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Exploring the Limits of Ukrainian Tort Law from Business and Human Rights Perspective

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Abstract

The increasing volume of business-related human rights violations significantly highlights the need for effective legal frameworks to ensure corporate accountability. Ukrainian tort law would face significant challenges in addressing these issues, particularly in cases involving corporate misconduct and indirect liability. This topic is crucial for aligning Ukraine's legal system with international standards on human rights and corporate responsibility. This paper aims to assess the capacity of Ukrainian tort law to provide redress for business-related human rights violations. It examines how effectively the legal system handles direct and indirect corporate actors involved in such violations. The methodology involves analyzing a model case that illustrates key challenges, such as the intersection of tort and human rights law, indirect liability, jurisdictional complexities, and collective redress mechanisms. The analysis identifies significant doctrinal and procedural shortcomings. These include the restrictive definition of wrongfulness, rigid causation standards, the underdeveloped concepts of vicarious liability and joint infliction, and the absence of a formal class action mechanism. The analysis reveals several systemic shortcomings in Ukrainian tort law. The concept of wrongfulness is narrowly tied to explicit statutory breaches, limiting its applicability in cases of subtle or systemic violations. Rigid causation requirements and the conflation of fault and wrongfulness further impede the effective use of tort law in addressing complex cases involving multiple actors. The framework for vicarious liability and joint infliction remains underdeveloped, posing additional barriers to holding entities accountable for indirect involvement in human rights violations. Despite these limitations, Ukrainian procedural law offers some avenues for addressing collective harms, such as the joinder of multiple claims and representation by NGOs, although the absence of a formal class action mechanism undermines litigation efficiency. Jurisdictional provisions demonstrate flexibility, accommodating cases with international elements and cross-border implications. The paper concludes that while Ukrainian tort law faces significant doctrinal and procedural challenges, these are not insurmountable. Through creative legal strategies and ongoing reforms, the framework has the potential to evolve into a more robust mechanism for addressing corporate accountability in human rights contexts. Future research should focus on refining tort law doctrines, particularly wrongfulness and causation, and developing clearer standards for indirect liability. Additionally, exploring the establishment of formal collective redress mechanisms would enhance Ukraine's ability to address business-related human rights violations effectively.

Key words: *tort law; business and human rights; wrongfulness; fault; causation; vicarious liability; joint infliction; class actions; environmental harm; jurisdiction.*

Випробування меж українського деліктного права з точки зору бізнесу і прав людини

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Зростання кількості бізнес-зумовлених порушень прав людини значно актуалізує необхідність створення ефективної правової основи для забезпечення корпоративної відповідальності. Українське деліктне право може зіткнутися зі значними проблемами у вирішенні цих питань, особливо у справах, пов'язаних з корпоративною неправомірною поведінкою та непрямою причетністю. Ця тема має вирішальне значення для приведення правової системи України у відповідність до міжнародних стандартів у сфері прав людини та корпоративної відповідальності. Стаття має на меті оцінити спроможність українського деліктного права забезпечувати відшкодування за порушення прав

людини, пов' язаних з бізнесом. Вона досліджує, наскільки ефективно правова система ладнає з безпосередніми та опосередкованими корпоративними суб'єктами, причетними до таких порушень. Методологія передбачає аналіз типової справи, яка ілюструє ключові виклики, такі як взаємодія деліктного права та права прав людини, непряма відповідальність, юрисдикційні складнощі та механізми колективного відшкодування. Аналіз виявив значні доктринальні та процесуальні недоліки. Серед них - обмежувальне визначення протиправності, жорсткі стандарти причинно-наслідкового зв'язку, нерозвиненість концепцій вікаріальної відповідальності та спільного заподіяння шкоди, а також відсутність формального механізму колективних позовів. Аналіз виявляє кілька системних недоліків в українському деліктному праві. Поняття протиправності вузько прив'язане до прямих порушень законодавства, що обмежує його застосування у випадках неявних або системних порушень. Жорсткі вимоги щодо причинно-наслідкового зв'язку та плутанина між виною та протиправністю ще більше перешкоджають ефективному застосуванню деліктного права у вирішенні складних справ за участю багатьох суб'єктів. Концепція субститутивної відповідальності та спільного заподіяння шкоди залишається недостатньо розвиненою, що створює додаткові бар'єри для притягнення суб'єктів до відповідальності за опосередковану причетність до порушень прав людини. Незважаючи на ці обмеження, українське процесуальне законодавство пропонує деякі шляхи для вирішення колективних вимог про відшкодування шкоди, такі як об'єднання декількох позовів та представництво громадськими організаціями, однак відсутність формального механізму колективних позовів підриває ефективність судових процесів. Юрисдикційні положення є гнучкими і дозволяють розглядати справи з міжнародними елементами та транскордонними наслідками. У роботі зроблено висновок, що хоча українське деліктне право стикається зі значними доктринальними та процесуальними проблемами, вони не є нездоланними. Завдяки креативним правовим стратегіям і постійним реформам ця система має потенціал перетворитися на більш надійний механізм для вирішення питань корпоративної відповідальності в контексті прав людини. Майбутні дослідження мають бути зосереджені на вдосконаленні доктрин деліктного права, зокрема протиправності та причинно-наслідкового зв'язку, а також на розробці чіткіших стандартів непрямої відповідальності. Крім того, вивчення можливості створення офіційних механізмів колективного відшкодування підвищить здатність України ефективно протидіяти порушенням прав людини, пов'язаним з бізнесом.

Ключові слова: *деліктне право; бізнес і права людини; протиправність; вина; причинний зв'язок; субститутивна відповідальність; спільне заподіяння; колективні позови; екологічна шкода; юрисдикція.*

Introduction

In a broad sense, there is a plethora of cases where violation of person's rights is committed in the course of running business. Yet business and human rights framework has given rise to a new, distinct and outstanding category of cases, so that in a narrow sense when we speak of a case involving business-related human rights violations we mean a specific (more or less) crystallized fact pattern. The purpose of this article is to test the protective capacity of Ukrainian tort law by applying its provisions to the model case representing a somewhat averaged image of a case involving business-related human rights violation.

Literature Review

Business and human rights is a new paradigm gaining more and more attention in academic literature [1]. Numerous works has been published recently. These include monographs by W. Cragg [2], L.C. Curzi [3], R. McCorquodale [4], P. Muchlinski [5], C.A. Rodríguez Garavito [6], V. Rouas [7], R. Sullivan & M. Robinson [8] and others. In Ukraine this paradigm is furthered by O. Uvarova [9-12].

