

Beyond Corporate Social Responsibility: Strengthening Human Rights Due Diligence through the Legally Binding Instrument on Business and Human Rights

Daniel Uribe Terán



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BEYOND CORPORATE SOCIAL RESPONSIBILITY: STRENGTHENING HUMAN RIGHTS DUE DILIGENCE THROUGH THE LEGALLY BINDING INSTRUMENT ON BUSINESS AND HUMAN RIGHTS

Daniel Uribe Terán*

SOUTH CENTRE

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* Daniel Uribe Terán is Lead Programme Officer of the Sustainable Development and Climate Change Programme (SDCC) of the South Centre.

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Any comments on this paper or the content of this paper will be highly appreciated. Please contact:

South Centre
International Environment House 2
Chemin de Balexert 7-9
POB 228, 1211 Geneva 19
Switzerland
Tel. (41) 022 791 80 50
south@southcentre.int
www.southcentre.int

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ABSTRACT

The discussion on the need for mandatory human rights due diligence (HRDD) requirements has permeated the interests of policy makers, civil society organizations and international organizations. The current trend on the adoption of domestic legislation concerning HRDD standards shows a variety of options and models that might serve as a step forward to the adoption of a strong international framework of corporate accountability and remedy for human rights violations in the context of business activities.

This research paper aims at identifying the elements that characterize human rights due diligence to find a possible common definition for its implementation. It does so through analysing current regional and State practice in the adoption of mandatory HRDD legislation in different sectors. Finally, it will discuss the principles that characterize the approach taken by the United Nations Open-ended Intergovernmental Working Group in charge of adopting a Legally Binding Instrument on transnational corporations and other business enterprises and how it could serve as an important cornerstone for modern rule making on the issue of business and human rights.

Le débat sur la nécessité d'imposer des obligations de diligence raisonnable en matière de droits de l'homme (en anglais: Human Rights Due Diligence, ou HRDD) a suscité l'intérêt des décideurs politiques, des organisations de la société civile et des organisations internationales. La tendance actuelle à l'adoption de législations nationales concernant les normes de HRDD montre une variété d'options et de modèles qui pourraient servir d'étape vers l'adoption d'un cadre international solide de responsabilité des entreprises et de recours en cas de violation des droits de l'homme dans le contexte des activités commerciales.

Ce document de recherche vise à identifier les éléments qui caractérisent la diligence raisonnable en matière de droits de l'homme afin de trouver une éventuelle définition commune pour sa mise en œuvre. Pour ce faire, il analyse les pratiques actuelles des régions et des États en matière d'adoption de législations obligatoires sur HRDD dans différents secteurs. Enfin, il discutera des principes qui caractérisent l'approche adoptée par le Groupe de travail intergouvernemental à composition non limitée des Nations Unies chargé d'adopter un instrument juridiquement contraignant sur les sociétés transnationales et autres entreprises et de la manière dont cet instrument pourrait servir de pierre angulaire à l'élaboration de règles modernes sur la question des entreprises et des droits de l'homme.

El debate sobre la necesidad de establecer requisitos obligatorios de debida diligencia en materia de derechos humanos (en inglés: Human Rights Due Diligence, o HRDD) ha atraído el interés de los responsables políticos, las organizaciones de la sociedad civil y las organizaciones internacionales. La tendencia actual sobre la adopción de la legislación nacional relativa a las normas de HRDD muestra una variedad de opciones y modelos que podrían servir como un paso adelante hacia la adopción de un marco internacional sólido de responsabilidad corporativa y remedio en caso de violaciones de los derechos humanos en el contexto de las actividades empresariales.

Este documento de investigación pretende identificar los elementos que caracterizan la debida diligencia en materia de derechos humanos para encontrar una posible definición común para su aplicación. Para ello, se analiza la práctica regional y estatal actual en la adopción de legislación obligatoria sobre HRDD en diferentes sectores. Por último, se discutirán los principios que caracterizan el enfoque adoptado por el Grupo de Trabajo Intergubernamental de Composición Abierta de las Naciones Unidas encargado de adoptar

un instrumento jurídicamente vinculante sobre las empresas transnacionales y otras empresas comerciales y cómo este instrumento podría servir como una importante piedra angular para la elaboración de normas modernas sobre la cuestión de las empresas y los derechos humanos.

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INTRODUCTION

During the 26th Session of the Human Rights Council in 2013, Ecuador and South Africa proposed Resolution 26/9 (A/HRC/26/9), requesting the establishment of an Open-Ended Intergovernmental Working Group (OEIGWG) with the mandate of elaborating an international legally binding instrument to regulate, in accordance with international human rights law, the activities of transnational corporations and other business enterprises (ILBI).

The OEIGWG has held six sessions since 2014. During its Sixth Session, the OEIGWG reviewed the Second Revised Draft of the ILBI submitted by the Chairperson-rapporteur. For the High Commissioner of Human Rights, the treaty process is “an opportunity to enhance the protection of human rights in the context of business, including by improving accountability and access to effective remedies for victims.”¹ The High Commissioner also highlighted that the process is part of the “ongoing efforts at the national and international levels to adopt regulatory measures requiring companies to carry out human rights due diligence.”²

The prevention of human rights abuses perpetrated by private actors has been a component of discussions surrounding the liability of business enterprises for a long time.³ The adoption of the United Nations Guiding Principles on Business and Human Rights (UNGPs)⁴ clarify in relation to certain aspects the means necessary to prevent such abuses through the Second Pillar regarding the corporate responsibility to respect human rights. Likewise, one of the key pillars of the ILBI is the prevention of human rights abuses in the context of business activities, which has been included in Article 6 of the current Third Revised Draft of the ILBI, published by the Chairperson-rapporteur in August 2021. This draft will serve as the basis for State-led direct substantive intergovernmental negotiations during the Seventh Session of the OEIGWG (25 to 29 October 2021).

This research paper will first identify the main elements of human rights due diligence. It will then consider current State practice in the adoption of mandatory human rights due diligence in different sectors, including mining and the prohibition of slavery. Finally, it will discuss the principles that characterize the approach taken by the LBI, as incorporated in Article 6 of the third draft dealing with prevention.

¹ Michelle Bachelet, United Nations High Commissioner for Human Rights, Opening statement during the 6th Session of the OEIGWG on Business and Human Rights, 26 October 2020. Available from <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26417&LangID=E> (accessed 21 September 2021).

² Ibid.

³ Daniel Uribe Terán, “Keeping the Head Up: Lessons Learned from the International Debate on Business and Human Rights”, *Homa Publica - Revista Internacional de Derechos Humanos e Empresas*, v. 2, n. 2 (2018).

⁴ United Nations Guiding Principles on Business and Human Rights (UN Doc. A/HRC/17/31). Available from https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf (accessed 21 September 2021).

1. DEFINING HUMAN RIGHTS DUE DILIGENCE

The concept of due diligence is usually directed towards reducing social, political, and economic risks from business transactions and relationships.⁵ As such, it is a process that normally consists of a two-stage procedure looking at the investigation of facts and the evaluation of these facts in line with a standard of care.⁶ Following this approach, private firms should assess the impact of their activities in various contexts, sectors and circumstances, with sufficient thoroughness and care as could be possibly expected from a reasonable person.⁷

This process might include the establishment of extra-legal ethical standards, including the establishment of an organizational culture that encourages “responsible business activities that improve both economic and social well-being.”⁸ The final objective of identifying and assessing the impacts of business activities through due diligence is to mitigate any “threat, of the potential for harm or damage,”⁹ including the commission of a crime, or human rights abuses and violations.

Although the process of due diligence is normally linked to a process of identifying and managing commercial risks in a business context, the current State practice at the national and international level has increasingly considered due diligence as a “set of processes undertaken by a business to identify and manage risks to the business” circumscribed to a particular context or transaction,¹⁰ including the prevention of human rights abuses. The following section will consider some of these elements as implemented in judicial decisions and through international standards.

1.1. *The relationship between the ‘duty of care’ and human rights due diligence*

The idea of due diligence serving the objective of mitigating liability has increased over the years. According to the United States Sentencing Reform Act of 1984 and its 2018 guidance for compliance,¹¹ due diligence could serve as a factor “that mitigate(s) the ultimate punishment of an organization.”¹² In paragraph 8B2.1. on the Effective Compliance and Ethics Program, the United States Sentencing Commission recognised that a compliance and ethics program requires to:

- a. exercise due diligence to **prevent and detect criminal conduct**;
- b. otherwise **promote an organizational culture** that encourages **ethical conduct and a commitment to compliance with law**. (emphasis added)

This due diligence process and organizational culture must, as a minimum, establish standards and procedures to prevent and detect criminal conduct and take reasonable steps to ensure its full implementation and effectiveness, including establishing complaints and

⁵ Mark B. Taylor, Luc Zandvliet and Mitra Forouhar, “Due Diligence for Human Rights: A Risk-Based Approach”, Working Paper, No. 53 (Corporate Social Responsibility Initiative, 2009), p. 5.

⁶ Ibid., p. 3.

⁷ Robert W. Kolb, ed., *Encyclopedia of Business Ethics and Society* (Sage Publications, 2008) p. 626.

⁸ Ibid., p. 624.

