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DOI: 10.51204/Zbornik_UMKP_25115A

Originalni naučni rad

CRIMINAL LIABILITY FOR ENFORCED DISAPPEARANCE OF PERSONS: INTERNATIONAL STANDARDS AND THE LAW OF BOSNIA AND HERZEGOVINA

Summary: On the basis of the international standards established within the framework of the documents of the United Nations Organization, liability and punishment for various international criminal offenses are prescribed in modern national criminal legislation. These are illegal activities of individuals or groups aimed at violating the most important human freedoms or rights, among which is the freedom of movement. This personal freedom, along with the freedom of thought and decision-making, belongs to the group of the most important fundamental human freedoms. Therefore, any illegal disruption, violation or deprivation of this human freedom is a prohibited and punishable crime.

A specific form of deprivation of freedom of movement in modern criminal legislation is qualified as the criminal offense of abduction (kidnapping). It is taking away (depriving) the freedom of movement of another person in a forced manner with specific aim - the exercise of extortion or coercion. Unlike kidnapping, certain criminal legislations define a specific, special form of deprivation of freedom of movement as enforced disappearance of a person. It is a specific criminal offense that, on the basis of the International Convention on the Protection of All Persons from Enforced Disappearance, is provided for by certain modern criminal codes, including the Criminal Code of Bosnia and Herzegovina, which is the subject of this paper.

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Keywords: freedom of movement, international standards, criminal offense, enforced disappearance of persons, Bosnia and Herzegovina.

1. INTRODUCTION

Enforced (forced) disappearance of a person represents a special, specific form of taking away, i.e. deprivation of freedom of movement of another person, as one of the fundamental human freedoms, in addition to freedom of thought or freedom of decision. It is about depriving the freedom of movement of another person by special activities – taking away (taking a positive, active action – doing) or detaining (taking a negative, passive action – withholding, neglecting) which were done in a dangerous way or with a dangerous means, thus creating a consequence in the form of “the state of deprivation of freedom of movement”.¹

In order to forestall, prevent and suppress such unlawful violent activities, both in times of peace² and even more so in times of war (international or

1 See W. Blair, “Taking Civilians: Terrorist Kidnapping in Civil War”, *International Studies Quarterly*, 2/2024, D. Gilbert, “The Logic of Kidnapping in Civil War: Evidence from Colombia”, *American Political Science Review*, 4/2022, 1226–1241; S. Polo, B. Welsh, *Terrorism and Counterterrorism Datasets: An Overview*, Oxford Research Encyclopedia of International Studies, 2022/12/21; D. A. Alexander, S. Klein, “Kidnapping and Hostage –Taking: A Review of Effects, Coping and Resilience”, *Journal of the Royal Society of Medicine*, 102/2009, 16–21; P. T. Brandt, J. George, T. Sandler, “Why Concessions should not Be Made to Terrorist Kidnappers”, *European Journal of Political Economy*, 44/2016, 41; M. C. Horowitz, E. Perkoski, P. B. K Potter, “Tactical Diversity in Militant Violence”, *International Organization*, 72/2017, 139; W. Enders, T. Sandler, K. Gaibulloev, “Domestic versus Transnational Terrorism: Data, Decomposition, and Dynamics”, *Journal of Peace Research*, 48/2010, 319.

2 The famous murder of Denise Amber Lee took place in North Port, Florida, United States, on 17 January 2008. Lee was a 21-year-old woman who was kidnapped, raped and murdered by Michael Lee King. The murder case became infamous because Amber Lee and several others tried to call for help through the 9–1–1 system, but there was a lack of communication, and the police and other emergency services arrived too late. Five 9–1–1 calls were made that day, including one by Amber Lee herself from her captor’s phone and one of the witnesses, Jane Kovalski, who gave a detailed display of the events that unfolded in front of her. Flaws were found in the way operators handled Kovalski’s call, and additional flaws were identified across the country in this system. In 2009, King was found guilty of kidnapping, sexual abuse and murdering Amber Lee. He was sentenced to death. See M. Brahney, *Michael King sentenced to death*, NBC-2 News Online, World Now and WBBH, 2009.

The Denise Amber Lee Act was unanimously adopted by the Florida legislative body on 24 April 2008. This act provides for optional training for 9–1–1 operators. Amber Lee’s family continues to lobby for a new law to be passed nationwide that would introduce mandatory training and certification for all 9–1–1 dispatchers. The Denise Amber Lee Foundation was established in June 2008 to promote such training, as well as to raise public awareness of the issues involved. Lee was the daughter of police detective, Sergeant

non-international armed conflicts or occupation) within the framework of the universal international community, at the beginning of the third millennium, the General Assembly of the United Nations Organization in New York adopted in December 2006, the International Convention for the Protection of All Persons from Enforced Disappearance³ – ICPPED.

On the basis of international obligations that Bosnia and Herzegovina accepted by signing and ratifying ICPPED in December 2011⁴, a special criminal offense called “Enforced disappearance” was introduced into the domestic, internal criminal legislation (Article 190a of the Criminal Code of Bosnia and Herzegovina⁵ – CCBiH).

In the same year, in 2011, this international convention was ratified in some other countries in the region of Southeast Europe, that is, in the countries that were created after the breakup of the SFRY. Such was the case in the Republic of Serbia⁶ and the Republic of Montenegro⁷.

In the Republic of Croatia, the ICPPED was ratified much later – only in 2021⁸, when it was also ratified in the Republic of Slovenia⁹, while there is no publicly available data for North Macedonia.

