

REFLECTIONS AND DIRECTIONS

BUSINESS AND HUMAN RIGHTS IN ASIA: FROM THE FIRST DECADE TO THE NEXT



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Reflections and Directions

Business and Human Rights in Asia:
From the First Decade to the Next

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PREFACE

The United Nations Human Rights Council unanimously endorsed the United Nations Guiding Principles on Business and Human Rights (UNGPs) in 2011. The UNGPs are based on three complementary normative pillars outlining the State duty to protect against business-related human rights abuse, the business responsibility to respect human rights, and the role of States and businesses in ensuring access to effective remedy.

The UNGPs have become the authoritative global standard on business and human rights (BHR). They clearly outline the minimum expectation that businesses should prevent and address their adverse human rights impacts. However, it has taken a long time for BHR to gain traction in Asia. Even in the years after the adoption of the UNGPs, most stakeholders in Asia still conceptualized the responsibility of business towards people and planet very narrowly. Indeed, corporate social responsibility was still the dominant narrative in Asia. The problem with this approach is that businesses are largely left to themselves to define their responsibilities to individuals, communities and the environment. Often, businesses would not tackle their adverse human rights impacts, instead preferring philanthropic approaches completely unrelated to their core business models and corresponding activities. In many States across the region, civil society spaces were shrinking. The term 'human rights' was still a sensitive one among governments and businesses. Often, people challenged the connection between 'business' and 'human rights'. Despite their obvious connection and visible impacts, the linkages between business activity and human rights abuses were not yet properly understood in Asia.

It is in this context that the United Nations Development Programme (UNDP) launched the project 'Promoting Responsible Business Practices through Regional Partnerships in Asia (B+HR Asia)' with support from the Government of Sweden in August 2016. Beginning with an almost clean slate on BHR across Asia, we leaned extensively on the knowledge and experience of rights holders and CSOs. Support and guidance from the UN Working Group on Business and Human Rights (UNWBG) ensured our plans and approaches were grounded in a human rights-based approach to corporate accountability. We started putting into practice the UNWBG's ideas through our field offices in Asia.

Five years later, we can observe increased dialogue and awareness of BHR in the region. Most notably, three States in Asia have adopted national action plans (NAPs) on business and human rights, either stand-alone or as part of broader human rights action plans, while seven are developing or have committed to developing NAPs. Beyond NAPs, external oversight of businesses has grown, including through national human rights institutions (NHRIs) and so-called force multipliers such as securities and exchange commissions, benchmarking organizations, and the media. Moreover, the push for strengthening partnerships between multilateral organizations, donors, CSOs and other stakeholders has reinforced the regional momentum on BHR. As a result, some companies have started to develop human rights policies and conduct human rights due diligence.

Despite this headway, significant gaps remain. BHR discourse still struggles to achieve tangible outcomes for rights holders, especially when it comes to the issue of access to effective remedy. Examples of progress are scattered and insufficient. If we seek to accomplish the UNGPs' goal of creating change where it matters most—to quote the author of the UNGPs, "in the daily lives of people"—we must put rights holders front and centre in our efforts. While recent progress has been achieved through top-down

strategies, civil society actors are calling for complementary bottom-up approaches that reflect a human rights-based approach to social change. To achieve this, advocates of BHR must connect with other human rights movements and, most importantly, rights holders to create political will where there is none.

Although June 2021 marks the tenth anniversary of the UNGPs, nearly all progress on implementing the UNGPs in Asia has been made in the last five years. During these five years, attempts to implement the UNGPs have faced numerous obstacles. Most notably, the COVID-19 pandemic has exposed the vulnerabilities and inequalities which have been ingrained in our political and economic systems for decades. While the pandemic has stalled or in some cases even reversed progress on BHR, it has also raised essential questions about the role of business in realizing human rights, and its contribution to society more broadly. Although it has always been clear that, to achieve impact at scale, BHR must connect with other agendas and frameworks, the pandemic has once again highlighted that sustainable development and preventing and addressing business-related human rights abuse are inherently linked. Indeed, the UNGPs have been designated as a means of implementation of the Sustainable Development Goals (SDGs), underscoring this link.

There are plenty of challenges that lie ahead of us in implementing the UNGPs and achieving the SDGs. To heed the call of the UNWG and make the next 10 years a 'decade of action' on BHR, we will need concerted and coherent efforts by a wide range of actors. Of course, States remain the primary duty bearers in respecting, protecting and fulfilling human rights. Moreover, businesses should become champions of human rights, not just followers, by proactively implementing or even going beyond the UNGPs. But the BHR movement should also focus on other essential actors. First and foremost, much work remains to be done in strengthening the capacity of civil society groups to take on vested government and industry interests, bringing together disparate movements, establishing local and regional networks, and amplifying their influence by unifying messages and priorities. Furthermore, leveraging the largely untapped potential of the media will be essential in the years to come, as well as building the capacity of academia on BHR. Finally, regional and international multilateral organizations should dial up their efforts to strengthen the regional momentum on BHR and promote policy coherence. All of this should lead to cross-sectional respect for human rights and, ultimately, access to effective remedy for rights holders.

B+HR Asia will continue driving progress on BHR through technical advisory support, awareness-raising and capacity-building. In doing so, we will build on B+HR Asia's existing support to State-based institutions such as governments, NHRIs and judiciaries, while deepening our engagement with rights holders and civil society groups, media, academia, and other stakeholders. We will strive to expand regional partnerships, facilitate South-South exchanges and peer-learning, advocate for the implementation of BHR policy and legislative frameworks, and convene and support the growing community of actors that are convinced that it is possible to have a more responsible business sector. In all of our work, we will be guided by the UNGPs and the SDGs as our compass.

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ABBREVIATIONS

AICHR	ASEAN Intergovernmental Commission on Human Rights
APF	Asia Pacific Forum
ASEAN	Association of Southeast Asian Nations
BHR	Business and Human Rights
BHRRC	Business and Human Rights Resource Centre
CHRP	Republic of the Philippines Commission on Human Rights
COVID-19	Novel Coronavirus (2019-nCoV), also known as COVID-19, COVID and the coronavirus
CSO	Civil Society Organization
CSR	Corporate Social Responsibility
EU	European Union
EU GSP	European Union Generalized Scheme of Preferences
EU GSP+	The European Union Special Incentive Arrangement for Sustainable Development and Good Governance
FPIC	Free, Prior and Informed Consent
GANHRI	Global Alliance of National Human Rights Institutions
HRCSL	Human Rights Commission of Sri Lanka
HRD	Human Rights Defender
HRDD	Human Rights Due Diligence
ICRPD	International Convention on the Rights of Persons with Disabilities
ILO	International Labour Organization
IPs	Indigenous Peoples
IUU	Illegal, Unreported and Unregulated (fishing)
Komnas HAM	National Commission on Human Rights of Indonesia
LGBTI	Lesbian, Gay, Bi, Trans and Intersex
MSI	Multi-Stakeholder Initiative
NAP	National Action Plan
NHRI	National Human Rights Institution
NGO	Non-Governmental Organization
NSBGM	Non-State-Based Grievance Mechanism
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights

SAARC	South Asian Association for Regional Cooperation
SBNJGM	State-Based Non-Judicial Grievance Mechanisms
SEZ	Special Economic Zone
SLAPP	Strategic Lawsuits against Public Participation
SMEs	Small and Medium-sized Enterprises
SOE	State-owned Enterprise
SOGIE	Sexual Orientation and Gender Identity and Expression
SUHAKAM	Human Rights Commission of Malaysia
UN	United Nations
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNGPs	United Nations Guiding Principles on Business and Human Rights
UNGPs10+	The project 'A vision for the next decade of business and human rights', also known as Next Decade of BHR
UNICEF	United Nations Children's Fund
UNWG	United Nations Working Group on the issue of human rights and transnational corporations and other business enterprises, also referred to in the shorter form as the UN Working Group on Business and Human Rights

EXECUTIVE SUMMARY

The 10-year anniversary of the UN Human Rights Council's unanimous endorsement of the United Nations Guiding Principles on Business and Human Rights (UNGPs) is an opportunity to reflect on business and human rights (BHR) and recalibrate. The UNGPs are a set of guidelines for States and business enterprises to prevent, address and remedy business-related human rights abuses with 31 principles that fall under three pillars.

Important victories were won in the first decade of the UNGPs in Asia, including strengthened regional momentum on business and human rights and the adoption of Asia's first national action plans (NAPs) on business and human rights. But stakeholders in Asia see many gaps and hurdles and the need for Asia's BHR movement to adjust and recalibrate for the next decade ahead. There are calls to rally around the region's vast and rich network of grassroots organizations and human rights defenders (HRDs). Pairing top-down leadership with bottom-up change from the grassroots will be the way to reckon with the challenges that lie ahead in the next decade of BHR in Asia.

At the time of the research for and writing of this report, the UN Working Group on the issue of human rights and transnational corporations and other business enterprises – referred to in the shorter form as the UN Working Group on Business and Human Rights (UNWG) – had launched the project, 'A vision for the next decade of business and human rights', also known as UNGPs10+ and Next Decade of BHR. The purpose of this project was to use the 10-year anniversary of the UNGPs as an opportunity for reflection and to chart a course to strengthen them. The UNGPs10+ aimed to "take stock of achievements to date, assess existing gaps and challenges, and, most importantly, develop an ambitious vision and roadmap for implementing the UNGPs more widely and more broadly between now and 2030."

The UNWG was established by the Human Rights Council in 2011 and is composed of five independent experts of balanced geographical representation. Anita Ramasastry and Dante Pesce of the UNWG state in the opinion piece, "A vision for the next decade of business and human rights":

This 10-year anniversary is an important milestone but there is much more at stake in our current environment which makes today a real inflection point for the future we want: the climate and environmental crises, combined with other major global challenges, such as shrinking civic space, populism, corruption, conflict and fragility, and yet unknown human consequences of technological disruption. The socio-economic crisis resulting from COVID-19 has further laid bare and amplified gross existing inequalities and structural discrimination.¹

¹ Anita Ramasastry and Dante Pesce, "A vision for the next decade of business and human rights". 11 November 2020. Opinion. UN Working Group on Business and Human Rights. <https://www.business-humanrights.org/de/blog/a-vision-for-the-next-decade-of-business-and-human-rights/>

Upon launching the UNGPs10+, the UNWG—in collaboration with the Office of the High Commissioner for Human Rights (OHCHR), United Nations Development Programme (UNDP) and others—sought input from stakeholders through an open consultation initiative, ‘Have Your Say.’ This was an open call to all stakeholders for contributions to inform a vision and roadmap for the next decade of the UNGPs. The call asked five specific questions and one open question. This report serves to contribute to the UNGPs10+ by surveying the status of BHR across Asia, bringing together different visions and identifying opportunities for the decade ahead.²

This report presents an overview of the status of BHR in Asia and focuses particularly (but not exclusively) on 11 countries demonstrating some progress on BHR. The list of countries mostly matches the list of the UNDP B+HR Asia programme’s partner and focal countries: Bangladesh, India, Indonesia, Malaysia, Mongolia, Myanmar, Nepal, Pakistan, Sri Lanka, Thailand, and Viet Nam.

Desk research provided a baseline understanding of the current status of BHR in each of the 11 countries, but the research for this report went further to assess BHR on the ground. In the context of COVID-19, the research team conducted over 100 remote interviews with government, corporate and civil society actors—including trade unions—who work on BHR in Asia in various capacities. Particular emphasis was put on civil society perspectives. The UNGPs and the UNGPs10+ initiatives are emphatic about achieving “tangible results for affected individuals and communities”, as the UNGPs state. Civil society actors work with or for affected rights holders, making them significant interlocutors. The scope of the research was deliberately broad and inclusive, and not an exhaustive coverage of selected issues. The findings and analysis are more subjective than empirical, as the report speaks to lived experiences and insights that cannot be reduced to facts or figures.

Part One of the report, entitled “The UNGPs in Asia”, assesses the status of each UNGP pillar and asks whether the BHR movement is achieving tangible results for affected rights holders. On Pillar I, the State duty to protect, informants praised the potential of NAPs, but cautioned that the field is only beginning to understand the utility of NAPs. Japan, Pakistan and Thailand are the only Asian countries to adopt a NAP (though South Korea has a BHR chapter in its human rights action plan)³, but India, Indonesia, Malaysia, Mongolia, and Viet Nam are well into the NAP drafting process. NAPs are important symbols of State commitment to the BHR agenda, but they are not an automatic solution to business-related human rights concerns. Still, they may be useful in tackling specific challenges in Asia such as those related to the informal economy, special economic zones (SEZs) and small and medium-sized enterprises (SMEs). Under Pillar II, the corporate responsibility to respect, publicly listed business enterprises in the region have begun to champion BHR. Yet, civil society actors consistently raised concerns about weak human rights due diligence (HRDD) and ‘rights washing’, the use of deceptive or unsubstantiated claims about human rights. SMEs in Asia remain largely untouched by BHR efforts. Corporate informants highlighted the need for more accessible and inclusive initiatives and resources for businesses of all kinds. Pillar III, access to remedy, has been a perennial focus of the

2 Note, however, that the research for this report was concluded at the end of January 2021. The UNGPs10+ stocktaking report and the subsequent roadmap for the future were published in June 2021 and November 2021, respectively.

3 The NAP of Pakistan was approved by the Federal Cabinet in September 2021.

UNWG's reports and statements on Asia. Despite concerted efforts, stakeholders have struggled to make top-down progress on Pillar III. Informants regularly spoke of the need to break the stagnation by creating new pathways through legal aid networks.

Part One concludes with reflections on whether the first decade of the UNGPs has brought tangible results for affected rights holders in Asia. It has been observed that most of the progress in the first decade of the BHR movement in Asia was made by the European Union (EU). In other parts of the world, including Asia, traction only started about five years ago. Still, the pervasive feeling among stakeholders, particularly those from civil society, is that Asia's BHR movement is struggling to even reach affected rights holders, much less achieve tangible outcomes for them. Informants acknowledge that the first decade of the UNGPs was understandably focused on gaining buy-in from government and corporate leaders in Asia and beyond. Now, they see that the task for the BHR movement is to reach more stakeholders and to focus on affected rights holders. This will require recalibration of the movement.

Part Two of the report, entitled "Snapshots of BHR in Asia", illustrates the current status of BHR across a range of themes (such as the environment) and affected groups (such as women, indigenous peoples and trade unions). These snapshots serve to show different BHR dynamics and experiences across countries and stakeholders including widely different challenges, opportunities, nuances, and connections. They collectively convey dire circumstances and an apparent disconnection between the BHR movement and established human rights movements in Asia. At the same time, some cases of successful advocacy and reform provide cause for hope. Part Two serves as a blunt but crucial reminder of the breadth and depth of gaps and challenges that remain and opportunities that are untapped.

Part Three, entitled "Asia's Evolving BHR Landscape", analyses the transformations that are underway in Asia and beyond. These profound changes will influence and be influenced by the BHR movement. Asia will be entering the next decade of BHR in the midst of the COVID-19 global pandemic and its aftermath, geopolitical shifts, and the Fourth Industrial Revolution, referring to myriad technological changes affecting communities and economies. Lives, livelihoods and physical places are already being transformed in irreversible ways, underscoring an urgent need for both leadership and BHR responses that reach all people. In addition to these transformations in Asia, the field of BHR is itself in a state of flux. Observers of the first decade of the UNGPs noticed a particular focus on encouraging leadership within governments and business enterprises. That drive to foster BHR leadership at the highest echelons, colloquially captured in phrases like 'race to the top,' made sense and gained much momentum. However, a decade on, it has produced a field that informants regularly characterize as top-down, technocratic and fragmented—and not focused on the rights holders it is meant to serve. As Asia's BHR landscape evolves, the BHR movement must adapt and change; it must recalibrate.

The report's conclusion, entitled "Recalibrating for the Next Decade", turns the focus from the current state to the future. The research pointed to several intriguing opportunities for the decade ahead. However, one finding stood apart. In Asia, the stage is set for approaches to BHR that are maximally inclusive and create change from the bottom up. Informant after informant called for better inclusion through efforts to target local government officials, SMEs, workers in the informal economy, universities, legal aid networks, unions and other collectives, and existing human rights networks, all aimed at creating change from the community level. This is an opportunity to recalibrate Asia's BHR movement. At the top, there are opportunities to tap the existing momentum created by

government commitments to NAPs and the efforts of leading business enterprises. At the grassroots, community-based organizers and organizations, journalists, legal aid groups, collectives, officials, and employers can be made into BHR allies, experts and agents of change. Informants were particularly enthusiastic about what is seen as a ready-made opportunity to rally around grassroots organizations and HRDs.

In a region with entrenched problems of accountability and governance, solutions are often built from the ground up. Asia's grassroots networks have irreplaceable knowledge and skills around navigating risks, engineering resiliency and achieving tangible results for affected individuals and communities. They are a first line of defence for affected individuals and communities and a beacon of hope. Asia's BHR movement can show the field what bottom-up, human rights-based approaches to BHR can accomplish. These calls to focus on the affected rights holders do not disregard the importance of change at the leadership and management levels. It is the combination of governmental, intergovernmental and corporate leadership and galvanized grassroots actors that will make it possible to bridge gaps and exponentially accelerate the full realization of the UNGPs in Asia.

Given that this research aims to contribute to the UNGPs10+, it is both relevant and timely to consider how the findings from the research speak to each point covered on the 'Have Your Say' consultation. The commentary below intends to capture the tone and main direction and themes from interviews with informants about the decade ahead. It is a synthesis of the more than 100 interviews conducted for the research and a qualitative first response to the 'Have Your Say' questions and not an aggregation of all feedback from informants. Further, it should be understood separately from the ideas and inputs of any one informant who contributed to this study. Even though the commentary below is a subjective synthesis and should be read as such, it usefully highlights a broad array of feedback on what has been achieved and what could be accomplished in the next decade.

(1) Where has progress taken place in UNGPs implementation over the course of the last decade? What are the promising developments and practices (by governments, businesses, international organizations, civil society organizations, etc.) that can be built upon?

The research identified four main domains of progress in the region. First, BHR has become an established discourse in Asia, meaning that some governments, industries, business enterprises, and civil society throughout the region have begun to speak in terms of BHR and the UNGPs, in contrast to more traditional corporate social responsibility (CSR) discourse. Even where BHR is not embraced or fully understood, it is being talked about. This is a critical achievement. Even if actors are not consistently living up to their claims and commitments, there is a discourse to work with. This discourse is not uniform. It is being criticized and disputed. But all of this is proof that BHR matters and is on the regional agenda. The ASEAN Intergovernmental Commission on Human Rights (AICHR) decision to make BHR a feature of their five-year work plan (2021–2025) is one example of evidence that BHR is here to stay. Now the task is to ensure that BHR resonates with and for the rights holders it is meant to serve.

Second, there is much momentum behind stand-alone NAPs. The Thailand NAP set a precedent that other countries in the region are studying and striving towards. Japan launched their NAP in October 2020. Thailand and Japan engaged in bilateral consultations, which illustrated the value of knowledge sharing. This learning and enthusiasm has been carried forward to the NAP drafting processes in India, Indonesia, Malaysia, Mongolia, Pakistan and Viet Nam. These dialogues have become increasingly collaborative and sophisticated.

Third, HRDD is being carried out by an increasing number of publicly listed companies, and corporate human rights policies are quickly becoming an expectation in some markets. The field as a whole is still working to clarify expectations and good practices. There is also the question of how to increase the number of SMEs doing HRDD. Still, the fact that some business enterprises are already carrying out HRDD means there is a starting point to advance from.

Lastly, UNDP B+HR and other influential institutions have strengthened partnerships and BHR architecture through events like the UN Responsible Business and Human Rights Forum in Asia and the Pacific and the UN South Asia Forum on Business and Human Rights. Government and intergovernmental institutions have also supported research and activities that deliberately engage in difficult questions and challenges related to BHR. These are not ceremonious or self-confirming efforts. They are built to be critical and push towards the best possible understanding and outcomes for target beneficiaries.

(2) Where do gaps and challenges remain? What has not worked to date?

This study brings into focus a range of gaps and challenges, many of which are not confined to Asia. COVID-19 was a brutal reminder of how many people in the region remain without reliable social protection, services and support. It revealed how supply chains systematically pass the burden down to the most vulnerable people. Garment workers in Bangladesh, for example, suffered a 35 percent pay reduction in their monthly income during lockdown. Many thousands of workers lost jobs and depleted their savings without proper social security or safety nets. Grassroots networks, local journalists and unions did not appear to leverage the UNGPs in response to the many human rights abuses and harm that came with COVID-19. Whether this was due to a lack of awareness or a feeling that the UNGPs would be ineffective, it is proof of a sentiment that many informants spoke about: the feeling that BHR has not reached those it is meant to serve.

BHR has yet to effectively reach SMEs and those working in the informal economy in the region, which is where most rights holders work and where there are some of the most severe abuses and risks. There are many significant institutions, issues and arenas that have received little attention from the BHR community in Asia. These include State-owned enterprises (SOEs), SEZs, national stock exchanges, the financial industry, trade policies, Indigenous Peoples (IPs), unions and other collectives, and grassroots human rights networks.

Specific to the UNGPs, in Asia and beyond, there are concerns that HRDD is currently more about managing the impact of human rights on business enterprises than managing business enterprises' impact on human rights. There is much talk about achieving outcomes for rights holders, but there appears to be a pervasive gap between rhetoric and practice.

Lastly, the first decade of the UNGPs brought reminders of the limits of what NAPs can accomplish. NAPs are not an antidote to legislation or governance that threaten the enjoyment of human rights. Their existence is not enough without implementation, monitoring and the ability to change course. For example, while the Thailand NAP process was well-designed, the resulting NAP remains in early stages of implementation and has not reached business enterprises in meaningful ways. Corporate informants from Thailand spoke of uncertainty as to what the NAP meant for them. This is a shortcoming that can be corrected moving forward.

(3) What are key obstacles (both visible and hidden), drivers, and priorities that need to be addressed to achieve fuller realization of the UNGPs?

The obstacles to fuller realization of the UNGPs are multidimensional. This makes prioritization difficult. Nonetheless, laws that directly undermine the UNGPs are a notable obstacle. Without legislation reforms, only limited realization of the UNGPs is possible, given that business enterprises are concerned foremost with legal liability.

Disconnection is another key obstacle: the BHR movement in Asia lacks strong connections with SMEs, the informal economy and existing human rights movements in Asia. BHR cannot remain in a silo, separate from other issues, movements and organizations; its alignment with broader human rights movements on the ground is key to the fuller realization of the UNGPs.

Another set of priorities emerges considering the many different drivers of BHR in Asia. Several global and regional trade deals are being negotiated that could either threaten or consolidate BHR. The BHR movement should seek every opportunity to become involved and promote efforts such as NAPs to ensure coherence of domestic policies and general readiness. China stands out as a key driver given its influence and impact on the economy in the region. Concerted engagement in China, not only with governmental and business enterprises, but also with grassroots organizations, thus emerges as a priority.

HRDD is clearly a regional and global driver of the UNGPs. A priority would be to carry this momentum forward and position HRDD to be both mandatory and meaningful for business enterprises and rights holders alike. This will require clarifying good practice around corporate HRDD.

Lastly, informants regularly proposed that the biggest priority in the decade ahead is to turn affected rights holders and organizations into BHR allies and agents of change. This is a call to work with, involve and engage with a variety of stakeholders including local unions, journalists, legal aid networks, organizers, associations, and HRDs in both formal and informal economies.

(4) What systemic or structural challenges need to be tackled to realize sustainable development based on respect for human rights?

In many countries in the world, governments are unable or unwilling to protect human rights, business enterprises do not know or have little concern about their corporate responsibility to respect human rights, and accountability of any kind is elusive. In this context, the question is not only where to begin, but how to start. Systemic, structural and cultural challenges are entrenched and often benefit those in positions of authority and clout. That explains why many informants called for an approach that attempts to

systemically transform structures by transforming power imbalances. The idea is to put affected individuals and communities in a better position to protect themselves and one another, to strengthen the networks and organizations who work with affected rights holders, and to build the capacity of local officials and corporate actors.

This may not directly dismantle structures of abuse and marginalization, but it does disrupt them. It empowers affected rights holders to speak with legitimacy, so they are in a better position to be heard and receive support. Empowered rights holders working in stronger grassroots networks create a situation where even extremely marginalized people can claim their rights and demand change. Informants were not calling for stakeholders to stop working for change through leadership from the highest levels or tackling systemic and structural challenges through, for example, collaboration between institutions like national human rights institutions (NHRIs) and national securities and exchanges commissions. But they did call for the serious consideration of approaches grounded in communities, particularly in recognition of the political strength that already exists in Asia's grassroots networks.

(5) In concrete terms, what is needed to achieve meaningful progress with regard to those obstacles and priority areas? What are actionable and measurable targets for key actors in terms of meeting the UNGPs' expectations over the coming years?

The targets listed below represent the more frequent calls for advocacy from informants. Some have been modified so that they are expressed as actionable, measurable targets that are scaleable and realistic. The key targets are categorized relative to the obstacle or driver that they respond to.

Obstacle: Laws and regulations that do not align with the UNGPs

Target: Targeted engagement that focuses on legislative reforms in accordance with the UNGPs.

Target: Establish short courses and capacity-building efforts for legal aid networks, government agencies, business schools, and law schools focusing on the UNGPs and exposing domestic laws and regulations that are out of alignment. This would create a groundswell of awareness, which may include mobilizing the media, around the laws and regulations that undermine UNGPs expectations.

Target: Concerted advocacy campaigns around laws and practices on strategic lawsuits against public participation (SLAPP) and the protection of HRDs who have been targeted by either governments or business enterprises.

Obstacle: Absence of cooperation mechanism/platform in working with China on BHR

Target: Establish a long-term and trusted partnership with China to promote BHR in China and across the Belt and Road Initiative through joint research, capacity building and piloting projects. Locate opportunities to engage governmental, corporate, and civil society stakeholders in China. These projects would serve to ensure that the BHR movement in Asia is suitably inclusive of China and responsive to China's influence in the region.

Obstacle: Asia's BHR movement is in its own silo, not integrated with other human rights movements and agendas, and out of reach for most local actors

Target: Mobilize a regional alliance of local unions and worker collectives (formal and informal), legal aid networks, journalists, and HRDs that work outside the BHR silo. The target is to turn existing grassroots organizers and defenders into BHR allies, experts, agents of change, and a collective force of accountability.

Target: Organize an event or applied research that explores what a bottom-up approach to BHR could look like in Asia.

Target: Produce approachable materials and guidance for SMEs on implementing BHR based on consultation with SME stakeholders.

Target: Initiate applied research that locates opportunities to integrate BHR into Asia's informal economies.

Obstacle: Clarifying and incentivizing good practices

Target: Undertake research aimed at defining good practices under each of the three UNGP pillars.

Target: Develop HRDD guidance for local contexts in local languages.

Target: Produce targeted, accessible and translated HRDD toolkits for all corporate actors: state-owned, multinational, large, medium, small, and informal enterprises.

Target: Create national-level guides for corporate legal teams so they advise on legal liability and risks through the lens of both domestic law and the UNGPs.

Target: Design a short course for government officials tailored to national contexts.

Target: Design targeted short courses to be distributed by industries within countries.

Target: Develop targeted training material for grassroots civil society actors. From this, pilot efforts that exemplify and capture how frontline organizers and defenders can promote greater business respect for human rights through contributions like community-led HRDD.

Drivers: Cross-cutting issues and force multipliers.

Target: Establish a regional think tank or platform of BHR experts and practitioners that informs action in important and evolving arenas such as SEZs, trade deals, national stock exchanges, banks, and in relation to cross-cutting issues such as the COVID-19 pandemic recovery and the Fourth Industrial Revolution.

Target: Commission a forum to explore opportunities to elevate NHRIs as vehicles of BHR throughout the region.

Target: Create national BHR curricula for law schools, business schools, social sciences, and other relevant higher education disciplines.

The 10-year anniversary of the UNGPs is a perfect moment to reflect and clarify who we are as a movement. It is a chance to independently and collectively sit down and ask big philosophical questions; to get vulnerable and ask hard questions; to ensure that we're shaping our work around drivers of abuse—the systemic and structural issues; to seek opportunities for more synergy and understanding between different groups; to reach out and reconnect with other human rights movements in Asia; to plan how business and human rights will help the region build back better; and to turn our 'asks' into action.

– Golda Benjamin, Programme Director, Business and Human Rights Resource Centre.
Interview, November 2020.

INTRODUCTION

When assessing the current state and apparent trajectory of BHR in Asia, perspective is everything. Asia is too diverse and complex to be reduced to a single view or a singular statement. The progress of BHR has not been linear, and it is moving at very different speeds across issues, sectors, organizations and places. It will continue to evolve like this in the decade ahead. Victories have been interwoven with defeats. What could be read as success by one stakeholder may be seen as a distraction or even regression by another. Nonetheless, there is value in providing an overall analysis of the last decade and current state of the field. There is also utility in looking forward and envisioning opportunities in the decade ahead. This report aims to do both of these things.

To mark the tenth anniversary of the UNGPs, the UNWG—with the support of the governments of Germany and Switzerland and other partners—launched a project to “chart a course for a decade of action on business and human rights.” The UNGPs10+ project aims to “take stock of achievements to date, assess existing gaps and challenges, and, most importantly, develop an ambitious vision and roadmap for implementing the UNGPs more widely and more broadly between now and 2030.”^{4, 5}

This report attempts to balance optimistic and cynical views of BHR in Asia. There are valid reasons for both. BHR has swiftly garnered attention throughout the region from various stakeholders including governments, civil society organizations (CSOs) and business over the last five years. It was not until the Seminar on Promoting CSR & Human Rights in Association of Southeast Asian Nations (ASEAN), organized by the ASEAN CSR Network in partnership with UNDP in November 2016, that the regional BHR agenda

4 OHCHR, “UN Guiding Principles on Business and Human Rights at 10, ‘Business and human rights: towards a decade of global implementation’”. <https://www.ohchr.org/EN/Issues/Business/Pages/UNGPsBizHRsnext10.aspx>

5 Note, however, that the research for this report was concluded at the end of January 2021. The UNGPs10+ stocktaking report and the subsequent roadmap for the future were published in June 2021 and November 2021, respectively.

began to take shape. Momentum was built through yearly catalytic events organized by UNDP and other actors which led to the 2019 Responsible Business and Human Rights Forum—now co-organised by nine UN agencies and various partners—and, in 2020, a UN Regional Forum on BHR for the Asia-Pacific. Now, five short years on, BHR is here to stay.

Business enterprises in Asia can no longer deny or question their responsibilities to people and the planet. Governments throughout the region are putting BHR into action through NAPs. NAPs are the starting point to achieving the UNGPs. In its five-year work plan for 2021–2025, AICHR referred to “a mechanism for coordinating a Human Rights-Based Approach (HRBA) and remedies in ASEAN”, which is in effect promoting the UNGPs.⁶ As Member of the UNWG, Dante Pesce stated in an interview:

We have made enormous progress in normalizing a conversation that was not there, and with some elements that today are clearly part of an equation that were not there earlier ... We can claim victory, to a great extent, at the high level (Interview, October 2020).

Yet, there is much work to be done in the next decade to mainstream BHR in Asia and ensure that the movement is delivering on its promise. There are real concerns that the movement is not reaching the very people it is meant to serve.

This report attempts to balance these contrasting views, capture different realities and entertain different visions of BHR in Asia. Further, as Golda Benjamin captured well in the introductory quote, the very purpose of the UNGPs10+ is to use this tenth anniversary as a moment to ask hard questions and be open to critical answers.

The report begins by providing an overview of the status of BHR in Asia from the perspective of the three pillars of the UNGPs. Part One of the report, “The UNGPs in Asia”, critically examines whether the UNGPs have achieved tangible results for affected individuals and communities, the objective of the UNGPs stated in the General Principles. The three pillars are the universally agreed structure through which the UNGPs are implemented. These are pillars upon which business and governments can be held accountable and as such provide strong bases to take stock and forecast future activities. Potential strategies emerge in this section, such as the use of securities exchanges and commissions and NHRIs. Where immense challenges are apparent, such as those under Pillar III, access to remedy, new possibilities and pathways are explored. The research examined both the most important topics, like NAPs or SLAPPs, and less-covered subjects like SMEs and non-judicial grievance mechanisms. Accordingly, Part One attempts to provide a dynamic picture of the implementation of the UNGPs in Asia. It shows that much work remains to implement the three pillars of the UNGPs in Asia.

Part Two of the report, “Snapshots of BHR in Asia”, attempts to capture the current state of BHR on the ground across the region. These thematic snapshots allow for an

⁶ AICHR, Five-Year Work Plan of the AICHR 2021–2025. https://aichr.org/wp-content/uploads/2020/10/AICHR-FYWP-2021-2025-approved-at-53rd-AMM_for-web.pdf

illustration of current realities across a range of issues. After inputs were received from the research team and UNDP and the literature review was completed, various topics were selected ranging from the thematic (e.g. the environment, conflict, education, the informal economy) to those focused on stakeholders and rights holders (e.g. women, children, persons with disabilities, indigenous groups, unions, and lesbian, gay, bisexual, transgender and intersex (LGBTI) people). While the aim was to be as exhaustive as possible, the focus was ultimately narrowed to the themes that regularly recurred during interviews. One can see widely different challenges, opportunities and specific issues that each country may face relative to these themes. For example, responses to rights related to sexual orientation and gender identity and expression (SOGIE) vary significantly across Asia, from LGBTI people being criminalized to SOGIE being grounds for protection from discrimination by law. However, common threads and connections are prevalent and feature throughout.

Part Three of the report, “Asia’s Evolving BHR Landscape”, is a discussion of how BHR in Asia is evolving alongside profound changes affecting work, the economy and politics. Of particular note is the shock of the COVID-19 global pandemic. Asia will be entering the next decade of BHR in the midst of a pandemic that has exacerbated the gaps and vulnerabilities which define BHR in Asia. In addition to forthcoming BHR efforts to recover from the ongoing COVID-19 pandemic, the Fourth Industrial Revolution – representing the enormous changes that technology is bringing – is fundamentally changing work, business and society. Meanwhile, developments in the region are causing fundamental geopolitical shifts. All countries in this research have economies which are dependent on foreign investments already transforming lives, livelihoods and the environment across Asia. The BHR implications of these investments are many. All of this requires readiness for what is sure to be a turbulent decade ahead.

The report concludes by looking forward to the next decade. The conclusion, entitled “Recalibrating for the Next Decade”, speaks to the one overarching finding that emerged from this research: Asia has an opportunity to be an architect of the next generation of BHR through two complementary pursuits of change: from above and from below. The latter has been neglected in the region and beyond. Asia has an opportunity to show what a bottom-up approach to BHR can accomplish.

Asia’s grassroots networks have decades of experience navigating risks and engineering resiliency and change, but they have been largely untapped by BHR. This 10-year anniversary is an opportunity to recalibrate the field by mobilizing these grassroots actors as BHR allies, experts and agents of change. But it does not end there. Building BHR from the bottom up is about integrating everyone: local government officials, SMEs, workers in the informal economy, universities, legal aid networks, unions and other collectives, and existing human rights networks, all aimed at creating a groundswell of awareness and capacity. Tapping into existing grassroots networks and movements could create momentum to drive BHR change from the bottom up.

RESEARCH METHODOLOGY

The research focused particularly, but not exclusively, on select UNDP B+HR Asia focal countries: Bangladesh, India, Indonesia, Malaysia, Mongolia, Myanmar, Nepal, Pakistan, Sri Lanka, Thailand, and Viet Nam. The research was conducted by six independent researchers, whose findings were then collated and synthesized by an editorial team. The researchers were given flexibility, though the instruction was to gain perspectives on the current and future states of BHR in Asia from those working in the field. During the drafting and editorial process, consultation with informants and UNDP B+HR Asia personnel helped to highlight critical issues and identify broader findings across the different realms of the research.

Desk research provided a baseline, but the main source of information for this research remains key informant interviews. Over 100 interviews were conducted with BHR stakeholders in and working with Asia. Informants from civil society, including from unions, were a particular target, as these individuals work with and for affected individuals and communities who are the target beneficiaries of the UNGPs. The UNGPs and the UNGPs10+ initiative are emphatic about the objective of achieving “tangible results for affected individuals and communities”, as the UNGPs’ General Principles state.⁷ The research team’s sampling and analysis reflects this emphasis on the lived experiences of affected rights holders. Importantly, interviews with government and corporate actors were also carried out and proved very useful in offering alternative perspectives to those provided by civil society actors.

The scope of the research was deliberately broad and inclusive, and not an exhaustive coverage of selected issues. The intention was to map out the many issues and concerns from those which are seen to be urgent (such as the environment) to those which are emerging (such as SOGIE rights). The expansive view reveals cross-cutting trends that can only be seen through a macro lens. Further, given that the findings are subjective, they should not be understood as empirical claims about achievements, challenges and opportunities. Rather, they reflect the experiences and impressions of stakeholders who have interacted with the BHR movement in varying capacities for extended periods of time. This report should thus be seen as a mapping of the dynamics of the movement, which can be used as a guide for further empirically based studies. The research for the report was concluded at the end of January 2021, with the exception of several interviews. Thus, the report does not account for events that have occurred since 31 January 2021.

⁷ The General Principles of the UNGPs state: “These Guiding Principles should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.”





PART ONE **THE UNGPs IN ASIA**

Too few States, business enterprises, financial institutions and international organizations have taken meaningful steps to effectively translate the Guiding Principles into practice. In too many cases, commitments and measures are lacking altogether, or commitments are not followed up on, or are accompanied by measures that are either piecemeal or ineffective. The overall picture is a world of too many governments and businesses pursuing development without implementing the necessary and accepted safeguards for people and planet.

- UN Guiding Principles at 10 – Business and human rights: towards a decade of global implementation: Background note by the UN Working Group on Business and Human Rights⁸

AN INTRODUCTION TO THE CURRENT STATUS OF THE UNGPs IN ASIA

As the background note to the UNGPs10+ captures, the UNGPs have only begun to gain traction. This is particularly true in Asia. More governments and business enterprises in the region are talking about BHR. However, when concrete action is taken, it is often “piecemeal or ineffective,” to borrow from the background note. In the assessments of progress against each of the UNGPs pillars below, one will find promising signs of progress. The momentum behind NAPs in Asia is self-evident. Corporate HRDD has become more common and robust. Access to effective remedy features in both the Thailand and Japan NAPs. However, as an anonymous civil society informant stated: “The UNGPs are about tackling the conditions that enable abuses. We have had meetings. We have made promises and plans. But we haven’t really begun to actually change those conditions in any real way.” This is a sentiment that even optimistic informants tended to concede.

It is important to put the current status of the UNGPs in Asia into context. Firstly, the UNGPs are themselves quite young. When asking for the UN Human Rights Council’s endorsement of the UNGPs, John Ruggie stated: “I am under no illusion that the conclusion of my mandate will bring all business and human rights challenges to an end. But Council endorsement of the Guiding Principles will mark the end of the

⁸ UN Working Group on Business and Human Rights, UN Guiding Principles at 10 – Business and human rights: towards a decade of global implementation. Background note. https://www.ohchr.org/Documents/Issues/Business/UNGPsBHRnext10/background_note.pdf

beginning.”⁹ While the UNGPs have been the authoritative global norm for a decade, the field of BHR is still very much in the learning phase. This is particularly true in Asia, where the UNGPs only began to find footing five or fewer years ago.

Government, corporate and civil society informants all agreed that the BHR movement lacks clarity on how to deploy the UNGPs. Stakeholders are learning how to effectively leverage NAPs in real time. Government officials spoke of struggling to understand the expectations of the UNGPs. Similarly, corporate informants explained that they were confused about the purpose of HRDD and how the corporate responsibility to respect human rights differs from other social responsibility and sustainability imperatives. One can imagine their struggle to build awareness and the capacity of their colleagues. The stagnation under Pillar III, access to remedy, is an indication of how many barriers remain firmly in place. Rights holders in SMEs, SEZs, the informal economy, and conflict-affected areas remain largely out of reach. Further, the BHR movement in Asia and beyond has yet to locate and demarcate good practices that achieve results for affected rights holders. These points are not meant to be critical or cynical. They are meant to remind us that the BHR movement in Asia, like the BHR movement worldwide, is still working out how to use the UNGPs.

Second, the UNGPs are subject to the political landscape of Asia. Wars, pandemics, coups and scandals are all shocks that can immediately change the status of the UNGPs in a country. The UNGPs can influence politics, but they are also subject to politics. When and where politics are averse to human rights, progress on the UNGPs is unlikely. The UNGPs are no less valid or relevant in these contexts. On the contrary, the UNGPs take on new importance in settings where there is an inability or unwillingness to reckon with business-related threats to people and the planet. Achieving results for affected individuals and communities remains the imperative, regardless of the conditions, which is why informants put such an emphasis on adaptability and localizing BHR responses.

⁹ John Ruggie. “Progress in Corporate Accountability”. Institute for Human Rights and Business. 4 February 2013. www.ihrb.org/focus-areas/benchmarking/commentary-progress-corporate-accountability.

Unless there is a strong political will from States, things will not move. One response might be there is no political will, so let us knock on some other doors. My view is that we need to create political will within States. Knocking on other doors alone will not be enough. We need mandatory rules and regulations. Without that, nothing much will change. Mandatory rules alone will not fix everything, but free-riders have to be punished by different means and responsible companies need to be rewarded. Carrots and sticks together.

– Surya Deva, UN Working Group on Business and Human Rights. Interview. December 2020.

