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*Legal Regulation of Liability for Illegal Deportation of Children:  
Administrative, Criminal Aspects,  
Experience of Ukraine and International Standards*

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# Secção I

## Investigação Científica\*

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## Legal Regulation of Liability for Illegal deportation of Children: Administrative, Criminal Aspects, Experience of Ukraine and International Standards

### Regulamentação Jurídica da Responsabilidade pela Deportação Ilegal de Crianças: Aspectos Administrativos e Penais - Experiência da Ucrânia e Normas Internacionais

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**ABSTRACT:** The article is devoted to the topical issue of criminal responsibility for illegal deportation of children. It is justified that illegal deportation of children is of particular concern, since it is practically impossible to record and establish the total number of such cases from the occupied territories of Ukraine to Russia. The recognition of such illegal actions in the criminal legislation and other legislation of Ukraine is also problematic. Attention is focused on the definition of the “child” legal category in the regulatory and legal acts of foreign countries, as well as in international acts. It has been proven that international standards and legal acts have clear mechanisms for protection of children's rights against illegal displacement and deportation. They also indicate that Ukrainian legislation has serious problems in regulating the use of such terms as “deportation”, “forced migration” and “illegal displacement”, as well as in defining the criteria for distinguishing between them. It has been concluded that the illegal displacement of children poses a threat to the national security of Ukraine, and the issue of deportation of children requires further development.

**KEYWORDS:** responsibility; war crimes; deportation; children; legislation; armed conflict; crimes of genocide; illegal displacement (transfer).

**RESUMO:** O artigo é dedicado à questão atual da responsabilidade criminal pela deportação ilegal de crianças. É justificado que a deportação ilegal de crianças é particularmente preocupante, uma vez que é praticamente impossível registrar e estabelecer o número total de tais casos dos territórios ocupados da Ucrânia à Rússia. O reconhecimento de tais ações ilegais na legislação penal e de outras legislações da Ucrânia é também problemática. A atenção está focada na definição da categoria

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jurídica “filho” nos atos regulamentares e jurídicos dos países estrangeiros, bem como nos atos internacionais. Está comprovado que os padrões internacionais e os atos jurídicos têm mecanismos claros para a proteção dos direitos das crianças contra a deslocação e a deportação. Indicam também que a legislação ucraniana tem problemas graves na regulação da utilização de termos como “deportação”, “migração forçada” e “deslocação ilegal”, bem como na definição dos critérios para distinguir entre eles. Concluiu-se que a deslocação ilegal das crianças representa uma ameaça à segurança nacional da Ucrânia, e a questão da deportação das crianças requer um maior desenvolvimento.

**PALAVRAS-CHAVE:** responsabilidade; crimes de guerra; deportação; crianças; legislação; conflito armado; crimes de genocídio; deslocamento ilegal (transferência).

## Introduction

The full-scale invasion of the Russian Federation into the territory of Ukraine has caused many unresolved issues in the legal field, and illegal transfer (deportation) of Ukrainian citizens and illegal adoption of children are of particular concern among these issues. It is the Russian Federation's violation of international law, in particular, international humanitarian law, international human rights law, and international criminal law, that caused the ambiguous position of the heads of state to the world: one group of states - provides all kinds of support to Ukraine, other states - supported the aggressor country, but there is also the third group of states - those which remained on the sidelines.

According to the National Information Bureau, as of September 2024, the aggressor country deported the largest number of children from Donetsk region: more than 13,600 of such cases were recorded. At least 1,600 children were taken from Kherson region, more than 1,300 children were taken from Zaporizhzhia region. In total, about 20,000 children were illegally removed and deported - these are only cases where there is any information about such deportation. The actual number of abducted children may be much higher.

It should be noted that

“the situation of international armed conflict significantly affects the processes of displacement of civilian population, and hostilities, danger and fear for their lives force people to leave their permanent place of residence. At the same time, it is important to identify and record facts of forced transfer (i.e., forced transfer of civilians within the territory of the state) or deportation (forced transfer of civilians to the territory of another state) of Ukrainian citizens by the occupying power or the enemy army, because such actions are an international crime”<sup>6</sup>.

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<sup>6</sup> DEPORTATION OF CITIZENS OF UKRAINE FROM THE TERRITORY OF ACTIVE HOSTILITIES OR FROM THE TEMPORARILY OCCUPIED TERRITORY OF UKRAINE TO THE TERRITORY OF THE RUSSIAN FEDERATION AND THE REPUBLIC OF BELARUS: Analytical

Illegal deportation of children from the occupied territories is of a particular concern, as it is almost impossible to document and establish the total number of such cases. Certain problems are caused when qualifying such illegal acts under the Criminal Code of Ukraine, which should be taken into account when developing the draft Criminal Code.

