

MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS VIOLATIONS

Proliferation of different instruments, is it good fishing in troubled waters?

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Summary: 1. Human rights violations and new international actors; 2. Due diligence as a 'solution' to human rights violations; 3. Incorporation of due diligence in the field of criminal law: old wine in new bottles?; 3.1. A possible subterfuge for corporations: integrating due diligence within criminal compliance; Final considerations.

Abstract: The so-called new era characterised by globalisation, neoliberalism or technological development has made transnational corporations not only the economic, social and political actors par excellence, but also the main perpetrators of human rights violations. This reality contrasts with the lack of an adequate response to the protection of human rights. Various social, economic, and essentially legal factors contribute to the predominance of a world of companies and for companies with freedoms, but without responsibilities, facilitating their impunity. The challenge of achieving true protection of human rights has therefore arisen, and several national and international legal instruments with different scopes have appeared along the way: compliance, due diligence, or organisational guilt. This article aims to analyse whether this plurality of legal instruments helps or, on the contrary, harms the process of attributing criminal liability to multinational companies for the violation of human rights carried out by their value chains.

Keywords: human rights; corporate criminal liability; compliance; due diligence; plutophilia.

Resumen: Vivimos en una era caracterizada por la globalización, el neoliberalismo o el desarrollo tecnológico que ha convertido a las empresas transnacionales no sólo en los actores económicos, sociales y políticos por excelencia, sino también en los principales responsables de la violación de los derechos humanos. Esta realidad contrasta con la falta de una respuesta adecuada a la protección de los derechos humanos. Diversos factores sociales, económicos y esencialmente jurídicos coadyuvan en el predominio de un mundo de empresas y para empresas con libertades, pero sin responsabilidades, facilitando prácticamente su impunidad. Ante esta realidad surge el desafío de lograr una verdadera protección de los derechos humanos, apareciendo en el camino diversos instrumentos jurídicos nacionales e internacionales con diferente alcance: *compliance*, diligencia debida o culpa organizacional. En este artículo se quiere analizar si esa pluralidad de instrumentos jurídicos ayuda o, por el contrario, perjudica en el proceso de atribución de responsabilidad penal a las empresas

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multinacionales por la vulneración de los derechos humanos llevados a cabo por sus cadenas de valor.

Palabras clave: derechos humanos; responsabilidad penal de las personas jurídicas; compliance; diligencia debida; plutofilia.

Resumo: A chamada nova era, caracterizada pela globalização, pelo neoliberalismo ou pelo desenvolvimento tecnológico, fez das empresas transnacionais não só os actores económicos, sociais e políticos por excelência, mas também os principais autores de violações dos direitos humanos. Esta realidade contrasta com a falta de uma resposta adequada à proteção dos direitos humanos. Diversos factores sociais, económicos e essencialmente jurídicos contribuem para o predomínio de um mundo de empresas e para empresas com liberdades, mas sem responsabilidades, facilitando a sua impunidade. Surge, assim, o desafio de alcançar uma verdadeira proteção dos direitos humanos, tendo surgido pelo caminho vários instrumentos jurídicos nacionais e internacionais com diferentes âmbitos: compliance, due diligence ou culpa organizacional. O presente artigo tem como objetivo analisar se esta pluralidade de instrumentos jurídicos ajuda ou, pelo contrário, prejudica o processo de atribuição de responsabilidade penal às empresas multinacionais pela violação dos direitos humanos levada a cabo pelas suas cadeias de valor.

Palavras-chave: direitos humanos; responsabilidade penal das pessoas colectivas; compliance; due diligence; plutofilia.

1. Human rights violations and new international actors

After the Second World War, the liberalisation of trade and investments, the important technological development or globalisation favoured the increase of transnational economic activities and, therefore, the existence of an important growth and expansion of companies without borders², of multinational corporations. Transnational corporations³ are the main actors in the world economy⁴, they have more power than many states, and their plutocratic zeal means that this power is increasing, essentially due to three factors.

The first can be summed up in the phrase uttered by Manuel Valls, French Prime Minister in 2014: *J'aime l'entreprise!*. States need companies; they are responsible for tax revenues, economic growth, job creation, social stability and innovation and technological development. Aware of their contributions, companies require the state to allow them to

² Referring to those that carry out their activities in several countries and beyond the borders of the State where they are based, in CHEMILLIER-GENDREAU, Monique. *L'entreprise est-elle soumise aux règles du droit international?*, in: A. Supiot (dir.), *L'entreprise dans un monde sans frontières. Perspectives économiques et juridiques* Ed. Dalloz, Paris, 2015, p. 87.

