

## Case Note

# DECLARING A NATURAL PERSON MISSING OR DEAD IN CIVIL PROCEEDINGS: NEW CHALLENGES IN THE CONDITIONS OF ARMED AGGRESSION IN UKRAINE

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**Summary:** 1. Introduction. – 2. Proceedings on The Recognition of a Person as Disappeared: Features and Differences from The Recognition of a Person as Missing. – 3. Proceedings Declaring a Person Dead and The Difference from Establishing the Fact of Death of a Person in the Temporarily Occupied Territories. – 4. Key Legal Issues of Proceedings in Cases of Recognition of a Natural Person as Missing or Declared Dead in the Conditions of Hostilities and Temporary Occupation of Certain Territories of Ukraine. – 5. Conclusions.

**Keywords:** *recognition of a person as disappeared; declaring a person missing; declaring a person dead; proceeding in the temporarily occupied territories; the Institution of the Commissioner for Missing Persons in Special Circumstances.*

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## ABSTRACT

The armed aggression against Ukraine has been started in 2014 when Crimea and part of Ukrainian territory were occupied. It led to the disappearance of number of people and the new notion of missing persons amid military conflict appeared in the legislation of Ukraine. The new law defines the concept of persons who have disappeared due to special circumstances and in connection with a military conflict. The difference between this institution is that the recognition of a missing person is primarily aimed at protecting these persons. The status of a missing person within military conflict provides a person with a number of guarantees in order to protect his/her rights and assist in the search for that person. However, today the implementation of this institute is incomplete. This study aimed to discover the gaps that prevent the full protection of the rights of missing persons and to optimize the activities of the authorities to protect this category of persons, based on the national legislation and case law. It was also discussed the Institution of the Commissioner for Missing Persons in Special Circumstances was introduced in April 2022, aimed to coordinate the authorities, law enforcement agencies on the search for missing persons.

## 1 INTRODUCTION

The armed aggression of the Russian Federation against Ukraine has been going on since 2014. The annexation of the Autonomous Republic of Crimea and the city of Sevastopol, the war in eastern Ukraine and, finally, the large-scale invasion of Ukraine, which began on 24th of February, 2022, have led to open hostilities and temporary occupation of certain territories of Ukraine. The protection of all citizens of Ukraine, especially those who still live in the occupied territories, their lives and health is one of the functions of the state. However, due to the loss of control over the territories occupied by the enemy, the capabilities of the state authorities of Ukraine to protect citizens are significantly limited. In order to protect the rights and freedoms of these citizens, the Verkhovna Rada of Ukraine adopted a number of legal acts, including the Law of Ukraine 'On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in The Temporarily Occupied Territory of Ukraine' of 15 April 2014 with changes and additions, 'On the Peculiarities of the State Policy to Ensure the State Sovereignty of Ukraine in the Temporarily Occupied Territories in Donetsk and Luhansk Regions' of 18 January 2018.<sup>1</sup>

Military actions and temporary occupation of part of the territory of Ukraine are the reason for the disappearance of people and their deaths. The exact number of missing persons is unknown. According to the Permanent Mission of Ukraine to the Autonomous Republic of Crimea and the public organization Krym SOS<sup>2</sup>, since 2014 about 45 people have become victims of enforced disappearances, the fate of 15 of them is still unknown. The number of missing persons in the temporarily uncontrolled part of Donetsk and Luhansk regions is also unknown. According to the International Committee of the Red Cross, their number can vary from 800 to 1,500 people<sup>3</sup>. The number of missing persons as a result of

- 1 The Law of Ukraine 'On the Peculiarities of the State Policy to Ensure the State Sovereignty of Ukraine in the Temporarily Occupied Territories in Donetsk and Luhansk Regions' <<https://zakon.rada.gov.ua/laws/show/2268-19#Text>> accessed 25 July 2022.
- 2 Krym SOS, Report 'Enforced Disappearances in Crimea During the Period of Occupation by The Russian Federation In 2014-2020' (*Hromadskyi Prostir*, 2 December 2020) <<https://www.prostir.ua/?news=krymsos-predstavyla-zvit-naslynytski-znyknennya-u-krymu-za-period-okupatsiji-rosijskoyu-federatsijeyu-u-2014-2020-rokah>> accessed 25 July 2022.
- 3 International Day of Disappeared: hundreds of families of the missing from the Donbas conflict still await news about their beloved ones. International Red Cross Committee, 30 August 2021. <https://blogs.icrc.org/ua/2021/08/30/idod-2021-eng/> accessed 25 July 2022.

