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Abstract

In recent years, the field of business and human rights has witnessed a shift from soft law to hard law, which has been taking place as a number of states have been intensifying their efforts to comply with their duty to protect human rights. Some states have adopted legislation on human rights reporting such as the UK Modern Slavery Act 2015, whilst other states have favoured the adoption of mandatory human rights due diligence legislation to govern corporate behaviour both within their territories and abroad. This is the case of the French Duty of Vigilance Law, which also provides for an associated civil liability regime in case of harm. This paper explores the limitations of these fragmented domestic approaches and argues that there is a pressing need to create a legislative level playing field at the European level. It investigates the strengths and weaknesses of the French of Vigilance Law in order to determine whether it could serve as a model.

Keywords

Business and Human Rights, Mandatory Human Rights Due Diligence, UN Guiding Principles on Business and Human Rights, Duty of Vigilance

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I. Identifying the need to adopt mandatory human rights due diligence legislation

On 24 April 2013, the multi-storey Rana Plaza building collapsed in Savar Upazilla, Bangladesh, taking the lives of 1,138 workers and injuring more than 2,500 others. Just a few months earlier, over 100 people lost their lives and over 200 were injured in a fire in the Tazreen Fashion factory of Dhaka, Bangladesh. These tragedies attracted significant public attention. In particular, the Rana Plaza disaster remains to date the deadliest in the history of the garment industry. In the aftermaths of the tragedy, it became apparent that international brands such as *Primark, Mango, Carrefour, Benetton, El Corte Ingles, Bon Marche, Kik* and *Matalan* had sourced products from Rana Plaza. As a result, the question of the accountability of lead companies for the adverse human rights impact in their global supply chains was put in the spotlight. In particular, the question arose as to the responsibility of lead companies to ensure certain minimum health and safety standards in their suppliers' factory, as it was revealed that cracks in the building had been discovered the day before the collapse and prompted an evacuation. On the day of the collapse, bank workers on the ground floor of the building had been instructed not to go back to work, but textile and garment workers had been ordered by their employers to go back in, even though they knew that it was unsafe. Many attributed this decision to the pressure placed on suppliers by international brands, both in terms of the price of production and the speed of delivery. Indeed, the purchasing practices of international clothing brands and retailers can be seen as fueling a 'race to the bottom' among suppliers, who seek desperately to attract big international brands to the detriment of working conditions in supplier factories.¹

Following these tragedies, initiatives were taken to improve the situation of the ready-made garment industry in Bangladesh, the second largest clothing manufacturer in the world.² One of these initiatives is the Accord on Fire and Building Safety in Bangladesh (the Accord), which was signed on 15 May 2013. This is a legally binding agreement between trade unions and brands (mostly European) to ensure a safe working environment in the Bangladeshi ready-made garment industry. A similar initiative, the Alliance for Bangladesh Worker Safety, was also set up by North American companies.³ Both the Accord and the Alliance have contributed to significant improvements in building safety. However, they do not completely resolve the issues, and international brands can easily escape the requirements by simply deciding to source apparel from countries other than Bangladesh, where the Accord or the Alliance do not apply. This practice of *law shopping* amongst states, and the lax regulations maintained by subcontractors, makes the need to regulate at the source (i.e. at the level of the home state of the sub-contracting company) even more pressing.

The systemic problem of the evasion of more stringent laws on human rights, health and safety and the environment by multinational corporations and the correlated alarming number of corporate abuses of the rights of workers and local communities worldwide calls for a different solution. In the face of the inability or unwillingness of many host states to regulate corporate activities on their territory, and the generalized practice of *law shopping* and *forum shopping* by multinational corporations allowing them to evade the sovereignty of states, it has become necessary to find other mechanisms to bridge the regulatory gap. Home states have a key role to play in this respect;⁴ the widely-accepted principle of active personality in international law justifies the exercise of extraterritorial jurisdiction that the regulation of overseas business activities requires from home states, based on the nationality of the regulated entity.⁵ And indeed, in practice, a number of home states have attempted to govern corporate

¹ P.M. Barrett, D. Baumann-Pauly and A Gu, 'Five Years After Rana Plaza: The Way Forward', NYU Stern Centre for Business and Human Rights, New York, 2018.

² *ibid*, 5.

³ *ibid*, 11

⁴ C. Bright, 'L'accès à la justice civile en cas de violations des droits de l'homme par des entreprises multinationales', European University Institute, 2013, available at: <http://hdl.handle.net/1814/29602>.

⁵ O. De Schutter, A. Ramasastry, M.B. Taylor, R.C. Thompson, 'Human Rights Due Diligence: The Role of States', December

behaviour both within their territories and abroad through the adoption of legislation on mandatory human rights due diligence, however, these measures remain fragmented.

