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## ON LIABILITY FOR THE FAILURE TO RETURN CHILDREN FROM ABROAD UNDER THE PROVISIONS OF THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

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According to the provisions of the Preamble of the Rome Statute of the International Criminal Court (hereinafter – ICC Rome Statute), the most serious crimes that concern the entire international community must not go unpunished, and their effective prosecution must be ensured through both national measures and strengthened international cooperation [9].

It should be noted that the ICC Rome Statute has jurisdiction over crimes such as: a) genocide; b) crimes against humanity; c) war crimes; and d) the crime of aggression (Article 5 of the Statute) [9]. Crimes against humanity related to the unlawful transfer of children to the aggressor state and failure to return children from abroad occupy a special place among these offenses.

On October 25, 2024, with the simultaneous entry into force of the Law of Ukraine “On the Ratification of the Rome Statute of the International Criminal Court and Amendments Thereto” of August 21, 2024 No. 3909-IX [8], the Law of Ukraine “On Amending the Criminal and Criminal Procedure Codes of Ukraine in Connection with the Ratification of the Rome Statute of the International Criminal Court and Amendments Thereto” of October 9, 2024 No. 4012-IX [7] also took effect. This law introduced a new Article 442-1 (Crimes Against Humanity) into the Criminal Code of Ukraine and made corresponding changes to Article 438 of the Criminal Code, including renaming it from “Violations of the Laws and Customs of War” to “War Crimes”. As a result of these amendments, criminal acts against humanity were separated from Article 438 and transferred to Article 442-1 of the Criminal Code, establishing an exhaustive list of forms of criminal activity constituting crimes against humanity.

It should be noted that before the introduction of the provision on crimes against humanity (Article 442-1 of the Criminal Code), crimes involving children were classified under Article 438 of the Criminal Code in its previous version, which referred to the provisions of international treaties ratified by the Verkhovna Rada of Ukraine, specifically the 1949 Geneva Conventions, particularly the Convention Relative to the Protection of Civilian Persons in Time of War [2], as well as the 1989 Convention on the Rights of the Child [3], which criminalize the unlawful removal and/or failure to return children from abroad. However, with the inclusion of the new Article 442-1 in the Criminal Code, which contains an exhaustive list of punishable acts, only acts in the form of population deportation remain criminalized, i.e., the forced and unjustified relocation (expulsion) of a group of individuals from a territory where they lawfully reside to another state. Notably, the criminal liability for failing to return children from abroad has been overlooked by the legislator.

In this context, it is worth noting that under certain conditions, such actions could be considered enforced disappearances, defined under Note 2 to Article 442-1 of the Criminal Code as arrest, detention, abduction, or deprivation of liberty of a person in any other form, followed by the refusal to acknowledge the fact of such arrest, detention, abduction, or deprivation of liberty of the person in any other form, or the concealment of information about the fate or whereabouts of such a person, as well as the refusal to acknowledge the fact of arrest, detention, abduction, or deprivation of liberty of the person in any other form or the concealment of information about the fate or whereabouts of such a person [5]. However, actions involving the deprivation of liberty or concealing information about the person's fate or location, which could hypothetically include the failure to return children from abroad, pertain solely to enforced disappearances. If a person (child) is lawfully relocated to the aggressor state in line with the Geneva Conventions in case of a life-threatening situation and subsequently conceals their relocation, whereabouts, or fate and illegally detains them against their will, such actions are currently effectively decriminalized under national law.

Consequently, criminal proceedings for such actions will be subject to termination. Under part 5 of Article 459 of the Criminal Procedure Code of Ukraine, the adoption of new laws or other regulatory acts that repeal laws or other normative acts in effect at the time of the proceedings does not constitute grounds for conducting criminal proceedings based on newly discovered or exceptional circumstances, thus prohibiting the review of court decisions [6]. Therefore, a court decision that has entered into force will not be subject to review. The situation differs when guilty individuals have not yet been held criminally responsible (a court verdict has not yet entered into force), which leads to the closure of ongoing criminal

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proceedings. Clearly, this situation is unacceptable, as criminal actions against children involving their non-return to Ukraine are a societal danger not only from the perspective of international law but also considering the social consequences of the unpunished mass non-return of children to Ukraine, whose numbers vary significantly according to different estimates. According to the information provided by the Ukrainian Parliament Commissioner for Human Rights, Dmytro Lubinets, the actual number of illegally transported children is approximately 150,000, while the Commissioner for Children's Rights, Daria Herasymchuk, estimates this figure to be "several hundred thousand". To date, through the efforts of Ukrainian human rights organizations and media coverage, the names of about 19,000 children who were illegally taken to the Russian Federation have been identified. As of the end of April 2023, only 361 children have been returned to Ukraine [1]. Thus, the number of children illegally transferred to the Russian Federation and/or unreturned children from abroad ranges from tens of thousands to several hundred thousand, with thousands of children recognized as victims in criminal proceedings under Article 438 of the Criminal Code of Ukraine.

The situation is also ambiguous regarding the provisions of the ICC Rome Statute concerning the criminality of failing to return children from abroad. Article 7 of the Statute lacks criminal liability for this crime against humanity [9]. Unfortunately, the ICC Rome Statute did not incorporate Article 11 of the 1989 Convention on the Rights of the Child [3]. Currently, the only relevant international legal instrument is the 1980 Convention on the Civil Aspects of International Child Abduction, under Article 3 of which the removal or retention of a child is considered unlawful if: a) it violates custody rights attributed to an individual, institution, or other entity, individually or collectively, under the laws of the state where the child habitually resided prior to removal or retention; and b) these rights were actually exercised, either collectively or individually, or would have been exercised but for the removal or retention [4]. It is based on the provisions of this Convention that children taken to the aggressor state are returned.

In view of the above, we believe that the civil aspects of returning children from abroad are insufficient, and the ICC Rome Statute needs to be supplemented with provisions extending the jurisdiction of the International Criminal Court to international criminal offenses involving children to ensure effective criminal legal measures against the non-return of children from abroad.

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