The intersection of tort law and business-related human rights violations has garnered increasing scholarly attention in recent years, driven by the growing recognition of corporate accountability in global supply chains and the limitations of traditional legal frameworks to address human rights abuses. Current literature explores this intersection across diverse jurisdictions, addressing doctrinal challenges, procedural issues, and the potential for reform.

A central theme in the literature is the challenge of aligning tort law with human rights obligations. Scholars such as Anita Ramasastry and John Ruggie have discussed the insufficiency of national legal systems to regulate multinational corporations effectively, emphasizing the need for tort law to evolve to bridge this accountability gap [13; 14]. This includes expanding notions of wrongfulness and causation to cover indirect involvement, such as supply chain complicity or parental company oversight. Some argue for the incorporation of human rights standards directly into tort law doctrines, while others suggest leveraging existing principles, such as negligence or vicarious liability, to hold corporations accountable.

Jurisdiction and access to justice are recurring obstacles in the literature. Authors like Joanna Kyriakakis [15] and Surya Deva [16] have noted how jurisdictional hurdles – especially in cases involving transnational corporations – often prevent victims from seeking redress in the companies' home countries. Discussions also emphasize the high evidentiary burdens in tort claims, particularly in proving causation and fault for human rights abuses occurring in distant or poorly regulated regions.

Scholars widely critique the absence of effective mechanisms for collective action in many jurisdictions. Class actions are seen as vital for addressing widespread human rights abuses, as they lower litigation costs and increase the feasibility of claims. However, legal systems like those in Ukraine lack formalized class action frameworks, necessitating reforms to facilitate collective redress for victims of corporate misconduct.

Some literature highlights emerging practices that could transform tort law's application to business and human rights. For instance, strict liability regimes are proposed as a solution to bypass the need for fault in high-risk corporate activities, such as mining or hazardous waste management. Others advocate for new statutory duties, such as the duty of care in supply chains, as seen in the UK's Modern Slavery Act and France's Duty of Vigilance Law.

Globally, courts in jurisdictions like the UK, Canada, and the Netherlands are increasingly willing to hear cases against parent companies for human rights violations committed by their subsidiaries. Scholars cite landmark cases as evidence of a judicial shift towards acknowledging corporate accountability through tort law mechanisms. These cases demonstrate courts' willingness to impose liability on parent companies for failing to exercise due diligence over their operations.

The literature underscores a growing consensus on the need for tort law to adapt to the realities of global business practices. While there is No. universal solution, doctrinal and procedural innovations, coupled with enhanced international cooperation, could provide more robust remedies for victims of corporate human rights abuses. This evolving discourse reflects the dynamic interplay between tort law, human rights, and the global push for corporate accountability.

Materials and Methods

In this paper we offer a model hypothetical case that would serve to test how Ukrainian tort law may respond to main challenges posed by the business and human rights perspective. However it worth noting that with regard to many issues case law and doctrine has not yet developed a conventional approach. Therefore there is much potential for creative lawyering and shaping new approaches.

Model case[1]. Company A in the course of its business activities infringes universally recognized fundamental human rights. The victims may be the employees of the Company A or third parties [18], including the general public. With regard to employees, the violation may consist in the use of forced labor, child labor, or in sustaining working conditions that are inhumane or unsafe and result in health deterioration, injuries, and death [19; 20]. With regard to third parties, the violation may consist in environmental harm [21; 22] or Company A may be involved in acts of violence, such as the brutal suppression of peaceful demonstrations against the construction of a new plant in the region [23; 24].

[1] For a more variations of typical case scenarios that may arise within business and human rights perspective see: [17].

Despite the gross human rights violations, bringing Company A to justice proves to be unrealistic. Usually it is because of the place of action (where Company A is registered and operates): it is a jurisdiction that does not provide effective protection and remediation of human rights (due to weak institutions, corruption or other reasons). However, it is conceivable that the reason may be the simple insolvency of Company A.

Therefore, victims have to sue Company B, whose business is closely related to the business of the direct perpetrator. The two companies may be linked either through the supply chain (Company B purchases raw materials for its products from Company A) or through the corporate structure (Company B is a parent company for A). Usually, Company B is domiciled in another jurisdiction. And it is this fact that nourishes the victims' hope for the better prospects for their lawsuit. Yet, we will also address the variation where both companies are residents of the same country and the sole reason for suing B is that A is insolvent.

Research Questions. The model case is a challenge for tort law, as it poses a number of questions that have not previously arisen, or at least have not been seen from this angle.

First, it is the interrelation between tort law and human rights law. Can private companies be the considered as bearers of human rights obligations, and if so, does a breach of these obligations constitutes a private tort?

Second, and perhaps the most convoluted, issue is the viability of tort action for *indirect involvement* in human rights violations, since Company B is not the principal offender whose actions immediately caused victims' harm.

Third, procedural, issue is jurisdiction. Since companies A and B are usually domiciled in different countries the case is related to at least two jurisdictions which calls for the determination of the proper court to consider the case. We will assume that Ukraine may be either the country of residence of the direct perpetrator (Company A) or the country of residence of the indirectly involved Company B.

Fourth, the effective protection of some human rights, (in particular the right to a safe environment) often requires the ability to consolidate the claims of many victims into a single lawsuit [25]. Therefore, another procedural issue is the availability of class action mechanism or similar ways to protect collective interests.

The analysis of the model case and the aforementioned issues needs, however, to be preceded by a brief outline of tort elements.

Results and Discussion

Elements of tort claim in general (See also [26]). According to the current case law and doctrine for a tort claim to succeed four elements of tort have to be established: wrongfulness, damage, causation and fault [27, Para 55; 28, Para 7.4]. The rules on "special delicts" may modify the basic formula (e.g. by excluding fault element).

A. Wrongfulness. Currently there is No. settled understanding of wrongfulness. The three main approaches are considered: violation of the norm, infringement of the right and non-performance of the duty [29, pp. 113-125]. Judges mostly see the concept self-evident, which is why courts' judgments do not contain extensive reflections on the subject. Since Ukrainian law is not familiar with the "duty of care" [30-32] as an overarching doctrine, wrongfulness appears to be strongly tied to the provisions of the written law (legislation). The Grand Chamber of the Supreme Court in a recent case defined wrongfulness as "non-compliance [of a person's conduct] with the requirements set out in the acts of civil legislation" [28, Para 7.4].

Thus, the courts are more inclined to find wrongfulness where defendant violates prohibitions expressly provided by statutes, or fails to fulfill obligations expressly provided by statutes. At the same time, interference with the plaintiff's right, which is not fortified by the express prohibitions or obligations saddled on the defendant, may also qualify as wrongful conduct, provided that the very

right is expressly set forth in the law. If the tortfeasor contends he or she acted in the exercise of his/her own right, then to resolve a conflict courts employ the abuse of rights doctrine [33].

