратифікації документу та перспектив розвитку. Для досягнення цієї мети були використані діалектичний, історичний, формальний, логічний, метод дедукції, статистичний, герменевтичний, порівняльно-правовий та логіко-правовий методи.

Ключові слова: зникнення, насильницьке зникнення, торгівля людьми, правовий захист, міжнародна конвенція 2006, міжнародне право людини, національна ратифікація конвенції, злочин держави.

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Introduction

For more than five decades, enforced disappearance has been a sign of state terror and proof of lack of justice. According to this horrible practice, a person can be arrested or stolen and then no further information about her whereabouts is known. All the traces of the victim were deliberately destroyed: there is neither a missing note, no information, no body. Relatives and society as a whole receive psychological trauma and material damage, and criminals can stay unpunished.

Talking about the term "enforced disappearance" refers to unlawful acts by third parties, who have caused the involuntary absence of one or the other person and are in possession location information.

As a part of the process of international law adaptation, Ukraine accepted and ratified the International Convention for the Protection of All Persons from Enforced Disappearance (further in the text – mentioned as – Convention 2006) in 2015. Discussing the practical side of this ratifications, unfortunately, national 5 year-experience showed that almost nothing was done to make the Convention actively determined into domestic Ukrainian law and practice. In fact, only absence of proper legal qualifications for enforced disappearances in national legislation leads to impossibility of adequate application of the aforementioned Convention.

Nowadays, major issue of including international responsibility for non-governmental players, together with the subjective element of the crime, and the recognition of a right not to be subjected to violent unwilling disappearance are still debatable. Issues requiring immediate resolution include: recognizing the rights of missing people' family, including right to adequate compensation, along with practical mechanism of rapid intervention.

The defined task of the present investigation is to know an international regulation such as the Convention and to identify the duties of the countries based on the International Convention for the protection of all persons against enforced disappearances.

To achieve a clear understanding of the definition of crime, with the key elements of Enforced Disappearance in accordance with the International Convention for the Protection of All Persons from Enforced Disappearance, the main part of the article is provided with th

identification of the main historical points that in most cases related to enforced disappearance international legislation, determination of definition of the Enforced disappearance, elements of the crime, and difference from related crimes, in the context of national as well as international acts. The article demonstrates existing rulings in the context of their practical contribution to the highlighted problem and represent significant challenges that the International Courts have already faced in its early hearings. The article is based on a variety of proposals outlined by the Convention — States responsibility, the definition of "victims," constructive mechanisms for enforced disappearances, and supervision and monitoring institutions.

Theoretical framework

The theoretical basis of the study is existing national and International laws as well as the researches of national and International scientists in area of the protection of human right not to be subjected to Enforced disappearance.

In the development of the concept of Enforced disappearance, indispensable role is made by the following international scholars: An Vranckx (2007), Anderson Kirsten (2006), Dalia Vitkauskaitė-Meurice, Justinas Žilinskas (2010), Gabriella Citroni (2016), Khushal Vibhute (2012), Nikolas Kyriakou (2012), Pervou Ioanna (2012), Philip Linghammar (2008), Reema Omer (2017), Tatjana Milić (2010), etc.

An Vranckx (2007) in her research "A long road towards universal protection against enforced disappearance", Anderson Kirsten (2006) in article "How Effective is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance?" and Pervou Ioanna (2012) in the article "The Convention for the Protection of All Persons from Enforced Disappearance: Moving Human Rights Protection Ahead", Tatjana Milić (2010) "International Convention for The Protection of All Persons From Enforced Disappearance" and Nikolas Kyriakou, (2012) "The international Convention for the Protection of all persons from Enforced Disappearance and its contributions to International human rights law, with specific reference to extraordinary rendition", explore the main backgrounds and specifics of the Convention, and highlights its relevance and the

impact it can be anticipated to have on the ground.

Dalia Vitkauskaitė-Meurice, Justinas Žilinskas (2010) in their research “The concept of enforced disappearances in international law” discussed the practical aspect of the human protection as well as determined the role of state and non-state agents in the committed crime.

National commissions for missing persons of enforced disappearance were discussed by author Gabriella Citroni (2016) in her article “Missing persons and victims of enforced disappearance in Europe”, with the full description of key mechanism of establishment of such national commissions, its main task of work and the regulations of the institution.

