

European Approaches To Resolving Public Disputes Between Population And Him Countries In Cases Of Hybrid Occupation

Mark Belkin, Julia Iurynets, Liudmyla Batanova, Khrystyna Marych, Galyna Ierko

Abstract : In today's conditions of the world globalization, the occupation of separate territories became one of the threats to states. At the same time forms of this occupation acquire new manifestations, which contributed to the origin of such a concept as "hybrid occupation." Due to the inability of an injured state to control the occupied territories, its citizens face the problems of their legal rights, freedoms, and interests implementation. This fact leads to their appeals to national and international courts against their country (bodies of state power) with the requirements to ensure their constitutional rights. This article, based on legal methods of analysis and comparison, examines the decisions of the European Court of Human Rights on disputes of citizens who have become victims of a hybrid occupation with countries such as Turkey, Cyprus, Azerbaijan, Armenia, Moldova and Ukraine. Thus, the purpose of the research was formulated - to summarize the approaches and legal positions of the European Court of Human Rights in resolving disputes regarding the enforcement of human rights in territories that are actually controlled by hostile states (in cases of hybrid occupation). The research methodology is based on the methods of documentary analysis and synthesis, comparative analysis, objective truth, which allowed us to systematically trace and generalize the position of the European Court of Human Rights on this issue. For the study we used the texts of five decisions of the European Court of Human Rights on this issue, which apply to all the "hot spots in Europe". As a result of the legal comparison of the European Court of Human Rights decisions with norms of the Ukrainian legislation, conclusions about the conformity of national law with the practice of international justice have been made. Also, the position is asserted that the liability for the material or non-material harm inflicted to a country as a result of its territories hybrid occupation has to be held on a country-invader in accordance with the principles and norms of International Law.

Index Terms: International law, international liability, human rights, hybrid occupation, national law.

1. INTRODUCTION

The General Assembly of the United Nations proclaims Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction (UN, 1948). According to Art. 1 ECHR, the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention. Thus, the key to the obligations of States Parties to the Convention from the point of view of ensuring human rights is the exercise of jurisdiction over the respective territories.

The ECHR's position on various human rights issues is widely studied and is known in many aspects (Krisjanis, 2015; Kamiński, 2016). However, the problem is that under the conditions of a "hybrid" confrontation, a vacuum of legal responsibility is created to protect human rights. Under the conditions of «hybrid occupation», the victim country cannot actually exercise its jurisdiction because of opposition to the actual occupier, but, on the other hand, adhering to the tactics «we are not there», the occupant country tries to avoid responsibility (Belkin, 2017). In the Final Act of the Conference on Security and Cooperation in Europe (CSCE), the key goal, which was designated first in the list of objectives, the Parties to the Act were called to promote better relations among themselves and ensuring conditions in which their people can live in true and lasting peace free from any threat to or attempt against their security. Among the basic principles of safety in the Act are: sovereign equality; respect for the rights inherent in sovereignty; refraining from the threat or use of force; inviolability of frontiers; territorial integrity of States; some others (UN, 1975). It follows that threats of the use of force or the actual use of force adversely affect the provision of human rights. Therefore, in order to avoid a vacuum of responsibility, international legal institutions are forced to develop new approaches, according to the requirements of the times. One such approach is the international legal concept of «effective control» of foreign territories. In this article, generalizations of known materials are made and new materials are used. The purpose of this paper – to summarize the approaches and legal positions of the European Court of Human Rights in resolving disputes regarding the enforcement of human rights in territories that are actually controlled by hostile states (in cases of hybrid occupation). The research methodology is based on the methods of documentary analysis and synthesis, comparative analysis, objective truth, which allowed us to systematically trace and generalize the position of the European Court of Human Rights on this issue. For the study we used the texts of five decisions of the European Court of

