A HANDBOOK FOR PRACTITIONERS | **GERMANY**

Civil Liability for Human Rights Violations

OAK FOUNDATION

Bonavero Institute of Human Rights

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PROFILE

I would like to thank Ekaterina Aristova, Miriam Saage-Maaß, Hannah Mangel, Nicolas Raitzsch and an anonymous peer reviewer for valuable feedback on and assistance with the text. All errors are mine.

FREQUENTLY USED ABBREVIATIONS	
AGG	General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*)
ArbSchG	Occupational Health and Safety Act (*Arbeitschutzgesetz*)
ArbStättV	Workplace Ordinance (*Arbeitsstättenverordnung*)
BGB	Civil Code (*Bürgerliches Gesetzbuch*)
GG	Basic Law of the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*)
LkSG	Supply Chain Due Diligence Act (*Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten*)
StPO	Criminal Procedure Code (*Strafprozessordnung*)
VersG	Law on Assemblies and Processions (*Versammlungsgesetz*)
ZPO	Civil Procedure Code (*Zivilprozessordnung*)

Publication Information: This country report is one of the 19 reports prepared for a comparative project on civil liability for human rights violations led by the Bonavero Institute of Human Rights. It follows a unified template, and some terms in this report were defined consistently for the purposes of the project. To access other country reports and introduction from the project team, please **click here**.

All online resources cited and/or referenced in this report were accessed on 1 April 2022. Publication Date: October 2022

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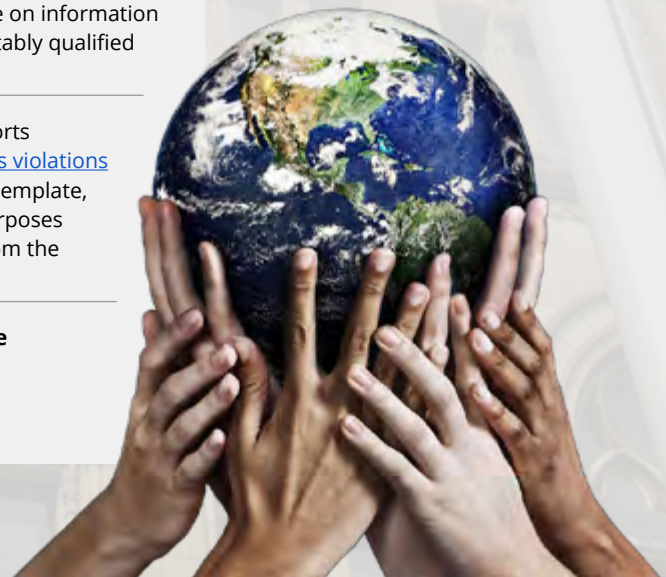

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The German law of delict is a potential tool for claimants seeking to claim damages for human rights violations. However, significant procedural hurdles hinder access to effective remedies. Litigation involving corporate defendants with complex business structures or supply chains is particularly problematic. However, the German Supply Chain Due Diligence Act 2021 is a promising legislative development. Without creating new avenues for civil remedy, the law expands corporate duties of care and potentially enables liability under the general law of delict. A separate regime of civil liability applicable to the State is another characteristic feature of German law.

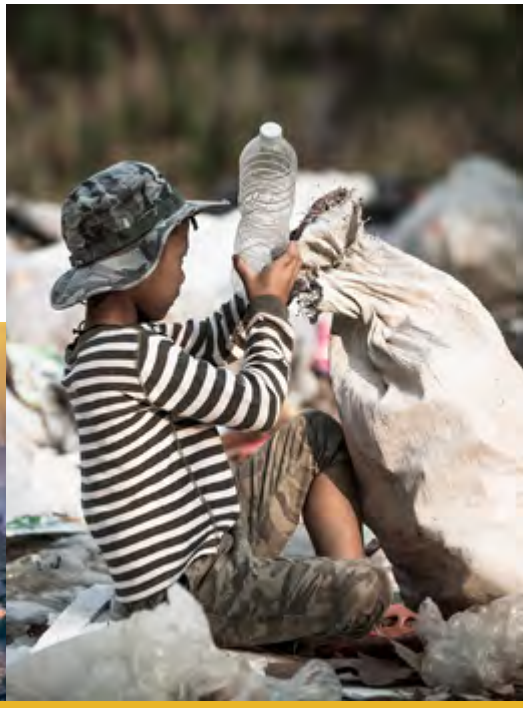
INDICES

15/167
Democracy Index 2021 Ranking

94/100
Freedom House 2022 Score

10/180
Transparency International Corruption Index 2021 Ranking

The focus jurisdictions within the scope of the project have been selected to maximise diversity and representativeness. They reflect both common law and civil law traditions, a wide geographic distribution, different political systems, and varying levels of socio-economic development. The latter factors may impact the overall efficacy of the law on civil remedies and respect for the rule of law as a value. To provide useful context about the jurisdiction, each report indicates the relevant ranking or score of that jurisdiction in three leading global indices on democracy and the rule of law: Democracy Index by the Economist Intelligence Unit (measures the state of democracy in 167 states and territories); Freedom House (rates people's access to political rights and civil liberties with 100 being an optimal score); and Transparency International Corruption Index (ranks 180 countries by their perceived levels of public sector corruption).



Introduction

1. In Germany, human rights claims under the law of civil remedies can arise through the law of delict – a legal body similar to the common law of torts. German law of delict is governed by ss 823 et seq of the Bürgerliches Gesetzbuch (BGB – the German Civil Code)[1] and protects against a range of violations that are also addressed by human rights law. However, procedural hurdles such as the burden of proof on the claimant, high discovery and trial costs, and expensive legal expertise make human rights damage claims rare in practice and hard to achieve. The most promising legislative development, despite explicitly leaving out a civil remedy pathway, is the German Supply Chain Due Diligence Act of 2021,[2] which expands corporate duties of care and thus enables liability for neglecting these duties of care under the general law of civil remedies.

1 German Civil Code (*Bürgerliches Gesetzbuch*) (BGB). For an English translation, see Federal Ministry of Justice, 'German Civil Code: BGB'.

2 Supply Chain Due Diligence Act 2021 (*Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten*) (LkSG). The law was passed on 16 July 2021 and will successively come into force from 1 January 2023.

General Questions

1

Can a claim under the law of civil remedies in your jurisdiction be brought against public bodies, corporations and/or individuals when one of the three defined harms results in human rights violations?

2

What are the elements of the civil remedies that you have identified above that have to be established by a claimant seeking the remedy?

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Q1 Can a claim under the law of civil remedies in your jurisdiction be brought against public bodies, corporations and/or individuals when one of the three defined harms results in human rights violations?

German law of delict is based on the principle that not all types of negligently caused losses warrant civil liability. It protects only against certain types of damages and penalises only certain types of behaviour.

2. The centrepieces of German law of delict relating to liability of private persons are BGB s 823(1), s 823(2) and s 826. These sections are complemented by a number of special provisions, such as that contained in BGB s 832 which establishes liability of a person under a duty of supervision, or BGB s 836 concerning liability of landowners for certain violations. According to BGB s 832(1), any person who is required by law to supervise a person in need of supervision [...] shall be liable to pay compensation for any damage that this person unlawfully causes to a third party. BGB s 836 stipulates that if a person is killed, the body or health of a person is injured, or an object is damaged, as a result of the collapse of a building or other work connected to a plot of land, or as a result of the detachment of parts of the building or work, the owner of the plot of land is obliged to compensate the injured person for the resulting damage if the collapse or detachment is the result of faulty construction or poor maintenance. The obligation to compensate shall not apply if the owner has observed the reasonable care required for the purpose of averting the danger. The rules in BGB ss 823(1), 823(2), 826, 832 and 836 address only the liability of private actors, but as they do not differentiate between natural and legal persons; they apply to both individuals and companies.[3]

3. BGB s 823(1) protects a list of **'absolute rights'**, ie rights that grant legal protection to everyone. These are, namely, the rights to life, bodily integrity, health, freedom of movement and property. It further includes an open-clause formulation of the so-called **'other rights'** which is among a variety of general norms found in the BGB that are open to interpretation and are therefore especially susceptive to human rights claims.[4] 'Other rights' in s 823(1) however, do not provide a catchall for every other possible right – rather, 'other rights' denotes only those with an explicitly absolute character, such that they cannot be partially restricted, similar to the right to property mentioned above.

