

Chapter 10

Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation

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Abstract

Although the UN Guiding Principles on Business and Human Rights (UNGPs) are a soft law instrument which does not create any legally binding obligations, they nevertheless constitute the first authoritative global standard on business and human rights and have spurred a number of domestic-level legislative developments that seek to implement the UNGPs and translate the human rights due diligence (HRDD) requirements into hard law, through a process of progressive ‘hardening’ of the UNGPs.

Indeed, since the adoption of the UNGPs in 2011, a wide spectrum of domestic-level measures on HRDD have bloomed in numerous jurisdictions throughout the world. Reporting regulations such as the UK and Australian Modern Slavery Acts focus on only one part, albeit an essential one, of the HRDD process which is the communication element. Other domestic-level measures, such as the Dutch Child Labour Due Diligence Law, go beyond mere mandatory reporting by requiring companies to actually undertake HRDD, whilst remaining issue-specific. Some go still further, such as the French law on the duty of vigilance, the Swiss Initiative on Responsible Business, and the German draft law on due diligence in supply chains, by aiming to provide an overarching mandatory due diligence framework, with penalties and a civil liability regime attached to it. This Chapter will provide an in-depth analysis of these legal developments.

Keywords Business and Human Rights; UN Guiding Principles on Business and Human Rights; Corporate Responsibility; Mandatory Due Diligence; Reporting; Dévoir de Vigilance; Soft Law

Short bio

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1. Introduction

The UN Guiding Principles on Business and Human Rights (UNGPs)¹ emerged in 2011 as a result of extensive stakeholder consultation organised by the then Special Representative on Business and Human Rights John Ruggie,² and constitute the first authoritative global standard on business and human rights. Pivotal to the second pillar of the UNGPs, the concept of human rights due diligence (HRDD) constitutes the means through which companies fulfill their responsibility to respect human rights.³

The UNGPs are a non-binding instrument that can be characterized as an example of soft law⁴ deliberately grounding the corporate ‘responsibility’ to respect human rights in non-legal norms (‘societal expectations’).⁵ Soft law has been described ‘as a transitional stage in the development of norms where their content is vague and their scope imprecise’.⁶ Soft law instruments can obtain legal force and give rise to harder-edged legal duties in particular through legislative developments at the domestic level. In this case, since 2011, noteworthy legislative developments have taken place in several jurisdictions, pointing to a process of progressive ‘hardening’ of the UNGPs through the development of domestic-level legislation on HRDD. This Chapter looks at examples from six jurisdictions to assess (i) whether the newly assessed or proposed norms are intended by their drafters as steps specifically targeted at implementing the UNGPs; and (ii) the consistency between these domestic instruments on HRDD and the UNGPs. Section 2.1 introduces the notion of HRDD enshrined in the UNGPs with the aim of clarifying its nature. Section 2.2 deals with the

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¹ Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, A/HRC/17/31 (2011).

² John G Ruggie, *Just Business* (Norton 2013) 141-148.

³ UNGPs (n 1) Guiding Principle 17.

⁴ Barnali Choudury, ‘Balancing soft and hard law for business and human rights’ (2018) 67 *International and Comparative Law Quarterly* 961, 968-969.

⁵ *Ibid*; David Bilchitz, ‘A chasm between “is” and “ought”? A critique of the normative foundations of the of the SRSG’s Framework and the Guiding Principles’ in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business – Beyond the Corporate Responsibility to Respect?* (CUP 2013).

⁶ Michèle Olivier, ‘The relevance of “soft law” as a source of international human rights’ (2002) 35(3) *The Comparative and International Law Journal of Southern Africa* 289, 294-295.

emerging legislation on ‘modern slavery’ with reference to the UK and to Australia. Section 2.3 reviews current developments in the realm of mandatory HRDD, presenting examples from four countries on laws and legislative proposals that go beyond the imposition of mere reporting requirements on companies. Section 3 draws conclusions on the effectiveness of the two types of legislation in ‘hardening’ the soft law requirements of the UNGPs.

2. Implementing the UN Guiding Principles on Business and Human Rights through Human Rights Due Diligence Legislation

2.1 The Notion of Human Rights Due Diligence in the UN Guiding Principles on Business and Human Rights

Guiding Principle 13(a) affirms the companies’ responsibility to avoid causing – or contributing to – human rights abuses. HRDD, in this regard, constitutes the means through which a company may fulfill such responsibility and internalise respect of human rights in its corporate culture.⁷ Guiding Principle 13(b) refers, in turn, to companies’ responsibility for the conduct of third parties, that is, a qualified responsibility to exercise due diligence in order ‘to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships’.⁸ As convincingly argued by Bonnitcha and McCorquodale, HRDD in this second ambit is not only a technical term indicating the processes and mechanisms that a company may put in place, but it also establishes a standard of conduct, and might constitute the ‘fault element’ that determines whether responsibility is attributable to the actor.⁹ This second reading of HRDD is particularly relevant to define a company’s responsibility for the human rights abuses it might become linked to as a consequence of adverse impacts in its supply chain.

As explained by the International Law Association (ILA) Study Group, due diligence under international law is ‘an open-ended standard’,¹⁰ which allows ‘deferring controversial inquiries as to the content of substantive rules regulating wrongdoing to less controversial questions relating to informed decision-making and process’.¹¹ The flexible and adaptable character of due diligence obligations ‘may encourage broader participation in an international regime’, ultimately strengthening it.¹² The content of HRDD in the UNGPs varies according to factors such as the severity of the human rights impacts, as well as the size, sector, operational context, ownership and structure of the enterprise.¹³ This allows companies of all kinds and sizes to put in place the most appropriate processes, policies and actions to fulfill their responsibility to respect. A coherent

⁷ John G. Ruggie, ‘Business and Human Rights: Further steps toward the operationalization of the “protect, respect and remedy” framework’, A/HRC/14/27 (2010), para 80.

⁸ UNGPs (n 1) Guiding Principle 13(b).

⁹ Johnathan Bonnitcha, Robert McCorquodale, ‘The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights’ (2017) 28(3) *European Journal of International Law* 899, 914.

¹⁰ ILA Study Group on Due Diligence in International Law, *Second Report* (2016), 3 <<https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1427&StorageFileGuid=ed229726-4796-47f2-b891-8cfa221685f>> accessed 28 April 2019.

¹¹ *Ibid* (quoting Martti Koskenniemi).

¹² *Ibid*.

¹³ UNGPs (n 1) Guiding Principle 14.

reading of the UNGPs in the light of international human rights law also shows that HRDD cannot be reduced to a ‘box-ticking’ exercise. HRDD as defined under UNGP 13(b), whilst constituting a standard of conduct, must be clearly targeted towards the achievement of the intended results. In the realm of international human rights law, as the ILA explains, due diligence measures ‘must be undertaken with some result in mind and the results will be key to the determination of a violation’.¹⁴ The progressive realization of economic, social and cultural rights, for instance, implies the State’s duty ‘to take deliberate, concrete and targeted steps’¹⁵ towards the achievement of the result, which can not be indefinitely postponed.¹⁶ Similarly, the HRDD standard enshrined in the UNGPs is not a formalistic exercise that can be protracted indefinitely without seeing change.¹⁷ In order to fulfill their responsibility under GP 13(b), companies need to screen their own business partners and, when one of them is recognised as causing – or contributing to – human rights violations, they must exercise leverage over that entity in order to put an end to or mitigate the adverse human rights impacts.¹⁸ When HRDD steps prove ineffective, a company might eventually have to terminate the business relationship, if that is the only way to avoid contributing or being linked to the adverse human rights impact.¹⁹ While there is no universal benchmark regarding the timeframe within which HRDD should be carried out and produce its effects, the UNGPs underline that ‘the more severe the abuse, the more quickly the enterprise will need to see change’ before it decides to end the relationship with the business partner.²⁰ Moreover, the Office of the High Commissioner for Human Rights (OHCHR) has clearly stated that, when a company retains a business relationship with an entity that causes or contributes to human rights abuses, and it fails over time ‘to take reasonable steps to seek to prevent or mitigate the impact (...)’, that company ‘could eventually be seen to be facilitating the continuance of the situation and thus be in a situation of “contributing” to the violation’.²¹ There is, therefore, a continuum²² between the company’s

¹⁴ ILA Study Group on Due Diligence in International Law, First Report (2014), 17 <https://olympereauinternational.files.wordpress.com/2015/07/due_diligence_-_first_report_2014.pdf> accessed 28 April 2019.