II. A fragmented trend towards mandatory human rights due diligence legislation in comparative law

In June 2011, the UN Human Rights Council unanimously endorsed the United Nations Guiding Principles on Business and Human Rights [UNGPs] which were developed by John Ruggie, as Special Representative of the Secretary-General on the issue of human rights and transnational companies and other business enterprise, in consultation with businesses, civil society, governments, and victims of corporate human rights abuses. The UNGPs are organised around three pillars: the state's duty to protect human rights; the corporate responsibility to respect human rights; and the need to provide access to remedy for those who have been adversely affected by business-related activities. The UNGPs provide an authoritative global standard for preventing and addressing corporate human rights abuses, however, their main limitation lies in their non-binding nature, which means that they do not create new obligations for states or for businesses. If the legal obligation for states to protect human rights already exists under international human rights law, the issue of corporate accountability for human rights violations is more controversial as debates are still ongoing on the question of the subjectivity of multinational corporations in international law.⁶ And this is precisely the reason why the second pillar of the UNGPs refers to a corporate *responsibility*, rather than *duty*, to respect human rights. Central to the second pillar of the UNGPs is the concept of human rights due diligence, which is in effect the operational means for businesses to discharge their responsibility to respect human rights.⁷ It provides the blueprint of the positive steps that businesses need to take, through policies and processes, to identify, prevent, mitigate, and account for the adverse impact on human rights they may cause or to which they are linked⁸.

However, in practice, implementation by business enterprises of their human rights due diligence responsibilities has been very poor. In 2019 the Corporate Human Rights Benchmark assessed 200 of the largest publicly traded companies in the world across four industries (agricultural products, apparel, extractives and Information and Communications Technology Manufacturing).⁹ The findings of the assessment notes that:

In aggregate, the 200 companies are painting a distressing picture. Most companies are scoring poorly and the UN Guiding Principles on Business and Human Rights (UNGPs) are clearly not being implemented.¹⁰

These findings underline the the limitations of over-reliance on voluntary approaches and 'soft law' regulation. Against this backdrop, the need for a top-down approach with governments mandating (and not merely encouraging) companies to exercise due diligence has become more apparent, and a

2012, available at: <http://corporatejustice.org/hrdd-role-of-states-3-dec-2012.pdf>.

⁶ Thus, for instance, the US Supreme Court recently denied the fact that international law currently extends liability – whether civil or criminal – for human rights violations to corporations: *Jesner v Arab Bank Plc*, 584 U.S. (2018). Kennedy, J., opinion 15: "(t)he international community's conscious decision to limit the authority of (...) international tribunals to natural persons counsels against a broad holding that there is a specific, universal and obligatory norm or corporate liability under currently prevailing international law".

⁷ According to Guiding Principle 15 of the UNGPs: "In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including: (a) a policy commitment to meet their responsibility to respect human rights; (b) a human rights due-diligence process to identify, prevent, mitigate and account for how they address their impact on human rights; (c) processes to enable the remediation of any adverse human rights impact they cause or to which they contribute."

⁸ R. McCorquodale and M. Orellana, 'Briefing Paper for Consultation: Human Rights Due Diligence, for the ESCR-Net and FIDH joint Treaty Initiative Project', available at: <https://www.escr-net.org/news/2016/you-design-the-treaty>.

⁹ Corporate Human Rights Benchmark (CHRB), '2019 Key Findings - Across sectors: Agricultural Products, Apparel, Extractives & ICT Manufacturing', available at: <https://www.corporatebenchmark.org/sites/default/files/2019-11/CHRB2019KeyFindingsReport.pdf>

¹⁰ Ibid, 3.

number of states are embracing the use of hard law to govern corporate behaviour. This is part of a more general, albeit fragmented, shift from soft law to hard law in the field of business and human rights.

The majority of these domestic-level initiatives take the form of legislation embedding elements of human rights due diligence requirements through obligations of reporting. This is the case of the transparency in supply chains clause (section 54) of the UK Modern Slavery Act 2015, which emulated the California Transparency in Supply Chains Act¹¹ adopted 5 years earlier.¹² The UK Modern Slavery Act requires large companies to publish an annual statement disclosing the steps that they are taking to prevent/tackle slavery and human trafficking in their own operations and in their supply chains.

This type of regulatory provisions incorporating human rights due diligence through reporting requirements constitutes a significant step towards greater corporate accountability. Many businesses have started to report on certain issues. However, in practice, the effectiveness of this approach remains limited.¹³ The underlying assumption according to which businesses would be eager to comply with the pressure coming from civil society, consumers and investors pressure has yet to be proven, especially for non public-facing companies.¹⁴ In addition, one of the fundamental weaknesses of this type of regulation derives from the lack of enforcement mechanisms in cases of non-compliance, and more generally by the significant barriers to access to justice that claimants face in domestic law when an adverse impact on human rights does occur,¹⁵ which means that the litigation risks for corporations remain low.¹⁶ Indeed, many hurdles are currently faced by claimants in proceedings involving corporate human rights abuses both in host states (due to issues ranging from the potential lack of adequate or independent judicial systems to the level of standards applicable) and in home states (such as the very limited availability of legal aid, the unavailability of class action mechanisms, issues of jurisdiction, extraterritoriality, applicable law and the complexity of the structure of the multinational corporation combined with the difficulty of lifting the corporate veil).¹⁷

