

A HANDBOOK FOR PRACTITIONERS | UKRAINE

# Civil Liability for Human Rights Violations



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## FREQUENTLY USED ABBREVIATIONS

CC	Civil Code of Ukraine
CPC	Civil Procedure Code of Ukraine
CSO	civil society organisation
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
Law on Illegal Acts	Law No 266/94-VR 'On the Procedure for the Compensation of Damage Caused to Citizens by Illegal Acts of the Operative Investigation Bodies, Pre-trial Investigation Bodies, Prosecutor's Offices and Courts'
LC	Labour Code of Ukraine

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# UKRAINE



Ukrainian legislation enshrines a broad catalogue of human rights and freedoms, but it often does not provide detailed rules for the remedies available to an aggrieved person. The main provisions on civil liability are to be found in the Civil Code of Ukraine and include the rules on so-called general delict and special delicts. Overall, the Ukrainian law of civil remedies has the potential to be a vehicle for remedying human rights violations. But significant obstacles remain such as the lack of a class action mechanism, the absence of a comprehensive theory of causation and a limited range of rules allowing a claimant to hold a perpetrator liable for the acts of a third person. In addition, Ukrainian legislation currently does not impose human rights due diligence obligations on businesses.

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## INDICES

86/167

Democracy Index  
2021 Ranking

61/100

Freedom House  
2022 Score

122/180

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. Ukraine is a signatory to a number of international human rights treaties.<sup>1</sup> In accordance with Article 9 of the [Constitution](#), these international agreements, which have been approved as binding by Parliament, constitute an integral part of domestic law. The influence of the [European Convention on Human Rights](#) (ECHR) is especially prominent. The Convention itself and the case law of the European Court of Human Rights (ECtHR) are widely applied by Ukraine's national courts.
2. Human rights and fundamental freedoms are enshrined in Section II of the Constitution of Ukraine. The Constitution guarantees the right to compensation for damage caused by illegal decisions, acts or omissions of public bodies and their officials (Article 56). Additionally, most of these human rights are reiterated in Book II of the [Civil Code of Ukraine \(CC\)](#) where they are called 'personal non-pecuniary rights'.
3. Violations of internationally recognised human rights do not constitute a special kind of tort in Ukraine. Victims therefore must rely on the general provisions of tort law, which is a part of the law of non-contractual obligations. The main provisions of tort law are embraced in Chapter 82, 'Compensation of Damage', of the CC. This includes a so-called 'general tort' which is an overarching rule allowing victims to claim compensation in any case where damage is inflicted as a result of wrongful actions or omissions (CC Articles 1166 and 1167), and so-called 'special torts' which are addressed by provisions governing tort obligation in particular cases. Some of the 'special torts' are addressed by separate legislation.<sup>2</sup> Several 'special torts' specifically concern instances where damage is caused by public bodies or their officials (CC Articles 1173-1176).
4. In general, Ukrainian tort law has the potential to be a vehicle for remedying human rights violations. But there are some notable obstacles preventing it from being used to address all situations. In particular, there is no mechanism for class actions that might be required in certain situations, especially in instances of environmental pollution. Among the doctrinal hurdles in Ukrainian tort law there is an absence of a comprehensive theory of causation and there is a limited range of rules that allow holding someone liable for damage which is not the direct consequence of his or her own actions. At present, national legislation does not impose human rights due diligence obligations on businesses.<sup>3</sup> As a result, it is difficult for victims to substantiate claims against wrongdoers whose involvement in human rights violations is indirect.

1 For a list of international human rights treaties ratified by Ukraine, see Olena Uvarova, '[Business and Human Rights: National Baseline Assessment](#)' (Yaroslav Mudryi National Law University, Ministry of Justice of Ukraine, Danish Institute for Human Rights, 2019) 4.

2 See the [Law 'On Liability for Damages Caused by Product Defects'](#) (19 May 2011, No 3390-VI), the [Law 'On Civil Liability for Nuclear Damage and its Financial Provision'](#) (13 December 2001, No 2893-III) and the [Law 'On The Procedure for Compensation of Damage Caused to Citizens by Illegal Acts of the Operative Investigation Bodies, Pre-trial Investigation Bodies, Prosecutor's Offices and Courts'](#) (1 December 1994, No 266/94-VR).

3 Uvarova (n 1) 8, 15, 17.

# General Questions



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?

Basic provisions of Ukrainian tort law are set out in the Civil Code and address the general principles of compensation for damage caused (**general tort**) or peculiarities of compensation for damage caused in certain circumstances (**special torts**). Some special torts are also addressed in separate laws. The State is not excluded from the ambit of the CC. Furthermore, there are provisions specifically concerning the civil liability of public bodies.

### Assault or unlawful arrest and detention

5. These actions do provide grounds for a claim for compensation. However, such a claim would be based on different provisions of tort law depending on whether the damage was caused by a public body or private actor. Additionally, (in the case of damage caused by a public authority) it would depend on whether the damage was inflicted during the performance of duties relating to an **official investigation** or **proceedings** against the victim (eg in relation to criminal or administrative charges); or if it was inflicted without any connection to official proceedings.
6. When public bodies commit violations against a person during the conduct of an official investigation in a criminal or an administrative offence case, the damage caused by unlawful arrest, detention and other procedural measures is subject to compensation under [CC Article 1176](#)<sup>4</sup> and under the special [Law No 266/94-VR](#) 'On the Procedure for the Compensation of Damage Caused to Citizens by Illegal Acts of the Operative Investigation Bodies, Pre-trial Investigation Bodies, Prosecutor's Offices and Courts' (the [Law on Illegal Acts](#)).<sup>5</sup>
7. If the unlawful actions of public bodies are not related to official proceedings, ie when those actions constitute arbitrary violence (such as the use of brutal force to disperse a rally), the [Law on Illegal Acts](#) is not applicable. In such a case, a claim for damages can be based on Article 56 of the [Constitution](#), and on Articles 1173 (damage caused by a public body) and 1174 (damage caused by officials of a public body) of the [CC](#). When the violation of a human right has caused injury or death, special rules for calculating the damage are provided in [CC Chapter 82 § 2](#) (Articles 1195-1208).

### Environmental harm

8. The right to compensation for environmental harm is provided for in a number of acts. This includes the [Constitution](#), the provisions of which are directly applicable.<sup>6</sup> Under Article 50 of the [Constitution](#), everyone has the **right to a safe and healthy environment** and to compensation for damage caused by violation of this right.

<sup>4</sup> The title of Art 1176 is 'Compensation for damage caused by unlawful decisions, actions or omissions of operative investigation bodies, pre-trial investigation bodies, prosecutor's offices and courts'.

<sup>5</sup> Law No 266/94-VR (24 November 2021, No 4652-VI).

<sup>6</sup> [Constitution of Ukraine](#), art 8, para 2. See also Resolution of the Plenary Supreme Court of Ukraine, '[On the Application of the Constitution of Ukraine in the Administration of Justice](#)' (1 November 1996, No 9).

The right to a safe and healthy environment is also set out in [CC](#) Article 293. According to [CC](#) Article 275, this right is subject to protection by all remedies available under the general provisions of the [CC](#).<sup>7</sup> Among those remedies are compensation for damage,<sup>8</sup> the cessation of the infringing act,<sup>9</sup> and restoration of the status quo that existed before the infringement (*restitutio in integrum*).<sup>10</sup>

9. The right to compensation for environmental harm is also provided for in the provisions of special environmental legislation. Under the [Law 'On Environmental Protection'](#), every citizen of Ukraine has the right to sue government agencies, enterprises, institutions, organisations and citizens, and can seek compensation for damage caused to their health and property as a result of negative impact on the environment.<sup>11</sup> Article 69 of the [Law 'On Environmental Protection'](#) further provides that damage caused as a result of the violation of environmental legislation is subject to compensation in full. In particular, persons who have suffered such damage are entitled to compensation for lost income for the period necessary to restore health, to restore the quality of the environment and to restore natural resources to a state suitable for their intended use.

