



THE CRIMINAL LIABILITY OF CORPORATIONS: A STEP FORWARD IN THE IMPLEMENTATION OF THE UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS?

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ABSTRACT: *The UN Guiding Principles on Business and Human Rights (UNGP) marked the end of a long journey towards regulating corporate conduct on this issue. However, they were conceived only as a focal point to guide public, corporate and civil governance towards the respect and protection of human rights. For this reason, the UNGP function as a common platform on which new rules and strategies should be developed. In this sense, as an element of public governance, Mexico adopted the criminal liability of corporations (CLC), which entered into force in 2016, along with the accusatory criminal justice system. Thus, since one of the purposes of criminal law is the subsidiary protection of legal assets —most of which have an underlying fundamental right—, the purpose of this article is to determine whether or not Mexico's adoption of the CLC enhances the implementation of the UNGP, and if so, to evaluate its scope and limitations. After scrutinizing the UNGP in light of the regulation of the CLC in Mexico, the author argues that, although its performance can be optimized in many ways, the CLC plays an essential role in the area of business and human rights, not only for its direct contributions, but also for the interaction it generates with corporate and civil governance.*

KEYWORDS: *Business and human rights, corporate criminal liability, human rights due diligence, criminal compliance.*

RESUMEN: *Los principios rectores de la ONU sobre las empresas y los derechos humanos (PR) marcaron el final de un largo camino hacia la regulación de la conducta de las corporaciones en relación con esta materia. No obstante, los mismos fueron concebidos únicamente como un punto focal tendiente a orien-*

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tar las gobernanzas pública, corporativa y civil hacia el respeto y protección de los derechos humanos. Por ello, los PR constituyen una plataforma común sobre la cual nuevas reglas y estrategias de regulación deben desarrollarse. En este sentido, como un elemento de la gobernanza pública, México adoptó la responsabilidad penal de las empresas (RPE), la cual entró en vigor en 2016, junto con el sistema acusatorio de justicia penal. En este sentido, si uno de los fines del derecho penal es la protección subsidiaria de bienes jurídicos —en la mayoría de los cuales subyace un derecho fundamental—, el propósito de este artículo es determinar si la adopción en México de la RPE constituye un avance en la implementación de los PR, y en su caso, evaluar cuáles son sus alcances y limitaciones. Después de escrutar los PR a la luz de la regulación de la RPE, el autor sostiene que, aunque existen diversas maneras de optimizar su contribución, la RPE desempeña una función esencial en el campo de las empresas y los derechos humanos, no solo por sus aportaciones directas, sino también por las relaciones de refuerzo que entabla con las gobernanzas corporativa y civil.

PALABRAS CLAVE: *Empresas y derechos humanos, responsabilidad penal de las empresas, debida diligencia en derechos humanos, cumplimiento penal empresarial.*

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I. INTRODUCTION

The UN Guiding Principles on Business and Human Rights (UNGPR) marked the end of a long journey towards regulating the conduct of corporations regarding this issue. However, the UNGP were conceived only as a focal point that tends to guide public, corporate and civil governance to the promotion and protection of human rights. Thus, these three systems of regulation must interact in a network-like fashion to enhance their strengths, shore up each other's weaknesses and face the challenges that a globalized market entail. For this reason, the UNGP work as a common platform on which new rules and strategies can be built upon.

In this sense, as an element of public governance, Mexico adopted the criminal liability of corporations (CLC), which entered into force in 2016, along with an accusatorial criminal justice system. Thereby, since one of the purposes of criminal law is the subsidiary protection of legal assets—in most of which a fundamental right underlies—the purpose of this article is to

determine whether or not Mexico's adoption of the CLC furthers the implementation of the UNGP, and if so, to evaluate its scope and limitations.

To this end, Chapter II will examine the regulatory framework implemented by the UNGP. In Chapter III, I will address the role of criminal law as a protector of human rights and how it can be enforced against corporations in Mexico. Finally, in Chapter IV, I will scrutinize the UNGP in correlation with the CLC. This will lead to the conclusion that, although its performance can be optimized in many ways, the CLC plays an essential function in the area of business and human rights, not only for its direct contributions, but also for the interaction it generates with the corporate and civil governance.

II. BUSINESS AND HUMAN RIGHTS

To contextualize the main topic of the essay, this chapter will first address the need for regulating the impact of business on human rights and the initiatives that have been presented for this purpose. Then, I will examine the content and structure of the regulatory framework proposed by the UNGP, as well as the main critiques against it. Finally, I will explore ways in which the shortcomings of the framework can be overcome by using the UNGP as a common platform from which other developments can depart.

1. *Background*

A. *The Need for Regulating the Impact of Business on Human Rights*

Traditionally, human rights were conceived as barriers against the abusive exercise of public power.¹ Consequently, the human rights regime was designed in a unidimensional way that considered states as the only duty bearers.² However, since power should entail responsibility, the law must limit and discipline any kind of power, not only governmental.³

In this sense, we must acknowledge that in the past decades private corporations have gained significant power and authority, which can be wielded with relative autonomy.⁴ Companies support politicians and lobby institu-

¹ David Weissbrodt & Muria Kruger, Human Rights Responsibilities of Business as Non-State Actors, in NON-STATE ACTORS AND HUMAN RIGHTS 315 (Philip Alston, Oxford University Press, 2005).

² Philip Alston, The Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?, in NON-STATE ACTORS AND HUMAN RIGHTS 3 (Philip Alston, Oxford University Press, 2005).

³ Weissbrodt & Kruger, *supra* note 1.

⁴ See John Gerard Ruggie, Multinationals as Global Institution: Power, Authority and Relative Autonomy, in REGULATION AND GOVERNANCE (David Levi-Faur, Wiley Editing Services, 2017).

tions to achieve their goals, request structural reforms in countries as a condition for investment and, contribute to shaping social expectations through marketing campaigns. As well, catastrophes like the one occurred in 1984 in Bhopal, India—in which three thousand people died, and tens of thousands more were injured due to a gas leak at a pesticide plant—, remind us of the risks that commercial activities pose to workers, communities and the environment.⁵ Therefore, the regulatory framework must be adapted to this new context and address the potential impact of business on human rights.

B. *Attempts at Regulation*

The Universal Declaration of Human Rights (UDHR) is addressed to every individual and every organ of society, including corporations.⁶ For this reason, there have been many initiatives to regulate corporate responsibility regarding human rights.

A first attempt took place in the 1970s when the UN developed the Draft Code of Conduct on Transnational Corporations, which was never officially implemented.⁷ In that same decade, the Organization for Economic Co-operation and Development (OECD) adopted the Guidelines for Multinational Enterprises, and the International Labor Organization (ILO) put into effect the Tripartite Declaration of Principles concerning Multinational Enterprises, which was later complemented with the Declaration of Fundamental Principles and Rights at Work in 1998.⁸

In 1999, the UN developed the Global Compact as a voluntary proposal to encourage companies to embrace ten principles concerning environmental protection, anti-corruption strategies and the respect of international human rights.⁹ Nevertheless, even when this initiative has attracted considerable corporate support, it has been criticized due to its vagueness and weakness to motivate companies to improve their performance in these areas.¹⁰

Consequently, in 1999, the UN designated a working group to draft a code of conduct for corporations regarding human rights. The first issues to arise were to determine whether the regulation should be voluntary or mandatory, and whether it should apply to all business enterprises or only transnational

⁵ See Surya Deva, Bhopal: The Saga Continues, in *BUSINESS AND HUMAN RIGHTS: FROM PRINCIPLES TO PRACTICE* 22 (Dorothee Baumann-Pauly & Justine Nolan, Routledge, 2016).

⁶ Justine Nolan, Mapping the Movement: The Business and Human Rights Regulatory Framework, in *BUSINESS AND HUMAN RIGHTS: FROM PRINCIPLES TO PRACTICE* 27 (Dorothee Baumann-Pauly & Justine Nolan, Routledge, 2016).

⁷ Weissbrodt & Kruger, *supra* note 1, at 318.

⁸ *Id.* at 319.

⁹ United Nations, Global Compact (2018) available at www.unglobalcompact.org.

¹⁰ PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS* 1468 (Oxford University Press, 2013).

corporations.¹¹ In the end, the working group proposed the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights (the Norms), as a mandatory standard to regulate all kinds of companies.¹² Even though many NGOs welcomed the Norms, most developed countries considered them unnecessary or over-reaching.¹³ Thus, in 2004, the UN affirmed that these norms had no legal standing.¹⁴

Therefore, in 2005, John Gerard Ruggie was appointed as Special Representative of the UN Secretary-General (SRSG) and given the task to identify and clarify standards and best practices in the area of business and human rights.¹⁵ By the end of his assignment in 2011, and going beyond the initial mandate, he proposed the UNGP, which were unanimously supported by the UN Human Rights Council.¹⁶ The development of the UNGP and their regulatory framework will be analyzed in the following section.

