CONSEIL NATIONAL DES BARREAUX
LES AVOCATS

BUSINESS AND HUMAN RIGHTS
PRACTICAL GUIDE FOR LAWYERS

1st EDITION

CONSEIL NATIONAL DES BARREAUX

2017

www.cnb.avocat.fr

FOREWORD

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The responsibilities of businesses in the area of human rights have long been governed by "soft legal" rules, which are now slowly creeping into French substantive legislation (the 2017 law on the duty of vigilance is one such example).

This inexorable and rapid change highlights the importance of this field for future laws. The legal profession and the Conseil national des barreaux [French association representing lawyers] have participated actively in this move to place human rights at the forefront of business concerns, and it is an area that offers a new scope of activity for our colleagues; however, it also involves complex issues for both clients and lawyers alike.

This guide aims to be a practical tool to provide colleagues with the key basic concepts of "Business and human rights" regulations, and help them understand the changes while also allowing them to work with this new area of law. It also aims to point colleagues towards the most relevant resources and outline the key issues that lawyers will need to resolve to provide optimal support to their clients.

Lawyers will find helpful information in this guide to assist them both when acting as a business advisor as well as when defending victims of human right violations, Illuminating contributions from William Bourdon, Chairman of the SHERPA association, Xavier Hubert, Ethics & Compliance Director at ENGIE, Julie Vallat, Head of the "Ethics and human rights" unit at Total SA, and Françoise Mathe, the chair of the National Commission on human rights and Freedoms at the Conseil National des Barreaux, which are included in the appendix to this guide, provide the balance required to address this topic.

Putting into practice the concept of human rights is a core component of our profession and taking such rights into account as part of the business environment is beneficial to each and every one of us. Given that a world that truly respects fundamental human rights would be hard to achieve without the contribution of business. It is perhaps above all the responsibility of lawyers to weigh up the challenges and advise their clients, as they are the ones with the legal tools to guarantee fair justice and equitable economic and social progress.

The aim of the Conseil national des barreaux in creating this practical tool is that it should be an evolving and participatory instrument, able to adapt to any legal changes and help lawyers support their clients and facilitate their professional duties.

METHODOLOGY

This guide recaps the existing rules in terms of "*Business & human rights*". Far from being an exhaustive guide, its goal is to provide information to lawyers about this fast growing and constantly changing legal field. It is essential to provide our legal colleagues with the appropriate documentation to facilitate their work in this new professional field.

This pressing need explains the reason why we have produced this accessible guide in a digital version. It has been designed using a "participatory" approach to reflect the evolving and changing nature of this field and should not be considered as the enactment of a doctrine. It will be updated regularly to add any new legal elements and allow a dialogue with colleagues who will be able to report on their experiences in this field during their professional practice. Lawyers can send their remarks or suggestions directly to the CNB by writing to: international@cnb.avocat.fr.

All the sources used to prepare this guide are given and Internet links[1] can be accessed using the hypertext links to obtain more detailed information. To make it easier to read the hypertext links in the guide, just select the electronic version.

Finally, it should be noted that this guide follows the approach proposed by the United Nations and concentrates on the concept of corporate responsibility in terms of human rights and the right of victims to seek redress and remedy, two elements that form a core component of the work of a lawyer and represent two of the three pillars established by the UN Special Representative John Ruggie for business and human rights, in the United Nations guiding principles on business and human rights, namely: "Protect, Respect and Remedy".

1. For the very few lawyers not familiar with this system, just click on the links in the text and the bibliography.

CONTENTS

I. REASONS FOR PRODUCING A GUIDE ON "BUSINESS AND HUMAN RIGHTS"

Everyone recognises the importance of respecting human rights in the business world but are somewhat perplexed when it comes to describing a positive interaction between these two somewhat heterogeneous elements.

The Rana Plaza and Erika disasters[2] confirmed the belief that, just like oil and vinegar, business and human rights do not mix.

Although this implied and accepted antagonism is a recent and inaccurate phenomenon.

International trade has always linked people together. Trade relations diffuse cultures and promote exchanges and respect. They contribute to the fulfilment of the human experience. Business is a key driver for the expansion of human rights, by spreading good practices and improving the living conditions of human beings.

However, the excessive pursuit of profits and drive to lower costs for both businesses and consumers has undoubtedly tarnished the social and positive side of business and contributed to its negative perception in which neglect for human rights has become the watchword.

The "*Business and human rights*" concept is based on the principle of setting up a virtuous circle in which business recognises that, without humanity, it is worthless and in which humanity accepts that, without business, exchanges are undermined and its progress curbed.

The question is how to promote virtue in a society where such stakeholders no longer possess the powers previously afforded to them by the societal structure.

The States have lost interest in their role as a regulator due to their inability to deal with economic globalization. At the same time, the size and power of multinationals and their cross-border dimension is ever increasing, to such an extent that they sometimes even compete with certain States in their ability to act and negotiate. While multinationals maintain they are shackled by the need for low consumer prices and increasingly fierce competition. Finally, they highlight the prevailing problem of individualism to attempt to justify their inability to act.

A combination of all these elements means that it is essential we implement incentives or regulatory provisions to govern the rights and responsibilities of all those involved in the area of human rights, as the law is the tool best suited to establish a virtuous equilibrium.

Primarily, it has been through the intermediary of "*soft laws*" that a body of international rules has been created to govern the activities of multinationals in terms of respect for human rights.

2. On 24 April 2016, the Rana Plaza building in Dhaka, the capital of Bangladesh, collapsed killing 1,127 textile industry workers. On 12 December 1999, the Maltese oil tanker Erika chartered by the Total Group broke in two off the coast of Brittany causing an oil spill extending over 400 km of coastline. Read the judgement and communiqué of the Court of Cassation.

The first version of the *OECD Guidelines for Multinational Enterprises* was adopted in 1976 (last updated in 2011).

In 1977, it was the turn of the International Labour Organization (ILO) to publish a *Tripartite declaration of principles concerning multinational enterprises and social policy* (revised in 2017).

The United Nations went even further by proclaiming, in 2008, a first legal framework in the form of *Guiding principles on business and human rights* which were endorsed by the human rights Council of the United Nations in its resolution 17/4 of 16 June 2011. These guidelines, which should constitute the cornerstone of all reflections on the relationship between business and human rights, are, in the words of the person who drafted them, John Ruggie, the "*end of the beginning*" of a vast movement committed to ensuring that multinationals respect human dignity.

The aforementioned are supplemented by: standard ISO 26 000 established in 2010 by a working group of about 500 international experts; the Equator Principles[3], which offer a framework for the financial sector to identify, assess and manage the risks of environmental and social projects, as well as a multitude of charters and ethical codes voluntarily adopted by various public and private entities (international organisations, NGOs, business enterprises, etc.) and European national CSR plans, adopted following the guiding principles of the United Nations at the request of the European Commission (Read the communication of 25 October 2011).

All these texts converge to create economic and legal regulations that respect human rights and underpin the start of the regulatory process.

By passing law no. 2017-399 dated 27 March 2017 relating to the duty of care/vigilance of parent companies and subcontracting companies, France is playing a pioneering role by becoming the first State to integrate the duty of care/vigilance of businesses vis-à-vis human rights into its body of law by the means of a dedicated law.

Many States have started working in this area.

In addition to work on a state level, various stakeholders have undertaken a number of initiatives in this area. For instance, in May 2017, the council of FIFA (International Federation of Football Associations) adopted a new and important policy on human rights implementing Article 3 of the FIFA Statutes through which "*FIFA is committed to respecting all internationally recognised human rights and shall strive to promote the protection of these rights*", thereby demonstrating the diversity of the international players implicated in this momentous shift.

