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Chapter 9

Protection of the Owner's Rights to Property Damaged during the War

ABSTRACT

Property is an economic, social, and legal phenomenon. Owning property is an inalienable natural human right. Destruction and damage to property belonging to a person during military operations, being forced to leave it in the occupied territories, a significant decrease in the value of the property, and other reasons for the impossibility of extracting benefits from the property are the realities in which many citizens of Ukraine found themselves. Military operations continue, and human life goes on. All owners, whose property was negatively affected by the war, seek to restore their rights. Adequate protection of the rights of owners, however, is not possible with the usual legal mechanisms used in peacetime. In emergencies, such as hostilities, martial law, and state of emergency, neither vindication, nor restitution, nor negative actions are possible. Currently, it is difficult to bring to justice the perpetrator of damage to private Ukrainian owners, since the damage was caused by military actions by the state that invaded Ukraine and does not recognize the norms of international law. Therefore, the realities require effective legal mechanisms, the use of which would allow the application of the norms of public law, including international, and humanitarian law, for real compensation to private individuals for the damage caused by the war. The scale of such damage is currently very significant, and legal mechanisms are absent or ineffective.

Keywords: property rights, objects, private property, property destruction, property damage, international law, humanitarian law, effective protection of property rights.

Introduction

Any war has a significant, direct or indirect, impact on property rights. This is not limited to the destruction of property, but includes the possibility of its forced requisition for public needs, a decrease in the income of private individuals due to the termination of work and contractual relations, forced emigration, damage caused to the health or the death of the breadwinner, etc.

While conducting a research on the peculiarities of protection of private property in the context of various war-related circumstances (military operations, armed conflicts, hostilities, etc.), the emphasis should be put on the following aspects:

- types of violations of property rights and other negative consequences for the owner (property requisition; damage as a result of the termination of contracts with private individuals; termination of other contracts; failure to perform contract obligations due to force majeure);
- peculiarities of property rights protection in wartime;
- subjects of responsibility;
- conditions of civil liability;
- the amount of compensation for damage, the procedure for its determination;
- sources of compensation.

I. Adverse Consequences for the Owner Arising from Hostilities

The issue of war as a civil-law delict and grounds for compensation for property damage in civil legal relations in Ukraine has not been investigated yet. There are probably many reasons for this, but of course, the main is that we used to live in peace and therefore the question of compensation for damage due to hostilities did not arise previously. However, the situation has changed and now this issue has become not only relevant, but also one that extends to many legal areas. One of them is the possibility for private individuals, if not to restore their property status which was affected during the hostilities, then at least to acquire resources for existence and normal life activities. The range of problems that arise in this case is too large, and therefore we will dwell on only some of them, focusing on the possibility for private individuals to receive compensation in the most effective way.

At the same time, it should be noted that in order to present this topic, we must inevitably refer not only to purely civil constructions, but also to other branches of law: humanitarian, international, procedural, etc.

The Impact of War on Property Rights

The owner's exercise of their right and, in general, the sense of being an owner definitely differs in times of peace and war. What a person used to consider their own, in wartime may cease to belong to them without any possibility for this person to do anything about it. Moreover, protecting one's right becomes so difficult that even attempts to do so become senseless and sometimes simply impossible.

This is true about all categories of owners: individuals and legal entities being subjects of private property law, and subjects of communal and state property law. The protection of private property rights raises the biggest number of questions. However, the subjects of communal property rights need protection since communal property also suffers from shelling and explosions. In addition, objective consequences of the war include a decrease in revenues to local budgets due to the destruction of objects used in business activities; the cessation of such activity by individuals due to forced migration or to other reasons; an increase in costs for supporting the city life, communications, removal of debris from damaged buildings and structures, etc.

Moreover, one cannot overlook the issue of protecting the right of state ownership of property which, for example, remained in captured and occupied territories or belonged to the state as a subject of authority, as well as a participant in other legal relations (for example, recreation facilities, medical facilities, educational institutions, energy facilities, etc.).

It is also necessary to take into account the location of the property during the war. It can be situated on the territory of the countries that are in military conflict (for example, Ukraine and the Russian Federation), as well as outside their borders (if we talk about such influence on property rights as sanctions imposed on certain citizens of the Russian Federation).

First of all, three groups of circumstances of the impact of war on private property should be noted.

The first group involves circumstances which are forced and actually unavoidable in such a period. These are: (a) significant restrictions on the owner's ability to use and dispose of their property, including funds on bank accounts; (b) forced seizure of property from the owner for military purposes, assistance to victims, etc.

The second group includes situational violations of property rights due to various actions of participants in the military conflict and other persons: (a) first of all, destruction and damage to property as a result of military operations (both by the enemy and own forces); (b) threats to property rights, which often turn into violations: looting, high risks linked to giving weapons to civilians; (c) use of the circumstances for illegal reregistration of ownership of real estate; (d) failure to perform contrac-

tual obligations due to force majeure; (e) refusal to the insurance sum by insurance companies due to force majeure; (f) devaluation of securities, increase in market prices of goods and, as a result, of services not only in the countries where military action takes place, but also in other countries due to globalization processes.

The third group of various circumstances which affect the right to property in one way or another can include, for example, the following: (a) the complexity of judicial protection due to changes in the territoriality of the consideration of disputes related to military actions in certain territories, the lack of formation of the composition of courts, which now happens to be the case in Ukraine, etc.; (b) judicial immunity; (c) the impossibility of protecting property rights due to the absence of agreements between the states in military conflicts; (d) termination of the right of ownership (de facto and according to the legislation of the state that seized the territories of another state, where property of private individuals is located), (e) uncertainty, under Ukrainian legislation, of the legal position of the owner of property in uncontrolled territories, etc.

The right of ownership is negatively affected by numerous circumstances that arise in the period of military operations—from the depreciation of property (both movable or immovable and property rights, securities) and its unavailability for use due to damage and destruction.

Forced and Unavoidable Factors and Consequences of Their Influence on Private and Communal Property during the War

Such well-known grounds for the forced termination of property rights as requisition (Article 353 of the Civil Code of Ukraine) and confiscation (Article 354 of the Civil Code of Ukraine) with the introduction of martial law acquire new meanings which are absent in peacetime. Since this is caused by the extraordinary factor of war, these influencing factors affect the constitutional principles that determine the scope of property rights. This is precisely what is defined in the Decree of the President of Ukraine №64 of February 24, 2022 “On the imposition of martial law in Ukraine.” (On the imposition of martial law in Ukraine: Decree of the President of Ukraine No. 64 dated February 24, 2022) According to section 3, it is allowed to limit the constitutional rights and freedoms of a person and a citizen, provided for in Articles 30–34, 38, 39, 41–44, 53 of the Constitution of Ukraine, due to the introduction of martial law in Ukraine and for this period of time.

This regime allows to restrict property rights in the following ways: to use the capacities of all Ukrainian companies for defense purposes; to force alienation of property that is in private or communal ownership; to confiscate property of state

enterprises and state economic associations for the needs of the state; to seize electronic communication equipment, television, video and audio equipment, computers, as well as, if necessary, other technical means of communication; to force admission of military personnel, members of the ordinary and senior staff of the law enforcement agencies, personnel of the civil protection service, evacuated population in their premises, etc. (On the legal regime of martial law: Law of Ukraine No. 389-VIII dated May 12, 2015, paragraphs 4, 5, 12).

The range of powers of military administrations also affects the property rights (Part 1, Article 15 of the said Law), since these administrations are allowed to attract, on a contractual basis, the funds of legal entities located in the relevant territory, and the funds of civilians, for the construction, expansion, repair and maintenance of social and industrial infrastructure facilities and for measures to protect the environment; transfer of governance over various objects of communal property rights to these administrations; establish for communal legal entities the size of the share of profit, which shall be transferred to the local budget, etc.