the invasion of Ukraine on 24th of February 2022 is still unknown<sup>4</sup>. Cases of war crimes by the armed forces of the Russian Federation have been repeatedly reported: killings of civilians, hostage-taking, illegal deportation, and so on<sup>5</sup>. Under such conditions, it is quite difficult to determine the exact number of missing persons. According to the Verkhovna Rada Commissioner for Human Rights, about 33,000 residents of Mariupol were victims of illegal deportation to the territory of the Russian Federation and the occupied part of the Donetsk region<sup>6</sup>. Also, more than 1100 civilians were killed in Kyiv region during an occupation, 412 of them were from Bucha<sup>7</sup>.

## 2 PROCEEDINGS ON THE RECOGNITION OF A PERSON AS DISAPPEARED: FEATURES AND DIFFERENCES FROM THE RECOGNITION OF A PERSON AS MISSING

The Civil Code<sup>8</sup> and the Civil Procedure Codes of Ukraine<sup>9</sup> provide for and regulate the possibility and procedure for declaring a natural person disappeared or declaring him or her dead. According to Art. 43 of the Civil Code of Ukraine, a natural person may be declared disappeared by a court if **within one year there is no information about his/her whereabouts at his/her place of permanent residence**. If it is impossible to establish the day of receipt of the latest information about the person's whereabouts, the beginning of his/her absence is the first day of the month following that in which such information was received, and if it is impossible to establish this month, then it is the 1st January of the following year.<sup>10</sup> The Civil Court of Cassation in its decision of 7 May 2018 (case № 225/1297/17)<sup>11</sup> noted that the disappearance is a certificate in court of the long absence of an individual in his/her place of permanent residence under conditions that failed to establish his/her whereabouts (stay). When a person is declared disappeared, the presumption that the person is alive is applied, but it is impossible to establish his/her whereabouts at this time, and this presumption is

4 The commissioner calls on citizens of Ukraine to report the facts of the disappearance of relatives and loved ones without fail. The official portal of the Verkhovna Rada Commissioner for Human Rights, 13 July 2022 < [https://www.ombudsman.gov.ua/news\\_details/upovnovazhenij-zaklikaye-gromadyan-ukrayini-obovyazkovo-povidomyati-pro-fakti-zniknennya-rodichiv-i-blizkih](https://www.ombudsman.gov.ua/news_details/upovnovazhenij-zaklikaye-gromadyan-ukrayini-obovyazkovo-povidomyati-pro-fakti-zniknennya-rodichiv-i-blizkih) > accessed 25 July 2022.

5 Commissioner: The occupiers are committing war crimes against Ukrainian citizens taken prisoner. The official portal of the Verkhovna Rada Commissioner for Human Rights, 08 May 2022 < [https://ombudsman.gov.ua/news\\_details/upovnovazhenij-okupanti-vchinyayut-voyenni-zlochyni-stosovno-ukrayinskih-gromadyan-zahoplenih-u-polon](https://ombudsman.gov.ua/news_details/upovnovazhenij-okupanti-vchinyayut-voyenni-zlochyni-stosovno-ukrayinskih-gromadyan-zahoplenih-u-polon) > accessed 25 July 2022.

6 Held an online meeting with Catherine Bomberger, Director-General of the International Commission on Missing Persons. The official portal of the Verkhovna Rada Commissioner for Human Rights, 04 May 2022. < [https://www.ombudsman.gov.ua/news\\_details/upovnovazhenij-provela-onlajn-zustrich-z-generalnim-direktorom-mizhnarodnoyi-komisiyi-z-pitan-zniklih-bezvisti-kettrin-bomberger](https://www.ombudsman.gov.ua/news_details/upovnovazhenij-provela-onlajn-zustrich-z-generalnim-direktorom-mizhnarodnoyi-komisiyi-z-pitan-zniklih-bezvisti-kettrin-bomberger) > accessed 25 July 2022.

7 Evidence of horrific war crimes and torture of civilians continues to be found in the lands liberated from the rassist occupiers. The official portal of the Verkhovna Rada Commissioner for Human Rights, 29 April 2022. < [https://www.ombudsman.gov.ua/news\\_details/upovnovazhenij-prodovzhuyut-viyavlyatisya-svidchennya-zahlivih-voyennih-zlochyniv-ta-katuvan-rashistami-mirnogo-naseleння](https://www.ombudsman.gov.ua/news_details/upovnovazhenij-prodovzhuyut-viyavlyatisya-svidchennya-zahlivih-voyennih-zlochyniv-ta-katuvan-rashistami-mirnogo-naseleння) > accessed 25 July 2022.

