Human Rights and Peace in Southeast Asia Series 6

PROTECTING THE POWERLESS, CURBING THE POWERFUL

Edited by

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SEAHRN
Southeast Asian Human Rights Studies Network

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Southeast Asian Human Rights Studies Network
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The Southeast Asian Human Rights Studies Network (SEAHRN) is an independent consortium of academic institutions and research centres providing human rights and peace education through study programmes, research, and outreach activities within the Southeast Asian region. Established in 2009, the Network currently has 23 members from seven countries: Cambodia, Indonesia, Lao PDR, Malaysia, the Philippines, Thailand, and Vietnam.

SEAHRN was born out of a common dream to enhance and deepen the knowledge and understanding of emerging and seasoned scholars, educators, researchers, and advocates, as well as other stakeholders from the region about human rights and peace. This goal will be achieved by engaging in collaborative research, improving course curricula and study programmes, sharing best practices, and conducting capacity-building training for educators, staff, and students. Furthermore, it seeks to strengthen regional academic and civil society cooperation to sustain the effective promotion and protection of human rights and peace in the region. The Network desires to open its doors to interested institutions and individuals who share its vision for human rights and peace in Southeast Asia.

Human Rights and Peace in Southeast Asia Series 6:
Protecting the Powerless, Curbing the Powerful

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Human Rights and Peace in Southeast Asia Series 5: Pushing the Boundaries (2015)

FOREWORD

The Institute of Human Rights and Peace Studies (IHRP) at Mahidol University has always had a very close relationship with the Southeast Asian Human Rights and Peace Studies Network (SEAHRN). Indeed, our very own Dr Sriprapha Petcharamesree was a driving force behind the creation of SEAHRN and since its creation in 2010, the secretariat has been housed at the IHRP. As the IHRP's current director, I am pleased and honoured to write the foreword for this volume of the *Human Rights and Peace in Southeast Asia Series*.

Although there have been a few bright moments in the region, it is safe to say we still have a long way to go in relation to human rights. Despite the ASEAN Charter 2008 and the ASEAN Human Rights Declaration 2012 (both affirming respect for democracy, human rights, and the rule of law), developments have been sporadic and few.

While the Malaysian people successfully changed a sixty-year-old regime peacefully through a democratic (albeit, flawed) process, the people of Thailand continue to live under a military government that has not been shy in clamping down on freedom of expression and other fundamental human rights. Timor-Leste still struggles with transitional justice following their difficult path to independence and democracy, and the humanitarian disaster consuming the Rohingya in Myanmar continues unabated.

These are but a few examples and there are many more. Within such an environment, it is more vital than ever that those involved in human rights and peace, be they from academia, civil society, or even government, must work hard to ensure that we as a region do not slip further back and instead progress to a time when the principles of human rights and peace become the norm and not the exception in Southeast Asia.

In this light, this collection of essays, drawn from SEAHRN's 2016 *Fourth International Conference on Human Rights and Peace in Southeast Asia*, is welcome. The analyses are detailed and meaningful and it is hoped they will be of use, not just to students and lecturers, but also to activists and government players.

The IHRP is pleased to continue collaborating with SEAHRN. Long may it continue!

Dr Eakpant Pindavanija
Director
Institute of Human Rights and Peace Studies
Mahidol University

A MESSAGE OF THANKS

It seems hard to believe but it has been seven years since we published the first of our *Human Rights and Peace in Southeast Asia Series*, entitled, *Breaking the Silence*. Since then, we have published four more volumes: *Defying the Impasse*, *Amplifying the Voices*, *Challenging the Norms*, and *Pushing the Boundaries*. And now, we are proud to publish the sixth volume in our series, *Protecting the Powerless and Curbing the Powerful*.

These books are a collection of the best papers presented at our international conferences on human rights and peace in Southeast Asia held once every two years. The volume you hold today was gleaned from our fourth conference held in Bangkok in 2016.

The process to select the best papers was long and tedious. First, writers were asked to submit their papers for consideration. Those who agreed then had their papers read by a panel of reviewers consisting of three individuals, all of whom conducted a blind reading of each paper. A consensus of two out of three readers had to be reached before a paper could be accepted for publication. Onwards to the editorial team where suggestions were made and corrections duly completed, and finally to the sub-editor and printer.

I would like to take this opportunity to thank the SEAHRN team of reviewers who worked so hard and selflessly to give their time to help the Editorial Team sift through scores of papers. They are (in alphabetical order):

Arpee Santiago (Ateneo de Manila University, Philippines)
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Maita Chan-Gonzaga (Ateneo de Manila University, Philippines)
Tesa De Vela (Miriam College Manila, Philippines)

Thank you very much, my friends.

We would also like to take this opportunity to thank: the Swedish International Development Cooperation Agency (SIDA) for their generosity; our SHAPE-SEA partners, the ASEAN University Network–Human Rights Education (AUN-HRE); and the Institute of Human Rights and Peace Studies, Mahidol University, which has been our home since the very beginning in 2010.

SEAHRN envisions a Southeast Asia where the principles of human rights and peace are the norm. This book, along with all work by academia and civil society which supports, defends, and promotes human rights, is necessary so we can progress towards that aspiration.

So to all involved, our deepest gratitude. *Terima kasih*.

Azmi Sharom
Chief Editor
On behalf of the Editorial Team of Human Rights and Peace in Southeast Asia Series 6: Protecting the Powerless and Curbing the Powerful


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INTRODUCTION

Azmi Sharom[*]

The Urgency of Continued Endeavour

'Protecting the powerless and curbing the powerful' is a phrase that perfectly sums up one of the key reasons we have laws on human rights and peace. Yet such ideals appear to be on the wane, not just in Southeast Asia, but across the world. Everywhere, right wing demagogues are either victorious or making inroads into the corridors of power. Principles of human rights are seen as a hindrance and talk of peace has been replaced by calls for war. In such an environment, it is even more vital that voices calling for human rights and peace are heard, not just to defend these hard-fought ideals, but as a method to solve many of the woes facing the world today.

When confronted with the enormity of human rights abuses in the region, be it the humanitarian crisis (some would say genocide) in Myanmar, or the extrajudicial killings in the Philippines which show no signs of abating, or continued military rule in Thailand, or the introduction of religious laws in Brunei potentially leading to torture, it is tempting to focus solely on these gross abuses. The struggle would then be reduced to a fight for that most basic of human rights: the right to life. Not in its complex interpretation, replete with implications that 'life' encompasses the right to employment, culture, environment, etc, but in its most simple incarnation – the right to exist.

Yet to limit oneself thus would do a disservice, not just to other (perhaps one could say lesser) human rights abuses, but also to the potential of human rights as a whole. It should not be forgotten that the modern concept of human rights as articulated in the Universal Declaration of Human Rights 1948 envisaged more than protection from harm; such rights should also improve and enhance people's lives. If practiced well, human rights ensure decent working conditions, healthcare, peaceful governance, education, and all the other elements comprising what may simplistically be described as a 'good' life. Thus, human rights do not only cover dramatic and life-threatening moments, they also incorporate everyday issues which, although less intense, are no less important to an individual's well-being.

In this light, the sixth volume in our *Human Rights and Peace in Southeast Asia Series*, achieves that balance wonderfully. The writers have produced detailed and finely researched works covering a range of issues. Helen Quane grapples with the friction arising from increased calls for religious laws to be introduced into existing legal systems and how this may be perceived as a threat to human rights. Such a development has already taken root in Brunei and has vocal proponents in both Indonesia and Malaysia. Although a highly sensitive subject, Quane expertly navigates the minefield which is made all the more treacherous as it encompasses not only law and governance but the extremely personal matter of faith.

[*] Chief Editor.

The situation in Myanmar is studied in depth by Matthew Bugher and Stan Jagger. Bugher explains the complications surrounding the country's bifurcated government in which elected civilians and the military control distinct areas of authority. Thus, control accorded to the military by Myanmar's legal system scuppers many attempts to progress as its influence is deep and pervasive. Yet, his analysis is not devoid of hope. Instead, Bugher suggests ways the National League for Democracy (NLD) may engender progress within its limited sphere of influence. Such possibilities ought to be appreciated and undertaken as the NLD is not exempt from responsibility for the humanitarian tragedy currently unfolding in Myanmar.