PILLAR I: THE STATE DUTY TO PROTECT HUMAN RIGHTS

An overview of the BHR situation in Asia must acknowledge the diversity in economies, politics and cultures among countries. It must acknowledge that many States in the region do not have a strong track record of championing human rights. The past years have seen the rise of new types of autocracies and illiberalism. Whereas once autocratic States used violence and military power, now illiberal governments have weaponized the media and use surveillance and fear mongering to threaten their opponents.¹⁰ Land governance is a chronic point of concern and contention.¹¹ There is a widespread unwillingness or inability to govern the informal economies that many rights holders in the region depend on. In addition, the nature of relations between States and business communities in the region can be in direct conflict with what the BHR field is trying to accomplish. Informants spoke about how States are using business and the wealth it generates to consolidate power. This manifests as the use of shopping centres and investment contracts, not armed force, to entrench supremacy.

Pillar 1 of the UNGPs acknowledges two important standards which are under threat as a result of illiberalism in the region. Firstly, the UNGPs declare an unquestioned duty for States to protect human rights, which includes the enforcement of laws and ensuring

10 In particular, see John Keane. 2020. *The New Despotism*. New Haven: Harvard University Press; and Aurel Croissant and Jeffrey Haynes. 2021. “Democratic regression in Asia: Introduction”, *Democratization*, 28(1): 1–21.

11 The Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on the Asia Forum on Business and Human Rights (2016) states: “The issue of how governance gaps due to Government failures lead to negative impacts on human rights in the context of business activities was raised in a discussion on land acquisitions. Land governance is, in many countries of Asia, characterized by issues of corruption and lack of transparency. Governments, which benefit from land acquisitions, are often complicit in harms that occur in the acquisition of land and the governance of land use and they are routinely absent in their crucial law enforcement role. Similarly, access to State-based remedy is elusive; private interests and those of investors collide with governments; and affected communities are not consulted.”

that business enterprises comply. A second standard deals with the nexus of States and business. UNGP Principle 4 on the State-business nexus states:

States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.

A current feature of illiberal governments in Asia is that SOEs and public-private partnerships (PPPs) are rarely transparent or diligent when it comes to human rights; 'crony capitalism' (an economic system where the business and political classes conspire to control parts of the economy) and corruption distort the State-business nexus. It is difficult for States to protect people from business-related human rights abuses when the State is responsible or complicit in that harm. Even in situations where there is a greater separation between business enterprises and the State, it is difficult for States to convincingly enforce corporate respect for human rights when the State itself is doing little to comply or enforce human rights norms and standards.

Not only is State protection of human rights critical for confronting predatory business conduct, it is crucial in creating an enabling environment and a level playing field. Informant Viraf Mehfa emphasized this: "What we hear from business right now is that this is not the age of voluntary leadership. If you want something done, mandate it. We would prefer a level playing field" (Interview, October 2020). Corporate informants consistently echoed this desire for clear and consistent regulations. As one of these informants stated, "It is not as if we want to do harm to people or the planet. If the government tells us what to do, we'll do it." There was consensus among informants that sustained progress on the UNGPs will require States that are willing and able to uphold Pillar I. Accordingly, actors are scrambling to invigorate political will within Asian States, including those with illiberal characteristics.

As the following sections will show, stakeholders have sought a number of ways to begin implementing Pillar I. The efforts most talked about have been those aimed at establishing NAPs throughout the region. NAPs immediately began to attract attention. However, recalling that BHR language and frameworks are new to the region and given the prevalence of illiberalism, the momentum behind NAPs has invited both excitement and suspicion. Civil society informants, in particular, raised concerns that NAPs were being used as a way to gain positive publicity and distract attention from systemic human rights concerns. This apparent contradiction reveals important contextual considerations. States are not uniform organs. Very few State officials possess awareness and capacity in relation to the UNGPs. BHR specialists may be able to advance a NAP but unable to prevent State action that contradicts that NAP. Indeed, there is not a clear roadmap for implementing Pillar I. Interventions will need to be vigilant and multidimensional, and progress will not be linear.

THE GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

I · THE STATE DUTY TO PROTECT HUMAN RIGHTS

FOUNDATIONAL PRINCIPLES

1. States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.
2. States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.

OPERATIONAL PRINCIPLES

GENERAL STATE REGULATORY AND POLICY FUNCTIONS

3. In meeting their duty to protect, States should:
 - (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;
 - (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;
 - (c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations;
 - (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.

THE STATE-BUSINESS NEXUS

4. States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.
5. States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.
6. States should promote respect for human rights by business enterprises with which they conduct commercial transactions.

SUPPORTING BUSINESS RESPECT FOR HUMAN RIGHTS IN CONFLICT AFFECTED AREAS

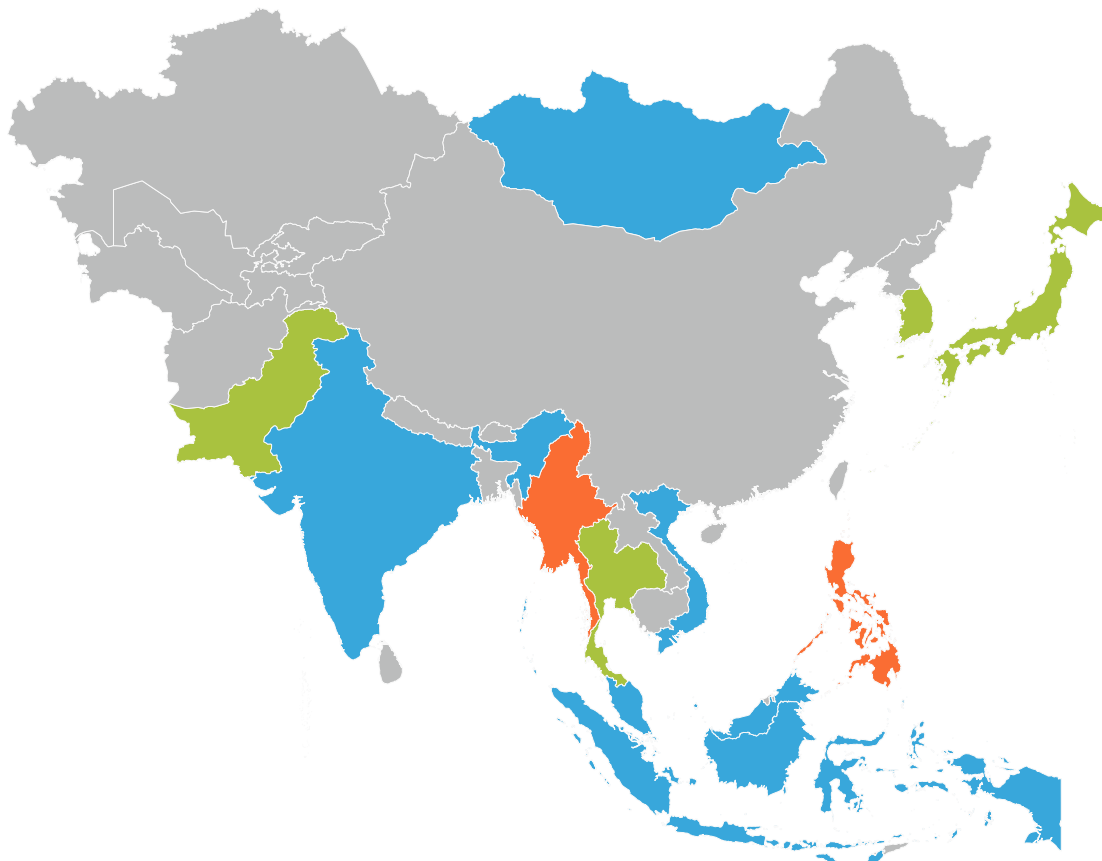
7. Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:
 - (a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;
 - (b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;
 - (c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;
 - (d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

ENSURING POLICY COHERENCE

8. States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.
9. States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.
10. States, when acting as members of multilateral institutions that deal with business-related issues, should:
 - (a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;
 - (b) Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;
 - (c) Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.

National Action Plan Status Map

Reproduced using data from National Action Plans on Human Rights and Business and Human Rights. <https://globalnaps.org/>



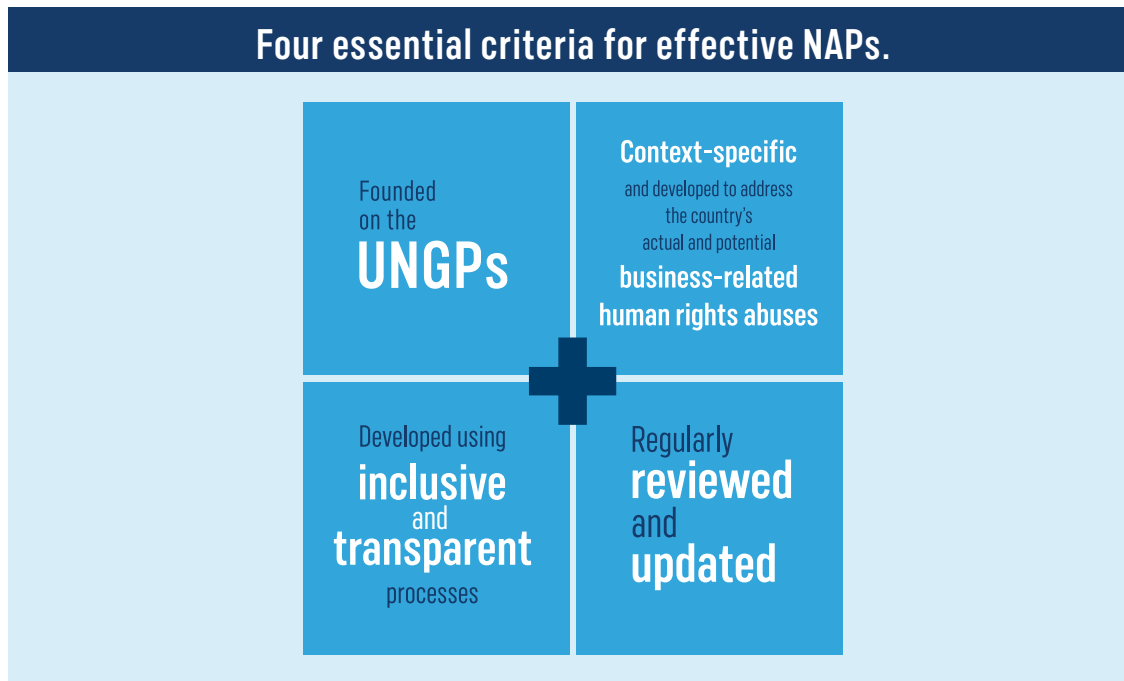
● Published a NAP ● Developing a NAP ● Other non-state initiatives

NATIONAL ACTION PLANS

Thailand was the first State in Asia to adopt a NAP after Thailand's cabinet adopted it in October 2019 and launched it in December 2019. In October 2020, Japan became the second Asian State to launch a NAP after it was adopted by an Inter-Ministerial Committee. In February 2019, India's Ministry of Corporate Affairs published a Zero Draft of a NAP. Indonesia's Coordinating Ministry for Economic Affairs began to undertake a formal NAP process in early 2019. As of early 2021, both the Indian and Indonesian NAPs are projected to be launched by 2022. Pakistan's Ministry of Human Rights initiated the NAP process in October 2019 and has facilitated several open consultations before they invited open inputs to the draft NAP in March 2021.¹² In Malaysia, the business and human rights agenda was prompted in 2015 by the publication of the Strategic Framework on a National Action Plan on Business and Human Rights, produced by the National Human Rights Commission of Malaysia (SUHAKAM). In 2019, Malaysia announced a cabinet decision to kick-start the NAP process and in September 2021, Malaysia formally committed to launching the action plan by 2023. Viet Nam is in the process of developing a NAP to be published in 2023. In April 2019, Mongolia's

¹² The NAP of Pakistan was approved by the Federal Cabinet in September 2021.

government appointed a 60-member working group to develop a NAP to be published in 2022. Stakeholders involved in these NAPs are hopeful that these plans can guide the entire State towards the UNGPs.



Still, how a NAP is positioned within a State matters. All NAPs need to fit to the national context. Viraf Mehta, a member of India’s NAP Drafting Committee, spoke to the nuances of positioning and socializing NAPs, emphasizing the importance of the correct positioning and process:

If the National Human Rights Commission of India would have taken the lead with the NAP, then it would have been ignored by business and indeed by government. The appropriate ministry for the NAP is the Ministry of Corporate Affairs. It doesn't have domain knowledge but it's free to get domain knowledge from other Ministries like Social Justice, Labour, Employment, Women and Children, and so forth. It is the regulator of business, so in my view the regulator should be taking the lead with the NAP ... I also think that if the government opens up a transparent process and releases the final draft for public comment, we will get buy-in for a good, action document—not a long-winded one with aspirational ideas that business can't translate into action.

The process of developing a NAP alone has value. As seen in Thailand and India, it prompts multi-stakeholder dialogues, and gaps and opportunities often surface that may otherwise go unnoticed. Regardless of where States are in the development of a NAP, the journey itself is an exercise in learning and adapting. It can facilitate coordination, prioritization, collaboration and the tracking of progress.

However, as many informants stressed, NAPs have inherent limitations. Many interviews revealed concerns that some BHR stakeholders may misunderstand what a NAP is and what it can accomplish. Specifically, there were concerns that NAPs would be seen as an enforceable legal document. Managing understanding and expectations around the NAPs will need to be a deliberate part of NAP processes throughout the region. NAPs

cannot automatically fix governance and legislation that undermines the UNGPs. They do not protect or promise remediation to affected rights holders. NAPs do not themselves build awareness and capacity within States and business enterprises. They are merely plans to achieve progress on BHR in a given context. The plans need to be socialized among State officials, corporate actors and civil society. Stakeholders need to understand what the NAP is trying to accomplish, which requires a baseline awareness of the UNGPs. Stakeholders also need to understand what the NAP means for them if it is to have a tangible impact.

Informants cautioned against becoming overly ambitious or enthusiastic when it came to NAPs, given their inherent limitations. Viraf Mehta spoke of the importance of not trying to do too much and instead having a short list of achievable goals: “Things will be excluded, but if we see this thing as a journey and [achieve] two NAPs in a decade, there is a cause for optimism and it puts India’s youth in a great position. It is also a way of seeing deliverables not only at the well-known companies, but in their supply chain” (Interview, October 2020). Surya Deva of the UNWG emphasized the importance of trying to build widespread awareness and capacity throughout the State, which requires more easily accessible approaches to the UNGPs. Chandan Kumar, the National Coordinator of the Working Peoples’ Charter of India, similarly pointed out that NAPs can only accomplish so much unless those NAPs and the UNGPs are localized: “change will only come when business and human rights becomes politically accessible and we start hearing about it in local election debates.” Informants commonly shared the sentiment that NAPs could catalyse change if they were targeted and supplemented with wider efforts to build a strong foundation of knowledge and capacity throughout the ranks of the State.

Case study: Lessons from Thailand’s first NAP

States throughout Asia are studying the experience of Asia’s trailblazer on NAPs, Thailand. Informants who had observed or been a part of the Thailand NAP drafting process pointed to several interesting lessons. The NAP process itself was inclusive, and informants praised the coordinated and meaningful engagement with CSOs and HRDs. The Thai government showed commitment and welcomed the contributions of the UNWG, UNDP and other intergovernmental organizations. Many features of the NAP have been widely praised, including the focus on HRDs and access to remedy.

However, informants proposed lessons that can be learned from Thailand’s first NAP. First, there was the feeling that explicit follow-up measures were lacking or absent. Second, there was the feeling that the NAP was not specific and actionable enough. Beyond Thailand, many informants spoke about how NAPs can be useful in prompting very specific governmental reforms or initiating activities in hard-to-reach domains like the informal economy, SMEs and SEZs. Lastly, and most notable, informants felt that the NAP did not adequately speak to corporate actors. Corporate informants from Thailand spoke of not knowing what the NAP meant for them. These are insights that can be taken into consideration for all States, including Thailand, as they start or carry on their NAP journey.¹³



13 Watch ‘The Journey, Thailand’s First National Action Plan on Business and Human Rights’. YouTube. Video File. 31 August 2020. <https://www.youtube.com/watch?v=Wcem9bp3h7s>.

While the convening role and power of NHRIs was not acknowledged in the UNGPs... the ability and potential to convene a range of groups and stakeholders should not be underestimated. As an independent institution, NHRIs do not have a defined constituency or vested interest, as such they are well placed to bring together a range of actors and enable the integration of various perspectives on a particular issue or challenge. Given they are often trusted institutions who have connections with the community, they can also create safe spaces for companies and communities to engage and can facilitate partnerships, where appropriate, under goal 17 of the Sustainable Development Goals.

– Sarah McGrath. 2019. *Navigating a New Era of Business and Human Rights*¹⁴

NATIONAL HUMAN RIGHTS INSTITUTIONS

The role of NHRIs in the promotion and protection of human rights has been expanding gradually since NHRIs were first put on the international agenda in the 1990s with the release of the Paris Principles in 1991 and the World Conference on Human Rights in Vienna in 1993. NHRIs across Asia have, at various points in history, played an important role in the promotion and protection of human rights when they are threatened by business enterprises. Informants spoke of NHRIs in Asia addressing the impact business enterprises can have on human rights before the UNGPs. This was done haphazardly, but now, with the UNGPs, there is an authoritative framework and standards for NHRIs to leverage.

NHRIs have been one of the primary promoters of the UNGPs worldwide. As Sara McGrath, Director of International Engagement, Business and Human Rights at the Australian Human Rights Commission, captures above, NHRIs are uniquely positioned to advance BHR because of their independence and proximity to the State, business enterprises and civil society, and their legislated role in human rights promotion and protection. Global Alliance of NHRIs (GANHRI) and the Asia Pacific Forum (APF), the umbrella network of NHRIs in the Asia-Pacific, have created trainings, specialized bodies and activities related to BHR. All of this has led to high hopes for NHRIs in Asia to be important proponents of BHR. However, NHRIs in Asia are often constrained in various ways.

To date, NHRIs in Asia have struggled to elevate the BHR agenda for a number of reasons. They experience mandate restrictions, and insufficient human and financial resources. Viet Nam does not have an NHRI. Pakistan's NHRI has not attempted accreditation under the Paris Principles, which are a set of internationally recognised standards to assess the credibility, independence and effectiveness of NHRIs, as adopted by the UN

¹⁴ Article 30 and Institute of Human Rights and Peace Studies (Mahidol University). 2019. *Navigating a New Era of Business and Human Rights*. <https://www.a30humanrights.com/knowledge-hub/navigating-a-new-era>

General Assembly in 1993. The NHRIs in Bangladesh, Myanmar and Thailand have a 'B' accreditation status under GANHRI, meaning that they are only partially compliant with the Paris Principles.¹⁵ This B status indicates that the NHRIs are compromised in one way or another, and may lack the requisite capabilities to address BHR issues. Even those NHRIs with A level status, indicating compliance with the Paris Principles, can face constraints when it comes to BHR. The Sri Lankan NHRI can only inquire into the actions of State actors, and not private business enterprises or individuals. A 2019 Asian NGO Network on National Human Rights Institutions report on the Sri Lankan NHRI notes that according to a recent workshop in Colombo:

*The Commission, however, noted that it is mandated to inquire into the actions of state actors but not private individuals and corporations ... Another limitation stems from the fact that social, economic, and cultural rights are not constitutionalised and so the HRCSL [Human Rights Commission of Sri Lanka] cannot inquire into violations of these rights. Ironically many of the complaints and grievances sent to the HRCSL relate to social, economic and cultural rights.*¹⁶

NHRIs in Asia have been engaged with BHR albeit at different levels and magnitudes owing to the level of institutional maturity, mandate and resources (financial and human). Some NHRIs such as in India, Bangladesh, Malaysia and Thailand engage with their government on the NAP development process and promote the UNGPs and BHR knowledge among the public and the business community.

Despite barriers and constraints, NHRIs in Asia can and do investigate business-related harm. Many more investigations into business have been carried out in Southeast Asia than in South Asia. In Southeast Asia, NHRIs in Indonesia, Malaysia, the Philippines and Thailand have all taken on business-related cases or issues in the past three years. A number of those cases focus on the extraterritorial activities of transnational corporations and ensuring their foreign subsidiaries uphold human rights standards. For example, in 2014, SUHAKAM investigated a case related to the development of the Don Sahong Hydropower Project in Cambodia and Laos. Although initially this was seen as a case outside its jurisdiction, the Commission decided to act as the company that was involved in this case was a Malaysian company—Mega First Corporation Berhad (MFCB)—and thus within the Commission's reach. The intervention by SUHAKAM had positive impacts, including the company agreeing to provide additional support to help the communities. This is a noteworthy example of a Commission accommodating a complaint it received from an extraterritorial entity. Similarly, the NHRI of Thailand has initiated multiple extraterritorial investigations, though those have not produced results. The Philippines NHRI has not yet initiated an investigation against a transnational corporation, either a Philippines-based or a foreign subsidiary in the Philippines, for human rights violations, but is actively involved in cases related to climate change, with a public inquiry of 47 major fossil fuel companies for contributing to climate change.¹⁷

15 GANHRI. 2019. Chart of the Status of National Institutions. <https://www.ohchr.org/Documents/Countries/Cooperation/StatusAccreditationChart.pdf>

16 ANNI. 2019. 2019 ANNI Report: 145. <https://www.forum-asia.org/uploads/wp/2019/10/3.0-Online-ANNI-Report-2019.pdf>

17 See also Ratchada Arpornsilp. 2019. "Human Rights and Climate Change in the Philippines" *E-International Relations*. www.e-ir.info/2019/04/18/human-rights-and-climate-change-in-the-philippines/. A collection of documents can be found at the Business & Human Rights Resource Centre page, see <https://www.business-humanrights.org/en/latest-news/carbon-majors-can-be-held-liable-for-human-rights-violations-philippines-commission-rules/>

Even when NHRIs have been active in investigating businesses, it is still a challenge to transform an investigation into an effective remedy. For example, NHRIs have been unable and sometimes unwilling to address attacks on human rights and environmental defenders who challenge business interests. In Indonesia, the NHRI (Komnas HAM) claims it does not have the mandate to protect these defenders against attacks by business enterprises, though individual commissioners have made public statements voicing their concerns.¹⁸ At the same time, there are examples where NHRIs have taken action to protect HRDs. For example, the epublic of the Philippines Commission on Human Rights (CHRP) has established a protection program for HRDs and works with them in lobbying for the enactment of the Human Rights Defenders Act—a proposed legislation that will protect the rights and fundamental freedoms of HRDs in the Philippines. The CHRP also works with trade unions in monitoring labour rights particularly in the Philippine Economic Zones. Similarly, the National Human Rights Commission of Bangladesh advocates for HRDs through its BHR thematic committee and has called upon the Government of Bangladesh to protect their rights.

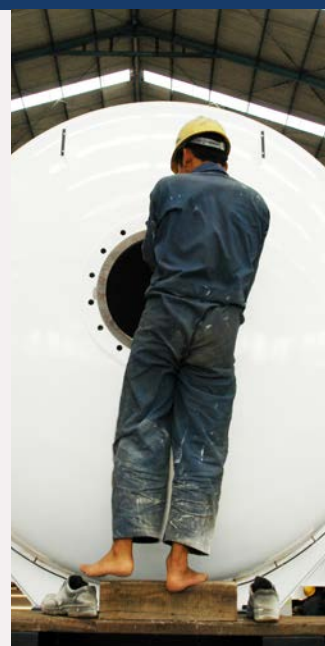
Informants who spoke about the role of NHRIs in the BHR movement believed that more could be done to utilize and galvanize these uniquely mandated and positioned institutions. NHRIs can be vehicles of protection and they can facilitate access to remedy. Yet, politics and constraints regularly limit the ability of NHRIs in Asia to ensure accountability and effective remedy. That is why many informants proposed that more emphasis be put on using NHRIs to build awareness and capacity. NHRIs in Asia have also started to focus on BHR promotion through educational activities. By focusing particularly, but not exclusively, on BHR promotion, NHRIs may be in an optimal position to build overall awareness and capacity of both duty bearers and rights holders. NHRIs may also be well positioned to reach new frontiers of BHR in Asia, including those working in the informal economy, SMEs, SEZs and loosely governed sectors. An NHRI's potential to be transformative is contingent on their independence and support from government, but in every context, there are sure to be openings to better leverage NHRIs to address BHR in the region.

18 The most recent review of Komnas HAM, the Indonesian NHRI, in the 2019 ANNI Report (op. cit. 12) states: "There are still no laws in Indonesia that regulate the protection of HRDs. Komnas HAM itself had suggested an alternative, by including articles on HRDs in the draft revision of the Law Concerning Human Rights. It is unfortunate that the draft revision of Law however was not made a priority. However, what is most concerning is the recent decision of Komnas HAM to abolish the HRD Desk. Komnas HAM should instead increase its commitment to the issue, rather than reducing it by removing the desk" (29). Komnas HAM does have the authority to investigate business as detailed in the report by Patricia Waagstein: "Article 1 (6) of the Human Rights Law confirms that human rights violations can be committed by 'individuals or groups of individuals, including the state apparatus.' 'Groups of individuals' arguably also includes corporations and other business entities, and this interpretation has been applied by the National Commission on Human Rights (Komnas HAM) in dealing with cases involving human rights violations by non-state actors, including businesses". Patricia Rinwigati Waagstein, n.d. Business and Human Rights in Indonesia: From Principles to Practice: 4. <http://hrrca.org/wp-content/uploads/2015/05/BHR-in-Indonesia.pdf>

Case study: Komnas HAM and abuses by gas exploration companies in Indonesia

In 2012, Komnas HAM issued its report following a three-year investigation into human rights abuses connected to the gas exploration activities of oil and gas exploration company PT Lapindo Brantas Inc. in Porong, Sidoarjo, East Java. According to the report, between 40,000 and 60,000 people were displaced after a human-made mudflow in 2006, for which the company was responsible, submerging over 10,000 homes in 12 villages in one subdistrict alone. In addition, 81 percent of the victims suffered from lung problems while more than 200 people died from poor health following the disaster. Thousands of people also lost their jobs when 30 factories affected by the mudflow ceased operating.

The Commission concluded that 15 different human rights of local residents had been violated, including life, safety, health, housing, employment, education, social security and education. Based on its findings, Komnas HAM issued a recommendation that Lapindo Brantas and its shareholders PT Medco Energi Internasional and Santos Ltd., the government, and the National Police take steps to restore the rights of the victims. For the company, this would require completing the payments of compensation to victims and plugging the mudflow.



The State-business nexus is a big issue in Asia and elsewhere. People are often left wondering whether they are dealing with a state, a government, or a company. Politicians are business people. Business people are politicians. Then there are state-owned enterprises. The affected communities are largely helpless as nothing is clear, and it is hard to know where to begin. The State-business nexus becomes especially problematic when dealing with an opaque or authoritarian regime.

- Surya Deva, UN Working Group on Business and Human Rights. Interview. December 2020.

STATE-OWNED ENTERPRISES

The governance and accountability of SOEs have been a focal point of civil society in the region. The Organisation for Economic Co-operation and Development (OECD) defines an SOE as any corporate entity recognized under national law as an enterprise, and in which the State exercises ownership. This includes joint stock companies, limited liability companies, partnerships limited by shares and statutory corporations. SOEs are widespread throughout Asia, though their contribution to national economies varies greatly. For example, they have a significant role in China and Viet Nam and relatively little influence in Cambodia and Nepal.

UNGP Principle 4 notes that States should take additional steps to prevent human rights violations by SOEs and ensure extensive HRDD. Of particular interest is the language in the commentary to Principle 4, which states that an abuse of human rights by an

SOE may entail a violation of the State's own international law obligations. The specific concerns in Principle 4 are also found in reports from the OHCHR, the OECD Guidelines on Corporate Governance of State-Owned Enterprises, and thematic reports from the Asian Development Bank (ADB). For example, OECD Recommendation V(D) states that SOEs should observe high standards of responsible business conduct. The Annotation to Recommendation V(D) further explains that SOEs have a commercial interest in being perceived as "good corporate citizens" and should base these high standards of responsible business conduct on relevant international standards with regards to human rights, among other things. This kind of oversight is necessary because it is widely recognized, as informants regularly reiterated, that corruption and adverse human rights impacts are common in relation to SOEs in the region. As Surya Deva's quote above captures, BHR stakeholders in Asia face the task of demystifying SOEs in order to begin addressing their human rights impact.

Pursuant to the UNGPs, States have the legal obligation to protect human rights, and the businesses in which they own shares or exercise control have the responsibility to respect human rights. This begs the question of whether a heightened level of oversight and transparency with regards to SOEs is required due to the complexity of this business configuration and the ease at which lines may be blurred. SOEs should not only institute HRDD and protections that match the same standards required by the State of private business enterprises, but they should lead by example as the gold standard. However, in Asia, SOEs rarely meet the minimum requirements of Pillar II. Indeed, States in Asia require less of SOEs than private enterprises in terms of monitoring, HRDD and accountability. These concerns are amplified given the expanding economic importance of SOEs in the Asia region. In their recent study, the OECD notes that:

According to OECD calculations, around a fourth of the largest global companies are entirely or largely owned by the state. Among the world's listed companies, public sector ownership comprises 14% of global market capitalisation, and in the OECD-plus area alone their value exceeds 2.4 trillion USD (full or majority ownership).¹⁹

Of the top 500 companies in their study, the OECD identifies 100 of them (20 percent) as Asian, and of these, 90 are Chinese.

Many of the largest corruption cases globally and in the region are linked to SOEs. In Asia, these include the Malaysia Development Berhad (1MDB) case, linked to Malaysia's sovereign wealth fund.²⁰ As the 1MDB corruption case began to unravel, the government allegedly constrained free speech and assembly and charged several individuals for posting online content critical of the government.²¹ The Malaysian Anti-Corruption

19 OECD. 2019. "Who are the Owners of the World's Listed Companies and Why Should we Care?". <https://www.oecd.org/corporate/owners-of-the-worlds-listed-companies.htm>.

20 At the time of writing, relevant court cases pertaining to 1MDB are still ongoing.

21 Human Rights Watch. 2016 "Malaysia: Crackdown on Free Speech Intensifies". <https://www.hrw.org/news/2016/10/12/malaysia-crackdown-free-speech-intensifies>.
CNN. 2016. Malaysia: "Crackdown on free speech creates 'culture of fear'". <https://edition.cnn.com/2016/10/13/asia/malaysia-free-speech-crackdown/index.html>.
Wall Street Journal. 2016. Malaysian Journalist: Najib Cracked Down on Free Speech to Limit 1MDB Fallout. <https://www.wsj.com/articles/malaysian-journalist-najib-cracked-down-on-free-speech-to-limit-1mdb-fallout-1465204766>.

Commission (MACC) recently noted that addressing such complex and interconnected cases involving vast quantities of assets in the global financial system requires a strong systemic response.²² One can see the cascading negative human rights impact that SOEs can potentially have given their close relations with the government.

Many, but not all, States in the region have increased their management and policy coordination of SOEs by establishing centralized bodies with some SOE-specific reporting procedures. However, these procedures are primarily centred on financial reporting. The requirements to disclose non-financial information, such as human rights risks, impact assessments and so on varies greatly across the region. On the whole, they are significantly lower than the requirements of financial reporting. While India, Malaysia and Thailand require non-financial reporting, there are no or limited requirements in other countries in the region. This shows that States do have an interest in responding to corruption, or at least managing corruption, because issues such as beneficial ownership and bribes may not be captured in financial reporting. But they show far less interest and concern relative to human rights.

Many SOEs are also transnational enterprises, which brings in another dimension of accountability, or lack thereof. SOEs tend to dominate energy production and resource extraction, two areas with high human rights risks. Corruption is a documented problem in these industries, which is why efforts like the Extractive Industries Transparency Initiative are critical to assessing the human rights impact of SOEs. SOEs often rely on State-backed financial services (or are financial service providers themselves) which should imply increased levels of transparency, but instead the regional trend is a lack of transparency.

An area of uncertainty is the definition of SOEs. While there are clear definitions (by the OECD and also found in national laws on business), the boundaries between State and private enterprises are not always clear. Blurring this distinction occurs, for instance, in public-private partnerships and other hybrid organizations. It can also blur when privatized State assets maintain ties to State actors and the State works to maintain pre-existing monopolies. As Dr Charlie Thame, Thammasat University, notes, “The boundary between the public and private interests of officials could be better distinguished and policed. More transparency and public accountability is needed, including in the governance of SOEs” (Interview, September 2020). Crony capitalism in Asia results in business ownership, protections and practices that mirror SOEs, but occur in private companies, which are owned or connected to individuals in the government.

There is also the question of how UNGP Principle 4 applies in relation to SEZs. Regardless of whether SEZs are run by a State agency, an SOE or a private entity that has won a State contract, it is clear that SEZs are direct beneficiaries of the State and would meet, for example, the Principle 4 standard of enterprises which “receive substantial support and services from State agencies.” The human rights impact of SEZs can be vast and diverse and relate to, for example, land acquisition, displacement, transparency, beneficial ownership, taxation and exploitation. Dr Charlie Thame summarizes the status quo of SEZs from a BHR perspective:

22 UNODC. 2021. Webinar on Combating Corruption Involving Vast Quantities of Assets in Indonesia. <https://www.unodc.org/roseap/en/what-we-do/anti-corruption/topics/2021/11-combating-corruption-assets-indonesia.html>.

*Although generous enticements and guarantees are offered to investors, similar commitments have not been extended to locals. While national and international laws and standards pertaining to land, labour rights and environmental protection officially apply to SEZs, they have not been implemented effectively. SEZs have been developed with limited transparency and locals have been displaced without proper consultation and adequate redress. Workers face obstacles protecting rights they are entitled to under domestic and international law and have been violently suppressed for asserting them. Environmental impact assessments have not always met international standards and environmental regulations have been enforced selectively in some zones.*²³

For these reasons and in light of UNGP Principle 4, there is a case for more UNGP action in and around SEZs in Asia.

There are specific human rights issues which deserve attention in relation to SOEs. Firstly, there is the issue of the protection and respect for workers' rights in SOEs. In some States, SOEs are a major employer in the workforce. The standards of worker protection at SOEs vary greatly across the region. In some countries, such as Thailand, SOEs have established public sector labour unions that are relatively successful in the protection of workers' rights. The situation is different in Viet Nam, where unions are compulsory, but under the leadership of the Communist Party. As members of the Executive Committee of the Trade Unions are often also members of the Party, they might be subject to guidance of senior management of the companies who have higher rankings in the Party's organizational structure. This has repercussions for collective bargaining and workplace disputes. Across South Asia, labour laws tend to be stronger and unionization rates higher, reducing this problem in relation to SOEs.

The impact of SOEs on the environment also requires attention. SOEs are involved in projects that have deep and major effects on the environment, such as dams and energy production. While there should be additional HRDD and accountability in relation to the displacement of people and environmental destruction, there appears to be less. Similarly, State-owned financial services, such as export credit agencies (as highlighted in the UNGPs) and State-owned banks, may be subject to regulatory financial requirements, but not to HRDD. As studies of the State-backed financial lenders to the major hydropower projects along the Mekong River have found, their guidelines make "no reference to human rights, grievance mechanisms and remediation measures."²⁴ According to Fair Finance Thailand's study, the hydropower projects financed by Thailand's banks might have displaced around 36,000 people and impacted the livelihood of an estimated 200,000 people. These estimates have been known for some time, as a 2013 study by the International Organization for Migration estimated that "63,112 [people] would be displaced, should the cascade of 12 mainstream dams be constructed."²⁵

23 Charlie Thame. 2017. "SEZs and Value Extraction from the Mekong: A case study on the control and exploitation of land and labour in Cambodia and Myanmar's special economic zones". Focus on the Global South. Bangkok. https://earthrights.org/case/dawei-special-economic-zone/sezs_and_value_extraction_in_the_mekong_english/.

24 Fair Finance Thailand. 2019. "Challenges of Dam Financing for Thai Banks: The Case of Xayaburi and XPXN Projects". <https://fairfinancethailand.org/media/495434/challenges-of-dam-financing-for-thai-bank-the-case-of-xayaburi-and-xpxn-projects.pdf>.

25 Marie Le Texier. 2013. "Dam-Induced Migration in the Mekong Region." *State of Environmental Migration: 2013*. Geneva. <http://labos.ulg.ac.be/hugo/wp-content/uploads/sites/38/2017/11/The-State-of-Environmental-Migration-2013-127-139.pdf>.

There appears a strong correlation between the level of human rights disclosure in a country and the Environmental, Social and Governance (ESG) disclosure rules, requirements and guidance mechanisms of the stock exchange in that country. Stock exchange regulations may be a potent catalyst for mainstreaming the responsibility to respect human rights in ASEAN.

- Article 30 (2019). Human Rights Disclosure in ASEAN.

Nonetheless, banks supported and funded the project despite the known human impact and the absence of HRDD and human rights protections. The call for additional steps to protect human rights in relation to SOEs appears to have been heeded selectively, with States responding to corruption, but ignoring key human rights concerns around the environment, displacement and labour, to name a few.

NATIONAL SECURITIES COMMISSIONS

In Asia and beyond, there is an obvious opportunity to target national stock exchanges to mandate human rights disclosure at the level of publicly listed companies. The question is not whether, but how, to leverage stock exchanges as force multiplying BHR institutions. Most major stock exchanges are publicly traded companies.²⁶ Since they are not State institutions, stock exchanges would be positioned under Pillar II. Exchanges have a corporate responsibility to respect human rights and that respect encompasses their relations with listed companies. There is certainly merit in engaging stock exchanges directly through the lens of Pillar II. However, the research found that the BHR movement in Asia would be well-advised to focus on national securities commissions. It is through these State securities commissions that immediate, comprehensive and sustainable change can happen. It is the State asserting its duty to protect through national securities commissions that appears the most reliable opening to make standardized HRDD a requirement for public listing.

India and Thailand are leading the way. The Securities and Exchange Board of India (SEBI) requires the top 1,000 companies on the Bombay Stock Exchange and National Stock Exchange to produce annual Business Responsibility Reports. The SEBI Business Responsibility Reports are structured around nine principles, including one (Principle 5) which requires business enterprises to report on their respect and promotion of human rights. Thailand's NAP sets an expectation for State and business enterprises to "assess risks and conduct HRDD, including preparing annual reports for public distribution" and for "the large business sector and companies listed in the stock market that use migrant labour as their primary production resource to prepare an HRDD report as a measure in deterring labour exploitation." Consequently, the Securities and Exchange Commission of Thailand reported that they were in the process of drafting new policies

26 The top exchanges in Asia include the Tokyo Stock Exchange, Japan; Shanghai Stock Exchange, China; Hong Kong Stock Exchange, Hong Kong SAR; Shenzhen Stock Exchange, China; Bombay Stock Exchange, India; National Stock Exchange, India; Korea Exchange, Republic of Korea; Taiwan Exchange, Taiwan Province of China; Singapore Exchange, Singapore; and Stock Exchange of Thailand, Thailand.

requiring all listed companies in Thailand to report on human rights issues in their annual reports starting from the end of the 2021 fiscal year onwards. If the new requirement is implemented, this will go beyond the Stock Exchange of Thailand's Social Responsibility Center and Corporate Governance Center guidance that promotes human rights disclosure and the human rights standards set forth in the Corporate Governance Policy and Code of Conduct.²⁷ Moreover, starting in 2022, human rights will be incorporated in the application form for any newly listed company for its initial public offering; however, it is not known at this time whether HRDD will be incorporated.

This is an obvious opportunity for BHR stakeholders throughout Asia to capitalize on. The challenge becomes ensuring that the reporting is not an end in itself. In a field that is dominated by managerialism, HRDD can get distilled down to a checklist for disclosure.²⁸ This is a conundrum that complicates all disclosure, reporting and benchmarking efforts, as Trinanjan Radhakrishnan explains:

The 'S' in ESG [Environmental, Social and Governance] is not quantifiable the way greenhouse gas emissions are. How do you quantify inequality? How do you measure the S through discrimination? How do we tackle the S? Let us find ways to capture inequality. And then figure out ways how to address that inequality. (Interview, November 2020).

All of this is to say that it is not enough to mandate human rights disclosure as an end in itself. The task is rather to work with securities commissions and national stock exchanges to mandate HRDD that actually achieves tangible results for affected rights holders. That is an aim that requires extensive reflection and consultation, which may go beyond the awareness or inclination of securities commissions and national stock exchanges. This is why BHR stakeholders in the region should consider ways to participate in the process.

MANDATORY HUMAN RIGHTS DUE DILIGENCE

In recent years, several European countries have adopted or commenced discussions and drafting efforts on embedding HRDD into national law. Key examples include the French Duty of Vigilance Law, which requires large French companies to establish and publish a vigilance plan with measures to adequately identify risks and prevent serious harms to human rights, and the Dutch Child Labour Due Diligence Law, which creates HRDD requirements for those companies, wherever incorporated, that deliver products and services to the Dutch market two or more times a year.²⁹ In early 2021, Germany

27 Stock Exchange of Thailand. "Business and Human Rights". www.setsustainability.com/page/business-and-human-rights; The Thailand Clearing House Co. Ltd. (TCH). "Corporate Governance Policy and Code of Conduct". Stock Exchange of Thailand. [www.set.or.th/tch/en/about/files/TCH CG_EN.pdf](http://www.set.or.th/tch/en/about/files/TCH	CG_EN.pdf).

28 Rajiv Maher has warned that the prominence of managerialism in the field, which "places its hope and trust firmly in the power of corporations to push and pull certain levers and controls to manage their human rights impacts", could result in a situation where due diligence and benchmarking devolves into an exercise in burying harm and risks.