B. Damage. Actionable damage is defined in Articles 22 and 23 of the Civil Code of Ukraine (CC): the former is devoted to pecuniary damage and the latter to non-pecuniary (moral) damage. Both pecuniary and non-pecuniary damage are subject to compensation in all cases as long as the plaintiff can prove it (universal remedy).

Pecuniary damage includes real losses and lost profits. Real losses are defined as "losses suffered as a result of person's property being destroyed or impaired as well as costs that has been incurred or have to be incurred by a person to restore his/her violated right" (Art. 22 CC).

Lost profits are generally compensable regardless of the type of tort, interest infringed or other circumstances. However, the courts are overly exacting with regard to the proof of lost profit [34, pp. 38-40]. The Supreme Court emphasizes that "[t]he plaintiff must prove that he could and should have received certain income, and only the wrongful acts of the defendant became the sole sufficient reason that deprived him of the opportunity to make the profit" [35-37].

Sometimes the rigid approach leads to untenable denial of remedy [34, pp. 38-40].

Nevertheless, as long as the case concerns physical person losing earnings because of injury or other health deterioration special provisions of § 2 Ch. 82 CC apply. They provide clear-cut rules for computing the amount of earnings lost and thus significantly ease the burden of proof for plaintiffs. The same paragraph also contains the rules for identifying other pecuniary losses that are subject to compensation in case of injury, other health deterioration or death.

C. Causation**.** Probably the least attention among all the elements of the tort is paid to causation. CC does not contain any guidelines on how to assess it. In Ukrainian jurisprudence (unlike in English or American), there were No. high-profile cases that would induce judges to reflect extensively on the issue of causation. Therefore, with regard to causal nexus judges usually confine themselves to yes-or-No. statements. Explanations are limited to tautological sayings like "causation is present whenever the defendant's conduct and the plaintiff's damage relate to each other as cause and consequence respectively" [38-41].

Neither the legislation nor the case law provides for exceptions to the proof of causation (when causation is presumed or the burden is reversed). Needless to say, courts do not award compensation in proportion to the probability of causation (proportional liability) (See: [42]).

D. Fault. There is No. definition of fault for the purposes of tort law. It is defined only with regard to breach of existing obligations (such as contractual obligations): under Art. 614 CC "a person is not at fault if he/she proves that he/she has taken all measures he/she could to properly perform the obligation". This definition *mutatis mutandis* is used for the purposes of tort liability as well. Thus, it is obtained that fault means that the tortfeasor has not taken all the measures he/she could to avoid harming the plaintiff [43, p. 38].

As a general rule, tort liability depends on fault. However, there are many exceptions to the rule, when a regime of strict, i.e. no-fault liability applies [44]. The most significant of these exceptions concerns the so-called "source of increased danger" (Art. 1187 CC.). The concept encompasses numerous activities that cannot be fully controlled and, hence, generate increased risk both for the actor and for the others. The scope of the concept is surprisingly broad, including a wide variety of activities related to vehicles, machinery, equipment, chemicals, radioactive or flammable substances, wild animals and fighting dogs (Art. 1187(1) CC). Even driving a regular automobile is considered to be a "source of increased danger".

Whenever damage is caused by a source of increased danger the tortfeasor cannot avoid liability by proving absence of fault (i.e. that he/she has done everything in his/her power to avoid the incident).

The only two defenses available are force majeure and intent of the victim (Art. 1187(5) CC) (as, for example, when man willing to commit suicide throws himself under the wheels of the car).

It is important to emphasize that even where liability depends on fault the latter is presumed (Art. 1166(2) CC). Hence, the plaintiff's burden of proof includes: wrongfulness, damage and causation [45-48]. And only if the plaintiff has discharged his burden, the presumption of fault activates. It means that it is now up to the defendant to prove that he took all possible measures to prevent damage.

Pursuant to common view the essence of strict liability regime is simply to strike off the element of fault while the other three elements remain intact [44, pp. 70-103]. But this view appears to produce a systemic error, in particular, because of the blurred borderline between wrongfulness and fault. Fault denotes failure to take necessary precautions, i.e. failure to comply with the standard of prudence expected of a person in the circumstances. But doesn't wrongfulness mean the same? This ambiguity may lead to the benefits of strict liability regime being negated by the need to prove wrongfulness.

Therefore, the doctrine should be reconsidered by acknowledging that fault-based liability and strict liability are two distinct regimes each having its own formula of tort elements[2]. Fault, damage and causation should be the elements of tort within the fault-based regime; source of increased danger, damage and causation should be the elements of tort within strict liability regime. Distinguishing the two regimes of liability is particularly important within the context of business-related human rights violations, since the defendants' activities in many industries can often qualify as a source of increased danger.

Analysis

A. Interrelation Between Tort Law and Human Rights

1. Referring to human rights law and the wrongfulness element in tort claim in general

In Ukraine human rights are enshrined at three levels: in international treaties, in the Constitution and in the CC.

Ukraine is a party to major international human rights treaties[3]. The impact of the European Convention on Human Rights (ECHR) is particularly significant. According to Art. 9 of the Constitution international treaties ratified by the Parliament are considered as part of the national legislation. When domestic law contradicts international treaty, the latter applies[4]. So, the provisions of international treaties do not require special implementation through the adoption of domestic legislation. Once an international treaty is ratified, it is integrated into national law, and its legal force is higher than any domestic statute other than the Constitution.

It means that in principle victims of human rights violations will not have problems appealing to international treaties to substantiate their claims. But can they appeal to international treaties when the defendant is a private company?

With regard to tort claims, so far there are No. such cases. Yet, the Supreme Court on a number of occasions has applied the ECHR to disputes between private parties, in particular: in the case where minority shareholders challenged the squeeze-out procedure [50]; in the case where plaintiff sought eviction of the relatives of the former apartment owner [51]; in the case where woman sought eviction of her ex-husband who drank and committed domestic violence [52]; in the case where depositor claimed back his money from the insolvent bank [53].

Thus, jurisprudence recognizes a horizontal effect of human rights enshrined in the ECHR. It is achieved primarily through the concept of positive obligations of the state. The state must not only

[2] This approach appears to be embodied in the Principles of European Tort Law (PETL). See Art. 1:101, Ch. 4 and 5 PETL.

[3] List of international human rights treaties ratified by Ukraine, see [49, p. 4].