The problem of criminal responsibility for illegal deportation of children has caused lively discussion among forensic scientists. So, in particular, O. Litvinov notes that “today, there is no separate article of the Criminal Code of Ukraine, which would contain a description of the composition of deportation or forced displacement of population”<sup>7</sup>. Instead, B.V. Ostrovska believes that “absence of a contextual element will make it possible to qualify the abduction of children by representatives of the aggressor state according to the norms that provide for responsibility for criminal offenses provided for by the general norms provided for in Articles 146 and 149 of the Criminal Code of Ukraine”<sup>8</sup>. Another point worth to be noted is the scientific article by B. Ostrovska on the topic “Children of war: illegal deportation, forced displacement and repatriation” in which the scientist

“analysed the evidence of the Russian Federation committing international crimes related to illegal deportation, forced displacement of Ukrainian children, their transfer to custody, changes in their citizenship and adoption in the Russian Federation. In particular, this constitutes the crime of genocide against the Ukrainian people together with the committed crimes of aggression, war crimes and crimes against humanity”<sup>9</sup>.

Foreign researchers did not neglect this problem, in particular, Ioffe Y., who in their works based on the available evidence (in Russian and Ukrainian languages), including official statements and documents issued by the relevant authorities and officials of Russia and Ukraine (including the heads of state, ombudsmen, commissioners for children's rights, people's deputies) analyzed the situation regarding the forced displacement (transfer) of Ukrainian children from

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report. July 28, 2024. Available online. In: [https://zmina.ua/wp-content/uploads/sites/2/2023/01/deportation\\_ukr.pdf](https://zmina.ua/wp-content/uploads/sites/2/2023/01/deportation_ukr.pdf)

<sup>7</sup> LITVINOV, Oleksii., ORLOV, Yurii. & YASHCHENKO, Andrii. Problems of criminal liability for illegal movement of persons in the context of armed conflict: scientific analysis of legislative initiatives. *Bulletin of the Criminological Association of Ukraine*, 28(1), 2023. 11–30. DOI: <https://doi.org/10.32631/vca.2023.1.01>

<sup>8</sup> OSTROVSKA, Bohdana. Children of war: illegal deportation, forced displacement and repatriation. *New Ukrainian law*. 2. 2023. 60-72. DOI: <https://doi.org/10.51989/NUL.2023.2.8>

<sup>9</sup> OSTROVSKA, Bohdana. Children of war: illegal deportation, forced displacement and repatriation. *New Ukrainian law*. 2. 2023. 60-72. DOI: <https://doi.org/10.51989/NUL.2023.2.8>

the temporarily occupied territories of the East and South of Ukraine and the possibility of bringing them to international criminal responsibility for genocide<sup>10</sup>.

However, despite the contribution made by these scientists to the state of scientific development of responsibility for illegal deportation, many issues remain debatable and require further research.

The purpose of this article consists in studying opinions of criminologists (scientists and practitioners) regarding the wording of the article on responsibility for the illegal removal of a child and articles containing signs of illegal deportation formulated by the drafters of the Criminal Code of Ukraine, as well as in identifying shortcomings of these articles and justifying promising directions for their elimination.

To achieve this purpose, the following tasks need to be performed: Establish a list of legislation that regulates responsibility for illegal removal of children and illegal deportation in the international law and the national legislation. Establish compliance of the article on illegal removal of children and articles containing signs of illegal deportation in accordance with Ukrainian national legal acts with the provisions of the international legislation.

Taking into account the subject of the research, a comprehensive approach to the application of scientific research methods was chosen. In particular, the dialectical method of cognition made it possible to establish legal norms that provide for responsibility for illegal deportation of children and to identify problems related to their enforcement. Using the dogmatic method, a list of criminally illegal acts, which include illegal deportation, was clarified. The comparative law method was used to compare the current Criminal Code of Ukraine with the draft Criminal Code and legislative initiatives regarding establishing criminal liability for forcible removal of persons in conditions of armed aggression and forced displacement of a person outside the territory of Ukraine.

## **Results and Discussion**

### **Protection of children's rights against illegal deportation in the international law and the national legislation**

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<sup>10</sup> IOFFE, Yulia. Forcibly Transferring Ukrainian Children to the Russian Federation: A Genocide? *Journal of Genocide Research*, 25(3-4), 2023. 315-351. DOI: <https://doi.org/10.1080/14623528.2023.2228085>



A child is an integral part of any state and what the child will be depends on the state. The only thing that can distinguish one child from another is whether the child is happy where he/she is<sup>11</sup>. Mostly it depends on what is happening around the child: the child hears laughter, sees the joyful faces of relatives and people close to him/her while listening to the intonation of their voice. It is hard to imagine that all this can stop in an instant, when war and death are all around<sup>12</sup>.

