

PELS RIJCKEN



Business human rights in Indonesia

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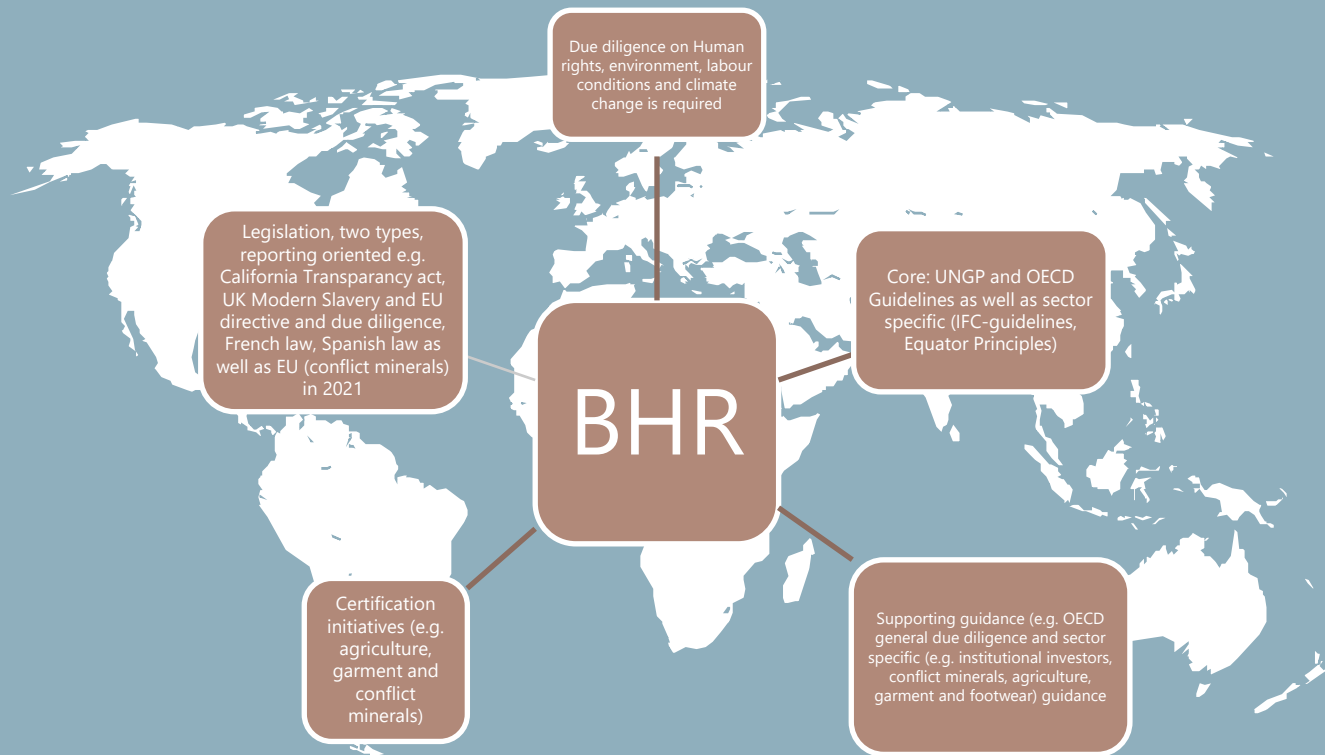


Is Business Human Rights (BHR) a legal topic?

- 1. Depends on region. In Europe compliance issue because of (emerging) legislation including public and private supervision.**
- 2. Contracts**
- 3. Transactions (M&A, investment)**
- 4. Corporate governance**
- 5. Liability**



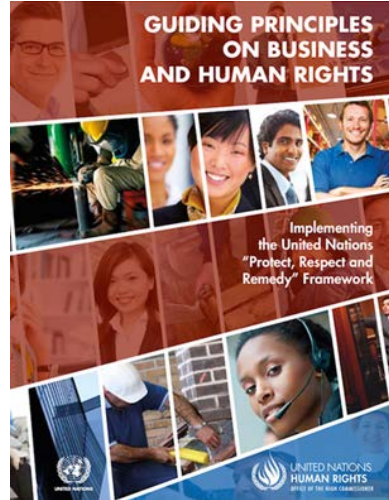
Complex landscape



The UN Guiding Principles on Business and Human Rights

State duty to protect

- **Protect against human rights abuses by business enterprises, through appropriate policy, legislation, regulations and adjudications.**