4. Depending on the exact harm resulting from assault, violations of the rights to life, bodily integrity, health and property can be claimed. Harm arising from unlawful arrest or detention may amount to the violation of the right to freedom of movement. In order to claim damages, the victim must claim that violation of any of the rights to life, bodily integrity, health and property occurred. Instances of harmful or unfair labour conditions may affect the rights to life, bodily integrity or health, for example. The environment itself does not fall within the scope of German law of delict and violations of absolute rights must be claimed in this regard.

3 For a company, an act of its managing body is treated as an act of the company (BGB s 31).

4 Leonhard Hübner and Luca Kaller, 'Germany: Tort Law's Potential to Remedy Human Rights Violations' in Ekaterina Aristova and Uglješa Grušić (eds), *Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions* (Hart Publishing 2022).

Further, it seems possible to invoke an infringement of the right to 'privacy and the free development of one's personality' (*Allgemeines Persönlichkeitsrecht*), that is generally recognised as an 'other right' protected by BGB s 823(1).

If the alleged tortfeasor is the **State**, liability can only be established according to a specific set of rules.

5. The liability of State actors is exclusively regulated in BGB s 839. Additionally, article 34 of the Basic Law of the Federal Republic of Germany[5] can be invoked to pursue claims of damage caused by government actions (*Staatshaftung*). BGB s 839 foresees the possibility of claiming purely economic losses.

Germany has enacted specific legislation that aims at remedying particular kinds of human rights violations and sometimes includes civil remedies as compensation.

6. Beyond the general laws of delict, there are some **statutory provisions** governing particular areas that include civil remedies. For instance, in cases of discrimination, the General Act on Equal Treatment (AGG s 15)[6] stipulates a provision for a separate damages claim. Another example is the Law on Liability for Defective Products (ProdHAftG s 1)[7] according to which the manufacturer of a product is obliged to compensate an injured party for the resulting damage if a defect in their product causes death, bodily injury or damage to property.

Q2 What are the elements of the civil remedies that you have identified above that have to be established by a claimant seeking the remedy?

BGB s 823(1) and (2)

7. According to BGB s 823(1), any person who intentionally or negligently causes unlawful injury to the life, bodily integrity, health, freedom, property or any other rights of a person may be liable to compensate the other party for the resulting damage.

8. Beyond identifying a violation of a particular right, however, BGB s 823(1) further requires the establishment of a breach of a tortious duty of care. While a duty of care is usually breached by a direct harmful action, determining the violation of a right tends to be a more complex matter when there is an instance of omission, or indirect harm. The duty of care is established on a case-by-case basis, although some scenarios have emerged in German jurisprudence where such a duty of care can be generally assumed. This includes a duty of care for those who create or control a hazard, as they will have the duty to protect others from its consequences. Further, if one assumes responsibility for performing a certain task,

5 Basic Law of the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*) (GG).

6 General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*) (AGG).

7 Law on Liability for Defective Products (*Gesetz über die Haftung für fehlerhafte Produkte, Produkthaftungsgesetz*) (ProdHAftG).

a duty of care in a reasonable performance of that task will be assumed. Lastly, those who profit from a certain (hazardous) activity might face a tortious duty of care (*Vorteilsziehung)*.[8]

9. According to BGB s 823(2), liability to compensate damage requires that there has been a breach of a statute intended to protect individual interests (so-called **'protective laws'**). If the statute recognises that a breach may occur without fault, then the obligation to compensate only exists where fault is established. The statutes that are relevant here include any with direct legal effect in Germany that protect individual interests, and, as a result, foreign legislation is not applicable.[9] The typical examples of 'protective laws' are the rules of criminal law and some statutory provisions (eg environmental and labour protection laws).

10. Some of the 'protective laws' that are relevant to BGB s 832(2) can be applied to the three defined harms.

    - Assaults can amount to a crime according to the German Criminal Code (StGB ss 223 et seq)[10] and unlawful imprisonment is prohibited by StGB s 239.
    - In the case of environmental pollution, if someone's property is harmed intentionally, the relevant criminal offence is found in StGB s 303. The StGB itself also establishes offences for environmental pollution (see ss 306 et seq and ss 324 et seq).
    - Further, a number of labour laws are also considered 'protective laws' such as those covering youth employment (JArbSchG)[11] and occupational safety (ArbSchG)[12]. These fall within the scope of BGB s 832(2).

BGB s 826

11. According to BGB s 826, a person who intentionally causes damage to another in a manner contrary to morality is obliged to compensate the damage. To meet the test of 'immorality', an act or omission must violate the 'sense of decency of all those thinking fairly and justly' (*gegen das Anstandsgefühl aller billig und gerecht Denkenden verstoßend*).[13] Unlike the other norms of delict, BGB s 826 enables injured parties to claim pure economic losses, but it contains strict limitations as it requires intent in relation to the harm done, as well as immorality.

BGB s 831

12. BGB s 831 stipulates that a person who appoints another to perform a task is obliged to compensate the damage that this person unlawfully causes to a third party while performing the task. The norm is similar to the common law concept of vicarious liability,[14] but is much narrower in its application than the concept in

8 For a detailed overview, see Hübner and Kaller (n 4) 181–202; Hartwig Sprau, 'Introduction to Sec 823 *et seq*' in Christian Grüneberg, Gerd Brudermüller, Jurgen Ellenberger, Isabell Gotz, Sebastian Herrler, Hartwig Sprau, Karsten Thorn, Walter Weidenkaff, Dietmar Weidlich, and Hartmut Wicke (eds), *Bürgerliches Gesetzbuch* (CH Beck 2021) para 11.

9 BGH NJW-RR 2014, 639 (Federal Court of Justice weekly law report); Hartwig Sprau, 'Sec 823' in Grüneberg et al (n 8) para 57.

10 Federal Ministry of Justice, German Criminal Code (*Strafgesetzbuch*) (StGB).

11 Federal Ministry of Justice, Youth Employment Protection Act (*Jugendarbeitsschutzgeset*) (JArbSchG).

12 Federal Ministry of Justice, Occupational Health and Safety Act (*Arbeitschutzgesetz*) (ArbSchG).

13 See, for instance, BGH, NJW 2014, 1098 (Federal Court of Justice). See also Hartwig Sprau, 'Sec 826' para 4 and 'Sec 138' para 2 in Grüneberg et al (n 8). For a detailed account, see Gerhard Wagner 'Sec 826' in Franz Säcker, Roland Rixecker, Hartmut Oetker and Bettina Limperg (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (CH Beck 2020) para 9.

14 See, for instance, discussion in the following project reports: [41] Canada; [22]-[23] England & Wales.

English tort law in that it does not follow the idea of *respondeat superior*. A textbook example of a relationship covered by BGB s 831 is that of a master and his journeyman, where the former closely oversees and controls the work of the latter. Importantly, according to BGB s 831(1)2, the principal has the possibility of legal exculpation when the appointing party can prove that they have carefully selected and supervised the agent who caused the damage. While the norm here is for the burden of proof to be placed on the principal as the alleged tortfeasor (this is an exceptional pattern for civil law where the burden of proof is conventionally placed on the claimant), the requirements for exculpation are rather easily achieved.[15]

BGB s 839 and GG Art 34

13. BGB s 839 and GG Art 34 operate together to impose liability on the State for damage caused by government actions (*Staatshaftung*). BGB s 839(1) stipulates that if a civil servant intentionally or negligently violates the official duty incumbent upon them towards a third party, they shall compensate the third party for the resulting damage. If the official is only guilty of negligence, a claim may only be made against him if the injured party is unable to obtain compensation in another way.

14. BGB s 839 therefore imposes personal liability on civil servants when acting in their official capacity only. If they are not acting in such a capacity, the general rules of BGB ss 823 *et seq* apply. It must be noted that, taken in isolation, BGB s 839 is insufficient to find the State liable for the actions of its civil servants. GG Art 34 assigns the personal liability of the civil servant to the State. Thus, BGB s 839 read in conjunction with GG Art 34 enables a civil claim against the State.[16] If a civil servant breaches an official duty owed to a particular individual (instead of a duty owed to the public at large), BGB s 839 declares them liable for any damage caused as a result.