⁹ Taylor, Zandvliet and Forouhar (2009), p. 5.

¹⁰ Jonathan Bonnitcha and Robert McCorquodale, “The Concept of ‘Due Diligence’ in the UN Guiding Principles on Business and Human Rights”, *European Journal of International Law*, vol. 28, No. 3 (2017), p. 902.

¹¹ United States Sentencing Commission, The 2018 Annotated Guidelines Manual, Chapter 8. Available from <https://www.ussc.gov/guidelines/2018-guidelines-manual/annotated-2018-chapter-8#NaN> (accessed 06 October 2021).

¹² Ibid.

response procedures and disciplinary measures for managers and employees.¹³ In the case of the United Kingdom, the principle of ‘duty of care’ is one of the most important developments in tort liability and is directly linked to due diligence processes.

The principle of duty of care has been extensively developed in the case law of the United Kingdom. For example, Lord Atkin recognized the need to:

“[...] take reasonable care to avoid acts or omissions which can reasonably be foreseen to cause injury to persons who are so closely and directly affected by such act that it would be reasonable to have them in contemplation when conducting such act or omission”¹⁴ (emphasis added)

The duty of care creates a **legal obligation** between one person who owes to another an obligation when conducting activities, or omitting them, to reasonably foresee the risk of causing harm. Nevertheless, there should be a link between the harm from such act or omission and the breach of an obligation, creating a level of **proximity** between the duty of care and a foreseeable harm. Further development of the duty of care has recognized that businesses, in particular parent companies, should have a **superior knowledge** on a relevant aspect in a particular sector, and therefore should have **actual knowledge** on the risks arising from their operations.¹⁵

The obligation of businesses to implement a duty of care over its operations has implications in the establishment of group-wide policies, in particular responsibility for risk management and compliance across the group.¹⁶ The decisions taken by the United Kingdom Supreme Court in *Vedanta* and *Royal Dutch Shell*¹⁷ have increased the need to implement human rights due diligence as part of a company’s corporate culture throughout its global value chain, and it is closely related with the concept of negligence as a basis for liability.¹⁸

Therefore, the aim of human rights due diligence processes seems to entail the design and implementation of a mechanism, or a set of mechanisms put in place by a business to fulfil its duty of care, not only towards its employees but also towards the community where they operate. Human rights due diligence requirements should be understood, in this context, as “the parent company’s obligation to monitor the activities of its subsidiary and to seek to prevent and mitigate damage caused by its business relationships.”¹⁹ Such processes should include designing internal policies throughout the business operations to identify and mitigate foreseeable damages, harm, or injuries.

¹³ Ibid.

¹⁴ *Donoghue v Stevenson* [1932] A.C. 562, House of Lords.

¹⁵ *Lubbe v Cape Plc* [2000] UKHL 41; *Chandler v Cape plc* [2012] EWCA Civ 525

¹⁶ Richard Meeran, “Multinational Human Rights Litigation in the UK: A Retrospective”, *Business and Human Rights Journal*, vol. 6, No. 2, pp. 8-9.

¹⁷ *Vedanta Resources PLC and another (Defendants/Appellants) v Lungowe and others (Claimants/Respondents)* [2019] UKSC 20; and *Okpabi & Others v Royal Dutch Shell Plc & Another* [2021] UKSC 3.

¹⁸ Bonnitcho and McCorquodale (2017).

¹⁹ Gwynne Skinner, Robert McCorquodale and Oliver De Schutter, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, (ICAR, CORE and ECCJ, 2013); cited in International Commission of Jurists, *Needs and Options for a New Instrument in the Field of Business and Human Rights* (Geneva, 2014), p. 30.

1.2. Human rights due diligence in international law

Due diligence has been conceived as a standard of conduct in international law, which “defines and circumscribes the responsibility of the state in relation to the conduct of third parties.”²⁰ This principle has been recognized as part of the law of nations, considering that:

“The law of nations requires every national government to use “due diligence” to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof, and because of this, the obligation of one nation to punish those who, within its own jurisdiction, counterfeit the money of another nation has long been recognized.”²¹ (emphasis added)

Similarly, the Permanent Court of Arbitration has recognized that a State is bound to use due diligence to prevent any criminal act against another nation or its people.²² From this, it is possible to conclude that the principal characteristic of due diligence, *vis-à-vis* States in international law, is the fact the due diligence involves a duty of conduct *to prevent*, rather than an obligation of result *not to infringe or fulfil* certain obligations.

For the International Court of Justice, the principle of due diligence is a “general and well recognized”²³ principle. It stated that “it is every State’s obligation “not to allow knowingly its territory to be used for acts contrary to the rights of other States.”²⁴ This implies that the State is “obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage.”²⁵ Therefore the obligation of due diligence is an obligation of conduct “to adopt regulatory or administrative measures”²⁶ to attain a particular objective, for an obligation to “avoid changes to the ecological balance.”²⁷

The International Law Commission (ILC) has considered that an obligation of conduct in international law is determined as a duty to provide the necessary means to attain a specific objective. For States, this will imply the need to adopt measures necessary for the purpose of achieving certain result, giving the State sufficient flexibility to choose whatever means in accordance to their legal systems.²⁸ Nevertheless, this flexibility should not be understood as limiting State responsibility. On the contrary, the fact is that the State will be responsible for the non-achievement of the expected result. For example, “the adoption of a law, while it may appear inimical to the result to be achieved, will not actually constitute a breach; what matters is whether the legislation is actually applied.”²⁹

The Committee on Economic, Social and Cultural Rights (CESCR) recognizes that the obligation of States to protect the rights recognized in the International Covenant on Economic, Social and Cultural Rights in the context of business activities

“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

²⁰ Jan Hessbruegge, “The Historical Development of the Doctrines of Attribution and Due Diligence in International Law”, *Journal of International Law and Politics*, vol. 36 (2004), p. 265, cited by Jonathan Bonnitcha and Robert McCorquodale (2017), p. 903.

²¹ *United States v. Arjona*, 120 U.S. 479 (1887), p. 120.

²² *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7), para. 269.

²³ *Corfu Channel Case (UK v Albania)*, Merits (1949) International Court of Justice (ICJ) Rep 22.

²⁴ *Ibid.*

²⁵ *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Merits (2010) ICJ, para. 101.

²⁶ *Ibid.*

²⁷ *Ibid.*, para. 187.

²⁸ James Crawford, Second report on State responsibility, United Nations International Law Commission, UN Doc. A/CN.4/498 and Add.1–4 (1999).

²⁹ *Ibid.*, para. 53.

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.”³⁰ (emphasis added)

In line with the general understanding of the obligation of due diligence, these obligations should include “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.”³¹

Finally, it is necessary to consider that the principle of due diligence cannot be understood as a standalone obligation for States, but a secondary rule (*standard of conduct*) linked to a primary rule or obligation (*the result*). Therefore, the duty of due diligence cannot be understood as a free-standing concept but requires a(n) “(a) [...] existing primary rule, right or principle (collectively referred to as ‘primary rules’); or (b) content of rules of treaty or customary law (rules which may or may not make explicit reference to due diligence).”³² The duty of due diligence cannot be interpreted in isolation, and it requires clearly identified outcomes in order to establish an obligation of conduct.

1.3. Human rights due diligence in the UNGPs

The United Nations Guiding Principles on Business and Human Rights (UNGPs) were developed by the Special Representative of the Secretary-General of the United Nations on the issue of human rights and transnational corporations and other business enterprises, Prof. John Ruggie. The Human Rights Council endorsed the UNGPs in resolution 17/4 of 16 June 2011.³³ According to the Special Representative, the UNGPs comprise of three different pillars:

“The first is the state duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by victims to effective remedy, both judicial and nonjudicial. Each pillar is an essential component in an interrelated and dynamic system of preventative and remedial measures [...]”³⁴ (emphasis added)

For Prof. Ruggie, the UNGPs were “a common global normative platform and authoritative policy guidance”³⁵ that could serve as basis for long-term developments. The UNGPs recognized that business enterprises have the responsibility to respect human rights and

³⁰ Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, UN Doc. E/C.12/GC/24 (2017), para. 16.

³¹ Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, UN Doc. E/C.12/GC/24 (2017), para. 16.

³² Neil McDonald, “The Role of Due Diligence in International Law”, *International and Comparative Law Quarterly*, vol. 68 (2019), p. 1044.

³³ United Nations Human Rights Council, Resolution A/HRC/RES/17/4 on 6 July 2011. Available from <https://undocs.org/en/A/HRC/RES/17/4> (accessed 8 October 2021).

³⁴ John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights*, Norton Global Ethics Series (W. W. Norton & Company, 2013), p. 82. Kindle Edition.

³⁵ *Ibid.*, p. 81.

that “they should avoid infringing on human rights of others and should address adverse human rights impacts with which they are involved.”³⁶

The commentary on UNGP 11 clarifies that “addressing adverse human rights impacts requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation”³⁷ of such adverse effects. The role that private firms might have in the enjoyment of human rights has been part of the development of international law in particular considering that

*“the development of international law has been influenced by the requirements of international life, and the progressive increase in the **collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.**”³⁸ (emphasis added)*

Similarly, according to Principle 13 of the UNGPs, the responsibility of corporations to respect human rights implies an obligation to avoid “[...] causing or contributing to **adverse human rights impacts** through their own activities, and **address such impacts** when they occur” and “[seek] to **prevent or mitigate adverse human rights impacts** that are directly linked to their operations, products or services by their business relationships, **even if they have not contributed to those impacts**” (emphasis added). The obligation to prevent or mitigate adverse human rights impacts of business enterprises is further developed in Principles 17 to 21, defining the parameters and components of HRDD requirements for business enterprises.

