



## UKRAINE

### SURVEY QUESTIONS & RESPONSES<sup>1</sup>

Survey conducted as part of *Commerce, Crime, and Conflict: A Comparative Survey of Legal Remedies for Private Sector Liability for Grave Breaches of International Law And Related Illicit Economic Activities*.

#### I. Disclosure requirements for business entities

1. **What sort of material information are business entities required to provide to their shareholders and/or public under your jurisdiction's company law or securities laws that may be relevant to potential litigants? For example, are such entities required to provide information about:**

- **material civil litigation?**
- **risk factors that would impact a shareholder's investment in the company?**
- **any reported violations of law or pending proceedings arising from such violations?**
- **revenues received from, or amounts paid to or on account of, a government or its officials or agents?**

At the end of February of 2006, the Ukrainian Parliament passed the law "On Securities and the Capital Market" (23.02.2006 № 3480-IV) (The Securities Law). The Securities Law came into effect on May 12, 2006. One of the biggest impacts of the Securities Law is in the area disclosure of information on the securities markets, which was previously not regulated by legislation. The Securities Law has significantly expanded the obligation of an issuer to disclose information about itself,

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<sup>1</sup> The initial responses to this survey of Ukrainian law were provided by Oksana Bilobran, Attorney-at-law. Additional help has been provided by: Nataliya Balushka, Attorney-at-law, and Sofiya Vankovych, Attorney-at-law. Comments on the responses have been provided by Scott Horton, Attorney-at-law, Patterson, Belknap, Webb & Tyler LLP. The contents of this survey response are intended for research purposes only and continue to be revised in light of peer review. The contents of this survey response are in no way intended as comment on specific cases or judgements, nor are they intended as legal advice on any of the issues covered. Due to constraints of space, many responses in this text provide only a basic introduction to the issue and the complexities of specific cases or provisions may not be fully explicated. Readers seeking practical legal advice should consult a lawyer in the relevant jurisdiction. Citations and references to this survey response should adhere to the following format: "Survey Response, Laws of Ukraine (Oksana Bilobran), 'Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions' Fafo AIS, [date accessed] 2006". The contents of this survey response are published by Fafo AIS under a Creative Commons Attribution-Share Alike 2.5 License.

its main shareholders and matters affecting its securities. For example, Article 39 of the Securities Law provides for the disclosure of information about:

- The financial situation of the issuer and results of its activities
- Any material events potentially affecting the financial situation of the issuer or price of shares
- Owners of large blocks of shares (greater than or equal to 10 percent)

The Securities Law classifies open information that the issuer is obligated to provide into “regular” and “special” information. Regular information concerning the finances and business of an issuer must be filed with the Ukrainian Securities Commission on an annual and quarterly basis. Annual information includes, in particular, the name and location of an issuer, its management, business and financial operations, issued securities, annual financial reports and an auditor's report. Quarterly information is essentially the same as annual information, except quarterly financial reports and information on participation of an issuer in other companies also must be filed.

Special information is information about events affecting an issuer that may result in a material change in the value of its shares. Such events particularly include placement by an issuer of securities in excess of 25% of its share capital, redemption by an issuer of its shares, listing or delisting of shares of an issuer on a stock exchange, an issuer obtaining loans in excess of 25% of its assets, a change in the officers of an issuer, a change of shareholders owning 10% or more of the shares, the reduction in the share capital of an issuer, a decision about establishment or voluntary dissolution of the subsidiary of the issuer, the beginning of bankruptcy proceedings, or a decision about dissolution of the issuer.

Both regular and special information about the issuer is open information and has to be published in one of the official publications of the Parliament of Ukraine, the Cabinet of Ministers or the Securities Commission, and also in the database of the Securities Commission, which is available to the public.

The Securities Law provides that the State Security Commission can establish additional requirements as to the information that has to be disclosed. The Security Commission is delegated with the authority to ensure proper disclosure of the information.

Because the Securities Law entered into force recently and no recommendations have been made by the Security Commission as to the application of the law, it is not clear whether material civil litigation, reported violations of law or pending proceedings arising from such violations and information about revenues received from, or amounts paid to a government will have to be disclosed by the legal entity.

**2. Is there a right to know statute enabling one to obtain information from your government?**

Article 34 of the Constitution of Ukraine states that “[e]veryone has the right to freely collect, store, use and disseminate information by oral, written or other means of his or her choice.” The Law of Ukraine “On Information” (02.10.1992 N 2657-XII) in Article 9 gives a definition of the right to information. According to this Law, “[a]ll citizens, legal entities, and state bodies of Ukraine shall have the right to information, envisaging the possibility of free receipt, use, distribution, and storage of any data as may be required for the implementation of their rights, freedoms, and lawful interests, as well as for carrying out their tasks and their functions.”

There are two types of information – open information and information of restricted access. Information of restricted access can also be subdivided into confidential and secret.

Access to open information is secured by way of systematic publication of such information in official printed periodicals (bulletins, collections); distribution of such information by the media; providing such information directly to the concerned citizens, state bodies, and legal entities or upon their request.

A person wishing to obtain open information should prepare a formal request for information and file it with the person who owns, possesses or uses such information.

Article 37 of the Law “On Information” establishes the list of documents and information that are not subject to access by requests. It states:

Compulsory access to official documents as per request shall not apply to documents containing:

- information duly qualified as a state secret;
- confidential information;
- information relating to operational and investigation activities of bodies of the Interior Ministry, Security Service of Ukraine, courts, criminal investigation, prosecution in cases when such disclosure may harm the investigation or citizens' right to a just and impersonal adjudication or threaten human life or health;
- information relating to private life;
- documents referred to as departmental service correspondence (reports, memoranda, letters, etc.), provided they relate to a given institution's policy, decision-making precede adoption of decisions;
- information not to be disclosed pursuant to other legislative or normative acts. Institution to whom such request is addressed may bar access to the requested documents provided it contains information not be divulged as per another government institution's normative documents and the institution receiving the request has no right to make a decision relating disclosure of such information;
- financial institutions' information prepared for controlling fiscal authorities.

**Confidential** information is information owned, used or possessed by certain natural persons or legal entities and may be distributed only at their consent and on terms provided by them. Article 30 of the Law “On Information” provides:

Citizens and legal entities possessing professional, business, production, banking, commercial, and other information received using their own funds, or information affecting their professional, business, production, banking, commercial and other interests, provided such information does not infringe the legally established secrecy procedures, shall independently determine its access mode, including confidential status, and shall take measures to secure its protection.

The exception from the above rule shall be commercial and banking information, as well as data whose legal regimes are determined by the Verkhovna Rada as submitted by the Cabinet of Ministers of Ukraine (in the case of statistics, ecology, banking transactions, taxes, etc.), and information which, if concealed, can hazard human life and health.

The following information cannot be confidential:

- information about the state of environment, quality of food products and consumer goods;
- information about accidents, catastrophes, disasters and other emergency events that have happened or may happen and threaten the safety of the citizens;
- information about the population health state, its standard of living, including food, clothing, dwelling, medical service and social maintenance; about social and demographic indices, state of rule of law, education and culture of population;
- information about the state of cases about rights and liberties of human beings and citizens, and events of their violation;
- information about the illegal acts of state bodies, local self-government bodies, their officials and public servants;
- other information, access to which, according to the legislation of Ukraine and international treaties accepted by the Verkhovna Rada of Ukraine, can't be limited.

Secret information shall be understood as information that contains data qualified by law as the state and other secrets, the disclosure of which will damage the person, society, or the state. Examples of secret information are a state secret and commercial secret.

### **Commercial secret**

Article 505 of the Civil Code of Ukraine (16.01.2003 № 435-IV) states:

A commercial secret shall be the information which is secret in a sense that it is as a whole or in the aggregate of its components unknown and is not easily accessed by the persons who usually deal with the type of information it belongs to and due to this has a commercial value and was a subject of the measures, adequate to the existing circumstances to preserve its secrecy, undertaken by a person who legally controls this information.

Information of technical, organizational, commercial, industrial and other nature can be a commercial secret, except for that which cannot be attributed to a commercial secret pursuant to the law.

The Decree of the Cabinet of Ministers of Ukraine (9.08.1993 of № 611) lists the information which cannot be a commercial secret:

- founding documents of a legal entity;
- Information on all kind of state accounts;
- Databases which are necessary for controlling incomes and payments of taxes and other obligatory payments;
- Information about the number of staff and workers, their wages and their salaries;
- Documents about payment of taxes and other payments;
- Information about environmental pollution, violation of safety requirements for employees, about products that can cause harm to the health of consumers and about damages caused;
- Documents about solvency;
- Information about participation in business entities.