Such legal provisions affect the extent of an owner's powers in the following ways: they allow to use private and communal property and even to terminate ownership rights to it against the will of the owner. This is evidenced by the terminology used in the Law of Ukraine "On the Legal Regime of Martial Law": 'removal,' 'admission,' 'forced alienation,' etc. It is also worth noting that the possibilities of coercive influence on property rights, provided by this Law, are even greater than that envisaged by the Civil Code of Ukraine. If, according to Art. 350, 351, 353, the seizure of property is allowed only for monetary/financial compensation, and only under Art. 354 it is gratuitous (confiscation as a sanction for a criminal offense), the Law "On the Legal Regime of Martial Law" allows to seize property for free. Only relevant documents of the prescribed format are issued (item 4, part 1, article 8). This Law does not specify other compensations for the owners.

Undoubtedly, ownership is affected by the owner's impossibility to dispose of their property freely, which follows from the termination of the functioning of state registers and databases administered by the state. This happened at the beginning of the hostilities and lasted for one month, as was provided by the Decree of the Cabinet of Ministers of Ukraine "Some issues of notary under conditions of martial law." (Some issues of notary under conditions of martial law: Resolution of the Cabinet of Ministers of Ukraine No. 164). However, these measures were fully justified and do not constitute an offense.

Meanwhile, this Decree suspends unfinished notarial actions requested by citizen of the Russian Federation and legal entities determined in this Decree, and if the said persons apply for notarial actions only after the Decree enters into force, the notary refuses to perform them. This restriction applies until the adoption and

entry into force of the Law of Ukraine on the settlement of relations involving persons affiliated with the Russian Federation.

This, of course, not only affects the property rights of legal entities and individuals of the Russian Federation, but is also an infringement into their rights; and it is only a matter of time before these individuals seek their protection.

Monetary settlements, i.e., the use and disposal of personal funds in Ukraine, are also subject to significant restrictions. This is provided for by the "Regulation on the procedure for the introduction of non-cash payments in Ukraine in the national currency during a special period," (Regulation on the procedure for the introduction of non-cash payments in Ukraine in the national currency during a special period, approved by the resolution of the Board of the National Bank of Ukraine No. 577) according to which the National Bank of Ukraine has a right to limit and to suspend non-cash payments in banks registered (or those that have their branches registered) in localities in which martial law has been imposed. There are also possible restrictions on the circulation of cash during the war period, provided for by the Resolution of the National Bank of Ukraine "On approval of the Regulation on the organization of cash circulation and conducting issue and cash operations in the banking system during a special period" from 5 May 2018 №51, („On the approval of the Regulation on the organization of cash turnover and the conduct of issue and cash operations in the banking system during a special period: Resolution of the National Bank of Ukraine" dated 5.05.2018 No.51) in particular regarding cash withdrawals, the obligation to deposit cash in a specific bank.

Situational Violations of Property Rights

If the first group of factors and the consequences of their influence on the right of ownership are allowed by law representing a legal restriction of the scope of the right of ownership, and therefore are not violations, the second group includes violations of the right of ownership itself. Moreover, these violations are either to a greater extent or always caused by military actions and the circumstances accompanying them.

All these circumstances can be combined under the umbrella of "deprivation of property" which occurs for various reasons. This can be both a physical deprivation of a person's property (for example, when it is destroyed) or a legal one (for example, when it is impossible to access it when the rights to this property are reissued to another person according to the laws of the country that seized the territory where the property is located).

In the first case, property damage was caused to the persons referred to as victims in connection with the *loss*, *destruction* or *damage* of property as a result of military actions. These terms are most often used when questions about the protection of property rights arise. Meanwhile, when analyzing these three terms, the following should be noted.

First, property should be understood as movable or immovable things that belong to an owner. This term is used in its narrow sense and should not include property rights and even money and securities. It seems that the methods of protecting the rights to the latter should be determined separately.

Second, none of the three terms is adapted to violations of the ownership of land plots, which can neither be 'lost' nor 'destroyed.' As for 'damage,' this term should probably be consistent with the term 'decrease in value' used in Art. 394 of the Civil Code of Ukraine, (Civil Code of Ukraine: Law No. 435-IV dated January 16, 2003) although this article relates to a different context of the protection of ownership of immovable property.

The term 'loss' is inappropriate for immovable property; it is rather acceptable for movables. Moreover, it is impossible to consider property as 'lost,' if the location of this property cannot be established, and in reference to real estate, it can only be 'lost' in the sense of being destroyed, but no other.

Most likely, 'lost' property should be understood as something the person no longer has control over. 'Destroyed' property is a property which no longer exists or whose restoration is impossible or impractical economically, that is, which is not subject to reconstruction according to the result of a construction examination.

Property is 'damaged' when its qualities have been affected negatively, i.e., when the property has (partially) lost the usability for the intended purpose and therefore its economic value has been lost. However, this property can potentially be restored and become suitable for its intended use again.

Third, in the case when a person loses control over the property that remains in the occupied territory, the person legally remains its owner because these facts are not grounds for terminating one's ownership according to the legislation of the state. According to Art. 11 of the Law of Ukraine "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine" dated April 15, 2014 №1207-VII, (On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine: Law of Ukraine dated April 15, 2014 No. 1207-VII) property rights in the temporarily occupied territory are protected in accordance with the legislation of Ukraine. The state of Ukraine, the Autonomous Republic of Crimea, territorial communities, including the territorial community of the city of Sevastopol, state bodies, local self-government bodies, and other subjects of public law retain ownership and other real rights

to property, including real estate, such as land plots located in the temporarily occupied territory.

At the same time, the ownership of this person is terminated according to the legislation of the other country in all cases or in the cases specified in the legislation. Of course, in this case, it is not merely difficult, but impossible for the Ukrainian owner to protect their right either through vindication or by demanding recognition of their right, or compensation for damages. This situation can persist at least for the duration of the military conflict and as long after its end until such issues are resolved at the interstate level.

It should be added that the Ukrainian owner who has real estate on the territory of the Autonomous Republic of Crimea could carry out state registration of their right to this property under the legislation of the Russian Federation. In this case, the owner does it based on their own free will, but this action contradicts Ukrainian legislation, since in accordance with part 2 and 3 of Art. 6 of the said Law, any bodies and their officials in the temporarily occupied territory as well as their activities are considered illegal if these bodies or officials have been created, elected or appointed in a manner which has not been provided for by Ukrainian law. Therefore, any act (decision, document) issued by the above-mentioned bodies and/or officials is invalid and does not create legal consequences, except for certain documents confirming the fact of birth, death, registration (or dissolution) of marriage. Any deed regarding immovable property, including land plots, made in violation of the requirements of this Law and other laws of Ukraine, is considered invalid from the moment of its execution and does not create legal consequences, except those related to its invalidity (h .6 of Article 11).

And *vice versa*, if the Ukrainian owner has not taken these actions, then according to the legislation adopted by public authorities created on the occupied territories (We will not go into the explanation of the status of these territories under international law or regarding the international status of these entities.) where this property is located, the owner is no longer considered as the one having property rights, and the property becomes communal property. In particular, such a consequence is provided for by the Decree of the Chairman of the DNR "On the identification, accounting and acceptance into municipal ownership of ownerless real estate and derelict property," dated April 28, 2022)

Violation of the owner's rights may be both a result of direct military actions (destruction of property by explosions, shelling, etc.), and of events generated by war, e.g., looting, damage to property by other offenses due to various situations in which conflicts escalate or emotional state changes (by military or territorial defense members in a state of intoxication or for other reasons) or due to unskillful handling weapons, etc.

Nota bene, looting may happen on both sides of warring parties. As literature exemplifies, war was originally perceived as one of the ways of enrichment whereby warriors had an opportunity to acquire the property of conquered peoples in the form of not only military trophies, but also military spoils. (Spesiytsev, 2022, pp. 64-65) This was noted, among others, by G.F. Dormidontov, who considered the seizure of things during the war as a basis for acquiring the right of ownership by *occupatio*. (Dormidontov, 1913, pp. 117-118) It is hardly disputable in regard to military trophies, these, however, do not fall into private ownership (except when private military companies fight and capture trophies). But with regard to military spoils, the situation in modern times should change as compared to ancient and medieval times, and little by little, attempts to settle it have been made. As early as the 19th century, it was provided at the legislative level that the acquisition of military spoil was lawful only in the case of the permission of the headquaters, and otherwise it was a crime. (Duvernoix, 1899, pp. 87-88) However, the proverbial cart little has actually changed: people behave as they used to, as evidenced by the situation in Ukraine. This significantly violates the right to property, which must be sufficiently responded to. Meanwhile, there are no adequate grounds for reacting to it with the use of effective protection yet.