29 See European Coalition for Corporate Justice. *Corporate due diligence laws and legislative proposals in Europe*. <https://corporatejustice.org/wp-content/uploads/2021/05/Corporate-due-diligence-laws-and-legislative-proposals-in-Europe-May-2021.pdf>.

introduced a new Supply Chain Act to “obligate German companies to better meet their global [human rights] responsibility.”³⁰ This draft legislation is potentially subject to further minor amendments, but is treated as agreed and was expected to pass before the end of 2021. While analysts were optimistic that the German legislative proposal could become something of a global blueprint, human rights organizations argued that extensive compromises and conditions led to a ‘paper tiger’, something that appears powerful but is ineffectual.³¹ In comparison, a law proposed in the Netherlands, the Bill for Responsible and Sustainable International Business Conduct,³² more closely aligns with the UNGPs by imposing a duty of care to prevent negative impacts on human rights and the environment on all companies in all economic sectors that are registered in the Netherlands or sell products or services on the Dutch market. The bill also requires companies to develop and implement action plans to address violations of human rights and environmental standards in their value chains and provide remedy to affected rights holders.³³

At the level of the EU, binding legislation to address human rights and environmental violations has typically focused on specific industries, such as conflict minerals and timber, along with the EU Non-Financial Reporting Directive, which instituted disclosure requirements for large and listed companies. Outside of these areas, the EU has promoted a voluntary approach proposed by the key international frameworks, such as the UNGPs, with a focus on specific sectors, which has resulted in poor results.³⁴ Recognizing this, the European Parliament has started to advocate for stronger legal frameworks to address HRDD concerns and push for mandatory measures;³⁵ recent developments show momentum towards tangible results. For example, in March 2021, the EU Parliament, by a wide margin, adopted a legislative initiative report calling for the urgent adoption of binding legislation ensuring companies comply with environmental and HRDD obligations, including access to legal remedies for victims.³⁶

30 The Federal Government of Germany. “Greater Protection for People and the Environment in the Global Economy”. 3 March 2021. www.bundesregierung.de/breg-en/news/supply-chain-act-1872076.

31 Watch ‘Erfolg der Lobbyisten: Lieferkettengesetz demontiert’ (Subtitles available). YouTube. Video File. 2 March 2021. <https://youtu.be/EBXdY4PSno0>.

32 MVO Platform. 2021. “Bill for Responsible and Sustainable International Business Conduct: Unofficial Translation”. www.mvoplatfom.nl/en/wp-content/uploads/sites/6/2021/03/Bill-for-Responsible-and-Sustainable-International-Business-Conduct-unofficial-translation-MVO-Platform.pdf.

33 The Bill for Responsible and Sustainable International Business Conduct is proposed to replace the Dutch Child Labour Due Diligence law; J. Wilde-Ramsing, M. Wolfkamp and D. Ollivier de Leth. “The Next Step for Corporate Accountability in the Netherlands: The New Bill for Responsible and Sustainable International Business Conduct”, NOVA BHRE Blog. 18 March 2021. <https://novabhre.novalaw.unl.pt/new-bill-for-responsible-sustainable-international-business-conduct-netherlands/>.

34 Corporate Human Rights Benchmark. 2019. “2019 Key Findings”. <https://www.corporatebenchmark.org/sites/default/files/2019-11/CHRB2019KeyFindingsReport.pdf>.

35 Legislative Observatory. “Resolution on the EU’s input to a UN Binding Instrument on transnational corporations and other business enterprises with transnational characteristics with respect to human rights EU’s input to a UN binding instrument on transnational corporations with respect to human rights”. *European Parliament*. 4 October 2018. <https://oeil.secure.europarl.europa.eu/oeil/popups/summary.do?id=1555389&t=d&l=en>.

36 European Parliament. “MEPs: Companies must no longer cause harm to people and planet with impunity”. 10 March 2021. www.europarl.europa.eu/news/en/press-room/20210304IPR99216/meps-companies-must-no-longer-cause-harm-to-people-and-planet-with-impunity.

A key goal of the law will seek to incorporate mandatory HRDD (mHRDD) requirements into relevant business law, along with corporate liability and enforcement mechanisms, access to justice and remedy for victims of business-related human rights abuses. The impact of this mandate will have a significant effect on transnational enterprises and cross-border business relations between Europe and Asia, similar to when the European Commission (EC) enacted legislation to combat illegal, unreported and unregulated (IUU) fishing in 2010. While IUU fishing is a global problem, the situation is worse in the Asia-Pacific region because it produces 75 percent of the world's seafood and IUU fishers target countries that are home to some of the most vulnerable communities with underdeveloped economies and inadequate capacity to enforce regulations.³⁷ The EC IUU regulation only allows marine fisheries products validated as legal to be imported into, or exported from, the EU. A country which repeatedly fails to meet the requirements of the regulation risks being downgraded from a yellow card to the EC blacklist, which happened to Cambodia in 2014. Once placed on the blacklist, all fisheries products caught by vessels registered in Cambodia were banned from the EU market.³⁸ The inability to access the EU market has the potential to be a massive blow to fishing industries in Southeast Asian countries. In Viet Nam alone, which received a yellow card in 2017, the seafood export industry is valued at approximately US\$10 billion with 15 percent of exports flowing to the EU market.³⁹ Similar to how IUU fishing became a barrier to doing business with unverified marine fish catch, participation in mHRDD may be a precondition for doing business with EU-domiciled business enterprises. This is a precondition that could impact if not redefine intergovernmental trade relations, which is a lesson from the EC IUU regulations.

In April 2020, the European Parliament announced a resolution on coordinated action to combat COVID-19, which also expressed its conviction that "corporate human rights and environmental due diligence are necessary conditions in order to prevent and mitigate future crises and ensure sustainable value chains."⁴⁰ Later in the same month, EU Commissioner for Justice Didier Reynders committed to a legislative initiative on mHRDD for EU companies in 2021, which will likely include liability and enforcement mechanisms and access to remedy provisions for victims of corporate abuse.⁴¹ This announcement was made after the publication of the EC study on due diligence requirements through the supply chain, conducted by the British Institute of International and Comparative Law, which underlined the consistently weak implementation of corporate voluntary measures

37 Food and Agriculture Organization of the United Nations. "Asia-Pacific revenues and livelihoods threatened as billions lost annually to illegal, unreported, unregulated fishing – UN FAO". 5 June 2019. www.fao.org/asiapacific/news/detail-events/en/c/1196430/.

38 ASEAN Post Team. "ASEAN Losing Billions to Illegal Fishing". ASEAN Post. 12 May 2021. <https://theaseanpost.com/article/asean-losing-billions-illegal-fishing>.

39 Asia News Network. "Experts: VN needs solutions for sustainable seafood exports to EU". *Phnom Penh Post*. 18 November 2020. www.phnompenhpost.com/business/experts-vn-needs-solutions-sustainable-seafood-exports-eu.

40 European Parliament. 2020. EU Coordinated Action to Combat the COVID-19 Pandemic and its consequences: European Parliament resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences. 2020/2616(RSP). www.europarl.europa.eu/doceo/document/TA-9-2020-0054_EN.pdf.

41 BHRRC. "Commissioner Reynders Announces EU Corporate Due Diligence Legislation". Business & Human Rights Resource Centre. 30 April 2020. www.business-humanrights.org/en/latest-news/commissioner-reynders-announces-eu-corporate-due-diligence-legislation/.

on HRDD and affirmed the need for mandatory rules at the EU level.⁴² Commissioner Reynders also stated that mHRDD will follow an autonomous legislative path, independent from the review of the EU Non-Financial Reporting Directive and potentially cross-sectoral to cover the entire supply chain and all corporate-related risks, while providing for sanctions in the event of non-compliance. The overall outcome of EU mHRDD would likely be a single standard which may allow for a sector-sensitive approach, along with a level playing field for business enterprises and greater legal certainty. With the draft of the legislation still in development in 2021, the EC has embarked on a series of public consultations with key stakeholders, including civil society and corporate actors. BHR stakeholders in Asia have watched this rapid advancement to EU mHRDD with interest. Informants explained that EU mHRDD will not only directly apply to supply chains that stretch to Asia, it will provide a blueprint for government and intergovernmental bodies in the region to adapt and replicate.

EU mHRDD, if enacted, will exert pressure and incentives on the evolving internal governmental and corporate debates in the region to move quickly towards compliance. For example, a draft report published by the European Parliament Committee on Legal Affairs last year indicated that the proposed mHRDD law should apply to all EU companies and any non-EU company selling goods or providing services in the EU. Thus, the law could impact any business in Asia selling their products to European consumers, as well as the foreign subsidiaries or suppliers of any EU enterprise.⁴³ Asia and Europe are leading trade partners, accounting for half of all global merchandise trade, with a value of approximately US\$1.5 trillion.⁴⁴ Moreover, Asia-Europe Meeting (ASEM) countries trade more between them than between any other regions in the world.⁴⁵ Enterprises of all sizes in ASEM countries will be required to respond and ensure their operations fully comply with these standards. A loss of access to this market due to non-compliance with the EU mHRDD law is a critical threat to transnational business. This will require the ability on the part of business enterprises in Asia to work with their European business partners, manage their own risks and address their operating shortfalls in order to avoid losing valuable trade and business opportunities and the potential penalty of sanctions or fines. At present, it is unknown whether sanctions for non-compliance will include criminal measures, but if so, this will add another layer of risk for those business enterprises that fail to adapt and subsequently run afoul of the law.

Business enterprises in the region will need to become both subjects and agents of mHRDD. Asian business enterprises who have European business partners will need to implement HRDD in line with the processes provided in the legislation to prevent adverse impacts on people, as well as in relation to mitigating environmental and governance risks. Informants pointed out that this legislation could ultimately

42 Lise Smit, Claire Bright, Robert McCorquodale and others. 2020. European Commission. <https://op.europa.eu/en/publication-detail/-/publication/5bd8a55a-4c84-11ea-b8b7-01aa75ed71a1/language-en/format-PDF/source-246304205>.

43 European Parliament. 2020. DRAFT REPORT with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)). www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf.

44 Ana Neves, William Becker and Marcos Dominguez-Torreiro. "Explained, the economic ties between Europe and Asia". 14 May 2019. World Economic Forum. www.weforum.org/agenda/2019/05/ways-asia-and-europe-together-connected/.

45 Ibid.

prompt layers of HRDD as regional enterprises will have to conduct proactive HRDD to ensure readiness for HRDD carried out by their EU business partners. However, civil society and other key stakeholders should manage their expectations in regard to the timeline for EU mHRDD, as the law may allow for a phase-in period of several years to allow time for governments and businesses to adapt to the new requirements prior to full enforcement.

A final question to consider is how EU mHRDD might catalyse a push for national or even sub-regional mHRDD in Asia. Informants were optimistic that one or more governments in the region will seize the opportunity to take the lead on mHRDD. Informants speculated on what State might be the first in the region to show leadership and in doing so posited that mHRDD is the next reasonable move for governments who have already enacted a NAP. Optimism was even more pronounced when informants spoke about the role of the AICHR. As mentioned, the UNGPs feature in the Five-Year Work Plan of the AICHR 2021–2025. The plan calls for the establishment of “a mechanism for coordinating a Human Rights-Based Approach (HRBA) and remedies in ASEAN.” Informants who work with or follow AICHR closely interpret this to mean that AICHR intends to systematically advance HRDD in the region. AICHR is not in a position to mandate HRDD, but it can assist with regional standardization and promotion. Much of this is speculation, but it is also evidence that the push for mHRDD in the EU is directly or indirectly catalysing a push for mandatory or otherwise standardized HRDD within Asia.

The European Commission published its Proposal for a Directive on Corporate Sustainability Due Diligence after the writing of this publication.⁴⁶

46 European Commission. Proposal for a Directive on corporate sustainability due diligence. 23 February 2022. https://ec.europa.eu/info/publications/proposal-directive-corporate-sustainable-due-diligence-and-annex_en

Case study: Is the Sri Lankan market ready for EU mHRDD?

The EU remains the single biggest market for Sri Lankan exports. Sri Lanka is also one of the few countries, along with Pakistan and the Philippines, to receive a special incentive arrangement for sustainable development and good governance under the EU Generalized Scheme of Preferences (EU GSP+). EU GSP+ reduces tariffs to 0 percent for vulnerable low and lower-middle income countries that implement 27 international conventions related to human rights, labour rights, protection of the environment and good governance. In 2023, the EU Parliament will review Sri Lanka's EU GSP+ status. By 2023, it is likely that HRDD will not only be encouraged but mandatory for Sri Lankan companies, at least those that are part of, supply or source to, or otherwise partner with EU businesses. The question is whether Sri Lanka is ready.

Currently, HRDD and BHR have not been identified as priority areas by public and private policy stakeholders. For example, the National Action Plan for the Promotion and Protection of Human Rights 2011–2016 (NHRAP) does not adequately incorporate the UNGPs or HRDD, and Sri Lanka has not made significant progress towards developing and implementing a stand-alone NAP on BHR. While there are a number of conglomerate and local business enterprises in Sri Lanka that engage in human rights disclosure, informants from Sri Lanka highlight a lack of coherent and comprehensive HRDD. Both the government and business community in Sri Lanka will have to move swiftly and purposefully to prepare the domestic market for evolving global BHR demands, starting with building awareness and expertise around BHR in general, and HRDD in particular. In 2018, a Sri Lankan NGO initiated a project on building human rights awareness among the business community. The project consisted of several round-table discussions in each of Sri Lanka's nine provinces among civil society activists, academia and business community groups. Such initiatives are worthy efforts to emulate, but they will have to be expanded and elevated significantly to sustain EU preferential trade status and ensure readiness for mHRDD.



REGIONAL OUTLIERS

Two regional outliers, Mongolia and New Zealand, exemplify how unpredictable the politics of BHR in Asia have been to date. Mongolia formed a working group under the Minister of Foreign Affairs in 2019 to initiate the development of a NAP. Mongolia then sought advice from UNDP B+HR Asia on the process and content of the forthcoming plans. Mongolia is among the most resource-rich countries in the world. Extractive industries are its economic backbone. Governance around mining has long been contentious and challenging with issues ranging from illegal mining and managing relations with foreign mining giants to concerns around transparency, taxation and beneficial ownership. Ulaanbaatar appears to be embracing the NAP process as an opportunity to improve governance around extractive industries in particular. And as was highlighted in the interviews that touched on BHR in China, Mongolia and Viet Nam, when centralized governments commit to something, it happens and it often happens swiftly. Mongolia's uptake of the BHR framework could be an important test case of what a NAP with an industry-specific focus, in this case the extractive industry, can accomplish and evolve into.

By contrast, New Zealand, often celebrated for championing democracy and good governance, has yet to formally commit to a NAP. New Zealand's International Human Rights Action Plan 2019–2023 does not integrate the UNGPs nor fully address BHR. Informants with experience in New Zealand noted a lack of BHR awareness and capacity. These informants speculated that the New Zealand government and business enterprises may be under the impression that their national laws and strong regulatory bodies are sufficient. Yet, the absence of a local BHR agenda results in a situation where UNGPs-specific measures, such as HRDD, are not normalized or mandatory. As regional outliers, New Zealand and Mongolia act as reminders that gaps and opportunities may be found in unforeseen circumstances.

Currently, at the company level, BHR is being viewed mostly through the legal lens, specifically the line between national and international law. From my experience working with Asian companies, they prioritize adherence to national law over international law—unless they are forced to and usually at a minimal level. Most are not thinking ahead or striving to integrate and implement the UNGPs, specifically doing their human rights due diligence as outlined in Pillar II. Thus, it is rather performative at the moment and not about a real, genuine integration of the UNGPs.

– Patchareeboon (Mam) Sakulpitakphon, III Muses

PILLAR II: THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS

The status of Pillar II of the UNGPs in Asia is relatively straightforward. In recent years, some large, primarily publicly listed companies in the region began asserting corporate respect for human rights in their public disclosure. These first movers seem to be the only movers at the moment. SMEs in the region appear largely untouched. Informants confirmed this and called for urgent engagement with SMEs. A number of industry-led-initiatives in the region refer to the UNGPs. However, those initiatives are primarily “venues for learning, dialogue and trust-building between corporations and other stakeholders” and have not spurred meaningful industry uptake of the UNGPs.⁴⁷ So, the implementation of Pillar II is limited to large listed companies that are regularly consumer facing and transnational in nature.

In order to assess Pillar II trends and features in Asia, the research surveyed the public disclosure of those first movers and interviewed informants who work in or with those business enterprises. That research revealed three overarching findings.

First, corporate informants spoke of being confused about the exact purpose and function of the UNGPs. They talked about struggling to clearly communicate the expectations of the UNGPs to their colleagues. This may be partly attributable to the novelty of the BHR language and frameworks. Annie Khan, Business and Human Rights Resource Centre (BHRRRC), posited this much: “BHR is just still a very new concept

⁴⁷ MSI Integrity. 2020. “Not Fit-for-Purpose: The grand experiment of multi-stakeholder initiatives in corporate accountability, human rights and global governance”. https://www.msi-integrity.org/wp-content/uploads/2020/07/MSI_SUMMARY_REPORT.FORWEBSITE.FINAL_.pdf

and people are still wrapping their heads around the idea that businesses should be responsible and that they are tasked with creating policies and a business environment that is respecting human rights” (Interview, November 2020). In Asia and beyond, there appears to be a need for BHR that is more easily accessible and actionable in terms of understanding.

Second, as Patchareeboon Mam Sakulpitakphon of III Muses raises above, there is a pre-eminent focus on domestic law. This is an assertion that was confirmed by corporate informants. As one anonymous corporate informant put it, “we give a nod to the UNGPs, but the only real concerns relate to compliance and liability” (Interview, November 2020). As long as commitments to the UNGPs are more performative than substantive, human rights risks will be washed over rather than reckoned with.

Lastly, when analysing publicly available human rights disclosure, one consistently finds a standard catalogue of commitments and claims that assure compliance. In Asia and beyond, HRDD can be more about managing the impact of human rights on a business enterprise rather than managing that business enterprise’s impact on human rights. Confronting this reality and clarifying expectations and good practices will be crucial as stakeholders in the region work to develop and expand corporate respect for human rights in all domains of business.

THE GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

II · THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS

FOUNDATIONAL PRINCIPLES

11. Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
12. The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.
13. The responsibility to respect human rights requires that business enterprises:
 - (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
 - (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.
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.
15. 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 impacts on human rights;
 - (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

OPERATIONAL PRINCIPLES

POLICY COMMITMENT

16. As the basis for embedding their responsibility to respect human rights, 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 necessary to embed it throughout the business enterprise.

HUMAN RIGHTS DUE DILLIGENCE

17. In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:
- (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
 - (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
 - (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.
18. In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:
- (a) Draw on internal and/or independent external human rights expertise;
 - (b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.

19. In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.
- (a) Effective integration requires that:
 - (i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;
 - (ii) Internal decision-making, budget allocations and oversight processes enable effective responses to such impacts.
 - (b) Appropriate action will vary according to:
 - (i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;
 - (ii) The extent of its leverage in addressing the adverse impact.
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.
21. In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, 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 to the particular human rights impact involved;
 - (c) In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.

REMEDIATION

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.

ISSUES OF CONTEXT

23. In all contexts, business enterprises should:
 - (a) Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;
 - (b) Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;
 - (c) Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.
24. Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.

We are committed to avoid causing, contributing to or being linked to adverse human rights impacts through our business activities and relationships ... As a responsible global corporate citizen, we endeavour to meet standards and practices consistent with internationally recognised principles, subject to constitutional constraints and regulations of the countries and territories in which we operate. When faced with conflicts between local and international norms and/or standards, we uphold the higher standard, where possible.

– Sime Darby Plantation’s (Malaysia) Human Rights Charter⁴⁸

HUMAN RIGHTS DISCLOSURE

Sime Darby Plantation (Malaysia) sits atop the list of corporate BHR leaders in Southeast Asia when assessed in terms of human rights disclosure.⁴⁹ It represents the exception, not the norm. Asia had the lowest rank on the 2019 Corporate Human Rights Benchmark with an overall regional average of 14 percent. This indicates that human rights disclosure is rare, even at the highest levels of consumer-facing business in the region. Awareness of human rights disclosure remains a notable hurdle that will require sustained efforts.⁵⁰ Only 37.1 percent of the top 50 publicly listed companies in Indonesia, Malaysia, the Philippines, Singapore and Thailand have publicly committed to human rights according to a 2019 assessment.⁵¹ While this statistic shows that human rights disclosure is uncommon, it also shows that the UNGPs are on the radar of some of the largest corporate actors in the region. However, a study of The Current Use of Metrics in Company Human Rights Reporting Southeast Asia found that:

Every country features a number of companies that stand apart with their focus on human rights and/or in terms of being thorough and transparent. Notably, these companies appear to share a commonality that they have been or are the subject of significant public scrutiny. Even these companies exhibit significant selectivity in their public disclosure of information on human rights performance.⁵²

This is not to suggest or assign a certain motivation to Sime Darby Plantation or any other business enterprise. It is to provide the full context or backdrop against which human rights disclosure in Asia is unfolding.

48 Sime Darby Plantation. 2020. “Human Rights Charter”. <https://simedarbyplantation.com/wp-content/uploads/2021/12/HRC-2020-1.pdf>.

49 Article 30, ASEAN CSR Network and Institute of Human Rights and Peace Studies (Mahidol University). 2019. *Human Rights Disclosure in ASEAN*. <https://static1.squarespace.com/static/602c19fa95b65244e2fd70f5/t/613911a4b35f70654a08414d/1631130031031/Human+Rights+Disclosure+in+ASEAN+-+Full+Report+%281%29.pdf>.

50 Corporate Human Rights Benchmark. 2019. “2019 Key Findings”. <https://www.corporatebenchmark.org/sites/default/files/2019-11/CHRB2019KeyFindingsReport.pdf>.

51 Article 30, ASEAN CSR Network and Institute of Human Rights and Peace Studies (Mahidol University). 2019. *Human Rights Disclosure in ASEAN*. <https://static1.squarespace.com/static/602c19fa95b65244e2fd70f5/t/613911a4b35f70654a08414d/1631130031031/Human+Rights+Disclosure+in+ASEAN+-+Full+Report+%281%29.pdf>.

52 Shift. 2019. “The Current Use of Metrics in Company Human Rights Reporting Southeast Asia”. https://shiftproject.org/wp-content/uploads/2019/09/Current%20use%20of%20metrics_ASEAN.pdf.

TOP TEN COMPANIES IN SELECT ASEAN COUNTRIES

The following companies had the highest UNGP diagnostic disclosure scores across Indonesia, Malaysia, the Philippines, Singapore and Thailand and hence represent the most mature companies in select countries.⁵³

N	Country	Company	GICS Description	HR Disclosure
1	Malaysia	Sime Darby Plantation Bhd	Consumer Staples	95%
1	Malaysia	Sime Darby Berhad	Industrials	95%
2	Singapore	Wilmar International Ltd	Consumer Staples	90%
2	Thailand	CP All PCL	Consumer Staples	90%
2	Thailand	PTT Global Chem	Materials	90%
2	Thailand	Indorma Venture	Materials	90%
3	Thailand	Kasikorn Bank PCL	Financials	86%
3	Thailand	PTT PCL	Energy	86%
3	Thailand	Thai Oil PCL	Energy	86%
3	Thailand	Siam Commercial Bank Pub Co	Financials	86%

Sime Darby Plantation stands out among a small cohort of large, publicly listed business enterprises in Asia as the most progressive example of human rights disclosure in the region. For that reason, they are an interesting case study to gauge what human rights disclosure, which is distinct from human rights performance, may or may not indicate about the status of Pillar II in Asia. Human rights disclosure is critical as it is a lens for stakeholders into an enterprise's HRDD. However, the obvious issue is that business enterprises can choose what to disclose and what to conceal.

The fact that Sime Darby Plantation has a Human Rights Charter is an accomplishment that would have been unthinkable a few years ago. It shows that some large business enterprises in the region are well aware of the UNGPs and acknowledge their corporate responsibility to respect human rights.

In general, these trends also pose key questions for the business community. Are public listed companies doing enough? Are they doing the right things the right way? Are they achieving tangible results? Are they allocating enough resources and authority to their corporate human rights personnel and programmes? How does a charter, or similar interventions, translate to outcomes for affected individuals and communities? Expectations and frameworks around human rights disclosure will need to mature significantly before stakeholders are able to answer these questions. In such cases, stakeholders may lack important insights, such as how human rights impacts and risks are assessed or how corporate respect for human rights trickles down supply chains, which almost certainly interface with small enterprises and the informal economy.

53 Article 30, ASEAN CSR Network and Institute of Human Rights and Peace Studies (Mahidol University). 2019. *Human Rights Disclosure in ASEAN*. <https://static1.squarespace.com/static/602c19fa95b65244e2fd70f5/t/613911a4b35f70654a08414d/1631130031031/Human+Rights+Disclosure+in+ASEAN+-+Full+Report+%281%29.pdf>.

Perhaps the most widespread question or concern that stakeholders may flag in relation to the extract from Sime Darby Plantation's Charter above relates to the tension between international and national standards: "When faced with conflicts between local and international norms and/or standards, we uphold the higher standard, where possible." "Where possible" reveals a point of subjectivity and possible conflict. While this wording is in line with the UNGPs, the commentary under UNGP Principle 11 asserts:

The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.

On the other hand, UNGP Principle 23(b) states: "In all contexts, business enterprises should: Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements." The commentary under Principle 23 elaborates:

Where the domestic context renders it impossible to meet this responsibility fully, business enterprises are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances and to be able to demonstrate their efforts in this regard.

In Asia and beyond, stakeholders including business enterprises have to interpret what constitutes the greatest extent possible in a given circumstance. As Patchareeboon Mam Sakulpitakphon and others note, corporate actors in Asia remain fixated on legal liability seen through the lens of domestic law. In this context, there may be an unwillingness to meaningfully strive towards the principles of international recognized human rights—and human rights disclosure will reflect this reality, even if tacitly.

If stakeholders are to make meaningful human rights disclosure the norm in Asia, it will require multifaceted efforts. Business enterprises are understandably hesitant to commit to international standards that they are unable to meet. In this sense, only so much progress can be made on Pillar II without an enabling environment. Informants spoke about the importance of pushing business enterprises to use their leverage to push for reform of laws and regulations that undermine the UNGPs. Beyond this, advancing human rights disclosure in the region will require awareness raising, vigilance against rights-washing, demarcating and elevating good practice, creating incentives and sanctions, and corporate trailblazers who are willing to openly disclose information about the lived experiences of affected rights holders.

The reality is that there are many countries and communities where there is so much anxiety around human rights that BHR is a non-starter. In these circumstances, CSR can make things move and lay the foundation for BHR work down the road. CSR is a bridge to unreachable places in Asia, but I'm afraid that BHR players appear too territorial to consider that.

- Thomas Thomas. Interview, November 2020.

INTERACTIONS BETWEEN BHR AND CSR

The relations between proponents of BHR and champions of CSR are often uncertain and sometimes tense in Asia. These interactions impact Pillar II because corporate actors can receive mixed or contradicting messages from seemingly alike messengers, both of whom speak in terms of responsible business conduct. It is important for the BHR movement in Asia to have some kind of stance on CSR, especially because CSR is entrenched and remains popular in the region. However, clarifying one's stance on CSR is easier said than done. There are two dilemmas that surface.

First, widely different conceptualizations of CSR coexist in Asia and beyond. There is not one definition of CSR, but many. When CSR is spoken of, one has to decipher what version of CSR is being discussed. Traditional views of CSR may focus entirely on philanthropy. This view of CSR has a deep history in Asia. That legacy is entrenched and remains strong across South and Southeast Asia. India's Companies Act of 2013 (or 'CSR Law') is exemplary of that traditional, philanthropic view of CSR. The Companies Act was passed by Parliament in 2013 and requires Indian business enterprises with a net worth of US\$77.5 million, revenue of US\$155 million or net profit of US\$660,000 to contribute 2 percent of their profits to CSR. The law provides clear procedures for what constitutes CSR contributions and the spend of this money can be monitored.⁵⁴ But, as Banerjee explains:

[The law] mandates that CSR activities cannot be undertaken exclusively for the benefit of employees of the company or their family members—clearly an effort to deter corruption. However, this approach takes a very conventional—some would say outdated—approach to CSR, a concept that in recent years has evolved away from simple philanthropy to embrace social investments that link back to a company's core business strategy.⁵⁵

54 "Education Sector Received the Lion's Share of Corporate CSR spend: Govt". *Business Standard*. 26 November 2019. www.business-standard.com/article/pti-stories/education-received-major-chunk-of-csr-spend-by-corporates-govt-119112501188_1.html.

55 Joya Banerjee. "India Mandates Corporate Social Responsibility: The 2 Percent Bill". *GBCHealth*. <http://archive.gbchealth.org/asset/india-mandates-corporate-social-responsibility-the-2-percent-bill>.

From a BHR perspective, mandating a 2 percent contribution of profits does nothing to address the harm that can be done in the pursuit of profit. It does not position affected individuals and communities as rights holders who are entitled to accountability and have agency. In this case, the contradictions between BHR and CSR are obvious. However, some conceptualizations of CSR in Asia are more evolved; they have integrated BHR frameworks and may even see BHR as core to CSR. Some practitioners may even use BHR and CSR interchangeably. In these cases, BHR practitioners may be more receptive to CSR language and approaches. Yet, as Wettstein posits, even when CSR cross-pollinates with BHR, there remains the risk of that being “counter-productive to the BHR agenda at a more fundamental level.”⁵⁶ Still, when BHR practitioners encounter approaches to CSR that feature BHR, they may want to take a more conciliatory stance. The problem is that BHR practitioners rarely know what version of CSR they are facing.

The second dilemma is a reality of Asia’s political landscape. As Thomas Thomas describes above, there are many settings and States throughout the region where human rights are a non-starter. There may be no openings to discuss BHR with government or corporate actors. In these circumstances, should the BHR movement lean on existing CSR networks? Informants were torn on this question. CSR networks may be able to open doors and create bridges for the BHR movement. In an interview, Thomas Thomas proposed that this is precisely how BHR gained traction in Asia:

It took years of coffees and discussions to persuade key actors to even consider any notion of responsible business conduct. Without that progress on CSR, there would be no talk of business and human rights in the region. (Interview, October 2020).

As the BHR movement looks to expand its reach, there may be good reason to turn to CSR networks in the region who have personal connections and experience in navigating local cultures. Yet interactions between CSR and BHR remain fraught. Many civil society informants felt that CSR posed a threat to the fidelity of the BHR movement. Nonetheless, CSR may be an entry point to new frontiers. Stakeholders will need to work through these quandaries. The evolution from traditional CSR to BHR is neither guaranteed nor linear and BHR stakeholders in Asia will need to manage this transition in the decade ahead.

56 Florian Wettstein. 2020. “Chapter 2: The history of business and human rights and its relationship with corporate social responsibility”, in *Research Handbook on Human Rights and Business*. Surya Deva and David Burchill, eds: 22–45. <https://www.elgaronline.com/view/edcoll/9781786436399/9781786436399.00007.xml>

SMEs are sitting out there with absolutely no awareness of the UNGPs. It's not the absence of goodwill, it's total unawareness. There will be medium and small companies that implement the UNGPs with or without government support, but they have to first know what the UNGPs are all about and what they are supposed to do.

- Michael Addo, Professor, University of Notre Dame Law School and Former Member of the United Nations Working Group on Business and Human Rights (2011-2018). Interview, October 2020.

SMALL AND MEDIUM ENTERPRISES

Despite being the backbone of global economies and integral components of global supply chains, SMEs, including micro-enterprises, have been, with rare exceptions, neglected by the BHR movement in Asia and beyond. The Asia Development Bank estimates that SMEs “make up more than 96 percent of all Asian businesses, providing two out of three private-sector jobs on the continent.”⁵⁷ This gives a sense of how vast the void is that Michael Addo describes. Every informant who spoke about SMEs agreed that they have been all but untouched by BHR.⁵⁸ This appears to be a global gap. In an interview, Addo recalled that SMEs were not directly involved in crafting the UNGPs. While organizations and advisory groups have created resources to assist SMEs in understanding their responsibilities under the UNGPs, there was consensus among informants that these materials generally do not reach SMEs in the region in meaningful ways.⁵⁹ Language barriers and a lack of foundational knowledge around human rights complicate capacity-building in the area. Yet, numerous informants felt that a key task was to consult with SMEs and rights holders affected by these enterprises to gain an understanding of what kind of awareness and capacity they want and need, as well as what they stand to gain by respecting human rights.

Regardless of what hurdles stand in the way of effectively reaching SMEs, they are worth overcoming. The garment industry is a backbone of the Bangladesh economy and 70 percent of garment factories in Bangladesh are small- and medium-sized. The human rights impact of those SMEs has implications for individuals, communities, the industry and the entire country.⁶⁰ In Indonesia, SMEs “account for 99 percent of all enterprises, employ 89 percent of the private sector’s workforce and contribute 57 percent to the

57 Naoyuki Yoshino and Farhad Taghizadeh-Hesary. 2018. “The Role of SMEs in Asia and Their Difficulties in Accessing Finance”. Asian Development Bank Institute. [www.adb.org/sites/default/files/publication/474576/adb-
wp911.pdf](http://www.adb.org/sites/default/files/publication/474576/adb-wp911.pdf).

58 In Asia, there is no uniform or regional consensus as to what exactly constitutes an SME. For example, Indonesia caps an SME at 100 employees, while SMEs in Cambodia employ between 11 and 50 employees. In Thailand, definitions of SMEs vary based on industry.

59 A good example of a concerted attempt to reach SMEs can be found in Annexure 2 of India’s National Guidelines on Responsible Business Conduct: https://www.mca.gov.in/Ministry/pdf/NationalGuideline_15032019.pdf

60 Refayet Ullah Mirdha. “Small Garment Factories Struggling to Stay afloat”. Daily Star. 23 February 2021. [www.
thedailystar.net/business/news/small-garment-factories-struggling-stay-afloat-2049633](http://www.thedailystar.net/business/news/small-garment-factories-struggling-stay-afloat-2049633).

country's GDP. Further, nearly half of SMEs in Indonesia are women owned."⁶¹ Thus, respect for human rights at the level of SMEs is central to the discussion about gender equality in Indonesia and elsewhere. The failure to effectively reach SMEs in the region means that BHR is missing most of the rights holders and the severe human rights risks they encounter, which are continuously compounding because SMEs lack the resources and corporate governance architecture to address them.

The task for the BHR movement in Asia is to find a way to cater to SMEs. This will require new thinking and approaches that meet SMEs where they are, that respond to both their demands, requests and limitations. This will require meaningful consultation with SMEs and the rights holders these enterprises affect. Those efforts could reach hundreds of millions of people and also provide a bridge to the region's millions of workers in the informal economy. For this reason, informant after informant proposed that SMEs need to be a priority in the decade ahead. Surya Deva of the UNWG proposed that this focus on SMEs is an opportunity to reimagine success in the field of BHR:

Real success of the BHR agenda would be when you could walk down the streets of various cities in Asia and find shops and workers who know about the UNGPs. (Interview, December 2020).

61 International Finance Corporation. 2016. "Women-owned SMEs in Indonesia: A golden opportunity for local financial institutions". www.ifc.org/wps/wcm/connect/260f2097-e440-4599-91ec-e42d45cf3913/SME+Indonesia+Final_Eng.pdf?MOD=AJPERES&CVID=lj8qhPY.

Companies are exploring ways to restrict the work of human rights defenders. They go to a forum that has proven itself to be effective and these are the courts. The moment the case is filed, the case is given some semblance of legitimacy because the companies can then say that they are using legal mechanisms to address the issues and so the narrative is effective and powerful.

- Golda Benjamin, Programme Director, Business and Human Rights Resource Centre. Interview, September 2020.

STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION

In Asia, business enterprises have often exercised their extensive political and economic power through courts to silence or intimidate affected rights holders and HRDs. A particularly prominent form of harassment through litigation is known as strategic lawsuits against public participation, or SLAPPs.⁶² A SLAPP lawsuit is filed strategically, for example, by a corporation against a group or activist opposing certain action taken by the corporation. Typical claims underlying a SLAPP suit are libel, slander, defamation or restraint of business. These lawsuits are used by litigious business enterprises to silence victims and protestors and intimidate critics. SLAPPs take advantage of already weak regulatory frameworks, making remedies and justice difficult to access.

This type of judicial harassment is on the rise globally and regionally. Recent research from the BHRRC provides insight into the status of SLAPPs in the region. In their March 2020 report on SLAPPs, it was shown that in 2015 the BHRRC recorded 86 instances of judicial harassment globally.⁶³ By 2019, the BHRRC recorded 286 instances of judicial harassment, approximately half of which exhibited elements of a SLAPP. Within the Southeast Asia region from 2015 to 2019, researchers recorded 131 acts of judicial harassment against HRDs, approximately half of which could be classified as SLAPPs.⁶⁴ During the COVID-19 global pandemic, as governments in Asia put further restrictions on speech and assembly, SLAPPs became even more common.⁶⁵ As will be discussed, SLAPP lawsuits are made possible when States do not effectively protect human rights and allow business enterprises to weaponize the legal system against affected rights holders and HRDs.

62 The "Mind the Gap" framework presents a number of legal or pseudo-legal corporate strategies that are used to avoid responsibility for human rights abuses around the world. The five main strategies are: constructing deniability, avoiding liability through judicial strategies, distracting and obfuscating stakeholders, undermining defenders and communities, and utilizing State power. <https://www.somo.nl/wp-content/uploads/2020/07/Mind-the-Gap-summary.pdf>.

63 BHRRC. (2020). Strategic Lawsuits Against Public Participation: Southeast Asia cases & recommendations for governments, businesses, & civil society. March. https://media.business-humanrights.org/media/documents/files/documents/SLAPPs_in_SEA_2020_Final_for_website.pdf.

64 The Business & Human Rights Resource Centre (BHRRC) defines a SLAPP as a lawsuit filed or initiated with the intent to intimidate and harass those engaged in acts of public participation, including criticism or opposition to certain activities.

65 BHRRC. (2020). Slapped into Silence. <https://www.business-humanrights.org/en/latest-news/slapps-are-on-the-rise-in-asia-as-governments-use-the-pandemic-to-silence-free-speech-says-article/>.

Informants who specialize in SLAPPs attribute this continuous intensification to the rise of authoritarianism in the region, few legal frameworks to protect HRDs and civil society's growing political strength. As civil society in Asia has grown stronger and louder, business enterprises have turned to SLAPPs as a countermeasure, as Golda Benjamin describes above. SLAPP litigation is immensely time and resource intensive for both the accused and the organizations who defend them. Victims, HRDs, CSOs and legal aid networks in the region rarely have surplus time and resources, so SLAPPs can induce paralysis and significant harm, even when the accusations are completely unfounded.

SLAPP is an issue that transcends all three UNGP pillars. It is a Pillar I concern as States have made it possible for SLAPPs to persist, or at least have failed to properly deter them. It is true that many prominent SLAPP cases have resulted in acquittals, but acquittals do not nullify the cost, fear and stress that SLAPPs inflict. It is obviously a Pillar II issue as business enterprises are the culprits of SLAPPs and SLAPPs are a corporate failure to respect human rights. It is a Pillar III issue because SLAPPs are an offensive move by business enterprises to disrupt the possibility of access to remedy for the affected rights holders who are advocating or being advocated for. They are also a State and corporate failure to ensure access to effective remedy.

There is a need to prevent judicial mechanisms from being used against victims and HRDs through both policy and advocacy. While anti-SLAPP laws are more developed in Australia, Canada and the United States, they provide models for Asian countries to develop their own similar laws. The primary purpose of an anti-SLAPP law is to protect free speech, provide for speedy hearings of the claims and offer the defendant the ability to seek recovery of legal fees and punitive damages. The Philippines and Thailand have taken initial steps to address the issue of SLAPPs in their national laws, but require significantly more development to be effective.⁶⁶ There is little sign that this will break the practice of SLAPPs being a first resort for many business enterprises that face public scrutiny through the region. Informants spoke about the need for new laws and reform in tandem with judicial and prosecutorial training to educate judges and other public officials on the characteristics of SLAPPs. They also spoke about the need for more bottom-up interventions to confront SLAPPs, including targeted support of local legal aid networks and projects to elevate the voices and profiles of SLAPP victims.

⁶⁶ The Philippines is currently the only country with a law defining SLAPPs. In Thailand, the NAP identified the protection of HRDs as a priority issue. They set out several action points aimed at protecting HRDs, including a study on the guidelines for development of laws, regulations or measures to prevent SLAPPs.

But have multi-stakeholder initiatives delivered on their promise to protect human rights? After reflecting on a decade of research and analysis, our assessment is that this grand experiment has failed. MSIs are not effective tools for holding corporations accountable for abuses, protecting rights holders against human rights violations, or providing survivors and victims with access to remedy. While MSIs can be important and necessary venues for learning, dialogue and trust-building between corporations and other stakeholders—which can sometimes lead to positive rights outcomes—they should not be relied upon for the protection of human rights. They are simply not fit for this purpose.

– MSI Integrity (2019). *Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance*.

MULTI-STAKEHOLDER INITIATIVES

BHR stakeholders in Asia and beyond have invested significant resources and hope in multi-stakeholder initiatives (MSIs). MSIs “bring together government, [intergovernmental organizations], civil society and the private sector to address complex development challenges that no one party alone has the capacity, resources and know-how to do so more effectively.”⁶⁷ There is no one type of MSI. They can take many different forms and each may have unique features. The most popular MSIs tend to be voluntary; initiated, led, driven and oriented by corporations; standard-setting; constructive rather than confrontational; and semi-transparent, meaning that information on proceedings or decisions is private or privy. They are often but not always industry-led and aim to address governance gaps and establish standards and mechanisms for that specific industry.

MSIs in Asia “cover almost every major industry, from certifying food or consumer products as ‘sustainable’, ‘fair’ or ‘ethical’ to establishing good practices for internet companies in respect of privacy and freedom of expression online.”⁶⁸ Notable standard-setting MSIs in the region include the Roundtable on Sustainable Palm Oil, the Fair Labor Association, the Extractive Industries Transparency Initiative, the Marine Stewardship Council, the Voluntary Principles on Security and Human Rights, the Global Reporting Initiative and the UN Global Compact. Asia also features MSIs with a narrower scope, such as the Seafood Task Force in Thailand.⁶⁹ States and corporate actors in Asia appear heavily invested in these voluntary initiatives and accompanying mechanisms,

67 Jeff Thindwa. “Multi stakeholder initiatives: Platforms of collective governance for development”. World Bank. 7 July 2015. <https://blogs.worldbank.org/governance/multi-stakeholder-initiatives-platforms-collective-governance-development>.