8 Civil Code of Ukraine < <https://zakon.rada.gov.ua/laws/show/435-15#Text> > accessed 25 June 2022.

9 Civil Procedure Code of Ukraine < <https://zakon.rada.gov.ua/laws/show/1618-15#Text> > accessed 25 June 2022.

10 Civil Code of Ukraine: Law of Ukraine of 16 January, 2003 № 435-IV. Information of the Verkhovna Rada of Ukraine. 2003. № 40. Art. 356.

11 Resolution of the Civil Court of Cassation of the Supreme Court in the case № 225/1297/17 of 7 May 2018 (*Unified State Register of Court Decisions*) <https://reyestr.court.gov.ua/Review/74342201> accessed 25 July 2022.

rebuttable. The norm of Art. 43 of the Civil Code of Ukraine provides, first of all, to find out the place of permanent residence of a person at the time of his/her disappearance, the measures taken by the applicant to establish the whereabouts of the person in question, and whether all possibilities for his/her whereabouts have been exhausted.

**The grounds** for recognizing an individual as disappeared are a **set of legal facts**, i.e. the legal structure, which includes:

- a) lack of information about the stay of an individual in his/her place of permanent residence;
- b) lack of information about the actual whereabouts of the person and the inability to obtain such information;
- c) the expiration of one year from the date of receipt of the latest information on the location of the natural person or from the date determined in accordance with part two of Art. 43 of the Civil Code of Ukraine;
- d) the applicant has a legal interest in resolving the issue of recognizing the person disappeared.<sup>12</sup>

At the same time, the courts of first instance in Ukraine have repeatedly emphasized that the subject of evidence in cases of recognition of a natural person as disappeared is:

- disappearance of a citizen;
- the presence of a legal interest of the person submitting the application for recognition of the citizen as disappeared;
- attempts by the applicant to search for the person;
- inability to establish the whereabouts of the person;
- the existence of circumstances that threatened the life of a disappeared individual;
- the presence of circumstances that give reason to assume the death of a person from a particular accident;
- the existence of circumstances that give reason to believe that a person may intentionally hide: be wanted, unwilling to pay alimony or comply with other court decisions, etc.;
- no dispute about the right.<sup>13</sup>

It should also be noted that after the beginning of the Russian armed aggression, the notion of missing persons appeared in the legislation of Ukraine. The legal status of such persons is determined by the Law of Ukraine 'On the Legal Status of Missing Persons' of 12 July 2018<sup>14</sup>. According to this law, a missing person is a natural person in respect of whom there is no information about his/her whereabouts at the time of application for search filing.

This Law also defines the concept of persons who have disappeared due to special circumstances and in connection with a military conflict - these are persons who have

12 Resolution of the Supreme Court of Cassation in the case № 225/1297/17 of 7 May 2018 (*Unified State Register of Court Decisions*) <<https://reyestr.court.gov.ua/Review/74342201>> accessed 25 July 2022.

13 Decision of the Chervonozavodsky District Court of Kharkiv in the case № 646/85/20 of 10 January 2020 (*Unified State Register of Court Decisions*) <<https://reyestr.court.gov.ua/Review/86831777>> accessed 25 July 2022.

14 The Law of Ukraine № 2505-VIII 'On the Legal Status of Missing Persons' (12 July 2018) <<https://zakon.rada.gov.ua/laws/show/2505-19#Text>> accessed 25 July 2022.

disappeared due to armed conflict, hostilities, riots within the state or in connection with natural or man-made emergencies or other events that may result in the mass death of people and persons who have gone missing in a zone of armed conflict during their military service or in any other circumstances that confirm the fact that a person is in that zone.<sup>15</sup> Although the above categories of persons have a similar normative wording, there is a number of significant differences between them in the **reasons** for acquiring such status, **the order** of its acquisition and **the legal consequences** in case of acquisition.

A person may be declared *disappeared* only by a court decision in the manner prescribed by Chapter 4 of Section IV of the Civil Procedure Code of Ukraine<sup>16</sup>. If a person is declared missing, the notary at his/her last place of residence describes the property belonging to him/her and *establishes guardianship over it*. Upon the application of the interested person or the body of guardianship and custody over the property of a natural person, whose whereabouts are unknown, guardianship may be established by a notary until the court decides to declare a person disappeared.