³ In this article, the terms transnational corporations and multinationals will be used interchangeably.

⁴ FORCADA BARONA, Ignacio. Derecho internacional, responsabilidad social corporativa y derechos humanos, in: E. Demetrio Crespo & A. Nieto Martín (dirs.), *Derecho penal económico y derechos humanos*, Ed. Tirant lo blanch, Valencia, 2018, p. 53 ff.

develop their activities as well as possible, to the extent that, as Chemillier-Gendreau states, the influence of the law is limited by the strategies of transnational companies⁵. Companies have the power to affect economic policy, state development and even to destabilise the government⁶, seriously endangering democracy⁷. The increase in the economic and political power of (multinational) corporations' contrasts with a weakening of the state⁸. The state has lost the ability to set standards in the face of transnational corporations that are the total organisers of the production of standards⁹, as well as the ability to discipline corporations, especially transnational corporations¹⁰. Second, because their operation is based on a strategy of outsourcing activities and fragmentation of the production process (post-fordist system); and third, because they choose where to locate their subsidiaries, their value chains¹¹. It is no coincidence that this outsourcing and fragmentation of production takes place in countries and/or regions with the lowest standards of labour, environmental and fiscal protection, etc. in order to increase profits and reduce costs, so-called *fiscal, social and environmental law shopping*¹². They take advantage of existing poverty, inequalities, low-skilled labour, child labour, etc. Moreover, it could be said that multinational companies even exert pressure on the states where their subsidiaries are based so that they are not required to comply with the

⁵ Focusing on the influence on the EU in sectors such as international transport, international subcontracting chains, the widespread use of self-employment, the use of the self-employed, and the use of the self-employed as a source of income, see MOREAU, Marie-Ange, *Mobilité des entreprises et mobilités des travailleurs dans l'Union européenne: réflexions sur l'espace juridique transnational*, in: A. Supiot (dir.), *L'entreprise dans un monde sans frontières. Perspectives économiques et juridiques*, op. cit., pp. 131-140.

⁶ SANZ MULAS, Nieves. Criminalidad transnacional y responsabilidad penal de las personas jurídicas. La necesaria armonización en el marco de la UE, in: Ana Isabel Pérez Cepeda (dir.), *Política criminal ante el reto de la delincuencia transnacional*, Ed. Tirant lo blanch, Valencia, 2016, p. 323.

⁷ HERNÁNDEZ PERIBÁÑEZ, María Eugenia. *Diligencia debida y derechos humanos: el acceso a mecanismos de reparación judicial*, Ed. Colex, A Coruña, 2022, pp. 21, 30 and 35.

⁸ BALLESTEROS SÁNCHEZ, Julio. "Delincuencia empresarial, derechos humanos y seguridad humana: reflexiones desde el Derecho penal económico y de la empresa", in: *Revista Criminalia*, Vol. 86, n. 1, 2019, p. 85; FERNÁNDEZ LIESA, Carlos, "La diligencia debida de las empresas y los Derechos Humanos: hacia una ley española", in: *Cuadernos de Derecho Transnacional*, 2022, Vol. 14, n. 2, p. 428; MARTÍN ORTEGA, Olga. *Empresas Multinacionales y Derechos Humanos en Derecho Internacional*, Ed. JMB Bosch, Barcelona, 2008. p. 38.

⁹ GUAMÁN HERNÁNDEZ, Adoración, *Diligencia debida en derechos humanos. Posibilidades y límites de un concepto en expansión*, Ed. Tirant lo blanch, Valencia, 2021, pp. 12-13; HERNÁNDEZ, Adoración & MORENO GONZÁLEZ, Gabriel. *Empresas transnacionales y Derechos Humanos. La necesidad de un Instrumento Vinculante*, Ed. Bomarzo, Albacete, 2018, p. 11.

¹⁰ ZÚÑIGA RODRÍGUEZ, Laura; DEMETRIO CRESPO, Eduardo & NIETO MARTÍN, Adán. Responsabilidad de la empresa, compliance penal y derechos humanos, in: *Libro en homenaje jurídico al año del bicentenario del Perú: 200 años de independencia*, Ed. Amachaq, Lima, 2021, pp. 1060-1061.

¹¹ GUAMÁN HERNÁNDEZ, Adoración & MORENO GONZÁLEZ, Gabriel. *Empresas transnacionales y Derechos Humanos*, Op. cit., p. 12; NIETO MARTÍN, Adán. *El cumplimiento normativo como estrategia político-criminal*, Ed. Hammurabi, Buenos Aires, 2022, p. 182.