Corporate responsibility to respect human rights

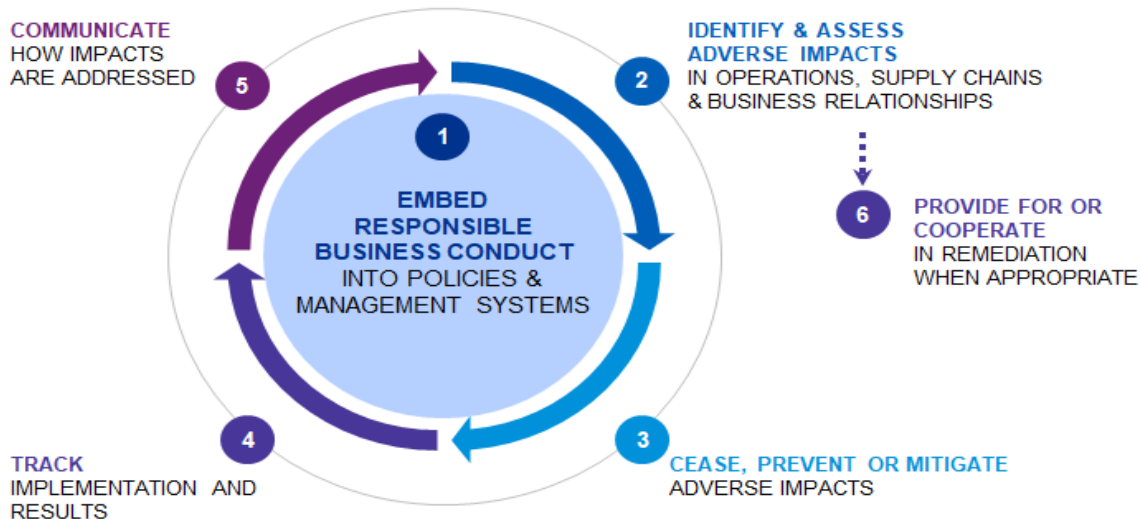
- **Businesses to act with due diligence and address adverse impacts.**

Access to remedy

- **Right for victims to access effective remedy, both judicial and non-judicial.**

Environmental and Human Rights Due Diligence

- Fundamental to the second pillar of the UNGPs, is the concept of **human rights due diligence (HRDD)**.
- It allows a company to take **proactive, preventative action** to address human rights risks and show that they respect human rights in practice.
- HRDD is an **ongoing human rights risk management process** which will vary in complexity with the size of the business, the risk of severe human rights impacts and the nature and context of its operations.



*UNGP/OECD
Guidelines:
human rights
due diligence
process to
identify,
prevent and
account for
how they
address their
impacts on
human rights.*



Observations for Asia

1. UNDP Report Reflections and Directions, Business and Human Rights in Asia: from the first decade to the next, <https://www.undp.org/publications/reflections-and-directions-business-and-human-rights-asia-from-first-to-next-decade>



Some NCP cases

1. Netherlands

1. ING: palmoil Indonesia, contributing?

Global Legislative Developments

Existing Laws – Modern Slavery

- **California Transparency in Supply Chains Act 2010:** Certain companies required to report on their specific actions to eradicate slavery and human trafficking in their supply chains.
- **UK Modern Slavery Act 2015:** Companies carrying on business in the UK (with turnover of £36 million) obliged to publish statements regarding steps to address modern slavery.
- **New South Wales Modern Slavery Act 2018:** Organisations with 1 employee in NSW and a turnover of AUD 50 million. Implementing regulations will set out statement content requirements and will clarify “extra-territoriality”. Fine: up to AUD1.1 million for non-compliance.
- **Australian Modern Slavery Act 2018:** Includes mandatory reporting criteria (e.g. on slavery risks and mitigations steps) for companies based in/operating in Australia with a turnover of AUD100 million or more.

