

# **BUSINESS & HUMAN RIGHTS**

# **2019**

## **A GUIDE FOR LAWYERS IN THE ASIA PACIFIC**



# **LAWASIA**

THE LAW ASSOCIATION FOR ASIA AND THE PACIFIC

## Foreword from the LAWASIA President



LAWASIA is pleased to present the *LAWASIA Toolkit on Business and Human Rights: A Guide for Lawyers in the Asia Pacific*.

The Toolkit, which was two years in the making, is designed to help lawyers navigate the laws and principles safeguarding human rights and the environment that are relevant to businesses, and to assist lawyers to actualise these principles in the course of rendering their professional services.

Business, human rights and the environment are intrinsically linked and the relationship between them is of central importance in our increasingly globalised economy. All manner of business activities invariably impacts upon, and affect to varying degrees, the lives of those involved in the business enterprise, the communities in which they operate and the wider region, as well as the environment. Lawyers are often at the centre of business transactions and cross-national issues concerning business and human rights. We are thus well placed to advise companies on what they can and should do to ensure their obligations under human rights and environmental laws, as well as assist individuals whose rights are impacted by activities and actions of business entities.

Since 2013 LAWASIA has supported the United Nations “Guiding Principles on Business and Human Rights – Implementing the United Nations ‘Protect, Respect and Remedy’ Framework”. The Guiding Principles are grounded on three foundations, namely:

- a) States’ existing obligations to respect, protect and fulfil human rights and fundamental liberties;
- b) The role of business enterprises, as organs within society, to comply with all laws and to respect human rights; and
- c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

LAWASIA became a signatory to the “Joint Declaration of Commitment on the Development and Promotion of the Field of Business and Human Rights within the Legal Profession” in December 2015.

As we know, human rights are not confined to freedoms of speech, expression and assembly, the right to liberty, legal representation of choice, freedom of religion and the right to education. There is also a much broader precept about the fundamental right to quality living, respect for others and the environment, and all that these connote. It is inevitable that the initiative to promote and instil respect and protection for human rights, and provide remedies for its breaches, must necessarily encompass the environment.

In the context of the business environment, we have also witnessed that anti-competitive behaviour and corrupt practices are areas which have an adverse impact upon our lives and the environment.

As part of our on-going advocacy to promote responsible business practices, we have endeavoured to include sessions on 'Business and Human Rights' as a composite topic, as opposed to have them as separate and disconnected discourses, in LAWASIA's business law conferences, as well as our annual conferences. We hope that this Toolkit serves as a useful resource to outline the existing international and regional human rights framework, including the 2011 United Nations Guiding Principles on Business and Human Rights, which has helped frame the issue. The Toolkit references a selection of important municipal laws and touches on specific issues such as the global supply chain, the obligations to counter corruption, the recently developed laws on the right to remedy and redress, and what lawyers can do to protect human rights defenders under threat.

We are grateful for the efforts of Professor Yasushi Higashizawa, Mr Matthew Baird, Mr David Simpson and Mr Shyam Divan in developing this Toolkit, which is intended to be periodically updated as a "living" document.

Christopher Leong  
President, LAWASIA

## **About the LAWASIA Guide – Business and Human Rights**

The project to develop “Business and Human Rights: A Guide for Lawyers in the Asia Pacific” was launched in early 2018 by Christopher Leong, the President of LAWASIA. LAWASIA first published the “Joint Declaration of Commitment on the Development and Promotion of the Field of Business and Human Rights within the Legal Profession” in 2015 with a number of national Bar and Law Societies. Since then, LAWASIA has explored this important topic with Bar leaders and experts at conferences in Sydney (2015), Colombo (2016), Tokyo (2017), Siam Reap (2018) and New Delhi (2019).

The Human Rights Section of LAWASIA has led the drafting of this Guide, with significant contributions by LAWASIA’s Environmental Law Committee. Through this process, the Guide has begun to address the challenges faced by lawyers in the Asia Pacific with respect to the adverse impacts of business activities on human rights, the environment and corrupt practices.

As noted in the introduction to this Guide, it is not intended to be a comprehensive or academic resource, but rather to be a guidance document and toolkit for lawyers in daily practice. It is also intended to be a ‘living document’ and will be regularly updated to ensure that it remains relevant as a practical guide.

Lastly, but not least, we would like to thank two experts who made this Guide possible: Mr Matthew Baird, the Deputy Chair of the Environmental Law Committee, as well as Mr David Simpson, Managing Director of InterPraxis Consulting.

Yasushi Higashizawa  
Shyam Divan  
Co-Chairs of the Human Rights Section, LAWASIA

## **About LAWASIA**

### **WHO WE ARE**

LAWASIA is a regional association of lawyers, judges, jurists and legal organisations, which advocates for the interests and concerns of the Asia Pacific legal profession. For over fifty years, LAWASIA has operated as a platform to promote the cross-jurisdictional exchange of legal knowledge; as a voice of the legal profession; and as a conduit for encouraging adherence to mutually held principles of the rule of law, professional integrity and the protection of human rights.

### **MISSION STATEMENT**

As the representative of lawyers and peak legal organisations from over 40 jurisdictions, LAWASIA's combined activities serve to:

- Encourage and enable regional interaction at all levels amongst law associations, judges, lawyers and others involved in the legal community;
- Provide an established voice for the interests of the legal community in Asia and the Pacific;
- Promote the rule of law, respect for human rights, and high standards of legal practice; and
- Facilitate quality cross-border legal education that is available and relevant to all jurisdictions, regardless of resources or level of development, for the purpose of enhancing the calibre of legal practice throughout the region.

### **OUR OBJECTS**

LAWASIA's central aim is to strengthen professional and business relations among law associations, lawyers, the private sector and government representatives in the Asia Pacific.

In the course of its activities across diverse political, social, cultural and economic contexts in the Asia Pacific, LAWASIA is further guided by the following objects:

- To promote the administration of justice, the protection of human rights and the maintenance of the rule of law within the region;
- To advance the standard of legal education within the region by all practicable means, including the interchange of students, teachers of law and practitioners, assistance in staffing of universities and the provision of advanced studies;
- To encourage communication and liaison between members in relation to general and specialised areas of law;
- To enhance the development of members' legal practices and their professional and business relations within the region;
- To further the diffusion of knowledge of the laws of the various countries within the region;
- To promote development of the law in the region;
- To advance the science of jurisprudence in all its phases and to promote the study and development of international law and of comparative law;
- To promote uniformity within the region in appropriate fields of law;
- To further international understanding and goodwill;
- To assist and co-operate with international, regional, or other organisations having all or any of the above-mentioned objects or similar objects;

- To foster relations and intercourse between lawyers and associations and organisations of lawyers within the region; and
- To uphold and advance the status of the legal profession within the region.

## **SECTIONS & COMMITTEES**

### **Sections:**

- Business Law
- Family Law & Family Rights
- Human Rights
- Judicial
- Law Management

### **Business Law Subcommittees:**

- ADR
- Anti-Trust & Competition Law
- Asia-Europe
- Banking & Finance
- Communication, Technology & Data Protection
- Corporate Securities & Investment
- Energy & Resources
- Environmental Law
- Franchising
- Intellectual Property
- One Belt, One Road
- Real Estate & Transactions
- Taxation
- UNCITRAL

### **Stand-Alone Committees:**

- Constitutional & Rule of Law
- Criminal Law
- Employment Law
- Legal Professional Indemnity Insurance
- Moot Competition
- South Pacific Committee
- Young Lawyers

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## **Part I: Guidance for Lawyers on Business, Human Rights and the Environment**

### **Chapter 1. Introduction**

This document provides lawyers who practice in the Asia Pacific Region with information and general guidance on how they can address the relationship between business and human rights and environmental issues.

Approaches to business and human rights have evolved in recent years. More rigorous obligations have been imposed on businesses and victims of human rights abuses have been afforded opportunities to qualify their injuries and seek redress. Many human rights breaches arise from environmental impacts of projects and activities, including climate change.

Lawyers play an important role in this area. On one hand, lawyers can assist businesses to fulfill their human rights and environmental obligations by helping them gain knowledge and awareness of their obligations and by building internal capacities within business to address business and human rights issues. On the other hand, lawyers can also play a key role in helping to defend individuals and communities against human rights abuses and establish a link between those alleged to have committed wrong-doings and their victims.

As such, lawyers are often at the centre of issues of business, human rights and the environment and are increasingly expected to address these issues in their practices. Due to globalisation modern legal practices often operate across-national borders and can span multiple legal systems and jurisdictions.

LAWASIA, with its mission to facilitate quality cross-border legal education, is well placed to provide lawyers in the region with basic information and skills to assist them in their practices.

This document presents a broad landscape of business, human rights and environmental issues and discusses the implications for lawyers and their clients. It is not intended to be a comprehensive or academic resource for these issues. It does, however, provide readers with a series of embedded links to further information throughout the text.

This document views the business, human rights and environmental issues broadly, through international and regional lenses. Lawyers must supplement this information with a more specific understanding of the local laws and regulations, as well as the particular business and cultural contexts in the jurisdiction in which the lawyer practices.