#### **State secret**

Article 1 Law of Ukraine “On State Secrets” (21.01.1994 №3855-XII) states that “state secret – type of secret information, which covers data in the sphere of defense, economy, science and technology, international relations, state security and protection of legal order, which disclosure may harm national security of Ukraine and which was classified, according to legal procedure, as state secret.”

The following information may not be referred to as a state secret:

- the state of environment,
- quality of food and household goods;
- accidents, catastrophes, dangerous natural phenomena and other extraordinary events, which occurred or may occur and threaten citizens security;
- the health of the population, its living standard, including meals, clothes, accommodations, medical care and social security, as well as social-demographics, level of general order, education and culture of population;
- facts of violation of rights and freedoms of a person and citizen; illegal actions of governmental bodies, local authorities and their officials;
- other information, which according to laws and international agreements may not be classified as secret.

The analysis of the above-described legislation shows that the obligation to provide information and the grounds for possible refusal to provide information are well settled in Ukraine. The legislation provides a mechanism for access to information. For example, according to the Law “On Information,” the burden of

proving the legality of any refusal is placed on the entity from which the information is requested. If refusal is legally groundless or the information is not provided in time, the court is obliged to impose penalties on the responsible authority.

The Constitution of Ukraine provides for a judicial review procedure, which allows citizens to appeal directly to the court on the grounds of a violation of their rights. This procedure was developed to overcome the bureaucratic delays during the administrative process of past regimes. As practice shows in Ukraine, the process of judicial review in such cases is not very expensive. It can take from one to three months, while pre-judicial, administrative processes can only extend the process of getting information by one or several months.

It is also worth mentioning that it is becoming much more difficult to get information from the business entities. Over the last few years business in Ukraine has become more sophisticated. Information is now seen as a valuable resource and is not very willingly shared by business entities.

The absence of legal sanctions for nondisclosure of information can be an obstacle to receiving requested information. Sanctions are provided for nondisclosure of only certain types of information. Therefore, when there are no significant sanctions, such as fines, businesses will often risk losing in court and not disclose the requested materials. The only potential remedy the person requesting information might receive in court is the information itself. So because litigation is not very expensive, businesses are not afraid to be sued. But nondisclosure of some types of information, such as consumer information, can lead to significant fines. Therefore, businesses are more willing to provide that type of requested materials.

## **II. Status of business entities under criminal law in Ukraine**

### **3. Does your penal code (or judicial interpretations thereof) provide that business entities may be prosecuted criminally for violations of such code?**

In Ukraine, only physical (natural) persons can be subject to criminal liability. Officials, managers, and servants of the business entity can be subjected to criminal liability for certain types of offenses committed while performing organizational, managerial, administrative and executive functions of the business entity.

Part 1 of Article 18 of Criminal Code of Ukraine (05.04.2001 № 2341-III) states that “A criminal offender shall mean a natural sane person who has committed a criminal offense at the age of criminal liability.” This means that only a natural person can be a criminal offender under Ukrainian legislation. The business entity is not the criminal offender under the Criminal Code of Ukraine and thus it cannot be prosecuted criminally for violations of the Criminal Code of Ukraine.

The issue of criminal liability of legal entities is receiving a great deal of attention among the nation’s scholars and the legislature. It again arose in the Parliament of Ukraine in July, 2006, during the debate over ratification of the Council of Europe Convention on the Prevention of Terrorism. Article 10 of the Convention “Liability of Legal Entities” states:

Each Party shall adopt such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal entities for participation in the offences [of terrorism]. Subject to the legal principles of the Party, the liability of legal entities may be criminal, civil or administrative.

During the discussion, the expert committee of the Parliament presented the position that it would be possible to introduce criminal liability of legal entities into Ukrainian legislation, but that it would require a significant amount of time and preparation. The Deputy Minister of Justice explained during the presentation of the Convention to the Parliament that because of the phrase “subject to the legal principles of the Party,” Ukraine does not have to change its fundamental principle of criminal law – only natural persons can be subject to criminal liability. The Deputy Minister of Justice stressed that because Ukraine already established the liability of legal entities for the offence of terrorism by national law, the country would be in compliance with the Convention, even though the existent liability is administrative in nature and not criminal.

Therefore, for the present legal entities cannot be held criminally liable for any offences. But there are other ways to criminally prosecute activity that takes place under the umbrella of a legal entity. This can be done, for example, by prosecuting its management. The Criminal Code of Ukraine defines that certain crimes can only be committed by a criminal offender that has certain special characteristics and therefore is a “special criminal offender”. Part 2 of Article 18 of Criminal code of Ukraine states that “A special criminal offender shall mean a sane person who has committed a criminal offence at the age of criminal liability, if that offense may only be committed by a certain person.”

One of the types of special criminal offender is an **official**. The Note to Article 364 of Criminal Code states that “Officials shall mean persons who permanently or temporarily represent public authorities, and also permanently or temporarily occupy positions in businesses, institutions or organizations of any type of ownership, which are related to organizational, managerial, administrative and executive functions, or are specifically authorized to perform such functions. Officials shall also mean foreigners or stateless persons who perform the functions described in paragraph 1 of this Note”.

The official or servant of the business entity can be prosecuted as a special criminal offender for the crimes if it is specially stated in the Criminal Code (Chapter XVII Criminal Offences in Office, number of articles in Chapter VII Economic Criminal Offences, Chapter VIII. Criminal Offences Against Environment, and Chapter X. Criminal Offences Against Occupational Safety).<sup>2</sup>

Most often in practice, the director of an organization is held criminally liable for actions of the organization. Depending on the type of the offence, other officials of the organization can bear liability as well. For example, a chief financial officer of an organization is often held liable for many economic crimes. Examples of such crimes can be evasion of taxes, fees or other compulsory payments; fraudulent bankruptcy;

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<sup>2</sup> Please see attachment 1 for the list and definitions of the crimes that can be only committed by special criminal offenders – officials or servants of the business entity.

and financial fraud. Other officers, for example the chief engineer of a company, can also be criminally liable for such criminal offences as violation of environmental safety rules, violation of nuclear or radiation safety rules and many others. In each case, the court must decide what the duties of the officer were and whether he/she fulfilled them.

Another type of special criminal offender that might be important for the purpose of this survey is **military servants**, and registrants during their training (or checkup) or special sessions. Only these persons can be held liable for military offences. Article 401 of Criminal Code of Ukraine explains that this category of special criminal offenders includes “members of the Armed Forces of Ukraine, the Security Service of Ukraine, the Border Troops of Ukraine, Internal Troops of the Ministry of Internal Affairs of Ukraine, and other military formations established in compliance with the laws of Ukraine, and also other persons specified in the law.” Crimes for which military servants can be found guilty include such offences as abuse of authority or official position by a military official, exceeding authority or official powers by a military official, neglect of duty in military service, omissions of military authorities, illtreatment of prisoners of war, violence against population in an war zone, and marauding. Other persons who do not have the characteristics of special criminal offenders but take part in the commission of a crime can be criminally liable for complicity in military offenses.

The vast majority of other criminal offenses (for example, crimes against life and health of a person, liberty, honor and dignity of a person, against peace, security of mankind and international legal order) can be committed by a general criminal offender, which means that it makes no difference if the person is an official or the servant of the business entity or other natural person.

#### **4. What type sanctions are applied to business entities, as opposed to natural persons?**

Since legal entities are not subject to criminal liability no sanctions can be put on them under criminal law of Ukraine. But as explained above, officials of legal entity can be criminally liable for crimes committed while in office.

Article 51 of the Criminal Code of Ukraine provides the list sanctions that may be imposed by a court on persons convicted of criminal offenses: fine; revocation of a military or special title, rank, grade or qualification class; deprivation of the right to occupy certain positions or engage in certain activities; community service; correctional labor; service restrictions for military servants; forfeiture of property; arrest; restraint of freedom; custody of military servants in a penal battalion; imprisonment for a determinate term; or life imprisonment. This is a full list of types of punishment according to the Criminal Code of Ukraine.

An important type of punishment for the purposes of this survey is deprivation of the right to occupy certain positions or engage in certain activities. It can be applied to officials or servants of the business entity (the special criminal offenders) as opposed to other natural persons. Article 55 states:

Deprivation of the right to occupy certain positions or engage in certain activities may be imposed as primary punishment for a term of two to five years or as additional punishment for a term of one to three years. Deprivation of the right to occupy certain positions or engage in certain activities as additional punishment may also be imposed without reference to a sanction of an article in the Special Part of this Code, if a court, having regard to the nature of the offense committed by a person in office or in connection with a certain activity, the character of the person convicted, and other circumstances of the case, decides that such person should be deprived of the right to occupy certain positions or engage in certain activities.