Emerging and New Laws – Modern Slavery

- **Hong Kong:** Modern Slavery Bill with MSA style reporting requirements, and new offences and a provision enabling victims to bring civil claims against perpetrators or others who received anything of value through involvement in a venture that they knew / should have known involved slavery. The Bill was debated in June; draft under discussion.
- **Netherlands:** Child Labour Due Diligence Law; companies providing goods/services to Dutch consumers will have to conduct child labour due diligence in their operations and supply chains. Passed in May 2019, will come into force in 2022.
- **Austria:** Proposed law on child and forced labour due diligence.
- **Norway:** Reporting on BHR issues by oil companies.
- **Canada:** A newly introduced Bill requires Canadian businesses and businesses that import into Canada to report annually on the risks of forced/child labour in their supply chains. Under the Bill businesses found to import goods produced using force/child labour may be prohibited from importing into Canada. To be tabled in the Senate.
- **US:** Ban on goods made with child labour, seizure by customs possible and ULC is discussing federal legislation on human trafficking.

Existing Laws – Human Rights

- **French Duty of Vigilance Law 2017:** Large French companies are obliged to publish and implement a vigilance / due diligence plan which considers human rights (which extends to “controlled” subsidiaries).
- **Directive 2014/95/EU Articles 19a / 29a:** EU headquartered large public interest entities including listed companies and banks with over 500 employees) need to report on issues including their human rights impacts. Currently under revision.
- **Section 172 of the UK Companies Act 2006:** Duty to promote success of the company including taking into account of employee welfare and impacts on communities and environment.
- **EU conflict minerals regulation:** has come into force as of January 1 2021.

Emerging Laws – Human Rights

- **EU proposal general due diligence:** proposal Directive published February 23, EP resolution has urged EC to propose legislation, draft text in annex.
- **EU proposal for expelling goods on European markets made with forced labour**
- **Switzerland:** Two draft legislative proposals in the Swiss legislature which would require larger Swiss companies to carry out human rights due diligence in line with the UNGPs, and would make provision for parent company liability. Rejected by popular vote, new proposal may emerge.
- **Netherlands:** Child labour law, Parliamentary initiative for general human rights due diligence law, government announced to implement legislation this October.
- **UN Business and Human Rights Treaty:** Internationally legally binding instrument to regulate activities of transnational corporations and other business enterprises. Revised draft published in 2020.
- **Other:** Political discussions on human rights due diligence are underway in the US, Germany (no liability but public supervision and fines), Luxembourg, Finland and Sweden.



Treaty

1.Content

1. After Zero draft revised draft (improved), new revised draft is expected this summer
2. Most important provisions: 5 prevention (due diligence, amongst others consultation and contractual provisions), 6 liability (6.1 violations of company, 6.5 other parties if contractual relationship and foreseeable, 6.7 criminal prosecution, 7 jurisdiction, 8 prescription, 9 applicable law and 13.7 fund for victims



EU Draft on environmental and human rights due diligence

- 1. Larger Companies**
- 2. Art. 4-11 substantive obligations including all steps of due diligence**
- 3. Less strict for banks**
- 4. Emphasis on contractual mechanisms**
- 5. Directors duties**



Multi-stakeholder initiatives

1. Multi-stakeholder initiatives

*** Effectiveness (OECD-alignment, EU Conflict Minerals Regulation)**

*** Recital 37 EU Draft: (art. 3(j)) mainly for corporations to assess, but guidelines by European Commission, art. 13 and 14(4)**



Liability

- 1. Emerging litigation, different from corporate litigation**
- 2. Netherlands: Shell Nigeria (environment and human rights, Kiobel, Milieudefensie climate change and HRDD), FMO (Honduras), Trafigura (Ivory Coast)**
- 3. France: Total (climate change and Oeganda) default notices EDF (indigenous rights), Teleperformance (workers' rights) and XPO (no policy)**
- 4. UK: Lungowe et al. vs. Vedanta, Shell Nigeria (Obkapi)**
- 5. US: rechtszaak 14 families against big tech on conflict minerals from Congo**
- 6. Canada: international customary law may apply to corporations**



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