



International  
**COCOA**  
Initiative

# **HUMAN RIGHTS DUE DILIGENCE IN SUPPLY CHAINS**

**A review of legislation  
and guidelines through  
the lens of the UN Guiding  
Principles on Business and  
Human Rights**

**ICI Review**

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## **LIST OF ABBREVIATIONS**

<b>EU</b>	European Union
<b>ETI</b>	Ethical Trade Initiative
<b>FAO</b>	Food and Agriculture Organization of the United Nations
<b>HRDD</b>	Human rights due diligence
<b>ICI</b>	International Cocoa Initiative
<b>ILO</b>	International Labour Organization
<b>IOE</b>	International Organisation of Employers
<b>MSA</b>	Modern Slavery Act
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>UN</b>	United Nations
<b>UNGP(s)</b>	United Nations Guiding Principles on Business and Human Rights

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## EXECUTIVE SUMMARY

This review analyses current due diligence and transparency legislation through the lens of the UN Guiding Principles for Business (UNGPs). In doing so, it seeks to support ICI members and contributing partners to get an overview of a fast-moving regulatory environment and to help define their human rights due-diligence strategies in light of current and upcoming legislations and guidance as well as against the general framework of the UNGPs.

The 31 UN Guiding Principles are divided between three pillars: the state duty to protect, the corporate responsibility to respect, and victims' access to effective remedy. UN Guiding Principles 11 to 23 are concerned with this second pillar of corporate responsibility<sup>1</sup>, and will be at the centre of this report. Although distinct, these 13 principles can be grouped into six categories, adapted from subsections outlined by Shift: responsibility, assessment, commitment, tracking, communication and remediation. This will be the framework for comparison and analysis, examining each theme as represented in the UNGPs and how they correspond to features of the laws and guidance.

This report finds that most laws do not entirely conform to the standards of the UNGPs. Most current laws focus primarily on external communication and disclosure with little emphasis on actions. The most neglected aspects of the UNGPs are tracking and remediation, the majority of laws not mentioning them whatsoever. A consistent pattern throughout these six categories is that the French Duty of Vigilance law goes further in its measures than any other law, aligning itself consistently with the UNGPs.

The findings from this report indicate that there are considerable differences between existing due diligence laws and that most are on a different 'achievement level' if we are to compare them with the standard set by the UNGPs. As such, at least until regional laws (such as those under consideration for the EU) come into force, businesses will be faced with the choice to comply with a higher, non-binding, single set of systems and procedures to align themselves with the UNGP, or to do the minimum to seek to comply with the obligations of the various overlapping pieces of domestic legislation. The former may well prove to be more practicable for large international businesses operating across different countries.

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<sup>1</sup> OHCHR, 2011. UNGPs. Available from: [https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr\\_eN.pdf](https://www.ohchr.org/documents/publications/GuidingprinciplesBusinessshr_eN.pdf)

## INTRODUCTION

Over the past decade, there has been a growing, international push towards tackling human rights abuses in supply chains, especially regarding human trafficking, child labour and forced labour. At the heart of this shift, the UN Guiding Principles are widely regarded as the first tangible move towards formalising this growing call for transparency and due-diligence. Since their publication in 2012 and even before, both national governments and international organisations have developed a range of hard laws and guiding principles in this area. Ultimately, these aim to encourage businesses to act according to their leverage and areas of responsibility, in order to eliminate human rights abuses, or at least mitigate risk thereof, in all aspects of their operations.

This wave of regulations on human rights and trade is largely confined to “the West”. The UK, the Netherlands, France and Australia are frontrunners of this trend, with Canada and Germany currently in the process of bringing in similar legislation. Many EU members, and EU-based companies<sup>2</sup>, would rather see an EU regulation on the matter to avoid the complexity of having to deal with 28 distinct laws, but discussions at EU level are still at an early stage<sup>3</sup>. There have been some efforts in Asia to introduce more transparency and due-diligence regulation, though the coverage and depth of these efforts largely do not go as far as those of the West.

Common requirements of these legally-binding regulations include public disclosures of efforts, risk assessments and an easily-accessible remediation system. These features reach across almost all existing and prospective legislation. Though these laws do take considerable strides in promoting transparency, it has been argued that most lack the breadth of features to be considered effective<sup>4</sup>.

Soft laws and principles are non-legally binding and exist to guide businesses on ideal practices. These principles tend to represent a set of values and general rules that an organisation should embody and follow, the UN Guiding Principles for Business (UNGPs) being the most prominent example. These are often coupled with practical guidance tools, intended to give more grounded and implementable advice to businesses. These provide concrete steps that companies can take in order to effectively address any unethical business practices occurring in the entirety of their supply chain.

