

UDC 340.12: 342.72/.73

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POSITIVE STATE OBLIGATIONS IN THE CONTEXT OF TEMPORARY LOSS OF CONTROL OVER A PART OF ITS TERRITORY

Abstract. *Drawing from the jurisprudence of the European Court of Human Rights, the study clarifies a state's positive obligations in contexts of armed conflict and partial territorial loss. It affirms that International Human Rights Law continues to protect conflict-affected populations, based on non-derogable treaty clauses. States are obligated to minimize harm in military operations, account for forcibly disappeared persons, and uphold rights of internally displaced individuals. Even when facing territorial loss, states retain limited jurisdiction as per Article 1 of the Convention, and must use all feasible means to regain control, in line with international law. The scope of these obligations is balanced against available resources and the principle of proportionality.*

Keywords: *human rights, derogations, armed conflict, state positive obligations.*

Problem Statement. The unique conditions under which the country has been operating in recent years have presented unprecedented complex challenges to domestic political and legal

thought, necessitating a professional response that takes into account the contributions of contemporary European jurisprudence. The one-sidedness and political determinism of certain scholarly approaches occasionally complicates a comprehensive, unbiased analysis of the legal obligations of all parties in the ongoing armed conflict in Ukraine. At the same time, when resolving relevant disputes, international jurisdictional bodies will adhere to established principles and doctrines, applying them with consideration for all circumstances of a specific case.

Among such doctrines is the doctrine of the state's positive obligations, the potential of which has been substantially strengthened through its applicability to issues concerning the protection of human rights not only in peacetime but also in conditions of armed conflict and post-conflict situations. Standards developed by the European Court of Human Rights (hereinafter, unless otherwise stated, ECHR or the Court) in cases related to the consequences of military operations (use of force) and the loss of state control over part of its territory will be considered by it in reviewing relevant cases pertaining to the conflict in Donbass and human rights violations in Crimea. According to representatives of the Secretariat of the ECHR, as of October 2016, 4,365 individual complaints have been submitted to the Court. About 400 of these cases relate to events in Crimea; more than 150 cases concern disappearances, murders, and kidnappings of the complainants' relatives; injuries sustained by the complainants; over 250 cases were filed by military personnel and their relatives, of which 9 cases have already been communicated. Lastly, more than 3,600 complaints are associated with human rights violations due to events in Donbass and forced internal displacement and concern issues such as destruction or damage to property; violation of the right to liberty; reasonable timelines for case review; appeals against decisions made in criminal cases; access to court and restrictions on freedom of movement; violation of the right to respect for private life; inability to receive a pension; discrimination, and participation in local elections [1, p. 17]. Data close to these are provided in the report «Legal Remedies in Case of Human Rights Violations on Ukrainian Territories Outside the Control of Ukrainian Authorities,» prepared by M. Bek for the Committee on Legal Affairs and Human Rights

of the Parliamentary Assembly of the Council of Europe (PACE) (paras. 48, 49) [2, p. 22].

Analysis of Recent Studies. In Ukrainian scholarship, specific aspects of the doctrine of the state's positive obligations have been examined in the works of M. V. Buromenskyi, V. G. Butkevich, M. M. Gnatovskyi, L. G. Huseinov, V. N. Denisov, N. V. Dryomin-Volok, and others. Concurrently, this doctrine has been extensively researched at the monographic, dissertation, and institutional levels in European jurisprudence, particularly in the works of J.-F. Akandji-Kombe, P. Van Dijk, B. Conforti, C. Droge, D. Feldman, K. Hajiyeve, M. Klatt, L. Lavrysen, A. R. Mowbray, R. O'Connell, L.-A. Sicilianos, K. Starmer, F. Sudre, and D. Xenos. Specific facets of the issue of the state's positive obligations in conflict conditions are reflected through an «exponential explosion of jurisprudence and academic legal literature» [4, p. 929] concerning the correlation between International Humanitarian Law (hereinafter – IHL) and human rights law [5; 6; 7; 8; 9 and others].

The objective of this article is to delineate the scope and nature of a state's positive obligations in the realm of human rights, particularly in circumstances involving temporary loss of territorial control and armed conflict. This also involves examining the implications of combat activities in light of the European Court of Human Rights' (ECtHR) jurisprudence, considering the permissibility of derogations.

Positive obligations entail active measures by the state aimed at the realization, protection, and promotion of human rights. Conversely, negative obligations involve the state's abstention from human rights violations. Positive obligations require national authorities to implement and apply necessary means to guarantee human rights. Specifically, these obligations demand the adoption of reasonable and appropriate measures to ensure and protect fundamental rights in each individual case. The degree of compliance is directly related to the state's adherence to principles of good faith and due diligence.

