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ARTICLE

Socio-legal instabilities in Ukraine's wartime Compensation Law for damaged and destroyed residential property

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Abstract

Laws seeking to resolve war-related problems face a significant dilemma. While the legal establishment in a war-affected country drafts laws based on normative approaches suited to peacetime and stable settings, the civilian population pursues crises livelihoods that are markedly unsuited to compliance with or use of such laws. What emerges are socio-legal instabilities that aggravate instead of resolve wartime problems. With a socio-legal examination of Ukraine's wartime housing Compensation Law, this article describes six sets of instabilities that compromise the utility of the law and aggravate or create additional problems: (1) the case-by-case approach, (2) administrative and institutional capacities, (3) legal vs. available evidence, (4) the timeframe for claims submission and awareness raising, (5) excluded segments of civil society and (6) prohibitions on selling properties. Approaches from international best practice that may be able to attend to these instabilities are then suggested.

Keywords: socio-legal; geography; housing Compensation Law; Ukraine; war recovery law

1 Introduction

Ukraine has moved quickly to attend to the critical needs of its population in its war with Russia, particularly its citizens who have suffered housing damage and destruction. With a rare combination of political will, law-making, use of technology, and prospective use of internationally confiscated Russian financial assets, Ukraine possesses great potential to successfully engage in the reconstruction of damaged and destroyed housing. This potential, however, hinges on the ability of the country's recently passed residential property Compensation Law to deliver this combination to a civil society heavily impacted by the war. With more than 14 million people forcibly displaced from their homes (Martyshev et al 2023), purposeful military targeting of residential areas by Russian forces (HRW 2022; OHCHR 2023) and more than $54 billion (USD) in residential damage and destruction (KSE 2023), the stakes are high. What will be the ability of this law to deliver comprehensive housing, land and property (HLP) compensation to a war-weary society in an effective, timely and 'at-scale' way so that reconstruction can play its fundamental role in the resilience and recovery of civil society, economy and governance in Ukraine?

Laws seeking to address wartime recovery exist in a particular dilemma. On one hand is the desire and convention within a country's legal establishment to have any 'war recovery law' be aligned with existing laws, operate in a normative manner and embody the precision, rigidity and assumptions about enforcement and compliance that exist in stable and peaceful sociopolitical settings. On the other hand, however, is a war-impacted society experiencing trauma, desperation

and crisis livelihoods characterized by very short-term decision-making that is focused on immediate personal security and well-being. At the same time, the institutional and administrative capacities for implementation and enforcement of laws become considerably degraded. Such a society and capacity exist in a set of circumstances that is very different from what conventional, normative laws are designed to engage with. What commonly emerges, then, is a socio-legal problem whereby a large disconnect exists between well-intentioned laws whose purpose is to address specific war-related problems using conventional legal approaches and the chaotic, dismantled reality of both the people the law is intended to assist and the institutions needed to implement the law. This creates specific socio-legal 'instabilities' whereby problems are not addressed but instead become aggravated and cause additional difficulties, forestalling economic, social, governance and security recovery. The examples of this occurring in war-affected HLP contexts are numerous (e.g. Almeida 2021; Economist 2023; Foray 2011; GOA 2004; Sannerholm 2012; Thomson 2017).

There is a compelling need for socio-legal examinations of 'war recovery laws' because this is an area in which the disconnect between law-making and civil society is most acute and, importantly, where re-establishing the rule of law in conflict-affected states begins. While there has been some discussion about the need for greater involvement of socio-legal thinking in law-making generally (e.g. Blandy 2014; Cownie and Bradney 2011; McCrudden 2006), in war-affected scenarios this need is urgent. Unlike peaceful and stable civil society scenarios, during and after wars the rule of law, governance, administrative capacity, institutional functioning, and state finances all become severely degraded. At the same time, civil society wartime norms of extreme self-reliance; ignoring laws due to lack of enforcement, impunity and corruption; and the normalization of desperate (and often illegal) methods to attain even day-to-day needs emerge and develop significantly. Meanwhile, those who draft laws during and after wars are usually isolated, do not have the usual opportunity for civil society consultation and rely on their training in law-making to create stable settings in which to focus on the integrity of the laws they are drafting as a priority. However, given the size, severity, fluidity and chaotic and uncontrolled nature of the social problems that war-related laws seek to influence, the real priority should be to have laws that focus on the social problems directly and on the context they exist within along the lines of transitional justice.[1] This is particularly the case given the compromised assumptions regarding enforcement, respect for rule of law and functioning of institutions. However, this shift in priorities in law-making is always a major challenge (e.g. Almeida 2021; Telo et al 2021; Waardt et al 2021).

This article examines Ukraine's recently passed residential Compensation Law from a socio-legal perspective and finds certain instabilities in the functioning of the law and its ability to 'deliver' to a war-impacted society. These instabilities occur due to the tendency for the law to be inward looking, normative, doctrinal or 'law first', as Blandy (2014) terms certain property laws—a common feature of HLP laws in war-affected countries. While Ukraine's law postpones several important aspects, it is already being implemented in some areas, and at least one major international donor is moving to use it now. At the same time, there is increasing momentum internationally to repurpose frozen Russian financial assets in the near-term to fund Ukraine's reconstruction (COE 2023; Ibrahim 2023; NLI 2022).[2] As a result, the socio-legal considerations emerging from the law do have some urgency.