John Ruggie, the primary author of the UNGPs, has noted that the Principles were intentionally separate from any kind of law or legally-binding regulation. In fact, he has argued that the UNGPs were intended to separate ‘human rights discourse and practice’ from the constraints of what is possible under law<sup>5</sup>. Instead, Ruggie prioritises what is ‘meaningful and actionable’ in everyday life, meaning

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<sup>2</sup> Barry Callebaut Group, 28 March 2019. Available from: <https://twitter.com/BCgroupnews/status/1111153494537445377>

<sup>3</sup> Brack, *Towards sustainable cocoa supply chains: Regulatory options for the EU*, FERN, June 2019. Available from: <https://www.fern.org/fileadmin/uploads/fern/Documents/2019/Fern-sustainable-cocoa-supply-chains-report.pdf>

<sup>4</sup> Hess, 2019. ‘The Transparency Trap’, Available from: <https://onlinelibrary.wiley.com/doi/pdf/10.1111/ablj.12134>

<sup>5</sup> Ruggie, 2015. ‘Life in the Global Public Domain’. Available from: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2554726](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554726)

the UNGPs can be seen as an aspirational set of ideal practices for businesses. As such, by comparing existing due diligence law with the Principles, it can be shown to what extent they converge or diverge. This will make clear any gaps in current laws and highlight any trends in these omissions.

Representing a model set of practices for businesses, the UNGPs are a valuable comparison point for due diligence laws. By highlighting the discrepancies and convergences between them, it can be shown how far different legislations go in promoting effective human rights practice and what measures companies are expected to put in place to comply with them.

In the following chapters, this paper will present those discrepancies and convergences according to the following structure:

<b>Responsibility</b>	<i>UNGP 14</i>
<b>Assessment</b>	<i>UNGPs 17 &amp; 18</i>
<b>Commitment</b>	<i>UNGPs 15 &amp; 16</i>
<b>Tracking</b>	<i>UNGP 20</i>
<b>Communication</b>	<i>UNGP 21</i>
<b>Remediation</b>	<i>UNGPs 15 &amp; 22</i>

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## I. RESPONSIBILITY / APPLICABILITY

The UNGPs are explicit in their statement that corporate responsibility lies with all business enterprises. This is specified in no uncertain terms in Principle 14:

### UN Guiding Principle № 14

*“The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts.”*

While the UNGPs require all businesses to respect human rights, the extent to which HRDD is necessary may be affected by the size of the entity. Certain pieces of domestic legislation (e.g. the UK, French, Swiss and German laws) diverge from the UNGPs in this respect by setting a minimum size/revenue threshold.

The [UK Modern Slavery Act](#), for example, includes a turnover threshold for applicability<sup>6</sup>, this having been set at £36 million per financial year<sup>7</sup>. This is not to say that child labour or modern slavery is not illegal for smaller companies; the UNGPs make clear that the extent of due diligence carried out by a business [should be proportional to its size](#) and the severity of its potential human rights impacts. This applicability threshold in law determines which companies are required to carry out the full due diligence and transparency measures mandated. These measures include the publication of annual statements, risk assessments and audits (see appended tables for full details).

### APPLICABILITY CRITERIA FOR HRDD LAWS

- Turnover
- Size
- Country of registration
- Country of operation

### Current laws: applicability thresholds

Country/region	Name of law	Applicability threshold for businesses
Australia	Modern Slavery Act	Annual consolidated revenue over AU\$100m
California	Transparency in Supply Chains Act	Annual worldwide gross receipts over US\$100m
EU	Directive on Non-Financial Reporting	Over 500 employees
France	Corporate Duty of Vigilance Law	Headquartered in France, with 5000 employees in France or 10,000 worldwide; or foreign companies with French subsidiaries employing ≥5000
Netherlands	Child Labour Due Diligence Bill	All companies delivering goods or services to Dutch market twice or more per year
UK	Modern Slavery Act	Worldwide revenue over £36m

<sup>6</sup> Part 6, section 54 (2b) of MSA

<sup>7</sup> Transparency in Supply Chains etc.: A practical guide. 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](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/649906/Transparency_in_Supply_Chains_A_Practical_Guide_2017.pdf)



The determination to establish a size/revenue threshold may have been made because Governments were concerned about placing unnecessary burdens on SMEs. However, recent research<sup>8</sup> suggests that such provisions are founded on a misconception. Indeed, size is not the only determinant of what HRDD will be required and some SMEs face a high risk of involvement in severe human rights impacts. In this context, it is worth noticing that some new and upcoming due diligence laws seem to be eliminating these size and turnover specifications. Passed by the Senate in May 2019, the [Dutch Child Labour Due Diligence Law](#) ('Wet Zorgplicht Kinderarbeid') will apply both to companies registered in the Netherlands and those importing goods and services into the country<sup>9</sup>. Similarly, the [prospective Canadian bill](#) would apply measures to any business entity trading in the country<sup>10</sup>. Contrastingly, however, the [Swiss](#)<sup>11</sup> and [German](#)<sup>12</sup> laws currently under discussion include a minimum size requirement similar in nature to that of the current UK and Australian legislation.