On a different note, Jagger studies the role of non-State actors, namely ethnic armed organizations (EAO) in Myanmar and how their activities are to be viewed under the lens of humanitarian law, particularly their continued use of child soldiers and land mines. Accordingly, Jagger explores how non-State armed actors are influenced by philosophical, economic, and geographic factors in their methods of operation, considerations which also affect EAOs' decisions to adhere to international humanitarian norms. Jagger's fieldwork is extensive and adds much to the existing literature on the area.

Two papers explore the role of technology in the protection of human rights. Indonesian migrant workers are a class of persons often facing abuse and exploitation especially as a result of the unethical practices of recruitment agencies. Sri Aryani and M Irsyadul Ibad assess the effectiveness of a CSO-initiated ICT-based monitoring system, first, in empowering aspiring migrant workers to participate fully in the complex and hitherto impenetrable world of overseas employment, and second, in ensuring the accountability of said recruitment agencies by the use of online migrant worker reviews of their services.

By contrast, Richard Lancaster examines the possibility of using technology to monitor activities in the detention centres of developing nations. While most, if not all countries have laws prohibiting abuse within such centres, underfunding, poor enforcement, corruption, and a lack of accountability and transparency mean abuses do occur. As technology advances and the cost of components drops, Lancaster studies the feasibility of using digital monitoring systems or DMS to protect the detained when standard laws and policies cannot.

Four papers deal with the issue of human rights in the realms of business and environmental protection. With the region experiencing rapid economic growth, negative impacts on labour rights and the environment are almost inevitable. Poor business practices can and do adversely affect workers. For example, the Thai fishing industry is plagued with accusations of debt bondage, trafficking, and poor work conditions. To counter growing international criticism, Sara Sunisa Pasang Lehman argues the necessity of understanding the conditions that give rise to, facilitate, and inhibit cross-sectoral collaborations by critically analysing existing multi-stakeholder initiatives seeking to alleviate these problems.

Saovanee Kaewjullakarn and Watcharachai Jirajindakul take a different approach, focussing instead on the National Human Rights Commission of Thailand (NHRCT). They assess how far the NHRCT implements the UN Guiding Principles of Business and Human Rights by analysing its handling of human and community rights abuses in the Dawei Special Economic Zone in Myanmar, thus, providing a real world context to such abuses as well as offering another angle of study – the difficulty of cross-boundary implementation of human rights principles.

Chuyen Duc Nguyen too writes about the UN Guiding Principles of Business and Human Rights, but from the perspective of its potential, if properly implemented, to protect a nation's environment through the use of human rights due diligence processes and corporate social responsibility in general. Vietnam's fragile environment as a result of the unscrupulous practices of businesses also serves as the backdrop to Thi To Uyen Nguyen's paper which specifically analyses and critically evaluates the country's legal and governance systems (or lack thereof) pertaining to the right to clean water.

Finally, Justice Marvic MVF Leonen's keynote address is reproduced in full and constitutes a powerful rallying cry for the continued defence and development of human rights in Southeast Asia. As mentioned at the beginning of this introduction, human rights were envisioned to protect the powerless and curb the powerful. It is only once such ideals are mainstreamed and societal issues are viewed through a rights-tinted lens that human rights legislation and institutions become a viable avenue to improve lives. This is a notion human rights defenders, from across fields and borders, must never forget. Justice Leonen's contribution eloquently expresses this sentiment and as such is the perfect paper with which to open this volume.

CHAPTER ONE:

HUMAN RIGHTS, DEMOCRACY, AND HUMANITY

DEMOCRACY AND HUMAN RIGHTS*

Keynote address at the *SEAHRN Fourth International Conference on Human Rights and Peace and Conflict in Southeast Asia: Reclaiming Lost Ground,* Bangkok, 10-12 October 2016

*Justice Marvic MVF Leonen***

Thank you for that generous introduction. It is indeed a pleasure to be here. I am sure that in the span of three days, the various papers presented by your participants have examined some of the important dimensions of achieving the ideals of human rights and ensuring human dignity within our various societies, cultures, and identities. It is indeed an honour to be given this space to contribute to the many interesting and provocative discussions you have had.

I

I agree with many of you. Democracy is under threat. Our peoples' collective capability to instil the full guarantees of human rights and the assurance of human dignity are indeed facing serious challenges. This may largely be because the prevailing and dominant view of democracy does not contribute to the empowering of peoples within our societies.

I refer to the folk view powered by the fundamentals of the political philosophy of liberal democracy. In that received and dominant view, elections are the most significant element constituting a democracy. However, the seemingly autonomous act of choosing our government representatives is not the only marker of the existence of an authentic democratic space. While casting a ballot is considered the epitome of democracy, the complexity of democracy is, thus, principally reduced in the excitement of regular elections for political offices.

Viewed this way, democracy is nothing but the political drama between personalities who are powerful enough and have the resources to engage in electoral contest. During elections, we track every move made by our politicians, become fixated on their controversies, and measure the value of social issues within the context only of their life stories. We are easily embroiled into meaningless chatter revolving around their reputations. Which is not to say those factors aren't important. But in the process, we lose sight of the structural character of our real issues. The dynamic interplays between government and huge powerful lobbies and interests, many of them transcending our political boundaries, become invisible. Authentic political discourse becomes an illusion within dominant forums.

This view of democracy trivializes our citizenship. It reduces our complexities as peoples. We become a supporting cast, a passive audience in a market composed of atomized individuals possessing no identities with nuanced historical and cultural differences. We become statistics of political pundits divided into geographical regions or economic classes. Our complex humanity is reduced to factors that only make sense to their campaign

* Portions of this speech have been orally delivered in other lecture forums. Not to be cited.

** Associate Justice, Supreme Court of the Philippines.

machinery. It is no accident that electoral campaign machinery is dominated by experts wielding corporate marketing strategies. Voters are treated the same way as consumers: passive subjects pliable to propaganda.

During elections, we succumb to a discourse that hides dominant ideologies. We mistake the eloquent sound bite calculated with the proper spin by propaganda experts to be their conviction for the common good. Those who present critical evaluation of the details of the candidates' programs and their capability to truly deliver are drowned out with paid election paraphernalia, victims of the fetishes that capture the attention of the established media. Reduced to elections, democracy becomes a recipe for entertainment, with eventual disappointment as dessert. Candidates adjust their language to resonate their views with the opinions of the masses. General statements, loaded with terms that generate emotion, are passed on as profound political platforms. They are the song-and-dance numbers performed on a political stage.

Thus, we are made to forget that all issues are complex and their solutions nuanced. Coherence in any political program will be challenged by standpoint. But social issues when described within the framework of lives lived are not so neat. They are full of contradictions, requiring decisions which ask what the costs are and who should bear them.

The electorate, during many of our elections, thus imbibes a culture of learned helplessness. The victors are our saviours and we are the masses waiting to be saved. We endow the winners in an electoral contest with undeserved entitlement. We create kings and queens rather than public servants. This should not be the case. Elections should provide for more. There are alternative symbols of democracy other than just elections.

The presence of dissent may present a more powerful view of democracy. But, a single solitary expression of dissent may not be enough.

Dissent can take the form of the uncouth and impolite slogans shouted by those taking to the streets and coloured by the chants and burned effigies that may challenge cultural conventions. There is no lack of passion among the mobilized. After all, they speak about their felt lives, their dissatisfaction, and their hope that things can get better. Their alternative may simply be a vision shaped by a rejection of the status quo without clear articulation of a workable political program. Still, it is dissent, and it is necessary for an authentic democracy.

Dissent can also take the form of the uncomfortable single dissenting opinion expressed in a board or council meeting or written as a separate judicial opinion. In this form, its logic and rationale may be legible, transparent, and cogent. Usually, a dissent does not square with the premises of a majority view. It is uncomfortable when it challenges the status quo.

Dissent in this form is temporal. It is a suggested idea at its inception promising coherence. It is a seed of subversion. For the time being, it is a view that may not capture the dominant view. It is a relevant idea tentatively articulated and waiting to be fully accepted – waiting to be developed into full coherence within a political platform. Yet, too much emphasis on a romantic symbol of democracy is also dangerous.

Traditional liberal theory is built around the single radical individual. It is premised on the idea of the self as separate and autonomous from all others. It sees the dissenter as a lone wolf, a cry in the wilderness. The dissenter is the stranger. His or her ideas may sound different, but they are to be celebrated because they make this person human. Dissent is to be tolerated as a badge of the quality and maturity of a democracy.

