From international 'soft' law to national law: the UNGPs in domestic mandatory human rights due diligence legislation*

DEL DERECHO INTERNACIONAL «BLANDO» AL DERECHO NACIONAL: LOS PRINCIPIOS RECTORES EN LA LEGISLACIÓN NACIONAL OBLIGATORIA SOBRE DILIGENCIA DEBIDA EN MATERIA DE DERECHOS HUMANOS

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Abstract: The UNGPs are today considered the authoritative international 'soft' standard on business and human rights. While the UNGPs generally fall within the category of international 'soft' instruments, the last decade has witnessed a wave of national legal developments which seek to convert principles enshrined in the UNGPs into binding obligations for relevant companies under domestic law. The article explores three selected national laws which attempt to 'harden' the corporate responsibility to respect human rights, enshrined in Pillar II of the UNGPs, through the imposition of a legal requirement for relevant companies to exercise human rights due diligence.

Resumen: Hoy en día, los Principios Rectores se consideran la norma *soft* internacional autorizada sobre empresas y derechos humanos. Si bien los PRNU generalmente caen dentro de la categoría de instrumentos internacionales «blandos», la última década ha sido testigo de una ola de desarrollos legales nacionales que buscan convertir los principios consagrados en los PRNU en obligaciones vinculantes para las empresas relevantes según la legislación nacional. El artículo explora tres leyes nacionales seleccionadas que intentan «endurecer» la responsabilidad corporativa de respetar los derechos humanos, consagrada en el Pilar II de los PRNU, mediante la imposición de un requisito legal para que las empresas relevantes ejerzan la debida diligencia en materia de derechos humanos.

Keywords: corporations, human rights, soft law, human rights due diligence, national legislation, UNGPs.
Palabras Clave: corporaciones, derechos humanos, derecho blando, diligencia debida en derechos humanos, legislación nacional, Principios Rectores.

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I. General introduction

In 2011, the UN Human Rights Council (HRC) adopted the UN Guiding Principles on Business and Human Rights (UNGPs)[1]. The UNGPs distinguish between three sets of principles, or Pillars, which respectively elaborate on the existing international human rights obligations of states to protect human rights against the harmful impacts of business actors (Pillar I), on the responsibilities of business actors to respect human rights (Pillar II), and on the right to effective remedy for victims of corporate adverse human rights impacts (Pillar III). The corporate responsibility to respect, specifically, entails that companies refrain from harmful interferences with individuals' enjoyment of their human rights in the context of their business activities and business relationships. Human rights due diligence (HRDD) is the process envisaged by the UNGPs to help companies avoid causing or contributing to adverse human rights impacts.

The UNGPs belong to the category of so-called 'soft-law' instruments in the field of business and human rights (BHR)[2], that is, non-legally binding instruments which seek to lay down principles of expected behavior rather than placing obligations binding under international law. While this is true, in recent years, 'hardening' processes of elements of the UNGPs have been on-going at the national level[3]. These processes have sought to translate into domestic law elements of the UNGPs' corporate responsibility to respect human rights by imposing binding obligations on corporate actors. More specifically, the core component of the corporate responsibility to respect human rights, namely human rights due diligence, has been embodied in legislation in several jurisdictions. These developments are commonly referred to as 'mandatory human rights due diligence' legislation.

The present article explores three selected national laws, which attempt to 'harden' the UNGPs' 'soft' corporate responsibility to respect human rights through the imposition on certain categories of companies of a legal requirement to exercise human rights due diligence. Put differently, the article is concerned with the move in the area of business and human rights from international 'soft' law to national law. It illustrates how norms enshrined in international soft law instruments 'may provide a model for domestic legislation and thus become legally binding internally, while remaining non-binding internationally'[4], by way of examining

1 UN Doc. A/HRC/17/31, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework: Report of the Special Representative to the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. 21 March 2011.

2 Choudhury, B., «Balancing Soft and Hard Law for Business and Human Rights» in *International and Comparative Law Quarterly*, vol. 67, 2018, 968-969.

3 Parallel to these developments it should be mentioned that a process to elaborate an international legally binding treaty on business and human rights is ongoing under the auspices of the UN. The treaty process started back in 2014 with the appointment by the UN Human Rights Council (HRC), through Resolution 26/9, of an open-ended intergovernmental working group (OEIGWG) with the mandate to elaborate such instrument. The OEIGWG has so far held nine working sessions and a number of treaty drafts have been negotiated. The latest updated draft of the treaty has been released in July 2023. For an overview of the process see https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc.

4 Shelton, D., «Soft Law» in *Handbook of International Law*, Armstrong, D. (ed), Routledge, 2008, at 2. See also Chinkin, C., «The Challenge of Soft-Law: Development and Change in International

the alignment between substantive aspects of the three selected legislative instruments and core principles enshrined in the three Pillars of the UNGPs.

The article is structured as follows. Section 2 briefly discusses the emerging trend towards a binding corporate obligation to exercise human rights due diligence at the national level, highlighting some of the reasons behind the call for mandatory corporate human rights due diligence. Section 3 introduces the categories of existing national legislation that broadly deal with business and human rights issues. It then introduces the three selected case studies of national legislation on mandatory human rights due diligence. They constitute the focus of the investigation of the incorporation of the UNGPs into domestic law for a number of reasons discussed below. Section 4 illustrates the substantive aspects of the selected legislation. Section 5 investigates how the selected legislative instruments respectively incorporate into domestic law and reflect specific elements of principles enshrined in the UNGPs. Section 6 provides concluding remarks.

II. The trend towards mandatory corporate human rights due diligence under national law

The UNGPs do not place binding obligations on companies to exercise human rights due diligence as part of their 'responsibility' to respect human rights under Pillar II. However, a trend towards binding corporate obligations to exercise human rights due diligence at the national level has emerged in response both to poor implementation by companies of their 'soft' – that is, non-binding – 'responsibility to respect' and to the perceived failure of international 'soft' law instruments on business and human rights, specifically the UNGPs, to improve standards of business conduct.

As to the corporate implementation of the 'responsibility' to respect human rights, the EU Commission reports that, 'despite the influence of the UNGPs, the actual implementation of due diligence for human rights […] impacts has been very poor in practice'[5]. Recent studies have shown that many companies do not implement at all human rights due diligence as envisaged by the UNGPs, or although purporting to implement it, 'do not demonstrate practices that meet the [expectations] set by the Guiding Principles'[6], in not identifying, preventing, or mitigating, human rights risks effectively[7]. The 2020 Corporate Benchmark Assessment shows that almost half of the 229 companies assessed across all sectors failed to score any points with respect

Law» in *International and Comparative Law Quarterly*, vol. 38, 1989, at 858.

5 See in this regard European Commission, «Study on Due Diligence Requirements through the Supply Chain – Final Report», 2020, at 243. Available at: https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en.

6 See Report by UN Working Group on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/73/163, July 2018, para. 25.

7 See, in this regard, OHCHR, «UN Human Rights "Issues Paper" on legislative proposals for mandatory human rights due diligence by companies», 2020, at 8. Available at: https://www.ohchr.org/Documents/Issues/Business/MandatoryHR_Due_Diligence_Issues_Paper.pdf.

to the exercise of human rights due diligence[8]. Two years later, in 2022, the same Assessment showed that almost half of the 129 companies examined across three sectors, namely food and agriculture, ICT manufacturing and automotive manufacturing, failed to meet the expectations for the initial steps of the human rights due diligence process envisaged by the UNGPs[9].

As for those companies that at least purport to implement the responsibility to respect human rights, among weaknesses in corporate human rights due diligence practices the UN Working Group on the issue of human rights and transnational corporations and other business enterprises[10] has highlighted the lack of understanding by companies that human rights due diligence should focus on the actual and potential risks to rights-holders, rather than to the business[11]; the tendency to undertake human rights due diligence processes as a box-ticking exercise, without meaningful engagement of stakeholders, especially vulnerable or at-risk groups[12]; and the failure by companies to address risks beyond first-tier companies in their global supply chains[13]. In response to these weaknesses, the Working Group has recommended that states adopt domestic measures to legally require companies to exercise human rights due diligence[14], so as to 'advance corporate human rights due diligence as part of standard business practice'[15].

The poor implementation of the corporate 'responsibility' to respect human rights has been generally attributed to the non-legally binding character of the UNGPs specifically[16]. According to stakeholders, the UNGPs' soft corporate responsibility to respect human rights has fallen short of improving the way in which companies identify and address their human rights adverse impacts[17] because it does not give rise to any legally binding obligations for companies to exercise human rights due diligence[18]. The lack of legally binding obligations on

8 World Benchmarking Alliance, *Corporate Human Rights Benchmark 2020: Key Findings*, 3, available at: https://assets.worldbenchmarkingalliance.org/app/uploads/2020/11/WBA-2020-CHRB-Key-Findings-Report.pdf.

9 World Benchmarking Alliance, *Corporate Human Rights Benchmark 2022: Insights Report*, 3, available at: https://assets.worldbenchmarkingalliance.org/app/uploads/2022/11/2022-CHRB-Insights-Report_FINAL_23.11.22.pdf.

10 The body of experts established following the adoption of the UNGPs to promote worldwide dissemination and implementation of the instrument.

11 UN Doc. A/73/163, para. 25(a).

12 *Ibid.,* para. 25(c).

13 UN Doc. A/73/163*,* para. 29.

14 *Ibid.,* para. 93.

15 *Ibid.*

16 See in this regard European Commission, «Study on Due Diligence Requirements through the Supply Chain – Final Report», 2020, at 141, available at: https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en.

17 Report by ECCJ and CORE, *Debating Mandatory Human Rights Due Diligence Legislation and Corporate Liability: A Reality Check,* (2020), at 6.

18 European Commission, «Study on Due Diligence Requirements through the Supply Chain – Final Report», 2020, at 243. See also Deva, S., «Mandatory Human Rights Due Diligence Laws in Europe: A Mirage for Rightsholders?» in *Leiden Journal of International Law*, 2023, at 10: 'as business responsibility to respect human rights under Pillar II is voluntary, conducting HRDD is also non-obligatory for businesses. This is a major limitation because market pressures or courts of public opinion do not always work against all enterprises'.

human rights due diligence is alleged to have 'allowed corporations to continue to disregard appalling human rights abuses […] taking place throughout their global value chains'[19]. In light of this, it has been argued that introduction of legal obligations is necessary in the area of human rights due diligence, 'where progress resulting from voluntary measures has been slow'[20]. The UN Working Group has observed that voluntary instruments are inadequate to address existing weaknesses in business human rights due diligence practices, and has highlighted the need for 'enhanced […] regulatory action to address business-related human rights impacts across sectors and global value chains', for instance through mandatory human rights due diligence requirements[21].