68 MSI Integrity. 2020. *Not Fit-for-Purpose: The grand experiment of multi-stakeholder initiatives in corporate accountability, human rights and global governance*. https://www.msi-integrity.org/wp-content/uploads/2020/07/MSI_Not_Fit_For_Purpose_FORWEBSITE.FINAL_.pdf.

69 Formerly the Shrimp Sustainable Supply Chain Task Force.

evidenced by the substantial resources and marketing behind MSIs.⁷⁰ The zeal is easy to understand, particularly in a region where lacking or absent State protections and regulations create corporate and industry-level voids. The question is whether the enthusiasm is merited. Are MSIs effective antidotes to business-related harm? Can they catalyse the fuller realization of the UNGPs?

BHR stakeholders in Asia and beyond eagerly awaited the findings of MSI Integrity's decade-long study of 40 of the most prominent MSIs in the world.⁷¹ In July 2020, MSI Integrity released the far-reaching report: *Not Fit-for-Purpose: The Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance*.⁷² As the title of the report suggests and as the introductory quote to this section reveals, the decade of research found that while MSIs are "a prominent human rights intervention", they are not an effective one, especially when measuring success in terms of the lived experiences of affected rights holders:

*[A]s robust rights protection or accountability institutions, MSIs have failed. Instead, MSIs have increasingly evolved to replicate traditional power structures, which has meant that they better serve corporate interests than those of rights holders. Ultimately, the hopes and expectation of governments, MSIs, consumers, businesses, civil society organizations, or others that this grand experiment in voluntarism would actually close governance gaps, have proved unfounded.*⁷³

Why have MSIs in the region and beyond failed to achieve outcomes for rights holders? The report points to two fundamental character flaws:

*First, MSIs are not rights holder-centric. In general, MSIs employ a top-down approach to addressing human rights concerns, which fails to centre the needs, desires, or voices of rights holders: the people whose living and working conditions are the ultimate focus of MSIs, whether they are farm workers, communities living near resource extraction sites, or internet users. Second, MSIs have not fundamentally restricted corporate power or addressed the power imbalances that drive abuse. Companies have preserved their autonomy and safeguarded their interests throughout the design, governance and implementation of MSIs.*⁷⁴

In an interview, lead researcher and author of the MSI Integrity report explains that a big part of the problem is unrealistic expectations:

70 "Many MSIs were created at the specific behest of governments, or with their explicit support; indeed, some governments even became members of MSIs, in which civil society and corporations have decision-making power over the nature and quality of governmental reforms." MSI Integrity. 2020. *Not Fit-for-Purpose: The grand experiment of multi-stakeholder initiatives in corporate accountability, human rights and global governance*.

71 The Institute for Multi-Stakeholder Initiative Integrity (MSI Integrity) was incubated at the International Human Rights Clinic at Harvard Law School from 2010 to 2012. MSI Integrity was established after several NGOs and government officials—concerned with understanding whether MSIs were working—expressed the need for an independent organization to focus on measuring the effectiveness of MSIs.

72 MSI Integrity. 2020. *Not Fit-for-Purpose: The grand experiment of multi-stakeholder initiatives in corporate accountability, human rights and global governance*. https://www.msi-integrity.org/wp-content/uploads/2020/07/MSI_Not_Fit_For_Purpose_FORWEBSITE.FINAL_.pdf.

73 Ibid.: 5.

74 Ibid.

Accountability and remedy, those are functions for the State. Until [industry-led] initiatives are able to more honestly say what they are and aren't able to do, we are going to remain in this complicated scenario where you have certain initiatives claiming or creating a perception that there is more compliance with human rights standards than can reliably be seen to be the case. (Interview, September 2020).

This sentiment was well captured by the International Trade Union Confederation in a 2015 statement:

Today, many voluntary private initiatives seek to show that it is possible to ethically to do business in countries where the government does not protect such human rights as the right to join or form trade unions or to bargain collectively ... It is not possible to audit for the recognition of freedom of association. For example, even when workers are consulted during an auditing process, it is meaningless to ask whether they believe that they have the freedom to associate when there is no practical means for them to do so. This practice has had the effect of redefining the human right for the purpose of showing to the public that there are no violations of human rights.⁷⁵

It may be too soon to abandon MSIs initiatives entirely. Indeed, Not Fit for Purpose does not call on BHR stakeholders to dismantle MSIs. Rather, it declares, "It is time to rethink the role of MSIs." As the BHR movement in Asia recalibrates for the next decade, there seem to be two questions that deserve consideration with regards to MSIs. First, how much attention and resources should BHR stakeholders invest in initiatives that have largely proven ineffective? This is a question that may invite very different answers from government, corporate and civil society actors. Second, if the BHR movement in the region decides to get behind MSIs, what can be done to properly design and position MSIs? Informants who have taken part in or studied MSIs warned against trying to accomplish too much through initiatives that are voluntary and often corporate driven. As the conclusion of Not Fit for Purpose stated:

The presence of an MSI should not be a substitute for public regulation. MSIs do not eliminate the need to protect rights holders from corporate abuses through effective regulation and enforcement. To the contrary, the existence of an MSI should put governments—as well as MSIs and their supporters—on notice that a governance gap exists, and that they need to supplement the voluntary efforts of that MSI with mandatory measures at local, national, and international levels.⁷⁶

Thus, there may be ways to reimagine MSIs, to make them more centred around rights holders and anchored in accountability. If MSIs can be reoriented in this way, there is a real possibility that MSIs can facilitate the fuller realization of the UNGPs in Asia.

75 International Trade Union Confederation et al. *The UN Guiding Principles on Business and Human Rights and the human rights of workers to form or join trade unions and to bargain collectively*: 7. https://www.ituc-csi.org/IMG/pdf/12-11-22_ituc-industrial-ccc-uni_paper_on_due_diligence_and_foa.pdf

76 MSI Integrity. 2020. *Not Fit-for-Purpose: The grand experiment of multi-stakeholder initiatives in corporate accountability, human rights and global governance*: 4. https://www.msi-integrity.org/wp-content/uploads/2020/07/MSI_Not_Fit_For_Purpose_FORWEBSITE.FINAL_.pdf

Case study: The Accord on Fire and Building Safety in Bangladesh

Bangladesh's Accord on Fire and Building Safety in Bangladesh (the Accord) provides an excellent example for BHR stakeholders in Asia of how to reimagine a MSI. The Accord is often compared with its chief competitor, the Alliance for Bangladesh Worker Safety (the Alliance). While the Alliance is predicated on a traditional non-binding and worker-exclusive model, the Accord is inclusive and enforceable.⁷⁷

The Accord was signed on 15 May 2013, in the immediate aftermath of the Rana Plaza building collapse that killed more than 1,100 and injured more than 2,000 people. The Accord is a legally binding agreement between global brands, retailers, factory managers and both global and local trade unions.⁷⁸ The Accord is governed by a Steering Committee that features equal representation between signatory enterprises and trade unions and the International Labour Organization (ILO) as a neutral chair.⁷⁹ The Accord represents a fundamental shift in how safety violations are addressed at garment factories. Previous corporate-led programmes were voluntary and lacked both enforcement mechanisms and transparency. Under the Accord, brands and retailers are legally responsible for ensuring the workers who make their clothes work in safe conditions.⁸⁰

The Accord is not a conventional MSI. Whereas nearly all MSIs are voluntary and corporate driven, the Accord follows a new paradigm known as worker-driven social responsibility (WSR). As the name suggests, in the WSR framework, workers and their organizations initiate the MSI and drive the solutions. The WSR-Network proclaims:

[F]rom the agricultural fields of Florida, which were once dubbed “ground zero for modern-day slavery” by federal prosecutors, to the apparel sweatshops of Bangladesh, the locus of some of this century’s most horrific factory fires and building collapses ... In these oppressive environments, WSR has demonstrated its ability to eliminate longstanding abuses and change workers’ lives for the better.

The Accord has: “conducted 30,000 inspections and remedied more than 90 percent of violations at 1,000 factories. The fixes affect 2.5 million workers ... The Accord brought credibility—and, importantly, the dollars provided by international brands facing a PR disaster—to improving safety conditions in Bangladesh’s garment factories.”⁸¹ The Accord or WSR model does not guarantee success. Indeed, it depends on genuine buy-in from an array of stakeholders. Further, the Accord has a narrow focus and would need a more expansive scope to ensure full coverage of the UNGPs. Yet, the Accord shows that it is possible for MSIs to be centred on rights holders and anchored in accountability.



77 Jaakko Salminen. 2018. “The Accord on Fire and Building Safety in Bangladesh: A new paradigm for limiting buyers’ liability in global supply chains?”. *The American Journal of Comparative Law*. Vol. 66(2): 411–451. <https://academic.oup.com/ajcl/article/66/2/411/5079089>.

78 BHRRC. “The Accord on Fire and Building Safety in Bangladesh”. Business & Human Rights Resource Centre. www.business-humanrights.org/en/latest-news/the-accord-on-fire-and-building-safety-in-bangladesh/.

79 See Accord on Fire and Building Safety in Bangladesh. “About”. <https://bangladeshaccord.org/about>

80 See Worker Rights Consortium. “Bangladesh Accord”. <https://www.workersrights.org/our-work/bangladesh-accord/>

81 Saurav Sarkar. “Bangladesh Accord Gets a Lifeline while Workers Organize Wildcat Strikes”. *Labor Notes*. 6 August 2019. <https://labornotes.org/2019/08/bangladesh-accord-gets-lifeline-while-workers-organize-wildcat-strikes>.

Banks can cause human rights violations themselves, such as through discrimination in hiring or service provision. They can also contribute or be linked to human rights violations through lending or other financial support for companies responsible for violating human rights. For example, banks have provided finance for agricultural companies involved in land grabs; given loans for large dams which displace Indigenous Peoples; provided lending to mining companies which have benefited from paramilitary violence around their operations; and supported companies with forced or child labour in their supply chains.

- BankTrack⁸²

BANKS

In the same way that national exchange and security commissions stand out as having strong potential to support Pillar I, banks may be force multipliers under Pillar II. Central banks, reserve banks and monetary authorities can, in relation to Pillar I, mainstream HRDD within commercial banks. At present, there does not appear to be BHR interest at the level of these State banking institutions in the region. That may change and there is every reason for BHR stakeholders to look for opportunities to instigate that change. However, at the moment, change appears to be possible at the level of commercial banks in Asia. Many informants pointed to banks as potentially important proponents of BHR, as described above by BankTrack, who can drive change by improving and changing their practices.

Banks are key to the business world. Almost all business enterprises require a relationship with a bank. Thus, if commercial banks introduce HRDD into their lending, project evaluation and investment processes, they can influence corporate respect for human rights. Their HRDD need not be limited to large projects and business enterprises. Even on a small scale, commercial banks could compel BHR conversations and change. The moment that HRDD becomes a substantive part of commercial banking, particularly around lending and investment decisions, BHR becomes a mainstream consideration, which is why banks are a key target for advocacy for many BHR stakeholders in Asia.

82 Ryan Brightwell and Hannah Greep. "Banks and Human Rights". BankTrack. 4 May 2021. www.banktrack.org/campaign/banks_and_human_rights.

Case study: Kasikorn Bank

Kasikorn Bank in Thailand is one example of a commercial bank in the region that has begun to introduce HRDD into their banking. Kasikorn Bank's human rights policy sits under their disclosure and transparency efforts. The policy commits Kasikorn Bank to the UNGPs and lays out the guidelines "for corporate-wide" implementation. Kasikorn Bank HRDD's guidelines cover stakeholders, including customers which encompasses business enterprises. Of particular interest are the commitments under lending and investment.⁸³

Lending

KBank has identified human rights as one of the factors in considering credit approval. As stated in the Environmental, Social and Governance (ESG) policy, lending transactions must not link to businesses or activities involved with a human rights violation, e.g., human trafficking or exploitation as defined by the laws, social morality and practices of each industry.

Investing

KBank has incorporated human rights issues in our investment analysis, decision-making process and portfolio construction across all asset classes. ESG aspects are integrated into our investment policy.

As with most human rights disclosures, stakeholders cannot know for certain if or how these commitments are carried out and to what effect. If this HRDD were to be carried out consistently and competently, the result would be a wave of pressure, incentives and dialogue that transcend business enterprises across the entire spectrum of scope, scale and sector. Of course, the promise of change and tangible results all depends on whether the HRDD is carried out appropriately, reliably and effectively. Hence, there is good reason for BHR practitioners to engage, guide and support the likes of Kasikorn and other regional banks that may be moving to champion BHR.



⁸³ Under the 'investment' tag, Kasikorn Bank may position itself as a shareholder rather than a stakeholder. In any case, the potential impact on human rights remains.

We need to build more effective ecosystems. How can multiple mechanisms and communities work together to create a more effective remedy ecosystem?

- Martijn Scheltema, Lawyer and Chair of the International Bar Association's Business and Human Rights Committee. Interview, September 2020.

PILLAR III: ACCESS TO REMEDY

States and business enterprises have a complementary obligation to ensure that affected rights holders have access to effective remedy. Three types of mechanisms provide access to effective remedy in business-related human rights abuses: State-based judicial mechanisms, State-based non-judicial grievance mechanisms and non-State-based grievance mechanisms (NSBGM). In order to meet their objectives, these mechanisms must not only exist, but also be accessible to rights holders and result in remedial solutions that are effective in the eyes of victims, as well as other stakeholders. Remedies are intended to rectify a grievance which is defined by the UNGPs as "a perceived injustice evoking an individual's or a group's sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities." Grievance mechanisms can take many forms, all of which are acceptable, though the outcome should create a sense on the part of the victim and public that justice was served. Surya Deva of the UNWG goes further to explain:

Key elements integral to effective remedy, are for example, they should be responsive to the diverse experiences and expectations of rights holders; remedies should be accessible, affordable, adequate and timely; the affected rights holders should have no fear of victimization in the process of seeking remedies; and a 'bouquet of remedies' should be available to rights holders affected by business-related human rights abuses.⁸⁴

Of the three UNGP pillars, access to remedy is widely recognized to be the least developed. This is particularly true in Asia. The UN Human Rights Council has described remedy as "elusive" and the EU Agency for Fundamental Rights found that "access to remedy leading to financial compensation remains largely ineffective for alleged victims of business-related abuses."⁸⁵ Informants spoke of twofold concerns regarding the status of Pillar III in the region. First, progress under Pillar III has been rare and hard-won. Second, numerous informants warned of backsliding. They explained that effective remedy is becoming increasingly hard to access, particularly in the COVID-19 era.

84 Article 30 and Institute of Human Rights and Peace Studies (Mahidol University). 2019. Navigating a New Era of Business and Human Rights. https://static1.squarespace.com/static/602c19fa95b65244e2fd70f5/t/6139129c60236d737eedd7f0/1631130280077/a_new_era+%281%29.pdf.

85 European Union Agency for Fundamental Rights. 2020. "Business and Human Rights – Access to Remedy". https://fra.europa.eu/sites/default/files/fra_uploads/fra-2020-business-human-rights_en.pdf.

The following section attempts to capture the current status of Pillar III in the region by looking at State-based judicial mechanisms, State-based non-judicial grievance mechanisms and non-State-based non-judicial grievance mechanisms in the region, or where grievance mechanisms are absent or lacking, considering the gap. State-based judicial mechanisms normally include the State's court system or other tribunal or regulatory bodies which have legal powers. A State-based non-judicial grievance mechanism may include bodies like NHRIs, ombudsmen, OECD national contact points and other formal dispute resolution mechanisms.⁸⁶ NSBGMs can be, for example, a process created within a business enterprise, such as a complaint body, or a third-party system such as a village level or religious body, or a mechanism selected by the parties themselves. The existence of grievance mechanisms is not enough, as they must be designed and function in a way that is genuinely accessible to all affected rights holders and engage victims and potential victims in a way that reaches a remedy that is effective for them and other stakeholders. While there is cause for hope about remedy in the region, too often the reality is that grievance mechanisms are inaccessible, ineffective or can be manipulated. Finally, access to remedy in relation to extra-territorial human rights obligations has received increasing attention, particularly from civil society in the region.

The list of constraints and challenges relating to remedy in the region is long. Grievance mechanisms can also serve to protect violators from affected rights holders. State-based judicial mechanisms are the platforms where SLAPPs play out and proceedings which drain rights holders of their resources and legitimize irresponsible business conduct. State-based non-judicial grievance mechanisms regularly lack the mandate or capacity to ensure effective remedy, which is not necessarily the fault of those institutions but result in the illusion of access to remedy. NSBGMs in the region are, with few exceptions, built to sanction individuals and respond to traditional compliance issues, rather than to remediate business-related violations or abuses. Affected rights holders and organizations that look to them for their pursuits of remedy regularly lack adequate resources. Informants also spoke about time limitations, a lack of applicable law, costs, legal illiteracy in marginalized communities, immunity, and a lack of cross-border accountability. Numerous informants recalled the saying "justice only happens when you run out of money."

Informants spoke recurrently of the need to recalibrate Pillar III interventions to break the stagnation and overcome the many hurdles. There are possibilities, even in environments with little or no accountability. The long-term aim of pushing for the creation and/or reformation of remediation mechanisms entails legislative reform, judicial education and addressing access to justice. That aim is not only about advocating and advising governments. It is about fostering greater education and capacity around the judicial and quasi-judicial processes that serve to ensure business accountability. This can be done through Asia's law and business schools and engagement with corporate legal teams. Then there are the more immediate opportunities that focus primarily on mobilizing legal aid networks. Given that a major shift in the regional judicial environment is

⁸⁶ OECD national contact points are only available in OECD countries, but: "Any individual or organisation with a legitimate interest in the matter can submit a case to an NCP regarding a company, operating in or from the country of the NCP, which has not observed the Guidelines"; OECD. 2017. "OECD Guidelines for Multinational Enterprises: Frequently asked questions – National contact points for the OECD Guidelines for Multinational Enterprises". <https://mneguidelines.oecd.org/OECD-Guidelines-for-MNEs-NCP-FAQ.pdf>.

unlikely, there are good reasons to invest in civil society as interlocutors between all actors and as potential catalysts of access to effective remedy. Legal aid groups can play an important role in enabling victims of business-related human rights abuses to seek effective remedy.

Legal aid enables those lacking financial means or coming from vulnerable populations to receive appropriate representation when pursuing fair and equitable justice. It helps individuals understand and defend their rights by developing their legal literacy and supports the principle that all are equal in the eyes of the law. This is precisely the kind of support that HRDs, individual victims and adversely affected communities need when they are challenging the powerful interests of business enterprises and the State. Legal aid is widely available in countries in the Asia-Pacific region, though its quality and effectiveness vary significantly. For example, legal aid to poor, marginalized and disenfranchised groups has existed in Nepal since the 1960s and was formally recognized as a fundamental right of Nepalese citizens in the Constitution. Yet, care must be taken to not overstate the ability of civil society to independently promote access to effective remedy in a region where businesses and governments deliberately or implicitly deny access to human rights.

THE GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

III · ACCESS TO REMEDY

FOUNDATIONAL PRINCIPLE

25. As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

OPERATIONAL PRINCIPLES

STATE-BASED JUDICIAL MECHANISMS

26. States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.

STATE-BASED NON-JUDICIAL GRIEVANCE MECHANISMS

27. States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.

NON-STATE-BASED NON-JUDICIAL GRIEVANCE MECHANISMS

28. States should consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms.
29. To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.
30. Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available.

EFFECTIVENESS CRITERIA FOR NON-JUDICIAL GRIEVANCE MECHANISMS

31. In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

- (a) Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
- (b) Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- (c) Predictable: providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- (d) Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- (e) Transparent: keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
- (f) Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;
- (g) A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:

- (h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

Effective judicial mechanisms are at the core of ensuring access to remedy. Their ability to address business-related human rights abuses depends on their impartiality, integrity and ability to accord due process. States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable

- UNGP Principle 26

STATE-BASED JUDICIAL MECHANISMS

The first principle of the UNGPs requires States to take “appropriate steps to prevent, investigate, punish and redress such abuses through effective policies, legislation, regulations and adjudication.” Judicial mechanisms provide the primary means to address business-related human rights abuses. Effective legal and judicial systems provide clarity and predictability for all actors. They create an environment of deterrence, provide incentives for HRDD within companies, and contribute to the development of jurisprudence that enhances the understanding of how human rights apply to corporate activities in practice. Remedies highlighted in the UNGPs, such as “apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition”, often directly or indirectly depend on effective judicial mechanisms. Whether a State has taken these steps is demonstrated by enforcement agencies having the ability to and actually undertaking proper investigations, or judicial bodies having the authority and ability to impose sanctions following a finding of business civil or criminal liability.

In assessing State-based judicial mechanisms in the region, two initial questions are whether the laws allow for justice and whether the various legal systems are strong enough to ensure justice. Access to remedy, in general, cannot be decontextualized from the strength of the rule of law in a country. The World Justice Project (WJP) Rule of Law Index ranks countries around the world using indicators such as the absence of corruption, enforcement of rulings and fundamental rights. States in Asia mostly sit in the bottom half of the world ranking.⁸⁷ The WJP defines the rule of law as a durable system of laws, institutions, norms and community involvement that delivers accountability, open government, just laws and accessible and impartial dispute resolution. Without a strong, durable system, only so much progress can be made under Pillar III.

Weak rule of law becomes particularly problematic when abuses or adverse impacts are not addressed by domestic criminal, administrative and/or civil law. Throughout the region, land grabs can be deemed legal, despite clearly being a human rights violation,

⁸⁷ Selected countries and their WJP ranking out of 128 countries surveyed: Bangladesh (115), India (69), Indonesia (59), Malaysia (47), Myanmar (112), Nepal (61), Pakistan (120), Sri Lanka (66), Thailand (71) and Viet Nam (85).

by reinterpreting laws around sovereign domain. Union practices may be deemed illegal and thus restricted or sanctioned when those actions are protected under international human rights law and the UNGPs. Even when laws exist, they may be insufficient, especially if they are antiquated and difficult to apply to modern-day situations. For example, Pakistan has a broad range of laws and policies on labour and human rights, along with labour and consumer courts established to provide remediation for human rights abuses within the context of business activities. However, many of these laws were passed in the early twentieth century and need to be updated to align with the UNGPs when it comes to access to remedy.

The consequences of an inefficient and ineffective justice system are compounded when powerful business actors are involved. There is rarely an equality of means in court cases and imbalances begin to take hold long before proceedings begin, as Surya Deva of the UNWG highlights below:

In many cases, victims may not even know about their rights. If a company has taken over their land without consultation, they don't even know what to do. What rights have been violated? Where can they complain? And even if they do know this, they don't have the money. Should they spend money on food or fighting this case, the fate of which is unknown. (Interview, December 2020).

This deep inequality persists even in States that have made progress in improving access to justice and remedy. Providing access to equitable, transparent and accessible grievance mechanisms and appropriate remedy requires the State to play an active role in embedding the necessary laws and processes in the judiciary and relevant government agencies. At present, the technical and practical barriers to judicial remedy are many and State-based judicial mechanisms in Asia regularly serve to prevent rather than facilitate access to effective remedy.

Any attempts to strengthen State-based judicial mechanisms must be country-specific because Asia is home to a diversity of legal systems. Programming BHR responses will necessitate tailoring country-specific responses to legal reform, strategic litigation and the capacity development of judicial stakeholders in order to effectively handle business-related human rights cases. For instance, in general, the legal systems of Bangladesh, India, Malaysia, Nepal and Sri Lanka are based on common law, and Indonesia, Thailand and Viet Nam on civil law, though in reality most of these systems are a mix of civil and common. Differences are also found in the claims that can be made, as some systems allow for class action suits or for public interest litigation, whereas others do not. There are also local cultural and customary norms which may play a large role in certain disputes (for example in land disputes or in gender discrimination) and which require tailored responses.

Each system and situation may present unique opportunities. An example of this is India's National Green Tribunal, which was created by Parliament in 2010 to handle cases specifically relating to environmental protection and the conservation of forests and other natural resources.⁸⁸ It gained recognition in the zero draft of India's NAP. The

88 The Tribunal can hear all civil cases linked to the following laws: The Water (Prevention and Control of Pollution) Act, 1974; The Water (Prevention and Control of Pollution) Cess Act, 1977; The Forest (Conservation) Act, 1980; The Air (Prevention and Control of Pollution) Act, 1981; The Environment (Protection) Act, 1986; The Public Liability Insurance Act, 1991; and The Biological Diversity Act, 2002.

Tribunal's judicial members possess specific environmental expertise and they have a mandate to dispose cases expeditiously, expectantly within six months. The Tribunal's exclusive scope and efficient procedures make it widely accessible.⁸⁹ However, the Tribunal's effectiveness has been undermined by a lack of resources and insufficient support.⁹⁰ Nonetheless, India's National Green Tribunal is precisely the type of judicial mechanism that BHR stakeholders can leverage, study and try to replicate elsewhere.

Case study: Thailand

The complexity of realizing effective remedy through State-based judicial mechanisms can be illustrated through the case of Thailand. Thailand has a civil law system, with the standard division between civil cases and criminal cases. Disputes around business are typically decided in the civil court, though cases may be heard at the Central Labour Court in disputes between employers and employees. Some cases related to BHR may be heard in the Administrative Court, which hears disputes involving the government and its agencies. Cases around the environment, pollution and workplace rights for government officers can be heard here.

Victims of human rights abuses generally instigate a claim at the appropriate Court of First Instance, unless the substance of the case falls within the jurisdiction of a different specialized court, such as the Thai Labour Court. Class action suits are not allowed under Thai law, meaning all cases need an individual complainant. The right to instigate a case is affirmed by the Thai Constitution and the Civil Procedure Code. Cases pursued through the formal judicial system can be lengthy (some taking between 5 and 10 years), expensive and regularly fail to provide an appropriate level of remedy to the complainant. Often findings are not enforced and compensation is not paid, as informants from Thailand noted.

Victims or complainants describe experiences where the court system feels hostile to them. Inadequate laws and mechanisms may hinder access to judicial remedies in a foreign state, for example those laws governing the extra-territorial obligations of companies, the limited scope of jurisdiction, unclear standards for assessing liability, short statutes of limitation, limited capacity and resource of justice actors, and inadequate support for claimants and victims to address their legal, financial and procedural barriers. This reflects a strong need for improving the judicial system to adequately address business and human rights issues and the ability of rights holders to access remedy.



89 Praveen Bhargav. "Everything you Need to Know about the National Green Tribunal (NGT)". Conservation India. 2 May 2011. <https://www.conservationindia.org/resources/ngt>.

90 Geetanjoy Sahu. "Whither the National Green Tribunal?". *Down To Earth*. 23 September 2019. www.downtoearth.org.in/blog/environment/whither-the-national-green-tribunal--66879.

We should encourage governments to look across the board and see what different States and different mechanisms are doing. A lot of these mechanisms have a special job to do in the context of a regulatory regime, but the question is how does this fit into the broader regulatory picture? What are the links between [non-judicial] institutions and courts and how are courts used to enforce what these regulatory bodies are working on? How do [state-based mechanisms] interrelate with corporate mechanisms?

– Jennifer Zerk, Legal Consultant, OHCHR Accountability and Remedy Project. Interview, September 2020

STATE-BASED NON-JUDICIAL GRIEVANCE MECHANISMS

As outlined in Principle 27 of the UNGPs, State-based non-judicial grievance mechanisms (SBNJGMs) should be developed and strengthened alongside State-based judicial mechanisms in order to provide comprehensive access to remedy of business-related human rights abuses. SBNJGMs can play an important role in complementing judicial mechanisms. The commentary to Guiding Principle 25 notes that State-based judicial or non-judicial grievance mechanisms should form the foundation of a wider system of remedy. That wider system should include non-State-based operational-level grievance mechanisms, formalized corporate procedures that enable affected stakeholders to submit a complaint regarding abuses or adverse impacts, and be enhanced by collaborative and regional and international human rights mechanisms. Support for SBNJGMs is widespread because they can provide a cheaper, more efficient and more accessible mechanism for very specific problems. For instance, labour dispute bodies and consumer protection boards are attractive for the average worker or consumer who wants to complain but may not want to initiate legal action. However, in practice it appears that SBNJGMs are only nominally contributing to access to remedy across the region. The OHCHR found SBNJGMs to be underused.⁹¹ A CORE report found that they “frequently lack independence as dispute resolution bodies, as well as the power and means to ensure effective redress.”⁹² These gaps are opportunities to transform SBNJGMs into effective mechanism for remedy.

SBNJGMs can vary greatly in terms of their mandate and form. The evaluation and strategic design of SBNJGMs have been a particular focus of the UNWG under its Accountability and Remedy Project, which is currently in its fourth phase (ARP IV). The diversity of SBNJGMs can be an asset. SBNJGMs for business-related human rights

91 OHCHR. 2017. Accountability and Remedy Project Part II: State-based non-judicial mechanisms. State-based Non-judicial Mechanisms for Accountability and Remedy for Business-related Human Rights Abuses: Supporting actors or lead players?” Discussion paper prepared for the 6th UN Annual Forum on Business and Human Rights. Geneva. www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/ARPII_%20DiscussionpaperonPhase2forUNForum_FINAL.pdf.

92 “Protecting rights, repairing harm: How state-based non-judicial mechanisms can help fill gaps in existing frameworks for the protection of human rights of people affected by corporate activities.”; The Corporate Responsibility Coalition. 2010. “Protecting Rights, Repairing Harm: How state-based non-judicial mechanisms can help fill gaps in existing frameworks for the protection of human rights of people affected by corporate activities”. <https://media.business-humanrights.org/media/documents/files/media/documents/ruggie/core-submission-to-ruggie-nov-2010.pdf>.

abuses include government departments with the responsibility for issuing grants, approvals and licences to business enterprises. These bodies can reject applications from business enterprises that are unaccountable. Consumer protection bodies feature in most Asian countries, though they rarely have enforceable powers. Many States have ombudsmen that tend to be specialized (for example, in Malaysia for financial services and Thailand for complaints against the government) or are for dispute resolution, many of which operate in a private capacity. Some States have specialized law enforcement bodies, such as labour inspectorates, environment inspection boards or social welfare bodies (for cases of child labour or trafficking, for example). The Board of Investment in Sri Lanka has a Board of Investigations which can look at complaints or grievances lodged by employees of companies in free trade zones (FTZ), but the research could not locate cases where this power was used. Finally, the most talked about SBNJGMs in the region are NHRIs.

The strength in specialized SBNJGMs is pointed out in an OHCHR report on them: “the more specialized a SBNJGM is, the stronger its investigation and enforcement powers are likely to be and the greater autonomy it will have to devise, enforce and monitor the implementation of remedies on its own initiative.”⁹³ Examples of specialized bodies include those dealing specifically with remedies for labour, the environment and consumer complaints. Specialization is also found in bodies addressing specific groups such as women, children and the disabled, for example, the Indian Chief Commissioner for Persons with Disabilities, who is able to act on complaints, or at the regional level the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC). It should be noted that these two examples are not business specific, nor can they make enforceable decisions.

The theory of ‘regime complexity,’ used in the field of international relations to explain the challenge of managing international migration, can be borrowed to help understand why SBNJGMs may not be more effective.⁹⁴ In situations where there is a complex array of organizations, laws, practices and policies, it is very difficult to develop efficacy. The complexity of laws around business remedies (for example, human rights, labour, environment, constitutions, and civil and criminal law), managed by a diversity of processes (for example, formal, informal, State and non-State, specific and general), engaged by a variety of bodies (business, civil, governmental and individual), results in a situation of confusion and a lack of accountability. The pitfalls of complexity may explain why so much of the focus fixates on NHRIs and points to the need for strengthening policy coherence.

Many informants felt that NHRIs could be a force multiplier for BHR generally and Pillar III in particular. Their capacities as SBNJGMs depends heavily on their

93 OHCHR. 2017. Accountability and Remedy Project Part II: State-based non-judicial mechanisms. State-based Non-judicial Mechanisms for Accountability and Remedy for Business-related Human Rights Abuses: Supporting actors or lead players? Discussion paper prepared for the 6th UN Annual Forum on Business and Human Rights. Geneva. www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/ARPII_%20DiscussionpaperonPhase2forUNForum_FINAL.pdf.

94 Karen J. Alter and Kal Raustiala. 2018. “The Rise of International Regime Complexity”. *Annual Review of Law and Social Science*. Vol. 14: 329–349.; Laura Gómez-Mera. 2016. “Regime Complexity and Global Governance: The case of trafficking in persons.” *European Journal of International Relations*. Vol. 22(3): 566–595.; Midori Okabe. 2020. “How States React to the International Regime Complexities on Migration: A study of cases in Southeast Asia and beyond.” *International Relations of the Asia Pacific*. Vol. 21(1): 65–90.

independence, mandate and available resources. Receiving complaints is not a mandated function of NHRIs under the Paris Principles, meaning that not all NHRIs are able to receive complaints. Many NHRIs in the region can receive complaints (though their jurisdictional reach may be limited), conduct investigations and facilitate effective remedy. Beyond facilitating access to remedy directly by handling complaints and making recommendations, NHRIs can indirectly influence Pillar III by recommending reforms, raising awareness, building capacity and assisting affected rights holders. There have also been cases taken up by NHRIs in Malaysia, the Philippines and Thailand involving extraterritorial violations.⁹⁵ Informants posited that because NHRIs have much potential, more could be done to build their capacity and leverage NHRIs to advance Pillar III. Not only could NHRIs become stronger access points for remedy, they could be a focal point for mechanisms helping stakeholders navigate this complex field.

A limitation of the SBNJGMs is the enforceability of the remedy. Many SBNJGMs are limited to mediation or to providing non-enforceable decisions. This regularly results in situations where victims do not receive the compensation or other remediation they are awarded. There are some areas where enforcement is possible, such as mechanisms involving government departments with mandates to issue grants, approvals and licences to business enterprises, which may be withdrawn from the business enterprises for violations. However, again, victims go without compensation. OHCHR's study of SBNJGMs recognized that the elusiveness of remedy for affected rights holders dissuades people from using these mechanisms.⁹⁶ A possible response to the constraint of enforceability is better coordination between judicial and non-judicial mechanisms, which may be achieved by Ministries of Justice and court systems having clear and active communication with the various SBNJGMs. This could possibly result in cases being transferred between systems in a way which ensures effective remedy.

The limitations of SBNJGMs are no reason to divert attention elsewhere. There are many possibilities to elevate SBNJGMs and capitalize on their unique roles and features. They have specific uses and can provide remedy in certain circumstances. When SBNJGMs are seen as part of an effective combination of remedy options, they can be appreciated as useful.

95 More details can be found in the section on extraterritoriality.

96 OHCHR. 2017. Accountability and Remedy Project Part II: State-based non-judicial mechanisms. State-based Non-judicial Mechanisms for Accountability and Remedy for Business-related Human Rights Abuses: Supporting actors or lead players?" Discussion paper prepared for the 6th UN Annual Forum on Business and Human Rights. Geneva. www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/ARPII_%20DiscussionpaperonPhase2forUNForum_FINAL.pdf.

Even with the best policies and practices, a business enterprise may cause or contribute to an adverse human rights impact that it has not foreseen or been able to prevent. Where a business enterprise identifies such a situation, whether through its human rights due diligence process or other means, its responsibility to respect human rights requires active engagement in remediation, by itself or in cooperation with other actors. Operational-level grievance mechanisms for those potentially impacted by the business enterprise's activities can be one effective means of enabling remediation when they meet certain core criteria, as set out in Principle 31.

- Commentary. UNGP Principle 22

NON-STATE-BASED GRIEVANCE MECHANISMS

Very few business enterprises have developed a human rights policy or carry out HRDD, so it is no surprise that there are few NSBGMs that meet the standards of the UNGPs. NSBGMs can cover a variety of issues from workplace disputes, consumer complaints, concerns raised by communities, and environmental standards. A report at the Human Rights Council (A/HRC/44/32) usefully summarizes three types: company-based; industry, multi-stakeholder and other collaborative initiatives; and independent accountability mechanisms of development finance institutions. Within business, there can be operational-level mechanisms based in separate work sites. These are often referred to as open grievance mechanisms by corporate actors. Large companies may have NSBGMs to monitor their supply chain. Those mechanisms may be linked to corporate codes of conduct or to national laws. Industries may establish NSBGMs, some of which have a presence in Asia, including the Roundtable on Sustainable Palm Oil, garment sector monitoring, and fair food and fair-trade initiatives. In some cases, these bodies have an international certification process (such as the Rainforest Alliance). There can be multilateral processes such as the Ethical Trading Initiative. Many international bodies such as the OECD, World Bank, the Asian Development Bank and so on have NSBGMs (though these mechanisms could be considered State-based, strictly from inter-governmental organizations). Some NSBGMs are based on framework agreements, normally provided for protecting labour rights in multinational organizations. This wide variety of mechanisms is itself an impediment for someone seeking remedy because they must have necessary knowledge of the potential mechanism, and often the process and resources needed for each one is unique.

The consensus among informants familiar with NSBGMs was that they have great potential but have yet to produce outcomes for rights holders. These informants explained that NSBGMs could be very useful if they were properly designed and monitored. However, corporate grievance mechanisms, for example, can be inaccessible or ineffective and the barriers can be physical, linguistic, logistical, cultural and/or psychological. In many examples from the region, corporate NSBGMs have not revealed chronic abuses. One such case that grabbed headlines was that of Jayasre Kathiravel, a 20-year-old Dalit garment factory worker in Tamil Nadu, India. On 1 January 2021, she was found dead

after allegedly being raped and murdered by her factory supervisor. The investigation revealed common “instances of sexual harassment, physical acts of sexual assault, unwanted sexual touching or physical contact, unwelcome sexual advances and feeling pressured to engage with supervisors and managers sexually within the factory.”⁹⁷ Natchi Apparels, the business enterprise responsible for the factory, was a supplier to Hennes & Mauritz (H&M). H&M’s Know the Chain profile positions H&M as a leader on grievance, stating:

In addition to having in place a grievance mechanism, H&M provides its contact information to workers in its supply chain so that they are able to report complaints directly to the company. Notably, H&M works with local trade unions as grievance channels, whereby trade union representatives are given business cards to distribute to workers. H&M then follows up on the grievances. H&M monitors the existence and effectiveness of worker-management communication systems, such as grievance systems and effective workers’ committees.

H&M’s response to Kathiravel’s case reveals that, for whatever reason, these mechanisms were not used to reveal what was allegedly chronic abuse:

We do not tolerate harassment of any kind and suppliers that do not share these values cannot and will not be part of our supply chain. Our ongoing monitoring, including announced and unannounced audits as well as self-reporting by the supplier, had not raised any cases of harassment in the factory in question. The factory has also been regularly assessed by other third-party auditors and brands.

This case shows that even leading practices may not be effective in revealing grievances and making remedy possible.

Effective NSBGMs allow affected rights holders and other stakeholders to raise concerns or complaints to alert industries and/or business enterprises of problems that need to be addressed. They provide opportunities to avoid escalation, reckon with risks and effectively remediate situations without needing judicial or public responses. When effective, these grievance mechanisms result in a win-win situation for all parties: affected rights holders experience justice and the business addresses its problems with manageable improvements in business accountability. In addition to avoiding public scrutiny, business enterprises are able to de-escalate situations and address shortcomings, resulting in greater compliance and sustainability. These mechanisms can be quicker, cheaper and more responsive to specific situations.

In Asia, very few NSBGMs exist and those that do often have fundamental design flaws, according to informants. The UNGPs are not overly prescriptive on NSBGMs. The UNGPs give some general criteria under Principle 31b for their effectiveness: they should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source

⁹⁷ Business & Human Rights Resource Centre. “India: Garment worker allegedly raped & murdered by supervisor at H&M supplier Natchi Apparels after months of sexual abuse & harassment; Incl. H&M’s response”. 8 February 2021. www.business-humanrights.org/en/latest-news/india-garment-worker-allegedly-raped-murdered-by-supervisor-at-hm-supplier-natchi-apparels-after-months-of-sexual-abuse-harassment-incl-hms-response/.

of continuous learning and anchored in engagement and dialogue.⁹⁸ Current NSBGMs in the region and beyond do not fulfil many of these criteria. For example, corporate human rights policies may establish an ethics and compliance panel, but often these panels are not predicated on the UNGPs. In practice, they serve as a way to protect the business enterprise from individual misconduct. As corporate and civil society informants explained, when some type of corporate remediation does occur, it happens inconsistently and there is not enough transparency to assess whether the remedy was effective. Informants said it was a struggle to decipher what is going on and what works in this realm. Processes are confusing, opaque and there are often statements that can be read as threatening to complainants.

NSBGMs are often built around large, known brands, meaning that only a fraction of potential business-related human rights abuses can be remedied by them. Globally, few industry-level NSBGMs are designed around the UNGPs and they are criticized for being inaccessible to affected rights holders. For example, often these grievances need to be expressed by lawyers in an international language and complainants may not have the capacity or financial resources to conduct litigation at the international level. As BHR stakeholders pivot to the next decade, the task is less to create NSBGMs, but to improve them. Numerous informants pointed to operational-level grievances as something worth pursuing in the region, because they offer a way to handle issues privately and avoid headlines. Yet efforts are needed to raise awareness, clarify expectations and promote the value of effective NSBGMs for all parties.

98 31(h) raises the imperative of engagement and dialogue, and it speaks exclusively to NSBGMs: "Operational-level mechanisms should also be: (h) Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances."