Among analyzed regional criminal legislations within the territory of Southeast Europe, two nomotechnical ways of legal regulation can be observed in terms of prescribing criminal liability and punishment for enforced disappearance. These are:

- a) prescribing of special, independent incrimination – the criminal offense of enforced disappearance (Bosnia and Herzegovina, Slovenia), whereby a difference in the systematics of this incrimination can be observed. At the same time, in the criminal law of Slovenia this criminal offense is provided for in the group of criminal offenses against freedoms and rights, in the law of Bosnia and Herzegovina it appears as an “international criminal offense” which is systematized in the group of criminal offenses against humanity and values protected under international law¹⁰, and
- b) prescribing the activity of enforced disappearance as one of several forms/types of manifestation of the classic, general, conventional, “archaic”

Rick Goff. See CS/SB 1694–911 *Emergency Dispatchers [SPCC]*, Florida House of Representatives, 2010; Lee, C., *Denise Amber Lee Act’ clears Senate*, Sarasota Herald-Tribune, April 24, 2008.

3 23 December 2010, by General Assembly of the United Nations in its resolution 47/133.

4 *Official Gazette of Bosnia and Herzegovina – International Treaties*, No. 10/2011.

5 *Official Gazette of Bosnia and Herzegovina*, Nos. 3/2003, 32/2003, 37/2003, 54/2004, 61/2004, 30/2005, 53/2006, 55/2006, 32/2007, 8/2010, 47/2014, 22/2015, 40/2015, 35/2018, 46/2021, 31/2023 and 47/2023.

6 *Official Gazette of the Republic of Serbia – International Treaties*, No. 1/2011.

7 *Official Gazette of Montenegro – International Treaties*, No. 8/2011.

8 *Official Gazette of the Republic of Croatia – International Treaties*, No. 9/2021.

9 *Official Gazette of the Republic of Slovenia – International Treaties*, No. 14/2021.

10 M. Simović, M. Simović, Lj. Todorović, *Krivični zakon Bosne i Hercegovine*, Fineks, Sarajevo, 2015, 52–53.

criminal offense of abduction (kidnapping), as is done in the legislation of Montenegro, Croatia, North Macedonia and Serbia. In all these legislations, this criminal offense is systematized as a criminal offense against the freedoms and rights of man and citizen, i.e. against personal freedom (Croatia), starting from the protected goods, values or interests that constitute the object of protection.

2. ENFORCED DISAPPEARANCE AS A CRIMINAL OFFENCE AND INTERNATIONAL STANDARDS

The fact that the ICPPED is the basis for prescribing criminal liability, i.e. punishment for a criminal offense that includes the features and elements of “enforced disappearance of a person” indicates that this is an “international criminal offense” for which the domestic, internal national criminal legislation determines the type and extent of prescribed penalty given the degree of severity and danger. The basis of this convention is the Charter of the United Nations Organization (1945) with the aim of promoting respect and adherence to human rights and fundamental freedoms, and especially the Universal Declaration of Human Rights¹¹ (1946), the International Covenant on Economic, Social and Cultural Rights¹² (1966), the International Covenant on Civil and Political Rights¹³ (1966), as well as other international instruments in the field of human rights, humanitarian law and international criminal law. The predecessor of ICPPED in international human rights law is, in fact, the Declaration on the Protection of All Persons from Enforced Disappearance, adopted by the General Assembly of the United Nations Organization in its resolution number 47/133 of 18 December 1992.

ICPPED (Article 1) emphasizes at the beginning that “no one shall be subject to enforced disappearance. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance”. As “enforced disappearance”, in terms of a criminal offense, ICPPED (Article 2) considers “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”.¹⁴ In addition, ICPPED (Article 5) qualifies enforced disappearance as a form of

11 United Nations, Resolution No. 217/III, 10 December 1948.

12 *Official Gazette of the SFRY – International Treaties*, No. 7/1971.

13 *Official Gazette of the SFRY – International Treaties*, No. 7/1971.

14 See T. Milić, „International Convention for Protection of All Persons from Enforced Disappearance“, *Međunarodni problemi*, 1/2010, 37–64.

manifestation of crimes against humanity,¹⁵ provided that such illegal activities are carried out as a “widespread or systematic practice of enforced disappearances”.

The following elements, characteristics of the criminal offense of enforced disappearance, derive from the aforementioned international legal provisions. They are:¹⁶

- 1) the object of protection is the freedom of human movement as one of the universal, general human rights and freedoms,
- 2) the action of execution is the taking away or deprivation of freedom of movement of another person. In doing so, it is necessary that it is a person who is objectively able to use the freedom of movement, either independently or with the help of technical means. This execution action is undertaken by activities such as: a) arrest – imprisonment, taking the person from the place where he/she was until then to another place that is secured against possible abandonment, b) detention – temporary restriction, aggravation, conditioning, complication of the use of freedom of movement, and c) abduction (kidnapping) – taking another person from the place where he/she was until then to another place or keeping a person in the place where he/she was until then against his/her freely made decision,
- 3) a certain person, a person with a special characteristic – *delicta propria* – appears as the perpetrator of the offense. These are: a) agents of the State, persons acting with the authorization, support or acquiescence of the State, or b) a group of persons acting with the authorization, support or acquiescence of the State, and
- 4) concealment of the fact of deprivation of liberty of another person. It is the activity of keeping silent, preventing another person from knowing, that is, creating conditions or assumptions that any other person will learn about the fate of a person deprived of his/her liberty. This subsequent behavior of the perpetrator appears as: a) refusal to acknowledge the deprivation of liberty of the disappeared person, b) concealment of the fate of the disappeared person, or c) concealment of whereabouts of the disappeared person, which place such a person outside the protection of the law.

The following persons are liable as perpetrators for the criminal offense of enforced disappearance (Article 6 of ICCPD):

- 1) a person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance (perpetrator or accomplice), and
- 2) a superior who: a) knew or consciously disregarded information which clearly indicated, that subordinates under his or her effective authority or

15 See M. Simović, M. Blagojević, V. Simović, *Međunarodno krivično pravo*, Pravni fakultet Univerziteta u Istočnom Sarajevu, 2023, 217–229.