¹⁵ CESCR, General Comment 3 - The nature of States parties obligations, E/1991/23 (1990), para 2 <<https://www.refworld.org/pdfid/4538838e10.pdf>> accessed 28 April 2019.

¹⁶ Scott Leckie, ‘Another Step towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights’ (1998) 20 Human Rights Quarterly 1, 81, 93-94; Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, E/CN.4/1987/17 (1987), Principle 21 <<https://www.escr-net.org/resources/limburg-principles-implementation-international-covenant-economic-social-and-cultural>> accessed 28 April 2019; Patrick Thornberry, *Indigenous peoples and human rights* (Juris Publishing 2002) 182.

¹⁷ Chiara Macchi, Tara Van Ho, Luis Felipe Yanes, ‘Investor Obligations in Occupied Territories: A Report on the Norwegian Government Pension Fund – Global’ (2019), 13 <<https://www1.essex.ac.uk/ebhr/documents/Investor%20Obligations%20in%20Occupied%20Territories%20-%20Report%20on%20the%20Norwegian%20Government%20Pension%20Fund%20-%20Global%20-%20EBHR%20report.pdf>> accessed 28 April 2019.

¹⁸ UNGPs (n 1) Guiding Principle 19, Commentary.

¹⁹ Ibid.

²⁰ Ibid.

²¹ OHCHR, ‘Response to request from BankTrack for advice regarding the application of the UNGP in the context of the banking sector’ (2017), 7 <<https://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>> accessed 2 April 2019.

²² Ibid.

responsibility under UNGP 13(b), which is based on a standard of conduct, and the responsibility under UNGP 13(a), which includes a responsibility of remediation.²³

Communicating externally the HRDD steps taken is a fundamental component of the HRDD process, aimed at ensuring accountability and providing ‘information that is sufficient to evaluate the adequacy of an enterprise’s response to the particular human rights impact involved’.²⁴ Other fundamental actions include the identification and assessment of human rights risks connected to the company’s activities and business relationships, acting upon the findings of that assessment (and allocating the necessary budget to do so), as well as tracking the effectiveness of the response.²⁵ Studies have shown, however, that many businesses fail to carry out HRDD in practice.²⁶ A 2018 assessment by the Corporate Human Rights Benchmark (CHRB) of 101 of the world’s largest publicly traded companies across three industries (agricultural products, apparel and extractives) showed a ‘deeply concerning’ picture, with the majority of companies scoring poorly on the Benchmark,²⁷ and an alarming 40% scoring no points at all across the HRDD section of the assessment.²⁸

Given the intrinsic limitations of voluntary measures and soft law regulation – sadly confirmed by numerous cases of corporate human rights abuses –,²⁹ and in light of the UNGPs’ call on States to consider ‘a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights’,³⁰ various types of regulatory framework seeking to introduce mandatory HRDD have started to emerge. Some of these domestic legislative measures take the form of legislation that embodies elements of HRDD requirements through mandatory reporting, while others go a step further by imposing legal duties on corporations that go beyond mere reporting. These two types of regulatory models will be analysed in turn.

2.2 Reporting Obligations: Domestic Legislation on ‘Modern Slavery’

2.2.1 The UK Modern Slavery Act

The UK Modern Slavery Act’s Section 54 on Transparency in Supply Chains falls within the category of legislative measures that impose obligations of disclosure on companies. Under this act, companies carrying out ‘business or part of a business’ in the UK,³¹ with a global annual turnover of £36m or more, are required to publish an annual Slavery and Human Trafficking Statement detailing the steps taken to ensure that slavery and human trafficking is not taking place in any of

²³ UNGPs (n 1) Guiding Principle 22.

²⁴ Ibid Guiding Principle 21.

²⁵ Ibid Guiding Principles 17-20.

²⁶ CHRB, ‘2018 Key Finding - Apparel, Agricultural Products and Extractive Companies’ (2018) <<https://www.corporatebenchmark.org/sites/default/files/documents/CHRBKeyFindings2018.pdf>> accessed 1 March 2019.

²⁷ CHRB (n 26) 5.

²⁸ Ibid 13.

²⁹ Axel Marx, Claire Bright and Jan Wouters, ‘Access to Legal Remedies for Victims of Corporate Human Rights Abuses in Third Countries’, Study requested by the DROI Committee, European Parliament (February 2019) <[http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf)> accessed 9 March 2019.

³⁰ UNGPs (n 1) Guiding Principle 3, Commentary.

³¹ UK Modern Slavery Act 2015 (UK MSA), s 54(12).

their supply chains, nor in any part of their own business.³² The Act does not mandate what should be reported in the statement nor does it require businesses to actually undertake due diligence to identify, prevent and address modern slavery.³³ A company could simply report in its annual statement that it ‘has taken no such steps’.³⁴ When a company fails to issue the statement, the Secretary of State can seek a court injunction mandating compliance,³⁵ although this has not been used in practice.³⁶ Failure to observe this is punishable by a fine.³⁷ However, the adequacy of the due diligence steps (if any) is not assessed or sanctioned under the Act.³⁸ The legislation largely reflects the approach of the California Transparency in Supply Chain Act,³⁹ in force since 2012, whilst having a broader scope of applicability.⁴⁰ The drafters discarded the option of creating a regime of corporate liability for the conduct of ‘associated’ entities modelled after the UK Bribery Act.⁴¹ The government favoured a ‘carrot’ approach with the aim ‘to encourage transparency’,⁴² essentially delegating to the courts of public opinion⁴³ – consumers, investors and NGOs – the task ‘to engage and/or apply pressure where they believe a business has not taken sufficient steps’.⁴⁴ In

³² Ibid s 54(4).

³³ Para 15.

³⁴ UK MSA 54(4)(b).

³⁵ Ibid 54(11).

³⁶ Frank Field, Maria Miller and Baroness Butler-Sloss, ‘Independent Review of the Modern Slavery Act 2015 - Final Report’ (2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf> accessed 26 June 2019.

³⁷ Shamistha Selvaratnam, ‘Global Modern Slavery Developments (Part I): A Critical Review of the UK Modern Slavery Act’ (Doing Business Right, 27 November 2018) <<https://www.asser.nl/DoingBusinessRight/Blog/post/global-modern-slavery-developments-part-i-a-critical-review-of-the-uk-modern-slavery-act-by-shamistha-selvaratnam>> accessed 6 March 2019.

³⁸ Justine Nolan, ‘Business and human rights: The challenge of putting principles into practice and regulating global supply chains’ (2017) 42(1) *Alternative Law Journal* 42, 44 <<https://journals.sagepub.com/doi/pdf/10.1177/1037969X17694783>> accessed 6 March 2019.

³⁹ California Transparency in Supply Chains Act, Cal. Civ. Code para 1714.43.

⁴⁰ Justine Nolan and Gregory Bott, ‘Global supply chains and human rights: spotlight on forced labour and modern slavery practices’ (2018) *Australian Journal of Human Rights*, 10 <<https://www.researchgate.net/publication/323803459>.