Effective Operational-level Grievance Mechanisms

In 2019, the International Commission of Jurists released *Effective Operational-level Grievance Mechanisms*, which serves as an authoritative guide to the design of grievance mechanisms. The guide, over 100 pages, prescribes specific attributes and processes including the following:

- Consultative and transparent design for long-term success
- A separate and open human rights grievance programme that ties-in and/or stands apart from existing mechanisms
- Qualified case workers to achieve effective resolution of communications
- Cultural sensitivity and awareness that “no communications” do not equal “no adverse human rights impacts”
- In accordance with the commentary on UNGP Principle 29, making external advisors available and accessible for rights holders to consult on their cases and providing rights holders with the option to bring their case to a court or a prosecutor in cases where no satisfactory remediation is achieved
- Third-party mediations and processes that involve capable humanrights practitioners
- Enabling rights holders submitting a communication to have suitable legal advice, as well as making sure that such rights holders fully understand the content of a settlement before signing it off
- Refraining from legal waivers as an entry condition and/or as an outcome of the process
- Monitoring of performance to assess the mechanism effectiveness and improve its operational design over time, as well continuous analysis of case handling
- Reporting on quantitative and qualitative remediation results and the continuous improvement of the grievance mechanism; most crucially, information on agreed upon remedy should be made public to enable stakeholders and rights holders to judge a business enterprise’s seriousness about effective remedy mechanisms.

The slow development of extraterritorial accountability stands in stark contrast to the scale of environmental change and impacts on local communities due to the rapid construction of mega-dams in the Mekong basin. Nonetheless, incremental progress can be attributed to the efforts of local communities and civil society building public attention and seeking redress through lawsuits and complaints. The UNGPs, together with the emerging framework on human rights and the environment, offer important tools that can only be concretized through their continued application to particular cases and contexts, revealing significant and persistent barriers to accountability in the process. Dismantling these barriers requires adjusting the human rights lens to expand the expectations placed on states and business enterprises with respect to extraterritorial accountability.

– Maureen Harris. “Our River, Our Rights: Extraterritorial accountability in the Mekong”, *Navigating a New Era of Business and Human Rights*.⁹⁹

EXTRATERRITORIAL ACCOUNTABILITY

For decades, the environmental rights movement in Asia has voiced the desire to strengthen the extraterritorial human rights obligations (EHROs) of States and hold business enterprises accountable at home and abroad for human rights abuses and adverse impacts. EHROs are critical to ensuring accountability in a globalized world. Yet, States in the region tend to interpret their human rights obligations as applicable only within their own borders, leading to gaps in human rights protection.

From the early attempts at regulating EHROs at the UN Commission on Transnational Corporations in the 1970s to their more recent inclusion in the UNGPs, the absence of consensus around EHROs creates ongoing implications for the field. For example, the UNGPs arguably missed the opportunity to strongly affirm EHROs with the status quo assertion under Principle 2 that States “are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction ... nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis.” While the Principle 2 Commentary acknowledges that “some human rights treaty bodies recommend that home States take steps to prevent abuse abroad by business enterprises within their jurisdiction”, if human rights are truly universal, the UNGPs were an opportunity to push a more progressive and active

⁹⁹ Article 30 and Institute of Human Rights and Peace Studies (Mahidol University). 2019. *Navigating a New Era of Business and Human Rights*. https://static1.squarespace.com/static/602c19fa95b65244e2fd70f5/t/6139129c60236d737eedd7f0/1631130280077/a_new_era+%281%29.pdf.

application of EHROs by States to promote and protect human rights inside and outside their territorial borders. Instead, NAPs drafted and enacted to implement the UNGPs now follow suit and either omit or narrow the scope of EHROs, thereby compounding the issue.¹⁰⁰

While the situation is compounded by the absence of a treaty regulating EHROs, there are efforts to address the matter, such as advisory opinions by the Inter-American Court of Human Rights and International Court of Justice and statements by the UN and regional human rights bodies.¹⁰¹ There are other non-legal measures attempting to advance the importance of establishing extraterritorial accountability for transnational corporations, but these are primarily used in the realm of civil society advocacy. A lack of clear identification of who is accountable and the number of countries with a track record of weak enforcement of relevant national laws enables transnational business enterprises to avoid their responsibility in legal terms: operators may be liable, but not their financiers; subcontractors may run afoul, but not those awarding the contracts. Clearer standards of accountability for transnational business action are needed, which is why this issue is of interest in ongoing treaty discussions. Ultimately, what is good for human rights is good for business, all business enterprises, and what is good for business enterprises benefits States—all States. That was the sentiment conveyed by informants who continue to push for EHROs in Asia.

There was some hope for extraterritorial legal accountability in the region in the late 1990s, with the use of the US Alien Tort Claims Act involving citizens of Myanmar affected by a pipeline, apparently using slave labour built for Unocal (though Unocal was not part of the recruitment or work plans, they benefited from their labour). There was no judicial decision as it was settled out of court with the claimants receiving compensation. In subsequent decisions by the US Supreme Court, most notably *Sosa v. Alvarez-Machain* in 2004 and *Kiobel v. Royal Dutch Petroleum* in 2013, the Alien Tort Claims Act was significantly narrowed, limiting the scope of viable claims for foreign plaintiffs. No other EHRO cases have been successful in Asia, though a handful of cases have been pursued or are currently in court. This includes the case involving Mitr Phol Sugar over the eviction of farmers in Cambodia, which is currently active in courts both in Thailand and the United Kingdom. Dams along the Salween and Mekong Rivers, mines in the Lao People's Democratic Republic and Myanmar and actions in SEZs are all being tracked and pursued in terms of EHROs. However, it is unclear whether there is real hope for judicial accountability in these cases and for stakeholders.

As noted in the section on SBNJGMs, NHRIs in Southeast Asia have begun to apply their mandates extraterritorially. However, it should be highlighted upfront that, while NHRIs play an important and unique role in advancing economic, social and cultural rights and act independently of government, they have no enforcement power. Thus, without the ability to prosecute or legislate, NHRIs primarily make recommendations

100 ESCR-Net. "International community must deliberate on binding treaty to fill ETO gaps in UN Guiding Principles framework". Blog. 13 February 2018. www.escr-net.org/news/2018/blog-international-community-must-deliberate-binding-treaty-fill-eto-gaps-un-guiding.

101 See International Commission of Jurists. 2004. "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory". <https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>; Inter-American Court of Human Rights. 2017 "The Environment and Human Rights". OC-23/17. www.corteidh.or.cr/docs/opiniones/seriea_23_ing.pdf.

and provide a public forum for showcasing complaints and bridging the discussion between government, business and the people. For example, the NHRI of Thailand has investigated complaints into a small number of transboundary cases. Cases have involved investigations into the large-scale land evictions following the granting of land concessions in Cambodia, as well as the Xayaburi Dam in Laos¹⁰² and the Hongsa Lignite Power Company in Laos. The NHRI initiated hearings but did not carry out a full investigation. As informants noted, the efforts of the Thailand NHRI are encouraging, but the results are a reminder that NHRIs are constrained in their capacity to bring about extraterritorial accountability. The Malaysian NHRI (SUHAKAM) accepted a complaint from Thai and Cambodian CSOs against Mega First Corporation Berhad, a Malaysian company, regarding their role in the Don Sahong Dam, but the company declined to participate. The NHRI in the Philippines accepted a complaint from Greenpeace that encompassed the extraterritorial climate impact of Philippine business enterprises. However, this complaint also failed to produce any direct accountability for the business enterprises involved.

While both judicial and non-judicial mechanisms in the region have failed to realize extraterritorial accountability, these cases can still have real world impact. Negative publicity created by a 2020 report by Teerachai Sanjaroenkijthaworn¹⁰³ about the Mitr Phol sugar case in Cambodia resulted in significant financial losses for the named plantation when foreign business enterprises and investors exited the investment and the plantation enterprise incurred the cost. The Cambodian government lost trade preferences and experienced damages. This is not a preferable BHR outcome, particularly as the affected rights holders likely suffered the most.

In the domain of EHROs, accountability is weakest where it is needed most: when transnational business enterprises who do not have strong corporate governance conduct activities in countries that are unable or unwilling to effectively regulate. Some countries are unwilling to sanction their own companies and developing countries do not have the resources or capacity to bring cases against wealthy transnational business enterprises. The same outcome occurs when looking at transnational business action between developing countries. While some governmental and non-governmental organizations (NGOs) are bringing attention to, and monitoring, the level of State interest in regulating and holding private companies accountable in more developed countries in the region (in Japan, the Republic of Korea and Thailand, for instance), there is little discussion and monitoring of Chinese companies from within China. Further, the treatment of EHROs by a specific State tends to correlate with the human rights protection standards within the home country. As highlighted by informant Dr Charlie Thame:

Using extraterritorial obligations to litigate against business can be a cat and mouse game. Enforcing legal accountability can be extremely challenging. Complicated governance and ownership structures such as SEZs and PPPs

102 Carl Middleton. 2018. "National Human Rights Institutions, Extraterritorial Obligations, and Hydropower in Southeast Asia: Implications of the region's authoritarian turn". *Austrian Journal of South-East Asian Studies*. Vol.11(1): 81–97. www.etoconsortium.org/nc/en/main-navigation/library/documents/?tx_drblob_pi1%5BdownloadUid%5D=224.

103 Titled "Deserted factory; empty operation center and residual responsibility of Thai sugar investor in Koh Kong", the report documents through photography and stories the situation of the Koh Kong villagers who were forcibly evicted from their land.

can impose additional hurdles due to unclear and contradictory laws, or the absence of joint liability provisions, for instance. (Interview, September 2020).

In the last decade, one significant effort towards formalizing EHROs of States has helped highlight the discussion and provide a path forward. The Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Maastricht Principles), issued in 2011, “clarify extraterritorial obligations of States on the basis of standing international law” with a call to “apply the principles as an integral part of any human rights analysis and policy making to ensure universal protection of human rights.”¹⁰⁴ The Maastricht Principles are based on a number of international human rights instruments, including the UN Charter and the Universal Declaration of Human Rights, customary international law, and the jurisprudence of international human rights bodies and courts, and define EHROs as: “a) obligations relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State’s territory; and b) obligations of a global character that are set out in the Charter of the United Nations (UN) and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally.”¹⁰⁵ Through EHROs, human rights protections can serve their role as the legal basis for regulating globalization and ensuring universal protection of all people and groups by filling gaps such as the lack of human rights regulation and accountability of transnational corporations; absence of human rights accountability of intergovernmental organizations; ineffective application of human rights law to investment and trade laws, policies and disputes; and lack of implementation of duties to protect and fulfil various rights abroad.¹⁰⁶ While not a treaty, the Maastricht Principles provide an important reference for civil society, international human rights organizations and governments in providing a common framework for discussion in defining and advancing the importance of EHROs.

Setting aside the future international acceptance or national incorporation of the Maastricht Principles, another method for strengthening EHROs is through domestic measures with extraterritorial implications, as opposed to direct extraterritorial jurisdiction.¹⁰⁷ Direct extraterritorial jurisdiction over private actors or activities abroad remains controversial, as the principles of non-intervention in the internal affairs of another country and territorial sovereignty are anchored in international law and diplomacy. However, States are increasingly prepared to use direct extraterritorial jurisdiction in relation to criminal activity such as terrorism, money laundering, corruption and sex tourism, and this trajectory is increasingly expanding into the realm of human rights abuses. With regard to domestic measures with extraterritorial implications, States have used this technique to help influence the behaviour of private actors abroad. Examples include asking locally incorporated parent companies to

104 Carl Middleton. 2018. “National Human Rights Institutions, Extraterritorial Obligations, and Hydropower in Southeast Asia: Implications of the region’s authoritarian turn”. *Austrian Journal of South-East Asian Studies*. Vol.11(1): 81–97. www.etoconsortium.org/nc/en/main-navigation/library/documents/?tx_drblob_pi1%5BdownloadUid%5D=224.

105 Ibid.: 6.

106 Ibid.: 3.

107 Jennifer A. Zerk. 2010. “Extraterritorial Jurisdiction: Lessons for the business and human rights sphere from six regulatory areas”. Harvard Corporate Social Responsibility Initiative. www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/crj/files/workingpaper_59_zerk.pdf.

take certain steps in relation to the management of foreign subsidiaries, the use of reporting obligations or import or export controls and taking steps to monitor and reduce risks associated with projects requiring export assistance. These measures can be highly influential in relation to private foreign conduct and may attract less controversy, presumably because they focus on acts or persons at home.¹⁰⁸ Thus, EHROs may serve as a mechanism for regulating the conduct of business enterprises, regardless of the location of the conduct, under the relevant national laws where the business enterprise is established.

In short, States could focus on the exercise of jurisdiction over the extraterritorial conduct of business enterprises established in the home country. Therefore, this territorial regulation with extraterritorial effects provides the authority for the State to pursue civil or criminal cases against a business enterprise for extraterritorial human rights abuses in domestic courts. While asserting national or parent company jurisdiction from the home country of a business enterprise is an available option, the prospect is limited to the jurisdiction of the parent company and only possible in countries with the political will and laws sympathetic to EHROs, such as laws that establish direct parent company liability or allow for piercing the corporate veil (the legal decision to treat the rights or duties of a corporation as the rights or liabilities of its shareholders). However, problems may exist in these cases, such as proving that the parent company exercised control over, or assumed responsibility for the conduct of, foreign subsidiaries, and this has been tested in some countries.

Given the politics that complicate State or business-led progress on the extraterritorial human rights obligations (EHROs), it is not surprising that one of the most effective means of raising the profile of EHROs in the political and public arenas has been consumer boycotts. Well-documented examples include boycotts against the fishing industry in Southeast Asia and in response to the Rana Plaza tragedy in Bangladesh. While boycotts can catalyse EHROs and prompt extraterritorial change, they are reactive and prescriptive, rather than preventative and anchored in accountability, and limited to branded consumer products. Boycotts are also quite ineffectual in relation to transnational mega-projects involving energy or extractives, which have immense impacts on human rights. Thus, for long-term meaningful impact, there is a need to strengthen EHROs in NAPs, and prompt legal, regulatory and policy reforms modeled on the Maastricht Principles.

108 Jennifer A. Zerk. 2010. "Extraterritorial Jurisdiction: Lessons for the business and human rights sphere from six regulatory areas". Harvard Corporate Social Responsibility Initiative. www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/csi/files/workingpaper_59_zerk.pdf.

Case study: Laos dam collapse and the failure to protect the rights of the victims

In July 2018, a subsidiary dam which was part of a larger hydroelectric system in the Lao People's Democratic Republic collapsed, leading to widespread destruction and the death of at least 70 people. The resulting flood destroyed houses, crops and property, leaving around 5,000 people homeless. The dam was constructed by a Thai, Lao and South Korean consortium, and financed by South Korean, Lao and Japanese banks. Two years after the collapse, few affected people have received compensation.

The dam's lead developer and builder, a South Korean engineering and construction firm, has been held responsible by some, but there have also been calls for the funders of the project (primarily Thai and South Korean banks) to be held to account. Even though UN experts have called on the enterprises to provide compensation, little has been done, demonstrating the challenge of enforcing EHROs through State action against national business enterprises. Implicated business enterprises have been involved in humanitarian assistance and disaster relief, traditional CSR projects, and individual negotiations with survivors. Short-term problems like hunger were responded to, but not long-term concerns such as livelihoods, housing and work, and human rights in general. There were no HRDD or remediation efforts that would indicate a respect for human rights.

The Laos government undertook studies which show the failure was caused by the construction company and not a force majeure, but it has not requested or enforced any remedial action. The Thai government also provided financial support of the project through the State-owned Export-Import Bank, as well as three Thai commercial banks financing the project. However, at present, there are no cases against the companies involved, nor requirements to compensate victims or standardized grievance efforts, showing an absence of access to justice for the victims.



Cultural transformation takes a lifetime, not because we have a new map ... We want change to happen, we want change to happen fast, but it will not be faster than [the next] decade ... During that [time], we need to give stakeholders power to challenge us in our own projects so that they will give us a chance to prove that we are honouring our commitments or words.

- Dante Pesce, UN Working Group on Business and Human Rights. Interview, October 2020.

ACHIEVING TANGIBLE RESULTS IN ASIA

As reported throughout the report, the General Principles assert that the UNGPs “should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities.” The three pillars are interdependent and they exist to create conditions under which affected rights holders experience tangible results. The first decade of the UNGPs in Asia has brought about NAPs, HRDD and State investigations into human rights abuses. But has it brought about tangible results for affected individuals and communities? Government, corporate and civil society informants in the region agreed that the answer is no. Affected rights holders have not yet experienced tangible results on a wide scale as a consequence of the BHR movement in Asia.¹⁰⁹ However, as the introduction to Part One noted, this reality needs to be seen in context.

Dante Pesce’s quote above captures a number of important caveats. Transformation takes time. NAPs and corporate human rights policies do not automatically achieve results. They hypothetically serve to put in motion processes and create conditions under which tangible results for rights holders will be achieved. This is why BHR actors use the phrase “fuller realization of the UNGPs” and why John Ruggie spoke about “the end of the beginning”. There is recognition that tangible results will take time. But how long? Every issue and setting will differ. The UNGPs represent a very new language and framework in Asia. The field as a whole is learning by doing. In the meantime, as Pesce’s quote conveys, it is critical to heed criticism and manage expectations as well as possible. Affected rights holders in the region are suffering.

Chandan Kumar of the Working Peoples’ Charter coalition of India captured a common view that the COVID-19 pandemic has revealed how devastating the situation is from the perspective of affected rights holders:

¹⁰⁹ The UN Working Group on Business and Human Rights has echoed this sentiment in their reports on Asia. The Working Group is concerned by reports of continued—and in some instances, increasing—adverse business-related human rights impacts across Asia, including relating to the difficult situation of human rights defenders; the negative impacts on the human rights of communities affected by land acquisitions; the harms suffered by migrant workers in countries of origin and destination; and the violations of core labour rights (A/HRC/32/45/Add.2).

There is much work to be done to bring [affected rights holders] into the realm of protection and services and accountability from the potential brutality of the market, especially during times of crises. The pandemic has made clear the consequences of absent information and responses. We are seeing workers dying on the street ... There is so much urgent work that needs to be done. (Interview, November 2020).

The snapshots shown in Part Two make it clear how pressing change is. Even the most optimistic informants did not downplay the urgency of the situation in any way. Every informant conveyed a sentiment of wanting fundamental change and wanting it to happen now. Yet, all that BHR stakeholders can do is engage the realities of the situation and ensure that the movement moves forward towards those tangible results.

When asked whether the BHR movement in Asia is properly oriented to achieve tangible results for affected rights holders, informants regularly argued that recalibration is critical. As the introduction to the report explains, informant after informant argued that it was time to start investing in bottom-up approaches to realize the UNGPs. The first decade was almost exclusively focused on top-down efforts. Informants proposed that introducing bottom-up approaches as a complement and not substitute to top-down projects could be a way of more immediately achieving tangible results for affected rights holders and accelerating the realization of the UNGPs in Asia. The conclusion of this report will discuss how introducing bottom-up responses could shift the course of BHR in the region and beyond in significant ways.

Here, it seems fitting to introduce a number of main points that may deserve consideration under each Pillar:

On Pillar I, there is much momentum behind NAPs. Those efforts could be complemented by major training efforts aimed at building the awareness and capacity of government officials of all ranks and roles. At the point that affected rights holders are met by government officials who know what the UNGPs are and what they mean, tangible results become far more likely. Various State institutions could be strategically targeted to immediately elevate the status of the UNGPs including NHRIs, national securities and exchange commissions and SOEs. There is also much work to be done to invigorate States to properly carry out their duty to protect in realms such as informal economies and SEZs.

On Pillar II, business enterprises and industries in the region have begun to take note of the UNGPs. As more and more business enterprises begin to consider the UNGPs, they will likely follow the playbook of their peers and corporate consultants. The problem is that prevailing practices and benchmarks may not be geared towards outcomes for affected rights holders. This is an impression and concern that regularly arose during interviews. Numerous informants who work with business enterprises globally observed that what is being called HRDD often devolves into an exercise in burying harm and risks and legitimating a problematic status quo. As an anonymous human rights practitioner stated: “Those of us who are familiar with a human rights-based approach look at so-called HRDD and ask, ‘where are the rights holders?’” All of these informants were hinting at that fundamental issue that Rajiv Maher encapsulated:

The nature of this space is being co-opted by a managerialist and consultancy type of mindset. That mindset means it is all about positive and optimistic thinking. So, it is about seeing the glass half full. And that means that you should

not really complain too much and just focus on the positives ... One would have thought that by now this glaring gap between what happens on the ground to the rights holders versus what the companies are saying and claiming to do and the whole rhetoric would have shocked people. But instead, it seems to have become normalized and accepted. (Interview, September 2020).

One way to reassert the focus on a business enterprise's real-world human rights impact and results for affected rights holders is to train them on HRDD. This is precisely what Surya Deva proposes. It could lead to a radically changed view of what Pillar II is all about:

We need to spend more than 50 percent of our time and energies on raising awareness and building the capacity of everyone. Most people think Pillar II is about businesses. I say Pillar II is not about businesses. Rather, it is about communities and their rights. If communities do not know what businesses need to do, they cannot insist that businesses do HRDD. I think we need to build the awareness and capacity [from the] bottom up of everyone, businesses, NHRIs, communities, and government officials. And then we have powerful pathways to implement the UNGPs. We need to help communities conduct community-based HRDD so that when a company or an external consultant produces a nice report, they can offer a different report. They can say, look here it is. Here are our alternative facts. (Interview, December 2020).

On Pillar III, there is so much work to be done that it is hard to say where to start. Rule of law programmes that focus on legal reform and awareness within the judiciary are critical. There are also opportunities to galvanize the legal networks that support affected rights holders. Legal aid is often the only way to create access to remedy where it is absent. Business-related human rights abuses are regularly perpetrated against the most vulnerable: rights holders who do not know their rights, who do not know what to do when someone takes over their land without consultation. These are individuals and communities that may not know who to engage or how. They may face a choice between feeding their family and pursuing unlikely justice. In these contexts, legal aid is the only bridge to accountability.

The possibilities with stronger legal aid networks are extensive, even in climates where accountability is elusive. But several barriers will need to be overcome. Current challenges include a shortage of qualified lawyers, especially outside urban areas; low pay for legal aid work; a lack of knowledge about legal aid and where to find this assistance on the part of citizens; and a preference to resolve issues through informal channels. Each country will likely have unique hurdles. In Viet Nam, for example, a lack of coordination between legal aid organizations and related agencies in the justice system creates a problem. Regardless of whether legal aid originates from the government, domestic bar associations or other legal aid organizations, there are many reasons to support these networks through increased funding and training, along with robust BHR education and awareness campaigns.¹¹⁰ The needs are substantial, but the support for them is feasible and their potential impact is notable.

¹¹⁰ It is also imperative to extend legal aid and assistance to third country residents where it is not available in their own countries.





PART TWO: SNAPSHOTS OF BHR IN ASIA

BHR hasn't made it to the mainstream yet in Asia ... Apart from the influence of practitioners or isolated community protests, companies and governments have not felt enough pressure from ordinary people to do more. This impairs how far BHR can go. In the next decade, I would like to see BHR being more of a mainstream idea than it is right now, because this could impact the power of how CSOs can influence things when there are BHR issues arising in the field.

- Anonymous BHR Analyst. Interview, November 2020.

INTRODUCING THE SNAPSHOTS

The current state of BHR in Asia is defined by gaps, challenges and opportunities. The following snapshots of select themes and dynamics help show the situation on the ground. The snapshots focus less on legal frameworks and official policies, and more on the reality of BHR for affected rights holders. The coverage is by no means exhaustive. Some of these snapshots focus on groups who are vulnerable to business-related abuses. It is important to assess what gaps of protection persist and in what ways the BHR community can work with governments and business enterprises to address risks in relation to these populations. Other snapshots focus on structural conditions (tripartism and the informal sector) deserving of particular BHR focus. Under these themes are discussions about the BHR movement's struggle to adequately respond to the concerns of a variety of stakeholders. Part Two also includes snapshots of two areas of the utmost concern, the environment and conflict. These are domains where BHR as a field is struggling to respond to the depth and complexities of the problems at hand. Readers will notice commonalities and interconnectivity among snapshots, which serve to remind us that BHR issues do not exist in a vacuum. They require holistic responses that address structural conditions and root causes. The first snapshot tackles a topic that was seen by many informants as the paramount measure of BHR progress or lack thereof: collective organizing and bargaining.

A true tripartite mechanism is irreplaceable and the bedrock for understanding, cooperation, support and collective problem solving. And it is not only about the tripartite but the development of the country. If development does not empower labour and treat them as stakeholders, what is the point of development? How can that development be good for the country? Without a tripartite, there is the risk of a type of development that leaves workers behind.

- Ussarin Kaewpradap. 2019. Interview. *Navigating a New Era of Business and Human Rights*.

ELUSIVE TRIPARTISM

In a politically diverse region, there is one overarching trend: tripartism is elusive, illusionary or entirely absent. Tripartism, the tripartite relations between governments, employers and workers that are predicated on the human right to collectively organize and bargain, serves to ensure that workers can protect their collective interests.¹¹¹ Where tripartism is present, workers are able to freely and effectively organize without fear of discrimination or reprisal. Where tripartism is lacking or absent, workers are limited in their capacity to protect themselves, their interests and their fellow rights holders. As an anonymous labour rights advocate explained: "If you want to know about BHR in a country or even in a more local context, look through the lens of the tripartite. That will tell you whether there is a serious commitment to protect, respect and remedy." Whether it be modern slavery, child labour, sexual harassment, discrimination, or workplace health and safety, informants argued that there is no better antidote than unions. Yet, unions throughout the region routinely face repression and oppression.

In South and Southeast Asian countries, recent years have seen widespread union-busting. The Solidary Center (2020) summarized the situation in Southeast Asia as follows:

As global consumer brands chase the lowest costs and highest profits around the globe, Southeast Asia has become a haven for export processing zones (EPZs). Millions of workers desperate for decent wages endure long workdays, forced unpaid overtime and sub-poverty wages. Garment workers, fish processors and others toiling in the EPZs for global manufacturing companies have few or no rights on the job and face daunting obstacles to forming unions. Factory-level union activists are fired and blacklisted, unable to find another job.¹¹²

The situation throughout Asia appears to have worsened since the COVID-19 pandemic took hold. Ye Yint stated:

The government has, in fact, dismissed unionists' suggestions, disregarded their formal disputes, and used COVID-19 to justify intimidation and arrests of protestors.

111 The ILO is "based on the principle of tripartism - dialogue and cooperation between governments, employers, and workers - in the formulation of standards and policies dealing with labour matters"; ILO. "International Labour Standards on Tripartite consultation". www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/tripartite-consultation/lang-en/index.htm.

112 See Solidarity Center. "Asia". <https://www.solidaritycenter.org/category/asia/>

Employers have ignored COVID-19 related concerns raised by unionists, exploited their inability to strike, and used the pandemic as an opportunity to sack unionists en masse. The government and employers have weaponized COVID-19 to union-bust so that unionists have had to scramble and employ different tactics to protect themselves and other workers.¹¹³

Similar situations played out throughout the region. The situation in Bangladesh devolved to the point that a global trade union campaign took shape after workers were detained and laid off en masse.¹¹⁴ Indonesia's Omnibus Law has been criticized by local and global union groups. An anonymous informant from Bangladesh was one of numerous informants who raised concerns that the pandemic was being weaponized to union-bust, to borrow the phrase from Ye Yint. She described the climate as "a culture of fear and paranoia amongst workers." This worsening position is occurring as BHR is being discussed more frequently and broadly.

At the same time, there have been victories that may be carried forward. Bangladesh's amended Labour Act was considered a step in the right direction by union advocates. Viet Nam's new Labour Code, effective from January 2021, aims to protect workers in all types of professions, focusing especially on women workers and the right to trade unions in order to "boost the effectiveness of employee representation and protect their rights and interests in labour relations".¹¹⁵ Thailand's NAP and other moves by governments in the region indicate an intention to promote tripartism. Yet, all of these positive developments are subject to the question of whether workers are actually enabled to form and join independent unions.

Government and corporate informants said the status of unions in Asia is complex. Their insights reveal systemic barriers. Government actors spoke of how foreign investors and industries quietly oppose unions. Corporate informants explained that if one enterprise allows collective organizing and bargaining but their competitors do not, they are at an inherent cost disadvantage. They were therefore looking to government for more leadership in promoting unions. The lack of systemic synergy is obvious. This underscores the importance of tripartite relationships predicated on a shared commitment to collective organizing and bargaining.

Informants from civil society regularly spoke of freedom of association and the right to collectively organize and bargain as the perennial constraint of BHR in the region. Indeed, informants described collective organizing and bargaining as the sticking point for BHR in Asia and beyond. As they explained, it is a sticking point because it has the potential to transform politics and power. Elusive tripartism in Asia has had many ramifications in the first decade of the UNGPs. Those consequences are set to compound with the Fourth Industrial Revolution and new trade deals on the table. But if the BHR movement rallies around unions in the region, there is a chance to change the fate of labour rights in the decade ahead.

113 Ye Yint. 2020. "COVID-19 Weaponized Against Unionists in Myanmar". *Tea Circle*. <https://teacircleoxford.com/2020/07/09/covid-19-weaponized-against-unionists-in-myanmar/>.

114 Rafiq Rafi. 2020. "Worker leaders to launch global campaign against buyers". *Business Mirror*, 13 April 2020. <https://bmirror.net/worker-leaders-to-launch-global-campaign-against-buyers/>

115 Kien Trung Trinh and Nam Ngoc Trinh. 2020. "How Viet Nam's new labour code will affect employers and employees". *Bangkok Post*, 3 March 2020. <https://www.bangkokpost.com/business/1870679/how-vietnams-new-labour-code-will-affect-employers-and-employees>

The workers who have fueled Asia's extraordinary economic growth through their labour in factories and the informal economy have not shared in economic prosperity—specifically in the form of increased wages, better benefits or secure work ... Millions more workers are forced to make a living in the informal economy, where as street vendors, domestic workers and taxi drivers, they earn low wages in often unsafe conditions and have little or access to pensions or other social protections.

– Solidarity Center¹¹⁶

INFORMAL ECONOMIES

For developing countries worldwide, the informal economy, the economic sector that is not taxed and operates largely outside of formal regulations or protections, forms an essential part of the economy.¹¹⁷ Information on Asia's informal economies is rarely precise or reliable. This has human rights consequences as the paucity of data leads to a scarcity of informed responses. Yet, available statistics do give a sense of the scale of this domain. ILO research has found that more than 68 percent of Asia's population, upwards of 1.3 billion people, work in Asia's informal economies.¹¹⁸ South (87.8 percent) and Southeast Asia (75.2 percent) have higher rates of informality than Eastern Asia (50.7 percent). South and Southeast Asia is home to a number of countries where over 90 percent of employment is informal: 94.3 percent in Nepal, 93.6 percent in Laos and 93.1 percent in Cambodia.¹¹⁹ The ILO states: "Almost all of agricultural employment (94.7 percent) is informal in the region, and it reaches a high of 99.3 percent in Southern Asia." Malaysia is one example of a relatively developed country with a significant migrant worker population "from Bangladesh, Indonesia, Myanmar and Nepal who work across a range of informal jobs."¹²⁰ The size of Asia's informal economies has fluctuated. For example, employment numbers in India's informal economy dropped from 86 percent in 2005 to 81 percent in 2018, which translates to over one billion people.¹²¹ However, it could be argued that COVID-19 might push people back into informal economies.

116 Solidarity Center. "Category: Asia" <https://www.solidaritycenter.org/category/asia/>.

117 Roughneen describes the informal economy as "generally off the radar of officials, regulators, and tax collectors"; Simon Roughneen. "Asia's Hidden Economy Masks Hard Realities". *Asia Times*. 26 November 2019. <https://asiatimes.com/2019/11/asias-hidden-economy-masks-hard-realities/>.

118 ILO. "More than 68 per cent of the Employed Population in Asia-Pacific are in the Informal Economy". 2 May 2018. www.ilo.org/asia/media-centre/news/WCMS_627585/lang--en/index.htm.

119 Ibid.

120 Simon Roughneen. "Asia's Hidden Economy Masks Hard Realities". *Asia Times*. 26 November 2019. <https://asiatimes.com/2019/11/asias-hidden-economy-masks-hard-realities/>.

121 "Nearly 81% of India's Employed Population is in Informal Economy". *NewsClick*. 5 May 2018. www.newsclick.in/nearly-81-indias-employed-population-informal-economy.

All of the statistics show that most rights holders and the most marginalized rights holders in the region subsist in informal economies. Women and youth are also disproportionately represented.¹²² Informal workers are disproportionately young, aged 15 to 24, and they lack wage protection, health and safety conditions, social benefits, collective organizing, bargaining opportunities, and the ability to enjoy their human rights. As informants explained, vulnerability in the informal economy has wider than individual impacts. Small informal businesses are prone to extortion and corruption by officials. Child labour in informal economies has development consequences for those children, their families and societies. Informality can enable land grabs in smallholder and indigenous communities. The goods and services offered in informal economies may be hazardous. In some cities, the informal transport system is dangerous and threatens the well-being of pedestrians and passengers. Informants spoke of unsafe transportation and a failure to take the safety and security of female passengers seriously. Additionally, there is the environmental impact of informal economies. Illegal mining in Myanmar and Indonesia, agricultural practices such as burning off which creates air pollution, or illegal fishing, hunting and logging are all known to have a cascade of human rights consequences. BHR stakeholders in the region are well aware of these realities. Nonetheless, the BHR movement has yet to create pathways to effectively engage Asia's far-reaching informal economies.

There was a feeling among informants that prevailing BHR thinking and practice simply do not translate to informal economies. As development specialist Trinanjan Radhakrishnan posits: "If there would be a version two of the UNGPs for the next decade, including informality would be a useful addition" (Interview, November 2020). The UNGPs do make clear that they "apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure." However, the question remains how to make the UNGPs meaningful in Asia's informal economies.

There is no obvious entry point to introduce the UNGPs into informal economies. One inclination may be to formalize the informal economy. Chandan Kumar, the National Coordinator of the Working Peoples' Charter, agreed:

Formalizing the work and employment structure is critical because that is the only way to bring these workers into the realm of State protection and services and accountability from the potential brutality of the market, as well as during times of crises. (Interview, November 2020)

But it is not clear whether that would always achieve desirable results for rights holders. Formalization can unintentionally leave actors behind. The ability to register a company, or to do business, is often expensive and time-consuming. This shows in the World Bank "Ease of Business" ranking in which countries with the largest informal sectors are also the ones with some of the worst business environments. The Ease of Business rankings show that of the 11 countries within the scope of this report, whose economies to a significant extent are informal, around half of them are in the bottom 50 percent in the rankings and the worst ones (Bangladesh and Myanmar) are in the bottom 20 percent of

122 ILO. 2013. *The Informal Economy and Decent Work: A policy resource guide supporting transitions to formality*. Geneva. www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_policy/documents/publication/wcms_212689.pdf.

being unfriendly to business.¹²³ Trying to formalize work without introducing new costs or burdens for rights holders is, indeed, a serious challenge. There is also the question of whether formalization is a guaranteed fix, given that the formal economy is also a notable human rights risk. Hence, beyond exploring formalization, BHR stakeholders may want to explore how human rights can be protected in informal situations, how to make informal businesses aware of human rights risks and the need for HRDD, and how a system of accountability and remedy can be established for these stakeholders.

Communicating with informal economies will require thoughtfulness from the BHR movement. Informal economies are diverse and varied across the region and also commonly dispersed through the country. Literacy levels of workers may be low and it is likely multiple languages are used, given migrant and minority workers are overrepresented. People Matters' 2019 diagnosis, "State of employment in informal sectors of Southeast Asia", shows that solutions have to be tailored to context: in Indonesia, this is done through the finance system which can provide easier credit to their indigenous SMEs; in Viet Nam and Cambodia, formalization of jobs is encouraged to ensure profitable revenue streams; States with smaller informal sectors are yet to revise their labour policies, partially because their strong economic performances have delayed the urgency.¹²⁴ There are differing gaps between and within countries and there is no one BHR solution.

As the BHR movement in Asia sets out to penetrate informal economies, it is critical to be consultative before being prescriptive. Formalization may be applicable in one scenario and completely misguided in the next. Some informal economies may feature strong grassroots networks while others do not. The causes and consequences of informality can differ drastically from one case to the next. Therefore, it is vital to work with affected rights holders, grassroots CSOs, SMEs and local officials to determine what will work and bolster rather than compromise well-being and resilience. That consultation will elucidate opportunities to erect the three pillars of the UNGPs in informal economies, promote formalization, or both.

123 See The World Bank. Doing Business. "Ease of Doing Business rankings". <https://www.doingbusiness.org/en/rankings>.

124 People Matters. "State of Employment in Informal Sectors of Southeast Asia". 1 March 2019. www.peoplesmattersglobal.com/article/recruitment/state-of-employment-in-informal-sectors-of-southeast-asia-20968.

Case study: The Working Peoples' Charter of India

The Working Peoples' Charter, a coalition of over 150 worker collectives organizing informal workers across India, provides an interesting case study of what is possible with regard to the defence of human rights in the informal economies of Asia. The Working Peoples' Charter was an idea born in 2013 to create a robust alliance of organizations ranging from national trade unions to small community-based organizations. Members of the alliance support one another and consolidate the collective political and bargaining power of informal workers throughout India. Today, the Working Peoples' Charter has become an increasingly formalized political force that has won recognition, collective organizing rights and entitlements for even the most marginalized and informalized day labourers.

Chandan Kumar, the National Coordinator of the Working Peoples' Charter, explained that while there is much work to be done, the model has proven effective. Seemingly small victories, like shelters that provide shade and facilities for informal workers at the markets where they gather to sell their labour, can be very meaningful for those rights holders. Bargaining power has proven critical in pushing back against the illegal contracting and bonded labour that remains prominent, particularly in peri-urban and rural settings. The Working Peoples' Charter model makes it possible to simultaneously make incremental improvements and push for broader solutions. The Working Peoples' Charter of India is proof that bottom-up approaches can respond to local, national and global BHR challenges. As Chandan Kumar explained:

Many new regional and global trade deals are under discussion. Those trade deals are set to deliberately strip away accountability, labour market standards and human rights. Our preparation and response to those negotiations should be to create more regional alliances of trade unions, from both formal and informal sectors, across civil society to be better prepared and positioned. Only as a collective is there a chance to make sure that these trade deals answer to the millions of people that they impact. It also creates networks across the region who can monitor the small subsidiaries who end up shouldering disproportionate burdens and human rights risks of those trade deals. (Interview, November 2020).



Asia's rich tapestry of cultures and unparalleled ethnic diversity are connected by important transboundary river basins, including the Mekong, Salween, Indus and Ganges-Brahmaputra-Meghna. These rivers originate in the Himalayas and the Tibetan plateau, connecting ecosystems fed by glaciers and snowmelt to floodplains and major river deltas downstream. They support rich biodiversity, and the food, livelihoods and cultural systems of the region's people are intimately connected with their flows. Large dams, ill-conceived infrastructure projects and climate change threaten to wreak havoc on these systems.

- International Rivers¹²⁵

BHR AND THE ENVIRONMENT

Problems such as pollution, environmental destruction and threats to biodiversity and deforestation in Asia are often the product of business action in some way. The situation is critical because it remains largely unsolved, resulting in a material loss of the human right to a safe, clean, healthy and sustainable environment for a growing number of people across the region. While there may be some small areas of improvement, for example, a gradual reduction in the use of plastics, some controls on wildlife trade and the protection of biodiverse areas, these advances are far from secure. Rather, the trend is that the environment is under increasing threat, as are those people who try to protect the environment or protect their communities from the impact of business-related environmental harm.

The list of concerns is long. On the global scale, climate change is a pressing BHR issue, though it is regularly seen through the lens of sustainability, rather than human rights. Very little is being done to substantially reduce carbon emissions. Business action in the region has had immense impacts on large river systems, with dams displacing thousands of people and destroying ecosystems. There is also the seasonal return of transboundary haze, a problem that remains unfixed after nearly two decades of efforts. There are problems of air and water pollution, affecting the majority of Asian cities. In the countryside, agricultural pollution harms many. Unchecked development displaces and pollutes countless communities. Business enterprises are complicit in these threats. Large projects like dams, mining and coal-fired plants have a significant impact. Even small-scale business enterprises contribute to pollution and destruction of the environment through the overuse of pesticides or producing plastic waste. Overfishing and other oceanic business activities lead to degradation of the ocean and oceanic life, which has significant implications for biodiversity and climate change. What makes things worse is that the environmental impacts are often suffered by the most vulnerable, such as indigenous groups who experience irreparable harm from dams and mines, or children who face a future of chronic pollution, degradation and climate disasters.

125 See International Rivers. "Asia". www.internationalrivers.org/where-we-work/asia/.

In an interview, Dr Charlie Thame of Thammasat University explains that business-related environmental harm continues because it is not confronted:

The fundamental problem in protecting the environment is that profit overrides all else and regulations and institutions have been ineffective at balancing corporate and public interests when they conflict. Better States [understood as States that effectively execute their duty to protect] are needed to enforce compliance. (Interview, October 2020).

This problem starts with laws and their enforcement. While laws in many countries may appear robust, informants point out that implementation and enforcement are weak. Environmental laws tend to be sector-specific, regardless of the reality that managing the environment requires multi-sector engagement across environment, health, industry, community and other portfolios. Though environmental impact assessments regulations are common, they vary in quality and often neglect human rights measures like proper free, prior and informed consent (FPIC) and meaningful HRDD. Weak enforcement mechanisms create a lack of accountability. Despite international standards on polluter sanctions, many of the worst polluters in the region face no sanctions for their damage. Denial, misinformation, externalization of costs, corruption, and harassment of, and attacks on, environmental activists are all tactics that are deployed when the State-business nexus is pressed on environmental threats. Corporate responses to the environment often take the form of philanthropic CSR programmes or weak prescriptions to significant problems, such as litter campaigns (which do not address the source of the litter or sanction those polluting).