16 See M. Kolaković Bojović, „The synergy between criminal law and medicine under the International Convention for the Protection of All Persons from Enforced Disappearance“, *Kazneno pravo i medicina* (ur. I. Stevanović), Institut za kriminološka i sociološka istraživanja, Beograd, 2019, 387–398.

control were committing or about to commit a crime of enforced disappearance, b) exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance, and c) failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution (command or senior responsibility).

Enforced disappearance is envisaged as a criminal offense (Article 7 of ICPPED) that shows “extreme seriousness”, for which each individual national criminal legislation prescribes a punishment in accordance with domestic regulations. Any perpetrator against whom proceedings are brought in connection with an offense of enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings. This, in other words, means that international documents guarantee him or her “shall benefit from a trial before an independent and impartial court or tribunal established by law” (Article 11 of ICPPED).

In each specific case, when sentencing the perpetrator of the offense, the court is obliged to take into account: 1) mitigating circumstances – the participation of persons who, having been implicated in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person alive or make it possible to clarify cases of enforced disappearance or to identify the perpetrators of an enforced disappearance, and 2) aggravating circumstances – the event of the death of the disappeared person or the commission of an enforced disappearance in respect of a special type of victim such as: pregnant women, minors, persons with disabilities or other particularly vulnerable persons.

In addition, the ICPPED (Article 8) sets another binding norm for national criminal legislations regarding criminal prosecution, i.e. punishment of perpetrators or co-perpetrators of the criminal offense of an enforced disappearance. This solution relates to the issue of statute of limitations. Statute of limitation, namely, is a general basis that leads to the termination of the “right of the State to punish” – *ius puniendi* due to the passage of a certain time. In this sense, it is foreseen that individual States – signatories of the ICPPED, shall take the necessary measures with regard to enforced disappearance to ensure that the term of limitation for criminal proceedings: a) is of long duration and is proportionate to the extreme seriousness of this offense, and b) commences from the moment when the offense of enforced disappearance ceases, taking into account its continuous nature.

Namely, it is a criminal offense which, given the consequences of the execution action taken, represents a “permanent criminal offence”. In criminal law theory, a permanent criminal offense is an offense in which, as a result of the execution action taken, an illegal state has been caused – a state of taken/deprived freedom of movement. This means that the beginning of the statute of limitations for such criminal offenses commences with the moment the unlawful state ceases, and not from the moment of undertaking the action of execution. Therefore, it is particularly required that each contracting State guarantees the victims of

enforced disappearance a right to an effective legal remedy during the entire period before the statute of limitations.

3. THE CRIMINAL OFFENSE OF ENFORCED DISAPPEARANCE OF A PERSON IN THE CRIMINAL LAW OF THE COUNTRIES OF THE REGION

3.1. Systematics of the criminal offense of enforced disappearance of a person

Out of all the criminal legislations of the countries that were created after the breakup of the SFRY, only two states explicitly prescribe the criminal offense of forced/enforced disappearance of a person in their domestic, national criminal legislation. These are:

- a) Bosnia and Herzegovina – the Criminal Code of BiH (CCBH) in Chapter Seventeen, entitled “Criminal Offences against Humanity and Values Protected by International Law”, therefore, provides for “Enforced Disappearance” as an international criminal offense (Article 190a),¹⁷ and
- b) The Republic of Slovenia – the Criminal Code¹⁸ in Chapter Sixteen entitled “Criminal Offenses Against Freedoms and Rights” also prescribes the criminal offense of “Kidnapping and Enforced Disappearance” – “*Ugrabitve in prisilno izginotje*” (Article 134).

Other countries do not recognize the enforced disappearance of a person as an independent incrimination, but subsume its characteristics, features, and elements of being under the previously already existing “classic” criminal offense called “Abduction (kidnapping)” – eng. *Abduction*,¹⁹ *kidnapping*,²⁰

17 See B. Petrović, D. Jovašević, A. Ferhatović, *Krivično pravo* 2, Pravni fakultet, Sarajevo, 2016, 189–193.

18 *Official Gazette of the Republic of Slovenia*, no. 55/2008, 66/2008, 39/2009, 91/2011, 55/2014, 6/2016, 38/2016, 27/2017, 23/2020, 91/2020, 95/2021, 186/2021, 105/2022 and 16/2023.

19 See R. W. Burch, “Deduction, Induction, and Abduction”, Chapter 3 in article *Charles Sanders Peirce*, 2001 and 2006, in the Stanford Encyclopedia of Philosophy, 2001 and 2006, https://en.wikipedia.org/wiki/Abductive_reasoning.

20 Laws in the US are derived from English common law. After the famous Lindbergh kidnapping in 1932, Congress passed the Federal Kidnapping Act, which authorized the FBI (Federal Bureau of Investigation) to investigate the kidnapping at a time when the Bureau was expanding in size and authority. The fact that the abducted victim may have been taken across state lines – brought this crime under federal criminal law. Most States in the US recognize different types of kidnapping and punish them according to factors such as location, duration, method, manner and purpose of the criminal offense. There are several deterrents to kidnapping. Among these are: (1) the extreme logistical challenges involved in successfully money exchange in order to return a victim without arrest or surveillance; (2) severe punishment. Convicted kidnappers face a long

hijacking,²¹ german. *Entführung*,²² french. *Enlèvement*,²³ rus. *похищение людеј*.²⁴ Such is the case with the legislation of the countries: a) Montenegro, b) Croatia, c) North Macedonia, and d) Serbia.