Contemporary jurisprudence, shaped by decades of active discussion, concludes that state obligations regarding human rights do not cease in conditions of armed conflict or loss of territorial control. During such conflicts, International Humanitarian Law

(IHL) applies, extending to all types of conflicts and parties involved. IHL and international human rights law complement each other and are applied concurrently, as evidenced by the practices of international organizations, monitoring bodies, and judicial institutions, including the ECtHR. However, the intersection of IHL and human rights law raises complex issues such as extraterritorial applicability of human rights law, mandates of human rights bodies, terminological and conceptual differences between these legal realms, and the unique challenges posed by non-international armed conflicts and socio-economic rights. These complexities, although noted, are beyond the scope of this study.

International human rights treaties do not preclude their application during armed conflicts, although they allow states to derogate from certain obligations in emergencies. For instance, Article 15 of the European Convention on Human Rights permits states, under exceptional circumstances, to temporarily deviate from fulfilling specific rights and freedoms, subject to limitations and oversight. The Ukrainian Parliament, by its Resolution No. 462-VIII dated May 21, 2015, approved a statement allowing Ukraine to derogate from certain obligations under the International Covenant on Civil and Political Rights and the European Convention. This derogation pertains to areas within Ukraine's control where prolonged anti-terrorist operations are ongoing. The statement also holds that the Russian Federation, as the *de facto* occupier of parts of the Donetsk and Luhansk regions, is responsible for ensuring and protecting human rights in those territories, under both international humanitarian and human rights law. Russia also bears full responsibility for human rights adherence in the annexed territory of Crimea [10].

In the case of *Ilascu and others v. Moldova and Russia*, the European Court of Human Rights (ECtHR) states that a *de facto* situation of a separatist regime does not negate a state's jurisdiction under Article 1 of the Convention over the territory temporarily controlled by local or insurgent authorities supported by another state. However, such factual circumstances do limit the scope of jurisdiction, and the court will consider only the positive obligations of the state toward individuals on its territory. As accurately pointed out by G. Yudkivska, this «landmark decision» represents a significant

advancement in defining the obligations of the affected state. This lays the groundwork for considering two categories of a state's positive human rights obligations: those during the loss of control over part of its territory, and those associated with armed conflict and its aftermath within its actual territorial control [10].

According to Article 1 of the Convention, states are responsible for violations of rights and freedoms protected by the Convention committed against individuals within their jurisdiction. Jurisdiction is thus a prerequisite for state accountability. The ECtHR employs a «presumption of competence,» meaning a state's jurisdiction is generally territorial and covers its entire territory, although it can be limited under exceptional circumstances like military occupation or insurrection.

To determine such a limitation, the Court considers objective facts and the state's conduct. According to the Convention, states have not only negative but also positive obligations to uphold rights and freedoms. These obligations persist even if a state's authority is limited over part of its territory. Specifically, in the cases involving Transnistria, the ECtHR ruled that despite Russia's «effective control» over the region, Moldova remains obligated to fulfill its positive obligations under the Convention and its Protocols.

The ECtHR emphasizes that a state exercising effective control over a portion of another state's territory is responsible for human rights violations there. According to international law principles, such responsibility arises from the fact of effective control, whether exercised directly or via a local administration. The scope and conditions for state accountability for actions or inactions beyond its territory («extraterritorial application of human rights obligations») are subjects of independent study, highly relevant for Ukraine in current conditions.

Summarizing the principles on a state's positive obligations (Ilascu and others v. Moldova and Russia, paras. 332–340):

— A state's positive obligations must be balanced between general public interests and individual rights, taking into account diverse situations and resource limitations. These obligations should not be interpreted to impose undue burdens (see also *g r G ndem v. Turkey*, para. 43).

– The Court cannot prescribe specific positive actions to be taken; instead, it assesses whether actions taken were appropriate and sufficient. If no actions were taken, the Court determines whether feasible measures were available.

– A state lacking «effective control» over part of its territory should aim to: a) restore control, refraining from supporting separatist regimes and employing all possible political and legal means; b) ensure respect for human rights, including efforts to free persons held by de facto authorities.

The Court focuses not on the end result but on the state's efforts to achieve it, which is generally characteristic of positive obligations.

H. Yudkivska suggests that state efforts may include «appeals to various intergovernmental organizations and foreign states for assistance in ensuring the applicant's rights» (*Mozer v. the Republic of Moldova and Russia*, para. 153) or «implementing alternative measures to restore property rights or compensate for the loss of property use» (*Sargsyan v. Azerbaijan*, para. 241). The ECHR judge notes that reconciling obligations towards people in occupied territories with the non-support of separatist regimes is complex and seemingly contradictory.