The guardian over the property of a natural person declared disappeared or a natural person whose whereabouts are unknown, *assumes the performance of civil duties in his/her favour*, repays debts at the expense of his/her property, *manages this property in his/her interests*, provides possession at the expense of this property to persons, whom the person who became disappeared was obliged by law to take care about. Also, *the spouse* of a missing person *acquires the right to divorce in a simplified manner* through the state bodies of registration of civil status, and obligations closely related to the missing person are terminated.

The subjective composition of the applicants in this case is not directly defined by law. In judicial practice, there are most often cases of appeals to the court by close relatives of the person against whom the proceedings are conducted, less often by the authorities endowed with certain powers or heads of military units. The main criterion for the possibility of going to court is legal interest. This property follows directly from the essence of the right to go to court. Its absence entails the impossibility for the person to file an application and to initiate a civil case, as he/she is not a proper applicant<sup>17</sup>.

For example, in case № 129/716/16-c, which was considered by the Haisyn District Court of Vinnytsia Oblast, the applicant applied for considering her husband disappeared. According to the applicant, her husband went missing during the fighting near Ilovaïsk in 2014 and his whereabouts are still unknown. Recognizing him missing was necessary for the applicant to obtain the status of a person covered by the Law of Ukraine 'On the Status of War Veterans, Guarantees of Their Social Protection' in order to receive subsidies, social assistance and benefits provided by current legislation. The court found a legal interest and upheld the application<sup>18</sup>.

In another case 671/282/19, a representative of the Volochysk District State Administration of the Khmelnytsky Region appealed to the court in the interests of a minor to declare his father disappeared. At the hearing the applicant supported his application and requested that it be granted. The court found that the child was deprived of parental care. The father is not interested in his son's life. Where he is now is unknown, but according to information held by the deceased wife of the disappeared man and the Volochysk police department, his

15 *ibid.*

16 Civil Procedure Code of Ukraine (n 11).

17 Y Polyuk, 'Legal Interest as A Prerequisite for The Emergence of The Right to Go to Court' in G Ulyanov (ed), *Traditions and Innovations of Legal Science: Past, Present, Future* (International Scientific-Practical Conference, Odesa, 19 May, 2017, Vol 2, Helvetica Publishing House 2017) 689-692.

18 Decision of the Haisyn district court of the Vinnytsia region in case No 129/716/16-ts of 1 April 2016 (*Unified State Register of Court Decisions*) <<https://reyestr.court.gov.ua/Review/57089327>> accessed 25 June 2022.

father's place of residence was village Bile, Lutuhyne district of Luhansk region. Due to the uncontrollability of this territory by the Ukrainian authorities, the Volochysk Regional State Administration is deprived of the opportunity to protect the rights of the child and find his father. The child lives with the mother's roommate. It is he who raises and fully supports the child and wants to adopt him. Thus, in this case, a special type of legal interest of the public authority was established<sup>19</sup>.

The decision to declare a person missing may be revoked only by a court. The grounds for revoking the decision are the receipt by the court of an application for the appearance of a natural person who has been declared disappeared or information about the whereabouts of this person. An application may be submitted by a person who has been declared disappeared or by another interested person to the court that made the decision to declare the person disappeared or to the court at the place of residence of the person.

Accordingly, in case of cancellation of the court decision on recognition of a natural person as disappeared, the legal consequences of such recognition lose their force, and the rights of such a person must be restored in the manner prescribed by law.

Thus, the recognition of a person as disappeared is most often necessary to satisfy the legitimate interests of others, mainly his/her close relatives.

At the same time, a person may acquire the status of *missing from the moment of submitting an application* to the National Police *on the fact of disappearance* of a person and his/her search or by a court decision. The person is considered missing until the moment of termination of his/her search. Simultaneously, the acquisition of such a status by an individual does not preclude the application to the court by his/her relatives or other interested persons with a request to declare him/her missing or to declare him/her dead. Even if the court makes one of these decisions, the person does not lose his/her rights as a missing person. A missing person has all the rights guaranteed by the Constitution and laws of Ukraine, as well as the right to a comprehensive investigation into the circumstances of his/her disappearance and to establish his/her whereabouts. The state is obliged to take all possible measures to search for a missing person. This person retains *the place of work*, position held and average earnings at the enterprise, institution, organization, regardless of subordination, but not more than until the moment of *declaring such a person dead* in the manner prescribed by law. Persons who went missing during military service as a result of armed conflict and/or hostilities are provided with the *guarantees by the Law of Ukraine 'On Social and Legal Protection of Servicemen and Members of Their Families'*<sup>20</sup> and other laws of Ukraine.