¹² GUAMÁN HERNÁNDEZ, Adoración, *Diligencia debida en derechos humanos*, Op. cit., p. 13; SUPIOT, Alain. Introduction. L'entreprise face au Marché total, in: A. Supiot (dir.), *L'entreprise dans un monde sans frontières. Perspectives économiques et juridiques*, op. cit., p. 22.

regulations in force or so that their application is relaxed, thus reducing control and surveillance of the regulations that protect human rights¹³.

This dynamic of social dumping favours not only the economic growth of multinational companies and the expansion of their power, but also the fact that this process is carried out without responsibility, with almost total impunity¹⁴. Thus, there is greater competitiveness in the market for the companies, with substantial economic benefits that are achieved fundamentally at the expense of the rights of workers and of the inhabitants where the subsidiaries are located, especially the indigenous population. It is argued that the international protection of business when operating in a foreign state has become too generous, more generous even than the guarantees offered by human rights treaties, to the point of limiting the regulatory power of the state itself¹⁵. But why do we talk about companies acting with impunity? In my opinion, the causes can be grouped into four factors:

First, the existing regulation, i.e. the protection of human rights provided by international law. A law designed and created to protect citizens from the state and not so much to safeguard them from corporate actions. Traditionally, it was considered that only states violated human rights, but nowadays, we can see how human rights are predominantly affected by the actions of private subjects, of companies. It should be borne in mind that many international crimes and, in general, human rights violations involve multinational companies in one way or another¹⁶, both directly (in personnel selection processes through the violation of the right not to be discriminated against, in the relationship with the company's workers - violation of labour rights - or in the exercise of business activities, for example, affecting the right to a healthy environment), and indirectly, through complicity between the company and the subject that violates human rights. Undoubtedly, the fragmentation of production, or the presence of subsidiaries, of global value chains, has a direct impact on employment and working conditions¹⁷. Indeed, among the worst forms of human rights violations is modern slavery or forced labour. Likewise, the so-called EPZs,

¹³ HERNÁNDEZ PERIBÁÑEZ, María Eugenia. *Diligencia debida y derechos humanos*, Op. cit., p. 17.

¹⁴ ZÚÑIGA RODRÍGUEZ, Laura. "Compliance penal, diligencia debida, culpa organizacional: ¿juego de abalorios para la responsabilidad (penal) de las personas jurídicas?", in: *La Ley compliance penal*, 2022, No 1.

¹⁵ See. VIÑUALES, Jorge E. L'État face à la protection internationale de l'entreprise: Regards sur le droit international des investissements contemporain, in. A. Supiot (dir.), *L'entreprise dans un monde sans frontières. Perspectives économiques et juridiques*, op. cit., p. 103.

¹⁶ GUAMÁN HERNÁNDEZ, Adoración, *Diligencia debida en derechos humanos*, Op. cit., p. 11; TEUBNER, Gunther. L'auto-constitutionnalisation des entreprises transnationales? Sur les rapports entre les codes de conduite «privés» et «publics» des entreprises, in. A. Supiot (dir.), *L'entreprise dans un monde sans frontières. Perspectives économiques et juridiques*, Ed. Dalloz, Paris, 2015, p. 71.

¹⁷ GUAMÁN HERNÁNDEZ, Adoración. *Diligencia debida en derechos humanos*, Op. cit., pp. 26-48.

export processing zones (places where the production of multinational companies is concentrated) are characterised by the affectation of workers' rights: the establishment of long working hours, the imposition of overtime or labour discrimination. Not only is there a clear violation of labour rights, but there is also an impact on the environment, clearly visible in the overexploitation of resources, but also conditioning the way of life of indigenous populations or causing forced displacement of the population. Examples of this are the cases of water privatisation in various regions, which leaves farmers without an essential resource for the exercise of their profession, the cultivation of land for the production of plant crops, or which limits or totally deprives citizens of an essential resource for their consumption and hygiene.

These normative deficiencies can be seen not only in the international sphere, but also in criminal law. Criminal law has gradually adapted to social changes in an attempt to respond to new realities (the emergence of companies and legal persons as the main social and economic actors, the presence of collective legal assets alongside individual legal assets, the anticipation of criminal protection, criminal law no longer intervenes exclusively when there is an injury to the legal asset but can also intervene when there is a probability of injury. All of these actions lead to a clear broadening of the scope of action of criminal law. Thus, the maxim '*societas delinquere non potest*' is being left behind. However, there are still many pitfalls to be overcome, as will be noted later in this article.