III. National laws in the area of business and human rights

The perceived necessity to impose human rights obligations binding on companies under domestic law has borne fruit in a number of EU and non-EU jurisdictions since the adoption of the UNGPs in 2011. Domestic legislation in the area of business and human rights differs in terms of the types of obligations it places on companies. Some impose loose reporting obligations. Some create specific obligations to exercise human rights due diligence with respect to certain risks associated with business activities. Other impose overarching obligations to exercise human rights due diligence and to disclose the human rights due diligence process, in some cases with potential civil liability attached for failure to comply with these obligations[22].

The purpose of the present section of the article is two-fold. First, the section briefly introduces the categories of existing domestic legislation that deals with business and human rights issues. Second, the section introduces the three selected examples of national legislation on mandatory human rights due diligence that constitute the focus of the analysis undertaken later in the article. It also explains why the three specific instruments are selected for the purpose of the article.

The categories of existing domestic legislation in business and human rights

Different categories of existing legislation in the area of business and human rights can be distinguished. The first category comprises domestic legislation that requires reporting

19 Report by ECCJ and CORE, *Debating Mandatory Human Rights Due Diligence Legislation and Corporate Liability: A Reality Check,* (2020), at 4.

20 World Benchmarking Alliance, *Corporate Human Rights Benchmark 2022: Insights Report*, at 5. Available at: https://assets.worldbenchmarkingalliance.org/app/uploads/2022/11/2022-CHRB-Insights-Report_FINAL_23.11.22.pdf. See also Report by ECCJ and CORE, *Debating Mandatory Human Rights Due Diligence Legislation and Corporate Liability: A Reality Check,* (2020), at 6.

21 Press Release, UN OHCHR, «UN experts welcome new study on corporate human rights due diligence», March 2020, available at https://www.ohchr.org/en/press-releases/2020/03/un-experts-welcome-new-study-corporate-human-rights-due-diligence?LangID=E&NewsID=25758.

22 Martin-Ortega, O., «Transparency and Human Rights in Global Supply Chains: From Corporate-led Disclosure to a Right to Know» in *Research Handbook on Global Governance, Business and Human Rights*, Marx A, Calster GV and Wouters J (eds), Edward Elgar, 2022, at 106.

by companies but does not specifically mandate the exercise of human rights due diligence. Legislation in this category places on high-earning domestic companies and foreign companies carrying out business or part of a business on the territory of the regulating state a requirement to report on their business activities and on the steps taken to address certain risks in their own business activities and in the context of their supply chains. Examples of such instruments are the 2015 UK Modern Slavery Act[23] and the 2018 Australian Modern Slavery Act[24].

The second category of existing domestic legislation in the area of business and human rights comprises instruments that place on certain categories of national and foreign companies a requirement to carry out human rights due diligence in order to prevent certain human rights risks associated with business activities and to report on the due diligence measures adopted to prevent those risks. An example of these legislative instruments is the 2019 Dutch Child Labor Due Diligence Act[25].

23 UK Modern Slavery Act 2015 (2015 c. 30). The legislation requires high-earning commercial organizations, wherever incorporated, undertaking activities or part of their activities in the UK to prepare a slavery and human trafficking statement for each financial year of the organization. The statement must include the steps that the organization has taken during the financial year to ensure that slavery and human trafficking is not taking place in any of its supply chains and in any part of its own business or it must declare that the organization has taken no such steps. If the organization has a website, it must publish the slavery and human trafficking statement there. See Part 6 in the legal text for the specific reporting requirements regarding transparency in supply chains, available at: https://www.legislation.gov.uk/ukpga/2015/30/enacted#:~:text=An%20Act%20to%20make%20provision,Commissioner%3B%20and%20for%20connected%20purposes. For a more thorough analysis of the legal instrument see, *inter alia,* Chiussi Curzi, L. and Malafosse C., «A Public International Law Outlook on Business and Human Rights» in *International Community Law Review*, vol. 11, 2022, 22; Macchi, C. and Bright, C., «Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation» in *Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law,* Buscemi M, Lazzerini N and Magi L (eds), Brill, 2020, 5; Martin-Ortega, O., «Transparency and Human Rights in Global Supply Chains: From Corporate-led Disclosure to a Right to Know» in *Research Handbook on Global Governance, Business and Human Rights*, Marx A, Calster GV and Wouters J (eds), Edward Elgar, 2022, 100.

24 Australian Modern Slavery Act 2018 (No. 153, 2018). The legislation requires entities based or operating in Australia, with an annual consolidated revenue of more than $100 dollars to produce annual statements on modern slavery, "describing the risks of modern slavery in the operations and supply chains of reporting entities and entities owned or controlled by those entities". The statement must also 'describe the actions taken by the reporting entity and any entity that the reporting entity owns or controls, to assess and address those risks'. See Part 2 in the legal text, available at: https://www.legislation.gov.au/Details/C2018A00153.

25 Netherlands Kamerstukken I, 2016/17, 34 506, A. The legislation requires companies registered in the Netherlands, as well as foreign companies which provide goods and services to Dutch customers, to exercise due diligence in order to identify and prevent the risk of child labor in their supply chains. More specifically, companies are required to investigate whether there is a reasonable suspicion that the goods and services supplied to Dutch consumers are produced with child labour. In the event of a reasonable suspicion, the company must draw up and implement an action plan. The Act also requires companies to produce a statement declaring that they are exercising appropriate due diligence in order to prevent child labour. For a more detailed analysis of the law see McCorquodale R, 'Human Rights Due Diligence Instruments: Evaluating the Current

The third category of domestic legislation in the area of business and human rights comprises instruments that place on certain categories of companies an all-encompassing human rights due diligence obligation, rather than an obligation to carry out human rights due diligence with respect to specific types of corporate-related human rights risks. Legislation of this kind, already adopted in a number of states in Europe, includes the 2017 French Duty of Vigilance Law, the 2021 German Corporate Due Diligence Obligations in Supply Chains Act, and the 2021 Norwegian Transparency Act. These three legislative instruments on mandatory human rights due diligence ('HRDD') are examined in the article.

The three selected laws on mandatory HRDD

The national legislation on mandatory human rights due diligence adopted in France, Germany, and Norway constitutes the focus of the present analysis for several reasons.

First, the laws selected are all attempts to incorporate into domestic law the corporate responsibility to respect human rights enshrined in Pillar II of the UNGPs by way of an all-encompassing legal requirement for certain categories of company to exercise human rights due diligence. The other existing legislation in the area of business and human rights either only requires reporting by businesses without specifically mandating the exercise of human rights due diligence or requires the exercise of human rights due diligence only with respect to specific business-related human rights risks. The legislation enacted in France, Germany, and Norway supplements reporting obligations with an obligation to exercise human rights due diligence, in line with the UNGPs[26]. It also imposes on companies an obligation to exercise human rights due diligence in relation to actual and potential adverse impacts on all internationally recognized human rights, again in line with the UNGPs[27].

A second reason for focusing on the three selected laws is that all three have been explicitly characterized by the states in question as tools to implement and give effect at the domestic level to the UNGPs and, in particular, to the corporate responsibility to respect human rights. The French and German laws on mandatory human rights due diligence are both referred to in the respective National Action Plans (NAP) on Business and Human Rights of France[28] and Germany[29] as important measures to implement the UNGPs nationally. For its part, while

Legislative Landscape' in Marx A and others (eds), *Research Handbook on Global Governance, Business and Human Rights* (Edward Elgar Publishing 2022), at 135-136. See also Macchi, C. and Bright, C., «Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation» in *Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law,* Buscemi M, Lazzerini N and Magi L (eds), Brill, 2020, at 10.

26 This is examined under Section 5.

27 The UNGPs provide that the corporate responsibility to respect human rights, through the exercise of human rights due diligence, covers all internationally recognized human rights, given that corporate actors can virtually have an impact on the entire spectrum of internationally recognized human rights. See Commentary to Principle 12.

28 Section 10 'Reinforcement of Legislation', at 24. French NAP available at: https://globalnaps.org/wp-content/uploads/2017/11/france-nap-english.pdf.

29 German National Action Plan on Business and Human Rights (2016-2020), at 10: "If fewer that 50 % of the enterprise […] have incorporated the elements of human rights due diligence […] into their corporate processes by 2020, the Federal Government will consider further action, which

Norway's National Action Plan does not specifically refer to the Transparency Act among the measures to implement the UNGPs domestically, the report accompanying the introduction of the Act into the Norwegian Parliament states that one of main purposes of the legislation is to 'promote enterprises' respect for fundamental rights'[30], as envisaged in international standards, including the UNGPs. Furthermore, the Act's drafting committee observed that the Transparency Act would cement in domestic law the expectations and requirements on corporate human rights responsibilities found in international standards and guidelines, among them the UNGPs[31].

The third reason for selecting the laws of France, Germany and Norway is the overall alignment between substantive aspects of these laws and a number of principles in the three Pillars of the UNGPs. Among other examples, the three instruments place on certain categories of company an obligation to undertake human rights due diligence processes whose substantive elements are largely modelled on the principles in Pillar II of the UNGPs[32].

IV. Substantive aspects of corporate human rights due diligence legislation in France, Germany and Norway

The present section of the article provides an outline of each of the selected domestic laws on mandatory human rights due diligence. The following subsections look respectively at the instruments adopted in France, Germany and Norway, with a focus on the scope of application of the instruments, the types of obligations set forth, the scope of these obligations, and the enforcement and liability mechanisms established.

may culminate in legislative measures". NAP available at: https://globalnaps.org/wp-content/uploads/2018/04/germany-national-action-plan-business-and-human-rights.pdf. Additionally, the National Baseline Assessment (NBA) Report commissioned by the Federal Foreign Office for the purpose of updating the current German NAP, provides that, with regards to the domestic operationalization of Pillar II of the UNGPs, the updated version of the NAP on business and human rights should focus specifically on the German Act on Corporate Due Diligence in Supply Chains. See https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Analyse_Studie/Analysis_National_Baseline_Assessment.pdf, at 15.

30 See *Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions (Transparency Act), Recommendation from the Ministry of Children and Families*, Prop. 150 L, April 2021, at 6. Available at: https://www.forbrukertilsynet.no/wp-content/uploads/2022/07/prop-150-transparency-act-1.pdf.

31 See Report by the Ethics Information Committee, *Supply Chain Transparency: Proposal for an Act regulating Enterprises' transparency about supply chains, duty to know and due diligence* (November 2019), 33-35. Available at: https://www.regjeringen.no/contentassets/6b4a42400f3341958e0b62d40f484371/ethics-information-committee---part-i.pdf.