Characterized this way, dissent becomes a curiosity. It is tamed at the margins of society. It is subterfuge for the maintenance of the dominance of those who are already powerful. In a way, it underscores the dominant view of those who are powerful. It is a means to legitimize the hegemony. Mere tolerance of dissent therefore foists a weak conception of democracy. It inaugurates what Marcuse calls "repressive tolerance."

Dissent should ripen into political action. Political action is relevant only when done in the company of others. Political action becomes powerful when congealed with the ideas contributing to the views of an identity or a community with respect to a social issue. Dissent should not be a lonely project. It is always a social act. It thrives with community. It ripens to mobilization.

Authentic democracies are plural but fluid. They require contestation. Democracy should assume that the status quo is not a fixed descriptive fact. Allegiances for identities, groups, and communities constantly change as leaders emerge and positions become more articulated. The subversive idea evolves. It can soon also become hegemonic.

Communities for agrarian reform, or indigenous peoples, or the fundamental rights of women, or the special consideration given to children, or those who consider themselves human rights practitioners rather than ordinary lawyers, used to be marginalized by their numbers. They used to be at the political and cultural margins. Advocacy, mobilization, debate, and contestation moved their ideas into the forefront of social consciousness. Then conditions changed to make them politically relevant. In the past, their standpoints were restricted to strident speeches. Later on, however, they became sober points of debate in legislative forums. Then their ideas would be congealed in a legal provision, invoked in judicial cases, and become part of the status quo.

Later, the cogency of their ideals formed into normative rules and provisions to be contested in the crucible of judicial cases. An interpretation of law emerges in jurisprudence. It is cited and used again in several cases, eventually becoming doctrine. Its judicial genealogy becomes fixed and fairly consistent. Hence, it emerges as a canon of legal interpretation, waiting to be dislodged again by more contemporarily relevant ideas, which may later win

application in other cases.

At any point in history, the ideas of some groups will be subordinate. The comfort of a majoritarian social perspective or a dominant understanding of our culture can seemingly make the subordination of some ideas natural and inevitable. For example, the majority may believe that divorce is immoral. Same-sex marriage is trumpeted as unnatural. The discomfort of those who believe otherwise is of the same nature as the discomfort felt by past ideas, such as: a woman's place is in the home, or indigenous groups are uncivilized, or only white men can be rational. The veracity of these ideas was, for a while, uncontested and powerfully normative. Those affected became conscious of the contradictions between their view of human dignity and autonomy. Dissatisfaction and critical thought sponsored the politically challenged against the irrationality of the powerful. Change happens. Society evolves.

Dominant hierarchies or the hegemony are never permanent. But they survive when democracies are not authentic and open. That is, when democracies are shibboleths that prevent the existence of that critical and dangerous voice.

A repressive status quo benefits from a view of democracy that considers people as spectator voters. It preserves itself so long as dissenters see themselves as radical individuals at society's margins, voicing opinions only to vent or express. Repressive governments thrive when the normativity in a society remains seriously unchallenged. It is that challenge that we now experience throughout our region.

II

The ability of people to converse, compare experiences, express disagreement, dissent, and mobilize is even more important today. Yet, instead of examining our social problems in all their complexities, regimes that fear democracy foster intolerance. Our common histories—through colonialism and post-colonialism—teach us that a fundamental means to stifle dissent is to make false ideas part of the dominant culture. In many ways, this entails creating stereotypes of target identities. It involves a strategy of caricaturing articulate dissenters.

Iris Marion Young described the phenomenon of cultural power imbalance vividly as thus: the culturally dominated undergo a paradoxical oppression, in that they are both marked out by stereotypes and at the same time rendered invisible. As remarkable, deviant beings, the culturally imperialized are stamped with an essence. The stereotypes confine them to a nature which is often attached in some way to their bodies, and which thus cannot easily be denied. These stereotypes so permeate society that they are not noticed as contestable. Just as everyone knows that the earth goes around the sun, so everyone knows that gay people are promiscuous, Indians are alcoholics, and women are good with children. White males, on the other hand, insofar as they escape group marking, can be individuals.

Successfully caricaturing a group leads to their dehumanization. Stereotyping another human being for the purpose of his or her domination is itself an inhuman act. We are familiar with these stereotypes. Those who belong to non-Christian tribes are uncivilized and have a low level of intelligence. Muslims are terrorists who believe in a religion without ethics are thus always the legitimate subject of privacy violations and law enforcement. Communists are godless and, therefore, legitimate targets of fundamentalist religious crusades. A sexually active woman is a slut who should be publicly shamed and shunned. Drug pushers are dogs. Drug addicts are beyond redemption.

On the other hand, those who do not belong to these categories are endowed with the social privilege of being seen as complex human beings enduring within nuanced contexts and endowed with precious souls. They become the elites, with privilege and access to resources. But stereotypes are dangerous. They breed intolerance. Intolerance, on the other hand, teaches the public to be insensitive to the humanity of others. An intolerant society is a breeding ground for violent secular fundamentalists. The cult of death and violence become valorised and protected rather than condemned and arrested. When sponsored by the elite or government, insensitivity becomes impunity. Impunity legitimizes abuse. Fear, not good governance, will become the foundation of government.

The public will be blind to the fundamental human and constitutional rights of those who are dehumanized by stereotypes. The politics of identity, belonging, and even citizenship can work for us as well as against us. Strategic essentialism which we deploy for our identities is for the purpose of our liberation and recognition. Stereotyping by dominant, powerful, and elite forces is there to allow unthinking domination over marginalized communities and identities.

For example, if drug pushers are dogs, they can be killed at the slightest provocation. If drug addicts are beyond redemption, then it is acceptable to segregate, marginalize, and shun them from society. Thus, they can be ferreted out through searches of homes and private spaces without warrants. If drug pushers are dogs and drug addicts are wasted homo sapiens, then those who coddle them are worse and can therefore be named and shamed without first assessing the testimony and evidence of those who provided their names in an impartial proceeding, which would afford them the opportunity to be heard.

Let me say this so I am not misunderstood: I do not condone criminal acts. It is my duty as a lawyer, as a member of the bench, and as a citizen to ensure that justice is done. It is my duty to ensure that the rule of law prevails. Crimes should be rooted out aggressively, professionally, and with due process of law. It is my hope that the rule of law becomes the rule of just law.

However, the rule of law includes the presumption of innocence. Public accusation of a crime especially by governments should be tempered both by sensitivity to the reputation of others as well as an attitude to ensure there is evidence to support the charge. The first is a consequence of the respect for human dignity. The second constitutes respect for a

system of laws. Public shaming is thus an act of cowardice and sloth. To shame publicly as a political strategy reflects a lack of rational human perspective. The same can be said of deliberate killing whether sponsored by the State or encouraged by it. Deliberate killing is a universal moral wrong. In our jurisdiction, it is a crime.

One who deliberately takes the life of another without the required legitimate and legal provocation assumes an undeserved superiority over the victim. The perpetrator assumes that the acts of the victim that he or she perceives define the victim's whole humanity. It does away with an understanding of the conditions under which the victim suffers. It forgets the corruption and other weaknesses of law enforcement mechanisms that made the crime possible – and in some cases, inevitable. It discounts atonement and rehabilitation.

One who kills deliberately judges with irreversible finality. It is without appeal. One who kills deliberately disregards the grief of others. Deliberately killing another is an exercise of unsanctioned absolute power. In many of our jurisdictions, it is clearly illegal. Murder is murder. Murder is facilitated by the unthinking labels that we allow to happen.

III

Inhuman acts done in the name of false nobilities which motivate the stereotypes for marginalized identities is made possible both by a lack of critical thought and the silence of many. Clearly, we are guilty of inhumanity if we fail to be critical. We cannot succumb to the propaganda of the powerful even though we have the resources to analyse, examine, communicate, and convince. We have to remember that there are many who do not have these resources.

Today, we hear people demand order at any cost. Understandably, this is a pragmatic, concrete, and present goal delivered by those who are able to ascend to power. What is disturbing is that we are starting to see multitudes applauding warped concepts of the rule of law purchased through the politics of fear, the cultural power of labelling, and the coercive apparatus of summary killings. This is not the rule of law; this is rule by fear.

I am hopeful for forums like this. I know that I am among kindred spirits. We all know that we are also part of the conspiracy of the powerful if we fall silent. In many of your words and deeds you have kept that light of critique to shine on our peoples' darkest fears.