Involvement and mobilisation is observed across the board and on all levels: globally, via the United Nations, regionally, particularly in Europe, through the European Union and the OECD, nationally, in many States and, finally, within business and non-state operators.

All these texts are based on a common principle: businesses must prove their "compliance" by producing reports. Reporting is therefore an essential instrument.

In this respect, the law on the duty of vigilance requires that "*any company that employs at least five thousand employees within the company itself and in its direct*

3. And also IFC Performance Standards on Environmental and Social Sustainability (World Bank).

or indirect subsidiaries, whose head office is located in France; or employs at least ten thousand employees within the company itself and in its direct or indirect subsidiaries, whose head office is located in France or abroad, is to establish and implement a vigilance plan".

The two main virtues of this approach are:

- Increasing the awareness of the role that business must play as a stakeholder involved in respecting human rights and the responsibilities stemming from this role.
- Sharing information to improve their knowledge, via agents internal or external to the companies, of their operations and good practices for the protection of human rights both in France and abroad.

However, merely "*checking the box is not enough*", to comply with the reporting obligation and wash their hands of any responsibility. It is now imperative that businesses participate truly, actively and visibly in respecting human rights through their actions and activities.

Lawyers can and must play a responsible role in this worldwide trend that goes beyond the association between "*Business and human rights*", which at first sight seems contradictory.

II. REASONS FOR A GUIDE FOR LAWYERS

Lawyers play a fundamental role in assisting businesses to fulfil their new obligations and also to support them gain the necessary awareness of the tenuous link between business and respect for human rights, which exceeds the strict compliance of their obligations.

In their role as defendants, lawyers have long identified victims or groups of victims, and been able to qualify their injuries and establish a link between the wrong doings committed by the persons responsible from whom they have sought to obtain redress.

Lawsuits filed in recent years have highlighted the causal link between the activity of a principal company and its responsibility in the violation of human rights.

Lawyers have been a driving force in making businesses aware of their necessary responsibilities in terms of human rights.

However, although major trials in recent years might suggest that the issue of human rights only concerns larger sized companies or certain types of industry, this would be to underestimate the scope of such risks. The types of human rights violations committed by business enterprises are as varied as the business world itself, regardless of their size or their sector of activity.

All lawyers, irrespective of their sector of activity, must gain an understanding of this close link between business and human rights to fulfil their remit, to be able to alert their clients and best support them, to allow them to consider the potential risks, evaluate them and implement preventative measures for their prevention or mitigation.

Whether by the means of international conventions, domestic legislation or soft law, the tool of the law is now used to impose respect for human rights, across all areas.

Lawyers are the best placed to understand the consequences of this regulatory change. As lawyers, by their very nature, are firmly committed to respecting human rights, are close to businesses and possess an in-depth knowledge of the business world. And they must now use this expertise and experience to anticipate the implications of the business or industrial decisions of their clients in terms of human rights.

In fact, lawyers are perhaps one of the players best able to alert their corporate clients to the potential long-term implications of the immediate decisions they wish to implement, to help anticipate any risks, even if this implies renouncing or modifying their decisions. Most, if not all, companies say they want to respect human rights. And it is up to their advisers to help them.

The legal profession possesses some key assets to help businesses promote and facilitate respect for human rights:

- Lawyers work in all countries of the world and are keen to promote human rights.
- The legal profession is governed by a number of rules in terms of skills and ethics.
- They are trusted by the world of business and by clients (both companies and victims), who confide in their lawyers, protected by professional confidentiality rules.

This profession is therefore the best equipped to put respect for human rights into practice, and elevate it beyond a mere legal concept, converting it into an asset for economic success.

The profession can promote the positive impact of respecting human rights for businesses.

III. A FEW ESSENTIAL CONCEPTS

"*Business and human rights*" are now enshrined in a series of international legal rules aimed at promoting and protecting human rights and stipulating the obligations of States and businesses.

A. Human rights

human rights are universal and inalienable, interdependent and indivisible. They can be individual or collective.

However, understanding human rights is complex: as no fixed framework or exhaustive list exists.

Lawyers should remain vigilant and take into account existing international, regional and national rules in the countries where their clients, suppliers or subcontractors operate.

In many cases, the following are often the first targeted:

- right to equality, non discrimination, prohibition of racial hatred and harmful gender stereotypes and prejudices
- rights of minorities
- right to work
- right to a private life
- rights relating to health and living conditions, including
- right to water and food
- right to own property

However, the types of human rights abuses able to be committed by companies are as varied as the world of business itself and its business sectors. As confirmed by the United Nations guiding principles on business and human rights[4], "*business can have an impact on virtually the entire spectrum of internationally recognised human rights*".

Four international instruments form the basic framework of human rights: the United Nations Charter, the Universal Declaration of human rights, the International Covenant on Civil and Political Rights and its two optional protocols, and the International Covenant on Economic, Social and Cultural Rights. The latter three instruments are collectively referred to as the International Bill of human rights.

4. These principles were established by Professor John Ruggie, UN Special Representative for human rights and business. The principles were presented to the human rights Council and approved via resolution 17/4 of 16 June 2011.

They are complemented by international treaties on the protection of human rights and a number of other instruments and treaties in the same field[5], notably : the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Rights of Persons with Disabilities. There are also instruments from the International Labour Organization containing human rights obligations, especially related to employment rights and the customary principles of international human rights law.

The regional dimension of human rights is a fundamental aspect. In Europe, human rights obligations are almost entirely transposed and framed in the European Convention on human rights, the Charter of the European Union, and in national Constitutions and laws.

Finally, a national dimension is also added to the above.

In France, applying the relevant rules (national laws, European regulations and international conventions) is generally sufficient.

However, in areas considered to have weak governance (conflict-affected zones, "failed" or "weak" States), it is much harder to rely on a reliable national body of law. The duty of care/vigilance has a much greater importance in these areas.

Finally, in this field as well, the law is also constantly evolving. It is therefore important to note that during the 2015 Paris Conference on Climate Change (COP21), the former Minister of Environment, Ms Corinne Lepage, initiated the Universal declaration of the rights of humankind. Although this declaration is not yet an international convention and is not binding on its signatory States, the text is intended to secure rights and duties not at individual level but on a collective one. At its general meeting held on 16 June 2017, the Conseil national des barreaux signed the declaration.

B. Fundamental principles of "Business and human rights"

1. The UN pillars: namely, the guiding principles on business and human rights

'Soft law', which has been developed internationally and is considered as an incentivising and voluntary law, has identified a number of general principles to use as the starting point for any analysis on the subject of "Business and human rights".

5. The core international human rights instruments are listed below: http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx

The United Nations Guiding principles on business and human rights break down the various responsibilities incumbent upon the States and private economic operators into three pillars:

- **The duty to protect:** it is up to the States and it is their responsibility to take the necessary steps to protect people from all violations of their rights.

Principle no. 1 is the foundational principle that lists the obligations of a State in relation to human rights: *"States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."*

The obligation to protect determined in Principle no. 1 means that the State must act to:

- prevent companies from violating human rights,
- investigate any human rights violations,
- punish the offenders, and
- remedy human right violations committed by companies.

Consequently, a State may be in breach of its international human rights law obligations if it fails to take appropriate steps to prevent, investigate, punish the offenders and redress any damage caused.

- **The duty to respect:** is targeted at businesses and imposes upon them a responsibility to avoid their activities having an adverse impact (principle of "do no harm") by the means of a duty of care/vigilance and due diligence.