32 Albeit with some distinctions, which are discussed in more detail in Part III.

The French law on the duty of vigilance[33]

The French Law on the Duty of Vigilance was the first legislation worldwide on mandatory corporate human rights due diligence[34]. It was adopted in 2017 at the end of a four-year long legislative process. It has been called the 'best known and far reaching'[35] domestic regime on mandatory human rights due diligence and 'a historic step forward for the corporate accountability movement'[36]. The Law is referred to in the French National Action Plan (NAP) on Business and Human Rights as one of the measures adopted by France to implement the UNGPs at the domestic level[37], specifically through the establishment of a 'duty of vigilance' on certain categories of parent companies to identify and prevent adverse impacts on the enjoyment of human rights in the context of their own activities and in their business relationships[38], in line with the UNGPs[39].

The Law places on large companies with registered office in French territory and other large companies with registered office in French territory or abroad[40] a tripartite obligation of vigilance or due diligence[41]. Companies falling within the scope of the law are required to

33 Unofficial translation into English available at https://respect.international/wp-content/uploads/2017/10/ngo-translation-french-corporate-duty-of-vigilance-law.pdf.

34 Bright, C. and others, «Toward a Corporate Duty for Lead Companies to Respect Human Rights in Their Global Value Chains?» in *Business and Politics*, vol. 22, 2020, at 685.

35 OHCHR, 'UN Human Rights "Issues Paper" on legislative proposals for mandatory human rights due diligence by companies' (June 2020), at 3. Available at: https://www.ohchr.org/Documents/Issues/Business/MandatoryHR_Due_Diligence_Issues_Paper.pdf.

36 Cossart S, Chaplier J and Lomenie TBD, «The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All» in *Business and Human Rights Journal*, vol. 2, 2017, at 317.

37 National Action Plan for the Implementation of the United Nations Guiding Principles on Human Rights, France (26 April 2017), at 24. Available at: https://globalnaps.org/wp-content/uploads/2017/11/france-nap-english.pdf.

38 Macchi, C. and Bright, C., «Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation» in *Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law,* Buscemi M, Lazzerini N and Magi L (eds), Brill, 2020, at 12.

39 Assembléè Nationale, XIVe Legislature, 'Compte rendu intégral, Première séance du lundi 30 mars 2015' (2015), available at: https://www.assemblee-nationale.fr/14/cri/2014-2015/20150193.asp.

40 "Any company that at the end of two consecutive financial years employs at least 5,000 employees within the company and its direct or indirect subsidiaries, whose head office is located on French territory, or that has at least 10,000 employees in its service and in its direct or indirect subsidiaries, whose head office is located on French territory or abroad". See Article 1 of the Duty of Vigilance Law.

41 It should be noted that the terminology used in the legal text to refer to human rights due diligence is 'reasonable vigilance' (*vigilance raisonnable).* It has been noted that the concept of vigilance allows to translate more appropriately the concept of human rights due diligence envisaged by the UNGPs into French Law. Even if different terminologically, the substantive aspects of the vigilance obligations reflect the components of human rights due diligence in Pillar II of the UNGPs. See, in this regard, Macchi, C. and Bright, C., «Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation» in *Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law,* Buscemi M, Lazzerini N and Magi L (eds), Brill, 2020, at 13.

develop, implement and disclose a vigilance plan with certain extraterritorial implications[42]. The vigilance plan has to cover the company's own activities, the activities of subsidiaries it directly or indirectly controls, and the activities of subcontractors and suppliers further down the supply chain with whom the company maintains an established commercial relationship. The concept of 'control over a company' in the Law is referable to Article L.233-16 of the French Commercial Code, which specifies that exclusive control by a company over another entity results from a number of factors, among them the right to exercise a dominant influence over a company by virtue of contract or statutory clauses[43]. By 'established commercial relationships', the Law means 'a stable, regular commercial relationship, taking place with or without contract, with a certain volume of business, and under a reasonable expectation that the relationship will last'[44].

The purpose of the vigilance plan is to enable companies falling within the scope *ratione personae* of the legislation to identify and prevent risks to human rights and fundamental freedoms, health, and safety[45] resulting from their own activities and the activities of companies under their control or with whom they maintain commercial relationships. To this end, the vigilance plan must include a number of substantive elements[46], among them measures to identify actual and potential risks linked to the company, the companies it controls, and business partners; measures to prevent the risks identified; a mechanism to assess regularly the situation of subsidiaries, as well as of subcontractors and suppliers with whom the company has commercial relationships; and a monitoring scheme to follow up on the measures adopted and to assess their efficacy. In addition to the obligation to draft and implement the vigilance plan, companies are required to disclose publicly their due diligence plan[47].

In the event of failure to comply with their obligations of vigilance, injunctions can be sought to compel companies to develop, implement and disclose their vigilance plan[48]. The Law establishes a civil liability regime that allows adversely affected parties to initiate proceedings in negligence whenever a company's failure to comply with its obligations of vigilance results in harm. A company that fails to comply with its obligations 'shall be held liable and obliged to compensate for any harm that due diligence would have permitted to avoid'[49]. The burden of proof remains with the claimant, who needs to prove harm, a breach of the company's due

42 As discussed further below, this refers mainly to the fact that the vigilance plan that enterprises falling within the scope of the Duty of Vigilance Law must draft and implement not only applies to the activities of the enterprise but also to any activity of entities the enterprise controls or with whom the enterprise has an established commercial relationship, including therefore the activities of entities potentially domiciled and operating outside the territory of France, which is to say extraterritorially.

43 Article L.233-16 – Commercial Code, available at: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000030927205/.

44 Cossart S, Chaplier J and Lomenie TBD, «The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All» in *Business and Human Rights Journal*, vol. 2, 2017, at 320.

45 Albeit outside the scope of the chapter, the Law also requires relevant enterprises to exercise due diligence to identify and prevent environmental harm.

46 Article 1 of the Duty of Vigilance Law.

47 *Ibid.*

48 Macchi, C. and Bright, C., «Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation» in *Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law,* Buscemi M, Lazzerini N and Magi L (eds), Brill, 2020, at 14.

49 Article 2 of the Duty of Vigilance Law.

diligence obligations, and a causal link between the harm and the breach[50]. The civil liability regime entered into force only in 2019[51]. Since then, however, a number of civil claims have been brought against companies domiciled in France for alleged human rights [and environmental impacts] resulting from their failure to comply with their due diligence obligations[52].

The German act on corporate due diligence obligations in supply chains[53]

The German law on mandatory corporate human rights due diligence was published in the Federal Law Gazette[54] on 22 July 2021, at the end of a legislative process that started back in 2019[55]. Debates on the potential introduction of binding human rights due diligence

50 Cossart S, Chaplier J and Lomenie TBD, «The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All» in *Business and Human Rights Journal*, vol. 2, 2017, at 321.

51 Macchi, C. and Bright, C., «Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation» in *Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law,* Buscemi M, Lazzerini N and Magi L (eds), Brill, 2020, at 14.

52 The following cases are pending and no decisions on actual violations of due diligence obligations under the Law have been made. (1) In *Friends of the Earth et al. v. Total,* brought in 2019 and the first case tested under the legislation, six NGOs sued oil company Total over a project in Uganda and Tanzania, for the alleged failure to take into account the project's potential human rights and environmental impacts. Total was requested to provide a vigilance plan for the oil project, in accordance with its obligations under the Duty of Vigilance Law, which includes the measures to prevent serious violations of human rights as well as environmental damage. After four years since the beginning of legal proceedings, in February 2023, a French civil court has ruled the case 'inadmissible' on procedural grounds, stating, *inter alia,* that the NGO plaintiffs did not correctly follow court procedures against Total. See, in this regard, https://www.business-humanrights.org/en/latest-news/total-lawsuit-re-failure-to-respect-french-duty-of-vigilance-law-in-operations-in-uganda/ (2) In *Envol Vert et al. v. Casino,* brought in 2021, French supermarket chain Casino was sued by eleven NGOs for alleged human rights and environmental impacts linked to the company's involvement in the cattle industry in Brazil and Colombia. The claimants require that the company complies with its obligation to produce and implement a duty of vigilance plan, as well as to compensate for damages stemming from the company's failure to comply with its due diligence obligations. See, in this regard, http://climatecasechart.com/non-us-case/envol-vert-et-al-v-casino/#:~:text=Summary%3A,environmental%20and%20human%20rights%20harms. (3) In February 2023, BNP Paribas has been sued under the French Duty of Vigilance Law by three French NGOs alleging that the commercial bank is in breach of its duty of vigilance obligations due to its alleged failure to provide a robust vigilance plan to identify and prevent environmental and human rights risks arising from its activities in the fossil fuel sector. In the same month a second lawsuit has been initiated against the bank under the Duty of Vigilance Law, in this case for the alleged provision of financial services without adequate due diligence to corporations engaged in deforestation, forced labor and violations of indigenous rights. See, in this regard, https://www.rfi.fr/en/business/20221027-ngos-launch-legal-battle-against-french-bank-bnp-over-fossil-fuel-investment.

53 Unofficial English text available at https://www.bmas.de/EN/Services/Press/recent-publications/2021/act-on-corporate-due-diligence-in-supply-chains.html.

54 See https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl121s2959.pdf#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl121s2959.pdf%27%5D__1646731666842.

55 For a more detailed account on the several phases of development of the legislation, see https://www.business-humanrights.org/en/latest-news/german-due-diligence-law/.

obligations for companies, however, can be traced back to 2016, when Germany adopted its first NAP on Business and Human Rights.

While the NAP included only voluntary measures to implement the UNGPs at the domestic level, it also made it clear, with regards to human rights due diligence, that the introduction of mandatory measures would be considered 'if less than 50 % of German companies with more than 500 employees incorporated the elements of human rights due diligence [in accordance with the UNGPs] into their corporate processes by 2020'[56]. A subsequent review of corporate human rights due diligence practices revealed that 'only 13 to 17 per cent of all companies with more than 500 employees actively applied human rights due diligence'[57], signaling that companies' compliance with voluntary standards in the area of business and human rights remained insufficient. In light of this, negotiations for a mandatory corporate human rights due diligence legislation officially began, culminating in the enactment in 2021 of the Act on Corporate Due Diligence Obligations in Supply Chains. The legislation officially entered into force at the beginning of 2023.

The Act applies to enterprises with 'central administration, principal place of business, administrative headquarters, or statutory seat' in Germany and with at least 3,000 employees[58]. Additionally, it applies to other enterprises with a domestic branch on German territory and with at least 3,000 employees[59]. From the beginning of 2024, however, the employee threshold will be considerably lower with respect to both domestically-domiciled and other companies, which will fall within the scope of the Act when they employ at least 1,000 individuals instead of 3,000 individuals[60].

The Act places on the relevant companies an obligation to exercise due diligence in order to identify, prevent and minimize, *inter alia,* any human rights risk in the company's supply chain[61]. An enterprise's 'supply chain' encompasses both the activities of an enterprise in its own business area and the activities of direct and indirect suppliers[62]. Human rights-related risks are defined as conditions 'in which there is sufficient probability that a violation of […] a prohibition is imminent'[63]. Section 2 of the Act provides an indicative list of human

56 National Action Plan for the Implementation of the United Nations Guiding Principles on Human Rights, Germany (16 December 2016), at 10. Available at: https://globalnaps.org/wp-content/uploads/2018/04/germany-national-action-plan-business-and-human-rights.pdf.