According to the original version of this Law, in order to ensure coordination of the activities of state bodies authorized to register and/or search for missing persons, including the search for missing persons in the area of anti-terrorist operation in Donetsk and Luhansk regions, the area of measures To ensure national security and defense, to repel and deter the armed aggression of the Russian Federation, *a Commission on Persons Missing in Special Circumstances was established*. This is an advisory body created under the Cabinet of Ministers of Ukraine. Also, this Law provides for the creation of the Unified Register of Missing Persons, the Procedure for which is established by the Cabinet of Ministers of Ukraine. This register contains information on missing persons, information that allows them to be identified, the presence or absence of a court decision declaring a person missing or declaring him/her dead, and other information that may help in the search for a person.

19 Decision of the Volochysk District Court of the Khmelnytsky Region in the case № 671/282/19 of 18 March 2019 (Unified State Register of Court Decisions) <<https://reyestr.court.gov.ua/Review/80544928>> accessed 25 June 2022.

20 The Law of Ukraine 'On Social and Legal Protection of Servicemen and Members of Their Families' <<https://zakon.rada.gov.ua/laws/show/2011-12>> accessed 25 July 2022.

On 14 April 2022, this Law was subject to amendments, according to which it now applies only to persons who went missing in special circumstances - persons who went missing due to armed conflict, hostilities, temporary occupation of part of the territory of Ukraine, natural or man-made emergencies<sup>21</sup>.

The concept of a search group was also introduced – this is to be understood as a humanitarian mission of the bodies authorized to register and/or search for missing persons in special circumstances, as well as to perform other functions related to the implementation of this Law, organizations and/or individuals, aimed at searching persons who have disappeared under special circumstances, their remains, search and marking of burial places of persons who disappeared under special circumstances, removal of bodies (remains) of deceased (dead) persons and removal of their remains. Also, instead of the Commission, the institution of the Commissioner for Missing Persons in Special Circumstances was introduced. It is he who coordinates the authorities, law enforcement agencies on the search for missing persons. The activities of the Commissioner are provided by the Secretariat of the Commissioner on issues of persons who have disappeared under special circumstances, which is formed as a part of the responsible body of executive power. In addition, notaries acquire the right to establish custody of the property of a missing person, at the request of the person concerned.

The difference between this institution and the previous one is that the recognition of a missing person is primarily aimed at protecting these persons. As can be seen, the status of a missing person provides a person with a number of guarantees in order to protect his/her rights and assist in the search for that person. However, today the implementation of this institute is incomplete. In order to eliminate the gaps that prevent the full protection of the rights of missing persons and to optimize the activities of the authorities to protect this category of persons, amendments to the legislation were adopted.

### 3 PROCEEDINGS DECLARING A PERSON DEAD AND THE DIFFERENCE FROM ESTABLISHING THE FACT OF DEATH OF A PERSON IN THE TEMPORARILY OCCUPIED TERRITORIES

An individual may be declared dead by a court if his or her place of residence has not been known for *three years*; and *within six months* – if he or she has gone missing in circumstances that threatened his/her life or give grounds to assume his or her death from an accident; and if it is possible to consider an individual dead from a certain accident or other circumstances due to man-made or natural emergencies - *within one month* after the completion of a special commission formed as a result of man-made or natural emergencies. An individual who has gone missing in connection with *hostilities* or an armed conflict may be declared dead by a court after the *expiration of two years* from the date of the end of hostilities. Taking into account the *specific circumstances* of the case, the court may declare an individual dead before the expiration of this period, but *not earlier than the expiration of six months*.

The procedural order for declaring a person dead is similar to declaring him or her disappeared. The same applies to the subjective composition of the participants in the proceedings and the requirements for them regarding the right to go to court. For example, in case № 308/10708/19 the applicant applied to the Perechyn District Court of the Zakarpattia

21 The Law of Ukraine ‘On Amendments to the Law of Ukraine “On the Legal Status of Missing Persons” and other legislative acts of Ukraine regarding the improvement of legal regulation of social relations related to the acquisition of the status of persons missing under special circumstances’ <<https://zakon.rada.gov.ua/laws/show/2191-20#n5>> accessed 25 July 2022.