<[_Global_supply_chains_and_human_rights_spotlight_on_forced_labour_and_modern_slavery_practices](https://www.researchgate.net/publication/323803459)> accessed 6 March 2019; Shift, ‘Mapping the Provisions of the Modern Slavery Act Against the Expectations of the UN Guiding Principles on Business and Human Rights’ (July 2015), 1 <<https://www.shiftproject.org/resources/publications/mapping-modern-slavery-act-un-guiding-principles/>> accessed 7 March 2019; Sarah A Altschuller, ‘U.K. Modern Slavery Act: New Disclosure Requirements for Companies Operating in the United Kingdom’ (CSR And The Law, 18 August 2015) <<https://www.csr.and.the.law.com/2015/08/18/u-k-modern-slavery-act-new-disclosure-requirements-for-companies-operating-in-the-united-kingdom/>> accessed 7 March 2019.

⁴¹ Genevieve LeBaron and Andreas Rühmkorf, ‘The domestic politics of corporate accountability legislation: struggles over the 2015 UK Modern Slavery Act’ (2017) 0(0) *Socio-Economic Review* 1, 19-20. See UK Bribery Act 2010, s 7.

⁴² House of Commons, Public Accounts Committee, ‘Oral evidence: Reducing Modern Slavery & Emergency Services Network: progress review’ (21 February 2018) HC 886, 68.

⁴³ John G Ruggie, ‘Protect, Respect and Remedy: A Framework for Business and Human Rights - Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises’, A/HRC/8/5 (7 April 2008), 54.

⁴⁴ UK Home Office, ‘Transparency in Supply Chains etc. A practical guide’ (2017) 6 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/649906/Transparency_in_Supply_Chains_A_Practical_Guide_2017.pdf> accessed 8 March 2019.

practice, this entails that consumer-facing companies are subject to greater scrutiny compared to their lesser-known peers that can get away with weak statements.⁴⁵

The momentum for the negotiation and adoption of the UK Modern Slavery Act (MSA) was fuelled by several domestic and international factors. Domestically, both the willingness of the Conservative government to leave a ‘legislative legacy’⁴⁶ and the activism of civil society, including the business sector, had a catalytic effect.⁴⁷ At the international level, heightened attention was drawn to labour rights issues by serious incidents that occurred in the supply chains of global brands – notably, the Rana Plaza building collapse⁴⁸ and the Ali Enterprises factory fire.⁴⁹ In addition, a new protocol added to the International Labour Organization (ILO) Forced Labour Convention was adopted in 2014, addressing ‘modern slavery’.⁵⁰ The MSA was intended by the UK government as one step taken ‘to give effect to the UN Guiding Principles’, as made explicit in the National Action Plan (NAP).⁵¹ The practical guide issued by the government also puts Section 54 in the context of the voluntary reporting framework set out by the UNGPs.⁵² The UNGPs place great emphasis on the importance of communicating HRDD externally, especially when there is a risk of severe adverse human rights impacts.⁵³ The disclosure requirements of the UK MSA mirror largely the guidance provided by the UNGPs reporting framework,⁵⁴ contributing to the implementation of at least one dimension of the corporate responsibility to respect.⁵⁵

However, studies have highlighted the lack of concrete impact that Section 54 has had on companies’ practices in terms of HRDD.⁵⁶ In particular, it has been highlighted that ‘while it has contributed to greater awareness of modern slavery in companies’ supply chains, a number of companies are approaching their obligations as a mere tick-box exercise, and it is estimated around 40 per cent of eligible companies are not complying with the legislation at all.’⁵⁷ This is due to the fact that the publication of the statement is the only requirement placed on businesses, and the law does not include any monitoring or effective enforcement mechanisms with sanctions for non-compliant companies.⁵⁸ In addition, there is evidence that many statements published so far fail to

⁴⁵ BHRRC, ‘FTSE 100 & The UK Modern Slavery Act: From Disclosure to Action’ (2018), 4 <<https://www.business-humanrights.org/sites/default/files/FTSE%20100%20Briefing%202018.pdf>> accessed 29 March 2019.

⁴⁶ Michael Dottridge, ‘How did we get the Modern Slavery Act?’ (openDemocracy, 25 September 2016) <<https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/path-to-modern-slavery-act/>> accessed 8 March 2019; Prabha Kotiswaran, ‘The path to the UK’s Modern Slavery Act 2015: an oral history project’ (openDemocracy, 25 September 2016) <<https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/path-to-uks-modern-slavery-act-2015-oral-history-project/>> accessed 7 March 2019.

⁴⁷ LeBaron and Rühmkorf (n 41) 22-23.

⁴⁸ Michael Pollitt, ‘Unfinished abolitionists: Britain returns to the frontline of the war on slavery’ (NewStatesman, 16 October 2014) <<https://www.newstatesman.com/politics/2014/10/unfinished-abolitionists-britain-returns-frontline-war-slavery>> accessed 6 March 2019.

⁴⁹ Clean Clothes Campaign, ‘Ali Enterprises: A Factory Inferno’ <<https://cleanclothes.org/safety/ali-enterprises>> accessed 8 March 2019.

⁵⁰ ILO Protocol of 2014 to the Forced Labour Convention, 1930, P029 (adopted 11 June 2014, entered into force 09 November 2016).

⁵¹ UK Government, ‘Good Business - Implementing the UN Guiding Principles on Business and Human Rights’ (2016), 8 <<https://www.gov.uk/government/publications/bhr-action-plan>> accessed 8 March 2019.

⁵² UK Home Office 2017, Annex D. The reference is to: UN Guiding Principles Reporting Framework <<https://www.ungpreporting.org/>> accessed 8 March 2019.

⁵³ UNGPs (n 1) Guiding Principles 16 and 21.

⁵⁴ Shift (n 40) 3-4.

⁵⁵ UNGPs (n 1) Guiding Principle 21, Commentary.

⁵⁶ Field, Miller and Butler-Sloss, (n 36) para 15.

⁵⁷ *Ibid* para 15.

⁵⁸ Nolan and Bott (n 40) 9.

respect the law's minimum requirements.⁵⁹ The Business & Human Rights Resource Centre has been tracking the transparency statements of the largest companies in the UK (FTSE 100) since the adoption of the UK MSA. In its latest annual assessment, it stated that 'three years on, most companies still publish generic statements committing to fight modern slavery, without explaining how. Sadly, only a handful of leading companies have demonstrated a genuine effort in their reporting to identify and mitigate risks'.⁶⁰

Moreover, the Act does not ease the existing barriers to accessing remedy in the UK for victims who have been subjected to forms of modern slavery abroad, for instance by the supplier of a UK company.⁶¹ The related difficulties remain unaddressed.⁶² The choice of an approach that would not put an 'unnecessary regulatory burden' on companies⁶³ has led to an overall weak piece of legislation that leaves much to be done in the direction of an effective implementation of the UNGPs. This approach fails to prescribe a positive obligation to undertake a fully-fledged HRDD process,⁶⁴ and creates a risk of staving off more stringent forms of regulation.⁶⁵ The MSA's shortcomings appear especially relevant if one considers the egregious character of the types of violations targeted by the Act.