15. Whilst BGB s 839 covers pure economic loss (giving it a significantly wider scope than s 823(1)), it also restricts liability in a number of ways.[17] First, if the civil servant has merely acted negligently, they may only be held liable if the injured person cannot obtain compensation through other means (see further BGB s 839(1)2). Second, if the civil servant breached their official duties in deciding a legal dispute, they are only liable for damages if this breach of duty also constitutes a criminal offence (see further BGB s 839(2)). Once liability is established in terms of BGB s 839, GG Art 34 assigns this personal liability to the State. The State is therefore effectively vicariously liable for the actions of its civil servants.[18]

15 For a more detailed assessment, see Hübner and Kaller (n 4) 181–202; Hartwig Sprau, 'Sec 831' para 10 and 'Sec 138' para 2 in Grüneberg et al (n 8).

16 Patrick Reinert, 'Sec 839' in Wolfgang Hau and Roman Poseck (eds), *Beck'scher Online Kommentar BGB* (CH Beck 2022) paras 2–7.

17 *ibid* para 1.

18 For an example of the restrictive interpretation of these norms, see BVerfG, DÖV 2013, 946 (Federal Constitutional Court) (Varvarin); European Center for Constitutional and Human Rights (ECCHR), 'NATO Airstrike on Varvarin Bridge'.

Q3 Does the law of your jurisdiction recognise civil liability for complicit or accessory conduct (or a similar concept) in relation to the three defined harms?

BGB s 830 assists with attributing the acts of one tortfeasor to another. The provisions cover liability of the tortfeasors where the defendants knowingly acted together as **joint tortfeasors**, **instigators** and **abettors**.

16. BGB s 830(1) stipulates that if several persons have caused damage by a tortious act committed jointly, each is responsible for the damage. The same applies if it cannot be determined which of several participants caused the damage by their act. In terms of BGB s 830(2), instigators and abettors are treated as equivalent to accomplices.

17. BGB s 830(1)1 and BGB s 830(2) open up the possibility of claiming damages from everyone involved in a tortious act and attributing responsibility accordingly.[19] These sections require that all tortfeasors knowingly acted together, whether as accomplices, abettors or instigators. This means that neither BGB s 830(1)1 nor BGB s 830(2) apply to a situation where several tortfeasors acted independently. However, a separate section, BGB s 830(1)2 can apply in such circumstances.[20] This section makes it easier to establish a causal connection between a particular person's act and the harm done when multiple persons are involved and it is unclear which particular act caused the harm. In essence, the provision makes it easier to prove such causal link.

18. According to case law, BGB s 830(1)1 and BGB s 830(2) are dogmatically the civil law counterpart to StGB ss 25, and are therefore to be measured against the same requirements.[21] Accordingly, an aider and abettor is a person who intentionally assists another in a deliberately committed tort (BGB s 823(1), s 823(2) and s 826, in comparison with StGB s 27(2)).[22] The concept of providing assistance is to be understood broadly, and therefore any contribution to the act that promotes the commission of the main tortious act, and is relevant to its commission, is sufficient.[23] Any form of assistance can be considered – even mere psychological support is sufficient. [24] According to case law, it is not a prerequisite that the contribution of the participant was a *conditio sine qua non* for the main offence, ie that the success of the offence could not have been materialised without the contribution of the participant. Instead, it is sufficient that the contribution facilitated the main perpetrator's execution of the offence.[25] To prove intent, the conscious factual promotion of another's act is sufficient.[26] A communicative understanding between the principal offender and the accomplice is not required.[27]

19 See BGH NJW 1953, 499 (Federal Court of Justice).

20 See BGH NJW 1959, 1772 (Federal Court of Justice).

21 Gerhard Wagner, 'Sec 830' in Säcker et al (n 13) para 9.

22 *ibid* para 24.

23 BGH ZIP 2010, 786 (Federal Court of Justice).

24 BGH ZIP 2012, 1552 (Federal Court of Justice).

25 See BGH NJW 2012, 3439, 3441 (Cologne Higher Regional Court). For the discussion, see Wagner (n 21) para 25.

26 *ibid* para 16.

27 *ibid* para 24.

Q4 When can a parent company be held liable under the law of civil remedies for the wrongful acts and/or omissions of a subsidiary or an independent contractor in a supply chain?

There is no case law in Germany on the question of whether a parent company can be liable under the law of civil remedies for the actions of a subsisidary or independent contractors in the supply chain, but some basic principles can be outlined.

19. The general rules of the law of delict apply to corporate actors. Company law does not limit the application of the law of delict, which means there is essentially **no corporate immunity in the law of delict**. According to Hübner and Kaller,[28] there are three main scenarios in which a parent company's duty of care over its subsidiary can be established – and thus its potential liability under the German law of civil remedies for wrongful acts or omissions:
    - If the subsidiary or supplier is effectively run as a department of the parent company;
    - If the parent company has actively intervened in the management of its subsidiary or supplier;
    - If the parent company imposes detailed rules and guidelines relating to the relevant activity.

Further, the parent company can be liable for the actions of its subsidiaries or suppliers if it is aware of the latter's human rights violations but chooses not to act to prevent or change the situation. These scenarios are best addressed in terms of BGB s 830.

SPOTLIGHT: GERMAN SUPPLY CHAIN DUE DILIGENCE ACT OF 2021

The most notable legislative development in the field is the German Supply Chain Due Diligence Act of 2021.[29] The new law imposes wide-ranging due diligence obligations on companies with a registered office or headquarters in Germany. It will initially cover companies with 3,000 or more employees, and from 2024 onwards, companies with 1,000 or more employees. The companies covered by the Act must make reasonable efforts to ensure that there are no violations of human rights in their own business operations and in the supply chain. Compliance with the human rights due diligence obligations requires publication of an annual report which should also be submitted to the competent authority. The Act does not provide for any extension of civil liability, but it does expand the parent company's duty of care in relation to its group operations and supply chains. It is possible for parent companies to be held liable under the general principles of civil liability for neglecting their duties of care under the Act.[30]

28 Hübner and Kaller (n 4).

29 LkSG (n 2).

30 For an overview of the new law in English, see Sebastian Rünz, 'Overview of the German Supply Chain Due Diligence Act' (Taylor Wessing, 28 July 2021). Accessed 10 March 2022. For an academic discussion of the expansion of the duty of care for the German law of delict, see Eva-Maria Kieninger, 'Englisches Deliktsrecht, internationale Unternehmensverantwortung und deutsches Sorgfaltspflichtengesetz: zur Rechtsprechung in den Sachen Vedenta, Okpabi und Hamida Begum' (2021) 67(6) *Recht der Internationalen Wirtschaft 331*.

Q5 What remedies are available under the law of civil remedies to victims of the three defined harms in your jurisdiction?

20. Available remedies are either to claim damages for a harm done, or in the case of a continuous harm, to seek a cease-and-desist order/injunctive relief according to BGB s 1004 and s 823.

21. The aim of a **claim for damages** would be, according to BGB s 249(1), to restore the conditions that would exist if the circumstance giving rise to the obligation to pay damages had not occurred. Thus, the normatively desired remedy would be restitution in kind. However, BGB s 249(2)1 continues that if damages are owing because of injury to a person, or because of damage to an object, the creditor may demand the amount of money required for this. This could be relevant for all three defined harms, depending on the consequences of the harm.

22. BGB s 253(1) stipulates that for **non-material damages**, where restitution in kind is naturally impossible, compensation in money may be claimed for damage other than pecuniary damage, but only in cases which are specified by law. BGB s 253(2) further explains that if damages have to be paid because of an injury to body, health, or freedom of sexual self-determination, equitable compensation in money can also be claimed for damage that is not pecuniary damage.

Q6 What are the advantages and disadvantages of using civil claims as a means of human rights protection in your jurisdiction?

23. The **advantage** of using civil claims for human rights protection is that, in theory, civil claims may be a means to secure damages or, in some cases, a cease-and-desist order. But this route has some disadvantages. Most significantly, the **burden of proof** is on the claimants (except under BGB s 831).

24. Furthermore, **pre-trial discovery** for civil lawsuits does not exist in Germany, and trial discovery in civil proceedings remains minimal.[31] Under German administrative law which regulates matters relating to government, VwVfG s 24[32] stipulates that it is up to the relevant authority – the defendant in a legal case – to investigate the facts ex officio. The deficiency in discovery in civil law is especially problematic in transnational cases, where persons harmed by corporate wrongdoing or negligence have to prove the corporate connection between operating entity and controlling entity, as well as the actual control of the latter over the former. Additionally, any abuses committed by members of the corporate group, such as explicit wrongdoing or negligence by the controlling entity in a foreign jurisdiction, must be credibly presented and evidenced.