Thus, the Criminal Code of Montenegro²⁵ (Article 164) in Chapter Fifteen entitled “Criminal Offenses Against the Freedoms and Rights of Persons and Citizens” provides for the criminal offense of “Abduction”, the perpetrator of which is prescribed a prison sentence for a term from one to eight years. The criminal offense of abduction consists in taking away or keeping someone: 1) in

prison sentences. If the victim was taken across state lines, federal charges may also be filed; (3) good cooperation and exchange of information between law enforcement agencies and mechanisms for dissemination of information to the public (such as the AMBER Alert system). See M. J. King, “Kidnapping in Florida: Don’t Move or You’ve Done It,” *Stetson Law Review*, 1/1983, 197.

- 21 See P. Baum, *Violence in the Skies: A History of Aircraft Hijacking and Bombing*, West Sussex, UK, Summersdale, 2016, 13–15.
- 22 In German criminal law (Strafrechtswissenschaft), the general term “criminal offenses of kidnapping” (Oberbegriff Entführungsdelikte) also refers to the crimes of human trafficking (Menschenraub), taking of hostages (Geiselnahme), kidnapping (Verschleppung) and kidnapping as special cases of the general crime of deprivation of liberty (Delikte der Freiheitsberaubung zusammengefasst). Previous criminal offenses of kidnapping, with and against the will of the abducted (§§ 236 and 237 in connection with § 238 of the Criminal Code – StGB, old version), in which the perpetrator’s intention had to be aimed at performing extramarital sexual acts on the abducted woman, was abolished during the reform of criminal offenses against sexual self-determination (Straftaten gegen die sexuelle Selbstbestimmung) in 1997/98. Since 1997, kidnapping against the abductee’s will can be punished as (attempted) sexual coercion or rape in connection with deprivation of liberty (Tateinheit mit Freiheitsberaubung bestraft werden).
- 23 The action of taking someone by force (action d’emmener qqn de force) – kidnapping, abduction.
- 24 See Н. Э. Мартыненко, *Похищение человека: понятие, анализ состава и проблемы квалификации*, Лекция, Академия управления МВД России, Москва, 1998, 20; В. М. Лебедев, *Комментарий к Уголовному кодексу Российской Федерации, Научно-практический комментарий*, Юрайт, Москва, 2001; А. Б. Наумова, *Постатейный Комментарий к Уголовному кодексу РФ 1996*, Москва, Правовая культура, 1998; Е. В. Иванова, „Уголовная ответственность за похищение человека: возникновение нормы в законодательстве России“, *Российский судья*, 4/2019, 35–39; О. А. Михаль, „Вопросы квалификации незаконного лишения свободы, похищения человека и захвата заложников“, *Уголовное право*, 4/2003, 60; С. С. Шестало, *Похищение человека, СПС КонсультантПлюс*, 2021; В. Г. Бязров, „Разграничение захвата заложника и похищения человека: вопросы квалификации“, *Российский следователь*, 1/2015, 18–22; О. А. Михаль, Ю.А. Власов, „Некоторые аспекты объективного состава похищения человека“, *Современное право*, 4/2013, 118–123; В. С. Отпущенников, „Уголовная ответственность за похищение человека“, *Молодой ученый*, 24/2021, 119–121.
- 25 *Official Gazette of the Republic of Montenegro*, No. 70/2003, 13/2004, 47/2006, 40/2008, 25/2010, 32/2011, 64/2011, 40/2013, 56/2013, 42/2015, 58/2015, 44/2017, 49/2018, 3/2020, 26/2021, 144/2021, 145/2021 and 110/2023.

a certain way: a) by use of force, b) by threat, c) by deception, or d) in other manner, and 2) with a certain intention (motive, motive that is qualified with direct intent as a form of guilt of the perpetrator) – to: a) extort money or another material benefit from the abducted person or from another (natural or legal) person, or b) to force the abducted or other person to act, refrain from acting or endure something.²⁶

The Criminal Code of Croatia²⁷ provides for the criminal offense of “Abduction” (Article 137) in Chapter Thirteen entitled “Criminal Offenses Against Personal Freedom”. This offense consists in the illegal deprivation of liberty of another person with an aim to force a third person to do, omit to do something, or make him suffer, for which a sentence of imprisonment for six months to five years is prescribed²⁸. The offense is foreseen in the simplest way – by a simple, “consequential” provision according to which, for its existence, it is sufficient to undertake any activity that is suitable, sufficient, determined to lead to “a state of deprivation of another person’s liberty” as a consequence of the offense, with a specific goal, regardless of whether such a goal was achieved at all in the specific case²⁹.

The Criminal Code of North Macedonia³⁰ in Chapter Fifteen entitled “Criminal Offenses Against the Freedoms and Rights of Humans and Citizens” in the provision of Article 141 prescribes criminal liability and punishment for the crime of kidnapping “Грабнување”. This criminal offense, for which a sentence of imprisonment of one to ten years is prescribed, consists in the kidnapping of another person intending to force him or else to commit, not to commit or to bear something.

Finally, the Criminal Code of Serbia³¹ in Chapter Fourteen entitled “Criminal Offenses Against the Freedoms and Rights of Man and Citizen” also provides for the criminal offense of abduction, which in its definition includes the act of enforced disappearance (Article 134). According to the legal description, the criminal offense of abduction consists in taking away or holding a person by force, threat, deceit or otherwise with the intent to extort money or other property gain from that person or another or to coerce that person or another to do

26 See Lj. Lazarević, B. Vučković, V. Vučković, *Komentar Krivičnog zakonika Crne Gore*, Obod, Cetinje, 2004, 428–431.

27 *Official Gazette of the Republic of Croatia*, No. 125/2011, 144/2012, 56/2015, 61/2015, 101/2017, 118/2018, 126/2019, 84/2021, 114/2022, 114/2023 and 36/2024.

