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ANALYSIS OF COURT PRACTICE IN UKRAINE ON COMPENSATION FOR PROPERTY DAMAGED OR DESTROYED DUE TO THE ARMED CONFLICT

LIST OF ABBRIEVIATIONS:

ATO – Anti-Terrorist Operation;

CCU – Civil Code of Ukraine;

CrCU – Criminal Code of Ukraine;

CCPU – Code of Civil Protection of Ukraine;

CMA – Civil Military Administration;

CMU – Cabinet of Ministers of Ukraine;

CPU – Civil Procedure Code of Ukraine;

ECHR – European Convention on Human Rights (1950);

ECtHR – European Court of Human Rights;

IDP – internally displaced person;

JFO – Joint Forces Operation;

MENSDC – Measures on Ensuring National Security and Defense, Countering, and Containing the Armed Aggression of the RF[1];

NSDC – National Security and Defense Council of Ukraine;

RF – Russian Federation;

SBU – Security Service of Ukraine;

SES – State Emergency Service of Ukraine;

SRPI – The Unified State Register of Pre-Trial Investigations.

1 The term “armed aggression of the Russian Federation” is used in connection with the Law of Ukraine 2268-VIII “On the Particularities of State Policy on Protecting State Sovereignty of Ukraine in the Temporarily Occupied Territories in Donetsk and Luhansk Oblasts. https://zakon.rada.gov.ua/laws/show/2268-19.

I. INTRODUCTION

By law, events in Donetsk as Luhansk oblasts have been designated as terrorist activities, and activities to secure peace and regain control over the non-controlled territories are considered an Anti-Terrorist Operation ("ATO")[2]. This legal designation influenced the development and practice of legislation, because de-facto military activities were de jure considered an ATO. Accordingly, all legal matters arising in connection with compensation for physical or emotional harm in the zone of the ATO are governed by counter-terrorism legislation, and judicial practice has developed in this context.

This analysis investigates how judicial practice developed on defined questions, particularly the development in 2014-2018 of Ukrainian courts' legal reasoning in light of legislative changes. It also highlights the basic problems encountered by applicants and Ukrainian courts in compensation cases. Currently there are around 150 of such cases in various courts. In 32 cases, the Charitable Foundation "Right to Protection" ("R2P"), for whom this type of case is a priority, represents plaintiffs.

> *"According to reports by international organizations, as of 15.02.2019, about 50,000 houses on both sides of the contact line have been damaged or destroyed as a result of hostilities[3]*

As of 01.02.2019, there are 7,433 such damaged and destroyed residential buildings in government-controlled areas of Luhansk oblast, with potential monetary compensation estimated at 954,115,655 UAH according to indirect indicators. There have been 140 claims for compensation for damaged/destroyed housing in Luhansk Oblast in 2014-2018[4]. In Donetsk Oblast there are 12,921 damaged or destroyed buildings. Of these, 11,783 are privately owned residences. As of 28.02.2019, 5,822 residences remain damaged or destroyed, of which 5,536 are privately owned. From 2015 to the present, there have been 39 claims for compensation for damaged/destroyed housing and 20 appeals since 2017 regarding voluntary transfers of such housing to local authorities for receiving compensation from the government[5].

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2 Decree of the President of Ukraine No. 405/2014 "On the Decision of the National Security and Defense Council of Ukraine of 13 April 2014 "On emergency measures to address the terrorist threat and protection of the territorial integrity of Ukraine" of 14.04.2014.

3 OHCHR Report on the human rights situation in Ukraine from 16 November 2018 to 15 February 2019, https://www.ohchr.org/Documents/Countries/UA/ReportUkraine16Nov2018-15Feb2019_Ukranian.pdf.

4 Official response of the Luhansk Oblast regional administration, No. 15/02-494 dated 27.02.2019 in response to a public information request from R2P.

5 Official response of Donetsk Oblast regional administration, No. 7-8/268-19 dated 04.03.2019 in response to a public information request from R2P.

II. OVERVIEW OF LEGISLATION ON COMEPNSATION FOR DAMAGED/DESTROYED PROPERTY DUE TO THE ARMED CONFLICT. DESCRIPTION OF CURRENT SYSTEMIC PROBLEMS.

2.1. Legal Uncertainty: Anti-Terrorist Operation, JFO or armed conflict?

In this period, an anti-terrorist operation was conducted in Ukraine under Decrees of the President of Ukraine No. 405/2014 *"On the Decision of the National Security and Defense Council of Ukraine of 13 April 2014 'On emergency measures to address the terrorist threat and protection of the territorial integrity of Ukraine'"* of 14.04.2014 and No. 116/2018 *"On the Decision of the National Security and Defense Council of Ukraine of 30 April 2018 'On the large-scale anti-terrorist operation in Donetsk and Luhansk oblasts'"* of 30.04.2018 (the text of this decree is available only for official use). Accordingly, anti-terrorism legislation regulates the issue of compensation for the pecuniary damage incurred, particularly Article 19 of the Law of Ukraine *"On Counter-Terrorism"*, stipulating that compensation for damage has to be reimbursed from the state budget.

> *In January 2018, the Law of Ukraine 2268-VIII "On the Peculiarities of State Policy on Ensuring Ukraine's State Sovereignty over the Temporarily Occupied Territories in Donetsk and Luhansk Oblasts" was adopted. Article 5 of this law introduced a new legal term "measures on ensuring national security and defense and countering the armed aggression of the Russian Federation"[6].*

However, the ATO and MENSDC are not the same legal means and have different legal effects, especially for victims. This is particularly noteworthy in the area of compensation.

Due to this legal uncertainty, people whose property was damaged or destroyed by hostilities are required to use general civil procedure rules for compensation, which causes a considerable amount of problems for them in court cases, which will be discussed further on. This substitution of legal concepts resulted in not only the application of legislation from other areas of law, but

6 Law of Ukraine 2268-VIII "On the Particularities of State Policy on Protecting State Sovereignty of Ukraine in the Temporarily Occupied Territories in Donetsk and Luhansk Oblasts,"zakon.rada.gov.ua/laws/show/2268-19.

also to a sizeable decline by one party—victims—in the possibility of implementing their right to compensation, since according to civil procedure rules the burden of proof lies on the applicant. In cases on compensation for damage caused by terrorist acts (such as those ongoing today), the government is a priori in an advantageous position regarding means and possibilities to support its arguments.

> *Law 2268-VIII not only did not improve this situation, but also created additional obstacles for victims to find justice in Ukrainian courts.*

Under the Article 2 (4) of the Law, the RF is charged "for pecuniary and non-pecuniary damage caused to Ukraine as a result of the armed aggression of the Russian Federation"[7], in compliance with the principles and norms of international law. Herewith, the law admits the possibility of lodging a case against the RF in Ukrainian courts for compensation of damage. In these cases, victims are even relieved from paying court fees (Article 5, Law of Ukraine "*On Court Fees*"). However, this legislation is just a formality, since:

- Under Article 5 of the UN Convention on Jurisdictional Immunities of States and Their Property, the RF, as a sovereign state, enjoys immunity with respect to itself and its property from the jurisdiction of the national courts of other states. In accordance with Article 79 of the Law of Ukraine *"On Private International Law"*, filing a case against an international government, joining a foreign government as a participant in a case as a respondent or third party, seizing/freezing the property of foreign governments located on the territory of Ukraine, attaching such property to secure a claim, and forfeiture of such property is permitted only with the consent of the State concerned, unless otherwise provided for by international agreements or the laws of Ukraine. Because of this, the filing of such cases to Ukrainian courts does not create any legal consequences for the RF. Furthermore, under Law 2268-VIII, the government of Ukraine stripped itself of responsibility for compensation for damage incurred during the ongoing conflict;
- Law 2268-VIII effectively invites victims to submit compensation-related cases against the RF to Ukrainian courts. However, this is not an effective remedy of legal protection within the meaning of Article 13 of the ECHR, considering the immunity of the RF from decisions of Ukrainian domestic courts. At the same time, the existence of this legislation impedes victims' implementation of their rights through fair proceedings, as

7 The term "armed aggression by the RF" is used in connection with the Law of Ukraine 2268-VIII "On the Particularities of State Policy on Protecting State Sovereignty of Ukraine in the Temporarily Occupied Territories in Donetsk and Luhansk Oblasts," https://zakon.rada.gov.ua/laws/show/2268-19

guaranteed by the Constitution of Ukraine and in Article 6 of the ECHR, since even providing for decisions in favor of plaintiffs, there will still certainly be an issue of execution, which is impossible given the above issues. In addition, the execution of court judgments is part and parcel of the right to fair proceedings within the meaning of Article 6 of the ECHR. Thus, the existence of Article 2(4) of the Law 2268-VIII makes it impossible for victims to implement their right to compensation for damage by hostilities. In this context, one should also keep in mind the concept of positive obligations of states, developed in the decisions of the ECtHR and according to which, in cases of the loss of control over parts of its territory, the State is not released from its duty to comply with the ECHR and secure the rights of people within its jurisidiction[8]. In addition, under Article 17 of the Law of Ukraine *"On the Execution of Judgments and Implementation of European Court of Human Rights Practice"* in considering cases courts may invoke ECHR provisions and ECtHR practice as a source of law.

The question of compensation for damaged/destroyed housing is closely related to two periods of time:

- From 14.04.2014 to 30.04.2018 - ATO;
- From 30.04.2018 – start of MENSDC (JFO) in accordance with Law 2268-VIII.

With respect to the first period, there is no doubt as to which legislation should be applied. However, the situation is not as clear-cut for the second period. The problem is the JFO measures introduced in Law 2268-VIII, although essentially similar, are not an anti-terrorist operation, nor are they measures that were carried out during the period of martial law. Accordingly, this legislation most likely will not apply to the legal consequences of its implementation. In addition, the public part of the Decree of the President of Ukraine No. 116/2018, *"On the Decision of the National Security and Defense Council of Ukraine of 30.04.2018 'On the Large-Scale Anti-Terrorist Operation in Donetsk and Luhansk Oblasts"* does not contain any provision whether the ATO, which has been carried out since April 2014, has terminated. This also creates legal uncertainty regarding compensation for damaged/destroyed property. Because of this, when these court cases are filed, Ukrainian courts may face some questions, specifically:

- Legal qualification of events in the conflict zone after the ATO is finished[9];

8 See, e.g., Ilaşcu and Others v. Moldova and Russia [GC], no. 48787/99, ECHR 2004-VII; Catan and Others v. the Republic of Moldova and Russia [GC], nos. 43370/04 and 2 others, ECHR 2012.

9 Another presidential decree can terminate the ATO. In this context, the attention to the qualification of events after the ATO would be officially finished, should be paid, in particular the question of the corresponding legislation applied etc..

- Legal evaluation of facts of damage or destruction in the conflict zone depending on the time period: ATO, JFO, or parallel proceeding of both operations;
- Which legislation will apply to facts of damage or destruction of property (residential and nonresidential objects).

It should be noted that according to Article 13(4)(8) of Law 2268-VIII, the ATO and MENSDC may proceed simultaneously, as well as in the context of martial law or state of emergency introduced.

> *Since as of April 2019 legal uncertainty on this issue continues, we will proceed as following: at the moment in Ukraine the ATO continues parallel to the JFO, until it has been determined otherwise.*

2.2. Absence of a legal mechanism of compensation for property damage due to terrorist acts, the ATO / JFO, and the armed conflict.