31 See Miriam Saage-Maaß, 'Human Rights Litigation against Multinational Companies in Germany' in Richard Meeran and Jahan Meeran (eds), *Human Rights Litigation against Multinationals in Practice* (Oxford University Press 2021).

32 Federal Ministry of Justice, Administrative Procedure Act (*Verwaltungsverfahrensgesetz*) (VwVfG).

25. Another disadvantage is that the **cost structure** of civil proceedings is unfavourable to the claimant. Generally, there is the risk of bearing the cost of the proceedings if the litigation is unsuccessful. But further, while the rules of civil procedure (ZPO s 78)[33] make it compulsory to have legal representation in the regional courts (*Landgericht*) and higher regional courts (*Oberlandesgericht*) as well as before the Federal Court of Justice,[34] compensation sums are generally low and lawyers may not be able to recover all costs from the defendant, even if they have won the case.[35]

Q7 Can civil claims be brought against a foreign defendant and if so, what are the rules for that?

26. Jurisdiction over foreign (ie non-EU) defendants will be determined under the German laws on civil jurisdiction. German civil law will be rarely applicable to cases involving foreign defendants and/or overseas wrongs. The only exception is when a company incorporated outside the EU, has its main administration, that is the location where central management decision are taken and implemented, in Germany (or the EU).[36]

Q8 Can you recommend resources for further research and consultation to anyone interested in learning more about civil liability for human rights violations in your jurisdiction?

27. There are a number of **legal commentaries and summaries of jurisprudence** that provide insight on the German law of civil remedies. Among these are:

- Jauernig Bürgerliches Gesetzbuch
- Münchener Kommentar zum Bürgerlichen Gesetzbuch
- Grüneberg Bürgerliches Gesetzbuch

There are also **online databases** which can be accessed for a fee. The most common are:

- Beck-online: This platform is Germany's largest specialist publisher of legal literature and makes a large portion of its print titles available online, including journals, books, and commentaries, including those mentioned above.
- juris – Das Rechtsportal: This online platform combines legal information with a research tool. Case law, laws and regulations are linked to a constantly growing collection of specialist literature.

Additionally, there are **databases** where no fee is charged:

- dejure.org: This platform offers laws, case law and news as well as articles from the Federal Law Gazette.
- gesetze-im-internet.de: This is a platform run directly by the German Federal Government and it makes almost the entire database of current Federal law available free of charge.

33 Federal Ministry of Justice, German Code on Civil Procedure (*Zivilprozessordnung*) (ZPO).

34 In spite of the general rule that in principle lower courts have jurisdiction (see ZPO s 1 and s 23(1) of the German Courts Constitution Act (*Gerichtsverfassungsgesetz*) (GVG)), this is only if the dispute value is below EUR 5,000. If the dispute value is above this amount, the regional court has jurisdiction (see GVG s 71(1)1 and ZPO s 23(1) No 1.

35 See further Saage-Maaß (n 31) 254, 273.

36 BGH, Verdict of 15.03.2010, 2010-II ZR 27/09.

CaseScenarios

1 Case Scenario

A wave of peaceful anti-government protests in the capital city of X Country denounced controversial legislation reforming electoral law. X Country's police responded to the peaceful protests with violence and brutality. The protesters were beaten and tear gassed. Some were detained for several days without charge or access to the lawyers. Human rights activists reported alleged torture and other ill-treatment in detention.

The protesters gathered in the market square where many shops and office buildings are located. Security Co is a private company providing security to the premises and personnel of the shops and offices. There is no evidence that personnel of the Security Co were involved in the violence that injured protesters. There is, however, evidence that on several occasions personnel of Security Co provided X Country's police with vehicles, equipment, and water. READ MORE

2 Case Scenario

X Group is a group of extractive companies. Parent Co is the parent company of X Group which is responsible for the overall management of X Group's business. X Group's extractive operations are carried out by its subsidiaries. Every subsidiary is incorporated as a separate legal entity and is responsible for an individual project. Subsidiary Co is a licence holder and operator of a major extractive project. Parent Co is the sole shareholder of Subsidiary Co.

X Group has been accused of severe environmental pollution arising from oil spills caused by Subsidiary Co's extractive project. Oil extracted by Subsidiary Co leaked and flowed into local rivers and farmland in the neighbourhood of the project site, destroying crops and killing fish. The result was that the food and water supplies of the local population were severely affected, and in addition members of the local community also experienced breathing problems and skin lesions. Journalists and environmental activists publicised the harm done to the local environment and community. Parent Co has made no statements about the oil spills but, in a recent report to its shareholders, Parent Co repeated that the X Group was committed to its policy of operating in an environmentally sound manner and ensuring the health and safety of its workers and those affected by its business operations. READ MORE

3 Case Scenario

Factory Co owns a garment factory that supplies many large international clothing retailers. The working conditions in Factory Co's factory have generally been poor and exploitative and have included physical abuse for non-compliance with production targets, sexual harassment of female workers by male supervisors, and compulsory unpaid overtime. Local trade unions have regularly accused Factory Co of poor factory workplace safety, including a lack of emergency procedures, ineffective fire safety equipment and few emergencies medical supplies. Two months ago, during a fire at Factory Co's garment factory, seventy-six workers died and fifty-eight were injured, many seriously. Preliminary investigations suggest that employees suffocated or were burned alive because windows were barred, emergency exits closed, smoke alarms did not work, and supervisors did not implement safety protocols and fire evacuation procedures.

Brand Co is the major purchaser of clothes produced by Factory Co's garment workers. It has been an enthusiastic and very public advocate for human rights standards and expressed its commitment to responsible business practices. Several civil society organisations wrote an open letter to the CEO of Brand Co calling on Brand Co to demonstrate leadership in preventing, addressing, and remedying adverse human rights impacts in its supply chain. READ MORE

Case**Scenario 1**

Q1 **Could injured or unlawfully arrested protesters bring civil claims against the police and/or Security Co (and/or its personnel) in your jurisdiction? Please also indicate the key elements of liability that would need to be shown by the claimants to hold the perpetrators liable.**

Claims against the police and/or police officers

28. **Civil servants:** In terms of BGB s 839, a civil servant is liable for damages caused by the intentional or negligent breach of an official duty owed to the third party. BGB s 839 covers civil servants, ie employees of the State who have been duly appointed to civil service. Police officers fall within this definition, see *Bundespolizeibeamtengesetz* (BpolBG) s 2) in conjunction with *Bundesbeamtengesetz* (BBG) s 10 for federal police or *Beamtenstatusgesetz* (BeamtStG) s 8 for state police). GG Art 34 expands the concept of civil servant to include all persons who perform tasks of public administration.

29. **Official duty protecting third parties:** A further prerequisite for liability is that the civil servant violates an official duty incumbent upon them vis-à-vis the third party. The term 'official duty' is to be understood broadly and includes every duty of conduct that the public official has in the exercise of his office. This includes the duty to act in accordance with the law (GG Art 20(3)).[37]

30. Accordingly, police officers may only use the coercive powers granted to them if the relevant legal requirements are met and they must strictly adhere to the procedural rules provided by law, particularly in the case of measures such as detention.[38] Included in such official duties is the requirement to refrain from unjustified tortious acts (BGB s 823). Any unjustified injury to body or health, or unjustified deprivation of freedom of movement, therefore constitutes a breach of official duty.[39]

31. The duty in question must also be incumbent on the public official in relation to the injured third party. Participants in a demonstration belong to a legally protected group and must be protected precisely from injuries to their bodies and infringements of their freedom of movement. Officers must obey the procedural rules during custody, as these norms are intended not only to ensure that custody proceeds properly, but also to protect individual rights during the time of custody.

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37 Hartwig Sprau, 'Sec 839' in Grüneberg et al (n 8) para 32.