The context of weak laws, poor regulatory management, lacking or absent enforcement and a lack of corporate ownership results in a situation where the many human rights that relate to the enjoyment of a safe, clean, healthy and sustainable environment go unprotected, not respected and without remedy.

Those who work to protect the environment in Asia, in particular human rights and environmental defenders, have regularly been treated like enemies of business enterprises and the State.¹²⁶ As Joseph Purugganan of Focus on the Global South declared, “there is complicity between the State and corporations in the killing of environmental activists in the region” (Interview, September 2020). As voices defending the planet have grown louder, attacks against them have intensified. A Global Witness report described, “It has never been a deadlier time to defend one’s community, way of life or environment.”¹²⁷ Alongside physical threats and harassment, business enterprises have used SLAPP in the form of criminal or civil defamation and libel lawsuits.

Against these odds, CSOs in Asia have continued to mobilize in defence of the environment. As a number of environmental activists explained in interviews, there is a vast, though often fragmented, network of local communities that have launched organic, innovative efforts to defend their environment. The report, *Free-Flowing Rivers: The Soul of South Asia*, presents a range of such grassroots responses:

126 Global Witness. 2019. “Enemies of the State?”. 30 July. <https://www.globalwitness.org/en/campaigns/environmental-activists/enemies-state/>.

127 Billy Kyte. “At What Cost?”. Global Witness. 24 July 2018. www.globalwitness.org/en/campaigns/environmental-activists/at-what-cost/.

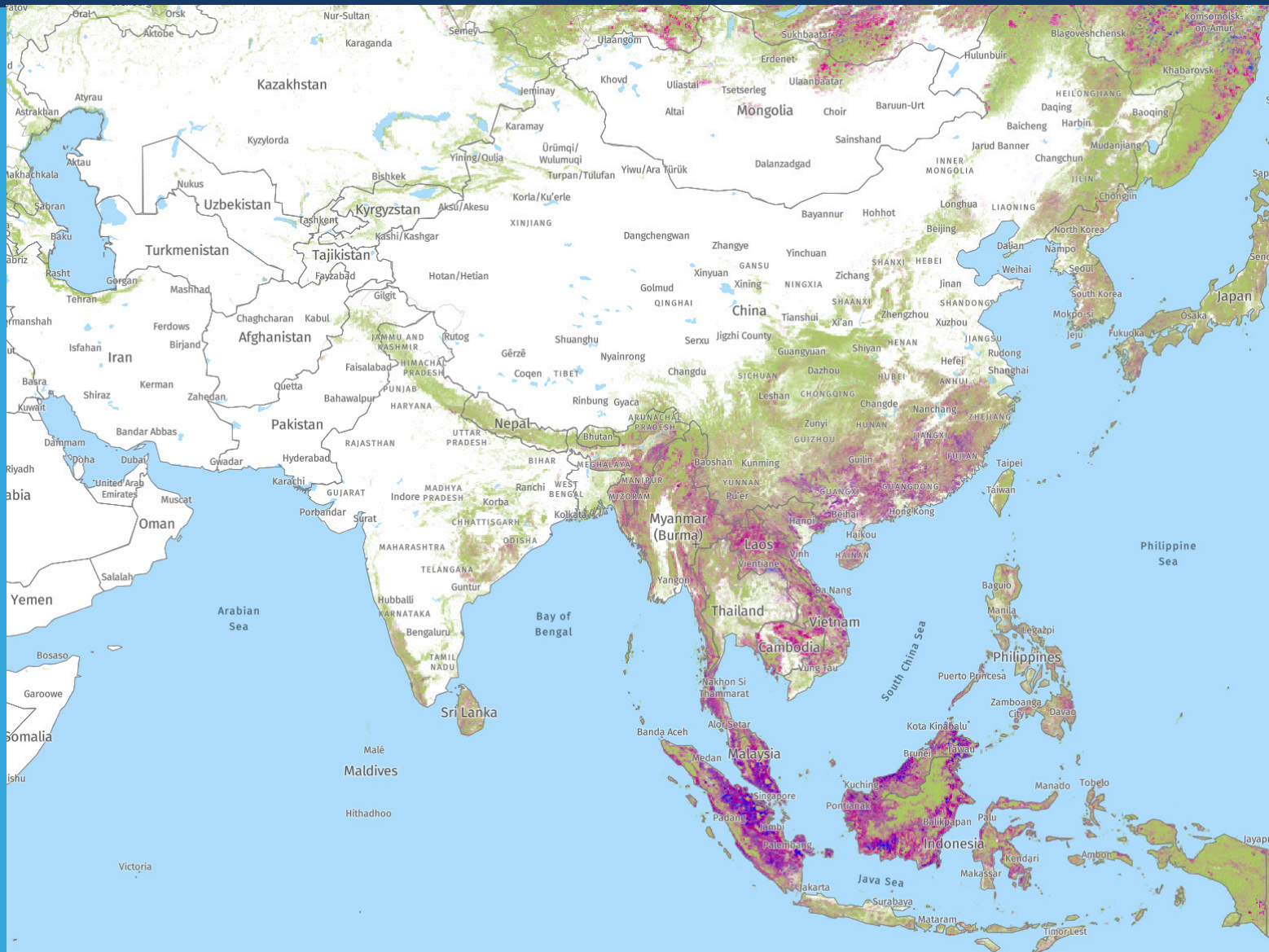
From Sikkim in North East India to Sindh in Pakistan, from the Karnali in Nepal to the Drangme Chhu in Bhutan, from Kerala in the Western Ghats of India to Bangladesh, in the arms of the Ganga Delta—local communities, supported by experts and civil society organizations, are developing inspiring and innovative initiatives to protect their free-flowing rivers or river stretches.¹²⁸

The BHR movement in Asia is working to invigorate State protection and corporate respect for the environment and the myriad human rights tethered to a safe, clean, healthy and sustainable environment. However, progress has been slow. Many informants felt that the BHR movement had not properly tapped into the climate change and environmental rights movement in the region. These same informants felt that the BHR movement could do much more to support the grassroots activism that is underway among affected communities. It, thus, appears that that the BHR movement may have three missions moving forward: (1) push States and business enterprises to protect and respect both the planet and the activists who defend the environment in accordance with the UNGPs, (2) find ways to strengthen the connection and cross-pollination between the BHR movement and the climate change and environmental rights movement in Asia, and (3) deploy support to those grassroots activists and communities who are working to prevent business-related environmental harm.

128 International Rivers. 2018. *Free-Flowing Rivers: The Soul of South Asia*. Oakland. www.internationalrivers.org/wp-content/uploads/sites/86/2020/06/free-flowing_rivers-the_soul_of_south_asia_0.pdf.

Global Forest Watch tree cover loss map of SEA

Reproduced from Global Forest Watch.. <https://globalforestwatch.org>



● Primary forest ● Tree-cover loss

Despite much progress made over the years in achieving substantive gender equality, many challenges remain. Women continue to experience multiple forms of discrimination, disadvantage, exclusion and violence in all spheres of life. They are underrepresented in decision-making positions, are often affected differently and disproportionately by business activities, and face additional barriers in seeking effective remedies. Women might also be affected more adversely by new technologies.

From the *Gender Dimensions of the Guiding Principles on Business and Human Rights* (2019).

WOMEN AND BHR

Women in Asia and beyond face chronic business-related discrimination, harassment, exploitation and abuse. Gender-based abuses and inequality can be difficult to confront because they are deeply embedded in structures and culture and cannot be addressed by addressing just one aspect of BHR. While many victories have been won on women's rights since the adoption of the Convention on the Elimination of All Forms of Discrimination against Women in 1979, substantial gaps remain and there are concerns that COVID-19 has emboldened new and renewed threats to gender equality.¹²⁹ The UNGPs acknowledge the importance of gender sensitivity, and the Gender Dimensions of the Guiding Principles on Business and Human Rights (Gender Guidance) makes the case for specific attention to the rights of women and girls in UNPGs implementation and for addressing the structural gender discrimination that underpins workplaces and communities globally. However, women's rights specialists from the region felt that the UNGPs do not go far enough to ensure that BHR is seen through a gender lens. Indeed, those who work with affected rights holders in Asia are constantly reminded that risks and abuses cannot be understood or addressed without adequate gender responsiveness.

As employees, women in Asia and beyond consistently "are underrepresented in managerial positions and, on average, are paid approximately 20 percent less than men."¹³⁰ Akiko Terada-Hagiwara et al. found that gender wage inequality remains a persistent problem in both developed and developing countries in Asia. They found that "closing gender gaps in labour force participation and education" may do little to equalize wages.¹³¹ This infers that there is indeed deeper discrimination driving the gender pay gap. They underscore the importance of analysing pay gaps in context. To

129 UN. "Progress Towards Gender Equality Under Threat, World Leaders Warn as General Assembly Marks Twenty-Fifth Anniversary of Landmark Women's Rights Conference". 1 October 2020. www.un.org/press/en/2020/ga12275.doc.htm.

130 UNDP and UNWG. "Gender Dimensions of the Guiding Principles on Business and Human Rights". www.ohchr.org/Documents/Issues/Business/BookletGenderDimensionsGuidingPrinciples.pdf.

131 Akiko Terada-Hagiwara, Shiela F. Camingue-Romance and Joseph E. Zveglic, Jr. 2018. "Gender Pay Gap: A macro perspective". Manila: Asian Development Bank. www.adb.org/sites/default/files/publication/404406/ewp-538-gender-pay-gap.pdf.

this point, there is a noteworthy range in the region. Thailand has a low gap of about 12 percent while Pakistan is at 37 percent.¹³² Bangladesh appears to be an outlier with the lowest gap in the world at 2.2 percent, though women only make up 4.8 percent of managers, revealing inequality in relation to position.¹³³ Beyond the gendered gaps in pay and employment in leadership positions, women employees can experience sexual harassment and abuse.

Corporate cultures often normalize the sexualization of women employees and other gender biases (including unconscious bias) and discrimination (such as maternity-related discrimination). The global #MeToo movement caught hold in Asia, but it has had a distinct character and effect:

In Asia, #MeToo is not just synonymous with sexual harassment and assault. As women across the region turn their anger into action, its manifestations have become a broader feminist rallying cry. In Japan, #WithYou has been used to express solidarity with survivors of workplace harassment; in Thailand, women voiced their frustration at being slut-shamed with #DontTellMeHowToDress; and in the Philippines, women have flooded social media and the streets in protest, under the hashtag #BabaeAko (I Am Woman). But daring to speak out in some of these deeply patriarchal societies comes with enormous risks.¹³⁴

#MeToo did gain traction throughout the region, but there were numerous incidents of States and business enterprises responding harshly by shutting down platforms or arresting advocates. When speaking about gender equality, informants regularly commented that only so much progress could be made under the UNGPs in climates where traditional patriarchal culture remains. Gender-based issues intersect and compound. Unequal pay and unequal hiring in managerial and leadership positions feed into corporate cultures that are discriminatory or biased which then feed back into the gaps. At the same time, nearly all women employees and workers face double burdens of bearing most or all of the workload in the home in addition to their formal work.

As workers, women are overrepresented “in informal, casual and part-time work worldwide, as well as in supply chains of numerous industries, where they are more vulnerable to exploitation and abuse. Moreover, women face pregnancy and maternity-related discrimination.”¹³⁵ Many women in Asia carry out care work for which they are not paid. Occupational segregation results in the situation where women disproportionately work in positions with fewer protections and benefits. Informants spoke about women passing out from overwork and disregard for sexual reproductive health, as well as a constant threat of termination for becoming pregnant. Women are underrepresented in local unions. Kaye Broadbent and Michele Ford state that “even when unions are strong,

132 UN DESA. 2020. Monthly Briefing on the world economic situation and prospects. No. 135. 2 March, www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/WESP_MB135.pdf.

133 Ibrahim Hossain Ovi. “UN Report: Bangladesh’s gender wage gap lowest in the world”. *Dhaka Tribune*. 8 March 2020. www.dhakatribune.com/bangladesh/2020/03/08/un-report-bangladesh-s-gender-wage-gap-lowest-in-the-world.

134 Suyin Haynes and Aria Chen. “How #MeToo is Taking on a Life of its Own in Asia”. *Time*. 9 October 2018. <https://time.com/longform/me-too-asia-china-south-korea/>.

135 UNDP and UNWG. “Gender Dimensions of the Guiding Principles on Business and Human Rights”. www.ohchr.org/Documents/Issues/Business/BookletGenderDimensionsGuidingPrinciples.pdf.

women's issues are seldom on the agenda."¹³⁶ A study by Ama Marston found that in Asia-Pacific cooperatives, women represent a mere 14.5 percent of board members and 18 percent of committee members. The National Cooperative Union of India has only two women out of 40 board directors. Moreover, the Indian National Cooperative Consumers' Federation has no women members on a board with 15 seats and no women on the executive committee.¹³⁷

Women migrant workers in the region face additional threats during migration, including trafficking and slavery, and also vulnerability to discrimination and safety in the workplace.¹³⁸ This is also true for domestic workers, where women can be vulnerable to poor working conditions and abuse. Global Estimates of Modern Slavery estimate that, "More than seven in ten victims were [sexually] exploited in the Asia and the Pacific region."¹³⁹

The threats that women workers in the region face are layered and multifaceted. Seik Nyan and Ye Yint Khant Maung illustrate the realities that women workers in Myanmar encounter:

*Supervisors pressure the workers with humiliating words like "prostitute" or "dog" and other forms of explicit comments ... There is no actual complaint mechanism to stop this abuse in the workplace ... married women workers have to agree upon applying for a job that they will not have a child within a year starting from the time of work. Employment contracts even stipulate that workers have to agree to voluntary resignation without compensation at the commencement of their pregnancy.*¹⁴⁰

Such stories are commonplace throughout the region. Much work remains to implement the articles of ILO Convention No. 190 and Recommendation No. 206 specifying the right of everyone to a world of work free from violence and harassment, including gender-based violence and harassment. The status quo is for the most part unchanged.

Gender-related abuses and discrimination suffered by women workers have to be seen through the lens of intersectionality. Migrant workers experience vulnerabilities related to their gender, race and immigration status. Workers from Dalit and other marginalized caste communities face layers of discrimination and bias based on gender and caste. Religious and local customs can create new risks and barriers for women workers. A women's rights advocate from Pakistan spoke of how attempts to empower women workers clash with prevailing attitudes around honour.

136 Kaye Broadbent and Michele Ford. 2008. "Women and Labour Organizing in Asia: Diversity, autonomy and activism", in *Women and Labour Organizing in Asia: Diversity, Autonomy and Activism*, Kaye Broadbent and Michele Ford, eds.: 1–14. London and New York. <https://core.ac.uk/download/pdf/212691599.pdf>.

137 Ama Marston. 2014. "Women, Business and Human Rights: A background paper for the UN Working Group on Discrimination Against Women in Law and Practice". OHCHR. www.ohchr.org/Documents/Issues/Women/WG/ESL/BackgroundPaper4.pdf.

138 Bandita Sijapati. 2015. "Women's Labour Migration from Asia and the Pacific: Opportunities and challenges". IOM Regional Office for Asia and the Pacific and the Migration Policy Institute. www.migrationpolicy.org/sites/default/files/publications/MPI-IOM-Issue-No-12-Female-Migration.pdf.

139 ILO. 2017. "Global Estimates of Modern Slavery: Forced labour and forced marriage". Geneva. www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf.

140 Seik Nyan and Ye Yint Khant Maung. "Advancing the Rights of Women Workers through the 2020 Elections". Tea Circle. 15 October 2020. <https://teacircleoxford.com/2020/10/15/advancing-the-rights-of-women-workers-through-the-2020-elections/>.

As members, often of multiple affected communities, women are regularly, uniquely and disproportionately impacted. Women HRDs face the same vulnerabilities as other defenders in Asia, as well as additional gender-related threats. Women and girls face higher rates of all types of displacement.¹⁴¹ This may be because women and girls may be expected to stay with their families near natural resources and conflict zones. When women and girls are displaced due to land confiscation or other business-related action, the displacement reinforces pre-existing discrimination and disadvantages. Further, “[d]isplaced women and girls tend to face greater challenges than men and boys in staying safe, securing work, accessing education and healthcare. Their sex and age often prevent them from making their voices heard and participating in decisions that affect them.”¹⁴² Beyond displacement, many informants commented that gender-disaggregated human rights assessments can reveal that women and men may have different views on business-related risks and impacts. This is why gender sensitivity, disaggregation and responsiveness are imperative when carrying out community HRDD.

As consumers and members of society, women encounter gender-related discrimination and bias on a daily basis. United Nations Children’s Fund (UNICEF) states, in relation to South Asia:

*Girls are systematically disadvantaged across the region as structural inequalities and the low status of women affect their rights. Social norms in South Asia prioritise a son receiving higher education, so the girl child often loses out on continuing her education. This is seen in the stark differences in the girl-boy ratio in secondary level classrooms across the region.*¹⁴³

Women in Asia and beyond face a pink tax, which refers to the tendency for women-oriented products to be more expensive than those targeting men. Marketing and media coverage may directly reproduce gender discrimination and bias. Cinema and other entertainment can normalize sexual harassment and assault, as well as gender-based violence. All of this highlights the broad scope of ways in which business enterprises directly and indirectly contribute to gender inequality at work, at home, in communities, throughout society, and across Asia as a whole.

While new digital technologies were expected to address gender bias and work in favour of women, this just isn’t happening. Online hate speech and the harassment of women has been seen around the world. Technology is reinforcing gender bias and inequality in unexpected ways, for example, artificial intelligence (AI) showing bias in recruitment based on gender stereotypes and the portrayal of women via chat bots perpetuating stereotypes. At the same time, there is gender inequality in the information and communications technology (ICT) sector and in ICT employment. A report by UNESCO¹⁴⁴ stated that in 2019, only 6 percent of software developers and 12 percent of AI researchers were women. They

141 Internal Displacement Monitoring Centre. “The Female Face of Displacement: 21 million women and girls uprooted by conflict and violence around the world”. 5 March 2020. www.internal-displacement.org/media-centres/the-female-face-of-displacement-21-million-women-and-girls-uprooted-by-conflict-and.

142 Ibid.

143 See UNICEF South Asia. “Gender equality”. <https://www.unicef.org/rosa/what-we-do/gender-equality>

144 United Nations Educational, Scientific and Cultural Organization (UNESCO). 2019. *I’d blush if I could: Closing gender divides in digital skills through education*. <https://unesdoc.unesco.org/ark:/48223/pf0000367416.page=1>.

were also 13 times less likely to file ICT patents than men. Men are four times more likely than women to be ICT specialists.¹⁴⁵ There is also inequality in access to ICT. For example, in South Asia women are 26 percent less likely to own a basic mobile phone and 70 percent less likely to own a smart phone that can connect to mobile Internet.¹⁴⁶ And yet, ICT could serve women in the business world in countless ways, whether they work in the field or use ICT as a tool for better outcomes.

Informants who spoke about women's rights in the region focused primarily on the gaps and barriers that BHR stakeholders face in relation to gender equality. Yet, there are significant achievements and promising signs. In Southeast Asia, ASEAN has played an active role through the ASEAN Commission on the Promotion and Protection of Women's and Children's Rights (ACWC) which has reported on the advancements and challenges to women in the workplace, and commitments to gender equality in the ASEAN Community Vision 2025 and ASEAN's Regional Plan of Action on the Elimination of Violence against Women. These activities, while limited, contrast with the South Asian Association for Regional Cooperation (SAARC), which currently has no specific women's rights committee nor policy standards.

At the national level, the interest in BHR for women is reflected in Thailand's NAP. The NAP aims at "providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence."¹⁴⁷ The Malaysian Cabinet passed a policy in 2011 that required public and limited companies to ensure that women held at least 30 percent of board and senior management positions. In 2012, the Lower House of the Parliament of India passed the Companies Bill mandating that all public companies have at least one woman director on their board. Quotas may be little more than an uncertain step to gender equality, but they are a step nonetheless. In Bangladesh, women's empowerment features in successive five-year plans, Vision 2021 and Vision 2041.¹⁴⁸ These are just some of the examples where governments in the region have sought to improve gender equality in the region in the world of work.

Progress on gender equality in Asia can often be linked to consistent advocacy from a well-established women's rights movement. Informants described the reality that on a daily basis, women have to mobilize themselves to defend their dignity and well-being. An anonymous labour rights specialist illustrated what the struggle for business-related gender equality looks like in real time:

Look at the pictures from wild cat strikes in Asia. They're almost all women. When you see communities protest a dam or project, women are front and centre. Women have organized themselves into grassroots associations all over Asia. This is not about women being empowered. Women are empowering themselves. (Interview, December 2020).

145 Organisation for Economic Co-operation and Development, *Bridging the Digital Gender Divide* (OECD, 2018), p. 5. <https://www.oecd.org/digital/bridging-the-digital-gender-divide.pdf>

146 Ibid., p. 30.

147 Rights and Liberties Protection Department, Ministry of Justice, Thailand. 2019. *First National Action Plan on Business and Human Rights (2019–2022)*: 9. <https://globalnaps.org/wp-content/uploads/2017/11/nap-thailand-en.pdf>

148 Mustafizur Rahman. "The Empowerment of Women in Bangladesh: Not Just Rhetoric". Institute of South Asian Studies, National University of Singapore. 12 August 2020. www.isas.nus.edu.sg/papers/the-empowerment-of-women-in-bangladesh-not-just-rhetoric/.

Grassroots and national women’s organizations act as both a first line of defence and a transformative force. For example, in South Asia indigenous women’s networks have confronted BHR issues for decades. Women entrepreneurs and farmers formally and informally come together to share knowledge and collectively problem solve. Women workers rally to protect one another each and every day. This is what informants pointed to with hope and enthusiasm. The challenge will be designing BHR responses that account for the structural and cultural nature of gender inequality, intersectionality, and the unique vulnerabilities and resilience in each circumstance.

THE ASIA-PACIFIC’S PERFORMANCE ON GENDER EQUALITY INDICATORS: GENDER EQUALITY IN WORK

Reproduced from McKinsey Global Institute’s *The Power of Parity: Advancing Women’s Equality in Asia Pacific*, April 2018.

	COUNTRY	Female Population 2016 Million	Per capita GDP, 2016 \$, current purchasing power parity	Labour force participation rate F/M ratio	Professional and technical jobs F/M ratio	Perceived wage gap for similar work F/M ratio	Leadership positions F/M ratio	Unpaid care work M/F ratio
OCEANIA	Australia	11.9	46,790	0.83	1.19	0.60	0.58	0.55
	New Zealand	2.3	39,059	0.85	1.25	0.71	0.67	0.58
EAST ASIA	China	671.2	15,535	0.81	1.07	0.59	0.20	0.39
	Japan	65.2	41,470	0.70	0.66	0.61	0.15	0.21
	South Korea	24.9	35,751	0.70	0.93	0.45	0.12	0.19
SOUTHEAST ASIA	Indonesia	125.6	11,612	0.61	0.94	0.63	0.30	NO DATA
	Philippines	50.0	7,806	0.64	1.42	0.76	0.96	NO DATA
	Vietnam	46.8	6,424	0.89	1.19	0.58	0.35	NO DATA
	Thailand	34.3	16,917	0.79	1.31	0.73	0.48	0.56
	Myanmar	27.6	5,773	0.93	1.12	NO DATA	0.40	NO DATA
	Malaysia	15.5	27,681	0.64	0.80	0.76	0.26	NO DATA
	Cambodia	7.9	3,736	0.87	0.57	0.72	0.45	0.25
	Singapore	2.8	87,856	0.76	0.91	0.78	0.52	NO DATA
SOUTH ASIA	India	612.2	6,572	0.34	NO DATA	0.50	NO DATA	0.10
	Pakistan	90.0	5,249	0.30	0.28	0.48	0.03	0.10
	Bangladesh	78.4	3,581	0.53	0.39	0.46	0.13	0.27
	Nepal	14.5	2,468	0.92	0.43	0.52	0.22	NO DATA
	Sri Lanka	11.0	12,316	0.40	0.97	0.63	0.33	NO DATA
Asia-Pacific Best				0.93	1.42	0.78	0.96	0.58
Asia-Pacific Average Weighted by 2016 female population				0.60	0.95	0.56	0.25	0.25
Global Best				1.00	2.66	0.86	1.13	0.85

LEVEL OF GENDER INEQUALITY

● Extremely high

● High

● Medium

● Low

THE ASIA-PACIFIC'S PERFORMANCE ON GENDER EQUALITY INDICATORS: GENDER EQUALITY IN SOCIETY

Reproduced from McKinsey Global Institute's *The Power of Parity: Advancing Women's Equality in Asia Pacific*, April 2018

	COUNTRY	Essential services and enablers of economic opportunity					Legal protection and political voice		Physical security and autonomy		
		Unmet need for family planning % of women	Maternal mortality Per 100,000 births	Education level F/M ratio	Financial inclusion F/M ratio	Digital inclusion F/M ratio	Legal protection Index	Political representation F/M ratio	Sex ratio at birth M/F ratio	Child marriage % of girls and young women	Violence against women % of women
OCEANIA	Australia	11	6	1.00	1.00	1.00	1.00	0.36	1.06	1	25
	New Zealand	9	11	1.00	1.00	1.00	0.83	0.56	1.06	1	33
EAST ASIA	China	4	27	0.97	0.87	NO DATA	0.58	0.20	1.16	3	15
	Japan	20	5	0.95	0.80	0.97	0.51	0.14	1.06	1	15
	South Korea	6	11	0.86	0.81	0.93	0.58	0.15	1.07	0	23
SOUTHEAST ASIA	Indonesia	12	126	0.98	0.81	0.86	0.45	0.29	1.05	26	NO DATA
	Philippines	18	114	1.00	1.00	NO DATA	0.70	0.37	1.06	2	18
	Vietnam	6	54	0.97	1.00	NO DATA	0.47	0.19	1.10	8	34
	Thailand	6	20	0.98	0.84	0.98	0.29	0.09	1.06	11	44
	Myanmar	16	178	0.98	0.60	NO DATA	0.39	0.08	1.03	12	38
	Malaysia	18	40	0.98	0.82	0.96	0.28	0.10	1.06	6	NO DATA
	Cambodia	13	161	0.86	0.80	0.97	0.50	0.17	1.06	20	14
	Singapore	11	10	0.96	1.00	0.96	0.64	0.17	1.07	0	NO DATA
SOUTH ASIA	India	13	174	0.87	0.66	0.72	0.40	0.18	1.11	21	37
	Pakistan	20	178	0.74	0.17	0.59	0.20	0.12	1.09	27	39
	Bangladesh	12	176	0.84	0.83	0.73	0.39	0.16	1.05	34	53
	Nepal	23	258	0.84	0.74	NO DATA	0.38	0.21	1.05	24	28
	Sri Lanka	7	30	0.99	0.96	NO DATA	0.29	0.05	1.04	9	38
Asia-Pacific Best		4	5	1.00	1.00	1.00	1.00	0.55	1.03	0	14
Asia-Pacific Average Weighted by 2016 female population		10	102	0.92	0.92	0.77	0.47	0.19	1.11	14	28
Global Best		4	3	1.00	1.00	1.00	1.00	0.93	1.02	0	6

LEVEL OF GENDER INEQUALITY

● Extremely high

● High

● Medium

● Low

Having SOGIE-inclusive and diverse policies can prevent LGBTQ+ persons from discrimination and assaults when at work. It may not erase history but it will lessen cases of discrimination and violent acts against them from today to the future. In addition, when companies become more inclusive towards the LGBTQ+ community, they actually gain more than they lose because this allows more innovation, productivity and personal growth which can generate more opportunities for employees and employers. With whatever policy a company does, either at a micro- or macro-level, the important thing to remember is it all boils down to how it can affect individuals.

- Asia Society. *The Shift to Inclusivity and Diversity in the Workplace: Importance of Promoting SOGIE-inclusive policies in Asian organizations and companies.*¹⁴⁹

SEXUAL ORIENTATION AND GENDER IDENTITY AND EXPRESSION AND BHR IN ASIA

In 2017, the OHCHR presented the *Standards of Conduct for Business: Tackling Discrimination against Lesbian, Gay, Bi, Trans, & Intersex People*.¹⁵⁰ The Standards, which build upon the UNGPs and the UN Global Compact Principles, offer guidance to companies on how to meet their responsibility to respect everyone's rights, including, in this case, the rights of LGBTI people in the workplace, marketplace and community. The Standards call upon businesses to respect human rights — including the rights of LGBTI people — in their operations and business relationships at all times; eliminate discrimination in recruitment, employment, working conditions, benefits, respect for privacy, or treatment of harassment; and provide a positive, affirmative environment in the workplace and prevent human rights violations beyond avoiding discrimination to address issues of violence, bullying, intimidation, ill-treatment, incitement to violence, or other abuses against LGBTI people that a company may be implicated in through their products, services, or business relationships in the marketplace.

While a few Asian businesses have taken a lead in respecting the rights of LGBTI people, by and large, SOGIE rights defenders and organizations in the region are, thus, left without clear pathways to advocate through the UNGPs. Where homosexuality is criminalized, for example, in Bangladesh, Malaysia and Myanmar, potential headway is limited under any UNGP pillar in the near term. Even where laws prohibit discrimination based on sexuality such as in India, Thailand and Viet Nam, LGBTI rights holders face unique business-related human rights risks. For example, in 2019, the International Commission of Jurists released the report *Sexual Orientation and Gender Identity Based Human Rights Violations in Housing, Work, and Public Spaces in India*, detailing the abuses and threats facing India's SOGIE minorities, in which it is stated:

149 Juliene Guillermo. "The Shift to Inclusivity and Diversity in the Workplace: Importance of promoting SOGIE-inclusive policies in Asian organizations and companies". Asia Society. <https://asiasociety.org/node/30642/shift-inclusivity-and-diversity-workplace>.

150 UN. 2017. "Tackling Discrimination against Lesbian, Gay, Bi, Trans, & Intersex People: Standards of conduct for business". www.unfe.org/wp-content/uploads/2017/09/UN-Standards-of-Conduct-Summary.pdf.

“...violations and abuses span a wide range of rights protected in Indian and international human rights law. Notably recurrent were complaints about violations of the rights to housing and work, as well as difficulty in securing equal and effective access to public spaces and facilities.”¹⁵¹

SOGIE minorities in Asia can face barriers to work; those who are employed may face human rights abuses at work and business-related human rights abuses as consumers and stakeholders. Workplace abuses can occur because the laws and regulations themselves are discriminatory, for instance, workplace codes demanding that employees dress and conform to their sex regardless of their gender identity. This legitimates and even facilitates SOGIE-based discrimination and abuse. There are also many situations where laws and regulations forbidding discrimination are simply dismissed because they do not comply with traditional values. The reality is that States may be unwilling or unable to enforce laws in the context where cultures of discrimination and violence are deeply embedded. On top of this is the lack of access to remedy for LGBTI people who have faced discrimination. Without laws or successful cases in courts to set precedents, it is both risky and difficult for LGBTI people to address workplace human rights abuses in court.

Beyond discrimination at work, LGBTI rights holders in the region face systemic barriers in relation to employment and employment benefits that have serious human rights consequences. Informants explained that SOGIE minorities and their family members are regularly denied full benefits and social security, particularly for members of their families. In Asia, same-sex marriage is legal only in the Taiwan Province of China and some municipalities in Cambodia, and Hong Kong SAR and Japan offer limited recognition. Elsewhere, LGBTI partners are not legally recognized and do not receive spousal benefits, which may include health care.

The many barriers that exist in the formal economy regularly push SOGIE minorities into informal economies. A recent UNDP report, *Denied Work*, has highlighted the discrimination faced by transgender people in finding work. Many transgender people are denied educational opportunities. This barrier combines with discrimination when transgender rights holders are then denied jobs.¹⁵² The APF manual, *Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics*, captures a situation where transgender persons face fewer and fewer opportunities:

Even transgender people who complete their schooling frequently struggle to get a job, either because they do not fit gender norms for men and women or their school qualifications, job references or identity documents disclose their gender identity. There are very high rates of unemployment, underemployment and occupational segregation among transgender people. They face barriers

151 ICJ. 2019. *Living with Dignity: Sexual Orientation and Gender Identity–Based Human Rights Violations in Housing, Work, and Public Spaces in India*. <https://www.icj.org/wp-content/uploads/2019/06/India-Living-with-dignity-Publications-Reports-thematic-report-2019-ENG.pdf>.

152 UNDP. 2018. *Denied Work – An audit of employment discrimination on the basis of gender identity in South-East Asia*. www.asia-pacific.undp.org/content/rbap/en/home/library/democratic_governance/hiv_aids/denied-work.html.

at all stages of the employment cycle, from initial education and training, pre-employment discrimination, limited career opportunities and advancement, and inferior employment conditions.¹⁵³

There are some instances of civil society advocacy in Asia in promoting SOGIE rights and there are signs of business leadership. Asian companies were involved in the development of the OHCHR's five Standards of Conduct to support the business community in tackling discrimination against LGBTI people, which specify what companies can and should do to ensure equal treatment at work and tackle discrimination in the broader community.¹⁵⁴ In India, Nayanika Nambiar, Parmesh Shabani and the Indian Culture Lab published *A Manifesto for Trans Inclusion in the Indian Workplace*. When the Supreme Court of India rejected a Delhi High Court judgment that legalized same-sex marriage, Indian jeweller Tanishq took to social media in support of SOGIE.¹⁵⁵ In 2018, The Lalit became India's first hotel chain to include LGBTI employees in health care benefits.¹⁵⁶ Even isolated signs of progress and leadership indicate a gradual shift in awareness and attitudes.

The UNGPs do not offer a solution to the discrimination that SOGIE minorities in the region face due to systemic structural and cultural conditions. However, informants proposed that more could be done to leverage the UNGPs. The BHR movement in Asia could use the UNGPs to push for addressing SOGIE issues under each pillar. Of note is the trend of business enterprises, include a small cohort in Asia, promoting LGBTI inclusion through corporate policies and practices. This is an opening for BHR stakeholders in the region to work with business enterprises, to establish SOGIE issues as part of HRDD, and to bring SOGIE rights holders and defenders to the forefront of Asia's BHR movement.

153 UNDP. 2016. *Promoting and Protecting Human Rights in relation to Sexual Orientation, Gender Identity and Sex Characteristics: A Manual for National Human Rights Institutions*. www.asia-pacific.undp.org/content/rbap/en/home/library/democratic_governance/hiv_aids/promoting-and-protecting-human-rights-in-relation-to-sexual-orientation.html.

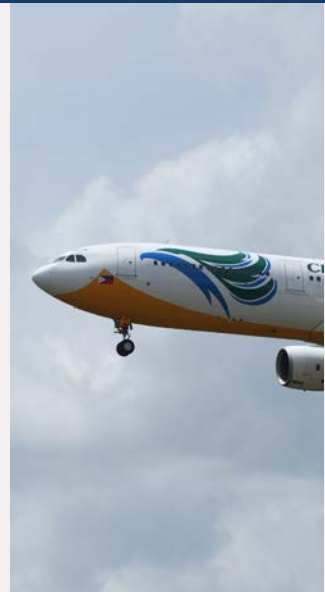
154 UN. 2017. "Tackling Discrimination against Lesbian, Gay, Bi, Trans, & Intersex People: Standards of conduct for business". www.unfe.org/wp-content/uploads/2017/09/UN-Standards-of-Conduct-Summary.pdf.

155 PRmoment. "Tanishq Stands up for Gay Rights in India and Wins Great PR". 12 December 2013. www.prmoment.in/good-and-bad-pr/tanishq-stands-up-for-gay-rights-in-india-and-wins-great-pr.

156 The LaLit. "The LaLiT becomes India's First Hotel Chain to Include LGBTQ Employees in Healthcare Benefits". 9 July 2018. www.thelalit.com/press-releases/the-lalit-becomes-indias-first-hotel-chain-to-include-lgbtq-employees-london/

Case study: Transgender flight attendants

When airlines in Southeast Asia began recruiting transgender flight attendants, firstly on PC Air in Thailand then later on Cebu Pacific in the Philippines, this was seen by some as an advancement of the rights of transgender women. A small number of transgender women were recruited, passed the course, and went on to work as flight attendants. Given the barriers to employment that persist in the region, this acceptance in the airline industry could be seen as a major step and a sign that business enterprises and consumers were becoming more progressive. Yet, sceptics pointed out that these programmes were highly promoted and publicized by the airline companies. They provided much free advertising for the airlines. Some advertisements used transgender imagery. So, the decision could be read as opportunistic and exploitative. What first appeared as a revolution in attitudes towards transgender people in the workplace may be more limited. The programme did not prove to create a career path for transgender women. Yet, it was indicative of how inclusive the tourism and service sectors are in some countries. Now the task is to shift the paradigm from inclusivity of SOGIE minorities being a choice or a progressive policy to SOGIE inclusion being a mandatory element of corporate respect for human rights.



Given that education on human rights is a human right itself, and that few students graduate from university with any knowledge of human rights, there is much work to do. Many lecturers at Southeast Asian universities spoke of the frustration of not having textbooks appropriate for their courses. While there are many excellent human rights textbooks available, they do not always suit the needs of students in Southeast Asian universities. Translation is a big problem, as nearly all undergraduate students study in their national language. The cost of a textbook is another challenge, as they can cost the equivalent of a month's living allowance for the average undergraduate student. Further, most textbooks do not mention Southeast Asia and do not focus on the concerns which are relevant for students.

- An Introduction to Human Rights in Southeast Asia. A Southeast Asian Human Rights Studies Network Project.¹⁵⁷

EDUCATION AND BHR

Education is an often overlooked but deeply important dimension of BHR. There are three key direct interactions between education and BHR. The first is the status of human rights where education is a business enterprise—where education has been privatized. A second interaction is the impact business enterprises can have on the right to education, including when business-related displacement or child labour directly deprives a child of their human right to education. This impact can also be indirect, such as when the children of migrant workers are denied or otherwise deprived of access to education. A third important interaction is bespoke BHR education, whether that takes the form of BHR in vocational schools, BHR education materials for certain sectors, BHR education in business courses, BHR in law curricula, or specialized training for those working in or around the field of BHR. BHR education has to go beyond creating specialists. It should strive to ensure that all BHR stakeholders, particularly affected rights holders, have some type of foundational human rights education and awareness that enables them to protect themselves and one another.

Education is being increasingly privatized throughout Asia and beyond. Though States remain the primary provider, some of the best schools and universities in the region are private. While privatization can improve educational standards, it can undermine the equality of access to quality education, particularly for already marginalized populations. Privatized education within a country can create a two-tiered system that widens the education gap between rich and poor. Studies in Nepal show that most wealthy children go to private schools compared to a small proportion of impoverished children. Thapa noted: “most students from the poorest group go to the community schools and only 6.4 percent from this quintile go to the private schools ... [From the] richest quintile,

157 Southeast Asian Human Rights Studies Network. 2015. “An Introduction to Human Rights in Southeast Asia”. <http://shapesea.com/wp-content/uploads/2015/11/HR-Textbook-Ed-1-Complete-low-rez.pdf>.

60 percent of students go to the private schools.”¹⁵⁸ There is a risk of privatization contributing to discrimination and inequity in education, directly threatening the human right to quality education.¹⁵⁹

The BHR implications of a two-tiered education system are many, which is why numerous informants were adamant that privatization be treated as a multidimensional BHR issue. Privatization is a Pillar I issue in that States have a duty to ensure the accessibility, quality and equality of education, whether through private or public institutions. Still, privatized education providers are business enterprises and thus have a responsibility to conduct HRDD that considers both the human rights of their students, teachers and staff, as well as their direct and indirect impact on the human right to education.

Business enterprises can, directly and indirectly, threaten the human right to education. When children are forced or compelled to work, they are often kept from school. This does not necessarily mean that business enterprises are keeping children from school. There may be a lack of available and accessible schooling, or the age of free and compulsory education set by the State may be low. Children may have to work because their families cannot afford education fees, as is regularly the case around child labour in Asia. Yet, there are certain situations where business practices impede, or prevent by illegal means under labour or trafficking laws, the ability of a child to attend school and pursue their education. Another area of interest is the access to education for children of migrant workers. Standards from the UN Convention on the Rights of Migrant Workers and Members of Their Families highlights that family members of workers do have rights (though only for regular migrant workers), which is relevant under the UNGPs regardless of whether a State has ratified the Migrant Workers Convention. This means that States and business enterprises have the respective duty and responsibility to ensure that the children of migrant workers have access to quality education. Unfortunately, business enterprises in the region regularly deny their responsibility and deflect blame to the State; in the end, civil society actors manage to create access to education or migrant children go without schooling.

Finally, what is the status of specialized BHR education in the region? The primary areas of advancement have been informal BHR trainings for CSOs and an exclusive group of corporate actors. Outside of these often intensive or one-off trainings, there are few signs that BHR education is proliferating in Asia. With few exceptions or mentions, human rights and BHR do not show up in business curricula. Bachelor’s and Master’s in Business Administration or general economics degrees in the region now include business ethics or CSR but not human rights. It is difficult to socialize the UNGPs in business communities that have not received foundational human rights education. The lack of BHR in curricula is partially due to capacity, with most teachers only having the capacity to teach CSR. Across Asia, there is little, if any, education about human rights in secondary education. With few exceptions, it does not appear that legal curricula in the region have integrated the UNGPs. Law faculties may have human rights courses or make mention of the UNGPs. However, informants from Asia’s law community felt that the UNGPs have not made their way into legal curricula in a structured or purposeful way. One area to explore is how advances, like the Principles for Responsible Management Education (PRME) initiative

158 Surya Bahadur Thapa. 2013. “Relationship between Education and Poverty in Nepal”. *Economic Journal of Development Issues*. Vol. 15 & 16: 1–2.