The responsibility to respect human rights is a general standard of conduct expected of all businesses, wherever they operate. It exists independently of the capacity and/or the determination of States to fulfil their obligations in terms of human rights and does not limit the latter.

It also prevails over compliance with national laws and regulations that protect human rights.

Many international instruments consist of a series of general guidelines, including guidance on corporate social responsibility[6].

Under the second pillar, businesses are encouraged to establish processes to identify the actual and potential impacts of their actions on human rights, and have processes to prevent, mitigate and report on the measures implemented to remedy such impacts. These processes should help assess the impact of their activities on human rights, compile the findings, follow them up, monitor the actions taken and communicate the methods used to remedy such impacts (Guiding principle no. 17).

6. Notably, the OECD Guidelines for Multinational Enterprises, ISO 26000 Guidance on social responsibility, the Ten Principles of the UN Global Compact for business, the Tripartite declaration of principles concerning multinational enterprises and social policy of the International Labour Organization etc.

Associated with the repair process, these four elements, which are key to human rights due diligence, constitute the basic requirements of the protection responsibility incumbent upon businesses.

- **The right of redress and the right to seek remedy,** both legal and non-legal, for all victims whose rights have been violated. The redress must be effective and its scope should be extended to the concept of "claim" and not simply restricted to legal liability.

→ Businesses are primarily affected by the 2nd and 3rd pillars of these guiding principles and, in terms of human rights, must:

a) Anticipate by checking upstream with their suppliers and subcontractors the human-right guarantees furnished.

b) Refrain from violating, through their activities, human rights. These violations can be direct, indirect or complicit.

c) Show respect for the fundamental rights of the populations affected by their scope of activities and strive to obtain, as part of their activities, a "licence to operate", which reflects the confidence they will receive from stakeholders by demonstrating their willingness to reduce or eliminate the "*negative impacts*" of their activities on human rights and ability to offer redress to those whose rights have been violated.

d) Participate in the promotion of human rights by encouraging respectful activities that allow an ever-greater development of the human rights of the populations affected by the scope of their activities (internal and external to the business).

2. Breakdown of these fundamental principles: practical concepts

These principles impose upon businesses, and the lawyers who work with them, a need to command a certain number of legal concepts that are key to fulfilling their duty of care/vigilance and due diligence obligations.

The first concept is the duty of vigilance or due diligence. It consists of a general supervisory duty in respect of the risks associated with the activities and corporate relationships of businesses. By implementing due diligence measures, supplemented by a duty of prevention, business enterprises must strive to prevent the occurrence of any identified risks. Sanctions may be imposed when the duty of vigilance/due diligence has not been carried out and the liability of the party failing to comply with this obligation is established, when damages have resulted from the failure to comply with such duties[7].

7. See the legal study on societal vigilance in France conducted by Coredem and the Ritimo and SHERPA associations.

The second concept is that of a negative/positive impact. The whole concept of corporate human rights responsibility is based on two simple concepts, those of negative and positive impacts. By limiting the former and increasing the latter, businesses can have a powerful multiplier effect on the enjoyment of fundamental human rights.

The Interpretative guide of the guiding principles defines a negative impact as "*any action preventing or reducing the ability of a person to enjoy his or her fundamental rights*".

The third concept is that of corporate social responsibility (CSR). France, through the auspices of the Ministry for Europe and Foreign Affairs (MEAE), defines corporate social responsibility (CSR) as "*the way businesses integrate sustainable development objectives in their practices by ensuring they control any impacts on society while remaining attentive to its expectations*". In turn, the European Union talks about "controlling the effects on society" (European Commission). Finally, the United Nations Institute for Training and Research (UNITAR) considers CSR as "*a management concept and a procedure that incorporates social and environmental concerns into business activities and the interactions of the business with all of its stakeholders*".

C. Examples of legal set ups in foreign countries in the area of "*Business and human rights*"[8]

In Canada[9], Bill C-45 or the "Westray Bill" of 31 March 2004 recognises the criminal responsibility of a parent company for actions committed by a subsidiary when it acts as an "operator" of the parent company. Any breach of the due diligence requirement in terms of preserving the health and safety of workers or the environment can be established, unless the company provides evidence that it has complied with the due diligence requirement (according to jurisprudence, this concept covers three components: a duty of forethought, a duty of effectiveness and a duty of authority). The sanction is financial.

In Spain, organic law 5/2010 of 22 June 2010 allows the parent company to be held criminally liable for the action of its subsidiaries, if these are effectively subordinated to the instructions and subject to the control of the parent company, or held liable for its subcontractors, if they work under the direction of the company's management. The company may be exonerated from the proven fault if it shows that it took measures and carried out the necessary due diligence required by the law. The sanction can consist of a monetary fine, the temporary or permanent prohibition on carrying out activities, the placement under judicial supervision, or the prohibition from receiving subsidies, etc.

In the United States, following the "Filártiga" case in 1980, the provisions of the Alien Tort Statute of 1789 were used to give the US courts jurisdiction to judge on a civil basis actions committed in a foreign country. The "Kibble" decision delivered by the Supreme Court on 17 April 2013 restricted the territorial scope

8. See the comparative study of legal system for the liability of parent companies or the liability of companies based on the duty of vigilance existing abroad. Study conducted by the French Commissariat-General for Strategy and Foresight and the CSR platform.
9. Ranking of countries alphabetically, as an example, not all countries are listed.

of the Alien Tort Statue ruling that federal courts were not competent to hear claims pursued by foreign nationals for acts committed abroad. The 1977 Foreign Corrupt Practices Act (FCPA) specifically mentions the civil and criminal liability of parent companies for the actions of their subsidiaries, in relation to bribing foreign public officials. The text applies to foreign subsidiaries of American companies and to foreign companies listed on an American stock market. These two systems impose a financial sanction.

In Italy, Legislative Decree No. 231 of 8 June 2001 establishes a criminal system of liability for crimes committed by the executive officers of a company or a person from the company under its control. The company is exonerated if it provides evidence that it has implemented - before the offence was committed - effective organisational and management processes to prevent the crime that has been committed. The sanction can be monetary, or the temporary or permanent ban on carrying out activities, or the prohibition on taking part in public tenders, or the prohibition from receiving subsidies, etc.

In the United Kingdom, the Bribery Act of 8 April 2010 renders parent companies liable for the actions of their subsidiaries in relation to criminal offences committed by the company's personnel or by any person "associated" with the company, when the company has failed to act and has not put in place adequate procedures to prevent the offence in question. Liability is presumed unless the company provides evidence that it has implemented "adequate procedures" to prevent the offence of bribery committed by a natural person. The sanction is financial.

The Modern Slavery Act 2015 (MSA) entered into force on 29 October 2015 and aims to combat modern slavery and human trafficking. Under the act, businesses with a turnover of over £36 million, and selling goods and services in the United Kingdom, are asked to issue a yearly statement on their website describing the actions they have implemented to combat these types of situation. The MSA applies to companies regardless of their place of registration, and therefore covers foreign companies operating in the United Kingdom.

In Switzerland, article 102 of the Swiss criminal code provides for criminal offences committed within the company during the pursuit of commercial activities in line with its corporate objectives, when the offence cannot be attributed to any natural person within the company and when the company has failed to act. When liability is established for a proven fault, the company may be exonerated if it demonstrates it has carried out all reasonable and necessary organisational measures to prevent the offence. The sanction is financial.

D. Corporate liability: the state of French law

1. European law

Directive 2014/95/EU amending Directive 2013/34/EU as regards the disclosure of non-financial and diversity information by certain large undertakings and groups. It was published on 15 November 2014, in the Official Journal of the European Union.