Findings from the presented study reveal a connection between the law level of knowledge, understanding, and identification through the prism of theoretical framework. The article discusses the practical questions, which arise in the prism of the determination of such crime as Enforced disappearance in accordance with International Convention. Most of the issues to be examined in this research are related to examine such an international regulation as Convention and to identify the Countries duties based on the International Convention for the Protection of All Persons from Enforced Disappearance.

Methodology

The subject of the study, its purpose and objectives, the specifics of the object and the subject determined its methodological basis. The scientific validity of the formulated conclusions is achieved by using the basic methods of scientific knowledge such as philosophical, general scientific and special legal methods.

In particular, the philosophical – dialectical method reveals the basic development of international instruments concerning the international legal protection of persons against enforced disappearances.

The use of the historical method of law has revealed the peculiarities of the emergence of normative legal acts of international law that protect a person from violent disappearances, as well as to investigate the impact of such norms on the criminalization of such criminal acts under the Convention 2006.

Logical and deductive methods helped to identify the main elements of crime of Enforced disappearance and their connection with related crimes.

The systematic structural method identified the main elements of the crime of enforced disappearance in accordance with the International Convention.

The comparative method discloses an international mechanism for the protection of persons against enforced disappearance in accordance with both the International Convention for the Protection of All Persons from Enforced Disappearance 2006 and the Declaration on the Protection of all Persons from Enforced Disappearance 1992.

The formal legal method was used for the legal analysis of international normative legal acts which regulate the protection against Enforced Disappearance.

The statistical method was used to summarize international practice in cases of enforced disappearance.

Also, the hermeneutical method promoted translation and a common understanding of the of international law and its mechanism in protection of human beings.

Results and discussions

Furthermore, since enforced disappearances are not actually the subjective definition of a binding legislation and still is not directly criminalized in international human rights law, there are many ways in which persons may, under certain cases, be held criminally liable under international law for the conduct of such actions. All such available mechanisms are reviewed, with a view to identifying the presence of gaps in the criminalization of enforced disappearances and, eventually, along with the evaluation of the suitability of Convention provisions.

Accordingly, to the Convention 2006, the Crime of enforced disappearance is determined by three aggregate elements: imprisonment against the desire of man; involvement of civil servants, at least with the tacit consent; refusal to admit imprisonment or fate disclosure or location of missing people.

Current research determines historical causes and legislative acts which evaluates the main elements of the crime of Enforced Disappearance in accordance with the Convention 2006,

examine key elements of Enforced disappearance crime and evaluates investigation states' process of enforced disappearance.

Legal regulation of «enforced disappearance» and historical aspect of legal definition before the International Convention 2006.

The enforced disappearance of persons is a harsh violation of universal rights, including the right to life, the right to personal security and dignity, the right not to be subjected to torture and inhuman treatment or punishment, the right of free movement, the right to a fair trial, the right to human conditions of detention etc.

From the second half of the twenty century, global community confronted with the need to identify the social dangers of this phenomenon and to regulate states' relations at both regional and universal levels.

With regard to the universal level, the response of the world community to violent disappearances was unnecessary and adequate. Initially, the UN considered people who disappeared by force as an only missing person. Many scholars refer the definition of enforced disappearance to the orders of Adolf Hitler, which were named as "Nacht und Nebel Erlass", acts signed December 7, 1941. This order of Adolf Hitler authorized the arrest of persons who were in the occupied territories and endangered the security of Germany (Anderson Kirsten, 2006).

Latter this term was used by Latin American non-governmental organizations in the 1960s and is generally translated as a Spanish phrase "disaparacion forzada", characterizing the concept of enforced disappearance as a severe violation of human rights and a criminal act, committed directly or indirectly with the support of public authorities to eliminate political opponents.

The Brazilian cases of enforced disappearance were occurred in 1960, mostly with the use of such mechanism to political opposition. As Khushal Vibhute, (2012) indicates, public authorities could systematically kidnap people, lock them in secret jails, torture them, and even assassinate them without justice. The bones have also been removed or burned ' to conceal all possible evidence of the crime and to preserve the reputation of those convicted.

After such cases were also occurred in the following countries: Argentina, South Korea,

Paraguay, Chile, Peru, Afghanistan, El Salvador, Mexico, Nicaragua, etc.

