

**Title:** A Primer on the Working of the United Nations Guiding Principles on Business and Human Rights in Asia-Pacific Jurisdictions

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**A PRIMER ON THE WORKING OF THE UNITED NATIONS GUIDING  
PRINCIPLES ON BUSINESS AND HUMAN RIGHTS IN ASIA-PACIFIC  
JURISDICTIONS<sup>†</sup>**

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**I. INTRODUCTION**

Traditionally, ensuring human rights protection has been within the remit of state governments. The key human rights treaties negotiated after the Second World War and during the de-colonisation period were by – and about – States, since States, who were then the most powerful actors, who apart from exercising traditional sovereign functions, were also decisive in determining the position of global economics and trade. Since this time, however, the world has changed: globalisation, deregulated trade and the transfer of traditionally state-based services such as security and the management of natural resources to corporations has led to companies having an increased ability to affect the environment, and the rights of individuals, both positively and negatively.

One of the major challenges that the international community faces in the 21<sup>st</sup> century is how to deal with human rights<sup>1</sup> violations committed (directly or indirectly) by non-state actors such as corporations. While the primary responsibility for the fulfilment, protection and respect for international human rights standards is still in the hands of sovereign states, there is growing acceptance that corporations hold a good level of responsibility as well.<sup>2</sup>

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<sup>†</sup> The article reflects the position of law as on April 15, 2018.

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<sup>1</sup> The term ‘human rights’ in this paper is used in a broad sense, so as to include not only traditionally recognised human rights but also the labour rights and environmental rights recognised under various hard and soft international legal instruments. There is a special focus on business related human rights abuses such as violation of labour laws and environmental rights, rights of indigenous communities and laws relating to bribery and corruption.

<sup>2</sup> Helja Henley, ‘Corporate Social Responsibility & Human Rights. A critical review of the Guiding Principles on Business and Human Rights for implementing the UN “Protect, Respect and Remedy” Framework’ (23

While state behaviour and the resolution of interstate disputes are regulated by international law, the need to regulate corporate behaviour internationally arises only when national legal regimes, for some reason, prove to be inadequate or when there is a desire to harmonize rules between national systems. Any activity of a given corporation will usually fall under the jurisdiction of one or more states, however, national systems of the host country cannot always be trusted and may prove to be ineffective for a variety of reasons<sup>3</sup>.

Multinational and transnational enterprises are also bound by their home country's laws which in most cases provide certain protections for human rights. However, as business operations span across borders, domestic law becomes less effective, creating certain legislative gaps which can be exploited.

Presently, there are several corporations deliberately operating in impoverished countries, post-conflict countries, in countries where the local government is unable or unwilling to enforce its laws and have scant regard for human rights enforcement, leaving ample room for these corporations to indulge in human rights abuses to maximise profit or gain. Victims of corporate abuses find themselves trapped between two actors (the States and corporations) who, in order to fulfil their vested interests, trample upon the rights of ordinary citizens and show no interest in addressing human right violations.

Common instances of human rights' violations by corporations include: indigenous communities being forcibly displaced to make room for business operations<sup>4</sup>, large-scale

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March 2015) *International Law Blog*, available at <https://aninternationallawblog.wordpress.com/2015/03/23/corporate-social-responsibility-human-rights-a-critical-review-of-the-guiding-principles-on-business-and-human-rights-for-implementing-the-un-protect-respect-and-remedy-frame/> (last visited 28 February 2018).

<sup>3</sup> The judiciary of the host state may be ineffective; even if host state has the necessary capacity, it might not penalize the corporation as the host state might be corrupt or otherwise profit from or participating in the corporation's operations; the state might want to retain an "investor-friendly" environment with little public interference and lax regulation and enforcement in order to attract foreign investors; sanctioning extraterritorial corporate behaviour might be a low-priority task in the home state.

<sup>4</sup> Business and Human Rights Resource Centre, 'Malaysia: Asian Development Bank to review loan to Sarawak Energy amid allegations of failure to consult with communities affected by Trans-Borneo transmission line;

environmental destruction in order to facilitate commercial operations<sup>5</sup>, negligent toxic gas leaks followed by inadequate compensation of the victims<sup>6</sup>, workers being underpaid<sup>7</sup>, and child labour being used and exploited by certain industries<sup>8</sup>.<sup>9</sup> Under international criminal law, corporations have no direct obligations to address human right violations as the Rome Statute only envisages jurisdiction solely over natural persons.<sup>10</sup>

The Asia-Pacific region is becoming an increasingly powerful economic force. The Association of South-East Nations (ASEAN) countries have recorded, in the last ten years, an average level of growth higher than most developed countries.<sup>11</sup> However, this progress has, in some cases, been accompanied by negative repercussions for the human rights and has resulted in an enormous strain on the environment. There is an alarming pattern of human rights abuses being caused by business activities on workers and local communities throughout Asia. This region, too faces major challenges such as corruption, land grabbing, forced labour, discrimination against vulnerable groups including indigenous peoples and migrant workers, and environmental and health disasters such as the transboundary haze.<sup>12</sup>

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company responds' (March 2015), at <https://www.business-humanrights.org/en/malaysia-asian-development-bank-to-review-loan-to-sarawak-energy-amid-allegations-of-failure-to-consult-with-communities-affected-by-trans-bernebo-transmission-line-company-responds> (last visited 15 April 2018).

<sup>5</sup> Cassie Werber, 'The world's biggest forest destroyers don't even know which forests they're destroying', *Quartz* (5 December 2016), at <https://qz.com/850320/companies-responsible-for-the-worlds-deforestation-dont-even-know-which-forests-theyre-destroying/> (last visited 15 April 2018).

<sup>6</sup> 'Bhopal Gas Tragedy: 33 years on survivors still await adequate payout', *Indian Express* (3 December 2017), at <http://indianexpress.com/article/india/33-yrs-on-gas-tragedy-survivors-still-await-adequate-payout-4965742/> (last visited 15 April 2018).

<sup>7</sup> Anuradha Nagaraj, 'India's low-paid garment workers seek \$7.6 million compensation', *Reuters* (17 July 2017), at <https://www.reuters.com/article/us-india-textiles-wages/indias-low-paid-garment-workers-seek-7-6-million-compensation-idUSKBN1A2005> (last visited 15 April 2018).

<sup>8</sup> Ayesha Minhaz, 'Millions of kids in danger: Why India struggles with a massive child labour problem', *The News Minute* (27 October 2017), at <https://www.thenewsminute.com/article/millions-kids-danger-why-india-struggles-massive-child-labour-problem-70661> (last visited 15 April 2018).

<sup>9</sup> This is not an exhaustive list of corporate related human rights abuses.

<sup>10</sup> Amendments to the Rome Statute of the International Criminal Court, art. 25, June 11, 2010, A-38544 U.N.T.S.

<sup>11</sup> UNDP Asia and Pacific, 'Regional meet on Business and Human Rights in ASEAN sets agenda for national action' (1 June 2017), at <http://www.asia-pacific.undp.org/content/rbap/en/home/presscenter/articles/2017/06/01/regional-meet-on-business-and-human-rights-in-asean-opens-in-bangkok.html> (last visited 15 April 2018).