Despite the fact that victims are forced to use Article 19 of the Law of Ukraine *"On Counter-Terrorism"* in the absence of other means to receive compensation, there is no mechanism for implementation of this legislative provision, as there is in any other law. Moreover, in special legislation—the Law of Ukraine *"On Guaranteeing the Rights and Freedoms of Internally Displaced Persons"* of 20.10.2014—there is no provision that confers victims the right to compensation for damage to their property. There is no provision for entering information on the existence of internally displaced persons' damaged or destroyed property in the Unified IDP Database included in the procedure for issuing and distributing IDP certificates, ratified by CMU Resolution No. 509 of 01.10.2014 *"On Incorporating Internally Displaced Persons".*

Some regulations on compensation for damage (not including proximate damages resulting from the ATO) are also envisioned by Article 21 of the CCPU, which states the possibility to receive compensation for damage because of emergencies. Under Article 4 of the CCPU, this includes wartime situations. The domestic courts base their holding on a systemic analysis of the provisions of the Law of Ukraine *"On Counter-Terrorism"* and the CCPU, which regulates similar legal issues. Consequently, there has been an analogous application of the law under Article 8 of the CCU.

> *However, again questions connected to compensation for harm, resulting from terrorist acts or emergencies of a military character, are not regulated by statute, affecting the protection of victims` right to compensation in court.*

One issue is inspecting the housing and establishing the extent of damage or destruction. The procedure for investigating the condition of housing to establish its habitability is still the one established by Council of Ministers of the USSR Decree No. 189 of 26.04.1984, which provides for investigation of the relevant premises and the drawing up of an inspection report indicating the damage observed, the source, and establishment of the fact of habitability/inhabitability of the housing for further use. At the same time, this procedure is general in nature. It has been used for inspecting the housing that, for example, has substantially deteriorated or was damaged in natural disasters. It does not consider the particular aspects of damage or destruction occurring as a result of military activities or terrorist acts, and the inspection report, the content of which is established by this Procedure, does not contain the appropriate points.

On the other hand, if a fire in a building was caused by shelling, it is possible to confirm such a case in the certificate of fire by representatives of the regional SES. The provisions of para. 7 of the procedure for records of fires and their consequences, enacted by CMU Resolution No. 2030 of 26.12.2003, establish that ministries and other executive agencies, located in buildings with fire departments on-site, can develop their activities on confirming the fact of fire in coordination with SES. The form of the fire report is established by Ministry of Internal Affairs of Ukraine Decree No. 503, *"On Confirming the Means of Reporting No. 1-PVO (Monthly) 'Report on Fires and Their Consequences' and the Investigation Records of Fires*", of 14.06.2017. In such investigation records, information, particularly on the date, time, place the fire started description of damage and destruction to property directly and indirectly caused by the fire, source of the fire, etc., should be included.

> *There is also no mechanism to assess the damage or methodology of measuring the amount of compensation for losses resulting from terrorist acts or hostilities.*

The general practice – for example, that is used for damage from fire — is still used, and is not relevant for assessing damage by terrorist acts or shelling. That being said, assessment of damage of property destroyed in such man-made emergency situations as fires, explosions, and collapse/demolition are done in accordance with CMU Resolution No. 175 *"On Confirming the Methods of Evaluating Damage from Emergency Situations of a Man-Made or Natural Character"* of 15.02.2002. The *CCPU* does not provide for the assessment of damage from emergencies of a military character. For the purposes of defining the amount of

compensation for damaged/destroyed housing, as provided for by *CCPU* Article 86(10), indicators of the approximate value of the housing in regions of Ukraine are applied, and are approved quarterly by the relevant records of the Ministry of Regional Development, Construction, and Communal Services of Ukraine.

Under the ninth part of *CCPU* Art. 86, the payment of financial compensation by the government is accomplished through the voluntary transfer of the damaged or destroyed housing by victims to local authorities.

> *As of today, there are no regulations covering the procedure for voluntary transfers of damaged/destroyed property to the government. The local administrations themselves confirmed this fact.*[10]

Moreover, the authority of civil-military administrations in Donetsk and Luhansk oblasts to take this property is not provided for the Law of Ukraine *"On Civil-Military Administrations".* In response to R2P's inquiry on damaged property, the Avdiivka CMA in Donetsk Oblast noted it does not have the authority to accept damaged/destroyed property from victims under point 39 of the first part of Art. 4 of the Law *"On Civil-Military Administrations"*[11]. Considering this, in the absence of a mechanism to fulfill this legislative provision, even if they wanted to victims are deprived of the opportunity to transfer their property to the government, which in turn makes it impossible for them to implement their right to adequate compensation.

Regarding the aforementioned, the State effectively has not ensured the implemnentation of victims` right to compensation for property damaged during the armed conflict. The negative legal consequences for individuals, whose property was damaged or destroyed due to hostilities, stem from two factors:

1. The change in legal concepts created a situation of legal uncertainty (ATO, JFO or armed conflict) and led to the application of substantive rules from anti-terrorist legislation;
2. The absence of effective legislative and administrative mechanisms for restitution for damage resulting from terrorist acts, that is, the absence of a mechanism for implementation of Article 19 of the Law of Ukraine *"On-Counter-Terrorism"* and the corresponding provisions of the *CCPU*.

10 Response of the Donetsk Oblast regional administration, No. 7-8/268-19 dated 04.03.2019 to a public information request by R2P.

11 Response of the Avdiivka civil-military administration in Donetsk Oblast, No. 01-15/1100 dated 19.05.2017, in response to an inquiry from R2P.

III. COURT PRACTICE ON SEPARATE ISSUES OF COMPENSATION FOR PROPERTY DAMAGED BY TERRORIST ACTS, DURING THE ATO/JFO AND ARMED CONFLICT

3.1.General Issues.

Before proceeding to the direct analysis of domestic court judgments on selected issues related to compensation for terrorist-inflicted damage, there is the following to consider:

- Unlike the common law system, court judgments in Ukraine are not a source of law. For this reason, it is not possible to approach decisions of Ukrainian courts as precedent, as the Court assesses the circumstances of each distinct case and the evidence of the parties in course;
- When reviewing civil claims, a Ukrainian court is limited to the provisions of national law and cannot depart from its scope. Consequently, even in case of a legislative gap, a Ukrainian court may use only analogous laws or statutes, often not considering the particular legal relations and situations of the parties. Accordingly, the restoration of justice in such cases becomes extremely unlikely.

Regadring this, public policy on compensation for damage due to the armed conflict is not developed only through domestic court judgments, since court practice may only expose the problem in legal enforcement. However, this may not necessarily promote its resolution.

The absence of a special mechanism for compensation for damage due to terrorist acts.

As noted previously, as a result of legal uncertainty of the factual situation in different parts of Donetsk and Luhansk oblasts, applicants are forced to use existing general rules for compensation for damage resulting from crimes—in this case, terrorist activity. An analysis of already adopted court decisions suggests that the absence of a special mechanism affects the decisions in compensation cases and raises a host of problems that applicants face in substantiating and documenting their position. This is because under the first part of CPU Art. 81 (Art. 61 in a previous edition)[12] each party must prove the circumstances that it alleged.

12 From this point, the new and previous editions of the CPU will be noted. The new edition was adopted in Law of Ukraine 2147-VIII, 03.10.2017. However, some of the court judgments cited were decided before the adoption of the new version in 2017, so the references are to the previous version

In the absence of a special legal mechanism for compensation, all courts are forced to apply analogous law and refer to statutes that regulate similar subjects:

"Considering that there are no special laws and regulations on compensation for victims affected during the ATO in Donetsk and Luhansk Oblasts, an analysis of the CCPU and Law of Ukraine "On-Counter Terrorism" show that these laws regulate similar issues []."[13]

Well-Known Circumstances.

Regardless the satisfaction or rejection of claims in this category of cases, courts consider that the events of the ATO in Donetsk and Luhansk oblasts are well-known circumstances that do not need to be proven under the third part of CCPU Art. 82 (Article 61 in a previous edition). In addition, domestic courts draw on such statutes and regulations as Decree of the President of Ukraine No. 405/2014, "*On the Decision of the National Security and Defense Council of Ukraine 'On Emergency Measures to Counter Terrorism Threats and Protect the Territorial Integrity of Ukraine,'"* of 13.04.2014 and CMU Decree *"On Approval of the List of Settlements on the Territory of the Anti-Terrorist Operation, and Repeal of Several CMU Decrees"* of 02.12.2015. Thus, in support of its position on compensation for the plaintiff, the Donetsk Oblast appellate court noted in its judgment on case **№ 265/6582/16-ц**:

"Aside from this, the fact of terrorist activity (shelling) in the territory of Vostochnyi neighborhood of Mariupol on January 24, 2015, as a result of which several people died and several houses, buildings, and transportation were destroyed, is well-known, and was well-covered by the media … Decree No. 33/6/a of the First Deputy of the Chair of the Security Service of Ukraine and the Director of the SSU's Anti-Terrorist Center "On Defining the Area of the Anti-Terrorist Operation and Its Duration" of 7.10.2014 defined the territory and time in which the ATO took place, including Donetsk Oblast, and the city of Mariupol from April 7, 2014. Currently, a decision on the conclusion of the ATO in Donetsk Oblast has not been adopted"[14]

In its decision on case **№ 423/450/16-ц** the appeal court also noted that the ATO in Donetsk and Luhansk oblasts was a well-known circumstance, not requiring evidence:

13 This reasoning regarding the applicability of similar laws can be seen in judgments of both district and appellate courts in many compensation cases, for example, № 243/11658/15-ц, 243/3867/16-ц, 757/43306/16-ц..

14 Judgment of the Donetsk Oblast appellate court, Case No. 265/6582/16-ц, 16.08.2017, http://www.reyestr.court.gov.ua/Review/68396251.

"CMU Decree "On Approval of the List of Settlements on the Territory of the Anti-Terrorist Operation, and Repeal of Several CMU Decrees" of 02.12.2015 includes Popasnyanskii district in Popasnaya, Luhansk oblast, where the Applicant's home was located, as one of the areas where the ATO was conducted. It is well-known that during the ATO in Donetsk and Luhansk oblasts a lot of housing and infrastructure was damaged or destroyed.»[15]

True, the recognition of such well-known circumstances and of those, which are not required to be proven, do not change the need for applicants to document the fact of damage or destruction to their property is a direct result of terrorist activitiy. In some judgments, courts have noted the lack of proof that damage was caused during the ATO. The Supreme Court also reached this conclusion in case **№ 243/8302/16-ц**[16].

State Responsibility for Compensation for Damage.