## Harmful or unfair labour conditions

10. Damage caused to an employee, including injury, illness and death, is compensated through insurance under the **state social security mechanism**,<sup>12</sup> and not through the tort law. Reimbursement is made by the Social Insurance Fund of Ukraine. Events insured include job-related accidents and occupational diseases. Various pieces of legislation specify in detail the conditions and the procedure for compensation in different circumstances.<sup>13</sup>
11. However, insurance payments do not include compensation for **non-pecuniary (moral) damage**.<sup>14</sup> Such damage is compensated on the grounds of tort law. A claim in this case would be based on [CC](#) Articles 23 and 1167 (general provisions on the right to compensation for non-pecuniary damage), and Article 237-1 of the [Labour Code of Ukraine](#) (LC), according to which moral damage should be compensated whenever violation of the employee's rights entails moral suffering, loss of normal life ties and requires him/her to make additional efforts to organise their life.

## Compensation for real estate destroyed in the armed conflict

12. The law of civil remedies in Ukraine has been also instrumental as a means of redress for victims in cases beyond the project's main scope and three defined harms. In particular, this applies to compensatory claims for real estate destroyed in the armed conflict in Eastern Ukraine.<sup>15</sup>

<sup>7</sup> [CC](#) ch 3.

<sup>8</sup> *ibid*, art 16, para 2, subpara 9, 10; [CC](#), arts 22, 23.

<sup>9</sup> *ibid*, art 16, para 2, subpara 3.

<sup>10</sup> *ibid*, subpara 4.

<sup>11</sup> [Law 'On Environmental Protection'](#) (25 June 1991, No 1264-XII), art 9, para 1, subpara (z).

<sup>12</sup> [Law 'On Labour Protection'](#) (14 October 1992, No 2694-XII), art 9.

<sup>13</sup> [Law 'On Labour Protection'](#); [Law 'On Mandatory State Social Insurance'](#) (23 September 1999, No 1105-XIV); Resolution of the Cabinet of Ministers of Ukraine, '[Procedure for the Investigation and Accounting of Safety Incidents, Occupational Diseases and Occupational Accidents](#)' (17 April 2019, No 337); Resolution of the Directorate of the Fund of Social Security, '[Procedure for Awarding, Recalculation and Making Insurance Payments](#)' (19 July 2018, No 11); Resolution of the Cabinet of Ministers of Ukraine, '[The List of Occupational Diseases](#)' (8 November 2000, No 1662); Resolution of the Cabinet of Ministers of Ukraine, '[The Procedure for Determining the Average Wage \(Income, Gains\) for the Purpose of Calculation of Payments within Mandatory State Social Insurance](#)' (26 September 2001, No 1266).

<sup>14</sup> [Law 'On Mandatory State Social Insurance'](#), art 36, para 8.

<sup>15</sup> Bohdan Karnaukh, 'Ukraine: The Untapped Potential of Tort Law' in Ekaterina Aristova and Uglješa Grušić (eds), *Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions* (Hart Publishing, 2022) 342-343.



## SPOTLIGHT: CASE STUDY

Armed conflict in the Donetsk and Lugansk regions has been ongoing since 2014.<sup>16</sup> One of the questions addressed by case law was whether the tremendous damage caused to a great number of persons and legal entities as a result of heavy weapons use can be compensated and, if so, at whose expense. Many claims were commenced under Article 19 of the Law on Combatting Terrorism, seeking compensation for the damage caused by the destruction of housing or other real estate. The Grand Chamber of the Supreme Court concluded that Article 19 cannot serve as grounds for legitimate expectation to be compensated at the State's expense for damaged real estate in the Anti-Terrorist Operation Zone.<sup>17</sup> The Grand Chamber emphasised the distinction between the negative and positive obligations of the State. The case was referred for a new trial, and the court of first instance held that the State had violated its positive obligations by not setting a compensation mechanism in place for more than five years. On this ground the plaintiff was awarded compensation (although the value of the destroyed property was significantly higher than the compensation for damage awarded).<sup>18</sup>

## 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?

There are four elements of tort: wrongfulness, damage, causation and fault. Although this formula is not expressly provided for in the CC, the courts consider it implied in CC Article 1166. If at least one element is absent, a person cannot be held liable for tort.

13. As a general rule, there are four elements of liability in tort: **wrongfulness, damage, causation** and **fault**. The **burden of proof** is allocated to the plaintiff for the first three elements (wrongfulness, damage and causation), while the defendant disproves their fault (in civil law, presumption of fault operates).<sup>19</sup> To disprove their fault, the tortfeasor must show that they have taken all measures in their power to prevent damage.
14. The definition of **compensable damage** is provided in [CC](#) Articles 22 and 23. It includes pecuniary and moral (non-pecuniary) damage. Pecuniary damage embraces both actual losses and lost profits.

<sup>16</sup> United Nations General Assembly, 'Resolution Adopted by the General Assembly on 27 March 2014: 68/262 Territorial Integrity of Ukraine' (UNGA, A/RES/68/262).

<sup>17</sup> Case No 265/6582/16-ts (Judgment of the Grand Chamber of the Supreme Court, 4 September 2019) [32].

<sup>18</sup> Case No 265/6582/16-ts (Judgment of the Ordzhonikidze District Court of Mariupol city (Donetsk region), 27 April 2021).

<sup>19</sup> [CC](#), arts 614, 1166.

15. The set of tort liability preconditions (the four elements described in [13]) can vary depending on the features of a particular situation. This applies to the three defined harms within the scope of the project.

### **Assault or unlawful arrest and detention: unlawful procedural measures**

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16. When damage is caused by unlawful procedural measures taken within a criminal case or an administrative offence case (see [6] above), the damage is subject to compensation regardless of the fault or non-fault of the officials who carried out the relevant procedural measures.<sup>20</sup> Thus the set of preconditions here includes only three elements (it excludes fault).
17. **Proof of unlawfulness** is an important distinguishing feature in this case. The [Law on Illegal Acts](#) contains an exhaustive list of circumstances that can evidence the unlawfulness of procedural measures that have been undertaken. Under Article 2 of this law, the right to compensation shall arise:
- in the event of an acquittal by a court;
  - 'where a court establishes the following in a verdict or other judicial decision (except for a decision ordering new consideration [of a criminal case]): the fact that there has been unlawful notification of suspicion of a crime; [and/or] that there has been unlawful remand and detention in custody; [and/or an] unlawful search [and] seizure in the course of criminal proceedings; [and/or] unlawful attachment of property; [and/or] unlawful suspension from work and other procedural actions restricting a citizen's rights; [and/or] unlawful conduct of operational search activities' (Article 2(1-1));
  - in the event of criminal proceedings being terminated for the reason that no crime has been committed, for the absence of *corpus delicti*, or for the lack of evidence to prove the accused's guilt in trial [where] all possible means to obtain such evidence have been exhausted;
  - in the event of proceedings for an administrative offence being terminated.
18. If one of the above-mentioned circumstances exists, the State cannot avoid liability by contending that law enforcement agencies have exercised all due diligence and have made a good-faith mistake (**no-fault liability regime**). If the person is acquitted, or if proceedings are terminated on 'exonerative' grounds, all procedural measures conducted within the respective proceedings are ipso facto considered to be unlawful and give rise to a claim for damages.