Finally, this document is intended to be a 'living document'. This is an emerging area of practice and it is anticipated that over time this Guide and Toolkit will be updated with new information, cases and references.



## Chapter 2. Background

The globalisation of business activities is progressing rapidly, including in the Asia Pacific Region. Modern business activities are rarely limited to a single jurisdiction, but are based on cross-border networks of supply chains. This can be where raw material or semi-processed goods are interlinked through trans-border sales, consumption, or, in some cases, through international finance and investment.

Despite best efforts, business activities can have adverse impacts which can lead to human rights abuses, environmental degradation and corruption. Multinational garment corporations, for example, may rely on supplies from poorly regulated countries where child and forced labor is pervasive. Cross-border investment in the extractives sector can lead to the destruction of the natural environment which is often a vital asset for relevant indigenous communities. Some international businesses continue to pay bribes to local government officials in order to operate or expand their business, which can seriously erode trust in the local legal systems.

In the past these adverse impacts were sometimes unaccounted for due to discrepancies in domestic law and regulations. More recently, strong concerns about these adverse impacts are being raised not only by local governments and communities, but also by foreign governments, business partners, investors, consumers and the media. As a result of such concerns, business enterprises may risk legal action or losing consumers, business partners or investors over reputational damage – they may even face legal actions in their home jurisdictions for issues that occur abroad. This is particularly the case when businesses are operating in insufficiently regulated areas or in jurisdictions where enforcement mechanisms are weak.

To be socially responsible and sustainable, businesses must address concerns about the human rights and environmental impacts of their activities. It is not enough for business enterprises to comply with the local law and regulations in jurisdictions where they operate. Business enterprises must also recognise international standards and expectations and respond to these by taking concrete actions to address human rights, the environment and corruption.

Business enterprises in the Asia Pacific Region face new laws and regulations of their own governments which often regulate overseas business activities. At the same time, business enterprises in the region (sometimes referred to as “the Workshops of the World”) are often key suppliers to multinational corporations and are increasingly required by those corporations to comply with international standards and expectations. In addition, the development of the Asia Pacific Region as the Workshop of the World has inevitably caused novel problems in communities such as widening gaps between the rich and poor, increased strain on social systems, and destruction of the natural environment on which local people rely.

Lawyers are destined to play critical roles in managing and mitigating some of these newfound risks and issues resulting from changes in the economy and increased expectations by stakeholders to uphold human rights. Lawyers are professionals equipped with skills to advise on applications of norms

relating to human rights and business. Lawyers are able to provide both business enterprises and victims of abuses with legal services. Some provide legal advice to business enterprises and investors in the Asia Pacific Region. Others advocate for rights of victims and endeavor to realise such rights. Lawyers have important roles and responsibilities to help address issues of human rights, the environment and corruption particularly with respect to business activities.

## Chapter 3. Business and Human Rights

There are a series of international legal frameworks, standards, and rules which stipulate the obligations of various parties to protect human rights, including businesses.

### What are Human Rights?

Human rights are rights inherent to all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, religion, language, or any other status. As humans we are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.

Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law and general principles. International human rights law sets out obligations for Governments to act in certain ways and/or to refrain from acting in other ways, in order to promote and protect human rights and the fundamental freedoms of individuals or groups.

Understanding the full spectrum of human rights can be a complex exercise involving a broad analysis of cultural, historical, political, gender and socio-economic contexts and factors related to rights-holders. Lawyers should therefore be mindful of, and take into account, existing international, regional and national rules and laws in the countries where their clients, suppliers or subcontractors operate.

The human rights abuse that may be committed by businesses are as varied as the world of business itself. As noted by the [United Nations \(UN\) Guiding Principles on Business and Human Rights](#) (UNGPs) (discussed further below) “business enterprises can have an impact on virtually the entire spectrum of internationally recognised human rights”.

### International Human Rights Framework

The basic framework of human rights is made up of four international instruments: the [Charter of the United Nations](#), the [Universal Declaration of Human Rights](#), the [International Covenant on Civil and Political Rights](#) and its two optional protocols, and the [International Covenant on Economic, Social and Cultural Rights](#). These three instruments are collectively referred to as the International Bill of Human Rights.

| Major Instruments of International Human Rights Law: “International Bill of Rights” |                                      |
|---|--------------------------------------|
| Universal Declaration on Human Rights (UDHR)  | Human Rights (General)               |
| International Covenant on Civil and Political Rights (ICCPR)                        | Civil and Political Rights           |
| International Covenant on Economic Social and Cultural Rights (ICESCR)              | Economic, Social and Cultural Rights |

These instruments are complemented by international treaties on the protection of human rights and a number of other instruments and treatise in the same field, notably:

- the Convention on the Rights of the Child (CRC)

- the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- the International Convention on All Forms of Racial Discrimination (ICERD)
- the Convention on the Rights of Persons with Disabilities (CRPD)
- the International Convention for the Protection of all Persons from Enforced Disappearance (ICPPED).

There are also instruments from the International Labour Organisation that contain human rights obligations, especially related to employment rights and the customary principles of international human rights law. These include the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW).

### ILO Core Conventions & International Human Rights

|   |   |  |
|---|---|--|
| Right to self-determination (ICESCR 1 & ICCPR 1)  |   |  |
| Freedom from discrimination (ICESCR 2 & ICCPR 2, 20, 26 & UD 1,2 & ILO 100)                         |   |  |
| Freedom of Association, right to unionize and strike (ICESCR 8 & ICCPR 11, 22 & UD 20 & ILO 87, 98) |   |  |
| Right to family (ICESCR 10 & ICCPR 23)  |   |  |
| Right to culture (ICESCR 15 & ICCPR 27)   |   |  |
| Right to life<br>(ICCPR 6 & UD 3)   | Right to work<br>(ICESCR 6 & UD 7)  |  |
| Freedom from torture & degrading treatment<br>(ICCPR 7, UD 5)                                       |   |  |
| Freedom from slavery & forced labor<br>(ICCPR 8 & UD 4 & ILO 29, 105)                               | Right to favorable working conditions to include<br>fair pay, equal pay & treatment, safe environment, rest<br>(ICESCR 7 & UD 23, 24 & ILO 100) |  |
| Right to security of person<br>(ICCPR 9 & UD 3)   |   |  |
| Freedom of movement<br>(ICCPR 12)   | Rights of the child, freedom from exploitive child labor<br>(ICESCR 10 & ILO 138, 182)  |  |
| Right to Personhood before the law<br>(ICCPR 16)  |   |  |
| Right to privacy (ICCPR 17)   | Right to an adequate standard of living, to include<br>food, housing, water & sanitation<br>(ICESCR 11; UD 25)                                  |  |
| Freedom of religion, thought & conscience<br>(ICCPR 18 & UD 7,23)                                   |   |  |
| Freedom of expression, opinion & access to information<br>(ICCPR 19)                                | Right to health<br>(ICESCR 12 & UD 25)  |  |
| Freedom of peaceful assembly<br>(ICCPR 21)  |   |  |
| Rights of the child and citizenship<br>(ICCPR 24)   | Right to education<br>(ICESCR 13, 14 & UD 26)   |  |
| Right to public participation<br>(ICCPR 25)   |   |  |

Rights contained in the ICCPR
  Rights contained in the ICESCR
  Rights contained in both

## Regional Dimension of Human Rights in Asia

There are no Asia-wide organisations or conventions to promote or protect human rights. Jurisdictions in the Asia Pacific vary widely in their approach to human rights and their record of human rights protection.

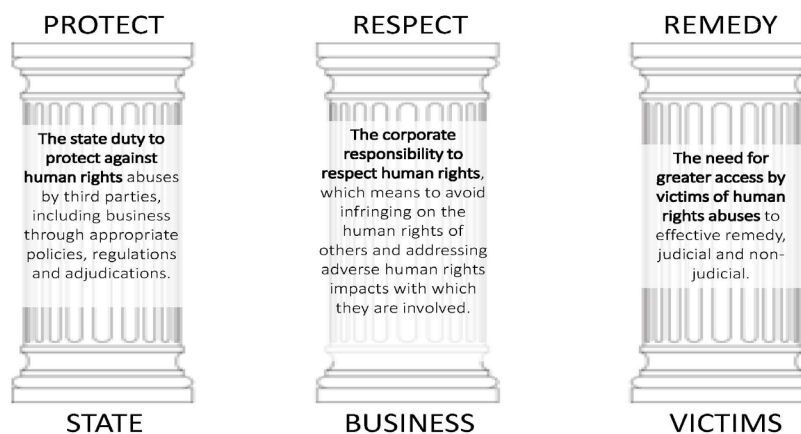
In 2010 the Association of Southeast Asian Nations (ASEAN), which includes Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore Thailand and Vietnam, established an [Intergovernmental Commission on Human Rights](#). In November 2012, ASEAN adopted the [ASEAN Human Rights Declaration](#). Currently, no regional human rights convention or a regional human rights court exists. As such, international human rights obligations are primarily transposed and framed within domestic laws.