**5. What are the standards applied in your jurisdiction for attributing liability to a business entity for the actions of individual servants?**

As mentioned above, in Ukraine a criminal offender can only be natural person. The business entity is not the criminal offender under the Criminal Code of Ukraine and thus it cannot be prosecuted criminally for the violations of the Criminal Code of Ukraine.

If the official or the servant of the business entity is the criminal offender he will be personally liable for the criminal offence. This liability means that a criminal offender used the authority or official position contrary to the official interests or he violated or didn't accomplish his employment duties.

For this purpose, in order to find the official guilty of the criminal offence a court must find that this natural person had organizational, managerial, administrative or executive functions, or was specifically authorized to perform such functions. In other cases this person will not be liable for criminal offences in office and can be liable for the other criminal offence she committed.

**6. Under your criminal law (penal code) what is the legal standard for convicting someone of being an accomplice to or aiding and abetting the commission of a crime by another (complicity)? What is the legal standard for convicting someone of plotting with another to commit a crime (criminal conspiracy)?**

The legal standards of **complicity** are defined in the Criminal Code of Ukraine. Article 26 states that "Criminal complicity is the willful co-participation of several criminal offenders in an intended criminal offense". Only physical (natural) persons can be found guilty under the complicity theory.

The objective and subjective legal features of complicity are defined in the theory of Ukrainian Criminal Law. The objective features are:

- The criminal offence should be committed by several criminal offenders;
- The consequences of the criminal offence are the same (joint) to all accomplices; and
- There is a causal connection between the actions of every accomplice and the criminal consequences.

The subjective features of complicity are:

- The intent of every accomplice;
- The mutual awareness of every accomplice about the actions on committing a criminal offence;
- Consciousness of co-participation and every single role in committing a criminal offence;
- The accomplices wish the socially injurious consequences of a criminal offence or anticipate them.

According to the Criminal Code of Ukraine there are the following types of accomplices: principal (or co-principal) offender, organizer, abettor, aider (accessory). Article 27 states:

The **principal (or co-principal)** is the person who, in association with other criminal offenders, has committed a criminal offense under this Code, directly or through other persons, who cannot be criminally liable, in accordance with the law, for what they have committed.

The **organizer** is a person who has organized a criminal offense (or criminal offenses) or supervised its (their) preparation or commission. The organizer is also a person who has created an organized group or criminal organization, or supervised it, financed it, or organized the covering up of the criminal activity of an organized group or criminal organization.

The **abettor** is a person who has induced any other accomplice to a criminal offense, by way of persuasion, subornation, threat, coercion or otherwise.

The **aider (accessory)** is a person who has facilitated the commission of a criminal offense by other accomplices, by way of advice, or instructions, or by supplying the means or tools, or removing obstacles, and also a person who promised in advance to conceal a criminal offender, tools or means, traces of crime or criminally obtained things, to buy or sell such things, or otherwise facilitate the covering up of a criminal offense.

Some types of co-participation are not complicity according to Criminal Code. Part 6.7 of Article 27 states that “The concealment of a criminal offender, tools or means of a criminal offense, traces of crime or criminally obtained things, or buying or selling such things shall not constitute complicity where they have not been promised in advance. A promised failure to report a crime, which is definitely known to be in preparation or in progress, prior to the consummation of such, shall not constitute complicity. Any such person shall be criminally liable only if the act so committed comprises the elements of any other criminal offense”.

**Criminal conspiracy** can have the following forms according to Criminal Code of Ukraine: a group of persons upon prior conspiracy, an organized group, a criminal organization. Article 28 states that:

A criminal offense shall be held to have been committed by a **group of persons upon prior conspiracy** where it was jointly committed by several (two or more) persons who have conspired in advance, that is prior to the commencement of the offense, to commit it together.

A criminal offense shall be held to have been committed by an **organized group** where several persons (three or more) participated in its preparation or commission, who have previously established a stable association for the purpose of committing of this and other offense (or offenses), and have been consolidated by a common plan with assigned roles designed to achieve this plan known to all members of the group.

A criminal offense shall be held to have been committed by a **criminal organization** where it was committed by a stable hierarchical association of several persons (three and more), members or structural units of which have organized themselves, upon prior conspiracy, to jointly act for the purpose of directly committing of grave or special grave criminal offenses by the members of this organization, or supervising or coordinating criminal activity of other persons, or supporting the activity of this criminal organization and other criminal groups.

The following legal standards apply for **criminal liability of organizers and members of an organized group or criminal organization**. Article 30 states that “An organizer of an organized group or criminal organization shall be criminally liable for all the criminal offenses committed by the organized group or criminal organization, if those offenses were part of his intent. Other members of an organized group or criminal organization shall be criminally liable for the criminal offenses prepared or committed with their participation, regardless of the role each of them had in such offenses”.

According to Article 67, the commission of an offense by a **group of persons upon prior conspiracy** is the circumstance aggravating punishment.

The commission of an offense by a group of persons upon prior conspiracy, an organized group or a criminal organization is specified in some articles of the Special Part of the Criminal Code of Ukraine as an aggravating element of an offense.

The voluntary **renunciation of accomplices** has the following specifics. Article 17 states that “The voluntary renunciation shall mean the final discontinuation of the preparation for crime or a criminal attempt by a person of his/her own will, where that person has realized that the criminal offense may be consummated. A person who voluntarily renounced to consummate a criminal offense shall be criminally liable only if the actual act committed by that person comprised elements of any other offense”.

Article 31 states that “In the event of a principal's (or co-principals') voluntary renunciation to commit a criminal offense, he (or they) shall not be criminally liable where the conditions prescribed by Article 17 of this Code are satisfied. In this event other accomplices shall be criminally liable for the preparation of the criminal offense or the attempted offense, which was voluntarily renounced by the principal.

An organizer, abettor or aider (accessory) shall not be criminally liable in event of their voluntary renunciation, where they averted the offense or timely reported the preparation or commission of the offense to the appropriate public authorities. The accessory's failure to supply the means and tools or remove obstacles for the offense shall also be regarded as his voluntary renunciation.

In event of a voluntary renunciation of any accomplice, the principal shall be criminally liable for the preparation of the criminal offense or for the attempted offense depending on the stage at which his act was precluded”.

**7. Are there any other practical considerations or factors that must be present when the defendant in a criminal proceeding is a business entity rather than a natural person?**

No other practical consideration can be discussed at this point because, as explained above, only physical (natural) persons can be subject to criminal liability in Ukraine. It is difficult to predict whether criminal liability of legal entities will be established and if so, how soon. It is widely believed by Ukrainian scholars that because a legal entity does not have a state of mind, the subjective element of crimes – guilt – cannot be attributed to a legal entity.

**III. Status of International Law/International Humanitarian Law in your Country's Legal Framework**

**8. Which international crimes have been incorporated into your domestic criminal law? Please include any crimes enumerated in the Rome Statute of the International Criminal Court such as genocide, war crimes, crimes against humanity, and other relevant instruments.**

As of 2006, Ukraine is Party to most of the major international treaties that set out international crimes. The list of the treaties includes:

- Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity
- Convention on the Prevention and Punishment of the Crime of Genocide
- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the field
- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
- Geneva Convention relative to the Treatment of Prisoners of War
- Geneva Convention relative to the Protection of Civilian Persons in Time of War

- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)
- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims on Non-International Armed Conflicts (Protocol II)
- International Convention Against the Taking of Hostages
- International Convention for the Suppression of Terrorist Bombing
- International Convention for the Suppression of the Financing of Terrorism
- International Convention for the Suppression of Unlawful Seizure of Aircraft
- International Convention on the Prevention and Punishment of Crimes Against International Protected Persons
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
- Protocol No. 1 to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
- Protocol No. 2 to the European Convention for the Prevention of Torture and inhuman or Degrading Treatment of Punishment
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

As of today, Ukraine has signed but **not ratified the Rome Statute of the International Criminal Court**. In July, 2001, the Constitutional Court of Ukraine determined that the Rome Statute is inconsistent with the Constitution of Ukraine. In particular, the Constitutional Court concluded that Article 1 of the Statute that states that an International Criminal Court “shall be complementary to national criminal jurisdictions” is inconsistent with the Constitution of Ukraine that exclusively sets out judicial system of Ukraine.<sup>3</sup> Therefore Ukraine can join the ICC only after amending the Constitution of Ukraine.

Despite the fact that Ukraine has not ratified the Rome Statute, the new Criminal Code of Ukraine incorporated many, but not all of the Statute’s provisions.

Below is an analysis of the incorporation of international crimes into the Ukrainian Criminal Code as they are listed in the Rome Statute.

### **Genocide**

There is a crime of genocide in Ukraine.<sup>4</sup> Its definition in the criminal code of Ukraine fully reflects the relevant provision of the Rome Statute.

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<sup>3</sup> Please see Opinion of the Constitutional Court on the conformity of the Rome Statute with the Constitution of Ukraine, Case N 1-35/2001, 11 July 2001.