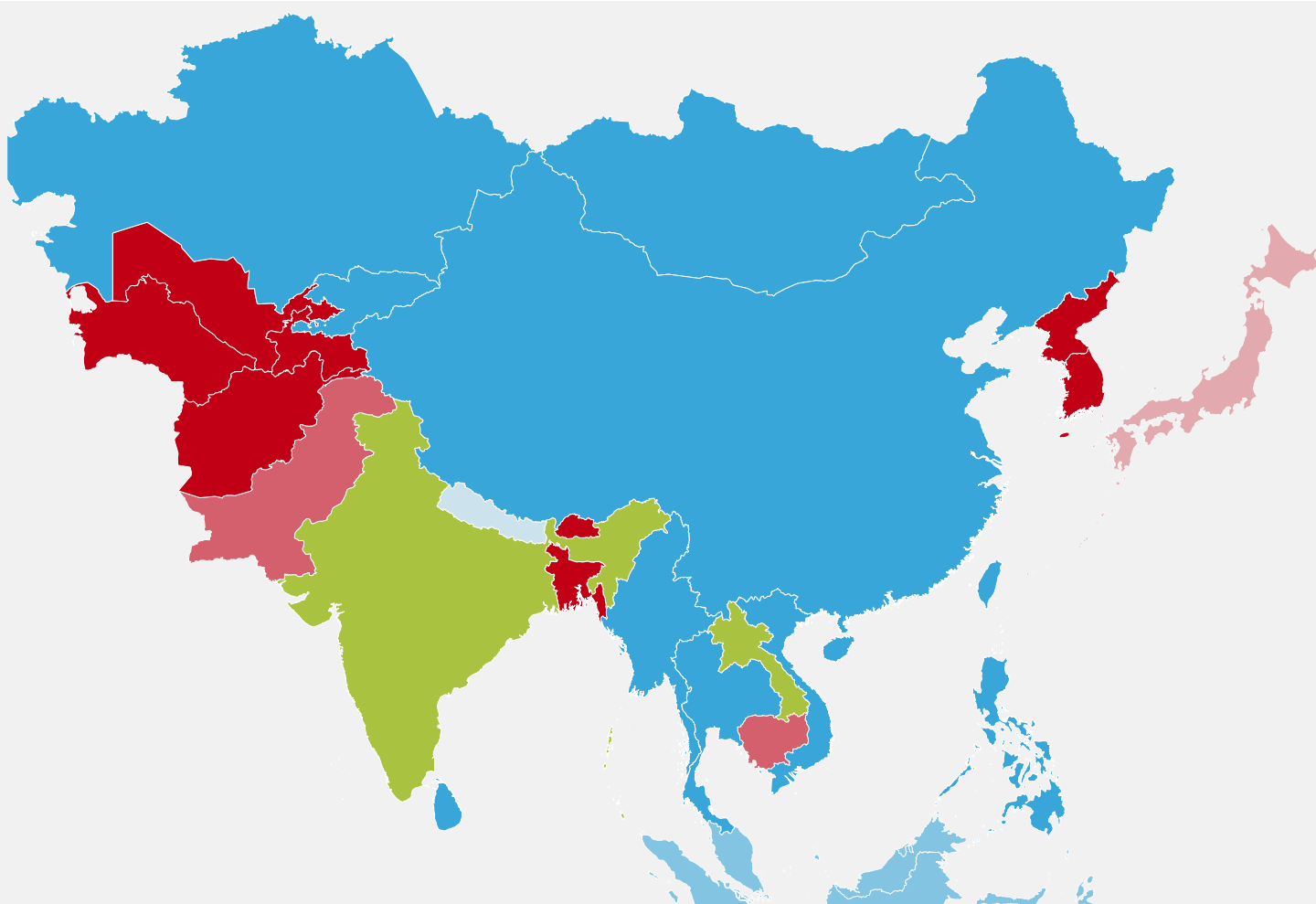
159 United Nations Educational, Scientific and Cultural Organization. “What You Need to Know about the Right to Education”. 26 November 2020. <https://en.unesco.org/news/what-you-need-know-about-right-education>.

and the Teaching and Business Human Rights Forum, may be leveraged by the BHR movement in Asia.

As the BHR movement thinks about how to elevate BHR education and reckon with the right to education as a BHR issue, there are some exciting possibilities. The UNGPs provide another tool to ensure that quality education is accessible to the most marginalized children and youth, including children of migrant workers and children who have been forced to work. There are exciting opportunities to engage universities, particularly law and business faculty, but also more generalized departments. The aim of this engagement is not only to increase the capacity of Asia's legal and corporate community, but also to ensure that all BHR stakeholders have a foundational knowledge around issues such as workers' rights, women's rights, legal systems and the UNGPs.

Gross enrolment ratio for tertiary education, gender parity index (GPI) 2016

Reproduced from the UNESCO eAtlas of Gender Inequality in Education, produced by the UIS. <https://bangkok.unesco.org/content/gender-equality-asia-pacific-education-international-women's-day-2018-statistics-snapshot>



● Gender parity (0.97 to 1.03)

● Women disadvantaged (less than 0.80)

● Men disadvantaged (1.04 to 1.10)

● Women disadvantaged (0.80 to 0.89)

● Men disadvantaged (1.11 to 1.20)

● Women disadvantaged (0.90 to 0.96)

● Men disadvantaged (greater than 1.2)

Businesses don't see the relevance of child rights beyond the norm of eradicating child labour and trafficking. There is a lack of attention to children and social media, especially around violations of rights such as privacy, freedom of expression, and physical safety from bullying and sextortion.

- Mark Capaldi. Interview, September 2020.

CHILDREN AND YOUTH

Business-related concerns about the rights of children and youth in the region are multifaceted and range in degree of intensity. There is still a disturbing amount of child labour, especially in South Asia. UNICEF estimates that "12 percent of the children aged 5–14 years in South Asia are involved in child labour, well over 41 million children."¹⁶⁰ Those statistics mark an estimated one-third decline in child labour, but the practice remains prevalent. This exploitation can take many forms and encompasses bonded labour, child soldiers, trafficking, and sexual and physical abuse in the workplace. Child labour and trafficking may be the most severe BHR concern in Asia, but as Dr Mark Capaldi notes above, there are traps in focusing only on the most extreme exploitation and failing to see the many other BHR concerns relating to children and youth. These issues include but are not limited to risks related to social media, children in the informal sector, discrimination and harassment of youth in the workplace, the potential impact of environmental degradation and changes in the global economy on children and youth, and limited access to remedies. Nevertheless, there is good reason to start by examining the ongoing struggle to tackle child labour and trafficking.

Asia is home to more working children than any other region.¹⁶¹ The ILO estimates that nearly half of child labourers in Asia work in hazardous jobs and conditions, and millions of those children are not enrolled in school at all;¹⁶² 57.5 percent of those children work in agriculture, 21.4 percent work in industry and 21.1 percent work in services.¹⁶³ The ILO has found that "in absolute terms, child labour for the 5–17 years age range is highest in India (5.8 million), followed by Bangladesh (5 million), Pakistan (3.4 million) and Nepal (2 million). In relative terms, Nepal has the highest rates of child labour in the

160 See UNICEF South Asia. "Child labour and exploitation". <https://www.unicef.org/rosa/what-we-do/child-protection/child-labour-and-exploitation>

161 The ILO explains that "[n]ot all work done by children is classified as child labour. Children's or adolescents' participation in work that does not affect their health and personal development nor interferes with their schooling is generally regarded as being something positive. Child labour refers to work undertaken by children below the appropriate legal minimum working age, based on ILO standards on child labour: the ILO Minimum Age Convention, 1973 (No. 138), as well as child labour defined by the Worst Forms of Child Labour Convention, 1999, (No. 182)."

162 ILO. "Child labour in South Asia". www.ilo.org/newdelhi/areasofwork/child-labour/WCMS_300805/lang--en/index.htm.

163 ILO. 2017. Global Estimates of Child Labour: Results and trends, 2012–2016. Geneva. www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575499.pdf.

region with one quarter of all 5–17-year-olds engaging in child labour.”¹⁶⁴ Child labour and trafficking are more clearly a BHR issue in some circumstances than others. As an anonymous informant who worked on child labour and trafficking explained: “When we look at children at work on brick kilns in Nepal, that is clearly a BHR issue. When we see the forced recruitment of child soldiers in Myanmar, that is hard to label as a BHR issue. When we see children in Thailand’s sex tourism industry, that seems part a BHR issue and part organized crime issue.” Thus, child labour and trafficking, like many BHR concerns, must be tackled holistically. Even something like the forced recruitment of child soldiers cannot be isolated from the formal and informal business enterprises and interests of the armed groups involved. Narrow applications of the UNGPs are insufficient. Reckoning with child labour and trafficking requires agility, the kind of agility that enables the BHR movement to effectively reach into informal economies and promote the human right to education, for example, as a BHR concern.

REGIONAL PROFILE OF CHILD LABOUR AND HAZARDOUS WORK: NUMBER AND PERCENTAGE OF CHILDREN IN CHILD LABOUR AND HAZARDOUS WORK BY REGION

Reproduced from “Global Estimates of Child Labour”. https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575499.pdf

		Children in child labour		Children in hazardous work	
		Number (000s)	%	Number (000s)	%
World (5–17 years)		15,622	9.6	72,525	4.6
Region	Africa	72,113	19.6	31,538	8.6
	Arab States	1,162	2.9	616	1.5
	Asia and the Pacific	62,077	7.4	28,469	3.4
	Americas	10,735	5.3	6,553	3.2
	Europe and Central Asia	5,534	4.1	5,349	4.0

Youth unemployment rates in the Asia-Pacific are lower than the global average. ILO estimates put youth unemployment at 10.6 percent in the Asia-Pacific compared to the global average of 12.5 percent. However, it should be noted that youth in the region cannot afford to be unemployed due to lacking or absent social security nets.¹⁶⁵ This creates pressure on youth to find employment. They can be driven into informal,

164 ILO. “Child labour in South Asia”. www.ilo.org/newdelhi/areasofwork/child-labour/WCMS_300805/lang-en/index.htm.

165 ILO. “Youth Unemployment in Asia-Pacific: Trends and projections”. https://www.ilo.org/global/about-the-ilo/multimedia/maps-and-charts/enhanced/WCMS_650040/lang-en/index.htm.

precarious, low-paid work and dangerous work (including sex work), which magnifies their vulnerability. As UN Youth notes, “in the absence of decent work, young people subsist in the margins of the economy and are particularly vulnerable to social exclusion, which breeds political instability.”¹⁶⁶ Marginalized groups, such as indigenous youth, sexual minorities, and youth living with disabilities cannot always enter the formal workforce. The unemployment rate of youth with disabilities has been estimated at about 80 percent.¹⁶⁷ As the ILO states: “Finding decent work early in life avoids a vicious cycle of diminished prospects, poverty, and social exclusion.”¹⁶⁸

When marginalized youth cannot access the formal labour market, they turn to informal labour or irregular migration in search of work. Some governments in the region have responded to youth employment problems, such as the Sri Lankan government proposing a raft of policies to address the 20 percent youth unemployment rate. Those policies set out to address what the government has coined the “four e’s: equal opportunity, employment creation, employability and entrepreneurship.” However, these policies do not appear to feature explicit BHR considerations apart from minimum wage and access to social services. When youth face barriers to decent work, there are larger political ramifications. A World Bank report on Youth Employment in Nepal notes that a “particularly relevant issue for Nepal, given its recent history, is the interplay between poor labour market conditions and prospects for youth and social unrest.”¹⁶⁹ Access to decent work is a significant Pillar I and II issue that has yet to receive sufficient focus in the region.

When young adults enter work for the first time, they can be vulnerable to human rights abuses. These risks can be compounded in the context of incentives for young people to enter the ‘gig economy’, to undertake internships, engage in contract work, and to become more ‘entrepreneurial’. These were precisely the wishes expressed in the recent First ASEAN Youth Development Index.¹⁷⁰ The push for youth to undertake ‘gig work’ or be more entrepreneurial can have incentives. However, many important protections for workers, such as sick pay, minimum hours and minimum pay, and collective organizing and bargaining, are rare or non-existent in this realm. According to Joel Barredo: “Young workers in the ‘gig economy’ basically work unprotected. On top of this is the push for volunteerism which undervalues youth labour. The rights of youth in all aspects of labour—such as application, recruitment, employment, safety, and benefits—should be taken more seriously” (Interview, September 2020). Making matters worse, it appears that it is uncommon for youth to have access to or seek remedy when they are exploited or abused.

166 UN Youth. 2013. “Youth Regional Overview: Youth in the Asia and the Pacific”. Bangkok. www.un.org/esa/socdev/documents/youth/fact-sheets/youth-regional-escap.pdf.

167 ILO. 2003. Proceedings of the ILO/Japan Technical Consultation Meeting on Vocational Training and Employment of People with Disabilities in Asia and the Pacific, 14–16 January 2003, Bangkok, Thailand.

168 ILO. 2020. “Youth Employment in Asia.” <https://www.ilo.org/asia/areas/youth-employment/lang--en/index.htm>.

169 Dhushyanth Raju and Jasmine Rajbhandary, eds. 2018. *Youth Employment in Nepal*. Washington, DC: World Bank Group. <http://documents1.worldbank.org/curated/en/816461530076091272/pdf/Youth-employment-in-Nepal.pdf>.

170 ASEAN. 2017. “First ASEAN Youth Development Index”. Jakarta. https://asean.org/wp-content/uploads/2017/10/ASEAN-UNFPA_report_web-final-05sep.pdf.

Youth may choose not to seek remedy because of their relative disempowerment. Due to the mobility of their labour, most youth simply change jobs, leaving the perpetrators free to conduct the abuse again. For youth in the region, remedies may be economically inaccessible or undesirable; using remedy, whether unsuccessfully or successfully, can have long-term negative effects on their future employment opportunities. This fear of reprisal can also lead to apprehension among youth to seek protection through measures such as unions. Informants proposed that while youth in the region have unprecedented awareness about rights in the workplace (due in a large part to social media and the success of movements like #MeToo), a culture of silence and anxiety persists.

There is concern that the situation of child rights in the region may worsen as a result of the simultaneous shock of the COVID-19 pandemic and new emerging threats such as social media.¹⁷¹ Numerous informants called for urgent grassroots mobilizing to avoid an upsurge in child exploitation.¹⁷² Social media deserves particular attention from the BHR movement. For most children and youth, social media is entertaining and harmless, and regulations and international standards around headline issues like child pornography are strong. Yet, sexual exploitation of children online is a fast-growing phenomenon in parts of the region. The way social platforms are structured and the regulatory framework of the internet can make the identification and arrest of perpetrators difficult.

The UNGPs provide an impetus to demand more of social media and other online platforms in relation to the rights of children and youth. Efforts like OHCHR's B-Tech project are an important advancement to this end. However, the challenges are many. In Asia, the lack of internet-based corporate respect for human rights has resulted in egregious exploitation, as noted above, largely unchecked online bullying and cyber harassment, harmful marketing, hate speech and misinformation around sexuality, reproductive health and socio-political issues. States in the region have appeared relatively unable (or sometimes unwilling) to protect human rights on online platforms. This is in part because the platform owners currently retain control. To date, those platforms, many of which are business enterprises headquartered in the United States, have not shown an ability (or a willingness as some informants argued) to address adverse impacts on children's rights, and States have not found a solution.

171 Leo Lin. "Southeast Asia Human Trafficking Risks are Increasing in the Time of COVID-19". *Atlas Institute for International Affairs*. 29 July 2020.

172 Ibid.

Case study: Children's rights and social media in Asia

Social media is global. These platforms can connect and inform in unprecedented ways. They are also home to online trolls and abusers and can threaten human rights in a multitude of ways. In Asia, the cyber laws that are meant to regulate such platforms serve not to protect children and youth, but to target advocates and political opponents, as informants noted. Yet, there is no easy fix. States have not found ways to effectively govern these platforms in Asia or elsewhere.

Informants who work on digital rights spoke to the challenge of regulating a constant barrage of millions of posts from known and unknown sources in different languages in a single country. Given that these business enterprises are headquartered in the United States, the United States government shares some of the responsibility. The social media companies themselves have shown an inability or unwillingness to respect human rights. However, there is an opportunity to harness the power of the region's social media constituency and bring social media companies to the table to determine better ways to regulate and monitor this space. Asia has 2.14 billion active social media users, with Bangladesh, China, India, Indonesia, the Philippines and Viet Nam in the top 10 countries for the number of social network users in the world. This strikes to the heart of social media business interests and may provide an avenue to advance discussions on ways to better monitor and regulate their practices and institute more appropriate legal and policy frameworks.

While social media companies may be diligent in relation to clear international crimes such as child pornography, there are no indicators that these companies have carried out effective HRDD around cyber-bullying, cyber-stalking, online harassment, predatory misinformation, hate speech, and other threats to the rights of children and youth, especially on a global scale. Further complexities arise when it is children themselves who are the perpetrators, especially around cyber-bullying. States in the region are yet to adequately protect the rights of children and youth on social media. The business enterprises involved have not adequately exercised corporate respect for the rights of children and youth on their platforms. The children and youth who experience abuse have no obvious access to effective remedy. No pillar of the UNGPs is being upheld. As a result, BHR stakeholders in Asia have the twofold task of trying to build awareness among affected rights holders, in this case, children and youth and their guardians, and working with the global BHR movement to address the breadth of social media's human rights impacts.



There is a mass of great recommendations coming out every year, but they are just not being implemented. For Indigenous Peoples, the reports and recommendations have just not been a very powerful tool unfortunately. IPs very much have agency in the BHR discourse, but they also have this scepticism towards the effectiveness of the UN. There are more and more IPs communities that have started developing their own protocols. ‘How do we actually want our rights to be respected and when outsiders come to our community what is our protocol because we cannot rely on the UN nor national legislation?’ If States and companies would actually talk to IPs about new projects, there could be solutions. And often IPs communities actually have a solution if such dialogue starts early on. Their solution may not be the most cost convenient or fastest, but they will have a solution which would allow the project to continue without damaging our lives. Moving ahead, there has to be a change from discourse to action and the creation of a legally binding, or at least some reprisal, mechanism. Just having BHR and the UNGPs as a discourse, we see it’s not enough. The intention is good, but it’s just not happening.

– Signe Leth. Interview, November 2020.

INDIGENOUS PEOPLES

IPs in the region regularly find themselves marginalized, vulnerable, and in conflict with immensely powerful business interests, especially from extractive industries, forestry, and agribusiness. Two thirds of the approximate 370 million self-identified IPs in the world are in Asia.¹⁷³ Those 260 million people represent 2,000 distinct civilizations and languages.¹⁷⁴ Many Asian States give IPs some form of legal recognition, and many of them prescribe special rights to IPs (including Bangladesh, India, Indonesia, Malaysia and Nepal).¹⁷⁵ Yet, in some States there is merely a recognition of equality of IPs as opposed to a special recognition of the additional protection and entitlements to which IPs have a right. Some countries have established legal provisions for public consultation with IPs (such as India, the Philippines, Thailand and Viet Nam) and/or customary land

173 Asia Indigenous Peoples Pact. 2014. “Overview of the State of Indigenous Peoples in Asia”. www.gapeinternational.org/wp-content/uploads/2011/08/asia-ip-overview-final.pdf.

174 Stefania Errico. 2017. “The Rights of Indigenous Peoples in Asia: Human rights-based overview of national legal and policy frameworks against the backdrop of country strategies for development and poverty reduction”. ILO. Bangkok. www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_545484.pdf.

175 Ibid.

ownership (Malaysia and India).¹⁷⁶ However, as a 2017 ILO study found, the legal frameworks are clearly disconnected from the politics and realities of protecting IPs on the ground:

*While such examples stand out positively, the overall picture in the region is characterized largely by a lack, in most countries, of dedicated mechanisms and procedures for consultations with Indigenous Peoples as envisaged in international standards.*¹⁷⁷

The principal framework governing the relationship between IPs and human rights is the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Other legal protections for IPs, such as ILO Convention No. 169, have been ratified by only one State assessed in this study, Nepal. Related conventions around the environment and climate change, such as the Paris Agreement only acknowledge the role of IPs in the preamble or through a more general desire for a participatory approach when responding to climate change. The Asia Indigenous Peoples Pact summarizes the context within which the international standards that are meant to protect IPs are regularly discarded:

*Several Asian states, underpinned by legal systems inherited from colonial times, have arrogated to themselves the right to allocate, regulate and determine land and resource ownership, use, control and development. These systems, imposed on Indigenous Peoples, often do not recognize the historical and customary use of lands and resources that they have nurtured and managed for centuries based upon their inherent rights and traditions. This has also led to the loss of these peoples' cumulative collective indigenous knowledge and worldview that have enabled them to sustainably develop their fragile homelands and unique cultures over the centuries.*¹⁷⁸

IPs typically live in marginal areas such as mountains and are among the poorest groups in the region. These IPs interact with business enterprises in many ways, but are most directly impacted by dams, mining, logging and agribusiness on their lands. This impact can be particularly adverse for IPs because “[t]he land and natural resources on which they depend are inextricably linked to their identities, cultures, livelihoods, as well as their physical and spiritual well-being.”¹⁷⁹ Displacement caused by land grabs or encroachment not only threatens the culture and identity of IPs, it pushes IPs from environments that are rich and biodiverse to settings that are not environmentally diverse or sustainable. This is one reason why IPs are disproportionately affected by climate change.

The Dongria Kondh tribe's struggle against the British mining giant Vedanta Aluminum Limited (Vedanta) in Odisha state, eastern India, was indicative of the immense power disparities that IPs face when trying to take a stand. The government of Odisha state signed a memorandum of understanding with Vedanta to develop an aluminium refinery and bauxite mining plant. Neither party took into account the project's potential impact

176 Stefania Errico. 2017. “The Rights of Indigenous Peoples in Asia: Human rights-based overview of national legal and policy frameworks against the backdrop of country strategies for development and poverty reduction”. ILO. Bangkok. www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_545484.pdf.

177 Ibid.

178 Asia Indigenous Peoples Pact. 2014. “Overview of the State of Indigenous Peoples in Asia”. www.gapeinternational.org/wp-content/uploads/2011/08/asia-ip-overview-final.pdf.

179 See The World Bank. “Indigenous peoples”. <https://www.worldbank.org/en/topic/indigenouspeoples>

on the Dongria Kondh tribe or their rights as IPs.¹⁸⁰ Despite being a small tribe of less than 10,000 people, the Dongria Kondh tribe had the awareness, capacity and support to challenge the project.¹⁸¹ The Ministry of Environment and Forests granted Vedanta an environmental clearance application despite many inconsistencies and violations, as the refinery and mining components of the project were divided to escape restrictions. Prompted by petitioners, India's Central Empowered Committee, a quasi-judicial body set up by the Supreme Court in 2002 to look into forest and environment issues, conducted a fact-finding mission and submitted a report to the Supreme Court stating that the project would do significant environmental harm, pointing out that the Dongria Kondh would be uprooted from their indigenous land, and was also in violation of Schedule V of the Indian Constitution, which prohibits the transfer of tribal land to a non-tribal group. The Supreme Court dismissed the report, and the mining operations went ahead. The Dongria Kondh and their supporters turned to public protests and disruption. A national movement against Vedanta took shape. In 2010, the Government of India intervened, and the Environment Minister called a halt to the project. The Orissa state government through the Orissa state-owned Orissa Mining Corporation immediately filed an appeal on behalf of Vedanta at the Supreme Court. All the while, the Dongria Kondh tribe and their supporters found themselves in a tense, two-year back and forth conflict with Vedanta. Vedanta ultimately decided to end the project in 2012. In April 2013, the Supreme Court landmark decision:

[D]ecided that the Dongria Kondh would have a decisive say in giving the go-ahead to Vedanta's mining project. The court recognized that the Dongria Kondh's right to worship their sacred mountain must be 'protected and preserved' and that those with religious and cultural rights must be heard in the decision-making process.¹⁸²

The Dongria Kondh's victory over a transnational mining giant illustrates the gamut of issues relating to IPs and human rights: corporate disregard for the rights of IPs, lack of community consultation, a local government prioritizing business interests over the well-being of local populations, local resilience, grassroots mobilization that turns into a national movement, and a State that ultimately rules on the side of human rights and IPs.

Unfortunately, the story of the Dongria Kondh tribe is exceptional. The more common story is one where IPs are pushed off their land and away from their way of life with nowhere to turn to and no real chance at redress. As informants explained, too often, despite explicit norms prescribing the opposite, IPs only learn about business projects on or around their lands when people arrive to initiate them. Specialists on the issues of IPs explained that the threat of displacement is ever-present and this threat is often compounded because IPs face many obstacles when trying to interface with legal systems, public authorities, banking and financial institutions, business activities, and the job market. These institutions may be unaware or unwilling to recognize the rights of IPs and adapt to be inclusive.

Informants pointed to free, prior and informed consent as exemplary of a principle that could be used by BHR stakeholders to change the fate of IPs in Asia. FPIC is a normative

180 BankTrack. "Briefing on Vedanta and the Niyamgiri Hills". www.banktrack.org/download/briefing_on_vedanta_and_the_niyamgiri_hills/vedanta.pdf.

181 See Survival International. "Tribes: Dongria". <https://www.survivalinternational.org/tribes/dongria>

182 Anjali George. "Claiming Niyamgiri: the Dongria Kondh's Struggle against Vedanta". Ritimo. 18 December 2014. <https://www.ritimo.org/Claiming-Niyamgiri-the-Dongria-Kondh-s-Struggle-against-Vedanta>

framework backed by UNDRIP, ILO Convention No. 169, and the Convention on Biological Diversity (CBD).¹⁸³ As an anonymous indigenous advocate declared in an interview: “FPIC is the last line of defence and last hope for Indigenous Peoples in the region.” The problem is that FPIC is often talked about and rarely implemented. A number of States have created laws mandating FPIC (such as India, Nepal and the Philippines) and companies claim they undertake the process. However, the reality is that which was captured in 2014 research by the Asia Indigenous People’s Pact:

*Of the more than a hundred corporate mines currently operating in indigenous territories in Asia, not many companies (if any) have undertaken a credible process of obtaining the FPIC of affected indigenous communities. In fact, some governments have even provided security services to these companies in the face of growing resistance of Indigenous Peoples and other affected communities [...].*¹⁸⁴

FPIC is a principle that is not being effectively enforced. When it is, FPIC is subverted in a number of ways, such as by disclosing inadequate information, bribing indigenous leaders or providing inadequate compensation. The ineffective enforcement of FPIC is mirrored in other areas of the rights of IPs, for example in land rights and rights to a clean environment.

IPs’ organizations and their partners in the region have mobilized to defend the rights of IPs. However, as the IPs’ movement has strengthened, there has been a proportional rise in the number of indigenous activists who have been intimidated and killed. Global Witness identified the murder of 212 environmental activists in 2019, with 40 percent of them being indigenous.¹⁸⁵ The Philippines has the second highest number of killings of environmental defenders in the world, with many being indigenous activists killed while protesting mining and agribusiness. The fact that the extractive industries, in complicity with governments, are willing to go to this level shows both the power of these industries and their level of impunity.

The position of IPs is alarming and requires swift attention from BHR stakeholders. There is concern that the situation may only worsen as the COVID-19 pandemic seems to have given rise to additional restrictions on expression and environmental protections, which could be weaponized against IPs.

Informants argued that the BHR movement could do more to elevate the rights of IPs across all three UNGP pillars and at every level of business in the region. There is also good reason to rally around efforts like the Zero Tolerance Initiative, “a global coalition led by IPs, local community representatives and supportive NGOs working collectively to address the root causes of killings and violence against HRDs linked to global supply

183 UNDRIP is rightly positioned as the beacon of FPIC in the context of a range of decisions that may affect IPs, from relocation (Art. 10) and land seizure (Art. 28) to the ability to control and protect the intellectual property associated with their cultural heritage (Art. 31) and development projects (Art. 32). However, UNDRIP and the standard of FPIC are not legally binding. See Food and Agriculture Organization of the United Nations. 2016. “Free Prior and Informed Consent: An indigenous peoples’ right and a good practice for local communities”. www.fao.org/3/a-i6190e.pdf.

184 Asia Indigenous Peoples Pact. 2014. “Overview of the State of Indigenous Peoples in Asia”. www.gapeinternational.org/wp-content/uploads/2011/08/asia-ip-overview-final.pdf.

185 Global Witness. 2020. “Defending Tomorrow”. <https://www.globalwitness.org/en/campaigns/environmental-activists/defending-tomorrow/>.

chains.”¹⁸⁶ Above all, it appears that much more could be done to provide additional BHR support to the IPs’ rights movement in Asia, particularly at the grassroots. The story of the Dongria Kondh tribe shows what is possible when stakeholders rally around IPs. In these scenarios, the UNGPs provide an impetus to ensure that IPs are aware of their rights and how to exercise them, supported by BHR professionals and advocates. Indeed, preventing the irreversible harm that appears to be on the horizon will require a rush of substantial top-down and bottom-up change.

186 See the Zero Tolerance Initiative. “The Geneva Declaration – November 2019”. <https://www.zerotoleranceinitiative.org/declaration>

Case study: A power line funded by the European Investment Bank, Lamjung district, Nepal

In 2015, a project to install electricity transmission lines through areas inhabited by IPs in the Lamjung district of Nepal was supported by the European Investment Bank (EIB, a public bank owned by member states of the EU). The project is known as the “220 kV Marsyangdi Corridor Transmission Line Project.” Complaints were made in 2018 against the project and its lack of FPIC and questionable environmental impact assessments. Planning around electricity-generating projects focuses more on impacts of dams and power plants, not the transmission lines, so there was little, if any, consideration or consultation done with indigenous groups living in areas through which the lines were passing.

There were local concerns about the health impact of the lines, increased lightning strikes, economic impacts from the loss of land value, and impacts to the environment and wildlife. Not all of these concerns have been scientifically corroborated, but that does not make them irrelevant. There was also the problem of inadequate compensation, with people getting full compensation for the land used for the towers, but only 10 percent for the land under the lines.

The importance of FPIC is clear in this project. Some of the concerns and accusations expressed by the community, for example, unfounded claims about lightning strikes, exhibit a simple lack of awareness. These points of tension could have been dealt with if the process were more participatory and consultative. Frustrations relating to compensation could also have been addressed at an earlier stage. Because the business enterprise did not engage local communities, the indigenous groups mobilized and made claims based on existing standards protecting indigenous rights including UNDRIP, FPIC, national laws, and the EIB’s own social and environmental policies and principles. The EIB’s complaints mechanism requested mediation between the groups in 2019, which has yet to be undertaken.

The fallout could have been avoided. Consultation would have not only prevented the unfortunate outcomes but unseen solutions and opportunities might have surfaced. Instead, the project is now headed for a long stand-off between indigenous groups, the EIB and the Nepal Electricity Authority.



It is not the inability of people with disabilities to work which is keeping them from the workplace, but rather the reluctance of workplaces to reasonably accommodate their needs.

- Ryuhei Sano. Interview, September 2020.

PERSONS WITH DISABILITIES

While the disability rights movement dates back to the 1970s, international standards and principles on the rights of persons with disabilities were not cemented until 2008 with the International Convention on the Rights of Persons with Disabilities (ICRPD). The ICRPD has been well received and all 11 States in this study of BHR in Asia are party to the Convention. Despite this widespread acceptance, there remain a number of hurdles to its realization, many of which occur in the realm of BHR. Persons with disabilities are mentioned in the UNGPs as a marginalized group alongside women, children, migrant workers and their families, IPs, and minorities. The UNGPs call upon States and business enterprises to take additional measures to realize the rights found in the ICRPD. However, according to informants who focus on persons with disabilities, the UNGPs have not brought about significant advancements towards inclusion and opportunities for persons with disabilities in Asia to exercise their rights.

Asia is home to an estimated 690 million persons with disabilities. This population faces extreme poverty, barriers to employment, barriers to participation and social protections, and additional vulnerabilities that vary across class, context and gender.¹⁸⁷ While there have been improvements in the treatment of persons with disabilities in Asia, as discussed below, the situation remains generally challenging for many persons with disabilities and their families.

Seen through the lens of BHR, several issues become apparent. Workplaces are rarely favourable to persons with disabilities because of barriers to access. Barriers can be physical, such as stairs; cultural, such as beliefs that persons with disabilities are unable to work; and communicative, such as when information is not available for those with auditory or visual impairments. A challenge is that, according to informants, business enterprises in Asia tend to understand reasonable accommodation only in terms of installing ramps, which ignores the significant barriers relating to communication and attitudes. Since 2004, the World Health Organization (WHO) has recognized that people with a disability are particularly vulnerable to road accidents.¹⁸⁸ Across Asia,

187 UN. 2018. *Building Disability-Inclusive Societies in Asia and the Pacific: Assessing progress of the Incheon Strategy*. Bangkok. www.unescap.org/sites/default/files/publications/SDD%20BDIS%20report%20A4%20v14-5-E.pdf.

188 World Health Organization. 2004. "World Report on Traffic Injury Prevention". Geneva.

persons with disabilities are killed at train and bus stations en route to or from work.¹⁸⁹ In developing countries, public transport is entirely inaccessible for most persons with disabilities, making work from home the only option.

Persons with disabilities in the region can face barriers as consumers. Outside of pockets in urban centres where recent development has employed universal design and reasonable accommodation, persons with disabilities are regularly prevented from shopping and leisure activities. And business-related harms can disproportionately impact persons with disabilities. For example, the privatization of services, especially around health, education, transport and utilities, has disproportional economic impacts on persons with disabilities. In all, the breadth and depth of businesses' impact on the rights of persons with disabilities in the region goes far beyond what is seen at first glance.

As Dr Sano's introductory quote suggests, perceptions towards persons with disabilities will need to change to make possible the fuller realization of the ICRPD and UNGPs. Across the region, persons with disabilities are commonly treated as subjects of charity rather than rights holders. Persons with disabilities in the region often find themselves in exclusionary arrangements, rather than inclusive, mainstream ones. At a corporate level, the region features many CSR programmes that fundraise for persons with disabilities, but few programmes that work to address the barriers that prevent capable persons with disabilities from job opportunities and equal treatment. Furthermore, there are gaps and barriers that prevent persons with disabilities in the region from access to remedy when they encounter impediments to work, discrimination at work or other business-related human rights abuses or adverse impacts.

Addressing the exclusionary attitudes and practices that persist in Asia will require action under all three pillars of the UNGPs. States in the region currently reserve certain occupations for persons with disabilities, establish subsidized sheltered workshops, or give disability quotas or tax breaks to business enterprises that employ persons with disabilities. All of these actions may be well-intentioned and aimed at inclusion, but none of them asserts the position of persons with disabilities as rights holders. As Ryuhei Sano summarizes:

People in the disability sector are cautious about businesses which employ persons with a disability for a financial incentive. While in many cases this is successful, some companies discourage disabled people from their workplace. It may suit some disabled people to work from home because the working environment is more accessible. But this kind of consideration should be taken according to the needs of a person with a disability and not the business. The private sector may recognize the right to work for a person with a disability but neglect the principle of inclusion. (Interview, September 2020).

189 Unfortunately, there are few studies of this phenomena in Asia, perhaps because the focus for much work is on accessibility, and not on the safety, of disabled commuters. Japan has been reviewing the safety of its public transport system with disability groups conducting surveys to find that at least 57 stations were considered dangerous: The Mainichi. "Many train stations remain dangerous for the blind in Tokyo". 18 September 2016. <https://mainichi.jp/english/articles/20160918/p2a/00m/0na/005000c>; and Japan Disability Forum commenting that there "have been continued accidents where persons with visual disabilities have fallen from the platforms in stations": Japan Disability Forum. 2019. *Japan Disability Forum (JDF)'s Parallel Report*. www.normanet.ne.jp/~jdf/data/pr/jdf_report_for_lois_en.pdf.)

The inclusion of persons with disabilities, recognizing their right to work, requires laws and regulations that establish accountability and agency. Under Pillar II, there is a need to mainstream the rights of persons with disabilities as a mandatory element of HRDD, rather than a special programme. Diversity, equality and inclusion policies may be another entry point, though it is important that those policies treat persons with disabilities as rights holders deserving of accountability and agency, rather than bystanders or statistics. There are a number of exemplary person with disabilities programmes in the region. In South Asia, Lemon Tree Hotels in India have won a global award for their programme to employ Opportunity Deprived Indians (referred to as ODIs) and persons with disabilities, which involves collaboration with governmental bodies and NGOs.¹⁹⁰ Starbucks' job advertisements in the region regularly include the following:

*We are committed to creating a diverse and welcoming workplace that includes partners with diverse backgrounds and experiences. We believe that enables us to better meet our mission and values while serving customers throughout our global communities. People of color, women, LGBTQIA+, veterans and persons with disabilities are encouraged to apply. Starbucks Corporation is committed to offering reasonable accommodations to job applicants with disabilities.*¹⁹¹

Food shops in India, Nepal and Sri Lanka were cited for their inclusion of persons with disabilities.¹⁹² This kind of commercial leadership is galvanized by government leadership like from the National Council for Persons with Disabilities in Sri Lanka and contributions from civil society like from the National Centre for Promotion of Employment for Disabled People in India. Still, informants emphasized that these efforts are only a start and there is much work to be done to foster inclusion, predicated on dignity and equality. Still, it is promising that there are positive efforts underway.

Concerted Pillar III interventions are needed to ensure that persons with disabilities are in a position to access remedy when their rights have not been properly upheld. Beyond any one pillar of the UNGPs, there appears a need to strengthen the connection between the BHR movement and the disability rights movement in the region. Disability activists tend to use the ICRPD as the 'go to' document for defining and protecting disability rights, thus enforcing rights through the treaty rather than mobilizing the UNGPs. The treaty is legally binding, clearer on standards and definitions, and widely ratified. Given this and recognizing the more voluntary nature of the UNGPs, it remains the preferred choice of disability advocates. However, this results in missed opportunities to demand corporate respect for the rights of persons with disabilities and to remedy those who experience business-related discrimination or exclusion.

190 Amazing Workplaces. "Building an Inclusive Organization, The Lemon Tree Hotel Way!" 2 December 2019. <https://amazingworkplaces.co/building-an-inclusive-workplace-the-lemon-tree-hotel-way/>.

191 See, for example, the advertisement on the Starbucks Taleo (talent acquisition) website: <https://starbucks.taleo.net/careersection/1000222retail/jobdetail.ftl?job=170011559>

192 Priyanjana Roy Das. "Taking a Different Turn: Many food places in the Capital are now employing differently-abled people". Indian Express. 20 December 2018. <https://indianexpress.com/article/lifestyle/food-wine/world-disability-day-food-restaurants-employing-pwds-5474986/>.

The past years, especially during the COVID-19 pandemic, have seen a mixture of positive and negative developments for persons with a disability in terms of their relationship to business. The COVID-19 pandemic has led to a fundamental (and maybe permanent) transformation of labour around the world. The acceptance of people working from home as an alternative to the office has opened up opportunities for persons with disabilities living with physical and sensory impairments. Work from home is not only more convenient, but it also eliminates the dangers and difficulties of travel. However, the work-from-home model only benefits those who have access to these types of jobs and technologies. Furthermore, informants raised concerns that these new opportunities and benefits will likely have consequences, such as a lack of upward mobility and intensified exclusion from society. This evolving situation exemplifies why it is so important to forefront the inclusion of affected persons with disabilities in processes like HRDD. It is also a reminder of the need to foster a stronger connection and collaboration between Asia's BHR movement and disability rights movement.

Case study: Reasonable accommodation and Bangkok's BTS train system

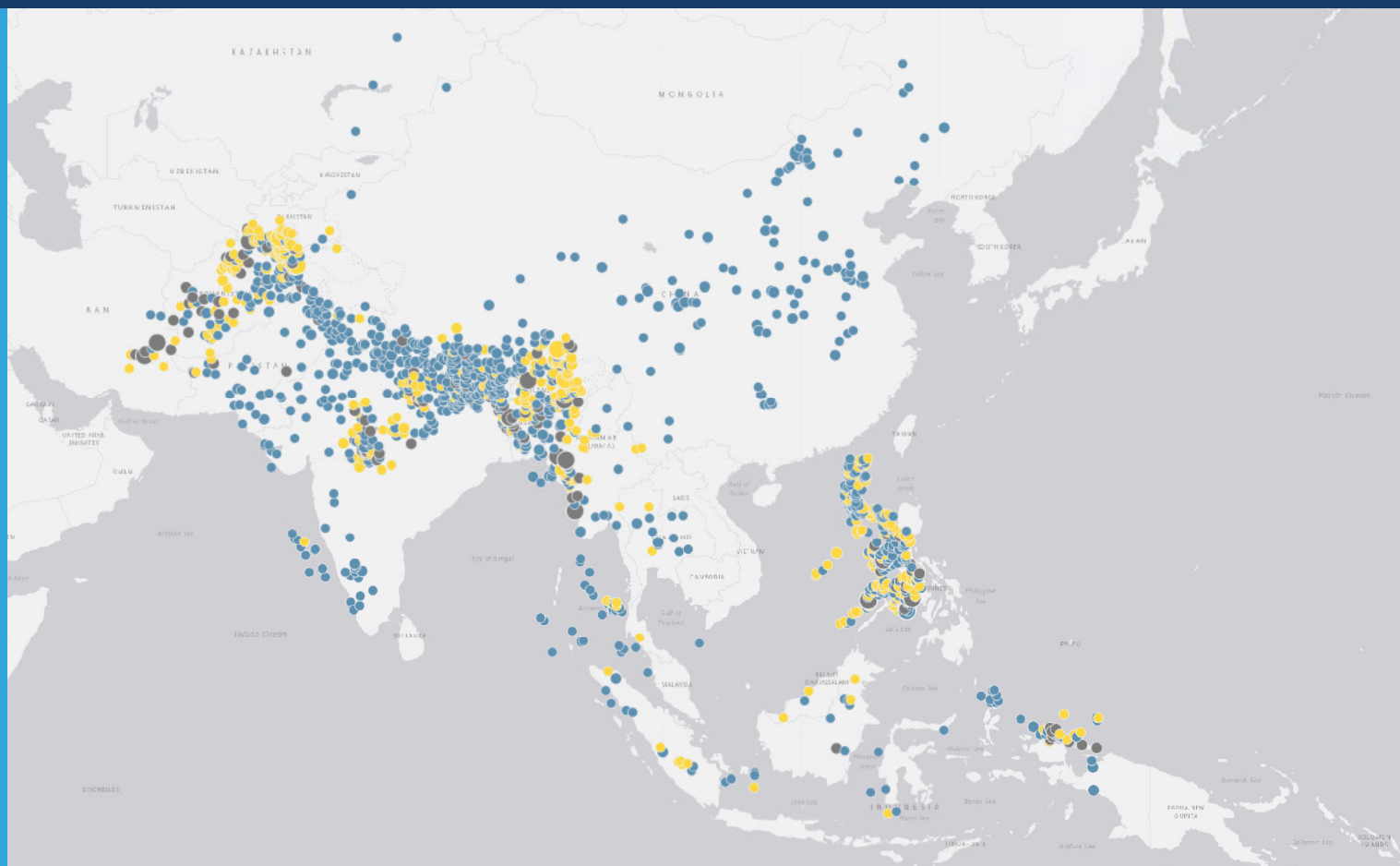
The Bangkok Mass Transit System (BTS, or the Skytrain) is part of the public transport system in Bangkok. Now open for around 20 years, it has slashed travel time in a city notorious for traffic jams. Persons with disabilities advocacy groups have been involved in a long-standing dispute with the BTS about the lack of accessibility for people in wheelchairs. Only 17 of the 36 stations are wheelchair accessible, and even those lifts may only be accessible from one side of a major road. The BTS is a public company operating a licence awarded by the Bangkok local government. A 2014 Administrative Court decision affirmed that all stations should be wheelchair accessible, but this is yet to be implemented.