Let us note one more aspect of the violation of the right to private property during hostilities: the discontinuation of contracts concluded before the war, which causes losses to at least one contractual party. This happens both through the withdrawal from the contract and through termination, in particular, because of failure to perform contract obligations due to force majeure. Doubtlessly, there is an objective reason for terminating contractual relations, which causes damage to contracting parties; this is war. The fact is, though, that due to this force majeure circumstance certain losses fall on the owner: a contractual party to which the other party does not provide compensation. However, this particular circumstance is not always sufficient for exemption from responsibility for a failure to perform contractual obligations, since the party that does not perform them on account of the war and thereby causes damage to the other contractual party must prove that the performance of the obligations has become impossible precisely as a result of such an irresistible force as war (Article 614 and Part 1 of Article 616 of the Civil Code of Ukraine). Therefore, the causation link in these cases must be proved by the party whose actions caused damage to its counterparty. Valid reasons include the destruction of the production facilities where the products were manufactured, or the means of transport by which they were to be delivered while their replacement by the services of other carriers would be disadvantageous to the contracting party. Undeniably another reason can be the occupation of the territory where the party to the contract is located with the necessary means of business activity for the performance of the contract.

II. Conceptual Grounds and Legal Norms which Should Be Relied upon when Solving Issues Concerning the Protection of Property Rights during Hostilities

The problem of the protection of property rights whose violation occurred due to military actions and their consequences is complex and multifaceted. Let us name two main reasons, from which others follow as their consequences.

The first is the existence of two spheres of law: private and public, which almost always overlap. This is especially pronounced in the conditions of martial law, when public law is clearly wedged into the legal mechanisms provided for by private law. In particular, civil legislation contains only a provision on requisition, which can be relied on, but this is only one article of the Civil Code of Ukraine, which cannot always be applied since martial law imposes its own specificity on this kind of confiscation of property. The principles of protection and responsibility provided for by the Civil Code of Ukraine will be partially acceptable. However, public law—international, criminal, humanitarian—will also inevitably be applied, which serve as a basis for the introduction of civil legal mechanisms. Therefore, the issues of the proper protection of property rights do not lie only in the sphere of private law.

The second is differences in the legal regulation of property during war, hostilities, and military conflict in comparison to legal models for the exercise and protection of property rights in peacetime. In this regard, it should be noted that many rights of subjects of private law change in wartime. This applies to both personal non-property rights (freedom of speech, information, etc.) and property rights; all of them shrink in scope, the powers of subjects are significantly narrowed, which is attributed to public law. Accordingly, the opportunities of individuals to exercise their rights at their own discretion, at their own will, and in their own interests are reduced. In such times, public interests prevail over private ones. The will of the owner may not be taken into account when using their property and alienating it, and therefore, it may not happen at the discretion of the owner.

Next, we will note the array of legislation containing public law norms which must be taken into account when solving issues of admissibility of the influence of public law regulators on the right of ownership and the legal mechanisms by which it is protected. At the same time, one should rely on the relevant norms of domestic law, international treaties, international humanitarian law, and decisions of the ECHR.

Public Law (International Public Law and International Humanitarian Law)

In the context of this discussion, it is worth noting, first, the importance of determining the ways of the protection of the owners who are in the occupied territory against the state that currently controls this territory and in the state that legally owns these territories, but currently does not control them. Second, the determination of the state's fault in order to indemnify it for damage and pay compensation depends on compliance with the norms of humanitarian law.

International law uses the term "civilian objects" to mean all property that is not military (Article 52 (1) of Additional Protocol 1 to the Geneva Conventions). It is these objects that are protected by the norms of international law and whose violation leads to responsibility, and therefore to the protection of property rights. This may refer to the destruction of civilian objects, regardless of whether it was justified by a military operation. Here, we can refer to the examples of earlier wars, in particular the second world war and the case of a German officer who ordered to burn several mills and to destroy their machinery before the Red Army's offensive, which served as a basis for finding him guilty of a war crime: the destruction of private property unjustified by military necessity, which was ruled in the judgment of the Higher Land Court in Dresden in 1947 (Gromovoi, 2022).

The same approach is seen in more recent events surrounding the military conflict in Turkey: in 2008, the Higher Administrative Court of Bavaria revoked the displaced person status of a Turkish citizen on the basis of a high probability that he had engaged in "…unlawful and arbitrary destruction of property not justified by military necessity, which was a violation of Article 8, Clause 2, Clause a) …of the Rome Statute" during the service in the armed wing of the Workers' Party of Kurdistan (Gromovoi, 2022).

These examples should be taken into account when assessing damage to property owned by private individuals and territorial communities in Ukraine. Possibly, the issue of the proportionality of damage to property used during hostilities for the needs of the people of Ukraine—bridges, buildings, and other infrastructure facilities—should also be considered. Meanwhile, this issue is very complex, and to solve it, one should delve even deeper into the realm of public law and evaluate the validity of approaches to military tactics used during the war. Herein questions about the subjects of compensation may arise, which is of crucial importance for the civil protection of property rights.

Therefore, it is necessary to distinguish the negative impact on the right of private property through forced deprivation of the owner of their property (a) by the enemy state (for example, through spoils, looting, acquisition of trophies); (b) by the native state through requisition, confiscation, looting.

At the same time, it should be taken into account that the confiscation referred to in the legislation of Ukraine differs from the confiscation under Art. 354 of the Civil Code of Ukraine, where confiscation is a consequence of a criminal offense. In general, the issue of any confiscation of property goes beyond the scope of regulation by civil law (Amfiteatrov, 1945, pp. 10-14), including the procedure for further use and alienation of property. It has traditionally been so that the participation of the state in any property relations, including its acquisition of rights to property and its management and vice versa (privatization of state property) is not regulated by civil law, although the Civil Code of Ukraine defines such relations as civil law, and the state as the same owner as private individuals. However, this is a matter for a separate discussion.

Internal Law of the Parties to the Military Conflict in Ukraine

Until September 2020, the issues of the protection of property rights in Ukraine due to damage or destruction were regulated only by a number of special laws. The courts relied on the laws of Ukraine "On Combating Terrorism," "On State of Emergency," "On Peculiarities of State Policy to Ensure State Sovereignty of Ukraine in the Temporarily Occupied Territories of Donetsk and Luhansk Regions," and the Code of Civil Protection of Ukraine. However, these laws lacked regulation for some issues sometimes happening in practice. In particular, an "emergency situation of a military nature" can have other causes than an armed conflict (for example, explosions at military warehouses). In addition, courts lacked conviction guidance as to the payments to be awarded to the owners.

This issue was resolved in 2020. The Cabinet of Ministers of Ukraine adopted Resolution №767 of September 2 (Resolution of the Cabinet of Ministers of Ukraine No. 767 dated September 2, 2020), which approved the "Procedure for providing and determining the amount of monetary assistance to victims of emergency situations and the amount of monetary compensation to victims, residential buildings (apartments) which were destroyed as a result of a military emergency caused by the armed aggression of the Russian Federation."

However, again only some issues are regulated by this Order. If we are talking about a comprehensive approach to the regulation of legal relations in this area, then Resolution No. 767 of the Cabinet of Ministers of Ukraine does not provide it.

In 2023, Ukraine adopted the Law "On compensation for damage and destruction of certain categories of real estate objects as a result of hostilities, acts of terrorism, sabotage caused by the military aggression of the Russian Federation against Ukraine, and the State Register of Property Damaged and Destroyed as a Result of

hostilities, terrorist acts, sabotage caused by the armed aggression of the Russian Federation against Ukraine" (On compensation for damage and destruction of certain categories of real estate objects as a result of hostilities, acts of terrorism, sabotage caused by the military aggression of the Russian Federation against Ukraine, and the State Register of Property Damaged and Destroyed as a Result of hostilities, terrorist acts, sabotage caused by the armed aggression of the Russian Federation against Ukraine: Law of Ukraine dated February 23, 2023. No. 2923-IX).[1]. In accordance with this Law, the right to receive compensation have owners of damaged/destroyed real estate objects; construction customers; people who had invested funds in the construction, but before its completion it was destroyed or damaged, the heirs of the specified people (Article 2). The law also provides categories of persons who have a priority right to receive compensation for destroyed real estate objects (Article 9).