2. The UN Guiding Principles on Business and Human Rights

A. Development of the UNGP

During the last decades, transnational business enterprises have experienced exponential growth and redefined their role in the globalized society.¹⁷ Nowadays, there are more multinational corporations than ever before, and their traditional integrated composition has been transformed into a network-like structure, characterized by worldwide supply chains and joint ventures.¹⁸ Thus, the task undertaken by the SRSG was anything but simple: to identify the most suitable way of regulating the impact of business on human rights within this complex backdrop.

After the experience of the Norms, the SRSG realized that, while human rights advocates preferred mandatory initiatives, such as a binding international treaty, the business community was in favor of a hybrid alternative,

¹¹ Weissbrodt & Kruger, *supra* note 1, at 322.

¹² *Id.*

¹³ Alston & Goodman, *supra* note 10, at 1477.

¹⁴ *Id.*

¹⁵ JOHN GERARD RUGGIE, *JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS* xi (Norton & Company, 2013).

¹⁶ *Id.*

¹⁷ Justine Nolan, *Business and Human Rights in Context*, in *BUSINESS AND HUMAN RIGHTS: FROM PRINCIPLES TO PRACTICE 2* (Dorothee Baumann-Pauly & Justine Nolan, Routledge, 2016).

¹⁸ Richard Locke, *We live in a World of Global Supply Chains*, in *BUSINESS AND HUMAN RIGHTS: FROM PRINCIPLES TO PRACTICE 299* (Dorothee Baumann-Pauly & Justine Nolan, Routledge, 2016).

which included compliance with domestic law and the implementation of voluntary measures of self-regulation.¹⁹ Nevertheless, the SRSG considered it necessary to move beyond the mandatory-voluntary discussion, and find middle ground on which cumulative progress could be achieved.²⁰ This approach, which he called “principled pragmatism”, intended to optimize the promotion and protection of human rights related to business through practical measures that were capable of transforming the daily situation of people.²¹

To this effect, the SRSG found that the conduct of corporations was affected by three different types of regulation.²² First, public governance, comprised of international and domestic law and policy.²³ Second, corporate governance, integrated by institutional designs and management systems.²⁴ And third, civil governance, represented by expectations and social pressure against corporations.²⁵ Consequently, to effectively improve corporate behavior in regards to human rights, it was necessary to develop a common platform upon which these three systems of regulation could enhance their strengths and compensate their weaknesses.²⁶ With this in mind, the SRSG drew up the UNGP as the focal point needed to guide public, corporate and civil governance towards the same goal: the protection and respect of human rights.²⁷ The regulatory framework presented in the UNGP will be studied in the next section.

B. *Protect, Respect and Remedy Framework*

The UNGP regulatory framework is underpinned with three pillars identified by the verbs protect, respect and remedy.²⁸ In this segment, I will only outline the general features since an in-depth analysis of each of the UNGP will be provided in chapter IV of this essay.

The first pillar, the obligation to protect, is aimed at States and tends to guide public governance towards the protection of human rights from corporate abuse. For this purpose, States have to adopt effective policies,

¹⁹ Ruggie, *supra* note 15, at xxii.

²⁰ *Id.* at xxiii.

²¹ *Id.* at xlii.

²² John Gerard Ruggie, *Hierarchy or Ecosystem? Regulating Human Rights Risks of Multinational Enterprises*, in *BUSINESS AND HUMAN RIGHTS: BEYOND THE END OF THE BEGINNING* 48 (César Rodríguez Garavito, Cambridge University Press, 2017).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Ruggie, *supra* note 15, at 78.

²⁷ *Id.* at 47.

²⁸ UN Guiding Principles on Business and Human Rights, General Principles.

legislation and regulations to prevent, investigate, punish and redress any such abuse.²⁹

The second pillar, the responsibility to respect, is directed at all types of corporations, regardless of their size, sector or operational context.³⁰ It aims to expand corporate governance so it can embrace the respect for human rights by avoiding to cause harm to others and addressing any adverse effect they might have.³¹ Thus, every company should develop a human rights due diligence process to identify the potential risks its commercial activity may pose and to adopt the necessary measures to mitigate them.³²

Finally, the purpose of the third pillar is to provide effective remedy to victims of human rights violations. To this end, States have to punish and redress any corporate violation of human rights through judicial, legislative, administrative or any other appropriate means.³³ As well, corporations must implement and participate in remedial mechanisms, even in the case that the State is unwilling or unable to respond to a given abuse.³⁴ Consequently, the procedures to provide a remedy to the victims can be State-based judicial (civil or criminal justice), State-based non-judicial (administrative process or conciliation) and non-State-based (agreements with victims, mutually accepted mediation, among others).³⁵

Taking into account that three different systems of regulation affect the conduct of business enterprises (public, corporate and civil governance), the UNGP framework follows an experimentalist design, which is characterized by the open participation of a variety of actors and a network-like structure, rather than a rigid, vertical hierarchy between stakeholders.³⁶ The SRSG considered that experimentalist governance was the adequate approach to govern the conduct of corporations because, in his view, other traditional, integrated or top-down models of governance have limited utility when dealing with current global challenges.³⁷ Therefore, if corporations are growing exponentially and operating in a network-like fashion, regulation has to be dynamic and flexible enough to keep pace even in the form of soft-law. This SRSG's decision did not go unnoticed by many human rights professionals and scholars, who reacted to the UNGP. The principal points of criticism will be summarized in the following section.

²⁹ *Id.* at Art. 1.

³⁰ *Id.* at Art. 14.

³¹ *Id.* at Art. 11.

³² *Id.* at Art. 15.

³³ *Id.* at Art. 26.

³⁴ *Id.* at Art. 29.

³⁵ Ruggie, *supra* note 15, at 102.

³⁶ Gráinne de Búrca, Robert O. Keohane and Charles Sabel, *New Modes of Pluralist Global Governance*, 45(1) N.Y.U.J. Int'L L. & Pol. 723, 738 (2013).

³⁷ Ruggie, *supra* note 22, at 49.

C. *Critiques of the UNGP*

The main criticism against the UNGP is that they constitute a voluntary initiative with no binding effect and, consequently, misrepresent the proper steps required to regulate corporations in regards to human rights.³⁸ For many scholars, the respect for human rights cannot be conditioned to the goodwill of corporations because, as Milton Friedman stated, companies are only concerned with making as much money as possible.³⁹ Therefore, professionals that support this idea are in favor of negotiating and adopting a legally binding treaty on business and human rights, or even the creation of an international court to settle claims against corporations for violating fundamental rights.⁴⁰

In response to this, the SRSG affirmed that the treaty route is unsuitable because, since the topic of business and human rights is still new for governments, the negotiation of a treaty would take a long time and human rights would have to be safeguarded by other means in the meantime.⁴¹ Moreover, the SRSG acknowledged that existing human rights treaties have not been entirely effective.⁴² Conversely, the committees currently in place cannot fulfill their duties even though they might only monitor compliance with a single set of rights.⁴³ Therefore, it would be unrealistic for these committees to cover a broader range of rights in a never-ending number of corporations.⁴⁴

A second criticism is that UNGP do not allow enough civil participation.⁴⁵ Consequently, if civil governance is not highly developed,⁴⁶ the regulatory framework will be ineffective to shift the power dynamics and compensate for the asymmetrical social relations that cause human rights abuses.⁴⁷

³⁸ Christine Parker & John Howe, Ruggie's Diplomatic Project and its Missing Regulatory Infrastructure, in *THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS* 273 (Radu Mares, Martinus Nijhoff Publishers 2012).

³⁹ See Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. Times Magazine, September 11, 1970.

⁴⁰ See SURYA DEVA & DAVID BILCHITZ, *BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXT AND CONTOURS* (Cambridge University Press, 2017).

⁴¹ Ruggie, *supra* note 19, at 57.

⁴² *Id.* at 60.

⁴³ *Id.* at 64.

⁴⁴ *Id.*

⁴⁵ See Tara J. Melish, Putting Human Rights Back into the UNGP on Business and Human Rights: Shifting Frames and Embedding Participation Rights, in *BUSINESS AND HUMAN RIGHTS: BEYOND THE END OF THE BEGINNING* (César Rodríguez Garavito, Cambridge University Press, 2017).

⁴⁶ César Rodríguez-Garavito, Business and Human Rights: Beyond the End of the Beginning, in *BUSINESS AND HUMAN RIGHTS: BEYOND THE END OF THE BEGINNING* 41 (César Rodríguez Garavito, Cambridge University Press, 2017).