Domestic courts do not always hold the government responsible for compensation to victims for damage from shelling. However, it`s possible to detect a common legal stance in the judgments that have been adopted by courts of first instance and courts of appeal on this issue since 2016. National courts have referred to ECtHR precedents on the State's responsibility for the fate of people located in its jurisdiction:

"Under Art. 17 of the Law of Ukraine No. 477-IV "On the Execution of Judgments and Application of European Court of Human Rights Practice" of 23.02.2006, courts treat the ECHR and ECtHR precedent as a source of law. Under CPU Art. 8(9), it is prohibited to refuse to review cases on the basis of the grounds of the absence, insufficiency, or vagueness of the legislation regulating this issue. In Ayder and Others v. Turkey, the ECtHR noted that "State liability is of an absolute, objective nature, based on the theory of 'social risk.' Thus, the administration may indemnify people who have suffered damage from acts committed by unknown or terrorist authors when the State may be said to have failed in its duty to maintain public order and safety, or in its duty to safeguard individual life and property." (para. 71). Thus, in the ECtHR's opinion, the absence of objective and independent inquiry into cases of damage is a stand-alone ground of accountability for acts of State agencies and officials. In Catan and Others v. the Republic of Moldova and Russia, the ECtHR

15 Judgment of the Luhansk appellate court, Case No. № 423/450/16-ц, 29.11.2018, http://www.reyestr.court.gov.ua/Review/78311121.

16 See, e.g., the judgment of the Donetsk Oblast appellate court, Case No. 243/8302/16-ц, 23.05.2017, or the judgment of the Kyiv City appellate court, Case No. 757/61954/16-ц, 13.12.2017.

noted that although Moldova did not have effective control over the "MRT" in Transdniestria, "the fact that the region is recognized under public international law as part of Moldova's territory gives rise to an obligation, under Article 1 of the Convention, to use all legal and diplomatic means available to it to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention to those living there." (para. 110). In such a way, the legal position of the ECtHR confirms the absolute responsibility of the State and the duty to guarantee law and order in society and to ensure the safety of individuals and property within its jurisdiction. Accordingly, the violation of public peace and order and the creation of a threat to people's safety is for the state a standalone ground for responsibility for the harm suffered. Moreover, the cause of harm could be not only terrorist activity, but also other circumstances such as riots and civil unrest. This, for a State duty to provide compensation to arise, it is not important whether the violence was carried out by State officials, terrorists, or unidentified persons. It should be noted that currently Ukraine has not derogated from the obligations in Article 1 of the Protocol in certain regions of Donetsk and Luhansk Oblasts in accordance with Article 15 of the Convention."[17]

Statement on Criminal Violations under Art. 258 of the Crimical Code of Ukraine (Terrorist Activities)

In the first cases on compensation for damage caused by terrorist activity, plaintiffs argued that the acts were crimes against them and their property under the second part of *CrCU* Article 194. Information on the entering of statements of criminal violations under this article in the SRPI was provided as evidence. However, as a result, courts refused some claims, relying on the necessity of establishing who was responsible for causing the damage and the existence of a guilty verdict against them. In all subsequent cases, the strategy of plaintiffs changed, since it was damage incurred during the ATO. Exactly because of this, by the time of court cases on recovery for pecuniary damage, applicants had appealed to law enforcement (police or SSU) with claims of criminal violations according to the third part of *CrCU* Article 258 (Terrorist Activity). Individuals lodged these claims in the place of current residence or, if filing immediately after the damage took place, in the place where the damaged property is located. After entering information on the crime in the SRPI, victims received an excerpt from the criminal proceedings and gave it to the court with the complaint. The appropriateness of such strategies was confirmed by domestic court judgments in all the analyzed cases, since applicants had

17 Judgment of the Donetsk Oblast appellate court, Case No. 243/11658/15-ц, 11.10.2017. However, this reasoning is in other judgments of national courts in compensation cases.

already raised the issue on compensation for harm from terrorist acts as provided by Article 19 of the Law of Ukraine *"On Counter-Terrorism".* (for more details on the basis for compensation for pecuniary damage, see Para. 3.3)[18].

3.2. Applicable Respondents

It is interesting that one of the first court cases on compensation for damage resulting from events in Eastern Ukraine was decided as part of administrative proceedings and not as a civil claim. In case **№ 800/570/14**, the applicant asked for the Decree No. 405/2014 *"On the Decision of the National Security and Defense Council of Ukraine 'On Emergency Measures to Counter Terrorism Threats and Protect the Territorial Integrity of Ukraine' of 13 April 2014"* to be found illegal and voided. It also asked for the activities of the President of Ukraine, as guarantor of the Constitution of Ukraine, chairman of the NSDC, and Commander in Chief of the Armed Forces of Ukraine, to be found illegal as regarding the Applicant and the violation of his right to property, life, and security, due to the use of heavy artillery, which was responsible for the damage to the applicant's home. In its decision, the Higher Administrative Court of Ukraine noted that the claim of establishment of fact of participation of specific individuals in the commission of illegal activities is not within the jurisdiction of administrative courts, and should be reviewed in criminal or civil proceedings[19]. Afterwards, applicants initiated civil proceedings.

The attribution of proper defendants in cases of compensation for harm from terrorist activity was one of the basic questions before national courts in the beginning. It should be noted that in many cases, the incorrect determination of the defendant probably precluded satisfaction of the claim. For example, in case **№ 757/24720/15-ц**, where the defendants were the Anti-Terrorist Center of the SSU, the NSDC, and the State Treasury Service, the Pechersk District Court in Kyiv rejected the suit, as the applicants had not documented the illegality of the defendant's actions in their case. In addition, the court noted that one of the defendants (the NSDC apparatus) is a government body, which currently performs the research-and-analytical and organizational support for activities of the NSDC and is not registered in the Unified State Registry of Legal Entities and Individual Entrepreneurs[20]. Because of this, in its interim order of 06.07.2016, the court concluded that they did not belong among the defendants in this case[21].

18 See, e.g., the judgment in cases № 242/1618/17 and № 423/450/16-ц

19 Interim Order in case No. 800/570/14, Superior Administrative Court of Ukraine, 02.01.2015, http://www.reyestr.court.gov.ua/Review/42278799

20 Judgment of the Pechersk District Court in Kyiv, Case No. 757/24720/15-ц, 10.03.2016, http://www.reyestr.court.gov.ua/Review/56874731

21 This decree is not in the Uniform State Registry of Court Decisions, however, its existence is noted in the interim order of the Perchesk District Court in Kyiv, 22.02.2018, http://www.reyestr.court.gov.ua/Review/72375968

Nonetheless, in many of the following cases, applicants continued to raise the issue of joining the SSU Anti-Terrorist Center as defendants. In some decisions, the prime role of the Anti-Terrorist Center in the ATO was noted. In this vein, in its decision in case **№ 757/43306/16-ц,** the Pechersk District Court in Kyiv noted:

"Regulation of the Anti-Terrorist Center and its coordination group by regional departments of the SSU was approved in Decree of the President of Ukraine No. 379/99 of 14.04.1999. Under para. 1 of this Regulation, the Anti-Terrorist Center (hereafter "the Center") is a standing body of the SSU implementing the coordination of the SSU's counter-terrorism efforts, including prevention of terrorist attacks against government officials, critical infrastructure, and other high risk targets, as well as acts that threaten the lives and health of the public. Part 3 of the Regulation provides that the basic issues of the Center are organization and implementation of anti-terrorist operations and coordination of counter-terrorism agencies… Part 21 of the Regulation notes that the Center is financed at the expense of a separate entry in the State budget of Ukraine. The Center is an independent legal entity with an account in the State Treasury of Ukraine; letterhead, seals, and stamps with its name, as well as the State Emblem of Ukraine. The Center also leads anti-terrorist operations in Ukraine."[22]

However, in the majority of cases, national courts say the SSU's Anti-Terrorist Center is not an independent state authority, so they cannot be a proper defendant:

"Under Article 4 of the Law of Ukraine 638-IV "On Counter-Terrorism" of 20.03.2003, the Cabinet of Ministers of Ukraine oversees the counter-terrorism organization in Ukraine and provides it with the necessary means and resources. The remaining counter-terrorism agencies, which are noted in Article 4 of "On Counter-Terrorism", including the SSU, are only entities, which are indirectly carry out counter-terrorist operations within their competency."[23]

Regarding the determination of proper defendants, the courts' conclusions in similar cases had already been taken into account in many of the subsequent claims, and lawsuits that had already been brought against the government of Ukraine, specifically the Cabinet of Ministers of Ukraine and the State Treasury Service of Ukraine. Allowing claims against the CMU, domestic courts start

22 Perchesk District Court in Kyiv Judgment in Case No. 757/43306/16-ц, 27.01.2017 http://www.reyestr.court.gov.ua/Review/64359992

23 Donetsk Oblast Appellate Court Judgment in Case № 243/11658/15-ц, 11.10.2017, http://www.reyestr.court.gov.ua/Review/69498996

with the systemic links between *CPCU* Article 48 regarding the State as a party in civil proceedings (Article 30 in a previous edition of the *CPCU*) and Article 4 of the Law of Ukraine *"On Counter-Terrorism"* (jurisdiction of the CMU to address counter-terrorism in Ukraine and provide the necessary means and resources):

"The mechanism of State` representation is determined by its internal structure: the state has civil rights and responsibilities in civil relations, and authorized individuals represent the State's (public) interest. As a party in a civil case, the State has civil procedural rights and duties, while the state bodies (state organizations, public officials to whom the State delegates its rights and obligations) represent the State in courts and participate directly in such relations.... Taking into account the authorities of the Cabinet of Ministers in the sphere of counter-terrorism (organizing counter-terrorist activity, providing the necessary means and resources), the court considers that the Cabinet of Ministers of Ukraine is a proper representative of the government in this case."[24]

According to the State Treasury of Ukraine, the basis for its involvement is its authority to pay plaintiffs on the ground of a court judgment against the government under Article 25, and its operation of the state budget under Article 43 of the *Budget Code of Ukraine.* Thus, in its judgment in case **№ 243/3867/16-ц**, the Sloviansk City Court in Donetsk Oblast noted:

"In cases on compensation for damage in which the government is a defendant, representatives of the State Treasury Service of Ukraine should appear on behalf of the government. This legal position was laid out exactly in part 28 of the Plenum of the Higher Specialized Court of Ukraine's decree No. 6, "Review of Court Practice on Appeals against Decisions, Acts or Omissions of State Agents or Other Official Persons of the State Enforcement Service Executing Court Decisions in Civil Cases" decided 07.02.2014."[25]

3.3. Grounds for pecuniary and non-pecuniary danage and assessment of the scope of damage

In this context, the pivotal question before Ukrainian courts was the application of *CCU* Articles 1166 and 1177, as well as Article

24 Judgment of the Druzhkivsky District Court in Donetsk Oblast, Case No. 229/3692/16-ц, 23.05.2017, http://www.reyestr.court.gov.ua/Review/66641122

25 Judgment of the Sloviansk district Court in Donetsk Oblast, № 243/3867/16-ц, 21.10.2016, http://www.reyestr.court.gov.ua/Review/62238676

19 of the Law *"On Counter-Terrorism"* as general and specialized grounds for compensation for the applicants' damage. In addition, despite the fact that the provisions of *CCU* Article 1177 provide for compensation for harm resulting from criminal activity, the classification of those acts in relation to the applicants' property became the subject of judicial review.