In order to resolve issues regarding the provision of compensation to these persons, a commission is created to review issues regarding the provision of compensation, to which appropriate applications are submitted by persons entitled to compensation. Claims for compensation are submitted during martial law and within one year from the date of its termination or cancellation in the territory where the destroyed real estate object was located. These applications are considered by commissions in the order of priority of their receipt, based on the results of which a decision is made to provide compensation for the destroyed object of real estate object or to refuse to provide compensation, which is possible only under the conditions specified in the Law. In addition, this refusal can be appealed in accordance with the established procedure. The decision on payment of compensation made by the commission, approved by the institution specified in the Law, is uploaded to the Register of damaged and destroyed property.

Compensation for the destroyed real estate object will be provided in monetary terms or by financing the purchase of an apartment, other residential premises, a house, etc., which will be built in the future. Sources of financing compensation are defined in Art. 13 of the Law. The amount of compensation for a destroyed real estate object is determined for each recipient of compensation and each destroyed object separately, based on the total area of the destroyed object and the cost of 1 square meter of the area of the it (Part 4 Article 8). At the same time, the recipient

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[1] On compensation for damage and destruction of certain categories of real estate objects as a result of hostilities, acts of terrorism, sabotage caused by the military aggression of the Russian Federation against Ukraine, and the State Register of Property Damaged and Destroyed as a Result of hostilities, terrorist acts, sabotage caused by the armed aggression of the Russian Federation against Ukraine: Law of Ukraine dated February 23, 2023. No. 2923-IX // https://zakon.rada.gov.ua/go/2923-20.

of compensation is prohibited from alienating real estate objects acquired under this Law for a period of five years (Part 17, Article 8).

An important element of the legal mechanism in this Law is the conclusion of an agreement on the cession to the state/territorial community of the right to demand compensation from the Russian Federation for the destroyed object of immovable property, in the amount of the received compensation. This contract is concluded simultaneously with the provision of monetary compensation to the person for the destroyed real estate object (Part 18, Article 8).

As for the legislation of the other party to the military conflict (the Russian Federation), at the least the provisions of the Federal Constitutional Law "On Martial Law" (Federal constitutional law of 01/30/2002 N 1-FKZ (as amended on 07/01/2017) "On martial law") should be taken into account, whose clauses 3 and 7, part 2 of Article 7 provide for the evacuation of economic, social and cultural objects, as well as the temporary resettlement of residents in safe areas with the mandatory provision of permanent or temporary housing to such residents; seizure of the property necessary for defense needs from organizations and citizens with subsequent payment by the state of the value of the seized property.

It can be assumed that these provisions concern not only citizens of the Russian Federation and their property, as well as the property of legal or municipal entities, but also the property of citizens of Ukraine, as well as legal entities registered in Ukraine and the property of territorial communities of Ukraine. Considering this interpretation of the Russian law to protect the rights of Ukrainian owners will be even more difficult, especially if it is a property used in business activities (equipment, etc.), which will be disassembled and transported to another area and possibly modified.

Ukraine responded adequately to such a threat by adopting the Law "On Amendments to Certain Laws of Ukraine on Optimizing Certain Issues of Compulsory Expropriation and Seizure of Property in the Conditions of the Legal Regime of Martial Law." (On amendments to some laws of Ukraine regarding the optimization of some issues of forced alienation and confiscation of property in the conditions of the legal regime of martial law: Law of Ukraine dated September 6, 2022 No. 2561-IX). The law, in particular, provides that movable property which is used or can be used to ensure the activity of enterprises of the defense-industrial complex of Ukraine and in respect of which there is a risk of interruption of its functioning since this property is located in the territory of an administrative-territorial unit of Ukraine threatened with a temporary occupation since it is located at a distance of no more than 30 kilometers from the area of military (combat) operations or from the temporarily occupied territory may be aliened or seized on the basis of the decision of the National Security and Defense Council of Ukraine. After that, the military

headquarters must ensure the preservation of this property. The law establishes the transfer of this property into state ownership.

What is questionable in this law?

First, it does not specify important features of movable property that can be seized or alienated, except for the indication that it is used or can be used to ensure the activities of enterprises of the defense-industrial complex of Ukraine. Such vague formulations may have negative consequences for owners since they open up an opportunity for abuse of the wording. Second, it does not mention compensation to property owners. Third, it establishes such a basis for turning a property seized from the owner to the state ownership as the Presidential Decree: the Law states that the right of state ownership over the confiscated movable property arises from the date of the entry into force of the decision of the National Security Council of Ukraine on forced alienation or seizure of such property introduced by the decree of the President of Ukraine. So it's time to refer to the theory of legal facts. However, Art. 11 of the Civil Code of Ukraine, which determines legal facts, covers only the grounds for the emergence of civil rights, while the Law covers the grounds for their termination. Instead, state property rights should be regulated in the same way as other civil rights, since all owners are equal (Article 318 of the Civil Code of Ukraine). However, here public principles have an undeniable influence on the private owner by the public owner: the state. Undoubtedly, a legal mechanism introduced by the Law, designed to preserve property, is needed by the state in times of war, but it can have a negative impact on the right to private property. As a result, private owners may find themselves between the hammer and the anvil: the danger of their property being seized by the Russian Federation or by Ukraine.

On November 12, 2019, Russia adopted a federal law on the withdrawal of ratification of the additional protocol to the Geneva Convention on the Protection of Victims of International Armed Conflicts. Thus, the Russian Federation no longer undertakes to refrain from attacking civilian objects. Therefore, if we evaluate the current context for Ukraine, the guarantees of international law may become illusory. Therefore, in a war with Ukraine that causes damage to property owners, it will be very difficult to rely on international legislation, which the Russian Federation does not recognize. In addition, on September 16, 2022, Russia finally withdrew from the European Convention for the Protection of Human Rights and Fundamental Freedoms. Therefore, disputes between citizens of Ukraine and the Russian Federation will no longer be considered in the European Court of Human Rights. (Russia is no longer in the ECHR. What will happen to the cases of Ukraine against the Russian Federation, 2022) Thus, it is impossible to carry out proper and effective protection of the rights of owners on the basis of Ukrainian and international legislation. Nevertheless, other methods of protection should be sought, if the ones

generally accepted in the world turn out to be unacceptable in the situation of military conflict between Ukraine and Russia.

Legal Approaches and Practice of the ECHR Regarding the Place of the State in the Mechanism of Protection of the Private Owner

Since the issue of protection of property rights is directly related to international law, and the reasons for the violation of property rights during war lie outside the boundaries of civil legal relations, while the main circumstance affecting the owner is war, the state is the main subject responsible for protecting property rights. At the same time, attention should be paid to the following important provisions:

First, whether the state controls this or that part of its territory or not, it is not exempt from fulfilling its obligations under the Convention and its Protocols (for example, the decision of the ECHR in the cases "Ilashku and others v. Moldova and Russia," (Рішення ЄСПЛ у справі "Катан та інші…, 2004; "Katan and others against Moldova and Russia", 2012). Second, the state is obliged to introduce appropriate mechanisms for compensation of the value of property, housing, and land if it is not able to ensure the possibility of returning this property to its owner (for example, decisions in the cases "Sargsyan v. Azerbaijan," "Chiragov and others v. Armenia," "Dogan and others against Turkey"[2]).