- Mark Belkin, Ph.D., Law Company «Maurice Group», 01042, 23a, Raievskiy st., Kyiv, Ukraine Email: advokat@etalon.co.ua
- ORCID: <http://orcid.org/0000-0003-0805-9923>
- Julia Iurynets, Dr., Associate Professor, Professor of the Constitutional and Administrative Law Department, National Aviation University, 03058, 1 Komarova ave, Kyiv, Ukraine
- Email: iurynetsjulia@ukr.net
- ORCID: <http://orcid.org/0000-0003-0281-3251>
- Liudmyla Batanova, Ph.D., Associate Professor, Associate Professor of Maritime and Customs Law Department, National University "Odessa Law Academy", 65000, 23 Fontanska str., Odessa, Ukraine
- Email: BatanovaLiudmyla@i.ua
- ORCID: <http://orcid.org/0000-0001-5923-3835>
- Khrystyna Marych, Ph.D., Associate Professor of the Civil Law and Procedure Department, Lviv Polytechnic National University, 79000, 12 Stepana Bandera str., Lviv, Ukraine
- Email: Marychkhrystyna@i.ua
- ORCID: <http://orcid.org/0000-0003-0088-980X>
- Galyna Ierko, Ph.D., Associate Professor of the Constitutional and Administrative Law Department, National Aviation University, 03058, 1 Komarova ave. Kyiv, Ukraine.

Human Rights on this issue, which apply to all the "hot spots in Europe".

2 DISCUSSION AND ANALYSIS

2.1 The theoretical foundations of hybrid occupation as a way of waging modern warfare

A theoretical basis for developing such approaches can be a thorough analysis of the hybrid methods of warfare developed, first of all, by the generals of the Russian Federation. Such an analysis is made, for example, by Academician of the National Academy of Sciences of Ukraine V. Gorbulin (2016). In his opinion, the «hybrid occupant» sets the goal of achieving political goals with minimal armed influence on the enemy. There are three groups of modern ways of conducting aggressive wars:

1. Traditional military means (use of regular military units and weapons, as well as special operations forces).
2. Quasi-militaristic activity (creation and support of illegal armed formations, support and radicalization of separatist movements, formal and informal private military companies).
3. The operations of non-militaristic influence, primarily through the method of special information operations and "active measures" (including economic pressure, operations in cyberspace, diplomacy, manipulation of the information space).

Thus, in modern conditions, not only direct military occupation becomes a way of limiting the sovereignty of a victim of aggression.

In par. 1 of Art. 2 of the International Covenant on Civil and Political Rights states that each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant (UN, 1966).

The above formulations show that the obligation to provide rights within the jurisdiction is not identical to the same security within the territory – the first may be wider than the second, and the opportunity – accordingly, already.

2.2 Decisions of the European Court of Human Rights 1995-2004 (Cyprus, Transnistria)

The concept of «floating» jurisdiction, which changes as a result of hostilities, was developed by the ECHR in its Decision of March 23, 1995 in the case of «Loizidou v. Turkey» (ECHR, 1995). Specifically, the Decision of March 23, 1995 was devoted precisely to the problems of jurisdiction (in the future, on this complaint, the decision of December 18, 1996 was taken as a matter of fact. In particular, in par. 62-64 of Decision of March 23, 1995 ECHR concludes that the concept of «jurisdiction» within the meaning of Article 1 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (the 1950 Convention, the Convention), not necessarily limited to the national territory of the States parties Of the Convention. In the event that under the control of a particular state a territory of another state is lawfully or illegally obtained, and this latter can not effectively exercise its jurisdiction over this territory by virtue of such control, then the responsibility for observance of the rights and freedoms guaranteed by the 1950 Convention is entrusted to the state, which these territories actually (in fact) control. It does not matter whether such actual control is carried out directly through the armed forces or other organs of the State