Before March 2016, applicants' claims for compensation for their property were rejected by courts. For example, in case № **243/9783/15-ц**, the court dismissed the case because the Applicant gave *CCU* Articles 1166 and 1177 as the grounds for the complaint. The court of first instance based its decision to dismiss the claim on the fact that under the first and second parts of *CCU* Article 1166, the person who caused the property damage through wrongful decisions, acts or omissions is responsible for the full amount of compensation for that damage. However, the duty to establish that the defendant caused this damage and its amount lies on the plaintiff. As the court noted in its decision, the applicant did not establish that the damage was caused by one of the defendants in the case—SSU and CMU. In addition, applying *CCU* Article 1177, under which the government provides compensation for property damage if the individual who committed the crime is not established, the court noted:

"An analysis of the regulations of CCU Art. 1177 permits the conclusion that there are several parts for the application of these regulations. These components are available for criminal offenses, causation of harm, and that the criminal offense is the direct cause of the harm caused. The circumstances of the case and the evidence provided by the parties do not permit the conclusion that the harm experienced by the applicant, resulting in the damage of two apartments, was caused directly by the criminal activitiy, since as the applicant herself notes, no procedural finding of a criminal proceeding under CrPU Article 194, part 2 (intentional destruction or damage of property) was adopted by a pre-trial investigation or court. Because of this, the court concluded there were no grounds for recovery for the property damage from defendants under CCU Article 1177, since a necessary condition of that article is the existence of a final and binding decision in either a criminal or administrative case. This reasoning is laid out in the Supreme Court of Ukraine's decision in case No. 6-1268цс15 of 1 September 205, which is binding on courts under Article 360-7 of the CPU."[26]

The court noted that CCU Article 1177 does not create directly applicable norms regulating the relationship between damage

26 Judgment of the Sloviansk district Court in Donetsk Oblast, Case No. 243/9783/15-ц, 21.12.2015, http://www.reyestr.court.gov.ua/Review/54904144

resulting from criminal activity, and the corresponding conditions and procedure that should be governed by the special law. Before the adoption of such a law, government compensation for harm in accordance with *CCU* Art. 1177 on the grounds of general rules cannot be implemented.

As seen in this case, the court of first instance relied not only on *CCU* Articles 1166 and 1177 and the absence of any procedural finding in a criminal investigation, but also on the legal reasoning of the Supreme Court of Ukraine on the necessity of such a determination in a criminal case. In addition, under the eighth part of *CrCU* Art. 194, the plaintiff's allegation of wrongdoing plays a defining role in this, although in practice it was about damage resulting from another crime—terrorist activity—as provided for by *CrCU* Article 258. In the case of harm from this type of crime, special grounds for compensation were provided in Article 19 of the Law of Ukraine *"On Counter-Terrorism".* In other compensation cases, domestic courts analyzed the provisions of this law, the *CCU* and *CCPU*, considering the existence of a claim of criminal activity under *CrCU* Article 258. In addition, afterwards courts noted that under the Law of Ukraine *"On Counter-Terrorism",* the determination of individuals who committed terrorist acts or carried out terrorist activities, and the existence thereon of a guilty verdict, is not a condition for compensation for damage. Consequently, this duty attaches to the government regardless of guilt, and the right to claim re-payment from the responsible person transfers to the government[27]. This reasoning of Ukrainian courts already can be called established, despite the outcome of the proceedings for the parties in the case.

At the same time, in several judgments, appellate courts paid attention to the disregard by courts of first instance to the requirements of para 2 of the sixth part of *CPCU* Article 130 (in a previous edition of the Law). They particularly noted:

"The duty to compensate for damage falls on the government regardless of its guilt, and afterwards the government has the right to seek re-payment from the guilty party. In connection with and pursuant to the requirements of para. 2 of the sixth part of CPU Article. 130, the court of first instance was bound to consider the issue of joining individuals, to whom the State in the cases of PERSON_3 and PERSON_4 may present a subrogation claim for damages in the future. These circumstances are well-known (part 2 of CPCU Art. 61) and stem from national and international acts aggression against Ukraine. With that in mind, as the court held, the shelling that damaged the plaintiff's house was conducted from the non-government-controlled areas of Ukraine, namely from areas controlled by terrorists. With that, the court of first instance did not

27 See, e.g., the judgments of the district and appellate courts in Case No. № 243/11658/15-ц or № 242/1618/17.

abide by the requirements of these laws, and the appellate court is not empowered to address this issue on appeal."[28]

The reasoning of the appellate court is very interesting, since it appears the court noted the necessity of compliance with the requirements of the procedural law on joining necessity parties as a prerequisite for a decision on compensation for harm, since the government may have the right to seek repayment from the terrorists or parties who caused the harm in the future. At the same time, this legal ground is problematic, considering the high probabilitiy that the person involved in terrorist activity in the non-government controlled areas of Ukraine will not be determined, as well as the previously discussed position of courts on the duty of the government to pay for damage caused by terrorist activities, regardless of fault.

> *Another subject of judicial review in compensation cases was the CMU's position on the absence of designated government means for compensation for victims.*

In reviewing this issue, Ukrainian courts have noted the government's duty to take certain actions relating to compensation. The first is the provisions of *CCPU* Art. 86, which establish the rights of victims and the duties of local authorities to provide them with housing, to repair damaged housing, or pay financial compensation. In addition, courts drew attention to the fact that certain acts already identified measuresrequired to implement the relevant provisions of Ukrainian legislation. However, during the court proceedings, none of these measures were taken. Thus, in case **№ 242/1618/17**, the Selidivskii District Court of Donetsk Oblast drew attention to the following:

"CMU Decree No. 1002-p of 16.10.2014 established the plan of measures on organizing repairs of damaged or destroyed housing and infrastructure in Donetsk and Luhansk Oblasts. according to which the Ministry of Regional Development, Construction, and Communal Services of Ukraine, the Ministry of Social Policy, the Ministry of Economic Development of Trade, the Ministry of Justice, and Ministry of Finace of Ukraine are obligated to introduce to the Cabinet of Ministers of Ukraine a draft procedure for the provision of financial assistance and compensation for damage to persons affected by the ATO in Donetsk and Luhansk Oblasts by October 2014. However, no such act has been adopted at this time. Under this same plan, these Ministries were also obligated to draft and submit to the CMU draft

28 Judgment of the Kyiv City appellate court, Case No. 757/61954/16-ц, 13.12.2017, http://www.reyestr.court.gov.ua/Review/71014482

regulation on State financing of priority repairs to social facilities, transportation infrastructure, residences, and vital social systems in Donetsk and Luhansk Oblasts."[29]

Separately, the courts did not adopt the defendants' arguments on the absence of a dedicated national budget item to compensatethe damage to citizens. Giving its reasoning on this issue, national courts referred to the ECtHR's judgment in Kechko v. Ukraine of 08.11.2005, according to which state authorities cannot refer to a lack of funds as a reason for not honouring its obligations.

It follows that for now Ukrainian courts are expressing a unanimous view: the implementation of rights, that are connected with budgetary costs and are based on specific laws and regulations valid at the time of the dispute, cannot be made dependant on budget allocations.[30]

Addressing the issue of the scope of damage, courts review the circumstances of each case and refer mainly to the mechanism established in the tenth part of *CCPU* Article 86, under which the extent of financial compensation for damaged or destroyed housing is determined by indirect indicators of the value of housing in that area. As previously noted, these indicators are established quarterly by the Ministry of Regional Development, Construction, and Communal Services of Ukraine. In their decisions, national courts have noted the absence of a procedure to determine the amount of compensation for damage resulting from terrorist acts. Simultaneously, to resolve disputes, courts use analogous laws, noting that *CCPU* Art. 86 should be applied in compensation-related disputes. This is consistent with Art. 19 of the Law *"On Counter-Terrorism"*.

Plaintiffs have also tried to use other means to determine the scope of damage. For example, if the inspection report states that the house was a certain percent destroyed and may be fit for habitation after repairs, the amount of compensation was determined by independent assessment, based on the cost of repairs as of the date of the report.[31] However, the Supreme Court has ruled that this mechanism of determining the scope of damage is not permitted, since it is not in accordance with the provisions of the *CCPU*[32].

29 Judgment of the Selidivskyy District Court in Donetsk Oblast, Case No. 242/1618/17, 18.10.2017, http://www.reyestr.court.gov.ua/Review/69630664

30 This reasoning appears in many judgments on compensation for harm from terrorist acts, regardless of the verdict in the case. See, e.g., the judgments in cases №№ 243/11658/15-ц, 757/61954/16-ц, 265/6582/16-ц, 757/43306/16-ц, 423/450/16-ц, and 242/1618/17.

31 Judgment of the Dobropilskyy District Court in Donetsk oblast, Case № 227/6023/15-ц, 01.03.2016, http://reyestr.court.gov.ua/Review/56795467

32 Judgment of the Supreme Court, Case № 227/6023/15-ц, 25.04.2018, http://reyestr.court.gov.ua/Review/74021731.

The court may also question the reliability and admissibility of inspection reports. For example, in case **№ 242/4413/16-ц**, the court did not consider the documents presented by the plaintiff admissible. In its decision rejecting the appeal, the appellate court noted:

"The trial court correctly noted that it is not admissible evidence of the fact of the destruction of the plaintiff's house and the conclusion of its partial unfitness for use, since it was done without taking into account the uncompleted construction in photos provided by the applicant and which do not contain any evidence on the existence of unfinished contruction (materials) on the plaintiff's land … The trial court clarified the right to request for an expert to be assigned to determine the extent of the property damage, particularly to report on the issue of the actual damages. However, the parties' representatives refused this expertise at trial."[33]

Another option is an expert forensic investigation of the damaged property and its surroundings, leading to an expert conclusion on the extent of damage and cost of repairs.

Compensation for non-pecuniary damage is more rarely considered in compensation cases. However, there are some court judgments, in which plaintiffs raised such issues. In satisfying compensation claims for non-pecuniary harm, courts are guided by the circumstances of the case and Decree No. 4 of the Plenum of the Supreme Court of Ukraine *"On Court Practice in Cases on Compensation for Non-Pecuniary Harm",* which includes pain and suffering. Nonetheless, in its judgment in case **№ 757/61954/16-ц** the Perchersk District Court in Kyiv noted:

"Under part 3 of the Decree of the Plenum of the Supreme Court of Ukraine No. 4 "On Court Practice in Cases on Compensation for Non-Pecuniary (Non-Material Harm)" of 31.03.1995, it should be understood that losses of non-monetary character due to mental or physical suffering or other negative developments, sustained by physical or legal entities by the illegal acts or omissions of others. As established, due to the damage of PERSON_17's apartment during the ATO in the village of Pisky, they were left homeless and forced to drastically change their way of life and place of residence. The family was also forced to move from its home to rented housing in a strange city. Currently the plaintiffs are homeless and not in a condition to make money for new housing. These circumstances cause the plaintiffs to be in a state of constant stress and anxiety. In addition,

33 Judgment of the Donetsk Oblast appellate court, Case № 242/4413/16-ц, 29.05.2018, http://www.reyestr.court.gov.ua/Review/74424208

in testifying, PERSON_17 noted that the circumstances in which they were left were not their fault or within their control, and worsened their mental condition. They feel resigned and at the mercy of these unjust conditions and the detachedness of the government from the social problems of its citizens, particularly the latter's failure to take responsibility for its failure to provide security and protections to people and their property … Pain and suffering is never repaid in full, as there is no and no possible accurate measurement of the material amount of mental suffering, tranquility, reputation, and personal dignity. Any compensation for non-pecuniary damage cannot be compared to the real amount of harm, since any measurement of it could be conditional, not the least if this compensation concerns a legal entity … Consering this, the court concluded that PERSON_17 suffered individual and excessive burdens and this violated the fair balance, which should be maintained between the requirements of the public interest and the need to protect the right to respect for property. There is no doubt the plaintiffs suffered a psychological loss and anguish: cumulatively there was an injury to their honor and dignity as residents of certain regions of Ukraine, emotional distress in connection with the violation of their right to property and the violation of their normal way of life and contacts with due to their forced displacement, and the weight of the forced changes to their life, could not but have the effect of worsening their health"[34]