It is aimed at public-interest companies (listed companies, banks, insurance companies and those designated as such by the Member States) with more than, on the date of closing their accounts, 500 employees over the financial period, as well as the parent companies of consolidated groups employing 500 employees (subsidiaries are exempt from publishing a report on condition they are included in the consolidated report issued by the parent company).

These entities must communicate sufficient information to provide an understanding of elements such as: their business trends, performance, situation of the company and the impact of their activity on, at the very least, environmental, social and personnel issues, and respect for human rights and the fight against corruption.

The disclosure of such information must include a brief description of the company's business model, a description of the policies pursued by the company in relation to the issues listed above, including due diligence processes implemented, the outcome of these policies, the principal risks related to those matters linked to the companies' operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the company manages such risks and non-financial key performance indicators relevant to the business operations in question.

If the business in question does not apply policies in relation to one or more of these matters, the report shall provide a clear and reasoned explanation of its reasons for not doing so.

To help companies meet their obligations arising from this directive, on 27 June 2017, the European Commission published non-binding guidelines.

2. French rules

A. Reporting obligations

Law no. 2001-420 of 15 May 2001 on new economic regulations now requires listed companies to publish some social and environmental information in their management report.

Law no. 2003-699 of 30 July 2003 relating to technological and natural risk prevention and repairing the damage requires that businesses disclose information on risk management at Seveso sites.

The Autorité des marchés financiers (AMF, the French financial markets regulator) has published a report on the information published by listed companies in relation to social and environmental responsibility and issued recommendation No. 2010-13.

Law No. 2010-788 of 12 July 2010 concerning the national commitment to the environment, called

"Grenelle II", substantially strengthened the obligations of companies, to achieve two objectives: extend the social and environmental reporting obligation and increase the credibility of the information published, by the means of an audit carried out by an external third party :

Decree no. 2012-557 of 24 April 2012 on corporate transparency requirements in relation to social and environmental issues (since consolidated), requires a system comparable to that applicable to human rights and other topics. Companies must ensure they follow the measures adopted and report externally their approach to human rights.

On 19 July 2017, the Minister for the economy and finance presented to the Council of Ministers an order relating to the disclosure of non-financial information by some larger sized companies and certain business groups.

This order, taken pursuant to article 216 of law No. 2017-86 of 27 January on equality and citizenship, allows provisions to be taken in the area of law required to transpose Directive 2014/95/EU.

The decree setting out the conditions of this new obligation was published in the Official French Gazette (JO) on 11 August 2017. The text applies to financial periods starting as of 1 September 2017.

The statement on extra-financial performance - replacing the corporate social responsibility (CSR) report - is a strategic management tool for businesses, which is both concise and accessible, while providing stakeholders with the information they require.

The system for checking the information published is a simple one: it only concerns companies with more than 500 employees and a total balance sheet or turnover exceeding €100 million. SMEs are no longer covered by the new extra-financial reporting system.

B. Due diligence

Law no. 2014-790 of 10 July 2014 concerning the fight against unfair social competition transposed the European directive on the secondment of workers. Not only does it establish a due diligence duty but it also provides for joint responsibility in the event of using seconded workers (it specifies the responsibility of supervisors and contractors vis-à-vis their subcontractors and contracting parties).

Law no. 2017-399 of 27 March 2017 on the due diligence obligations of parent companies and other controlling companies applies to companies that employ, at the end of two consecutive financial years, at least 5,000 employees within the company itself and in their French subsidiaries, or employing at least 10,000

employees within the company itself and within French or foreign subsidiaries. In France, this should affect around 150 to 200 businesses.

The businesses will have to put in place a vigilance plan that includes *"reasonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental freedoms, of the health and safety of persons and of the environment resulting from the activities of the company and those of the companies over which it has direct or indirect control, as well as the activities of subcontractors or suppliers with which it maintains an established commercial relationship, when these activities are connected to this relationship..."*

The plan must include:

- A mapping of risks
- Procedures to regularly assess subsidiaries, subcontractors or suppliers with whom the company maintains an established commercial relationship
- Appropriate actions to mitigate risks or prevent serious violations,
- An alert and report-collecting mechanism
- A system to check the measures put in place and assess their effectiveness

The vigilance plan and a report into its effective implementation shall be publicly disclosed and included in the annual report

If any business fails to comply with these obligations it may be considered liable and obliged to compensate for any harm that its compliance with these obligations would have helped avoid.

Proceedings to seek liability for damages may be brought before the competent court by any person who can prove they have an interest to act. They can be brought by a victim but also a trade union, an association, an NGO, etc. The judge may order *"the publication, dissemination or display of its decision or an extract thereof, according to the terms specified. Costs are to be borne by the condemned party*". The decision can be executed subject to a penalty payment.

The fines stipulated in the original text were removed in accordance with decision no. 2017-750 of 23 March of the Constitutional Council.

Note, many companies are likely to be affected, including suppliers or subcontractors who will be asked by their clients to prepare and monitor a vigilance plan.

C. Consumers' right to information

Law no. 2014-856 of 31 July 2014 relating to the social and solidarity-based economy, adopted on 21 July 2014, provides consumers with the opportunity to check with distributors, manufacturers and producers, the conditions under which the products they market in France are manufactured.

D. Right to notify

Law no. 2016-1691 of 9 December 2016 on transparency, fighting corruption and modernising economic life known as "SAPIN II" introduced into the French legal system a unique mechanism to protect whistleblowers and a component aimed at reducing the risk of corruption of businesses. Thus, French companies employing more than 500 employees and posting a turnover of over €100 million must implement a programme to prevent and identify corruption (article 17). This new system also aims to punish influence-peddling behaviour. In terms of whistleblowers, the law now protects them by imposing upon companies with more than 50 employees the requirement to set up procedures for collecting the reports issued by employees or by external and casual staff. The enforcement decree of the law, published in the Official Gazette on 20 April 2017, specifies the terms of implementation of these procedures which will enter into force on 1 January 2018.

IV. THE RIGHT TO REDRESS AND REMEDY

A. Individual redress

The right to obtain redress is one pillar of the United Nations guiding principles on business and human rights. As mentioned above, this remedy can be either legal or non-legal; however, it must be effective. Its scope is extended to the notion of "claim".

The French National Consultative Commission on human rights, in its opinion on the issues associated with the application by France of the United Nations' Guiding Principles, which were adopted on 24 October 2013, distinguishes:

- Effective judicial mechanisms of the State (Guiding principle no. 26)
- Non-judicial mechanisms of the State (Guiding principle no. 27, for example, the National Contact Points (NCP) of the OECD)
- Non-judicial mechanisms of the company (Guiding principle No. 28, for example managed by a separate company or with stakeholders, by a professional association or a multipartite group).

• On a corporate level:

Under the terms of UN guiding principle no. 22: "*Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.*" Businesses are therefore advised to set up internal notification and repair procedures to identify any violations, to end such violations and repair any damage caused to victims.

• On a State level:

The French Conseil constitutionnel has recognised the right of individuals, and especially the victims of human rights abuses committed by businesses, to appear before a judge to seek appropriate remedy.

In its decision of 9 April 1996 (DC no. 96-373), the Constitutional Council recognised the constitutional value of the right to obtain effective redress.

In its decision of 23 July 1999 (DC no. 99-416), the council sets out the consequences of this line of reasoning, notably by attaching the right to seek effective redress to "respect for the rights of the defence", which it considers as "one of the fundamental principles recognised by the laws of the French Republic".

In 2017, France established a national action plan for the implementation of the UN Guiding Principles on human rights and business[10] which offers a comprehensive inventory of legal remedies, the powers of the European Court of human rights and the French courts along with extra-judicial redress.