### Prospective laws: applicability thresholds

Country/region/body	Name/description of law	Applicability threshold
Canada	Bill C-423 (due diligence and transparency)	Any entity operating in or importing into Canada
Canada	Supply chain due diligence	Not yet specified
Hong Kong	Prohibiting slavery and forced labour	Any business entity trading in Hong Kong
OEIGWG	Legally-binding global instrument	Corporations of a 'transnational character'
USA	Business Supply Chain Transparency on Trafficking and Slavery Act	Annual worldwide global receipts ≥US\$100m

## II. ASSESSMENT

The act of assessing a company's human rights impacts is central to the due diligence process, as is reflected in Guiding Principles 17 and 18 below:

### UN Guiding Principle № 17

*“human rights due diligence [...] should include assessing actual and potential human rights impacts”*

<sup>8</sup> <https://www.shiftproject.org/resources/viewpoints/busting-myth-smes-corporate-responsibility-respect-human-rights>

<sup>9</sup> Article 4, section 1.

<sup>10</sup> Canada Private Members Bill, section 6 ('Entities').

<sup>11</sup> Eidgenössische Volksinitiative 'Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt': Indirekter Gegenentwurf, section 3.

<sup>12</sup> Sorgfaltspflichtengesetz (draft), article 1, section 2 ('Anwendungsbereich').

## UN Guiding Principle № 18

*“This process should:*

- a) Draw on internal and/or independent external human rights expertise*
- b) Involve meaningful consultation with [...] relevant stakeholders.”*

Shift have noted that assessment is the ‘first step’ for businesses seeking to mitigate their human rights risks<sup>13</sup>. Indeed, Shift also note that ‘identifying the company’s “salient” human rights issues can provide a focus’ for their subsequent efforts.

In the UNGPs, emphasis is placed upon assessing both actual and potential human rights impacts. This means that companies are encouraged to both respond to current issues in their supply chain and be proactive in preventing further negative impacts.

Though the [California Transparency in Supply Chains Act](#) goes far in requiring supply chain verification and company-wide accountability, its risk mitigation extends only to internal training. This law does not require a publicly disclosed risk assessment or risk mapping. Some, like the 2018 [Australian Modern Slavery Act](#) and the [French Corporate Duty of Vigilance law](#), place risk assessment at the heart of the legislation, with this information also being published in yearly progress statements<sup>14</sup>.

The assessment of risks is also central to many guiding frameworks. The [OECD-FAO Guidance for Responsible Agricultural Supply Chains](#) places this at its core, with the second step of its ‘Five-Step Framework for Due Diligence’ being to ‘identify, assess and prioritise risks in the supply chain’<sup>15</sup>. Being a crucial step in this guidance framework, assessment can be seen as playing a vital role in proactive due diligence in supply chains.

While the assessment and acknowledgement of human rights risks plays an important role in due diligence, the recognition of risks is only the first step. With these risks identified, the UNGPs put forward that a business should make explicit and outright policy commitments to address these risks directly. It should be noted that, where a business identifies a risk and fails to take reasonable steps to address it, and this actually causes harm, this could give rise to a civil claim, for example in

## KEY AREAS OF RISK ASSESSMENTS

*adapted from ETI's HRDD Framework*

### Context risk assessments

Risks posed by sourcing country. Areas for consideration include human rights record, labour laws, civil freedoms.

### Site-level risk assessments

Risks posed by production sector, nature of work, seasonality/terms of employment.

Other areas to consider include: recruitment practices (fees, debt bondage), sub-contracting and freedom of association.

### Ranking of risks

Risks should be ranked by severity, scale and the business' degree of responsibility

<sup>13</sup> Shift, ‘Assess’. Available from: <https://www.shiftproject.org/resources/respect/assess/>

<sup>14</sup> Australia Modern Slavery Act 2018, part 2, section 16.

<sup>15</sup> OECD-FAO Guidance for Responsible Agricultural Supply Chains, 2016, p. 22.

negligence. However, this is a source of legal liability which exists outside of the legislative mechanisms discussed in this review and which will depend on the applicable law.

### III. COMMITMENT

The idea of businesses conveying a public and concrete policy commitment to respecting human rights is central to the UNGPs. This is most prominently represented in Guiding Principles 15 and 16:

#### UN Guiding Principle № 15

*“business enterprises should have in place [...] a policy commitment to meet their responsibility to respect human rights”*

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#### UN Guiding Principle № 16

*“business enterprises should express their commitment to meet this responsibility through a statement of policy that:*

- a) Is approved at the most senior level of the business enterprise;*
  - (b) Is informed by relevant internal and/or external expertise;*
  - (c) Stipulates the enterprise’s human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services;*
  - (d) Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;*
  - (e) Is reflected in operational policies and procedures*
- 

In theory, the UNGPs are encouraging business enterprises to embed this notional responsibility into the operational fabric of the organisation. In this, the UNGPs look to transform hollow statements of solidarity into palpable and practical processes that translate into a material change.