Perhaps in an attempt to address these issues, the House of Commons Joint Committee on Human Rights recommended in 2017 the adoption of mandatory due diligence legislation modelled on the 'Failure to prevent' mechanism under the UK Bribery Act 2010.⁶⁶ In addition, Members of Parliament (MPs) commissioned by the UK Government to review the MSA recently issued a report recommending changes that would make the reporting requirements more stringent without fundamentally altering the law's architecture.⁶⁷

2.2.2 The Australian Modern Slavery Act

The Australian Modern Slavery Act, approved by the national Parliament in 2018, entered into force on 1 January 2019. It has clearly been influenced by the UK MSA, and it entails annual reporting obligations for companies with a consolidated revenue of at least \$100 million for the

⁵⁹ For critical reviews, see: CORE Coalition, 'Risk Averse? Company Reporting on raw material and sector-specific risks under the Transparency in Supply Chains clause in the UK Modern Slavery Act 2015' (2017) <https://corporate-responsibility.org/wp-content/uploads/2017/10/171003_Risk-Averse-FINAL-1.pdf> accessed 8 March 2019; Ergon Associates Ltd, 'Modern slavery reporting: Is there evidence of progress?' (October 2018) <https://ergonassociates.net/wp-content/uploads/2018/10/Ergon_Modern_Slavery_Progress_2018_resource.pdf?x74739> accessed 8 March 2019; Joint Committee on Human Rights, 'Human Rights and Business 2017: Promoting responsibility and ensuring accountability' (5 April 2017) 37 ff <<https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/443/443.pdf>> accessed 8 March 2019; Virginia Mantouvalou, 'The UK Modern Slavery Act 2015 Three Years On' (2018) 81(6) *Modern Law Review* 1017, 1042; Nolan and Bott (n 40) 10-11.

⁶⁰ BHRRC (n 45) 3.

⁶¹ Mantouvalou (n 59) 1041; UNGPs (n 1) Guiding Principle 26.

⁶² Joint Committee on Human Rights 2017 (n 59), 49 ff; Mantouvalou (n 59) 1041.

⁶³ Frank Field, 'David Cameron could have been an anti-slavery hero' (*Spectator*, 16 August 2014) <<https://www.spectator.com.au/2014/08/everywhere-in-chains/>> accessed 7 March 2019.

⁶⁴ Norton Rose Fulbright and BIICL, 'Making sense of managing human rights issues in supply chains' (2018) 10 <<https://human-rights-due-diligence.nortonrosefulbright.online/publications/2018/q2/components-of-effective-supply-chain-management/>> accessed 5 March 2019.

⁶⁵ Ingrid Landau, 'What are we missing by focusing on modern slavery?' (2016) <<https://www.business-humanrights.org/en/what-are-we-missing-by-focusing-on-modern-slavery/>> accessed 8 March 2019.

⁶⁶ Joint Committee on Human Rights (n 59) 59.

⁶⁷ Field, Miller and Butler-Sloss, (n 36) para 17.

reporting period (the threshold is slightly higher than in the UK MSA).⁶⁸ Similarly to the UK legislation, the Australian MSA applies both to Australian entities and to entities carrying out at least part of their business in Australia, regardless of where they are located.⁶⁹ However, while the list of areas to be covered by the modern slavery statement is merely indicative in section 54 of the UK MSA, the new Australian legislation establishes reporting criteria against which companies must report.⁷⁰ Importantly, reporting entities must disclose not only the steps they have taken to identify and address risks of modern slavery, but also how they assess the effectiveness of such actions.⁷¹ Like the UK MSA, and consistent with the UNGPs,⁷² the statements must be approved by the ‘principal governing body’ of the entity.⁷³ Unlike the UK MSA, which simply requires publication of the statements on the company’s website (if it has one), the Australian Act provides for the establishment of a government-run registry of statements: the Modern Slavery Statements Register.⁷⁴ Neither of the two acts, however, entails the publication by the competent authorities of a list of entities required to report, making it more difficult for civil society to act as a ‘watchdog’ of corporate compliance.⁷⁵

The UN Working Group framed Australia’s adoption of modern slavery legislation as a step towards implementation of the UNGPs.⁷⁶ As a matter of fact, in adopting the MSA, Australia confirmed that it ‘supports the UN Guiding Principles and encourages businesses to apply them in their operations’, including for the identification and prioritization of modern slavery risks.⁷⁷ The Explanatory Memorandum specifies that the provisions on mandatory reporting ‘draw on terminology and concepts’ used in the UNGPs.⁷⁸ It also confirms that the government’s intervention is consistent with Australia’s duty, under the UNGPs, to regulate businesses under its jurisdiction.⁷⁹ The parliamentary reports that preceded adoption of the MSA also insisted on the necessity to ensure consistency between the new reporting requirements and the UNGPs.⁸⁰

However, Australia’s commitment to the implementation of the UNGPs seems somewhat limited since, at the time of writing, it has not adopted a NAP on business and human rights and is not taking further action in this regard.⁸¹ The government took some initiatives on the matter in 2016,

⁶⁸ Australia Modern Slavery Act 2018, No. 153.

⁶⁹ Ibid ss 4-5.

⁷⁰ Ibid s 15(16).

⁷¹ Ibid s 15(16)(1).

⁷² UNGPs (n 1) Guiding Principle 16.

⁷³ Australia Modern Slavery Act 2018, s 15(13)(2).

⁷⁴ Ibid s 17(18).

⁷⁵ Human Rights Watch, ‘Submission to the Legal and Constitutional Affairs Committee on Australia’s Modern Slavery Bill 2018’ (20 July 2018); Selvaratnam (n 37).

⁷⁶ UN Working Group on Business and Human Rights, Letter to Australian Ambassador in Geneva (18 December 2017) <<https://www.business-humanrights.org/sites/default/files/documents/UNWGLetterAustralia.pdf>> accessed 5 March 2019.

⁷⁷ House of Representatives, ‘Modern Slavery Bill 2018 – Explanatory memorandum’ (2018), 20 and 38.

⁷⁸ Ibid 20.

⁷⁹ Ibid 38.

⁸⁰ Joint Standing Committee on Foreign Affairs, Defence and Trade, ‘Hidden in Plain Sight An inquiry into establishing a Modern Slavery Act in Australia’ (2017), 5.25 <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024102/toc_pdf/HiddeninPlainSight.pdf;fileType=application%2Fpdf> accessed 8 March 2019; Joint Standing Committee on Foreign Affairs, Defence and Trade, ‘Supply chain reporting in Australia’ <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Interim_Report/section?id=committees%2Freportjnt%2F024092%2F24952.3.39-3.43> accessed 5 March 2019.

⁸¹ BHRRC, National Action Plans <<https://www.business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans>> accessed 9 March 2019.

during its bid for a seat at the UN Human Rights Council (HRC),⁸² and after several UN Member States had raised the issue during Australia's Universal Periodic Review.⁸³ In October 2017, however, after winning a seat on the HRC,⁸⁴ the government informed the Advisory Group that it was 'not proceeding with a [NAP] at this time.'⁸⁵

While the Australian Act can be seen as 'a step in the right direction',⁸⁶ and relatively more advanced than the UK MSA, its effectiveness in contributing to the implementation of the UNGPs suffers largely from the same limitations highlighted for the UK MSA. In particular, it suffers from a lack of independent oversight and of effective machinery for enforcement with no penalties or civil liability regime⁸⁷ envisaged in case non-compliance.⁸⁸ More generally, it has been highlighted that reporting initiatives 'assume that businesses will be eager to comply due to pressure faced from civil society, consumers and investors. This is however, not confirmed by evaluative research'.⁸⁹

2.3 Domestic Legislation on Mandatory Due Diligence

2.3.1 The Dutch Child Labour Due Diligence Law

On 14 May 2019, the Dutch Senate adopted the Child Labour Due Diligence Law which will enter into force at the earliest on 1 January 2020.⁹⁰ The law introduces a duty for companies providing goods and services to the Dutch end-users to undertake due diligence (*gepaste zorgvuldigheid*)⁹¹ in order to identify and address the risk of child labour in their supply chains. The aim of the law is

⁸² Sarah Joseph, 'Australia's bid for the UN Human Rights Council' (30 September 2015) <<https://theconversation.com/australias-bid-for-the-un-human-rights-council-48385>> accessed 5 March 2019; Julie Bishop, Speech on Australia and the Human Rights Council (12 December 2016) <<https://www.lowyinstitute.org/publications/julie-bishop-australia-and-un-human-rights-council>> accessed 5 March 2019.