This approach is evidenced not only by the practice of the ECHR, but also by the Basic Principles and Guidelines concerning the right to legal protection and compensation for victims of gross violations of international norms in the field of human rights and serious violations of international humanitarian law, dated July 25, 2005, adopted by The United Nations Commission on Human Rights (Основні принципи та керівні положення…). The provisions of these principles, which are important for Ukrainian owners, allow them to hope for compensation. At least, this is what is stated in Principle VII, where one of the means of protection for victims of violations of international humanitarian law is defined as the right to receive adequate, real and quick compensation for damage. And while this statement is perceived as declarative, it takes on a more concrete shape in principle IX, according to which states should seek to establish national mechanisms for reparation for victims of violations in the event that the party responsible for the harm caused is unable or unwilling to comply with their obligations.

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[2] chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://supreme.court.gov.ua/user files/media/Sargsyan_v_Azerb.pdf.

This is exactly the situation in the war between Ukraine and Russia, where the latter shows no desire to restore the violated rights of the owners. Therefore, it is not difficult to predict that the entire burden of solving this problem will fall on Ukraine and it is our state that must decide what legal mechanisms for compensation of damage to implement.

III. Ways to Protect Property Rights

The well-known methods of protection of property rights provided for by the Civil Code of Ukraine (Article 16 and Chapter 29), which are used in peacetime, turn out to be unable to protect owners in war and post-war times effectively. Therefore, it is necessary to focus on the provisions of international humanitarian law, which provide for compensation of damage to the owners as a way of protection, and the forms of such compensation are defined as restitution and compensation along with rehabilitation, satisfaction and guarantees of non-repetition, thanks to which it is possible to satisfy the interests of the owners whose rights have been violated as a result of hostilities. This is provided for in the Basic Principles and Guidelines on the right to legal protection and compensation for victims of gross violations of international norms in the field of human rights and serious violations of international humanitarian law.

International and regional judicial practice shows that the state is accused of violations of human rights and international humanitarian law if it fails to prevent and punish the violations, does not act with due diligence in this respect. This should lead the state to take measures to compensate for the damages it may have caused and to prevent future violations. These measures range from paying compensation to victims and their families and providing guarantees of non-repetition to implementing legal mechanisms to prevent future abuses. (International legal protection of human rights in armed conflicts – 2011 – UN. New York and Geneva)

> ***Restitution*** means restoration of rights or return of property (Lat. *restitutio*: restoration, return)[3]

In civil law, restitution is understood as a consequence of the invalidity of transactions (Article 216 of the Civil Code of Ukraine) (Strelbytska, Sibilov, 1998-2004).

[3] https://leksika.com.ua/16120724/legal/restitutsiya.

If it is about the restitution of property violated as a result of hostilities, then the approach developed in international law should be applied.

It is proposed to introduce restitution in criminal law as well (Tsylyuryk, 2021, pp. 80-86) to the extent that corresponds to this right before its violation. Therefore, the term 'restitution' is interdisciplinary and its semantic value has its own characteristics in different fields. However, the main thing that characterizes restitution is the restoration of the property status of the victim through giving their property back to them. If it is impossible to give such property back to the owner, then it can only be a question of compensation in the form of transferring the same kind of property to them (for example, a land plot) or reimbursement of the sums for the purchase of the property they were deprived of. In particular, this is allowed under Part 1 of Art. 23 of the Law of Ukraine "On the Legal Regime of Martial Law" (a similar provision is contained in Part 5 of Article 353 of the Civil Code of Ukraine).

In accordance with Part 2 of Article 23 of this Law, if the property that was forcibly expropriated from legal entities and individuals survives after the cancellation of the legal regime of martial law, the former owner or a person authorized by them has the right to demand in court the return of such property on the conditions defined by law. This provision is similar to the provision of Part 6 of Art. 353 of the Civil Code of Ukraine, which however, does not use the term "former owner," but refers to the person to whom the confiscated property belonged.

In both cases, a rather interesting situation arises when a person who is not the owner of the property has the right to demand its return by law – specifically property which the person owned before it was taken by the state due to reasons caused by war. Such a claim of the former owner is not vindictive and is not related to the protection of their violated right, since their ownership was terminated without an offense, on the basis provided by law. If we talk about the claim for the return of property to the owner who was injured during hostilities, then the offense took place, but not due to the fault and not on the part of the state, which nevertheless undertakes to return the property to the owner, if it is possible.

Finally, the third case: when the property was seized from the owner or the owner lost possession over the property as a result of the actions of certain persons not related to the need to use this property for military or other actions objectively important during the martial law. In other words, if an offense was committed by civilians, military personnel of any warring party or some armed groups, the owner can defend his right by filing a vindication claim or a claim for compensation for the damage caused to him.

The above clearly demonstrates the scale and complexity of the problem of restitution. However, it is not properly studied in domestic legal literature on civil law (Spasybo-Fatyeyeva, 2015; Spasybo, 2021).

The difficulties of applying restitution as a remedy of protection of property rights due to violations during the war lie primarily in the fact that its application is possible only if the state authorities exercise their powers in the territory where the property is located. Restitution becomes impossible if the property is located in temporarily occupied territories. That is why in international law, restitution is associated with the signing of a peace treaty or capitulation, although experts insist on regulating restitution at the domestic level (Zakirova). However, the domestic regulation of restitution currently covers only restitution which is not related to the protection of property rights violated by military conflicts.

The application of restitution can be seen in the conclusion of the International Court of Justice, according to which, "Israel is obliged to return the land, gardens, olive groves and other immovable property seized from individuals or legal entities for the construction of a wall in the occupied Palestinian territory. If such restitution turns out to be essentially impossible, Israel is obliged to pay the specified persons compensation for the damage caused. The court considers that Israel is also obliged to pay compensation in accordance with the applicable norms of international law to all individuals or legal entities who suffered material losses in any form as a result of the construction of the wall." (Advisory Opinion of the International Court of Justice on the Legal Consequences of Building a Wall in the Occupied Palestinian Territory, 2004).

Therefore, restitution and compensation go hand in hand.

Compensation is a kind of reimbursement, which is introduced in case returning property in kind or transferring similar property to the person whose ownership was violated during the war is impossible. The following issues arise in the context of compensation: (a) Is compensation possible for all owners, or only for private ones? (b) Is compensation introduced in all cases of destruction or damage to property, or only if they occurred as a direct result of military action? (c) How does indemnification differ from compensation? (d) Should the fault of the tortfeasor be taken into account? (e) What facts must be proved by the owner in order to receive compensation and in what manner? (e) What amount of compensation should be paid to the owner and can they affect its determination? etc.

Each of the above questions is important and it is not easy to answer them. Of course, the person who needs compensation must be the owner of the property, and therefore it is necessary to identify this person and prove that the one has the property right. However, difficulties arise with those individuals who have acquired ownership rights to real estate being under construction, that is, either its construction has not yet been completed, or although it has been completed, the right to it has not yet been registered. Case law fluctuates even in times of peace: previously, the legal position of the Supreme Court in Ukraine came down to the conclusion that

the right to real estate that was built arises only after state registration, and therefore a person who is not the owner of the property cannot defend their right (Resolution of the Supreme Court of Ukraine dated June 24, 2015 and dated November 18, 2015). However, this position was replaced by the opposite one: a person who has invested in the construction of an apartment in a building which is being built has a property right, and therefore is its owner and as such can protect their own right (Resolution of the Grand Chamber of the Supreme Court dated December 14, 2021). Therefore, it is easy to imagine the scale of compensation claims for those who have invested in the construction, but have not yet become the owners of the apartments, as the building or part of it was destroyed during the war.

The provision of compensation to the affected persons may take place in various ways, in particular through: (a) payment of monetary funds; (b) transfer of ownership of immovable property; (c) payment of funds to construction companies as a contribution for the purchase of housing in the form of deposits, interest on the loan, full or partial repayment of the loan, etc. This is provided by the Law of Ukraine "On compensation for damage and destruction of certain categories of real estate objects as a result of hostilities, acts of terrorism, sabotage caused by the military aggression of the Russian Federation against Ukraine, and the State Register of Property Damaged and Destroyed as a Result of hostilities, terrorist acts, sabotage caused by the armed aggression of the Russian Federation against Ukraine"[17].