The objective behind these principles was to establish a process of “investigation and control”³⁹ by businesses enterprises. HRDD under the UNGPs is constructed as a set of interlinked procedures attaining the final objective of mitigating and remediating any adverse impact on human rights. First, businesses should identify and assess any actual or potential risk to rights-holders in their operations, products or services, and business relationships.⁴⁰ The assessment of this risks should be considered from the beginning of any operation or relationship, for example by including HRDD provisions in contracts or service agreements and prioritizing HRDD assessments in high-risks contexts or sectors.⁴¹

The second step requires the integration of these findings into internal functions and processes of businesses by taking appropriate action to address any impact on right-holders.⁴² The UNGPs consider that ‘taking appropriate action’ is not limited to establishing internal procedures in the company but taking “the **necessary steps to cease or prevent its contribution** and [...] **mitigate any remaining impact** to the greatest extent possible”⁴³ (emphasis added). These steps will also include the need to remediate any harms caused by wrongful practices of business enterprises. Finally, corporations should be accountable for “how they address their human rights impacts,”⁴⁴ requiring to ‘show’ businesses’ commitment to respect human rights. Showing their commitment “involves communication,

³⁶ UNGPs, United Nations Human Rights Council, UN Doc A/HRC/17/31, Principle 11, cited by Daniel Uribe and Danish, *Designing a Legally Binding Instrument on Business and Human Rights* (Geneva, South Centre, 2020), p. 8. Available from <https://www.southcentre.int/wp-content/uploads/2020/07/Designing-an-International-Legally-Binding-Instrument-on-Business-and-Human-Rights-REV.pdf> (accessed 8 October 2021).

³⁷ See https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf, page 14.

³⁸ International Court of Justice, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, p. 178 cited by Uribe and Danish (2020).

³⁹ Bonnitcho and McCorquodale (2017), p. 908.

⁴⁰ UNGPs, United Nations Human Rights Council, UN Doc A/HRC/17/31, Principles 17 – 18 and commentary.

⁴¹ Ibid.

⁴² UNGPs, Principle 19 and commentary.

⁴³ Ibid.

⁴⁴ UNGPs, Principle 21 and commentary.

providing a measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders, including investors.”⁴⁵

The inclusion of HRDD requirements in the UNGPs are a welcome step forward in the identification of businesses’ responsibilities with respect to human rights, particularly concerning preventive mechanisms. Nevertheless, the fact that there are no obligations of result identified in the UNGPs may suggest the wrong idea that the duty of businesses to ‘respect’ human rights is fulfilled once they have internalised HRDD processes in their operations, thereby leading to wrongly consider HRDD procedures as “[tick-box] exercises that allow businesses to claim that they are compliant with *their human rights obligations*,”⁴⁶ even if their operations, or those by their business relationships, resulted in adverse human rights impacts.

Therefore, progress towards bringing together the essential components of the due diligence requirements included in the operational principles of the UNGPs’ Second Pillar, on the one hand, and the mandatory language from State practice on the other⁴⁷ could support the implementation of HRDD as a standard of conduct establishing businesses’ responsibility for “adverse human rights impact that result from its failure to act with reasonable diligence.”⁴⁸

⁴⁵ Ibid.

⁴⁶ Bonnitcha and McCorquodale (2017), p. 910.

⁴⁷ Uribe and Danish (2020).

⁴⁸ Bonnitcha and McCorquodale (2017), p. 911.

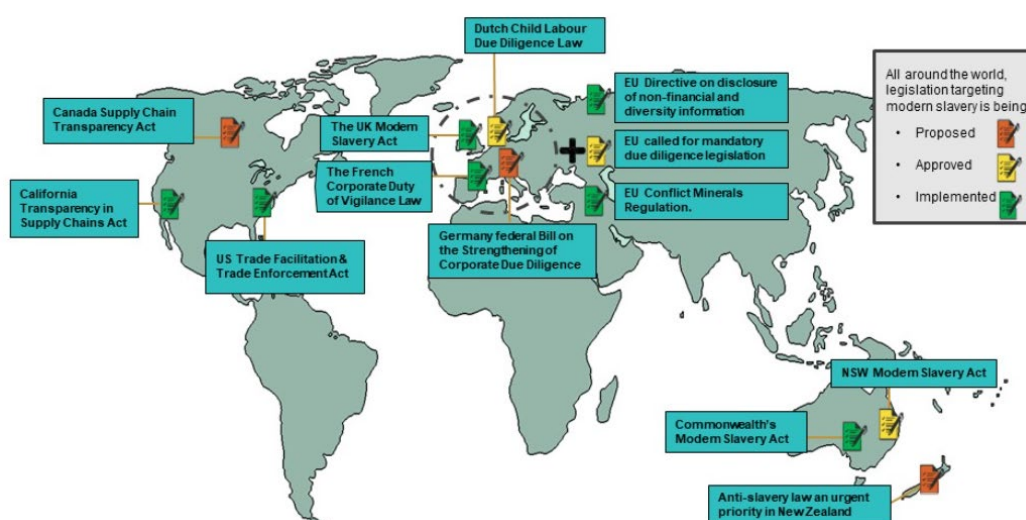
2. CURRENT DEVELOPMENTS ON HUMAN RIGHTS DUE DILIGENCE

The progression from human rights due diligence in the UNGPs to its implementation in domestic legislation could strengthen the 'preventive' component of human rights due diligence before any violation is committed and address remediation after the occurrence of harm through State-based grievance mechanisms (judicial or non-judicial remedies).⁴⁹

Business practices around the world have been commonly designed towards shaping corporate social responsibility (CSR) as businesses' voluntary contributions towards society. CSR initiatives have been usually used to endow businesses and corporations with a "social role," but one reliant on the discretion of business executives and occasionally used as a marketing strategy to limit reputational risks or gain social legitimacy.⁵⁰ Nonetheless, the voluntary nature of CSR initiatives guarantee neither access to justice for victims, nor corporate accountability for enterprises.

In addition, non-mandatory HRDD has been implemented with limited interest by business enterprises. A study prepared for the European Commission in 2020, looking at businesses' practices in the European Union (EU), highlighted that only 37.14% of businesses responding to the study have included due diligence procedures that consider all human rights and environmental impacts.⁵¹ The lack of commitments from the business sector towards HRDD has increased the trend of State legislation requiring companies to conduct mandatory due diligence, including an EU possible directive on sustainable corporate governance (see Figure 1). The following section reviews some examples of this new 'trend'.

Figure 1.- Due Diligence Legislation around the World



Source: EDGE⁵²

⁴⁹ Uribe and Danish (2020).

⁵⁰ Başak Bağlayan, Ingrid Landau, Marisa McVey and Kebene Wodajo, *Good Business: The Economic Case for Protecting Human Rights* (Geneva, Young Researcher Summit, Frank Bold and International Corporate Accountability Roundtable, 2018), p. 15, cited in Uribe and Danish (2020).

⁵¹ Lise Smit, Claire Bright and others, *Study on Due Diligence Requirements through the Supply Chains*, European Commission (2020). Available from <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1> (accessed on 10 October 2021). See also: Adriana Espinosa González, Alejandro García Esteban, Christopher Patz and others, *Debating Mandatory Human Rights Due Diligence Legislation: a Reality Check* (European Coalition for Corporate Justice and CORE, 2020). Available from <http://corporatejustice.org/wp-content/uploads/2021/03/debating-mhrdd-legislation-a-reality-check.pdf> (accessed on 10 October 2021).

⁵² EDGE, "Supply chain due diligence: the new normal?" Available from <https://edgeenvironment.com/supply-chain-due-diligence-the-new-normal/> (accessed on 10 October 2021).

2.1 The European experience

The European Union adopted the **Directive 2014/95/EU**⁵³ (Directive) in 2014 on the disclosure of non-financial and diversity information by certain large undertakings and groups. According to the Directive, the objective is to require some **large companies** “to **disclose in their management report, information on policies**, risks and outcomes as regards environmental matters, social and employee aspects, **respect for human rights**, anticorruption and bribery issues, and diversity in their board of directors” (emphasis added).

According to the adopted text of the Directive, the obligation to disclose non-financial information should include:

- (a) A brief description of the undertaking's business model;
- (b) A description of the policies pursued by the undertaking in relation to those matters, including due diligence processes implemented;
- (c) The outcome of those policies;
- (d) The principal risks related to those matters linked to the undertaking's operations including, where relevant and proportionate, its business relationships, products or services which are likely to cause adverse impacts in those areas, and how the undertaking manages those risks; and
- (e) Non-financial key performance indicators relevant to the particular business.