However, the ECHR reached a different conclusion in evaluating the relationship between Moldova and the Transnistrian separatist regime. The Court observed that economic cooperation agreements and other collaborations were not support for the separatist regime but aimed to improve daily life in Transnistria. These actions confirmed Moldova's intent to regain control over the region (*Ilascu and others v. Moldova and Russia*, para. 345).

State obligations regarding human rights in the context of armed conflict and its consequences are conditional on the state's actual territorial control.

Considering the conditions for derogating from obligations – particularly the non-derogable right to life, except in «cases of death resulting from lawful acts of war,» and the prohibition of torture (see Art. 15 of the Convention) – states are subject to various positive obligations. These enhance the protection of fundamental rights and freedoms under special circumstances like natural disasters, emergencies that «threaten the life of the nation,» and various

intensities of armed conflict. S. Kr henmann categorizes these obligations into three main areas [8].

First, states must take measures to protect individuals from the effects of military actions. This includes planning and control of operations involving lethal force and protection against explosive remnants of war.

Second, states are obliged to account for individuals during armed conflicts, which involves the responsibility for missing persons and justifying the use of force based on «absolute necessity.»

Third, states must protect individuals both from rebels and illegal militarized formations.

In summary, states have extensive positive obligations, especially in the context of armed conflicts, that require active measures and long-term policy decisions.

The European Court of Human Rights (ECHR) confirms the obligation of states to plan and control operations involving lethal force during armed conflicts, particularly concerning the protection of civilians. Originating from the McCann case against the United Kingdom, European human rights law establishes a principle requiring state authorities to plan operations involving force in a way that «minimizes the risk to both the targeted individuals and civilians, as well as the use of lethal force.»

Assessing the Court's practice post-McCann, Professor B. Dickson points out that standards for planning and controlling operations primarily cover aspects such as: 1) available time for planning; 2) documentation explaining planning and control processes; 3) personnel selection, equipment, and training; 4) effective communication among involved personnel; 5) rapid access to professional medical aid during operations.

These standards, taking into account individual circumstances, apply even during armed conflicts, leading to several important implications. First, state authorities are obliged to plan their operations to minimize risks to civilians, which restricts the means they can employ. For instance, the Court has ruled that deploying heavily armed military aircraft is not proportionate for lawful detentions or defending against unlawful violence (see: Case of Esmukhambetov and others v. Russia, para. 146; Kerimova and Others v. Russia, paras. 253, 257).

Second, authorities must consider potential risks to life resulting from counteractions by the other side of the conflict («legitimate targets») [7]. In essence, states must protect civilians against force from insurgents, rebels, or other opposing forces, including an obligation to avoid operations near populated areas. Lastly, the ECHR has recently affirmed that the obligation to minimize life-threatening risks can extend to armed insurgents (Case of Esmukhambetov and others v. Russia, para. 146). The burden of proof for the «absolute necessity» of using force lies on the state, even during armed conflicts (McCann and Others v. the United Kingdom, paras. 148–50; Kerimova and Others v. Russia, para. 238). However, this obligation generally does not extend to combatants in international armed conflicts, in line with international humanitarian law standards for lethal force.

In armed conflict, states are obligated to protect the population from explosive remnants of war. This duty stems directly from the positive obligation to «take all appropriate steps to protect the lives of individuals within its jurisdiction» (Osman v. United Kingdom, para. 115). This includes protecting civilians from dangers like anti-personnel mines and booby traps, whether placed by state agents or insurgents. Specific duties include marking and fencing off known mined areas, warning the local population, and detecting and destroying mines or other explosive devices. Two points are noteworthy: First, if a state is responsible for mining an area, its obligations are particularly stringent, as the ECHR leans towards a view that mines should not be used at all, especially near populated areas. Second, the state has heightened obligations to protect children from the dangers of mines, given their particular vulnerability.

In Ukrainian legal discourse, the issue of protection against militarized groups and liability for their infringements on fundamental human rights, as well as damage to human dignity and property, is relatively underexplored. This problem can be viewed from two angles. On one hand, the concept of «attribution» applies to these armed groups, meaning that their actions are ascribed to a state that exercises «effective control» over them and is thus responsible for their human rights violations. On the other hand, the previously mentioned positive obligation to protect against actions of third parties (see: Osman v. United Kingdom, para 115, 116, 282–284) may also make

a state liable if such illegal armed groups operate within its territory. The degree of this liability depends on specific circumstances, largely related to the level of control the state exerted over the violators. In this context, it's important to distinguish between protection against insurgent forces and protection against militarized groups that are, officially or unofficially, linked to a specific state [4].