It is worth paying attention to the aspect that the international law lacks a unified approach to the definition of “child”. So, for example, according to the UN Convention on the Rights of the Child, “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”<sup>13</sup>. In the Convention on the Prohibition and Immediate Measures for the Elimination of the Worst Forms of Child Labor No. 182, the term “child” shall apply to all persons under the age of 18<sup>14</sup>. Also, according to the European Social Security Code (revised) (ETS No. 139), the term “child” means: a child not having reached school-leaving age, or under 16 years of age; under prescribed conditions, a child over the age specified in the foregoing subparagraph who is an apprentice or a student or suffers from chronic illness or infirmity making him unfit to engage in any occupational activity.<sup>15</sup>

Thus, based on the analysis of individual provisions of international legal acts, it can be noted that the term “child” means any person under the age of 18, but sometimes it is also a person under the age of sixteen.

And according to the national legislation the term “child” means:

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<sup>11</sup> MUELRATH, Lily. “Never Again” Yet Another Genocide: Russia’s Unlawful Forced Transfer and Adoption of Ukrainian Children, 41 *Wis. Int’l L.J.* 219 (2024). DOI: <https://doi.org/10.59015/wilj.QZEF9680>

<sup>12</sup> MARCONI, Claudia. LIRA, Júlia. Unmasking Forcible Displacement of Childhood: A Multidimensional Analysis of Ukrainian Children. Available online. In: <https://www.e-ir.info/2023/07/12/unmasking-forcible-displacement-of-childhood-a-multidimensional-analysis-of-ukrainian-children/>

<sup>13</sup> UN CONVENTION ON THE RIGHTS OF THE CHILD: International document dated November 20, 1989. Official. website page of the Verkhovna Rada of Ukraine. Available online. In: [https://zakon.rada.gov.ua/laws/show/995\\_021#Text](https://zakon.rada.gov.ua/laws/show/995_021#Text)

<sup>14</sup> CONVENTION ON THE PROHIBITION AND IMMEDIATE MEASURES FOR THE ELIMINATION OF THE WORST FORMS OF CHILD LABOR No. 182: International Document No. 182 dated 17.06.1999 Official. website page of the Verkhovna Rada of Ukraine. Available online. In: [https://zakon.rada.gov.ua/laws/show/993\\_166#Text](https://zakon.rada.gov.ua/laws/show/993_166#Text)

<sup>15</sup> EUROPEAN SOCIAL SECURITY CODE (REVISED) (ETS N 139): International document dated November 6, 1990 No. ETS No. 139. Official. website page of the Verkhovna Rada of Ukraine. Available online. In: [https://zakon.rada.gov.ua/laws/show/994\\_651#Text](https://zakon.rada.gov.ua/laws/show/994_651#Text) online. In: <https://zakon.rada.gov.ua/laws/show/2235-14#Text>

- a person under the age of 18 unless, under the law applicable to him or her, he or she acquires the rights of an adult earlier (Law of Ukraine “On Childhood Protection”)<sup>16</sup>;
- a person under eighteen years of age (of majority), if according to the law he or she does not acquire the rights of majority earlier (Law of Ukraine “On State Assistance to Families with Children”)<sup>17</sup>;
- any natural person under the age of eighteen (Law of Ukraine “On Combating Human Trafficking”)<sup>18</sup>;
- a person under the age of 18 (Law of Ukraine “On Ukrainian Citizenship”)<sup>19</sup>.

Therefore, based on the above, according to national legislation the following are considered under the term “child”: 1) a person under eighteen years of age; 2) the fact of not acquiring the rights of an adult earlier in accordance with the legislation applicable to him or her.

The problem of forced displacement and deportation of children arose even before the full-scale invasion in February 2022, and much earlier - during the so-called “hybrid” period of the armed conflict from March 2014 to February 23, 2022. It has been repeatedly noted in the mass media that “after the annexation of Crimea, under the “Train of Hope” program, children were moved to Russian regions, where they were given up for adoption.” At that time, there were about 5,000 orphans in Crimea, and it is not known for sure where they are now. Since then, deportations have taken place in all occupied territories”<sup>20</sup>.