<sup>12</sup> *Ibid.*

To tackle these issues, in 2005, then UN Secretary-General Kofi Annan appointed Professor John Ruggie as UN Special Representative on business and human rights. Professor Ruggie's main task was to "identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights".<sup>13</sup> Accordingly, in June 2008, Professor Ruggie presented the UN "Protect, Respect and Remedy" Framework to the Human Rights Council. The Framework on Business and Human Rights marked a watershed moment for business actors, states, and civil society, by elucidating guidelines in three different spheres – first, the state obligation to protect against human rights abuses by third parties, including businesses, through appropriate policies, regulation, and adjudication; second, the corporate responsibility to respect human rights, i.e. to act with due diligence to avoid infringing on the rights of others and to effectively address adverse impacts that occur; and third, greater access by victims to effective remedy, both judicial and non-judicial.<sup>14</sup> These were the three pillars which were to act as precursors to any future business and human rights framework.

On basis of these three pillars, Ruggie developed the United Nations Guiding Principles on Business and Human Rights (UNGPs<sup>15</sup>) which were the first authoritative global framework to address business impact on all human rights, applicable to both states and businesses. They provided not only a common language and point of reference for discussion, but also a broadly supported tool for dealing with business-related human rights abuses, to be used by business and states alike.<sup>16</sup>

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<sup>13</sup> The UN Commission on Human Rights adopted resolution E/CN.4/RES/2005/69 requesting "Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises."

<sup>14</sup> United Nations Human Rights Office of the High Commissioner, 'Commentary on the Guiding Principles on Business and Human Rights' (4 November 2011).

<sup>15</sup> Any reference to the terms 'Guiding Principles' or the acronym 'UNGP' or 'GP' is indicative of the United Nations Guiding Principles on Business and Human Rights.

<sup>16</sup> Directorate General for External Policies, Policy Department, 'Implementation of the UN Guiding Principles on Business and Human Rights', European Parliament (2017), 13, 88.

On 16 June 2011, the Human Rights Council adopted Resolution 17/4 endorsing the UNGPs for implementing the UN ‘Protect, Respect and Remedy’ Framework. The “endorsement”<sup>17</sup> by the UN Human Rights Council, added to the UNGPs’ authoritative stature, helped to achieve their uptake by other international standard setting bodies,<sup>18</sup> and embedded them into the global regulatory ecosystem for business and human rights.<sup>19</sup> The Council’s reception was unprecedented, never before had it endorsed a normative text that governments did not negotiate themselves.

The UNGPs consist of 31 guiding principles which represent the first global standard in form of legal measures and policy rationales for preventing and addressing the risk of adverse impacts on human rights linked to business activity. Their overall aim is to combat human rights violations in those countries where corporations usually relocate their production and in states where there is a combination of weak governance and little respect for human rights.

In 2014, the UN Working Group on Business and Human Rights urged States to develop a policy framework in form of a National Action Plan (NAP) in consonance with the criteria laid down under the UNGPs.<sup>20</sup> The development of business and human rights NAPs is a corresponding, UN-supported process. These policy statements are used by governments to translate the guiding principles into practice. So far, out of the 20 states which have completed

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<sup>17</sup> The term “endorse” is the UN’s strongest expression of support. UN intergovernmental bodies rarely “endorse” reports or guidelines prepared by appointed UN experts; the fact that the Human Rights Council unanimously endorsed the Guiding Principles is reflective of the significant and broad-ranging support from relevant stakeholders, including governments, business communities, investors and civil society that the principles enjoy.

<sup>18</sup> The international uptake of the guiding principles was swift by institutions such as the Organization for Economic Cooperation and Development, the European Union, the International Organization of Standardization, the International Finance Corporation, the Human Rights Commission of the Association of Southeast Asian Nations, the General Assembly of the Organization of American States, and the African Union, as well as by scores of individual states and businesses—even by the American and International Bar Associations.

<sup>19</sup> John G. Ruggie, ‘Life in the Global Public Domain: Response to the Commentaries on the UN Guiding Principles and the Proposed Treaty on Business and Human Rights’ (23 January 2015) *SSRN*, available at <https://ssrn.com/abstract=2554726> (last visited 28 February 2018).

<sup>20</sup> United Nations Human Rights Office of the High Commissioner, ‘State National Action Plans’, available at <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (last visited 28 February 2018).

drafting an NAP, only one belongs to the Asia-Pacific region.<sup>21</sup> The relevance of the UNGPs to the ASEAN Community is undeniable. The freer flow of trade and intraregional investment that is a prominent feature of the single market advanced by the Asean Economic Community, has in a few cases caused negative impacts and human rights violations in destination countries.

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While, on one hand, a large number of the economically sophisticated western states have drafted NAPs, some have embarked on the drafting process, on the other hand, several states have resisted drafting an NAP citing reasons such as their domestic law offers adequate protection or calling for an internationally binding treaty to enforce the objectives.

The present paper sheds light on the state of affairs of business-related human rights abuses in the Asia-Pacific, reflects on the position of law and underscores best practices directed towards building a more ethical business environment. Part II of the article discusses in detail the structure and the nuances of the UNGPs and what the UNGPs envisage with respect to the role of each actor. It further elaborates how the UNGPs help solve the dilemma of dealing with negative impacts caused by businesses on society, particularly vulnerable communities. Part III investigates major instances of corporate human rights abuses in the Asia-Pacific Region. This part further sets out measures undertaken to remedy such abuses and the steps being taken by certain states towards implementation of the UNGPs. Part IV of the article will address the challenges ensuing the implementation of the UNGPs and the common criticisms which have been levelled against their all-encompassing nature. The part concludes by outlining potential benefits which can arise out of successful implementation of the UNGPs and recommend measures which can be adopted by States which are yet to develop a business related human

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<sup>21</sup> Business and Human Rights Resource Centre, 'National Action Plans', available at <https://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans> (last visited 28 February 2018).

<sup>22</sup> Seree Nonthasoot, 'Thai action plan a step to rights protection by business' (28 January 2017) *Bangkok Post*, at <https://www.bangkokpost.com/print/1188481/> (last visited 28 February 2018).

rights mandate, thereby highlighting a way forward. A business environment fully respectful of human rights attracts further long-term sustainable investments where risks are better managed.

## II. AN ANALYSIS OF THE GUIDING PRINCIPLES

Resulting from six years of in-depth research, extensive multi-stakeholder consultations with an unprecedented variety of actors from all continents, as well as practical road-testing, the UNGPs clarified the duties and responsibilities of both states and businesses on tackling human rights risks related to business activities.<sup>23</sup> Condensed into 3 pillars and comprising 31 Foundational and Operational Principles, they affirmed:

- I. States' existing obligations to respect, protect and fulfil human rights against adverse impacts by non-state actors, including business (Pillar I: State Duty to Protect);
- II. The responsibility of business enterprises to respect human rights (Pillar II: Business Responsibility to Respect); and
- III. The need for State and non-State based, judicial and non-judicial remedies to ensure that rights and obligations are matched to appropriate and effective remedies when breached (Pillar III: Access to Remedy).<sup>24</sup>

The following part analyses the three pillars which form the essence of the guiding principles in detail.

### *A. The First Pillar: The State Duty to Protect*

The State duty to protect is a standard of conduct. Therefore, States are not per se responsible for human rights abuse by private actors. However, States breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take

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<sup>23</sup> Directorate General for External Policies, Policy Department, 'Implementation of the UN Guiding Principles on Business and Human Rights', European Parliament (2017), pp. 12, 88.