In geographical areas considered to have weak governance (such as conflict affected zones, ‘failed’ States or ‘weak’ States) it can be difficult to rely on a local law to protect human rights, especially in a context where business and commerce is often multi-layered and globalised. As such, there is an increasing reliance on extra-territorial approaches to implement and enforce international human rights law. This requires lawyers from various jurisdictions to work closely together to apply and test various laws, frameworks and standards to achieve a universal international human rights approach.

## UN Guiding Principles on Business and Human Rights (UNGPs)

In 2011, the UN Human Rights Council unanimously endorsed the “[Guiding Principles on Business and Human Rights](#)” (UNGPs) to provide a global standard for preventing and addressing the risk of adverse human rights impacts linked to business activities. The UNGPs are a statement on the relationship between business and human rights, recognising that while governments have the primary duty to protect and promote human rights, businesses have a distinct responsibility to respect human rights. They also recognise the importance of access to effective judicial and non-judicial remedies when things go wrong.

The UNGPs provide a series of three interdependent pillars and consist of 31 principles and commentary. The three core pillars are:



Within in each of these three pillars there are foundational principles and operational principles.

The UNGPs make it clear that they should not be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.

The unique feature of the UNGPs is that they are not limited to State duties to protect human rights. They also contain principles relating to the corporate responsibility to respect human rights. The UNGPs require business enterprises (regardless of size, sector, operational context, ownership or structure) to:

- Respect human rights – this means that businesses should avoid infringing upon the human rights of others and should address adverse human rights impacts with which they are involved;
- Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts as they occur;
- Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products, services or business relationships; and
- Have in place policies and processes appropriate to the enterprises' size and circumstances.

Although not legally binding, the UNGPs have become an authoritative global standard for the human rights responsibilities of enterprises. Many of the principles have been incorporated into legislative instruments and Codes of Professional Practice. They have also been used by businesses and law firms as part of corporate governance practices. The UNGPs apply – as far as they reach – to all business sectors.

Failure to comply with the UNGPs would amount to an issue under Chapter IV of the [OECD Guidelines for Multinational Enterprises](#). This could possibly form the basis for a complaint to the [OECD National Contact Points](#).

### **Some Key Social Issues Related to Human Rights**

- Employment/labour rights
- Occupational health and safety
- Diversity / non-discrimination
- Equal opportunity
- Gender rights
- Freedom of association
- Child labour
- Forced labour
- Security practices
- Indigenous rights
- Product health and safety
- Privacy rights

**Case Study: Pregnant Migrant Workers in Asia Face Discrimination and Deportation** (26 March 2018)

According to the Fair Labour Association (FLA), women migrant workers in parts of Asia risk being deported if they become pregnant, forcing many to have unwanted abortions or abandon their newborns. Migrant workers in garment and footwear factories are forced to undergo regular pregnancy tests. The Fair Labor Association (FLA), a coalition of companies, universities and charities, has called for an end to "pregnancy discrimination", and urged countries to scrap laws that allow or encourage pregnancy tests and the use of contraception as a condition of employment. The group also encourages brands to support initiatives to protect pregnant workers.

Around the world, there are more than 122 million women working outside their home countries. Many of these women find factory jobs in Asian countries such as Taiwan, Thailand and Malaysia. Migrant workers in these countries are under tremendous pressure to finish their contracts so they can continue to financially support their families back home. Migrant workers found to be pregnant are sometimes immediately deported at their own expense. To avoid deportation, many enter the informal workforce where labour laws are often ignored and abuses are common. According to the report, some countries in Asia do provide natal care for migrant workers, but they are subjected to pregnancy tests as part of a general medical exam when they apply for a work permit which may negatively impact their employment opportunities.

Lawyers and civil society organisations are increasingly identifying human rights issues related to migrant workers and championing these causes to the legislatures and in the courts.

*Source: Business and Human Rights Resource Centre*

### **Selected Laws, Frameworks and Standards Related to Social Aspects of Human Rights**

The following laws, frameworks, and standards may have particular relevance for social aspects of human rights within the Asia Pacific Region. In particular, where businesses are a part of a globally integrated supply chain, these laws, frameworks and standards may be particularly relevant. Accordingly, legal professionals may wish to familiarise themselves with these.

#### **French Corporate Duty of Vigilance Law**

This French law enacted in 2017 establishes a legally binding obligation for French companies to identify and prevent adverse human rights and environmental impacts resulting from their own activities, activities of companies they control and activities of their subcontractors and suppliers (including those in Asia), with whom they have an established commercial relationship. Further information is available [here](#).

#### **Modern Slavery Act (UK)**

The *Modern Slavery Act 2015* is designed to combat modern slavery in the UK and consolidates previous offences relating to trafficking and slavery. The *Transparency in Supply Chain Provisions* requires businesses to publish an annual statement confirming the steps taken to ensure that slavery and

human trafficking are not taking place in the business (or in any parts of supply chain including offshore). Further information is available [here](#)

### **Modern Slavery (Australia)**

The Government of Australia introduced the *Modern Slavery Act 2018* (Cth) based on the UK legislation. The Act requires businesses and other organisations above a certain size to report annually on the risks of modern slavery in their operations and supply chains, the action they have taken to assess and address those risks, and the effectiveness of their response. Further Information is available [here](#).

### **California Transparency in Supply Chain Act**

The California *Transparency in Supply Chains Act 2010* requires large manufacturers and retailers doing business in California to publicly disclose the extent of their efforts to prevent human rights abuses in their supply chains. Further information is available [here](#).

### **US Federal Acquisition Regulations on Combatting Trafficking in Persons**

In 2015 the US Federal Acquisition Regulation (FAR) rule, “Ending Trafficking in Persons”, implemented trafficking-related prohibitions for federal contractors and subcontractors that require them to notify government procurement personnel of human trafficking or violations of the prohibited practices associated with trafficking and forced labour. Federal agencies may impose remedies, including termination, for failure to comply with the requirements. Further information is available [here](#)

### **Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)**

The CPTPP is a trade agreement between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. It covers nearly 500 million people and about 13.3% of the global gross domestic product. Among the objectives of the CPTPP are to promote high standards of human rights, labor practices and environmental protection. Article 9.17 of the CPTPP identifies the need for national entities to observe “internationally recognised standards, guidelines and principles of corporate social responsibility”. Further information is available [here](#).



## Chapter 4. Human Rights and the Environment

### Relationship between Human Rights, the Environment and Business

Business activities can have adverse impacts on areas of the environment. These include impacts on environmental systems that support life (e.g. pollution of air and water, global warming), destruction of natural resources (e.g. destruction of forests, soil pollution) and harmful effects on biological order and biodiversity.

From a business perspective, production costs would be reduced if there were no regulations imposing environmental protections that have to be followed in the manufacturing process. On the other hand, in cases where transnational business enterprises start to 'shop around' for the least regulated state as venue for production, inestimable value of the environment could be lost. Consequently, there needs to be a framework for the protection of the environment, just as there is for human rights.

Professor John Knox, as Special Rapporteur on Human Rights and the Environment, articulated the relationship between human rights and the environment. His point, set out below, was widely accepted and continues to be available at the UN's human rights website.

*All human beings depend on the environment in which we live. A safe, clean, healthy and sustainable environment is integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation. Without a healthy environment, we are unable to fulfill our aspirations or even live at a level commensurate with minimum standards of human dignity. At the same time, protecting human rights helps to protect the environment. When people can learn about, and participate in, the decisions that affect them, they can help to ensure that those decisions respect their need for a sustainable environment. – Special Rapporteur on Human Rights and the Environment ([OHCHR, Special Rapporteur on Human Rights and the Environment](#))*

Many States now establish the right to a healthy environment in their constitutions. The growing nexus between the emerging rights to a safe, clean and healthy environment and environmental law has also been the subject of significant discussion in a number of international forums such as:

- The final document of the Rio+20 Summit, '*The Future We Want*' (2012);
- The ASEAN Human Rights Declaration (2012) confirms "the protection and sustainability of the environment for the peoples of ASEAN to enjoy all human rights" (paragraph 38); and
- The Paris Agreement on climate change (entered into force in 2016) confirms in its preamble that Parties should, when taking action to address climate change "respect, promote and consider their respective obligations on human rights ...".

In the context of the environment as something closely linked to human rights, key procedural rights are also significant. These include rights of access to environmental information, rights to participate and access to remedies in environmental matters (identified in the Principle 10 of Rio Declaration on Environment and Development of 1992). Supporting procedural rights can be seen as one option for

enhancing the ability of governments to incorporate a safe, clean and healthy environmental into development outcomes.

### **Framework Principles on Human Rights and the Environment**

Just as Professor John Ruggie developed the UNGPs, over a period of five years Professor John Knox developed the [Framework Principles of Human Rights and the Environment: The main human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment](#) ("Framework Principles"). This was presented to the UN Human Rights Council in March 2018 (A/HRC/37/59). Professor Knox suggested that the Framework Principles should be accepted as a reflection of actual or emerging international human rights law and provide a sturdy basis for understanding and implementing human rights obligations relating to the environment.