<sup>16</sup> Law of Ukraine. ON CHILDHOOD PROTECTION: Law of Ukraine dated 04/26/2001 No. 2402-III. official website page of the Verkhovna Rada of Ukraine. Available online. In: <https://zakon.rada.gov.ua/laws/show/2402-14#Text>

Law of Ukraine. ON COMBATING HUMAN TRAFFICKING: Law of Ukraine dated September 20, 2011. Official. website page of the Verkhovna Rada of Ukraine. No. 3739-VI. Available online. In: <https://zakon.rada.gov.ua/laws/show/3739-17#Text>

<sup>17</sup> Law of Ukraine. ON STATE ASSISTANCE TO FAMILIES WITH CHILDREN: Law of Ukraine dated November 21, 1992 No. 2811-XII. Available online. In: <https://zakon.rada.gov.ua/laws/show/2811-12#Text>

<sup>18</sup> Law of Ukraine. ON COMBATING HUMAN TRAFFICKING: Law of Ukraine dated September 20, 2011. Official. website page of the Verkhovna Rada of Ukraine. No. 3739-VI. Available online. In: <https://zakon.rada.gov.ua/laws/show/3739-17#Text>

<sup>19</sup> Law of Ukraine. ON UKRAINIAN CITIZENSHIP: Law of Ukraine dated January 18, 2001 No. 2235-III. official website page of the Verkhovna Rada of Ukraine. Available online. In: <https://zakon.rada.gov.ua/laws/show/2235-14#Text>

<sup>20</sup> LEHEZA, Yevhen. FILATOV, Viktor. VARAVA, Volodymyr. HALUNKO, Vira. KARTSYHIN, Dmytro. Scientific and practical analysis of administrative jurisdiction in the light of adoption of the new code of administrative procedure of Ukraine. *Journal of Legal, Ethical and Regulatory Issues*. Vol. 22, Issue 5. 2019. P. 1-8. URL: <https://www.abacademies.org/articles/scientific-and-practical-analysis-of-administrative-jurisdiction-in-the-light-of-adoption-of-the-new-code-of-administrative-proced-8634.html>



Additionally, more than 19,000 children have been displaced by the Russian Federation since February 2022, according to the National Information Bureau.

It should be noted that issues of protection of children's rights are constantly in the focus of attention due to the special vulnerability of this category. Protection of children's rights is an important component of international and national law. Among the many international documents on the protection of children's rights, there are also those that regulate the issue of forced transfer of children, it is worth noting the UN Convention on Human Rights of 1948, the Convention on the Rights of the Child, 1989; Geneva Convention on the Protection of the Civilian Population in Time of War, 1949; Convention on the Prevention of the Crime of Genocide and its Punishment, 1948; Hague Convention on the Civil Aspects of International Child Abduction, 1980, as well as the Rome Statute of the International Criminal Court, 1998.

In particular, in Art. 49 of the Geneva Convention on the Protection of the Civilian Population in Time of War of 1949 it is stated that "it is prohibited, regardless of the motives, to carry out forced individual or mass resettlement or deportation of persons under protection from the occupied territory to the territory of the occupying state or to the territory of any of any other country, regardless of whether it is occupied or not. However, the occupying state may carry out total or partial evacuation from a certain territory, if it is necessary for ensuring safety of the population or is due to particularly compelling reasons of a military nature. Carrying out such evacuations may not involve the movement of protected persons outside the occupied territory, except in cases where this cannot be avoided for material reasons. Persons who have been evacuated in this way must be sent home immediately after the cessation of hostilities in that territory"<sup>21</sup>.

In Article II of Convention on the Prevention of the Crime of Genocide and its Punishment, 1948, acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, and which constitute genocide include "(e) forcible transfer of children of such group to another group"<sup>22</sup>.

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<sup>21</sup> GENEVA CONVENTION ON THE PROTECTION OF THE CIVILIAN POPULATION IN TIME OF WAR of August 12, 1949. Officer. website page of the Verkhovna Rada of Ukraine. Available online. In: [https://zakon.rada.gov.ua/laws/show/995\\_154#Text](https://zakon.rada.gov.ua/laws/show/995_154#Text)

<sup>22</sup> CONVENTION ON THE PREVENTION OF THE CRIME OF GENOCIDE AND ITS PUNISHMENT of December 9, 1948. Officer. website page of the Verkhovna Rada of Ukraine. Available online. .In: [https://zakon.rada.gov.ua/laws/show/995\\_155#Text](https://zakon.rada.gov.ua/laws/show/995_155#Text)

As for the Rome Statute, forced relocation is discussed in Art. 7. Crimes against humanity ((d) deportation or forcible transfer of population), Art. 8. War crimes (including vii) unlawful deportation or transfer or unlawful deprivation of liberty; viii) transfer, directly or indirectly, by the occupying power of part of its own civilian population to the territory occupied by it or deportation or transfer of all or part of the population of the occupied territory within or beyond the borders of this territory), and in Art. 6. Genocide refers to the forcible transfer of children of this group to another group. In addition, in part 2 of Art. 7. Crimes against humanity are interpreted as “deportation or forcible displacement of the population”, which should be understood as the forcible displacement of relevant persons through eviction or other coercive actions from the territory where they are legally present, in the absence of grounds permitted by international law<sup>23</sup>.