I cannot fully describe to you the difficulties in trying to make the right decisions during times of crises. I am sure that many of you who have experienced these dilemmas will also grope for your own words. Then as now, all I can say is that I know that it takes courage to do what may seem unpopular, dangerous, inconvenient, but right.

The choice to do nothing is also a political act. Silence means being an accomplice to the corrupt acts of the powerful. Silence maintains the status quo. This kind of silence ensures others will also be victimized. Silence in the face of abuse of power skews the system in

favour of those with resources and against those needing justice.

Silence also legitimizes greed. It undermines the public's trust in the government. Silence about corruption, abuse of power, and any violation of human dignity is thus not only unjust, it becomes the cause of injustice.

The questions I ask in many of the forums I have been invited to speak is this: Do we still have the passion and courage to do right by our people? And if not, why have we lost the passion and courage to do right by our people?

Doing the right thing is necessary because of the poverty, oppression, and helplessness that many experience in our society. We are all witnesses to deprivation. There are families that live in squalor. There are children who cannot eat three square meals a day. There are those who languish without shelter. There are those who live through oppression. There are children raped by their fathers and uncles. There are those robbed of their youth by poverty. There are those who succumb to addiction but are killed and robbed of the opportunity for rehabilitation. There are also those who are stereotyped and outcast. We are witness to many who are dehumanized and made invisible.

In the course of their careers, many lawyers, judges, justices, doctors, engineers, entrepreneurs, or academics lose appreciation for the social value of their profession. Somewhere along the way, convenience takes the form of pragmatic silence. Expediency overwhelms conscience.

We should stridently call for all to do their part. Find the courage to do things differently. Live with the discomfort of doing something that may be different but right and just.

Repression and fear and intolerance do not easily fade. Those who benefit from them will push back. When you do what is right, you will be called names, at the very least considered a dissident, or a subversive, or an outlier. Your reputation will be tarnished. You will be shamed. You may be the subject of threats, perhaps even violence.

But people suffer when those of us who can live lives of convenience and comfort do nothing. In conscience, none of us should be able to live meaningfully when we know that we can do something to bring back humanity to many of our societies. In times of crises, the line of fire has always indeed been a place of honour.

I sense difficult days ahead of us. Seeing you, I am hopeful. Serve the people. We cannot do anything less.

Thank you.

CHAPTER TWO:

RELIGIOUS GOVERNANCE AND HUMAN RIGHTS

ROADMAPS OR ROADBLOCKS TO RECONCILING RELIGIOUS LAW AND HUMAN RIGHTS: LESSONS FROM THE ASEAN STATES

Helen Quane[*]

Abstract

Claims for State recognition of religious law are increasingly made and equally resisted across the globe. Combined with the rise in identity politics and the heightened significance of religious affiliation, these claims can pose significant challenges to human rights protection. Yet, the relationship between religious law and human rights is a complex and multifaceted one and one that cautions against a zero-sum response to these claims. This chapter examines briefly the contours of this relationship and the role of the State in mediating it. It maps out the tentative conceptual framework that is beginning to emerge within the global human rights bodies for reconciling religious law and human rights. At present, this framework is articulated with a high degree of generality. There is a need to move beyond this and assess the challenges, opportunities, and risks associated with operationalizing it on the ground. The experience of ASEAN States can provide invaluable insights in this regard. Characterised by a remarkable level of religious and political diversity as well as a range of constitutional arrangements regulating religious law, the insights provided by the experience of these States will have resonance not only within the region but also beyond it.

1.0 Introduction

The rise of identity politics and the heightened significance of religious beliefs can pose significant challenges for the promotion and protection of human rights. Religious beliefs can lead to contestations about human rights norms both between and within distinct communities. Identity politics, such as those based on religious affiliation, can exert considerable influence in moulding the political and legal context in which human rights are interpreted and applied. The normative and legal pluralism that religious beliefs and identity politics can engender can impact the protection of rights at all levels: national, regional, and global. Against this backdrop, and at a time when claims for State recognition of religious laws are increasingly made and equally resisted across the globe, there is a need to explore the potential impact of recognising such claims on human rights.

Drawing on the practice of members of the Association of Southeast Asian Nations (ASEAN),[1] this chapter explores the relationship between State recognition of religious law and compliance with international human rights law. It begins by mapping out in general terms the complex and multifaceted relationship that exists between religious law and international human rights law. It then proceeds to focus on the prospects for reconciling these two bodies of law. In doing so, it draws on the tentative conceptual framework for reconciling religious law and international human rights law that is beginning to emerge

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[1] Namely, Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam.

from the practice of UN human rights bodies.[2]

Currently, this framework is articulated with a high level of generality. There is a need to move beyond this to identify factors that will determine the viability of the framework and how it is operationalized on the ground. The ASEAN States provide an important body of experience to draw upon in this regard given the religious diversity and different patterns of relations between State, religion, and human rights that characterise the region. In collating this experience, the chapter draws extensively on the official documentation produced as part of the UN human rights monitoring processes[3] and the important body of research undertaken by the Human Rights Resource Centre on religious freedom within individual ASEAN States, albeit the latter focuses on religious freedom rather than State recognition of religious law.[4] What emerges from the present analysis is that the experience of ASEAN States can provide valuable insights into the risks, opportunities, and challenges associated with operationalizing the tentative UN conceptual framework and with State recognition of religious law more generally. The lessons to be learned from the experience of ASEAN States are ones that are relevant not only within the region but may also be relevant to other regions where States are beginning to grapple with similar

[2] That is, those bodies that exist within the UN Human Rights Treaty Body System and the UN Charter-based System. The UN Human Rights Treaty Body System is concerned with the implementation of the core UN international human rights treaties. These are: the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); the International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195; the Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85; the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3; the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3; the Convention on the Rights of Persons with Disabilities (adopted on 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3. The UN Charter-based System is derived from the UN Charter and includes the work of the UN Human Rights Council and the system of Special Procedures.

[3] For example, State reports produced as part of the UN Human Rights Treaty Body System for the Treaty Monitoring Bodies (TMBs), Concluding Observations and Recommendations of the TMBs, National Reports submitted as part of the Universal Periodic Review (UPR) process, the compilation of information contained in various UN official reports as part of the UPR process, and the Reports of the Working Group on the Universal Periodic Review on individual States.

[4] Human Rights Resource Center (HRRC), *Keeping the Faith: A Study of Freedom of Thought, Conscience and Religion in ASEAN*, West Java: HRCC, 2015, available at http://hrrca.org/wp-content/uploads/2015/11/Book-of-Keeping-the-Faith_web.pdf, accessed on 18 August 2018 (*Keeping the Faith*). This report provides invaluable data on religion within the various ASEAN States including the religious composition of its populations, relevant constitutional provisions, legislative provisions, case law on religious freedom and the broader context and impact of recent developments not only on religious freedom but also on peace and security within the States and across the region. Like many other primary or secondary sources on religion in the region, there is limited discussion of the status of religious laws and their impact on human rights. The focus instead tends to be on religious freedom, hermeneutics, or the broader implications of regulating religion: see, for example, International Humanist Ethical Union, *Freedom of Thought Report*, 2016, available at http://freethoughtreport.com/; Musawah, *CEDAW and Muslim Family Laws: In Search of Common Ground*, Malaysia: Musawah, 2011; Tey Tsun Hang, 'Excluding religion from politics and enforcing religious harmony – Singapore-style' *Singapore Journal of Legal Studies*, 2008, pp 118-142.

issues.[5]

2.0 The relationship between religious law and international human rights law and the role of the State in mediating that relationship

It is useful to begin by examining the relationship between religious law and international human rights law. It is not uncommon to find the relationship portrayed as inherently incompatible or hostile.[6] This perhaps is not surprising given the well-documented human rights harm that can be caused by some religious laws. This can include the discriminatory treatment of women, children, lesbian, gay, bisexual, transgender and intersex individuals, severe constraints on individual autonomy not least in terms of changing one's religion or adhering to the religion of one's choice, and the imposition of punishments such as floggings, amputations, and stoning that defy international prohibitions on torture, inhuman and degrading treatment or punishment.[7] This harm is often a by-product of traditional views of gender relations, family structures or punishments for transgressing community mores. However, it can also reflect more deep-seated beliefs that are not always easy to reconcile with fundamental principles of international human rights law,[8] notably, that rights derive from one's humanity rather than divine prescription. Taken as

[5] In the United Kingdom, two examples will illustrate the point. One is the *de facto* operation of Sharia courts in the UK which has attracted considerable controversy and is the subject of a government review. See, for example, Botzas, S, 'Sharia courts: The inside story' The Independent, 5 December 2015, pp 1, 8-10. The second concerns intra-religious pluralism and is illustrated by events at a Sikh temple when members of Sikh Youth UK tried to disrupt an inter-faith marriage at the temple. Significantly, a representative from Sikh UK did not criticise these actions but referred to the need to prevent the 'dilution' of identity albeit he did not oppose inter-religious marriages *per se*: 'Sunday' (interview), BBC Radio, 18 September 2016.