<sup>24</sup> United Nations Human Rights Office of the High Commissioner 'Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework', (21 March 2011) A/HRC/17/31. This was unanimously endorsed by the United Nations Human Rights Council on 16 June 2011. The Council also created a new expert Working Group on business and human rights to take forward the dissemination and implementation of the Guiding Principles

appropriate steps to prevent, investigate, punish and redress private actors' abuse.<sup>25</sup> While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventive and remedial measures, including policies, legislation, regulations and adjudication. States also have the duty to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency.<sup>26</sup>

At present States are neither required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction nor are they generally prohibited from doing so, provided there is a recognised jurisdictional basis. States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.<sup>27</sup>

Guidance to business enterprises on respecting human rights should indicate expected outcomes and help share best practices. It should advise on appropriate methods, including human rights due diligence, and how to consider effectively issues of gender, vulnerability and/or marginalization, recognizing the specific challenges that may be faced by indigenous people, women, national or ethnic minorities, religious and linguistic minorities, children, persons with disabilities, and migrant workers and their families.<sup>28</sup> For instance, Indian company law mandates corporations meeting a certain turnover threshold to undertake corporate social responsibility (CSR) initiatives revolving around: eradicating extreme hunger and poverty; promotion of education; promoting gender equality and empowering women;

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<sup>25</sup> UN Document A/HRC/17/31, pp. 3, 35.

<sup>26</sup> *Ibid.*

<sup>27</sup> UN Document A/HRC/17/31, Guideline 2.

<sup>28</sup> UN Document A/HRC/17/31, p. 6.

reducing child mortality and improving maternal health; ensuring environmental sustainability, to name a few.<sup>29</sup>

### *B. The Second Pillar: Business Responsibility to Respect*

The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations.<sup>30</sup> Where nation states violate human rights or fail to protect human rights through adequate legal protection, the question about nature, scope, demands and realisation of human rights duties for corporations becomes relevant. Moreover, it exists over and above compliance with national laws and regulations protecting human rights. Addressing adverse human rights' impacts requires taking adequate measures for their prevention, mitigation and, where appropriate, remediation.<sup>31</sup> Potential impacts should be addressed through prevention or mitigation, while actual impacts – those that have already occurred – should be a subject for remediation.<sup>32</sup>

Business enterprises may undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of rights. But this does not offset a failure to respect human rights throughout their operations.<sup>33</sup>

For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. They must conduct a wholesome stakeholder analysis before

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<sup>29</sup> Section 135 and Schedule VII of the Companies Act, 2013 (India) as well as the provisions of the Companies (Corporate Social Responsibility Policy) Rules, 2014 (CSR Rules) which came into effect on 1 April 2014.

<sup>30</sup> UN Document A/HRC/17/31, pp. 15, 13.

<sup>31</sup> *Ibid.*

<sup>32</sup> UN Document A/HRC/17/31, pp. 15, 18.

<sup>33</sup> UN Document A/HRC/17/31, pp. 15, 13.

undertaking any operation which is ought to have a large-scale impact on a certain indigenous community or the local population.

In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families.<sup>34</sup> Moreover, in situations of armed conflict enterprises should respect the standards of international humanitarian law.<sup>35</sup>

This pillar also elaborates the importance of tracking, in order for a business enterprise to know if its human rights policies are being implemented optimally, whether it has responded effectively to the identified human rights impacts, and to drive continuous improvement.<sup>36</sup>

Business enterprises should make particular efforts to track the effectiveness of their responses to impacts on individuals from groups or populations that may be at heightened risk of vulnerability or marginalization.<sup>37</sup>

### *C. The Third Pillar: Access to Remedy*

Unless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless. For the purpose of these Guiding Principles, a grievance<sup>38</sup> is understood to be a perceived injustice evoking an individual's or a group's sense of entitlement, which may be

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<sup>34</sup> *United Nations Declaration on the Rights of Indigenous Peoples* (2 October 2007) A/RES/61/295; *Convention on the Elimination of All Forms of Discrimination Against Women* (18 December 1979) 1249 UNTS 13; *Convention on the Rights of Persons with Disabilities* (24 January 2007) A/RES/61/106; United Nations, *Minority Rights: International Standards and Guidance for Implementation*, 2010, HR/PUB/10/3.

<sup>35</sup> UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010) (17 July 1998).

<sup>36</sup> UN Document A/HRC/17/31., pp. 15, 24.

<sup>37</sup> *Ibid.*

<sup>38</sup> The term grievance mechanism is used to indicate any routinized, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought.

based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities.<sup>39</sup>

Access to effective remedy includes both procedural and substantive aspects. Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.<sup>40</sup> Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome.<sup>41</sup>

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<sup>39</sup> UN Document A/HRC/17/31, pp. 15, 27.

<sup>40</sup> *Ibid.*

<sup>41</sup> UN Document A/HRC/17/31, pp. 15, 28.

### III. A TALE OF CORPORATE-HUMAN RIGHTS ABUSES IN THE ASIA-PACIFIC REGION

Given the continued rise of Asia in the global economy, and Asian companies being very active abroad, it is of concern that states, which could play a key role in improving the respect for human rights by business enterprises not only within the region but also beyond, have been reluctant in implementing a business and human rights framework. There has been limited action aimed at the UNGPs' implementation that can be reported as far as governments in the Asia-Pacific region are concerned.

The following part uses a case study based approach as a medium to highlight business<sup>42</sup> related human rights abuses in selected countries of the Asia Pacific region. Cases are selected based on two criteria. First, they are high profile cases at the national or local level. They represent issues that are commonly found in practice, namely: land acquisition, security, corruption, union busting, labour and human rights concerns in the supply chain. Secondly, this part is not an exhaustive in covering the entire range of business related human rights abuses committed in the below-mentioned nations nor does it offer all plausible solutions in integrating respect for human rights in business operations.

The countries selected are those who have large-scale of economic activity in foreign developing nations and/or employ a vast amount of foreign labour from developing countries in their operations, so as to place greater emphasis on the socio-economic disparity.

The part additionally delves into the measures adopted by the select countries in the Asia-Pacific region in addressing the said violation and traces the progress made in forming NAPs

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<sup>42</sup> The term "business" has been used liberally by the author to include individuals or business entities, either incorporated as legal entities or not, established and domiciled or conducting business activities within the jurisdiction of the concerned country, either independently or jointly based on agreement, conducting various business activities in the economic field including, amongst others, state owned enterprises and subsidiaries of foreign enterprises.

or undertaking equivalent measures in consonance with the foundation laid down in the UNGPs.