### **Assault or unlawful arrest and detention: arbitrary violence**

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19. When a claim is based on general provisions concerning liability of public bodies and their officials (such as when the damage is inflicted without any relation to criminal proceedings or to an administrative offence case as clarified in [7] above), liability of the State does not depend on the fault of responsible officials (as explained above in terms of [Law on Illegal Acts](#)).

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<sup>20</sup> CC, art 1176; [Law on Illegal Acts](#), art 1, para 2.

20. However, in this case the victim may encounter difficulty in proving unlawfulness in terms of CC Articles 22 and 23. This is due to the fact that the use of disproportionate force by law enforcement officers is generally considered to constitute a crime under Article 365 of the [Criminal Code of Ukraine](#) (abuse of power by a law enforcement officer). To substantiate a tort claim for damages, a victim would effectively assert that a crime was committed by law enforcement officers. It seems extremely unlikely that court would satisfy such a claim in the absence of a verdict in a criminal case against the responsible law enforcement officers.
21. Damage in this case is determined in accordance with the general rules.<sup>21</sup>

## **Environmental harm**

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22. In the case of environmental harm, the plaintiff must prove wrongfulness, damage and causation. In this type of case, a defendant can often be defined as an actor whose operations constitute 'a source of increased danger'.<sup>22</sup> Where this is applicable, the defendant is subject to a special regime of strict liability, where they cannot avoid liability by proving that they are not at fault. The only way to avoid liability is to show that the harm is the result of irresistible force or the victim's own intentional actions.<sup>23</sup>
23. Damage in this instance is defined in accordance with the general rules.
24. Plaintiffs in environmental cases may face difficulty proving wrongfulness and causation. The courts tend to find wrongfulness only where there are official reports by public bodies (such as the State Environmental Inspectorate) which monitor and document the emission of pollutants without permit, or violations of maximum allowable concentrations.<sup>24</sup> With regard to causation there are no exceptions to the general rule that causation must be proved by the plaintiff, and there can be no lowering of the standard of proof in this regard.

## **Harmful or unfair labour conditions**

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25. With regard to compensation for non-pecuniary damage (see [10]-[11] above) caused by the violation of an employee's rights, Article 36, paragraph 8, of the [Law 'On Compulsory State Social Insurance'](#) refers to the [CC](#) and [LC](#). This should mean that the damage is reimbursed according to the general provisions, and the regular formula of preconditions applies (wrongfulness, damage, causation and fault).
26. Yet, in one of its judgments,<sup>25</sup> the Ukrainian Supreme Court interpreted [LC](#) Article 237-1 in a quite unexpected way. The Court treated it as an extension of the social insurance mechanism rather than as a rule of tort law. The Court concluded that even if injury was caused by a breach of safety rules by the employee himself, the employer was nonetheless liable for non-pecuniary damage. It stated that a causal nexus (between the injury and the employer's wrongful conduct) was not necessary in this case. According to this decision, the only thing that matters is that the incident should have taken place in relation to the employee's job function.

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21 [CC](#), art s 22, 23, 1166, 1167.

22 For the definition, see [CC](#), art 1187, para 1.

23 [CC](#), art 1187, para 5.

24 Case No [2012/4613/2012](#) (Judgment of the Civil Cassation Court, 25 February 2019); cf Case No [283/518/17-ts](#) (Judgment of the Civil Cassation Court, 18 November 2020).

25 Case No [212/7705/16-ts](#) (Judgement of the Civil Cassation Court, 25 April 2018).

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?

A person may be held liable for the wrongful act or omission of another person only in cases expressly provided for by law. The cases of vicarious liability are limited. With regard to accessory liability, CC Article 1190 states that persons whose joint actions or omissions caused damage shall be held liable *in solidum*.

#### Tort liability for joint actions

27. Tort liability for **aiding** and **abetting** is not known in Ukrainian law. Yet, [CC](#) contains a fairly broad rule in Article 1190 which addresses liability for damage caused by **joint actions**. According to this, persons who cause damage by joint actions or omissions shall be liable *in solidum*. At the request of the victim, the court may determine liability in proportion to the degree of tortfeasors' respective fault.
28. The scope of Article 1190 depends on what is meant by the 'joint actions'. If interpreted widely, 'joint actions' include any form of complicity in the infliction of harm, including indirect involvement (aiding and abetting) which may consist in providing various types of assistance to the direct perpetrator (such as financial, other material assistance or assistance in the form of advice, etc), or encouraging the direct perpetrator. With such a broad interpretation, [CC](#) Article 1190 could serve as a basis for imposing tort liability on those whose involvement in human rights violation is indirect.
29. On the other hand, a narrow interpretation of 'joint actions' is also conceivable. In this interpretation, 'joint actions' would mean that there is more than one 'principal offender' (in criminal law parlance) in the tort. Interpreted this way, [CC](#) Article 1190 would not allow a victim to make a claim against those whose involvement in human rights violations is indirect.
30. Currently, [CC](#) Article 1190 is applied to a rather limited range of cases – when damage is caused by a **crime committed in complicity**,<sup>26</sup> and in traffic cases when damage is caused to third parties as a result of the **collision of several vehicles**.<sup>27</sup> The High Specialized Court for Civil and Criminal Cases has only made a cursory attempt to define 'joint infliction' of damage, noting that the harm must be indivisible, and the actions of perpetrators must be interdependent and collective, or committed with common intent.<sup>28</sup> However, it cannot be ruled out that the courts, in response to new challenges, may have to reconsider their approach and adopt a broader interpretation of 'joint actions'.

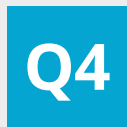
26 Case No [0909/4190/12](#) (Judgement of the Civil Cassation Court, 26 September 2018); Case No [753/21343/14-ts](#) (Judgement of the Civil Cassation Court, 4 June 2021); Case No [740/967/16-ts](#) (Judgement of the Civil Cassation Court, 29 May 2019).

27 Resolution of the Plenary High Specialized Court of Ukraine for Civil and Criminal Cases, '[On Some Issues Concerning the Application of Legislation Regarding Compensation for Damage Caused by the Source of an Increased Danger](#)' (1 March 2013, No 4) [8]; Case No [242/5392/16-ts](#) (Judgement of the Civil Cassation Court, 5 December 2018); Case No [668/12293/15-ts](#) (Judgement of the Supreme Court, 2 March 2020).

28 Resolution of the Plenary High Specialized Court of Ukraine for Civil and Criminal Cases, '[On Some Issues Concerning the Application of Legislation Regarding Compensation for Damage Caused by the Source of an Increased Danger](#)' (1 March 2013, No 4) [8].

## Vicarious liability

31. The rules on **vicarious liability** are defined exhaustively in [CC](#). According to [CC](#) Article 1172: (1) an employer is responsible for the damage caused by an employee;<sup>29</sup> (2) a commissioner of the work is responsible for the damage caused by a contractor;<sup>30</sup> and (3) an entrepreneurial company is responsible for the damage caused by its shareholder while conducting business activity on behalf of the company.<sup>31</sup> It should be noted that clause (2) refers only to contractor agreements, and does not apply to contracts for the supply of goods. Thus, if the connecting 'link' in the supply chain is a contract for the supply of goods (rather than a contractor agreement), [CC](#) Article 1172 does not permit holding the buyer liable for the human rights violations committed by the seller.
32. Moreover, [CC](#) Article 1172 mentions only that the contractor 'acts on the commissioner's assignment'. However, the Supreme Court has concluded in some cases<sup>32</sup> that for the Article 1172 to apply, the contractor has to act not only on the commissioner's assignment but also under the control of the latter. As a result, the commissioning company can potentially avoid liability if it can prove it did not have control over the contractor performing the work.



### 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 independent contractor in a supply chain?

As a general rule, shareholders are not liable for the debts of the company.