⁴⁷ Chris Jochnick, *Shifting Power on Business and Human Rights: States, Corporations*

In this respect, the SRSG replied that he conceptualized UNGP bearing in mind the importance of civil society participation, which plays a vital role in the experimentalist approach.⁴⁸ Furthermore, he said that UNGP constitute an effective tool for advocacy that can be used by NGOs and workers associations.⁴⁹

The above criticism is weighty and persuasive. However, we should remember that even when UNGP marked the end of a long journey towards regulating business and human rights, they are just the starting point on which further developments can be constructed. Therefore, the voluntary nature of UNGP and the limited role of civil society can be strengthened by building upon this common platform, as I will illustrate in the next section.

D. *Building upon UNGP*

The UNGP have two different dimensions.⁵⁰ The static dimension is shaped by their foundational and operational standards.⁵¹ However, the dynamic dimension refers to their ability to foster the creation of new norms and practices that, when pulling in the same direction, can improve corporate compliance with human rights.⁵² Therefore, UNGP must be understood as ongoing processes rather than a fixed document.⁵³

In this sense, the effectiveness of UNGP must be improved through the strategic development of public, corporate and civil governance. If these three systems operate together, they can generate cumulative progress and contribute to the protection of human rights.⁵⁴

As César Rodríguez-Garavito asserts, the field of human rights is expanding its boundaries with the incorporation of new rights, different duty-bearers and rights-holders, as well as innovative types of regulation and adjudication.⁵⁵ These novel elements coexist in a way that is both horizontal and interconnected, resembling the structure of an ecosystem.⁵⁶ Consequently, the individual contribution of each component and the reinforcing or symbiotic

and Civil Society in Global Governance, in *BUSINESS AND HUMAN RIGHTS: BEYOND THE END OF THE BEGINNING* (César Rodríguez Garavito, Cambridge University Press, 2017).

⁴⁸ Ruggie, *supra* note 22, at 52.

⁴⁹ *Id.* at 53.

⁵⁰ Rodríguez-Garavito, *supra* note 46, at 11.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Ruggie, *supra* note 22, at 47.

⁵⁴ Rodríguez-Garavito, *supra* note 46, at 11.

⁵⁵ César Rodríguez-Garavito, *The Future of Human Rights, from Gatekeeping to Symbiosis*, 20 *SUR International Journal on Human Rights* 499, 505 (2014).

⁵⁶ *Id.*

relations each can build with the others are essential to the effective protection of the people.⁵⁷

Having analyzed the background, context and current regulation of business and human rights, the following sections discuss whether Mexico's recent adoption of the criminal liability of corporations, as part of public governance, advances the implementation of UNGP, and if it builds mutually reinforcing relationships with corporate and civil governance, as encouraged by the dynamic dimension of UNGP.

III. CRIMINAL LAW IN RELATION TO BUSINESS AND HUMAN RIGHTS

In this chapter, I will address the role of criminal law as a protector of human rights. I will also examine the enforcement of the criminal liability of corporations (CLC), as it is regulated in Mexico. Since the main topic of this essay falls within the field of business and human rights, explanations on the CLC will be brief.

1. *Criminal Law as a Protector of Human Rights*

The Political Constitution of the United Mexican States confers authority to the Congress to determine criminal offenses against the Federation and their corresponding penalties.⁵⁸ However, this does not imply that the legislators can punish any type of behavior, since their punitive power is limited by the objectives of criminal law.⁵⁹

For this reason, since the primary purpose of criminal law is to safeguard legally protected assets, the only conducts that can be considered crimes are those that can harm said assets or put them in actual danger.⁶⁰ Nevertheless, the defense of legally protected assets is not only undertaken by criminal law, but also by the entire legal system.⁶¹ Therefore, since criminal repression is the most violent response of the State against an individual, it should only punish the most severe attacks against the assets deemed most essential for society.⁶² Less harmful behaviors should be regulated by other branches of law such as civil

⁵⁷ *Id.*

⁵⁸ Constitución Política de los Estados Unidos Mexicanos [C.P.E.U.M.] [Political Constitution of the United States of Mexico], as amended, article 73 XXI b), Diario Oficial de la Federación [D.O.], February 5, 1917, (Mex.).

⁵⁹ CLAUS ROXIN, DERECHO PENAL PARTE GENERAL [Criminal Law General Part] 51 (Civitas, 1997).

⁶⁰ *Id.*

⁶¹ *Id.* at 65.

⁶² *Id.*

or administrative law.⁶³ This is why criminal law is considered the last resort of the social policy.⁶⁴

In this sense, legally protected assets can be defined as given circumstances or aims that are useful to the free development of the individual.⁶⁵ Consequently, legally protected assets are, for example, life, physical integrity, liberty, public health or the environment, without which the development of the individual would terminate or be severely compromised.⁶⁶

At this point, the object of protection of criminal law coincides with the natural concept of human rights.⁶⁷ Nonetheless, we should emphasize that criminal law only punishes serious offenses to legally protected assets, as described in law, while human rights violations can be caused by many other behaviors that may not be considered crimes.

This is not the place to delve further into this topic. However, Chapter IV of this essay provides a chart of the internationally recognized human rights and the crimes that directly go against them. Let us now examine how criminal law can be enforced, so it can regulate the impact that business enterprises have on human rights.

2. Mexico's Regime for Criminal Liability of Corporations

On June 18, 2016, Mexico's National Code of Criminal Procedures (NCCP) was enacted.⁶⁸ Besides the implementation of an accusatorial criminal justice system, the NCCP introduced a special procedure to prosecute legal persons;⁶⁹ that is, any collective organization composed of individuals, which operates as a separate entity, such as corporations.⁷⁰ In this section, I will address the key features of the CLC.

A. Background

Historically, the criminal system of Mexico considered that only natural persons could commit crimes. Nevertheless, since commercial activity was

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 54.

⁶⁶ JUAN BUSTOS & HERNÁN HORMAZÁBAL, LECCIONES DE DERECHO PENAL 56 [Lessons of Criminal Law] (Trotta, 1997).

⁶⁷ Marie Bénédicte Dembour, What are Human Rights? Four Schools of Thought, 32 Human Rights Quarterly 1, 2 (2010).

⁶⁸ Código Nacional de Procedimientos Penales [C.N.P.P.] [National Code of Criminal Procedures], *as amended*, Diario Oficial de la Federación [D.O.], March 5, 2014, (Mex.).

⁶⁹ *Id.* at Arts. 421-425.

⁷⁰ LUIS DAVID COAÑA BE, LA RESPONSABILIDAD PENAL DE LAS EMPRESAS 11 [The Criminal Liability of Corporations] (INACIPE, 2017).

increasingly generating risks that oftentimes led to the commission of crimes, Congress drafted the CLC as a mechanism to allow the indictment of all legal persons, excluding State-owned or operated institutions.⁷¹

In doing so, legislators aimed to modernize the regulations, since the dissipation of liability between the holding and its subsidiaries, the complex distribution of tasks within the organization, and interstate and transnational commercial activities were hindering the enforcement of criminal law.⁷² Taking these challenges into account, Congress produced the accusation model to be analyzed next.

B. *Accusation Model*

Article 421 of the NCCP establishes a direct and autonomous accusation model against legal persons.⁷³ This means that legal persons can be liable for the commission of a crime, regardless of the responsibility of the natural person directly involved in the facts.⁷⁴ Moreover, this provision establishes two requirements for the accusation of a legal person: (i) that the crime be committed in its name, for its benefit or through means provided by it, (ii) and that, in addition, a non-compliance with the due control in the organization be proven.⁷⁵

The second condition implies that, if the legal person demonstrates due control in the organization; that is, the implementation of strategies, protocols and policies to identify risks and prevent crimes from being committed, its criminal responsibility would be ruled out or, at least, attenuated. This is because a natural person that eludes due diligence controls to commit a crime is acting on his or her own and not on behalf of the corporation.⁷⁶ Consequently, corporations should adopt a compliance program to manage and mitigate criminal risks as an essential measure to avoid criminal liability.⁷⁷ The requirements of such a program will be analyzed hereunder.

⁷¹ Código Nacional de Procedimientos Penales [C.N.P.P.] [National Code of Criminal Procedures], *as amended*, Art. 421, Diario Oficial de la Federación [D.O.], March 5, 2014, (Mex.).

⁷² Coaña, *supra* note 70, at 3.

⁷³ Código Nacional de Procedimientos Penales [C.N.P.P.] [National Code of Criminal Procedures], *as amended*, Art. 421, Diario Oficial de la Federación [D.O.], March 5, 2014, (Mex.).

⁷⁴ Coaña, *supra* note 70, at 15.

⁷⁵ Código Nacional de Procedimientos Penales [C.N.P.P.] [National Code of Criminal Procedures], *as amended*, Art. 421, Diario Oficial de la Federación [D.O.], March 5, 2014, (Mex.).