The Directive is only applicable to “[l]arge undertakings which are public-interest entities exceeding the average number of 500 employees during that financial year”. This means that such requirements are only applicable to **large public interest entities**, while small and medium businesses will not have new requirements to fulfil. This might imply that “just one in seven large companies will be required to report” non-financial issues which is much less than the 6000 companies considered by the European Union.⁵⁴

The Directive did not consider introducing any requirement on the implementation of HRDD for EU firms, nor identified any actions or steps towards preventing human rights ‘impacts’ by business corporations. Nevertheless, the European Commission established the EU High-Level Group on Sustainable Finance (HLEG) with the objective of supporting the development of an overarching and comprehensive EU roadmap on sustainable finance. The HLEG recommended the EU Commission to identify “key performance indicators for social factors to be used as part of requirements to integrate ESG [(environmental, social and governance)] aspects and risk assessments into different pieces of EU legislation.”⁵⁵

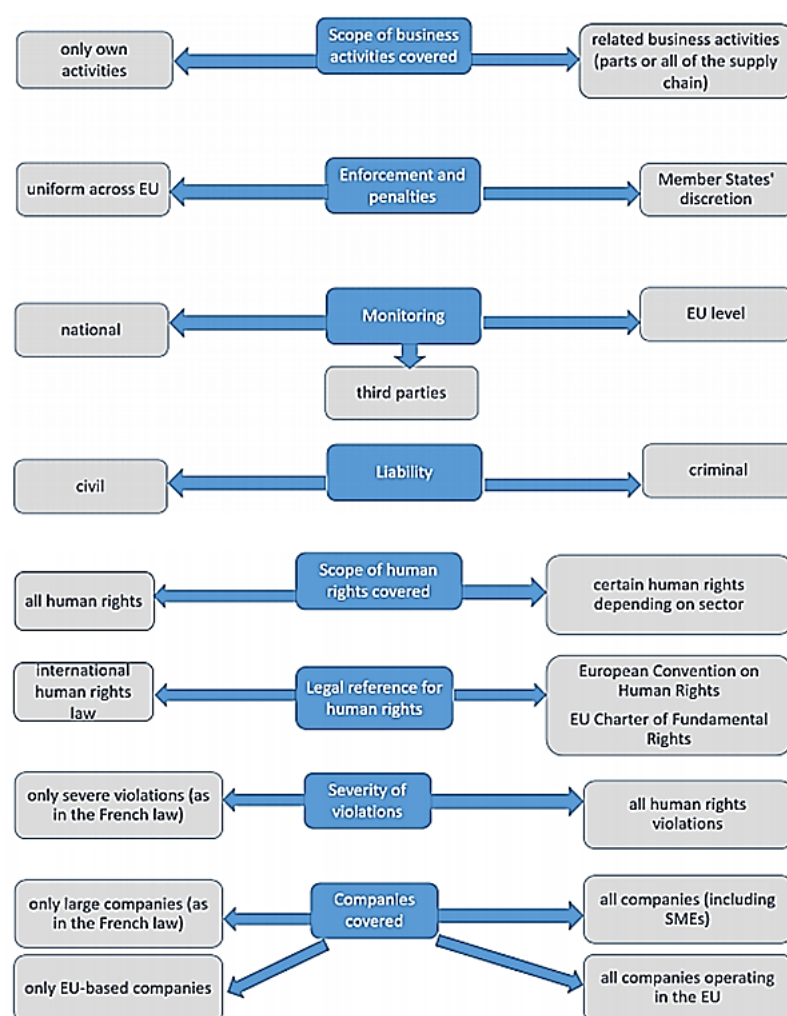
The European Commission published an Action Plan stemming from the recommendations of the HLEG on financing sustainable growth (Action Plan).⁵⁶ Action 10 of the Action Plan

⁵³ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014. Available in <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0095&from=FI> (accessed 10 October 2021).

⁵⁴ Jerome Chaplier, “EU To Force Large Companies To Report On Environmental And Social Impacts”, *The Guardian*, 28 February 2014. Available from <http://www.theguardian.com/sustainable-business/eu-reform-listed-companies-report-environmental-social-impact> (accessed 22 September 2015).

⁵⁵ European Union High-Level Expert Group on Sustainable Finance, *Financing a Sustainable European Economy*, Final Report (2018). Available from https://ec.europa.eu/info/sites/default/files/180131-sustainable-finance-final-report_en.pdf (accessed 11 October 2021).

⁵⁶ European Commission, Action Plan: Financing Sustainable Growth (2018). Available from <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0097&from=EN> (accessed 11 October 2021)

Figure 2.- Options for possible EU law on due diligence

Source: Briefing European Parliament: Towards a mandatory EU system of due diligence for supply chains

inclusion of HRDD in the EU legislation. A set of 4 different options (see Box 1) were posed by the Study, including the possibility of establishing a “[n]ew regulation requiring mandatory due diligence as a legal duty of care.”⁶¹ According to the Study, for establishing such duty of care, the company should be required to set up a level of due diligence according to particular circumstances and contexts, including the need “to identify, prevent, mitigate and account for actual or potential human rights and environmental impacts in their own operations and supply or value chain”⁶² (emphasis added).

The fourth option included in the Study considered the development of mandatory due diligence requirements which would be based on a legal duty of care. Such recognition could

considered the possible need to “require corporate boards to **develop and disclose a sustainability strategy, including appropriate due diligence throughout the supply chain, and measurable sustainability targets**” (emphasis added).⁵⁷ As an outcome from the Action Plan, the EU Commission mandated a study on Due Diligence Requirements through the Supply Chain (the Study).⁵⁸ The Study was also based on the Report on Sustainable Finance, prepared by the European Parliament,⁵⁹ which requested the Commission to provide a proposal on an “**overarching, mandatory due diligence framework including a duty of care** to be fully phased-in within a transitional period and taking into account the proportionality principle” (emphasis added).⁶⁰

The Study analysed different regulatory options at the EU level for the

⁵⁷ Ibid., p. 11.

⁵⁸ Smit, Bright and others (2020).

⁵⁹ European Parliament Report on Sustainable Finance (2018/2007(INI)), 4 May 2018. Available from http://www.europarl.europa.eu/doceo/document/A-8-2018-0164_EN.html (accessed 13 October 2021).

⁶⁰ Ibid., para. 6

⁶¹ Smit, Bright and others (2020), p. 20.

⁶² Ibid.

mean departing from the a “pure compliance with formal requirements”⁶³ approach as included in the due diligence reporting option (non-financial reporting directive), into a more substantive obligation based on a legal standard of care directed towards promoting “compliance with all relevant obligations under the EU Charter of Fundamental Rights and **ensure the coherence of the EU’s internal and external policies in the area of human and labour rights**”⁶⁴ (emphasis added). Nonetheless, the Commission is studying the possibility of giving flexibility to companies considering the sector of activity, the company size and type (see Figure 2).

Following the Study, the EU Parliament stressed that “**corporate human rights and environmental due diligence are necessary** conditions in order **to prevent and mitigate future crises** and ensure sustainable value chains”⁶⁵ (emphasis added). The European Commission published an Inception Impact Assessment (the Assessment), as a follow up procedure from the consultations organized on improving the EU Regulatory Framework on company law and corporate governance. The Commission observed that some EU Member States have already established legislation on corporate governance but highlighted that “States’ action alone is unlikely to be sufficient and efficient as sustainability problems are of a global dimension and have cross-border effects (climate change, pollution),”⁶⁶ and mentioned that “the majority of [...] surveyed companies (mostly large) expect significant or very significant economic benefits arising from a corporate due diligence duty.”⁶⁷ The adoption of the initiative by the EU Commission is pending for the fourth quarter of 2021, possibly expected on 27 October 2021 (see Box 1).⁶⁸

Box 1.- Regulatory Options for HRDD in Europe

Option 1.- No policy change (baseline scenario) – No changes in current EU regulation

Option 2.- New voluntary guidelines – Not legally enforceable, but may influence corporate conduct

Option 3.- Due diligence reporting – More detailed information and transparency required from non-financial reporting directive

Option 4.- Mandatory due diligence – requiring companies to carry out due diligence as a legal duty of care

Source: European Commission (2020)

2.2 The United States Section 1502 of the Dodd-Frank Act (2010)

The United States Securities and Exchange Commission (SEC) made a reform on the Consumer Protection Act, requiring several publicly traded companies to disclose their use of ‘conflict minerals’ in their products.⁶⁹ The adoption of the law responded to the need to

⁶³ Juliette Renaud, Françoise Quairel and others, eds., *The Law on Duty of Vigilance of Parent and Outsourcing Companies. Year 1: Companies must do Better* (ActionAid, Friends of the Earth, among others, 2019), p. 9. Available from https://media.business-humanrights.org/media/documents/Companies-Must-Do-Better_IZFW9PA.pdf (accessed 17 October 2021).

⁶⁴ Ibid., p. 5.

⁶⁵ European Parliament, Resolution on EU coordinated action to combat the COVID-19 pandemic and its consequences, Res P9_TA(2020)0054 (2020), para. 68.

⁶⁶ European Commission, Inception Impact assessment, Ref. Ares(2020)4034032 (July 2020), p. 2.

⁶⁷ Ibid., p. 4.

⁶⁸ Eliza Casazza, “EU Due Diligence Law Proposal Delayed”, *CSR Europe*, 31 August 2021. Available from <https://www.csreurope.org/newsbundle-articles/eu-due-diligence-law-proposal-delayed> (accessed 15 October 2021).