#### A. *Australia*

Although Australia has ratified a number of key international human rights instruments and has been a forerunner in advocating human rights protection, its reputation in the field is not entirely unblemished. Australia is a giant in African mining, but its vast — and in some cases, deadly — footprint has not been thoroughly examined. Australian-listed mining companies are linked to hundreds of deaths and alleged injustices in Africa which wouldn't be tolerated in better-regulated nations

In 2015, an investigation termed 'Fatal Extraction'<sup>43</sup>, conducted by the International Consortium of Investigative Journalists (ICIJ) found that, since 2004, Australian-listed companies were linked to more than 380 deaths in on-site accidents and off-site skirmishes in Africa, including those of persons who were brutally shot to death.<sup>44</sup> More were horribly disfigured or injured while working at Australian mines or during community protests against them. It further revealed how across the African continent, Australian mining companies have been implicated in deaths, cases of alleged negligence, illegal licensing, unfair dismissal, forced displacement and environmental degradation, according to legal filings and community petitions gathered from South Africa, Botswana, Tanzania, Zambia, Madagascar, Malawi, Mali, Cote d'Ivoire, Senegal and Ghana.<sup>45</sup> For instance, in Malawi, litigation continues against

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<sup>43</sup> Fatal Extraction is an investigation conducted by ICIJ, in collaboration with 13 African reporters combining corporate data and extensive field reporting to reveal deaths, injuries and community conflicts linked to Australian mining companies across Africa. The investigation uncovered locally-filed lawsuits, violent protests and community petitions criticising some Australian companies. As per their report, Australia has more mining companies in Africa than other mining giants such as Canada and China. The report is available at <https://www.icij.org/investigations/fatal-extraction/> (last visited 15 April 2018).

<sup>44</sup> *Ibid.*

<sup>45</sup> International Consortium of Investigative Journalists, 'Fatal Extraction, Key Findings', *ICIJ Blog* (8 July 2015), available at <https://www.icij.org/investigations/fatal-extraction/key-findings-11/> (last visited 15 April 2018).

Paladin Africa Limited, a subsidiary of Perth-based Paladin Energy, and its subcontractor after an explosion disfigured one worker with such intense heat that his skin shattered when touched by rescuers. Two others died in the same incident. The report also affirms how the Australian state and federal government entities, including government workers' pension funds, have invested in controversial Australian mining companies operating in Africa.

The companies involved denied that they were responsible for any of the incidents. But Tracey Davies, an attorney with the Centre for Environmental Rights in Cape Town, South Africa, said she had seen a pattern of poor behaviour by Australian mining companies, a sentiment echoed by employees, villagers, tribal leaders, members of parliament and activists across Africa. She said, *“There is a very strong perception that when Australian mining companies come here they take every advantage of regulatory and compliance monitoring weaknesses, and of the huge disparity in power between themselves and affected communities, and aim to get away with things they wouldn't even think of trying in Australia.”*<sup>46</sup>

Under Australian law, in order for Australian states to exercise jurisdiction over extraterritorial claims there must be the requisite nexus between the extraterritorial act and the jurisdiction. Australian courts have held that civil liability would only arise if the incidents were to occur within Australia.<sup>47</sup> Despite this constitutional limitation, it has been noted that the Australian approach to exercising jurisdiction over extraterritorial matters is relatively lenient.<sup>48</sup>

In 2000, an attempt was made to secure the enactment of the Corporate Code of Conduct Bill<sup>49</sup> (the Bill) in order to institute a home-state model of extraterritorial regulation aimed at ensuring

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<sup>46</sup> Will Fitzgibbon, 'Companies Accused Of 'Taking Advantage Of Regulatory Weakness' *ICIJ Blog* (10 July 2015) at <https://www.icij.org/investigations/fatal-extraction/companies-accused-taking-advantage-regulatory-weakness/> (last visited 15 April 2018).

<sup>47</sup> *Dagi v. The Broken Hill Proprietary Co.*, [1997] 1 V.R. 428.

<sup>48</sup> Barnali Choudhury, 'Beyond the Alien Tort Claims Act: alternative Approaches to Attributing Liability to Corporations for Extraterritorial Abuses', 26 *Northwestern Journal of International law & Business* Fall 2005 43 at 53.

<sup>49</sup> Corporate Code of Conduct Bill 2000 [2002] First Reading, Parliament of the Commonwealth of Australia, available at <https://www.legislation.gov.au/Details/C2004B01333> (last visited 15 April 2018).

TNC accountability for human rights violations. The Bill applied to Australian corporations employing more than 100 people overseas, requiring such corporations to meet international standards relating to environmental performance, employee health and safety, employment and human rights. The Bill also made corporate officers liable to civil penalties for contraventions and gave a person suffering loss or damage as a result of contravention a right of action for injunctive relief and compensation. The Senate referred the Bill to the Parliamentary Joint Committee on Corporations and Securities which, by majority, recommended that the Bill ‘not be passed because it is unnecessary and unworkable’. The Joint Committee noted that incidents of Australian companies’ inappropriate behaviour were so ‘few in number’ that there was no ‘systematic failure’. Hence, the Bill lapsed.

The past decade a handful of troubling cases have been reported connecting Australian mining companies to serious human rights abuses overseas. The muted domestic response<sup>50</sup> to these allegations may reflect a lack of legal avenues to bring Australian companies to account and/or a reluctance to use the avenues currently available. But whatever be the cause, it is a source of concern.

The standard of conduct prescribed by the UNGPs in terms of the state duty to protect and business responsibility to respect can come in handy in resolving the crisis in Africa. In 2014, the Australian government supported a resolution of the UN Human Rights Council calling on countries to adopt NAPs as a vehicle for implementing the guiding principles. In June 2017, the Government of Australia established a Multi-Stakeholder Advisory Group on the Implementation of the UNGPs which involved the engagement of small and medium-sized enterprises as part of the process. The Advisory Group recommended unanimously in August 2017 that Australia should develop a NAP, in line with international standards.

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<sup>50</sup> The ICIJ has used thousands of corporate records to detail how Australian companies can under-report deaths, injuries, legal actions or strikes.

In backing these UNGP's, the Australian government has consistently voiced its support for international initiatives aimed at achieving greater corporate respect for human rights.

However, in October 2017, the Australian Government decided not to proceed in developing a national action plan (NAP) on business and human rights at the time.

## *B. Indonesia*

In the context of human rights, it is clear that Indonesia has committed itself to respect and protect human rights,<sup>51</sup> and that the government continues to take various actions and enact reforms to realize this commitment. However, Indonesia's business environment suffers greatly from widespread corruption.

The efficiency of business operations is restricted by a corrupt judiciary<sup>52</sup>, complicating the process of dispute settlement and weakening property rights protections. Extensive bribery in Indonesia's public service is a reason for concern for foreign investors<sup>53</sup>: Corruption at the borders is cited by companies as a problem and public officials often exploit ambiguous legislation to extort informal payments and bribes from companies in the process of registering a business<sup>54</sup>, filing tax<sup>55</sup> reports or obtaining permits and licenses.<sup>56</sup> Corruption is also rampant in the natural resources sector<sup>57</sup> owing to weak oversight.

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<sup>51</sup> Human Rights Council, 'Report of the Working Group on the Universal Periodic Review: Indonesia' (5 July 2012), Doc A/HRC/21/7.

<sup>52</sup>Agustinus Beo Da Costa et al, 'Indonesia's 'marathon' probe of politicians to test graft battle', *Reuters* (7 April 2017), available at <https://www.reuters.com/article/us-indonesia-corruption/indonesias-marathon-probe-of-politicians-to-test-graft-battle-idUSKBN1790US?il=0> (last visited 15 April 2018).

<sup>53</sup> US Department of State, 'Investment Climate Statements for 2017' at <https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm#wrapper> (last visited 15 April 2018).

<sup>54</sup> The World Bank, 'Ease of Doing Business in Indonesia' *Doing Business: Measuring Business Regulations*, at <http://www.doingbusiness.org/data/exploreeconomies/indonesia> (last visited 15 April 2018).