[4] Art. 19, the Law of Ukraine "On International Agreements of Ukraine".

refrain from interfering human rights, but also must take actions to prevent interference by others, namely private persons. Hence, if a private company can get away with violation of human rights, it may signal that the state has failed to fulfil its obligations under an international treaty.

Section II of the Constitution addresses human rights. It is titled "Rights, Freedoms and Duties of Human and Citizen". Although some of the articles in the Section are clearly addressed to the state (e.g. Art. 29), a number of other articles are formulated in a way that implies imposing obligations on everyone (e.g. Art. 43).

Under Art. 8(3) of the Constitution, "the provisions of the Constitution of Ukraine have direct effect. Applying to court for the protection of the constitutional rights and freedoms of human and citizen directly on the basis of the Constitution of Ukraine is guaranteed". As the Constitutional Court of Ukraine explained, this means that the norms of the Constitution are applicable "regardless of whether relevant laws or other normative legal acts have been adopted to elaborate on those norms" [54]. If a court concludes that a law or other legal act contradicts the Constitution, the court shall not apply the law or other legal act, but instead shall apply the norms of the Constitution of Ukraine directly[5].

In addition, provisions of the Constitution, similar to international treaties, also have a horizontal effect: the rules of private law must be interpreted and applied in a manner compatible with constitutional values, the most important of which are human rights [55, pp. 17-19]. Constitutional justice knows examples of Section II of the Constitution being employed to interpret the acts governing relationships between private parties [56].

Finally, many of the human rights are reiterated in the CC, where there is Book II ("Personal non-pecuniary rights of natural person") devoted to them. According to Art. 275(1) CC, "a natural person has the right to protect his/her personal non-pecuniary right from unlawful encroachments *by other persons*". Thus, the range of potential perpetrators is not limited to public authorities, but instead encompasses all civil law actors (Art. 2 CC). The available remedies are determined in accordance with the general provisions of the CC (Ch. 3 CC). Naturally, one of the remedies is compensation for pecuniary and moral damage (Subparas (8) and (9) Para 2 Art. 14 CC).

Based on the above, in the Model case plaintiffs would not have troubles finding the provisions of Ukrainian law that enshrine the respective human rights. Neither would they have troubles proving that the relevant provisions apply to relations between private parties. In particular, in case of violation of the employees' rights, victims may invoke Art. 4 of the ECHR, Art. 43 of the Constitution, Art. 312 CC, as well as special labor legislation; in case of environmental harm – Articles 2 and 8 of the ECHR, art 50 of the Constitution, Articles 282 and 293 CC, as well as special land and environmental legislation; in case of violent rally dispersal – Articles 2, 3, 5, 10, 11 of the ECHR, Articles 27-29, 34, 39 of the Constitution, Articles 288, 289, 314 and 315 CC, as well as special legislation providing for compensation for damage caused by law enforcement agencies.

However, the mere fact that a person's fundamental right has been interfered with is not sufficient to conclude that such a person has the right to seek redress. All the elements of tort need to be established for the claim to succeed.

The fact that the victim is able (a) to identify the rule of domestic law that recognizes the alleged right and (b) to prove that a private company has interfered with that right may be relevant for establishing one element only, viz wrongfulness. However, even in this context, the court may find No. wrongfulness if the special provisions defining the obligations of the defendant company have not been violated by the latter.

2. Wrongfulness in environmental cases

Environmental cases illustrate the point. Suppose a company pollutes the air with harmful substances, which adversely affects the inhabitants of the adjacent areas. The court while examining the

[5] Art. 10(6) Civil Procedural Code of Ukraine (CPC).

wrongfulness element, will not confine itself to the fact that plaintiffs have a right to a safe environment, and polluting the air is certainly an interference with such a right. Instead, the court will assess whether the emission of pollutants was legal (i.e., whether the defendant company had a permit or a license to emit), and whether the emissions did or did not exceed the permissible limits. And if it turns out that the emission was legal, and the amount was within the permissible limit, the court finds No. wrongfulness and, on this basis, denies the claim.

In the case No. 2012/4613/2012 a woman sued Kharkiv coke plant [57]. She claimed that due to dioxin emissions she developed a number of diseases, namely: bronchial asthma, pneumosclerosis, emphysema, immune disorders and skin pigmentation. However, the Supreme Court noted that the Plant had all the necessary permits for emissions of pollutants into the atmosphere, and "the volume of emissions met the requirements of sanitary legislation of Ukraine". In addition, the plaintiff failed to convince the Court that her health problems were actually caused by the defendant. The claim was denied for the lack wrongfulness and causation.

A number of lawsuits concerned the operation of the Trypilska Thermal Power Plant (TPP) [58-63]. The plaintiffs referred to the fact that the TPP emits 37 pollutants into the atmosphere, including lead (3.47 t / year) and chromium (3.44 t / year). Permanent inhaling of these substances has adverse effect on the respiratory system, central nervous system (lead) and some of them are carcinogenic (nickel, lead, chromium).

Two aspects of TPP cases are noteworthy. First, they prove the general trend in the courts' assessment of wrongfulness in environmental cases: the claims were dismissed because the TPP had the necessary permits and complied with the standards of maximum allowable concentrations. The Court placed special emphasis on official documents by regulatory authorities, viz the State Environmental Inspectorate, which did not report violations of environmental legislation by the defendant TPP.

In contrast, in cases where regulatory authorities had reported violations of environmental law by the polluters, the Supreme Court ruled in favor of the plaintiffs. This was the case, in particular, in the lawsuit against the Korostenskyi MDF plant [64], where the numerous inspections of the plant by the State Environmental Inspectorate during 2012-2015 revealed a number of serious violations, including: excessive emissions of pollutants into the air; unauthorized discharge of pollutants into the soil; excess of pollutants in wastewater discharged to water treatment plants. The Supreme Court upheld a first instance court's judgment to award each of the plaintiffs living in the adjacent area 50,000 UAH in compensation for non-pecuniary damage.

The second interesting aspect about TPP cases is that the Supreme Court refers directly to the ECHR and the case law of the ECtHR. The judgment states that "the lawsuit in this case was filed against the business entity and not against the state, yet the assessment of the circumstances that constitute the subject matter of the lawsuit, is effectively the same".

While considering the claim for non-pecuniary damage caused by the violation of the right to a safe environment, the Supreme Court refers to the ECtHR's case-law [65, Para 77] setting the conditions under which environmental pollution may be considered sufficient to constitute a violation of the right to respect for private and family life (Art. 8 ECHR). The logic of the Supreme Court is as follows: whenever environmental pollution is severe enough to qualify as violation of the right to respect for private and family life (according to the tests used by the ECtHR), the plaintiff is entitled to compensation for moral damage and vice versa.