10. See the summary of the national plan in the appendix

In addition to legal procedures, extra-judicial procedures are also available: the bureau du médiateur (office of the ombudsman), the National Contact Point and the national human rights institution.

The French national contact point for the implementation of the Guidelines of the Organisation for Economic Cooperation and Development (NCP) is mandated to promote and ensure compliance with the OECD Guidelines for multinationals. It is a non-judicial dispute settlement body whose aim is to promote mediation by offering its good offices and, if possible, by suggesting mediation to the conflicted parties. The decisions of the French NCP are public.

The NCP is committed to respond in detail to the questions raised by the complainants, and its remit extends to ruling on compliance with the guidelines of the OECD.

To conclude, the office of the ombudsman (*bureau du médiateur*) and the French National human rights Institution (NHRI) are also worth mentioning[11].

B. Group actions

In France, the notion of group actions[12] was introduced via Law no. 2014-344 of 17 March 2014 relating to consumer protection.

Law no. 2016-41 of 26 January 2016 relating to the modernisation of the health system extended group actions to this area.

Law no. 2016-1547 of 18 November 2016 relating to modernising the legal system to the 21st century widened the options offered. Several persons in a similar situation and who have suffered *"injury caused by the same person, with the common cause of a breach of the same nature of his or her legal or contractual obligations may take action"*.

It should be noted that group actions do not exclude anyone on account of their nationality or place of residence.

C. Actions against parent companies

French law allows a parent company to be held liable for the faults committed by one of its subsidiaries, including overseas, as long as its involvement can be established.

Standard ISO 26000 of November 2010 defines complicity in article 6.3.5.1 as *"assisting in the commission of wrongful acts of others that are inconsistent with, or disrespectful of, international norms of behaviour that the organisation, through exercising due diligence, knew or should have known would lead to substantial negative impacts on society, the economy or the environment. An organisation may also be considered complicit where it stays silent about or benefits from such wrongful acts"*.

11. More detailed information is available at national action plan for the implementation of the UN Guiding Principles on human rights and business.
12. Ibid.

The liability of the parent company may also be sought on other grounds such as possessing stolen goods or laundering offences committed by foreign subsidiaries.

The existing case law should be consulted. The Erika case is a perfect example. The ruling of the Court of Cassation via its communiqué can be consulted.

The parent company can only be pursued for complicity in the offence committed by its foreign subsidiary when two conditions are met: firstly, that the offence is also contrary to the laws in the State where it was committed (dual criminality) and where the said offence is established by a final foreign ruling (Article 113-5 of the French Criminal Code). And, secondly, that the victim proves a foreign jurisdiction has confirmed the offence.

The rule set out in Article 113-8 of French Criminal Code in relation to offences represents another obstacle when victims seek redress or use the traditional complainant system by lodging a civil action. The public prosecutor's office has a monopoly over triggering proceedings for offences committed by French nationals overseas or when French nationals have been the victims of an offence overseas.

V. ROLE OF LAWYERS IN THE "BUSINESS AND HUMAN RIGHTS" RELATIONSHIP

A. The role of lawyers

Lawyers can take on different roles in the business and human rights sphere: they can defend victims and they can also play a part in identifying the implications for companies of respecting human rights. In this respect, they act as a promoter of human rights for businesses.

1. Lawyers as defenders of victims

Lawyers establish the causal link between the victim and the principal. They investigate the cases of the victims to ascertain the extent of the wrongdoing and provide information on the options for remedy and the types of redress available.

They can act as a mediator and ensure that the business understands that its economic decisions can have dramatic consequences regardless of the place of their occurrence.

They can pursue a business to establish its liability even when it is not legally set up in the place where the damage has occurred.

Along with other parties, a lawyer is responsible for conducting the trial to obtain redress of victims in a satisfactory manner, regardless of the country where the offence was committed.

Through the cases they pursue, lawyers can advance this area of law and turn it into positive law.

2. Lawyers as business advisers

Lawyers play a major and ever-increasing role in the integration and management of human rights by businesses.

Lawyers must help businesses understand the risks linked to respecting human rights. Their role involves:

- Daily monitoring
- Support to identify risks
- Defining a strategy and an economic model tailored to the costs associated with such risks;
- Setting up with internal actors of the company (ethics/compliance manager, CSR, internal audit internal, etc.) a diagnostic procedure within the company relating to risks associated with the failure to comply with human rights in all the areas concerned;
- Preparation of the mapping of risks;
- The implementation of risk prevention and management procedures when these are identified internally by the business;
- The implementation of practical guides and processes to help business and their staff perform their duties and resolve any difficulties that may arise in relation to human rights (reviewing contracts with subcontractors, national and international human resources policies, etc.);
- Setting up a communication policy in relation to legal risks to increase the awareness of all internal or external stakeholders of the business;
- Support their clients in their litigation.

Lawyers must advise their corporate clients within the scope of the applicable regulations, soft law or legislation and jurisprudence.

In this respect, a lawyer is more than an interpreter, he or she becomes an active guide, a veritable promoter of human rights.

3. Conclusions: lawyers promote human rights in businesses

The emergence of legislations on the interactions between companies and human rights has propelled the business world into a new era: businesses must now be more than merely "compliant" in terms of their respect for human rights. They must move from a passive posture (disclosure/compliance) to adopting an active position for change and the promotion of human rights.

A parallel can perhaps be made with the protection of environement. Communications from the most innovative companies have now changed from "my activities are not harming the environment" to "I am promoting the preservation of the environment through my activities".

Lawyers, whether defending victims or advising businesses, have a major role to play in raising the awareness of business of the implications of effectively respecting human rights.

The question is: how can a lawyer participate in this development and become a defender and interpreter of human rights but also truly promote the integration of human rights in a business environment?

- By accepting that human rights are not only shared good intentions but should also be put into practice locally, lawyers can achieve this local adaptation through training or communicating via international networks;
- By working on each case submitted to them with a colleague based near the place of business or manufacturing, when the lawyer is located far away, thereby ensuring their clients gain a complete understanding of local issues;
- By allowing their clients to understand that all legal areas have an impact on human rights. General-practice lawyers as well as lawyers specialising in criminal, tax or employment law, for instance, all have a responsibility in terms of the advice they give to their clients in this area. Business must implement economic models with the help of their lawyers to quantify the impact that respecting human rights will have on their activities, and this will be an essential tool for the development of respect for human rights.

Lawyers must monitor any changes to the law in this area, and alert their clients to provide the correct advice and offer useful support.

B. Positioning vis-à-vis CSR charters, business codes of conduct and the position of the Council of Bars and Law Societies of Europe (CCBE)

Access to a lawyer and legal advice is part of the fundamental rights of every person. The corollary of this right is the principle of non-assimilation of the lawyer to his or her client or to the client's cause. The code of ethics of lawyers stipulates that they cannot be party to the illegal actions of their clients.

Lawyers need to remain extremely vigilant and ensure they include respect for human rights in the advice they give and that they do not contribute either directly or indirectly to any damage caused by their client.

On top of this, lawyers represent a business. As such, they may be asked to submit to the "process" set up by companies to comply with their duty of vigilance.

In fact, businesses, regardless of their size, are increasingly tending to adopt a CSR charter, a Code of conduct, etc., and then imposing these on their employees, partners and suppliers.

The recent guidelines issued by the CCBE (May 2017) "Practical Issues for Bars and Law Societies on Corporate Social Responsibility" emphasise the difficulties faced by lawyers.