Oblast to declare his brother dead. The claims are based on the fact that his brother lived in temporarily occupied Donetsk. The last time information about him was obtained was in 2014, according to which in July of that year, gunmen broke into his brother's house and took him away in an unknown direction. He has not returned home since then, and his relatives have no information about his whereabouts. Since the brother went missing in circumstances that threatened his life, the brother's declaration of death is necessary for him to claim inheritance, so in view of the above, he asks to satisfy the application. The court found that the applicant had a legal interest and upheld the application to declare his brother dead.<sup>22</sup>

It should also be noted that in the CPC of Ukraine there is an institution of establishing the fact of death of a person in the temporarily occupied territories. Unlike the institution of declaring a person dead, which is regulated by Chapter 4 of Section IV of the CPC of Ukraine, the establishment of the fact of death is based on procedural rules that determine the establishment of facts that have legal significance. Peculiarities of consideration of such cases are defined in Art. 317 of the CPC of Ukraine.

An application to establish the fact of a person's death in the temporarily occupied territory of Ukraine, determined by the Verkhovna Rada of Ukraine, may be filed by the relatives of the deceased or their representatives in court outside such territory of Ukraine. Cases of establishing the fact of birth or death of a person in the temporarily occupied territory of Ukraine, determined by the Verkhovna Rada of Ukraine, shall be considered immediately from the moment of receipt of the relevant application by the court. Decisions in such cases are subject to immediate execution.

The main difference between declaring a person dead and establishing the fact of death is that declaring a person dead is based on the presumption of his/her death *in the absence of evidence to the contrary*, and *establishing the fact of a person's death is based on evidence of his/her death*. Also, the legislation does not provide for the procedure in case a person whose death has been established turns out to be alive. There are also no significant legal consequences for establishing the fact of a person's death. For example, when a person is declared dead and his/her inheritance is opened, the heirs do not have the right to alienate this property for 5 years. The law does not provide for such a prohibition to establish the fact of a person's death<sup>23</sup>. Therefore, in our opinion, the two above-mentioned institutions do not have significant differences, and in some cases duplicate each other, which may complicate the possibility of their enforcement.

#### 4 KEY LEGAL ISSUES OF PROCEEDINGS IN CASES OF RECOGNITION OF A NATURAL PERSON AS MISSING OR DECLARED DEAD IN THE CONDITIONS OF HOSTILITIES AND TEMPORARY OCCUPATION OF CERTAIN TERRITORIES OF UKRAINE

Today, there are two key legal issues related to the proceedings and evidence in cases of recognition of an individual as disappeared or declared dead: the determination of jurisdiction and the admissibility of evidence.

In accordance with Part 1 of Art. 305 of the CPC of Ukraine, the application for recognition of a natural person disappeared or declaring him/her dead is filed with the court at the place

22 Decision of the Perechyn District Court of the Zakarpattia Region in the case № 308/10708/19 of 7 December 2020 (Unified State Register of Court Decisions) <<https://reyestr.court.gov.ua/Review/93645170>> accessed 25 June 2022.

23 V Pleeva, V Mazur, 'Correlation of The Concepts "Declaring A Person Dead" And "Establishing the Fact of Death" Under the Civil and Civil Procedure Legislation of Ukraine' 3 (2018) Law and Society 104-109.



of residence of the applicant or at the last known place of residence (stay) of a natural person whose whereabouts are unknown, or at the location of his/her property. But as of today, due to hostilities and loss of control over certain territories of Ukraine, some courts are unable to perform their functions, and the High Council of Justice at the beginning of the invasion could not exercise its powers due to lack of quorum. Under such conditions, on 3 March 2022, the Verkhovna Rada of Ukraine adopted amendments to the Law of Ukraine 'On the Judiciary and the Status of Judges', according to which in connection with natural disasters, hostilities, measures to combat terrorism or other emergencies, the court may be terminated with the simultaneous determination of another court that will administer justice in the territory of the court that has ceased to exist, and which is closest to the court whose work has been terminated, or to another designated court, by a decision of the High Council of Justice, and in case of impossibility of the High Council of Justice to exercise its powers - by order of the Chairman of the Supreme Court.<sup>24</sup> According to the Chairman of the Supreme Court V. Knyazev, since the beginning of the invasion, the jurisdiction of about 20% of Ukrainian courts has been changed.