28 See B. Pavišić, V. Grozdanić, P. Veić, *Komentar Kaznenog zakona*, Narodne novine, Zagreb, 2007, 359–361.

29 K. Turković et al., *Komentar Kaznenog zakona*, Narodne novine, Zagreb, 2013, 189.

30 *Official Gazette of the Republic of Macedonia*, no. 37/1996, 80/1999, 4/2002, 43/2003, 19/2004, 81/2005, 60/2006, 73/2006, 7/2008, 139/2008, 114/2009, 51/2011, 135/2011, 185/2011, 142/2012, 166/2012, 55/2013, 827/2013, 14/2014, 27/2014, 28/2014, 28/2014, 41/2014, 115/2014 and 132/2014, 160/2014, 199/2014, 196/2015, 226/2015, 169/2016, 97/2017, 170/2017, 248/2018, 36/2023 and 188/2023.

31 *Official Gazette of the Republic of Serbia*, No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019 and 94/2024.

or refrain from doing or to endure. The perpetrator of this crime is threatened with prescribed sentence of imprisonment from two to ten years.

Regardless of the legal name of the criminal offense used: “abduction” or “enforced disappearance” – it is a general criminal offense against personal freedom of movement and decision-making,³² which means that any person (domestic citizen or foreigner, adult or minor, male or female person) can find himself in the role of an injured person or a passive subject (victim).³³

It follows from the legal systematics that the basic, fundamental, universally proclaimed human freedom – the freedom of human movement³⁴ – appears as the object of protection of these criminal offenses. However, in legal theory, one can also find understandings³⁵ according to which the “right to personal freedom” appears as an object of protection in these criminal offenses.³⁶ In this sense, the theory states that the freedom of movement of a person includes both the freedom of unrestricted movement and the change of place of residence, and the freedom of a person not to change the place of residence at all.³⁷ There are also opinions in the literature that consider that the object of protection in the case of these criminal offenses is “fundamental human rights and those social goods that serve to exercise these rights”. In this sense, freedom represents one of the basic human rights, the rights of man. The issue is, in fact, about the right to freedom.

3.2. Enforced disappearance of a person in the criminal law of Slovenia

Enforced disappearance of a person is a criminal offense prescribed in the Criminal Code of Slovenia (Article 134) and is entitled: “Ugrabitev in prisilno izginotje” (Kidnapping and Enforced Disappearance). Here, the legislator combined two independent incriminations in the structure of one criminal offense that has an identical object of criminal protection – the freedom of movement of man as one of the most important human freedoms or the “right to freedom of movement”. This indicates that the passive subject (victim) in this case is a natural person, regardless of age, who has the ability to move independently, who temporarily or permanently changes place of his residence.

This criminal offense appears in two basic forms of manifestation.

32 Z. Stojanović, O. Perić, *Krivično pravo, Posebni deo*, Službeni glasnik, Beograd, 2000, 118.

33 Z. Stojanović, N. Delić, *Krivično pravo, Posebni deo*, Univerzitet u Beogradu – Pravni fakultet, Beograd, 2013, 39.

34 See N. Delić, *Krivično pravo, Posebni deo*, Univerzitet u Beogradu – Pravni fakultet, Beograd, 2020, 42–44.

35 K. Turković *et al.*, *op. cit.*, 188.

36 See D. Jovašević, D. Miladinović Stefanović, *Krivično pravo, Posebni deo*, Pravni fakultet, Niš, 2023, 70–72.

37 Lj. Lazarević, *Komentar Krivičnog zakonika Srbije*, Savremena administracija, Beograd, 2005, 202 i 203.

The first form of the crime is abduction³⁸ (paragraph 1). It is the abduction (kidnapping) of another person in order to compel him to perform an act or to omit to perform or to suffer (endure), for which a sentence of imprisonment of six months to five years is prescribed. The more serious form of this offense (paragraph 2), for which a sentence of imprisonment of one to ten years is prescribed, exists: a) if it committed against a minor (where the capacity of passive subject is a qualifying circumstance), or b) if the abduction was carried out in a particular manner (with a qualified threat as a qualifying circumstance) – a threat with murder or serious bodily harm to the abducted person.

The second form of the criminal offense referred to in Article 134 is enforced disappearance (paragraph 3), for which a sentence of imprisonment for one to eight years is prescribed. According to this legal solution, enforced disappearance as a criminal offense is characterized by the following constitutive elements:³⁹ 1) the act of execution is made up of several activities of deprivation (taking away) of another person's freedom of movement provided by law,⁴⁰ 2) the act of execution is undertaken in a specific manner: a) by order of the state or political organization, or b) with the authorization, support or consent of the state or political organization, 3) subsequent activity of the state or political organization after the previous deprivation of liberty of another person which manifests itself as: a) non-recognition of such deprivation of liberty of a person, b) refusal to provide information about the fate of the person deprived of liberty or his whereabouts, and 4) a violence occurs as the consequences of the offense – in the form of the state of deprivation of legal protection of the “missing” person, i.e. the person who was previously deprived of freedom of movement.

4. ENFORCED DISAPPEARANCE OF PERSONS IN THE CRIMINAL LAW OF BOSNIA AND HERZEGOVINA

As already mentioned, the CCBiH contains a criminal offense called “Enforced disappearance” (Article 190a). In addition, the enforced disappearance of a person is also a form of manifestation of the criminal offense of crimes against humanity (*crimen iuris gentium*), “crime of crimes”, along with the crime of genocide, which represents the most severe crimes of today. It is also a criminal offense that is systematized in the same Chapter of the Criminal Code, in the group of crimes against humanity and values protected by international law.