Subsequent to a brief overview of Ukraine's Compensation Law, followed by a summary of how information for this article was gathered, this article describes six sets of socio-legal instabilities emerging from the law, with suggestions from international best practice that may address the

[1]See the special issue of the *International Journal of Transitional Justice* on 'Land and Property Rights in Transitional Justice' for fourteen articles on the topic, at https://academic.oup.com/ijtj/issue/15/1.

[2]The Compensation Law engages this repurposing by having the recipient of compensation pass on to the state the right to claim the value of the compensation from Russia, with Canadian legislation insisting that the confiscation of Russian assets is to be used for reconstruction and victim compensation (Currie et al 2023).

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instabilities. Thus, the entirety of the law is not covered, only the aspects with more problematic socio-legal repercussions. These instabilities include: (1) the insistence on a case-by-case approach to dealing with compensation claims; (2) the administrative and institutional capacities to operate the law; (3) the evidence that is legal vs. available for establishing HLP claims; (4) the short timeframe for submitting a claim, together with the lack of awareness raising; (5) excluded segments of civil society; and (6) the prohibition on selling HLP that is involved in the compensation programme.

2 Ukraine's residential compensation law

Signed into law on 17 March 2023 by President Zelensky, law 7198, 'On Compensation for Damage and Destruction of Certain Categories of Real Property as a Result of Hostilities, Terrorist Acts, and Sabotage Caused by the Military Aggression of the Russian Federation', seeks to define the legal and organizational frameworks for the provision of compensation for damage and destruction of residential real estate (BRDO 2023; VRU 2023). The law came into force on 17 May 2023 and covers property owners and heirs of deceased owners for damaged and destroyed apartments, houses and unfinished residential construction, as well as the common property of apartment buildings (Shvadchak and Datsenko 2023). For damaged property, compensation in the form of repair, reconstruction or the provision of building materials is what is provided. For destroyed HLP, a housing certificate will be issued, comprising a state guarantee to finance the purchase of a residence (including one to be constructed in the future) in the amount noted in the certificate, direct monetary compensation or provision of an alternative HLP (VRU 2023). While a thorough description of the law would be lengthy and beyond the scope of the present article, the interested reader is directed to the law itself (VRU 2023) as well as to various summaries (e.g. CMS 2023; Shvadchak and Datsenko 2023; UNHCR 2023). This article instead focuses on aspects of the law that are of particular socio-legal concern.

3 Information gathering

The socio-legal examination of Ukraine's Compensation Law was informed by (1) in-person key informant interviews conducted by the author in August and November of 2022 in Kyiv, Bucha, Borodyanka and Kosarovychi—with the latter three having suffered heavy residential property damage from and destruction by Russian forces; (2) a review of the relevant legal, academic, international organization, NGO, diplomatic, government and journalism literature; and (3) the author's experience working with socio-legal land and property rights issues in twenty-three war-affected countries.

The in-person key informant interviews in Ukraine totaled 154 persons, which included legal professionals, members of national and international NGOs, members of civil society impacted by the war, members of private business, personnel with UN agencies (International Organization for Migration, UN Development Programme and UN Human Rights Office) and Ukrainian and international academics. Within the Ukrainian government, key informant work was carried out with the National Social Service of Ukraine, the Ministry of Justice, the Ministry of Regional Development and Social Policy, the Office of the Commissioner for Gender Equity Policy, the Office of the Deputy Prime Minister for European and Euro-Atlantic Integration, the Office of the Prosecutor General and the Office of the Parliamentary Commissioner for Human Rights. In addition, local clergy and HLP experts familiar with Ukraine, mass claims, transitional justice and restitution contributed to the key informant work.

In addition, more than 200 persons were engaged in online discussions regarding Ukrainian HLP from April 2022 to October 2023. These included personnel from Ukraine: legal NGOs, lawyers, academics, the Association of Cities of Ukraine, the State Geo-Cadastre, reconstruction

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companies, and the Ukrainian Business Ombudsman Council. Additional personnel from international donor organizations, international NGOs, UN agencies and the Canadian government effort working on repurposing Russian assets were also consulted in online formats.

4 Socio-legal instabilities

4.1 The case-by-case approach to HLP claims processing

A primary instability in the Compensation Law is its focus on the processing of claims on an individualized, case-by-case basis. Although the law puts the responsibility for claims processing onto 'local commissions', these commissions are nonetheless to process the cases individually. In addition, the law does not make an attempt to align the war-degraded institutional and administrative capacities of local and national governments with the enormous numbers of claims that will be forthcoming. Such a case-by-case approach will by no means be able to handle, at the needed volume and timeframe, the flood of claims that will come. This approach means that either claimants will experience excessively long wait times (years, decades) or large numbers of claims will need to be dismissed from the claims-making process through eligibility rules. Both risk instability among the disaffected claimant population regarding delayed or forgone restitution and recovery (e.g. Haersolte-van 2006). HLP claims processing in other war-affected countries has demonstrated that the difficulties that arise from attempting to treat very large numbers of claims on a case-by-case basis result in significant problems (e.g. Fischbach 2006; Haersolte-van 2006; Unruh et al 2017; Zimmerman 2015). While it may appear that a purposeful choice was made to pursue a case-by-case approach instead of the internationally used best practice 'category approach', in reality it was a default decision made by legal drafters who focused on the 'law first', combined with little ability to consult with civil society, as noted previously. At a UN reparations conference held in Kyiv in November 2022, there was considerable discussion about this issue. International HLP restitution personnel argued that the problem is as much a social issue as a legal issue and that the law should attend to the social reality. But as is the case generally in war-affected countries, there is an unwillingness by the legal establishment to move towards forms of transitional justice that is able to attend to the crises. The Ukrainian lawyers' response to such entreaties was that they need to abide by existing legal approaches (which were made for a stable socio-legal landscape and which the current Compensation Law draws from). Hence, for Ukraine the decision to pursue the case-by-case approach was due more to the legal burden of convention and normativity than to an actual choice made between options.