⁶⁹ Dodd–Frank Wall Street Reform and Consumer Protection Act 2010 (Dodd-Frank Act), PL 111–203, s. 1502(p), I.A (i). Available from https://www.cftc.gov/sites/default/files/idc/groups/public/@swaps/documents/file/hr4173_enrolledbill.pdf (accessed 17 October 2021).

know the origin of certain minerals that might be exploited and traded by armed groups in certain countries, and therefore helping to finance armed conflicts.⁷⁰

The rule applies only to a limited number of minerals (tantalum, gold and tungsten), and to companies filing reports to the SEC under the Exchange Act. Finally, only companies that use such minerals because they are “necessary to the functionality or production” of a product manufactured by the company, including those which are contracted, are required to make such a disclosure. According to the SEC, a company is contracted to manufacture a product if it:

- Affixes its brand, marks, logo, or label to a generic product manufactured by a third party.
- Services, maintains, or repairs a product manufactured by a third party.
- Specifies or negotiates contractual terms with a manufacturer that do not directly relate to the manufacturing of the product.

The disclosure requirement should follow a similar approach to that of HRDD, to knowingly “conduct a reasonable ‘country of origin’ inquiry [...] performed in good faith and be reasonably designed to determine whether any of its minerals originated in the covered countries,”⁷¹ including a description of the products manufactured, the entity that conducted the independent private sector audit, the facilities used to process the minerals, the country of origin of the minerals, and the efforts to determine the mine or location of origin with the greatest possible specificity.⁷²

If the company has reasons to believe, or knows, that the minerals have originated from conflict areas, or may be from scrap of recycled sources, the company should “exercise due diligence on the source and chain of custody of such minerals” and make that information public. Nevertheless, the Dodd-Frank Act does not recognise liability of business using such minerals, it only imposes reporting requirements.⁷³

It is important to note that the United States Government Accountability Office has recognised that the percentage of companies able to make a determination of country of origin has significantly reduced since 2015, and only seventeen percent (17%) of companies required to conduct due diligence have determined the origin of the minerals they use in their manufacturing processes, without knowledge of which factors have contributed to such decrease.⁷⁴

⁷⁰ U.S. Securities and Exchange Commission, Disclosing the Use of Minerals, Fact Sheet (2012). Available from <https://www.sec.gov/opa/Article/2012-2012-163htm---related-materials.html> (accessed 17 October 2021).

⁷¹ U.S. Securities and Exchange Commission (2012).

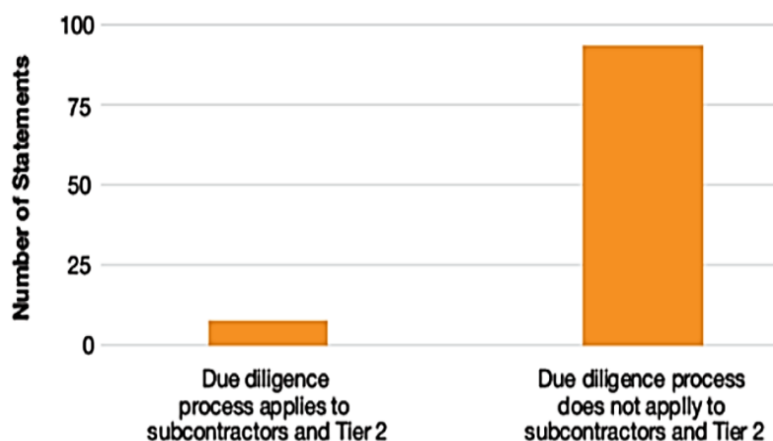
⁷² Dodd-Frank Act, s. 1502 I.A (i) (ii).

⁷³ Bonnitcha and McCorquodale (2017), p. 908.

⁷⁴ United States Government Accountability Office, Conflict Minerals: Actions Needed to Assess Progress Addressing Armed Groups' Exploitation of Minerals, Report to Congressional Committees (September 2020), p.18. Available from <https://www.gao.gov/assets/gao-20-595.pdf> (accessed 16 October 2021).

2.3 The United Kingdom Modern Slavery Act (2015)

Figure 3.- HRDD Applied through the Supply Chain



Source: PWC, Modern Slavery Compliance

or what the statement should include, it only requires a recognition of what steps a company has taken to prevent slavery or human trafficking.

The United Kingdom Modern Slavery Act (MSA) came into force in October 2015. Section 54 of the MSA requires business enterprises to “prepare a slavery and human trafficking statement for each financial year of the organisation.”⁷⁵ The aim of the MSA is to ensure that no slavery or trafficking has or is occurring in the supply chain of a company, or in its own operations. It is important to notice that the MSA does not establish any step to be taken,

Although the MSA does not establish what the content of the statement should be, it does include certain requirements for its validity. For instance, Subsection 6 requires that the statement be signed by a senior level executive in the business, usually the signature of the director and approval by the board. The aim behind the need for this signature is to guarantee an appropriate level of support by the board and senior management.⁷⁶ Similarly, Subsection 7 establishes the need to publish the slavery and human trafficking statement in the companies’ website, or to provide copy to anyone requesting it within 30 days of that request.⁷⁷

The MSA and its guidance refer to HRDD as one of the elements that may be included in the statement.⁷⁸ The process of due diligence in relation to modern slavery will require “consultation with stakeholders that are potentially or actually affected”⁷⁹ by business operations and in their supply chains. According to the Guidance prepared by the Home Office of the United Kingdom, due diligence processes should be: (1) proportionate to the identified modern slavery risk, the severity of the risk, and the level of influence a business may have; and (2) informed by any broader risk assessments that have been conducted.

One important element to consider is that forty two percent (42%) of the statements submitted by 2019 are not compliant, or do not meet the legal requirements established in the MSA.⁸⁰ Similarly, even when eighty-eight percent (88%) of companies apply due diligence in their supply chain, only a small percentage include due diligence processes beyond the second tier of business relationships (see Figure 3).⁸¹ A failure to comply with the reporting requirement in the MSA will be a ground for an injunction against the company

⁷⁵ United Kingdom, Modern Slavery Act (2015 c. 30).

⁷⁶ See: United Kingdom, Modern Slavery Act (2015 c. 30), Explanatory notes, para. 255. Available from <https://www.legislation.gov.uk/ukpga/2015/30/notes/division/5/6/1>.

⁷⁷ Ibid., para. 256.

⁷⁸ United Kingdom, Guidance issued under section 54(9) of the Modern Slavery Act 2015 (Home Office, 2017). Available from

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/649906/Transparency_in_Supply_Chains_A_Practical_Guide_2017.pdf (accessed 10 October 2021).

⁷⁹ Ibid., p. 33.

⁸⁰ See: <https://www.pwc.co.uk/assets/pdf/modern-slavery-health-check.pdf>.

⁸¹ See: <https://www.pwc.co.uk/assets/pdf/modern-slavery-health-check.pdf>.

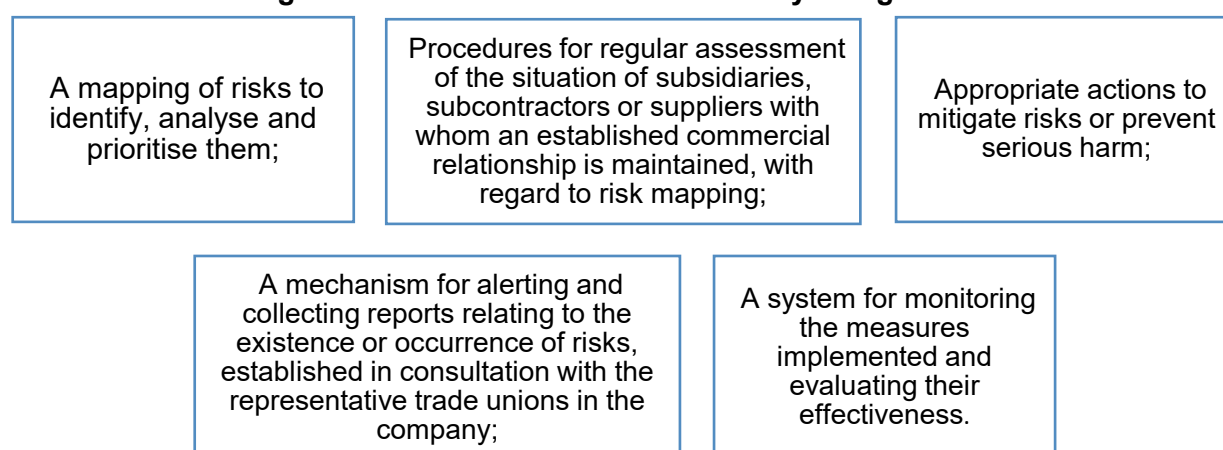
in the High Court, and a possible unlimited fine against the company if its non-compliance continues.⁸²

2.4 The French Law on the Duty of Vigilance (2017)

The Duty of Vigilance Act was adopted by the French Assembly in 2017.⁸³ The law imposes a duty of vigilance on companies with over 5,000 employees in France or over 10,000 worldwide. According to Article 1, the duty of vigilance must include a reasonable due diligence process as necessary to identify risks and prevent serious violations of human rights and fundamental freedoms, to protect the health and safety of individuals and the environment. These measures are applicable to the companies' own operations, directly and indirectly, and to other companies they control, contractors and firms in their supply chain.