38 See Lj. Selinšek, *Kazensko pravo, Splošni del in osnove posebnega dela*, GV Založba, Ljubljana, 2007, 377–380.

39 See D. Korošec *et al.*, *Veliki znanstveni komentar posebnega dela Kazenskog zakonika*, Uradni list, Ljubljana, 2023, 680–706.

40 It occurs as: a) arrest (catch), b) detention, c) abduction, and d) deprivation of liberty in any other way.

4.1. Enforced disappearance of persons as an element of crimes against humanity

A crime against humanity, in fact, consists in undertaking various activities against humanity as part of a broad or systematic attack against the civilian population. The crime against humanity itself is a criminal offense whose origin is linked to the Statute of the International Military Tribunal (1945) and the Nuremberg Judgment. It is a serious international crime that attacks values that are characteristic of humanity as a whole, that is, values that are considered universal human values. The development of ideas and concepts about crimes against humanity was decisively influenced by ideas about the need to protect basic human rights and freedoms.

A crime against humanity is based on the violation of the basic laws of humanity, i.e. the right of every person to life and the right of every ethnic group to exist as such. So, these are acts that are directed against the conditions of existence of man and his individual human groups or humanity as a whole. Unlike genocide, this is a crime that is not aimed at a specific group of people, but the entire civilian population in general.

In legal theory, the following elements of crimes against humanity stand out: a) these are particularly heinous violations of prohibitions that represent a serious insult to human dignity and the humiliation of one or more persons, b) these are not isolated or sporadic events, but occur as part of the government's policy of a State or a broad or systematic practice of committing crimes tolerated, condoned or agreed to by a government or *de facto* authority, c) these are acts that are prohibited and must be punished regardless of whether they were committed during war or peace, and d) the victims of this crime can be civilians or, if committed during an armed conflict, persons who do not participate (or no longer participate) in armed hostilities, as well as enemy soldiers, under customary international law.

The act of committing the criminal offense crime against humanity consists of various activities which are:⁴¹ a) directed against any civilian (non-veterans) population, b) part, segment, element of a broad or systematic attack,⁴² and c) undertaken by a person who knows, who is aware of such attack.

The specificity of this criminal offense, for which an alternative sentence of at least ten years of imprisonment or a long-term imprisonment is prescribed, occurs in two forms. These are: a) the application of the statute of limitations for criminal prosecution, i.e. punishment of its perpetrator, is explicitly excluded, and b) the universal principle of spatial validity of the criminal law (principle of absolute extraterritoriality) is applied for the prosecution of the perpetrator of this criminal offense.

41 See O. Ševo, „Opšta pitanja u vezi sa prinudnim nestankom lica kao oblikom zločina protiv čovječnosti“, *Srpska pravna misao*, 52/2019a, 177–190.

42 An attack directed against civilian population is conduct that involves the repeated commission of lawfully prescribed actions against any civilian population on the basis of or with the aim of a State or organizational policy to commit such an attack.

A crime against humanity (Article 172 of the Criminal Code of BiH), for which an alternative sentence of at least ten years of imprisonment or a long-term imprisonment is prescribed, consists in being committed within, as part of a widespread or systematic attack directed against any civilian population, with knowledge of such an attack – several alternatively prescribed activities, including acts of enforced disappearance (item h.). At the same time, the law itself determined that the enforced disappearance of a person includes: arrest, detention or abduction of a person, by or with the authorization, support or acquiescence of the State or political organization, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of such a person, with the intention of placing them outside the protection of the law for a longer period of time.⁴³

In order for the “enforced disappearance” of a person to be legally qualified as a manifestation of a crime against humanity, it is necessary that this activity was undertaken within (as part of) a widespread or systematic attack directed against any part of the civilian population⁴⁴. A grammatical interpretation of this legal provision could lead to the conclusion that this criminal offense can only be committed during an armed conflict (“in the context of an attack”), which is not correct. It is more correct to consider that crimes of this type can be committed during a war or armed conflict, but also when that conflict has already ended, provided that the execution of some of the legally prescribed activities during the commission of the crime is realized in the context of a “widespread or systematic attack which is directed against the civilian population”.⁴⁵

In terms of attack, as an element of crime against humanity, it should be pointed out that it must fulfill three conditions. These are:⁴⁶

- a) the attack must be “wider”, which means that it is part of an armed conflict that takes place in a wider, larger area, i.e. for a shorter or longer duration, which indicates the possible scope or intensity of the danger caused to the civilian population;
- b) the attack must be “systematic”.⁴⁷ This indicates that we are talking about a pre-planned, deliberate, well-prepared and detailed attack, on which an agreement (consent of the will of several persons) has been previously reached (oral or written), or for which certain guidelines, instructions and orders have been given. This plan can be part of a broader military or political plan, but it can also be linked to immediate, specific military operations;

43 See O. Ševo, „Prinudni nestanak lica kao oblik zločina protiv čovečnosti u Rimskom statutu“, *Crimen*, 2/2019b, 144–155.

44 See B. Petrović, D. Jovašević, *Krivično (kazneno) pravo Bosne i Hercegovine, Opći dio*, Pravni fakultet, Sarajevo, 2005, 127–129.

45 See K. Turković *et al.*, *op. cit.*, 137–139.

46 See D. Korošec *et al.*, *op. cit.*, 99–122.

47 Đ. Đorđević, D. Kolarić, *Krivično pravo, Posebni dio*, Kriminalističko-policijski univerzitet, Beograd, 2020, 271 i 272.