An Vranckx in her article indicates that Human Rights Commission was the first institution of the United Nations to prosecute and monitor acts of enforced disappearance. All these cases started to be identified after 11 September 1973, the date of the Chilean military coup. During that moment, the western powers could stand by and watch silently as citizens in Chile, and later in Argentina and elsewhere, become victims of abuse of power by their own governments. The same situations least till 1979 and the General Assembly was fully focus its attention towards this ongoing problem of enforced disappearance. The key determination was indicated in 1979 when firstly, Human Rights Commission formed a Working Group on Enforced or Involuntary Disappearances, secondly, this Commission reported that the systematic practice of enforced disappearances in Chile is a grave violation of human rights. As a consequence, the Commission forced the government of Chile to prosecute and establish the fate of the missing people and punish those responsible for their disappearance (An Vranckx, 2007).

Accordingly, to the statistical data, enforced disappearance crimes have to borders and are detected all around the world. Discussing the numbers, the situation is crucial – within last forty years, since creation of the UN Working Group on Enforced and Involuntary Disappearance, there are registered more than 55,273 cases at 107 States, what is more that the Working Group was actively considering 44,159 from 91 States (UN Report A/HRC/33/51 from July 2016 of the Working Group on Enforced or Involuntary Disappearances).

As Nikolas Kyriakou specifies in his article, this tactic was used to instill fear and terror among civil people, to discourage anyone from assisting or joining nationalist movements, and to prosecute leaders of the resistance (Nikolas Kyriakou, 2012).

Indeed, the cases of enforced disappearances continues increase dramatically since the 1980s and has spread to all regions around the world. Taking into account the reports of UN Working Group from 2010-2018, enforced disappearances are generally occurring today in most countries dealing with internal conflicts or war, including Sudan, Nepal, Russian Federation, etc.

It should also be mentioned that, despite all efforts made by Working Group to call on the UN Countries to implement the Declaration on the

Protection of all Persons from Enforced Disappearance, through appropriate jurisdictional, administrative and judicial measures, no significant progress has been made to stop the crimes of enforced disappearance. The Declaration has not a separate legal definition of Enforced disappearance, but indicated the basic principles and minimum standards of international legal protection of persons against enforced disappearances.

The document reflected urgency of the huge differences of enforced disappearances cases and emphasized the need to intensify the cooperation of states in the fight against such crimes. Thus, in Part 2 of Art. 1 of the Declaration 1992, is indicated that any act of enforced disappearance "is a violation of international law guaranteeing, in particular, the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment; being a violation of the right to life or a serious threat to that right. "

The adoption of the discussed Declaration, which has a recommendatory character, allowed international community to move to the next stage - the adoption of an international treaty.

Accordingly, to Kirsten Anderson article which reflects the report of UN Working Group, lawlessness together with the absence of clear determination of the concept of enforcement disappearance were probably the main factor leading to this problem as to International crime. Working group recommended taking criminals to court for these actions as a vital step to help deter them from occurring such crimes. Nevertheless, even after the international recognition on both regional and national levels the international definition and punishments for enforced disappearances, the adoption in 1992 of the United Nations Declaration on the Protection of All Persons from Enforced Disappearance and the approval of the Inter-American Regional Convention, enforced disappearances have not yet been the subject of a valid, legitimate international instrument, which works in practice. (Kirsten Anderson, 2006).

After 3 years of lengthy discussions in 2005, this group adopted the text of the International Convention for the Protection of All Persons from Enforced Disappearance.

During the discussions of States' representatives within Geneva session 2005, following statements were agreed:

- 1) "Convention" as a form of new international legal act was fully accepted by Countries' Parties;
- 2) Convention was fully entitled as "International Convention for the Protection of All Persons from Enforced Disappearance" (Reema Omer, 2017. Report of the International Commission of Jurists).

As a result, the States on December 20, 2006 during the UN General Assembly adopted the Convention, by the following regulation: GA Resolution 61/177. After, the Convention was signed within the same day by 57 States: France, Albania, Austria, Argentina, Guatemala, Belgium, India, Sweden, Japan, etc. Ukraine acceded and ratified this legal act only on 16 June 2015.

Definition of enforced disappearance under the International Convention for the Protection of all Persons from Enforced Disappearance.

As we already discussed in previous part of this research, the essential progress linked with the adaptation of *Declaration* on the Protection of all Persons from *Enforced Disappearance* by General Assembly resolution 47/133 is beyond any doubt.

However, the conception of enforced disappearance was not clearly discussed and set minimum standard of the protection without the description of such act as a separate crime of International law.

The description which is included in Article 2 of the Convention continues the trend set out in the 1992 Declaration, but the terminology of the definition is significantly different, even though the definition amendments appears to be limited (International Convention for the Protection of All Persons from Enforced Disappearance, document number A/61/488, adopted from 20 December 2006). Article 2 hereby consist of the following:

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

However, we may conclude that International Convention contains more unified and generalized definition of “enforced disappearance”, and finally, the term “enforced disappearance” is analyzed in three elements according to the dominant approach and has been accepted as a result of lengthy discussions.