33. The general principle envisaged in Ukrainian law is that 'a legal entity and the participants of such a legal entity are separate entities, and accordingly do not fulfil each other's obligations'.<sup>33</sup> This presumption, as a general rule, is in no way affected by the relationship of dependence of one company on another.
34. The doctrine of '**piercing the corporate veil**', which exists in common law jurisdictions and allows in appropriate circumstances making a shareholder liable for the acts of a company,<sup>34</sup> is not recognised in the Ukrainian legal doctrine and court practice. Courts mention it purely in the context of the possibility of a shareholder going to court to protect the interests of the company.<sup>35</sup>
35. In the area of tax law, the Ukrainian legal system has an example of the **doctrine of 'due diligence'**. Relevant legislative provisions were introduced into the [Tax Code of Ukraine](#) only in 2020, but this doctrine gained its active application much earlier, and was formed by court practice. According to this doctrine, taxpayers need to take responsibility for the preparation of the evidence base that would confirm the exercise of due diligence in choosing a counterparty in financial transactions.

29 CC, art 1172, para 1.

30 *ibid* para 2.

31 *ibid* para 3.

32 Case No [904/5489/18](#) (Judgement of the Supreme Court, 16 April 2020).

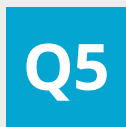
33 Dissenting Opinion of Vasyl Krat in Case No [522/1423/16-ts](#) (Judgement of the Supreme Court, 27 November 2019).

34 See discussion in the following project reports: [28] Australia; [29] Bangladesh; [42] Canada; [74] Hong Kong; [36] Malaysia; [44] US; [87] Zambia.

35 Case No [916/1914/20](#) (Judgement of the Supreme Court, 30 June 2021).



36. According to the Supreme Court,<sup>36</sup> business activities are carried out by a business entity at its own risk. Therefore, in financial legal relationships, participants must exercise reasonable caution, and the negative consequences of choosing an unscrupulous counterparty would be borne by such participants. Accordingly, a company must be prepared to answer the court's questions about reasonable precautions taken in selecting a business entity to receive goods, namely whether there was verification of: registration and permits; the presence of business reputation; solvency of the counterparty; risk of non-fulfilment of obligations and guarantees of their fulfilment; physical, technical and technological capabilities to perform actions that constitute the content of the business transaction; the counterparty having the necessary resources, qualified personnel, fixed assets including premises (office and warehouse-own or leased); and the ability to carry out transactions with the appropriate quantity of a particular product in a timely manner.<sup>37</sup>
37. The requirement that the taxpayer must further prove why it chose this particular counterparty is based on decisions of ECtHR, in particular the case of *Bulves AD v Bulgaria*, which states that the VAT payer should not bear liability for abuses committed by its supplier if it did not know about such abuses and could not have known about them.<sup>38</sup>
38. Accordingly, there is a potential for further elaboration of the concept of human rights due diligence which would include the matter of the parent company's responsibility for the human rights impact of the subsidiary. For now, however, it is necessary to note that there are presently no indications of potential legal reforms in this area.



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

### Assault or unlawful arrest and detention

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39. Where procedural measures within a criminal investigation or administrative offence case have been found to be illegal (see [6] and [17] above), a person is entitled to compensation for both pecuniary and moral damage. The procedure for calculating damage is determined by the [Law on Illegal Acts](#). If property was confiscated, it has to be returned or its value has to be reimbursed.<sup>39</sup> A person fired from a job or position due to illegal conviction, or who is dismissed from office due to illegal prosecution, must be reinstated in their former position.<sup>40</sup> If a citizen has been deprived of military or other rank, as well as state awards, due to an illegal conviction, their rank must be restored and the awards returned to them.<sup>41</sup>
40. When damage is caused outside of a criminal investigation or administrative offence investigation (as outlined in [7] above), the appropriate remedy is compensation for pecuniary and moral damage on the basis of general Civil Code provisions.<sup>42</sup>

36 Case No [826/15729/17](#) (Judgement of the Supreme Court, 4 December 2019).

37 Case No [560/2231/19](#) (Judgement of the Supreme Court, 2 November 2021).

38 *Bulves AD v Bulgaria* App No 3991/03 (ECtHR, 22 January 2009).

39 [Law on Illegal Acts](#), art 4.

40 *ibid*, art 6.

41 *ibid*, art 10.

42 [CC](#), arts 22, 23, 1166, 1167 and [CC](#), arts 1173, 1174 – whenever the damage is inflicted by public bodies or their officials.

## **Environmental harm**

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41. With regard to environmental harm, the list of available remedies is broader. CC defines a right to a safe environment as a personal non-pecuniary right.<sup>43</sup> In terms of [CC](#) Article 275, non-pecuniary rights may be vindicated by any remedy provided for in the general provisions of [CC](#).<sup>44</sup> Article 16 lists available remedies including inter alia compensation for pecuniary damage; compensation for non-pecuniary damage; termination of an action that violates the right; and restoration of the situation that existed before the violation. The latter remedy, however, is often understood as restoring the legal rather than the factual status quo.
42. If the environmental harm entails deterioration of the natural properties of the land, the available remedies are also governed by the [Land Code of Ukraine](#). Article 152, para 3, subpara (b), outlines available remedies which include restoring the qualities of the land that existed before the violation, as well as preventing the commission of actions that violate rights or preventing actions that create a danger of rights violation.
43. To safeguard property rights (which may be relevant in various contexts, including environmental harm), [CC](#) provides for the possibility of so-called preventive protection. It allows some measures to be taken even before a plaintiff's right has been actually infringed. It applies whenever the plaintiff has reasonable suspicions that a violation of their right/s is about to occur. In terms of [CC](#) Article 386, para 2, the owner who has reason to anticipate the possibility of violation of their property rights by another person may apply to the court asking to prohibit the commission of actions that may violate their right or asking to take certain other actions to prevent such a violation.
44. A broad rule that allows courts to order defendants to take active measures is provided for in [CC](#) Article 276 which deals with the protection of personal non-pecuniary rights. According to this article, the perpetrator of violations of personal non-pecuniary rights is obliged to take the necessary actions for their immediate restoration. If the proper actions have not been taken, the court may order the perpetrator to restore the violated right and to compensate for non-pecuniary damage caused by the violation. Under [CC](#) Article 279, if a person does not comply with an order by the court to take appropriate action to eliminate the violation of personal non-pecuniary rights, they may be fined in accordance with the [Civil Procedure Code of Ukraine](#) (CPC).<sup>45</sup>

## **Harmful or unfair labour conditions**

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45. With regard to the violation of employees' rights, the proper remedy is compensation for non-pecuniary damage. Other payments are made through the social insurance mechanism as explained in [10] and [11] above.

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43 [CC](#), art 293.

44 [CC](#), ch 3.

45 [Law 'On Enforcement Proceedings'](#) (2 June 2016, No 1404-VIII), arts 63, 7.

Q6

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

Unfortunately, while the legislation of Ukraine enshrines a fairly complete catalogue of human rights and freedoms, in a number of cases, there is still a lack of effective civil law remedies to safeguard those rights.

### Advantages

46. A claim for damages under civil law is a universal remedy. Its application is not limited to prescribed situations, and compensation for damage can thus potentially be sought in all cases involving human rights violations.

### Disadvantages

47. A claim for damages saddles the plaintiff with a **burden of proof** that sometimes may be difficult to discharge. As outlined in [13] above, the claimant must prove three elements: wrongfulness, causation, and damage.

48. The limited range of vicarious liability case law and the underdeveloped doctrine of tort liability for joint actions are two other obstacles to the effective vindication of human rights violations through civil claim. As a result, actors who have indirect involvement in human rights abuses can often get away with it.