As a response to these limitations, other types of legislation have emerged that go beyond mere reporting requirements to mandate companies to actually exercise human rights due diligence.¹⁸ An example of such legislation can be found in the Dutch Child Labour Due Diligence Act adopted on 14 May 2019.¹⁹ The legislation requires companies falling within its scope to investigate whether there is a 'reasonable suspicion' that the goods or services they provide have been produced using child labour, should that be the case, to put in place an action plan in order to address, and to publish a declaration about the human rights due diligence that they exercised. The statement, which only has to be submitted once (unlike the UK Modern Slavery Act which must be prepared annually), must be published on the

¹¹ California Transparency in Supply Chains Act of 2012, Senate Bill No 657: it require retail sellers and manufacturers (having more than \$100,000,000 in annual worldwide gross receipts) doing business in the California to disclose their efforts to eradicate slavery and human trafficking from their direct supply chains, available at: https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=200920100SB657.

¹² M. Koekoek, A. Marx, and J. Wouters 'Monitoring Forced Labour and Slavery in Global Supply Chains: The Case of the California Act on Transparency in Supply Chains', in, 8(4) *Global Policy* 2017, 522.

¹³ S. Cossart, J. Chaplier and T. Beau de Loménie, 'The French Law on Duty of Care: a Historic Step Towards Making Globalization Work for All' (2017) *Business and Human Rights Journal*, 2 (2017) 317, at. 319.

¹⁴ PricewaterhouseCoopers, 'Strategies for Responsible Business Conduct (Report prepared at the request of the Ministry of Foreign Affairs of the Netherlands)', 2018, at 59.

¹⁵ C. Bright, 'L'accès à la justice civile en cas de violations des droits de l'homme par des entreprises multinationales', *op. cit.*, at 97.

¹⁶ J.J. Álvarez Rubio and K. Yiannibas (eds), *Human Rights in Business: Removal of Barriers to Access in the European Union* (London: Routledge, 2017).

¹⁷ C. Bright, 'The Civil Liability of the Parent Company for the Acts or Omissions of Its Subsidiary: The Example of the Shell Cases in the UK and in the Netherlands', in A. Bonfanti (ed.), *Business and Human Rights in Europe* (Routledge, 2018), 212.

¹⁸ ECCJ Position Paper, "Key Features of Mandatory Human Rights Due Diligence Legislation", June 2018, available at: <http://corporatejustice.org/eccj-publications/6245-eccj-position-paper-key-features-of-mandatory-human-rights-due-diligence-legislation>.

¹⁹ The Netherlands Child Labour Due Diligence Act 2019.

website of the responsible regulatory authority. The law applies to companies (whether or not registered in the Netherlands) providing goods and services to Dutch end-users. It provides for a symbolic fine up of €4,100 for companies that fail to publish a statement. In addition, third parties affected by a company's failure to comply can submit a complaint to the company in the first instance, which can then be escalated to the supervising authority if the company's reaction is inadequate. If the regulator finds that the company failed to conduct appropriate due diligence, it can give legally-binding instructions to the company, accompanied by a time frame for execution. The company can be fined up to €8,200 in case of failure to submit the statement in accordance with the act, or up to 10% of the worldwide annual turnover in case of failure to exercise due diligence.²⁰

Another example in this context is the French Duty of Vigilance Law.²¹ This act is broader and much more ambitious than the Dutch Child Labour Due Diligence Law as it is not limited to one specific issue. Instead, it introduces a general legal obligation to undertake due diligence, and in the case of failure to do this - and that failure results in harm - allows for the imposition of a civil liability regime.

The various standards and requirements created by these fragmented legislative initiatives give rise to much legal uncertainty which is detrimental both to companies and affected individuals. Against this backdrop, it is essential to create a level-playing field at the European level which would provide an harmonized legal standard. To that end, the French Duty of Vigilance Law is often cited as a model for a potential EU-level legislation on these issues.

III. The French duty of vigilance law as a model?

The French legislation emerged as a result of the collaboration between civil society organizations, trade unions, academics, lawyers and Members of Parliament. Although the idea behind the French legislation had surfaced in 2012,²² the tragedy of Rana Plaza gave it a decisive push; the initial version of the legislation, sometimes referred to as the "Rana Plaza law", was put forward just a few months later, on 6 November 2013. From the start, it faced serious opposition, especially from the business lobby, which led to a legislative struggle lasting three and half years, involving much back-and-forth between the National Assembly (*Assemblée Nationale* – the lower chamber) and the Senate (*Sénat* – the upper chamber).²³ The legislation was finally adopted on 21 February 2017 and is the result of a compromise; the original version was gradually modified and watered down in its content.