According to the law, the measures intended to comply with the duty of vigilance should be developed together with possible affected stakeholders, and consider a number of elements, including the mapping of identified risks, appropriate actions to mitigate those risks or prevent them, and a monitoring mechanism to assess the effectiveness of such measures (see Figure 4). According to the law, companies would be held liable for non-compliance with these obligations, and would be bound to compensate for the damage that its performance would have avoided.

Figure 4.- Elements included in the duty of vigilance



Source: LOI n° 2017-399 du 27 mars 2017

The enforcement mechanism under the referred to French law does not require for the damage to occur to initiate a claim. Rather, the law provides for a two-step enforcement mechanism which allows for a court injunction to seek compliance with the law by the company concerned, including fines for omissions, and secondly, companies could be held liable for those damages that resulted from the omissions of implementing a vigilance plan. To date, the enforcement mechanism has been triggered seven times since 2019, and three of those cases have reached the French courts.⁸⁴ Nevertheless, it is important to consider that the burden of proof remains on the claimants, who will require to satisfy the high

⁸² Guidance issued under section 54(9) of the Modern Slavery Act 2015, p. 6.

⁸³ LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.

⁸⁴ Elsa Savourey and Stéphan Rabant, "The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since its Adoption," *Business and Human Rights Journal*, vol. 6, No. 1 (2021), p. 149. Available from <https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/french-law-on-the-duty-of-vigilance-theoretical-and-practical-challenges-since-its-adoption/0398716B2E8530D9A9440EEB20DB7E07/share/5a7acbeec4fc717a9334d0ec87dbb2170bbac1ea> (accessed 17 October 2021).

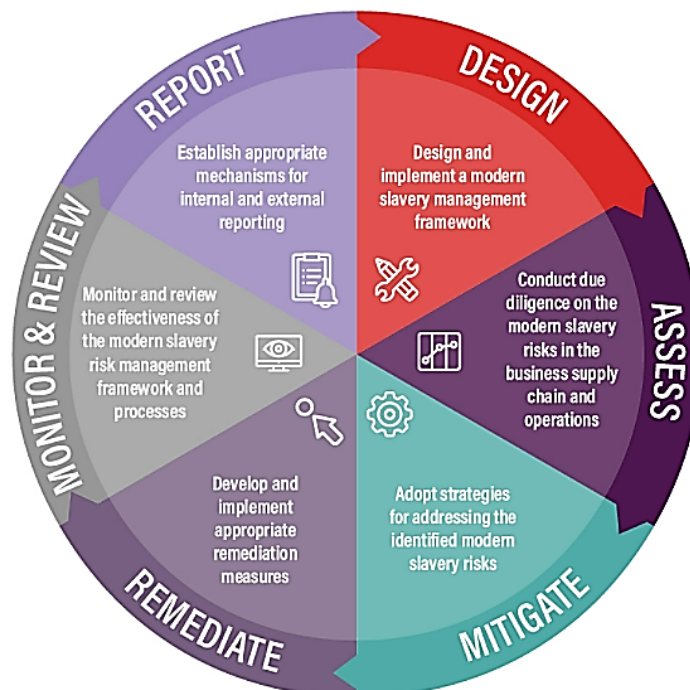
threshold of the law of torts, including proving the existence of a causal link between the harm and the breach of the duty of vigilance.⁸⁵

2.5 Commonwealth Modern Slavery Act (2018)

In 2018, the Australian Parliament passed the Modern Slavery Act (MS Act)⁸⁶ requiring certain companies operating in Australia to report about the measures taken to address modern slavery risks in their operations and supply chains. Such report should include the structure, operations and supply chains of the reporting entity, the risk of modern slavery in such operations, the actions taken to assess and address those risks, among others (see Figure 5).⁸⁷

If a company fails to comply with such requirements, the MS Act allows the Home Office Minister to request an explanation for the failure to comply or undertake specified remedial action. The MS Act does not recognise tort liability for any harm that could have been foreseen by the company, it only grants the Home Office Minister to inform the Register about the identity of the business that failed to comply with the request of explanation or remedial action, to make its non-compliance public.

Figure 5.- Requirements under the MS Act



Source: Norton Rose Fulbright (2020)

2.6 The Swiss Responsible Business Initiative (2020)

In November 2020, Switzerland rejected a popular initiative on Responsible Businesses for the Protection of Human Beings and the Environment (the Initiative).⁸⁸ The Initiative aimed at establishing a standard of duty of care on Swiss companies, their subsidiaries, suppliers and business partners. Such standard would have required companies to have oversight of their operations and verify whether human rights and environmental standards are respected abroad.

The Initiative included the obligation of companies to respect internationally recognised human rights and international environmental standards, as well as to carry out due diligence, including the following measures:

⁸⁵ Ibid., p. 152. See as well: Renaud, Quairol and others, eds. (2019), p. 9.

⁸⁶ Modern Slavery Act 2018 (No. 153, 2018). Available from <https://www.legislation.gov.au/Details/C2018A00153> (accessed 18 October 2021).

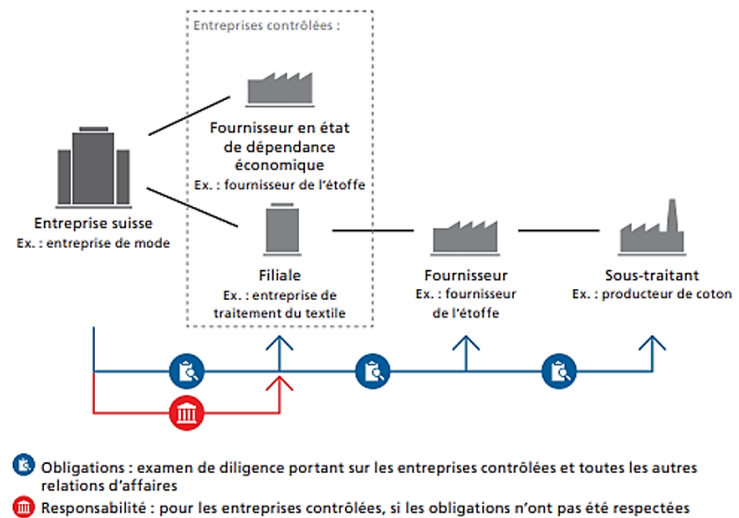
⁸⁷ Abigail McGregor, "Modern Slavery Act: What businesses in Australia need to know", Norton Rose Fulbright (2020). Available from <https://www.nortonrosefulbright.com/en/knowledge/publications/06a565ee/modern-slavery-act-what-businesses-in-australia-need-to-know> (accessed 18 October 2021).

⁸⁸ Swiss Federal Council, Initiative populaire « Entreprises responsables – pour protéger l'être humain et l'environnement » (2020). Available from <https://www.admin.ch/entreprises-responsables> (accessed 19 October 2021).

- Monitor compliance with internationally recognised human rights and environmental standards in their operations, identifying actual and potential impacts;
- Prevent negative impacts and cease any violations through appropriate action; and,
- Report regularly on compliance on the duty of due diligence, including all measures taken to remediate damages or harm.

The Initiative also recognised the liability of corporations for any damage caused by their own operations, or by the companies they control, unless they can prove that they have complied with due diligence obligations. An element which is important to consider is that the ‘control’ was interpreted as encompassing of the activities of their own subsidiaries, as well as those of suppliers which are economically dependant on the Swiss company⁸⁹ (see Figure 6).

Figure 6.- Principal Elements of the Swiss Popular Initiative



Source: Swiss Federal Council (2020)

Although the Initiative reached fifty percent (50%) of the popular vote, it did not achieve the majority of the Canton votes, and therefore was rejected. The Swiss Parliament adopted a counter-proposal that was also supported by the Federal Council and implied the reform of the Code of Obligations of the Swiss Civil Code. Given that the Popular Initiative was rejected, the counter-proposal entered into force and considered the exercise of due diligence measures and accountability limited to large Swiss companies under the title of Transparency on Non-Financial Matters.

According to the counter-proposal, only large companies that reports or controls a workforce of at least five hundred (500) full time jobs and exceed a total balance sheet of twenty million Swiss francs (CHF 20 million), with a total turnover of forty million Swiss Francs (CHF 40 million) in two consecutive financial years will fall under the obligations of the counter-proposal.

The obligation included in the new legislation resembles the reporting requirement established in the French Duty of Vigilance and requires Swiss companies to report on the risks arising from their operations abroad to human rights and the environment. Similarly, the counter-proposal includes a criminal provision for a fine of up to one hundred thousand Swiss Francs (100,000 CHF) for breaches on the new reporting obligations, but does not include any liability for damages or harmed caused by their own operations, or those of their subsidiaries or companies under their control.

⁸⁹ Ibid., p. 10.