49. As a general rule, a civil claim cannot be brought against a parent company of a corporate group, even if it exercises control over a subsidiary whose activities have resulted in a human rights violation.

50. There is no mechanism for class action in procedural law, even though it may be required in the particular context of protecting environmental rights. However, there are some other routes available to protect collective interests. These include consolidating several lawsuits in one proceeding,<sup>46</sup> and allowing a lawsuit to be filed by a civil society organization (CSO) or other body authorised by law to represent the interests of the claimants.<sup>47</sup> These routes, however, do not allow plaintiffs to optimise costs and collection of evidence in the way that a class action mechanism might allow.

Q7

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

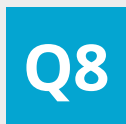
51. According to Article 76 of the Law 'On Private International Law', Ukrainian courts have jurisdiction over a case with a foreign defendant if the dispute concerns compensation for alleged damage which has been inflicted on the territory of Ukraine (paragraph 3) or if the plaintiff claiming compensation for damage is a

<sup>46</sup> [CPC](#), art 50.

<sup>47</sup> [Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters](#) (Aarhus, Denmark, 25 June 1998), art 9; [CPC](#), arts 56, 57; CC, art 293, para 2; Law '[On Environmental Protection](#)', art 21, subpara (zh); Case No [12-rp/2013](#) (Judgement of the Constitutional Court of Ukraine, 28 November 2013) [2.6].

natural person domiciled in Ukraine (paragraph 5). In jurisprudence, there is no high-profile example of these provisions being applied to cases of alleged human rights violations by transnational corporations or by foreign corporations. Most cases using these provisions concern traffic accidents,<sup>48</sup> including instances where trains have derailed due to the negligent maintenance of a wagon by its foreign owner.<sup>49</sup>

52. Yet, under Ukrainian law the rules of Article 76 can be overturned by a bilateral or multilateral international treaty providing other principles on courts' jurisdiction.



**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?**

### **Legislation and case law**

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- [Legislation of Ukraine](#)
- [Register of Courts' Judgments](#)
- [Supreme Court's Jurisprudence Analysis](#)
- [Database of Supreme Court's Legal Positions](#)
- [Digest of Supreme Court's jurisprudence in environmental cases](#)

### **Useful links**

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- [Business and Human Rights in Ukraine](#)
- [Business and Human Rights National Baseline Assessment](#) (in Ukrainian)
- [Website of Ukrainian Helsinki Human Rights Union](#)

### **Academic literature**

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- Olena Uvarova and Katerina Buryakovska, *Handbook of Business and Human Rights*. (Holembovska, 2019).
- Bohdan Karnaukh, 'Ukraine: The Untapped Potential of Tort Law' in Ekaterina Aristova and Uglješa Grušić (eds), *Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions* (Hart Publishing, 2022).
- Bohdan Karnaukh, '*Compensation of Damage Caused by Another Person (Article 1172 of the Civil Code of Ukraine)*' (2020) *Entrepreneurship, Economy and Law* 11, 29.
- Bohdan Karnaukh, '*Tort Liability of Public Authorities under the Civil Code of Ukraine*' (2021) *Entrepreneurship, Economy and Law* 3, 19.

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<sup>48</sup> See Case No [916/3878/19](#) (Judgment of the Economic Court of Odesa Region, 2 July 2020) and Case No [159/2893/15-ts](#) (Judgment of Kovel'skyi Interdistrict Court of Volyn Region, 15 November 2018).

<sup>49</sup> See Case No [922/4834/15](#) (Judgment of the Economic Court of Kharkiv Region, 17 December 2015) and Case No [914/2612/16](#) (Judgment of the Economic Court of Lviv Region, 2 February 2017).

# 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](#)





# CaseScenario 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 police: unlawful procedural measures

53. Among the special provisions envisaging compensation for damage inflicted by public bodies contained in [CC](#) (Articles 1173-1176), Article 1176 applies to Case Scenario 1 as it concerns compensation for damage caused by unlawful decisions, actions or omissions within criminal proceedings, proceedings in administrative offence cases or civil proceedings. The provisions of [CC](#) Article 1176 are further developed and detailed in the [Law on Illegal Acts](#).<sup>50</sup>
54. The [Law on Illegal Acts](#) provides an exhaustive list of unlawful actions that may serve as grounds for civil liability of public bodies. It encompasses:
- unlawful conviction; unlawful notification of suspicion of a crime; unlawful remand and detention in custody; unlawful search [and] seizure in the course of criminal proceedings; unlawful attachment of property; unlawful suspension from work and other procedural actions restricting the citizen's rights;
  - unlawful administrative arrest or correctional labour; unlawful confiscation of property; [an] unlawful fine; and
  - the unlawful conducting of operational investigation measures.
55. The [Law on Illegal Acts](#) also squarely sets out the conditions under which the above-mentioned actions should be deemed unlawful (see [17] above).
56. Thus, the [Law on Illegal Acts](#) is applicable if, firstly, certain procedural measures within criminal proceedings or within proceedings in an administrative offence case have been taken against the victim and, secondly, if these measures were found to be unlawful in the course of relevant proceedings.
57. This means that only the protesters who have been officially prosecuted (charged, arrested, taken into custody, etc) will be able to turn to the [Law on Illegal Acts](#), and then only if the relevant procedural measures were declared unlawful in one of the documents listed in Article 2 of the [Law on Illegal Acts](#).

<sup>50</sup> The law is supplemented by the Statute on the Application of Law 'On the Procedure for Compensation of Damage Caused to a Citizen by Unlawful Acts of the Operative Investigation Bodies, Pre-trial Investigation Bodies, Prosecutor's Offices and Courts' (4 March 1996, No 6/5/3/41).

58. Liability under [CC](#) Article 1176 and the [Law on Illegal Acts](#) does not depend on fault of the particular public officials or law enforcement officers.<sup>51</sup> But in cases falling within the scope of the [Law on Illegal Acts](#), finding a person not guilty or terminating the proceedings on 'exonerative'<sup>52</sup> grounds ipso facto entails an irrefutable conclusion that all the procedural measures applied in the course of the respective proceedings were unlawful.
59. Pursuant to Article 3 of the [Law on Illegal Acts](#), a citizen shall be entitled to recover or be compensated for:
- i. the salary and other income which he or she has lost as a consequence of the unlawful actions;
  - ii. the property ... which has been confiscated by the court or seized by the bodies of inquiry or the pre-trial investigation authorities, or which has been attached;
  - iii. the fines paid as part of the execution of a sentence; [or] the court fees and other expenses paid by the citizen;
  - iv. the sums paid by the citizen for legal assistance;
  - v. non-pecuniary damage.
60. The [Law on Illegal Acts](#) regulates in detail the procedure for calculating each of the above. In particular, the amount of compensation for non-pecuniary damage must be no less than one minimum wage<sup>53</sup> for each month of being under investigation or trial.

## Claims against police: arbitrary violence

61. The [Law on Illegal Acts](#), however, does not apply to protesters who have suffered harm if the brutal force was used in circumstances that were not part of the execution of official procedures. This would apply, for example, in beatings, the use of tear gas, torture, inhuman or degrading treatment. [CC](#) Article 1176, para 6, provides that such damage is 'compensated on general grounds'. 'General grounds' in this context refers to the general provisions on civil liability of public bodies and their officials ([CC](#) Articles 1173 and 1174).
62. Under [CC](#) Article 1174, damage caused to a natural or legal person by unlawful decisions, actions or omissions of public officials shall be reimbursed by the State or local government regardless of the public official's fault.
63. There is no presumption that would ease the burden of proof for the victim where the use of excessive force has taken place outside the scope of procedural measures. And since the use of excessive force by law enforcement officers usually constitutes a criminal offence,<sup>54</sup> the injured protesters can get compensation (from law enforcement officers) only if the perpetrators are prosecuted and found guilty.<sup>55</sup>

<sup>51</sup> See [CC](#), art 1176, the [Law on Illegal Acts](#), art 1, para 2.