57 Krajewski, M., Tonstad, K. and Wohltmann, F., «Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction? » in *Business and Human Rights Journal*, vol. 6, 2021, at 552.

58 Act on Corporate Due Diligence Obligations in Supply Chains, General Provisions, Section 1, Scope of Application.

59 *Ibid.*

60 *Ibid.* In this regard, it is expected that the Law covers approximately 900 companies at the beginning of 2023, and 4,800 companies at the beginning of 2024. See Krajewski, M., Tonstad, K. and Wohltmann, F., «Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction? » in *Business and Human Rights Journal*, vol. 6, 2021, at 553.

61 *Ibid.*, Due Diligence Obligations, Section 3.

62 Definitions, Section 2(5).

63 Definitions, Section 2(2) and Section 2(3).

rights-related prohibitions, which includes prohibitions in the area of child labor, forced labor, employment, and discrimination[64].

The due diligence obligation includes five relevant requirements[65]. The first requirement is the establishment of an appropriate and effective risk management system to allow the enterprise to comply with its due diligence obligations. An 'effective' risk management system is one that enables the enterprise to identify and minimize human rights risks and to prevent, end or minimize human rights-related violations if the enterprise has caused or contributed to these risks or violations within the supply chain[66].

As part of risk management, the second requirement is the performance of appropriate risk analyses to identify human rights risks resulting from the enterprise's own area of business and that of its direct suppliers[67].

If the enterprise identifies a risk in the course of a risk analysis, the third due diligence requirement is the adoption of preventive measures by the enterprise in its own area of business and that of its direct suppliers[68]. In the specific case of preventing human rights risks in the activities of direct suppliers, the enterprise must consider, *inter alia,* human rights-related expectations when selecting a direct supplier and the adoption of contractual assurances from the entity that it will comply with the expectations required by the enterprise and address them along the supply chain[69].

If, in spite of preventive measures, a violation of human rights-related obligation has nonetheless occurred or is imminent in the enterprise's own business area or that of a direct supplier, the fourth due diligence requirement is to adopt immediately remedial measures to end or minimize the violation[70]. When a violation results in the business area of the enterprise, the Act requires enterprises to bring the violation to an end. When a violation results in the context of direct suppliers' activities, and the enterprise cannot bring the violation to an end, it is required to minimize the violation without undue delay. The termination of the business relationship with the direct supplier is considered a last resort, required only if the violation is very serious, the measures adopted do not remedy the situation, and less severe measures are not available[71].

64 Act on Corporate Due Diligence Obligations in Supply Chains, Definitions, Section 2. Each of the prohibitions included in Section 2 refers to specific provisions included in international and domestic human rights standards. Although outside the scope of the chapter, it should be specified that the Act also requires enterprises to exercise due diligence in relation to environmental risks. The Act provides examples of environment-related prohibitions, including the prohibitions to manufacture mercury-added products, to produce and use chemicals, to collect and dispose of waste in a manner that is not environmentally sound, and to export hazardous waste.

65 *Ibid*., Due Diligence Obligations, from Section 3 to Section 9.

66 *Ibid.,* Section 4.

67 *Ibid.,* Section 5. Section 2 of the Act defines a 'direct supplier' as 'a partner to a contract for the supply of goods or the provision of services whose supplies are necessary for the production of the enterprise's product or for the provision and use of the relevant service'.

68 *Ibid.,* Section 6.

69 *Ibid.*

70 *Ibid.,* Section 7.

71 *Ibid.*

The fifth and final due diligence requirement is the establishment of a complaints procedure to enable persons to report potential human rights risks, as well as violations of human rights-related or environment-related obligations enshrined in the Act resulting from the company's activities in its own business area or those of its direct suppliers[72].

The requirements of the due diligence obligation in the Act apply primarily to the activities of an enterprise in its own business area and those of its direct suppliers. With regards to the activities of indirect suppliers, which fall within the meaning of 'supply chain'[73] in the Act and, therefore, within the scope of the due diligence obligations[74], the legislation sets forth an obligation for enterprises to set up a complaints mechanism to allow persons to report potential risks and violations of obligations resulting from the activities of these entities. Only if the enterprise has obtained 'substantiated knowledge' that a violation of human rights-related obligations by an indirect supplier 'may be possible'[75] is it required to follow the five due diligence requirements[76]. Where, in contrast, the enterprise does not have 'actual indications that suggest that a violation of a human rights-related obligation by indirect suppliers may be possible'[77], it is not obliged to conduct due diligence in relation to these entities[78].

The fulfillment of the due diligence obligations must be documented by the enterprise on a regular basis. Under Section 10, the Act places a separate reporting requirement on enterprises to draft an annual report on the fulfillment of their due diligence obligations in the previous financial year and make it available on the enterprise's website. The report must state whether the company has identified any human rights risk, or any violation of the human rights-related obligations stipulated in the Act. It must also include the measures adopted to fulfill the due diligence obligations and an assessment of the impact and effectiveness of such measures[79].

In contrast to the French Duty of Vigilance Law, the German Act does not establish a civil liability regime for harm resulting from enterprises' failure to comply with their due diligence obligations. As a result of political compromises during the legislative process[80], the final draft of the Act specifically contains a provision[81] which excludes the possibility that violations of due diligence obligations enshrined in the Act give rise to any liability under civil law[82]. Any

72 *Ibid.,* Section 8.
73 Act on Corporate Due Diligence Obligations in Supply Chains, Section 2(5).
74 *Ibid.,* Section 3(1).
75 *Ibid.,* Section 9.
76 *Ibid.*
77 *Ibid.*
78 Krajewski, M., Tonstad, K. and Wohltmann, F., «Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction? » in *Business and Human Rights Journal*, vol. 6, 2021, at 556.
79 Act on Corporate Due Diligence Obligations in Supply Chains, Section 10.
80 Krajewski, M., Tonstad, K. and Wohltmann, F., «Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction? » in *Business and Human Rights Journal*, vol. 6, 2021, at 558.
81 Act on Corporate Due Diligence Obligations in Supply Chains, Section 3(3).
82 Act on Corporate Due Diligence Obligations in Supply Chains, Division 2, Section 3(3).

liability arising independently of the Act remains unaffected, meaning that enterprises might still face legal claims on the basis of general tort law[83].

Monitoring and enforcement of the Act falls to the Federal Office for Economic Affairs and Export Control (BAFA)[84]. This administrative agency is responsible for receiving and assessing the reports prepared by enterprises where, pursuant to their due diligence obligations under the Act, potential human rights and environmental risks are identified and preventive measures are laid out. In terms of sanctions, for companies that fail to comply with their due diligence obligations intentionally or by negligence the Act envisages the imposition of administrative fines[85] and the possibility of being excluded 'from participation in a procedure for the award of a supply, works or service contract […] until they have proved that they have cleared themselves'[86].

The Norwegian transparency act[87]

On the same day that Germany adopted its legislation on mandatory human rights due diligence, the Norwegian Parliament passed a law relating to enterprises' transparency and work on fundamental human rights and decent working conditions, commonly referred to as the 'Transparency Act'[88]. In response to call by various civil society organizations and NGOs "for a law that would give a right to information about working conditions at production sites"[89], the Norwegian Government appointed in 2018 the Ethics Information Committee, with the mandate, *inter alia,* "to examine whether it is possible and predictable to impose a duty on enterprises to provide information to consumers and organizations about their production sites, and how they exercise responsible business conduct and manage their supply chains"[90]. In the final Report presented to the Government, the Committee stressed the importance of national legislation on corporate transparency and due diligence in supply chain, observing:

> "Transparency can serve as a competitive advantage. Benefits may include enhanced reputation, motivated employees, greater efficiency, legal compliance, and improved access to capital […] Today enterprises increasingly recognize the need for transparency about the production of goods and services, and their responsibilities also when

83 Krajewski, M., Tonstad, K. and Wohltmann, F., «Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction? » in *Business and Human Rights Journal*, vol. 6, 2021, at 558.

84 Act on Corporate Due Diligence Obligations in Supply Chains, Division 6, Section 19(1).

85 *Ibid.,* Division 6, Section 24.

86 *Ibid.,* Division 5, Section 22(1).

87 Full text available at https://www.regjeringen.no/contentassets/c33c3faf340441faa7388331a735f9d9/transparency-act-english-translation.pdf.

88 Krajewski, M., Tonstad, K. and Wohltmann, F., «Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?» in *Business and Human Rights Journal*, vol. 6, 2021, at 550.

89 *Ibid.*, at 551.

90 See Report by the Ethics Information Committee, *Supply Chain Transparency: Proposal for an Act regulating Enterprises' transparency about supply chains, duty to know and due diligence* (November 2019), 9. Available at: https://www.regjeringen.no/contentassets/6b4a42400f3341958e0b62d40f484371/ethics-information-committee---part-i.pdf.

it comes to the supply chain […] An Act regulating transparency about supply chain and due diligence with respect to human rights and decent work is an appropriate answer to some of the most crucial challenges of our time"[91].

Along with its final report, the Committee presented in 2019 the draft Transparency Act, which was later submitted to the Norwegian parliament and enacted in 2021[92]. The Transparency Act officially entered into force on 1 July 2022.

The Transparency Act applies to larger Norwegian enterprises which offer goods and services in or outside Norway and to larger foreign enterprises that offer goods and services in Norway[93]. The term 'larger enterprises' refers to enterprises as defined in the Accounting Act or that satisfy two of three criteria, namely sales revenues in excess of NOK 70 million, a balance sheet total in excess of NOK 35 million, and an average number of employees in the financial year in excess of 50 full-time equivalent[94]. The Act provides that parent companies shall be considered 'larger enterprises', within the scope of the Act, if the criteria above are satisfied for 'the parent company and subsidiaries as a whole'[95].

The Act places on these enterprises two main substantive obligations, referred to as the 'duty to carry out due diligence' and the 'duty to account for due diligence' respectively.

In accordance with the first, the relevant enterprises are obliged to carry out human rights due diligence in accordance with the OECD Guidelines for Multinational Enterprises[96]. Due diligence is defined by implicit reference to the six due diligence steps envisaged in the OECD Due Diligence Guidance for Responsible Business Conduct[97]. First, enterprises are required to embed responsible business conduct in their policies[98]. Second, they are required to identify and assess actual and potential adverse impacts on fundamental human rights[99] and decent working conditions[100] that the enterprise may cause or contribute to or that are directly linked to the enterprise's operations, products or services via the supply chain[101] or

91 *Ibid.,* at 7-8.