In the analytical report “Deportation of citizens of Ukraine from the territory of active hostilities or from the temporarily occupied territory of Ukraine to the territory of the Russian Federation and the Republic of Belarus”, its authors emphasize that “a significant part of the deported persons are children, who are in a particularly vulnerable position due to their age. The Russian army takes away orphans and children deprived of parental care from the occupied territories. There is information on placement and adoption of such children into families of Russian citizens. Moreover, Maria Lvova-Belova, a Commissioner under the President of the Russian Federation for Children’s Rights, “adopted” a child from Mariupol.

These facts are also recognized by the International Criminal Court, because on March 17, 2023 Pre-Trial Chamber II of the ICC issued arrest warrants for two persons in the context of the situation in Ukraine: President of the Russian Federation V.V. Putin and the Commissioner for Children’s Rights in the Office of the President of the Russian Federation M.O. Lvivova-Belova On the basis of the requests of the prosecutor's office dated February 22, 2023 Pre-Trial Chamber II concluded that there are reasonable grounds to believe that each suspect *is responsible for the war crime of illegal deportation of the population (children) and illegal transfer of the population (children) from the*

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<sup>23</sup> THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT. officer website page of August 21, 2024. Officer. website page of the Verkhovna Rada of Ukraine. Available online. In: [https://zakon.rada.gov.ua/laws/show/995\\_588#Text](https://zakon.rada.gov.ua/laws/show/995_588#Text)

*occupied territories of Ukraine to the Russian Federation, to the detriment of Ukrainian children* (ed. – A.S.P.).

Therefore, there is a clear mechanism in international law to protect the rights of children against illegal displacement or deportation. And as for the national legislation, we should note that the decree of the President of Ukraine dated 08 August, 2022 No. 568/2022, a consultative and advisory body was created under the President of Ukraine - the Coordination Council for Protection and Safety of Children. The main tasks of the Coordination Council for the Protection and Safety of Children include the systematic analysis of the situation and the determination of priorities for the protection of the rights and safety of children, in particular in the conditions of martial law. The Council is also engaged in the development of proposals for prevention of crimes against children and their forced removal, it ensures coordination and monitoring of the effectiveness of these measures. An important part of the activity consists in preparation of normative legal acts, monitoring of the situation regarding children evicted from the occupied territories and those who need evacuation from the combat zone with the aim of their return and settlement after the war<sup>24</sup>.

### **Responsibility for the illegal deportation of children under the current Criminal Code of Ukraine and directions for improvement**

It is worth noting that in the scientific articles and individual publications we paid attention to in the framework of preparation and writing of the scientific article, the acts committed by the aggressor country regarding illegal transfer or deportation of children contain signs of a criminal offense provided for in Art. 442. Genocide of the Criminal Code of Ukraine. So, for example,

"according to the opinion of Emmanuel Doud, a French lawyer who filed a lawsuit at the International Criminal Court due to the forcible deportation of Ukrainian children to Russia, the very fact of deportation of children is a component of the crime of genocide. Attacking a part of the population with a goal (which is very important!) – the assimilation of this population (in this case it is the Ukrainian nation) is enough to qualify what is happening as genocide. In other words, take the children by force, deport them, take them to Russia, give them to Russian adoptive parents, and then sever all ties - both psychological and physical - with their parents, with the Ukrainian

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<sup>24</sup> Law of Ukraine. ABOUT THE COORDINATION COUNCIL FOR THE PROTECTION AND SAFETY OF CHILDREN: Decree of the President of Ukraine dated August 8, 2022 No. 568/2022. officer website page of the Verkhovna Rada of Ukraine. Available online. In: <https://zakon.rada.gov.ua/laws/show/568/2022#Text>

people, with history... So, it is called the assimilation of a part of the Ukrainian nation, and therefore it can be called genocide”<sup>25</sup>.

However, the analysis of registered criminal offenses and the results of their pre-trial investigation by the Office of the General Prosecutor of Ukraine for 2022-April 2024 allow us to note: in 2022, 22 criminal offenses provided for by Art. 442 of the Criminal Code of Ukraine were registered, in 5 criminal proceedings, persons were served with a notice of suspicion and 4 were sent to court with an indictment; In 2023, 7 criminal offenses were registered, according to 2 criminal proceedings, persons were served with a notice of suspicion and 1 was sent to court with an indictment; in 2024 – 1 criminal was registered and a notice of suspicion was served on those persons.