This approach departs from the conventional understanding of compensable damage. Under the conventional account interference with the right in itself does not amount to compensable damage. Instead damage is a certain economic loss that plaintiff suffers as a result of the interference. It may well be that there is an interference with the right, but the right holder nevertheless does not suffer

any losses (as, for example, when someone unauthorized walks through my land without harming crops[6]).

In contrast, in the TPP cases the Supreme Court effectively implies that the very interference with the right to respect for private and family life may be seen as a compensable damage. It has to be admitted, though, that the "distance" between "interference with right", on the one hand, and "compensable damage" on the other, is leaped largely due to the concept of moral harm. It is reasonable to assume that when an individual has good reasons to fear for his/her life or health on a daily basis, it causes stress and anxiety which may constitute moral damage. Accordingly, the Supreme Court's position can be read as establishing the presumption of non-pecuniary damage in any case where environmental pollution (according to ECtHR case-law) amounts to interference with the right to respect for private and family life (Art. 8 of the ECHR).

In fact, in the case of Korostenskyi MDF plant [64] the Supreme Court *obiter dictum* recognized that there are two distinct grounds for compensation: one is the negative impact on the environment *per se* while the other is the damage to the life, health or property due to the negative impact on the environment.

It is eloquent that among all the environmental cases considered by the Supreme Court there are no cases where the plaintiff is compensated for the actual health deterioration. All successful lawsuits [66-70] concerned non-pecuniary damage consisting in anxiety and stress caused by the mere threat of a health deterioration. The reason is the difficulty of proving causation in the absence of any guidelines in the CC or jurisprudence, as well as the critical lack of a comprehensive doctrine of causation in the academic literature.

The analysis of the wrongfulness element in the context of environmental cases is closely related to the problem of distinguishing between fault-based and strict liability regimes. In all the above cases defendants' businesses shall be considered the "sources of increased danger" and thus defendants shall be subjected to strict liability.

But since under the prevailing view strict liability eliminates only the fault element (while others remain in place) the jurisprudence places considerable emphasis on the proof of wrongfulness. And since the wrongfulness inquiry is considerably based on the documented assessment of the polluters by the official governmental bodies (in particular State Environmental Inspectorate) victims are often denied compensation.

Had the strict liability been considered a distinct regime with its own set of tort elements, there would have been no need to prove wrongfulness; it would suffice to establish that the defendant's business is a "source of increased danger" and it causes actionable harm to the plaintiff. Such an understanding would really meet the definition of "strict liability" and would make it much easier for the victims to obtain compensation.

In a scenario with a violent dispersal of a rally by law enforcement bodies Ukrainian law does allow to sue the relevant law enforcement body[7]. Two different sub-scenarios have to be distinguished though. First, when the law enforcement body officially prosecutes protesters: e.g. brings charges against them, officially arrests or detains them within criminal proceedings or proceedings in administrative offense case. Second, when law enforcement officers use brutal force (beatings, torture, kidnapping people) without even trying to cover it with made-up charges against protesters.

In the first sub-scenario special law applies, namely the Law No. 266/94-VR. With regard to wrongfulness element the Law provides in Art. 2 that procedural measures shall be considered illegal (wrongful) only in the specified cases, that include acquittal of the person by a court, termination of

[6] In this case, under Ukrainian law the tort claim has no standing.
[7] Art. 1176 CC; Law "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" (Law No. 266/94-VR).

the criminal proceedings for exonerative grounds or establishing the wrongfulness of the measures in a verdict or other judicial decision (delivered in respective criminal proceedings).

3. Wrongfulness in case of oppressing the demonstration
In this case liability of the state does depend on the fault of the particular law enforcement officer[8]. Hence, whenever a person is acquitted all procedural measures applied during the investigation are thereby considered illegal (wrongful) and the state cannot avoid liability asserting good faith mistake. In the second sub-scenario, when the actions of the law enforcement officers are completely arbitrary, proving the elements of the tort is much more difficult for the plaintiffs. This sub-scenario is not covered by the Law, and therefore the wrongfulness element has to be proved on general grounds.

Moreover, beatings, torture and kidnapping all constitute criminal offences. Therefore, if plaintiff bases his/her civil claim on the allegation of these criminal offences the court will find the claim ill-founded unless there is a verdict in a criminal case, finding defendant law enforcement officers guilty of these crimes.

Both sub-scenarios took place during the Revolution of Dignity (21 November 2013 – 21 February 2014). Those protesters who were officially charged (mostly with mass disorder under Art. 294 of the Criminal Code of Ukraine) were eventually acquitted and awarded compensation [71-76]. As for the protesters who have suffered from arbitrary violence, the situation is more complicated, as many criminal cases against law enforcement officers and their accomplices are still pending [77; 78].

4. Tort law and employee's rights

With regard to damage caused by harmful working conditions tort law does not apply. Instead, employees receive compensation through the social insurance mechanism.[9] Therefore, if a work-related accident occurs or an employee contracts professional disease then compensation is provided by the Social Insurance Fund of Ukraine (and not by the employer).

The Supreme Court clarified that social insurance law is a *lex specialis* in relation to tort law, and therefore the former excludes the latter [79]. However, in accordance with Art. 36 (8) of the Law "On Compulsory State Social Insurance" insurance payments do not include compensation for non-pecuniary damage, and victims have the right to claim compensation for it by filing tort claims in accordance with the CC and the Labor Code of Ukraine.

This should mean that to claim compensation for non-pecuniary damage from the employer, the employee has to prove all elements of the tort. However, in one such case [80] the Supreme Court ruled in favor of the employee, despite the fact that his own negligence was the cause of the injury. In other words, the claim was satisfied although neither the wrongfulness (on the part of the employer), nor the causation (linking the employer's wrongful actions with the harm) was established. Noteworthy, it is exactly the conclusion that would have been reached had there been a clear distinction between the regimes of fault-based and strict liability: employer's business (coal mining) is a source of increased danger, which is why there is no need to prove wrongfulness; and causation

[8] Art. 1176 CC, Para 2 art 1 Law No. 266/94-VR.
[9] See the Law "On Labour Protection"; the Law "On Mandatory State Social Insurance"; Resolution of the Cabinet of Ministers of Ukraine, "Procedure for the Investigation and Accounting of Safety Incidents, Occupational Diseases and Occupational Accidents" (No. 337, April 17, 2019); Resolution of the Directorate of the Fund of Social Security, "Procedure for Awarding, Recalculation and Making Insurance Payments" (No. 11, July 19, 2018); Resolution of the Cabinet of Ministers of Ukraine, "The List of Occupational Diseases" (No. 1662, November8, 2000); 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" (No. 1266, 26 September 2001).

has to bridge the employer's very activity (and not the wrongful aspect of it) with the employee's harm.