92 Krajewski, M., Tonstad, K. and Wohltmann, F., «Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction? » in *Business and Human Rights Journal*, vol. 6, 2021, at 551-552.

93 Norwegian Transparency Act, Section 2.

94 Norwegian Transparency Act, Section 3(a).

95 *Ibid.*

96 Norwegian Transparency Act, Section 4.

97 Norwegian Transparency Act, Section 4(a) to (f). See http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf.

98 Norwegian Transparency Act, Section 4(a).

99 'Fundamental human rights' encompass internationally recognized human rights enshrined, *inter alia,* in the ICCPR and ICESCR, and in the ILO's core conventions on fundamental principles and rights at work. See Section 3(b).

100 'Decent working conditions' refers to work that safeguards fundamental human rights and health, safety and environment in the workplace, and that provides a living wage. See Section 3(c).

101 The Act defines 'supply chain' as encompassing 'any party in the chain of suppliers and subcontractors that supplies or produces goods, services or other input factors'. Norwegian Transparency Act, Section 3(d).
Ibid., Section 3(e). The term 'business partner' is defined as 'any party that supplies goods or

business partners[102]. When adverse impacts are identified, the third requirement in the due diligence obligation is to implement suitable measures to cease, prevent or mitigate the adverse impacts[103]. The fourth and fifth requirements are to track the implementation and results of measures adopted to prevent and mitigate adverse impacts[104] and to communicate to affected stakeholders how the enterprise is addressing the adverse impacts[105]. The final due diligence requirement is to provide for or cooperate in remediation and compensation, where this is required, if the enterprise has caused or contributed to adverse impacts[106].

Pursuant to the obligation to account for due diligence, the relevant enterprises must publish an account of how the enterprise carries out due diligence[107]. More specifically, enterprises are required to publish on their website an account of due diligence which includes information regarding, first, actual adverse impacts and significant risks of adverse impacts identified through due diligence and, secondly, measures implemented or planned to cease the former or to mitigate the latter, as well as the results or expected results of such measures[108]. The obligation to account for due diligence is linked to another provision of the Act, which deals with individuals' right to information[109]. Section 6 provides that, upon request, 'any person has the right to information from an enterprise regarding how the enterprise addresses actual and potential adverse impacts'[110] pursuant to their due diligence obligations. The right to information includes 'both general information and information relating to a specific product or service offered by the enterprise'[111]. Only under certain circumstances may the enterprise deny a request for information[112].

Like the German Act on Corporate Due Diligence Obligations in Supply Chains, the Norwegian Transparency Act does not provide for a civil liability regime for harm resulting from enterprises' non-compliance with due diligence obligations. The Norwegian Consumer Authority is tasked with monitoring compliance by enterprises with the provisions of the Act[113] and with seeking to influence enterprises to comply with their obligations[114] and to cease illegal conduct in the event of breach of the Act[115]. For enterprises that fail to comply with their obligations to carry out and to account for due diligence, the Consumer Authority may issue

services directly to the enterprises, but that is not part of the supply chain'.

102 *Ibid.,* Section 4(b).

103 *Ibid.,* Section 4(c).

104 *Ibid.,* Section 4(d).

105 *Ibid.,* Section 4(e).

106 *Ibid.,* Section 4(f).

107 *Ibid.,* Section 5.

108 *Ibid.,* Section 5(b) and 5(c).

109 *Ibid.,* Section 6.

110 *Ibid.*

111 *Ibid.*

112 These circumstances include when (1) the request does not provide a sufficient basis for identifying what the request concerns; (2) the request is clearly unreasonable; (3) the requested information concerns data relating to an individual's personal affairs; and (4) the requested information concerns data that is important to keep secret in the interest of the person whom the information concerns. See Section 6(a)-(d).

113 *Ibid.,* Section 9.

114 *Ibid.*

115 *Ibid.*

prohibitions and orders and may establish enforcement penalties[116]. For repeated failure to comply with the obligation to account for due diligence, the obligation to disclose upon individuals' request or the obligation to provide access to the relevant information in a timely manner, infringements penalties may be imposed on the enterprise, as well as on natural persons acting on behalf of the enterprise[117].

V. The UNGPS in due diligence legislation in France, Germany and Norway

The aim of the present section of the article is to highlight how the UNGPs, as a 'soft' law instrument, have influenced the making of the selected domestic human rights due diligence laws and informed substantive aspects of the laws. To this end, the following subsections highlight the extent to which the laws enacted in France, Germany and Norway reflect elements of the UNGPs by examining selected principles enshrined in the three Pillars of the instrument. With regards to Pillar II specifically, they examine how the three laws transform the non-binding corporate responsibility to respect into a binding obligation to exercise human rights due diligence at the domestic level.

Subsection 1 examines selected principles in Pillar I, which deals with the state duty to protect human rights in the context of business activities. Subsection 2 examines principles found in Pillar II of the UNGPs, which deals with the responsibility of companies to respect human rights. Finally, Subsection 3 examines how principles found in Pillar III, on access to remedies, inform substantive aspects of the three laws.

Pillar I: The state duty to protect

The three legislative instruments examined in the article are informed by core principles belonging to the state duty to protect human rights in Pillar I of the UNGPs. What follows focuses on selected principles.

Principles 1 and 2

Pillar I of the UNGPs reaffirms the existing international human rights obligations binding on states with respect to the conduct of business entities within their territory or, depending on the language of the relevant treaty provision, jurisdiction. States are required to secure to everyone within their territory or territory under their jurisdiction the enjoyment of internationally-protected human rights against any adverse impacts resulting from the activities there of business entities. Principle 1 in the UNGPs provides that, in order for states to discharge this obligation, they are required to take appropriate steps to 'prevent, investigate, punish and redress' corporate adverse human rights impacts within their territory or jurisdiction. The commentary to Principle 1 elaborates on this, saying that, while states generally have discretion in deciding upon these appropriate steps, they should consider

116 *Ibid.,* Sections 12 and 13.

117 *Ibid.,* Section 14.

preventative and remedial measures such as 'effective policies, legislation, regulations and adjudication'. The specific requirement to prevent corporate adverse human rights impacts within their territory or jurisdiction entails a positive duty to adopt preventative measures at the domestic level, including the enactment of effective legislation aimed at strengthening business respect for human rights, that is, ensuring that business enterprises do not interfere with individuals' enjoyment within their territory or jurisdiction of their human rights.

As part of their duty to protect, Principle 2 provides that states should 'set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations'[118]. With respect to home states specifically, the commentary to Principle 2 provides that, while 'not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction', 'there are strong policy reasons for home States to set out clearly the expectation that businesses [domiciled in their territory and/or jurisdiction] respect human rights abroad'[119].

The laws enacted in France, Germany and Norway are arguably examples of tools whereby states set out clearly, as urged by Principle 2 of the UNGPs, the expectation that businesses respect human rights throughout their operations. But more than setting out mere 'expectations' to respect, they mandate business respect for human rights at the domestic level through the creation of a legal requirement to exercise human rights due diligence to identify, prevent and mitigate adverse human rights impacts in the context of business enterprises' activities and business relationships. The French Duty of Vigilance Law is specifically referred to in the country's NAP as one of the regulatory legislative measures adopted by France to give effect to the corporate responsibility to respect human rights under domestic law[120]. The German Act on Corporate Due Diligence Obligations in Supply Chains is referred to in the NBA Report[121] as the key legislative instrument to implement under national law the corporate responsibility to respect human rights. Lastly, while not specifically referred to in the country's NAP, the preparatory works of Norway's Transparency Act have clarified that one of the purposes of the legislation is to foster business respect for fundamental human rights under national law, in accordance with international standards, among others the UNGPs[122].

118 UNGPs, Principle 2.

119 Commentary to Principle 2.

120 Section 10 'Reinforcement of Legislation', at 24. French NAP available at: https://globalnaps.org/wp-content/uploads/2017/11/france-nap-english.pdf. See also Report No. 2578, French National Assembly, *Proposition de Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre,* February 2015. The report clarifies that the overall purpose of the proposed legislation is to make enterprises responsible in order to prevent the occurrence of tragedies in France and abroad. Available at https://www.assemblee-nationale.fr/14/propositions/pion2578.asp.

121 The National Baseline Assessment (NBA) Report commissioned by the Federal Foreign Office for the purpose of updating the 2016 German NAP, provides that, with regards to the domestic operationalization of the corporate responsibility to respect human rights, enshrined in Pillar II of the UNGPs, the updated version of the NAP on business and human rights should focus specifically on advancing the implementation of the German Act on Corporate Due Diligence in Supply Chains. See https://www.institut-fuer-menschenrechte.de/fileadmin/Redaktion/Publikationen/Analyse_Studie/Analysis_National_Baseline_Assessment.pdf, at 15.

122 See Report by the Ethics Information Committee, *Supply Chain Transparency: Proposal for an Act regulating Enterprises' transparency about supply chains, duty to know*

The commentary to Principle 2 observes that one approach adopted by states to 'set out clearly the expectation that businesses respect human rights throughout their operations' is the enactment of 'domestic measures with extraterritorial implications'[123]. Examples include domestic legislative measures that place on parent companies obligations to report in the regulating state on the global activities of the entire enterprise[124], therefore including the activities of entities potentially located and operating on the territory of states other than the regulating state.

The laws adopted in France, Germany and Norway are arguably examples of domestic measures with extraterritorial implications mentioned in the commentary to Principle 2. The three laws place on enterprises falling within their scope an obligation to undertake human rights due diligence not only in relation to their own business activities, but also in relation to the activities of subsidiaries and entities in their supply chains, irrespective of where these entities are located and operate. In other words, enterprises falling within the scope of the laws are required to exercise human rights due diligence to identify, prevent and mitigate adverse impacts resulting from the activities of entities potentially domiciled and operating outside the respective regulating states, which is to say extraterritorially. These entities are not subject directly to obligations with respect to human rights but their human rights performance is indirectly regulated through the due diligence obligation placed on enterprises subject to the legislative instruments in France, Germany and Norway[125].

In sum, by placing on the relevant enterprises a territorial obligation to exercise human rights due diligence with respect to the activities of subsidiaries and other entities potentially located outside the regulating states, the laws examined in the chapter arguably reflect at the national level the expectation placed on home states under Principle 2 of the UNGPs, as part of the broader duty of states to protect human rights in the context of business activities enshrined in Principle 1.

Principle 3

Principle 3 of the UNGPs provides guidance on the operationalization of foundational Principles 1 and 2. It elaborates on the exercise by states of their regulatory and policy functions in meeting their obligation to protect human rights via prevention of adverse human rights impacts in the context of business activities. According to Principle 3, states should, among other things, 'address any gaps' in laws that 'are aimed at, or have the effect of, requiring business enterprises to respect human rights', as well as 'provide effective guidance to business enterprises on how to respect human rights throughout their operations'. In general, the commentary suggests that, in meeting their obligation to protect human rights against corporate adverse impacts, states should consider 'a smart mix of measures', including national mandatory measures, aimed at fostering business respect for human rights[126]. Respect by

and due diligence (November 2019), at 4. Available at: https://www.regjeringen.no/contentassets/6b4a42400f3341958e0b62d40f484371/ethics-information-committee---part-i.pdf.