[6] See, for example, the discussion in Hajjar, L, 'Religion, state power, and domestic violence in Muslim societies: A framework for comparative analysis' *Law & Social Inquiry*, 2004, Vol 29, No 1, pp 16-19; Mashhour, A, 'Islamic law and gender equality – Could there be a common ground? A study of divorce and polygamy in Sharia law and contemporary legislation in Tunisia and Egypt' *Human Rights Quarterly*, 2005, Vol 27, No 2, pp 562-596.

[7] Within an ASEAN context, see, for example, *Keeping the Faith* (note 4 above), at 58, 62-68, 75-76 (concerning aspects of Brunei's Penal Code as well as its treatment of women and members of the LGBT community generally; see also, *Report of the Working Group on the Universal Periodic Review: Brunei Darussalam*, 7 July 2014, UN Doc A/HRC/27/11), the *Summary Prepared by the Office of the UNHCHR in accordance with paragraph 15(c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Singapore*, 6 November 2015, UN Doc A/HRC/WG.6/24/SGP/3, paras 4, 33-37, 48, 50 (concerning discrimination on grounds of sexual orientation and gender); *Compilation prepared by the Office of the UNHCHR in accordance with paragraph 15(b) of the annex to Human Rights Council Resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21: Lao People's Democratic Republic, 12 November 2014, UN Doc A/HRC/WG.6/21/LAO/2*, para 19 (concerning gender discrimination in relation to early marriages and inheritance); *Report of the Working Group on the Universal Periodic Review: Malaysia*, 5 October 2009, UN Doc A/HRC/11/30, paras 46-48, 34, 89 (concerning LGBT rights, rights of women and children and religious minorities). In relation to experiences outside the region, see, for example, Smith, PS, 'Silent witness: Discrimination against women in the Pakistani law of evidence' *Tulane Journal of International & Comparative Law*, 2003, Vol 21, pp 30-39, at 48-49; Calaguas, MJ, Drost, CM, and Fluet, ER, 'Legal pluralism and women's rights: A study in postcolonial Tanzania' *Columbia Journal of Gender & Law*, 2007, Vol 16, No 2, at 471, 472, 518, 520, 522, 527-28, 538; Farran, S, 'Is legal pluralism an obstacle to human rights? Considerations from the South Pacific' *Journal of Legal Pluralism & Unofficial Law*, 2006, Vol 52, at 77, 87, 97-99; Afary, M, 'The human rights of Middle Eastern and Muslim women: A project for the 21st century' *Human Rights Quarterly*, 2004, Vol 26, at 106, 110; *Curtis Francis Doebbler v Sudan*, African Comm'n on Hum & Peoples' Rights, Comm'n No 236/2000 (2003).

[8] See, for example, Shestack, JJ, 'The jurisprudence of human rights' in Meron, T (ed), *Human Rights in International Law: Legal and Policy Issues*, Oxford Scholarship Online, 1984.

a whole, these considerations might suggest an inherent hostility between international human rights law and religious law.

While acknowledging the considerable potential for conflict between religious law and international human rights law, it is open to question whether the relationship should be viewed in such one-dimensional terms. To do so simply encourages a zero-sum approach to the relationship and the risk of a total rejection of or deference to religious law. Above all, it would risk abandoning those whose rights and daily lives are impacted by religious law. Rather than viewing the relationship between religious law and international human rights law in such a singular and uncompromising manner, it may be helpful to start by recognising the dynamic nature of the former[9] and the potential inherent in the latter to accommodate national and regional variations without compromising its fundamental tenets.[10] This, at the very least, opens up the possibility of developing a framework for reconciling these two bodies of law; one that may have the potential to deliver tangible human rights benefits on the ground. While this approach may seem overly optimistic, recent developments in international human rights practice lend some credence to it. Prior to examining these developments, however, one must consider the role of the State in the relationship.

To the extent that there can be any relationship between religious law and international human rights law, it is one that must be mediated by the State. International human rights law still adheres very much to a State-centred approach[11] and, for the most part, imposes direct legal obligations only on States.[12] To the extent that it can impact religious law, it does so primarily via the State and specifically through the concept of State responsibility. It is well-established in international law that a State can be held responsible for any human rights harm caused by religious law in certain instances.[13] One is where the State recognises

[9] See also, in a similar vein, Calaguas (note 7 above), at 534; Perry, R, 'Balancing rights or building rights? Reconciling the right to use customary systems of law with competing human rights in pursuit of indigenous sovereignty' *Harvard Human Rights Journal*, 2011, Vol 24, pp 71-114, at 71, 77-79.

[10] On the context sensitive interpretation of human rights treaties, see, for example, Committee on the Elimination of Racial Discrimination, *General Recommendation No 32,* 24 September 2009, UN Doc CERD/C/GC/32, para 5. On its application in a specific case, see, for example, the recognition by the CEDAW Committee that the pluralistic nature of Singaporean society and its history call for sensitivity to the cultural and religious values of different communities: UN Doc A/56/38(SUPP) (2001).

[11] Notwithstanding some recent developments concerning the responsibility of non-state actors for human rights harm. See, for example, Ruggie, J, P*rotect, Respect, and Remedy: A Framework for Business and Human Rights. Report of the Special Rep of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc A/HRC/8/5, 7 April 2008.

[12] Although a very small number of international human rights treaties now allow regional intergovernmental organizations to become parties. See, for example, Convention on the Rights of Persons with Disabilities, Art 44, 13 December 2006, 2515 UNTS 3. The European Union ratified the Convention on 23 December 2010. See, http://treaties.un.org/Pages/ViewDetails.aspx? src=TREATY&mtdsg no=IV-15&chapter=4&lang=en.

[13] See, International Law Commission, *Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries*, Arts 4, 5, 2001, available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9 62001.pdf. International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries*, Arts 4, 5, 9, 2001, available at http://legal.un.org/ilc/texts/instruments/english/ commentaries/9.6.2001.pdf. Articles 4 and 5 are regarded as codifying customary international law and are binding on all States.

religious laws or religious courts within its legal system.[14] This will occur, for example, when the State makes the validity of national law conditional on its compatibility with religious law,[15] transposes religious law into statute law,[16] grants autonomy to members of religious communities to regulate personal status matters in line with their religious laws,[17] or permits the operation of religious courts within its jurisdiction.[18] The second is where the State fails to discharge its duty to protect human rights against interference by non-state entities such as religious bodies operating *de facto* within its territory.[19] Once State responsibility is established, the State can be held accountable for any human rights harm caused by religious law and can be required to undertake a range of measures to remedy the violation. These measures can require the State to abolish or reform certain religious laws or the operation of religious courts. In some instances, it may even require the State to recognise religious laws especially where they intersect with the customary laws of indigenous peoples.[20] It demonstrates how the concept of State responsibility operates as a gateway for an interesting dynamic to emerge between international human rights law and religious law.