38 Such strict procedural safeguards can arise from criminal prosecution (see Federal Ministry of Justice, Code of Criminal Procedure (*Strafprozessordnung*) (StPO)) or administrative interventions to avert dangers to the public (*Gefahrenabwehr* – see police state laws). These include the right of the person concerned to contact a relative or a trusted person (state police laws) or to consult a defence attorney (StPO s 127b(1)2 in conjunction with StPO s 114b(2)1) and the duty to have the lawfulness of the detention reviewed by a judge after 48 hours at the latest, GG Art 104(2)3.

39 Hartwig Sprau, 'Sec 839' in Grüneberg et al (n 8) para 37.

32. **Breach of official duty:** Further, the duty in question must be breached. Generally, a violation of rights can be justified if an enabling norm exists that permits police interventions such as the use of force or detainment. Then, the obligation of the public authority to respect the physical integrity and the freedom of the affected demonstration participants does not come into play (BGB s 823(1)). However, torture and ill-treatment – the use of force while a person is in police custody or detention – can never be justified as these violate the inalienable right to personal integrity, a part of human dignity (GG Art 1(1)). In the present case, a breach of the official duty would be established.

33. The same applies with regard to the use of beatings and tear gas, as well as to the detention itself. While both the federal and the state police laws contain enabling provisions in this regard, their requirements were not met in Case Scenario 1. At the time of the breach of official duty, the protesting individuals took part in a public assembly which was held for the common purpose of criticising a controversial reform and thus for the purpose of forming public opinion. It therefore qualified as an assembly within the meaning of the law on public gatherings (VersG s 1(1)).[40] For the period that the assembly is under way, up to the point of dissolution, the applicability of VersG restricts or displaces police law and police competence. Once the assembly is dissolved, police law and police competence apply again. A peaceful assembly such as in the present case, however, does not meet the requirements for dissolution and, accordingly, police were not allowed to use any force against demonstrators or to take individual participants into custody

34. Detention without charge does not in itself constitute a breach of official duty, as long as it does not last longer than 48 hours (see GG Art 104(2)3 and StPO s 128(1)). The prerequisite for lawful detention is that the prescribed conditions for detention are met for the entire duration of the detention. Any detention beyond the legally stipulated duration constitutes an unlawful deprivation of liberty and thus a breach of official duty.[41] The same applies to an arrest for the purpose of criminal prosecution when there is no urgent suspicion of a criminal offence (StPO s 127(2) in conjunction with StPO s 112(1)).

35. The procedural obligations regarding custody or detention (including notification of a trusted person, lawyer or defence counsel) constitute inalienable rights of the person. Failure to grant these provisions therefore also represents a breach of official duty.

36. **Fault:** This violation also occurred in obvious disregard of the obligations of the VersG. It is therefore to be assumed that the officials at least accepted that they were acting in breach of their official duties.

37. **No exclusion of liability under BGB s 839(1)2:** If only negligent action can be proven, BGB s 839(1)2 contains a special rule according to which the public official (and thus also the authority employing them) are only liable if the injured party has no other means of compensation. In the present case, such a possibility for remedy could lie in action against Security Co as the supporter of the breach of official duty (see BGB s 830(2)). The claim for compensation against Security Co must have the specific purpose of assigning liability to Security Co, so that Security Co will carry the cost of damages as an aider or abettor. This provision on aiders and abettors

40 Federal Ministry of Justice, Law on Assemblies and Processions (*Versammlungsgesetz*) (VersG).

41 OLG München, Verdict of 20.06.1996-1 U 3098/94 (Munich Higher Regional Court).

does not relieve the perpetrator (in this case, the police) of their liability. Rather, it intends that other responsible parties can be held liable to compensate damages of the injured party.[42] Accordingly, even if Security Co is liable, there is no exclusion of liability of police.

38. **No exclusion of liability according to BGB s 839(3):** The claim for compensation in Case Scenario 1 may not be excluded under BGB s 839(3). According to this section, the obligation to pay compensation does not apply if the injured party intentionally or negligently failed to use a legal remedy to avert the damage. Legal remedy is to be understood broadly. It includes those legal remedies that are directly intended to remedy or rectify a breach of official duty which has already occurred.[43] BGB s 839(3) is therefore inapplicable if remedies exist which would have had a preventive effect or would have had the effect of remedying the damage but not averting it.[44] In Case Scenario 1, however, both the beatings and the release of tear gas were used on the day of the demonstration. The associated breach of official duty can neither be remedied nor corrected retrospectively. The detention of the demonstrators also ended with their release. The only legal remedy therefore remains a lawsuit with the aim of having the unlawfulness of the police action established. The damage that has occurred has already been finally sustained.

39. **Damage and potential claimants:** The damage caused by the breach of official duty must be compensated in accordance with BGB s 839. Here, the damaging party must restore the condition that would hypothetically have existed without the damaging event, ie if the breach of official duty had not occurred.[45] If the officials had behaved correctly, in particular if they had not used beatings or tear gas, costs for subsequent visits to the doctor, for example, would not have been incurred. In addition, it would have been possible for the injured parties to pursue their employment the next day, so there would not have been any loss of earnings through sick leave or detention (BGB s 252). Non-material damages that demonstrators suffered are also compensable (BGB s 253(2)).

40. The amount of monetary compensation deemed appropriate and 'fair' is at the discretion of the court (ZPO s 287) which must take into account all relevant circumstances of the individual case. When exercising its discretion, the court must take into account, in addition to the particularities of the individual case, that comparable injuries should result in approximately the same compensation, even if this is only possible to a limited extent in the case of individual rights. Since there are no binding prescripts, the compensation tables for 'pain and suffering' (*Schmerzensgeldtabellen*) which are based on an evaluation of numerous court decisions can be considered for guidance in addition to the court's case law.

41. The type, intensity and duration of the infringement suffered must be included in the decision-making process, must influence the amount of compensation, and must always form the decisive element in its assessment. If the liability to pay compensation is based exclusively on strict liability (*Gefährdungshaftung*) and if this also extends to compensation for non-pecuniary damage, the discretion of the court is limited by upper limits of liability as laid down in the law (*Haftungsgrenzen*).[46]

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42 Sprau (n 39) para 54.

43 *ibid* para 69.

44 *ibid*.

45 *ibid* para 77.

46 For a more detailed account, see Hartmut Oetker 'Sec 253' in Säcker et al (n 13) para 36.

42. According to BGB s 839, the opponents of the claim are the officials who took the actions themselves. In principle, therefore, BGB s 839 establishes personal liability of the officials. Under the conditions of GG Art 34, however, the public body that entrusted the officials with the office during the performance of which the breach of official duty occurred is liable instead of the officials.[47]

43. **Burden of Proof:** The burden of proof falls to the injured parties with regard to both the official status of the police officers, or their actions in the exercise of a public office entrusted to them, as well as in regard to the breach of official duty.[48] In addition, the demonstrators must prove the occurrence of damage and its causation by the breach of official duty (causality).[49] However, since the obligation to refrain from unlawful acts serves precisely to prevent damage to bodily integrity and deprivation of freedom of movement, the causal connection is supported by prima facie evidence.[50] The illegality of the police actions as well as the fact that the officers acted culpably is indicated by the proof of an objectively given breach of official duty.[51] It is therefore the task of the employing authority to demonstrate and prove that there was a basis for authorisation of the actions of the officers and that the requirements for this basis were fulfilled.

44. **Other legal bases for claims:** Other claims against state agents based on the law of delict beyond BGB s 839 cannot be considered, because tortious liability for civil servants is conclusive in this respect. In particular, liability of the State for the actions of civil servants under BGB s 823(1) in conjunction with BGB s 31 or s 89 or s 831 is ruled out.[52] However, claims under state police laws may arise.[53]

Claims against Security Co and its employees

45. Security Co and its employees cannot be held liable solely on the basis of their individual contribution to providing the officers with vehicles, equipment and water. This alone did not cause a violation of legal rights to the detriment of the demonstrators. Rather, an encroachment on the rights of the demonstrators only occurred because the police officers acted against the demonstrators.

46. If the requirements of BGB s 830(1) are met, Security Co and its employees can be held fully liable in the external relationship vis-à-vis the victims for the damage caused by the police measures. A prerequisite for the liability of Security Co and its employees is, however, that the conduct of the police officers, which must have constituted an unlawful tort, occurred intentionally. Both the main perpetrator and contributors must have had intent regarding the violation of the legal right as well as regarding the unlawfulness of their act. In Case Scenario 1, it would therefore be necessary to prove that both the officers and Security Co and their employees have recognised and at least accepted that the conditions of the authorisation for the use of force and the detention were not met, ie that the police measures were unlawful. If they are only charged with (gross) negligence in this respect, according to case law, there is no liability as an accessory.[54]

47 Sprau (n 39) para 25.

48 *ibid* para 84.