123 Commentary to Principle 2.

124 *Ibid.*

125 OHCHR, 'UN Human Rights "Issues Paper" on legislative proposals for mandatory human rights due diligence by companies' (June 2020), at 10. Available at: https://www.ohchr.org/Documents/Issues/Business/MandatoryHR_Due_Diligence_Issues_Paper.pdf.

126 UNGPs, Commentary to Principle 3.

business enterprises for human rights is understood to involve their refraining from causing or contributing to adverse human rights impacts in the context of their business activities and business relationships through the exercise of human rights due diligence, in line with the expectations of Pillar II of the UNGPs[127].

It can be argued that, as part of the 'smart mix of measures' that states should consider adopting to foster business respect for human rights, states might consider adopting mandatory national measures mandating business respect for human rights through a specific legal requirement for businesses to exercise human rights due diligence in order to identify, prevent and mitigate adverse human rights impacts throughout their operations[128]. Put differently, states might consider 'hardening' the corporate responsibility to respect human rights and its core component, namely human rights due diligence, at the domestic level. In doing so, states would meet the requirement to take appropriate steps to prevent corporate adverse impacts as part of their international obligation to protect human rights in the context of business activities within their territory or jurisdiction.

The three laws examined in the chapter can be included among relevant preventative measures in the 'smart mix of measures', advised by commentary to Principle 3, to foster business respect for human rights at the domestic level.

Principle 3 of the UNGPs suggests that, among measures adopted to operationalize the state duty to protect, states should consider 'encourag[ing], and where appropriate require[ing], business enterprises to communicate how they address their human rights impacts'[129]. According to the commentary to Principle 3, state encouragement or binding obligations placed on companies to communicate how they address their adverse impacts, including by way of formal public reporting, are key to foster respect for human rights by business enterprises[130]. It could be argued that, as human rights due diligence is generally understood as the process whereby companies can address their adverse human rights impacts, states might consider encouraging, and where appropriate requiring, companies to communicate how they carry out human rights due diligence.

The three national laws examined in the chapter arguably reflect this aspect envisaged by Principle 3 of the UNGPs. As illustrated in Part III, the laws adopted in France, Germany and Norway not only impose on relevant categories of companies an obligation to exercise human rights due diligence but also require these companies to disclose how they fulfill their human

127 See UNGPs, Principle 11, Principle 13 and Principle 17.

128 By way of example, the UN Committee on Economic, Social and Cultural Rights has noted that 'the obligation to protect entails a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant rights, to avoid such rights being abused, and to account for the negative impacts caused or contributed to by their decisions and operations and those of entities they control on the enjoyment of Covenant rights. States should adopt measures such as imposing due diligence requirements to prevent abuses of Covenant rights in a business entity's supply chain and by subcontractors, suppliers, franchisees, or other business partners'. General Comment No. 24 on State Obligations under the International Covenant on Economic, Social, and Cultural Rights in the Context of Business Activities, E/C.12/GC/24, para. 16.

129 UNGPs, Principle 3.

130 Commentary to Principle 3.

rights due diligence obligation by providing information on the adverse impacts identified and on the measures adopted to prevent and mitigate the identified adverse impacts in their own activities and supply chains.

Pillar II: The corporate responsibility to respect

The laws examined in the chapter not only reflect aspects of principles belonging to the state duty to protect human rights in Pillar I but also incorporate into domestic law core principles belonging to the corporate responsibility to respect human rights in Pillar II of the UNGPs. What follows focuses on selected principles.

Principle 17

To recall, Principle 17 of the UNGPs provides that, '[i]n order to identify, prevent, mitigate and account for how they address their adverse human rights impacts', business enterprises should carry out human rights due diligence[131]. The UNGPs provide that companies might be involved with adverse human rights impacts 'either through their own activities or as a result of their business relationships with other parties'[132]. In light of these different degrees of involvement in adverse human rights impacts, Principle 17(a) provides that human rights due diligence processes 'should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships'. 'Business relationships' are understood to encompass 'relationships with business partners, entities in [the company's] value chain, and any other non-State or State entity directly linked to its business operations, products or services'[133], with no restriction as to where these entities are located.

The laws examined in the chapter 'harden' at the domestic level Principle 17 of the UNGPs by placing a legal obligation binding on certain categories of companies to exercise human rights due diligence. The parameters of human rights due diligence provided, *inter alia,* by Principle 17(a) are also generally reflected in the human rights due diligence obligations set forth in the laws examined. Albeit with some distinctions, the three laws require enterprises falling within their scope to exercise human rights due diligence in relation to adverse human rights impacts stemming in the context of their own activities and adverse human rights impacts stemming from their business relationships with other entities, including subsidiaries, suppliers and business partners, regardless of where these entities are located.

In the French Duty of Vigilance Law, the vigilance obligation covers the human rights risks resulting directly or indirectly from the activities of the enterprise, the activities of companies it controls directly and indirectly and the activities of subcontractors or suppliers further down the supply chain with whom the enterprise maintains an 'established business relationship'. With respect to risks stemming from business relationships, however, it should be observed that the scope of the vigilance obligation is narrower than the parameters of the human rights due diligence process in the UNGPs[134]. Indeed, while human rights due diligence in the UNGPs

131 UNGPs, Principle 17.

132 Commentary to Principle 13.

133 *Ibid.*

134 Macchi, C. and Bright, C., «Hardening Soft Law: the Implementation of Human Rights Due

should cover adverse human rights impacts that may be directly linked to the enterprise's business relationships, the vigilance obligation in the French Duty of Vigilance Law covers the adverse human rights impacts linked to the enterprise's 'established' business relationships. An established business relationship is understood as 'a stable, regular commercial relationship, taking place with or without a contract, with a certain volume of business, and under a reasonable expectation that the relationship will last'[135].

In the German Act on Corporate Due Diligence Obligations in Supply Chains, the due diligence obligation covers 'all world-wide supply chains' that are initiated or controlled by German and foreign enterprises with a domestic branch in Germany falling within the scope of the Act[136]. As provided by the Act, an enterprise's supply chain includes 'all steps in Germany and abroad that are necessary to produce the products and provide the services' of an enterprise and encompasses the activities of the enterprise, the activities of its direct suppliers and the activities of its indirect suppliers[137]. In light of this, the human rights due diligence requirement covers the human rights-related risks stemming from the activities of the enterprise, as well as from the activities of its direct and indirect[138] suppliers.

In the Norwegian Transparency Act enterprises are required to carry out due diligence to identify and prevent actual and potential adverse impacts resulting from their own activities, and the activities of entities in their supply chain as well as the activities of their business partners. With respect to the activities of an enterprise, the legal commentary of the Act provides that these encompass the activities of the parent company together with the activities of its subsidiaries[139]. In light of this, it has been clarified that 'the parent company's due diligence shall therefore include risks associated with both the parent company's and subsidiaries' activities, regardless of where the subsidiaries are domiciled'[140]. With respect to the activities of entities in the enterprise's supply chain, the due diligence obligation covers the global supply chain of the enterprise and 'is not limited to specific tiers'[141], in line with the

Diligence Requirements in Domestic Legislation» in *Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law*, Buscemi M, Lazzerini N and Magi L (eds), Brill, 2020, at 14.

135 Cossart, S., Chaplier, J. and Lomenie, TBD., «The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All» in *Business and Human Rights Journal*, vol. 2, 2017, at 320.

136 See https://www.csr-in-deutschland.de/EN/Business-Human-Rights/Supply-Chain-Act/FAQ/faq.html.

137 Section 2(5) in the Act.

138 With regards to risks stemming from the activities of indirect suppliers, however, it should be recalled that enterprises are under the obligation to exercise human rights due diligence only when the enterprise has actual indications or 'substantiated knowledge' that a violation of a human rights-related obligation 'may be possible'. See Section 9(3) in the Act.

139 *Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions (Transparency Act), Recommendation from the Ministry of Children and Families*, Prop. 150 L, April 2021, at 69. Available at: https://www.forbrukertilsynet.no/wp-content/uploads/2022/07/prop-150-transparency-act-1.pdf.

140 *Ibid.,* 70.

141 Report by the Ethics Information Committee, *Supply Chain Transparency: Proposal for an Act regulating Enterprises' transparency about supply chains, duty to know and due diligence* (November 2019), at 47. Available at: https://www.regjeringen.no/contentassets/6b4a42400f3341958e0b62d40f484371/ethics-information-committee---part-i.pdf.

UNGPs which 'do not […] restrict due diligence requirements to apply to a specific number of tiers in the supply chain'[142]. The drafting committee of the legislation has noted that 'it is the risk of harmful impact that determines the scope of due diligence'[143].

In sum, it is interesting to note how the parameters of the human rights due diligence obligation set forth in the three laws examined are modelled on the parameters of the human rights due diligence process envisaged in the UNGPs. Albeit with some distinctions, the three laws require enterprises falling within their scope to exercise human rights due diligence in relation to adverse human rights impacts stemming in the context of their own activities and adverse human rights impacts stemming from their business relationships with other entities, including subsidiaries, suppliers and business partners, regardless of where these entities are located.

Principles 18, 19 and 20

The essential components of the human rights due diligence process envisaged by the UNGPs are respectively dealt with in separate principles under Pillar II. In accordance with Principle 18, businesses should identify and assess any actual or potential adverse human rights impacts stemming from their own business activities or their business relationships. Principle 19 states that, in order to prevent and mitigate any adverse human rights impacts identified, businesses should integrate the findings of their human rights impact assessments across relevant internal functions and processes and take appropriate action. Such action will vary according to whether the company has caused or contributed to the adverse impact or is involved 'solely because the impact is directly linked to its operations, products or service by a business relationship'[144]. Pursuant to Principle 20, in order to verify whether they are addressing any adverse impacts identified, businesses should track the effectiveness of their response.

The substantive components of the human rights due diligence obligation in the domestic legislation enacted in France, Germany and Norway generally reflect the core elements of the human rights due diligence process envisaged by the UNGPs.

In the context of the French Duty of Vigilance Law, the preparatory works to the legislation clarify that the concept of due diligence adopted resonates with the concept of due diligence advanced in Principle 17 of the UNGPs[145] and that the purpose of placing a due diligence or 'vigilance' obligation on certain categories of companies is to prevent and tackle adverse

142 Report by the Ethics Information Committee, *Supply Chain Transparency: Proposal for an Act regulating Enterprises' transparency about supply chains, duty to know and due diligence* (November 2019), at 47. Available at: https://www.regjeringen.no/contentassets/6b4a42400f3341958e0b62d40f484371/ethics-information-committee---part-i.pdf.