Another, more serious problem is the admissibility of evidence. Since Ukraine does not recognize the legal personality of either the occupation administrations or the 'authorities' of self-proclaimed quasi-state entities, the documents issued by them cannot be recognized as admissible evidence. However, there is a principle in international law called the Namibian Exceptions, formulated by the International Court of Justice in its Advisory Opinion of 21 June 1971 (Namibia case). This principle is also actively used in the practice of the European Court of Human Rights and the courts of Ukraine. It states that documents issued by occupation administrations can be recognized if their non-recognition leads to serious violations or restrictions on the rights of citizens. This does not mean recognizing the occupying power or its legal capacity.

As an example, we could take the decision of the European Court of Human Rights in the case of *Cyprus v. Turkey*. Referring to this finding of the UN International Court of Justice, where the Court concluded that in situations similar to the one in the present case, the obligation to ignore the actions of *de facto* entities, such as the Turkish Republic of Northern Cyprus, was far from absolute. The Court considers that, in the territory in question, the lives of its inhabitants were taking their turns, and that the *de facto* authorities, in particular the relevant courts, must ensure a satisfactory standard and protection of that life. The Court noted that, in the interests of these residents, third states and international organizations, especially the courts, could not simply ignore the actions of such authorities. The opposite conclusion would mean the complete disregard of all the rights of the inhabitants of this territory in any discussion of them in the international context, and this would amount to the deprivation of their minimum rights belonging to them. In concluding, the majority of the Court emphasized that there was no reason to legitimize the 'TRNC' and reiterated that the Government of the Republic of Cyprus remained the sole legitimate Government of Cyprus<sup>25</sup>.

This principle is often used by the courts of Ukraine. For example, in case № 524/551/20, the Avtozavodsky District Court of Kremenchuk considered an application to declare the applicant's father missing<sup>26</sup>. In November 2017, he took his personal belongings and went

24 The Law of Ukraine № 2112-IX 'On Amendments to Part Seven of Article 147 of the Law of Ukraine "On the Judiciary and the Status of Judges" Concerning the Determination of Territorial Jurisdiction of Judicial Cases' (3 March 2022) <<https://zakon.rada.gov.ua/laws/show/2112-20#n2>> accessed 25 July 2022.

25 Judgment of the European Court of Human Rights in the case of *Cyprus v Turkey* of 10 May 2001 (Case 25781/94 <<https://hudoc.echr.coe.int/Eng?i=001-59454>> accessed 25 June 2022.

26 Decision of the Avtozavodsky District Court of Kremenchuk in the case № 524/551/20 of 24 February 2020 (Unified State Register of Court Decisions) <<https://reyestr.court.gov.ua/Review/87779347>> accessed 25 July 2022.

to the Autonomous Republic of Crimea, Alushta, where his brother lived. Since then, her father's whereabouts have been unknown. She applied to the Ministry of Internal Affairs of the Autonomous Republic of Crimea, but it was not possible to establish his whereabouts. Referring to the above circumstances, the applicant requests that her father be declared disappeared. The fact is necessary for the applicant to apply for a subsidy for housing and communal services. The proof that the applicant's father did indeed disappear is the decision of the Russian Ministry of the Interior in Alushta of 19 January 2018, which instituted proceedings on the fact of his disappearance. Taking into account the documents issued in the temporarily occupied territory confirming the disappearance of the applicant's father, the court is guided by the case law of the European Court of Human Rights as well as by the 'Namibian exceptions' of the UN International Court of Justice: documents issued by the occupying authorities must be recognized if their non-recognition leads to significant violations or limitations of citizens' rights. However, in exceptional cases, the recognition of acts of the occupying power in the limited context of the protection of human rights does not in any way legitimize such authority. This was the key to the decision granting the application and declaring the applicant's father disappeared<sup>27</sup>.

In another case, the applicant applied to the Pavlograd City District Court of the Dnipropetrovsk Region for her husband to be declared disappeared (case 185/4679/19). The statement is substantiated by the fact that in January 2014 her ex-husband left home and did not return. He did not get in touch with his relatives. He was not at the address of his close relatives, the company where he worked was liquidated, and the applicant's website found out from the Mirotvorets website that her ex-husband had been a fighter for the DNR terrorist organization since 2016. Satisfying this statement, the court took into account the evidence - a printout from a page on the Internet (from the site 'DNR'), which confirmed as of August 2016, this person was a militant IAF (Illegal armed formations) 'Oplot'.