The Convention 2006 as a first compulsory and standardized international legal binding treaty, which provide protection for the right of every human not to be subjected to enforced disappearances. In addition, part 2 of Article 1 provides for the absolute nature of this right:

"No war, political instability, or state of emergency in a state can be used as a justification for violating a specified human right."

The mechanism which works on International level for protection of people all over the world against enforced disappearance consists of four essential parts: prohibition, prevention, monitoring and punishment. A key decision was also to set up a Committee on Enforced Disappearance, which performs the monitoring of States' responsibilities due to the compliance with the Convention. Thus, the international legal protection of persons against enforced disappearance is realized by recognizing, at both the regional and universal levels, the right not to be subjected to enforced disappearance, as well as the absolute nature of that right.

In this article, we will describe in details keys Crime elements accordingly to Convention and determine fundamental main differentiation with similar crimes' groups.

The elements of the crime are as follows:

- a) Deprivation of liberty in any form (in this case it does not matter if such actions had legal or illegal character. The main point is that such actions was against the will of victim),
- b) State act (an act carried out by State, Government, or officials on behalf of state' purposes or organized group with the permission, approval or at even indirectly with the permission of the State.),
- c) Refusal to announce the location, the fate and whereabouts of the individual involved.

Deprivation of liberty in any form

Referring again and again to the legal articles of the Convention 2006, this legal act firstly fully describes the concept of enforced disappearance,

by following indication: "the arrest, detention, abduction or any other form of deprivation of liberty by ..." (Article 2 of the Convention). Thus, the definition accordingly to the Convention 2006, as well as to Rome Statute, and essentially the concept of "enforced disappearance" is broader than the abduction of a person because it includes actions such as arrest and detention.

Deprivation of liberty means, first and foremost, a restraint of physical rights, such as rights to act, walk or move. Indeed, the questions deprivation of liberty in most case depends on the circumstances of each particular situation and requires the review of factors including the type of deprivation, its length and its consequences.

Article 2 of the Convention outlines the forms of deprivation, incarceration, detention and kidnapping of freedoms. In addition, the list is not complete, as indicated by the context of "or any other sort of deprivation of liberty". Also, the specificity of first described element is that imprisonment can be both unlawful and legal. Accordingly, in such cases the act of enforced disappearance de facto should lead to the last two elements.

The concept of "enforced disappearance" is much wider than the general concept of "abduction of person". The difference between these concepts goes beyond the lack of redemption for the disappeared.

Enforced disappearance is fundamentally different from similar crimes in that the state takes participation in its planning and execution. As a typical "crime of the state", enforced disappearance can only be done by government officials or with their permission and with their support.

State act

The second major component of the crime is included in the concept of enforced disappearance – state act or government involvement, which is expressed as a contextual element of enforced disappearance. However, evaluating present practice of enforced disappearance more often began to question the definition of "state act" and the crime of government and the evidence and definitions of such activity. As Pervou Ioanna, (2012), concludes, while a classic model state apparatus, based on the principles of authoritarianism, to realize the disappearance of political opponents still exist in many parts of the world, non-state

performers, more often use the same method for their own political, military or simply criminal purpose.

The 2006 Convention removes activities perpetrated by non-state groups or individuals from the concept of enforced disappearances. The direct reference in the text of the Convention to the need for a legal connections of perpetrators of a crime and the State involvement "... 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", this statement fully confirms qualification of enforced disappearances as international crimes (International Convention for the Protection of All Persons from Enforced Disappearance, 2006).

From Colombia or Mexico drug cartels to armed groups in Democratic Republic of the Congo, the enforced disappearances are quite similar, although the perpetrators are unrelated to the state and often cannot or unwilling to prevent disappearance and justice (Khushal Vibhute, 2012). The law must reflect the reality of the situation if it is adopted in order to regulate it. The emergence of new examples of extinction revealed the existence of a legal gap and raised controversy over the definition of a perpetrator of a violent disappearance, such as a private person. Interesting case is described in the article of prof. Dalia Vitkauskaitė-Meurice, Justinas and Žilinskas, they referred to the American Court designation to the Parties' implementation of [...] such legislative or other actions as may be appropriate to give force to certain rights or freedoms, in the meaning of Article 2 of the Convention: In the present case, the Court acknowledged the liability of the State for the actions committed by its agents in their official capacity and for their omissions, particularly when such agents behave beyond the sphere of their authority or infringe international law (case of Velásquez-Rodríguez v. Honduras, supra note 8, § 170, I/A Court H.R.). In that case, the Court was persuaded that the disappearance was conducted by individuals represented as public authority. The Court referred to the principle of the State coherency along with the obligation which exists independently of political changes and that duty remains from both the time of the act that created responsibility to the time until the act is declared unconstitutional (Dalia Vitkauskaitė-Meurice, Justinas and Žilinskas, 2010).