⁷⁶ Coaña, *supra* note 70, at 16.

⁷⁷ Miguel Ontiveros Alonso, ¿Para qué sirve el compliance en materia penal? [What is the purpose of a criminal compliance program?], in EL CÓDIGO NACIONAL DE PROCEDIMIENTOS PENALES. ESTUDIOS 146 [Studies on the National Code of Criminal Procedures] (Sergio García Ramírez, IIJ-UNAM, 2015).

C. *Criminal Compliance Program*

A criminal compliance program is composed of a broad assortment of measures implemented by an organization to prevent the commission of crimes.⁷⁸ It expresses the corporate commitment to adopt a culture of legality.⁷⁹ However, in Mexico there is a legal void on this topic because, even when the NCCP assumes the adoption of such program to rule out or attenuate the CLC, there is no further provision that explains its requirements.

Therefore, to fill this legal gap, it is necessary to dip into external materials, such as comparative law or standardization norms like ISO 19600 on compliance management systems, ISO 26000 on social responsibility, or even the UNGP for they provide recommendations on this issue.⁸⁰ Thus, a criminal compliance program should consider, at least, the following aspects: (i) the identification of criminal risks, (ii) the adoption and implementation of protocols and policies to mitigate such risks, (iii) corporate commitment to prevent the commission of crimes, (iv) the allocation of financial resources and the creation of a body to run the program, (v) the creation of internal disciplinary and grievance mechanisms, (vi) internal and external communication of the progress made and (vii) the continuous program revision.⁸¹

There are still several areas of the CLC that need to be complemented by Congress and these will be pointed out in Chapter IV of this essay. However, this has not been an obstacle for some Mexican states to also adopt the CLC at the local level and develop more comprehensive regulations, as in the case of the state of Quintana Roo,⁸² to which I will return later. For now, let us continue with the analysis of the CLC as regulated by the NCCP.

D. *Crimes that can be Attributed to Legal Persons*

One interesting feature of the CLC is that legal persons cannot be prosecuted for the commission of just any crime, but only those listed in the Article 11 bis of the Federal Criminal Code,⁸³ which are mainly related to what is called economic criminal law.⁸⁴ It is not my intention to discuss why legislators only included those offenses in the CLC. However, as I will argue in

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ United Nations Guiding Principles on Business and Human Rights Arts. 19-21.

⁸¹ Coaña, *supra* note 70, at 22.

⁸² See Código Penal para el Estado de Quintana Roo [C.P.Q.R.] [Criminal Code for the State of Quintana Roo] *as amended*, Articles 18-18 nonies, Periódico Oficial del Estado de Quintana Roo [P.O.Q.R.], March 29, 1991, (Quintana Roo, Mex.).

⁸³ Código Penal Federal [C.P.F.] [Federal Criminal Code], *as amended*, Article 11 bis, Diario Oficial de la Federación [D.O.], August 14, 1931, (Mex.).

⁸⁴ Coaña, *supra* note 70, at 27.

Chapter IV, this catalog should be considerably expanded to optimize the contribution of criminal law in the protection of human rights.

E. Punishment and Alternative Dispute Resolution Mechanisms

Since legal persons are inventions and cannot be deprived of their liberty, it was necessary to conceive sanctions that were suitable to their nature. Currently, Article 422 of the NCCP establishes the following: (i) fines, (ii) comprehensive reparation of damages, (iii) confiscation of assets, (iv) the publication of a sentence (v) and the dissolution of the organization.⁸⁵

However, a criminal conviction can also entail non-legal consequences, such as a tarnished image of the corporation, decreased value of the company and its shares, a loss of clients and suppliers, and limitations for obtaining credit, among others.⁸⁶ In this sense, the CLC also enables alternative dispute resolution mechanisms, so that, by compensating the victims, corporations can avoid these undesirable effects.⁸⁷

Having studied the role of criminal law as a subsidiary protector of human rights and its enforcement against legal persons, let us analyze the contribution of the CLC to business and human rights.

IV. THE CLC: A STEP FORWARD IN THE IMPLEMENTATION OF THE UNGP?

So far, we have explored the current situation of business and human rights, as well as the purpose, content and scope of the CLC as it has recently been implemented in Mexico. We will now delve into the central issue of this article and determine to what extent the CLC contributes to regulate the conduct of corporations in accordance with the UNGP. To this effect, this chapter will scrutinize each of the foundational and operational standards to determine up to what point the CLC can fulfil them.

1. Contribution to the State Duty to Protect

The State duty to protect human rights is stated in the first part of the framework and comprises UNGP 1 to 10.

⁸⁵ Código Nacional de Procedimientos Penales [C.N.P.P.] [National Code of Criminal Procedures], *as amended*, Art. 422, Diario Oficial de la Federación [D.O.], March 5, 2014, (Mex.).

⁸⁶ Coaña, *supra* note 70, at 30.

⁸⁷ Código Nacional de Procedimientos Penales [C.N.P.P.] [National Code of Criminal Procedures], *as amended*, Art. 424, Diario Oficial de la Federación [D.O.], March 5, 2014, (Mex.).

A. Guiding Principle 1

This principle establishes the State duty to protect against human rights violations by third parties, including corporations, within their territory and/or jurisdiction.⁸⁸ To this effect, States must take appropriate steps to prevent, investigate, punish and redress human rights abuse, through effective policies, legislation, regulations and adjudication.⁸⁹

Mexico has partially fulfilled these obligations by adopting the CLC, since it is a legislative measure that aims to protect human rights, in the form of legally protected assets, from potentially harmful activities carried out by business enterprises. Furthermore, as a national law, it applies to all Mexican territory at both federal and local levels. Hence, the enactment of the CLC represents an appropriate step towards preventing, investigating, punishing and redressing human rights abuses by corporations.

However, compliance with this UNGP is incomplete because, according to Article 11 bis of the FCC,⁹⁰ the CLC is limited to specific crimes, which do not entirely encompass the broad array of human rights outlined in the International Bill of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work, as indicated in UNGP 12.

Therefore, the scope of protection of the CLC in Mexico should be extended, so it can cover all human rights violations applicable to criminal law. The discussion on the scope of defense provided by the CLC is found in the analysis of the UNGP 12, but let us continue with the following principle.

B. Guiding Principle 2

This principle provides that States must clearly lay down the expectation that all companies in their territory and jurisdiction are to respect human rights throughout their operations.⁹¹

In this regard, legislation is a suitable way of setting out social expectations since it is ultimately an instrument of communication. Consequently, to fully comply with this principle, among other measures, it is necessary for States to enact law that explicitly specify corporations' obligation to respect human rights. Currently, there is no such law in Mexico. However, the CLC helps to create the expectation that corporations should respect the human rights protected by criminal law. In this sense, due to the restricted catalog of crimes companies can held responsible for, the CLC only partially meets

⁸⁸ United Nations Guiding Principles on Business and Human Rights Art. 1.

⁸⁹ *Id.*

⁹⁰ Código Penal Federal [C.P.F.] [Federal Criminal Code], as amended, Article 11 bis, Diario Oficial de la Federación [D.O.], August 14, 1931, (Mex.).

⁹¹ United Nations Guiding Principles on Business and Human Rights Article 1.

with this UNGP. Nevertheless, as I will further argue, if this catalog were extended to other existing crimes, it could enhance the contribution of the CLC to this UNGP.

C. Guiding Principle 3

This principle refers to the State regulatory function and establishes four different obligations.⁹² First, to enforce laws that require corporations to respect human rights; second, to ensure that other laws and policies that govern corporations do not limit but promote respect for human rights; third, to provide guidance to companies on how to respect human rights in their operations; and fourth, to encourage business enterprises to communicate how they are addressing their impact on human rights.⁹³

In connection with the first obligation, the CLC constitutes a legislative measure that clearly demands corporations to respect human rights. Article 421 of the NCCP states that legal persons shall be responsible for any crimes committed in their name, in their benefit or through the means that they provide, if it can be proven a lack of control in the organization.⁹⁴ As analyzed in Chapter III, to prove proper control and, consequently, rule out their liability, corporations must demonstrate the existence of an effective compliance program, which includes the detection, prevention and mitigation of criminal risks. Consequently, the CLC indirectly contributes to this compliance since it requires companies to implement a criminal preventive program as part of their responsibility to respect human rights.

As regards the second obligation, the CLC has made no contribution because it is mainly related to corporate law. Nevertheless, the CLC can play an important role in the third and fourth obligations. Currently, neither the FCC nor the NCCP explain the mandatory features of a criminal compliance program. However, these provisions can be reformed to provide sufficient guidance on how to develop an efficient criminal compliance program, which can include the creation of channels to communicate the preventive measures implemented by the corporations. One example of this is found in the local legislation of the state of Quintana Roo, Mexico, which elaborates on the requirements of a criminal compliance program, including the identification of risks, the adoption of protocols and the allocation of financial resources for the prevention of crimes, the creation of a body in charge of the program implementation, the creation of internal grievance mechanisms, and the constant review and updating of the adopted programs.⁹⁵ If this guidance on

⁹² *Id.* at Art. 3.