The case-by-case approach in Ukraine will encounter a bureaucratic burden that is profoundly out of step with the abilities of claimants and local and national governments to manage. In the law there are nine separate assessments, or determinations, that the state or other entity needs to perform for each claim application to be processed, depending on the claim. These are:

1. Article 3 describes the need for an individual assessment of the cost of restoration of the property in question for each claim, including a determination as to both the degree of damage and the price of its restoration, with the latter being a significant exercise involving the determination of materials, labor costs and availability.
2. Article 3 also indicates the need for a report on the possibility or impossibility of restoring each 'real estate object' subject to a claim application.
3. Article 4 states that the determination as to compensation (or not) is to be decided separately for each 'real estate object' by the local commission.
4. Article 5 states that the amount of compensation needs to be determined for each case based on the assessment of the cost of restoring the damaged property.
5. Article 6 indicates that the determination of the financing of alternative land is needed for each relevant case.

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6. Article 6 also says that for each case where alternative HLP is to be provided, this determination is to occur on the basis of an agreement among (1) the executive body of a village, settlement or city; (2) the executive body of the council; (3) the construction company; and (4) the claimant.
7. Article 7 describes a separate assessment that is needed for the determination of the cost of restoration of the common property of damaged apartment buildings (hallways, entryways, stairways, elevators, outdoor areas etc.).
8. Article 10 notes that for each case of inherited property, a certificate of inheritance is required as part of the claims application, which necessitates its own process for acquiring the certificate.
9. Article 10 then outlines the nine steps to be taken in order for a decision to be reached for each case, based in part on the assessments submitted with the application.

The very long wait times resulting from the requirement to complete several assessments in order to submit a claim mean that HLP repairs cannot be done by the owners because damage assessments need to evaluate pre-existing damage rather than repaired or reconstructed HLP. As a result, claimants will have to either make repairs anyway because they need shelter in order to reconstruct their lives and, thus, likely forgo the prospect of compensation or refrain from making repairs while they wait, with significant impacts on their lives as they continue to live elsewhere or occupy their damaged or destroyed HLP (e.g. GPC 2020). Both options are daunting prospects for a war-weary population. And, of course, the cost of having the various assessments done will disadvantage the less financially well off.

One of these assessments will be particularly difficult to prepare for. The assessment regarding the value of HLP is quite difficult in war-related compensation processes; with even pre-war HLP, value information difficult to obtain (e.g. ADB 2007; Hurwitz et al 2005; van Houtte et al 2008). For the calculation of fair market value or replacement value, HLP prices can be very distorted in wartime, reflecting damaged HLP, impoverishment, dislocations, tenure insecurity, lack of buyers and prohibitions on the sale of HLP (e.g. ADB 2007), with the latter being an explicit part of Ukraine's compensation law. Determining value quickly and fairly on a case-by-case basis will be daunting, requiring significant research; personnel; legal, administrative and institutional capacity; as well as money. These elements are unlikely to be present in the quantities and forms needed in war-stressed Ukraine. The socio-legal problem then becomes one of either long delays in calculating values to be compensated or the estimation of values based on too little or distorted information, which can result in undervalued damaged or destroyed HLP. Both result in lack of trust, confidence and, hence, participation in the process by those needing compensation. There are currently indications from Ukraine that assessments are significantly undervaluing the value of HLP involved in the claims process.

The opportunities for corruption created by the case-by-case approach are additional socio-legal concerns. Corruption opportunities are enhanced with this approach primarily due to the very large volume of separate cases and the requirement that each case be prepared and processed separately. This volume increases the likelihood that a variety of questionable private sector assessment operators will emerge, resulting in the potential for a good deal of bribery and chaos to take place, as occurred with similar assessment requirements for HLP claims in postwar Iraq. In addition, attempting to arrange such assessments while being displaced enhances the prospect for corruption, as the owner is not present to oversee the assessment. Ukraine ranked as the most corrupt country in Europe (after Russia) prior to the war (ECCD 2018), with the country experiencing particularly large-scale corruption in the HLP sector both within and outside of government (CU 2018; PoU 2020; RIEL 2021). Corruption in HLP transactions, fraud, 'property raiding' and mafia takeovers of property were extensive prior to the conflict (Markus 2015; RIEL 2021). This begets a further socio-legal question: how will the dense tangle and purposeful obfuscation of who really owns what (due to this prewar corruption in the HLP sector) (Unruh 2023)

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intersect with attempts to get the various assessments done, given that the conduct of an assessment assumes that the correct owner is known and is the one applying for compensation?