Payments made during requisition under Art. 353 of the Civil Code of Ukraine also qualify as compensation, although instead of "compensation" they are named "reimbursement" in this provision. The fundamental difference between such requisition and compensation to war-affected owners is that, in the former case, funds are paid to the owner before their property is seized, although this is prompted by events of an extraordinary nature which should be responded to quickly. In the latter case, payments are made not before the confiscation of property, but much later, most likely after the end of hostilities. Nevertheless, Part 1 of Art. 23 of the Law of Ukraine "On the Legal Regime of Martial Law" provides for the subsequent full reimbursement of the value of the property seized from the owner if the previous full reimbursement of its value was not made. That is, this Law allows for different options for the timing of settlements with property owners.

It is also worth noting that this Law uses the term "compensation of damages" and not "compensation of the value" of the property.

The differences between the regulation of the Civil Code of Ukraine, the Law of Ukraine "On the Legal Regime of Martial Law" and Drafts of laws of Ukraine on the restoration of property rights or compensation to war-affected owners lie in the grounds for compensation. They are associated not only with the seizure of property from the owner, but also with its destruction or damage.

Among other things, in the case of requisition under part 1 of Art. 353 of the Civil Code, the owner is paid full compensation for the value of their property, and in the case of compensation to the owners affected by the war, this amount of compensation may not be given, because it depends on the state's ability to pay the funds to all the affected owners, which will be discussed further.

What is common to both types of restoration of the property rights of owners whose property was affected by the war is that they are provided with funds or property that is in the state or communal ownership. This is either an existing property or one that has been built or is being built for this purpose from the legally defined sources.

In talking about compensation, it is also important to determine the order in which it is provided and its amount.

Considering the order in which compensation is to be provided, there are several steps which should be taken to receive the compensation. The first step is that a person whose property suffered from war-related issues applies for such a compensation. This can be done by the submission of an application to the relevant state authorities or registration in certain databases, in particular through the "Diia" platform.

The second necessary step is the recording of the fact of the violation of property rights by the relevant bodies defined in the law—the inspection of the property to determine the degree of its damage or destruction.

The third step is to determine the amount of expenses necessary to repair the property or purchase a similar property to replace the destroyed or damaged one.

Registration of the facts of the violations of property rights must be centralized. It is made in a register specifically created for this purpose. In order to enter data into it, it is not only the owner (or a person authorized by them) who can apply to the relevant state commissions, centers for the provision of administrative services, officials of the social protection body or a notary public, but also the local self-government bodies or the military-civilian administration of the corresponding settlement which have revealed property violations. Keeping a register of damaged or destroyed property will ensure transparency and regularity of compensation to owners.

To establish the degree of violation of property rights (damage or destruction of property) appropriate qualification and objectivity are required. Therefore, this issue should be resolved with the help of experts, which requires an inspection of the property and therefore an access to it. Suitable commissions can do this, but the situation during hostilities is complicated by the impossibility of accessing the property in an occupied territory or in a dangerous area.

Currently, section 15 of the "Procedure for providing and determining the amount of monetary assistance to victims of emergency situations and the amount of

monetary compensation for victims whose residential buildings (apartments) were destroyed as a result of a military emergency caused by the armed aggression of the Russian Federation" provides that if there are restrictions established by an order of the Commander of the Joint Forces regarding the stay or movement of people on the territory where the housing necessary for the survey is located, the survey commission conducts a survey of housing based on the Commander's written permission. In the case of refusal of the Commander of the Joint Forces to grant such a permission, the period for carrying out the survey, determined by the Order, is suspended until the relevant permission is obtained or the established restrictions are lifted. In this regard, people whose property, in particular destroyed housing, is located on the territory of such settlements, may actually be deprived of the opportunity to receive monetary compensation for their destroyed property.

In this case, there is an alternative to the physical inspection of housing: in the event of the impossibility of documenting the facts of damage or destruction of property due to the lack of access to the settlement or part of the settlement where the relevant object is located, the survey commission carries out documentation according to available materials. At the same time, the survey commission can make a decision to confirm the fact of complete destruction of real estate based on aerial photography, satellite map data, and information received at its request from the head of the relevant military administration body. In case it is impossible to make a decision based on available materials, the inspection commission carries out an inspection of the damaged property after obtaining access to the property based on the written permission of the head of the relevant military administration body (in the absence of a threat to human life or health).

Owing to these efforts, databases of the extent to which property has been destroyed or damaged are formed and the necessity or possibility of its reconstruction is assessed (Yaresko, 2022).

The amount of compensation is a vital question that will inevitably arise in practice. If compensation is considered a positive obligation of the state, which itself determines this amount, then the actual value of the damaged or destroyed property is not taken into account. And practically, is only the possibility of the state to provide compensation to the owners in a certain amount. At the same time, this is not consistent with the principle of full reimbursement, which is understood as an effective remedy of protection of violated rights.

The Law of Ukraine "On compensation for damage and destruction of certain categories of real estate objects as a result of hostilities, acts of terrorism, sabotage caused by the military aggression of the Russian Federation against Ukraine, and the State Register of Property Damaged and Destroyed as a Result of hostilities, terrorist acts, sabotage caused by the armed aggression of the Russian Federation

against Ukraine"[17] provides guidelines for determining the amount of compensation (Part 4 of Article 8). That is, it must be specified and substantiated.

On the other hand, in the case of a tort or even compensation caused by forced seizure of property from a person (repurchase for state needs), the owner may disagree with the proposed amount, conduct examinations, etc. Therefore, the question arises whether it is possible to take the same course in the cases of compensation to owners of damaged/destroyed property during hostilities.

The Basic Principles and Guidelines on the Right to Legal Protection and Compensation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law provide that victims must receive compensation commensurate with the severity of the violations and the damage they suffered from.

The size of reparations can be determined by the International Criminal Court, which can also directly order the convicted person to compensate the victim in an appropriate manner, including restitution, compensation, and rehabilitation (Article 85 of the Rome Statute).

It is probably important for the owners to specify the terms of payment of compensation as an element of protecting their rights. In this case, the relationship regarding the payment of compensation would at least acquire the rank of a legal relationship, the owner would be able to demand payments and the state, in the person of the authorized body, would have to fulfill its duty. Such an arrangement would lead to an effective protection of property rights. However, according to the legal mechanism provided for by the Law "On compensation for damage and destruction of certain categories of real estate objects as a result of hostilities, acts of terrorism, sabotage caused by the military aggression of the Russian Federation against Ukraine, and the State Register of Property Damaged and Destroyed as a Result of hostilities, terrorist acts, sabotage caused by the armed aggression of the Russian Federation against Ukraine"[17], the question of the term is bypassed. It is only about the 10 years during which a person can apply for compensation, as well as the terms of consideration of a person's application for compensation. Moreover, the second deadline can be suspended if the organization to which the applicant is applying does not have funds to finance the purchase of an apartment, other residential premises, etc. and in other cases determined by the Cabinet of Ministers of Ukraine (paragraph 2 of part 12 of Article 8 of the Law). Perhaps it will be regulated in a Resolution of the Cabinet of Ministers of Ukraine, but the principles in this Law do not give reason to think that it will be resolved at the in the Resoltion.

IV. Factors Complicating the Protection of Property Rights and Ways to Address Arising Issues

In addition to the objective difficulties faced by owners on the way to protecting their rights due to the lack of proper legislative regulation and appropriate state institutions, one should also take into account other problems whose impact on this situation cannot be underestimated. These are: (a) proper functioning of judicial bodies, which make the protection of property rights possible; (b) the creation of other bodies for this purpose; (c) resources to form the compensation fund for making payments to the owners; (d) immunity.

The Importance of Judicial Bodies and Other Bodies Created to Restore the Property Rights of Owners whose Property Was Damaged, Seized or Destroyed during the War

The analysis of the status quo concerning lodging of claims by citizens and legal entities of Ukraine for the protection of their rights to the judicial authorities of Ukraine allows to anticipate the following difficulties.

The first one concerns jurisdiction. As a general rule, the protection of property rights by means of a claim for damages takes place in court and these disputes are resolved by courts of general or economic jurisdiction in accordance with the Civil Procedure or Economic Procedure Codes of Ukraine.