exercising control or through local administrations actually controlled by that State. In the upcoming ECHR confirmed his practice in the Case of Cyprus v. Turkey (ECHR, 2001). Thus, in par. 77 of the ECHR Decision has nodded on the principles position regarding the general Turkey's general responsibility under the Convention for the policies and actions of the «TRNC» authorities. With effective control over northern Cyprus, Turkey's responsibility as a controlling state spreads to both its own bodies and the local administration, which survives thanks to Turkish military and other support. Therefore, it is Turkey that is responsible for the full range of rights arising from the Convention and its protocols. Based on a detailed analysis (court decision includes 388 points), the ECHR concluded that there are systematic rights violations across the entire spectrum guaranteed by the Convention in the so-called «Turkish Republic of Northern Cyprus», and that Turkey is responsible for these violations. To the number of rights that are violated, the ECHR assigned the following violations: right to life (Art. 2 of the Convention, par. 136 of Decision), right to liberty and security (Art. 5 of the Convention, par. 150 of Decision), prohibition of torture (Art. 3 of the Convention, par. 158 of Decision), right to respect for private and family life (Art. 8 of the Convention, par. 175 of Decision), protection of property (Art. 1 of Protocol No 1, par. 189, 269-270 of Decision), right to an effective remedy (Art. 13 of the Convention, par. 194 of Decision); right to freedom of thought, conscience and religion (Art. 9 of the Convention, par. 246 of Decision), freedom of expression (Art. 10 of the Convention, par. 254 of Decision), right to education (Art. 2 of Protocol No 1, par. 280 of Decision), right to respect for their private and family life and to respect for their home (Art. 8 of the Convention, par. 296 and 301); right to a fair trial (Art. 6 of the Convention, par. 359). Thus, the ECHR has established at least 11 violations of the requirements of the Convention on the part of the state that exercises «effective control», and Turkey is such a state that exercises military control and control over the local administration. A similar approach was used by the ECHR when considering in the Court of the Application No 48787/99 of the applicants in the case «Ilaşcu and Others v. Moldova and Russia» concerning human rights violations in Transnistria. The applicants claimed that in the period when, as they believed, their convention rights were violated, Transnistria, although de jure it was considered part of Moldova, but in fact was under the control of the Russian authorities. But the «hybrid occupant» - the Russian Federation - behaved according to the typical principle «we are not there», which was later widely used in the situation in the Crimea and in the Donbas. On this occasion, the ECHR in a relevant decision of July 8, 2004 (par. 305) on this case specifically noted that the Russian Federation rejected its responsibility for the state of affairs in Transnistria and argued, that only the Government of Moldova can and should be responsible for this territory, since the territory of Transnistria de jure enters the borders of Moldova. In this regard, the ECHR in its decision of July 8, 2004 (par. 305) on this case specifically noted that the Russian Federation rejected its responsibility for the state of affairs in Transnistria and argued that only the Government of Moldova can and should be responsible for this territory. The territory of Transnistria de jure enters the borders of Moldova. However, the ECHR, citing its case law in the cases of «Loizidou v. Turkey» and «Cyprus v. Turkey» (described above, the reference to these cases is given in par.312 of the decision of

July 8, 2004), indicated that actual jurisdiction in exceptional cases may not coincide with legally recognized boundaries and that in each case the Court must analyze whether this case is «Exceptional». Such exceptional circumstances may arise especially particularly where a State is prevented from exercising its authority in part of its territory. That may be as a result of military occupation by the armed forces of another State which effectively controls the territory concerned, to acts of war or rebellion, or to the acts of a foreign State supporting the installation of a separatist state within the territory of the State concerned (par. 310-312). In this regard, the ECHR noted that almost from the first days of independence, which is recognized by the international community, the Republic of Moldova was faced with the separatist movement in Transnistria. In December 1991, this movement acquired the form of armed resistance to legitimate authorities, which (resistance) was supported by the armed personnel of the 14th Army. The Russian Federation, to which this army belonged, did not prevent the participation of its armed citizens in official military service in military actions on the side of the separatists (par. 323, 325, 330). Moreover, the leadership of the Russian Federation directly supported these separatist actions with political declarations. The Russian Federation developed the main provisions of the cease-fire agreement of July 21, 1992 and even signed it as a party. In addition, after the conclusion of this agreement, the Russian Federation continued to provide military, political and economic support to the separatist regime, which allowed it to survive, gaining strength and gaining a certain degree of autonomy compared to other regions of Moldova. The ECHR concluded that the authorities of the Russian Federation made a decisive military and political contribution to the creation of a separatist regime in the Transnistrian region, which is part of the territory of the Republic of Moldova (par. 323, 325, 330). Under these conditions, Moldova, in fact, in the confrontation with the Russian Federation, could do little to restore its power over the Transnistrian territory, although the authorities of the Republic of Moldova constantly appealed to international organizations and the world community to promote the territorial integrity of the Republic (par. 333, 341). In the light of all these circumstances, the ECHR concluded that the Russian Federation is responsible for the illegal actions committed by Transnistrian separatists, given the military and political support provided to them, in order to help them establish a separatist regime. Thus, the responsibility for the observance of human rights in the Transnistrian region lies entirely with the Russian Federation, which exercises effective control over these territories (par. 381, 382, 384).