"*The clients' Codes of Conduct are not necessarily coherent, but require usually application to the whole law firm and all its members and employees and in all matters. The law firm may sign the first client's Code of Conduct, when more clients come with the same request and different Codes of Conduct the law firm may not be in a position to sign them without risking to breach retainer agreements of other clients*".

The clients' supplier codes are usually not designed to meet the specific situations of law firms, in particular, confidentiality aspects."

The clarity regarding the status of these rules, which are frequently drafted in general fairly unspecific terms, is not helped by a barely nascent jurisprudence.

The CCBE therefore states that *"Law firms and bars are not usually considered as high-risk businesses, and neither is their typical supply chain. There are no general rules or guidance available in this regard."*

The CCBE suggest that Bars may wish to advise their members not to sign any client Code of Conduct in order to assist with a coordinated and uniform approach to client requests in this regard. In fact, as indicated by the CCBE, lawyers are independent and have an official role in the administration of justice and their standards of behaviour are defined by law and by bar rules. Moreover, the supplier codes of clients are not usually designed to meet the specific situations of law firms.

Clients should be reminded that French lawyers are subject to a strict code of ethics and supervision by a bar, and therefore meet all the necessary requirements in terms of CSR and human rights, meaning that they are not required to sign the client's code of conduct or charter.

C. Professional responsibility

The absence of due diligence, if it causes damage, can implicate the responsibility of the business. Lawyers must therefore be especially vigilant about the way they advise and the contents of their advice.

Lawyers may be found liable if they fail to fulfil their advisory duties within the scope of the work entrusted to them. It is advisable that any lawyer receiving a request from a business should make sure they draft a letter of engagement[13] and check that the remit (hard, soft, national, international or conventional legal advisory services) is correctly insured. Lawyers must remain vigilant regarding the amount and risk level of the mission entrusted to them, in a context where there is an increased temptation to place the blame on advisers for the decisions taken by their corporate clients.

Today, we are facing an international trend that is increasingly inclined to consider legal advisers as an intermediary in the decision-making process of their corporate clients and, consequently, to attempt to hold them responsible. This risk is further exacerbated by the fact that the field of human rights covers an extremely broad and ill-defined area.

13 Published in the Official Gazette on 4 August 2017 decree no. 2017-1226 of 2 August 2017 on miscellaneous provisions relating to the legal profession. This decree amends the wording of article 10 of Decree No. 2005-790 of 12 July 2005 on the code of ethics of the legal profession, to take account of the binding nature of the fees agreed between a lawyer and his client, stemming from article 10 of law No. 71-1130 of 31 December 1971.

For instance, consider the example of tax law. Not that long ago, it could be considered that this area of law was poles apart from human rights; however, in view of current developments, this topic is now firmly entrenched within tax law. It is now agreed that tax evasion leads to an impoverishment of respect for human rights, as the governments of tax havens deliberately create laws, regulations and secrecy measures that deprive populations and governments of the income required to ensure compliance with their human rights commitments. This situation deepens inequalities even further. Taxation systems must allow States to collect the resources required to provide fundamental goods and services to their population, such as hospitals, schools, etc. The OECD Action Plan on base Erosion and Profit shifting (BEPS) is the embodiment of a plan that takes this situation into account. It relies on the fact that the State, creator of wealth, must be able to benefit from a tax on it to enable its development and therefore to promote the actual respect for human rights in its territory. Increasingly, responsibility for tax evasion is attributed to legal advisers.

Lawyers should always carefully consider the consequences of any tax avoidance schemes. They must take great care to identify and respect the boundary between avoidance and the risk of evasion – a boundary that modern guidelines are increasingly endeavouring to blur.

CONTRIBUTIONS

CONTRIBUTIONS

Julie VALLAT,

Head of the "Ethics and human rights" unit at Total SA

Total, via its Code of conduct, is committed to respecting the guiding principles of the United Nations on human rights and business.

The adoption of these principles in 2011 clarified the respective roles of States and businesses in this area. States, endowed with a power to police, are required to "protect" human rights. Although businesses are not per se subjects of international law, they must in all circumstances, **regardless of the state of law of the country in which they operate**, be accountable to their stakeholders and are, in this regard, required to "respect" human rights. States and businesses must also respectively "repair" the damages suffered by third parties as a consequence of human rights violations.

These unifying principles have helped create an unprecedented consensus between States, companies and civil society, on the one hand, and **at the level of international law, transcend the old outdated divide between 'hard law' and 'soft law',** on the other. **To be effective, it does not need to be mandatory, it just needs to be followed.**

Although not legally binding as such, these Principles have quickly acquired a tremendous significance, in the sense that many international organisations, such as the OECD, the European Union, the International Finance Corporation and other donors, etc., have integrated them into their own standards. Also, in practice, a company wishing to invest, for example, outside the OECD area in a project funded by international donors, will need to justify the fact that they respect human rights to obtain and secure the payment of funds - and this, throughout the life of the project, to avoid facing a potential loss of investments.

Investors, agencies and other bodies - such as the recent "Corporate human rights Benchmark" initiative that manages nearly five trillion dollars - are now recording the human rights performance of listed companies and are comparing the results.

Following serious accidents, including the disaster at Rana Plaza in Bangladesh, lawmakers in various countries have used the UN principles to strengthen their expectations vis-à-vis companies in the fight against modern slavery, targeting more specifically the supply chain. These moves resulted in the UK Modern Slavery Act - which inspired the French law on the duty of vigilance.

Respect for human rights by companies involves more specifically the implementation of internal due-diligence policies and procedures, to identify, manage and address the negative impacts on people caused by their activities or those of their partners. Specific tools such as a procedure to handle complaints from residents supplement this system.

On the ground, multinationals such as Total, which operate in sensitive countries, can sometimes face tricky situations involving **a conflict of standards. When differences exist between the provisions of local law and the aforementioned international standards, Total is committed, via its Code of conduct, to apply the most protective standard** - which, in fact, is not always simple and must often be applied creatively to respect the spirit of the international standards, without infringing the letter of the local law.

For example, Total operates in some countries where women are not permitted to drive. To minimise potential risks of discrimination during the recruitment process, as female candidates could be discriminated against in relation to male candidates, our local subsidiaries endeavour to provide public transport systems for staff.

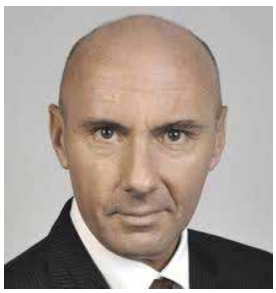
Total also has a presence in some conflict-affected countries. To protect our employees and facilities against hostage-taking or potential sabotage, our subsidiaries can use the services of security guards. If armed protesters show up at the gates of the subsidiary, our guards are required to use a proportionate amount of force. To ensure this is the case, in the contracts of our guards we insert specific clauses that allow us to guarantee that these guards have been properly trained. We also get an independent third party to assess the potential impacts of our activities on residents. Thus, in Democratic Republic of Congo, Total commissioned an NGO specialising in the protection of vulnerable populations to conduct a study on the impact of our activities on human rights. The conclusions of this study were shared with local residents and published on the website of the NGO as part of our commitment to transparency.

The procedures and policies Total has implemented to protect our most salient risks in terms of human rights are detailed in the first dedicated report published in 2016. This report was based on the "UN Guiding Principles Reporting Framework".

In conclusion, the UN Guiding Principles have resulted in a real **paradigm shift: they require businesses - and their legal advisers - to move away from the centre and assess risks for third parties, particularly for the most vulnerable, and not just for themselves,** and go beyond simple compliance with the laws. However, there is still some way to go in the application of these principles, especially as many businesses (public, small and medium size, etc.) have not yet adopted them and require help to implement them.