1. Article 1: The Duty of Vigilance

Article 1 of the legislation introduces a new Article L. 225-102-4 into the French Commercial Code, which places a duty of vigilance on large French corporations through a threefold obligation to put in place, disclose and implement a vigilance plan (*plan de vigilance*) detailing the ‘reasonable vigilance measures to identify risks and prevent serious violations of human rights and fundamental freedoms, health and safety and the environment resulting from the own activities of the company or the companies under their control, or from the activities of their subcontractors and suppliers with whom they have an established business relationship’.

The legal duty of the company therefore includes the parent company's activities but also the activities of their subsidiaries and the companies that it controls directly or indirectly,²⁴ as well as the activities of subcontractors and suppliers with whom the company maintains an established business relationship. The notion of ‘established business relationship’ has already been used elsewhere in the

²⁰ R. Littenberg and N.V. Blinder, 'Dutch Child Labor Due Diligence Act Approved by Senate - Implications for Global Companies', available at: <https://www.ropesgray.com/en/newsroom/alerts/2019/06/Dutch-Child-Labor-Due-Diligence-Act-Approved-by-Senate-Implications-for-Global-Companies>.

²¹ Loi no. 2017-399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, available at:

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&categorieLien=id>.

²² Friends of the Earth France and al, "End of the Road for Transnational Corporations...", *op. cit.*, at 4-5.

²³ S. Cossart, and al., "The French Law on Duty of Care ...", *op. cit.* n. 18, at. 317.

²⁴ French Commercial Code, art L.233-16 II.

French Commercial Code (Articles L. 420-2 and 442-6) and has been characterized by the French Court by its regularity, its stability and the volume of business involved.²⁵

The vigilance plan must include five elements, in particular: 1) a mapping of the risks involved, containing in particular the identification, analysis and prioritization of risks; 2) procedures to regularly assess risks associated with the activities of subsidiaries, subcontractors or suppliers with whom the company has an established business relationship; 3) actions to mitigate risks and prevent serious harm; 4) a whistleblowing mechanism collecting reports of potential and actual risks and effects, drawn up in consultation with the company's representative trade unions; 5) a mechanism to monitor measures that have been implemented and evaluate their effectiveness.

Article 1 of the French legislation therefore imposes due diligence obligations on parent and lead companies in order to ensure that responsible business standards are adhered to in their own activities but also in the activities of their subsidiaries, suppliers and subcontractors wherever they operate. This represents an ex-ante prevention plan (rather than a mere ex-post reporting plan),²⁶ whereby the company must 'know and show' how they go about respecting human rights in their activities and throughout their supply chain.

Article 1 also provides that the vigilance plan can be drafted in consultation with relevant stakeholders or within multi-party initiatives. This can include internal stakeholders such as CSR, legal or sustainable departments [CSR] but also auditing, finance, lobbying and public affairs as well as employees and trade unions within the company and its subsidiaries; it can also include external stakeholders, such as subcontractors, suppliers, NGOs, consumers and local communities.²⁷ A study analysing the first published plans highlighted that most of the vigilance plans were the fruit of a collaborative approach within the companies, usually coordinated by CSR or sustainable development departments.²⁸ However, external stakeholder engagement can also play a key role in the effective application of the law on the corporate duty of vigilance and should not be undermined by business. For instance, stakeholders can help corporations identify potential risks or expose the actual practice of corporate-related human rights or environmental violations on the ground (especially if their involvement is ongoing rather than a one-off exercise). They also have an important role to play in the development of whistleblowing mechanisms as well as in the management of complaint reporting,²⁹ though the study analysing the first published plans has revealed that a majority of companies identified the question of whether to open up alert mechanisms to external individuals as a challenge.³⁰ The effectiveness of this collaborative approach to regulation is in line with findings from the field of behavioural psychology of the law, which point to a collaborative model of regulation as the best way to improve corporate behaviour in the long run.³¹ However, although the legislation encourages consultation with stakeholders, it is not a legal obligation: because of the diversity of stakeholders and their potentially conflicting interests, it was felt that it was important to leave corporations a choice in this respect.³²

²⁵ Cour de cassation, Chambre Commerciale, 15 septembre 2009, n° 08-19200, Bull. IV, n° 110

²⁶ Friends of the Earth France and al, "End of the Road for Transnational Corporations...", *op. cit.* (n. 11), 9-10.

²⁷ T. Beau de Loménie and S. Cossart, "Parties prenantes et devoir de vigilance", 2017 *Revue Internationale de la Compliance et de l'Ethique des Affaires* (50), 93.

²⁸ Entreprises pour les Droits de l'Homme (EDH) and B&L Evolution, 'Application of the Law on the Corporate Duty of Vigilance: Analysis of the First Published Plans', 25 April 2018, at 4, available at: https://www.edh.org/userfiles/Edh_2018_Etude_EN_V4.pdf, at 4.

²⁹ T. Beau de Loménie and S. Cossart, "Parties prenantes et devoir de vigilance", *op. cit.* n. 39, 93.