<sup>4</sup> **Article 442. Genocide**

1. Genocide, that is a willfully committed act for the purpose of total or partial destruction of any national, ethnic, racial, or religious group by extermination of members of any such group or inflicting grave bodily injuries on them, creation of life conditions calculated for total or partial physical destruction of the group, decrease or prevention of childbearing in the group, or forceful transferring of children from one group to another, - shall be punishable by imprisonment for a term of ten to fifteen years, or life imprisonment.

## **Crimes against humanity**

(a) **Murder;**

Criminal Code of Ukraine provides liability for murder

(b) **Extermination;**

There is no separate crime of extermination in Ukraine. Extermination is included into the means of committing of genocide only.

(c) **Enslavement;**

The closest to the crime of enslavement in Ukraine is trafficking in human beings and other illegal transfer deals in respect of a human being.<sup>5</sup>

(d) **Deportation or forcible transfer of population;**

There is no separate crime of forcible transfer of population in Ukraine. The closest to the deportation crime is violation of security of residence.<sup>6</sup>

Deportation can probably constitute a crime of abuse of authority or office or excess of authority or official powers.

(e) **Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;**

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2. Public calls to genocide, and also making any materials with calls to genocide for the purpose of distribution, or distribution of such materials, -

shall be punishable by arrest for a term up to six months, or imprisonment for a term up to five years.

<sup>5</sup> **Article 149 Trafficking in human beings and other illegal transfer deals in respect of a human being**

1. Sale, other transfer for payment or any other illegal deals with regard to a person, involving legal or illegal movement of that person, with or without his/her consent, across the border of Ukraine for further sale or other transfer to any person (or persons) for the purpose of sexual exploitation, use in porno-business, engagement in criminal activities, peonage, adoption for commercial purposes, use in armed conflicts, labor exploitation, -

shall be punishable by imprisonment for a term of three to eight years.

2. The same actions committed in respect of a minor, or several persons, or repeated, or committed by a group of persons upon their prior conspiracy, or through abuse of office, or by a person on whom the victim was financially or otherwise dependent, -

shall be punishable by imprisonment for a term of five to twelve years, with or without the forfeiture of property.

3. Any such actions as provided for by paragraphs 1 and 2 of this Article, where committed by an organized group, or involving illegal taking of children abroad or failure to bring them back to Ukraine, or for the purpose of removal of the victim's organs or tissues for transplantation or forcible donor purposes, or where these actions caused any grave consequences, -

shall be punishable by imprisonment for a term of eight to fifteen years with the forfeiture of property.

<sup>6</sup> **Article 162. Violation of security of residence**

1. Unlawful entry into residence or any other property of a person, or unlawful examination or search thereof, and also unlawful eviction or any other actions that violate the security of a citizen's residence, - shall be punishable by a fine of 50 to 100 tax-free minimum incomes, or correctional labor for a term up to two years, or restraint of liberty for a term up to three years.

2. The same actions committed by an official, or accompanied with violence or threats of violence, - shall be punishable by imprisonment for a term of two to five years.

Certain crimes in Ukraine reflect the idea of or prohibition of the unlawful imprisonment or other severe deprivation of physical liberty. They are: knowingly unlawful apprehension, taking into custody or arrest, illegal confinement or abduction of a person and illegal placement of a person in a mental institution.<sup>7</sup>

**(f) Torture;**

There is a crime of torture in Ukraine.<sup>8</sup> It is defined as a willful causing of severe physical pain or physical or mental suffering by way of battery, martyring or other violent actions for the purpose of inducing the victim or any other person to commit involuntary actions. This definition is narrower than the one suggested by the Rome Statute, because the definition in the Criminal Code of Ukraine requires torture to be done in a manner of violent act and for the purpose of forcing a victim to commit involuntary actions.

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<sup>7</sup> **Article 371. Knowingly unlawful apprehension, taking into custody or arrest**

1. Knowingly unlawful apprehension or unlawful taking into custody, - shall be punishable by deprivation of the right to occupy certain positions or engage in certain activities for a term up to five years, or to restraint of liberty for a term up to three years.

2. Knowingly unlawful arrest or detention, - shall be punishable by restraint of liberty for a term of three to five years, or imprisonment for the same term.

3 Any such acts as provided for by paragraph 1 or 2 of this Article, where these caused any grave consequences, or were committed for mercenary motives or any other personal benefit, - shall be punishable by imprisonment of a term of five to ten years with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.

**Article 146. Illegal confinement or abduction of a person**

1. Illegal confinement or abduction of a person, - shall be punishable by restraint of liberty for a term up to three years, or imprisonment for the same term.

2. The same acts committed in regard of a minor, or for mercenary purposes, or in regard of two or more persons, or by a group of persons upon their prior conspiracy, or by a method dangerous to the victim's life or health, or causing bodily suffering to him or her, or with the use of weapons, or within a lasting period of time, - shall be punishable by restraint of liberty for a term up to five years, or imprisonment for the same term.

3. Any such acts as provided for by paragraph 1 or 2 of this Article, where committed by an organized group, or where they caused any grave consequences, - shall be punishable by imprisonment for a term of five to ten years

**Article 151. Illegal placement of a person in a mental institution**

1. Placement of a person, known to be mentally sane, in a mental institution, - shall be punishable by arrest for a term of three to six months, or restraint of liberty for a term up to two years, or imprisonment for the same term, with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.

2. The same act that caused any grave consequences, - shall be punishable by imprisonment for a term of two to five years with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.

<sup>8</sup> **Article 127. Torture**

1. Torture, that is an willful causing of severe physical pain or physical or mental suffering by way of battery, martyring or other violent actions for the purpose of inducing the victim or any other person to commit involuntary actions, - shall be punishable by imprisonment for a term of three to five years.

2. The same actions repeated or committed by a group of persons upon prior conspiracy, - shall be punishable by imprisonment for a term of five to ten years

**(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;**

The Ukrainian Criminal Code provides criminal liability for crimes of rape, violent unnatural gratification of sexual desire, compulsion to sexual intercourse, trafficking in human beings and compelling prostitution.<sup>9</sup>

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<sup>9</sup> **Article 152. Rape**

1. Rape, that is sexual intercourse combined with violence, threats of violence, or committed by taking advantage of the victim's helpless condition, - shall be punishable by imprisonment for a term of three to five years.
2. Rape, where it was repeated, or committed by a person who previously committed any of the offenses provided for by Articles 153 to 155 of this Code, - shall be punishable by imprisonment for a term of five to ten years.
3. Rape committed by a group of persons, or rape of a minor, - shall be punishable by imprisonment for a term of seven to twelve years.
4. Rape which caused any grave consequences, and also rape of a young child, - shall be punishable by imprisonment for a term of eight to fifteen years.

**Article 153. Violent unnatural gratification of sexual desire**

1. Violent unnatural gratification of sexual desire combined with physical violence, or threats of violence, or committed by taking advantage of the victim's helpless condition, - shall be punishable by imprisonment for a term up to five years.
2. The same act, if repeated, or committed by a group of persons, or by a person who previously committed any of the offenses provided for by Articles 152 or 154 of this Code, and also committed in regard of a minor, - shall be punishable by imprisonment for a term of three to seven years.
3. The same act committed in regard of a young child, where it caused especially grave consequences, - shall be punishable by imprisonment for a term of eight to twelve years.

**Article 154. Compulsion to sexual intercourse**

1. Compulsion of a female or male to natural or unnatural sexual intercourse by a person on whom such female or male is financially or officially dependent, - shall be punishable by a fine up to 50 tax-free minimum incomes, or arrest for a term up to six months.
2. The same actions accompanied with threats to destroy, damage or seize property of the victim or his/her close relatives, or to disclose information defaming the victim or his/her close relatives, - shall be punishable by arrest for a term up to six months, or restraint of liberty for a term up to three years.

**Article 149. Trafficking in human beings and other illegal transfer deals in respect of a human being**

1. Sale, other transfer for payment or any other illegal deals with regard to a person, involving legal or illegal movement of that person, with or without his/her consent, across the border of Ukraine for further sale or other transfer to any person (or persons) for the purpose of sexual exploitation, use in pornobusiness, engagement in criminal activities, peonage, adoption for commercial purposes, use in armed conflicts, labor exploitation, - shall be punishable by imprisonment for a term of three to eight years.
2. The same actions committed in respect of a minor, or several persons, or repeated, or committed by a group of persons upon their prior conspiracy, or through abuse of office, or by a person on whom the victim was financially or otherwise dependent, - shall be punishable by imprisonment for a term of five to twelve years, with or without the forfeiture of property.
3. Any such actions as provided for by paragraphs 1 and 2 of this Article, where committed by an organized group, or involving illegal taking of children abroad or failure to bring them back to Ukraine, or for the purpose of removal of the victim's organs or tissues for transplantation or forcible donor purposes, or where these actions caused any grave consequences, - shall be punishable by imprisonment for a term of eight to fifteen years with the forfeiture of property

**Article 303. Prostitution or compelling to and engaging in prostitution**

1. Systematic prostitution, that is gainful provision of sexual services, - shall be punishable by a fine of 50 to 500 tax-free minimum incomes, or community service for a term up to 120 hours.