Such statistical data allow us to note that law enforcement agencies classify cases of deportation or illegal transfer of children under another article of the Criminal Code of Ukraine, namely under Art. 438. Violation of laws and customs of war of the Criminal Code of Ukraine. This indicates certain problems with qualification, because on the one hand, according to part 1 of Art. 442

“genocide, i.e., an act intentionally committed with the aim of complete or partial destruction of any national, ethnic, racial or religious group by taking the lives of members of such a group or inflicting serious bodily harm on them, creating living conditions for the group designed for its complete or partial destruction physical destruction, reduction or prevention of childbearing in such a group or *by forceful transfer of children from one group to another* (ed. – A.S.P.)”,

and on the other hand – part 1 of Art. 438 provides for responsibility for

“cruel treatment of prisoners of war or the civilian population, deportation of the civilian population for forced labor, looting of national values in the occupied territory, use of means of warfare prohibited by international law, other violations of the laws and customs of war provided for by international treaties, consent to the binding nature of which is provided by the Verkhovna Rada of Ukraine (ed. – A.S.P.), as well as issuing an order to perform such actions”<sup>26</sup>.

That is why it is worth agreeing with leading scholars of criminal law, who note that

“in order to distinguish the displacement of population as a war crime (which can be criminalized in Art. 438 of the Criminal Code of Ukraine) and as a crime against humanity (cannot be defined in Art. 438 of the Criminal Code

<sup>25</sup> KORNIENKO, Maksym. DESYATNIK, Anatolii. DIDKIVSKA, Galina. LEHEZA, Yevhen. TITARENKO, Oleksiy. 2023. Peculiarities of investigating criminal offenses related to illegal turnover of narcotic drugs, psychotropic substances, their analogues or precursors: criminal law aspect. *Khazanah Hukum*. Vol. 5. No. 3, 205-215 DOI: <https://doi.org/10.15575/kh.v5i3.31742>.

<sup>26</sup> VOLOBUIEVA, Olena. LEHEZA, Yevhen. PERVII, Vita. PLOKHUTA, Yevhenii. PICHKO, Roman Criminal and Administrative Legal Characteristics of Offenses in The Field of Countering Drug Trafficking: Insights from Ukraine. *Yustisia*. Vol 12, No 3. 2023. 262-277. DOI: <https://doi.org/10.20961/yustisia.v12i3.79443>

of Ukraine) the key point is to take into account the contextual element. For a war crime, it is a situation of armed conflict and war nexus (relationship with conflict). But crimes against humanity can also be committed in a situation of armed conflict. So, it is not a sufficient criterion.”

It also points to the need and improvement of the Law on Criminal Liability.

When investigating the matter of the qualification of illegal deportation,

I. Shkaruta notes that

“when conducting an analysis of the criminal legislation of Ukraine and the activities of the Prosecutor General’s Office of Ukraine, we can come to the conclusion that there is no rule of law in the domestic legislation that would clearly and unequivocally regulate the criminal liability of persons who committed forced (as well as fraudulently, through abuse of trust) deportation, relocation of the civilian population, children - citizens of Ukraine”<sup>27</sup>.

The issue of improving the Criminal Code of Ukraine regarding establishment of responsibility for forcible removal of persons was raised in the draft Laws of Ukraine “On Amendments to the Criminal Code of Ukraine and other legislative acts of Ukraine regarding forcible removal of a person in conditions of armed aggression” (Reg. No. 8326 dated 30 December 2022) and “On Amendments to the Criminal Code of Ukraine regarding the forcible transfer of persons outside the territory of Ukraine” (Reg. No. 9204 dated 13 April 2023)<sup>28</sup>. It should be noted that in the draft Law of Ukraine “On Amendments to the Criminal Code of Ukraine and other legislative acts of Ukraine regarding the forcible removal of persons in conditions of armed aggression” (reg. No. 8326 dated 30 December 2022) we are talking about supplementing the Criminal Code of Ukraine with a new article 438-1 “Forcible removal of persons in conditions of armed aggression”, which establishes criminal responsibility for forcible removal of a person outside the territory of Ukraine in conditions of armed aggression (part one of this article) and for committing such actions against two or more persons, or against a minor in the absence of signs of genocide (part two of this article). We believe that adoption of this draft Law would create competition,

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<sup>27</sup> LEHEZA, Yevhen. SHCHERBYNA, Bogdan. LEHEZA, Yulia. PUSHKINA, Olena. MARCHENKO, Olesia. Features of Applying the Right to Suspension or Complete/ Partial Refusal to Fulfill a Duty in Case of Non-Fulfilment of the Counter Duty by the Other Party According to the Civil Legislation of Ukraine. *Revista Jurídica Portucalense*, 2023. 340–359. Retrieved from <https://revistas.rcaap.pt/juridica/article/view/29662>