In law, the concept of policy commitments is less distinct than in the UNGPs. In the [2015 UK Modern Slavery Act](#), for example, the communication of a business’ slavery and human trafficking policies is embedded within the requirement of a yearly statement<sup>16</sup>. Though the UK law encourages businesses to report their policy commitments, the law in fact only necessitates a statement detailing the business’ efforts, or lack thereof (and the same is true of all the substantive steps recommended in the Government’s guidance). Under the UK law, a company could comply with the strict requirements of the transparency provisions of the Modern Slavery Act by releasing a statement reporting that they had not taken any steps to counter modern slavery in their supply chain (albeit that this would likely be unpopular amongst stakeholders and could be used as evidence that it had failed to discharge a duty of care in negligence). An independent review of the Modern Slavery Act noted that, while the

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<sup>16</sup> Section 54 (5b) of the MSA.

law ‘was ground-breaking when it was introduced’ and ‘contributed to greater awareness of modern slavery in supply chains’, a ‘number of businesses approached their obligations as a mere tick-box exercise’. This lack of stringency in the law itself led to an estimated ‘40 per cent of eligible companies not complying with the legislation at all’. As such, the Act drew considerable criticism for not having ‘levelled the playing field as [the] Government intended’.<sup>17 18</sup>

The same review of the Modern Slavery Act proposed that the language of the law should be changed to directly mandate more material action from businesses. The review suggests that ‘the areas that an organisation’s statement may cover will become mandatory’ with the recommended changes<sup>19</sup>. Moreover, report suggests that the section ‘allow[ing] companies to report they have taken no steps to address modern slavery in their supply chains’ should ‘be removed’<sup>20</sup>. In effect, if this were ever to come into force, this would create a legally binding mandatory human rights due diligence requirement, albeit with respect only to those rights affected by issues of slavery and trafficking. This shows that there is a willingness to improve current laws to encourage more embedded policy commitments and palpable change in the ways businesses practice.

MANDATED AREAS OF POLICY COMMITMENT					
REGION	Disclosure of efforts	Assessment of subsidiaries	Risk mitigation systems	Risk alert mechanisms	Monitoring mechanisms
Australia	✓	✗	✗	✗	✗
California	✓	✗	✗	✗	✗
France	✓	✓	✓	✓	✓
Netherlands	✓	✗	✗	✓	✓
UK	✓	✗	✗	✗	✗

The [2010 California Transparency in Supply Chains Act](#) also falls short of the UNGPs in this regard, however. Though it outlines what exactly is expected from the written disclosure, the law specifies that the report ‘shall, at a minimum, disclose to what extent, if any, that the retail seller or manufacturer does’ each of the required items<sup>21</sup>. Similar to the UK law, the California act theoretically allows for businesses to do nothing to address the risks of human rights abuses in their supply chain.

Diverging from the UK and California examples, 2017 the [French Corporate Duty of Vigilance](#) law mandates actual, material actions<sup>22</sup>. While the French law follows similar lines as the UK law in prioritising external reporting, the French legislation goes further and requires not only the disclosure of efforts, but also a risk and monitoring plan and a progress report of its implementation. By taking

<sup>17</sup> Independent Review of the Modern Slavery Act 2015: Final Report, May 2019, p. 14. Available from: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/803406/independent\\_review\\_of\\_the\\_Modern\\_Slavery\\_Act\\_-\\_final\\_report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf)

<sup>18</sup> While this general argument is made in this specific chapter of the review under “Commitment”, it is to be noted that the same is true with respect to all of the substantive steps recommended by the UK Government, not just in relation to policy statements.

<sup>19</sup> Independent Review of the Modern Slavery Act 2015: Final Report, May 2019, p. 14.

<sup>20</sup> Ibid.

<sup>21</sup> Section 10.2(b) of 2010 California Transparency in Supply Chains Act

<sup>22</sup> Article 1 of the French Corporate Duty of Vigilance

extra steps to ensure businesses act upon their obligation to respect human rights, the French law more effectively implements the expectations under the second pillar of the UNGPs by mandating compliance rather than leaving it to the discretion of the business. As a relatively new law, it is as yet unclear whether the approach of the French law is more effective than that of the UK. Nevertheless, this comparatively comprehensive, newer law and the potential revision of the UK MSA demonstrate trends towards greater alignment with the UNGPs.

The UN Guiding Principles place special emphasis on policy commitments, with businesses having an obligation to ‘know and show that they respect human rights’ (OHCHR, 2011). As demonstrated by Guiding Principle 16b above, there is also a need for these policies and processes to be relevant and directly linked to the current operations of the business. This considered, the tracking of responses also becomes a crucial part of a business’ human rights policy.