Xavier HUBERT,

Ethics & Compliance Director at ENGIE



For ENGIE, respect for human rights is an integral part of its corporate responsibility and is at the heart of its model of responsible growth. The Group is committed to operating in compliance with the highest international standards of human rights protection wherever it operates in the world. Aware of sectoral and geographical issues, the Group has decided to adopt a human rights policy as early as 2014 that is fully integrated into its ethical and social responsibility commitments. This framework constitutes a common foundation for all Group entities and our partners.

This human rights[14] policy is based on the identification and management of risks; it allows the Group to be particularly vigilant so that its activities do not have consequences on human rights and to meet new legal requirements such as the French law on the duty of care.

Initiated by Gérard Mestrallet, Chairman of the Group, led by Isabelle Kocher, Group CEO, this policy is managed by the Secretary General and the Ethics & Compliance Department at the highest level of the Group. The Ethics & Compliance Department reports annually on the implementation of this policy to the Committee for Ethics, Environment and Sustainable Development of the Board of Directors of ENGIE Group.

It aims to integrate vigilance at all levels of the Group (1) into a continuous improvement approach (2).

1. Integrating vigilance throughout all corporate levels

To exercise its responsibility as a Group, ENGIE has developed human rights risk analysis processes for all of its activities.

ENGIE considers that vigilance must be exercised **at the highest operational level possible,** with human rights issues closely related to the operational contexts of the activities (country, project, potentially affected population). Each business unit must therefore undertake human rights risk analysis processes including those related to their business relationships (e.g. annual risk assessment of activities and the definition of associated action plans, analyses of the impacts of new commercial projects or due diligence on partners).

In addition to risk analysis at the operational level, human rights risk has been specifically identified in the last few years as an ethical risk **at the corporate level** and integrated into the Group's annual review. Specific human rights studies, carried out in depth in countries considered to be at risk, are also included in the analysis of investment projects decided on at group level.

14. This policy aims to respond to the recommendations of the United Nations Guiding Principles on business and human rights of 2011.

The Group is also vigilant about **respect for human rights through its commercial relations**. The human rights policy requires its trading partners to respect the Group's commitments. It complements the Group's responsible procurement policy, which includes the integration of human rights criteria throughout the procurement process.

2. A continuous improvement approach

Because human rights risks are evolving and linked to external and operational factors, it is essential for the Group to pursue continuous improvement.

The principles of action underpinning human rights policy are in particular the regular assessment of risks, the establishment of action plans adapted to operational and progressive situations, and dialogue and consultation with all stakeholders through complaints mechanisms at the operational level. It is up to each Business Unit to apply its principles in the context of their specific activities.

To assist them, the Ethics & Compliance Department plays a vital role in providing support, awareness and training. It sets the overall human rights framework for the group and ensures the follow-up of the Policy, integrated into the ethical compliance processes (annual compliance report, internal control system, audits...). The Ethics & Compliance Department is also responsible for the Group's alert system, which is open to anyone who considers itself affected by the Group's activities.

William BOURDON,

Chairman of the SHERPA association

For about twenty years, private actors have been proud of their love for sustainable development and human rights. And they loved with great heterogeneity, sometimes with the utmost sincerity but also, with the utmost cynicism.

Naturally there is nothing spontaneous in this movement. This is the consequence of the globalisation within civil society of a feeling of risk, at the origin of an increasing ethical negligence of citizens whose demands are claimed by increasingly professional and demanding NGOs .

This movement has a very mixed impact on the activities of economic players. On the one hand, they must adapt and thus take account, including by accepting additional costs, of the need to reduce the impact of their activity, in particular on the environment, and on the other hand, at times on public health.

Some do so with enthusiasm because they have understood that "virtue" is a source of long-term profitability and could lead to consumer confidence, if not market share.

On the other hand, this demand to enhance its ethical image has led to a greater sensitivity to reputational risk and sometimes, cynically, to develop strategies of concealment, either by sophisticated technical processes or by taking advantage of new tools, financial globalisation (outsourcing of certain flows and certain activities to affiliates and subsidiaries, which are not easily controlled). We see it through the incredible scandals that affect the automotive groups today, the first producers of ethical communications for years.

At the same time, some private actors remain impervious in the eyes of the consumer, including some major players in the financial economy (some investment funds, but also some mining companies).

It is because of this observation that new jobs have been created and that new expertise is being developed among lawyers.

On the one hand, large firms have been asked - and increasingly are - to accompany these private actors in their desire to be as coherent as possible with regard to their commitments but also with the law (including the Sapin II Law). Or, in reverse, to help them discreetly by providing them with the necessary engineering to outsource some of their activities, or even, in some cases, to circumvent the Law, or to try to accompany those who do not accept, as there are still some of us that feel this new self-proclaimed co-responsibility is a lure to better organise its legal irresponsibility.

Faced with the complexity of structures born out of globalisation, the legal imagination is a recourse. We have, I believe, demonstrated it in the adventure of ill-gotten goods, which we do not need to go back over.

It quickly became clear to us that the defence of the victims of these different offences required imagination and the combination of soft law and hard law.

Indeed, on several occasions the invocation before the criminal court of unilateral undertakings made by undertakings without constituting a formal legal basis has favoured the interest of the judicial authority considering the case. In other words, the reference to all these commitments must not be underestimated and contributes to convincing the judge, as without having a contractual dimension they are such as to justify and seek the elements that could be used to determine responsibility, namely:

- of the directors of a French subsidiary abroad;
- of the legal entity, parent company.

We tried to get parliamentarians to amend, in vain, Articles 113-3 and following of the French Penal Code, which allow the Prosecutor to declare a complaint filed in respect of offences committed by French citizens abroad inadmissible. In strictly timely and unjustified circumstances, we believe that this decision must henceforth be motivated and be the subject of an adversarial debate and, of course, possibly of an appeal.

One of the avenues used by civil society was to take ethical commitments at its word and to base the proceedings on the very basis of the misdemeanor of deceptive marketing practices. This option remains underestimated and little used.

The difficulty for legal teams and / or lawyers is obviously to work for free in general in the obvious absence of resources of the complainants and the NGOs that accompany them, without procedures adapted to procedures of such scope. The implementation of an effective group action would have enabled SHERPA teams, for example, to act collectively for 857 Congolese workers who had been unfairly dismissed by a subsidiary of a French group in Gabon, rather than having to calculate the compensation for each of them.

This lack of resources is one of the reasons why I created SHERPA because it was due to the funding that we were modestly able to achieve in recent years the sending of teams to interview the complainants, establish the facts, collect evidence in a very difficult context, which is that of the asymmetry of evidence.

Indeed, what makes it possible to characterise the responsibility of executives and / or the parent company is generally secret evidence, in any case, not revealed, either difficult to access or all capitalist links and other between the parent company and the subsidiary, the entire correspondence, emails, notes, memos exchanged between the various entities, if necessary, social audits that are performed in-house (and we know that they are multiplying under the pressure of citizens resulting from the concern of companies to enhance their ethical image, which is the source to evaluate their assets.

Finally, accompanying victims and obtaining compensation for the damage suffered by large private actors has become more and more complex due to:

- the heterogeneity of the behaviour of private actors who, in the ethical rainbow, which goes from the most cynical to the most virtuous;
- the difficulty of having access to evidence on the opacity of evidence in order to organise legal irresponsibility, whereas at the same time, the same private actors chant praises to consumers, ethics compliance officers and pension funds, the sincerity of their commitments to sustainable development, human rights, etc;
- the heterogeneity of the tools available to solicitors;
- the imbalance of the power relationship between the tools and the legal resources available to the economic actors and those available to the populations affected by their activities.