Admittedly, the State may try to restrict this gateway by adopting certain strategies. One is to enter a reservation to a human rights treaty to limit its effect. To be valid, the reservation must be compatible with the object and purpose of the treaty.[21] Several States, including Brunei, Singapore and Malaysia, have entered reservations to international human rights treaties to the effect that the treaty or certain provisions of the treaty will apply only to the extent that they are compatible with religious law. This strategy is a controversial one

[14] State responsibility in these circumstances may be due to (1) the adoption of religious laws by organs of the State or by entities exercising elements of governmental authority while exercising that authority, or (2) the status of the religious courts as organs of the state or as exercising elements of governmental authority.
[15] See, for example, Sharia Guarantee Clauses. On such clauses, see, Lombardi, CB, 'Designing Islamic constitutions: Past trends and options for a democratic future' *International Journal of Constitutional Law*, 2013, Vol 11, No 3, pp 615-645, at 615.
[16] See, for example, Brunei's Penal Code 2013: *Keeping the Faith* (note 4 above), at 58-68.
[17] See, for example, the position in the Philippines and Singapore: *Keeping the Faith* (note 4 above), at 398, 387-8, 420.
[18] See, for example, the position in the Philippines, Singapore, Brunei, Indonesia, and Malaysia: *Keeping the Faith* (note 4 above), at 387-8, 420, 57, 141, 290.
[19] Under general international law, State responsibility can arise due to the due diligence principle. Aside from this principle, IHRL imposes obligations on the State not only to respect human rights but also to protect these rights against interferences by private individuals and organisations: see, for example, the approach adopted by the UN Committee on the Elimination of Discrimination Against Women, *General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women*, UN Doc CEDAW/C/GC/28, 2010. The difficulty is that the extent of the State's positive obligations to protect human rights is far from clear. According to international jurisprudence, the scope of these positive obligations is determined in the light of all the circumstances of the case and, in no case, can they result in the imposition of an impossible or disproportionate burden on the State: See, for example, *Osman v United Kingdom*, 29 Eur HR Rep 245, at para 116 (2000); *Case of the Sawhoyamaxa Indigenous Community v Paraguay*, Inter-Am Ct HR 155 (29 March 2006).
[20] See further, Quane, H, 'International human rights law as a catalyst for the recognition and evolution of non-State law' in Helfand, MA (ed), *Negotiating State and Non-State Law: The Challenges of Global and Local Legal Pluralism*, Cambridge University Press, 2015.
[21] See, Vienna Convention on the Law of Treaties, Art 19(c), 1155 UNTS 331 (adopted 22 May 1969, entered into force 27 January 1980).

and States are subject to sustained international pressure to withdraw these reservations.[22]

A second strategy is to claim that the individual concerned waived her human rights, for example, by submitting voluntarily to the jurisdiction of religious courts notwithstanding that these courts may apply rules that discriminate on grounds of gender, sexual orientation, or religious belief. Admittedly, this strategy can only be deployed where there is a choice of court, otherwise the possibility of waiver does not arise. The question of whether it is even possible to waive one's human rights has arisen within the European human rights system where jurisprudence suggests that it is possible to waive the *exercise* of a human right but not the right itself since by their very nature human rights are inalienable. Even then, the waiver is subject to certain conditions, namely, it must: (a) be 'permissible,'[23] (b) not be contrary to any important public interest,[24] (c) be established in an 'unequivocal manner' with the onus on the State to establish its existence,[25] and (d) be consented to by the individual in a very real and genuine sense.[26] It follows that the State cannot be complacent even where the individual seemingly waives the exercise of her human rights as the waiver may not be a permissible one and the State may still be accountable for any ensuing human rights harm.

A third strategy to restrict the 'gateway' is for the State to justify the restriction on the human right, effectively denying any human rights violation, and thereby limiting the impact of international human rights law on religious law. Most human rights are qualified rights and, as such, they can be restricted provided the State can demonstrate that the restriction: (a) is prescribed by law, (b) pursues a legitimate objective, (c) is necessary to achieve that objective, and (d) is not discriminatory.[27] Further, one has to bear in mind that a restriction is only discriminatory if the State treats persons in analogous positions differently without objective and reasonable justification or when it fails "to treat differently persons whose positions are significantly different" without objective and reasonable justification.[28] The State is often accorded a certain margin of appreciation in assessing whether a restriction is justified, at least at the regional level.[29] It follows that while there are some absolutes in

[22] See, for example, the objections to the reservations entered by Brunei to the Convention on the Elimination of All Forms of Discrimination Against Women by Austria, Belgium, Canada, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden, United Kingdom: see, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en#EndDec.

[23] See, for example, *Thompson v United Kingdom*, 40 Eur HR Rep 11, at para 43 (2005).

[24] See, for example, *Ozerov v Russia*, App No 64962/01, at para 57 (Eur Ct HR, 18 May 2010).

[25] See, for example, *Colozza v Italy*, 7 Eur HR Rep 516, at para 28 (1985).

[26] See, for example, *Deweer v Belgium*, 2 Eur HR Rep 439, at paras 49-51, 54 (1980); *Pfeifer and Plankl v Austria*, 14 Eur HR Rep 692, at para 39 (1992).

[27] See, for example, *Case of YATAMA v Nicaragua*, Inter-American Court of Human Rights (23 June 2005), at para 206.

[28] See, for example, UN Human Rights Committee, 'General comment no 18' in *Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev 7 (2004).

[29] This is the case particularly under the European Convention on Human Rights where the European Court of Human Rights takes the view that "by reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions:" *Frette v France*, Application No 36515/97, Judgment, 26 February 2002, at para 41.

international human rights law, there is also considerable potential for it to accommodate competing rights and interests and to adapt to local conditions. This must be factored in to any consideration of its relationship with religious law.

What emerges from this very brief overview is that there is some basis for a relationship between international human rights law and religious law albeit an indirect one with the State acting as intermediary. Irrespective of its willingness to do so, the concept of State responsibility casts the State in the role of mediating the relationship between the two bodies of law. Depending on the range of obligations undertaken by the State, international human rights law may require the State to recognize, restrict, abolish, or instigate reform of particular religious laws. The extent to which it actually does so will depend on several factors. One is the scope of its international human rights obligations. The greater the number of human rights obligations undertaken by the State, the greater the prospects for the relationship between international human rights law and religious law taking hold. One of the interesting by-products of the UN Universal Periodic Review (UPR) process in recent years is the considerable expansion in the number of ratifications of human rights treaties by States.[30] If this continues, it suggests that the potential for international human rights law to influence religious law will increase rather than decrease in the coming years. Of course, much will depend on whether a State is prepared to comply with its international obligations in good faith. The State may simply ignore its obligations and refuse to engage with the international human rights bodies. If it does, the impact of international human rights law on religious law will be minimal. While it is important to appreciate the shortcomings of international human rights law in this respect, one should not discount completely its potential efficacy even if tangible results are not delivered in the short term but only materialise in the mid to long term.[31] When analysing the relationship between international human rights law and religious law, it is useful to recognise this time component and to acknowledge that what we are witnessing are the very early stages in the development of this relationship.

3.0 A tentative conceptual framework for reconciling religious law and international human rights law

A review of international practice demonstrates not only the very real tensions that can exist between international human rights law and religious law but also what appears to be a tentative conceptual framework for developing a more constructive relationship between them. This is apparent from a review of international practice within the UN Human Rights Treaty Body system although it can also be seen within the UN Charter-based system and several regional human rights systems. There are several key strands to this framework. The starting point is that State recognition of religious law is not an integral

[30] See, for example, Pillay, N, *Strengthening the United Nations Human Rights Treaty Body System*, OHCHR, 2012, available at http://www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBStrengthening.pdf. According to this report, the six core international human rights treaties in force in 2000 had attracted 927 ratifications. By 2012, this total had increased by more than 50% to 1,586 ratifications.

[31] See, for example, Alston, P, 'Beyond 'them' and 'us': Putting treaty body reform into perspective' in Alston, P, and Crawford, J (eds), *The Future of UN Human Rights Treaty Monitoring*, Cambridge University Press, 2000.

or necessary component of the right to freedom of religion or the right to respect for one's religious or ethnic identity.[32] At the same time, it seems that there is no *automatic* bar on States recognising religious law.[33] This is consistent with the principle that international human rights law does not dictate how a State organizes its domestic legal system.[34] Its task is simply to ensure that whatever system is adopted is compatible with the State's international human rights obligations.

At a practical level, this means that the UN Human Rights Treaty Monitoring Bodies (TMBs) focus less on the existence of religious courts and more on ensuring that these courts operate in a manner that respects human rights. In relation to religious law, the TMBs tend to focus on specific laws that cause human rights harm rather than the recognition of religious law *per se*.[35] For example, they consistently call on States to eliminate laws permitting polygamy on the ground that they violate the principle of equality in marriage and family relations under international human rights law.[36] It is important to stress, however, that they do not require the wholesale abolition of religious law or religious courts. The TMBs adopt a more calibrated approach, distinguishing between those laws and courts that are incompatible with human rights and those that are compatible or, at least, can be *rendered compatible* with international human rights law.

The second element of the conceptual framework is the belief that religious law has the capacity to evolve in line with international standards.[37] Attempts to portray religious

[32] See, for example, the Human Rights Committee (HRC), *General Comment No 23* (8 April 1994) UN Doc CCPR/C/21/Rev 1/Add 5, at para 6.2; HRC, *General Comment No 22* (30 July 1993) UN Doc CCPR/C/21/Rev 1/Add 4.