⁸³ HRC, Report of the Working Group on the Universal Periodic Review – Australia, 'Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review' A/HRC/31/14/Add.1 (29 February 2016), 63; Multi-Stakeholder Advisory Group, 'Advice on the prioritisation of issues and actions to implement the UN Guiding Principles on Business and Human Rights (UNGPs)' (August 2017) <<https://dfat.gov.au/international-relations/themes/human-rights/business/Documents/final-msag-priorities-paper.pdf>> accessed 5 March 2019; National Action Plans on Business and Human Rights, Australia <<https://globalnaps.org/country/australia/>> accessed 5 March 2019.

⁸⁴ Ben Doherty and Paul Karp, 'Australia elected to UN Human Rights Council' (16 October 2017) <<https://www.theguardian.com/world/2017/oct/17/australia-elected-to-un-human-rights-council>> accessed 5 March 2019.

⁸⁵ Human Rights Law Centre, 'Government ignores advice of expert group on business and human rights' (18 October 2017) <<https://www.hrlc.org.au/news/2017/10/17/government-ignores-advice-of-expert-group-on-business-and-human-rights>> accessed 5 March 2019.

⁸⁶ Fiona McGaughy and Justine Nolan, 'Modern Slavery Bill a step in the right direction – now businesses must comply' (29 June 2018) <<https://theconversation.com/modern-slavery-bill-a-step-in-the-right-direction-now-businesses-must-comply-99135>> accessed 5 March 2019.

⁸⁷ Human Rights Watch (n 75).

⁸⁸ Ibid.

⁸⁹ PwC, 'Strategies for responsible business conduct' (December 2018) <<https://www.rijksoverheid.nl/documenten/rapporten/2019/02/22/strategies-for-responsible-business-conduct>> accessed 26 June 2019.

⁹⁰ Anya Marcelis, 'Dutch Take the Lead on Child Labour with New Due Diligence Law' (17 May 2019) <<https://ergonassociates.net/dutch-take-the-lead-on-child-labour-with-new-due-diligence-law/>> accessed 26 June 2019.

⁹¹ Annaloes Hoff, 'Dutch Child Labour Due Diligence Law: A Step Towards Mandatory Human Rights Due Diligence' (10th June 2019) <<http://ohrh.law.ox.ac.uk/dutch-child-labour-due-diligence-law-a-step-towards-mandatory-human-rights-due-diligence/#>> accessed 25 June 2019)

framed as ensuring that Dutch consumers can purchase goods and services ‘in good conscience’.⁹² The law has extraterritorial reach since it concerns companies bringing goods or services onto the Dutch market, including the ones domiciled outside of the jurisdiction, and applies throughout their supply chains.⁹³

Under the law, exercising due diligence entails investigating, based on ‘reasonably knowable and consultable sources’,⁹⁴ whether there is reasonable suspicion that the goods or services that they provide have been produced using child labour.⁹⁵ Should such a suspicion be identified, companies are required to set out an action plan on how to address it. Companies are required to produce a statement on their investigation and plan of action.⁹⁶ Unlike the UK or the Australian Modern Slavery Act, this, however, is a one-off exercise and does not have to be repeated on an annual basis,⁹⁷ which constitutes one of the limitations of the law.

The law provides that a supervising authority will monitor and enforce compliance with the law. Companies are required to submit their statement to the supervising authority, which will make them publicly available in an online public registry.⁹⁸ Third parties affected by a company’s actions or failure to comply with the law can file a complaint with the supervising authority, after having submitted it first to the company, on the basis of concrete evidence of non-compliance.⁹⁹ The law provides for both administrative and criminal law sanctions in case of non-compliance. In particular, the supervising authority can impose a fine of up to €4,100 in case of failure to produce the statement. It can also impose a fine of up to €820,000, or, alternatively, 10% of the company’s turnover, after having given a binding instruction, in case of continued non-compliance with the due diligence requirements.¹⁰⁰ Repeat offence within five years will constitute an economic offence and may lead to criminal sanctions for the company directors, who could face imprisonment.¹⁰¹

The law provides that further requirements and clarifications will be set by General Administrative Order. Companies merely transporting goods are exempted from the law. In addition, General Administrative Orders might ‘exempt certain sectors or categories of companies for which the risk of child labour is low, and/or introduce a limitation based on companies’ size’.¹⁰²

The Dutch law seems to respond to the Netherland’s 2014 NAP, through which the government committed to investigate ‘whether the obligations of Dutch companies in relation to [Corporate Social Responsibility (CSR)] are adequately regulated in Dutch law, and in accordance with the UN

⁹² Preamble to the Netherlands Child Labour Due Diligence Act 2019.

⁹³ MVO, ‘Frequently Asked Questions about the new Dutch Child Labour Due Diligence Law’ (14 April 2017) <<https://www.mvoplatform.nl/en/frequently-asked-questions-about-the-new-dutch-child-labour-due-diligence-law/>> accessed 28 February 2019.

⁹⁴ The Netherlands Child Labour Due Diligence Act 2019.

⁹⁵ Ibid; Sarah A Altschuller and Amy K Lehr, ‘Proposed Dutch Legislation on Child Labor Due Diligence: What You Need to Know’ (CSR And The Law, 24 August 2017) <http://www.csrandthelaw.com/2017/08/24/proposed-dutch-legislation-on-child-labor-due-diligence-what-you-need-to-know/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original> accessed 28 February 2019.

⁹⁶ Marcelis (n 90).

⁹⁷ Barbara Bier, ‘Bill adopted by Dutch Parliament introducing a duty of care to prevent child labour’ (22 May 2019) <<https://www.lexology.com/library/detail.aspx?g=c1a2ac77-7647-430c-ba64-c2bf8e9243f3>> accessed on 26 June 2019.

⁹⁸ Hoff (n 91).

⁹⁹ Ibid.

¹⁰⁰ Bier (n 97).

¹⁰¹ Ibid.

¹⁰² MVO (n 93).

Guiding Principles'.¹⁰³ It may be argued that it goes a bit further than this commitment, considering the reluctance expressed in the NAP towards legislation with an extraterritorial reach.¹⁰⁴ Nevertheless, the Dutch law can be seen as falling short of effectively implementing the UNGPs in several respects. Firstly, like other legislation focusing on a specific human rights issue, the law only partially responds to the UNGPs' call for companies to carry out due diligence covering *all* of their adverse human rights impacts. Secondly, the absence of specifications as to the form or content of the statements and action plans creates legal uncertainty for companies and may in practice lead to significant variation in terms of the quality of due diligence approaches.¹⁰⁵ Thirdly, the fact that the reporting requirement is a one-off exercise limits the possibility of evaluating progress and is not in line with the UNGPs' definition of HRDD as a dynamic, ongoing process.¹⁰⁶ Fourthly, given that the authorities would not actively enforce the law if not in response to a third-party complaint, it relies on the watchdog role of civil society to ensure its effectiveness. Finally, the law does not contain any specific provisions seeking to improve access to remedy in the Netherlands for victims of child labour.

2.3.2 The French Law on the Duty of Vigilance of Parent

In contrast to the regulations previously described, other pieces of legislation apply horizontally across human rights issues and across sectors. This is the case of the French Law on the Duty of Vigilance,¹⁰⁷ adopted on 21 February 2017, and enacted on 27 March 2017. The law places a legal duty on large companies to undertake HRDD in their operations and supply chain. The legislation emerged as a result of the collaboration between civil society organisations, trade unions, academics, lawyers and MPs and is the result of a compromise following a nearly four-year long legislative struggle involving much back-and-forth between the National Assembly and the Senate.¹⁰⁸

The French National Action Plan adopted on 26 April 2017 refers to the law on the duty of vigilance as one example of actions taken by the French government to implement the UNGPs.¹⁰⁹ And indeed, the parliamentary debates leading up to the adoption of the legislation made explicit reference to the UNGPs.¹¹⁰ The explanatory memorandum of the draft law affirmed that the pursued objective was to implement the UNGPs through the establishment of a duty of vigilance on the parent company to identify, prevent and address human rights issues in its own activities but also in the activities of its subsidiaries and the companies that it controls directly or indirectly, as well as

¹⁰³ Dutch National Action Plan on Business and Human Rights 2014.