Liability for Indirect Involvement. In the model case, Company A is the direct perpetrator of human rights. Company B's involvement is indirect: it is involved because its policy affects Company A's policy which appears to include violation of human rights.

There are two potential ways to substantiate the liability of Company B. The first is to prove that under the circumstances granted Company B shall be responsible for the actions of others (liability for others). The second is to argue that the actions of Company B itself, even though not immediately cause harm, shall nevertheless be considered unlawful and result in the obligation to compensate (liability for own actions).

1. Liability for others. As a general rule, everyone shall be responsible only for his/her own actions or omissions, and should not be responsible for the actions or omissions of others (personal responsibility). Exceptions to this rule are possible, but any such an exception has to be explicitly provided for in the law.

Art. 1172 CC is a Ukrainian analogue of what is known in English-language literature as "vicarious liability". The article contains three exceptions to the rule of personal responsibility: (1) an employer is responsible for the damage caused by an employee; (2) a commissioner of the work is responsible for the damage caused by a contractor; (3) commercial company is responsible for the damage caused by its shareholder while conducting business activity on behalf of the company.

Exception (2) can potentially be used in the model case: it makes commissioner of the works accountable for the actions of an independent contractor. The exception encompasses a fairly broad range of agreements commonly referred as contracts for work (Ch 61 CC). They have to be distinguished from the contracts for providing services (Ch 63 CC). The key distinction is that under the contracts for work contractor has to hand over some tangible result to the commissioner (Art. 837 CC) (e.g. house built, equipment repaired, architectural project drafted etc.), while in service contracts there is no tangible result: the service is being consumed while it is being provided (Art. 901(1) CC). Hence, the exception (2) is applicable only if the two companies are linked through some type of contract for work. Service contracts will not do, let alone contract for the supply of goods.

In case law exception (2) is used, for example, when traffic accidents occur due to potholes or other deficiencies in highways maintenance [81-83]. Car owners sue local authorities responsible for the maintenance of the roads, although it is the independent contractors who actually maintain the road surface.

Art. 1172(2) CC literally requires only that contractor acts "on the assignment" of the commissioner. However, the Supreme Court of Ukraine in the case No. 6-13344sv10 [84] concluded that contractor must act not only "on the assignment" but also "under the control" of the commissioner. According to the Court it shall be assessed whether the commissioner exercised (or at least under the terms of the contract should have exercised) control over the contractor's operations, in particular, the control over observing safety rules during the work. So, if it turns out that the commissioner did not and should not have exercised such a control, he/she is not responsible for the damage caused by the contractor. Generally, the approach remains good law in the jurisprudence of the new[10] Supreme Court as well [85; 86].

[10] I use "new" to denote the composition of the Court after the judicial reform of 2016.

At the same time, in one of the new cases [87] the Supreme Court concluded that defendant Road Service is obliged to monitor the performance of the contractor's obligations not because it is so provided in the contract, but because Art. 849 CC allows commissioner to do it. This article, in particular, stipulates that "the commissioner has the right to check the progress and quality of the work at any time without interfering with the contractor's operations". Instead of examining the terms of the particular contract, in this case the Court noted that commissioner is entitled to control by virtue of the direct provision of the CC which is applicable to all the contracts for works. Under this approach it makes no sense to set the additional requirement of control in the first place, since this requirement is always met as long as the contract for works is at hand. However, it would be premature to conclude that this latter approach now dominates as there is only one such case in the Supreme Court's practice and so far the Court has not contemplated the divergence openly.

Thus, in the model case, Company B may be held responsible for the damage caused by Company A only if there was a contract for works between the two companies where Company A was the contractor and caused damage while performing the contract. In addition, it should be shown that Company B was obliged to control Company A performing the obligations under the contract. It would be helpful for the plaintiffs if the contract explicitly provided for the possibility of such control. However, it may suffice to invoke the provisions of applicable law setting forth commissioner's right to control the progress of work.

2. Liability for own actions. In some jurisdictions the doctrine of aiding and abetting is employed to substantiate liability for indirect involvement in human rights violations [88, pp. 351, 357]. There is no such concept in Ukrainian law. The closest analogue is Art. 1190 CC: "persons whose joint actions or omissions have caused damage are jointly and severally liable to the victim. At the request of the victim, the court may determine the liability of the persons who jointly caused damage, in proportion to the degree of their fault".

The key question is, can Company B be considered to have caused damage jointly with Company A? The article itself does not contain definition of what shall qualify as joint infliction of damage. The jurisprudence has not fashioned elaborate approach either.

Courts apply the article mainly to two categories of cases. The first one is cases concerning traffic accidents. The Plenary High Specialized Court of Ukraine explained that when two cars collide, a distinction should be made between the damage caused by the drivers to each other and the damage caused by the drivers to third parties (such as passengers or pedestrians). The first type of damage is compensated depending on the fault of each driver (Art. 1188 CC), while the second type of damage is compensated regardless of their fault and considered to be a damage jointly inflicted by the drivers (Art. 1190 CC).

The other category of cases where Art. 1190 CC applies is compensation for damage resulting from a crime committed by several accomplices [89-91]. Understandably, if the crime is committed in complicity, the resulting damage is "jointly inflicted". But does it mean that "joint infliction" in tort law can only take place if there has been "criminal complicity"? The jurisprudence in this regard is somewhat confusing.

The milestone case No. 6-168tss13 concerned obtaining a bank loan by submitting the forged documents with no intention to repay the debt [92]. There were three defendants in the case. Two of them were found guilty of forgery (Art. 366 of the Criminal Code of Ukraine (CrimC)) and financial fraud (Art. 222 CrimC). The third defendant, the bank employee, was found guilty of neglect of duty (Art. 367 CrimC). The bank filed a civil lawsuit against all three, seeking to invoke joint and several liability under Art. 1190 CC.

The court of first instance, upheld the claim. However, the Supreme Court of Ukraine overturned this decision and remanded a case for a new trial. The following passage from the Supreme Court's decision became often cited:
"Based on the content of the substantive law rule [Art. 1190 CC], persons who jointly caused indivisible damage by interdependent, collective actions or actions with common intent, are jointly and severally liable to the victim.

When damage is caused by the crime committed by two or more persons in order for joint and several liability to apply it shall be established that the actions of the tortfeasors were united by a common criminal intent, and the damage caused by them was the result of their joint actions" [92].