⁹³ *Id.*

⁹⁴ Código Nacional de Procedimientos Penales [C.N.P.P.] [National Code of Criminal Procedures], *as amended*, Art. 421, Diario Oficial de la Federación [D.O.], March 5, 2014, (Mex.).

⁹⁵ *See* Código Penal para el Estado de Quintana Roo [C.P.Q.R.] [Criminal Code for the

how corporations can respect human rights is provided at a local level, there is no obstacle for doing the same at the federal level.

D. Guiding Principles 4, 5 and 6

These guidelines are related to the State's responsibility when conducting commercial activities, licensing others to provide services with potential impact on human rights and hiring private corporations.⁹⁶

Principle 4 establishes the obligation to protect against human rights abuses by corporations that are owned or controlled by the State.⁹⁷ To this effect, the CLC has nothing to offer since, according to the second paragraph of Article 421 of the NCCP, State institutions cannot incur in criminal liability.⁹⁸ It is understandable to safeguard the operation of official corporations because, to some extent, they perform public services. Therefore, the suspension of activities or the dissolution of the company would be undesirable for the State and possibly more harmful to society than the crime committed. However, this exemption should not be interpreted as if the official corporations were not required to implement a criminal compliance program. They might not be accountable for the crimes, but they still have the duty to prevent crimes from happening. For these reasons, non-criminal (administrative) measures would be more suitable to comply with this obligation.

Meanwhile, principle 5 provides that States must oversee the operations of companies that provide privatized services with a direct impact on human rights, such as water supply, electric energy, healthcare, and private security, among others.⁹⁹ In this regard, since such corporations are not owned or controlled by the State, they can be criminally liable. Consequently, the CLC contributes to comply with this guideline because by monitoring company operations, the State is able to initiate a criminal procedure for the commission of a crime as an accountability mechanism.

In addition, principle 6 orders that States should promote respect for human rights by corporations with which they conduct commercial transactions.¹⁰⁰ To this end, the CLC can play an important role since States are able to set the implementation of a criminal compliance program as an official requirement for public contracting.

State of Quintana Roo] *as amended*, Article quinquies, Periódico Oficial del Estado de Quintana Roo [P.O.Q.R.], March 29, 1991, (Quintana Roo, Mex.).

⁹⁶ United Nations Guiding Principles on Business and Human Rights Articles 4-6.

⁹⁷ *Id.* at Art. 4.

⁹⁸ Código Nacional de Procedimientos Penales [C.N.P.P.] [National Code of Criminal Procedures], *as amended*, Article 421, Diario Oficial de la Federación [D.O.], March 5, 2014, (Mex.).

⁹⁹ United Nations Guiding Principles on Business and Human Rights Article 5.

¹⁰⁰ *Id.* at Art. 6.

E. Guiding Principle 7

This principle establishes the obligation of States to guarantee that business enterprises will respect human rights in conflict-affected areas.¹⁰¹ John Ruggie defines a conflict-affected area as a law-free zone with no central authority because the State is unwilling or unable to respect, protect and fulfill human rights.¹⁰² This generally occurs in countries involved in armed conflict or with authoritarian governments. It is a delicate problem since most gross human rights violations take place under these circumstances.¹⁰³

To comply with this UNGP, countries must help corporations identify and prevent human rights risks and assist them in the implementation of procedures to minimize such risks.¹⁰⁴ Moreover, States should suspend or deny public support to companies that do not cooperate in this effort, and ensure that measures are in place to sanction any involvement in human rights abuses.¹⁰⁵

In this regard, the CLC can be very helpful because, as seen above, it obligates corporations to develop a due diligence program to detect and mitigate criminal risks. Hence, the assistance that States must provide to protect human rights can be more effective if corporations have already implemented preventive policies and compliance structures.

Moreover, the CLC is an enforcement mechanism to punish human rights abuses perpetrated by corporations, which can not only be applied within the Mexican territory but also beyond its borders. Article 4 of the FCC provides that the crimes committed abroad by or against Mexicans can be prosecuted and punished according to the federal laws when the defendant is domiciled in Mexico, when the crime has not already been judged elsewhere and the facts constitute a crime both in Mexico and in the country where they took place.¹⁰⁶

For this reason, the CLC makes it possible to sanction not only the crimes committed in Mexico by domestic or foreign corporations, but also those perpetrated by Mexican companies in any other country. This extraterritorial feature of the CLC has enormous potential for the “home country” to punish human rights violations that occur in “host countries”, that might be conflict-affected zones, where law enforcement is almost impossible.

¹⁰¹ *Id.* at Art. 7.

¹⁰² See Ruggie, *supra* note 15, Chapter 1.

¹⁰³ *Id.*

¹⁰⁴ United Nations Guiding Principles on Business and Human Rights Art. 7.

¹⁰⁵ *Id.*

¹⁰⁶ Código Penal Federal [C.P.F.] [Federal Criminal Code], as amended, Article 4, Diario Oficial de la Federación [D.O.], August 14, 1931, (Mex.).

F. Guiding Principles 8, 9 and 10

These principles are related to the policy coherence that States must uphold.¹⁰⁷ To this effect, countries must provide State-based institutions nationwide with information and support to fulfill their human rights obligations.¹⁰⁸ This includes preparing and training investigation and law enforcement agencies to learn how to draw upon the CLC. In the international arena, States should promote business respect for human rights in the multilateral institutions of which they are members.¹⁰⁹ In this case, if the CLC helps to comply with this duty, Mexico should encourage other countries to adopt similar measures in their criminal justice systems.

2. Contribution to the Corporate Responsibility to Respect

So far, I have analyzed how the adoption of the CLC contributes to the State duty to protect human rights. In this section, I will examine whether it is also useful to comply with the corporate responsibility to respect these rights.

A. Guiding Principle 11

This principle provides that corporations should respect human rights.¹¹⁰ Therefore, they must avoid infringing on the human rights of others and address any negative impact they might have.¹¹¹

As discussed, this guideline has been severely criticized because its observation depends on corporate goodwill and entails a voluntary system of adoption and implementation of codes of conduct with no enforcement mechanisms.¹¹² Therefore, it urges, but does not oblige companies to respect human rights.

In this respect, the adoption of the CLC establishes not only the moral responsibility, but also the binding obligation of corporations to respect human rights protected by criminal law. The CLC also encourages business enterprises to implement a criminal compliance program, for it is necessary for them to exclude or attenuate their liability. Furthermore, it enables criminal procedure to function as an enforcement mechanism to punish companies that violate human rights while equipping victims with a comprehensive set of substantive and procedural rights. For these reasons, the CLC has great

¹⁰⁷ United Nations Guiding Principles on Business and Human Rights Arts. 8-10.

¹⁰⁸ *Id.* at Art. 8.

¹⁰⁹ *Id.* at Art. 10.

¹¹⁰ *Id.* at Art. 11.

¹¹¹ *Id.*

¹¹² Weissbrodt & Kruger, *supra* note 1, at 338.

potential to transform the international soft law of the UNGP into domestic hard law, and to empower the participation of civil society.

B. *Guiding Principle 12*

This UNGP determines the scope of human rights that corporations should respect. Since commercial activity is potentially harmful to almost all of the internationally recognized human rights, it states that business enterprises must respect, at least, those established in the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as well as the principles set out by the International Labour Organization in the Declaration on Fundamental Principles and Rights at Work.¹¹³

As analyzed in Chapter III, the CLC in Mexico is restricted to the crimes that are listed in Article 11 bis of the FCC.¹¹⁴ The next chart contains the criminal offenses that can be attributed to companies and the legal asset to be protected.

CRIMES CONSIDERED IN THE CLLP

| <i>Crime</i> | <i>Protected Asset</i> |
|---|---------------------------------------|
| Terrorism | Several |
| Drug-related | Health |
| Corruption of minors and persons with disabilities | Unhindered development of personality |
| Anti-corruption crimes | Public service |
| Money forgery | Public finances |
| Crimes against national wealth | National wealth |
| Human trafficking | Several |
| Vehicle theft and commercialization of stolen goods | Property |
| Fraud | Property |
| Concealment | Justice administration |
| Money laundering | Several |
| Environmental crimes | Environment |
| Crimes against the author's right | Author's right |
| Arms trafficking, introduction and gathering | Several |
| Human organ commercialization | Several |
| Kidnapping | Liberty |
| Smuggling | Public finances |

¹¹³ United Nations Guiding Principles on Business and Human Rights Art. 12.