Second, the actions of the states themselves, which are either unable or unwilling to act¹⁸, due to the aforementioned economic dependence, the attraction of foreign investment, the financing of political parties, corruption, etc.¹⁹

Thirdly, the organisation of legal entities, the framework and structure of multinational companies make the task of attributing liability difficult.

And fourth, the prevailing value system, the priority given in today's society to economic interests, which are imposed over human rights, i.e. the pursuit of economic benefits prevails over respect for human rights. This violation of norms and human rights can be explained by a reformulation of the theory of anomie: the theory of institutional

¹⁸ DEVA, Surya. "Acting extraterritorially to tame multinational corporations for human rights violations: Who should "bell the cat"?", in: *Melbourne Journal of International Law*, 2004, vol. 5, p. 54; RUGGIE, John. *¿Solamente Negocio? Multinacionales y derechos humanos*, Ed. Icaria, Barcelona, 2014.

¹⁹ TERRADILLOS BASOCO, Juan M^a, *Aporofobia y plutofilia. La deriva jánica de la política criminal contemporánea*, Ed. JM Bosch, Madrid, 2020, pp. 31-36.

anomie proposed by Messner and Resenfeld²⁰, who argue that the ideal of the American dream and cultural values are not exclusively given by the cultural structure, but that the institutional configuration of society plays an essential role. Social and cultural values are transmitted through social institutions (family, neighbourhood, school, church, community, public authorities, etc.) and these can also be subject to pecuniary values. The idea of a conflict between pro-social values and capitalist values is thus emphasised. Thus, the cultural dominance of one economic approach to the detriment of others in society can contribute to economic crime.

The orientation towards a culture in favour of economic profit implies that economic institutions, the market imposes its rationality and social institutions, in principle, designed to safeguard citizens from the negative effects of the economy and the market mutate to serve economic success. This prevailing social hegemony of achieving the American dream does not underline the importance of doing so by using the legitimate means available, it does not find a counterpoint in ethical, cultural values of a pro-social nature; rather it idealises economic success, individualism at any cost. There is a clear social pressure to succeed at all costs. This goal takes precedence over the importance of social ties, the expectations generated in others, respect for human rights. Thus, today's society is characterised by being ultra-competitive from an economic perspective, but socially precarious²¹. Logically, this 'idea' can be seen not only in individuals, natural persons, but also in legal persons, especially in companies, but also in public institutions, which, for example, when guaranteeing human rights or providing public services, make them dependent on their profitability and therefore hinder or slow down, for example, the human rights of the population in rural areas in terms of health, education, etc.

Plutophilia, the attraction to wealth, fosters a system in which economic power is the predominant value in society. This fact encourages multinational corporations to have great influence over states and regulatory norms, creating a permissive environment for corporate malfeasance²². Moreover, in order to maintain this power, companies will try to maximise their economic profits even more, reducing costs without caring if human rights are violated

²⁰ MESSNER, Steven & ROSENFELD, Richard, *Crime and the American Dream*, Ed. Wadsworth Publishing Company, Belmont, 1997.

²¹ BALLESTEROS SÁNCHEZ, Julio. Delincuencia empresarial, derechos humanos y seguridad humana, Op. cit., p. 65.

²² DEMETRIO CRESPO, Eduardo. Presentación: Vulneración de Derechos Humanos por empresas multinacionales: ¿De un Derecho penal económico transnacional a un Derecho penal internacional económico?, in: E. Demetrio Crespo & A. Nieto Martín (dirs.), *Derecho penal económico y derechos humanos*, Ed. Tirant lo blanch, Valencia, 2018, p. 14.

in the process. This situation of subordination of human rights is perpetuated by the lack of accountability of both the subsidiaries and the parent company. Impunity of the subsidiaries because the states (usually located in the so-called global South²³) are more interested in attracting foreign investment and giving in in terms of regulation than in pursuing human rights violations that have occurred on their territory, in order to obtain short-term economic gains. But there is also impunity for the parent corporation based in a country other than the one where human rights violations are committed by its subsidiaries. The power of multinational corporations allows them to act in a framework of impunity, while access to justice and reparation for victims is hindered. There is thus a clear dichotomy: a criminal law of the (rich) friend, aimed at the self-defence of the business world, which has its own rules, and an aporophobic and exclusionary criminal law for the poor²⁴. The presence of this vicious circle (corporations, economic and political power and impunity) makes it necessary to prioritise respect for human rights and fight against impunity, and human rights due diligence can be an appropriate tool for corporation to identify, prevent, mitigate and account for the negative impacts that their activities (including those of their subsidiaries) can have on human rights.