Refusal to disclose the fate

The third dimension of enforced disappearance illustrates rejection of the responsible state power to comply with victim's families and to notify them of his or her fate. That is not surprising that government officials can refuse to deprive themselves of freedom or information and, as a result, destroy all evidence of the victim.

The Convention does not, however, include a description or form of harm that could be directly incurred as a consequence of enforced disappearance. Two types of potential direct impacts of enforced disappearances may be mentioned. The first type involves physical or emotional damage to the individual, e.g. threat or use of abuse, distress for the missing family member, etc. The second form of harm is characterized as discrimination and inability to exercise rights in the areas of social security, financial affairs, property rights and family law (loss of earnings, lack of legal assistance costs, etc.) (Tatjana Milić, 2010).

Practical mechanisms of enforced disappearance cases Investigation.

In fact, there are two essential grounds for starting investigation procedure due to enforced disappearance in national criminal legislation. Both of these grounds are based on the Convention' propositions, firstly, individual complaint and initiation by the authorities. From the first circumstance, there is a governmental duty to investigate the claim and in case it would be necessary, to conduct a detailed and objective investigation without delay. (Philip Linghammar, 2008). In either the second scenario, the responsible officers are obligated to investigate the case if there are reasonable grounds for assuming that a person has been forced to involuntary disappearance, even though there is no formal request. For order to make the Convention practical and effective, the States obliges to guarantee that the conditions of the Convention for the investigation of enforced disappearances are met in each national legislation (Philip Linghammar, 2008). States shall take the appropriate steps to avoid ill-treatment and abuse of individuals connected to the case (complainants, witnesses, families of the missing person, defense attorneys, individuals conducting the investigation).

Accordingly, to the article 98 of the Convention 2006, the UN Working Group have to overview the request which is send form the family or

friends of disappeared person and have to take further steps to investigate and monitor this case. As a practice shows, a list of countries has already established National commissions for missing persons of enforced disappearance (Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Kosovo, Montenegro and Serbia) (Gabriella Citroni, 2016).

Nowadays, many countries have already criminalized the concept of enforced disappearance as a crime against humanity into national legislation, assimilating the description of the Rome Statute. However, it is quite important to determine the difference between related crimes, crimes against humanity and enforced disappearance crimes, mainly in National legislations to make a universal mechanism as a part of regional and national legal systems.

Conclusions

Indeed, the Convention is replacing huge gaps in security regarding enforcement disappearances. Furthermore, the establishment of the universal human right not to be subject to enforced disappearance, as well as the essential concept of disappearance are possibly the most significant outcomes of the discussed Convention 2006.

To summarize the before indicated statements:

1. The most prominent effect of the discussed International Convention for the Protection of all Persons from Enforced Disappearance is determination the large-scale or systematic act of enforced disappearance and the prohibition of being subjected to enforced disappearances for all individuals.
2. The essential Convention's purposes and the application of this act in national level are not limited with the legal methods, but it also increased with the new practices.
3. Comparing the conception of enforced disappearance accordingly to the Declaration 1992 and to the Convention 2006, we must admit that the Convention is a legally binding act, which provide clear definition of the crime.
4. The Convention determine the essential obligations of the State Parties to implement legal provisions on protections against enforced disappearance into national legal act, as well as to clearly determine the definition of such criminal acts.
5. The necessity of establishing the mechanism of minimum protection is highly important

firstly in the regulations of International law, and secondly in the clear determination of national protection all around the world.

6. Convention as a consequence developed main mechanism of monitoring such crimes, by establishing Committee on Enforced Disappearance as well as provided the development of National commissions for missing persons of enforced disappearance in national systems.

To summarize, it has to be said that the Convention's definition is the essential starting point for understanding, firstly, the importance of legal universal protection of all individuals right not to be subjected to enforced disappearance, and secondly to continue development the provisions of Convention and fulfill the gaps between the Convention and its practical side.

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