¹¹⁴ Código Penal Federal [C.P.F.] [Federal Criminal Code], *as amended*, Art. 11 bis, Diario Oficial de la Federación [D.O.], August 14, 1931, (Mex.).

| <i>Crime</i> | <i>Protected Asset</i> |
|------------------------------------|------------------------|
| Tax fraud | Public finances |
| Crimes against industrial property | Industrial property |
| Banking and financial crimes | Financial system |
| Bankruptcy-related crimes | Property |
| Chemical substance-related crimes | Several |

Considering that it is a small catalog, most of the human rights that corporations should respect fall outside the scope of the CLC. However, it would be desirable to reform this article so as to include other existing crimes and optimize the protection of a broader range of human rights.

The following charts draw a parallel between the human rights recognized in the International Bill of Rights and the Declaration on Fundamental Principles and Rights at Work, and the specific offence that is legally defined to protect them. It is also indicated whether these crimes can be attributed to corporations or not. The abbreviation N/A is used when there is no offence established in law that directly aims to protect the corresponding human right.

UNIVERSAL DECLARATION OF HUMAN RIGHTS

| <i>Art.</i> | <i>Human Right</i> | <i>Crime</i> | <i>Legal Basis</i> | <i>CLC</i> |
|-------------|---|--|--------------------|------------|
| 2 | Non-discrimination | Discrimination | Art. 149 ter FCC | NO |
| 3 | Life | Homicide | Art. 302 FCC | NO |
| | | Genocide | Art. 149 bis FCC | NO |
| | Physical integrity | Injuries | Art. 288 FCC | NO |
| | Liberty and security of person | Unlawful deprivation of liberty | Art. 364 FCC | NO |
| | | Kidnapping | Special Law | YES |
| 4 | Prohibition of slavery or servitude | Human trafficking | Special Law | YES |
| 5 | Prohibition of torture, cruel, inhuman or degrading treatment or punishment | Torture, cruel, inhuman or degrading treatment or punishment | Special Law | NO |
| 6 | Legal personality | N/A | N/A | N/A |
| 7 | Equality and non-discrimination | Discrimination | Art. 149 ter FCC | NO |
| 8 | Access to justice and effective remedy | Denial of Justice | Art. 215 (IV) FCC | NO |
| 9 | Prohibition of arbitrary arrest, detention or exile | Abuse of authority | Art. 215 (VI) FCC | NO |
| 10 | Public hearing, independent and impartial tribunal | Against justice administration | Art. 225 FCC | NO |

| <i>Art.</i> | <i>Human Right</i> | <i>Crime</i> | <i>Legal Basis</i> | <i>CLC</i> |
|-------------|--|--|--------------------|------------|
| 11 | Presumption of innocence and procedural rights | Against justice administration | Art. 225 FCC | NO |
| 12 | Prohibition of arbitrary interference with privacy, family, home, correspondence, honor and reputation | Violation of correspondence and communications | Art. 173 FCC | NO |
| 13 | Freedom of movement and residence | Unlawful deprivation of liberty | Art. 364 FCC | NO |
| | | Attacks to public roads | Art. 165 FCC | NO |
| 14 | Asylum from prosecution | N/A | N/A | N/A |
| 15 | Nationality | N/A | N/A | N/A |
| 16 | Consent to marriage and family rights | Human trafficking | Special Law | YES |
| 17 | Private property | Theft | Art. 367 FCC | YES |
| | | Abuse of confidence | Art. 382 FCC | NO |
| | | Fraud | Art. 386 FCC | YES |
| | | Extortion | Art. 390 FCC | NO |
| | | Dispossession of land | Art. 395 FCC | NO |
| | | Damages | Art. 397 FCC | NO |
| 18 | Freedom of thought, conscience and religion | N/A | N/A | N/A |
| 19 | Freedom of opinion and expression | N/A | N/A | N/A |
| 20 | Freedom of assembly and association | N/A | N/A | N/A |
| 21 | Political rights | Electoral crimes | Special law | NO |
| 22 | Social security | Social security crimes | Special law | NO |
| 23 | Labor rights | Labor crimes | Special law | NO |
| 24 | Rest and leisure | Labor crimes | Special law | NO |
| 25 | Adequate standard of living and health | N/A | N/A | N/A |
| 26 | Education | N/A | N/A | N/A |
| 27 | Cultural life and scientific advancements | N/A | N/A | N/A |
| 27 | Author's right | Against the author's right | Art. 424 FCC | YES |

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

| <i>Art.</i> | <i>Human Right</i> | <i>Crime</i> | <i>Legal Basis</i> | <i>CLC</i> |
|-------------|--|---|--------------------|------------|
| 1 | Self-determination | N/A | N/A | N/A |
| 2 | Non-discrimination | Discrimination | Art. 149 ter FCC | NO |
| 3 | Equality between men and women | Discrimination | Art. 149 ter FCC | NO |
| 6 | Life | Homicide | Art. 302 FCC | NO |
| | | Genocide | Art. 149 bis FCC | NO |
| | Physical integrity | Injuries | Art. 288 FCC | NO |
| 7 | Prohibition of torture, cruel, inhuman or degrading treatment or punishment. | Torture, cruel, inhuman or degrading treatment or punishment. | Special Law | NO |
| 8 | Prohibition of slavery, servitude, compulsory labor | Human trafficking | Special Law | YES |
| 9 | Liberty and security of person | Unlawful deprivation of liberty | Art. 364 FCC | NO |
| | | Kidnapping | Special Law | YES |
| | Prohibition of arbitrary arrest or detention. | Abuse of authority | Art. 215 (VI) FCC | NO |
| 11 | Prohibition of imprisonment for civil debts | N/A | N/A | N/A |
| 12 | Freedom of movement and residence | Unlawful deprivation of liberty | Art. 364 FCC | NO |
| 14 | Presumption of innocence and procedural rights | Against justice administration | Art. 225 FCC | NO |
| 15 | Non-retroactivity of criminal laws | N/A | N/A | N/A |
| 16 | Legal personality | N/A | N/A | N/A |
| 17 | Prohibition of arbitrary interference with privacy, family, home, correspondence, honor and reputation | Violation of correspondence and communications | Art. 173 FCC | NO |
| 18 | Freedom of thought, conscience and religion | N/A | N/A | N/A |
| 19 | Freedom of opinion and expression | N/A | N/A | N/A |
| 21 | Freedom of assembly | N/A | N/A | N/A |
| 22 | Freedom of association | N/A | N/A | N/A |

| <i>Art.</i> | <i>Human Right</i> | <i>Crime</i> | <i>Legal Basis</i> | <i>CLC</i> |
|-------------|--------------------------------------|-------------------|--------------------|------------|
| 23 | Consented marriage and family rights | Human trafficking | Special Law | YES |
| 24 | Name and nationality | N/A | N/A | N/A |
| 25 | Political rights | Electoral crimes | Special law | NO |
| 26 | Equality and non-discrimination | Discrimination | Art. 149 ter FCC | NO |

INTERNATIONAL COVENANT ON ECONOMIC,
SOCIAL AND CULTURAL RIGHTS

| <i>Art.</i> | <i>Human Right</i> | <i>Crime</i> | <i>Legal Basis</i> | <i>CLC</i> |
|-------------|---|------------------------|--------------------|------------|
| 1 | Self-determination | N/A | N/A | N/A |
| 3 | Equality between men and women | Discrimination | Art. 149 ter FCC | NO |
| 6 | Right to work | N/A | N/A | N/A |
| 7 | Minimum remuneration | Labor crime | Special law | NO |
| | Safe and healthy working conditions | Labor crime | Special law | NO |
| | Rest and leisure | Labor crime | Special law | NO |
| 8 | To form unions | N/A | N/A | N/A |
| | Strike | N/A | N/A | N/A |
| 9 | Social security | Social security crimes | Special law | NO |
| 10 | Consented marriage and family rights | Human trafficking | Special Law | YES |
| 11 | Adequate standard of living | N/A | N/A | N/A |
| 12 | The highest attainable standard of health | N/A | N/A | N/A |
| 13 | Education | N/A | N/A | N/A |
| 14 | Education | N/A | N/A | N/A |
| 15 | Cultural life | N/A | N/A | N/A |
| | Scientific progress | N/A | N/A | N/A |

ILO DECLARATION ON FUNDAMENTAL PRINCIPLES
AND RIGHTS AT WORK

| <i>Art.</i> | <i>Human Right</i> | <i>Crime</i> | <i>Legal Basis</i> | <i>CLC</i> |
|-------------|--|-------------------|--------------------|------------|
| 2 | Freedom of association and collective bargaining | N/A | N/A | N/A |
| | Elimination of forced labor | Human trafficking | Special Law | YES |
| | Abolition of child labor | Labor crime | Special law | NO |
| | Non-discrimination in employment and occupation | Discrimination | 149 ter FCC | NO |

As seen, in terms of civil and political rights, Mexican legislation defines several offences that intend to protect almost all of them. The ones that are not directly addressed, such as the right to a name, nationality or legal personality, can be indirectly protected by other figures such as human trafficking. Moreover, in regards to economic, social and cultural rights, there is specific criminal protection for labor and social security rights, as well as for the principle of non-discrimination. Furthermore, the progressive achievement of the rights to health, education, adequate standard of living, enjoyment of cultural life and scientific progress can be indirectly protected by the punishment of anti-corruption crimes.