<sup>28</sup> HRYHORASH, Olha. KORNEYEV, Maxim. LEHEZA, Yevhen. ZOLOTUKHINA, Liliya. HRYHORASH, Tetiana. The development of small business as a source of formation of local budget revenues in Ukraine. *Investment. Management and Financial Innovations*. 15 (1). 2018. P. 132-140. DOI:10.21511/imfi.15(1).2018.12

namely between Art. 438. Violation of laws and customs of war and Art. 438-1<sup>29</sup>. Forcible removal of persons in conditions of armed aggression of the Criminal Code of Ukraine, which would complicate the qualification of already recorded criminal offenses, because according to the general rule of qualification in the competition of general and special norms priority belongs to the special norm, that is, the legal composition of the criminal offense that defines criminally illegal behavior more specifically. At the same time, it is worth remembering that Part 2 of Art. 5 of the Criminal Code of Ukraine states that “The Law on Criminal Liability, which establishes the criminal illegality of an act, increases criminal liability or otherwise worsens the situation of a person, does not have retroactive effect in time”<sup>30</sup>.

And as for the draft Law of Ukraine “On Amendments to the Criminal Code of Ukraine regarding the forcible transfer of persons outside the territory of Ukraine” (Reg. No. 9204 dated April 13, 2023), here we are talking about the new edition of Art. 438. Violation of laws and customs of war of the Criminal Code of Ukraine, which separately provides for such a feature as the forcible transfer of persons outside the territory of Ukraine. Shortcomings of this edition include the incorrect use of the phrase “outside the territory of Ukraine”.

In our opinion, it is worth noting that the analysis of the provisions of the Convention on the Civil Aspects of International Child Abduction allows us to note one feature: in this Convention, two terms are used at once, which should have different meanings in terms of their content - “displacement” (in the text of the Convention) and “abduction” (in the title of the Convention). In particular, as regards the first term,

“Displacement or keeping a child is considered illegal if:

a) at the same time, the rights of custody of the child belonging to any person, institution or other body, collectively or individually, in accordance with the legislation of the state in which the child permanently resided before the transfer or retention, are violated; and

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<sup>29</sup> LEHEZA, Yevhen. YEROFIEIENKO, Larysa. KOMASHKO, Volodymyr. (2023). Peculiarities of legal regulation of intellectual property protection in Ukraine under martial law: administrative and civil aspects. *Law of Justice Journal*, 37(3), 157-172. <https://doi.org/10.5335/rjd.v37i3.15233>

<sup>30</sup> Law of Ukraine. CRIMINAL CODE OF UKRAINE dated April 5, 2001. Revision dated May 19, 2024. officer website page of the Verkhovna Rada of Ukraine. Available online. In: <https://zakon.rada.gov.ua/laws/show/2341-14#Text>



b) at the time of the displacement (transfer) or detention, these rights were effectively exercised, collectively or individually, or would have been exercised but for the transfer or detention”<sup>31</sup>.

A somewhat similar situation regarding the incorrect (in our opinion) use of terminology also occurs in the draft Criminal Code. So, in particular, the wording of article 11.5.11. Illegal abduction of a child: "A person who illegally removed a child whose father, mother or guardian is known to be a victim of enforced disappearance has committed a crime of the 5th degree”.

According to the International Convention for the Protection of All Persons from Enforced Disappearance, enforced disappearance is defined as

“arrest, detention, abduction or deprivation of liberty in any other form by representatives of the State or persons or groups of persons acting with the authorization, support or consent of the State , with the subsequent refusal to recognize the fact of deprivation of liberty or concealment of information about the fate or location of the missing person, as a result of which this person is left without the protection of the law, and based on the title of the article itself, we are talking (in our opinion) about abduction of a child”<sup>32</sup>.

That is, the father, mother or guardian must be recognized as victims of such illegal acts.

And as for the child, based on the construction of the disposition of this article, when talking about the "removal of a child" we are talking about abduction of this removed child.

In addition, the provisions of the articles of the Chapters included in the Eleventh Book. Crimes against the international legal order of the draft Criminal Code contains an act that, according to international humanitarian law, refers to illegal deportation, but the wording of the articles itself has certain shortcomings, because there is again a reference to certain international legal acts, which indicates that these dispositions are blanket and complicate their enforcement.