<sup>55</sup> John Mcbeth, 'Tax amnesty reveals new depths of Indonesian corruption' *Asia Times* (31 March 2017) at <http://www.atimes.com/article/tax-amnesty-reveals-new-depths-indonesian-corruption/> (last visited 15 April 2018).

<sup>56</sup> GAN Business Anti-Corruption Portal, 'Indonesia Corruption Report' at <https://www.business-anti-corruption.com/country-profiles/indonesia> (last visited 15 April 2018).

<sup>57</sup> *Ibid.*

Corruption is a high risk within the land management sector in Indonesia. Nearly half of businesses report expecting to give gifts in order to obtain a construction permit.<sup>58</sup> Property rights are inadequately protected due to corruption in the judiciary; courts in land rights cases frequently side with whomever provides the largest bribe to the judges. A lack of clear land titles is a problem when doing business in Indonesia; absence of credible maps combined with customary land rights for local people and competing laws and regulations sometimes allow multiple parties to make a legitimate claim to the same lands.<sup>59</sup>

The government has been accused of appropriating land for private development projects against the owner's wishes without fair compensation.<sup>60</sup> Central and local government officials have reportedly accepted kickbacks from mining and palm oil companies in exchange for access to lands.<sup>61</sup> In September 2016, the Jakarta Corruption Court found Ariessman Widjaja, General Director of Agung Podomoro Land, guilty of bribing a legislator in the Jakarta provincial assembly in order to influence two bills concerning two properties his company was developing. Widjaja was sentenced to three years in prison and a fine of IDR 200 million.<sup>62</sup>

The Law on Eradication of Criminal Acts of Corruption<sup>63</sup> criminalizes major acts of corruption - including active and passive bribery, abuse of office and extortion. Private sector bribery is criminalized, but only when the bribe is of 'relatively large value'. Embezzlement,

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<sup>58</sup> World Bank Group, 'Indonesia (2015) Enterprise Surveys at <http://www.enterprisesurveys.org/data/exploreconomies/2015/indonesia> (last visited 15 April 2018).

<sup>59</sup> Karl Mathiesen, 'Greenpeace reveals Indonesia's forests at risk as multiple companies claim rights to same land', *The Guardian* (2 April 2016) at <https://www.theguardian.com/sustainable-business/2016/apr/02/greenpeace-palm-oil-logging-indonesia-overlapping-land-claims-greenpeace-forest-fires> (last visited 15 April 2018).

<sup>60</sup> US Department of State, 'Indonesia 2016 Human Rights Report', available at <https://www.state.gov/documents/organization/265550.pdf> (last visited 15 April 2018).

<sup>61</sup> *Ibid* at p. 35

<sup>62</sup> Ariessman Widjaja, 'Corruption in Indonesia: Agung Podomoro Land Bribery Case' (9 September 2016), *Indonesia-Investments* at <https://www.indonesia-investments.com/news/news-columns/corruption-in-indonesia-agung-podomoro-land-bribery-case/item7174?> (last visited 15 April 2018).

<sup>63</sup> Law regarding the Eradication of Corruption, 1999 (Indonesia) at [http://publicofficialsfinancialdisclosure.worldbank.org/sites/fdl/files/assets/law-library-files/Indonesia\\_Corruption%20Eradication%20Law\\_1999\\_en.pdf](http://publicofficialsfinancialdisclosure.worldbank.org/sites/fdl/files/assets/law-library-files/Indonesia_Corruption%20Eradication%20Law_1999_en.pdf) (last visited 15 April 2018).

failure to report corrupt activities and gifts to public officials are punishable by Indonesia's Criminal Code<sup>64</sup>; any gifts to public officials must first be approved by the Anti-Corruption Commission, KPK; undisclosed gifts are considered an offense. However, corruption legislation is poorly enforced and does not address facilitation payments, and legislation does not specifically address bribery of foreign public officials.<sup>65</sup>

Although the absence of corruption is not a human right per se, abundance of corruption often leads to a violation of human rights. When corruption is prevalent, those in public positions fail to make decisions with the best interests of society in mind.<sup>66</sup> It denies access to justice for victims, it exacerbates inequality, weakens governance and institutions, erodes public trust, fuels impunity and undermines the rule of law—which, among many others, could affect the right to a fair trial, the right to due process, and the victim's right to effective redress.<sup>67</sup>

On September 2014, the Indonesian government appointed the National Commission on Human Rights (Komnas HAM) and the Institute for Policy Research and Advocacy (ELSAM), the country's largest civil society organization working on human rights to lead the NAP process. The NAP draft was formally launched and handed over to the Deputy Minister of Foreign Affairs in June 2017. Indonesia is the first country in Asia to actually join those that have published their NAP on business and human rights. It is worth noting that this document has not yet been adopted by the government as an Action Plan, but contains recommended actions under the three UN Guiding Principles pillars. Moreover, the Indonesian NAP can be specifically tailored to address and tackle the corruption problem.

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<sup>64</sup> Indonesian Penal Code, available at [http://www.unodc.org/res/cld/document/idn/indonesian\\_penal\\_code\\_html/I.1\\_Criminal\\_Code.pdf](http://www.unodc.org/res/cld/document/idn/indonesian_penal_code_html/I.1_Criminal_Code.pdf) (last visited 15 April 2018).

<sup>65</sup> GAN Business Anti-Corruption Portal, 'Indonesia Corruption Report' at <https://www.business-anti-corruption.com/country-profiles/indonesia> (last visited 15 April 2018).

<sup>66</sup> Office of the High Commissioner for Human Rights, 'The Human Rights Case Against Corruption' (27 March 2013) at <http://www.ohchr.org/EN/NewsEvents/Pages/HRCCaseAgainstCorruption.aspx> (last visited 15 April 2018).

<sup>67</sup> *Ibid.*

### C. Japan

Since 1993, Japan has operated a foreign trainee programme called the Technical Intern Trainee Programme (TITP), under which persons from developing countries are employed as technical interns by companies in Japan for a maximum of three years, ostensibly to obtain skills that they can utilize after returning to their countries.<sup>68</sup> Most trainees come to Japan under contracts between overseas recruitment groups and domestic recipient organizations, and are then hired by businesses across the country under contracts with the recipient organizations.

But criticism of the program abounds. At the end of 2013, there were approximately 155,000 foreign trainees, most of whom were from China or Vietnam (the running total since 1993 was more than 800,000).<sup>69</sup> Human rights advocates report that abuses are rife in the system, and accuse companies and the government of exploiting foreigners as cheap labour. Reports of forced labour continued in the manufacturing, construction, and shipbuilding sectors, largely in small- and medium-size enterprises employing foreign nationals through the TITP. Workers in these jobs experienced restrictions on freedom of movement and communication with persons outside the program, non-payment of wages, high debts to brokers in countries of origin, and retention of identity documents.<sup>70</sup> Workers were also sometimes subjected to “forced savings” that were forfeited by their leaving early or being forcibly repatriated. For example, some technical interns reportedly paid up to one million yen (\$9,200) in their home countries for jobs and were reportedly employed under contracts that mandate forfeiture in

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<sup>68</sup> ‘Wrong way to import workers’, *The Japan Times* (10 February 2015) at [https://www.japantimes.co.jp/opinion/2015/02/10/editorials/wrong-way-to-import-workers/#.WtWC\\_IhubIV](https://www.japantimes.co.jp/opinion/2015/02/10/editorials/wrong-way-to-import-workers/#.WtWC_IhubIV) (last visited 15 April 2018).