³⁰ Entreprises pour les Droits de l'Homme (EDH) and al. 'Application of the Law on the Corporate Duty of Vigilance...', *op. cit.* n. 38, at 4.

³¹ C. Hodges, *Law and Corporate Behaviour: Integration Theories of Regulation, Enforcement, Compliance and Ethics* (Hart, 2015).

³² N. Cuzacq, 'Quelle place peut-on octroyer aux parties prenantes dans le puzzle de la gouvernance de la société?', 2017 *Dalloz*, 1844.

The legislation applies to companies incorporated or registered in France for two consecutive fiscal years which employ at least 5,000 people in France (either directly or through their French subsidiaries), or at least 10,000 worldwide (through their subsidiaries located in France and abroad). In practice, it is estimated that approximately 237 companies fall within the scope of the legislation,³³ which is a rather small number.³⁴ Perhaps the choice of a scope in terms of turnover rather than in terms of number of employees, like the UK Modern Slavery Act which applies to companies with a turnover of more than £36 million of which there are approximately 12,000 in the UK, would have been a better choice.

Under the new Article L. 225-102-4 (Article 1 of the law) anyone with standing (i.e. victims, NGOs or trade unions) can file a complaint with the relevant French court to oblige a company to establish, implement and publish a vigilance plan if they have not done so already. Five formal notices have been sent to date: two were sent to Total (on 19 and 25 June 2019) respectively for allegedly failing to address its climate change impacts in its vigilance plan,³⁵ and for allegedly failing to meet the requirements of the law with respect to the company's impacts on local communities in Uganda.³⁶ Another formal notice was also sent to Teleperformance on 18 July 2019 in relations to issues concerning workers' rights and freedom of association in its subsidiaries.³⁷ A further formal notice was sent to EDF on 26 September 2019 with respect to a wind farm project in the State of Oaxaca.³⁸ Another formal notice was sent to XPO Logistics Europe on 1 October 2019, for allegedly failing to meet the requirements of the law in relations to labour issues in its supply chain.³⁹

Initially, the French legislation, in its version adopted on 21 February 2017, had a rather powerful enforcement mechanism in the form of a civil fine of up to €10 million, could be imposed by a judge in case of non-compliance. However, this disposition was struck down by the French Constitutional Council in its decision of 23 March 2017,⁴⁰ on the grounds that it lacked legal certainty. Indeed, as civil fine provisions constitute a criminal sanction in French law, specific principles apply, such as the principles of criminal liability and legality of offences, which require the laws to be clear and specific in order to ensure legal predictability.⁴¹ Here, the Constitutional Council found that the legislation violated these principles on the grounds of the general nature of the terms used by the legislator, the broad reference to human rights and fundamental freedoms, as well as the wide range of

³³ Sherpa, 'Duty of Vigilance Radar' <<https://vigilance-plan.org/search/>>.

³⁴ C. Macchi and C. Bright, 'Hardening Soft Law: The Implementation of Human Rights Due Diligence Requirements in Domestic Legislation', in M. Buscemi, N. Lazzarini and L. Magi, *Legal Sources in Business and Human Rights - Evolving Dynamics in International and European Law* (Brill, forthcoming 2020).

³⁵ Notre Affaire A Tous, Sherpa, Les Eco Maires & ZEA "1,5°C: 13 French Local Authorities and 4 NGOs ask the French oil company Total to prevent global warming", 23 October 2019, available at: <https://notreaffaireatous.org/wp-content/uploads/2018/10/DP-english.pdf>.

³⁶ Environment News Service (ENS), "Total Sued Under France's New Duty of Vigilance Law" (23 October 2019), available at: <http://ens-newswire.com/2019/10/23/total-sued-under-frances-new-duty-of-vigilance-law/>; AFP, "NGOs file suit against Total over Uganda oil project", *The East African* (24 October 2019), available at: <https://www.theeastafrican.co.ke/business/NGOs-sue-Total-over-Uganda-oil-project/2560-5323092-r3aeku/index.html>. See also BHHRC, "14 Cities and NGOs call on Total to comply with French Duty of Vigilance Law", available at: <https://www.business-humanrights.org/en/14-cities-ngos-call-on-total-to-comply-with-french-duty-of-vigilance-law>.

³⁷ Sherpa, "Sherpa and UNI Global Union send formal notice to Teleperformance calling on the world leader in call centers to strengthen workers' rights", 24 July 2019, available at: <https://www.asso-sherpa.org/sherpa-and-uni-global-union-send-formal-notice-to-teleperformance-calling-on-the-world-leader-in-call-centers-to-strengthen-workers-rights-2>.

³⁸ ProDESC, "Indigenous human rights defenders and NGOs call on EDF Group to comply with its duty of vigilance regarding human rights prescribed by the French 'Duty of Vigilance' Law", 15 November 2019, available at: <https://prodesc.org.mx/indigenous-human-rights-defenders/>.

³⁹ ITF, "Transport giant served notice under duty of vigilance law in landmark legal move", 1 October 2019, available at: <https://www.itfglobal.org/en/news/transport-giant-served-notice-under-duty-vigilance-law-in-landmark-legal-move>.

