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**PROBLEMS OF PROTECTION OF THE RIGHTS TO REAL ESTATE IN
MODERN ARMED CONFLICTS**

The article is devoted to the consideration of the modern challenges for the doctrine of grounds for protection of rights to real estate in context of modern armed conflicts. The author define factors that determine necessity of modernization of current legal mechanism of property rights protection and considers two main models of violation property rights to real estate during armed conflict: 1) armed groups carry out shelling of objects of real estate that are private property; 2) armed groups establish control over certain objects of real estate that are private property and use them to arrange fire positions in connection with which they are attacked by government forces. Turning to provisions of Ukrainian legislation and international conventions he describes main possible means of restoration property rights to real estate that were violated during armed conflict. Main provisions of effective control doctrine are considered. Features of doctrine of protection and self-defense are formulated.

Keywords: real estate, immovable property, protection of civil rights, property rights, armed conflict, self-defense, non-state actors.

I. Introduction & background. Today, we are witnessing the evolution of interstate and intrastate conflicts, the transition from open military confrontation to so called “hybrid” forms of aggression that provides the participation of non-state actors in armed clashes and that can be prerequisite of future wide military invasion on one state to the territory of another one. Such trend of conflicts evolution directly influences the tendency of development of legal security system of property rights including rights to real estate of individuals and legal entities whose immovable property is located in the territory of the conflict.

In this regard, we must take into account the fact that, under the general rule in peaceful conditions, the responsibility for the commission of a tort law violation, which is manifestation, in particular the damage or destruction of another’s real estate property, relates to the person who committed the offense in question. In some cases researches note that uncoordinated actions of state and non-state actor can contribute the same harm, for example when state fails to prosecute or extradite presumed



terrorists present on its territory [2, p. 65]. Moreover as R. Müllerson notes non-state actors may become involved in armed attacks against States in two different (though not always easily distinguishable) capacities: acting on behalf of a State or acting on their own [2, p. 763].

In context of damage caused during armed conflicts the European Court of Human Rights (hereinafter – ECHR) have made attempts to form legal ways of solving relevant issues in the context of the doctrine of “effective control”.

However, in the present conditions its application causes certain difficulties. This doctrine is intended to identify the person responsible for the observance of human rights in a particular area during the existence of a conflict. In particular, in the context of the doctrine of “effective control”, the parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (hereinafter – Convention) are conditionally divided into a “passive” Contracting Party and an “active” Contracting Party. The latter refers to a state which: a) carries out full or partial occupation of the territory of another state; b) supports an uprising or a civil war in another state; c) establishes (or helps to establish) a separate regime in the territory of another state or other entity that is not recognized as a sovereign state by the international community [3]. In the light of the above, cases of human rights violations occurring in the respective territories fall within the jurisdiction of the “active” Contracting Party. This means that it is the duty of the State concerned to ensure the observance of human rights in the relevant territory [4]. This is done in order to prevent the assumption by the “active” Party of violations or the transfer of guilt to the passive side in case of violation.

At the same time the participation of non-state actors in interstate and intrastate armed conflicts complicate the application of abovementioned doctrine. Thus, the key for legal settlement of appropriate problem can be found during complex analyses of situations related to causing damage during armed conflict, particularly: 1) armed groups carry out shelling of objects of real estate that are private property; 2) armed groups establish control over certain objects of real estate that are private property and use them to arrange fire positions in connection with which they are attacked by government forces (including heavy weapons) or government troops during the course of shelling of paramilitaries’ positions harm the property of private individuals.

II. The Firing of Private Immovable Property by Armed Groups.

In the ECHR case law, the courts proceed from the presumption of the extension of the jurisdiction of the passive party to the relevant territory [5]. In this regard the legal qualification of the paramilitaries’ actions is conducted in terms of the national legislation of the country in which the conflict takes place. In this regard, the use of appropriate arms in the territory under the control of the Government, which leads to real estate damage, is recognized as a crime.

The recent example of such a case is Ukraine. From the very beginning of the conflict in Donetsk and Luhansk regions actions of armed groups caused damage to life, health of natural persons or to property (including real estate) of natural persons or legal entities very often juridically qualified by Ukrainian law enforcers as terrorism.



In particular, in Ukraine, from 14.04.2014 to 30.04.2018, an anti-terrorist operation was carried out, which was replaced by the Operation of the Joint Forces. At the same time, Articles 23 and 24 of the Law of Ukraine “On Fight against Terrorism”, in particular, provide that: “Persons guilty of terrorist activities are prosecuted in the manner prescribed by law <...> The organization responsible for committing a terrorist act and recognized by a court decision as a terrorist is subject to liquidation, and property belonging to it should be confiscated” [6].