143 *Ibid.*

144 UNGPs, Principle 19(b).

145 Report No. 2628, French National Assembly, *RAPPORT FAIT AU NOM DE LA COMMISSION DES LOIS CONSTITUTIONNELLES, DE LA LÉGISLATION ET DE L'ADMINISTRATION GÉNÉRALE DE LA RÉPUBLIQUE SUR LA PROPOSITION DE LOI (n° 2578), relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre,* March 2015, available at: https://www.assemblee-nationale.fr/14/rapports/r2628.asp.

impacts by businesses in their activities and supply chains[146]. As discussed, in order to meet their vigilance obligations, companies falling within the scope of the legislation are required to produce and implement a vigilance plan which shall include a number of measures. In line with Principle 18 of the UNGPs, the vigilance plan must include, *inter alia,* measures allowing an enterprise to identify and assess risks stemming from the operations of the company, as well as from its business relationships[147]. In line with Principle 19, the vigilance plan must include measures to allow the enterprise to prevent and mitigate identified human rights risks. Finally, along the general lines of Principle 20, the vigilance plan must include a monitoring scheme to allow enterprises to follow-up on the measures adopted to address their human rights impacts and assess their efficacy.

The German Act on Due Diligence Obligations in Supply Chains, too, transforms the human rights due diligence expectations under Pillar II into human rights due diligence obligations under domestic law. Pursuant to Sections 4 and 5 of the Act, enterprises must have in place a risk management system, as part of which they must conduct risk analyses to identify actual and potential adverse human rights risks in line with Principle 18 of the UNGPs. Pursuant to Sections 6 and 7 of the Act, enterprises must adopt measures to prevent, end or minimize adverse human rights impacts, in line with Principle 19 of the UNGPs. Specifically, the measures required by Section 7 reflect on the whole the recommendations in Principle 19. Enterprises are required to cease violations of human rights-related obligations when these stem from their own business activities[148]. With respect to violations of human rights-related obligations to which the enterprise is linked through its contractual relationships with direct suppliers, it is required to consider additional measures to end or minimize the violation without undue delay. Such measures include increasing the influence or leverage exercised on the entity that causes or may cause harm and temporarily suspending the business relationship, with termination of the latter as last resort[149]. Finally, generally in line with the recommendations in Principle 20 of the UNGPs, Sections 6 and 7 of the Act require enterprises to review the effectiveness of, and update if necessary, the measures adopted to prevent, end or minimize adverse human rights impacts.

For its part, the Norwegian Transparency Act provides that enterprises must carry out human rights due diligence specifically in accordance with the OECD Guidelines for Multinational Enterprises, rather than the UNGPs. However, the final report by the drafting committee explains that the due diligence standard adopted in the legislation generally

146 Report No. 2578, French National Assembly, *Proposition de Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre,* February 2015, available at: https://www.assemblee-nationale.fr/14/propositions/pion2578.asp.

147 In this regard, as part of risk mapping, enterprises are required to adopt 'procedures to regularly assess […] the situation of subsidiaries, subcontractors or suppliers with whom [they] maintain an established business relationship'. Article 1.

148 The commentary to Principle 19 of the UNGPs states that, when a business enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact.

149 With respect to adverse human rights impacts to which the company is linked through its business relationships, the commentary to Principle 19 states that the business enterprise should exercise or increase leverage if it has leverage to prevent or mitigate the adverse impact. In the event that the business enterprise lacks leverage over the other relevant entity and is unable to increase it, it should then consider ending the business relationship.

'reflects the agreed standards as set out in the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises'[150]. The drafters also clarify that the substance of the due diligence duty is intended to align with the UNGPs, whereas 'the duty is materially restricted in comparison with the OECD Guidelines for Multinational Companies, which also require due diligence on disclosure, environmental protection, bribery and corruption and consumer interests'[151]. In practice, the substantive due diligence requirements set forth in the Act do indeed align by and large with the due diligence steps envisaged in Pillar II of the UNGPs. Enterprises exercising due diligence pursuant to their obligations under the Transparency Act would at the same time 'be able to fulfill the recommendations in the UNGPs […] regarding due diligence'[152]. Pursuant to Section 4(b) of the Act, which is in line with Principle 18 of the UNGPs, enterprises are required, among other things, to identify and assess actual and potential adverse impacts that the enterprise has caused or to which it has contributed or that are directly linked to the enterprise's business relationships. Once adverse impacts are identified, Section 4(c) of the Act, which aligns with the expectations in Principle 19 of the UNGPs, requires enterprises to adopt measures to cease, prevent or mitigate these impacts. Finally, in accordance with Section 4(d) of the Act, which is in line with Principle 20 of the UNGPs, enterprises are required to track the implementation and results of measures adopted to cease, prevent, or mitigate adverse human rights impacts.

In sum, the substantive components of the human rights due diligence obligation in the three laws examined generally reflect the core elements of the human rights due diligence process envisaged by the UNGPs, specifically with respect to identification, prevention and mitigation of adverse human rights impacts, as well as tracking of effectiveness of the measures adopted.

Principle 21

As part of the human rights due diligence process envisaged by the UNGPs, Principle 21 of the UNGPs provides that 'in order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders'[153]. The commentary provides that 'the responsibility to respect human rights requires that business enterprises have in place policies and processes through which they can both know and show that they respect human

150 Report by the Ethics Information Committee, *Supply Chain Transparency: Proposal for an Act regulating Enterprises' transparency about supply chains, duty to know and due diligence* (November 2019), at 5. Available at: https://www.regjeringen.no/contentassets/6b4a42400f3341958e0b62d40f484371/ethics-information-committee---part-i.pdf. It is also important to recall, in this respect, that in the 2011 updated version of the OECD Guidelines, the newly introduced chapter on human rights (Chapter IV) draws upon and aligns with the Guiding Principles, including with respect to human rights due diligence. See https://www.oecd.org/daf/inv/mne/48004323.pdf, at 31-34.

151 *Ibid.*

152 See *Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions (Transparency Act), Recommendation from the Ministry of Children and Families*, Prop. 150 L, April 2021, at 88. Available at: https://www.forbrukertilsynet.no/wp-content/uploads/2022/07/prop-150-transparency-act-1.pdf.

153 UNGPs, Principle 21.

rights in practice'[154]. By way of communicating how they address their adverse human rights impacts, companies can provide 'a measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders'[155]. Communication can take the form, *inter alia,* of formal public reporting, which is especially expected 'where risks of severe human rights impacts exist, whether this is due to the nature of the business operations or operating contexts'[156].

In line with the expectations of Principle 21 of the UNGPs, the three laws examined in the chapter supplement the obligation to exercise human rights due diligence with an obligation publicly to disclose or report how the company addresses human rights risks in its operations and supply chains, that is, how the company undertakes human rights due diligence in practice.

Transparency and disclosure play an important role in the French Duty of Vigilance Law[157]. As part of their vigilance obligations, in addition to the obligation to establish and implement an effective vigilance plan with measures to address human rights risks, companies are required by Article 1 of the Law publicly to disclose the vigilance plan along with the report on its effective implementation. By supplementing the obligation to draft and implement the vigilance plan with an obligation to make the vigilance plan publicly available to stakeholders, "the French law brings together the human rights due diligence and transparency elements of the UNGPs' second pillar"[158].

The human rights due diligence obligations in the German Act on Corporate Due Diligence Obligations in Supply Chains includes a reporting obligation under Section 10. Specifically, the Act requires enterprises to document 'continuously' how they fulfill their due diligence obligations[159], by way of preparing an annual report and making it publicly available, and free of charge, on the enterprise's website for a period of seven years[160]. The report must state whether the company has identified any human rights risk or any violation of the human rights-related obligations laid out in the Act. It must also include the measures adopted to fulfill the various components of the due diligence obligation, as well as information on how the company assesses the impact and effectiveness of the measures adopted[161].

The Norwegian Transparency Act, as the name suggests, places great emphasis on the importance of transparency in the context of enterprises' activities and their supply chains. As highlighted by the drafting committee, 'the Act builds on the understanding that transparency is a key asset in our society'[162]. Disclosure by enterprises and individuals' access

154 Commentary to Principle 21.

155 *Ibid.*

156 *Ibid.*

157 Elsa Savourey, France Country Report in European Commission (EC) Study on Due Diligence, 70. Available at: https://repub.eur.nl/pub/116741/EC-study-DD-in-supply-chains-part-3-country-reports.pdf

158 Chambers, R. and Vastardis, AY., «Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability» in *Chicago Journal of International Law*, vol. 21, 2021, at 335.

159 Section 10(1) in the Act.

160 *Ibid.*, Section 10(2).

161 *Ibid.*

162 Report by the Ethics Information Committee, *Supply Chain Transparency: Proposal*

to information with regards to business activities are regarded essential 'to display the due diligence expected under the UN Guiding Principles on Business and Human Rights (UNGPs) and thereby prevent adverse human rights impacts'[163]. In light of this, the Transparency Act includes two interrelated provisions dealing with transparency, whose overall aim is to 'enable [stakeholders'] informed decisions about purchases and investments, and other decisions that take into account the social impacts of businesses'[164]. The first provision under Section 5 is an obligation to account for due diligence, that is, to make accessible on their website an account which includes information on the enterprise's structure, area of operations, guidelines and procedures for handling actual and potential adverse impacts; information on actual and potential impacts identified through human rights due diligence; and information on the measures to cease or mitigate these adverse impacts. The second obligation generally dealing with transparency is the obligation under Section 6 to provide information upon written request, or 'an obligation to disclose on demand[165]', how the enterprise addresses actual and potential adverse impacts pursuant to the due diligence obligations set forth in the legislation. Overall, the two obligations together are designed to enhance transparency by enterprises which, in turn, is considered key to achieving the purpose of the UNGPs at the national level, that is, ensuring corporate respect for human rights[166].

As discussed, it is interesting to highlight how in the three laws examined transparency plays a fundamental complementary role to the obligation to exercise human rights due diligence. Albeit in different modalities, the laws require relevant enterprises to disclose how they address adverse human rights impacts in their own activities and supply chains, that is, how they exercise human rights due diligence in practice.

Pillar III: Access to remedy

Pillar III elaborates on the roles of states and corporations in ensuring that victims of corporate-related adverse human rights impacts have access to an effective remedy when adverse impacts occur. Core foundational and operational principles enshrined in Pillar III inform the laws examined in the chapter. What follows focuses on selected principles.

Principles 25 and 26

Guiding Principle 25 provides that, as part of their obligation to protect human rights against the adverse impacts of business enterprises, states are required to 'take appropriate

for an Act regulating Enterprises' transparency about supply chains, duty to know and due diligence (November 2019), at 7. Available at: https://www.regjeringen.no/contentassets/6b4a42400f3341958e0b62d40f484371/ethics-information-committee---part-i.pdf.