<sup>69</sup> Business and Human Rights Resource Centre, ‘Japan: Human rights abuses persist in the “foreign trainee” programme’ at <https://www.business-humanrights.org/en/japan-human-rights-abuses-persist-in-the-foreign-trainee-programme> (last visited 15 April 2018).

<sup>70</sup> US Department of State, ‘Japan 2016 Human Rights Report’, pp. 24-25, available at <https://www.state.gov/documents/organization/265552.pdf> (last visited 15 April 2018).

their home countries of the equivalent of thousands of dollars if workers try to leave, both of which are illegal under the TITP.<sup>71</sup>

Japanese law prohibits all forms of forced or compulsory labour. The government effectively enforced the law, although there were small segments of the labour market, such as some categories of foreign workers, where violations persisted and enforcement could be strengthened. Legal penalties for forced labour vary depending on its form, the victim(s), and the law that prosecutors used to prosecute such offenses. Not all forms of forced or compulsory labour are subject to sufficient penalties. For example, for recruitment of forced labour, the law allows maximum punishment of a fine of 200,000 yen (\$1,840), which is not sufficient to deter violations. Some NGOs argued that the legal definition for forced labour cases was too narrow. They further stated that oversight was insufficient. The prescribed governmental response to non-compliance in the TITP program, for instance, was to issue warnings and advisories and ban companies from future participation in the TITP for a period of one to five years. In 2015, the Health, Labor, and Welfare Ministry inspected Japanese recruiting organizations. Of the more than 30,000 workplaces employing TITP workers in 2015, the ministry investigated 5,173 workplaces of concern and found violations of working hours, safety standards, payment of overtime wages, and other regulations at 3,695 of them.<sup>72</sup> The ministry instructed the TITP employers to take corrective actions, and in 46 cases where they failed to act, the ministry referred the cases to public prosecutors. Following this disclosure, in 2016, the Diet<sup>73</sup> approved a revision to the TITP law that established a new Supervisory Body to oversee entities receiving

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<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> The Bicameral Legislature of Japan.

technical interns and establishes new penalties in case of violations. However, the abuses still continue.<sup>74</sup>

The United Nations Human Rights Council also noted with concern that, ‘despite the legislative amendment extending the protection of labour legislation to foreign trainees and technical interns, there are still a large number of reports of sexual abuse, labour-related deaths and conditions that could amount to forced labour in the technical intern training programme. In line with the Committee’s previous concluding observations, the State party should strongly consider replacing the current programme with a new scheme that focuses on capacity-building rather than recruiting low-paid labour. In the meantime, the State party should increase the number of on-site inspections, establish an independent complaint mechanism and effectively investigate, prosecute and sanction labour trafficking cases and other labour violations’.<sup>75</sup>

To add to the growing woes, the Japanese government has announced its plan to expand the system, to increase foreign labour in preparation for the 2020 Tokyo Olympics. Given that the 2020 Tokyo Olympics which will require a large labour force is imminent, and there exist state-sponsored trainee programs, serving vested interests will continue to prolong head-on redressal of the forced labour problem.

At the 5th UN Annual Forum on Business and Human Rights held in 2016, Ambassador Mitsuko Shino of the Permanent Mission of Japan to the International Organizations in Geneva, officially announced Japan’s intention to develop a National Action Plan on Business and

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<sup>74</sup> Japan Press Weekly, ‘Revised foreign trainee program falls short of getting rid of human rights abuses’ (1 November 2017) at <http://www.japan-press.co.jp/modules/news/index.php?id=11037> (last visited 15 April 2018).

<sup>75</sup> Human Rights Committee, ‘Concluding observations on the sixth periodic report of Japan’ (20 August 2014) UN Doc CCPR/C/JPN/CO/6.

Human Rights.<sup>76</sup> The Japanese Government, while drafting the said plan, must insert concrete protections for the foreign labourers coming to the country under the TITP.

#### *D. Malaysia*

Malaysia has been under the international human rights radar for a while due to the Asia migrant crisis. Malaysian authorities have exhumed bodies of migrants from Bangladesh and Myanmar buried in 139 grave sites in the jungle near the Thai border.<sup>77</sup> Authorities believe the migrants were held for ransom in jungle camps by gangs of human traffickers.<sup>78</sup> This extreme case of abuse is, however, part of a much wider and under-reported pattern of exploitation of migrants who travel to Malaysia in search of a better life.

Many migrants from other countries in Southeast and South Asia reach Malaysian cities and plantations to work in the construction, electronics, manufacturing and palm oil sectors.<sup>79</sup> There are currently 2.9 million documented migrant workers in Malaysia, and an estimated 3.1 million undocumented workers.<sup>80</sup> The law prevents migrant workers from forming their own trade unions. While technically they are allowed to join existing unions, in reality they face major barriers in doing so, and cannot hold office within them.<sup>81</sup> Several people also flagged the important role of unscrupulous labour brokers, who undertook corrupt practices, often resulting in human rights abuse for the migrants. For instance, as officials allegedly receive

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<sup>76</sup> The Danish Institute for Human Rights 'National Action Plans on Business and Human Rights – Japan', available at <https://globalnaps.org/country/japan/> (last visited 28 February 2018).

<sup>77</sup> 'Asia migrant crisis: Malaysia exhumes mass graves' *BBC News* (26 May 2015) at <http://www.bbc.com/news/world-asia-32879985> (last visited 15 April 2018)

<sup>78</sup> *Ibid.*

<sup>79</sup> Business and Human Rights Resource Centre, 'Business & human rights in Malaysia: A report from Kuala Lumpur' available at <https://www.business-humanrights.org/en/business-human-rights-in-malaysia-a-report-from-kuala-lumpur> (last visited 15 April 2018).

<sup>80</sup> Asia-Pacific Migration Network, 'Migrant Workers in Asean: The Hidden and Neglected Workforce' ILO Regional Office for the Asia and the Pacific at <http://apmigration.ilo.org/news/migrant-workers-in-asean-the-hidden-and-neglected-workforce> (last visited 15 April 2018).

<sup>81</sup> *Ibid.*

bribes for issuing work permits, more are issued than the jobs available and the “extra” workers are housed in poor conditions and sub-contracted out at the behest of the brokers.<sup>82</sup>

Construction sites are everywhere in Kuala Lumpur, including those for the MRT (“Mass Rapid Transport”) system. In November 2015, a Bangladeshi migrant worker died while working on the MRT construction – the fifth worker to die on the project. He was working under a “sub-sub-subcontractor”, as a result of which, being under such a dense system, it was difficult to trace and take appropriate action against the responsible owners, developers and contractors.<sup>83</sup> Further, since many migrant workers are also undocumented, they are hired by subcontractors to complete the project within a certain duration of time, made to work long hours for the minimum of wage; and treated as cheap labour in slave-like situations.<sup>84</sup> Since the first accident in February 2014, Tenaganita (a notable Non-Governmental Organisation in Malaysia) stated that there had been no indication as to whether additional safety measures had been put in place by MRT Corp, which was owned by the Finance Ministry.