The Framework Principles set out the basic obligations of States under human rights law as they relate to the enjoyment of a safe, clean, healthy and sustainable environment. The sixteen principles focus on the obligations of State to ensure that human rights obligations, in the context of the environment, are protected and enhanced. In his report, Professor Knox pointed out that States' obligations include protection "against harmful environmental interference from other sources, including business enterprises." Professor Knox also noted that these obligations inter-relate to procedural obligations, such as those contained in Principle 10 of the Rio Declaration.

### **Framework Principles on Human Rights and the Environment**

1. States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights.
2. States should respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment.
3. States should prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment.
4. States should provide a safe and enabling environment in which individuals, groups and organs of society that work on human rights or environmental issues can operate free from threats, harassment, intimidation and violence.
5. States should respect and protect the rights to freedom of expression, association and peaceful assembly in relation to environmental matters.
6. States should provide for education and public awareness on environmental matters.
7. States should provide public access to environmental information by collecting and disseminating information and by providing affordable, effective and timely access to information to any person upon request.
8. To avoid undertaking or authorizing actions with environmental impacts that interfere with the full enjoyment of human rights, States should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights.
9. States should provide for and facilitate public participation in decision-making related to the environment, and take the views of the public into account in the decision-making process.
10. States should provide for access to effective remedies for violations of human rights and domestic laws relating to the environment.
11. States should establish and maintain substantive environmental standards that are non-discriminatory, non-retrogressive and otherwise respect, protect and fulfil human rights.
12. States should ensure the effective enforcement of their environmental standards against public and private actors.
13. States should cooperate with each other to establish, maintain and enforce effective international legal frameworks in order to prevent, reduce and remedy transboundary and global environmental harm that interferes with the full enjoyment of human rights.
14. States should take additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risks and capacities.
15. States should ensure that they comply with their obligations to indigenous peoples and members of traditional communities, including by:
  - a. Recognizing and protecting their rights to the lands, territories and resources that they have traditionally owned, occupied or used;
  - b. Consulting with them and obtaining their free, prior and informed consent before relocating them or taking or approving any other measures that may affect their lands, territories or resources;
  - c. Respecting and protecting their traditional knowledge and practices in relation to the conservation and sustainable use of their lands, territories and resources;
  - d. Ensuring that they fairly and equitably share the benefits from activities relating to their lands, territories or resources.
16. States should respect, protect and fulfil human rights in the actions they take to address environmental challenges and pursue sustainable development.

*Source: Framework Principles of Human Rights and the Environment: The main human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, 2018*

There is also a relationship with the rights of indigenous peoples and other people who may be displaced or whose livelihoods may be impacted by large scale or mega-developments. Environmental law can operate to ensure that these rights are protected. The role of public participation and the recognition of “free, prior and informed consent” by indigenous groups to development that may have an adverse impact on their lands or community, including the possibility of relocation and resettlement, highlights the importance of human rights in sustainable development (UN Declaration of the Rights of Indigenous People, Articles 10 and 32).

### **Risks versus Due Diligence/ Remedial Measures**

Business operations that do not exercise due care for the environment may result in risks for human rights of local people or destruction of local communities. There are a variety of business practices that may lead to such risks, including the dumping or transshipping hazardous wastes, emission of poisonous or warming exhaust, deforestation, exploitation of natural resources, large-scale industrial accidents or trade in endangered species.

Human rights and environmental risks also pose risks for the success and sustainability of business enterprises, even in less regulated countries. Business partners may withdraw from their relationships with business enterprises who do not exercise due care for the environment or human rights matters. Responsible investors will avoid such business enterprises. Once such risks become reality, business enterprises may be sued in foreign jurisdictions for a large amount of damages. Consumers, civil society or the media may ruin the reputation of business enterprises.

To avoid such risks to the environment, business enterprises should take measures in the same way they do for human rights risks. Business enterprises should have and publicise a clear policy regarding the environment. They need to implement due diligence on risks on the environment. In addition, businesses should have a remedial framework including grievance mechanisms, as discussed below.

### **Some Selected Environmental Issues Related to Human Rights**

- Procedural Rights: Access to information, public participation and access to effective judicial and administrative proceedings regarding a “clean and healthy environment”
- Occupational health and (environmental) safety
- Environmental degradation
- Ecosystem decline
- Water shortage (quality)
- Fisheries depletion
- Natural disasters due to deforestation
- Climate change
- Unsafe management and disposal of toxic and dangerous waste and products
- Pollution of water, air, earth and living things
- Harm to human health as a result of transboundary movement of hazardous material
- Noise pollution

### **Case Study: Human Rights and the Environment**

Environmental damage caused by companies can impact a range of substantive human rights, including the rights to life, health, food, water and sanitation. There are growing calls for the global recognition of the right to a safe and healthy environment.

This is an area where human rights law intersects with other areas of domestic and international law. The Chief Prosecutor and judges at the International Criminal Court have recently called for the development of international criminal law to cover widespread environmental damage and indicated that this is an area where it would be appropriate to prosecute business leaders.

Citizens and governments are beginning to seek redress in court for environmental issues. Ground-breaking cases emerging around the world have led to a whole new area of litigation. These new strategies are focused not only on private industry but on the sovereign responsibility of governments to preserve constitutional and public trust rights to a stable climate and healthy atmosphere on behalf of both present and future generations. Climate litigation has spread beyond industrialised economies in the West into new jurisdictions throughout Asia, the Pacific and elsewhere.

Claimants are not only targeting some of the world's largest producers of oil, coal and gas, but are also targeting the governments around the world that are continuing to support the fossil fuel industry by promoting, subsidising and approving a fossil-fuel based energy system, despite the potentially catastrophic impacts of climate destabilisation and ocean acidification that would result from continuing to burn fossil fuels. Non-government organisations and environmentalists claim that governments have allowed and encouraged this crisis to transpire, in many instances in violation of citizens' fundamental rights.

Indigenous people from the low-lying Torres Strait Islands off Australia's northeast coast recently filed a landmark complaint with the UN, accusing the government of breaching their human rights by failing to tackle climate change which threatens their homelands and culture. Lawyers representing the group claim it is the first case to be lodged with the UN linking alleged government inaction on climate change to the violation of human rights.

The Philippines Human Rights Commission is also investigating fossil fuel corporations for their role in the human rights impacts of climate change.

Activists are increasingly demanding that Governments need to be held to their own affirmative fiduciary and constitutional responsibilities to their citizens to protect essential natural resources for the benefit of all present and future generations, and to pursue liability for fossil fuel corporations. The also argue that the importance of such efforts by governments could be explicitly recognised and actively encouraged in the international climate regime, just as it is in the international tobacco regime.

*Source: "Climate Justice: The international momentum towards climate litigation", June 2016*

### **Selected Good Practices and Frameworks Related to Human Rights and the Environment**

Many governments are now implementing domestic law and policies in accordance with obligations provided by the Framework Principles. The Special Rapporteur has published Good Practices on the right to a healthy and sustainable environment. While these are geared towards the state, they may also be relevant to the activities of business enterprises. Legal professionals may wish to become familiar with them.

These good practices include:

- **Transparency: Obligations to Make Environmental Information Public**  
“Most countries have adopted specific laws relating to access to information, and some, such as South Africa, have adopted constitutional provisions relating to access to information. In addition, some countries have adopted specific laws or constitutional provisions relating to access to environmental information.”
- **Stakeholder Engagement: Obligation to Facilitate Public Participation in Environmental Decision-Making**  
“Allowing for public participation in the formulation of environmental laws, regulations and policies is a good practice that can lead to better-informed decisions that reflect the public’s interests and values. Many countries have adopted comprehensive public participation procedures that apply to this context.”
- **Right to a Healthy Environment: Substantive Obligations**  
“Constitutional rights to a healthy environment are recognised in many national constitutions, with over 90 national constitutions recognising some form of the right since the mid-1970s. About two-thirds of the constitutional rights refer to health and one-quarter refer to the right in terms of an ecologically balanced environment; alternative formulations include rights to a clean, safe, favourable or wholesome environment. Africa and Latin America have in particular seen the proliferation of such rights. With the recent adoption of the right to a healthy environment in the Tunisian Constitution, over 30 African countries have now incorporated such a right in their constitutions.”
- **Obligations Relating to Non-State Actors**  
“The EU 2011 Corporate Social Responsibility Strategy endorsed the Guiding Principles. EU institutions and EU member States have made commitments and efforts to support their implementation relating to activities that may impact on the environment. For example, the European Commission (EC) has prepared sector guidelines on implementing the Guiding Principles, including for the oil and gas industry. The guidelines for the oil and gas industry set out what the Guiding Principles expect from companies operating internationally, including in the assessment of human rights impacts, the monitoring and tracking of performance, and remediation and grievance mechanisms. Under the category of assessing human rights impacts, the EC guidelines provide details on the content of an assessment, stakeholder consultation, and impacts on groups in vulnerable positions, such as indigenous peoples and women.”