Inheritance issues warrant further elaboration. The law asserts that claims involving inheritance must first be handled individually by an inheritance court (Article 10), as would occur in the stable setting of peacetime. However, inheritance claims for HLP are known to surge dramatically as a result of wars, as original owners become deceased or do not return and as the spouse, descendants and relatives (or all of these) pursue claims, often in an uncoordinated manner. In the Compensation Law, Article 3 requires—apparently in addition to an inheritance court determination—that an official document confirming the death of the owner be provided as part of the claim. This raises the question of how the war-degraded administrative and institutional capacity will provide such documentation in a timely way to interact with what will certainly be a large volume of requests. And how would refugees obtain such documents from outside the country? In addition, any competing inheritance claims would have to be adjudicated, which can be complicated and protracted even in peacetime. IOM (2008) details the difficulty and high frequency of such inheritance problems in war-affected HLP scenarios. The socio-legal impact of such inheritance difficulties would likely include significant delays in being able to complete claims applications or abandonment of the application process due to overly complicated and lengthy requirements and procedures.

International best practice for handling very large numbers of HLP claims in war-affected settings is to pursue a 'mass claims–transitional justice' approach whereby instead of claims being dealt with individually, they are grouped into categories according to a long a set of criteria and evaluated according to a set of legal precepts tailored to the problem, and then a single legal decision is made for the entire category. Ample literature and multiple examples of experience with this approach exist (e.g. Das 2006; Das and van Houtte 2008; Holtzmann and Kristjansdottir 2007; Leckie 2009; Rowen and Snipe 2021; Unruh and Abdul-Jalil 2021). The overall objective of this approach is to engage the social problem directly and with priority, using innovative law and legal techniques to attend to the exceptional nature of the problem, as opposed to attempting to get such a monumental problem to bend to the conveniences, rigours, details and functioning of normative law.

4.2 Administrative and institutional capacity

Administrative and institutional capacity weakness is common in war-affected countries. From the destruction, loss, looting and neglect of official records, registries, court files, property titles, buildings and equipment to the degradation of legal aid services and ministerial functioning and to the even more difficult-to-remedy deficit of human capacity, virtually all war-affected states suffer from capacity degradation (e.g. Rose-Ackerman 2008; Sannerholm 2012). Thus, while there can exist a statutory framework that a legal system can operate within, the institutional and administrative infrastructures on which the framework depends often become so compromised in war-affected settings that laws have difficulty functioning (Sannerholm 2012). A war-affected population's response to such weakened capacity adds to the problem, as it leads to decreased confidence and trust in state capacity and, hence, lowered respect for legal authority. This can then lead to a lack of motivation to adhere to the rule of law, particularly as the urgency of crises livelihoods prevails and a greater tendency for corruption and political instability emerges (e.g. Hay 2017; Sannerholm 2012). At the same time, the creation (via law) of overly bureaucratic procedures and processes based on unrealistic expectations and assumptions regarding existing capacities in war-affected HLP settings is a known problem (e.g. GPC 2020; RW 2011).

In an HLP compensation context, the socio-legal instabilities created by this capacity degradation include long delays, poor (or non-existent) dispersement of compensation funds, chaotically and ineffectively organized and implemented procedures and enhanced corruption opportunities. The result is then loss of trust and confidence in the process, as bureaucracies

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become overwhelmed, corrupt and non-functional (e.g. ADB 2007; Hay 2017). This encourages claimants to seek alternative approaches to solving their HLP problems (with some approaches being destabilizing) and creates space for criminality and certain political actors to take advantage of large numbers of disillusioned claimants. The following section examines the parts of the Ukrainian Compensation Law that will likely be particularly problematic because of this capacity deficit.

4.2.1 The capacity of local commissions

Article 9 describes the temporary local commissions that are to be created for processing claims. Established by the executive body of each local government council, the commissions are to comprise at least five persons, including a chairman, a deputy chairman, a secretary and others drawn from, as needed, representatives of state and local government, private enterprises, service providers, and representatives from relevant institutions and organizations, including international organizations. Article 10 then lists the tasks to be undertaken by the commissions in order to determine the outcomes of claims. These tasks include making sure the needed assessments are carried out, determining the amount of compensation (with this needing to be determined within thirty calendar days from the date of claim submission) and providing claimants with information and advice. In addition, the commissions are to form temporary working groups, as needed, to consider other issues related to HLP compensation. Article 9 states that the material and technical support for the commissions is to be provided by the 'relevant executive body of the board' but doesn't elaborate on the nature of this board.

In one sense, decentralizing the claims processing to the local level is laudable, given that local government best knows the details of the local population, including the extent of damaged and destroyed HLP; and having local commissions act simultaneously across the country theoretically provides for speed and scale advantages. However, a significant concern is the mismatch between the capability of these commissions (which, according to fieldwork, was often low and highly variable across localities) and what the law expects them to be able to do. Variations in the abilities of local commissions will likely lead to significant differences in the outcomes of similar types of claims, which may create problems as perspectives of disparity in fairness spread. Article 9 presents a separate capacity problem in that the local commissions are to be guided by the Constitution, the Compensation Law itself, other laws, acts of the Cabinet of Ministers and 'other regulatory legal acts'. This, in turn, assumes that local commissions will have the capacity to learn about and keep track of all these laws and acts and will be able to use them in their decision-making, despite the fact that they have not previously done this.