2.7 The German Supply Chain Due Diligence Act (2021)

The German National Action Plan on Business and Human Rights (NAP) incorporated a monitoring mechanism for assessing its effectiveness.⁹⁰

The NAP established the obligation of Germany to conduct a survey to identify the number of enterprises that have introduced the element of due diligence incorporated in the NAP, including a qualitative analysis of the measures taken and the challenges encountered during its implementation.⁹¹

The objective of the study was to establish whether “at least 50 % of all German-based enterprises with more than 500 employees have incorporated the elements of human rights due diligence described in chapter III into their business processes by 2020.”⁹²

Figure 7.- Due diligence requirements under the German Law

Establishing a risk management system
Designating a responsible person or persons within the enterprise
Performing regular risk analysis
Issuing a policy statement
Laying down prevention measures
Establishing a complaints procedure
Implementing due diligence obligations with regards to risks at indirect suppliers
Documenting and reporting

Source: Supply Chain Due Diligence Act

As the goal of fifty percent (50%) was not reached by 2020, the Government had to conclude that voluntary self-commitment was insufficient and that a mandatory due diligence law was necessary. In accordance with two voluntary surveys conducted in accordance with the NAP, only twenty percent (20%) of companies with more than five hundred (500) employees had fulfilled the requirements of the NAP.⁹³

The German Ministries of Labour and Development presented the key points of a mandatory due diligence law in 2020, with the objective of passing the law by August 2020, but the lack of agreement on certain issues (principally liability of German companies) delayed the adoption of the new law. In 2021, the new Supply Chain Due Diligence Act (the German Act) was adopted by the German Parliament.

The German Act will enter into force in two phases. The first one enters into force in 2023, requiring German companies with more than three thousand employees (3,000) in Germany or in foreign subsidiaries to carry out due diligence to identify, assess, prevent and remedy human rights and environmental risks in their supply chains. The second phase enters into force in 2024, requiring companies with more than one thousand employees (including foreign companies) to fulfil due diligence requirements (see Figure 7).

⁹⁰ Federal Republic of Germany, National Action Plan: Implementation of the UN Guiding Principles on Business and Human rights 2016-2020 (The Federal Foreign Office on behalf of The Interministerial Committee on Business and Human Rights, 2016). Available from <https://globalnaps.org/wp-content/uploads/2018/04/germany-national-action-plan-business-and-human-rights.pdf> (accessed 18 October 2021).

⁹¹ Ibid., p. 28.

⁹² Ibid.

⁹³ Dirk Seiler and Nathalie Isabelle Thorhauer, “Human rights compliance in Germany: Current steps towards a mandatory Human Rights Due Diligence Law”, Corporate Crime Update - Germany, *Herbert Smith Freehills LLP*, 30 November 2020. Available from <https://www.lexology.com/library/detail.aspx?g=9c8c9971-d0e6-4f1f-b3e5-ed867464ebe8> (accessed 18 October 2021).

In case of non-compliance with the provisions of the Act, the companies covered by the law could be excluded from the award of public contracts under public procurement processes or receive an administrative fine up to two percent (2%) of their average global turnover.

Three elements from the German law are important to highlight, the first is that Section 2 (2) refers to the definition of human rights risks, and incorporates an extensive list of exemplary prohibitions amounting to risks, including the prohibition of unequal treatment in employment, the prohibition of causing water and air pollution, or excessive water consumption, prohibition of eviction, the prohibition on the use of security forces for the protection of the enterprise that might result in torture and cruel, inhumane or degrading treatment, among others. The second, is that the law annexes a list of International Conventions and Treaties incorporated into the definition of “protected legal positions,” incorporating the content of such international instruments in a direct obligation for companies’ standard of care. Finally, it incorporates a rather detailed set of criteria necessary to comply with the requirements of due diligence.

3. HUMAN RIGHTS DUE DILIGENCE IN THE LEGALLY BINDING INSTRUMENT ON BUSINESS AND HUMAN RIGHTS

In 2014, the United Nations (UN) Human Rights Council adopted Resolution 26/9 to set up an Open Ended Intergovernmental Working Group (OEIGWG) with the mandate to elaborate an international legally binding instrument “to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”⁹⁴ Part of this regulation required to strengthen the pillar of prevention as the primary pillar of the ILBI.⁹⁵

Although the need to include certain regulations on HRDD in the ILBI seems to have been an issue without contention during discussions in the OEIGWG, the extent and nature of such standards seem to be of concern to some delegations and other stakeholders. Several States shared the view that the nature of HRDD requirements should respond to an approach based on an expected conduct, rather than an expected outcome and should be built closer to the spirit of the UNGPs.⁹⁶ This sentiment was voiced on the grounds that the provisions on prevention seemed to prescribe too much for companies, which could overburden some businesses, particularly small and medium enterprises.⁹⁷ Concurrently, discussions in the OEIGWG considered the need to clarify the language on prevention, including its linkages with liability and criminal penalties in case of non-compliance.⁹⁸

As mentioned above, differentiating between obligations of conduct and obligations of outcome is quite important, as it will clarify what is the standard of conduct expected to achieve a particular outcome. Nonetheless, the challenge in drafting an international legally binding instrument on business and human rights appears to be the need to prescribe States’ obligations that will set standards of conduct of business enterprises, but that at the same time clearly establishes a duty of care with respect to business operations.

The draft ILBI seems to require the adoption of domestic legislation and national enforcement mechanisms for imposing HRDD on all business enterprises as a means to respect human rights and prevent human rights violations. The legal obligation to respect human rights falls on all business enterprises as a primary rule, while the preventive obligations in the draft ILBI define and describe the conducts required for the achievement of such objectives. The following section will consider how these elements have been defined in the draft ILBI and identify commonalities with the current trend of mandatory HRDD processes at the domestic level to address concerns considering the language on prevention incorporated in the draft ILBI as extremely burdensome for any due diligence requirement.⁹⁹

⁹⁴ Human Rights Council, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, adopted during the Twenty-Sixth Session of the Human Rights Council, Resolution A/HRC/RES/26/9 (2014). Available from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/082/52/PDF/G1408252.pdf?OpenElement> (accessed on 19 October 2021).

⁹⁵ Report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, UN Doc. A/HRC/40/48 (2019).

⁹⁶ Ibid., para. 55.

⁹⁷ Ibid., para. 63.

⁹⁸ Report on the fifth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, UN Doc. A/HRC/43/55 (2020), paras. 60-61.

⁹⁹ Daniel Uribe, “Setting the pillars to enforce corporate human rights obligations stemming from international law”, Policy Brief No. 56 (Geneva, South Centre, 2018).

3.1 *Prevention in the Legally Binding Instrument on Business and Human Rights based on the UNGPs*

The elements of prevention incorporated in the draft ILBI are included in Article 6,¹⁰⁰ which requires States Parties to regulate the activities of all business enterprises within their territory, jurisdiction, or otherwise under their control. For attaining such objective, the ILBI requires States Parties to adopt appropriate legal and policy measures to ensure that business enterprises respect internationally recognized human rights and prevent and mitigate human rights abuses throughout their business activities and relationships.

The language used in the ILBI seems to follow traditional approaches to international norm making, by the fact of identifying States obligations directly, rather than including direct obligations for non-State actors. Nevertheless, the objective of Article 6 seems to identify the process required by States Parties to be undertaken by all business enterprises in their jurisdictions, and in the context of their operations, taking consideration of the size and actual or real risk on human rights and the environment. These elements seem to be grounded in the language of the UNGPs regarding the essential components of human rights' due diligence requirement, while also being contingent on the mandatory language that must be included in national regulations for its implementation. From this perspective, the language included in the ILBI could allow clarification as to the expected conduct of business enterprises, while allowing sufficient flexibility for States to decide the modalities of such obligations according to their domestic laws and practices.

In general terms, prevention under the ILBI strives to follow the four core components identified by it, which are also present in the UN Guiding Principles. This includes in particular the identification and assessment of any actual or potential risk, the integration of these findings through appropriate measures to prevent and mitigate such risks, to monitor the effectiveness of such measures including by providing remedy for such violations, and be accountable for "how they address their human rights impacts."¹⁰¹ Article 6.3 of the draft ILBI includes the following elements (emphasis added):

- a) **Identify, assess and publish** any actual or potential human rights abuses that may arise from their own business activities, or from their business relationships;
- b) **Take appropriate measures** to avoid, prevent and mitigate effectively the identified actual or potential human rights abuses which the business enterprise causes or contributes to through its own activities, or through entities or activities which it controls or manages, and take reasonable and appropriate measures to prevent or mitigate abuses to which it is directly linked through its business relationships;
- c) **Monitor the effectiveness** of their measures to prevent and mitigate human rights abuses, including in their business relationships;
- d) **Communicate regularly** and in an accessible manner to stakeholders, particularly to affected or potentially affected persons, **to account** for how they address through their policies and measures any actual or potential human rights abuses that may arise from their activities including in their business relationships.

Nevertheless, States Parties are required to have effective national procedures to ensure compliance with this Article, including through appropriate corrective action for business enterprises failing to comply with these provisions. The latitude in the language of the ILBI seems to reflect the concerns raised during the discussions in the OEIGWG and designs a formula that allows States to decide the most suitable regulation of business enterprises

¹⁰⁰ Chair-Person Rapporteur OEIGWG, Third revised draft, Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (2021). Available from <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf> (accessed 19 October 2021).

¹⁰¹ UNGPs, Principle 21 and commentary.

operating in their territories, as well as include any other elements which would be useful in the context of their own national circumstances.