In view of the above, compensation for damage caused by terrorist acts on the territory of Ukraine (at the applicant’s reference to the legislation of Ukraine) is also carried out in accordance with the procedure provided by Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly UN of 29.11.1985 which provides that the perpetrators or third parties are responsible for their behavior and should provide fair compensation to victims, their families and dependents. Such restitution, in particular, includes the return of property, compensation for damage, etc. (paragraphs 8, 9). In addition, the Declaration encourages the creation of national funds to compensate for the damage done to the victims, as well as the provision of necessary, including material assistance to the victims by the state (paragraphs 13, 14) [7].

Moreover, it is obvious that, in the case of armed groups’ damage caused by property that is in the territory under their control, they are also responsible for causing it, by analogy, to apply the doctrine of “effective control”. In the case of the establishment of a Contracting Party exercising such control, responsibility shall be transferred to it.

III. The Shelling of Paramilitaries’ Positions by Government Troops in Private Immovable Property or Damage to Private Immovable Property During Shelling. This situation is rather complicated, because the government troops have a choice of one of the possible variants of behavior:

a) Apply more massive attacks with the use of heavy weapons and thereby preserve the health and life of the personnel, that is, minimize the risks for him;

b) Restrict the use of such weapons and use personnel to minimize damage to real estate, however, putting the military at greater risk.

In the context of the above, recognizing human life as the highest social value, which can not be compared with the value of property, is often the military command decides in favor of the first option, thus retaining personnel. In addition, very often the specific conditions for a military operation make it impossible to use personnel directly and, in order to increase the likelihood of achieving the goal, require a remote strike.

In addition, in this regard, the ECHR has developed a rather clear and unambiguous practice in dealing with cases of damage to private property during a conflict in the Chechen Republic. In particular, in *Esmukhambetov and Others v. Russia* (application no 23445/03) the Court, in particular, has established that: “The air raid having resulted in the destruction of a number of buildings in the village of Kogi, it was clear that there had been an interference with the applicants’ rights under Article 8 and Article 1 of Protocol No. 1. As regards the lawfulness of the interference, the Government had referred to the Suppression of Terrorism Act as a legal basis. The Court had already noted in other cases concerning the conflict in



the Chechen Republic, that that Act did not define with sufficient clarity the scope of those powers and the manner of their exercise so as to afford an individual adequate protection against arbitrariness. The law could not serve as a sufficient legal basis for such a drastic interference as the destruction of an individual's housing and property. The interference with the applicants' rights had not been "lawful", within the meaning of Article 8 of the Convention and Article 1 of Protocol No. 1. There had accordingly been a violation of Article 8 of the Convention and Article 1 of Protocol No. 1" [8].

Thus, the Court's stated position creates a situation in which the use of heavy weapons by government troops in the course of hostilities, resulting in damage to or destruction of private real estate, conflicts with the principle of inviolability of property. In this case, the offender acts as a subject that uses military force, i.e. it includes Government forces.

It is obvious that in this case, the doctrine of military action goes into a deadlock. The alternative approach is associated only with the creation of increased threats to the health and life of the troops.

Along with this, one needs to look at the situation from other positions, in particular paramilitaries can take control of a certain part of the settlement or over the entire population and use private property as defense structures, arranging their fire positions, in particular, and from heavy weaponry. In such a case, it turns out that the use of military force by the units of the Government Army will be considered its violation of the right of the owners' private immovable property concerned. In this regard, the conduct of offensive military operations becomes economically unprofitable. In view of this, it turns out that the implementation of passive defense from the economic point of view is more productive.

In this context, one can not ignore the provisions of Art. 1 of the Convention, which establishes: "The High Contracting Parties shall guarantee to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention" [4].

The aforementioned provision imposes the duty on the Contracting Party to ensure by all means the rights and legitimate interests of its own citizens and those who are in the territory of the state. In this regard, it is seen that in that event that the manifestations of paramilitaries create a threat to such persons and their property, if the standards of protection of rights and legitimate interests in the territories controlled by paramilitaries are reduced, then it is obvious that the state must try to restore the corresponding rights and standards of their protection by all means, including the military one. In this case, if the further promotion of the appropriate paramilitaries" regime poses a threat to an even larger number of people, then the use by the Government of the military counteraction is absorbed by the doctrine of "protection".

In particular, in order to eliminate the threat to the health and life of persons who are in the control of the Government of the territory and prevent further destruction caused by the military advancement of armed formations, as well as to end violations of rights held on the territories controlled by such subjects, the Government is forced to use military force. This is justified by the fact that the detrimental damage in this case is greater than that which is characteristic of protection and self-defense.