- c) the attack must be aimed at the civilian population.⁴⁸ This means that the attack includes multiple, repeated undertaking of the same or different activities alternatively prescribed by law against any part of the civilian population on the basis of or with the aim of implementing a certain State policy or the policy of some organization or group to carry out such an attack.⁴⁹

The prevalence of attack is determined according to a quantitative criterion that can be expressed by the number of victims.⁵⁰ Thus, an attack is widespread when it refers to an attack that is by its nature on a wide scale and directed against a large number of persons. A systematic attack is determined according to quantitative criteria. It indicates the organized nature of acts of violence and the low probability that the events are random. This requires the existence of a previous plan or crime policy.⁵¹

4.2. Enforced disappearance of a person as an independent criminal offense

The criminal offense of “Enforced disappearance”⁵² (Article 190a of the CCBiH) consists in imprisoning, keeping imprisoned or in some other manner depriving another person of the freedom of movement by an official in the institutions of Bosnia and Herzegovina or by any other person acting in the capacity of an official in the institutions of Bosnia and Herzegovina, or by the order, incentive or with explicit or tacit consent of an official in the institutions of Bosnia and Herzegovina, followed by a refusal to acknowledge that he was deprived of his liberty or to give information on the fate or whereabouts of that person, with an aim of removing him from the protection of the law (paragraph 1).

This criminal offense has another form of manifestation. This is ordering, inciting or giving explicit consent to undertaking any activity to carry out the enforced disappearance of a person or giving explicit or tacit consent to carry out enforced disappearance of a person by an official in the institutions of Bosnia and Herzegovina (paragraph 2).

For the criminal offense of enforced disappearance of a person, according to the principle of command or senior responsibility, another person is also responsible – a superior person who knew or consciously ignored the information that a person subordinate to him had committed the criminal offense of enforced disappearance or was about to commit such a criminal offense, if he

48 Lj. Prljeta, *Zločini protiv čovečnosti i međunarodnog prava, Nirnberška presuda i dokumenti o genocidu*, Službeni list, Beograd, 1992, 39 i 40.

49 See Lj. Selinšek, *op. cit.*, 432–434.

50 See J. M. Henckaerts, B. L. Doswald, *Customary International Humanitarian Law*, University Press, Cambridge, 2005, 108–121.

51 See B. Pavišić, V. Grozdanić, P. Veić, *op. cit.*, 427–431.

52 See M. Kolaković Bojović, *op. cit.*, 387–398.

was responsible and had control over the procedures related to the commission of a criminal offense, so he did not take all necessary and reasonable measures within his power to prevent or make the commission of the criminal offense of enforced disappearance impossible, or to forward this issue to the State authorities for investigation and criminal prosecution (paragraph 3).

In addition to the freedom of movement of a person as universally protected human and social value, the criminal offense of enforced disappearance in the criminal law of Bosnia and Herzegovina is characterized by: a) an alternatively multiple prescribed acts of execution, b) a special personal characteristic of the perpetrator, and c) subsequent action, i.e. the goal of the perpetrator.

The act of committing a crime, in the simplest terms, is deprivation, taking away the freedom of movement of a person. This presupposes that it is a person as a passive subject who has the ability to physically move, either independently or with the help of another person or technical means, as well as that his freedom to decide on his movement, i.e. to change his place of residence or determine the direction or time of movement, is preserved.⁵³

The act of depriving the freedom of movement of another person prescribed in this way can be undertaken with several alternatively prescribed activities that have an identical consequence – causing a state of deprivation of freedom, completely or partially, permanently or temporarily. This determination of the consequence of the violation as a result of the execution action indicates that this is a “permanent criminal offense”. Thus, the act of committing a crime consists of activities such as:⁵⁴ a) incarceration – preventing another person from leaving a certain area, b) keeping incarcerated – prolonging the previous state, based on the law or other regulations, of deprivation of liberty by the expiry of a certain time, or c) deprivation of freedom of movement – preventing a certain person from leaving a certain place or coming to a certain place in any other similar way against his free will.

The existence of this criminal offense requires the fulfillment of two cumulatively stipulated requirements. They are:⁵⁵

- 1) the execution is undertaken by: a) an official in the institutions of Bosnia and Herzegovina, b) any other person acting in the capacity of an official in the institutions of Bosnia and Herzegovina, or c) any other person acting by authorization, support or with explicit or with the tacit acquiescence of an official in the institutions of Bosnia and Herzegovina, and
- 2) the execution action is undertaken by a specific person as the perpetrator with a specific goal: a) to refuse to acknowledge that another (disappeared) person is deprived of liberty, or b) to conceal information about the fate or whereabouts of another (disappeared) person, thus placing him outside the protection of the law.

53 See B. Petrović, A. Ferhatović, D. Jovašević, *Krivično pravo* 2, Pravni fakultet, Sarajevo, 2024, 88–89.

54 See T. Milić, *op. cit.*, 37–64.

55 See O. Ševo (2019a), *op. cit.*, 177–190.

A special form of manifestation of this criminal offense is actually incitement, which is foreseen as an independent act of execution, and not as a form of complicity. This means that the very moment of undertaking an inciting act, there is a completed criminal offense of enforced disappearance, regardless of whether a person actually directly took part in the activity to which he was led, incited as a result of such activity. In this case, the criminal offense of enforced disappearance is undertaken by the following alternatively prescribed activities of incitement – deliberately undertaking various psychological activities to influence the will of another person or other persons to engage in the act of depriving, taking away the freedom of movement of a person, such as:⁵⁶ a) ordering the execution of activities of deprivation of another person's freedom of movement, b) inciting the execution of activities of deprivation of another person's freedom of movement, c) giving express (immediate, direct) clear or unequivocal acquiescence (oral or written consent) to undertaking any activity of deprivation of another person's freedom of movement aimed at the execution of his enforced disappearance, or d) giving explicit or tacit acquiescence to the execution of enforced disappearance, provided that such activities are undertaken by a certain person – an official in the institutions of Bosnia and Herzegovina.