2. Due diligence as a ‘solution’ to human rights violations

Global society and the *lex mercatoria* provide a breeding ground for human rights violations by multinational corporations, which, far from diminishing, continue and even increase, thanks to the impunity of transnational corporations and the defencelessness of the victims.²⁵ There are many examples of this situation: Ali Enterprises, Rana Plaza, Obedrecht, Volkswagen, Bophal, Auca Mahuida, Syngenta... These cases have highlighted the virtual impunity enjoyed by multinational companies and the problem of effective access to justice for the victims and to obtaining reparation for the damages suffered. Kofi Annan pointed out that neither security nor development can be achieved without respect for human

²³ The terms ‘Global North’ and ‘Global South’ refer to the division of the world along economic lines, with the richest economies generally located in the northern hemisphere and the poorest in the southern hemisphere, GOYES, David. (2020). *Southern Green Criminology: A science to end ecological discrimination*, Ed Emerald Publishing, 2019.

²⁴ FERRÉ OLIVÉ, Juan Carlos. “Reflexiones político-criminales sobre aporofobia y plutofilia en Derecho penal”, in: *Sistema Penal Crítico*, 2021, No 2, p. 12; passim. TERRADILLOS BASOCO, Juan M^a. *Aporofobia y plutofilia. La deriva jánica de la política criminal contemporánea*, Op. cit.

²⁵ GUAMÁN HERNÁNDEZ, Adoración & MORENO GONZÁLEZ, Gabriel. *Empresas transnacionales y Derechos Humanos*, Op. cit., p. 22.

In relation to corporate victimology, see at length, NIETO MARTÍN, Adán. *El cumplimiento normativo como estrategia político-criminal*, Op. cit., pp. 187-203.

rights²⁶. Economic globalisation and international law must be humanised²⁷ and it is necessary to try to offer a valid response from the human rights due diligence mechanism²⁸.

At the international level, since the 1970s there have been various initiatives²⁹ in the form of recommendations (soft law) to urge companies to adopt measures to prevent, mitigate and remedy the negative impacts on human rights arising from their activities. The aim, therefore, is for companies to take an active role in the protection of human rights. In this regard, the UN Guiding Principles on Business and Human Rights (2011), known as the Ruggie Principles, which establish that States have an obligation to protect human rights and that companies should respect them through due diligence, thus ensuring that victims of human rights violations have access to effective remedies. Consequently, their objective is not to sanction, to punish companies, but to repair the damage, to compensate the victims.

Similarly, the EU has taken a number of initiatives to promote human rights due diligence within its borders and globally, with the clear objective of ensuring that European companies respect human rights and the environment in their operations and supply chains. Thus, within the EU framework, the need was raised for a horizontal standard that would make due diligence mandatory, as a way of linking business activity with sustainability. In this regard, it is worth highlighting the recent Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate due diligence with regard to sustainability (hereinafter the CS3D Directive), which establishes the duty of the company to prevent, mitigate, correct and remedy adverse effects on the environment and human rights arising from its operations, those of its subsidiaries, and the operations in its chain of activities, i.e. all its business partners. This is undoubtedly an important step, as it is a binding regulation, but it should be borne in mind that a directive and not a regulation is being adopted, so the final scope will depend on each Member State and how it transposes the directive.

²⁶ Secretary-General's report In Larger Freedom: towards development, security and human rights for all, A/59/2005.

²⁷ PÉREZ CEPEDA, Ana Isabel. "Hacia el fin de la impunidad de las empresas transnacionales por la violación de los Derechos Humanos", in: *Revista penal*, No 44, pp. 126 ff.

²⁸ DEMETRIO CRESPO, Eduardo. Presentación: Vulneración de Derechos Humanos por empresas multinacionales: ¿De un Derecho penal económico transnacional a un Derecho penal internacional económico?, Op. cit., p. 11.

²⁹ Such as the OECD Guidelines for Multinational Enterprises, the UN Global Compact, the World Bank and International Finance Corporation Principles, the ILO Tripartite Declaration on Multinational Enterprises and Social Policy, etc.

Also, in recent years, some states have regulated due diligence, e.g. France, Germany, etc.

This CS3D Directive obliges States to regulate mechanisms and companies - mainly large companies, but also smaller companies operating in high-risk sectors such as mining or textiles - to implement systems to identify, prevent and remedy any potential harm. Monitoring methodologies based on the risk, likelihood, severity and urgency of potential or actual impacts of their activities, whether they cause, contribute to, or are directly linked to, such potential or actual adverse impacts.