The position in this case is ambiguous. The first sentence of the passage uses conjunction "or" and, thus, implies that "joint infliction" requires *either* the actions being "interdependent and collective" *or* the actions having common intent. In contrast, the second sentence contains a clear indication that all tortfeasors must have a common intention. And it is this second sentence that became decisive for the final judgment in the case: after the remittal of the case the third defendant (bank employee) was absolved from liability in tort [93-95].

The jurisprudence concerning Art. 1190 CC, thus, reveals a major inconsistency. On the one hand, whenever the damage is caused by the criminal offence committed by several persons, for joint and several liability to apply all the tortfeasors must act with common intent. Instead, whenever the damage is caused by actions that do not amount to criminal offense, then common intent is not required. The latter applies primarily to the infliction of harm to third parties due to several cars colliding. Obviously, no one would consider two drivers that crashed into each other as having a "common intention" to harm their passengers or pedestrians.

Thus, it turns out that the concept of "joint infliction" of damage within Art. 1190 CC is attached two different meanings depending on whether the harmful actions amount to a criminal offence. If they do, "joint infliction" is treated as the absolute equivalent of complicity in criminal law (Art. 26 CrimC) (which means, in particular, that all tortfeasors must act intentionally). If not, then "joint infliction" is treated much more broadly and in this case the finding of the joint infliction is not precluded by one of the tortfeasors acting negligently. In this latter case, the exact meaning of the concept remains unclear.

The above considerations regarding Art. 1190 CC are relevant for the two aspects of the model case. First, they may cast light on the sub-scenario where Company A provides assistance to the state law enforcement bodies in violent dispersing of the rally. Second, they are relevant for the question of whether Company B may be held liable for the Company A's actions as an accomplice in all sub-scenarios.

As for the first question, the case is not very promising for the plaintiffs. Illegal use of force by law enforcement bodies to disperse a peaceful rally is a criminal offense. It may qualify as abuse of power by a law enforcement officer (Art. 365 CrimC). Therefore, according to the approach currently followed in jurisprudence, only those who have been found guilty of complicity in respective crimes can be held liable in tort.

Meanwhile under Art. 18 CrimC only a natural person (and not a company) can be subjected to criminal liability. At the same time, the CrimC provides for the possibility of imposing so-called "measures of criminal law" (Sec XIV-1 CrimC) (fine, confiscation, liquidation) on a legal entity in case its official is found guilty of a crime and the crime is committed on behalf and in the interests of the legal entity. Although the "measures of criminal law" do not in themselves restore the rights of the victim, Art. 96-6(2) CrimC provides that "whenever measures of criminal law are applied, the

legal entity is obliged to compensate for damage and harm in full". Therefore, in general the law provides for the possibility to claim damages from the legal entity in the event of a crime committed by its official. However, the range of the crimes which allow to invoke the mechanism is limited to an exhaustive list provided for in Art. 96-3 CrimC.

The list in Art. 96-3 does not include abuse of power by a law enforcement officer (art 365 CrimC). However, the list includes other crimes that could potentially be relevant in the context of a violent dispersal of a rally, e.g. unlawful deprivation of liberty or kidnapping (Art. 146 CrimC), creation of illegal paramilitary or armed organizations (Art. 260 CrimC), creating, managing a criminal community or criminal organization, and participation in it (Art. 255 CrimC).

Considering the above, in the sub-scenario with the violent dispersal of the rally, the prospect of recovering compensation from Company A appears hardly feasible (let alone recovering compensation from Company B). It is noticeable that despite the amendments introducing "measures of criminal law" into the Criminal Code were passed in 2015[11] there are still no instances of those measures having been applied by the courts.

The second aspect of the model case where Art. 1190 CC could be of use is the substantiating Company B's liability in all sub-scenarios. The above considerations concerning criminal complicity can also be applied here. But the whole other thing when defendants' harmful actions do not amount to a criminal offence. In this case, plaintiffs will have to rely solely on Art. 1190 CC.

As have been shown, neither jurisprudence nor doctrine has developed clear criteria for qualifying harm as "jointly inflicted" in case of pure torts (i.e. torts which are not criminal offenses at the same time). *De lege ferenda*, "joint infliction" in tort law should be no narrower than criminal complicity. However, not in the sense that only accomplices recognized as such in criminal proceedings can only be sued in tort, but in the sense that the civil law concept of "joint infliction" should include all the forms of complicity recognized in criminal law (Art. 27 CrimC) (organizer, abettor, instigator and accessory).

So that even when the harmful act does not constitute a crime, it should be possible to sue in tort not only the principal tortfeasor, but also the one who incited the principal tortfeasor (instigator) helped him/her in causing damage with advice, guidance, tools etc. (abettor) or managed the harmful operations (organizer).
The broad approach would pave the way for holding Company B liable as an organizer (whenever it is a parent company) or instigator (whenever it is a purchaser in the supply chain). It would also allow to hold Company A liable as an abettor in the sub-scenario with violent dispersal of protesters.

Jurisdiction. With regard to the jurisdiction four variations of the model case should be considered: a) Company A and Company B both have their places of business in Ukraine; b) Company A has its place of business in Ukraine while Company B has its place of business abroad; c) Company A has its place of business abroad and Company B has its place of business in Ukraine; d) Company A and Company B both have their places of business abroad.

In variation (a), the case is subject to consideration by the Ukrainian courts, and the specific court is determined in accordance with the rules of civil procedural law of Ukraine (§3 Ch 2 CPC).
In variations (b) and (c) legal relationship contains a "foreign element" (SubPara (2) Art. 1 of the Law "On Private International Law"). Therefore, when suing Company B, plaintiffs should resort to Art. 76 of the Law "On Private International Law" according to which Ukrainian "courts may allow claims and consider cases containing a foreign element if: 1) … 3) the case concerns compensation for

[11] The Law of Ukraine No. 314-VII, May 23, 2013, https://zakon.rada.gov.ua/laws/card/314-18.

damage caused on the territory of Ukraine; … 5) the case concerns compensation of damage as long as the plaintiff is a natural person domiciled in Ukraine or the defendant is a legal entity having its place of business in Ukraine".

In the context of subPara 3) Art. 76 of the Law "On Private International Law", the question is how to determine the place where damage was caused: is it the place where the plaintiff suffered damage or is it the place where the defendant committed the action which entailed damage?
Currently, there are no high-profile cases where the higher courts would have touched upon the question in detail. Most of the cases concern traffic accidents that took place on the territory of Ukraine with foreigners involved [96-97]. In several cases [98-99] rolling stock derailed because of the negligent maintenance of one car owned by a foreign company. In one such case [99], the defective car belonged to a Russian company and its last maintenance was carried out in Russia. Although the negligence (failure to check and repair the car properly) was committed in Russia, the case was considered by Ukrainian courts because the accident occurred in Ukraine.