Further complicating the capability problem is that commissions have the power to request and receive documents and other information from state authorities, local governments, companies, institutions and other organizations regarding all forms of HLP ownership needed to make decisions on compensation, including the replacement of lost or destroyed HLP documents. As Article 3 notes, if the needed documentation or information for a claim exists with another part of government, then the claimant does not need to submit these documents because they can be obtained from that other government's systems and databases. This relationship between the commissions and other government and private entities assumes that there will be a fairly high interoperability capacity between the local commissions and the 'relevant information and telecommunication systems' within different parts of government and the private sector. The magnitude of this assumption is apparent in Article 9, which states that within three business days of receiving a commission's request for documents or information regarding a case, 'state bodies, local governments, enterprises, institutions, organizations of all forms of ownership' need to provide the documents or information. It is highly unlikely that such institutions, state bodies, etc. will have the capacity to comply with all such requests within three days, given the number of local commissions across the country that will be making these requests on a claim-by-claim basis. In

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addition, because the envisioned relationship between recently created commissions and these other organizations is new, this interoperability capacity would have to be constructed – in wartime. There is also no guidance in the law about what to do if the needed documentation never existed in the first place (which is different from documentation that is missing). Shcherbatyuk (2014) notes that the lack of HLP documentation was a significant problem in Ukraine prior to the war and that in many rural villages, there were no HLP documents at all.

Additional socio-legal concerns regarding the abilities of local commissions include the prospect of their being overwhelmed with claims, given the short timeframe for submission of claims applications (elaborated further below); the possibility that those who need to serve on the commissions are among the more than 14 million displaced Ukrainians; the need to train commission members in claims processing; the need to deal with the significant mistrust that, according to the fieldwork, currently exists between many local governments and local populations; the need to manage the potential for corruption within commissions given the history of corruption at the local level (Bader 2021), particularly concerning HLP (Markus 2015); and the reality that the powers provided to these commissions will be significant.

While the above issues are likely to create problems in claims determinations, the law does include an appeals process. However, this process has significant deficits. Article 11 indicates that appeals of the 'decisions, actions, or inactions' of state bodies, local government officials, experts, appraisers and other people who work in public services can be made in court. While this may make sense legally, the war-affected court system in Ukraine will very likely not have the capacity to handle such appeals, given what is likely to be a large number of them—especially appeals regarding 'inaction', which itself will be due to a capability deficit. There are also issues regarding the financial burden of such court proceedings and the low trust that courts are often held in with regard to HLP problems, stemming in part from the noted corruption of the courts in HLP matters (Dolgopolova et al 2020; PoU 2020,; RIEL 2021).

4.2.2 The capability to provide alternative HLP as compensation

While the provision of alternative HLP is a common remedy in restitution/compensation programmes (e.g. Bagshaw 2003; Holtzmann and Kristjansdottir 2007; Rowan and Snipe 2021), it is usually provided as a remedy to a whole category of claims, not individual claims. This provision is also used when the appropriate level of capability and information exists to facilitate the remedy. However, in Ukraine's case, Articles 5 and 6 assume a capability of cadastre (fundamental to the remedy) operation, which, in reality, is fairly problematic. There is an assumption that the alternative HLP, or land upon which to build alternative HLP in fact exists in the quantity and location needed and that the administrative and institutional abilities exist to find that land and ascertain its owner and/or its availability. However, the State Land Cadastre faces ongoing struggles with data quality, accuracy and public accessibility, and there are criticisms about the cadastre's efficacy (LT/KSE/GOU 2021; Popov 2019). The cadastre holds information about surface area only and does not contain HLP data for multi-story buildings—which is the case in other post-Soviet countries. While there can be congruence among a landowner, the HLP owner and the cadastre for a single house on its own parcel of land in rural areas, there will not be congruence in urban areas or on parcels where multiple families live. The fieldwork also revealed that certain large urban areas were never in the cadastre. Although the cadastre is estimated to be about 70 percent complete, approximately 200,000 parcels have mismatched information or other errors (Yuliia et al 2022). Such errors apparently exist due to mistakes in the original paper documents for land parcels, together with the overlap of boundaries (Nizalov 2022). Additionally, the State Service of Ukraine for Geodesy, Cartography and Cadastre was unable to locate 5 million hectares of land in their records (LT/KSE/GoU 2021). And detailed information on HLP is provided to the cadastre only on a voluntary basis, with uncertainty as to the legal status of such information (LT/KSE/GoU 2021). These issues, combined with the requirement that the provision

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of alternative HLP take place in the same or adjacent district as the original, destroyed HLP; a lack of transparency; outdated cadastre images; record duplication; and multiple conflicts of interest within laws governing the Land Cadaster and State Geocadaster, bring into question the capacity to, in fact, provide alternative HLP (LT/KSE/GoU 2021; Nizalov 2019), especially given that the capacity to operate the cadastre has now been degraded by the war.

Perhaps more problematic than the lack of cadastre capability is that Article 6 mandates that in exchange for alternative HLP, the rights to the original HLP be relinquished. This same requirement was present in an earlier HLP compensation programme in the occupied east of the country and was responsible for a good deal of reluctance to engage the programme due to a lack of trust that alternate HLP would, in fact, be provided or would be of equal value (NRC 2018). In areas of Ukraine where the current Compensation Law is being implemented, this same issue is now causing problems: there is currently a refusal by HLP developers to recognize the certificates issued to claimants via the law, due to the lack of a mechanism regarding how developers will cash the certificates. At the same time, there are indications that the value indicated on the certificates is not enough to acquire an alternative HLP of commensurate value to the HLP that was destroyed. Meanwhile, the government is not obligated to back up the certificate with actual money. This was made even more problematic by a statement from the Ukrainian Cabinet that ownership of destroyed residential HLP is terminated due to the HLP's being destroyed and that in order to receive compensation, claimants must first register the termination of the right of ownership (DRC 2023b). The prospect of first registering the termination of rights and then subsequently receiving what can turn out to be inadequate or non-existent alternative HLP acts as a strong deterrent to engaging in the compensation programme. Presently there are claimants wanting to return their certificates to the government and get their original property back, even if it is destroyed.