Forced pregnancy and enforced sterilization are not recognized as separate crimes in Ukraine. Decrease or prevention of childbearing in a group, or forceful transferring of children from one group to another can be a means of perpetrating genocide.

**(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;**

The Ukrainian Criminal Code provides criminal liability for violation of citizens' equality based on race, color of skin, political, religious and other convictions, sex, ethnic and social origin, property status, place of residence, and linguistic or other characteristics.<sup>10</sup>

**(i) Enforced disappearance of persons;**

There is no separate crime of enforced disappearance of person in Ukraine as it is defined by the Rome Statute. The elements of the crime of enforced disappearance can be covered by such crimes as knowingly unlawful apprehension, taking into custody or arrest, illegal confinement or abduction of a person and illegal placement of a person in a mental institution. These crimes however do not require such element as “authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give

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2. Compelling to or engaging in prostitution, that is to provide sexual services for a fee by use of violence or threats of violence or destruction or endamage of property, or by blackmail or deceit, - shall be punishable by a fine of 500 to 1000 tax-free minimum incomes, or arrest for a term up to six months, or imprisonment for a term of one to three years.

3. Any such acts as provided for by paragraph 1 or 2 of this Article, if committed in regard of a minor, or by an organized group, - shall be punishable by imprisonment for a term of three to five years.

4. Trading in prostitution, that is creating, leading or participating in an organized group which supports activities related to the provision of paid sex services by males and females for gainful purposes, -

shall be punishable by imprisonment for a term of five to seven years.

<sup>10</sup> **Article 161. Violation of citizens' equality based on their race, nationality or religious preferences**

1. Willful actions inciting national, racial or religious enmity and hatred, humiliation of national honor and dignity, or the insult of citizens' feelings in respect to their religious convictions, and also any direct or indirect restriction of rights, or granting direct or indirect privileges to citizens based on race, color of skin, political, religious and other convictions, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics, -

shall be punishable by a fine up to 50 tax-free minimum incomes, or correctional labor for a term up to two years, or restraint of liberty for a term up to five years, with or without the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.

2. The same actions accompanied with violence, deception or threats, and also committed by an official, -

shall be punishable by correctional labor for a term up to two years, or imprisonment for a term up to five years.

3. Any such actions as provided for by paragraph 1 or 2 of this Article, if committed by an organized group of persons, or where they caused death of people or other grave consequences, - shall be punishable by imprisonment for a term of two to five years.

information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.”

**(j) The crime of apartheid;**

There is no separate crime of apartheid in Ukraine. Actions that constitute apartheid under the Rome Statute can be prosecuted under the crime of Violation of citizens' equality based on their race, nationality or religious preferences.<sup>11</sup>

**Crimes of war**

The Criminal Code of Ukraine has a different approach to the crimes of war as they are identified in the Statute of Rome. Some of the crimes of war in Ukraine are classified as military offences and some as offences against peace, security of mankind and international legal order. **Military offences** can only be committed by special criminal offenders - by military servants, and also registrants during their training (or checkup) or special sessions, in violation of the established procedure of military service

Military offences include some of the war crimes, for example:

- Marauding<sup>12</sup>
- Violence against the population in an operational zone<sup>13</sup>

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<sup>11</sup> **Article 161. Violation of citizens' equality based on their race, nationality or religious preferences**

1. Willful actions inciting national, racial or religious enmity and hatred, humiliation of national honor and dignity, or the insult of citizens' feelings in respect to their religious convictions, and also any direct or indirect restriction of rights, or granting direct or indirect privileges to citizens based on race, color of skin, political, religious and other convictions, sex, ethnic and social origin, property status, place of residence, linguistic or other characteristics, - shall be punishable by a fine up to 50 tax-free minimum incomes, or correctional labor for a term up to two years, or restraint of liberty for a term up to five years, with or without the deprivation of the right to occupy certain positions or engage in certain activities for a term up to three years.
2. The same actions accompanied with violence, deception or threats, and also committed by an official, - shall be punishable by correctional labor for a term up to two years, or imprisonment for a term up to five years.
3. Any such actions as provided for by paragraph 1 or 2 of this Article, if committed by an organized group of persons, or where they caused death of people or other grave consequences, - shall be punishable by imprisonment for a term of two to five years.

<sup>12</sup> **Article 432. Marauding**

Stealing things of the killed or wounded persons at a battlefield (marauding), - shall be punishable by imprisonment for a term of three to ten years.

**Article 433. Violence against population in an operational zone**

1. Violence, unlawful destruction or taking of property under the pretext of military necessity, which were committed in respect of population in an operational zone, - shall be punishable by imprisonment for a term of three to eight years.
2. Brigandism committed in respect of local population in an operational zone, - shall be punishable by imprisonment for a term of seven to ten years.

<sup>13</sup> **Article 433. Violence against population in an operational zone**

1. Violence, unlawful destruction or taking of property under the pretext of military necessity, which were committed in respect of population in an operational zone, - shall be punishable by imprisonment for a term of three to eight years.
2. Brigandism committed in respect of local population in an operational zone, -

- Ill treatment of prisoners of war<sup>14</sup>
- Unlawful use or misuse of the Red Cross and Red Crescent symbols<sup>15</sup>

Chapter XX of the Criminal Code of Ukraine separately identifies the criminal offences against peace, security of mankind and international legal order. Such military offences can be committed by a general criminal offender, not necessarily military personnel. These offences include:

- Propaganda of war<sup>16</sup>
- Planning, preparation and waging of an aggressive war<sup>17</sup>
- Violation of the rules of the warfare<sup>18</sup>
- Use of weapons of mass destruction<sup>19</sup>
- Development, production, purchasing, storage, distribution or transportation of weapons of mass destruction<sup>20</sup>

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shall be punishable by imprisonment for a term of seven to ten years.

<sup>14</sup> **Article 434. Ill treatment of prisoners of war**

Repeatedly ill treatment of prisoners of war, or any such treatment combined with exceptional cruelty or committed in respect of sick or wounded persons, and also negligent performance of duty in respect of sick or wounded persons by persons required to provide medical treatment and care to them, where it involved no elements of a more grave criminal offense, - shall be punishable by imprisonment for a term up to three years.

<sup>15</sup> **Article 435. Unlawful use or misuse of the Red Cross and Red Crescent symbols**

Carrying the Red Cross and Red Crescent symbols in an operational zone by persons not entitled to do so, and also misuse of flags or signs of the Red Cross and Red Crescent or the colors attributed to medical vehicles in state of martial law, - shall be punishable by imprisonment for a term up to two years.

<sup>16</sup> **Article 436. Propaganda of war**

Public calls to an aggressive war or an armed conflict, and also making of materials with calls to any such actions for distribution purposes or distribution of such materials, - shall be punishable by correctional labor for a term up to two years, or arrest for a term up to six months, or imprisonment for a term up to three years.

<sup>17</sup> **Article 437. Planning, preparation and waging of an aggressive war**

1. Planning, preparation or waging of an aggressive war or armed conflict, or conspiring for any such purposes, -

shall be punishable by imprisonment for a term of seven to twelve years

2. Conducting an aggressive war or aggressive military operations, -

shall be punishable by imprisonment for a term of ten to fifteen years.

<sup>18</sup> **Article 438. Violation of rules of the warfare**

1. Cruel treatment of prisoners of war or civilians, deportation of civilian population for forced labor, pillage of national treasures on occupied territories, use of methods of the warfare prohibited by international instruments, or any other violations of rules of the warfare recognized by international instruments consented to by binding by the Verkhovna Rada (Parliament) of Ukraine, and also giving an order to commit any such actions, -

shall be punishable by imprisonment for a term of eight to twelve years.

2. The same acts accompanied with a murder, -

shall be punishable by imprisonment for a term of ten to fifteen years, or life imprisonment.

<sup>19</sup> **Article 439. Use of weapons of mass destruction**

1. The use of weapons of mass destruction prohibited by international instruments consented to be binding by the Verkhovna Rada of Ukraine, -

shall be punishable by imprisonment for a term of eight to twelve years.

2. The same act that caused death of people or any other grave consequences, -

shall be punishable by imprisonment for a term of eight to fifteen years, or life imprisonment.