[33] See, for example, the UPR of Brunei where some States challenged the recognition of certain religious laws within the Penal Code 2013 but not the fact that Brunei could recognise religious law *per se*.

[34] See, further, Quane, H, 'Legal pluralism and international human rights law: Inherently incompatible, mutually reinforcing or something in between?' *Oxford Journal of Legal Studies*, 2013, Vol 33, No 4, pp 675-702, at 675, 696.

[35] See, for example, Committee on the Elimination of Discrimination against Women (CEDAW Committee), *General Recommendation on Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic Consequences of Marriage, Family Relations and their Dissolution)*, 30 October 2013, UN Doc CEDAW/C/GC/29, at paras 27, 33, 53; the recommendation of the Committee Against Torture to Dijbouti concerning the abolition of corporal punishment: UN Doc CAT/C/DJI/CO/1 (2011); the recommendation of the Committee on the Rights of the Child to Nigeria to abolish corporal punishment: UN Doc CRC/C/NGA/CO/3-4 (2010). This approach is also echoed at the regional level. See, for example, *Curtis Francis Doebbler v Sudan* African Commission on Human and Peoples' Rights, Comm No 236/2000 (2003); *Case of the Saramaka People v Suriname* Inter-American Court of Human Rights (28 November 2007), at para 86.

[36] See, for example, the recommendations of CEDAW Committee to Kenya, Oman, Uganda, Myanmar, Ghana, South Africa, Tajikstan, and Madagascar: UN Docs CEDAW/C/Ken/CO/6 (2007); CEDAW/C/OMN/CO/1 (2011); CEDAW/C/UGA/CO/7 (2010); CEDAW/C/MMR/CO/3 (2008); CEDAW/C/GHA/CO/5 (2006); CEDAW/C/ZAF/CO/4 (2011); CEDAW/C/TJK/CO/3 (2007); CEDAW/C/MDG/CO/5 (2008); the recommendation of the Human Rights Committee to Gabon: UN Doc CCPR/CO/70/GAB (2000). See also, *General Comment No 28* (29 March 2000), UN Doc CCPR/C/21/Rev 1/Add 10, at para 24; and, more generally, CEDAW, *General Recommendation 21* in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2004) UN Doc HRI/GEN/1/Rev 7.

[37] See, e.g. CEDAW Committee's Recommendations to Morocco, Singapore, and Kuwait: UN Docs A/52/38/Rev.1 (Supp), para 71 (1997); CEDAW/C/SGP/CO/4 (2011); CEDAW/C/KWT/CO/3–4 (2011). Although the European Court of Human Rights at times appears to subscribe to a view of religious law as 'static law' specifically in relation to Sharia law: see, *Refah Partisi (The Welfare Party) v Turkey* (2002) 35 EHRR 3, para 70.

law as unchanging and incapable of reform are consistently challenged and rejected.[38] Attention focuses instead on encouraging a more flexible interpretation of these laws and a sharing of best practice. For example, TMBs have called on States to "study reforms in other countries with similar legal traditions with a view to reviewing and reforming personal laws" so that they conform to their treaty obligations.[39] Reference has also been made, for example, to the existence of a "comparative jurisprudence seeking to interpret Islamic law in harmony with international human rights standards"[40] and to a State's "gradual, greater flexibility in the interpretation of Sharia."[41] All these recommendations and observations demonstrate a firm belief in the capacity of religious law to develop in line with international human rights standards.

These recommendations and observations also demonstrate the potential significance of developments at the *national* level. The way in which religious laws are interpreted and applied in one State may be drawn upon by other States for guidance on how to reconcile recognition of religious law with international human rights law. These developments at the national level merit further study given their capacity to contribute to an *international* consensus on how best to reconcile religious law and international human rights law. They can help international human rights law to move beyond debates about cultural relativism and assist with the more effective protection of human rights on the ground where religious laws continue to exert a considerable influence on the day to day lives of a sizeable portion of the world's population.[42]

The third element of the conceptual framework is the need for States to harmonize statutory and religious law with international human rights law.[43] TMBs have called on States to undertake a "comprehensive review process"[44] of all laws, including religious laws, to ensure that they comply with their international human rights obligations.[45] Where

[38] See, for example, CEDAW Committee's Recommendations to Israel and Niger: UN Docs CEDAW/C/ISR/CO/3 (2005); CEDAW/C/NER/CO/2 (2007).
[39] See, CEDAW Committee's Recommendations to Singapore: UN Doc A/56/38(Supp), at para 74 (2001). See also, its Recommendations to Kuwait, Oman, Malaysia, Sri Lanka, Jordan, and Djibouti: UN Docs CEDAW/C/KWT/CO/3–4 (2011); CEDAW/C/OMN/CO/1 (2011); CEDAW/C/MYS/CO/2 (2006); A/57/38 (Supp) (2002); CEDAW/C/JOR/CO/5 (2012); CEDAW/C/DJI/CO/1–3 (2011).
[40] See, for example, CEDAW Committee's Recommendations to Maldives: UN Doc A/56/38 (Supp), at para 141 (2001).
[41] See, for example, CEDAW Committee's Recommendations to United Arab Emirates and Singapore: UN Docs CEDAW/C/ARE/CO/1 (2010); A/56/38 (Supp.), at para 74 (2001); CEDAW/C/SGP/CO/4 (2011).
[42] See, for example, International Council on Human Rights Policy, *When Legal Worlds Overlap: Human Rights, State and Non-State Law*, ICHRP, 2009, at 43-59.
[43] See, for example, CEDAW Committee's Recommendations to Niger, Kenya, Myanmar, Ghana, Madagascar, Zambia, Tanzania, Uganda, and Malaysia: UN Docs CEDAW/C/NER/CO/2 (2007); CEDAW/C/KEN/CO/6 (2007); CEDAW/C/MMR/CO/3 (2008); CEDAW/C/GHA/CO/5 (2006); CEDAW/C/MDG/CO/5 (2008); CEDAW/C/ZMB/CO/5–6 (2011); CEDAW/C/TZA/CO/6 (2009); CEDAW/C/UGA/CO/7 (2010); CEDAW/C/MYS/CO/2 (2006).
[44] See, for example, CEDAW Committee's Recommendations to Chad: UN Doc CEDAW/C/TCD/CO/1–4 (2011). See also its Recommendations to Niger, Botswana, and Zimbabwe: UN Docs CEDAW/C/NER/CO/2 (2007); CEDAW/C/BOT/CO/3 (2010); CEDAW/C/ZWE/CO/2–5 (2012).
[45] See, for example, the recommendations concerning the right to gender equality in marriage and family relations and the right of women to equality with men before the law that were made by the CEDAW

there is a conflict between formal legal provisions that are rights compliant and religious law, States have been called upon to give priority to the formal provisions[46] and to make religious leaders and the wider community aware of this position.[47] Consideration must also be given to the position of minorities within the State. The general principle is that minorities should be governed by secular law rather than religious law where the latter conforms only to the religious beliefs of the majority of the population. Where religious courts exist to interpret and apply religious law, States have been called upon to regulate them to ensure that they comply with international human rights standards.[48] States have been asked to "take steps" to ensure that religious laws are interpreted and applied consistently with fundamental human rights.[49] Procedurally, the Human Rights Committee has asserted that religious courts can only hand down binding decisions recognised by the State where (a) the proceedings are limited to minor civil and criminal matters, (b) meet the basic requirements of a fair trial, (c) their judgments are validated by State courts in light of the guarantees set out in international human rights law, and (d) can be challenged by the parties concerned in a procedure meeting fair trial requirements.[50] General international practice suggests that the procedure of religious courts should be "brought into line with statutory courts," that a choice of court should be introduced where none exists,[51] and

Committee to Kenya, Niger, Papua New Guinea, Liberia, Cameroon, Zambia, Tanzania, Uganda, Chad, and Myanmar: UN Docs CEDAW/C/Ken/CO/6 (2007); CEDAW/C/NER/CO/2 (2007); CEDAW/C/PNG/CO/3 (2010); CEDAW/C/LBR/CO/6 (2009); CEDAW/C/CMR/CO/3 (2009); CEDAW/C/ZMB/CO/5-6 (2011); CEDAW/C/TZA/CO/6 (2009); CEDAW/C/UGA/CO/7 (2010); CEDAW/C/TCD/CO/1-4 (2011); CEDAW/C/MMR/CO/3 (2008); the recommendation of the HRC to Gabon: UN Doc CCPR/CO/70/GAB (2000). See also the recommendations concerning the need to ensure respect for the principle of the best interests of the child that were made by the Committee on the Rights of the Child to Malawi, Zambia, Mozambique, Gabon, Botswana, Lesotho, Gambia, Bolivia, Sri Lanka, Madagascar, Kiribati, Palau, and Nigeria: UN Docs CRC/C/15/ADD 174 (2002); CRC/C/15/ADD 206 (2003); CRC/C/15/ADD 172 (2002); CRC/C/15/ADD 171 (2002); CRC/C/15/ADD 242 (2004); CRC/C/15/ADD 147 (2001); CRC/C/15/ADD 165 (2001); CRC/C/BOL/CO/4 (2009); CRC/C/LKA/CO/3-4 (2010); CRC/C/15/ADD 218 (2003); CRC/C/KIR/CO/1 (2006); CRC/C/15/ADD 149 (2001); CRC/C/NGA/CO/3-4 (2010).