⁴⁰ Décision n° 2017-750 DC du 23 mars 2017 - Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre

⁴¹ S. Cossart, and al., 'The French Law on Duty of Care ...', *op. cit.*, at 321.

companies and operations covered by the duty of vigilance. The Council concluded that legislating such a fine for breaches of requirements defined so inadequately would violate the requirements resulting from Article 8 of the 1789 French Declaration of the Rights of Man and of the Citizen.⁴²

The Constitutional Council found, however, that these concerns did not extend to the possibility for interested parties to seek an injunction to order a company to establish, implement and publish a vigilance plan, accompanied by periodic penalty payments in case of non-compliance.⁴³ So, even if the absence of the civil fine provision might remove some of the incentive for businesses to comply with their duty of vigilance, the potential financial and reputational risk that could ensue from the injunction could nevertheless help fulfil the preventative objective of the legislation.⁴⁴

The French Duty of Vigilance Law also provides for another enforcement mechanism through the introduction of an associated liability regime set forth in Article 2 of the law.

2. Article 2: The Civil Liability Regime

Article 2 of the French legislation introduces a new Article L. 225-102-5 to the French Commercial Code, which provides that a company may incur civil liability, in the conditions set forth by Articles 1240 and 1241 of the French Civil Code, whenever its failure to comply with the obligations set forth in the legislation give rise to damage. This article therefore allows for the company's civil liability to be engaged by interested parties seeking compensation when the company's violation of its legal obligations has resulted in damage. Here again, stakeholders have a decisive role to play in ensuring the effective compliance of the duty of vigilance and, together with victims, NGOs in particular can make a difference through strategic litigation in the field of business and human rights.⁴⁵

In French Law, the traditional regime of civil liability is set forth in Articles 1240 and 1241 of the French Civil Code and the reference to these articles entails that the general rule applies. In particular, Article 1240 provides that: '*Any act of man that causes damage to another, shall oblige the person by whose fault it occurred to repair it.*' In addition, Article 1241 provides that: '*One shall be liable not only by reason of one's own acts, but also by reason of one's imprudence or negligence*'. Under these articles, three elements are necessary before civil liability can be imposed: a fault (which could be either the commission or omission of an act), a damage and a causal link between the two. Failure to comply with the obligation to design and implement a vigilance plan, or putting in place an inadequate one, would be constitutive of a fault, and the information published in the vigilance plan may be used as evidence in this respect.⁴⁶ However, if the company has put in place and implemented a robust vigilance plan, taking every reasonable step to avoid causing or contributing to an alleged human right abuse, it may be able to escape liability in the event of damage occurring.

The burden of proof remains on the claimant, who will need to prove that they suffered a damage as a result of a fault on the part of the parent company. It has been argued that the legislation constitutes a missed opportunity with regards to effective access to justice in this respect: the burden of proof may constitute an insurmountable obstacle for the claimants as many tort cases in the field of corporate human rights accountability have shown in the past.⁴⁷ However, through their experience in litigation, NGOs can help gather evidence on the ground and hopefully help alleviate the burden of proof.

One of the main advantages of the French legislation in terms of effective access to justice for the victims of corporate human rights abuses stems from the fact that it allows for the lifting of the

⁴² Article 8 of the Declaration states that: "The law shall only establish penalties that are strictly and clearly necessary, and one shall only be punished under a law that has been established and enacted prior to the criminal offence, and that is legally applicable".

⁴³ S. Cossart, and al., "The French Law on Duty of Care ...", *op. cit.*, at 322.

⁴⁴ S. Brabant and E. Savourey, "Loi sur le devoir de vigilance, pour une approche contextualisée", 50 *Revue Internationale de la Compliance et de l'Ethique des Affaires*, 2017, p. 6.

⁴⁵ T. Beau de Loménie and S. Cossart, "Parties prenantes et devoir de vigilance", *op. cit.*, 93.

⁴⁶ Friends of the Earth France and al, "End of the Road for Transnational Corporations...", *op. cit.* (n. 11), 9-10.

⁴⁷ C. Bright, "The Civil Liability of the Parent Company for the Acts or Omissions of Its Subsidiary ...", *op. cit.* at 212.