<sup>20</sup> **Article 440. Development, production, purchasing, storage, distribution or transportation of weapons of mass destruction**

- Ecocide<sup>21</sup>
- Genocide<sup>22</sup>
- Trespass against life of a foreign state representative<sup>23</sup>
- Criminal offenses against internationally protected persons and institutions<sup>24</sup>
- Illegal use of symbols of Red Cross and Red Crescent<sup>25</sup>
- Piracy<sup>26</sup>
- Mercenaries<sup>27</sup>

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Development, production, purchasing, storage, distribution or transportation of weapons of mass destruction prohibited by international instruments consented to be binding by the Verkhovna Rada of Ukraine, -

shall be punishable by imprisonment for a term of three to ten years.

<sup>21</sup> **Article 441. Ecocide**

Mass destruction of flora and fauna, poisoning of air or water resources, and also any other actions that may cause an environmental disaster, -

shall be punishable by imprisonment for a term of eight to fifteen years.

<sup>22</sup> **Article 442. Genocide**

1. Genocide, that is a willfully committed act for the purpose of total or partial destruction of any national, ethnic, racial, or religious group by extermination of members of any such group or inflicting grave bodily injuries on them, creation of life conditions calculated for total or partial physical destruction of the group, decrease or prevention of childbearing in the group, or forceful transferring of children from one group to another, -

shall be punishable by imprisonment for a term of ten to fifteen years, or life imprisonment.

2. Public calls to genocide, and also making any materials with calls to genocide for the purpose of distribution, or distribution of such materials, -

shall be punishable by arrest for a term up to six months, or imprisonment for a term up to five years.

<sup>23</sup> **Article 443. Trespass against life of a foreign state representative**

Trespass against life of a foreign state representative or any other person who enjoys international protection for the purpose of influencing the nature of their activity or activity of their states or organizations, or for the purpose of provoking a war or international complications, -

shall be punishable by imprisonment for a term of eight to fifteen years, or life imprisonment.

<sup>24</sup> **Article 444. Criminal offenses against internationally protected persons and institutions**

1. Attacks on official premises or private accommodations of internationally protected persons, and also kidnapping or confinement of such persons for the purpose of influencing the nature of their activity or the activity of their states or organizations, or for the purpose of provoking a war or international complications, -

shall be punishable by imprisonment for a term of three to eight years.

2. A threat to commit any such actions as provided for by paragraph 1 of this Article, -

shall be punishable by correctional labor for a term up to two years, or arrest for a term up to three months, or restraint of liberty for a term up to three years, or imprisonment for a term up to two years.

**Article 445. Illegal use of symbols of Red Cross and Red Crescent**

Illegal use of symbols of Red Cross and Red Crescent, other than in cases provided for by this Code, - shall be punishable by a fine up to 50 tax-free minimum incomes, or arrest for a term up to six months.

<sup>25</sup> **Article 445. Illegal use of symbols of Red Cross and Red Crescent**

Illegal use of symbols of Red Cross and Red Crescent, other than in cases provided for by this Code, - shall be punishable by a fine up to 50 tax-free minimum incomes, or arrest for a term up to six months.

<sup>26</sup> **Article 446. Piracy**

1. Piracy, that is the use of a vessel, whether armed or not, for capturing any other sea or river vessel, and violence, robbery or any other hostile actions against the crew or passengers of such vessel, for the purpose of pecuniary compensation or any other personal benefits, -

shall be punishable by imprisonment for a term of five to twelve years with the forfeiture of property.

2. The same acts, if repeated, or where they caused death of people or any other grave consequences, - shall be punishable by imprisonment for a term of eight to fifteen years with the forfeiture of property.

<sup>27</sup> **Article 447. Mercenaries**

1. Recruiting, financing, supplying and training of mercenaries for the purpose of using them in armed conflicts of other states or violent actions aimed at overthrowing of government or violation of territorial integrity, and also the use of mercenaries in war conflicts or operations, -

**9. Do your country's laws modify the provisions of the ICC Statute, such as concepts of aiding and abetting and conspiracy or liability of business entities rather than only natural persons?**

The ICC Statute's provisions concerning aiding and abetting and conspiracy or liability of business entities are not applied in Ukraine due to two reasons. First, Ukraine has not ratified the ICC Statute. The Constitutional Court of Ukraine concluded that this will be possible only after amendments are made to the Constitution of Ukraine. Second, according to the Criminal Code of Ukraine, only natural persons can be subjects of criminal complicity and/or conspiracy. Article 26 of the Criminal Code states that "criminal complicity is the willful co-participation of several criminal offenders in an intended criminal offense." According to Article 18 of the Criminal Code, only natural persons can be criminal offenders. Therefore only physical (natural) persons can be found guilty of complicity or conspiracy.

**10. Do your criminal courts have jurisdiction over those international crimes that have not been incorporated into your domestic law?**

According to the Article 9 of the Constitution of Ukraine, international treaties that are in force and that the Verkhovna Rada of Ukraine has declared binding are part of the national legislation of Ukraine. Article 17 of the law of Ukraine, "On International Treaties" states that if there is a contradiction between provisions of an international treaty and national legislation, provisions of an international treaty prevail.

Because international treaties are considered to be part of Ukrainian legislation, they can be directly invoked by courts. But direct application of international treaties is extremely difficult if there are no practical measures established in the country to ensure implementation. For example, international treaties that set out international crimes cannot be directly applied to establish liability in criminal cases because they do not provide sanctions for such crimes. Therefore, as a common practice during the ratification of a treaty, Parliament simultaneously makes amendments to the Criminal Code of Ukraine. Article 3 of the Criminal Code also states that "[t]he laws of Ukraine on criminal liability must be consistent with provisions of existing international treaties, consent for the binding effect of which has been granted by the Verkhovna Rada of Ukraine."

Moreover, Article 3 of the Criminal Code of Ukraine states: "The Criminal Code of Ukraine, based on the Constitution of Ukraine and generally recognized principles and rules of international law, shall be the Ukrainian legislation on criminal liability.... The criminality of any act and also its punishability and other criminal consequences shall be determined exclusively by this Code." This statement means that the Criminal Code is the only legal basis for imposing criminal liability for crimes in Ukraine. Therefore if there is international treaty, consent to binding of

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shall be punishable by imprisonment for a term of three to eight years.

2. Participation in armed conflicts of other states for the purpose of pecuniary compensation without authorization obtained from appropriate government authorities, -

shall be punishable by imprisonment for a term of five to ten years.

which was given by Parliament of Ukraine, and if such treaty establishes a crime, but which is not incorporated into national Criminal Code, there will be no basis for criminal liability for this crime in Ukraine.

As to international customs, they cannot be used in Ukraine as a basis for establishing criminal liability. According to the Article 92 of the Constitution of Ukraine, acts that are crimes can only be defined by the laws of Ukraine

As a practical matter it is worth mentioning that some of the war crimes that have not been formally incorporated into the domestic Criminal Code can be brought to trial under Article 438 of the Criminal Code of Ukraine “Violation of rules of warfare.” According to this Article, violation of the rules of warfare shall mean “cruel treatment of prisoners of war or civilians, deportation of civilian population for forced labor, pillage of national treasures on occupied territories, use of methods of the warfare prohibited by international instruments, *or any other violations of rules of warfare recognized by international instruments* consented to which was given by the Verkhovna Rada (Parliament) of Ukraine, and also giving an order to commit any such actions.”

Also according to Article 8 of the Criminal Code of Ukraine, universal jurisdiction can be established on the basis of international agreement and for grave violations against rights and freedoms of Ukrainian citizens or Ukraine, but only for the crimes provided in the national Criminal Code.

**11. May a business entity be prosecuted for international crimes in the courts of your country, whether under domestic law or with reference to international law? If yes, under what circumstances?**

As explained above, a business entity cannot be the subject of criminal liability in Ukraine. Only their officials, meaning persons that perform organizational, managerial, administrative and executive functions in the business entity, can be brought to justice for specific offences – offences in office.<sup>28</sup>

**IV. Alternative Mechanisms**

**12. Can you think of any bases in your country’s tort law (civil law) for suing individuals and /or business entities for violations of international criminal law, IHL, (whether or not incorporated into domestic law)?**

It is clear that legal entities in Ukraine can be subject of civil liability and liability of an administrative nature.

**Civil liability**

The civil liability of business entities is based on the Civil Code (16.01.2003 № 435-IV) and Commercial Code of Ukraine (16.01.2003 № 436-IV)

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<sup>28</sup> See attachment 1 for the list of these offences

Ukraine has a concept of payment of damages that is close to the concept of tort as it is used in many common law countries. The Civil Code of Ukraine provides that damages caused to the property of individuals or business entities, human health and life and moral damages can be compensated on the basis of the Civil Code of Ukraine.