Two ways of protecting property rights should be taken into account: private law and public law ways. The former concerns compensation for the damage caused to the owner, and the latter concerns the fulfillment of positive obligation by the state to pay compensation to the owners or to apply restitution. It is clear that the subjectivity of these disputes will cause different positions and discussions in practice.

Second, lodging claims to the state of Ukraine, which is currently in a difficult financial situation and is unlikely to have the means to satisfy these claims, does not make this way of protecting the rights of owners effective. That is, our state is unlikely to be able to fulfill its positive duty in the near future.

Claiming to the state authorities in cases where the owner was harmed by the actions of the Ukrainian military or officials, faces the same problem, since these compensations, even if they are awarded by the court, must be reimbursed by the state.

Third, we should expect an enormous number of owners' claims for compensation to courts, which will inevitably lead to an overload of the courts. Such claims may hardly be called typical and their consideration standard, since these cases must be considered in perspective of their individual situations.

This threat of an extremely long time of a hearing in courts, along with the lack of funds in the state budget to satisfy the owners' demands, makes this method of protecting the owners' rights ineffective. The owners will try to hurry with appeals to the court to have better chances of resolving the cases in their favor, and then hurry to the executors.

Fourth, when the owner determines the amount of the claim, the problem of proving damages will arise, which is important both for the owner and for the state since the latter must verify the existence of these damages, their proper assessment, etc. Without creating a unified approach to this, it can hardly be expected that the claims of the owners will be satisfied.

Fifth, it is necessary to determine the funds for the payment of compensation to the owners and the procedure for their distribution, as well as the institution that should take care of it.

Considering the above issues, the current legal method of protecting the rights of the owners cannot be perceived as optimal. Taking into account the scale of destruction and loss of life, a centralized mechanism for aggregating claims and paying compensation, proving damages, etc. should be made.

A comprehensive approach to the protection of owners through their appeal to the Russian Federation for recovery of moral damages and lost profits is also possible, and compensation for real losses suffered by them as a result of damage and/or destruction of property (housing) will take place through the mechanisms provided for by the Law of Ukraine "On compensation for damage and destruction of certain categories of real estate objects as a result of hostilities, acts of terrorism, sabotage caused by the military aggression of the Russian Federation against Ukraine, and the State Register of Property Damaged and Destroyed as a Result of hostilities, terrorist acts, sabotage caused by the armed aggression of the Russian Federation against Ukraine"[17]. However, even in this case, the problem of determining the amount of the claim and methods of its satisfaction remains open or even deepens due to additional complications. There is little doubt that such claims will be made for significant sums. Thus, the courts will face the problem of justifying the satisfaction of these requirements to a certain extent. In addition to the principles of reasonableness and justice, there is a high probability that the courts may act on patriotic grounds and, when making decisions, not refrain from demanding significant amounts of compensation. This approach raises many legal issues.

In other countries which had a similar experience to Ukraine in overcoming the property consequences of the war, transitional justice (Transitional Justice and Economic, Social and Cultural Rights. – UN, 2014, p. 6) mechanisms were created with the purpose to establish the truth and compensate the victims of the war. Truth-finding commissions are established immediately after the end of the conflict or

shortly thereafter. These commissions help to determine the amount of compensation to owners (For such an analysis of the mechanisms of establishing the truth and reconciliation, see in Instruments for ensuring the rule of law in post-conflict states: Commissions for the establishment of truth (HR/PUB/06/1)). Similar out-of-court mechanisms would collect information through the "Diya" application and in other ways that would allow to respond to owners' claims in a timely manner or to act in accordance with the actual circumstances.

At the international level, the experience of addressing the issues of effective compensation to the owners of their claims results in the creation of international compensation commissions, in particular as an auxiliary body of the UN. Such a commission considered claims and had the right to pay compensation for loss and damage suffered by owners as a result of Iraq's attack on Kuwait and its occupation. It would be worthwhile for the commission to include investigating violations of human rights in its activities.

As for the bodies involved in resolving issues of compensation for owners, according to the Law of Ukraine "On compensation for damage and destruction of certain categories of real estate objects as a result of hostilities, acts of terrorism, sabotage caused by the military aggression of the Russian Federation against Ukraine, and the State Register of Property Damaged and Destroyed as a Result of hostilities, terrorist acts, sabotage caused by the armed aggression of the Russian Federation against Ukraine"[17], these are commissions for considering issues regarding the provision of compensation. The compensation mechanism also involves applying to the relevant centers for the provision of administrative services, officials of the social protection body or a notary public.

Meanwhile, all these actions are performed in order to establish and confirm the person's right to compensation. There is not enough information in the given Law regarding the implementation of the compensation itself and the institutions that are involved in it. It is believed that a mission of this importance for the entire society should be performed by non-state bodies as managers of the fund created to compensate the owners. Taking into account the specific situation with the level of corruption in Ukraine, it would probably be desirable to form this body from persons who enjoy public respect. On the part of the state of Ukraine, it may include a representative of the Ministry of Justice, as well as representatives of the audit union, the bar association, churches, etc.

Sources of Funds to Compensate Owners

Ideally, budget funds should be allocated to pay owners for property damaged and destroyed by the war. However, it is obvious that such funds will not be enough and, among other things, the question arises about the fairness of directing the funds of our state for this purpose, if the war is started by a foreign state. The search for a way out of this situation resulted in the adoption of the Law of Ukraine "On the Basic Principles of Forcible Expropriation of Objects of Property Rights of the Russian Federation and its Residents in Ukraine." (On the Basic Principles of Forcible Expropriation of Objects of Property Rights of the Russian Federation and its Residents in Ukraine: Law of Ukraine No. 2116-IX dated 3.03.2022) According to Art. 1 of this Law, it is allowed to forcibly remove objects of property rights of the Russian Federation and its residents in Ukraine for reasons of public necessity (including cases in which it is urgently required for military needs) in favor of the State of Ukraine on the basis and in the manner established by this Law without any compensation (reimbursement) of their cost. The decision to seize such a property is made out of court; the property becomes state property and is transferred to legal entities with varying degrees of participation in them by the state of Ukraine.

Therefore, such a legal mechanism indicates, first of all, the choice of responding to the initiation of war by the Russian Federation as negative property consequences for the Russian Federation and its residents. Second, as a result of the implementation of the mechanisms of this Law, the state of Ukraine is expected to acquire property that was in the state or private ownership of other persons. Third, it does not directly follow from this Law that the property and funds obtained in this way can be directed to meeting the needs of Ukrainian private owners who suffered losses during the war. Fourth, the question of protecting the property rights of those people whose property was confiscated on the basis of the specified Law of Ukraine may arise.

Regarding some of the aspects outlined above, the following can be pointed out. Despite the fact that the Russian Federation has abstracted itself from international legislation, this legislation is an expression of the rights of any person. Therefore, the issue of its application becomes more acute because changes in the legislation of the Russian Federation, on the one hand, make its legislation introverted and unaffected by international law, and on the other hand, this situation (as always) influences the protection of the rights of citizens of the Russian Federation, their ability to refer to the norms of international law whose application the Russian Federation refused.

However, these norms directly refer to the context of the protection of property rights, according to which every individual and legal entity has the right to respect for their property and no one can be deprived of their property except in the

interests of society and under the conditions provided for by the law and general principles of international law (Article 1 of Protocol 1 of the Convention on the Protection of Human Rights and Fundamental Freedoms).

Examining the Law of Ukraine through the lens of this provision, on the one hand, allows us to see the possibility of confiscation of property from the owners, which is determined by the interests of Ukrainian society (this is noted in the Law of Ukraine, according to which the interests of Ukrainian society can be satisfied outlined the said confiscation of the property of the Russian Federation and its residents). On the other hand, it refers to the seizure of property not of Ukrainian, but of foreign owners, which cannot but be taken into account in the legal analysis of this mechanism. Such doubts are unlikely to be dispelled by Part 2 of Art. 1 of the Protocol 1, according to which the right of the state to ensure the implementation of such laws as it deems necessary to control the use of property in accordance with common interests or to ensure the payment of taxes or other fees or fines is allowed.

