

Corporate “Due Diligence” in the field of Human Rights: the new challenge for companies.

Corporate due diligence is featured as a new regulatory challenge for companies which tends to accelerate with the imminent enactment of a legally binding instrument coming from the United Nations to regulate, in International Human Rights Law, the activity of transnational corporations and other enterprises.

What is the “due diligence” in terms of Human Rights and companies?

The concept of company has evolved through time. Not anymore it is a mere synonym for money, profit, speculation or sustenance; a new paradigm related to the impact of its activities in the human factor has been created, since the latter is considered the corporation's main asset' for its continuity and permanence.

The aforementioned became particularly relevant due to the major efforts of the United Nations to regulate the impact of corporations' activities with regards to human rights. Thus, provoking a constant creation of international and domestic norms in several jurisdictions worldwide.

Therefore, the concept of “due diligence”, which is no stranger to corporate law, had to migrate to the field of human rights' protection, turning into an emergent challenge for worldwide corporations in the last decade. Consequently, implying the need for enterprises to incorporate and mainstream mechanisms of identification, evaluation, prevention, mitigation and in some cases, remediation of potential human rights' violations deriving from third parties' activities.

The regulatory development, both domestic and international, is accelerating, thereby demanding an imminent update of business management systems and, consequently, a transition from a traditional legal risk-containment approach to an updated prevention-based policy.

Due Diligence and International Law.

In the “United Nations Guiding Principles on Business and Human Rights”, released by the UN in 2011, a catalogue of obligations in the field of human rights was established for the first time. These were attributed to both the State and companies. This work is considered as a pioneer in the field on an international level²

Said document established that States acquire obligations related to respect of the human rights of people within their territory and, even if they cannot take responsibility for human rights'

¹ Ruggie, John, United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” framework, [online], Geneve, United Nations, 2011. Available in: https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf

² It is worth mentioning that since 2008, there were already similar records such as Resolution 63/263 of the General Assembly, in which the “Human Rights guidelines for Pharmaceutical Companies in relation to Access to medicines” were issued.



violations committed by private agents, they are indeed obligated and will be held accountable if they did not adopt sufficient measures to prevent, investigate and repair such violations.

What is the Due Diligence with respect to companies? and what does this have to do with Human Rights?

What was mentioned before is known as “due diligence”. A concept that refers to a co-responsibility scheme among the State and private agents (or enterprises) through a set of political, legislative and administrative measures that the State has the obligation to implement in order to guarantee that private agents respect human rights and the existing regulatory framework.

Due diligence implies that States, to prevent companies registered in their jurisdiction to commit abuses abroad, must establish measures preventing those companies to violate human rights, to ensure the companies' behavior.

Some examples of the measures to be adopted for these purposes are the creation of human rights guidelines for companies, codes of conduct required by institutions supporting foreign investment, as well as criminal penalties prosecuting responsible parties based on their nationality and regardless on the location in which the infringement or the harmful act was done.

This also implies that States need to evaluate if domestic laws on human rights' protection are being applied effectively in their territory, and the need for them to undertake sufficient efforts to make the due diligence in the field of human rights demandable to companies. In consequence, the State must provide the necessary elements for companies to address gender issues as well as specific problems for indigenous groups, boys, girls, teenagers, people with disabilities and any other vulnerable group, as well as to prevent actions that harm the environment, labor rights and any other action against human dignity.

Likewise, the due diligence implies that States have the obligation to exercise their supervision duties over companies providing services which may possibly impact the human rights of the population, inducing a shared responsibility scheme in which corporations will have to design and implement prevention and risk mitigation measures in their activities. Simultaneously, the State shall monitor compliance with these measures and impose penalties for those infringing them.

For example, an increasingly recurring measure is to establish, in service contracts signed by the State with companies, the obligation to respect human rights at any time and to implement penalties or terminate the contractual relationship.