Article 1166 of the Civil Code of Ukraine sets general provisions for compensating damages caused to individuals or legal entities. It states that property damages caused by wrongful decisions, actions or inactions to personal non-property rights of natural persons or legal entities, as well as damages caused to property of natural persons or legal entities shall be fully compensated by the parties at fault.

Article 1167 states that moral damages caused by wrongful decisions, actions or inactions to natural persons or legal entities shall be compensated by the parties at fault except in situations when moral damages are compensated regardless of guilt.

Moral damages are compensated regardless of the guilt of the authority, natural person or legal entity who caused the damages if:

- damages are caused by injury, other health damage or death to a natural person by sources of increased danger;
- damages are caused to a natural person as a reason of illegal conviction, illegal criminal liability, illegal capture, illegal arrest, or illegal imposed administrative punishment such as arrest and correctional labor;
- in other situations defined by the legislation.

Article 1172 establishes **vicarious liability** of legal entities or natural persons for the damages caused by their employees. Damages should be paid by legal entities or natural persons if they are caused by their employees who were acting in their employment or official duties. Entrepreneurial companies and cooperatives compensate damages caused by their partners (members) during entrepreneurial activity or other activity on behalf of a business entity.

Article 1187 establishes strict liability for damages caused by sources of increased danger. The source of increased danger is the activity connected with using, keeping and maintaining vehicles, mechanisms and accessories, using and keeping of chemicals, radioactive materials, explosive, flammable, etc. The person conducting activities that are a source of increased danger is responsible for damages caused unless he/she proves that damages were caused due to insuperable force or the wronged party's intent.

Article 1195 states that a natural person or legal entity that caused damages to a natural person by injury or other health damage should compensate an injured party the lost salary (income) as a consequence of lost or low professional or general employability, and also should compensate additional damages for better nutrition, resort therapy, medical supplies, bridgework, or outside attendance.

Article 28 of the Criminal Procedural Code of Ukraine (28.12.1960 № 1001-05) states that a person who has suffered damage as a result of a criminal offence may

file a civil lawsuit against a guilty party to recover suffered damages. This lawsuit is litigated together with a criminal case.

### **Administrative liability**

While the civil liability of natural persons and legal entities in Ukraine is based on the same legal principles and institutes, administrative liability of legal entities is very different from administrative liability of natural persons. This difference can probably be explained by the fact that administrative liability has much in common with criminal liability.

The main source of administrative liability in Ukraine is the Code on Administrative Infractions (07.12.1984 № 8073-X) (“The Code”). The Code establishes liability for a large number of social wrongs that are less socially dangerous than crimes. According to the Code, only natural persons can be administratively liable under the Code. But Article 2 of the Code states that “legislation about administrative liability in Ukraine includes this Code and other laws” (as opposed to the criminal liability that can be established by the Criminal Code only and not by any other law). This means that any other law can establish administrative liability for infractions not included in the Code, as well as liability of legal entities for any violations in the area of public legal relations.

The basis for such liability can be found in many laws of Ukraine, mainly those that regulate commercial activity of legal entities, for example in the area of taxation, commercial competition, state insurance, and financial operations. Because laws that regulate commercial activity of legal entities most often establish liability for their violation, there are debates taking place about whether this liability should be called administrative, commercial or financial, though such liability is administrative in nature.

The Commercial Code of Ukraine, Chapter “Administrative-Commercial sanctions” establishes that certain administrative-commercial sanctions can be applied in case of violation of established rules that regulate commercial activity. The types of the administrative-commercial sanctions include:

- confiscation of profits
- fines
- forced payment of necessary payments
- antidumping measures
- application of the individual regime of licensing
- annulment of licenses
- Suspension or termination of a license to conduct certain types of activity
- Restrictions on activities
- Dissolution of a legal entity

As mentioned above, most often legal entities can be subject to administrative liability for improperly conducting commercial activity. But there are other possible bases for administrative liability. For example, Article 24 of the Law “On the Fight against Terrorism” (20.03.2003 № 638-IV) states that an organization that is responsible for terrorist activity and is recognized by court as a terrorist organization shall be dissolved and its assets shall be confiscated.

There are many draft laws registered in Parliament that, if adopted, would provide for administrative liability of legal entities in Ukraine. One of the most important is a draft of a new Code of Administrative Infractions. This proposal would finally unify administrative infractions for which legal entities can be held liable. Another proposal in this area is the draft law “On the liability of legal entities for acts of corruption.”

## **V. Jurisdiction and related issues**

### **13. On what bases do the courts of your country assert personal jurisdiction over criminal and civil defendants?**

Article 124 of the Constitution of Ukraine says that “[t]he jurisdiction of the courts extends to all legal relations that arise in the State.” Ukrainian legislation establishes jurisdiction over legal relations and cases, as opposed to jurisdiction over a person or legal entity.

#### **Bases for jurisdiction over criminal offences**

##### **1. Commission of a crime in Ukraine by any person (citizen of Ukraine, citizen of another country and stateless person)**

Article 6 of the Criminal Code of Ukraine provides:

1. Any person who has committed an offense on the territory of Ukraine shall be criminally liable under this Code.
2. An offense shall be deemed to have been committed on the territory of Ukraine if it has been initiated, continued, completed or discontinued on the territory of Ukraine.
3. An offense shall be deemed to have been committed on the territory of Ukraine if the principal to such offense, or at least one of the accomplices, has acted on the territory of Ukraine.
4. Where a diplomatic agent of a foreign state or another citizen who, under the laws of Ukraine or international treaties the consent to the binding effect of which has been granted by the Verkhovna Rada of Ukraine is not criminally cognizable by a Ukrainian court, commits an offense on the territory of Ukraine, the issue of his criminal liability shall be settled diplomatically

##### **2. Commission of a crime outside of Ukraine by citizens of Ukraine or stateless persons permanently residing in Ukraine.**

Article 7 of the Criminal Code of Ukraine provides:

1. Citizens of Ukraine and stateless persons permanently residing in Ukraine, who have committed offenses outside Ukraine, shall be criminally liable under this Code, unless otherwise provided by the international treaties of Ukraine, the consent to the binding effect of which has been granted by the Verkhovna Rada of Ukraine.
2. Where the persons referred to in the first paragraph of this Article underwent criminal punishment for the committed criminal offenses outside Ukraine, they shall not be criminally liable for these criminal offenses in Ukraine.

### **3. Limited jurisdiction over the offences committed by foreign nationals or stateless persons outside Ukraine.**

Article 8 of the Criminal Code of Ukraine provides:

Foreign nationals or stateless persons not residing permanently in Ukraine, who have committed criminal offenses outside Ukraine, shall be criminally liable in Ukraine under this Code in such cases as provided for by international treaties, or if they have committed any of the special grave offenses against rights and freedoms of Ukrainian citizens or Ukraine as prescribed by this Code.

There is no known practice of using this basis of jurisdiction since the Criminal Code of Ukraine was enacted in 2001.

#### **Jurisdiction in civil cases**

The Civil Code of Ukraine has a separate chapter that defines the procedure for cases with the participation of foreigners, stateless persons, foreign legal entities, foreign states (their bodies and officials) and international organizations. Pursuant to the Code, such entities have procedural rights and duties equal to the rights and duties of natural persons and legal entities of Ukraine, except for those set by the Constitution and laws of Ukraine, as well as international agreements the binding nature of which has been ratified by the Verkhovna Rada of Ukraine. The Civil Code states that jurisdiction over cases with the participation of foreigners, stateless persons, foreign legal entities, foreign states (their bodies and officials) and international organizations should be regulated by the legislation of Ukraine. The Code itself does not provide the basis for such jurisdiction. But the recently adopted Law of Ukraine “On International Private Law” (23.06.2005 № 2709-IV) provides a list of the bases for establishing jurisdiction over “a case with foreign element.”<sup>29</sup> The bases for obtaining jurisdiction over the case that are relevant to this survey are:

- 1) If it was agreed by the parties that the case will be decided by a Ukrainian court;
- 2) if a defendant is a domiciliary of Ukraine, owns property in Ukraine that can be subject to remedy, or if a foreign legal entity has a subsidiary in Ukraine;
- 3) harm was caused in Ukraine;
- 4) in the case of payment of harm when plaintiff is a natural person – domiciliary of Ukraine or defendant is a legal entity has a place of business in Ukraine;
- 5) the cause of action occurred in Ukraine;
- 6) if the defendant is a citizen of Ukraine who was acting abroad and is immune from the foreign jurisdiction
- 7) other cases provided by Ukrainian legislation and international agreements.