In another case, the appellate court further elaborated on compensation for non-pecuniary damage from terrorist activities, based upon this Decree as well as a review of the provisions of the *CCU*, the Law of Ukraine *"On Counter-Terrorism"* and several ECtHR decisions:

"Under the first part of CCU Art. 23, an individual has the right to compensation for psychological suffering, resulting from the violations of his rights. Under parts 2 and 3 of the second part of this article, psychological harm includes distress experienced as a result of misconduct against himself, a family member of loved one and distress as a result of the destruction of damage of property, among others. In accordance with Art. 19 of the Law "On Counter-Terrorism," compensation for damage from terrorist acts is paid out of the State Budget in accordance with the relevant laws, with later recovery from the responsible individuals. The duty to provide compensation falls on the government regardless of fault, and the government receives the right to seek repayment from the responsible individuals. This corresponds with the CCU, particularly point 3 of the second part of Art. 1167 (recognizing the existence of Art. 19 of the Law "On

34 Judgment of the Pechersk District Court in Kyiv, Case № 757/61954/16-ц, 14.06.2017, http://www.reyestr.court.gov.ua/Review/67270582

Counter-Terrorism") … The fact of the existence of plaintiff's distress, which she suffered in connection with misconduct (artillery shelling of Popasna city on 03.10.2014) against herself (complete destruction of house, damage to health) is confirmed by the materials of the case. Given these circumstances, the fact that the plaintiff suffered psychological harm owing to the destruction of her house and injuries to her health is not disputed by the parties to the case … in para. 82 of the ECtHR's judgment in Rysovskyy v. Ukraine, it noted that Art. 13 of the Convention guarantees the availability of effective remedies at the national level for providing compliance with the rights and freedoms of the Convention, in whatever form provided by national legislation. An individual should be able to use effective remedies that would prevent future or repeated violations or provide the plaintiff with compensation. In these circumstances, the panel of judges of the appellate court conclude, that the absence at the national level of effective remedies for ensuring compliance with the essence of the rights of the Convention does not prevent the implementation of the applicant's rights and freedoms. In other words, the absence of the corresponding procedural law cannot be an obstacle to the protection of the plaintiff's rights to receive compensation for psychological harm from the government under Art. 19 of the Law "On Counter-Terrorism."[35]

3.4. Statute of Limitations

In accordance with the *CCU*, the limitation period can be general or specific. If it is the latter, it can be established by law for certain types of cases. The *CCU*, the *CCPU*, and the Law of Ukraine *"On Counter-Terrorism"* do not establish a specific statute of limitations for compensation cases. In such cases, the general limitation period of **three years**, as defined in *CCU* Art. 257, is applied. Currently, there is no decision refusing a case on in compensation cases due to expiration of or petition on the limitation period. However, this issue could arise in the future.

Under *CCU* Art. 253, the period begins the day after the calendar date of the event in question. Under the first part of *CCU* Art. 261, the limitation period begins from the day that the plaintiff learns or could have learned of a violation of their rights or of the person who violated them. In compensation cases, this period could begin:

- From the day after the day the property was damaged or destroyed (for example, after shelling, if the individual resides in the home and is a witness to the events);

35 Judgment of the Luhansk appellate court, Case № 423/450/16-ц, 29.11.2018, http://www.reyestr.court.gov.ua/Review/78311121

- From the day, the plaintiff learns or could have learned that the property has been damaged or destroyed. This could be particularly appropriate for people who left their place of residence before the harm occurred, notwithstanding that they could receive this information from relatives, neighbors, acquaintances or social media;
- From the day that the individual accused of the criminal offense under *CrCU* Art. 258 was identified. In this case, compensation would be carried out under various *CCU* provisions and per a guilty verdict against this person.

However, one of the main problems for lawsuits regarding the compensation for damage caused by a terrorist act that may arise is the omission of limitation periods. In this case, the following options are possible:

1. A petition for the court to reset an expired limitation period because of a reasonable excuse; or
2. A petition for the court to freeze the limitation period based on force majeure.

These options are mutually exclusive, so potential plaintiffs must choose one to use. In cases of resetting an expired limitation period, it is important to determine the validity of the reason why the plaintiff missed the deadline to submit their claim. If an event beyond force majeure is claimed, it is necessary to prove the circumstances in question were beyond the plaintiff's control.

If the limitation period expired due to extraordinary circumstances, then the plaintiff has the right to reset the limitation period. To determine if the reasons are extraordinary/extenous, one can look to analogous law, such as Decree No. 10 of the Plenum of the Higher Economic Court *"On Various Issues of Application fo the Limitation Period in Economic Disputes"*. Paragraph 2.2. of this decree states:

"The issue of the importance of these grounds and whether there were circumstances, objectively not the fault of the plaintiff, that made impossible or significantly prevented the timely filing of the claim, is decided by the economic court, taking into account the available data on the circumstances in each case. In connection with individual persons (citizens), such circumstances could be serious illness or prolonged stay outside the place of residence (for example, abroad), etc."[36]

Accordingly, plaintiffs have the option to refer to their forced move from the permanent place of residence and internal displacement

36 Decree № 10 of the Plenum of the Higher Economic Court of Ukraine, "On Various Issues of Application fo the Limitation Period in Economic Disputes", 29.05.2013, https://zakon.rada.gov.ua/laws/show/v0010600-13

when proving extunating circumstances. CCU Art. 263 states that the limitation period is suspended, if emergency or unpreventable events (extenuating circumstances) prevented the filing of a claim. The only definition of extenuating circumstances at the present is in the eighth part of Art. 14-1 of the Law of Ukraine No. 671/97-BP *"On Chambers of Commerce and Industry"*. This law states that emergencies and unpreventable events, that objectively meant obligations provided by contract or duties set in legislation could not be fulfilled, are extenuating circumstances (force majeure). Some such circumstances are: threat of war or armed conflict, including but not limited to hostilities, blocades, arms embargoes, military mobilization, military activities, declaration or non-declaration of war, acts of terrorism, sabotage, piracy, disruptions of public order, invasions, revolution, insurrection, insurgency, and others. Under point 24 of the first part of *CCPU* Art. 1, an emergency is a disturbance, which is characterized by violation of the normal living conditions in an area and in which there is use of weapons or other dangerous events that led (or may lead to) threats to the life or health of residents, death and injury of a large number of people, and significant damage, and that make continued residence there impossible. Under para 4 of the eighth part of *CCPU* Art. 5, military situations are also emergency situations. Therefore, the ATO/JFO as well as other circumstances such as the threat of war, military activities, and acts of terrorism are extenuating circumstances within the meaning of *CCU* Art. 263, and therefore halt the limitation period. Based on the eighth part of this article, if these circumstances arise, the limitation period should be stopped for the entire duration of these circumstances.

3.5. Payment of Legal Fees

Under the eighth part of Art. 4 of the Law *"On Court Fees"*, plaintiffs usually must pay court fees equaling 1% of the damages sought in the complaint[37]. With regard to compensation cases, plaintiffs that are recognized as victims in criminal proceedings under *CrCU* Art. 258 are relieved from paying court fees under para. 6 of the first part of *CrCU* Art. 5.

However, in some compensation cases, courts have returned claims to plaintiffs in connection with the non-payment of court fees, claiming that this basis for relief requires a court decree recognizing the plaintiff as a victim in a criminal proceeding:

37 The amount of court fees is sometimes calculated with reference to the subsistence level. The subsistence level is calculated yearly by the Law of Ukraine on the State Budget for that year. The amount of the subsistence level changes three times a year. For example: UAH 2027 from 01.01.2019 to 30.06.2019; UAH 2118 from 01.07.2019 to 30.11.2019 and UAH 2218 since 01.12.2019.

"In accordance with part 6 of the first part of Art. 5 of the Law of Ukraine "On Court Fees," applicants in criminal cases on compensation for pecuniary damage are relieved from payment of court fees for review of the case at all levels. The provided record of criminal proceeding No. 22017050000000274 only confirms the registration of the statement in the SRPI. The fact of the commission of a crime may be established only by a court verdict, in which the individual who suffered the damage was recognized as a victim. However, the plaintiff did not provide admissible evidence supporting this fact, namely a verdict. Accordingly, PERSON_1's petition for relief from payment of court fees for his appeal based on part 6 of the first part of Art. 5 of the Law "On Court Fees" should be rejected."[38]

However, in other judgments in compensation cases, including those that were rejected, courts do not require applicants to provide additional confirmation of their status as a victim of terrorist activitiy, considering the established position of courts that it is government's duty to compensate for damage from criminal offenses, regardless of fault.

3.6. Evidence of Damage/Destruction of Property; Casual Relationship between the Damaged/Destroyed Property and Terrorist Acts, the ATO/JFO, and the Armed Conflict

Under the eighth part of *CCPU* Art. 81 (Art. 60 in a previous edition), each party must prove the circumstances it alleges in their pleadings. In compensation cases, the burden of proof lies on the plaintiff. However, it might be difficult for some plaintiffs to gather the necessary evidence given the ongoing emergency circumstances in Eastern Ukraine. This could lead to a violation of the right to fair trial due to the inequality between parties, since individual plaintiffs have less opportunities to prove their case, as they are not always have the opportunity to gather the necessary documents on the damage to their property.

In the previously discussed case **№ 265/6582/16-ц**, the trial and appellate courts, deciding in favor of the plaintiff, relied on the documents provided, particularly the record of fire establishing the destruction of the property as a result of bombing or artillery shelling, forensic evaluation and appraisal of the damage, as well as the existence of a criminal proceedings in connecting with the shelling of Vostochnyy district on 24.01.2015 in Mariupol. In another case, **№ 242/1618/17**, the trial and appellate courts also considered the record of fire that established the source of the

38 Interim Order of the Kyiv appellate court, Case № 757/52913/17-ц, 05.04.2018, http://reyestr.court.gov.ua/Review/73195446; see also Interim Order of the Donetsk Oblast appellate court, Case № 243/10233/15-ц, 02.12.2015, http://www.reyestr.court.gov.ua/Review/53952989.

fire was artillery shelling in Avdiivka on 17.07.2016, as well as the certificate that the house was unfit for use from the Avdiivka CMA working group on reconstruction issues in Donetsk oblast.