Therefore, the currently limited contribution of the CLC to comply with this UNGP can be significantly enhanced if the catalog of crimes that can be attributed to corporations is expanded as follows:

CRIMES THAT SHOULD BE CONSIDERED IN THE CLLP

| <i>Crime</i> | <i>Protected Human Right</i> | <i>Legal Basis</i> |
|---|--|--------------------|
| Discrimination | Non-discrimination | Art. 149 ter FCC |
| Homicide | Life | Art. 302 FCC |
| Genocide | Life | Art. 149 bis FCC |
| Injuries | Physical integrity | Art. 288 FCC |
| Against reproductive rights | Reproductive rights | Art. 199 FCC |
| Unlawful deprivation of liberty | Personal liberty and security | Art. 364 FCC |
| Torture, cruel, inhuman or degrading treatment or punishment. | Prohibition of torture, cruel, inhuman or degrading treatment or punishment. | Special law |
| Denial of justice | Access to justice | Art. 215 (IV) FCC |
| Abuse of authority | Several | Art. 215 (VI) FCC |

| <i>Crime</i> | <i>Protected Human Right</i> | <i>Legal Basis</i> |
|--|--|--------------------------|
| Against justice administration | Legal certainty, procedural rights | Art. 225 FCC |
| Violation of correspondence and communications | Privacy, inviolability of communications | Art. 173 FCC |
| Attacks to public roads | Freedom of transit | Art. 165 FCC |
| Theft | Property | Art. 367 FCC |
| Abuse of confidence | Property | Art. 382 FCC |
| Extortion | Property | Art. 390 FCC |
| Dispossession of land and water sources | Property | Art. 395 FCC |
| Damages | Property | Art. 397 FCC |
| Electoral crimes | Political rights | Special law |
| Social security crimes | Social security rights | Special law |
| Labor crimes | Labor rights | Special law |
| Child pornography | Unhindered development of personality | Art. 202 FCC |
| Sexual tourism of minors | Unhindered development of personality | Art. 203 FCC |
| Prostitution of minors | Unhindered development of personality | Art. 204 FCC |
| Pederasty | Sexual liberty and unhindered development of personality | Art. 209 bis FCC |
| Rape, sexual assault, sexual harassment. | Sexual liberty and sexual development | 259 bis, 260 and 265 FCC |

This extension of the catalog is not a legislative illusion, but is a real possibility. For example, at the local level, the state of Quintana Roo has adopted a broader list of crimes that can be attributed to corporations, such as homicide, injuries, and dispossession of land, among others, which are often violated by companies.¹¹⁵ Hence, there is no limitation for the federal congress to place the CLC within the scope of protection established by this UNGP.

C. Guiding Principle 13

This principle provides that corporations should avoid causing harm or contributing to adverse human rights impacts, not only through their opera-

¹¹⁵ See Código Penal para el Estado de Quintana Roo 2017 [Criminal Code for the State of Quintana Roo] (Mexico) Art. 18 nonies.

tions, but also within the activities of their business partners.¹¹⁶ To this effect, the CLC can be very useful, taking into account the fact that crimes can be committed by one or several actors,¹¹⁷ and also result from actions or omissions.¹¹⁸ In this sense, if just one corporation is involved in a crime, it can be punished as a direct perpetrator.¹¹⁹ If a business partner commits the crime, the corporation can be sanctioned as joint-perpetrator by omission if the company fails to comply with its preventive duties within the supply chain.¹²⁰

D. Guiding Principle 14

All business enterprises, regardless of their size, can have severe human rights impacts. Therefore, this principle declares that the responsibility to respect applies to all corporations.¹²¹ However, the steps they take to meet this requirement are expected to be proportional and suitable to their size, sector, operational context, ownership and structure.¹²²

The principle of equal application of the law is also embraced by the CLC, as Article 11 bis of the FCC establishes that all legal persons, without distinction, can be punished for crimes.¹²³ Even when the FCC does not provide much detail about the requirements of a criminal compliance program, Article 18 quinquies of the Criminal Code for the state of Quintana Roo stipulates that corporate governance models should be fitting for each business enterprise.¹²⁴ Consequently, the CLC can be arranged along the lines of this guideline.

E. Guiding Principles 15 and 16

In a similar sense, principle 15 says that the policies adopted by corporations to comply with their responsibility should include three essential aspects: the specific commitment to respect human rights, a human rights due

¹¹⁶ United Nations Guiding Principles on Business and Human Rights Art. 13.

¹¹⁷ Código Penal Federal [C.P.F.] [Federal Criminal Code], *as amended*, Art. 13, Diario Oficial de la Federación [D.O.], August 14, 1931, (Mex.).

¹¹⁸ *Id.* at Art. 7.

¹¹⁹ *Id.* at Art. 13.

¹²⁰ *Id.* at Art. 7.

¹²¹ United Nations Guiding Principles on Business and Human Rights Art. 14.

¹²² *Id.*

¹²³ Código Penal Federal [C.P.F.] [Federal Criminal Code], *as amended*, Article 11 bis, Diario Oficial de la Federación [D.O.], August 14, 1931, (Mex.).

¹²⁴ Código Penal para el Estado de Quintana Roo [C.P.Q.R.] [Criminal Code for the State of Quintana Roo] *as amended*, Article 18 quinquies, Periódico Oficial del Estado de Quintana Roo [P.O.Q.R.], March 29, 1991, (Quintana Roo, Mex.).

diligence process and mechanisms to provide remediation of any violation.¹²⁵ Meanwhile, principle 16 explains that the corporate commitment to respect human rights should be approved by the most senior level of the corporation and be communicated to its personnel and business partners.¹²⁶

In the absence of a specific provision in the FCC, the corporate governance adopted by the CLC to prevent the commission of crimes can be informed by these guidelines. Thus, a criminal compliance program should include a meeting of shareholders or directors to formally adopt the commitment to prevent crimes from being committed, as well as communication channels to make this policy known both internally and externally.

F. Guiding Principles 17, 18, 19, 20 and 21

These principles explain the requirements of a human rights due diligence.¹²⁷ The first stage of this process is to identify the risks against human rights generated by the corporation's commercial activities and its supply chain.¹²⁸ To this effect, companies should ensure the participation of workers, consumers, communities and other potentially affected groups.¹²⁹ The second phase is to prevent and mitigate such risks by adopting internal policies and protocols, as well as the allocation of financial resources to ensure their communication, implementation, evaluation and revision.¹³⁰

As seen in Chapter III, the adoption of an effective criminal compliance program excludes or attenuates corporate criminal liability, for it aims at detecting, preventing and mitigating criminal risks. If the legal definition of crimes aims to protect human rights in the form of legal assets, a criminal compliance program is, to some extent, a human rights due diligence. However, the former cannot replace the latter because, even if the scope of application of the CLC is extended to all the offences that are legally defined to protect human rights, it would not encompass all possible abuses. While criminal law only sanctions serious offenses to legally protected assets, human rights violations are caused by many other means, even minor offenses that involve administrative infractions or civil liability. Nevertheless, a criminal compliance program can be an essential component of a human rights due diligence.

One relevant feature required by these UNGP is the participation of the civil society in the identification and assessment of the risks. There is no provision in Mexico that requires civil participation in a criminal compliance program. However, it would be desirable for the FCC to call for such ac-

¹²⁵ United Nations Guiding Principles on Business and Human Rights Article 15.

¹²⁶ *Id.* at Art. 16.

¹²⁷ *Id.* at Art. 17.

¹²⁸ *Id.* at Art. 18.

¹²⁹ *Id.*

¹³⁰ *Id.* at Arts. 19-21.

tion because, if violations generally occur in situations with significant power asymmetries, an effective way to prevent them is by empowering potential victims.¹³¹

3. *Access to Remedy*

In the last two sections, I have examined how the implementation of the CLC helps to comply with the UNGP in regards to the State duty to protect human rights and corporate responsibility to respect human rights. To finalize the analysis, in this chapter I will evaluate the function of the CLC as a remedial mechanism for human rights violations.