Finally, in addition to directly undertaking of any of the several alternatively prescribed activities of depriving another person's freedom of movement or inciting in any way such deprivation of freedom, the CCBiH foresees criminal liability, i.e. sentence of imprisonment of not less than eight years, for the so-called command or senior responsibility of a superior person – to the immediate perpetrator of the offense. In order to establish the criminal liability of a superior, it is necessary:⁵⁷ a) that had knowledge or consciously ignored the information that a person subordinate to him had committed the criminal offense of enforced disappearance or that a person subordinate to him was about to commit such a criminal offense, b) that this person was responsible and had control over the subordinate's actions related to the commission of the criminal offense of enforced disappearance, and c) that he did not take (therefore, that he failed to take) all necessary and reasonable measures in his power to prevent or make impossible the commission of the criminal offense of enforced disappearance, that is, to hand over already committed offense, as well as its immediate perpetrator, to the State authorities (criminal prosecution authorities) for investigation and criminal prosecution.

In the end, the law explicitly (paragraph 4) stipulates that there is no possibility of absolution from guilt, but it can represent a mitigating circumstance “if the court considers that the interests of fairness require it”, which is a factual issue (the basis for optional mitigation of the punishment prescribed by law for the perpetrator of the offense in a specific case) if a person – as a direct executor

56 See M. Haseljić, „Prisilni nestanci na području Sarajeva 1992–1995“, *Pregled*, 2/2016, 6–19.

57 See O. Ševo (2019b), *op. cit.*, 144–155.

or a subordinate person – acted on the order of the government or a person superior to him. In any case, a person who refuses to execute an order for the enforced disappearance of a person – will not be punished (in which case there is a mandatory basis for absolution from guilt).

In terms of guilt, the intent of the perpetrator is required.

Only a certain person – a person with a certain personal characteristic (*delicta propria*) – can appear as the perpetrator of the offense. This can be: a) an official in the institutions of Bosnia and Herzegovina, b) another person who acts in the capacity of an official in the institutions of Bosnia and Herzegovina, or c) another person who acts by order or at the incitement or with the explicit or tacit acquiescence of an official in institutions of Bosnia and Herzegovina. The CCBiH (Article 2, item 3) determines who can have the status of an official.

For this offense, regardless of the form of manifestation, both for the immediate perpetrator or for a person superior to him, a sentence of imprisonment of at least eight years is prescribed.

5. CONCLUSION

Starting from universal international documents that establish a system of international legal protection of fundamental human rights and (or) freedoms, the ICCPED was adopted in December 2006 in New York within the framework of the Organization of United Nations. It established an obligation for individual States to prescribe the criminal offense of enforced disappearance in their national criminal legislations.

Following this international standard, certain criminal legislations, including Bosnia and Herzegovina and Slovenia in the region of Southeastern Europe, as states that were created after the breakup of the SFRY, established criminal liability and punishment for the criminal offense of enforced disappearance. In addition, these laws prescribe enforced disappearance as a form of crime against humanity.

The other analyzed criminal legislations of the countries in the region (Montenegro, Croatia, North Macedonia and Serbia) do not recognize the enforced disappearance of a person as an independent incrimination, but as a form of manifestation of another criminal offense, most often of a criminal offense against personal freedom – abduction (kidnapping), i.e. criminal offense of crime against humanity, provided that the deprivation of freedom of movement of another person was committed within or as part of a wider or systematic (widespread) attack on the civilian population, most often within armed conflict (international or non-international).

In the law of Bosnia and Herzegovina, the criminal offense of “Enforced disappearance” occurs in three basic forms of manifestation, depending on the type, nature or character of undertaken act of execution, or the characteristics of the perpetrator. In all cases, the object of protection is identical – the personal freedom of movement of a person, that is, the type of consequence of the violation

in the form of causing a state of deprivation of freedom of movement, for a shorter or longer period, permanently or temporarily, which indicates a “permanent criminal offense” by its legal nature.

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KRIVIČNA ODGOVORNOST ZA PRISILNI NESTANAK LICA: MEĐUNARODNI STANDARDI I PRAVO BOSNE I HERCEGOVINE

Rezime

Na osnovu međunarodnih standarda uspostavljenih u okviru dokumenata Organizacije Ujedinjenih nacija u savremenom nacionalnom krivičnom zakonodavstvu je propisana odgovornost i kažnjivost za različita međunarodna krivična djela. Radi se o protivpravnim djelatnostima pojedinaca ili grupa koje su usmjerene na povredu najznačajnijih ljudskih sloboda ili prava, među kojima se svakako nalazi sloboda kretanja čovjeka. Ova lična sloboda, uz slobodu mišljenja i odlučivanja, spada u skup najznačajnijih osnovnih ljudskih sloboda. Stoga je svako protivpravno narušavanje, povreda ili uskraćivanje ove ljudske slobode zabranjeno i kažnjivo djelo.

Specifičan oblik uskraćivanja slobode kretanja u savremenom krivičnom zakonodavstvu se kvalifikuje i kao krivično djelo otmice (kidnapovanja). To je oduzimanje (lišavanje) slobode kretanja drugog lica na prinudan način sa određenim ciljem – ostvarenja iznude ili prinude. Za razliku od otmice, pojedina krivična zakonodavstva poseban, specijalan oblik ispoljavanja oduzimanja slobode kretanja definišu kao prisilni nestanak lica. To je specifično krivično djelo koje na temelju Međunarodne konvencije o zaštiti svih lica od prisilnih nestanaka predviđaju pojedini savremeni krivični zakoni, a među njima i Krivični zakon Bosne i Hercegovine što je tema ovog članka.

Ključne riječi: sloboda kretanja, međunarodni standardi, krivično djelo, prisilni nestanak lica, Bosna i Hercegovina.

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