At the same time, even the existence of the necessary documents does not always lead to judgments for plaintiffs. Courts can also focus on the quality of documents. Thus, in case № 757/61954/16-ц, the Kyiv appellate court overturned the trial court's judgment, on the ground that the inspection report was prepared by the plaintiffs themselves. The court concluded that the evidence provided by the applicants did not show the causal relationship between the ATO and the damage sustained:

"In support of the fact of the damage to their property as a result of the ATO, the plaintiff and third party PERSON_4 provided the certificate by the Executive Committee of the Pisky Village Council No. ДЗЖ-128 OF 09.09.2015; certificate of the chair of the Yasinuvatsky regional administration No. 976 of 16.08.2016; un-numbered certificate of 09.09.2016, prepared by the plaintiffs themselves with the participation of former resident of Pisky - PERSON_18; photographs; report of the property damage by PERSON_17 of 28.10.2016. They referred to evidence given to them as part of their interrogation as witnesses, PERSON_19 and PERSON_20, which vouches they were plaintiffs' neighbors, as well as were questioned as witnesses. The evidence provided does not give grounds for an unquestioned conclusion that the damage sustained to the plaintiff's property was a direct result of the ATO. The value of damages, noted in the certificate and report of the property damage was issued without taking into account this property by the people who created it. The act of 09.09.2016 was created by the plaintiffs, who are interested parties. The photographs do not have a link to the address of the plaintiff's property under the right of joint tenancy. In addition, they noted that all their property was in the apartment, and the rooms in the photographs are empty. Thus, they did not confirm the fact of a direct causal relationship between the acts of defendants and the harm incurred."[39]

A similar situation occurred in case **№ 243/8302/16-ц**, as the demining certificate and inspection report of a building that was damaged during the ATO were found inadmissible by both the trial and appellate court. In its decision, the Donetsk Oblast appellate court noted that both acts did not establish that the destruction of plaintiff's property directly resulted from terrorist activity. The Supreme Court also reached this conclusion. That being said, the well-known circumstances regarding the conduction of the ATO in the city of Sloviansk were considered by the courts.

39 Judgment of the Kyiv appellate court, Case № 757/61954/16-ц, 13.12.2017, http://www.reyestr.court.gov.ua/Review/71014482

The insufficiency of evidence of a direct causal relationship between the damage inflicted and the ATO also was the ground for the rejection of case **№ 646/4340/17**. In its decision, the court noted the following:

"For the above reasons, the court concluded there was no legal basis for satisfying the claim, since the applicant did not provide sufficient evidence that her home at ADDRESS_1, located in Nyzhnya Vilkhova village in Stanytsa-Luhanska rayon in Luhansk Oblast, was damaged, the scope of damage, and the cost of repairs, or prove the existence of a causal relationship between the defendant's actions and the damage sustained by the plaintiff. Thus, there is no basis to conclude that the damage was the direct result of the anti-terrorist operation, terrorist acts or a crime."[40]

Similarly, in case **№ 646/4335/17**, the Kharkiv Oblast appellate court did not find a causal relationship between the destruction of the plaintiff's property and the conduction of the ATO:

"However, in spite of its procedural obligations, the plaintiff did not prove that in this case his house was destroyed as a result of illegal decisions, acts or omissions by State authorities while executing their functions, or that the property damage was caused as a result of terrorist activities or use of force during the anti-terrorist operation … In support of the scope of property damage, the plaintiff provided the court with an appraisal of the scope of damage dated 21.09.2017. According to this document, to establish the cost of repairs to plaintiff's apartment at ADDRESS_1 for damage from shelling, the appraiser examined the report on the technical condition and the technical passport of the building. Based on this, he estimated the cost of repairs at 27,900 UAH, before VAT. However, the appraiser did not immediately investigate the damage apartment, and his account of the scope of damage is based only on the inspection report of 17.06.2016 that does not contain an exact estimate of the damage of room partitions and ceilings. His conclusions are only probable estimates, and are not credible and sufficient to establish the actual scope of damage. The appellate court was also provided with additional evidence that the plaintiff has received partial material assistance for repairs. The panel of judges affirmed the conclusions of the trial court on the absence of proof on the scope of pecuniary damage to the plaintiff. The fact that the city of Toretsk in Donetsk Oblast is located close to the contact line areas in Donetsk Oblast over which the government of Ukraine has lost control due to the armed conflict with participants of so-called "DNR," and that it is within

40 Judgment of the Chervonozavodskyy District Court in Kharkiv, Case № 646/4340/17, 29.09.2017, http://www.reyestr.court.gov.ua/Review/69240596.

reach of artillery fire from the NGCA, are well-known circumstances, not subject to demonstration in accordance with part 3 of CCPU Art. 82 …»[41]

In fact, in making this judgment, the court relied on the Ukrainian government's lack of jurisdiction over the territory that was shelled and in which the plaintiff's property was destroyed:

"From this, the panel considers that the destruction of the plaintiff's residence from artillery shelling from non-controlled territory of the so-called "DNR," and not as a result of the ATO on 11.06.2016, has been proven. The plaintiff received partial assistance from local authorities for repairs. Since the artillery shelling of Toretsk on the night of 11.06.2016 came from non-government-controlled areas and a connection or control of the Government of Ukraine over the forces that used the artillery during the period of shelling was not established, in this case the presumption of jurisdiction of the Government of Ukraine in this territory must be rejected. In such cases, when the State has lost the ability to exercise its authority in part of its territory, its responsibly under the Convetnion on Human Rights and Basic Freedoms of 1950 is limited to fulfillment of positive obligations. These obligations concern measures, necessary to establish control (as an expression its jurisdiction) over the relevant territory, as well as measures to secure respect for the rights of the plaintiff. The first part of these obligations requires the State to assert of establish its sovereignty over the territory and abstain from any actions in support of the separatist regime. According to the second part of obligations, the State should adopt legal, political or administrative measures to secure the rights of applicants (see on this issue §§ 335, 339, 340-345, 346 of the ECtHR judgment in Ilascu and Others vs. Moldova and Russia, no. 48787/99, 08.07.2004). In this context, the panel of judges also noted that the Government of Ukraine, on the day the dispute arose, had already lost control and sovereignty over parts of Donetsk Oblast where the so-called "DNR" was created. It also noted that the damage to plaintiff's property was caused by shelling from the non government-controlled areas on the government-controlled areas was possible only by use of artillery, considering the technical difficulty of their operation and use, requires special military knowledge and skills from the persons using such weapons. This is also not typical for terroist acts.[42]

41 Judgment of the Kharkiv Oblast appellate court, Case № 646/4335/17, 11.07.2018, http://www.reyestr.court.gov.ua/Review/75340146

42 Id.

There are various legal precedents concerning evidence of the relationship between the damage inflicted and the government's activities. In some cases, the courts did not link the existence of a verdict in a criminal case on terrorist activity with the government's duty to provide compensation for damage under Art. 19 of the Law of Ukraine *"On Counter-Terrorism"*, arguing that the government should provide such compensation regardless of fault. However, in other cases, this link played a notable role in evaluating the casual relationship between the damage and the ATO, and was a main ground for rejecting the case. For example, in case **№ 646/5062/17**, the Kharkiv Oblast appellate court said:

"Under para. 3 of the first part of Art. 1 of the Law of Ukraine "On Counter-Terrorism," a terrorist act is a crime through the use of weapons, detonation of explosion, arson, or other acts, the accountability for which is provided by CrCU Art. 258. In the event that terrorist activities are accompanied by criminal acts, as provided by Articles 112, 147, 258-260, 443, 44 and others of the CrCU, liability attaches pursuant to the CrCU. Only on the existence of the following grounds may an individual claim compensation for such harm from the ATO: if an individual's or legal entity's property is damaged by terrorist acts; an individual is convicted for this act; a guilty verdict has entered into force; and the individual or legal entity whose property was damaged is declared a victim in a criminal proceeding. In the absence of even one of these grounds, the individual loses the right to compensation under the procedure established in the Law "On Counter-Terrorism." … The plaintiff and his representative did not provide adequate and admissible evidence that PERSON_3 had filed a statement of a criminal violation on the damage to her home, or evidence that this statement was accepted and registered in the SRPI, in compliance with the law's requirements."[43]

However, these court judgments could have negative consequences for future court practice on this issue, since they effectively determine that investigation reports for houses are not sufficient to prove a causal relationship between the damage/destruction of the house and terrorist activity or the ATO/JFO. In addition, despite the well-known circumstances of the ATO/JFO in Donetsk and Luhansk Oblasts, the courts' decision to require plaintiffs to prove the existence of a link between their property damage and shelling, which has long been considered terrorist activitiy, is incomprehensible. This requirement puts plaintiffs at a procedural disadvantage and reduces their possibility to obtain justice in court.

43 Interim order of the Kharkiv oblast appellate court, Case № 646/5062/17, 09.11.2017, http://www.reyestr.court.gov.ua/Review/70253056.

3.7. RF as a third party and delay of judicial processes

With the adoption of the Law 2268-VIII *"On the Peculiarities of State Policy on Ensuring Ukraine's State Sovereignty over the Temporarily Occupied Territories in Donetsk and Luhansk Oblasts"*, the approach to compensation for damage due to terrorist acts changed. Invoking the fourth part of Art. 2 of the Law, CMU representatives submitted a motion requesting to bring in the RF as a third-party intervenor, since a judgment in the case could affect the rights and obligations of the RF. These applications risk proceedings being discontinued: similar motions were filed and granted in several cases, such as cases **№№ 237/870/18, 237/4806/17** and **237/3961/17**. Below is a quotation from one judgment granting such a request:

"The court, upon hearing the parties and reviewing the materials in the case, considers necessary the petition of the Cabinet of Ministers of Ukraine` representative and PERSON_2 to join the Russian Federation as a third party. The third part of Art. 2 of the Law on Ukraine "On the Peculiarities of State Policy on Ensuring Ukraine's State Sovereignty over the Temporarily Occupied Territories in Donetsk and Luhansk Oblasts" establishes that responsibility for pecuniary and non-pecuniary damage in Ukraine resulting from the armed aggression of the RF falls on the Russian Federation in accordance with the principles and norms of international law … Under part 6 of letter № 24-754 / 0 / 4-13 of the Higher Specialized Court of Ukraine for Civil and Criminal Cases, "On Court Practice in Reviewing Civil Cases with Foreign Components," of 16.05.2013, filing a case against a foreign government and attaching a foreign government as a participant in a case either as a defendant or as a third party, is allowed only with the consent of the competent authorities of the respective government or as provided by international agreements or domestic legislation of Ukraine. Under the first part of Art. 79 of the Law "On Private International Law," filing a case against a foreign government, attaching a foreign government either as a defendant or third party in a case, attaching a foreign government's property located within Ukraine, using such property to secure a claim, and forfeiture of such property is allowed only with the consent of the competent authorities of the relevant government, unless otherwise provided by international agreements or laws of Ukraine. … Taking this into account, the Court considers it necessary to grant the defendant's petition to send a request to the RF and suspend proceedings in the case, since the plaintiff's property is located on the contact line with the parts of Donetsk Oblast occupied by armed groups. Because of this the government of Ukraine, as defendant, may have legal grounds for a dispute on compensation with the Russian Federation."[44]

44 Interim Order of the Marinskyi District Court in Donetsk Oblast, Case № 237/870/18, 21.06.2018, http://www.reyestr.court.gov.ua/Review/75050314

In another case, the court argued a break in review was necessary to clarify whether the competent authorities of the RF consented to participate in the case. In making this decision, the court relied on provisions of the Convention on Legal Aid and Legal relations in Civil, Family, and Criminal Cases of 1993 and the first part of Art. 79 of the Law of Ukraine *"On Private International Law"*:

"Given that, the break in proceedings on this issue is temporary, because there is not a procedural way to join another country that is a Contracting Paryt to a Convention, except a preliminary request for its consent to participate in the case. This effectively prevents further review of the case. The panel of judges therefore approves the court's decision to stop proceedigns before finding out if the competent authorities of the RF consent to participate as a third party in this case."[45]

It should be noted that the existence of decisions granting similar requests leads to delays in review of compensation cases. The competent authorities of the RF have not responded to requests to join the government as a third party in these cases. To do otherwise would imply a de-facto acknowledgement by the RF that it is a party to the conflict, triggering consequences under international law (international law sanctions, fractures in diplomatic relationships, loss of membership in international organizations, etc.).