¹⁰⁴ Ibid 39.

¹⁰⁵ Marcelis (n 90).

¹⁰⁶ UNGPs (n 1) Guiding Principle 18; MVO (n 93).

¹⁰⁷ Loi No 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.

¹⁰⁸ Nadia Bernaz, 'Unpacking the French Bill on Corporate Due Diligence: a presentation at the International Business and Human Rights Conference in Sevilla' (Rights As Usual, 2016) <<http://rightsasusual.com/?p=1087>> accessed 28 February 2019.

¹⁰⁹ National Action Plan for the Implementation of the United Nations Guiding Principles on Business and Human Rights, France (26 April 2017), 24 <<https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/11/france-nap-english.pdf>> accessed 29 March 2019.

¹¹⁰ Assemblée nationale, XVIIe législature, 'Compte rendu intégral, Première séance du lundi 30 mars 2015' (2015) <<http://www.assemblee-nationale.fr/14/cr/2014-2015/20150193.asp>> accessed 28 February 2019.

the activities of subcontractors and suppliers with whom the company maintains an established business relationship.¹¹¹

It is worth noting that the terminology used in the French law is not perfectly aligned with that used in the UNGPs, as the former refers to ‘reasonable vigilance’ measures (*mesures de vigilance raisonnable*) with regard to human rights issues, rather than human rights due diligence (*diligence raisonnable*), referred to by the latter. One possible explanation for this divergence is that the French legislator might have found in the concept of vigilance a more suitable translation of the concept of HRDD into French law. The UNGPs themselves refer to concepts of both ‘human rights due diligence’ and ‘due diligence’. McCorquodale and Bonnitcha have argued that the use of the term ‘due diligence’ in the UNGPs was part of a deliberate strategy by Ruggie in order to build a consensus, as it is a concept that is familiar to business people, human rights lawyers and States.¹¹² However, both concepts carry different meanings. HRDD refers to a standard of conduct expected from a duty bearer to discharge an obligation, whereas due diligence refers to a process to manage business risks.¹¹³ The choice made by the French legislator to refer to the concept of ‘vigilance’ might therefore have been an attempt to avoid such confusion between the two substantially different concepts of HRDD and due diligence. In addition, the concept of due diligence is a *common law* concept that is not widely used in French law.¹¹⁴ In turn, the concept of ‘vigilance’ is more familiar to French law where it has been used notably in the field of labour law.¹¹⁵

If the wording might differ slightly, the French law and the UNGPs resonate to a large extent in terms of the content of the HRDD requirements.¹¹⁶ The legislation places a duty of vigilance on large French companies through a threefold obligation to put in place, disclose and implement a vigilance plan (*plan de vigilance*), detailing the

[R]easonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental freedoms, health and safety and the environment resulting from the own activities of the company or the companies under their control, or from the activities of their subcontractors and suppliers with whom they have an established business relationship.¹¹⁷

The vigilance plan must include five elements, in particular: 1) a mapping of the risks involved, containing in particular the identification, analysis and prioritization of risks; 2) procedures to regularly assess risks associated with the activities of subsidiaries, subcontractors or suppliers with whom the company has an established business relationship; 3) actions to mitigate risks and prevent serious harm; 4) a whistleblowing mechanism collecting reports of potential and actual risks and

¹¹¹ Tiphaine Beau de Loménie, Sandra Cossart and Paige Morrow, ‘From Human Rights Due Diligence to Duty of Vigilance: Taking the French Example to the EU level’ in Angelica Bonfanti (ed), *Business and Human Rights in Europe* (Routledge 2019) 133.

¹¹² Bonnitcha and McCorquodale (n 9) 899, 900.

¹¹³ Ibid 900.

¹¹⁴ Marine-Caroline Caillet, Marie-Laure Guislain and Tasmin Malbrand, ‘La vigilance sociétale en droit français’ (2016) 16 *Passerelle* <https://www.coredem.info/IMG/pdf/pass_16_web.pdf> accessed 19 April 2019.

¹¹⁵ French Labour Code, Article D8222-5.

¹¹⁶ IBA, ‘Legislating human rights due diligence: opportunities and potential pitfalls to the French duty of vigilance law’ (2017) <<https://www.ibanet.org/Article/Detail.aspx?ArticleUid=e9dd87de-cfe2-4a5d-9ccc-8240edb67de3>> accessed 9 March 2019.

¹¹⁷ Loi No 2017-399, Art 1.

effects, drawn up in consultation with the company's representative trade unions; 5) a mechanism to monitor measures that have been implemented and evaluate their effectiveness. This list, which is not exhaustive, covers the main elements of HRDD envisaged by the UNGPs, that is to say the need for businesses to assess actual and potential human rights impacts, integrate and act upon the findings, track responses and communicate how impacts are addressed.

In terms of scope, the law applies to French companies employing at least 5,000 employees in France; or at least 10,000 employees worldwide. No publically available database exist nor official list compiled by the French government on the companies subjected to the law, however, according to the non-exhaustive list compiled by Sherpa on its recently created website dedicated to the law, at least 237 companies fall within the scope of the legislation,¹¹⁸ which is a rather small number. Although the UNGPs permit a differentiated standard of HRDD for small and medium size companies, they do not exonerate SMEs altogether from any obligations in relation to HRDD.¹¹⁹ In the French legislation, the HRDD extends to the activities of the company as well as the activities of its subsidiaries and the companies that it controls directly or indirectly, but also to the activities of subcontractors and suppliers with whom the company maintains an '*established* business relationship'. The scope of the HRDD requirements is therefore narrower than the one set out in the UNGPs which refers to 'business relationships'. The implementation, by the French law on the duty of vigilance, of the HRDD requirements under the UNGPs therefore remains very limited in scope. In case of failure to implement the law, interested parties can seek an injunction to order a company to establish, implement and publish a vigilance plan, accompanied by periodic penalty payments in case of continued non-compliance.¹²⁰ In addition, a civil liability regime is created by the legislation according to which interested parties can file civil proceedings, under the general principles of French tort law (Articles 1240 and 1241 of the French Civil Code) whenever a company's failure to comply with the obligations set forth in the legislation gives rise to damage. The burden of proof remains on the claimants, who will need to prove that they suffered a damage as a result of a breach of the vigilance obligations on the part of the parent company. However, the burden of proof constitutes one the main hurdles faced by claimants of business-related human rights claims in accessing remedy, especially when combined with issues linked to the complexity of corporate structures and the lack of access to information and internal documents preventing claimants from substantiating their claims.¹²¹ As a result, the French law on the duty of vigilance falls short of the requirements set out in Guiding Principles 26 of the UNGPs with regard to the reducing of legal and practical barriers that could lead to a denial of justice. The possibility of introducing legal actions on the basis of this law has become available only very recently, in 2019.¹²² The legal proceedings that will be brought on the basis of the law on the duty of vigilance will be crucial to assess the effectiveness of French domestic judicial mechanisms.

¹¹⁸ Sherpa, 'Duty of Vigilance Radar' <<https://vigilance-plan.org/search/>> accessed 5 July 2019.

¹¹⁹ UNGPs (n 1) Guiding Principle 17 (b) provides that the HRDD requirements 'will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations'.

¹²⁰ Sandra Cossart, Jérôme Chaplier, Tiphaine Beau De Loménie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) 2(2) Business and Human Rights Journal 317, 322.

¹²¹ Marx et al. (n 29) 15.

¹²² Sherpa, 'Vigilance Plans Reference Guidance' (2018) <https://www.asso-sherpa.org/wp-content/uploads/2019/02/Sherpa_VPRG_EN_WEB-ilovepdf-compressed.pdf> accessed 9 March 2019.