In summary, the CS3D Directive strengthens corporate responsibility with regard to respect for human rights and the environment with a strong focus on due diligence, transparency and sanctions for non-compliance. It provides for civil liability for damages and administrative liability for non-compliance.

3. Incorporation of due diligence in the field of criminal law: old wine in new bottles?

As mentioned above, the recent CS3D Directive considers due diligence exclusively from a civil and administrative point of view, but would it be possible to apply it from a criminal point of view?

In the first place, we should ask ourselves whether due diligence is really something new or novel or whether we are dealing old wine in new bottles; that is, whether we are dealing with a variety of nomenclature (due diligence, compliance programmes, criminal compliance, objective duty of care, recklessness, organisational guilt, corporate complicity) which, far from offering a more individualised legal response, simply muddies the waters, thus facilitating impunity for companies. All the more so when all these instruments or tools are characterised by having poorly defined contours, i.e. by great flexibility: they are public, but also private, heteronomous and autonomous, the principle of legality and the principle of opportunity, etc³⁰.

The existing difficulty in differentiating between these instruments and their fields of action would require a detailed reflection, which unfortunately cannot be carried out in these pages, simply pointing out some of the possible implications.

³⁰ ZÚÑIGA RODRÍGUEZ, Laura; DEMETRIO CRESPO, Eduardo & NIETO MARTÍN, Adán. Responsabilidad de la empresa, compliance penal y derechos humanos, Op. cit., p. 1062.

The violation of human rights by multinational corporations, the main perpetrators of such violations, supports the need to exercise control over corporations. Could this social control be exercised by criminal law? Would criminal law be legitimised to act? It should be remembered that the intervention of criminal law is subject to limits. Limits that come from liberal criminal law and that legitimise its intervention. In principle, we could affirm that human rights are legal goods deserving, needing and capable of criminal protection and that criminal law, by virtue of the principle of minimum intervention, must intervene when the other branches of the legal system have failed and in the face of the most serious attacks on the legal goods involved (*ultima ratio*). Furthermore, as NIETO MARTÍN³¹ points out, the combination of self-regulation and criminal coercion would be positive. Criminal law is more effective if there are prior controls provided by other branches of the legal system or by self-regulation itself.

Criminal law, the criminal liability of legal persons, proves to be the best instrument to ensure that the leaders of a multinational corporation (parent company) have an interest in ensuring that their subsidiaries and business partners respect human rights, the environment, etc. The parent corporations, the centres of power, must be held responsible for the offences committed by the organisation.

At this point, it is useful to differentiate between the possible criminal response at the national and international level.

From an international perspective, there is no international criminal jurisdiction to prosecute human rights violations committed by companies. Traditionally, as has been indicated, international criminal protection of human rights has focused on violations committed by states either directly or due to the lack of adequate instruments to enforce human rights. Furthermore, criminal law has focused on human rights violations in armed conflict, but not on human rights violations in peacetime³², and it is necessary to provide for a peacetime international law that covers or makes provision for other gross human rights violations. Consequently, the most logical response has come up against an insurmountable stumbling block: its lack of normative provision. International corporate responsibility in defence of human rights is needed. Only by creating international criminal law will human rights dumping be prevented. It is clear that in a globalised world where multinational

³¹ NIETO MARTÍN, Adán. *El cumplimiento normativo como estrategia político-criminal*, Op. cit., p. 184.

³² DEMETRIO CRESPO, Eduardo. Presentación: Vulneración de Derechos Humanos por empresas multinacionales: ¿De un Derecho penal económico transnacional a un Derecho penal internacional económico?, Op. cit., p. 20.

companies operate in different countries, a global response is needed. A common, legitimate and effective criminal law is needed. Criminal law is necessary because this branch of the legal system is the *ultima ratio*, the only instrument with sufficient repressive force to achieve the universalisation of disapproval (of human rights violations) and the internationalisation of repression to prevent the current social, environmental, and human rights dumping that exists³³. It is therefore essential to expand the core international crimes to include this reality, or else the creation of an International Corporate Law.

Disregarding the international route can be dangerous or counterproductive because it implies leaving it to the national criminal law of each state to sanction its companies when their subsidiaries violate human rights in third countries, because the truth is that if states depend economically and politically on companies, they will be more concerned with promoting their economic interests and those of their corporations than with the harmful consequences produced and suffered by other countries and the people/workers of those other countries (but not of their own country).