It is worth pointing that a company may incur in corporate responsibility for human rights violations if it causes affectations under three premises: (i) due to its own activities, (ii) due to activities of associated entities (such as subsidiaries, affiliates or commercial partners), and (iii) due to activities of an entity with which the company has some commercial relation and is linked to its operations, products or services, or if it is caused by a part of the supply chain of the company.

The development of the concept of due diligence has been so important that the OECD, since 2011, promotes a new concept called “responsible business conduct”, which means that “every enterprise, regardless of its legal type, size, property structure or sector, prevents and addresses the negative consequences of its operations, while contributing to sustainable development in the countries of their operations”³.

³ Responsible Business Conduct in Latin America and the Caribbean. The project « Responsible Business Conduct » is implemented by the International Labor Organization (ILO), the Organization for Economic Co-operation and Development (OECD) and the United Nations High Commissioner for Human Rights (UNHCHR).



In consequence, the difference among the responsible business conduct, the corporate social responsibility and corporate responsibility for human rights violations consists in the following: the first relies on the due diligence based on risk, it is a process in which companies mitigate potentially negative current impacts and how these must be addressed jointly by the company and the States.

The second one is a creation of the corporate guild with the purpose of keeping closeness to the population, pursuing to build identity with society through empathy on problems that may emerge. Thus, it is a self-generated mechanism by the companies that does not imply penalties since it is not enforceable by the State. While corporate responsibility for human rights violations is a duty of such companies to not violate these rights in their activities, being enforceable by the State under law and having as purpose the consolidation of human rights in a legal system, as well as their respect on behalf of companies.

Finally, it is worth mentioning that in June 2014, the United Nation's Human Rights Council adopted during its twenty sixth session a resolution calling to the creation of an open intergovernmental work group to "create an international, legally-binding instrument to regulate human rights and the activities of transnational and other commercial enterprises". This resolution, proposed by Ecuador and South Africa, was adopted with 20 votes in favor, 13 abstentions and 14 votes against it. It is currently going through its sixth round of negotiations after two preliminary drafts, indicating that perhaps this year or in 2022, this treaty might finally be enacted.

Other countries regulations.

It is worth remarking that there are countries that already have legislation in this subject. For example, **France**, since February of 2017, approved the Law on Due Diligence for Companies⁴, imposing obligations to evaluate and prevent the negative impacts that might derive from their corporate activities.

This law was criticized at its time by several different groups, among them, the French civil society organizations, arguing that this act only applied to large French companies, or to those with a considerable number of workers, leaving aside smaller companies.

While it may be true that one of the obligations imposed to the companies by the law is the elaboration of a risk charter to prioritize them, the implementation of procedures to evaluate subsidiaries, subcontractors and providers, and actions to decrease or prevent serious affectations, these are a first step in French law and represent great advancement in the corporate and human rights field.

For its part, **Canada's** International Commerce minister, on another hand, announced since 2018 the creation of the Ombudsman Canadian de la Responsabilité Sociale des Entreprises (OCER).

OCER's main tasks are the following:

- i. Independently investigate presumed human rights violations related to Canadian enterprises' activities abroad.

It is financed and designed in collaboration with the European Union (EU). Available in: <https://mneguidelines.oecd.org/RBC-in-Latin-America-and-the-Caribbean-Fact-Sheet.pdf>

⁴ LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre; URL : <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000034290626/>



- ii. Solve any existing conflict between the affected and the accused Canadian enterprises.
- iii. Make every type of recommendation to reform laws and implement or modify deficient public policies for the protection of human rights and,
- iv. Report, implement corrective measures and guarantee their instauration.⁵

The OCER was created due to constant demands to the Canadian government to hold its companies operating abroad accountable for their implication in presumed human rights violations and severe harms to the environment. The creation of an advisory council, which aims to include representatives of companies and of the legal and academic sectors, was consequently announced.

Recently, **Germany** announced that it would enact the "Supply Chain Act", a law in the field of corporate responsibility for human rights violations. Its main purpose is to monitor supply chains⁶ to guarantee that these are free from practices against human rights. Once approved, this law will be applied to a little over 600 enterprises with at least 3,000 employees in 2023, and to approximately 2,900 enterprises with over 1,000 employees starting 2024. A regulatory effort that, once materialized, will turn into the most relevant in the subject on an international level.