The local government that awarded the licence has not pressured the BTS to comply. Most pressure has come from persons with disabilities activists. From the planning stage on, there was clearly not enough consideration given to persons with disabilities. The BTS has recognized its responsibility to install lifts, but they also claim that providing this accessibility is not reasonable, as there are infrastructure challenges and suitable contractors are hard to find. Six years after the ruling, 19 stations still do not have lifts. Persons with disabilities groups have been involved in a number of legal cases and regular meetings with the Ministry of Transport. The most recent court case involves a claim for compensation by persons with disabilities activists for the failure of the Bangkok Metropolitan Administration to implement the earlier court ruling to install lifts at all stations. This case was lost, but the ruling that the BTS must build lifts still stands. This case is exemplary of how BHR standards and processes may be a pathway to accountability, but justice ultimately depends on enforcement.



Battles and violence against civilians

Map captured from the Armed Conflict Location and Event Data Project (ACLED). <https://acleddata.com/>



EVENT DATE RANGE
07 May 2020 to 07 May 2021

ACTOR TYPES
State Forces
Rebel Forces
Political Militias
Identity Militias
External / Other Forces

- Battles
- Violence against civilians
- Multiple event types

BHR AND ARMED CONFLICT

BHR frameworks consistently stress the importance of heightened HRDD and an understanding of the implications of international humanitarian law when doing business in or around conflict zones.¹⁹³ There is a notable risk of criminal or civil liability for violating international humanitarian law by failing to operate in a conflict-sensitive way. Business enterprises operating in armed conflict zones are to use extreme caution and account for the reality that “their actions may be considered closely linked to the conflict even though they do not take place during fighting or on the battlefield.”¹⁹⁴

¹⁹³ The commentary under Principle 12 explains that “in situations of armed conflict enterprises should respect the standards of international humanitarian law.”

¹⁹⁴ International Committee of the Red Cross. 2006. *Business and International Humanitarian Law: An introduction to the rights and obligations of business enterprises under international humanitarian law*. Geneva. www.icrc.org/en/doc/assets/files/other/icrc_002_0882.pdf.

The main instruments of international humanitarian law are the four Geneva Conventions of 1949 and their Additional Protocols of 1977, though there are numerous other treaties that address more specific topics related to conflicts, as well as the existence of related customary international law.¹⁹⁵ The justification for heightened HRDD under the UNGPs is indicated in Principle 7: “Because the risk of gross human rights abuses is heightened in conflict-affected areas.” The commentary in Principle 7 goes further to state: “Some of the worst human rights abuses involving business occur amid conflict over the control of territory.” In addition to the UNGPs, there is the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.

The necessity of heightened HRDD is clear and has been since the outset. Professor Ruggie’s original report to the Human Rights Council states:

Conflict situations are one of the most difficult circumstances for human rights. Human rights abuses frequently spark or heighten conflict, and conflict in turn often leads to further human rights abuses. Many business enterprises have to operate in such environments either because their activities require them to be in the area already affected by conflict or because they get caught up in the outbreak of a conflict. Unsurprisingly, the most egregious business-related human rights abuses also take place in such environments, where the human rights regime cannot be expected to function as intended.

A multitude of different conflicts are taking place in Asia, from high-intensity interstate armed conflicts to low-intensity subnational and transnational extremism. This includes ethnic and religious violence that features many but not all components of armed conflict. These armed conflicts create layers of threats, chronic vulnerabilities, ripe climates for exploitation and pillaging, and situations where business interests may become complicit in the activities of armed groups. The human rights risks that are inherent in and around conflict zones are too numerous to capture here. There are also vastly different types and degrees of risks from one conflict zone to another under international humanitarian law, such as labour conditions, displacement, acquisition of assets and the manufacture and trade of weapons.

As the Uppsala Conflict Data Program (UCDP) Georeferenced Event Dataset (GED) map above illustrates, Asia provides ample opportunity to learn how to deploy the UNGPs in arenas where “the human regime cannot be expected to function as intended”, to borrow from Ruggie’s report. What can and should heightened HRDD look like in conflict zones? What can be done to achieve tangible results for the conflict-affected rights holders in these areas? The BHR movement will have to learn how to navigate the region’s armed conflicts in real time. Collaboration between BHR networks and stakeholders working in or on armed conflict will be critical.

The BHR challenges and complexities that exist in Asia’s armed conflict zones cannot be overstated. For the BHR movement in the region, the task is to support rights holders who face threats ranging from everyday rent-seeking and land grabs as well as rights holders from contested territories, who face deep vulnerabilities during displacement or forced migration. When rights holders migrate from their communities in search of work, they likely lack basic protections and there is a chance that their houses may not be standing when they return. This is the kind of situation where BHR stakeholders need

195 Ibid.

to be doing concerted triage. BHR specialists may not have ample local knowledge and networks to properly design and implement responses. Yet grassroots networks in these armed conflict zones have been organizing and taking action for decades. They are the entry point for BHR. Unfortunately, too often, these toughest circumstances are avoided entirely. At present, as observed by numerous informants, Asia's armed conflict zones are seen as unapproachable, when they should be treated as locations where BHR interventions are absolutely critical.





**PART THREE:
ASIA'S EVOLVING
BHR LANDSCAPE**

In addition to the constant flux that all regions experience, Asia is in the midst of profound transformations related to the COVID-19 global pandemic, geopolitical shifts and the Fourth Industrial Revolution. Asia's BHR landscape, that is the socioeconomic, political and cultural conditions that influence and are influenced by BHR, is in flux. It is evolving and the only certainty is uncertainty. The fate of BHR in Asia depends heavily on the ability of stakeholders in and around the region to navigate these changes. Haphazard or piecemeal responses will not suffice. The various shifts and shocks require readiness at every level: globally, regionally, subregionally, nationally and locally.

The UNGPs10+ project is a promising attempt at global readiness. However, significant time and resources will need to be invested into the UNGPs10+ efforts, if they are to reckon with the scale and complexity of the challenges on the horizon. Informants felt that ASEAN and SAARC could play a critical role in advancing regional and subregional readiness. However, these same informants remarked that politics often undermine the efficacy of these institutions. This indicates a gap at the regional and subregional levels that may only be filled by civil society collaboration.

At the national level, NAPs can prepare countries for Asia's evolving BHR landscape. Yet, as this report has mentioned, NAPs alone do not achieve results or readiness. States and civil society are tasked with developing strategies, policies and projects that reckon with transformations that will impact entire countries. At the local level, lives, livelihoods and the environment are already being transformed in irreversible ways by new shocks and shifts. There are communities that are feeling the threefold impact of the COVID-19 global pandemic, geopolitical shifts and the Fourth Industrial Revolution. At the grassroots, the evolving BHR landscape is adding layers of threats and vulnerabilities to already arduous circumstances. For these affected rights holders, the task is not readiness, but triage, and that is a call to urgent action for the BHR movement.

THE IMPACT OF COVID-19

Asia will start the next decade of the UNGPs in the middle of a painful and prolonged global pandemic. The pandemic will have repercussions for years, if not decades. COVID-19 has impacted every region and has fundamentally shifted the BHR landscape. UNDP called the virus: "the defining global health crisis of our time and the greatest challenge we have faced since World War Two."¹⁹⁶ States, the business world and the human rights community—none were ready for the shock of COVID-19. That shock hit the most vulnerable individuals and communities around the world the hardest. COVID-19 "had devastating effects on Asia's micro, small and medium-sized enterprises", according to the Asian Development Bank.¹⁹⁷ Both formal and informal economies in Asia have been hard hit. Farmers throughout the region have faced what Neha and Kaustubh Kumar describe as a triad of "agri-market-income shock and

196 UNDP Asia and the Pacific. "COVID-19 Pandemic". <https://www.asia-pacific.undp.org/content/rbap/en/home/coronavirus.html>.

197 Asian Development Bank. "Asia's SMEs Beyond the COVID-19 Crisis". 28 October 2020. www.adb.org/news/events/asia-s-smes-beyond-covid-19-crisis-live-webinar.

reduced access to food and water”.¹⁹⁸ Different sectors have been affected in different ways. The automotive industry in the region and beyond was particularly hard hit. The ILO explains:

*Wuhan, the city at the centre of the outbreak in China, is known as ‘motor city’ as it is the home to such auto plants as General Motors, Honda Motor, Nissan Motor, the Peugeot Group (PSA), Renault and Toyota Motor. Production at these plants has stopped completely, and there are reports of plant closures across Asia.*¹⁹⁹

The BHR perspective on the global pandemic did have encouraging elements. Automotive and garment factories shifted production to produce much-needed personal protective equipment, testing kits and other health care supplies.²⁰⁰ Trade unions in the region moved swiftly to protect workers. In April 2020, the Ceylon Federation of Labour in Sri Lanka campaigned “against any action that would resume production without first ensuring the safety and security of workers while at work, in the course of employment and while commuting to and from work”.²⁰¹ The ILO was quick to produce guidance to protect workers during the pandemic, some of which was taken up by governments and industries in Asia.²⁰² Unfortunately, positive outcomes of BHR actions are overshadowed by the negative impacts of the pandemic.

Global brands triggered force majeure clauses, effectively passing their burdens and expenses down the supply chains. Suppliers in Asia then made similar moves. Ultimately, the most marginalized rights holders in the region ended up shouldering impossible costs and conditions. The impact of the pandemic had deep economic, gendered and cultural dimensions, as this anecdote from *The Guardian* illustrates:

When Hla, 19, tried to go back to work seven months ago after having a baby, there were no jobs. Hundreds of garment factories in Myanmar had closed after western fashion brands cancelled orders due to the pandemic, leaving thousands of women jobless.

As lockdown gripped Yangon, her marriage broke down, her husband left, and her father had to sell his trishaw—no longer able to take passengers in the city. Her parents and baby were hungry. Five months ago, she became a sex worker.

‘I feel very scared,’ she says. ‘Since I’m always working in the dark, I try to be careful. I do this with my family in mind, thinking about how I’m going to feed them.’

198 Neha and Kaustubh Kumar. 2021. “The Impact of COVID-19 on Food Security and Income of Women Farmers in South and Southeast Asia”. *Journal of Agriculture, Food Systems, and Community Development*. Vol. 10(2): 269–271. www.foodsystemsjournal.org/index.php/fsj/article/view/922/895.

199 ILO. 2020. “COVID-19 and the Automotive Industry”. www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/briefingnote/wcms_741343.pdf.

200 Kanchana N Ruwanpura and Alessandra Mezzadri. 2020. “How Asia’s Factories Swapped High Street Fashion for PPE”. University of Edinburgh. www.ed.ac.uk/covid-19-response/expert-insights/how-asia-clothing-factories-switched-to-ppe.

201 “COVID-Hit Sri Lanka not Ready to be Open for Work.” *Sunday Times Online*. 22 April 2020.

202 James Lowell Jackson, Jason Judd and Christian Viegelahn. 2020. “The Supply Chain Ripple Effect: How COVID-19 is affecting garment workers and factories in Asia and the Pacific”. ILO. www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/briefingnote/wcms_758626.pdf.

*Hla's situation mirrors those of a growing number of women pushed into the sex trade to escape destitution, say campaigners. COVID-19 has dealt Myanmar's garment industry several blows, beginning with a shortage of raw materials from China in February that closed factories and cost between 10,000 and 15,000 jobs.*²⁰³

A recent report from the Center for Global Workers' Rights (CGWR), *Unpaid Billions*,²⁰⁴ summarizes how the global response to the pandemic saw an offloading of costs and burdens that ultimately landed on the shoulders of factory workers in Asia:

*Suppliers around the world told the same essential story: beginning in March [2020], many leading apparel corporations began renegeing on their financial obligations to the factories that make their clothes ... CGWR and the WRC [Worker Rights Consortium] estimate that buyers, in the initial weeks of the crisis, reneged on their financial commitments on roughly USD 40 billion in orders—with devastating implications for suppliers and workers. In Bangladesh alone, more than one million workers were adversely affected, with many being sent home from work without severance or furlough pay.*²⁰⁵

The pandemic revealed the way in which hardships trickle down through global supply chains and rights holders at the bottom of the chain are systematically denied agency and voice, leaving them unable to protect themselves when threats arise. That is true whether that threat is a global pandemic, a land grab or a predatory factory manager.

Few States in Asia have stepped up to protect workers during the COVID-19 pandemic. As the Clean Clothes Campaign report, *Un(der)paid in the Pandemic: An estimate of what the garment industry owes its workers*, summarizes:

Faced with the economic downturn caused by the pandemic, some governments provided direct financial support to garment workers or established legal decrees preventing factories from terminating their employees. Other governments however announced less favourable policies for workers. For example, Cambodia postponed the payment of workers' biannual indemnity pay in June and did not require employers to provide workers with legally mandated compensation and notice before closing their factories. In Bangladesh, the government required factories to pay only less than three quarters of workers' wages during the month of April.

In a situation that demanded State support, many governments in Asia have used the COVID-19 pandemic as a pretext to tighten controls on workers, particularly unionists, and HRDs. Informants questioned whether Indonesia's Omnibus Job

203 Lorcan Lovett and Nay Chi Nway. "I have to do this": Myanmar garment workers forced into sex work by Covid." *The Guardian*. 22 October 2020. <https://www.theguardian.com/global-development/2020/oct/22/i-have-to-do-this-myanmar-garment-workers-forced-into-sex-work-by-covid>.

204 The subtitle of the report is: "Trade Data Show Apparel Order Volume and Prices Plummeted through June, Driven by Brands' Refusal to Pay for Goods They Asked Suppliers to Make".

205 Mark Anner. 2020. "Unpaid Billions: Trade data show apparel order volume and prices plummeted through June, driven by brands' refusal to pay for goods they asked suppliers to make". Center for Global Workers' Rights, Penn State College of the Liberal Arts. https://ler.la.psu.edu/documents/UnpaidBillions_October62020.pdf.

Creation Law would have passed in October 2020 without the pandemic.²⁰⁶ The UN High Commissioner for Human Rights raised concerns about how the 2018 Digital Security Act has been weaponized against people during COVID-19, and urged the Bangladesh government to “suspend the application of the Digital Security Act and conduct a review of its provisions to bring them in line with the requirements of international human rights law”.²⁰⁷ According to a report by Human Rights Watch, Thailand’s Emergency Decree was claimed to be misused for the illegal detention of migrant workers, anti-foreigner sentiments, and the limitation of free speech.²⁰⁸ Informants described how, across the region, the pandemic has given way to renewed efforts to bust unions and worker collectives.

In the context of COVID-19, States in Asia have reportedly shown signs of regression on human rights, global and local business enterprises have exhibited minimal regard for human rights, and already vulnerable and indebted populations have been further marginalized.²⁰⁹ This marginalization was immediate but will be prolonged and, in some cases, permanent. The exponential increase in household debt throughout Asia will leave individuals and communities vulnerable to an array of BHR risks for years to come. The influx of household debt and prolonged unemployment resulting from the pandemic exacerbates existing concerns around surplus labour, land rights, drug abuse, mental health and criminal extortion, all of which have a significant, even if indirect, impact on BHR in Asia. Vulnerable groups that already faced concerns—women, children, informal labourers, migrant workers, persons with disabilities and IPs—are likely to be disproportionately and uniquely impacted.

As the BHR movement in Asia enters the next decade of the UNGPs, COVID-19 will certainly be front of mind, especially given that the pandemic is ongoing. The pandemic revealed and exacerbated significant BHR gaps. As BHR stakeholders move to close those gaps, they will have to reckon with the unfortunate realities that many affected rights holders are experiencing. In other words, there are many BHR lessons to be learned from the COVID-19 pandemic, but there are also very immediate and severe risks to address. Many of those risks transcend the UNGPs. BHR stakeholders will need to be ready to reckon with household debt, sex work, mental health, drug abuse and other issues that may be seen as outside the conventional scope of BHR. The COVID-19 pandemic has made those very relevant BHR issues. BHR failures in the region and beyond have created or contributed to these hardships and, thus, BHR must be part of the solution.

206 Alya Nurbaiti. “Job Creation Law rolls back economic, sociocultural rights: Activists”. *Jakarta Post*. 7 October 2020. www.thejakartapost.com/news/2020/10/07/job-creation-law-rolls-back-economic-sociocultural-rights-activists.html.

207 OHCHR. 2021. Bachelet urges review of Digital Security Act following death in custody of writer. <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26815&LangID=E>

208 Human Rights Watch. “Thailand: COVID-19 Clampdown on Free Speech: Critic arrested, State of Emergency censorship threatened”. 25 March 2020. www.hrw.org/news/2020/03/25/thailand-covid-19-clampdown-free-speech.

209 Eamon Barrett. “The pandemic’s ‘new poor’: Poverty in parts of Asia could rise for the first time in 20 years”. *Fortune*. 29 September 2020. <https://fortune.com/2020/09/29/pandemic-poverty-asia-poor-world-bank-stats-research/>.

THE FOURTH INDUSTRIAL REVOLUTION AND BHR IN ASIA

The Fourth Industrial Revolution was a term popularized by the World Economic Forum's (WEF) founder, Klaus Schwab, in 2016. It is characterized by "a fusion of technologies that is blurring the lines between the physical, digital, and biological spheres."²¹⁰ Data has become a centrepiece of today's global economy, and as the WEF notes, more data is being generated than ever before. New and emerging technologies including AI, 5G, the internet of things (IoT) and robotics are reshaping the way we live and work. Surveying the field of BHR in Asia, the impact of technology and the Fourth Industrial Revolution on human rights becomes salient in two ways.

The first concern is how the development and deployment of new and emerging technologies impact supply chains, workers within supply chains, and human development in Asia. The second concern is the role that technologies (in addition to the business enterprises operating them and the laws governing them) play in promoting or compromising human rights, especially in online spaces and digital ecosystems. The Corporate Human Rights Benchmark coins these particular human rights concerns 'downstream' or 'end-user' human rights issues. They are also widely referred to as 'digital rights'.

TECHNOLOGY AND GLOBAL SUPPLY CHAINS

Throughout the years, the ILO has warned of automation's potential impact on rights holders in global supply chains. Job displacement in Asia stands out as a top-line concern. ILO's 2016 report, *ASEAN in Transformation*, anticipated that approximately 56 percent of all employment in Cambodia, Indonesia, the Philippines, Thailand and Viet Nam is at high risk of automation-induced displacement due to technology over the next two decades.²¹¹ In Myanmar's garment sector, an ILO survey found that nearly 70 percent of factories had adopted new technologies in the past three years.²¹² The McKinsey Global Institute forecast that 12 million women and 44 million men in India are likely to lose their job by 2030 as a direct result of automation.²¹³ By 2030, 60 percent of garment workers in Bangladesh are also expected to lose their jobs.²¹⁴ The predictions are grim. However, research into the employment impact of automation technologies suggests that there may be a silver lining. ADB figures from 2018 revealed

210 Klaus Schwab. "The Fourth Industrial Revolution: What it means, how to respond". World Economic Forum. 14 January 2016. www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/.

211 ILO. 2016. ASEAN in transformation. www.ilo.org/actemp/publications/WCMS_579558/lang--en/index.htm.

212 ILO. 2020. "Automation and Digitization in the Myanmar Garment Sector: A review of the current situation and implications for market strategies, investment and skills policies". Yangon. www.ilo.org/wcmsp5/groups/public/--asia/---ro-bangkok/---ilo-yangon/documents/publication/wcms_736624.pdf.

213 Suneera Tandon. "Up to 12 mn Indian Women may Lose Their Jobs to Automation by 2030: Study". *Mint*. 4 June 2019. www.livemint.com/news/india/up-to-12-mn-indian-women-may-lose-their-jobs-to-automation-by-2030-study-1559669338838.html.

214 Daily Star. "60pc RMG Workers to Lose Jobs by 2030". *Daily Star*. 1 May 2019. www.thedailystar.net/business/news/60pc-rmg-workers-lose-jobs-2030-1737412.

a net positive impact of AI-driven automation technologies from 2005 to 2015, as 101 million jobs were cut, but 134 million jobs were added.²¹⁵ Even if automation does ultimately “increase opportunities for productivity growth and hence employment growth,” concerns remain as less affluent workers may be the hardest hit.²¹⁶

In the context of job displacement, issues like corporate and income taxation, which are rarely a focal BHR issue, may become exponentially more important. It may be the only way to deploy benefits and resources to households whose access to income is disrupted by the Fourth Industrial Revolution. Beyond thinking about how to manage job displacement as a BHR risk, there is the more immediate question of whether job displacement is inevitable. Ussarin Kaewpradap notes that the interactions between new technologies and labour do not have to be adversarial:

*Think of the possibilities. These advancements can lessen hazards and increase productivity. But this is precisely why we have to be relentless about protecting the interests of labour as new technologies come about. We have to push back against efforts that are initiated to kill the workforce and push the workers into informal sectors.*²¹⁷

Historically, technological change has hurt some workers while benefiting others. The scale of labour market disruption during this Fourth Industrial Revolution will require BHR responses that are dually urgent, expansive and structural, which underscores the importance of efforts like the ASEAN Intergovernmental Commission on Human Rights’ prospective 2023 Consultation on “Human rights and the impact of Industry 4.0 in the Digital Age.”

The Fourth Industrial Revolution certainly poses challenges for BHR, but it also presents opportunities. Technological solutions can be deployed by business enterprises to mitigate and prevent harm in global supply chains. Their impact, at scale, has yet to be realized or systematically evaluated, but this is an emerging domain. A 2019 landscape assessment by UC Berkeley School of Law’s Human Rights Center, *Technology Solutions for Advancing Human Rights in Global Supply Chains*, found that multinational companies and suppliers have deployed technology solutions for HRDD, social compliance audits, self-assessments and other traditional responsible sourcing activities. These solutions include desktop and mobile solutions, AI and blockchain. However, barriers exist that limit the adoption, impact and scalability of these solutions. Informants pointed to significant opportunities for BHR stakeholders to better engage workers in the design and development of supply chain technologies, to educate workers on the value of these technologies, and to share the outputs of data collected more widely to improve the human rights impact of measurement efforts. In the coming years, the success of technology-driven human rights solutions in the supply chains of Asia will require meaningful inclusion and engagement with affected rights holders and a robust civil society to ensure that these technologies are utilized appropriately.

215 ADB. (2018). *Asian development outlook 2018: How technology affects jobs*.

216 Christian Parschau and Jostein Hauge. 2020. “Is Automation Stealing Manufacturing Jobs? Evidence from South Africa’s Apparel Industry”. *Geoforum*. Vol. 115: 120–131. <https://www.sciencedirect.com/science/article/pii/S0016718520301871>.

217 Article 30 and Institute of Human Rights and Peace Studies (Mahidol University). 2019. *Navigating a New Era of Business and Human Rights*. https://static1.squarespace.com/static/602c19fa95b65244e2fd70f5/t/6139129c60236d737eedd7f0/1631130280077/a_new_era+%281%29.pdf.

Case study: Digital wages in Asia

Digital wages are perhaps the most documented and well-studied example of technology being deployed in global supply chains in order to improve BHR outcomes. Digital wages involve paying employees using digital accounts instead of cash. It is a practice that is becoming increasingly popular in supply chains across Asia and is thought to reduce wage-related abuses and produce better outcomes for workers, especially women.

In 2018, data gathered by Sustainable Apparel Coalition's Higg Index across 3,000 factories in 58 countries found that 67 percent of factories paid workers digitally through bank accounts.²¹⁸ Digital payments have become a widely supported practice by brands and CSOs alike, and factories that pay workers digitally are five times more likely to follow "exemplary social and labour practices" compared to those that pay with cash or checks.²¹⁹ Business for Social Responsibility's HERfinance Digital Wages programme has helped facilitate the transition to digital payments for over 100,000 garment workers across Bangladesh, Cambodia and Egypt since 2015.²²⁰

However, the adoption of digital payments varies significantly across Asian countries. In India, 95 percent of factories pay workers digitally, compared to only 25 percent in Bangladesh.²²¹ This discrepancy points to a significant opportunity for the BHR agenda to advocate for and facilitate the regional adoption of digital wages. While it may be obvious, digital payments should also not be treated as a panacea, especially given widespread job loss and unpaid wages in Asia's garment sector during the past year of the COVID-19 pandemic.²²² Still, recent events highlight the need for increased financial transparency and accountability in Asia's supply chains, and there is a major opportunity to scale the transition towards digital wages in the region in the next decade.



218 Amina Razvi and Marjolaine Chaintreau. "Factories Paying Workers Digitally are Five Times More Likely to Provide Good Social and Labor Practices". Sustainable Apparel Coalition. <https://apparelcoalition.org/factories-paying-workers-digitally-are-five-times-more-likely-to-provide-good-social-and-labor-practices/>.

219 Ibid.

220 HERproject. 2020. "Digital Wages: Positive impact for women and business". <https://herproject.org/files/reports/HERproject-digital-wages-positive-impact-for-women-business-summary.pdf>.

221 Better Than Cash Alliance. "Factories Paying Workers Digitally are Five Times More likely to Provide Good Social and Labor Practices". www.betterthancash.org/news/factories-paying-workers-digitally-are-five-times-more-likely-to-provide-good-social-and-labor-practices.

222 Human Rights Watch. "Brands Abandon Asia Workers in Pandemic: Companies canceling orders, adding to job loss, unpaid wages". 1 April 2020. <https://www.hrw.org/news/2020/04/01/brands-abandon-asia-workers-pandemic>.

The UN has affirmed that human rights apply online the same way that they apply offline. Yet, speech online is often criminalized through defamation laws that target critical perspectives, through higher criminal and civil penalties than offline crimes. In general, governments in Asia seem to want broader leeway for what constitutes a crime online ... Digital communication laws are being passed without adequate safeguards. Laws and regulations are being drafted to enable the exploitation of personal data without providing adequate safeguards. There is a desperate need for better legislation and stronger human rights mechanisms.

- Ayesha Khan, Digital Rights Researcher. Interview, September 2020.

END-USER HUMAN RIGHTS ISSUES

Awareness surrounding 'end-user' or digital rights issues has matured significantly over the past few years, as evidenced by international technology and human rights conferences such as RightsCon and corporate indexes like New America's Ranking Digital Rights' Corporate Accountability Index. Today, issues like privacy, disinformation, hate speech and algorithmic bias are frequently discussed and debated in Asia. Stakeholders recognize that confronting end-user concerns requires coordinated responses across all three pillars of the UNGPs. There is also awareness of intersectionality. The 2021 UN South Asia Forum on BHR featured a session on "Addressing Gender Bias in New Technologies" with the premise:

Algorithmic bias comes from simply uploading it along with everything else when we use machine learning and can amplify and perpetuate gender bias by uploading unrepresentative data sets. Reliance on underlying language processing and algorithms have demonstrated gender bias in the context of employment advertising and recruitment tools. For example, NLP, a critical ingredient of standard AI systems like Amazon's Alexa and Apple's Siri, among others, has been found to show gender biases. Similarly, facial recognition technologies have been called out for disproportionately misidentifying women, particularly women of colour. As new technologies expand at an unprecedented pace, it is crucial to evaluate how they depict and reinforce existing gender bias and stereotypes.

While the UN's 2016 Resolution on the promotion, protection and enjoyment of human rights on the Internet called on States "to address security concerns on the Internet in accordance with their international human rights obligations to ensure protection of freedom of expression, freedom of association, privacy and other human rights online," in Asia, there is a regional trend of States passing cyber laws without adequate human rights safeguards. Between June 2018 and May 2019, 13 out of 15 Asian countries assessed as part of Freedom House's *Freedom of the Net* report had introduced

advanced social media monitoring programmes.²²³ That report describes how social media monitoring programmes that are meant to combat extremism, for example, can create new human rights risks.

In an interview with Ayesha Khan, lawyer and digital rights researcher, she noted that inadequate human rights safeguards have allowed for the broad criminalization of online activity and the weakening of safety tools in the region. A 2019 report by the International Commission of Jurists, which analysed how Southeast Asian governments have used the law to restrict and control expression and content online, noted a “general pattern of abuse across the region, where legal provisions have been implemented in a way that curtails the rights to freedom of expression, opinion, and information online.”²²⁴ These are trends that reflect gaps and challenges across all three pillars of the UNGPs.

The task for the next decade will be to craft and promote rights-respecting cyber laws that enable and protect freedom of expression online, including the use of strong encryption and anonymous expression. As informants explained, as the use of digital communication becomes even more prevalent, consultation with local organizations will also be key to ensuring that communities are educated on how to practise “digital hygiene” and use online tools safely. OHCHR’s B-Tech project, which will seek to provide authoritative guidance to enhance the implementation of the UNGPs in the technology sector, will also be an initiative of critical importance. Digital rights are increasingly being framed as a natural extension of human rights, and in the coming decade, all stakeholders will have a role to play in advancing these rights and responding to the rise of digital communications laws in Asia that threaten human rights. The pace of change around digital rights, like the entirety of the Fourth Industrial Revolution, has put BHR stakeholders in Asia in a reactive position; it will take immense collaboration and innovation to catch up and get ahead in the next decade.

223 Freedom House. 2019. “The Crisis of Social Media”. Washington, DC. https://freedomhouse.org/sites/default/files/2019-11/11042019_Report_FH_FOTN_2019_final_Public_Download.pdf.

224 International Commission of Jurists. 2019. “Southeast Asia: ICJ launches report on increasing restrictions on online speech”. <https://www.icj.org/southeast-asia-icj-launches-report-on-increasing-restrictions-on-online-speech/>.





**CONCLUSION:
RECALIBRATING FOR THE
NEXT DECADE.**

In Asia, our experiment has failed to strengthen the existing capacity on the ground... We need the locals to lead the local solution—in order to really embed any social transformation agenda.

– Dante Pesce, UN Working Group on Business and Human Rights. Interview, October 2020.

BHR stakeholders in Asia are being pulled in countless different directions as they enter the next decade of the UNGPs. There is the ongoing triage related to the COVID-19 pandemic. There is a scramble to become ready for the Fourth Industrial Revolution, which is already well underway. Then there are the ongoing BHR treaty discussions and EU mHRDD legislation, both of which require close attention and input. All of this is on top of the deep gaps and challenges that constrain BHR in the region. BHR stakeholders in Asia will have to create their own strategies and blueprints to proliferate the UNGPs into their respective political, economic and social contexts. Under every human rights topic and in every domain of business, whether SMEs, SOEs or SEZs, tailored responses are needed. The need for change is endless and urgent. Faced with an insurmountable task, what are BHR stakeholders to do? The overarching message from informants was that the BHR movement in Asia needs to recalibrate.

Informants acknowledged the importance of NAPs, discussed the consequences of a BHR treaty, and called for new efforts aimed at potentially key influential institutions like national securities commissions, banks and NHRIs. They praised the victories that were won in a matter of years and spoke of carrying that momentum forward. Beyond these positive sentiments, though, was a fervour. That fervour was about the possibility of shifting the course of the BHR movement in Asia in a significant way. There was no single or defined vision for how Asia's BHR movement should do this over the next decade. However, there were critiques, commentaries and calls to action that consistently pointed to one conclusion: at present, the BHR movement in Asia is overly dependent on top-down change and, as Dante Pesce describes above, is out of reach for stakeholders on the ground; it does not include affected individuals and communities.

In Asia, there are ready-made opportunities to recalibrate the BHR movement so that it focuses on becoming maximally inclusive and creates change from the bottom up. Informants called for maximum efforts aimed at mainstreaming the UNGPs through local universities, legal aid networks, unions and other collectives, community organizations, government offices, SMEs and other possible allies. Informants spoke with excitement because Asia has an opportunity to be a true leader in this realm. The region is home to a vast and rich network of grassroots organizations, HRDs and civil society groups. They possess immeasurable political strength that the BHR movement could readily tap. Asia also features an array of established human rights movements. Informants felt that the BHR movement currently sits in a silo removed from those well-established movements. There is certainly much that BHR stakeholders could offer those networks and vice versa. Against this backdrop, informant after informant proposed that the stage is set to galvanize a bottom-up BHR movement, one that is centred on rights holders and driven to create change from below. Recalibrating Asia's BHR movement in this way would not only establish a strong foundation and make it possible to effectively reach affected rights holders, including those in the region's immense informal economies, but it would also unleash the experience, expertise and political strength of the grassroots.

Informants were not calling for the abandonment of top-down approaches to BHR in Asia. They recognized that without leadership and change at the highest echelons, BHR stakeholders will be unable to more fully realize the UNGPs. For example, informants were excited about the standing of BHR in the ASEAN Intergovernmental Commission on Human Rights' 2021–2025 plan.

Yet informants called for reallocation of resources and attention to bottom-up efforts. Informants consistently spoke with frustration about the top-down, technocratic and exclusive status of the BHR movement in Asia. They commented that in a region where the rule of law is regularly elusive, resilience and solutions are built from the ground up by inimitable local organizers and organizations. They envisioned a shift from a movement that depended on elites to one where bottom-up and top-down change are combined to create new opportunities.

This type of bottom-up movement, centred on rights holders, is possible. Informants who work in and on Asia are yearning for it. It will require a push towards initiatives that focus on making the UNGPs more easily accessible, understandable and applicable. But it will only become a reality if BHR stakeholders are able to reimagine how to more fully realize the UNGPs, how to measure success and how to confront global BHR challenges.

In the first decade of the UNGPs in Asia and beyond, there was a concerted focus on securing State and corporate buy-in. Toolkits, guides and benchmarks were developed to equip States and business enterprises with the means and incentives to execute their duties and responsibilities, respectively. Consultations and forums focused on further enabling States and business enterprises to realize the UNGPs. What was notably lacking, as informants regularly reiterated, were initiatives that focused on empowering civil society and building capacity on the ground. In the section on Pillar II, informant Surya Deva proposed that: "People think Pillar II is about businesses. I say Pillar II is not about businesses." Reimagining BHR in these terms reminds us that while the UNGPs ultimately require dutiful States and responsible business enterprises, there are many pathways to this end. The pathway centred on rights holders would focus on building awareness and capacity throughout civil society, particularly on the ground. When affected rights holders and the organizations that support them are well-versed on the UNGPs and understand how to leverage them, they can make demands of the UNGPs and act as agents of the UNGPs. They can carry out their own HRDD and go far beyond the corporate checklists. Legal aid networks may locate new ways to litigate and can advocate for reforms among their peers. A civil society that is galvanized around the UNGPs is a force for the fuller realization of the UNGPs.

There are many pathways to more fully realize the UNGPs and, in this sense, there are many ways to measure success. Informants spoke of how prevailing measures of success are often disconnected from the lived experiences of affected rights holders. One anonymous informant described the current situation as follows: "A group of elites gather in a room and create some benchmarks and goals for themselves. They sell those as targets. Everyone begins the chase without questioning the politics or anti-politics behind it. The next thing you know we're all hitting our targets but nothing has changed." This informant was being facetious in making the point that a framework does not necessarily translate to meaningful change. This is not to dismiss the very real victories that have been won in Asia and beyond. It is to propose that alternative measures of success deserve due consideration. These may be less quantifiable and conventional than prevailing BHR measures. But this does not lessen their validity.

Informants spoke of many examples of what success could look like: walking down the streets of Asia and encountering employers and workers who know the essentials of the UNGPs, government officials at a border or port post who have capacity on the UNGPs, informal labourers who are able to collectively organize and bargain, garment workers who know where to turn to when they are harassed or abused, factories with accessible grievance mechanisms, a local legal aid group who is able to use their training on the UNGPs and connections with the global BHR movement to support an illegally dislocated community, and an indigenous advocate who builds their campaign on the UNGPs' three pillars.

These are the measures of success that informants spoke with excitement about. Indeed, bottom-up approaches to BHR can complement top-down approaches by creating networks of resilience and readiness, and promoting a holistic, pluralistic and coherent approach towards creating change where it matters most, in the daily lives of people. That is the only way to reckon with the BHR challenges that are underway and on the horizon in Asia. If stakeholders are able to recalibrate the BHR movement for the next decade, if they bring BHR to the streets, factories and farms of Asia, they will redefine what is possible.

PROJECT BRIEF

UNDP BUSINESS AND HUMAN RIGHTS IN ASIA (B+HR ASIA)

OUR WORK

Providing technical and advisory support to governments and national human rights institutions

Promoting corporate human rights policies, due diligence processes, and remediation

Amplifying the voices of rights holders and highlighting the need for effective remedy


Conducting research and developing toolkits


Raising awareness, building capacity and facilitating peer learning


OUR IMPACT

 Regional momentum and partnership architecture

 Policy coherence between business and human rights and other agendas

 Peace, justice and strong institutions

 Reduced inequalities for all

 Climate action and environmental protection

 Decent work and economic growth

 Responsible trade and investment

WHERE WE WORK



Bangladesh
India
Indonesia
Malaysia
Sri Lanka
Thailand
Viet Nam

REGIONAL CHALLENGE

The Asia-Pacific region has long been synonymous with economic dynamism. Over the last few decades, pro-growth economic policies, increased foreign direct investment, and international trade flows have combined to lift millions out of poverty. Employment has risen significantly, industrial production has ballooned, education and healthcare have expanded, and technology and innovation have been pushed to the forefront.

Yet, rapid economic development has resulted in numerous human rights abuses, including but not limited to decent work, environmental degradation and climate change, the rule of law, conflict, civic space and public participation, corruption, trade and investment, and inequality. Many businesses operating within the region have been rocked by scandals involving abuses in their activities and value chains, impacting their reputation and future performance.

OUR FOCUS

NATIONAL ACTION PLANS

UNDP provides technical and advisory support to governments and other State-based institutions on the development of National Action Plans on Business and Human Rights and other policy and legal frameworks.

ENVIRONMENT AND CLIMATE

UNDP engages with relevant stakeholders to integrate the human rights, environment and climate agendas.

DECENT WORK

UNDP works to ensure the enjoyment of human rights in all workplaces across all business sectors and types of work or employment status.

RULE OF LAW AND SUSTAINING PEACE

UNDP promotes the rule of law, including in conflict contexts. We guide on the nexus between business and human rights and sustaining peace through consultations, research and toolkits.

GENDER EQUALITY

UNDP guides and trains States and businesses on how to integrate gender perspectives into policy and legal frameworks and their implementation.

TRADE AND INVESTMENT

UNDP strengthens policy coherence between the trade and investment ecosystem and the UNGPs to enhance the region's competitive positioning and ensure sustainable development.

COMMUNITY AND SOCIETY IMPACTS

UNDP promotes the preconditions that are necessary to enjoy human rights, including free civic space and public participation, absence of business-related corruption, respect for land rights, and the role of digital technology in society.

MAINSTREAMING BUSINESS AND HUMAN RIGHTS

UNDP acknowledges consumers, citizens and the general public as drivers for responsible business. By training Asian media professionals and running advocacy campaigns, we attempt to mainstream business and human rights in Asia.

RIGHTS HOLDERS

UNDP puts rights holders at the front of mind, in everything we do. We work to ensure that everyone's rights are respected, protected and fulfilled, including women, children, migrants, indigenous peoples and human rights defenders.

UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

The UNGPs, unanimously endorsed by the Human Rights Council in 2011, represent the most authoritative framework to prevent and address business-related human rights abuse. Its three pillars outline the State duty to protect human rights, the corporate responsibility to respect human rights, and the need for States and businesses alike to ensure access to effective remedy when violations occur.

While awareness is growing among governments, business and civil society on how the UNGPs can be used to prevent and address business-related human rights abuse, efforts need to be intensified by all to ensure that abuses do not derail Asia's progress towards the SDGs, and that progress is made where it matters most: in the daily lives of people across the region.

PROTECT

Clarifies the duty of States under international law to protect against business-related human rights abuse, and outlines how States can implement this duty.

RESPECT

Outlines the responsibility of businesses to respect human rights through corporate human rights policies, due diligence processes, and remediation of abuses.

REMEDY

Specifies the roles of States and businesses to ensure access to effective remedy for victims of business-related human rights abuse.

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