163 *Ibid.,* 8.

164 *Ibid.,* 6.

165 Martin-Ortega O, «Transparency and Human Rights in Global Supply Chains: From Corporate-led Disclosure to a Right to Know» in *Research Handbook on Global Governance, Business and Human Rights*, Marx A, Calster GV and Wouters J (eds), Edward Elgar, 2022, at 119.

166 See *Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions (Transparency Act), Recommendation from the Ministry of Children and Families*, Prop. 150 L, April 2021, at 121. Available at: https://www.forbrukertilsynet.no/wp-content/uploads/2022/07/prop-150-transparency-act-1.pdf.

steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy'[167]. The commentary to Principle 25 provides that, unless states take steps 'to investigate, punish and redress' the adverse human rights impacts of businesses, the international obligation of states to protect human rights can become 'weak or even meaningless'. The commentary continues by stating that remedies can be provided by State-based or non-State-based, judicial or non-judicial, mechanisms[168] and can include, *inter alia,* restitution, compensation and punitive sanctions such as criminal or administrative fines, as well as the prevention of harm through injunctions or guarantees of non-repetition. Principle 26 provides that 'states should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses'. The commentary to Principle 26 places state-based judicial mechanisms 'at the core of ensuring [victims'] access to a remedy'[169].

The three laws examined in the chapter, albeit with some distinctions, reflect at the domestic level the requirement for states, as part of their duty to protect human rights in the context of business activities, to take steps to ensure that those adversely affected by corporate activities have access to effective remedy.

Under the French Duty of Vigilance Law, in the event of failure by an enterprise to comply with its obligations of vigilance in a three months period after receiving formal notice to comply, 'the relevant jurisdiction can, following the request of any person with legitimate interest in this regard, urge said company, under financial compulsion if appropriate, to comply with its duties'[170]. The French Duty of Vigilance Law also provides for civil liability action for harm resulting from companies' failure to comply with their duty of vigilance obligations. In such cases, the legislation provides that companies failing to comply with their duty of vigilance 'shall be held liable and obliged to compensate for the harm that due diligence would have permitted to avoid'[171]. Proceedings brought under the law shall be governed by the principles of general tort law, where civil liability is established when a harm occurs, a duty of vigilance obligation is breached by the company in question, and a causal link between the harm and the breach of the obligation is found[172]. The burden of proof remains with the claimant, who needs to prove that a claim satisfies all three conditions above[173].

167 UNGPs, Principle 25.

168 For the purposes of the UNGPs, a grievance is understood as 'a perceived injustice invoking an individual's or a group's sense of entitlement'. A grievance mechanism is therefore understood as a process through which grievances concerning corporate adverse human rights impacts can be raised and remedy can be sought. See Commentary to Principle 25.

169 Commentary to Principle 26.

170 Duty of Vigilance Law, Article 1.

171 Duty of Vigilance Law, Article 2.

172 Elsa Savourey, France Country Report in European Commission (EC) Study on Due Diligence, at 73. Available at: https://repub.eur.nl/pub/116741/EC-study-DD-in-supply-chains-part-3-country-reports.pdf.

173 Cossart, S., Chaplier, J. and Lomenie, TBD., «The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All» in *Business and Human Rights Journal*, vol. 2, 2017, at 321. Although the establishment of a civil liability regime is arguably a relevant operationalization of Pillar III of the UNGPs under domestic law, some commentators have pointed out that, due to the failure to alleviate the burden of proof, the French legislation falls short of the requirements

The German Act on Corporate Due Diligence Obligations in Supply Chains allows the competent authority to make appropriate orders and to take appropriate measures to detect, end and prevent human rights-related violations upon request, 'if the person making the request makes a substantiated claim that he or she has been violated in his or her legal position as a result of the non-fulfillment of [human rights due diligence obligations] or that a violation [of this kind] is imminent'[174]. The Act also envisages administrative fines for regulatory offences by enterprises, which are understood as enterprises' failure, either intentionally or by negligence, to comply with the different components of their human rights due diligence obligation, with the requirement to submit the report pursuant to Section 10 of the Act, or with the orders that may be issued by the competent authority to rectify the report within a reasonable period of time or to submit a corrective action plan in case of violations of the human rights due diligence obligations[175].

Last but not least, the Consumer Authority tasked with the monitoring and enforcement of the Norwegian Transparency Act may issue prohibitions and orders to ensure that enterprises falling within the scope of the legislation observe the obligation to exercise due diligence, the obligation to account for due diligence, the obligation to disclose upon request, and the obligation to provide access to the relevant information in a timely manner[176]. To ensure that prohibitions and orders are observed, enforcement penalties may be established, to be paid in case of non-compliance[177]. Finally, for repeated failure to comply with the obligation to account for due diligence, the obligation to disclose upon individuals' request or the obligation to provide access to the relevant information in a timely manner, infringements penalties may be imposed on the enterprise, as well as on natural persons acting on behalf of the enterprise[178].

Principles 28 and 29

According to the UNGPs, 'states should consider ways to facilitate access to effective non-state-based grievance mechanisms dealing with business-related human rights harms'[179]. As specified in the commentary to Principle 28, 'one category of non-state-based grievance mechanisms encompasses those administered by a business enterprise alone or with stakeholders, by an industry association or a multi-stakeholder group'[180]. These are referred to as operational-level grievance mechanisms.

set out in Principle 26, which expects states to remove legal and practical barriers that might lead to victims' denial of justice. See, in this regard, Macchi C and Bright C, «Hardening Soft Law: the Implementation of Human Rights Due Diligence Requirements in Domestic Legislation» in *Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law*, Buscemi M, Lazzerini N and Magi L (eds), Brill, 2020, at 14.

174 Act on Corporate Due Diligence Obligations in Supply Chains, Sections 14 and 15.

175 *Ibid*, Section 24.

176 Act Relating to Enterprises' Transparency and Work on Fundamental Human Rights and Decent Working Conditions (Transparency Act), Section 12, Prohibitions and Orders.

177 *Ibid.,* Section 13, Decisions regarding Enforcement Penalties.

178 *Ibid.,* Section 14.

179 UNGPs, Principle 28.

180 Commentary to Principle 28.

With respect to these, Principle 29 provides that, 'in order for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who might be adversely impacted'. Such mechanisms are administered at company level and 'can engage the business enterprise directly in assessing the issues and seeking remediation of any harm'[181]. According to the commentary to Principle 29, operational-level grievance mechanisms might play an important role with respect to the corporate responsibility to respect human rights because they provide a channel for individuals and communities affected by the activities of the company 'to raise concerns when they believe they are being or will be adversely impacted'. This contributes to support the identification by the company of adverse human rights impacts, as part of its on-going human rights due diligence[182]. Once grievances are identified, these mechanisms make it possible for the company to address them and to remediate early adverse impacts, 'thereby preventing harms from compounding and grievances from escalating'[183].

Aspects of Principles 28 and 29 of the UNGPs are reflected in the three laws examined in the chapter. As part of the due diligence obligations in the three instruments, enterprises are required to establish an operational-level grievance mechanism in the form of a complaint mechanism or procedure.

In the French Duty of Vigilance Law, among other measures that the vigilance plan must include, companies are required to establish an alert mechanism 'that collects reporting of existing or actual risks, developed in working partnership with the trade union organizations representatives of the company concerned'[184]. It has been pointed out that the mechanism in question is intended to apply to both internal stakeholders, such as workers, and external stakeholders, such as local communities, who might be adversely affected by the activities of companies falling within the scope of the Law, providing them a tool to raise concerns about the existence or 'realization' of risks[185].

As part of their human rights due diligence obligations under the German Act on Corporate Due Diligence Obligations in Supply Chain, enterprises are required to set up a complaints procedure. According to Section 8 in the Act, 'the complaints procedure enables persons to report human rights […] risks as well as violations of human rights-related […] obligations that have arisen as a result of the economic actions of an enterprise in its own business area or of a direct supplier'. The Act provides that, whenever risks and violations are reported, the persons entrusted by the enterprise with the implementation of the procedure, having discussed the facts with the person reporting the information, may offer a procedure for amicable settlement to those raising the complaint.

Finally, the Norwegian Transparency Act requires enterprises falling within the scope of the legislation, as part of their duty to carry out due diligence, to provide for or cooperate in

181 Commentary to Principle 29.

182 *Ibid.*

183 *Ibid.*

184 Duty of Vigilance Law, Article 1.

185 Elsa Savourey, France Country Report in European Commission (EC) Study on Due Diligence, at 69. Available at: https://repub.eur.nl/pub/116741/EC-study-DD-in-supply-chains-part-3-country-reports.pdf.

remediation and compensation. The guidance document on due diligence published by the OECD clarifies that this requirement for companies entails, *inter alia,* establishing legitimate remediation mechanisms[186], such as operational-level grievance mechanisms like in-house worker complaint mechanisms or third-party complaint systems, 'through which impacted stakeholders and rightsholders can raise complaints and seek to have them addressed with the enterprise'[187].

In sum, it is interesting to note how the laws examined incorporate the UNGPs' expectation for companies to have in place an operational-level mechanism to address and remediate grievances early. In this sense, the laws require relevant enterprises to have in place an operational-level grievance mechanism in the form of a complaint mechanism or procedure, allowing affected individuals or communities to report adverse human rights impacts and have them addressed directly with the enterprise.

VI. Concluding remarks

In recent years, 'hardening' processes of elements of the UNGPs have been ongoing at the national level. These processes have sought to translate into domestic law elements of the UNGPs' corporate responsibility to respect human rights by placing binding obligations on corporate actors. More specifically, the core component of the corporate responsibility to respect human rights, namely human rights due diligence, has been embodied in legislation in jurisdictions such as France, Germany and Norway. Besides the specific obligation to exercise human rights due diligence, the national laws enacted in France, Germany and Norway are clear examples of how the UNGPs, more generally, have served as model for domestic legalization in the area of business and human rights. In this respect, the principles enshrined in the three Pillars of the UNGPs are reflected in either the process leading to the adoption of the laws and in a number of substantive aspects of the obligations they set forth.

Overall, the present article has sought to examine the ongoing move in the area of business and human rights from international 'soft' law to national law, by illustrating how norms enshrined in international soft law instruments have provided 'a model for domestic legislation and [have become] legally binding internally, while remaining non-binding internationally'[188].

186 See http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf, at 35.

187 *Ibid.*

188 Shelton, D., «Soft Law» in *Handbook of International Law*, Armstrong, D. (ed), Routledge, 2008, at 2. See also Chinkin, C., «The Challenge of Soft-Law: Development and Change in International Law» in *International and Comparative Law Quarterly*, vol. 38, 1989, at 858.