<sup>52</sup> 'Exonerative' grounds are those enlisted in the [Law on Illegal Acts](#), art 2, para 1, subpara 2.

<sup>53</sup> From 1 January 2022, minimum wage amounts to UAH 6,500 (approximately USD 220).

<sup>54</sup> It may be an abuse of powers by law enforcement officers ([Criminal Code of Ukraine](#), art 365), obstruction of the lawful activities of trade unions, political parties and CSOs ([Criminal Code of Ukraine](#), art 170), or wrongful obstruction of an organisation or of the holding of meetings, rallies, marches and demonstrations ([Criminal Code of Ukraine](#), art 340).

<sup>55</sup> This is due to the fact that standards of proof for criminal and civil cases are not distinguished in Ukrainian law. See generally Bohdan Karnaukh, '[Standards of Proof: A Comparative Overview from the Ukrainian Perspective](#)' 2021 2(10) Access to Justice in Eastern Europe 25.

## Claims against Security Co

64. If interpreted broadly, (see [28] above), [CC](#) Article 1190 could serve as a basis to hold Security Co liable for aiding law enforcement agencies in their actions which inflicted damage. But to date there have been no instances of such a broad understanding of Article 1190 in jurisprudence.
65. Narrow application of Article 1190 (see [28] above) should be seen as a gap in tort law doctrine, since the wording of the article itself allows for fairly wide judicial discretion. One way of conceivably bridging the gap could be to draw parallels between [CC](#) Article 1190 and the concept of complicity in criminal law. Having proved that joint infliction of harm in the context of [CC](#) Article 1190 is a civil law equivalent of criminal complicity (Articles 27, 28 of the [Criminal Code of Ukraine](#)), one could possibly substantiate holding Security Co liable for indirect involvement in the damage caused by human rights violations. However, at present there are no such cases which have used this approach.



**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.**

66. Filing a civil claim allows victims to obtain compensation for damage suffered. Other measures can be pursued as well, but they will have a different legal effect (eg finding perpetrators guilty of a criminal offence and punishing them. See [63] above). In this regard it should be noted that Article 128 of the Criminal Procedure Code allows the filing of a civil claim within criminal proceedings.
67. An alternative route for obtaining compensation was provided for those who suffered in mass protests known as '[Euromaidan](#)' (see [68] below). In this case, the government established a special mechanism for recognising the victims' status and fixing amounts of compensations payable without the need to go to court.<sup>56</sup>

<sup>56</sup> See the Law '[On Establishing Government Aid to Injured Participants of Mass Civil Protests and Their Family Members](#)' (21 February 2014, No 745-VII) and the Resolution of the Cabinet of Ministers of Ukraine '[Some Issues Concerning Social Security of Injured Participants of the Revolution of Dignity](#)' (28 February 2018, No 119).



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

68. In Ukraine, circumstances similar to Case Scenario 1 occurred in events that unfolded between 21 November 2013 and 21 February 2014.<sup>57</sup>

### SPOTLIGHT: EUROMAIDAN

Following the decision of the Cabinet of Ministers of Ukraine to suspend preparations for signing the Association Agreement with the European Union, a number of protests were staged throughout Ukraine. The largest of these took place in Kyiv. These mass protests became known as ‘Euromaidan’ and/or ‘Maidan’. They marked the beginning of the [Revolution of Dignity](#). Authorities tried to disperse protesters by force, using truncheons, teargas, flashbang grenades, water cannons, rubber bullets, and eventually firearms. More than a hundred protesters were killed and more than a thousand were injured. The protesters were detained, arrested, taken into custody, many were accused of criminal offences (mass disorder) and many were prosecuted. However, over time the accused protesters were acquitted, and investigations were commenced against law enforcement officers involved in illegal actions. The acquitted protesters thus obtained the right to claim compensation. The courts upheld their claims<sup>58</sup> on the grounds of [CC](#) Article 1176 and [Law on Illegal Acts](#). Thirty-nine participants in those events also filed applications to the ECtHR<sup>59</sup> alleging violations of [ECHR](#) Articles 2; 3; 5 sections 1, 3; 8 and 11. However, the ECtHR concluded that applicants who received compensation in national courts had lost their status as victims.<sup>60</sup> Their applications were found inadmissible on that ground.

<sup>57</sup> For the overview of the events, see [Shmorgunov v Ukraine](#) App nos 15367/14 and 13 others (ECtHR, 21 January 2021).

<sup>58</sup> See Case No [200/10801/14-ts](#) (Judgment of the Babushkynskiy District Court of Dnipropetrovsk, 24 December 2014); Case No [200/10799/14-ts](#) (Judgment of the Babushkynskiy District Court of Dnipropetrovsk, 24 December 2014); Case No [753/24154/15-ts](#) (Judgment of the Darnytskyi District Court of Kyiv, 6 September 2018); Case No [756/2925/17](#) (Judgment of the Obolonskyi District Court of Kyiv, 29 March 2018); Case No [592/5801/14-ts](#) (Judgment of the Kovpakivskiy District Court of Sumy, 3 December 2014); Case No [756/2925/17](#) (Judgment of the Supreme Court, 18 April 2019).

<sup>59</sup> See [Shmorgunov](#) (n 57); [Lutsenko and Verbytskyi v Ukraine](#) App Nos 12482/14 and 39800/14 (ECtHR, 21 January 2021); [Kadura and Smaliy v Ukraine](#) App Nos 42753/14 and 43860/14 (ECtHR, 21 January 2021); [Dubovtsev v Ukraine](#) App Nos 21429/14 and 9 others (ECtHR, 21 January 2021); [Vorontsov v Ukraine](#) App Nos 58925/14 and 4 others (ECtHR, 21 January 2021).

<sup>60</sup> [Dubovtsev](#) (n 59).

# 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 Subsidiary Co

69. As mentioned in [8] above, the Constitution guarantees everyone the right to a safe and healthy environment, and to compensation for damage caused by the violation of this right. The [Constitution](#) also demands that the use of property should not harm the rights, freedoms and dignity of citizens, the interests of society, or worsen the environmental situation and natural qualities of the land.<sup>61</sup>
70. Potentially a claim could be brought against Subsidiary Co under [CC](#) Articles 270 and 282. These guarantee an individual the right to demand the elimination of a danger created as a result of business or other activities that threaten life and health. In accordance with [CC](#) Article 293, an individual has the right to an environment that is safe for life and health; the right to accurate information about the environment, the quality of food and household items; as well as the right to collect and distribute this information.
71. In accordance with the [Law 'On Environmental Protection'](#) Article 9,<sup>62</sup> every citizen of Ukraine has the right to a safe and healthy environment. [Article 69](#) stipulates that damage caused as a result of the violation of environmental legislation is subject to compensation, usually in full without the application of penalties and regardless of the fee for environmental pollution and deterioration of natural resources. In addition, persons who have suffered such damage are entitled to compensation for income lost for the time necessary to restore health, to restore environmental quality, and to restore natural resources to a condition suitable for their intended use.
72. However, there are several key barriers to access to civil remedies for claimants in Case Scenario 2.

61 Art 41, para 7.

62 [Law 'On Environmental Protection'](#) (26 June 1991, No 1268-XII).