#### IV. TRACKING

Tracking effectiveness of responses is another key area emphasised in the UNGPs, as shown in Guiding Principle 20 below:

##### UN Guiding Principle № 20

*In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should:*

- a) Be based on appropriate qualitative and quantitative indicators;*
- b) Draw on feedback from both internal and external sources, including affected stakeholders.*

By using tracking mechanisms, it would be possible for businesses to continually improve upon and advance their policies addressing human rights risks. This would ensure that the policies are both effective and specialised to the types of risks present.

Despite its centrality in the UNGPs, tracking is one of the most neglected aspects of mandated due diligence processes in existing hard law. The California Transparency in Supply Chains Act, for instance, does not mention tracking whatsoever. The [Dutch Child Labour Due Diligence Law](#) also does not mention the tracking of responses. Similarly, as mentioned above, the UK Modern Slavery Act also does not necessitate any tracking. It does, however, suggest its inclusion in the business’ statement as a guideline. Though this appears to echo the UNGPs, under the UK law tracking responses is optional and occurs only on a voluntary basis.

The Australian Modern Slavery Act of 2018 has a similar approach to the UK law. Businesses complying with this law must ‘describe how the reporting entity assesses the effectiveness’ of its counter-slavery actions in the publicly disclosed statement. In this, the law does not actually require any tracking processes, just information on what actions the business has or has not taken.

The [French Duty of Vigilance law](#) is the only law to explicitly include tracking in its mandated ‘vigilance plan’, namely ‘a mechanism for monitoring the measures implemented and evaluating their effectiveness’, the results from which should be made public<sup>23</sup>. By including tracking in a clear and explicit way, the French law allies itself very closely with the UNGPs.

Policy commitments and tracking mechanisms are important internal processes that help businesses to offset and address human rights risks. With these procedures in place, the UNGPs make clear that these actions should be made public and accessible through regular external communications. This is to ensure both transparency and accountability.

## V. COMMUNICATION

Expectations around external communication of a business’ actions regarding their human rights impacts are laid out in Guiding Principle 21 below:

### UN Guiding Principle № 21

*In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally. [...] Communications should:*

- a) Be of a form and frequency that reflect an enterprise’s human rights impacts and that are accessible to its intended audiences;*
- b) Provide information that is sufficient to evaluate the adequacy of an enterprise’s response*
- c) In turn not pose risks to affected stakeholders*

While external communication is on an equal footing to other principles in the UNGPs and is intended to provide a window into the underlying systems and processes put in place by businesses to mitigate human rights violations, the majority of hard laws make public reporting the only enforceable provision thus giving more prominence to this particular principle.

In law, this external communication most commonly takes the form of a yearly statement on the steps the business has taken to address human rights risks in its supply chain. For some laws, such as that of the UK Modern Slavery Act, external communication is the only action mandated whatsoever. As previously mentioned, under UK law, a business could comply with the Act by saying that it has done nothing to mitigate human rights risks.

It is possible that, by putting external communication at the forefront, the UK and Dutch laws anticipate that businesses will not release these kinds of statements. Instead, by requiring

## COMMON KEY AREAS OF YEARLY STATEMENTS

- Organisational structure
- Policies
- Effectiveness of policies and procedures
- Areas of risk
- Internal accountability and training

<sup>23</sup> Article 1 of the French Corporate Duty of Vigilance

transparency, these laws make businesses accountable to the wider public and consumer pressure. As such, despite these laws not mandating material action themselves, the transparency that they require indirectly prompts businesses to act. Academic Andreas Rühmkorf has labelled this legislative approach to transparency as ‘a soft form of “regulation of self-regulation”’, which ultimately ‘leaves too much discretion to businesses’<sup>24</sup> according to him.

The [French Duty of Vigilance law](#) requires more than just an annual report. Business complying with the measures must also disclose a vigilance plan on an annual basis. This includes a risk map, details of their violation alert mechanisms and information on monitoring and evaluation tools<sup>25</sup>. Both in communication and other aspects, the French law goes further than any other due diligence law currently in force.

These previous five categories of the UNGPs exist to mitigate risk and prevent human rights violations. In the event that a business uncovers any actual adverse impacts which it caused or to which it contributed, however, the UNGPs make clear that appropriate remediation systems should be in place to address them.

## VI. REMEDIATION

As already stated, this report is primarily concerned with the second pillar of the UN Guiding Principles, the corporate responsibility to respect. Though the theme of remediation features somewhat in this pillar, access to remedy is mainly addressed in its [own independent pillar of the UNGPs](#). A summary of the Guiding Principles’ recommendations for effective remediation, as found in the ‘access to remedy’ pillar, can be found in the summary box (right).

The existence of an independent pillar for remediation underscores how vital accessible remedy is to due diligence processes. Remediation is also mentioned in the ‘corporate responsibility to respect’ pillar that features in this report, as demonstrated below:

### UN Guiding Principle № 15

*In order to meet their responsibility to respect human rights, business enterprises should have in place [...] processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute*

### UN Guiding Principle № 22

*Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.*

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<sup>24</sup> Rühmkorf, 2018. ‘From Transparency to Due Diligence Laws?’, p. 189.