49 *ibid*.

50 *ibid* ('*Anscheinsbeweis*').

51 *ibid*.

52 *ibid* para 3.

53 *ibid* para 2a.

54 BGH NJW 2005, 3137, 3139 (Federal Court of Justice).

Q2 If civil claims would not be the preferred route for holding perpetrators in Case Scenario 1 to account, please indicate any other legal avenues available to the protesters.

47. The injured parties could bring an action in an administrative court against the police. As the violation will have ended by the time a claim can be filed, protesters can file a petition for a declaratory order (*Fortsetzungsfeststellungsklage)* before the administrative court with the goal of a declaratory judgment. The aim of such a petition is to have the court declare that police conduct in regard to the demonstration was unlawful, in order to avoid similar interventions in the future.

Q3 Are there any high-profile lawsuits in your jurisdiction that are relevant to Case Scenario 1?

48. The most prominent successful civil liability lawsuit against police is probably the case of the 'Stuttgart 21', where police used water cannons to curb a protest, which led to blindness of a person.[55]

55 VG Stuttgart, Verdict of 18 November 2015-5 K 1265/14 (Administrative Court Stuttgart).

CaseScenario 2

Q1 **Could the local community, or its representatives, or someone acting on their behalf, bring civil claims against Parent Co and Subsidiary Co in your jurisdiction? Please also indicate the key elements of liability that would need to be shown by the claimants to hold the perpetrators liable.**

Claims against Security Co

49. **Rights violation:** First, rights must be violated. The rights explicitly named in BGB s 823(1) include the rights to property, health and bodily integrity. Causing respiratory problems and skin injuries to members of the surrounding population thus constitutes a violation of rights within the meaning of BGB s 823(1). The same applies to the contamination of farmland as a violation of property rights at the expense of the respective owner of the land, as does the destruction of the harvest, as crops become part of the land through their connection to the soil (BGB s 946). In contrast, fish swimming in the wild are no one's property, because wild animals are ownerless, BGB s 960(1)1. Therefore, the death of fish does not constitute a violation of property. The same applies to pollution of rivers and groundwater.[56]

50. Currently, rights to environmental goods such as air, water and soil do not enjoy the protection of BGB s 823(1) as 'other rights'. This means that oil-related pollution and the associated impairment of the supply of food and water cannot be claimed by the surrounding population.[57]

51. **Act of injury:** Subsidiary Co has allowed oil from its production facilities to penetrate the surrounding area, and therefore violated a safety obligation that was incumbent upon it as the operator of the production facility. It controlled the source of the danger of leaking oil. Accordingly, it was incumbent upon Subsidiary Co to take suitable measures to ensure that third parties did not suffer any damage from the operation of the plant. Subsidiary Co therefore committed an act of injury by way of omission.[58]

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56 This is because, according to WHG s 4(2), neither groundwater nor surface waters, which, according to the definition in WHG s 3(3), also include rivers, are capable of being owned. See Water Management Act (*Gesetz zur Ordnung des Wasserhaushalts*). Nothing else follows from BGB s 946, since free-flowing water and groundwater are not physically tangible objects and thus not 'things' within the meaning of BGB s 90. Further, while everyone has the right to use surface waters within the framework of public use, this does not fall under ownership of property, as it lacks the characteristic of exclusivity. For the same reason, public use does not constitute any other right within the meaning of BGB s 823(1). See BGH NJW 1971, 886 (Federal Court of Justice).

57 There is, however, a dispute in the literature. Those against such a qualification of air, water and soil as an 'other right' in BGB s 823(1) argue that these goods are not assigned to individual persons but to the general public for use, so that they lack the exclusivity function otherwise required for classification as other rights. At the same time, it cannot be ignored that the surrounding population is particularly dependent on the use of the affected water and land, and is therefore also affected by its pollution in a prominent manner. In cases where the pollution does not result in a violation of one of the absolute rights mentioned in BGB s 823(1), a legal protection gap may arise. However, the legislature seems to want to close this gap by public law means, rather than through private law: see the Environmental Damage Prevention and Remediation Act (*Gesetz über die Vermeidung und Sanierung von Umweltschäden*) (USchadG) s 5 (regarding duty to avert danger) as well as USchadG s 6 (concerning a duty to clean up), which exclude the damage that is privately suffered and concentrate on the damage to the environment itself. See Gerhard Wagner, 'Sec 823', para 355 in Säcker et al (n 13) para 355; Christine Godt, Haftung für Ökologische Schäden (Drucker & Humboldt 1997)149 ff.

58 BGH NJW 2014, 2104, 2105 Rn 8 (Federal Court of Justice); Wagner (n 57) para 453.

52. **(Quasi-)Causality:** Both the pollution of the farmland and the associated destruction of the harvest can further be directly attributable to the contamination from the leaking oil and are thus quasi-causal. This is because both would have been prevented if Subsidiary Co had prevented the oil from leaking in accordance with its duty to ensure safety. The same applies to the violation of health and bodily integrity of the surrounding population, for these would not have occurred either if the Subsidiary Co had prevented the oil from spilling.

53. **Illegality:** All violations of rights also happened unlawfully. While the owner of a property must accept certain emissions, this only applies to insignificant or customary impairments (BGB 906 (1), (2)). The spill of oil certainly exceeds this threshold.

54. **Fault and causality:** Subsidiary Co culpably disregarded the safety obligation incumbent upon it, which was causal for the damage to occur. This is due to the finding that Subsidiary Co failed to take reasonable safety measures and disregarded its duty of care.[59]

55. **Damage:** Subsidiary Co must therefore compensate the injured parties for the damage resulting from the infringement of their legal rights. In accordance with the principle of *in rem restitution* (BGB s 249(1), (2)), this includes medical treatment costs for those injured as well as relief from the seepage of oil through remediation of the affected farmland.

Claims against Parent Co (under BGB s 831)

56. **Unlawful damage:** Unlawful harm according to BGB s 831(1) has been done as explained in [49] above.

57. **Subsidiary Co as vicarious agent:** The unlawful damage was caused by Subsidiary Co, not Parent Co. Parent Co would only be liable for this if Subsidiary Co were Parent Co's vicarious agent. A vicarious agent is a person who only acts within the legal scope and obligations of the principal and is bound by the principal's instructions.

58. Such a relationship of superordination-subordination, including being bound by instructions, is conceivable in a group, even if they are independent legal entities. However, it is the exception. This is because the purpose of outsourcing to the subsidiary is precisely to relieve the parent company by having the subsidiary perform the task independently. In accordance with the case law of the German Federal Court of Justice (BGH), the subsidiary is therefore only bound by instructions if it carries out its activities in an organisationally dependent position because the parent company can restrict or withdraw the activities of the subsidiary at any time, or determine these in terms of time and scope.[60] Subsidiaries, however, typically have an independent management which makes business decisions according to its own considerations of expediency.

59 Wagner (n 57) para 447.

60 BGH NJW 2013, 1002, 1003 (Federal Court of Justice).

59. This is the case in Case Scenario 2. Although Parent Co is responsible for the overall management of the X Group's business, Subsidiary Co manages the project assigned to it autonomously, ie makes organisational decisions itself. The fact that Parent Co could theoretically exert more influence since it holds 100 per cent of the shares in Subsidiary Co, and thus controls it, does not change the independence of Subsidiary Co according to case law. This is because the actual circumstances are decisive for the classification as a vicarious agent, not the potential influence.[61] In addition, even if Parent Co were to use its dominant position and exert more operational influence on the business, the subsidiary would continue to operate in its own legal sphere, not in that of the parent company since responsibility for the individual project is assigned to them.

Claims against Parent Co (breach of an organisational duty)

60. In principle, BGB s 831 conclusively regulates any case in which a damaging party is liable for the conduct of a third party for its own fault of not properly selecting and monitoring its agents. There has been discussion about making an exception to this principle as far as liability for human rights violations is concerned.[62] However, even if one were to assume that Parent Co exercised actual control over Subsidiary Co, a further prerequisite for liability would be that the parent company has breached its organisational duty in a culpable, ie negligent, manner. This is because liability for breach of an organisational duty is not a liability based on attribution, but a liability based on one's own fault.[63] It would therefore not be sufficient in Case Scenario 2 to prove that Subsidiary Co culpably failed to organise its business in such a way as to prevent oil from leaking. Rather, Parent Co would have to be reproachable for not having adequately supervised Subsidiary Co and its dutiful execution.