3.2 Article 6 reflects an obligation of conduct, not an obligation of outcome

Article 6 of the third revised draft of the legally binding instrument covers the corporations' duty of due diligence in their subsidiaries, companies in its supply chain and the communities in which they operate. Article 6.3. establishes the core components of conducting human rights due diligence in accordance with the United Nations Guiding Principles on Business and Human Rights¹⁰², and the list of measures that follows in Article 6.4. could be considered as the steps necessary to achieve such objectives (results), rather than as obligations by themselves.

By identifying a list of measures that business enterprises shall take to fulfil their duty of due diligence, the third revised draft attempts to achieve the objective of clarifying "the parent company's obligation to monitor the activities of its subsidiary and to seek to prevent and mitigate damage caused by its business relationships."¹⁰³ The detailed language of the provisions has led to a broader discussion on the nature of human rights due diligence, particularly whether it is an obligation of result or an obligation of conduct.¹⁰⁴

Nevertheless, it is important to note that the ILBI follows previous models set out by the Basel Core Principles for Effective Banking Supervision which recognises the obligation of banks to "have adequate policies, practices and procedures in place, including strict "know-your-customer" (KYC) rules, that promote high ethical and professional standards in the financial sector and prevent the bank being used, intentionally or unintentionally, by criminal elements,"¹⁰⁵ and includes a list of methods and requirements necessary for the fulfilment of such regulations. Similarly, the detailed set of criteria necessary to comply with the due diligence requirements set out in the German Act observes a similar approach, as it clearly establishes a list of measures and actions which are necessary to comply with HRDD requirements under the German legislation.

Considering that the aim of human rights due diligence processes entails the design and implementation of a set of mechanisms for complying with a "duty of care", human rights due diligence requirements should be clearly identified in order to incorporate necessary processes and internal policies throughout the business operations to identify and mitigate foreseeable damages, harm, or injuries.¹⁰⁶ The compliance with 'duty of care' could include the obligation to carry out human rights impact assessments before initiation of an investment, the design and implementation of internal due diligence policies throughout the corporation's conduct, or requirements of financial security to repair foreseeable damages in case of causing harm or injuries.

Therefore, the detailed requirements in the provisions relating to obligations of HRDD do not transform the nature of due diligence from an obligation of conduct to an obligation of result. Rather, it serves as a mechanism for guaranteeing transparency and certainty of the law, including its effects for non-compliance and clearly establishing a link with the duty of care. Given the flexibility embedded in the language of Article 6 of the draft legally binding instrument, Article 6.4 could be seen as establishing a minimum standard, allowing States the flexibility to include more stringent mechanisms of HRDD (see figure 8).

¹⁰² Identify and assess any actual or potential human rights abuses, take appropriate steps to prevent and mitigate them, monitor its fulfilment, and communicate the results.

¹⁰³ Skinner, McCorquodale and De Schutter (2013), p. 30.

¹⁰⁴ An obligation of result refers to the provision of the promised result, an obligation of means focuses on the duty of care given by a reasonable person for the performance of a service.

¹⁰⁵ See: <https://www.bis.org/publ/bcbs30a.pdf>.

¹⁰⁶ Skinner, McCorquodale and De Schutter (2013), p. 30.

Figure 8.- Understanding Prevention in the ILBI

HRDD: “the parent company’s obligation to monitor the activities of its subsidiary and to seek to prevent and mitigate damage caused by its business relationships” (ICAR, CORE and ECCJ, 2013) – Is it an obligation of result or an obligation of conduct?

Obligations of conduct: steps necessary to reach a promised result. “The necessary steps to cease or prevent its contribution and [...] mitigate any remaining impact to the greatest extent possible” (UNGPs, Principle 19 and commentary)

Duty of Care: “[...]reasonable care to avoid acts or omissions which can reasonably be foreseen to cause injure to persons who are so closely and directly affected by such act that it would be reasonable to have them in contemplation when conducting such act or omission

Article 6.4 could be constructed as: “Reasonable and appropriate measures to prevent and mitigate human rights abuses in the conduct of business activities, including through its business relationships, shall include, but not be limited, to: [keeping the current list of activities]”

Source: South Centre (2021)

3.3 Finding commonalities with current domestic HRDD legislation

The proposal to develop a legally binding instrument on business and human rights is a response to the lack of commitment by the business sector to respect human rights. The current ‘trend’ of mandatory HRDD requirements at the domestic and regional level seems to respond to the same concerns. Although the inclusion of an HRDD requirement in domestic legislation could result in “the crystallization of customary international law norms reflecting”¹⁰⁷ State practice, the different criteria and standards included in each legislation is still too inconsistent, particularly with respect to liability and sanctions for non-compliance.

Even if there is still room for discussion on the effects of HRDD, State practice could allow identifying certain practices that facilitate the adoption of mandatory HRDD standards in the ILBI. First, the majority of current practices have identified the need to conduct the four core components identified in the UN Guiding Principles, which are also included in the revised draft of the ILBI.

In the case of the European proposal, the French Duty of Vigilance Law, the Swiss and German Acts, and the United Kingdom and Australia Modern Slavery Acts, reporting obligations are subject to business obligations to design a set of policies and mechanisms directed towards identifying and assessing risks in their business operations, with the objective of mitigating such risks or providing remedy, and reporting the effectiveness of such measures. As mentioned above, the draft legally binding instrument is built on the same premises, with the objective of establishing international standards on HRDD.

Domestic initiatives have included criteria to identify the business entities which will have to comply with HRDD. Basically, countries have considered the sector of businesses (US Dodd-Frank Act), or the number of employees and total turnover in a given fiscal year (EU,

¹⁰⁷ Antony Crockett and Alisha Matthew, “UN Sharpens Draft Treaty on Business and Human Rights”, *Herbert Smith and Freehills*, 31 August 2021. Available from <https://www.lexology.com/library/detail.aspx?g=2618fba4-f2d1-4d3e-b176-4b1f5ad08b33>.

France, United Kingdom, Switzerland, Germany) as means to limit the obligations under their legislation. Such difference is aimed at not overburdening small and medium enterprises, as well as considering the impact that larger corporations have in the enjoyment of human rights and the protection of the environment.

The scope of the draft legally binding instrument considers all business activities, including those of a transnational character, and it no longer refers to all business enterprises. This reform could signal the recognition of States' flexibility to establish a national threshold for the fulfilment of corporate HRDD obligations "proportionate to their size, risk of human rights abuse or the nature and context of their business activities and relationships" following similar approaches to the US Dodd-Frank Act, as the reporting requirement is applicable to the activity use of conflict minerals which are "necessary to the functionality or production" of the final product. Nevertheless, if such flexibility is intended, there is a need for reviewing the language of the provision, as Article 6.1 refers to "all business enterprises."

Similarly, the possibility of including different thresholds and criteria for the fulfilment of the HRDD obligations does not come without a problem. For example, the EU proposal is intended to apply to companies exceeding five hundred (500) employees, the French Law applies to companies exceeding five thousand (5,000) employees at the national level, and ten thousand employees (10,000) worldwide, and the German Act also requires more than one thousand (1,000) employees, which would imply that almost 99% of all businesses in the European Union will be excluded from these requirements. Therefore, it would be important that the legally binding instrument could serve as a mechanism for leveling the playing field and, in particular, reduce the disparity of criteria among countries, with the objective of strengthening HRDD provisions worldwide.

Finally, the draft legally binding instrument seems to address the 'big elephant in the room,' by recognizing that without prejudice to the provisions on criminal, civil and administrative liability under Article 8, State Parties shall provide for adequate penalties and corrective actions for non-compliance. Given that liability and sanctions are the 'missing link' within domestic practices, the legally binding instrument seems to be building a close nexus between harms resulting from business operations and the failure to take all reasonable and appropriate measures to prevent, investigate and redress the human rights violations. Nonetheless, this objective could be better achieved by clarifying Article 8.7, which tries to avoid the consideration of failure to conduct HRDD as strict liability.

CONCLUSIONS

Globalization is allowing more and more companies, independently of their scale and nature, to participate in cross-border supply chains. At the same time, business activities are carried out at a fast pace, making risk assessment harder. Such elements can increase the risks and occurrence of human rights violations resulting from business activities. In the face of this scenario, different countries have developed domestic interventions aimed at responding to the challenges deriving from these activities.

Although domestic interventions are a step forward for the adoption of legally binding standards of corporate accountability, the criteria and models followed by each State could result in fragmentation of standards of remedy for victims of human rights abuse in the context of business enterprises and increase the uncertainty of corporate accountability and liability, also affecting the legal certainty required by businesses to conduct their operations.

The adoption of a legally binding instrument on business and human rights could clarify such international standards directed towards preventing human rights abuses by business enterprises, while providing sufficient flexibility for States to frame such measures consistent with their own needs, realities and legal traditions. The ILBI could serve as means for levelling the playing field for businesses, and promote an inclusive and transparent framework for accountability of business enterprises and the protection of human rights.

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International Environment House 2
Chemin de Ballexert 7-9
POB 228, 1211 Geneva 19
Switzerland

Telephone: (41) 022 791 8050
E-mail: south@southcentre.int

Website:
<http://www.southcentre.int>

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