Therefore, when Company A is located in Ukraine and company B is located abroad (variation (b)), a claim against Company B may be filed in a Ukrainian court on the basis of subPara 3) Art. 76 of the Law "On Private International Law" (damage caused in Ukraine). It should be noted that the article states that courts "*may* allow claims". It means that in this case the jurisdiction is not exclusive, i.e. the Ukrainian law does not exclude the possibility of the case being considered by foreign court. In other words, no monopoly of Ukrainian courts is asserted over this type of cases.

When Company A is located abroad and Company B is located in Ukraine (variation (c)), a claim against Company B may be filed in a Ukrainian court on the basis of the second part of subPara 5) Art. 76 of the Law "On Private International Law" (defendant is a legal entity having its place of business in Ukraine). In this case, the jurisdiction is not exclusive either.
In variation (d), when both companies are located abroad, filing a lawsuit against Company B in the Ukrainian court is theoretically possible on the basis of the first part of subPara 5) Art. 76 of the Law "On Private International Law" (the plaintiff is a natural person domiciled in Ukraine). However, there are no such cases so far.

Vindicating Collective Interests. Ukrainian procedural law does not provide for the mechanism of class actions. However, it allows for a number of actions (brought by a number of plaintiffs) being joined and considered by the court within one case. Participation of several plaintiffs in one case is allowed if: 1) the subject of the dispute are common rights of several plaintiffs; 2) the rights of several plaintiffs were brought about by the same fact; 3) the subject of the dispute are similar rights and responsibilities (Art. 50 CPC). These provisions are often applied by courts in environmental cases. Two of them are notable: the first, already mentioned above, concerned the Trypilska TPP; the second concerned a large-scale fire at an oil depot in the town of Glevakha (Kyiv region). In total, the Supreme Court considered six TPP cases. The total number of plaintiffs is 280 (the largest number of plaintiffs in one case – 108).

In the second case, plaintiffs claimed compensation for non-pecuniary damage arguing that extensive pollution of air, soil and groundwater was caused by the fire. The Supreme Court considered five such cases [100-104] with a total of 330 plaintiffs (the largest number of plaintiffs in one case was 215). Each plaintiff in these cases was awarded UAH 50,000 in compensation for non-pecuniary damage.

The other way of vindicating collective interests in environmental cases may be through filing a lawsuit by members of the public concerned (either NGOs or even individuals). This option is provided for in the Aarhus Convention[12] and in national legislation as well.[13]

Yet, this type of lawsuits is usually aimed at some other goals rather than compensation, for instance: halting the pollutant's operations [105]; declaring illegal and revoking permits issued for the construction of a new industrial facility [106-108]; ordering defendant to take measures to lessen the environmental impact [109-111] etc. The probable reason why there are no claims for damages brought by the members of the public concerned is that national legislation does not provide a mechanism for allocating the awarded money among all victims.

Case No. 904/6125/20 is the rare exception. In this case, the NGO "Lawyers for Environment" filed a lawsuit against seven mining companies in Shirokiv district [112]. The lawsuit stated that the defendants' businesses exert adverse impact on the environment of the surrounding areas. On this basis, the NGO claimed UAH 0.5 million for 48 of its members (residents of the area) in compensation for pecuniary damage and the same amount in compensation for moral damage. In the lawsuit it was stated that the awarded funds will be allocated proportionally among the members of the NGO in whose interests the lawsuit was filed.

While considering the issue of proper jurisdiction for the case (civil or commercial), the Grand Chamber of the Supreme Court in general confirmed that NGOs are entitled to file lawsuits for the sake of vindicating environmental rights of their members [112].

However, during the retrial [113], the claim was returned to the plaintiff without consideration.[14] Among the deficiencies there were: lack of any reasoning as to the amount of compensation claimed for each individual separately; lack of evidence proving the alleged victims own property in the affected area; lack of evidence that property has been destroyed or damaged.

From the deficiencies indicated it follows, that for this claim to succeed, NGO should have provided individualized evidence (i.e. evidence pertaining to each particular victim) substantiating two elements of tort: damage and causation, meanwhile wrongfulness (as a violation of environmental regulations by the defendants) could be proved once and for all. Thus, with regard to the burden of proof and the range of evidence required the situation is no different from that when there are numerous plaintiffs in one case.

Thus, in the sub-scenario, where Company A violates the environmental rights of residents of adjacent territories, the collective interests of the victims can be considered and vindicated in a single case either through the mechanism of joining multiple claims (Art. 50 CPC) or through filing a claim by a body authorized by law to represent the interests of others (Articles 56, 57 CPC). However, in both cases, the optimization (as would have been provided by the class action mechanism) is not achieved, since Ukrainian law requires the submission of individualized evidence for each victim showing the damage, its exact calculation and causal nexus between damage and defendant's activities.

Conclusions

[12] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (done at Aarhus, Denmark, on June 25. 1998) Art. 9.

[13] Para 2 Art. 293 CC; subPara (zh) art 21 of the Law "On environmental protection"; Judgment No. 12-rp/2013 of the Constitutional Court of Ukraine, November 28, 2013, Para 2.6.

[14] It means there were deficiencies in statement of the claim and the plaintiff was given time to amend them, but failed. See Art. 174 of Commercial Procedural Code of Ukraine.

Of the four challenges tort law encounters in the model case as for Ukraine the biggest issue is the liability for the indirect involvement in human rights violations. Several factors contribute to it being so, in particular: absence of the duty to ensure ethical supply chain in national legislation; a limited number of cases of vicarious liability; inchoate doctrine of joint infliction. In addition, there are some systemic shortcomings concerning the formula of tort elements: the concepts of fault and wrongfulness significantly overlap entailing the misconception of strict liability regime; requirements for the proof of causation are rigid and inflexible allowing for no exceptions or alleviation.

Against this background, a relatively minor problem is the lack of a mechanism for class actions: although the desired optimization of litigation costs may not be achieved, some avenues to protect collective interests do exist.

The "translation" of the circumstances of the case from the language of human rights into the language of tort law is not in itself an obstacle: some difficulties are explained rather by the already mentioned imperfection of the doctrine of tort elements. Finally, the rules of jurisdiction seem flexible enough to allow either Ukrainian or foreign courts to consider the case.

At the end of the day, all the obstacles mentioned are not insurmountable, so given the creative lawyering and further development of the doctrine and jurisprudence, the model case may well have a judicial prospect in Ukraine.

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