With the international route closed, at least for the time being, would it be possible to apply due diligence in national criminal law? In this sense, more and more states are recognising the criminal liability of legal persons, overcoming the maxim '*societas delinquere non potest*' and extending the catalogue of offences. This trend is part of the process of expansion to which criminal law is subject. Its intervention is not limited to actions or omissions carried out by natural persons, but also by legal persons, not only when legal assets are effectively harmed, but also when they are simply endangered (there is a probability of harm), when the objective duty of care is infringed, when collective legal assets, etc. are involved. These aspects denote a criminal law oriented towards prevention (and even beyond prevention, towards precaution), in short, we are dealing with a proactive criminal law, in which not only the State intervenes, but this power is increasingly delegated, for example, to legal persons through the rules of compliance. One could say that we are witnessing a privatisation of criminal law. This aspect is clearly seen in the area of corporate criminal liability, insofar as there is room for negotiation or there are reward formulas³⁴.

³³ SANZ MULAS, Nieves. "Suicidio ecológico e impunidad", in: *Revista Electrónica de Ciencia Penal y Criminología*, No 24-15, 2022, p. 32.

³⁴ ZÚÑIGA RODRÍGUEZ, Laura. "Compliance penal, diligencia debida, culpa organizacional: ¿juego de abalorios para la responsabilidad (penal) de las personas jurídicas?", *Op. cit.*, p. 4.

So, would it be possible to establish due diligence as a mechanism for attributing criminal liability? In theory it is possible, but in practice, the very configuration of criminal law poses major obstacles.

An obvious obstacle lies in the extraterritoriality or delocalisation of the activity; whereas criminal law limits its application to the territory of its own State: the principle of territoriality regardless of the nationality of the perpetrator or the victim. Moreover, states themselves are reluctant to dispense with their power to punish, *ius puniendi*. Alongside this obstacle, there are others, such as, for example, the problems of imputation of criminal liability due to the corporate structure itself: the presence of subsidiaries, supply chain, outsourcing of services, suppliers, etc. They all have separate legal personality and are governed by the principle of limited liability. However, this pitfall, if the will exists, could be overcome by using the notion of economic unity³⁵.

There are also difficulties in applying the guarantor position of the parent company. In principle, the responsibility of the parent company could be argued on the basis of its duty to supervise the subsidiaries, its duty to prevent its subsidiaries from violating human rights. The parent company would have control over the operations of the subsidiaries and would assume a position of guarantor with regard to compliance with standards and respect for human rights by its subsidiaries. The parent company would be obliged to take appropriate measures to prevent its subsidiaries from committing human rights abuses or violations. But how far can the duty of vigilance and supervision extend, and where does the parent company's duty of vigilance end and thus cease to be responsible for violations committed by subsidiaries?³⁶ These are open questions and even more difficult to answer in the case of business partners.

Similarly, the problems of legal certainty cannot be avoided. This is an essential requirement in criminal law and difficult to achieve in this area. One need only think of the following basic questions: how far do the parent company's duties of vigilance extend or what do human rights, the environment, and good governance consist of.

³⁵ See MUÑOZ DE MORALES, Marta. "Vías para la responsabilidad de las multinacionales por violaciones graves de Derechos humanos", in: *Política Criminal*, Vol. 15 No 30, 2020, pp. 954-955.

³⁶ MUÑOZ DE MORALES, Marta. "Vías para la responsabilidad de las multinacionales por violaciones graves de Derechos humanos", Op. cit., p. 955; ZÚÑIGA RODRÍGUEZ, Laura; DEMETRIO CRESPO, Eduardo & NIETO MARTÍN, Adán. Responsabilidad de la empresa, compliance penal y derechos humanos, Op. cit., p. 1077.

And finally, we can mention the difficulties inherent in international cooperation, which is essential for gathering information and evidence from the countries where the events are taking place (where the subsidiaries are located) and which, on many occasions, is often faced with the absence of solid legal systems or the lack of will of these states, which are more interested in maintaining economic growth or attracting foreign investment³⁷.

3.1. A possible subterfuge for corporations: integrating due diligence within criminal compliance

Given that Spain's Criminal Code already provides for compliance programmes, it would not be difficult to integrate human rights and environmental due diligence into compliance rules. But would this be an appropriate solution, and would it achieve respect for human rights? If one chooses to integrate human rights due diligence into compliance, it will imply admitting the possibility for corporations to benefit from the mechanisms of mitigation and exclusion of criminal liability provided for in our criminal code. Thus, they exonerate the company from criminal liability, both for crimes committed in its name and for crimes committed in the exercise of its corporate activities under certain requirements that the organisation and management models must meet, and which are contemplated in art. 31 bis.5 of the Spanish penal code³⁸. This possible pathway or 'solution' would inevitably lead to a change of perspective that would, in my opinion, betray the objective pursued. Companies would not aim to prevent human rights violations, but to prevent liability arising from their actions. Corporations would not aim to prevent human rights abuses, but to prevent liability arising from their actions. Favouring the design of compliance programmes with the aim of formally complying (and avoiding the attribution of criminal liability), the so-called in Spanish '*cumplo*' (comply) and '*miento*' (lie), making a play on words with

³⁷ HERNÁNDEZ PERIBÁÑEZ, María Eugenia. *Diligencia debida y derechos humanos*, Op. cit, p. 37.