3.8. Voluntary transfer of damaged/destroyed property to the government

Analyzing court decisions on compensation, the voluntary transfer of damaged/destroyed housing to the government raised several problems before the courts:

- evidence of the existence/absence of refusal;
- understanding of property in this context;
- existence of local CMA's powers to accept property;
- transfer of the property right to the land under the house.

As already noted, the ninth part of *CCPU* Art. 86 makes the voluntary transfer of damaged or destroyed housing to local governments a required condition for financial compensation or housing. However, this mechanism is still not defined at the legislative level. In some cases, domestic courts have mentioned that the defendant (the government of Ukraine) should provide evidence that the plaintiff refused to transfer the damaged property to local administrations.

45 Judgment of the Donetsk appellate court, Case № 237/3961/17, 07.11.2018, http://www.reyestr.court.gov.ua/Review/77743389

For example, in case **№ 757/43306/16-ц**, the Pechersk District Court in Kyiv noted:

"Part 9 of CCPU Art. 86 provides that the supplying of housing for victims or the payment of financial compensation is conditional on the voluntary transfer by victims of the damaged or destroyed housing to local authorities. Defendants have not provided the court with evidence that the plaintiffs refused to transfer their home to local authorities."[46]

However, domestic courts mainly reject claims if the plaintiff did not transfer the rights to the damaged or destroyed property to the local administration. In case **№ 243/3867/16-ц**, the Sloviansk City Court noted that there were no legal grounds for satisfying the complaint, since the plaintiff did not transfer the property to local authorities, and the plaintiff's proposal to transfer the debris did not constitute a voluntary waiver of property rights[47].

In cases **№ 242/519/17** and **№ 242/1618/17**, the Selidivskyi City Court did not link the grounds for compensation under Art. 19 of the Law of Ukraine *"On Counter-Terrorism"* with the condition of voluntary transfer of the damaged housing under *CCPU* Art. 86. The court noted that the CMA did not have the authority to accept such housing from victims. This reasoning bases on provisions of point 39 of the first part of Art. 39 of the Law of Ukraine *"On Civil-Military Administrations"*:

"Under point 39 of the first part of Art. 39 of the Law "On Civil-Military Administrations," civil-military administrations for villages have the power to provide consent to transfers of property from government and communal ownership, as well as to acquistions of government property on the relevant territories. However, Avdiivka CMA has no grounds to accept the housing destroyed in emergencies from the victim. In addition, the court considers that Art. 19 of the Law "On Counter-Terrorism" defines the basis for paying compensation for damage to the plaintiff, and part 10 of Art. 86 of the CCPU establishes the basis for establishing the scope of damage. Given these circumstances, the court concludes that in this case there is no connection between the payment of compensation for damage and the requirement of voluntary transfer of the damaged house."[48]

46 Judgment of the Pechersk District Court in Kyiv, Case № 757/43306/16-ц, 27.01.2017, http://www.reyestr.court.gov.ua/Review/64359992

47 Judgment of the Sloviansk City Court in Donetsk Oblast, Case № 243/3867/16-ц, 21.10.2016, http://www.reyestr.court.gov.ua/Review/62238676.

48 Judgment of the Selidivskyi City Court in Donetsk Oblast, Case № 242/519/17, 27.06.2017, http://www.reyestr.court.gov.ua/Review/67491839; Judgment of the Selidivskyi City Court in Donetsk Oblast, Case № 242/1618/17, 18.10.2017, http://www.reyestr.court.gov.ua/Review/69630664.

It is true that the Selidivskyi City Court's judgment in case **№ 242/519/17** was later overturned by the Donetsk Oblast appellate court. The appellate court abandoned the necessity of compliance with the provisions of the ninth part of *CCPU* Article 86, and noted the lack of the plaintiff's intent to give up his property rights to the damaged property as one of the grounds for cancelling the decision of the trial court[49]. In its judgment on case **№ 243/8302/16-ц**, the Supreme Court effectively closed this issue, noting:

"The cassational complaint's arguments that the norms of the law do not require a decision of the issue of the transfer of compensation in connection with the receipt of compensation before a court judgment, and that it is possible in the future, are ill-founded. An analysis of these norms shows that in making a claim for compensation for destruction of property in the ATO, the owners must first transfer the damaged or destroyed property to local authorities, before the court judgment has been made"[50]

The Supreme Court's reasoning conclusively determines the transfer of property rights to damaged/destroyed property is a necessary condition to receive compensation and will be a particular focus for lower courts in the future.

In addition, another problem could arise, when the plaintiff tries to transfer the property rights, and the local administration does not accept it. This situation arose in case **№ 423/450/16-ц**. On appeal, the Luhansk appellate court focused on the fact that the applicant submitted an application to transfer her destroyed house to the Popasna City Council. However, the Council did not seed the need to accept it without the property rights to the land around the house. Adopting a decision partially satisfying the appeal, the court noted it was unlawful for the city council to require the applicant transfer the plot of land to them, and stated:

"The plaintiff tried to satisfy the requirements of the ninth part of CCPU Art. 86 on the voluntary transfer of the destroyed house. This section does not provide that the transfer of the land is a necessary condition for the receipt of financial compensation. In accordance with Art. 41 of the Constituion of Ukraine, each person has the right to own, use, and dispose of their property … No one can be unlawfully deprived of their property rights. Private property rights are inviolable. On these grounds, the panel of judges consider that the

49 Judgment of the Donetsk Oblast appellate court, Case № 242/519/17, 12.09.2017, http://www.reyestr.court.gov.ua/Review/68895276.

50 Judgment of the Supreme Court, Case № 243/8302/16-ц, 20.09.2018, http://www.reyestr.court.gov.ua/Review/76614844

court of first instance erred in concluding that the voluntary transfer of the plaintiff's land to local authorities was required."[51]

Plaintiffs sometimes refuse to transfer their rights to damaged or destroyed property to local authorities because they have already repaired their houses. In such cases, courts reject the claims for compensation under Art. 19 of the Law of Ukraine *"On Counter-Terrorism"*. For example, in cases **№ 242/519/17** and **229/3692/16-ц**, the Donetsk Oblast appellate court noted that the plaintiffs received assistance from the humanitarian organization "People in Need" to partially repair their houses. In addition, in these decisions, the plaintiffs not only did not claim they intended to terminate their ownership, but had repaired the property for further use. Consequently, in case **№ 229/3692/16-ц**, the appellate court cancelled the trial court's decision and rejected the claim[52]. In case **№ 242/519/17**, in which the trial court's decision was cancelled as well, the Donetsk Oblast appellate court developed the legal stance, noting:

"In this case, the plaintiff did not intend to terminate her ownershipon the damaged house. On the other hand, she had the goal to repair it, and has already partially done so, including with the help of humanitarian organizations and the help of the Avdiivka CMA … The trial court also did not take into account that in accordance with Chapter 17 of the CCPU, "Compensation for Pecuniary Damage and Providing Assistance to Victims of Emergency Situations," humanitarian aid, which is regulated by Article 88 of this Code, is a component of state compensation."[53]

Nonetheless, in this decision the appellate court distinguished between help with reconstruction and compensation. This reasoning was set out in a case on the powers of CMAs:

"However, the provision of assistance to the owner of the property for repairs and compensation for damage are not identical concepts. Compensation for damage is provided in full, whereas assistance can be provided to a lesser degree based on available resources, and includes the provision of building materials."[54]

51 Judgment of the Luhansk appellate court, Case No. 423/450/16-ц, 29.11.2018, http://www.reyestr.court.gov.ua/Review/78311121

52 Judgment of the Donetsk Oblast appellate court, Case No. 229/3692/16-ц, 05.09.2017, http://www.reyestr.court.gov.ua/Review/68769316.

53 Judgment of the Donetsk Oblast appellate court, Case № 242/519/17, 12.09.2017, http://www.reyestr.court.gov.ua/Review/68895276

54 Id..

Thus, it can be concluded that these judgments have significant risks for plaintiffs who do not have a choice other than to repair their home themselves or with humanitarian assistance, since they do not receive compensation from the government as guaranteed by law. In practice, the courts' position confirms that humanitarian assistance provided by the international community, relieves the government of its obligation to pay compensation to those affected by terrorist acts or by the ATO/JFO. Moreover, this reasoning effectively and impermissibly substitutes itself for legislation on the State's duty to pay compensation for damage resulting from terrorist activity or the ATO/JFO. If anything, only legislators can effect such changes.

IV. RECOMMENDATIONS REGARDING LAWSUITS ON COMEPNSATION FOR DAMAGE DUE TO TERRORIST ACTS, PROCEEDING OF THE ATO/JFO, AND ARMED CONFLICT.

Based on this analysis, the following is recommended for preparing compensation cases. However, these recommendations are only for caess of property owned and used by the plaintiff, and do not apply to cases when the resident is not the owner of the property.

JUDICIAL PROTECTION IN UKRAINE

1. Filing a claim against the Government of Ukraine, acting through:

- The Cabinet of Ministers of Ukraine (Government of Ukraine) as the highest executive authority (Art. 1 of the Law of Ukraine No. 794-VII *"On the Cabinet of Ministers of Ukraine"*); and
- The State Treasury Service of Ukraine, since government compensation for damage is effected from the state budget.

2. Grounds for recovering financial compensation for destroyed property:

- General provisions on compensation for harm under *CCU* Art. 1166;
- Provisions of Art.19 of the Law of Ukraine *"On Counter-Terrorism"*;
- *CCPU* Articles 21 and 86.

3. Report a crime, as provided under *CrCU*, to police or the regional representative of the SSU in the place of registration or of actual residence for entry in the SRPI.

4. Evidence of the damaged/destroyed property. In light of the relevant case law, the key evidence that a plaintiff can use in support of his/her claim is:

- Document confirming title to the property (purchase agreement, certificate of ownership, certificate of inheritance, and others);
- Document confirming the technical condition of the property (for example, technical passport);

- Document confirming the scope of damage to the property, such as:
  - Certificate of fire, created by SES;
  - Inspection report of the property, created by the appropriate local administrative body or CMA;
  - Forensic evaluation and appraisal of the damage;
  - Photo/video materials, confirming the property damage;
  - Witness testimony confirming the property damage.

5. Assessment of the Scope of Damge. For this, one of these means should be used:

- In case of the complete destruction of housing (because of shelling, etc.), in accordance with part 10 of *CCPU* Art. 86, the amount of financial compensation is determined by approximate indicators of the value of residential housing in the region where the property is located.
- While the case is under consideration, it is also possible to adopt measures to determinate the scope of property damage by assigning an expert to conduct a forensic evaluation and estimate the scope of damage and cost of repairs. However, the expert's conclusion is based solely on photo materials, which may be held inadmissible by the court.

6. File an application to local authorities in order to transfer property to the government and request for compensation.

This application should be submitted **before** the court claim. It is worth finding out the procedure for transferring property to local authorities, the steps that need to be completed to receive compensation, and the timefrome for payments.