Other good practices include:

- Obligation to Protect the Rights of Expression and Association
- Obligation to Provide Access to Legal Remedies
- Obligations Relating to Transboundary Environmental Harm
- Obligations Relating to Those in Vulnerable Situations

Further details of good practices from the [“Framework Principles” may be accessed here.](#)

## Chapter 5. Human Rights and Corruption

The human rights set out in the international covenants and other international instruments give rise to three kinds of obligations: the obligations to respect, protect and fulfill human rights. The obligation to respect is essentially a negative obligation to refrain from infringements. The obligation to protect primarily refers to protection from dangers emanating from third parties. The obligation to fulfill requires positive action from the State.

The State is primarily responsible for promoting and protecting the human rights of citizens and other individuals within its jurisdiction. Businesses must respect these rights. However, when corruption is prevalent, those in public positions may fail to take decisions with the interests of society in mind, causing violations of the State's obligations under the core UN human rights treaties, especially the [International Covenant on Civil and Political Rights](#) (ICCPR) and the [International Covenant on Economic, Social and Cultural Rights](#) (ICESCR).

Where corruption is systemic, it compromises a government's ability to deliver public services including health, education and welfare – all essential elements for the realisation of economic, social and cultural rights. Indeed, many of the most serious human rights violations are the result, in large part, of corruption and related efforts by powerful and governing elites to safeguard their privileged positions in order to continue to benefit from accumulated power and wealth, causing social harm to others. As former UN Secretary General Kofi Annan remarked “corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organised crime, terrorism and other threats to human security to flourish”.<sup>1</sup>

The concept of social harm is recognised in human rights law. It encompasses notions of social, economic, psychological and environmental injury or damage inflicted on society by acts of individuals, organisations or governments. Utilising this concept enables an assessment to be made of illegal and harmful acts beyond domestic criminal justice systems, providing a bridge to international human rights law. This enables lawyers to move the narrow focus on corruption as a purely economic crime to be sanctioned under criminal law, to a broader understanding of corruption that will address the consequences of corruption for individual people and society. Widening the focus of anti-corruption efforts in this way enables the application of international law, with potential far reaching consequences.

The concept of social harm is reflected in the [UN Convention Against Corruption](#). The preamble recognises “the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardising sustainable development and the rule of law.”

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<sup>1</sup> Secretary General of the United Nations, “Statement on the Adoption by the General Assembly of the United Nations Convention Against Corruption, New York, 31 October 2001  
<<https://www.unodc.org/unodc/en/treaties/CAC/background/secretary-general-speech.html>>.



## Examples of Corrupt Practices and their Impact on Human Rights

| Corrupt Practice  | Corrupt Action (UNCAC)               | Potential Harm  | Possible Human Rights Violation   |
|---|--------------------------------------|---|---|
| Officials bribed to allow toxic waste to be dumped illegally.   | Bribery (UNCAC, Article 15)          | Exposure to toxic waste which has serious health and life consequences  | Right to life (ICCPR, Article 6)<br>Right to health (ICESCR, Article 12)  |
| Immigration officers bribed to allow trafficking, sale or abduction of workers                                | Bribery (UNCAC, Article 15)          | Exploitation and abuse; forced labour; denial of liberty and dignity  | Right to be protected from trafficking (CRC, Article 34)<br>Right to freedom from slavery or servitude (ICCPR, Article 8)                           |
| Bribery of labour inspector by an employer to prevent enforcement of labour law                               | Bribery (UNCAC, Article 15)          | Poor working conditions; unreasonable working hours, low remuneration; unhealthy or unsafe working conditions                               | Right to just and favourable conditions of work (ICESCR, Article 7)   |
| Illegal diversion of sale of medicines from public clinics to private practice by doctors and health officers | Misappropriation (UNCAC, Article 17) | Reduction in drug availability; poor and discriminatory service by health officials.  | Rights to health (ICESCR, Article 12)<br>Rights to non-discrimination (ICESCR, Article 2(2))  |
| Persons who request an official document, such as passport, are asked for bribes to obtain them               | Bribery (UNCAC, Article 15)          | Unfair privilege to certain people; restriction of access to personal official documents; restrictions on liberty to move and leave country | Right to equality and non-discrimination (ICCPR, Articles 2(1) and 26; ICESCR, Article 2(2)).<br>Right to liberty and movement (ICCPR, Article 12). |

## Some Corruption-related Issues that may be linked to Human Rights Abuses

- Bribery of public officials
- Embezzlement of public funds
- Tax Evasion
- Money Laundering
- Trading in Influence
- Abuse of position
- Bid rigging
- Illicit enrichment
- False Book-keeping

## Selected List of Key Laws, Frameworks and Standards Related to Corruption and Human Rights

The following laws, frameworks, and standards may have particular relevance for issues of corruption and human rights within an Asian context. Legal professionals may wish to familiarise themselves further with the below.

- **UN Convention Against Corruption (UNCAC)**

UNCAC is a multilateral treaty negotiated by member states of the UN. It is a legally binding international anti-corruption instrument that requires state parties to implement anti-corruption measures that focuses on prevention, law enforcement, international cooperation, asset recovery, and technical assistance and information exchange. Further information is available [here](#).

- **The OECD Anti-Bribery Convention**

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions is an anti-corruption convention aimed at reducing political corruption and corporate crime in developing countries, by encouraging sanctions against bribery in international business transactions carried out by companies based in the Convention member countries. Further information is available [here](#).

- **The US Foreign Corrupt Practices Act (FCPA)**

The FCPA is a United States federal law made up of two main provisions: one that addresses accounting transparency requirements under the Securities Exchange Act, and another concerning bribery of foreign officials. The core aim of the FCPA is to prohibit companies and their officers from influencing foreign officials with any personal payments or rewards. Further information is available [here](#).

- **The UK Anti-Bribery Act 2010**

The UK *Bribery Act of 2010* covers the criminal law relating to bribery including provisions on offering and accepting bribes, the bribery of foreign public officials, and the failure of commercial Organisations to prevent bribery. The Act has a near-universal jurisdiction, allowing for the prosecution of an individual or company with links to the UK, regardless of where the crime occurred. Further information is available [here](#).

- **Asian Development Bank's Anti-Corruption Policy**

Similar to other Multilateral Development Banks, the Asian Development Bank (ADB) has a strict anti-corruption policy to which all ADB projects and project proponents must comply. The purpose of the policy is to support competitive markets, strengthen anti-corruption compliance in the region and ensure ADB-financed projects do not involve corruption. Further information is available [here](#).

- **ISO 37001 – Anti-Bribery Management System (ABMS)**

ISO 37001 is a certifiable management system standard to help organisations fight against corruption, by establishing a culture of integrity, transparency and compliance. Further information is available [here](#).



## Chapter 6. Right to Redress and Remedy

### Why is Remediation so important to address Business, Human Rights and the Environment?

The UNGPs are unique in the focus on the third pillar, Access to Remedy. Relevantly, the UNGPs direct that:

- States are obliged to ensure means of judicial and non-judicial remedies to business-related human rights abuses (Principles 25-27); and
- Business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted (Principles 28-30).

Accordingly, there are three different types of mechanisms that may enable victims and their representatives to access remedy in connection to human right abuses linked to business activities.

#### Mechanisms Available for Effective Remediation

|   | Judicial Grievance Mechanisms | Non-judicial Grievance Mechanisms   |
|---|-------------------------------|---|
| <b>State-based</b>  | Access to Judicial Systems    | Administrative, legislative and other non-judicial mechanisms (e.g. national human rights institutes (NHRI), OECD National Contact Points (NCPs))   |
| <b>Non-State-based (i.e. business, industry associations, international bodies, etc.)</b> | N/A                           | Different forms of GMs according to the demands of scale, resource, sector, culture and other parameters (e.g. contact points at operational-level, enterprise-level and/or industry-level) |

While all of the above mechanisms play an important role, the UNGPs suggest that judicial mechanisms serve as a *primus inter pares* and are “at the core” of ensuring access to effective remedy for business-related human rights (UNGP 26, Commentary). It is therefore important that States (and lawyers accessing judicial mechanisms) take appropriate steps to ensure the effective functioning of these mechanisms which includes addressing possible barriers (legal or practical) that may deny victims access to judicial remedy.

Some of the possible legal obstacles that might impede access to effective remedy are included in the table below:

| Issue  | Description   |
|--|---|
| Lack of direct applicability of human rights law to business     | International human rights law generally recognises only States as duty bearers. As such abuse perpetrated by corporations often lacks any direct remedy in human rights law.   |
| Separate corporate personalities existing among corporate groups | The ownership or control by a parent company of its subsidiary may not constitute a sufficient basis for a court to hold a parent company liable for the acts of a subsidiary. Lawyers may have to challenge the presumption against “piercing the corporate veil”.       |
| Jurisdiction and applicable law                                  | If a court decides it has jurisdiction to hear a case regarding harms outside its territory, it must decide which State’s law applies. This may impede access to an effective remedy.   |
| Rules regarding limitations of actions                           | Statutes of limitations may define the time period after the occurrence of a harm where legal claims can be brought which can pose an obstacle especially for complicated human rights claims where investigations and evidence gathering can be problematic and lengthy. |
| Rules of evidence  | In criminal proceedings, the evidentiary burden is borne by the prosecution rather than the defendant. In civil proceedings the claimant, rather than the defendant, normally bears the evidentiary burden of establishing their claim.                                   |

Other practical obstacles to accessing an effective judicial remedy include elements such as:

- Poverty, social exclusion and discrimination often encountered by claimants;
- Costs of legal representatives and the funds required to bring forward a case;
- Delays or the length of time it takes for a judicial remedy; and
- Political factors, corruption, and overall risks often endured by human rights defenders.