## Appropriate plaintiff

73. The local community, ie the residents of the relevant territory, cannot be the plaintiff in the case. Potentially, there are several options for deciding who may initiate a civil lawsuit in the interests of the local community:
- i. **Local governments (municipal bodies).** Local governments act on behalf of and in the interests of local communities. The executive bodies of local councils have the power to make appeals to the courts to declare illegal the acts of executive authorities, other local governments, enterprises, institutions and organisations restricting the rights of territorial communities.<sup>63</sup> However, the courts assume that a more specific law, the [Law 'On Environmental Protection'](#) applies. This stipulates that local councils are responsible for the state of the environment in their territory and, within their competence, must monitor compliance with legislation on environmental protection. The courts are following the position that 'the law in these legal relations connects the activities of local councils as a subject of power, and not a representative body of the local community'.<sup>64</sup>
  - ii. **Civil society (environmental) organisations.** The [Law 'On Environmental Protection'](#)<sup>65</sup> explicitly establishes the authority of civil society organisations (CSOs) that operate in the field of environmental protection to file lawsuits for damages caused as a result of violations of environmental legislation, including damage to health of people and damage to property of organisations. But, in practice, this opportunity is also associated with several insufficiently defined procedural points:
    - a. [Courts](#) often assume that a CSO can file a lawsuit in the interests of its members, but not in the interests of all affected residents of the community;
    - b. It is unclear in which order of proceedings – civil or commercial<sup>66</sup> (in Ukraine there are separate civil, commercial and administrative courts) – the case should be considered by the court.
  - iii. **A resident of the community in an individual capacity.** The Law ['On Environmental Protection'](#)<sup>67</sup> stipulates that every citizen of Ukraine has the right to file lawsuits against state bodies, enterprises, institutions, organisations and citizens for compensation for damage caused to their health and property as a result of the negative impact of actions on the environment. Examples of such individual lawsuits in situations where the local community is negatively affected may be found in the court practice of Ukraine.<sup>68</sup>

## Key elements of liability

74. The **biggest barrier to access to justice** in cases related to environmental damage caused to the local community by companies is the requirement that plaintiffs should prove wrongfulness, damage and causation. The situation is greatly complicated by the fact that state regulatory authorities issue companies with documents that record their compliance with the established norms, and

63 [Law 'On Local Self-government in Ukraine'](#) (21 May 1997, No 280/97-BP).

64 [Law 'On Environmental Protection'](#), art 15.

65 Art 21, para 1, subpara g.

66 Case No [367/4695/20](#) (Judgment of the Grand Chamber of the Supreme Court, 23 March 2021).

67 [Law 'On Environmental Protection'](#), art 9, para 9.

68 Unified State Register of Court Decisions, ['Register of Courts' Judgments'](#) (Doc No 76654523).

the courts perceive such documents as indisputable proof of the absence of a violation by the company. At the same time, it is recorded in many sources, that the relevant spheres of state control are 'extremely corrupt'.<sup>69</sup> This creates a situation where companies rely on formally valid documents since there is a presumption of their legality.

75. Ukraine's failure to fulfil its commitment to protect human rights from negative impacts on the environment has been recognised, including at the level of the ECtHR.<sup>70</sup>
76. In past court cases, the failure by public bodies to fulfil their obligation to identify and record the negative impact of the actions of companies on the environment has meant that the plaintiff has had to bear the additional burden of finding a body of alternative evidence of such negative impact (plaintiffs conduct surveys among residents about companies' impacts, measure air/soil/water quality, order expert conclusions etc). However, even with such alternative evidence available, courts often prefer official documents provided by the state authorities.<sup>71</sup>
77. The second element which causes significant problems in practice, is the requirement to prove the causal link between the harm to the plaintiff and the company's activities. In one case the plaintiff referred to the fact that the company had located its plant in the immediate vicinity of his house, had not complied with the instructions arising from a sanitary-epidemiological inspection and had stored mineral fertilisers in violation of the established requirements. The plaintiff referred to the fact that he was recognised as a person with disabilities. However, the Court pointed out the lack of proof of a causal link between the company's actions and negative consequences for the plaintiff's health.<sup>72</sup>
78. In another case, the plaintiff appealed to the Court and asked it to oblige a company to house its grain terminal in a stone building, install noise and dust collectors, reconstruct the conveyor, carry out protective work on her house, and pay UAH 100 000 (approximately USD 3,387) in moral damage because for several years she had endured moral suffering as she could not sleep, breathe and rest normally, and had also fallen ill with cancer. The claims were motivated by the fact that the grain terminal was built in the immediate vicinity of the house where the plaintiff lives. The terminal created vibration, noise and dust which exceeded the permissible sanitary and environmental standards and interfered with the residents of the building, including the plaintiff. The Court's reason for refusing to satisfy the claim was given as the lack of proof of a causal link between the actions of the defendant company and the impact on the health of the plaintiff. Moreover, according to the Court, 'the plaintiff's arguments, including those concerning the location of the grain terminal within the sanitary protection zone, at a distance of 60 metres instead of 100 metres from the residential area, do not refute these conclusions'.<sup>73</sup>
79. In some cases, courts also conclude that 'the plaintiffs have not proved that the intensity and duration of the harmful effects of activities are so significant that they directly affect their lives or health, and outweigh the environmental risks inherent in life in every modern city'.<sup>74</sup>

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69 Centre for Social Expertise, ['Corruption in Housing, Public Health and Sanitary and Epidemiological Services in Ukraine Commissioned by the World Bank'](#).

70 *Hrymkovska v Ukraine* App no 38182/03 (ECtHR, 21 July 2011); *Dubetska v Ukraine* App no 30499/03 (ECtHR, 10 February 2011).

71 Case No [372/2085/16-ts](#) (Judgment of the Civil Cassation Court, 12 October 2020).

72 Unified State Register of Court Decisions, ['Register of Courts' Judgments'](#) (Doc No 34677395).

73 *ibid* ([Doc No 14571238](#)).

74 *ibid* ([Doc No 80017085](#)).

## Claims against Parent Co

80. The legislation of Ukraine is based on the general rule that 'a legal entity and the participants of such a legal entity are separate entities, and accordingly do not fulfil each other's obligations'.<sup>75</sup>



**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.**

81. Filing a civil claim allows victims to obtain compensation for damage suffered. Other measures can be pursued as well, but they will have a different legal effect (eg an administrative fine). One avenue would be to file a complaint with authorised state bodies or to send such a complaint to the Parliamentary Commissioner for Human Rights.

82. Current Ukrainian legislation entrusts the monitoring of companies' observance of environmental protection legislation to certain authorised state bodies (primarily, the State Ecological Inspectorate).<sup>76</sup> Among the measures applied to companies that violate the law and cause damage to the environment is provision for compensation to the State for such damage. The amount of damage is determined in accordance with a formalised environmental damage compensation [Methodology](#).<sup>77</sup>

83. Accordingly, such claims take place exclusively in a procedure intended for public (non-private) benefit and are not intended to compensate for damage caused to the local community or to individuals.



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

84. The procedure for assessing environmental damage claims was the subject of consideration by the Grand Chamber of the Supreme Court in 2021.<sup>78</sup> Although the Grand Chamber stated in its decision that 'a CSO may protect in court the individual non-property and property rights of both its members and the rights and legally protected interests of others who have applied to it for such protection',<sup>79</sup> in a situation such as Case Scenario 2, and in all similar cases, CSOs represent the interests of only their members.<sup>80</sup>

<sup>75</sup> See [33]-[38] above.

<sup>76</sup> State Ecological Inspectorate of Ukraine, 'Our Mission and Functions', [www.dei.gov.ua/posts/1955](http://www.dei.gov.ua/posts/1955).

<sup>77</sup> Order on the [Methodology for determining the amount of damage caused by pollution and littering of land resources due to violations of environmental legislation in the order of the Ministry of Environment](#) (4 April 2007, No 149).