7. Payment of Legal Fees.

Under point 6 of the first part of Art. 5 of the Law of Ukraine "*On Court Fees",* plaintiffs — as victims in a criminal proceeding under *CrCU* Art. 258 — should be relieved from paying court fees. To receive the waiver, the existence of a crime incident report, made under this article and registered in the SRPI, is necessary.

JUDICIAL PROTECTION IN INTERNATIONAL COURTS

The following recommendations are for plaintiffs planning to apply to the European Court of Human Rights:

- Application for a violation of Art. 1, Protocol 1, ECHR. In case a plaintiff has a favorable court judgment that has not been executed, the plaintiff may also file a claim for a violation of Art. 6 (right to a fair trial);
- Under ECHR Art. 35, to be admissible, applicants must first exhaust national remedies. Specifically, they must first receive a final judgment by national courts before applying to the ECtHR.
- Also, under ECHR Art. 35, the applicants should submit their application no later than four months from the date the final judgment in their case has been made.
- Applicants should submit evidence and documents in support of their claim to the ECtHR. In the inadmissibility decision *Lisnyy and Others v. Ukraine and Russia*, it was not sufficient to send only a copy of the applicant's passport and photographs of the damaged/destroyed property. Under ECtHR practice, sufficient evidence could be documents confirming the right of ownership, entries in the Land or Tax Registry, certificates from local governments, geographic plans, photographs, witness testimony, and other admissible evidence. (See, e.g., the judgments in *Prokopovich v. Russia*, no. 58255/00, § 37, ECHR 2004-XI (extracts); *Elsanova v. Russia* (dec.), no. 57952/00, 15 November 2005; *Sargsyan v. Azerbaijan* [GC], no. 40167/06, § 183, ECHR 2015) In addition, as in domestic courts, a crime incident report can be provided as circumstantial evidence.

V. MECHANISM FOR THE IMPLEMENTATION OF COURT DECISIONS IN CASES ON COMPENSATION FOR DAMAGE DUE TO TERRORIST ACTS, PROCEEDING OF THE ATO/JFO OR ARMED CONFLICT.

The procedure for execution of judgments in compensation cases is established in the Law of Ukraine № 1404-VIII *"On Enforcement Proceedings"* of 02.06.2016 and Law № 4901-VI *"On State Guarantees Regarding the Execution of Court Judgments"* of 05.06.2012. The latter legislative act is a special act to be applied in order to execute judgemnts in compensation cases in favor of plaintiffs.

Under the first part of Article 2 of Law 4901-VI, the State guarantees the execution of court judgments when the debtor is a state body. Article 3 regulates the basic procedure for providing funds from the appropriate state body upon receipt of a court judgment. For example, execution of a judgment for restitution from the government is carried out by the State Treasury Service of Ukraine (hereafter "Treasury") within the limits of the relevant budget item of that body. In case if the defendant (state body) does not have such earmarked funds, the judgment is paid from the programme КПКБ 3504040 (measures for execution of court judgments guaranteed by the government).[55] Under the second part of Art. 3, the plaintiff should appeal to the Treasury for execution of the judgment, provide the necessary documents and information, and most importantly the writ of execution. In accordance with Art. 3 of the Law of Ukraine "On Enforcement Proceedings", in this should be noted:

1. Title and date of issue of document, name of state body, position and full name of the official who issued it
2. Date of adoption and number of judgment on which the document was issued;
3. Full name of either the corporation or individual (both plaintiff and debtor); their principal place of business (corporations) or place of residence (individuals);
4. Identification code of the corporation in the United State Register of Legal Entities, Individual Entrepreneurs and Public Organizations of Ukraine of the plaintiff and of the debtor, as

55 In accordance with the Law of Ukraine "On the State Budget of Ukraine for 2019", this program for 2019 provides funds in the amount of 600 million UAH.

well as the Tax Identification Number (passport number for individuals who are relieved of registering for such a number due to their religious beliefs);

5. The parts of the judgment relating to implementation;
6. Date of entry into force;
7. Period for implementation.
8. Other documents are sometimes specified in the writ of execution.

Taking into account that the pecuniary damage is caused by a crime – terrorist act – plaintiffs should be relieved from advance payments in accordance with the second part of Art. 26 of Law of Ukraine *"On Enforcement Proceedings"*. Under the fourth part of Art. 3 of the Law *"On State Guarantees Regarding the Execution of Court Judgments"*, the transfer of compensation is done within 3 months from the date of receipt of the required documents by the Treasury. If the Treasury does not transfer the funds within 3 months, the plaintiff is paid three percent annually on the unpaid amount from the КПКБ 3504040 programme.

It should be noted, that under part 3 of the final and transitional provisions of the Law of Ukraine *"On State Guarantees Regarding the Execution of Court Judgments"* debts of compensation for damage pursuant to a court judgment are the first to be paid. The mechanism for execution of judgments is established by *CMU* Decree No. 845 of 03.08.2011 (last edition – 30.01.2013)[56]. Under point 3 of this procedure, a judgment to receive compensation based on a writ of execution is fulfilled by the Treasury in order of priority and receipt of these documents. In case of a judgment for compensation, the plaintiff submits to the Treasury:

- Declaration of the execution of this judgment with a statement of bank account details (bank statement if available), the name of the bank, its MFO and USR code, the account number, and accountholder's full name, or transfer information for the post service (full name, address, and bank account details);
- Original writ of execution;
- Court judgment on restitution (if available);
- The original or a copy of the transaction document (transfer order, statement, etc.) confirming the transfer of funds in accordance with the court judgment).

Other documents may be attached to the application that contain information to facilitate the execution of the judgment.

56 Cabinet of Ministers of Ukraine Decree No. 845 "On Establishing the Procedure of Execution of Court Judgments for Collecting Payment from Government and Local Budgets or Debtors," 03.08.2011, https://zakon.rada.gov.ua/laws/show/845-2011-%D0%BF

However, in compensation cases, the plaintiff may face a set of problems, such as a long waitlist for execution of judgments, the absence or insufficient funding in the budget, delays in execution, return of the writ of execution, and others. If the Treasury causes delays or does not act to execute the judgment, plaintiffs may appeal to administrative courts. In Decree No. 13 of the Plenum of the Higher Administrative Court of Ukraine»[57] the following administrative disputes were isolated:

- Holding that the defendants' return of the writ of execution was unlawful, and obliging defendants to accept it;
- Holding the Treasury's non-execution of the court judgment was unlawful and obliging it to immediately execute the judgment and submit a confirmation of its execution to the court, as well as of the payment for non-pecuniary damage;
- Holding the Treasury's non-execution of a court judgment was unlawful and obligating it to immediately transfer the funds to the plaintiff as per the writ of execution, calculate and pay compensation for a violation of the term for enforcement for the entire time of the delay;
- Obliging the Treasury to execute the judgment.

While the filing of an administrative case could lead to delays in the processing of execution of judgments, it is worth using this mechanism to compel the Treasury to fulfill its duties under law, as well as to receive compensation for damage resulting from terrorist activities or the ATO/JFO.

In conclusion, for compensation cases the issue is not so much the existence of a special mechanism for execution of judgments, but of the effectiveness. Currently, the procedure established in the Law *"On State Guarantees Regarding the Execution of Court Judgments"* is the only possible way to execute judgments on compensation for damage in accordance with the Law *"On Counter-Terrorism"*. It is important to note that the execution of judgments is a part of the right to a fair trial and one of the procedural guarantees of access to courts, as provided under Article 6 of the ECHR.

57 Decree No. 13 of the Plenum of the Higher Administrative Court of Ukraine, "Summary of Administrative Court Practice on Resolving Disputes Arising in Relation to Execution of Court Judgments and Payment of Debts by Government Bodies, Institutions, Enterprises, and Organizations," 29.09.2016, https://zakon.rada.gov.ua/laws/show/v0013760-16/sp:wide

VI. CONCLUSIONS AND RECOMMENDATIONS

In conclusion, this legal uncertainty regarding compensation for damaged and destroyed property created negative legal implications for conflict-affected persons. The absence of a well-defined legal framework to protect victims' rights to compensation for their damaged property made civil lawsuits the only available method. However, as demonstrated, in some cases there is inequality between the parties as one side is the government, who generally has more resources than plaintiffs do. On the other hand, it can be concluded that court practice on this issue is irregular and still being formed. Certainly, there is already a general legal position of Ukrainian courts on certain aspects of compensation. However, this position is still not permanent and could be change at any time, for example, in connection with a decision of the Grand Chamber of the Supreme Court. As for the most recent, we can only hope that the judgment in case **265/6582/16-ц**, adopted as a model case, will cover the disputed points of this issue.

Based on this analysis, the following is recommended:

1. Supreme Court:

- Relying on parts 2 and 7 of the first part of Article 36 of the Law *"On the Judiciary and the Status of Judges"*, create a compliation of case law on issues of compensation for damage due to terrorist acts, the ATO/JFO, and armed conflict, and provide courts with this information;

2. Parliament of Ukraine (Verkhovna Rada) and the Cabinet of Minsiters of Ukraine:

- Amend the legislation to implement a procedure for compensation for damage that will promote effective implementation of victims' rights and improve the protection of rights in court.

ANNEX 1

Court Judgments Cited		
№	**Case Number**	**Did R2P Provide Legal Representation in the Case?**
1.	265/6582/16-ц	
2.	423/450/16-ц	
3.	243/11658/15-ц	
4.	243/8302/16-ц	Yes
5.	757/61954/16-ц	
6.	242/1618/17	Yes
7.	800/570/14	
8.	757/24720/15-ц	
9.	757/43306/16-ц	
10.	229/3692/16-ц	Yes
11.	243/3867/16-ц	
12.	243/9783/15-ц	
13.	227/6023/15-ц	
14.	242/4413/16-ц	
15.	757/52913/17-ц	Yes
16.	237/870/18	Yes
17.	237/4806/17	Yes
18.	237/3961/17	Yes
19.	242/519/17	Yes
20.	646/4335/17	
21.	646/4340/17	
22.	646/5062/17	
23.	243/10233/15-ц	

ANNEX 2

Some ECtHR decisions on compensation for damaged or destroyed property:

3. Loizidou v. Turkey (preliminary objections), 23 March 1995, Series A no. 310;
4. Cyprus v. Turkey [GC], no. 25781/94, ECHR 2001-IV;
5. Ilaşcu and Others v. Moldova and Russia [GC], no. 48787/99, ECHR 2004-VII;
6. Xenides-Arestis v. Turkey, no. 46347/99, 22 December 2005;
7. Ioannou v. Turkey, no. 18364/91, 27 January 2009;
8. Solomonides v. Turkey, no. 16161/90, 20 January 2009;
9. Kerimova and Others v. Russia, nos. 17170/04 and 5 others, 3 May 2011;
10. Doğan and Others v. Turkey, nos. 8803/02 and 14 others, ECHR 2004-VI (extracts);
11. Ayder and Others v. Turkey, no. 23656/94, 8 January 2004;
12. Chiragov and Others v. Armenia [GC], no. 13216/05, ECHR 2015;
13. Sargsyan v. Azerbaijan [GC], no. 40167/06, ECHR 2015;
14. Selçuk and Asker v. Turkey, 24 April 1998, Reports of Judgments and Decisions 1998-II;
15. Decision on inadmissibility, Lisnyy and Others v. Ukraine and Russia, no. 5355/15, 28.07.2016.