Thus, the Ukrainian law provides for the termination of property rights of non-residents through an out-of-court procedure. This needs to be carefully analyzed. After all, along with the impression of the fairness, which it makes, there are opposite feelings. Negative property consequences for the state that started the war are seen as fair, but they should be applied as reparations in the manner determined by international law. The possibility of lobbying changes to the legislation of the G20 countries, which would allow the frozen assets of Russia and Belarus to be used for reparations, was noted. At the same time, examples were given of sending frozen reserves to Afghanistan after the Taliban came to power, as well as the implementation of the "oil for food" program in Iraq. Even more, it is proposed to direct the revenues from Russian oil, which the Russian Federation could receive from sales in Europe, to the reconstruction of Ukraine (Yaresko, 2022).

The funds that will come for compensation to the owners and for the reconstruction of the state of Ukraine must be accumulated by creating a corresponding fund that will operate on the basis of a trust. The management of this trust should be carried out on a public basis, as discussed above.

About Judicial Immunity

The issue of judicial immunity directly concerns the protection of property rights, both Ukrainian and Russian. Of course, being in a state of war waged by the Russian Federation on the territory of Ukraine, we cannot abstract from our emotions, which are completely justified. In addition, these circumstances cannot be assessed as contradicting the principles of justice. At the same time, in any case, we must

remain in the legal sphere and evaluate the actions of the Russian Federation from the standpoint of law.

First of all, for this end, we should rely on Art. 79 of the Law of Ukraine "On Private International Law" (On private international law: Law of Ukraine No. 2709-IV dated 6.23.2005). In accordance with the first part of this Law, the filing of a claim against a foreign state, the involvement of a foreign state in the case as a defendant or a third party, the seizure of property belonging to a foreign state and located on the territory of Ukraine, the use of other means of securing a claim and enforcement of such property in relation to such property may be allowed only with the consent of the competent authorities of the relevant state, unless otherwise provided by an international treaty of Ukraine or the law of Ukraine. Therefore, the given provision does not contain grounds for the seizure of the property of the Russian Federation and the enforcement of it otherwise than with the consent of the Russian Federation itself represented by its competent authorities. This provision is mandatory and does not allow for variations. Therefore, according to the Ukrainian law, the Russian Federation's violation of the norms of international law does not constitute grounds for deprivation of immunity.

At the same time, the Supreme Court expressed a different legal position (Resolution of the Supreme Court dated May 18, 2022) depriving the Russian Federation of judicial immunity based on the following grounds:

First, the Court applied the ECHR's approach to the purpose of granting state immunity in civil proceedings, which is to uphold international law to promote civility and good relations between states through respect for the sovereignty of another state. Since the Russian Federation committed acts of armed aggression against Ukraine, this is a violation of its obligation to respect the sovereignty and territorial integrity of another state, which is enshrined in the UN Charter. Therefore, such actions of the Russian Federation against Ukraine are not the realization of its sovereign rights, which gives grounds not to apply judicial immunity to it.

Second, the Court focused on the right to judicial protection, which must be provided by the state (Article 55 of the Constitution of Ukraine), and therefore to a fair and public consideration of cases in court, which can be limited by applying the judicial immunity of the state only in case if it: 1) pursues a legitimate goal; 2) is proportional to the pursued goal; 3) does not violate the very essence of the right to access to court (Clause 1, Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms).

Third, the Court relied on the principles of customary international law (in particular, as they were applied in the decision of the ECHR in the case „Oleynikov v. Russia") (Decision of the ECHR dated March 14, 2013). According to this approach, if national courts support judicial immunity of the state having no regard

to the provisions they apply, the courts violate the right of the plaintiff to access to justice, even when the judicial immunity is to be applied. In addition, reference was made to Article 12 of the UN Convention on Jurisdictional Immunities of States and their Property (2004) as a ground for the conclusion that the state has no reasons to refer to judicial immunity in cases related to the infliction of damage to health, life and property, if such damage was caused in whole or in part on the territory of the state of the court and if the person who caused the damage was at that time on the territory of the state court.

In legal social networks and at events regarding the discussion of the issue of judicial immunity, other arguments were also expressed to strengthen the position regarding the possibility of not applying judicial immunity: violation by the Russian Federation of the norms and principles of the UN Charter, the Universal Declaration of Human Rights, the Budapest Memorandum, the Helsinki Final Act of the Security Conference and Cooperation in Europe dated August 1, 1975, and the Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation.

In particular, paragraph 1 of the Budapest Memorandum stipulates that the Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America confirm to Ukraine their obligations in accordance with the principles of the Helsinki Final Act of the Conference on Security and Cooperation in Europe dated August 1, 1975 to respect the independence and sovereignty and existing borders of Ukraine. The Russian Federation, the United Kingdom of Great Britain and Northern Ireland, and the United States of America reaffirm their commitment to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine, and that none of their weapons will ever be used against Ukraine except for the purposes of self-defense or in any other way according to the Charter of the United Nations (clause 2 of the Budapest memorandum).

On the other hand, the opposite position on the application of judicial immunity also has solid grounds. In addition to Part 1 of Article 79 of the Law of Ukraine "On Private International Law," to argue this position, they refer to the decision of the UN International Court of Justice from 2012, in which it concluded that the principle of jurisdictional immunity remains valid and cannot be subject to any exceptions to the rights of a person. Although the national courts of Italy have satisfied several claims of citizens who considered themselves victims of Nazi persecution in the second world war, to Germany for compensation of damages. At the same time, the non-application of jurisdictional immunity in relation to Germany by Italian courts was explained by the fact that this principle cannot interfere with the protection of human rights. Attention was also drawn to the fact that the issue of judicial immu-

nity is a field not only of domestic national law, but also of international public law. Therefore, when it comes to the non-application of judicial immunity, the decisions of Ukrainian courts may be perceived differently in international institutions (The legal community discussed the issue of compensation for damages caused by Russia, 2022).

Absolute judicial immunity is usually applied at the international level. Limited judicial immunity is provided for by the European Convention on Judicial Immunities of States of 1972 (European Convention on Judicial Immunities of States, 1972) and contained in the UN Convention on Jurisdictional Immunities of States and Their Property of 2004, which has not entered into force.

In addition to judicial immunity, there are immunities from protective measures and from the execution of court decisions, which should also be taken into account. Consideration of these issues is beyond the scope of this study, but they should be taken into account when applying proper and effective methods of protection of Ukrainian owners affected by the war with the Russian Federation.

The above indicates the significant problems faced by Ukrainian owners in the way of protecting of their rights to property that was damaged during the war with the Russian Federation. Some of them can be solved by Ukraine adopting a package of normative legal acts, while others can only be solved with the adoption of international documents that would introduce means for effective protection. Neither the current Ukrainian legislation nor the legal positions of the Supreme Court provide confidence that the approaches proposed in them are unexceptionable.

Conclusions

Military operations and armed conflicts of various kinds have a negative impact not only on the rights of owners who suffer losses as a result, but also on the legal regulation of property. The rights of the owners are significantly restricted, and the rights of the state represented by the relevant authorities to forcibly seize property from its owners are increasing. At the same time, the obligations of the state to apply appropriate measures to ensure the rights of owners during the war are also increasing. The positive obligation of the state to compensate the owners for the losses they suffered as a result of military actions is also demonstrative.

The owners have the right to apply to the state their claims for the return of their property if it has been preserved and there is a possibility of its return. Otherwise, the owner can count on compensation. The amount of compensation should be determined by the state in internal regulatory legal acts, with the provision of

the procedure for proving damage and destruction of the owners' property, the cost of damages; keeping relevant registers; mechanism of owners' appeals to the state for compensation; order and scope of satisfaction of owners' requirements; sources of compensation payments, etc.

Since the volume of payments to owners whose property was damaged during the war with the Russian Federation is very significant and the funds of the state budget of Ukraine will not be enough for compensation, a universal and unimpeachable legal mechanism for involving the Russian Federation in property liability should be developed with the adoption of international legislation that would regulate reparations and non-application of judicial and other immunities.

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