61. A further exception seems conceivable for cases in which a parent company transfers tasks to a subsidiary which – as in Case Scenario 2 regarding oil production – cause considerable damage in the event of an accident. In such cases, the parent company benefits from the profits of the subsidiary but is at the same time shielded from the latter's liabilities in the event of damage. It therefore seems likely that the outsourcing serves the purpose of shifting the obligation to pay compensation such that it falls to third parties.[64] However, such constructions at the expense of third parties are not explicitly provided for in the German Civil Code, BGB s 328.[65]

61 *ibid*.

62 In this context, it must be noted that this would represent a considerable breach of the principle of the legal entity and the associated principle of separation if liability within the group were to extend beyond the boundaries of the acting company; see Wagner (n 57) para 110. Ultimately, this would mean that all companies within a group would merge into a joint liability mass. Exceptions exist at least for cases in which the parent company exercises actual control over the conduct of the subsidiary and thereby breaches a duty of care. See Mathias Habersack and Peter Zickgraf, 'Deliktsrechtliche Verkehrs- und Organisationspflichten im Konzern' (2018) 182 *Zeitschrift für das Gesamt Handels-und Wirtschaftsrecht* 252, 288 ff.; Holger Fleischer and Stefan Korch, 'Konzerndeliktsrecht: Entwicklungsstand und Zukunftsperspektiven' (2019) *Der Betrieb* 1944, 1946 ff. Whether this can be assumed in the present case, however, appears questionable. Although Parent Co has assumed the overall management of the X Group, the subsidiaries are independently responsible for the respective projects. It is true that no instruction is required in the individual case (see BGB s 831). What is required, however, are organisational measures which have actually been taken and which apply throughout the group. A mere lack of exercise of control powers is not likely to be sufficient, as this would establish nothing other than joint liability for the corporate group for any culpable conduct on the part of the subsidiary.

63 See Wagner (n 57) para 113.

64 See for issuing investments, Wagner (n 57) para 112. For delegation on traffic safety obligations, see BGH NJW 2006, 3628, 3629 (Federal Court of Justice).

65 For a nuanced discussion, see Gerhard Wagner 'Haftung für Menschenrechtsverletzungen' (2016) 80(4) Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 717, 766.

Q2 If civil claims would not be the preferred route for holding the perpetrators in Case Scenario 2 to account, please indicate any other legal avenues available to the local population.

62. Possible alternative legal pathways to hold the perpetrators to account would be USchadG s 5ff [66] or BImSchG s 14.[67] Both laws establish specific duties of care toward the environment and formulate damages as remediable.

Q3 Are there any high-profile lawsuits in your jurisdiction that are relevant to Case Scenario 2?

63. There are no high-profile lawsuits known to the author.

66 Federal Ministry of Justice, Environmental Damage Prevention and Remediation Act (*Gesetz über die Vermeidung und Sanierung von Umweltschäden*). (USchadG).

67 Federal Ministry of Justice, Federal Emission Control and Protection Act '*Bundesimmissionsschutzgesetz – Gesetz zum Schutz vor schädlichen Umwelteinwirkungen durch Luftverunreinigungen, Geräusche, Erschütterungen und ähnliche Vorgänge*' (BImSchG).

CaseScenario 3

Q1 **Would it be possible to bring a civil claim against Factory Co and/or Brand Co? Please also indicate the key elements of liability to be shown by the claimants to hold Factory Co and/or Brand Co liable.**

Claims against Factory Co

(Inadequate implementation of fire safety standards)

64. **Establishing breach of contractual obligation under BGB s 280(1), BGB 241(2):** the surviving employees or their heirs (then in conjunction with BGB s 1922) are entitled to claim damages against Factory Co arising from the employment contract, according to BGB s 280(1) in conjunction with BGB 241(2). Factory Co as immediate employer is obligated to consider the rights and legal interests of its employees (BGB 241(2)). The employer's duty of care (BGB s 618(1)1) includes maintaining the workplace in such a way that the employees are protected against threats to life and health.

65. The threshold for the employer's duty of care and resulting obligations can be found, inter alia, in the Occupational Safety Law (ArbSchG) and the Workplace Ordinance (ArbStättV).[68] While these norms are of general public legal applicability, according to BGB s 618(1)1 they permeate any individual employment relationship (so-called *Drittwirkung*) and therefore establish a private-law obligation that the employer owes to each individual employee. The employer's general duty of care under BGB s 618(1)1 is concretised via the public-law occupational health and safety standards.[69] A violation of the duties of the ArbStättV therefore also constitutes a breach of duty of care towards each individual employee. The only prerequisite for this is that the regulation that has been violated is one that protects third parties, ie that its purpose is to protect the individual employee.[70] ArbStättV s 3a(1)1 obliges the employer to ensure that workplaces are set up and operated in such a way that hazards to the safety and health of employees are avoided as far as possible and any remaining hazards are kept to a minimum. An almost identical obligation arises from ArbSchG s 4(1).[71]

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68 Federal Ministry of Justice, Occupational Safety Law (*Arbeitsschutzgesetz*) (ArbSchG), and Workplace Ordinance (*Arbeitsstättenverordnung*) (ArbStättV).

69 BAG NZA 2009, 102, 103 para 13a (Federal Labour Court); BAG NZA 2009, 775, 776 para 24, 25 (Federal Labour Court).

70 BAG NZA 2009, 102 (Federal Labour Court).

71 This general obligation includes maintaining safety equipment, in particular fire alarm and fire extinguishing equipment, and signalling systems, and having them checked for proper functioning at regular intervals, ArbStättV s 4(3). The employer is also obliged to ensure that traffic routes, escape routes and emergency exits are kept clear so that they can be used at all times; to take precautions in such a way that employees can get to safety immediately in the event of danger and can be rescued quickly; and to draw up an escape and rescue plan if the location, extent and type of use of the workplace make this necessary. Exercises must be carried out in accordance with this plan at appropriate intervals (ArbStättV s 4(4)). Finally, ArbStättV s 4(5) obliges the employer to provide means and equipment for first aid when setting up and operating workplaces, and to have them regularly checked for their completeness and usability. A very similar canon of duties results from ArbSchG s 10(1)1 according to which the employer must take the measures necessary for first aid, firefighting and evacuation of employees, depending on the type of workplace and activities as well as the number of employees, and, in accordance with ArbSchG s 10(1)3, must ensure that the necessary connections to external agencies are established in case of emergency, especially in the areas of first aid, emergency medical care, rescue and firefighting.

66. The standards of the ArbStättV and the ArbSchG not only serve to ensure an orderly process within the company but are also intended to ensure the protection of each individual employee against risks to their health.[72] If the preliminary investigation can be substantiated, according to which the Factory Co did not ensure adequate fire protections and workers suffocated as a result, Factory Co breached its duty of care toward workers and can therefore be held liable.

67. **Reversal of the burden of proof:** BGB s 280(1)2 provides for a reversal of the burden of proof in favour of the injured party. In this instance, Factory Co must prove it was not responsible for the accident. According to the facts of the case, Factory Co cannot present such exculpatory evidence and therefore is at fault.

68. **Causality:** Further, a causal link between the breach of duty of the employer and death and injuries of employees must be established. According to established case law, proof of causality is supported by prima facie evidence since the purpose of fire-safety obligations outlined above is precisely to prevent injuries and death of employees from fire or smoke.[73] Since this danger was realised in the present case, general life experience suggests that the disregard of the above-mentioned obligations was causal for the occurrence of the injuries and death.

69. **Damages calculation:** The resulting obligation to pay compensation for the surviving employees includes compensation for the costs of medical treatment (BGB s 249(1), (2)), as well as appropriate compensation for pain and suffering (BGB s 253). Presuming that the deceased employees did not incur any medical costs, compensation for pain and suffering could no longer fulfil its reparation and satisfaction function in relation to them. The heirs of the deceased employees can therefore claim the costs of a funeral (BGB s 844(1)), maintenance (BGB s 844(2)), and compensation for non-material damage for the emotional suffering caused by the loss of the deceased. The latter, however, is not available to the heirs, but only to persons who were in a special relationship of proximity to the deceased, eg close relatives (BGB s 844(3)).