4.3 Evidence for claims: legality vs. availability

The legal evidence available to reconnect people with their property is a critical part of any HLP restitution and compensation process. However, a dilemma usually emerges whereby the evidence that is legal and the evidence that is available become separated. This occurs as evidence prescribed as legally acceptable in a restitution/compensation law isn't possessed by enough claimants for it to be broadly available to reconnect significant portions of the population with their HLP. Often, the forms of evidence that are legally acceptable are the HLP titles or deeds or digital registrations that the law requires in peacetime. However, in mass forced displacement and HLP damage and destruction scenarios, people usually flee without taking these documents, or the documents are confiscated, lost or destroyed or become subject to coerced or under-duress sales while the owners are dislocated. At the same time, restitution/compensation processes can expose irregularities in HLP documents that render them useless. One of the more common of these irregularities results from a failure to update HLP documents with the name of the current owner, which sometimes occurs over the course of many generations, with the HLP in question being in the name of a long-deceased ancestor. In many cases, people who are dislocated never had such documents in the first place but instead held their HLP in customary, informal or traditional forms of tenure. Meanwhile, digital registration systems often do not contain the majority of claimants' information, become poorly maintained or otherwise degraded during wartime or are subject to forms of cyberattacks, with the fear of such attacks leading government to restrict access to the registry by users, as is currently the case in Ukraine (Coumans 2022). On the other hand, the available evidence that people do have in such situations that is able to reconnect them with their HLP is often excluded from the relevant laws. International best practice involving the 'mass claims and transitional justice' approach to restitution/compensation focuses on making this available evidence temporarily legal—thus positioning the law to attend to the exceptional nature

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of the problem, as opposed to doing the reverse (e.g. Gonzalez et al 2021; Haersolte-van 2006; Holtzmann and Kristjansdottir 2007).

Available evidence from this best practice approach often includes a variety of 'non party evidence' (evidence held by a party other than the claimant) that is able to corroborate assertions of ownership. This includes water, electricity and school records; membership in civil society organizations; and of course the vast Internet holdings of data regarding identity and home location. Also valuable and available are forms of attestation from relatives, neighbours and friends; intimate knowledge of specific aspects of one's HLP; photos and other media held on mobile devices or cloud services; and customary and informal law and associated evidence. These forms of evidence are what displaced populations usually do have or can get and are able to verify their assertions of claim, particularly when corroborated with each other. Yet restitution/compensation laws derived for use in war-affected scenarios often do not regard these forms of evidence as legal – and will be regarded as such until these laws become so unworkable that they must be changed. Ukraine's Compensation Law (and the government's legal establishment) struggle with this dilemma. This section discusses this problem in the Compensation Law and the possible opportunities that the law itself may present to resolve it.

Part of the situation in Ukraine regarding HLP documentation is that numerous archives have been destroyed and looted, with Russian and proxy forces purposefully targeting them, even in Kyiv. And with the digitization of HLP records varying across the country prior to the war (and occurring particularly slowly in rural areas), most villages and towns have only paper HLP documents; the result is that destruction of these archives means that property owners may have the only copy. But the loss of personal HLP documents has been especially significant during the war (Nizalov 2022), as they are left behind while people are fleeing, are purposefully discarded or destroyed prior to crossing Russian checkpoints or are destroyed as residential areas are targeted. Municipalities in Ukraine have reported that the lack of proof of HLP ownership is going to be a large problem in the implementation of the law.

Articles 3 and 13 of the law are the most descriptive of the types of evidence legally allowed. Article 3 indicates that 'a document confirming the ownership' of the HLP in question is to be submitted with one's claims, unless the HLP in question is already registered in the State Register of Real Property Rights. However, Nizalov (2022) notes that the state registration system for HLP was only 40 percent complete at the onset of the war (and was lower in the occupied eastern areas), with the majority of property rights obtained prior to 2013 not included in the registry. Meanwhile, the electronic version of the State Register includes only information about HLP whose inclusion was initiated by the owner as of 1 January 2013 (Ben 2021). But, importantly, the exact nature of 'a document' (noted above) is left undefined in the law. This ambiguity may constitute an important opportunity to match what is legal with what affected populations do have in terms of evidence; but it can also be interpreted to be overly restrictive and unrealistic or highly variable with regard to acceptable evidence, if left to the local commissions, as it seems it currently is. Article 1 (which includes the definition of terms) may also allow some flexibility in terms of evidence, as it states that additional terms may be defined by 'other legislative acts of Ukraine'. If such 'other acts' are to include the Land Code, Article 160 of that law (on land disputes) indicates that a claimant may 'submit documents and other evidence, file motions, give oral and written explanations . . . ' (VRU 2000). In this regard there may exist the opportunity to expand on the forms of legally acceptable evidence to more closely match what is available.