corporate veil.⁴⁸ One of the major obstacles to access to justice faced by claimants arises from the fact that, from a legal perspective, each entity forming the international group of companies is considered separately. As a result, a parent company cannot normally be held liable for adverse human rights or environmental impact caused overseas by its subsidiaries, and even less so when they caused by suppliers or subcontractors. This in turns frequently prevents access to home state courts to victims of corporate human rights and environmental abuses.⁴⁹ By providing for a new civil liability regime in case of harm – whereby the parent company can be liable for breach of their duty of vigilance in the case of human rights or environmental damage resulting from the activities of the company, its subsidiaries, subcontractors and suppliers – it circumvents the obstacle of the corporate veil and captures the economic reality of the multinational corporation. Before the Constitutional Council, the applicants sustained that the legislation thereby established a new principle of vicarious liability for the parent company that would be held liable for damages caused by a separate entity (subsidiary, subcontractor or supplier) in breach of the requirements of personal liability.⁵⁰ The applicants also sustained that Article 2 violates the right to effective judicial relief by allowing third parties to initiate liability actions without having received any mandate from the victim. However, the Constitutional Council rejected both arguments and found that the legislation did not establish a new regime of vicarious liability, as it referred to the traditional regime of liability under Article 1240 and Article 1241 of the Civil Code. This meant that the liability company could only be engaged in the case that a breach of the obligations laid down in Article 1 caused damage and that a causal link could be established between the breach and the damage. It also confirmed that the civil action could only be launched by victims.

3. Implementation

A study which analysed the first published plans highlighted that the vast majority of companies performed or initiated new efforts to identify at-risk suppliers, either through reviewing existing procedures or through establishing a new mapping procedure in order to comply with the French legislation.⁵¹ The study revealed that the main criteria used to identify at-risk suppliers involves geographical location and the suppliers' business activity.⁵² The study also showed that the main issues identified by businesses in relation to human rights risks concerned the fundamental rights of employees, such as prohibition of forced and child labour, trade union freedom and non-discrimination and, to a lesser degree, the impact on local communities.⁵³ The responses of businesses in terms of risk management usually involve global, group-wide policies on risk identification and internal control processes. In addition, the main issues identified by businesses in relation to environmental risks concerned soil, air and water pollution, threats to biodiversity and waste management. The study reported that half of the companies reviewed were developing global CSR responses to these risks, such as internal audits and responsible procurement clauses, with the primary objective to monitor supplier and subcontractor practices.⁵⁴ The positive impacts that the French Duty of Vigilance has had on business practices was confirmed in a recent report according to which the law prompted 70% of companies to start mapping risks of adverse human rights and environmental impacts or to revise existing mappings and processes.⁵⁵ However, there is still some room for progress. A report by French

⁴⁸ S. Brabant and E. Savourey, "Loi sur le devoir de vigilance, pour une approche contextualisée", *op. cit.*, 6.

⁴⁹ A. Marx, C. Bright, N. Pineau and J. Wouters, 'Corporate Accountability Mechanisms in EU Member States for Human Rights Abuses in Third Countries', *European Yearbook of Human Rights*, 2019, at 157.

⁵⁰ S. Cossart, and al., 'The French Law on Duty of Care ...', *op. cit.*, at 322.

⁵¹ Entreprises pour les Droits de l'Homme (EDH) and B&L Evolution, 'Application of the Law on the Corporate Duty of Vigilance: Analysis of the First Published Plans', 25 April 2018, at 4, available at: https://www.e-dh.org/userfiles/Edh_2018_Etude_EN_V4.pdf.

⁵² *Ibid.*, at 4.

⁵³ *Ibid.*, at 4.

⁵⁴ *Ibid.*, at 5.

⁵⁵ Edh, 'Application de la loi sur le devoir de vigilance: Plans de vigilance 2018-2019', 14 June 2019, available at: <https://www.e-dh.org/userfiles/EDH%20-%20Etude%20plans%20de%20vigilance%202019.pdf>.

NGOs which analysed 80 vigilance plans published between March and December 2018 (first year of the application of the law) concluded that 'companies must do better'.⁵⁶ The report identified issues of non-compliance,⁵⁷ and insufficient implementation of the law amongst the complying companies. The report also revealed that the majority of the vigilance plans focused on the risks to the business itself rather than the risks to third parties or the environment.⁵⁸

In particular, the report noted that the companies subject to the law should facilitate the access to their vigilance plans,⁵⁹ and that they should be subject to a stand-alone document published on the company's website (rather than merely being integrated in the reference document (annual financial statement) of the company).⁶⁰ The report also highlighted that the vigilance plans should be transparent and comprehensive and include a list of the controlled companies, suppliers and subcontractors with which the company maintained established commercial relationships, their activity, a list of their employees, their location and the risks of adverse human rights impacts linked to their activity.⁶¹ The report also revealed that stakeholders engagement is infrequent in the vigilance plans analysed⁶² and that the majority of vigilance plans do not give sufficiently precise information as to the stakeholders' engagement in the drafting of their plans.⁶³