A. *Guiding Principles 25, 26 and 27*

Besides the duty to protect human rights, these principles provide that the State must also ensure effective remedy to the victims.¹³² These State-based mechanisms can be judicial or non-judicial in nature.¹³³ In this sense, the adoption of the CLC helps to meet this obligation, since it constitutes a legislative measure that enables a State-based judicial procedure to investigate and punish the crimes committed by corporations, which might involve the violation of human rights.

The sanctions that can be applied to business enterprises seek not only punishment, but also compensation.¹³⁴ Thus, after the commission of a crime, corporations can be sentenced to full remediation of the damages, which includes, at least: the restitution of the assets obtained through the crime or the payment of their cost; compensation for material and moral harm, indirect damages and the loss of profit, the loss of employment or educational opportunities, medical and psychological assistance; public apologies and guarantees of non-repetition.¹³⁵

Moreover, the CLC allows alternative dispute resolution mechanisms, such as reparatory agreements and conditional suspension of the process, which entail mediation or conciliation between the parties and the payment for the full remediation of the damages.¹³⁶ Consequently, the CLC also allows State-based non-judicial grievance mechanisms in favor of the victims.

¹³¹ See Melish, *supra* note 45; and Jochnick, *supra* note 47.

¹³² United Nations Guiding Principles on Business and Human Rights Art. 25.

¹³³ *Id.* at Arts. 26-27.

¹³⁴ Código Penal Federal [C.P.F.] [Federal Criminal Code], as amended, Article 422, Diario Oficial de la Federación [D.O.], August 14, 1931, (Mex.).

¹³⁵ *Id.* at Art. 30.

¹³⁶ *Id.* at Art. 424.

Furthermore, the CLC has other convenient features. For example, it can be attributed directly to the corporation, regardless the liability of the natural persons involved in the crime, it has extraterritorial application against Mexican companies that operate in a host country that might be unwilling or unable to prosecute them, and it is free of charge for the victims. Consequently, the CLC contributes to overcoming some legal barriers to the effective access to justice.

B. Guiding Principles 28, 29, 30 and 31

These principles provide that, besides the State-based judicial and non-judicial grievance mechanisms, States must encourage the implementation of non-State based alternatives, such as internal procedures administered by corporations alone or with the participation of other stakeholders.¹³⁷ Companies must also implement and collaborate in operational-level grievance mechanisms, to address any adverse impact on human rights in a timely manner.¹³⁸

With the adoption of the CLC, companies are required to adopt a criminal compliance program that can include a channel to file claims, as well as a dialogue-based and operational-level grievance mechanism (informed by the principles established in UNGP 31), in order to provide adequate remedy for crimes without the need of initiating a criminal procedure. This mechanism can be applied to crimes that only affect particular interests, since a direct claim for the victim is required for such crimes to be prosecuted.¹³⁹ In the case of crimes that are prosecuted *ex officio*, the implementation of a non-State based grievance mechanism by which the corporation provides compensation to the victim can attenuate its responsibility.¹⁴⁰

4. Summary

After evaluating the CLC in light of the UNGP, we can conclude that the CLC plays a significant role in the business and human rights sub-ecosystem, not only because of its direct contributions, but also for the mutually reinforcing connections it creates with corporate and civil governance. However, there are still many areas in which its performance can be optimized.

To finish this analysis, the next chart recaps the individual contributions, symbiotic relations and shortcomings of the CLC in relation to each UNGP.

¹³⁷ United Nations Guiding Principles on Business and Human Rights Art. 28.

¹³⁸ *Id.* at Art. 29

¹³⁹ Código Nacional de Procedimientos Penales [C.N.P.P.] [National Code of Criminal Procedures], *as amended*, Article 225, Diario Oficial de la Federación [D.O.], March 5, 2014, (Mex.).

¹⁴⁰ Código Penal Federal [C.P.F.] [Federal Criminal Code], *as amended*, Article 11 bis, Diario Oficial de la Federación [D.O.], August 14, 1931, (Mex.).

| UNGP | <i>Individual Contribution of the CLC to the Field of Business and Human Rights</i> | <i>Symbiotic Relation with Corporate and Civil Governance</i> | <i>Suggestions to Optimize its Contribution</i> |
|------|--|---|---|
| 1 | It represents an appropriate legislative step to protect against human rights violations by corporations. | N/A | Expand the catalog of crimes that can be attributed to corporations to broaden the scope of protection. |
| 2 | It helps to create the social expectation that corporations should respect the human rights that are protected by the criminal offenses defined in law. | It raises awareness in corporations about their duty to respect human rights and creates the social expectation that they should do so. | Expand the catalog of crimes that can be attributed to corporations to broaden the scope of protection. |
| 3 | It encourages corporations to develop a criminal compliance program to rule out or attenuate their liability, which also demands corporate respect for human rights. | It requires the implementation of a criminal compliance program in corporate governance to rule out or attenuate the liability. | Guide corporations on how to develop a criminal compliance program, including the participation of civil society. |
| 4 | N/A | N/A | N/A |
| 5 | It can punish corporations that provide privatized services with a direct impact on human rights. | N/A | Expand the catalog of crimes that can be attributed to corporations to broaden the scope of protection. |
| 6 | N/A | N/A | Require a criminal compliance program as a condition for public contracting. |
| 7 | It enables the extraterritorial application of criminal law to sanction violations committed by Mexican corporations in conflict-affected areas. | N/A | Expand the catalog of crimes that can be attributed to corporations to broaden the scope of protection. |
| 8-10 | N/A | N/A | Promote the adoption of the CLC by other countries in multilateral organizations. |
| 11 | It establishes a binding obligation for corporations to respect the human rights that are protected by the offences defined in law, and criminal procedure has the function of an enforcement mechanism. | It equips civil society with a comprehensive set of substantive and procedural rights, in case they become victims of a crime. | Expand the catalog of crimes that can be attributed to corporations to amplify the scope of protection. |

| UNGP | <i>Individual Contribution of the CLC to the Field of Business and Human Rights</i> | <i>Symbiotic Relation with Corporate and Civil Governance</i> | <i>Suggestions to Optimize its Contribution</i> |
|-------|---|---|--|
| 12 | It lists crimes that can be attributed to corporations. | N/A | Expand the catalog of crimes that can be attributed to corporations to encompass most internationally recognized human rights. |
| 13 | It is possible to sanction corporations if they fail to comply with their preventive duties, even by omission, within the supply chain. | It requires corporations to demand that their business partners in the supply chain uphold the same respect for human rights. | Clarify the preventive duties of corporations within the supply chain. |
| 14 | It establishes that all private corporations can be punished for the commission of such crimes without any distinction. | N/A | Emphasize that the criminal compliance program should be proportional to the size, sector and operational context of the corporation. |
| 15-16 | N/A | N/A | Specify that the criminal compliance program must contain the specific commitment to respect human rights and be approved by senior levels of the corporation. |
| 17-24 | The criminal compliance program can be an essential component of a human rights due diligence. | N/A | Guide corporations on how to develop a criminal compliance program with the participation of civil society. |
| 25-27 | It enables a State-based judicial procedure to obtain a remedy and allows State-based non-judicial alternative dispute resolution mechanisms. | It gives victims the right to full remediation of the damages. | Expand the catalog of crimes to amplify the scope of protection. |
| 28-31 | N/A | N/A | Specify that a criminal compliance program should include a dialogue-based and operational-level grievance mechanism. |

V. CONCLUSION

The findings of this research have been already synthetized in the previous section. Thus, I prefer to use these lines to point out some of the challenges to be faced in the future.

Policy-makers and human rights professionals should explore the dynamic dimension of the UNGP to create innovative mechanisms, like the CLC, which engages and orients public, corporate and civil governance in the same direction. By doing so, it will be possible to narrow the gap between regulation and complex transnational business activities. Emphasis should be put on developing civil governance, for it is essential to shift the power dynamics and improve the situation of workers, consumers and communities. In the case of Mexico, the working group appointed by the Ministry of the Interior to address the issue of business and human rights should also consider the potential of the CLC in drafting the national action plan.¹⁴¹

On the other hand, in terms of criminal justice, the implementation of the CLC will be useless if the impunity rate in Mexico continues at around 98%.¹⁴² Therefore, the criminal policy needs to be comprehensively restructured to diminish impunity and increase remedy for the victims. Not only for the UNGP, but also for the CLC, this is only the end of the beginning.

¹⁴¹ The preliminary documents produced by this working group are *available at* Secretaría de Gobernación [Ministry of the Interior] (Mexico), www.gob.mx/segob/documentos/documentos-del-grupo-de-trabajo-sobre-empresas-y-derechos-humanos.

¹⁴² See INEGI [National Institute of Statistics and Geography] (Mexico) Encuesta Nacional de Victimización 2017 [National Survey of Victimization] *available at* www.inegi.org.mx/saladeprensa/boletines/2017/envipe/envipe2017_09.pdf.