2.3 Decisions of the European Court of Human Rights 2015-2017 (Azerbaijan, Armenia, Ukraine)

These legal positions were also taken as the basis for the Decision of the ECHR dated June 16, 2015 in the case of «Chiragov and Others v. Armenia» (ECHR, 2015), where the issue of human rights violation in Nagorno-Karabakh, which is de jure recognized as part of Azerbaijan and prior to forceful rejection, it was actually controlled by this state (the so-called «Nagorno-Karabakh Republic», «NKR»). In the decision of June 16, 2015, the ECHR also turned to the Provisions on the laws and customs of warfare on land, The Hague, October 18, 1907 (hereinafter referred to as «The Hague Regulations of 1907»). In par. 42 of the Decision, in particular, states that the territory is considered occupied when it is actually transferred

under the authority of a hostile army. Accordingly, the occupation, in the sense of the Hague Regulations of 1907, exists when the state exercises effective power over a territory or part of the territory of an enemy state. The requirement of the actual authority is considered synonymous with the requirement of effective control. Military occupation is deemed to exist in a territory or part of a territory, if it can be demonstrated, in particular, the presence of foreign troops that are able to exercise effective control without the consent of the sovereign (par. 96). Accordingly, the ECHR did not recognize the claim of the Armenian side in this legal process that there are no Armenian troops on the territory of «NKR» (the same principle of hybrid control noted above - «we are not there»). The court took into account the official statements of Armenian officials, for example, the statement of Mr. Manukyan, a former defense minister, who acknowledged that the public statements that the Armenian army did not participate in the war were exclusively for foreign consumption; in fact, the Armenians of Karabakh – supporters of the «NKR» and the Armenian army were united in military actions. It doesn't matter if someone was a Karabakh man or an Armenian (par. 62). The speech delivered by the incumbent President of Armenia Mr. Serzh Sargsyan to the leadership of the Ministry of Defense in January 2013, in which he stated that the goal of Armenia's foreign policy was to achieve legal recognition of the victory achieved by «Our Army» in the Nagorno-Karabakh war is even more important. (par. 72) It should also be noted that the government of Armenia in this case acknowledged, with reference to the agreement on military cooperation of 1994, that the Armenian army and the «NKR» defense forces cooperate in defense (par. 178). The ECHR decided to consider it established that the Republic of Armenia, thanks to its military presence and the provision of military equipment and experience, was involved in the Nagorno-Karabakh conflict from the very beginning. This military support was and remains decisive for the conquest and continued control over the territories in question (par. 180). In addition, up to 70% of the «NKR» budget was formed at the expense of sources from the Republic of Armenia, that is, the latter also has a decisive financial influence (paragraph 183). All of the above indicates that the «NKR» and its administration survive thanks to military, political, financial and other support provided by Armenia, which, therefore, exercises effective control over Nagorno-Karabakh and the surrounding territories, including the Lachin region. Therefore, the issues under consideration fall under the jurisdiction of Armenia for the purposes of Art. 1 of the Convention. Therefore, the government's objection regarding the jurisdiction of the Republic of Armenia with respect to Nagorno-Karabakh and the adjacent territories is rejected (paragraph 186, 187). Thus, the ECHR actually recognized the occupation by Armenia of a part of the territory of Azerbaijan («NKR») and, accordingly, Armenia's responsibility for respecting human rights in that territory. On July 25 2017, when the ECHR decided on the case of «Khlebiuk v. Ukraine» (2017), the queue reached Ukraine in the context of the consideration of cases on «effective control». A citizen of Ukraine A. Khlebiuk (the applicant) appealed to the ECHR with a complaint against Ukraine, in which he stated that in 2013 he had been convicted by the Alchevsk court of the Luhansk region for a long term of imprisonment. The verdict was appealed. However, the Court of Appeal of the Luhansk region during its work in Lugansk was not able to consider this appeal in connection with the military actions of the pro-Russian