To counter this, in 2017, the Malaysian government carried out crackdowns and more than 2,000 illegal migrant workers in Malaysia are facing deportation amid one of the largest crackdowns in recent years, with campaigners concerned that this has forced immigrants into hiding and increased the risk of human trafficking.<sup>85</sup> Many fear the current crackdown on undocumented migrant workers will lead to a dire labour shortage, which will have an adverse impact on Malaysia's economic growth.<sup>86</sup> The Malaysian government must consider alternate

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<sup>82</sup> Business and Human Rights Resource Centre, ‘Business & human rights in Malaysia: A report from Kuala Lumpur’ available at <https://www.business-humanrights.org/en/business-human-rights-in-malaysia-a-report-from-kuala-lumpur> (last visited 15 April 2018).

<sup>83</sup> ‘Sub-subhuman conditions under sub-subcontractors’, *malaysiakini* (28 May 2015) at <https://www.malaysiakini.com/news/299919> (last visited 15 April 2018).

<sup>84</sup> *Ibid.*

<sup>85</sup> ‘Thousands of Migrant Workers Arrested in Malaysia in Major Crackdown’, *Voa News* (6 July 2017) at <https://www.voanews.com/a/thousands-migrants-workers-arrested-malaysia-crackdown/3932145.html> (last visited 15 April 2018).

<sup>86</sup> Melissa Goh, ‘Malaysia continues crackdown on illegal migrant workers even as businesses cry foul’ *Channel NewsAsia* (15 July 2017) at <https://www.channelnewsasia.com/news/asia/malaysia-continues-crackdown-on-illegal-migrant-workers-even-as-9033668> (last visited 15 April 2018).

measures which address the undocumented migrants' problem without having an adverse impact on the lives of workers or the Malaysian economy.

The Malaysian Government committed to developing a National Action Plan on Business and Human Rights on 24 March 2015, after welcoming the Strategic Framework for a National Action Plan on Business and Human Rights produced by SUHAKAM, the National Human Rights Commission of Malaysia.<sup>87</sup> The Strategic Framework articulates a set of policy objectives and related recommendations, based on the UN Guiding Principles, for the Government's consideration in developing its NAP on Business and Human Rights.<sup>88</sup> The NAP can further account for the rights of undocumented migrants and put necessary strictures in place.

#### *E. Thailand*

For decades, Thailand has been one of the world's biggest exporters for seafood.<sup>89</sup> However, the Thai fishing industry has been rife with accusations of how migrant fishers from neighbouring countries in Southeast Asia are often trafficked into fishing work, prevented from changing employers, not paid on time, and paid below the minimum wage.<sup>90</sup> Migrant workers do not receive Thai labour law protections and do not have the right to form a labour union.<sup>91</sup> Migrant workers who voluntarily enter employment aboard Thai fishing vessels often cannot leave because boat owners, skippers, and brokers hold them in forced labour<sup>92</sup>.

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<sup>87</sup> The Danish Institute for Human Rights 'National Action Plans on Business and Human Rights – Malaysia', available at <https://globalnaps.org/country/malaysia/> (last visited 28 February 2018).

<sup>88</sup> *Ibid.*

<sup>89</sup> Food and Agriculture Organization of the United Nations, *The State of World Fisheries and Aquaculture 2016: Contributing to food security and nutrition for all*, p.55, at <http://www.fao.org/3/a-i5555e.pdf> (last visited 15 April 2018).

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> Human Rights Watch's findings show that labor and human rights violations come together under different configurations to put workers into situations of forced labor, as defined in the International Labour Organization (ILO) Forced Labour Convention, 1930 (No. 29).

In June 2014, mainstream media organisations exposed<sup>93</sup> the brutality of the Thai fishing industry which created massive international outrage. Prompted in part by numerous media exposés that raised serious concerns about killings, beatings, and trafficking of migrant fishers, many from Burma and Cambodia, led to wide scale global criticism for the country and heightened the possibility of sanctions imposed by the United States of America<sup>94</sup> and the European Union<sup>95</sup>.

The Thai Government, yielding to international pressure, announced a massive overhaul in the fishing industry. New interagency inspection frameworks were established across the country, and teams of officials are now supposed to check fishing boats each time they depart and arrive in port. Laws have been strengthened and penalties for infringing on fishers' rights have substantially increased.

In some respects, the situation has gotten worse. For instance, the government's "pink card" registration scheme, introduced in 2014 in an effort to reduce the number of undocumented migrants working in Thailand, has tied fishers' legal status to specific locations and employers whose permission they need to change jobs, creating an environment ripe for abuse. Despite the new legislation virtually all captains hold onto the workers' pink cards for what they call "safekeeping". That leaves the workers extremely vulnerable to harassment and abuses. By keeping custody of the pink cards, the captains are virtually telling the fishermen that they cannot go to another boat and seek employment without permission. In the last three years,

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<sup>93</sup> Kate Hodal, Chris Kelly, and Felicity Lawrence, "Revealed: Asian Slave Labour Producing Prawns for Supermarkets in US, UK," *Guardian* (10 June 2014) <https://www.theguardian.com/global-development/2014/jun/10/supermarket-prawnsthailand-produced-slave-labour> (last visited 15 April 2018).

<sup>94</sup> Ten days later, the United States Department of State downgraded Thailand in its annual Trafficking in Persons (TIP) report to Tier 3, the lowest possible status

<sup>95</sup> The European Commission in April 2015 issued a "yellow card" warning to Thailand, identifying it as a possible non-cooperating country in fighting illegal, unreported, and unregulated (IUU) fishing. A subsequent "red card" would lead to European Union sanctions.

governmental inspections have apparently been unable to identify even a single case of forced labour.<sup>96</sup>

Forced labour and other rights abuses are widespread in Thailand's fishing fleets despite government commitments to comprehensive reforms. The cases outlined in HRW report complaint echo accounts of modern slavery.

Thailand's anti-trafficking law was amended in 2017 to include additional means by which people can be placed into forced labour, such as debt bondage, but it still fails to provide protection to victims of forced labour who have not been trafficked.

During its second Universal Periodic Review (UPR) review<sup>97</sup> in May 2016, the Royal Thai Government received a recommendation<sup>98</sup> to develop, enact, and implement a NAP on business and human rights. The Thai government accepted this recommendation.

The government agency responsible for the implementation of UPR recommendations at the domestic level, the Rights and Liberties Protection Department of the Ministry of Justice, is now leading the NAP process. The government plans to launch the NAP in September 2018.<sup>99</sup> Recent reports suggest that the Thai Government has been collaborating with the UN Working Group on Business and Human Rights to correct abusive practices not only in the fishing sector, but in the agriculture, energy, manufacturing and construction sectors as well.<sup>100</sup> The Working

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<sup>96</sup> International Labour Office, 'Sixth Supplementary Report: Report of the Committee set up to examine the representation alleging non-observance by Thailand of the Forced Labour Convention, 1930 (No. 29), made under article 24 of the ILO Constitution by the International Trade Union Confederation (ITUC) and the International Transport Workers' Federation (ITF)' (20 March 2017), GB.329/INS/20/6.

<sup>97</sup> The Universal Periodic Review (UPR) is a unique process which involves a periodic review of the human rights records of all 193 UN Member States. It provides an opportunity for all States to declare what actions they have taken to improve the human rights situations in their countries and to overcome challenges to the enjoyment of human rights. The UPR also includes a sharing of best human rights practices around the globe.