### **Non-Judicial Grievance Mechanisms**

As noted, access to a remedy does not necessarily require access to a court. Other mechanisms are available which may complement and support judicial mechanisms. They may also “provide a more immediate, accessible, affordable and adaptable point of initial recourse” (UN General Assembly 2008, para 84)

Legal advisors to victims should therefore review both judicial and non-judicial avenues of recourse that may be available to their clients in their respective jurisdictions.

State-based non-judicial grievance mechanisms in the Asia Pacific Region may include:

- National Human Rights Institutions (i.e. Malaysia’s SUHAKAM and Thailand’s NHRI)
- Ombudsman institutions

- National Contact Points (NCPs) under the OECD Guidelines for Multinational Enterprises (i.e. Australia, Japan, Korea, and New Zealand)

In addition to State-based non-judicial grievance mechanisms, the UNGPs also advocate for effective business-related grievance mechanisms. These “operational-level grievance mechanisms” can be accessed directly by individuals and communities who are adversely impacted by a business enterprise. Such grievance mechanisms perform two key functions regarding the responsibility of business enterprises to respect human rights:

1. They support the identification of adverse human rights impacts as a part of an enterprise’s on-going human rights due diligence; and
2. These mechanisms make it possible for grievances, once identified, to be addressed and for adverse impacts to be remediated early and directly by the business enterprise, thereby preventing harms from compounding and grievances from escalating. (Commentary to Principle 29)

They also may offer certain advantages to victims over legal forms of redress, which can include:

- Providing quick resolution of grievances that do not necessarily raise actionable legal matters;
- Being less costly for complainants to bring forward grievances;
- Providing businesses with early notice about possible abuses before situations escalate; and
- Enabling companies to improve and maintain relationships with their key stakeholders.

## **The 8 Effectiveness Criteria for Grievance Mechanisms**

In order to perform its functions appropriately, the grievance mechanisms (either State-based or non-State-based), must meet certain effectiveness criteria (Principle 31 of the UNGPs).

| <b>Criteria for Effective Grievance Mechanisms</b> |   |
|--|---|
| Legitimate   | Enabling trust from the stakeholder groups for whose use they are intended and being accountable for the fair conduct of grievance processes.   |
| 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.   |
| Predictable  | Providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation.                              |
| 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.                |
| 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. |

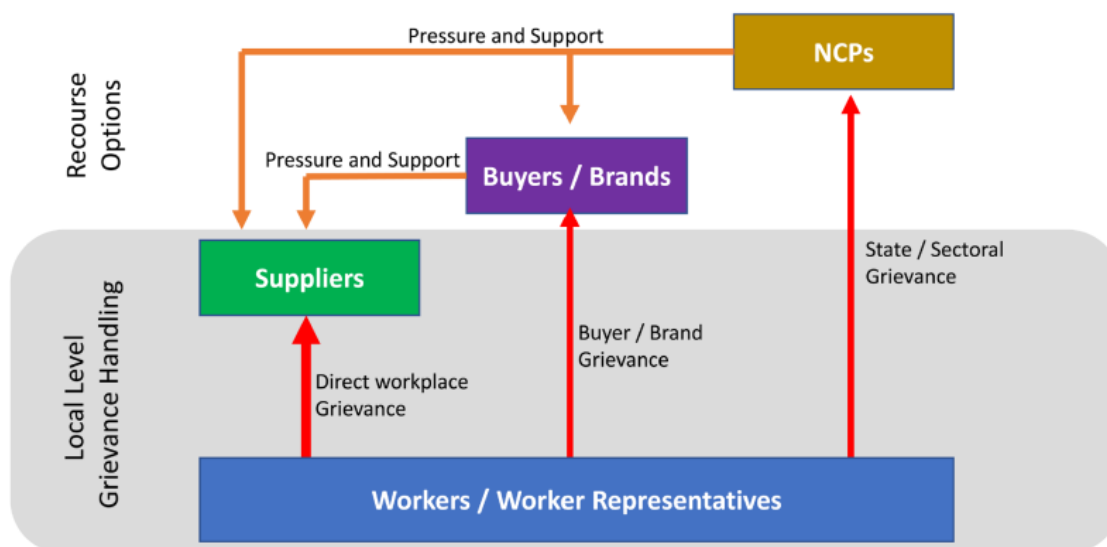
|                         |  |
|-------------------------|--|
| Rights-compatible       | Ensuring that outcomes and remedies accord with internationally recognised human rights.   |
| Continuous learning     | Drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms  |
| 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. |

## Grievance Mechanisms in the Supply Chain

There are a number of ways in which lawyers can help companies to provide access to remedies and operational grievance mechanisms for their supply chain workers. Often different mechanisms may be available at different levels.

Dealing with grievances at a workplace level is probably the best approach in most situations. There may be occasions however where local mechanisms are not available or fail to resolve grievances in an appropriate way and therefore require other avenues of recourse. In these cases, supply chain grievances may be raised directly with mechanisms operated by buyers' mechanisms or grievance mechanisms operated by the State or other regional bodies. The figure below illustrates an overview of the different approaches. These mechanisms will require specific policies and procedures which lawyers may be able to assist their clients with.

## Approaches to Grievance Mechanisms and Access to Remedy in Supply-Chain Setting



### Direct Workplace Grievance Mechanisms (workplace level)

Mechanisms where employees can raise issues directly with their employer are probably the most accessible and direct form of an operational level grievance mechanism. In most cases, resolving issues where they arise is the most appropriate and effective way to facilitate access to remedy. As direct

employers, suppliers bear the primary responsibility for addressing labour rights-related grievances. These typically take the form of mechanisms where workers can:

- lodge formal grievances and have them dealt with in a systematic manner;
- make complaints to joint committees of workers and management; or
- raise concerns via complaint boxes or hotlines (Note, however, that hotlines are insufficient by themselves).

### **Supply Chain Grievance Mechanisms (buyer/brand level)**

There are a number of ways in which brands, retailers and other organisations can ensure that effective grievance mechanisms are in place. They can require suppliers to put grievance procedures in place and help them develop the capacity to do so. They can also implement their own global supply chain grievance mechanism through which they can receive complaints directly from affected parties. Usually these are designed as a fall-back option requiring that local mechanisms be exhausted first before a complaint can be accepted.

### **Grievance Mechanisms linked to National Contact Points or Other Initiatives**

A further approach to grievance mechanisms exists where operational grievance mechanisms are linked to other mechanisms. This means that where operational level mechanisms are absent or fail to provide adequate remedy, victims can escalate their grievance to other bodies such as industry-led mechanisms or state-based non-judicial mechanisms such as National Contact Points. For example, if a retailer or brand company purchasing a product or service from the downstream supplier in Asia is based in an OECD member State, the complainant could escalate their complaint to that level.



## Chapter 7. Human Rights and Environmental Rights Defenders

Human rights and environmental rights defenders (“human rights defenders”) working on business related issues are increasingly the target of threats and intimidation (including through legal action), attacks and even killings. Environmental advocates, land defenders, women, indigenous and LGBT human rights defenders have been identified as being particularly at risk. According to the Business & Human Rights Resource Centre, there have been more than 1700 attacks reported worldwide since 2016 (see the [Human Rights Defenders Portal](#)) that were directly or indirectly related to private sector activities.

### Who are human rights defenders?

Human rights defenders have been defined as persons who peacefully act to promote or protect human rights by calling attention to violations and abuses by any actor, including governments, businesses, individuals, groups, and non-state actors. Human rights defenders can be community members, workers, activists, indigenous leaders, business executives, journalists, and whistle-blowers. By assisting in identifying problematic practices, they can also help to decrease the likelihood of more serious and widespread conflicts arising.

Lawyers can play a key role in helping to protect and promote human rights and strengthen the rule of law by aligning their own practices, as well as those of their clients, to conform with the UNGPs. As previously noted, the UNGPs call upon the private sector to respect human rights in their operations and supply chains, and also encourage businesses to consult human rights defenders as an important expert resource, while noting that they may be more vulnerable to attack.<sup>2</sup> At the same time, the UNGPs call upon governments to ensure that legitimate and peaceful protests and other activities by human rights defenders can continue in an unobstructed manner.

### Why Support Human Right Defenders?

Beyond the moral case for lawyers and their clients standing up for human rights defenders, there is increasing recognition that this practice, more often than not, will result in better outcomes for all. Whether one agrees with their particular viewpoint or not, human rights defenders should be free to raise their concerns in a peaceful manner. By supporting approaches that seek to decrease the likelihood of human rights issues arising in the first place, lawyers and their private sector clients can decrease the risk of reputational harm, shareholder activism and divestment, financing being withdrawn, expensive litigation, and/or significant unplanned operational costs associated with such risks. Engaging in respectful manner with human rights defenders with legitimate claims who are carrying out peaceful activities can also provide a platform of trust on which to identify problematic practices early, build relationships and community support, and increase operational predictability, stability and ultimately, profitability for the business.