In addition, the report mentioned that the majority of the companies analysed merely transpose, in their vigilance plans, their reporting practices or their engagements in terms of corporate social responsibility.⁶⁴ The report stated that the methodology for the identification of the human rights risks is insufficient, when not absent altogether, in over two third of the vigilance plans analysed.⁶⁵ The report also mentioned that the vigilance plans analysed do not clearly distinguish between the human rights due diligence policies concerning the company's subsidiaries and the ones concerning its suppliers and subcontractors.⁶⁶ The report affirmed that many vigilance plans do not sufficiently detail the actions and measures taken by the company to prevent serious human rights and environmental harms and give a very incomplete answer to the risks identified in the mapping.⁶⁷ In relation to the requirement to establish a whistleblowing mechanism, the report stated that a number of companies answered to this requirement through the setting up of an email address which the report deemed insufficient in the light of difficulties of access that this can create (e.g. lack of access to internet in many countries, lack of awareness of the email address, etc.).⁶⁸ The report noted that, generally speaking these the types of mechanisms put in place by companies remain imprecise and that, most of the time, they are not open to third parties such as affected communities.⁶⁹ Furthermore, the report pointed out that a number of companies made no mention in relation to the establishment of a mechanism to monitor measures that have been implemented and their effectiveness.⁷⁰

⁵⁶ J. Renaud, F. Quairel, S. Gagnier, A. Elluin, S. Bommier C. Burlet and N. Ajaltouni, "Loi sur le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre - Année 1: Les entreprises doivent mieux faire", February 2019, at 10 available at: https://ethique-sur-etiquette.org/Deux-ans-apres-l-adoption-de-la-loi-sur-le-devoir-de-vigilance-les-entreprises?var_mo.

⁵⁷ *Ibid.*, at 10.

⁵⁸ *Ibid.*, at 10.

⁵⁹ J. Renaud et al., "Loi sur le devoir de vigilance ...", *op.cit.*, at 11.

⁶⁰ *Ibid.*, at 11.

⁶¹ "Vigilance Plans Reference Guidance", *op. cit.*, at 15.

⁶² *Ibid.*, at 13.

⁶³ *Ibid.*, at 13.

⁶⁴ *Ibid.*, at 15.

⁶⁵ *Ibid.*, at 15.

⁶⁶ *Ibid.*, at 16.

⁶⁷ *Ibid.*, at 17.

⁶⁸ *Ibid.*, at 18.

⁶⁹ *Ibid.*, at 18.

⁷⁰ *Ibid.*, at 19.

Conclusion

The French Duty of Vigilance Law has a number of weaknesses, in particular with regards to its scope limited to a small number of large companies, its failure to address certain recurrent obstacles to access to justice faced by victims of corporate human rights abuses, and the insufficient implementation of the law in practice in the first vigilance plans published. Despite of these weaknesses, it represents an innovative combination of the state's duty to protect human rights and the responsibility of business enterprises to respect human rights. It has been described as: 'a historic step forward for the corporate accountability movement, and a testament of the importance of civil society participation in the law-making process.'⁷¹ The legislation seeks to make large French companies more accountable for human rights and environmental harms occurring throughout their supply chain. It has extraterritorial reach since the duty of vigilance applies throughout the international supply chain and legal proceedings may be brought before French courts for damage that occurred abroad.⁷² Furthermore, contrary to what critics might have suggested, the legislation does not seem to have affected France's international competitiveness; the country attracted a record level of foreign direct investment after its adoption.⁷³ With over a fifth of the 50 largest European companies being French companies, France has recognised that it has a particular role to play in the regulation of corporate behaviour.⁷⁴ The legislation certainly seems to have considerable potential to address the adverse impact on human rights of businesses. France is seeking to play a leading role and hoping that this law will serve as a model at the European level.

Discussions are currently underway to turn the UNGPs into a Treaty and the adoption of a legally-binding instrument allowing for a uniform approach at the international level to regulate corporate behavior, as opposed to fragmented initiatives at the domestic level which can easily be circumvented by businesses through the practice of law shopping. This would certainly go a long way to improving corporate behaviour and accountability.⁷⁵ However, obtaining a consensus on meaningful legal obligations for businesses at the international level might prove difficult and attempts in this respect have failed in the past.⁷⁶ In the meantime, the adoption of legislation imposing mandatory due diligence at the European level seems more achievable and would constitute a major step forward for corporate accountability. Many large multinational corporations are based in Europe and Europe therefore has a role to play in regulating the overseas activities of European companies or companies operating on the European territory. By improving ethical competitiveness, Europe could lead by example and create a race to the top.

⁷¹ S. Cossart, and al., 'The French Law on Duty of Care ...', op. cit. n. 18, at 317.

⁷² S. Cossart, and al., 'The French Law on Duty of Care ...', op. cit. n. 18, at 319.

⁷³ "Les projets d'investissements étrangers en France à un niveau record en 2017", available at: https://www.lemonde.fr/economie/article/2018/04/03/les-projets-d-investissements-etrangeurs-en-france-a-un-niveau-record-en-2017_5279979_3234.html

⁷⁴ <http://www.assemblee-nationale.fr/14/propositions/pion2578.asp>

⁷⁵ D. M. Aragão, M. C. Roland, "The Need for a Treaty", in S. Deva and D. Bilchitz, *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press, 2017) 131.

⁷⁶ K. Hamdani and L. Ruffing, "Lessons from the UN Centre on Transnational Corporations for the Current Treaty Initiative", in S. Deva and D. Bilchitz, *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press, 2017) 27.