The French legislation has been described as ‘a historic step forward for the corporate accountability movement’,¹²³ and is at the far end of the spectrum of existing legislative measures on mandatory human rights due diligence. Nevertheless, issues of non-compliance have been reported.¹²⁴ In addition, a recent report has revealed that, in practice, the first vigilance plans published insufficiently implement the law, with a majority of them tending to focus on the risks to the business itself and its performance rather than the risks to the rights-holders or the environment.¹²⁵ Progress therefore remains to be made for an effective implementation of the HRDD requirements by companies in order to go beyond mere superficial compliance.

2.3.3 The Swiss Popular Initiative on Responsible Business and the Counter-Proposal

A regulation on mandatory HRDD across all sectors has also been proposed in Switzerland through the Popular Initiative on Responsible Business, which was launched by the Swiss Coalition for Corporate Justice after having collected the requisite threshold of 100,000 signatures from Swiss citizens.¹²⁶ This initiative emerged in parallel with various developments at the level of the Swiss federal government. In April 2015, the Swiss federal government affirmed its commitment to CSR in its Position Paper on corporate social and environmental responsibility. The following year, Switzerland released its NAP on the implementation of the UNGPs.¹²⁷

The NAP states that ‘business enterprises that are based and/or operate in Switzerland should respect human rights in all of their business activities, wherever they operate’,¹²⁸ and that the Swiss federal government seeks to fulfil its duty to protect human rights through a smart mix of non-legally-binding and, where necessary, legally-binding instruments to require business enterprises to respect human rights.¹²⁹ However, the NAP also noted that Swiss law does not currently contain provisions making it legally binding for business enterprises to carry out HRDD, and added that the potential introduction of a regulation on mandatory human rights due diligence would have to have ‘a broad base of international support’ in order to avoid placing Switzerland in a situation of competitive disadvantage, and deter foreign direct investment’.¹³⁰

The Swiss Responsible Business Initiative would entail a revision of the Swiss Constitution. In particular, it would aim to add an Article 101a to the Swiss Constitution entitled ‘Responsibility of Business’, which would require Swiss-based business enterprises to carry out ‘appropriate due diligence’ in order

¹²³ Cossart et al. (n 120) 317.

¹²⁴ Sherpa, ‘Duty of Vigilance Radar’ (n 118).

¹²⁵ Juliette Renaud and others, ‘Loi sur le devoir de vigilance des sociétés mères et entreprises donneuses d’ordre - Année 1: Les entreprises doivent mieux faire’ (February 2019), 10 <https://ethique-sur-etiquette.org/Deux-ans-apres-l-adoption-de-la-loi-sur-le-devoir-de-vigilance-les-entreprises?var_mo> accessed 10 March 2019.

¹²⁶ Nicolas Bueno, ‘The Swiss Popular Initiative on Responsible Business - From Responsibility to Liability’ in Liesbeth FH Enneking and others (eds.), *Accountability and International Business Operations: Providing Justice for Corporate Human Rights Violations in Global Value Chains* (Routledge forthcoming 2019) 12.

¹²⁷ Swiss Federal Council, ‘Report on the Swiss strategy for the implementation of the UN Guiding Principles on Business and Human Rights’ (9 December 2016), 8 <<https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2017/11/switzerland.pdf>> accessed on 1 March 2019.

¹²⁸ Ibid 8.

¹²⁹ Ibid 11, 14.

¹³⁰ Ibid 14.

[T]o identify real and potential impacts on internationally recognized human rights and the environment; take appropriate measures to prevent the violation of internationally recognized human rights and international environmental standards, cease existing violations, and account for the actions taken.¹³¹

In terms of scope, the Responsible Business Initiative covers all companies across sectors, although the text of the draft recognises, in line with the UNGPs, that the needs of small and medium-sized companies that have limited risks of this kind are to be taken into account.¹³² The HRDD requirements under the Swiss Initiative apply to ‘controlled companies as well as to all business relationships’. If the concept of ‘business relationships’ mirrors the terminology used by the UNGPs, the concept of control used in the Swiss Initiative in relations to the legal duty to respect human rights and environmental standards, implies a narrower scope than that envisaged by the UNGPs which relied on the company’s exercise of ‘leverage’ over its business partners.¹³³ The text of the Swiss Responsible Business Initiative not only implements the UNGPs but goes further by imposing direct human rights obligations on companies. In particular, it states that ‘companies must respect internationally recognized human rights and international environmental standards, also abroad; they must ensure that human rights and environmental standards are also respected by companies under their control’.¹³⁴

The Swiss Initiative also provides for a specific liability regime of Swiss parent companies for the extraterritorial damages caused by the companies that they control. This regime has been modelled on the existing Swiss provision concerning principal liability.¹³⁵ The text of the initiative provides that the parent companies are not liable if they can prove that they carried out their due diligence obligations appropriately. In this respect, it provides for a reversal of the burden of proof which addresses some of the hurdles encountered by claimants in bringing evidence concerning the conduct of controlled companies located abroad.¹³⁶

On 14 June 2018, the National Council adopted a counter-proposal of the text, which is much less ambitious than the original text of the Swiss Responsible Business Initiative,¹³⁷ in that it would require certain Swiss based business enterprises to carry out ‘appropriate due diligence’, in order to identify human rights risks arising out of their activities and throughout their supply chains but restricting the specific liability provision to the company's legally controlled subsidiaries.¹³⁸ Liability would therefore only extend to the subsidiaries over which a parent company exercises actual control but would not extend throughout its supply chain. In terms of scope, it would apply to Swiss companies exceeding two of the three following thresholds: (1) a balance sheet total of 40

¹³¹ Swiss Coalition for Corporate Justice, ‘The Initiative Text with Explanations’ <https://corporatejustice.ch/wp-content/uploads/2018/06/KVI_Factsheet_5_E.pdf> accessed 29 March 2019.

¹³² Ibid para 1.b.

¹³³ UNGPs (n 1) Guiding Principle 19.

¹³⁴ Swiss Coalition for Corporate Justice, para 1.a.

¹³⁵ Ibid para 2.

¹³⁶ Bueno (n 126) 15.

¹³⁷ SCCJ, ‘How does the parliamentary counter-proposal differ from the popular initiative (RBI)?’ (May 2018) <https://corporatejustice.ch/wp-content/uploads/2018/07/Comparision_RBI_counter-proposal_EN-1.pdf> accessed 10 March 2019.

¹³⁸ Ibid.

million CHF/USD; (2) a turnover of 80 million CHF/USD; and/or (3) 500 full-time employees.¹³⁹ The legislation would also apply to certain Swiss companies, regardless of their size, with particular high-risk activities (to be defined by the government in a decree).¹⁴⁰ An amended version of the counter-proposal was rejected by the Senate on 12 March 2019. After a new vote from the National Council, the Senate will have a second vote on the counter-proposal.¹⁴¹

2.3.4 The German Proposal on Mandatory Human Rights Due Diligence

In its NAP released in 2016, the German government set a number of expectations in relation to the implementation of HRDD by German companies. In particular, it states that all enterprises are expected to introduce the process of corporate due diligence commensurate with their size, the sector in which they operate, and their position in supply and value chains.¹⁴² The NAP set the goal that, by 2020, at least 50% of all enterprises based in Germany with more than 500 employees would have incorporated HRDD into their corporate processes,¹⁴³ failing which the government would consider further action, ‘which may culminate in legislative measures’.¹⁴⁴

In the meantime, on the 1st of February 2019, a draft law for due diligence in supply chains from the German Federal Ministry for Economic Cooperation and Development was made public.¹⁴⁵ The draft legislation would require large German companies to undertake due diligence to identify, prevent and remediate adverse human rights and environmental impacts in their activities and throughout their supply chains.¹⁴⁶ Large companies, as defined by section 267 para. 3 of the German Commercial Code (HGB), are companies meeting at least two of the following criteria: a minimum of 250 employees, a balance sheet total of at least €20 million, or a minimum turnover of €40 million. It would also include medium-sized companies operating in high risk sectors.¹⁴⁷

Non-compliance with the due diligence requirements could lead to fines totalling up to €5 million for the company.¹⁴⁸ In addition, companies would need to appoint a compliance officer who would be required to establish a complaint mechanism and a whistle blowing system.¹⁴⁹ The compliance officer could be subject to sanctions in the form of fines or imprisonment for breach of its duties in the case of serious health damage or death.¹⁵⁰

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ ‘Parliament Keeps Responsible Business Counter-Proposal Alive’ (13 June 2019) <https://www.swissinfo.ch/eng/political-deadlock_parliament-keeps-responsible-business-counter-proposal-alive/45029100> accessed on 26 June 2019.