<sup>25</sup> Article 1 of the French Corporate Duty of Vigilance

Alongside tracking mechanisms, remediation is one of the most neglected elements of due diligence in current hard laws. Though remediation features as a significant component of the UNGPs, the matter of remediation and grievance mechanisms is very sparsely covered in hard laws. For clarity, the term “remediation” here refers to the overarching provision of remedy to those negatively impacted by a business’ human rights conduct. In contrast, “grievance mechanisms” are, [as defined by SOMO](#), ‘complaint processes that can be used’ by those who ‘are being negatively affected by certain business activities and operations’. As such, grievance mechanisms are often a constituent part of remediation processes.

The inclusion of remediation in current hard law is sparse, with [UK Modern Slavery Act](#) not mentioning remediation whatsoever. The [California Transparency in Supply Chains Act](#) similarly has no reference to remediation systems a business should have in place. The Dutch law, though still being refined before it is anticipated to come into force in 2020, has no explicit mention of remediation processes as of yet, although the anticipated penalties for non-compliance are significant.

In a similar fashion to other aspects of the UNGPs, the [French Duty of Vigilance law](#) goes beyond other hard laws with respect to remediation processes. The law states that the ‘vigilance plan’ businesses must release should include an ‘alert mechanism and the collection of reports relating to the existence or the realization of risks’<sup>26</sup>.

It is, however, important to consider the dynamic interaction between the legislative mechanisms discussed in this paper and other sources of legal liability so as to provide, in principle at least, access to remedy for victims. Consider, for example, a business which publishes a Modern Slavery Statement under the UK Act reporting that it has a zero tolerance policy on slavery and has implemented strict measures to uphold this policy. If it materialises that no such measures were ever put in place and, as a result of such a failure, an incident of forced labour occurred in a first tier supplier, the victim may be able to use the common law to obtain damages – for example via a claim in negligence. The challenges associated with such claims should not be understated however this does provide victims with a potential means to access remedy outside of the four corners of legislation which is otherwise “toothless” with respect to remedy. Equivalent mechanisms are available under French law with respect to a failure to implement an adequate vigilance plan.

Some prospective laws currently under discussion seem to prioritise remediation to a greater extent. [Draft German due diligence law](#) includes a measure requiring businesses to establish a complaint mechanism, or participate in a multi-stakeholder initiative to this effect<sup>27</sup>. The [prospective Canadian](#)

## CRITERIA FOR EFFECTIVE NON-JUDICIAL GRIEVANCE MECHANISMS

*from UNGP 31, via Shift*

- Legitimate
- Accessible
- Predictable
- Equitable
- Transparent
- Rights-compatible
- Based on dialogue and engagement
- Source of continuous learning

<sup>26</sup> Article 1.

<sup>27</sup> Article 1, section 9 (‘Beschwerdemechanismus’).



[due diligence bill](#) also explicitly mentions remediation measures, but as a law primarily concerned with external reporting, it would not necessitate actual action from businesses.

Remediation features heavily in many other “soft laws” and guiding frameworks. The [ILO-IOE Child Labour Guidance Tool for Business](#) consistently recommends for businesses to adopt remediation processes and ‘operational-level grievance mechanisms’<sup>28</sup> as part of their due diligence strategy. The [OECD-FAO Guidance for Responsible Agricultural Supply Chains](#) also includes grievance mechanisms at length. This only highlights the importance of remediation systems in a business’ due diligence process, further bringing into light the absence of such measures in most existing laws.

## CONCLUSION

In this report, we have shown how the UN Guiding Principles set out a clear, aspirational standard for ethical business practice. In the ‘corporate responsibility to respect’ pillar prioritised by this report, the Guiding Principles set out the ‘global standard of expected conduct for all business enterprises wherever they operate’ ([OHCHR, 2011](#)). By comparing these standards with existing due diligence and transparency laws, it has been shown that the provisions of many laws, although aligned in principle with this standard, are not mandatory and therefore not enforced. Some, like the California Transparency in Supply Chains Act and the UK Modern Slavery Act, prioritise external reporting over mandated policy commitments and material action. The French Corporate Duty of Vigilance law, however, encompasses most if not all of the UNGPs and making adherence to them mandatory.

From this, it becomes clear that the enforceable components of existing hard laws touch upon only a few of the Guiding Principles, mostly related to accountability. External communication is therefore key to each of the hard laws examined in this report and appear as the lowest common denominator among legislators. The influence of these enforceable provisions related to accountability on businesses may be intended to be indirect. As such, this limitation may not necessarily mean that they are ineffective and it is also important to note that neither the laws in question nor the Guiding Principles work in isolation. They form part of a wider matrix of human rights guidance, frameworks and legislation that co-act to encourage transparency and ethical trade at all levels of business practice. This is particularly apparent in the FERN document laying out options for an EU regulation on sustainable cocoa supply chain.<sup>29</sup>

Despite the apparent, progressive trend in enacting wide-reaching due diligence laws, many legislators are not all aligned with this type of regulatory approach. The US [Business Supply Chain Transparency on Trafficking and Slavery Act](#) is a case in point. Having been introduced to Congress in three successive Congressional sessions, the bill has “died” in committee with each iteration, meaning that it has so far failed to be enacted. A similar [Hong Kong bill](#) looking to combat slavery has also met with considerable resistance.