German legislation shows a clear advance when compared to French legislation, especially considering that the legal framework pretends to cover not only big enterprises, but also progressively cover those with a smaller number of employees. Also, this initiative will increase the requirement level since it pretends to hold legally accountable those enterprises that commit diverse violations, from the right to an environment, to those affecting the right to health.

On another hand, in the **European Union**, Justice Commissioner Didier Reynders pointed in April 2020 that the European Commission would present a legislative agenda that had as purpose the creation of a common legal framework establishing due diligence obligations for companies regarding the protection of the environment and the respect to human rights through global supply chains involving States belonging to the European Union.

The mentioned agenda is the product of civil society organizations that have continuously requested the creation of legally binding laws for enterprises to be held accountable for human rights violations committed in past years, as well as for guaranteeing access to an integral reparation of damage for the victims.

Finally, it is worth mentioning that other than the efforts made by France and Germany to regulate corporate responsibility for human rights violations, countries like **Switzerland, Denmark, Holland and Italy** already have bills pending of approval in their parliaments, reaffirming how dynamic this subject is and how it is constantly evolving worldwide.

⁵ Méndez Lopez, Adalberto: "Ombudsman Corporativo: Reflexiones sobre Derechos Humanos y Empresas", Flores Editores; México, 2019. Pág. 34.

⁶ Understood as the set of activities, facilities and distribution means that are necessary to complete the selling process of a product.



In Mexico.

In our country, there is already a law initiative concerning corporate due diligence in the subject of human rights, which is pending of resolution, analysis and ruling in the Senate.⁷ If approved, it will be the first law of its type in Latin America.

Namely, the “Ley General de Responsabilidad Empresarial y Debida Diligencia Corporativa” was born as a result of General Recommendation Number 37 on the Respect and Observance of Human Rights in Corporate Activity issued by the National Commission of Human Rights on May 21, 2019.

This recommendation derives from the premise that it is necessary to create a new corporate paradigm that allows to explore a new model of productive activity rendering as a result benefits for the company, the society and the State. Thus, it recommends to the Federal Congress to regulate corporate responsibility in the field of human rights violations, by implementing effective protection measures, and with the participation and willingness of the companies for its compliance.

The mentioned law initiative addresses some fundamental topics, such as: (i) the creation of a corporate responsibility register with the purpose of monitoring compliance of human rights and corporate social responsibility obligations, (ii) incorporating arbitration and mediation as dispute resolutions means in this area, (iii) promoting risk prevention by implementing control and compliance mechanisms in the subject of human rights, (iv) transforming corporate social responsibility in an efficient control and damages mitigation mechanism, and (v) the establishment of a mixed penalty regime that incorporates fines and administrative warnings, while classifying penalties in severe and minor and, considering some as equal to crimes.

Points to take into account regarding Corporate Due Diligence in Human Rights matters.

- Several jurisdictions worldwide, including Mexico, are already working on law initiatives that incorporate due diligence in the field of human rights as part of the legal framework of companies, which necessarily implies the creation or update, as applicable, of control and compliance management systems on the subject.
- The extraterritoriality of companies' obligations in the human rights field constitutes an unavoidable regulatory tendency, deriving from the developing due diligence normativity, and to the international pursuit of making human rights violations committed by public or private agents abroad, as applicable, responsible in the jurisdiction of origin of the agents.
- The incorporation of obligations to private agents in the field of human rights protection represents a rethinking of traditional corporate law, which requires new professional capacities and innovative legal instruments, not only to contain risks, but effectively prevent them.

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⁷ Law Project on Human Rights Corporate Responsibility and Due Diligence filed by Mexican Senator Germán Martínez Cázares. Available at the following link: https://infosen.senado.gob.mx/sgsp/gaceta/64/3/2020-10-06-1/assets/documentos/Inic_Morena_Sen_German_Diligencia_Corporativa.pdf

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