It should be acknowledged that the threshold for holding states accountable for violations committed by insurgent forces is generally high. Typically, state authorities are not expected to have known about a «real and immediate risk» to specific individuals, despite a «higher risk in a general situation of violence» (see: *Belikza Kaya and others v. Turkey*, para. 81–82). However, European Court of Human Rights (ECHR) case law indicates that states have an obligation to prevent hostile forces from advancing into populated areas and to, at least, warn the local population of their approach (*Isayeva v. Russia*, para. 187). Additionally, state forces are required to intervene in ongoing violence from private entities like armed groups. Failure to take protective measures during armed conflict, including due to the collapse of state law enforcement mechanisms, is likely to result in a violation of a state's positive obligations. These obligations include the duty to establish an effective law enforcement system that ensures proper application of criminal law (see, for instance, *Koku v. Turkey*).

International human rights bodies universally recognize the state's obligation to account for the fate of forcibly disappeared persons. Due to the difficulty in proving state involvement in such disappearances, states are required to safeguard the welfare of these individuals. The state can also be held accountable for violating the right to life even when the body of the disappeared person has not been found. European Court of Human Rights (ECHR) jurisprudence has established the presumption of facts and the shifting of the burden of proof to the state in disappearance cases, particularly when victims were last seen in areas under governmental control (*Imakayeva v. Russia*; *Tanis v. Turkey*; *Varnava and others v. Turkey*). Failure by the government to provide adequate and convincing explanations can also result in the state being held liable for violating the right to life.

Finally, the ECHR and other international human rights institutions are increasingly focusing on states' obligations towards

internally displaced persons (IDPs). The fundamental requirements for the respect and protection of IDPs' rights are outlined in the Council of Europe's Committee of Ministers Recommendation Rec(2006)6 and relevant court decisions. Detailed analysis of these obligations, along with other issues mentioned in this article, are key areas for future research in the context of human rights applicability in emergency situations.

Conclusions. The above-reviewed types of state's positive obligations indicate its primary responsibility for protecting human rights in situations of armed conflicts and the aftermath of hostilities. In the event of temporary loss of control over a part of its territory, the state does not entirely lose its jurisdiction as per Article 1 of the Convention; however, its scope is limited to positive obligations towards individuals remaining in the uncontrolled territory. These obligations require the state to employ all available diplomatic, economic, judicial/legal, and other measures that are in its power and comply with international law to continue ensuring the satisfaction of rights and freedoms in accordance with the Convention. At the same time, these state obligations have been recognized by the European Court of Human Rights (ECHR) based on the individual circumstances of each specific case. They do not determine the Court's conclusions regarding the scope and nature of Ukraine's positive obligations in conflict conditions but will serve as a guideline in resolving cases related to events in Crimea and Donbass. Notably, the Court's assessment will not depend on the national position regarding the nature of the armed conflict (national, international, «internationalized») or the scope of responsibility defined by Ukrainian law for all parties to the conflict.

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Позитивні зобов'язання держави в умовах тимчасової втрати контролю над частиною своєї території

***Анотація.** Виходячи з розгорнутого огляду практики Європейського Суду з прав людини, стаття висвітлює контури позитивних зобов'язань держави під час збройних конфліктів, їх наслідків, а також періодів часткової втрати контролю над територією. Дослідження виходить з передумови, що Міжнародне право прав людини зберігає свою актуальність для захисту населення, затронутого конфліктом. Це підтверджується недоговірними положеннями в договорах з прав людини, які продовжують діяти навіть у війні або національних надзвичайних ситуаціях.*

Під час збройних конфліктів на держави покладається ряд позитивних зобов'язань. Ці зобов'язання охоплюють все, від забезпечення належно регульованих та спланованих військових операцій, які мінімізують шкоду, до взяття на себе відповідальності за долю осіб, які були насильно вивезені. Додатково, на держави покладається обов'язок захищати населення від небезпек, таких як нездетоновані залишки, захисту населення від незаконних збройних формувань, а також підтримки прав людини внутрішньо переміщених осіб.

Що стосується територіального контролю, в статті наголошується, що держави зберігають юрисдикцію, згідно зі статтею 1 Конвенції, навіть над територіями, які тимчасово контролюються повстанськими силами або іншою державою. Однак обсяг цієї юрисдикції обмежується позитивними зобов'язаннями держави перед її жителями. Презюмується обов'язок держав вичерпати всі можливі дипломатичні, судові та правові шляхи для відновлення контролю над такими територіями у відповідності до міжнародних норм.

Визначення цих позитивних зобов'язань підлягає збалансованій оцінці, яка враховує ресурси держави, загальну користь та індивідуальні інтереси, з метою уникнення накладання невинуватених або непропорційних тягарів.

Ключові слова: права людини, відступи, збройний конфлікт, позитивні зобов'язання держави.