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<sup>28</sup> P. 18.

<sup>29</sup> See Brack, Duncan, 2019

Despite this, there has also been significant support for due diligence measures. Large businesses such as Coca-Cola have publicly voiced support for human rights due diligence law and regulation<sup>30</sup>. Following the collapse of an iron ore mine in Brazil, BMW and Daimler also expressed their support, reportedly ‘welcom[ing] legislative initiatives that focus on compliance with human rights’<sup>31</sup>.

While the UNGPs may be too stringent to directly translate into mandatory legislation in the current climate, they provide a useful “roadmap” for businesses to understand their role in protecting human rights. They represent a useful framework allowing business entities (especially multinational operating across different countries) to work along a single set of principles rather than to adapt to every new national legislation enacted. Considering its nearly universal presence as a mandatory requirement in enacted hard laws, disclosure and external communication appear to be a good place to start the journey towards more responsible cocoa supply-chains.

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<sup>30</sup> Business and Human Rights Resource Centre, *List of large businesses & associations that support human rights due diligence regulation*, June 2019. Available from: <https://www.business-humanrights.org/en/list-of-large-businesses-associations-that-support-human-rights-due-diligence-regulation>

<sup>31</sup> Wirtschafts Woche, ‘Berlin will Autokonzerne zur Lieferketten-Kontrolle zwingen’, 8 March 2019. Available from: <https://www.wiwo.de/unternehmen/auto/nach-vale-dammbruch-berlin-will-autokonzerne-zur-lieferketten-kontrolle-zwingen/24077872.html>

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## APPENDIX A - HARD LAWS ON DUE DILIGENCE AND TRANSPARENCY

Date passed	Country/Region	Name of law	Mandates:						Penalty for non-compliance?	Description	Status of law
			Size applicability threshold	Risk assessment	Policy commitment	Tracking mechanisms	External communication	Integrated Remediation			
2010	California, USA	<a href="https://oag.ca.gov/SB6">California Transparency in Supply Chains Act</a> <a href="https://oag.ca.gov/SB6">https://oag.ca.gov/SB6</a>	✓	✗	✗	✗	✓	✗	Yes	- Aims to counter human trafficking and slavery - Mandated reporting in areas of: verification, audits, certification, internal accountability and training.	Passed and enacted
Oct. 2014	EU	<a href="#">Directive on Non-Financial Reporting (Directive 2014/95/EU)</a>	✓	✗	✗	✗	✓	✗	Enforced under national law	- 'Large undertakings and groups' required to release statement on environmental matters, respect for human rights, anti-corruption/bribery, and the due-diligence processes in place to address them.	Passed – each member state required to transpose the directive into national law (e.g. Germany's CSR Directive Implementation Act).
March 2015	UK	<a href="#">Modern Slavery Act</a>	✓	✗	✗	✗	✓	✗	Yes	- Requires commercial organisations to provide a yearly statement on the steps it has taken to counter slavery and human trafficking in its supply chain and own business.	Passed and enacted
Feb. 2017	France	<a href="#">Corporate Duty of Vigilance Law</a>	✓	✓	✓	✓	✓	✓	Yes	- Requires companies of a certain size to provide annual vigilance plan to address and prevent violations of human rights. - Plan requires: a risk map, assess risks associated with subsidiaries/suppliers, violation alert mechanisms, devices to monitor/evaluate efficacy of implemented measures.	Passed and enacted
Feb. 2017	Netherlands	<a href="#">Child Labour Due Diligence Bill</a>	✗	✓	✓	✓	✓	✗	Yes	- Applies to companies selling in Dutch market.	Passed, will come into force in 2020

											- Requires statement on child labour in a company's supply chain, a plan of action and a subsequent investigation into this plan.	
<b>Dec. 2018</b>	Australia	<a href="#">Modern Slavery Act</a>	✓	✗	✗	✗	✓	✗	Yes		- Requires some entities to report annually on the risks of modern slavery in their operations/supply chains, and what actions are being taken to address these risks.	Passed and enacted