Thus, the use of arms by conflict party instead of a political and legal solution to contentious issues gives the government the right to use lawfully military force as a counteraction to destabilization and real threats to citizens and individuals in its territory. In this regard the core of self-defense can be identified with an archetypical act of self-help in furtherance of the survival and viability of the victim, 'in extremis', meaning when an unlawful armed attack has occurred it necessitates all existing means in order for that threat to be thwarted [9, p. 178].

Concerning the violations of Article 1 of Protocol No. 1 of the Convention, then from the formal legal point of view in the above cases, they certainly take place, since there is a fact of damage or destruction of private immovable property by the Government forces. On the other hand in virtually all cases the restoration of violated rights of citizens in case of damage or destruction of the corresponding property takes place at the expense of the state. This is due to the peculiarities of the social function of the state. However, it is obvious that the difference lies in the mechanisms of reimbursement. In particular, in that event that the damage or destruction is the result of the Government Army, in such a case, the victim has the opportunity to apply a direct mechanism of protection by collecting the appropriate amount of funds from the state. At the same time, the mediated mechanism is predominantly can be used in cases of causing harm by paramilitaries. It means full or partial compensation is provided by the state, which is able to collect the relevant amounts from persons who have caused the corresponding damage.

In this regard, irrespective of whether the damage was caused directly by the Government forces or the opposing party to the conflict, it is believed that the state should strive to secure its full reimbursement by economical means and by juridical mechanisms of revealing and punishing guilty persons. For the effective functioning of the mechanisms for such reimbursement in aspect of modern armed conflicts, there is a need to regulate this issue at the level of a separate law. And as as M. Khomenko, A. Kostruba and O. Kot note the absence of funds is not a reason which may justify inactivity on the part of state. State is responsible to ensure compliance of final decisions if factors preventing its full and timely performance are within their control [10, p. 2338].

IV. Conclusion. The modern armed conflicts shows the vulnerable places of the existing system of protection of civil rights including property rights to real estate, which is related to the complexity of the establishment of individuals who damage the private property and ensure that they are reimbursed. Against this background, an effective means of counteracting such manifestations is to ensure the economic disadvantage of participation in the conflict. In addition, at the level of national legislation, it is necessary to ensure the effectiveness of the penal system and the ability of the state to use military force as an extreme measure of countering the threats to statehood. Meanwhile, at the international level, there are currently no comprehensive mechanisms for reimbursing harm, and the complexity of establishing guilty parties in causing such harm minimizes the international legal standards for the protection of violated rights of individuals particularly to real estate. At the same time, the international community has approached the need to solve the problems. This is evidenced by the history



of conflicts over the time of existence of the UN and the real conditions, one of which is the economic cooperation and mutual integration of world powers. Further stable economic and political development of the international community and certain regions of the modern world are difficult to imagine without reassessing the existing mechanisms for ensuring global security and their further improvement. New challenges determine new approaches and in this context doctrine of “protection and self-defense” seems to be an effective alternative for the protection of property rights during armed conflicts.

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PROBLEMY OCHRONY PRAW DO NIERUCHOMOŚCI WE WSPÓŁCZESNYCH KONFLIKTACH ZBROJNYCH

Artykuł poświęcony jest analizie aktualnych wyzwań stojących przed doktryną w zakresie przesłanek przywłaszczania praw do nieruchomości w kontekście współczesnych konfliktów zbrojnych. Autor identyfikuje czynniki, które determinują potrzebę usprawnienia istniejącego mechanizmu prawnej ochrony prawa własności, a także rozważa dwa główne modele naruszenia prawa własności do nieruchomości w trakcie konfliktu zbrojnego: 1) grupy zbrojne ostrzeliwiają nieruchomości będące własnością prywatną; 2) grupy zbrojne ustanawiają kontrolę nad nieruchomościami będącymi własnością prywatną i wykorzystują je do zakładania pozycji strzeleckich, a tym samym prowokują atak sił rządowych. Odnosząc się do przepisów obowiązującego ustawodawstwa Ukrainy i konwencji międzynarodowych, autor przedstawia główne mechanizmy prawne przywracania prawa własności do nieruchomości naruszonej podczas konfliktu zbrojnego. Artykuł analizuje również główne postanowienia doktryny skutecznej kontroli i formułuje specyfikę doktryny obrony i samoobrony w kontekście konfliktu zbrojnego.

Słowa kluczowe: nieruchomości, mienie nieruchome, ochrona praw obywatelskich, prawa własności, konflikt zbrojny, samoobrona, podmioty niepaństwowe.

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