### How Lawyers Can Decrease the Likelihood of Human Rights Defender Issues Arising

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<sup>2</sup> See for example [UN Working Group of Business and Human Rights’ Background Note, “Human Rights Defenders and Civic Space”](#),

Support for human rights defenders can be divided into proactive or reactive categories. The proactive components to reduce incidences of human right defenders related issues arising are focused around lawyers ensuring that their clients:

- 1) Develop appropriate human rights defenders policies – that explicitly recognise the important role played by human rights defenders and the value of supporting freedom of expression, while avoiding any acts that seek to limit or suppress human rights defenders engaging in legitimate and peaceful activities.
- 2) Implement appropriate procedures – including carrying out gender and culturally sensitive Human Rights Due Diligence (HRDD) to assess human rights defenders' risks and concerns associated with the company's operations and ensuring that the company's interactions with human rights defenders are always carried out in a respectful manner.
- 3) Issue appropriate training – for both their employees and contractors/supply chain partners and private security partners, which includes identifying risks to defenders that could be triggered by a company's activities.

### **How Lawyers Can Respond After a HR Defender Issues Arises**

If a human rights defender issue arises, lawyers and other third-party professionals can help their clients react by adopting a four-step approach proposed by the [Business Network on Civic Freedom and Human Rights Defenders](#). The four steps are to:

1. Assess the human rights defenders' claims and activities, and the severity of any human rights harm (or potential harm) including the veracity of the allegations.
2. Understand the degree of company involvement, ranging from being the cause, to be a contributor, to having no direct involvement but being in a position to speak out openly.
3. Identify possible forms of support the company might take, while taking into account the position that the company is in, as well as its ability to influence relevant authorities in order to maximise the potential positive impact on civic freedoms and/or the human rights defender.
4. Consider the relative risks (legal and non-legal) of action or inaction; to the company, to the defender, and to the broader community.

Stakeholder engagement with civil society, peers and government officials, undertaken in a sensitive manner so that it does not jeopardise the human rights defender, can improve the effectiveness of all of these steps.

It is important to emphasise that the safety and privacy of human rights defenders should always be paramount. As such, lawyers should ensure that their actions (and those of their clients) do not serve to worsen the situation for human rights defenders, and where possible, continue to consult with human rights defenders or their representatives. Lawyers should always take into account the particular circumstances of more marginalised peoples such as women and indigenous peoples.

|  |
|--|
| <b>Investor Alliance for Human Rights Calls on Companies to Take Actions to Protect Safety of Defenders (2018)</b> |
|--|

A 2018 petition filed in court by the Department of Justice of the Philippines sought to have a number of indigenous peoples' leaders and human rights defenders who work to defend against threats from various agriculture, mining and industrial operations on indigenous lands, declared as terrorists and outlaws pursuant to the *National Security Act* 2007. The list of 600 people contained the names of prominent indigenous leaders and human rights defenders including the UN Special Rapporteur and former Chairperson of the UN Permanent Forum on Indigenous Issues; and the co-convenor of the Indigenous People Major Group on the Sustainable Development Goals and former Secretary General of the Asia Indigenous Peoples Pact.

In light of this, the International Alliance for Human Rights (IAHR) – a coalition of 68 institutional investors made up of charities, labour unions, responsible investment organisations and pension funds – came together to denounce any action that seeks to restrict or impair the legitimate work of human rights defenders, to take positive steps to challenge the erosions of civic freedoms and support a safe and enabling environment for human rights defenders in the countries in which they are operating. The IAHR argue that companies and financial institutions have a responsibility to review their operations, supply chains and policies to identify real and potential negative impacts on human rights defenders and take meaningful action to address them, which may include lobbying government officials and denouncing any acts of government that seeks to restrict the legitimate activities of human rights defenders. Many of these activities can happen quietly behind the scenes.

Eventually, a Philippine court removed several people from the list, citing a lack of justification for their inclusion. A legal assistance group, the National Union of People's Lawyers, welcomed the court decision saying the list was clumsily drawn up by the military in "a malicious fishing expedition" that included bogus names, repeated entries and people who were dead.

*Source: Interfaith Centre on Corporate Responsibility (ICCR)*

## **Part 2: Toolkit for Lawyers/ Law Firms and Bars/ Professional Associations**

### **1. Role of Lawyers in Business and Human Rights**

International standards on the role of lawyers for society are provided by the [UN Basic Principles on the Role of Lawyers of 1990](#) (UN Basic Principles) which assists member States to ensure that the proper role of lawyers is taken into account by Governments within their domestic legislation and practices. In addition, each jurisdiction around the world will have its own Code of Conduct regarding the legal profession which will expand upon the roles and expectations of lawyers in their society.

The UN Basic Principles require that as part of ensuring adequate protection of human rights, “all persons (must) have effective access to legal services provided by an independent legal professional” (Preamble). At the same time, “lawyers shall always loyally respect the interests of their clients” (15th Principle). Thus lawyers have a unique role to play in protecting human rights in society, while being loyal to the interests of their clients.

In the context of business and human rights and adverse human and environmental impacts caused by business activities, lawyers can play important but different roles in the following capacities:

- defenders of victims;
- business advisors;
- members of law firms as business entities themselves, subject to human rights law; and
- members of law societies, professional associations and Bars, that advocate on policy issues in the public interest.

Lawyers and law firms can also play important roles in supporting human rights defenders – particularly in countries or regions where the rule of law is weak or not well established.

Lawyers, law firms and Bar/Professional Associations are often in a unique position with the necessary abilities and skills to help maintain and restore the rule of law against violence or legal harassment, by investigating, expressing concerns around particular events or circumstances or indeed representing human rights defenders in legal cases involving businesses.

## 2. Lawyers as Defenders of Victims

Lawyers may be engaged in human right advocacy on behalf of victims or communities suffering human rights abuses caused by business activities.

It is important for those lawyers to recognise that their work occurs in the broader international context. While it may be difficult for victims to obtain remedies through the local judicial system or other domestic remedy, foreign business enterprises doing business with local enterprises may be sensitive to adverse impacts and it may be possible to seek alternative remedies through those foreign business enterprises or foreign states. It could also be effective to seek assistance through international networks working on business and human rights issues. Lawyers working for victims should have knowledge and skills to make use of such cross-border measures.

### Case of Xe Pian Xe Namnoy (PNPC) hydropower project in Laos

Massive flooding by collapsed dam displaced thousands of people, destroying the homes of at least 6,000 local residents in Laos in 2018. The dam was a joint-venture among local and foreign companies including South Korean and Thailand power companies. Soon after the incident, activists and experts including lawyers to help victims of the incident held forums in Bangkok and Seoul, demanding companies involved to take entire responsibility for all the damages.

*Source: Bangkok Post, "Activists call on Laos dam operator to own up" 10 August 2018*

### Checklist

|                |   |
|----------------|---|
| 1. To Know     | <ul style="list-style-type: none"><li>• Standards of International Organisations</li><li>• Policies, if any, of national action plans</li><li>• Guidelines of industry specific activities</li></ul>  |
| 2. To Identify | <ul style="list-style-type: none"><li>• What rights of clients are infringed or at risk, not only based on local laws and regulations, but also international standards on human rights/ the environment</li><li>• Which business enterprises are involved in such harms through supply chains and investments</li><li>• What forums could be available to address such harms, either judicial or non-judicial, or either local, in foreign states or international</li></ul> |
| 3. To Enhance  | <ul style="list-style-type: none"><li>• Utilise cross-border networks of lawyer and advocates.</li></ul>  |

### Areas and Engagements where Lawyers Can Play an Important Role

Lawyers can play a fundamental role in assisting human rights defenders. In their role acting for a defendant, lawyers are called upon to identify victims or groups of victims and be able to qualify their injuries and establish a link between their harm(s) and the responsible persons or entities in order to seek remedy.

### Example of Engagements Related to Defending Human Rights Victims:



Defenders  
of Human  
Rights  
Victims

- Identify victims of human rights abuses (i.e. workers and forced labour)
- Ensure whistle-blowers and human rights defenders are protected.
- Investigate cases to determine wrong-doing and options for remedy (working with labour non-government organisations, academics, etc.)
- Help clients access judicial or non-judicial grievance mechanisms (i.e. help trade union access [OECD National Contact Points](#))
- Help clients pursue justice against both domestic and foreign companies (i.e. collaborate with law firms in other countries to bring forward a court case in relevant jurisdictions)

### 3. Lawyers as Business Advisors

Lawyers may provide clients with legal services for business operations on cross-border transactions of goods, services, capital and as such. Through this relationship lawyers may be able to assist in preventing adverse impacts arising from the business activities of their clients.