separatists. As the ECHR points out (par. 9), since the beginning of April 2014, armed groups began to seize official buildings in the Donetsk and Lugansk regions and announced the creation of self-proclaimed entities, known as the «Donetsk People's Republic» and the «Luhansk People's Republic» («DPR» and «LPR») (par. 10); in response, on April 14, 2014, the government of Ukraine, which considers these armed groups as terrorist organizations, authorized the use of force against them in the legal form of the «antiterrorist operation». After the cassation court moved to Lysychansk, the court still could not consider the appeal in essence, since the case file remained in the territory of the Luhansk region, which was not under the control of the Ukrainian authorities. On March 18 2016, the Lysychansky Court released the applicant. He considered that, since he had been detained on remand since May 1, 2010, in accordance with the Law of November 26, 2015, he could be considered to be serving a sentence (par. 30). In the complaint, the complainant claimed that the State of Ukraine did not ensure that his complaint was considered in a reasonable manner, which violates Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the right to a fair trial in a reasonable time). As a result of the examination of the complaint and appeal to the circumstances of the present case, the Court notes that it is indisputable that the applicant was able to appeal against his conviction, and this complaint was accepted for consideration on the merits. It is also not disputed that the main reason why the applicant's case has not yet been considered by the Court of Appeal is that his case files are no longer available as a result of military actions in areas that the government does not control (par. 70). Consequently, there is no reason to believe that the authorities of the respondent state intentionally "restricted" the exercise of the applicant's right to access the Court of Appeal. In considering this issue, the Court takes into account the context in which the case arose, and notes that it would be artificial to study the facts of the case without considering this general context (par. 71). In par. 74 of the decision of the ECHR he noted: «The applicant did not claim that the lack of a mechanism for the Luhansk region was caused by a deficiency on the part of the Ukrainian authorities, and not on any other party. It should also be taken into account that the hostilities in this area continued throughout the period under review, and a stable and durable cease-fire has not yet been achieved». In par. 79, 81 the Court concludes that «in view of the above considerations and, in particular, the fact that the authorities had duly examined the possibility of restoring the materials of the applicant's case, the national authorities did everything in their power under the circumstances consider the applicant's situation. The applicant was unable to point out any other specific actions that he could take at present in the respondent state» (par. 79). In the light of the above, and taking into account the objective obstacles encountered by Ukrainian authorities, the Court finds that in the circumstances of the present case there was no violation of Article 6 of the Convention (par. 81). It is interesting to note that the ECHR made conclusions about the impossibility of proper control by the Ukrainian authorities over the territories of the terrorist activities of the pro-Russian forces, in particular, on the basis of resolution 2133 (2016) of the Parliamentary Assembly of the Council of Europe (PACE) of October 12, 2016 (par. 52), which was previously analyzed by M. Belkin (Belkin, 2017). The court refers to the following provisions: «The Parliamentary Assembly is deeply concerned

about the human rights situation in the Crimea and in the self-proclaimed «people's republics» of Donetsk and Lugansk («DPR» and «LPR», respectively)... Victims of human rights violations have no effective internal legal remedies at their disposal: as far as the residents of the «DPR» and «LPR» are concerned, local 'courts' lack legitimacy, independence and professionalism; the Ukrainian courts in the neighbouring government-controlled areas, to which jurisdiction for the non-controlled areas was transferred by Ukraine, are difficult to reach, cannot access files left behind in the «DPR» or «LPR» and cannot ensure the execution of their judgments in these territories; ... Numerous inhabitants of the conflict zone in the Donbas, on both sides of the contact line, still suffer on a daily basis from numerous violations of the ceasefire that was agreed in Minsk. These violations are documented daily by the OSCE Special Monitoring Mission to Ukraine, despite the restrictions on access imposed mainly by the de facto authorities of the «DPR» and «LPR». The inhabitants also suffer from the prevailing climate of impunity and general lawlessness due to the absence of legitimate, functioning State institutions, and in particular access to justice in line with Article 6 of the European Convention on Human Rights (ETS No 5). ... The Assembly therefore urges: ... the international community to continue focusing on the human rights and humanitarian situation of the people living in the territories of Ukraine not under the control of the Ukrainian authorities and refrain from placing demands on Ukraine which would cement the unlawful status quo if fulfilled...». Thus, referring to these findings, the ECHR actually legalized this Resolution as a legal document and a source of law. At the same time, one cannot help dwelling on the fact that excluding the blame of Ukraine, the ECHR did not explicitly indicate who is really to blame for violating human rights in «DPR» and «LPR». The ECHR described this as follows: «The Court notes at the outset that the scope of its examination of the case is delimited by the fact that the application is directed against Ukraine only (contrast, for example, «Ilascu and Others v. Moldova and Russia» (2004)) and that the applicant did not allege that his rights had been breached due to a deficiency in the mechanisms of international cooperation between Ukraine and any other High Contracting Party». That is, the Court directly indicated that there is a direct analogy with the above-mentioned case «Ilascu and Others v. Moldova and Russia» (ECHR, 2004), and that the potential fault of Russia in this case lies on the surface. The question of why the authors of the complaint did not want to use this analogy (the precedent is clearly on the surface) and practically limited the applicant's ability to obtain a fair satisfaction, for example, from Russia, remains open