Article 3 may also provide some opportunity for flexibility in acceptable evidence by noting that if the claimant is lacking the 'confirming documents' (currently left undefined), then the claimant can still apply for compensation, with the application being held until the needed documents can be supplied. The ambiguity regarding which types of documents are to be acceptable in these cases possibly allows for a variety of available evidence to be used, but this ambiguity also could be used in a more narrow and rigid way or for corruption. In any case, it does appear to allow for some discretion on the part of local commissions to define what evidence is to

be legally acceptable. This discretion can be positive if the local commission knows what evidence most of the local population does have and is interested in acting on the population's behalf, as opposed to viewing it as a financial opportunity. And finally, Article 13, regarding the 'Register of Damaged and Destroyed Property', also may present the possibility of flexibility in acceptable evidence, as it states that 'the scope of information to be entered into the Register of Damaged and Destroyed Property is determined by the Cabinet of Ministers . . . .' This register is different from the 'Register of Damage Caused by the Aggression of the Russian Federation against Ukraine', which was established by the Council of Europe in 2023 for the purpose of constructing a 'compensation mechanism' (COE 2023). However, the registers are connected. While the types of 'damage' to be included in the European register is wider than that pertaining only to HLP, the Ukrainian-based register is to submit claims to the European register – ostensibly for the purpose of claiming damages from Russia at a later date (EUKN 2024). At the time of this writing, however, the European register was still developing the evidentiary rules for categories of claims; for this reason, it is unknown whether there will be compatibility between the two registries with regard to HLP evidence as well as what the repercussions will be if there is not.

4.4 The claims submission timeframe and awareness raising

An important socio-legal instability in the law is the very short timeframe allowed for filing claims. While the law (Article 3) initially indicated that applications for compensation must take place during martial law or within ninety calendar days from when martial law is terminated in the area where the damaged/destroyed HLP is located, this timeframe was subsequently amended to one year (DRC 2023a, 2023b). While this allows for claims submission during the war – a much-needed improvement in best practice for restitution/compensation processes – the one-year timeframe after the end of martial law is a problem. Postwar HLP mass claims processes in other countries usually allow claims submission to take place several years after the end of a war (e.g. Das and van Houtte 2008; Erdem and Greer 2018; Holtzman and Kristjansdottir 2007).

The crises livelihoods and pressing personal concerns of much of the war-affected population will preclude their being able to comply with such a short timeframe. Particularly disadvantaged will be the millions of displaced Ukrainians who are residing in or moving across a variety of countries and internal locations and who will be experiencing a large number of variations in personal situations; livelihood priorities; and forms of hardship, desperation and financial difficulties that will be consuming their time and attention. This short timeframe, combined with the lack of a mandate in the law for awareness raising regarding the timeframe and other requirements, will produce an additional socio-legal instability. In HLP compensation/restitution programmes, if potential claimants are unaware of the details of the programme (particularly the cutoff dates for claims submission), then their engagement will be severely compromised (Hay 2017) and grievances over being excluded will be many. A review of the earlier HLP compensation efforts in the eastern occupied regions revealed a very limited understanding, among both local government and civil society, of the procedures and their timing (NRC 2016). The resulting exclusion of a large segment of the claimant population led to a wave of claims applications directed to the European Court of Human rights (Kuznetsova et al 2018).

It will take much longer than one year for the millions of refugees, IDPs and even those who stayed, to learn about and then to arrange for and complete all the time-consuming assessments and other requirements that are needed to file a claim, all while managing very time-consuming crises livelihoods. The exclusion of large numbers of potential claimants is all but guaranteed with such a short filing timeframe, thus creating the prospect of grievance-based socio-political repercussions. At the same time, such a timeframe can worsen a capability deficit problem, as those who are aware of the timeframe will act quickly to submit claims, likely overwhelming degraded administrative structures. International best practice argues strongly for an adequate timeframe for submissions of claims, including the prevention of inflexibility with regard to

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compliance with a deadline that can be seen as unfair. Instead, it is advised that an orderly method by which deadlines can be extended be used (e.g. Holtzman and Kristjansdottir 2007).

4.5 Excluded segments of civil society

In focusing exclusively on ownership of residential property in Ukrainian-occupied lands, the law excludes important segments of civil society and their property rights. Renters, as well as owners of farmlands, small businesses and all other forms of property in the Russian- and proxy-occupied eastern regions, are excluded from the law.

Of the more than 14 million dislocated persons, a significant proportion was certainly made up of renters of apartments, houses and lands. Residential renting in Ukraine is in many cases a fraught enterprise, involving problems of corruption, informality, lack of documentation and tenure insecurity (Mamo 2021; Prindex 2022; RIEL 2021). While these would be challenges in deriving compensation modalities anywhere, unless this segment of society is addressed in terms of loss of shelter, the affected population will not likely recover from their dislocation, thus constituting an ongoing burden on the countries and communities that currently host them, along with the development of grievances at being excluded. Secondary repercussions that will occur because of deficits in labor, technological and administrative expertise and rental incomes and that will affect economic recovery are also likely with the exclusion of renters. Under international human rights law, renters who have been forcibly dislocated are due redress (UN Habitat 2014). The EU, which Ukraine certainly aspires to join, takes human rights transgressions seriously, including those of renters (e.g. HRW 2022), and is likely to react aggressively to the exclusion of renters from the Compensation Law when non-return of dislocated persons and grievances begin to emerge.