In this case, the court also used the 'Namibian Exceptions' in the context of assessing documents issued by institutions in the occupied territories as evidence, as the possibility of gathering evidence in such cases may be significantly limited, while establishing the relevant facts is essential for realization of a number of human rights, including the right to property (inheritance), the right to respect for private and family life, etc.<sup>28</sup>

Thus, it can be concluded that the Russian aggression against Ukraine creates obstacles in the exercise of civil rights and in the performance of its functions by the state. Therefore, when conducting civil proceedings for the recognition of an individual as missing or declaring him/her dead in the conditions of hostilities and temporary occupation of certain territories of Ukraine, the peculiarities provided by national and international law for such conditions should be observed.

## 5 CONCLUSIONS

Summarizing all the above, we can draw the following conclusions.

The difference between declaring a person disappeared and declaring a person missing is that the institution of disappeared persons is primarily aimed at protecting persons to whom this disappeared person may create difficulties in exercising their rights and legitimate interests, while recognition of a missing person is aimed precisely at the protection of this

<sup>27</sup> Ibid.

<sup>28</sup> Decision of the Petropavlovsk District Court of Dnipropetrovsk region in the case № 185/4679/19 of 22 October 2019 (*Unified State Register of Court Decisions*) <<https://reyestr.court.gov.ua/Review/85825105>> accessed 25 July 2022.

person, the protection of his/her fundamental rights, including civil and labour ones. There are also significant differences in the legal and factual grounds for acquiring these statuses, the procedure for their acquisition and loss of these statuses. In addition, the acquisition by a person of the status of a missing person does not deprive the persons concerned of the right to go to court to declare him or her missing or to declare him or her dead.

The main difference between declaring a person dead and establishing the fact of death in the temporarily occupied territory is that recognizing a person dead is based on the presumption of death in the absence of evidence of another, and establishing the fact of death in the temporarily occupied territory is made directly on evidence of death. Also, declaring a person dead is an independent type of case, which is considered in a separate proceeding, and the establishment of the fact of death belongs to the cases of establishing the facts that have legal significance. In other respects, these two institutions do not have significant differences, and in some places duplicate each other.

Today there are two main legal problems related to the recognition of an individual as disappeared or declaring him/her dead in the conditions of hostilities and temporary occupation of certain territories of Ukraine: determining the jurisdiction of cases and the admissibility of evidence.

In connection with hostilities, some courts in Ukraine do not have a *de facto* capacity to administer justice. In this regard, the Verkhovna Rada of Ukraine adopted amendments to the Law of Ukraine 'On the Judiciary and the Status of Judges', according to which in connection with natural disasters, hostilities, measures to combat terrorism or other emergencies, the work of the court may be terminated with the simultaneous determination of another court that will administer justice in the territory of the court that has ceased to exist, and which is closest to the court whose work has been terminated, or to another designated court, by a decision of the High Council of Justice, and in case of impossibility for the High Council of Justice to exercise its powers - by order of the Chairman of the Supreme Court.

Despite the non-recognition by Ukraine and most UN member states of the legal capacity of the occupation administrations of the Russian Federation and the 'authorities' of quasi-state entities, documents issued by them may be recognized as admissible evidence if their non-recognition entails significant restriction or violation of rights, freedoms of citizens. Taking these documents into account does not automatically recognize the occupation administration or its legal personality. This principle is called 'Namibian Exceptions'.

Armed aggression against Ukraine creates difficult conditions for the realization of rights and interests. In order to protect the vulnerable category of Ukrainian citizens living in the temporarily occupied territories or having relatives there, a number of legal acts were adopted. Special legal institutions aimed at protecting individuals affected by the war in Ukraine have also been introduced. However, their implementation is not yet complete, and some of them contain significant inaccuracies, which could hamper the exercise of their rights by vulnerable citizens of Ukraine, especially in the context of open armed aggression.

## REFERENCES

1. Pleeva V, Mazur V, 'Correlation of The Concepts "Declaring A Person Dead" And "Establishing the Fact of Death" Under the Civil and Civil Procedure Legislation of Ukraine' 3 (2018) Law and Society 104-109.
2. Polyuk Y, 'Legal Interest as A Prerequisite for The Emergence of The Right to Go to Court' in G Ulyanov (ed), *Traditions and Innovations of Legal Science: Past, Present, Future* (International Scientific-Practical Conference, Odesa, 19 May, 2017, Vol 2, Helvetica Publishing House 2017) 689-692.