When providing legal services to businesses, lawyers should advise their clients of the need to comply with local laws and regulations in respect of human rights, the environment and rule of law. Additionally, business enterprises should be advised of the importance of international standards and expectations in relation to business activities.

Lawyers have to be responsive to any risks to human rights and the environment in foreign countries that may be caused by their clients' activities. Business enterprises are also required to comply with human rights and environmental due diligence demands from foreign business partners, financial institutions or investors. Lawyers must be able to provide their clients with legal information and services to respond to such demands.

Lawyers may be asked to provide clients with legal services for purely local business operations, outside of cross-border supply chains. Even in such cases, it is not appropriate that only local laws are considered. Even if the activities are in compliance with local laws, they may be in violation of international standards which could result in serious harm to human rights or the environment. Clients may face international criticism if they have not met international standards.

#### **Special focus: Business lawyers**

'Human rights due diligence (and the reporting and remedial elements in particular) can pose dilemmas for business lawyers whose job it is to identify, analyse and advise on the management of legal risk. However, the best lawyers analyse legal risk, not in the abstract, but take full account of the client company's background commercial and reputational issues, and in a manner that is consistent with the company's "responsibility to respect". They take into account the understanding that risks of human rights impact also involve risks to the business enterprise.'

[\*UN Working Group on Business and Human Rights, Companion note II to the Working Group's 2018 report to the General Assembly \(A/73/163\), 16 October 2018, page 19.\*](#)

#### **Checklist**

|                |  |
|----------------|--|
| 1. To Know     | <ul style="list-style-type: none"><li>• Standards of International Organisations</li><li>• Policies, if any, of national action plans</li><li>• Guidelines of industry specific activities</li></ul> |
| 2. To Identify | <ul style="list-style-type: none"><li>• Human rights and environmental risks which could be caused by clients' business activities as well as their supply chains.</li></ul>                         |

|                                 |  |
|---------------------------------|--|
|                                 | <ul style="list-style-type: none"> <li>• How those risks are related to right protected by international instruments on human rights/ the environment.</li> </ul>  |
| 3. To recommend and assist with | <ul style="list-style-type: none"> <li>• Publishing a commitment to respect human rights and the environment</li> <li>• Carrying out human rights due-diligence on clients' operation and their supply chains.</li> <li>• Preventing and minimising adverse impacts on individuals and communities which clients' operation may affect.</li> <li>• Setting up or making available effective grievance mechanism</li> <li>• Following up any complaints filed against the clients.</li> </ul> |

### **Areas and Types of Engagements where Lawyers Can Play an Important Role**

Lawyers can play a fundamental role in assisting businesses to fulfill their various obligations in what is a dynamic and rapidly evolving environment. In addition, legal professionals can help to support businesses and others to gain the necessary awareness of the sometimes-tenuous link between the operation of business enterprises and respect for human rights, which may exceed the strict compliance of their obligations.

Equally, when acting for a defendant, lawyers are called upon to identify victims or groups of victims and be able to qualify their injuries and establish a link between their harm(s) and the responsible persons or entities in order to seek remedy.

### **Example of Types of Engagements Related to Advising Business on Human Rights:**



- Advise business clients on human rights related issues and risks (assist in carrying out due diligence on labour risks)
- Advise business clients on reporting or disclosure requirements
- Assist business clients to develop necessary policies, procedures and/or guidelines related to human rights (i.e. design gender equality policy for company)
- Ensure that appropriate legal clauses are inserted into contracts regarding human rights, anti-corruption and environmental protections.
- Help raise awareness of human rights risks for business (i.e. help train extractive company on human rights security protocols such as those outlines in the [Voluntary Principles on Security and Human Rights](#))
- Advise clients on grievance mechanisms and alternative dispute mechanisms as part of their commitment to remedy



#### 4. Lawyers and Law Firms (as Enterprises) and Human Rights

The UNGPs provide that the responsibility of business enterprises to respect human rights applies to all enterprises. However, the policies and processes required to fulfil this responsibility will vary depending on the size and circumstances of the enterprise (Principles 14 and 15).

Law firms are among those business enterprises and are under required to take steps to ensure the firm respects human rights including:

- a) preparing a policy commitment to meet their responsibility to respect human rights;
- b) carrying out a human rights due-diligence process to identify, prevent, mitigate and account for how the law firm will address their impacts on human rights; and
- c) having processes to enable the remediation of any adverse human rights impacts which the firm causes or to which they contribute.

When running a firm and representing client, law firms should be ready to take those measures.

These responsibilities may be reinforced by codes of conduct for lawyers and law firms in respective jurisdictions. However, this needs to be carefully considered because lawyers have professional and legal duties in their practices, such as the requirement for independence and loyalty to, and a privileged relationship with, their clients.

##### **Law Firm Business and Human Rights Peer Learning Process (the Process)**

The Process was launched in 2016 among leading worldwide-renown law firms. It was a ‘workshop in September 2016 to discuss implementation of the law firms’ own responsibility to respect human rights, focusing on (i) policy, strategy and governance; (ii) embedding through training, capacity building and awareness raising; (iii) client risk mapping and client acceptance; and (iv) approaches to supply chain due diligence, including in response to the UK Modern Slavery Act.’

*Source: “Law Firm Business and Human Rights Peer Learning Process Summary Report - March 2019”*

##### **Checklist**

|                               |  |
|-------------------------------|--|
| 1. Commitment                 | To draft and establish a policy for human rights/ the environment<br>Provide layers and other employees with training on the policy  |
| 2. Human rights due diligence | Carry out human right’s due diligence on current and future clients and cases to determine whether providing legal services to a client could cause adverse impacts. Such due diligence must cover other business relationships of the firm. |
| 3. Grievance mechanism        | Make available a grievance mechanism for possible victims where complaints can be filed and dealt with effectively. Such measures include firm's own complaint mechanisms as well as information   |

|  |  |
|--|--|
|  | on available external mechanisms, such as the ethics board of bar/professional associations. |
|--|--|

### **Note on Possible Legal Liability Regarding Advice on Business and Human Rights**

Since the importance of advising clients in the area of Business and Human Rights has just started to be recognised in many jurisdictions, it is not clear whether the issue of legal liability would arise upon failure to advise clients properly on Business and Human Rights. The expectation of business enterprises for such advices is, however, certainly being enhanced. So, it is advised that the topic of Business and Human Rights may be interdependent with legal advice<sup>3</sup> and that lawyers should ascertain whether such legal advice on the topic is covered by the firm's professional liability insurance.<sup>4</sup>

<sup>3</sup> CCBE, "[Practical Issues for Bars and Law Societies on Corporate Social Responsibility: Guidance III](#)," May 2017, p.5.

<sup>4</sup> IBA, "[Practical Guide on Business and Human Rights for Business Lawyers](#)," May 2016, p.38.

## 5. Role of Bar / Professional Associations

*[P]rofessional associations of lawyers have a vital role to play in ... providing legal services to all in need of them and cooperating with governmental and other institutions in furthering the ends of justice and public interest*

– Preamble, UN Basic Principles on the Role of Lawyers

The topic of business and human rights/ the environment is closely related to the goal of justice and public interest in society.

While lawyers can play a vital role in relation to business and human rights/ the environment, individual lawyers and law firms may lack of the immediate knowledge or experience to address the issues. Legal professional associations can help lawyers to play their roles more effectively by providing support and guidance, as well as connecting lawyers with each other.

Legal professional associations can themselves play an important role in influencing the development of legislation, as well as policies held by public authorities and business enterprises, on human rights and the environment. As entities comprised of legal experts, these Professional Associations can develop proposals for reform to existing structures and legislation to enhance the positive interrelationship between business, human rights and the environment.

### Role of Bars/ Law Societies

'In order to carry out these goals, Law Societies are able to implement different initiatives and tools, starting from the basic premise that the Law Societies themselves are in an optimal position to evaluate the specific needs of their own jurisdictions, and to respond to these in so far as their abilities and available resources allow them to.

Among these initiatives, these Guidelines offer the following: establish an adequate structure to respond correctly to their role in Business and Human Rights; offer awareness-raising and training on these matters, as well as deontological support. It is also proposed that, whenever the nature and circumstances of the Law Society in question so allow, they should offer technical assistance to their members and also to society at large, as well as playing a lobbying role at institutional and legislative levels.'

Source: European Bars Federation (FBE), *Guidelines on Business and Human Rights for European Law Societies* (2017) page 13.

### Missions of Role of Bar / Professional Associations

|              |   |
|--------------|---|
| 1. Policies  | Draft and establish a policy for the issues of business and human rights/ the environment in accordance with any existing code of professional conduct. |
| 2. Awareness | Raise awareness of these issues among members.  |

|                            |  |
|----------------------------|--|
|                            | Provide members with opportunities to learn information about, and best practices in relation to, the issues of business and human rights/ the environment.                                |
| 3. Grievance mechanism     | Provide grievance mechanisms which are easily accessible by the public and can refer complaints to proper forums or services.  |
| 4. Structure on strategies | Further consider, when available, a structure on strategies, timetable and follow-up mechanisms within Bar/Professional Associations to address business and human rights/the environment. |

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