The exclusion of agricultural and business properties is also a significant problem, given their very large roles in food production and employment. Agricultural damages and losses due to the war are estimated to be $127 billon, with vast areas emptied of occupants and damaged by ordinance and military vehicle traffic (Martyshev et al 2023). The social repercussions of the non-compensation of damaged agricultural lands will have both national and international repercussions, as delays in recovery will mean ongoing food insecurity for Ukraine as well as for countries that depend on produce from Ukraine. Along similar lines, excluding compensation for small business properties will impact the returns of dislocated people and sectors of economic recovery that depend on jobs, services, distribution networks, investments and circulation of money. While there is some discussion in Ukraine that agriculture and businesses will be dealt with by separate laws, to date these laws have yet to be in development. Concerning agriculture, the government has recently made funds available for compensation for demining (MEU 2024), even though damage to agricultural lands extends well beyond removing these remnants of war (Deininger et al 2022). The thinking behind the current Compensation Law's focus on residences is that urgency is most needed regarding people's homes, with attention given to other forms of property to come later.

The law is explicit about excluding all properties in the eastern occupied areas by stating that only properties damaged/destroyed after February 2022 will be covered. This may be because a separate, earlier compensation scheme was applied to the area; however, as noted earlier, this scheme was broadly seen as dysfunctional (DRC 2015; NRC 2018). While it may be that the eastern areas will not see the conditions needed for HLP reconstruction for some time, it can be argued that it is important to register claims now so that Russia will incur a debt related to this HLP. But it will also be important for those who lost HLP to damage, destruction and secondary occupation to be included in national recovery, thus minimizing the emergence of detrimental grievances from a fairly large population.

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4.6 Prohibitions on selling compensated HLP

The law imposes two prohibitions on the sale of HLP by owners who benefit from compensation via the law: Article 6, as noted earlier, prohibits for three years the sale of HLP provided as alternative housing. And Article 8 stipulates that the recipient of monetary compensation does not have the right to alienate their HLP for five years. While such prohibitions go against the Constitution and the Civil Code (AVRU 2023), they are also a significant socio-legal problem in that they prevent claimants from using their HLP for recovery remedies tailored to their specific circumstances – which best practice for war-affected HLP restitution supports (e.g. Van Houtte et al 2008).

Transactions in violation of this prohibition are virtually guaranteed to occur as certain postwar segments of the population make difficult livelihood decisions involving their HLP and as enforcement will be weak. This will result in informal, illegal and undocumented transactions, creating subsequent problems when such HLP attempts to enter the legal market and finds it difficult to be brought back into the law – or continues to exist outside the law. This then creates the prospect of a parallel informal and illegal HLP market and rule set. Holders of such transacted property would then not have access to other property-related benefits that require legality of holding, such as the legal property market, collateral and forms of service provision. At the same time, it would cause problems for governance, rule of law and political alignment and, importantly, allow for the illegally transacted HLP to be used by organized crime in money laundering, forced takings of HLP and forms of HLP trafficking (e.g. Unruh 2022). This would constitute a significant instability. Such illegality in HLP transactions in the face of prohibitions was present throughout the country during the moratorium on the sale of agricultural land in Ukraine (Amosov 2019; Kostyashkin et al 2020; Nizalov 2019) and created a legacy of corruption, non-transparency, confusion and ongoing informality in land documentation (Yuliia et al 2022). In addition, such a prohibition may discourage some citizens from entering the compensation process altogether, further contributing to difficulty in recovering livelihoods. Although the reasoning of such a prohibition may be to prevent claimants from selling their compensated HLP and then becoming homeless or claiming again, the possibility of such occurrences and their repercussions must be weighed against the much broader and longer-term problem of creating an illegal HLP sector.

5 Conclusion

Ultimately, the central assumption of many well-intentioned HLP laws in war-affected scenarios is that there continues to be congruence among (1) law, including the law-making process; (2) society and its ability and willingness to adhere to laws in unstable settings; and (3) the state of institutions that laws rely on to be implemented. This misassumption of congruence emerges from the experience and training of a national legal establishment based on stable and peaceful settings, without a full understanding of the impact that armed conflict has on civil society and the rule of law (e.g. Sannerholm 2012). This is understandable, of course, given that the legal establishment of any particular country seldom experiences the effects of armed conflict and recovery from it. In reality, however, the rupture of this congruence creates the space for the emergence of socio-legal instabilities with regard to the rule of law. This is particularly the case in the HLP sector, where those most affected by war, apart from loss of life or injury (i.e. the forcibly dislocated and those with destroyed homes, farms and businesses), are also arguably the most unable to utilize the laws made for peaceful settings. This is due to the gap between what would be needed to make such laws actually work and the severity of the crisis livelihoods that such segments of the population are forced to engage in. Globally, this population of the forcibly displaced is at the record high of 114 million people (*UN News* 2023). While there are approaches for managing the instabilities within this condition (both before and after they emerge), the overriding difficulty in using them is

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convincing the legal establishment in war-affected states to proceed directly to such approaches, thus avoiding the torturous and socio-legally costly process of first experiencing the unworkability of normative laws that are used to try to resolve wartime problems. While considerable effort is made by the international community to engage in this convincing by using examples from other countries, each new set of national law-makers nevertheless believes that their country is unique in this regard. While every country is certainly unique, what is not unique is the profound operational differences between the rule of law in peacetime vs. the rule of law in war-affected settings.

Ukraine possesses unusual potential compared with other countries in its HLP restitution and compensation efforts. However, the socio-legal instabilities associated with its Compensation Law that are described in this article are presented as a warning that even economically and technologically advanced countries, with their significant political and societal will, considerable backing by the international community and the prospect of ample funds, will still need to carefully consider the limits of normative approaches to law-making in war-affected contexts.

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