¹⁴² German Federal Foreign Office, ‘National Action Plan: Implementation of the UN Guiding Principles on Business and Human Rights 2016-2020’ (December 2016), 7.

¹⁴³ Ibid 10.

¹⁴⁴ Ibid.

¹⁴⁵ BHRRC, ‘German Development Ministry drafts law on mandatory human rights due diligence for German companies’ (2019) <<https://www.business-humanrights.org/en/german-development-ministry-drafts-law-on-mandatory-human-rights-due-diligence-for-german-companies>> accessed 8 March 2019.

¹⁴⁶ Norton Rose Fulbright, ‘Compliance update – Germany’ (March 2019) <<https://www.nortonrosefulbright.com/en-de/knowledge/publications/501f3bf/compliance-update-germany>> accessed 25 June 2019.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

Although the draft legislation does not provide for a new legal avenue of redress, it nevertheless strengthens the civil liability regime available to victims by providing that the due diligence law would have to be taken into account irrespective of the law applicable under Private International Law rules.¹⁵¹ It also provides that the statute of limitations would be waived pending completion of a complaint procedure provided for in the draft law.¹⁵²

The German proposal therefore seeks to implement the UNGPs not only by creating an overarching mandatory due diligence framework but also by addressing some of the barriers to access to legal remedies faced by claimants.

3. Conclusions

The UNGPs, as an authoritative soft law instrument, have great potential to spur a process of legal incrementalism capable of translating the principles into hard law, as shown by the pieces of human rights due diligence legislation adopted – or being discussed – since 2011 both at the domestic and at the regional level.¹⁵³ The Revised Draft of the proposed internationally binding treaty on business and human rights also contains a provision that would compel the States parties to enact legislation requiring business enterprises to undertake HRDD.¹⁵⁴ Several states, though, including most of those mentioned in this Chapter, do not support the adoption of an international treaty, claiming to favour an approach that focuses on implementing the UNGPs.¹⁵⁵ Indeed, on the one hand, the instruments reviewed in this Chapter have been framed by their drafters as steps to give effect to the UNGPs. On the other hand, though, evidence shows that some of these legislative developments achieve the stated goal only to a minimal extent (if at all). Modern slavery legislation enacts only one prong of the HRDD, namely the requirement to communicate externally how companies address their actual or potential human rights impacts. The other prongs – assessing the risks, taking action upon those risks, and tracking the effectiveness of HRDD – are left to the voluntary initiative of businesses.¹⁵⁶ The need to ‘show’ the actions taken to curb modern slavery in the company’s supply chain can contribute to accountability and might, in theory, incentivize companies to address human rights risks more effectively. This effect, which leverages a company’s interest in protecting its own reputation, will tend to be more pronounced for ‘consumer-facing companies that are

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Although beyond the scope of this Chapter, it is worth recalling the EU Non-Financial Reporting Directive (2014) and the EU Regulation on Conflict Minerals (2017).

¹⁵⁴ OEIWG, Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises: Revised Draft, (16 July 2019), <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf> accessed 23 September 2019, Article 5. On the Draft Business and Human Rights Treaty see Chapter 3 in this volume.

¹⁵⁵ ECCJ, ‘UN Treaty on Business & Human Rights “Zero Draft” Negotiations Day 1’ (2018) <<http://corporatejustice.org/news/9757-un-treaty-on-business-human-rights-zero-draft-negotiations-day-1>> accessed 8 March 2019; BHRRRC, ‘UN Human Rights Council adopts two resolutions on business & human rights - includes our analysis of recent developments’ <<https://www.business-humanrights.org/en/un-human-rights-council-adopts-two-resolutions-on-business-human-rights-includes-our-analysis-of-recent-developments>> accessed 9 March 2019.

¹⁵⁶ Justine Nolan, ‘Hardening Soft Law: Are the emerging corporate social disclosure and due diligence laws capable of generating substantive compliance with human rights norms?’ (2018) 15(2) *Revista de Direito Internacional* 65, 71.

subject to broader public scrutiny’,¹⁵⁷ and even for those companies it might result in little more than a box-ticking exercise aimed at avoiding major scandals.¹⁵⁸ The lack of ‘teeth’ of existing reporting legislations make them only a very partial response to the persisting governance gaps, replicating the weaknesses of voluntary CSR schemes.¹⁵⁹ Moreover, the very narrow focus on some of the worst forms of exploitation (slavery, forced labour, human trafficking, etc.) excludes from mandatory reporting other equally important internationally recognized human rights that should be covered by HRDD.¹⁶⁰ As stated above, companies’ supply chain responsibilities under the UNGPs also entail that a company failing over time to take ‘effective’ action towards a business partner causing or contributing to human rights violations could eventually find itself in a situation of ‘contributing’ to adverse human rights impacts. In this respect, drafting more or less accurate statements on the steps taken to address some specific human rights issues can only constitute a tiny portion of a process that must also entail the exercise of leverage, the monitoring of HRDD’s effectiveness and, in some cases, the termination of the supply chain relationship with an abusing entity.

The shortcomings of modern slavery laws suggest that the enactment of this type of transparency legislation might be favoured by some governments, with broad support from the private sector, to stave off more stringent forms of regulation.¹⁶¹ Circumscribing such legal obligations to only certain violations (eg modern slavery as in the UK and Australian MSA, child labour, as in the Dutch law) or types of business relationships (eg parent-subsidiary tie, as in the Swiss counter-proposal) fails to grasp the wide scope of the corporate responsibility to respect, which covers all human rights violations and all business relationships. Legislation on an overarching mandatory HRDD is undoubtedly a more promising way of implementing the UNGPs, but, as this chapter has shown, it must be brought more firmly in line with the standards they set. However, an effective implementation of the UNGPs by States requires a smart mix of measures that not only include mandatory legislation on HRDD across sectors, commodities and human rights issues, but also addresses the persisting barriers related to victims’ access to remedy as identified in the UNGPs’ third pillar.

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¹⁵⁸ On the limits of approaches that leverage market forces to correct market failure, see Thomas McInerney, ‘Putting regulation before responsibility: Towards binding norms of Corporate Social Responsibility’ (2007) 40 *Cornell International Law Journal* 171, 184-185.

¹⁵⁹ Stephen John New, ‘Modern slavery and the supply chain: the limits of corporate social responsibility?’ (2015) 20(6) *Supply Chain Management: An International Journal* 1, 5-6; McInerney (n 157) 184-188.

¹⁶⁰ Landau (n 65).

¹⁶¹ Ingrid Landau and Shelley Marshall, ‘Should Australia be Embracing the Modern Slavery Model of Regulation’ (2018) 46 *Federal Law Review* 313, 323 (‘[i]n the Australian context, opposition to the possibility of penalties being imposed on companies that fail to comply with the proposed reporting requirement by the very same actors that have called for the introduction of a reporting requirement’); LeBaron and Rühmkorf (n 41).

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