Article 77 of the Law “On International Private Law” sets out the list of cases over which Ukrainian courts have exclusive jurisdiction. These are cases about real

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<sup>29</sup> Article 1 of the Law on International Private Law defines “foreign element” as a characteristic of legal relation that can be in any of these forms:

- at least one participant of legal relations is a foreign citizen, stateless person or foreign legal entity
- object of legal relation is on the territory of a foreign country
- legal fact that is relevant to occurring, change or termination of legal relations took place on the territory of foreign country

estate in Ukraine, some domestic relations cases, intellectual property cases that arise from Ukrainian legislation, bankruptcy cases when the entity was formed according to Ukrainian legislation, etc.

In Ukraine there are separate commercial courts that are not part of the courts of general jurisdiction. According to the Commercial and Procedural Code of Ukraine (06.11.1991 № 1798-XII) (“CPC”), the commercial court decides cases between enterprises; institutions; organizations; other legal entities (including foreign entities); citizens that conduct entrepreneurial activity. The CPC provides that foreign enterprises and organizations have procedural rights and liabilities equal to Ukrainian enterprises and organizations. The CPC establishes that commercial courts have jurisdiction over cases in which a foreign legal entity is a party if the plaintiff is a resident of Ukraine. (According to the Article 93 of the Civil Code of Ukraine, a legal entity is a resident of Ukraine if it is registered in Ukraine.) Commercial courts also have jurisdiction over cases with the participation of foreign enterprises and organizations if:

- 1) The subsidiary of the foreign enterprise or organization is a resident of Ukraine;
- 2) The foreign enterprise or organization has real property in Ukraine which is the subject of the dispute.

**14. When parent and subsidiary entities are involved in a multinational setting, how does a court assert personal jurisdiction over parents or subsidiaries located out of country? What are the standards for overcoming limitations on jurisdictions over business entities within a multinational corporation?**

The bases of obtaining jurisdiction are described in the answer to question 13 above.

**15. How may a court attribute the actions of a subsidiary to a parent business entity, i.e. “pierce the corporate veil”?**

The liability of the parent business entity will depend on the legal status of its subsidiary in Ukraine. If such subsidiary is registered in Ukraine as a separate legal entity according to the procedure of forming a legal entity, it will bear sole liability for its actions. If the subsidiary is registered only as an office or branch of a business entity, without the status of a separate legal entity, then the parent business entity will be liable for any actions of such branch or office.

Thus as a rule, the parent organization is not responsible for the activity of its subsidiary.

But current legislation provides a very limited number of bases for “piercing the corporate veil.” For example, Article 126 of the Commercial Code of Ukraine provides that if a subsidiary of a holding corporation becomes insolvent due to the fault of the holding company and announces bankruptcy, then the holding company will bear subsidiary liability.

**16. What types of actions (civil and criminal) might be asserted against a business entity with respect to activities taking place outside of your jurisdiction by a business entity over which your courts have jurisdiction?**

A business entity cannot be subject to criminal liability in Ukraine. As to civil liability, assuming that the court has jurisdiction over a case, and pursuant to a conflicts of law analysis, the applicable law is the law of Ukraine, any of the traditional civil causes of action could presumably be employed.

**17. If plaintiffs wanted to sue a business entity in your jurisdiction, what are some of the jurisdictional and procedural obstacles that they (and their lawyers) might face?**

Any person who thinks that his rights have been violated can commence an action. According to the Civil Procedural Code of Ukraine, Ombudsmen, prosecutors, state authorities, organs of self-government, natural persons and legal entities authorized by law can protect in court interests of other persons or public interests.

Article 20 of the Law of Ukraine “On Public Association”(16.06.1992 N 2461-XII) authorizes public associations, including non-governmental organizations, to represent and protect their own interests and rights and the interests of their members in court. In order to be allowed to represent the interests and rights of its members, an NGO has to show that its founding document (statute) includes protection of the interest of its members as one of the aims of the organization (as a general principle, a legal entity in Ukraine is only allowed to do what it is specifically authorized to do. The founding document can provide such authorization). An NGO also has to prove that the plaintiff is its member. But this fact is not difficult to show if the NGO has non-fixed membership, which is allowed by the legislation. Therefore in general an NGO can only be a representative of the interests of its members, unless it is direct party to the dispute.

The situation is different in environmental cases. According to the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice on Environmental Matters, to which Ukraine is a Party, “non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest” that is sufficient for the purpose of access to justice on environmental matters. Therefore environmental NGOs can have direct standing as plaintiffs and not only as representatives of their members.

International NGOs have the same rights as local NGOs if they are registered in Ukraine or they can act through their branches and offices, registered according to Ukrainian legislation.

As to criminal cases, any person can request the prosecutor’s office to open a criminal proceeding, including NGOs and natural persons.

The cost of litigation in Ukraine can be high for the average person, mainly due to attorney's fees. The cost of filing an action is not high (for example 1% from the relief asked in the action for payment of money but not more than 1700 hryvnya (about \$300); 17 hryvnya (\$1,5) for an action against state government. Corruption unfortunately can still be an obstacle to achieving justice.

Some of the tactics that a business entity can employ to prevent a civil suit for damages or other relief include, but are not limited to:

- Making a motion and then appealing a court's order on the motion. Such appeals can take a very long time to be decided. For example it might take 1.5 years for an appeal to be decided by the Supreme Court. Until appeal is decided the case is pending and no same action can be commenced in court;
- Appealing a letter of execution of judgment in the case;
- Constant change of address or providing the wrong address;
- Change of name of the business entity;
- Not keeping money in the bank account from which judgment is to be paid;
- Applying for bankruptcy.

**18. Do the civil courts of your country sometimes decline to exercise jurisdiction over matters where the events occurred in another country and/or the majority of witnesses and the bulk of other evidence is outside of your country, thereby making it more convenient for the parties to litigate in the courts of another jurisdiction (sometimes referred to as the doctrine of *forum non conveniens*)?**

In order to hear a case, a Ukrainian court has to have jurisdiction over the case. If such jurisdiction is established, a court cannot decline to exercise jurisdiction based solely on convenience.

A court can decline to open proceedings in a civil case only on one of the bases set forth in Article 122 of the Civil Procedural Code. The list of the reasons for declining to open a civil proceeding is:

- the case is not civil
- there is a court decision to close civil proceedings because of a settlement of the same case between the same parties
- the same case is being tried in the same or different court
- if the natural person party died or the legal entity ceases to exist and no legal succession for the entity is possible

Article 75 of the Law of Ukraine "On Private International Law" also states that courts shall decline jurisdiction if a court or another organ of proper jurisdiction in a foreign country is deciding the same case between the same parties. Therefore, a court can only decline to exercise jurisdiction if the same case has either been decided or is being decided by another court, including a foreign court. If the events occurred in another country and/or the majority of witnesses and the bulk of other evidence is outside of Ukraine, on the basis of bilateral agreements with another country the Ukrainian court will ask the court of another country to make a deposition of a

witness or otherwise present the evidence to the Ukrainian court. This procedure is done very often through the Ministry of Justice.

**19. Are there any checks and balances on prosecutorial discretion or decision making (e.g. when a prosecutor declines to prosecute a case, are there any measures in place to review his or her decision or an appeals mechanism?)**

According to Article 97 of Criminal Procedure Code of Ukraine, prosecutors, investigators or judges are obligated to accept any statement about a committed or planned crime. Such statement or request to open a criminal case should be reviewed in 3 days and a decision should be made whether a criminal case should be opened. An answer with sufficient explanation should be given to the party that requested a case to be opened. A decision made by investigator about declining to open a criminal case can be appealed by an interested party **to a prosecutor**<sup>30</sup> (Article 99-1 of the Criminal Procedure Code of Ukraine). If a decision to decline to open the proceeding is made by the prosecutor, such decision can be appealed to a supervising prosecutor.

A decision about declining to open a criminal case or a decision to close a criminal case can also be appealed by an interested party **in court** (Articles 99-1, 236-1, 236-6 of the Criminal Procedure Code of Ukraine).

One more effective check and balance method is the so-called “Request of a Member of Parliament.” It is a demand of a Member of Parliament to provide certain information. In practice a Member of Parliament can send such request to a Head of Prosecution office of a region demanding the information about the action of one of the prosecutors or demanding the information about the reasons for declining to prosecute.

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<sup>30</sup> It is worth mentioning that according to Article 121 of the Constitution of Ukraine, the Prosecution Office of Ukraine is entrusted with such functions as prosecution in court on behalf of the State; representation of the interests of the State in court; supervision of the observance of laws by bodies that conduct pre-trial investigation; and supervision of the observance of laws in the execution of judicial decisions in criminal cases and also with a more general function of oversight. The function of general oversight is probably the broadest and the most controversial. Fulfilling this function, the Prosecution Office carries on supervision of compliance with the laws that provide for human rights and freedoms of citizens by the organs of state executive power, local self-government and their officials. Therefore, the Prosecution Office in Ukraine is the highest organ of oversight.