Françoise MATHE,

Chair of the National Commission on human rights
and Freedoms at the Conseil national des barreaux

We recall the announcement made by the first prosecutor of the International Criminal Court, Luis MORENO-OCAMPO, when he took office: we'll see what we're going to see! the Public Prosecutor's Office of the International Criminal Court would seek the responsibility of economic actors in mass crimes within the jurisdiction of the Court.

Former chairmen of the TRANSPARENCY INTERNATIONAL delegation in Latin America, his willingness with regard to economic offences was well known.

Fourteen years later, no such proceedings were brought before that court...

Yet there are few dictatorships, armed conflicts in which these crimes are committed without economic actors bearing any responsibility, either because their activities directly or indirectly finance the actors of the conflict, or because the economic activity itself is at the source of the conflict and crimes.

Except in these extreme circumstances, corporate social responsibility remains a major factor in the malfunctioning of societies and the infringement of human rights, whether civil, political or economic, social or cultural.

This responsibility is built in an international legal space that has undergone radical changes in just over half a century.

In the landscape of an international law which knew no other actors other than sovereign States, new subjects arose: the individual now have individual recourse against States, the fighting forces committed to respect international humanitarian law (Additional Protocol III to the Geneva Conventions), natural persons, and even heads of State, now in certain cases deprived of immunity, were criminally responsible for State crimes. The emergence of an "enforceability" of economic, social and cultural rights, and not merely civil and political rights, through judicial, political or advisory mechanisms, complements the evolution that promotes the birth of corporate responsibility for infringements of human rights which they may have been able to promote, tolerate, provoke.

Old or forgotten mechanisms have been reactivated, such as the Alien Tort Claims Act (1789), which allows extraterritorial civil lawsuits in the United States, rediscovered in 1980 but limited by the Supreme Court of the United States following a decision of 17 April 2013 to facts that have a strong connection (e.g. the nationality of one of the parties) with the United States.

For a long time this mechanism seemed to constitute the civil equivalent of the universal jurisdiction which is now developing in most European countries and certain countries of the New World.

This enforceability of economic actors is at the heart of the tensions between the European judicial systems and the US judicial system which, through deferred prosecution or non-prosecution agreements (NPA, DPA, the so-called "justice

deals"), led foreign economic actors to find themselves obliged to enter into agreements with the US Public Prosecutor's Office as costly as they were intrusive (considerable fines, internal checks and balances) to avoid prosecution that could compromise the continuity of their activities in the United States.

It is also part of the very old controversy between specialists in international law on the articulation between hard law and soft law (positive law / flexible law, this flexible right which is precisely the preferred tool for internal regulation) for large economic entities that have the capacity to implement it.

As we can see, the latest legislative developments relating to the duty of care are only one piece of a complex and evolving field in which no national, organisational or judicial system can hope to be watertight. In this whole affair, the business may be both an actor that infringes fundamental rights and a victim of those infringements, either directly or indirectly, and in any event subject to obligations and to procedural rights.

The interactions of State, parastatal, economic and social actors in a globalised society and their impact on the rights of individuals and the sustainability of the common goods presupposes a regulation by preventive or punitive mechanisms that are necessarily sophisticated and still under construction. The role of solicitors alongside the actors, whether victims (victims today are no longer passive, they are actors in these processes), economic agents, state actors or civil society organisations is a key element.

BIBLIOGRAPHY

1. Guides for lawyers

Council of Bars and Law Societies of Europe (CCBE):

Practical Issues from the CCBE for Bars and Law Societies on Corporate Social Responsibility - Guidance III, May 2017
http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/CSR/CSR_Guides___recommendations/FR_CSR_20170519_Guidance-III.pdf

International Bar Association (IBA):

IBA Practical Guide on business and human rights for business Lawyers and the IBA business and human rights Guidance for Bar Associations
https://www.ibanet.org/LPRU/Business-and-Human-Rights-Documents.aspx

The Law Society of England Wales:

Business and human rights Guide
http://www.lawsociety.org.uk/support-services/advice/articles/business-and-human-rights-guide/

2. General guides on business and human rights:

United Nations Guide:

The corporate responsibility to respect human rights: an interpretative guide
http://www.ohchr.org/Documents/Publications/HR_PUB_12_2_fr.pdf

OECD guide:

OECD guidelines for multinational enterprises
http://www.oecd.org/fr/daf/inv/mne/2011102-fr.pdf

OECD due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas
http://www.oecd.org/fr/daf/inv/mne/Guide-OCDE-Devoir-Diligence-Minerais-%20Edition3.pdf

A global standard for responsible mineral supply chains
http://mneguidelines.oecd.org/Brochure_OCDE-Chaines-dapprovisionnement-en-minerais-responsables.pdf

OECD due diligence guidance for meaningful stakeholder engagement in the extractive sector
http://www.oecd-ilibrary.org/governance/guide-de-l-ocde-sur-le-devoir-de-diligence-pour-un-engagement-constructif-des-parties-prenantes-dans-le-secteur-extractif_9789264264243-fr;jsessionid=1lv89nj0fu1f1.x-oecd-live-02

Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector
https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-Garment-Footwear.pdf

OECD-FAO Guidance for Responsible Agricultural Supply Chains
http://mneguidelines.oecd.org/Guide-OCDE-FAO.pdf

Due diligence in the financial sector: adverse impacts directly linked to financial sector operations, products or services by a business relationship
http://mneguidelines.oecd.org/global-forum/GFRBC-2014-financial-sector-document-1.pdf

3. GO thematic guides

FIDH :

Guide pratique sur les recours existants à l'intention des victimes et des ONG
https://www.fidh.org/fr/themes/mondialisation-droits-humains/responsabilite-des-entreprises/Entreprises-et-violations-des

SHERPA :

Etude : la vigilance sociétale en droit français
https://www.asso-sherpa.org/wp-content/uploads/2017/02/pass_16_web.compressed.pdf

SHIFT :

Human Rights Due Diligence in High Risk Circumstances: Practical Strategies for Businesses
https://www.shiftproject.org/media/resources/docs/Shift_HRDDinhighriskcircumstances_Mar2015.pdf

4. Internet platforms

Help Programme of the Council of Europe: On-line Business and human rights courses for legal professionals
http://help.elearning.ext.coe.int/course/index.php?categoryid=356

Point de contact national français pour la mise en œuvre des Principes directeurs de l'OCDE à l'intention des entreprises multinationales
http://www.tresor.economie.gouv.fr/pcn

Plateforme RSE France
http://www.strategie.gouv.fr/plateforme-rse

Liste des plans d'actions nationaux
https://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans

OCDE Watch
https://www.oecdwatch.org/

Business and Human Rights ressources center
https://www.business-humanrights.org/fr

Corporate Human Rights Benchmark
https://www.corporatebenchmark.org/

Institute for Human Rights and Business
https://www.ihrb.org/

UN Global Compact
http://www.globalcompact-france.org/

SHERPA
https://www.asso-sherpa.org/accueil

Global Witness
https://www.globalwitness.org/en/fr/

Shift project
http://www.shiftproject.org/

Novethic
http://www.novethic.fr/

CONSEIL NATIONAL
DES BARREAUX
LES AVOCATS

1re édition | Octobre 2017
Etablissement d'utilité publique
Art. 21-1 de la loi n°71-1130 du 31 décembre 1971
modifiée

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Ce document à destination exclusive des avocats a été élaboré par la commission Libertés et droits de l'Homme du CNB