## Conclusion

Therefore, the illegal deportation of children poses a threat to the national security of Ukraine. The events of February 2022 exacerbated the problem that

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<sup>31</sup> CONVENTION ON CIVIL LEGAL ASPECTS OF INTERNATIONAL CHILD ABDUCTION of October 25, 1980. Official. website page of the Verkhovna Rada of Ukraine. Available online. In: [https://zakon.rada.gov.ua/laws/show/995\\_188#Text](https://zakon.rada.gov.ua/laws/show/995_188#Text)

<sup>32</sup> LEHEZA, Yevhen. SHABLYSTYI, Volodymyr. ARISTOVA, Irina. KRAVCHENKO, Ivan. KORNIKOVA, Tatiana. Foreign Experience in Legal Regulation of Combating Crime in the Sphere of Trafficking of Narcotic Drugs, Psychotropic Substances, their Analogues and Precursors: Administrative and Criminal Aspect. *Journal of Drug and Alcohol Research*. Vol. 12. No. 4, 2023. 1-8. DOI: <https://doi.org/10.4303/JDAR/236240>.

had existed since 2014. But unfortunately, the aggression of the Russian Federation is lasting and the occupation of the territory is lasting, no matter how painful it may be for us. This, in turn, affects the number of criminal proceedings under Art. 438 of the Criminal Code of Ukraine and Art. 442 of the Criminal Code of Ukraine, and among these criminal proceedings it is difficult to single out a category regarding the illegal deportation of children. The difficulty of proving this category of criminal proceedings is related to the limited access of law enforcement agencies to information and the impossibility of establishing the exact number of persons involved in such illegal acts.

Summarizing our research, we can draw the following conclusions:

In international law, there are a number of international legal acts that regulate the issue of illegal deportation of children, in particular, the UN Convention on Human Rights of 1948, the Convention on the Rights of the Child, 1989; Geneva Convention on the Protection of the Civilian Population in Time of War, 1949; Convention on the Prevention of the Crime of Genocide and its Punishment, 1948; The Hague Convention on the Civil Aspects of International Child Abduction, 1980, as well as the Rome Statute of the International Criminal Court, 1998. As for the national legislation, there is an acute problem in the normative regulation of the use of the terminology “deportation”, “forced displacement” and “illegal removal” and the definition of the criteria for distinguishing these terms.

Forced displacement (transfer), deportation of children has signs of violation of the provisions of the UN Convention on the Rights of the Child, in particular, Articles 8 and 21 of this convention, which establish the obligation of states to respect the child’s right to preserve individuality, including citizenship, name, family ties, not allowing illegal intervention, and the duty of the state to ensure that the adoption of a child is authorized only by competent authorities who determine that the adoption is permissible in view of the child’s status parents, relatives and legal guardians, and that the persons concerned have given their informed consent to the adoption. Article 78 of Additional Protocol I establishes a direct ban on the transfer of children to a foreign state and notes the only exceptional circumstance in which the transfer of children who are in the occupied territory may be permitted — urgent reasons related to the health or treatment of the children. At the same time, it is emphasized that such an

evacuation should be temporary. Also taking into account the adoption of children, the simplification of the procedure for such adoption by citizens of the Russian Federation, the imposition of Russian citizenship on such children, the actions of the Russian Federation have signs of genocide under Article 6 and (e) of the Rome Statute.

According to the national criminal legislation of Ukraine, the actions of the Russian Federation regarding the forced deportation of Ukrainian citizens can be qualified under Article 438 of the Criminal Code of Ukraine (violation of laws and customs of war). Such an international crime as deportation is currently not directly enshrined in the disposition of Article 438 of the Criminal Code of Ukraine (there is a blanket norm regarding other violations of laws and customs of war provided for by international treaties, the consent of which has been granted by the Verkhovna Rada of Ukraine), so its application requires an investigation in order to determine the norms of international humanitarian law violated during deportation, forced relocation. In the draft Criminal Code of Ukraine, Article 11.5.11. Illegal abduction of a child refers to the abduction of a child, which causes some debate as to the place of this article in the Eleventh Book. Crimes against the international legal order of the draft Criminal Code, because the main immediate object in this case is determined as freedom of the child. In addition, the wording of the articles in this book indicates blanket dispositions and possible difficulties in their enforcement.

Our conclusions allow us to note that today there are certain problems of attracting persons who have committed illegal deportation as well as problems regarding qualification of their actions, and this topic requires further scientific research.

The issue of improving the Criminal Code of Ukraine regarding establishment of responsibility for forcible removal of persons was raised in the draft Laws of Ukraine "On Amendments to the Criminal Code of Ukraine and other legislative acts of Ukraine regarding forcible removal of a person in conditions of armed aggression" (Reg. No. 8326 dated 30 December 2022) and "On Amendments to the Criminal Code of Ukraine regarding the forcible transfer of persons outside the territory of Ukraine" (Reg. No. 9204 dated 13 April 2023).

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