³⁸ 1. *Identify the activities within the scope of which the offences to be prevented may be committed.*

2. *They shall establish protocols or procedures that specify the process for the formation of the legal person's will, the adoption of decisions and their execution in relation to them.*

3. *They shall have appropriate financial resource management models to prevent the commission of crimes that must be prevented.*

4. *They shall impose the obligation to report possible risks and breaches to the body responsible for overseeing the operation and compliance of the prevention model.*

5. *Establish a disciplinary system that adequately sanctions non-compliance with the measures established in the model.*

6. *Periodically verify the model and its possible modification when relevant breaches of its provisions are revealed, or when changes occur in the organisation, control structure or activity carried out that make them necessary.*

*'cumplimiento'*³⁹. For TERRADILLOS BASOCO⁴⁰, compliance mechanisms are yet another manifestation of plutophilia, of the criminal law of the friend, mechanisms responsible for the impunity of transnational corporations. Furthermore, in Spain we find another important obstacle: the criminal liability of legal persons is only possible in those cases in which it is expressly provided for, i.e. the Spanish criminal code contemplates a system of *'numerus clausus'* or closed catalogue of crimes and, surprisingly, crimes against workers' rights are not included. However, as noted above, the fragmentation of production in multinational corporations has a direct impact on working conditions. Indeed, so-called modern slavery and forced labour are the most frequent and worst human rights violations.

Final considerations

Companies, and especially transnational corporations, are the main economic, social, political, and also criminal actors. Companies commit crimes: intentional crimes, but also through recklessness, negligence, mismanagement, affecting criminal law assets and human rights. Today's society demands not only that crimes should not be committed, but also that risks should not be generated. In this sense, instruments such as the 2030 Agenda pose the challenge of how to achieve the safeguarding of human rights and sustainability in a global world in which States have diminishing power and in a world that is led and dominated by multinational corporations. This is seen as a task not only for the state, but also for business itself⁴¹. Hence the emergence of new instruments aimed at self-regulation in the field of criminal law. The state thus reserves the role of supervisor and transfers its responsibilities for monitoring and controlling risks to companies to private parties⁴².

Attributing criminal liability to corporations is a decisive step towards achieving respect for human rights and attempting to reverse the dominance of economic interests and profits over the rights of human beings. It is absolutely unacceptable that massive human rights abuses by companies continue to go unpunished. However, attributing criminal

³⁹ BALLESTEROS SÁNCHEZ, Julio. *Responsabilidad penal y eficacia de los programas de cumplimiento normativo en la pequeña y la gran empresa*. Ed. Tirant lo blanch, México, 2021, p. 416.

⁴⁰ TERRADILLOS BASOCO, Juan M^a. *Aporofobia y plutofilia. La deriva jánica de la política criminal contemporánea*, Op. cit., p. 71.

⁴¹ Or even to citizens, consumers who, if they have the necessary information, can choose products or services from companies that respect human rights throughout the production, supply, etc. chain. In this sense, work is being done on the transparency requirements included in the EU Directive 2022/2464 on corporate reporting on sustainability, which obliges large companies to publish reports on their activities with environmental and social impact.

⁴² TERRADILLOS BASOCO, Juan M^a. *Aporofobia y plutofilia. La deriva jánica de la política criminal contemporánea*, Op. cit., p. 75.

liability to multinational corporations for human rights violations carried out by their subsidiaries or business partners is not without its complications, and there is still a long way to go. Overcoming this criminal law challenge will require a thorough analysis of all possible mechanisms and, more importantly, of the consequences (intended and unintended) that would ensue. All of this with the aim of avoiding that, in this way, the search for a tool to attribute responsibility to multinational corporations for their failure to comply with the obligation of due diligence on human rights with respect to their subsidiaries becomes an advantage, a defence mechanism for companies that allows them to avoid criminal liability for the human rights violation. In short, that it becomes a defence tool of the powerful, of the large multinational corporations to avoid criminal liability, constituting yet another manifestation of plutophilia in criminal law and in society.

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