Claims against Factory Co

(under BGB s 823(1) and (2))

70. The same damages claim arises from BGB s 823(1) and (2).[74]

Claims against Factory Co

(Violations of physical integrity, sexual self-determination and for compulsory, unpaid overtime)

71. **Making use of BGB: s 280, s 241, s 618(1):** The employment contract existing between Factory Co and its employees obligated Factory Co to respect the physical integrity of its employees (BGB s 241(2), and to actively protect it (BGB s 618(1)). Further arising from the employment contract is the duty of

72 BAG NZA 2009, 775, 776 para 26 (Federal Labour Court).

73 This is standard practice when a protective law or duty of care exists that is intended to prevent hazards typical of the kind that has been realised in the damage that has occurred. See Ulrich Foerste 'Sec 286' para 27 in Hans Musielak and Wolfgang Voit (eds), *Zivilprozessordnung* (CH Beck 2021), and in particular for damages resulting from fire, see *ibid* for further reference to case law.

74 Life, health and bodily integrity are absolute legal interests within the meaning of BGB s 823(1). Factory Co has violated these by disregarding its obligations under the ArbSchG and the ArbStättV and thus violated its duty to ensure fire-safety. This violation also occurred unlawfully for lack of justification. Subject to proof of fault – which falls to the claimants within BGB s 823 – Factory Co must pay damages according to the above standards. The same claim also arises from BGB s 823(2). This is because the standards of the ArbSchG and the ArbStättV are mandatory legal standards and their purpose is to protect not only the general public, but also the individual employee to precisely avert the risks of injury and death that have occurred in the present case. The above-mentioned standards therefore constitute protective laws which Factory Co has violated.

Factory Co to protect the sexual self-determination of its (female) employees. The latter follows from AGG s 7(3),[75] according to which discrimination by employers or employees constitutes a breach of contractual obligations. Finally, the ArbZG[76] obliges Factory Co to employ its employees for only eight hours per day (ArbZG s 3). Only exceptionally are ten hours also permitted. Routinely exceeding the eight-hour day is prohibited. This obligation also serves to protect each individual employee, as can be seen from ArbZG s 1(1), according to which the law is intended to ensure the safety and health protection of employees in the Federal Republic of Germany. It therefore influences the employment relationship and each employee can assert a violation individually. Factory Co has violated its duty of care toward the assaulted and exploited employees by allowing physical and sexual violence at the workplace, and by making employees work mandatory overtime. Provided that Factory Co cannot exculpate itself (BGB s 280 (1)2), it must compensate the damage resulting from the above-mentioned breaches of duty.

72. **Provisions of AGG s 15(1):** An identical claim remedying sexual harassment (AGG s 2(1)1– s 4(3)4) arises from AGG s 15(1), which provides for a special damages claim for employees in the event of violations of the AGG. This includes compensation for material (AGG s 15(1)) and non-material (AGG s 15(2)) damages. However, there is a strict time limit of two months for the assertion (AGG s 15(4)).

73. **Provisions of BGB s 823(1) and (2) or BGB s 831:** Identical claims further arise from BGB s 823(1) and (2) since health and bodily integrity, as well as sexual self-determination, are protected legal rights whose injury justifies a claim for damages. The only difference is that the claimant needs to substantiate the claim in BGB s 823, whereas BGB s 280(1)2 stipulates a reversal of the burden of proof. The conduct of its employees must be attributed to Factory Co in terms of BGB s 31 or it will be liable for its own fault, since it did not select or supervise its (managing) employees to the extent required (BGB s 831). In addition, StGB s 184i, and StGB s 223(1) and ArbZG s 3 constitute protective laws, the violation of which also gives rise to claims for damages according to BGB s 823(2).

Civil claims of employees against Brand Co according to BGB s 831(1)

74. A claim in terms of BGB s 831 would require that Factory Co is the vicarious agent of Brand Co. A vicarious agent is someone who acts within the legal sphere of the principal (here Brand Co) according to their instructions. Given the narrow interpretation of the relationship between vicarious agent and principal in German civil law, the requirement of BGB s 831 is essentially impossible to establish for supplier relationship between two separate legal persons.

75. In Case Scenario 3, one could argue that a relationship of control exists between Factory Co and Brand Co that is similar to vicarious liability's principal-agent relationship, as Brand Co is the main purchaser of Factory Co's products. It is therefore not far-fetched to assert that Brand Co economically, and therefore factually, controls Factory Co as it can de facto exert influence similar to instructions. However, the mere possibility to issue instructions does not suffice for vicarious liability. Rather the actual circumstances are decisive for the classification as a vicarious agent.

75 Federal Ministry of Justice, Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*).

76 Federal Ministry of Justice, Working Hours Act (*Arbeitszeitgesetz*).

76. The same problem occurs when aiming to establish liability of Brand Co due to organisational fault in terms of BGB s 823(1) and BGB s 31. Even if BGB s 831 fails due to the lack of a principal-agent relationship, everyone remains obliged to organise their business in such a way that third parties do not suffer any damage from its operation. However, this organisational obligation ends at the boundaries of one's own organisation, ie it does not include one's suppliers.[77]

77. There has been discussion about making an exception to this principle as far as liability for human rights violations is concerned, although a piercing of the veil here would constitute a far-reaching break with the fundamental principles of legal entity and separation if the organisational duty were to be extended beyond the company to completely independent companies.[78] In addition, even if such an extension were permitted, it would still have to be proven that Brand Co has culpably – ie negligently – breached its organisational duty in the present case. This is because liability for breach of an organisational duty is not a liability based on attribution, but a liability based on one's own fault.[79]

Q2 If civil claims would not be the preferred route for holding the perpetrators in Case Scenario 3 to account, please indicate any other available legal avenues available to the victims and/or their families?

78. Importantly, many damage claims against employers arising from contract (BGB s 280(1)) or through the law of delict BGB s 823 are excluded due to SGB s 104(7), according to which employers are only liable if they intentionally caused the damage.[80] The preferred route in such legal cases is therefore through employment law, as statutory accident insurance will cover (much of) the costs arising from injury at work. Further, criminal action can be pursued against any employer who, contrary to ArbStättV s 3a(1)1 does not ensure that a workplace is set up or operated in the manner prescribed therein (ArbStättV s 9(1)2). In addition, regulatory action can be instigated for violations of the ArbZG.

Q3 Are there any high-profile lawsuits in your jurisdiction relevant for Case Scenario 3?

79. The Karachi-based Ali Enterprises factory burned down in 2012, killing more than 255 workers. The Pakistani factory's biggest client was the German discount retailer KiK which, according to own statements, had bought at least 70 per cent of the textiles the factory produced in 2011. KiK stated that it was its business that enabled the Pakistani manufacturing firm to grow into a major company.

77 Wagner (n 57) para 110.

78 For reference and summary of the discussion, see Gerhard Wagner, 'Haftung für Menschenrechtsverletzungen in der Lieferkette' (2021) ZIP 1095.

79 Carsten König, 'Deliktshaftung von Konzernmuttergesellschaften' (2017) 217 (4-5) Archiv für die civilistische Praxis 611, 671; Wagner (n 65).

80 Social Security Act (*Sozialgesetzbuch*) (SGB).

On the initiative and with the support of the European Center for Constitutional and Human Rights and medico international, four of the Pakistani employees affected by the factory fire sued KiK in a German court.

80. In March 2015, they filed a civil lawsuit against KiK at the Regional Court in Dortmund seeking EUR 30,000 each in compensation. In January 2019, the court dismissed the case, finding that it had exceeded the statute of limitations. KiK originally agreed to waive potential statutory limitations, but later rescinded its offer. The case was thus decided on procedural grounds, not merit. Questions about corporate liability remain unresolved. Although, importantly, Pakistani civil law, not German civil law was applicable in the case. The civil claim of the four Pakistani plaintiffs against German retailer KiK was the most prominent case in this regard and prompted a broad legal debate about liability for suppliers under German civil law.[81]

81 LG Dortmund, Verdict of 10.01.2019-7 O 95/15 (Dortmund Regional Court).

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