<sup>98</sup> UPR recommendation 158.49 by Sweden.

<sup>99</sup> The Danish Institute for Human Rights 'National Action Plans on Business and Human Rights – Thailand', available at <https://globalnaps.org/country/thailand/> (last visited 28 February 2018).

<sup>100</sup> Christopher Anderson, 'UN rights experts urge Thailand to improve corporate respect for human rights' *Jurist* (4 April 2018), available at <http://www.jurist.org/paperchase/2018/04/un-rights-experts-urge-thailand-to-improve-corporate-respect-for-human-rights.php> (last visited 15 April 2018).

Group has commended the Thai Government for the progress made, but also remarked that a lot of work remains to be done.<sup>101</sup>

The aforementioned instances demonstrate the dire need of having a stringent framework in place to systematically counter all abuses.

A national action plan, can be used as a tool for states to reaffirm their commitment to human rights protection and the roles to be undertaken by the various agencies under their jurisdiction vis-à-vis business enterprises. Until now, the majority of efforts in the region leading towards NAPs' development or UNGPs' implementation in the broader sense have been led by the National Human Rights Institutions, as is the case in Indonesia, the Philippines or Malaysia, which have all developed National Baseline Assessments and even readied strategic frameworks which are awaiting the government's decision to move forward with the NAPs.<sup>102</sup>

Governments in the Asia-Pacific region can work with the UN Working Group on Business and Human Rights, in order to draft a National Action Plan specifically tailored to address major corporate-human rights abuses, as is being done in Thailand. Alternatively, they can strengthen the position of domestic law and enforcement so as to ensure human rights protection. The governments must pay particular attention to the enforcement aspect so that bad actors do not surpass the law and continue the illegal practices, as has been observed in many of the cases cited above.

Further, business enterprises in the Asia-Pacific region can themselves can undertake initiatives such as conducting a human rights due diligence or major stakeholder analysis so that their operations do not create any adverse impact.

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<sup>101</sup> *Ibid.*

<sup>102</sup> European Parliament, 'Implementation of the UN Guiding Principles on Business and Human Rights', p. 48.

#### IV. THE WAY FORWARD

The UNGPs, despite their first-of-a-kind advent, have received a barrage of criticism on their structure, working, and applicability. Some criticism has been made by major non-governmental organisations (NGOs) and academics who raised concerns about the lack of reference to issues such as extraterritorial adjudication, together with the absence of a central mechanism to ensure UNGPs' implementation across the board, as well as about their non-binding character.<sup>103</sup> The following part addresses the aforementioned criticisms with respect to the UNGPs and attempts to outline a way forward.

A plethora of States have advocated for an overarching, binding instrument for business and human rights in form of a treaty, rather than mere guiding principles, which has been an oft-cited demand. The brief explanation put forth by Professor Ruggie is that the category of business and human rights involves an enormous range of problem diversity, legal and institutional variations, as well as conflicting interests across and even within states. Therefore, a general business and human rights treaty would have to be pitched at so high a level of abstraction that it would be of little if any use to real people in real places.<sup>104</sup>

The UNGPs are a “soft law” instrument, which increasingly is how governments make initial moves into highly complex and conflicted issues.<sup>105</sup> Even so, several generally human rights-friendly states needed considerable persuasion to accept certain foundational formulations in the UNGPs, not merely because they were protecting “their” corporations as might be assumed, but in defence of strongly held legal doctrines and to avoid setting precedents for other, unrelated matters.<sup>106</sup> Professor Ruggie further states that it would be next to impossible in the

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<sup>103</sup> UN Document A/HRC/17/31, p.13.

<sup>104</sup> Ruggie, *supra* n.19, p. 5.

<sup>105</sup> *Ibid.*

<sup>106</sup> Ruggie, *supra* n.19, p.5.

current international political order for states to agree to establish and enforce a single set of global standards for corporate conduct concerning every internationally recognized human right, ranging from extrajudicial killings to providing an adequate work-life balance. <sup>107</sup>

At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognised jurisdictional basis.

An additional demand raised by treaty sponsors and advocates is having comprehensive forms of extraterritorial jurisdiction under international human rights law.

In response to the aforesaid proposition, Professor Ruggie raises the following two questions:

(1) For how many internationally recognized human rights would states would endorse extraterritorial jurisdiction? ; (2) For how many rights should they do so?. <sup>108</sup>

He argues that extraterritorial jurisdiction cannot prevail across the entire range of internationally recognised rights. A legally binding international instrument coupled with extraterritorial jurisdiction, would utterly incapacitate national and local governments from conducting the often extensive number and variety of trade-offs that the very act of governance requires.<sup>109</sup> No single treaty could possibly resolve these complex interactions, so it would be left to each state to take its own approach to enforcement which would simply produce confusion and conflicting outcomes, and not uniform practices.<sup>110</sup>

It is true that the UNGPs do not end all business and human rights challenges, but for the first time there is a commonly agreed-upon foundation to build from. They represent the most comprehensive discussion to date of the relationship between corporations and human rights.

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<sup>107</sup> *Ibid.*

<sup>108</sup> Ruggie, *supra* n.19, p.7.

<sup>109</sup> *Ibid.*

<sup>110</sup> Ruggie, *supra* n.19, p.7.

The UNGPs' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for states and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it could be improved.<sup>111</sup>

For States which are yet to develop NAPs, the United Nations Working Group has laid down extensive guidance to optimally enforce these guiding principles which seek to fit the needs of each State. The United Nations Working Group's Guidance on NAPs outlines four essential criteria for effective NAPs, namely that they must: (i) be founded on the GPs; (ii) respond to specific challenges of the national context; (iii) be developed and implemented through an inclusive and transparent process; and (iv) be regularly reviewed and updated.<sup>112</sup> The Guidance document also recommends that states keep in mind the following five sequential phases to adopt a NAP: (i) initiation; (ii) assessment and consultation; (iii) drafting of any initial NAP; (iv) implementation; and (v) update.<sup>113</sup>

Rapid economic integration in the Asia-Pacific – despite its huge potential to lift people out of poverty and create decent work – is currently accompanied by widespread human rights abuses as observed earlier. It is now imperative for governments to strengthen the protection of human rights, and companies to ensure that they do not become involved in abuses, either through their direct operations and supply chains, or in the form of complicity with government abuses.

The Guiding Principles are a crucial step in the right direction to ensure that commercial enterprises adhere to human rights protection. With the Guiding Principles providing an

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<sup>111</sup> United Nations Human Rights Council, 'Report of the Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie' (21 March 2011) A/HRC/17/31.

<sup>112</sup> UN Working Group on Business and Human Rights, 'Guidance on National Action Plan on Business and Human Rights' (November 2016), available at [http://www.ohchr.org/Documents/Issues/Business/UNWG\\_%20NAPGuidance.pdf](http://www.ohchr.org/Documents/Issues/Business/UNWG_%20NAPGuidance.pdf) (last visited 28 February 2018).

<sup>113</sup> *Ibid.*

authoritative blueprint for how companies should prevent and address adverse human rights impacts, and outlining the policy implications for states of their existing obligations under international human rights law, all attention must now turn towards their proactive implementation. Asia-Pacific States particularly must enlarge implementation and become a destination which does not condone corporate abuses, but rather amply upholds human rights.