## APPENDIX B -PROSPECTIVE HARD LAWS ON DUE DILIGENCE AND TRANSPARENCY

Date	Region/ Organisation	Subject of new law	Would require:		Who would the law apply to?	Status	Discussion
			Disclosure of efforts	Risk assessment			
First introduced in Congress June 2014	<b>USA</b>	<a href="#">Business Supply Chain Transparency on Trafficking and Slavery Act</a>	✓	✓	'An issuer that has annual worldwide global receipts in excess of \$100,000,000'	The bill has died in Congress three times (2014, 2015, 2018). Senator Carolyn Maloney has committed to reintroducing the bill next session.	- Would have required annual reporting, risk assessment, supplier verification, internal accountability, appropriate remedial action, risk assessment and disclosure of actions taken to mitigate risk. -
Group formed in July 2014	UN open-ended intergovernmental working group (OEIGWG)	<a href="#">Legally binding instrument</a> on transnational corporations with respect to human rights	✓	✓	"all business activities, including particularly but not limited to those of a transnational character"	Second Draft subject to consultation and negotiation by IGWG	- Needs further clarification regarding its stance on jurisdiction and remediation for victims. -Divergence from the UNGPs on the extent to which businesses expected to carry out due diligence on non-contractual business relationships (eg second tier suppliers and below)
First proposed November 2017	<b>Hong Kong</b>	Prohibiting <b>slavery</b> and <b>forced labour</b> , and providing <b>protection</b> for victims	✓	✓	Any business entity trading in Hong Kong.	Draft bill - some delays in being passed.	- Would require disclosure of company's policies, risk-prone areas, due-diligence processes and training regarding slavery and forced labour. - Its effectiveness is measured against performance indicators.
Bill introduced December 2018	<b>Canada</b>	<a href="#">Bill C-423: Due-diligence and transparency</a> in	✓	✓	Any entity operating within, or importing into Canada.	Private bill introduced. If passed, will	- The entity must annually disclose their policies and operational risks

		supply chains, against forced/child labour				come into force January 2020.	regarding child labour, and the steps taken to manage those risks
Consultation to begin in 2019	<b>Canada</b>	<u>Supply chain due-diligence</u>	N/A	N/A	Not yet specified.	Under discussion.	Very few details available – the Canadian government’s commitment to this legislation is not formalised.



## APPENDIX C - SOFT LAWS AND PRINCIPLES ON DUE DILIGENCE AND TRANSPARENCY

Date	Organisation	Name of soft law/principle	Encourages:		Description	Status/Discussion
			Policy commitment	Remediation processes		
2015	ILO & IOE	<a href="#">Child Labour Guidance Tool for Business</a>	✓	✓	<ul style="list-style-type: none"> <li>- Guidelines aiming to enhance global supply chain due-diligence to work towards eliminating child labour.</li> <li>- Proposes practical steps including performance tracking, stakeholder engagement and incorporating grievance mechanisms.</li> </ul>	- Commonly cited as an essential tool for businesses and is widely used.
2010	International Organisation for Standardization	<a href="#">ISO 26000 - Social Responsibility</a>	✗	✗	<ul style="list-style-type: none"> <li>- Voluntary guidelines for social responsibility (SR) with a multi-stakeholder approach</li> <li>- Can be used in any kind of organisation</li> <li>- Includes wide range of SR areas, including labour practices and human rights.</li> <li>- No concrete recommendations – organisations must identify areas for action themselves.</li> </ul>	<ul style="list-style-type: none"> <li>- No certification available, as it does not contain requirements.</li> <li>- More of a primer on SR than an implementable framework.</li> </ul>
2016	OECD & FAO	<a href="#">Guidance for Responsible Agricultural Supply Chains</a>	✓	✓	<ul style="list-style-type: none"> <li>- Includes model enterprise policy for building responsible agricultural supply chains, and a risk-based due-diligence framework.</li> <li>- Promotes cooperation along entirety of supply chain</li> </ul>	- Endorsed by G7 Agricultural Ministers
2011	United Nations	<a href="#">UN Guiding Principles on Business and Human Rights</a>	✓ (for the state)	✓ (for the state)	<ul style="list-style-type: none"> <li>- States “must protect against human rights abuse within their territory by third parties, including business enterprises”.</li> <li>- States encouraged to provide guidance and enforce laws aimed at the upholding respect for human rights in business enterprise.</li> <li>- Businesses must respect human rights regardless of their “size, sector, operational context, ownership and structure”.</li> <li>- Businesses have an obligation to carry out human rights due-diligence and publish these findings publicly.</li> </ul>	<ul style="list-style-type: none"> <li>- Endorsed by several large companies (e.g. Coca-Cola)</li> <li>- Little enforcement capability</li> <li>- Not being set in law has allowed the UNGPs to be more ‘comprehensive’, and ‘foundational’ (<a href="#">Ruggie, 2015</a>) than legally-binding equivalents.</li> </ul>
2012	UNICEF, Save the Children & UN	<a href="#">Children’s Rights and Business Principles (CRBP)</a>	✓	✓	<ul style="list-style-type: none"> <li>- Comprehensive framework of principles and practical guidelines for businesses to ‘respect’ and ‘support’ children’s rights.</li> </ul>	