<sup>78</sup> The circumstances of this case were as follows: The plaintiff, a CSO, appealed to the Commercial Court for damages caused by the fact that 'for a long time the respondent companies have been engaged in economic activities for the extraction of iron ore, explosives, cast iron, steel, ferroalloys, coke and coke products in violation of environmental norms, rules, regulations, resulting in material damage and moral damage to villagers ... deposition of dust and gas emissions from dumps, tailings and sinter plants. Due to the man-caused impact on the quality of drinking water, air and soils, the residents of Novoselivka have a number of related chronic diseases, their homes are subject to destructive processes due to landslides and floods, flooding and leaching by return waters generated by nearby mining-defendants'. At the same time, the CSO indicated that it was acting in the interests of those community members who were members of this organisation, and the amount of compensation it required would be distributed proportionally among the members of the organisation (48 villagers in total). Case No [904/6125/20](#) (Judgment of the Grand Chamber of the Supreme Court, 15 June 2021). See [7.13] of the decision.

<sup>79</sup> *ibid* [7.5], [7.10].

<sup>80</sup> Case No [904/6125/20](#) (Judgment of the Grand Chamber of the Supreme Court, 15 June 2021).

85. In order to substantiate the competence of a CSO to apply on behalf of its members to the court in cases of violation of their rights due to the negative impact of companies on the environment, the court would refer to the practice of the ECtHR.<sup>81</sup>
86. In the case referred to above in [84]-[85], one year had passed between commencement of the initial claim by the CSO in the court of the first instance and the decision of the Grand Chamber of the Supreme Court (ie the case had passed through all courts, up to the highest court). During this time, only the procedural question of the need to consider the case under civil procedure had been solved. This is a good illustration of the procedural barriers in this category of cases.
87. In another high-profile case, a CSO was set up specifically to represent the interests of residents of an area affected by damage to the environment by certain companies. The organisation included 2,225 people who were named in a lawsuit seeking non-pecuniary damage. The case ended with the conclusion of an amicable agreement.<sup>82</sup>
88. The issue of the causal link between a company's actions and a negative impact on people living in the immediate vicinity of the company's production facilities was also the subject of a Supreme Court opinion.<sup>83</sup> The relevant legal position of the Supreme Court is included in the Digest of Judicial Practice of the Supreme Court in disputes arising in the field of environmental protection and environmental rights<sup>84</sup>:
- '... the evidence available in the case does not indicate that the plaintiff's health was harmed by the defendants' activities and that there was a causal link between her illnesses and the defendants' possible emissions of harmful substances into the atmosphere. ... The only basis for civil liability for damages is an offence, which includes as constituent elements: damage, wrongful act of the person who caused it, the causal link between them, as well as the guilt of the perpetrator'.<sup>85</sup>*
89. As a result, in court practice in Ukraine, there are only isolated cases in which plaintiffs succeed in disputes with companies about their negative impact on the environment, whereas there are numerous examples of court refusals to satisfy claims due to unproven key elements of liability.
90. There is a much better chance of obtaining compensation for damage caused by a company's impact on the environment in situations where an employee of the company is prosecuted for a specific act that led to harm (for example, if a court judgement establishes the use by an employee of the company of banned chemicals or their use in gross violation of the established limits).<sup>86</sup> However, this approach significantly limits the victims' access to remedies. It also does not provide for the concern that environmental cases are often associated with long-term company operations undertaken without standards of responsible behaviour, rather than a single gross violation by a particular employee, in the actions of which is a *corpus delicti*.

81 *ibid.*

82 Case No [754/8602/18](#) (Judgement of the Civil Cassation Court 4 November 2020).

83 Case No [178/69/17](#) (Judgement of the Civil Cassation Court, 8 April 2019).

84 [Digest of the Jurisprudence of the Supreme Court in Disputes Arising in the Field of Environmental Protection and Environmental Rights](#) (Kyiv, 2019).

85 Case No [2012/4613/2012](#) (Judgement of the Civil Cassation Court, 25 February 2019).

86 Case No [709/588/16-ts](#) (Judgment of the Civil Cassation Court, 27 November 2019).

# 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

91. Pecuniary damage is reimbursed by the state since all employees are subject to state insurance. This conclusion is confirmed by judicial practice, including high-profile lawsuits.
92. Insurance against accidents at work and occupational diseases that cause disability form part of compulsory state social insurance. An insured event is an accident at work or an occupational disease that caused the insured person physical or mental injury in the circumstances specified in Article 14 of the Law on Compulsory State Social Insurance. Meeting these specifications gives rise to the insured person's right to receive material support and/or social services. An accident investigation or an investigation into an occupational disease (such as poisoning) serves as the basis for payment to the victim of costs for medical care; professional, social and medical rehabilitation; as well as insurance.
93. Accordingly, the courts conclude that the obligation to compensate the employee for damage caused to the employee is fully imposed on the Social Insurance Fund.<sup>87</sup>
94. However, this does not exclude the possibility of going to court with a claim for compensation for moral damage against the company. The courts do recognise the validity of such claims. In such cases, courts state that 'the following circumstances are subject to obligatory clarification on compensation for moral (non-pecuniary) damage: the presence of damage, illegality of the act of its perpetrator, the presence of a causal link between the damage and the act of the perpetrator and the fault of the latter'. In the presence of a recorded fact of an accident, this requirement is usually not a problem.

## Claims against Brand Co

95. The [CC](#)<sup>88</sup> stipulates that 'the charterer indemnifies the damage caused to another person by the contractor, if he acted on behalf of the charterer'. When it comes to a company that manufactures clothing to the order of the brand, this provision is applicable.<sup>89</sup>

<sup>87</sup> Case No [180/500/13-a](#) (Judgement of the Supreme Court, 22 May 2018); and Case No [127/20705/16-ts](#) (Judgement of the Civil Cassation Court, 24 May 2021).

<sup>88</sup> [CC](#), art 1172, para 2.

<sup>89</sup> See also the decision in Case No 382/1331/16-ts (proceedings No 61-28945sv18) (Judgment of the Supreme Court, 24 October 2019).

96. An additional argument could be used. Good faith is one of the fundamental principles of civil law.<sup>90</sup> The principle of good faith implies the need for honest and fair conduct by subjects in the performance of their legal duties, and in the exercise of their subjective rights.
97. The actions of participants in civil and corporate relations must meet a certain standard of conduct, characterised by honesty, openness, and respect for the interests of the other party to the contract or the relevant legal relationship.



**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?**

98. As mentioned previously (see [84]-[85] above), the obligation to compensate the employee for damage is fully imposed on the Social Insurance Fund (see also [9]-[10] above).



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

99. To support the argument on good faith (see [96]-[97]), one may rely on the ruling of the Supreme Court of 10 April 2019 in Case No [390/34/17](#) stating that in Ukrainian law the doctrine of *venire contra factum proprium* (prohibition of contradictory conduct) is manifested, in particular, in the qualification of certain behavioural acts (so-called implicit actions) by a person, and is based on the Roman maxim '*non concedit venire contra factum proprium*' (no one can act contrary to their previous behaviour), which is based on the principle of good faith.
100. Behaviour is contrary to good faith and fair business practice if it does not comply with the party's prior statements or conduct, provided that the other party to the relationship has reasonably relied on those statements or prior conduct.<sup>91</sup>



<sup>90</sup> [CC](#), art 3, para 6.

<sup>91</sup> A similar legal position is expressed in many other judgments. See, for instance: Case No [461/9578/15-ts](#) (Judgment of the Grand Chamber of the Supreme Court, 25 May 2021); Case No [910/4569/21](#) (Judgment of the Supreme Court, 17 February 2022); Case No [918/302/21](#) (Judgment of the Supreme Court, 18 January 2022).