4 CONCLUSION

Thus, the generalization of the position of the ECHR leads to the following conclusions: First, the status of certain areas of a given country controlled by armed forces hostile to the government of that country (the victim country) is determined on the basis of actual control (occupation). The requirement of actual control (occupation) is considered synonymous with the requirement of "effective control", and "effective control" is identical to occupation. Secondly, the responsibility for such territories lies with the controlling (occupying) side, and therefore the responsibility for humanitarian policy and ensuring the rights of citizens in these territories cannot be assigned to the country of sacrifice. In the resolution of the

Verkhovna Rada of Ukraine No. 254-VIII of March 17, 2015 «On the recognition of certain regions, towns and villages of Donetsk and Lugansk regions as temporarily occupied territories» (2015) certain regions, cities, towns of Donetsk and Lugansk regions are recognized as temporarily occupied territories, up to the withdrawal of all illegal armed units, the Russian occupation forces, their military equipment, as well as militants and mercenaries from the territory of Ukraine and the restoration of full control of Ukraine over the state border of Ukraine.

This rule is fully consistent with the stated positions of the ECHR.

The Law of Ukraine No. 2268-VIII of January 18, 2018 "On the peculiarities of the state policy on ensuring the state sovereignty of Ukraine in the temporarily occupied territories in the Donetsk and Luhansk oblasts" (VRU, 2018) states that the Provisional Occupied Territories in Donetsk and Luhansk Oblasts on the day of the adoption of this Law recognize parts of the territory of Ukraine within which the armed formations of the Russian Federation and the occupation administration The Russian Federation has established and exercised general control, namely: 1) the land territory and its internal waters within the limits of separate regions, cities, with villages of Donetsk and Luhansk regions; 2) the inland seawater adjacent to the land territory specified in paragraph 1 of this part; 3) subsoil within the territories specified in paragraphs 1 and 2 of this part and airspace over these territories. However, the temporary occupation by the Russian Federation of the territories of Ukraine, as defined in part one of Article 1 of this Law, irrespective of its duration, is illegal and does not create any territorial rights for the Russian Federation. The activity of the armed forces of the Russian Federation and the occupation administration of the Russian Federation in the Donetsk and Lugansk regions, which contradicts the norms of international law, is illegal, and any act issued in connection with such activities is invalid and does not create any legal consequences, except documents confirming the fact the birth or death of a person in the temporarily occupied territories in the Donetsk and Lugansk regions, which are attached in accordance with the statement on the state register birth of a child. The person and the application for state registration of the death of a person. Responsibility for material or moral damage caused by Ukraine as a result of the armed aggression of the Russian Federation is assigned to the Russian Federation in accordance with the principles and norms of international law. Individuals, regardless of whether they are registered as internally displaced persons or from acquiring a special legal status, as well as for legal entities, retain the right of ownership, other rights to immovable property, including immovable property, including land plots located on temporarily occupied territories. territories in Donetsk and Lugansk regions, if such property is acquired in accordance with the legislation of Ukraine. The state of Ukraine territorial communities of villages, towns, cities located in the temporarily occupied territories in the Donetsk and Lugansk regions, state authorities, local governments and other subjects of public law retain the right of ownership and other rights to real estate, including real estate including land plots located in the temporarily occupied territories in Donetsk and Lugansk regions.

This rule is fully consistent with the stated positions of the ECHR.

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