[46] See, the recommendations of the CRC to New Zealand and Equatorial Guinea: UN Docs CRC/C/NZL/CO/3-4 (2011); CRC/C/15/ADD 144 (2001); CRC/C/15/ADD 245 (2004); the recommendation of CEDAW to Zambia, Mozambique, Chad and Tanzania: UN Docs CEDAW/C/ZMB/CO/5-6 (2011); CEDAW/C/MOZ/CO/2 (2007); CEDAW/C/TCD/CO/1-4 (2011); CEDAW/C/TZA/CO/6 (2009); the recommendation of the HRC to Zambia: UN Doc CCPR/C/ZMB/CO/3 (2007).

[47] See, the recommendations of CEDAW Committee to Chad and Congo: UN Docs CEDAW/C/TCD/CO/1-4 (2011); CEDAW/C/COG/CO/6 (2012).

[48] See, the recommendation of the Independent Expert on Minorities to Ethiopia: UN Doc A/HRC/4/9/Add 3 (2007); the recommendation of the HRC to Botswana: UN Doc CCPR/C/BWA/CO/1 (2008); the recommendation of CERD to Mozambique: UN Doc A/62/18 (2007).

[49] See, for example, the recommendation of the Committee on Economic, Social and Cultural Rights (CESCR) to Israel: UN Doc E/C 12/1/ADD 90 (2003); the recommendation of the CRC to Libya: CRC/C/15/ADD.209 (2003); the recommendation of the HRC to Gambia and Albania: UN Docs CCPR/CO/75/GMB (2004); CCPR/CO/82/ALB (2004); the recommendation of CERD to South Africa: UN Doc CERD/C/ZAF/CO/3 (2006).

[50] See, HRC, *General Comment No 32*, at para 24.

[51] See, the CEDAW Committee's Recommendations to Singapore: UN Doc CEDAW/C/SGP/CO/4 (2011). Singapore has amended its law to enable the Family Court to have concurrent jurisdiction in selected areas notwithstanding the application of Sharia law in personal matters: *Keeping the Faith* (note 4 above), at 424. However, concerns persist: see, *Compilation prepared by the Office of the UNHCHR in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to council resolution 16/21: Singapore*, 20 November 2015, UN Doc A/HRC/WG.6/24/SGP/2, at 7.

that individuals should be made aware that they can request the transfer of a case to a State court.[52] A key feature of all these recommendations is not simply that religious laws and courts should be compatible with international human rights standards but that States should be *proactive* in ensuring this compatibility.

A further element of the framework is that the TMBs acknowledge the need for the population to support any reform of existing laws (religious or secular) concerning human rights.[53] This does not mean that the State can stand by and wait until this support materializes. Instead, the State is given the role of generating support for law reform, for example, through "partnerships and collaboration with religious and community leaders, lawyers and judges, civil society organizations and women's NGOs."[54] In several instances, States have been called upon to engage with religious and traditional authorities in a "frank," "public," and "constructive dialogue" about how religious laws can be rendered compatible with human rights.[55] More generally, States have been called upon to increase efforts to sensitize stakeholders about the importance of law reform in this area,[56] to conduct awareness training about rights[57] and to "train and sensitize" administrators of religious courts about human rights.[58] In effect, the State is cast in the role of an agent or driver of change.

What also emerges from the international practice is that the law reform process must be fully inclusive, with the effective participation of religious leaders, civil society representatives, and women's organizations.[59] Beyond this, the modalities are left to the State and communities concerned to develop religious law in a manner compatible with international human rights law. This allows local variations to be factored into the process of reform without compromising the fundamental tenets of international human rights law.[60] Further, by focussing on an inclusive and participatory approach to law reform, it

[52] See, for example, CEDAW Committee's Recommendations to Botswana: UN Doc CEDAW/C/BOT/CO/3 (2010). See also, its Recommendations to Vanuatu: UN Doc CEDAW/C/VUT/CO/3 (2007).
[53] See, for example, CEDAW Committee's Recommendations to Morocco: UN Doc A/52/38/Rev 1 (Supp), at para 71 (1997).
[54] See, CEDAW Committee's Recommendations to Syria: UN Doc CEDAW/C/SYR/CO/1 (2007). See, also, its Recommendations to Malaysia, Morocco, Jordan, Myanmar, Tunisia, and Egypt: UN Docs CEDAW/C/MYS/CO/2 (2006); A/52/38/Rev 1 (Supp), at para 71 (1997); CEDAW/C/JOR/CO/4 (2007); CEDAW/C/MMR/CO/3 (2008); CEDAW/C/TUN/CO/6 (2010); CEDAW/C/EGY/CO/7 (2010).
[55] See, for example, CEDAW Committee recommendations to Mauritius: UN Doc CEDAW/C/MAR/CO/5 (2006); the recommendation of the Special Rapporteur on Violence against Women to Ghana: UN Doc A/HRC/7/6/Add 3 (2008).
[56] See, for example, CEDAW Committee recommendations to Niger: UN Doc CEDAW/C/NER/CO/2 (2007).
[57] See, for example, the recommendations of the UN Special Rapporteur on Violence Against Women to Saudi Arabia: UN Doc A/HRC/11/6/Add 3 (2009); the recommendations of the CRC Committee to Bolivia and Sierra Leone: UN Docs CRC/C/BOL/CO/4 (2009); CRC/C/15/ADD 119 (2000).
[58] See, for example, CEDAW Committee recommendations to Zambia and Vanuatu: UN Docs CEDAW/C/ZMB/CO/5-6 (2011); CEDAW/C/VUT/CO/3 (2007); the recommendation of the Independent Expert on Sudan: UN Doc A/HRC/18/40 (2011).
[59] See, for example, CEDAW Committee's Recommendations to Singapore, Papua New Guinea, and Sri Lanka: UN Docs CEDAW/C/SGP/CO/4 (2011); CEDAW/C/PNG/CO/3 (2010); CEDAW/C/LKA/CO/7 (2011).
[60] See also, CEDAW Committee, *General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women*, UN Doc CEDAW/C/GC/28 (2010), at para 23.

can increase the prospect of a credible and viable process of reform. The participation of all relevant stakeholders in the process, for example, should ensure that claims based on religion are fully tested while co-opting religious leaders into the reform process[61] offers the prospects of greater understanding and the more effective implementation of international human rights law on the ground.

To summarise, international practice suggests that a tentative conceptual framework for reconciling religious law and international human rights law is beginning to emerge. It is one that avoids the superficially attractive alternatives of rejecting or deferring to religious law in its entirety. At its core is the belief that while religious law can cause human rights harm, it has an inherent capacity to evolve and adapt to the fundamental requirements of international human rights law. The overarching objective is to ensure that the relationship between religious law and international human rights law is a mutually reinforcing one. To achieve this objective, a genuinely participatory and inclusive law reform process is envisaged with the State cast in the role of driver of change. While international human rights law sets out the objective to be achieved and, in broad terms, how it should be done, it does not seek to micro-manage the process. In principle, it is an approach that may offer the prospect not only of rendering religious law compatible with international human rights law but of harnessing religious law in the push for more effective protection of human rights on the ground.

4.0 Testing the conceptual framework: Insights from ASEAN States

While the conceptual framework may provide one way of addressing the human rights harm caused by some religious laws, it may be viewed as unduly optimistic, if not naive, especially by those experiencing such harm at first hand. The separation of church and State may seem to offer an altogether more credible alternative for the effective protection of human rights. However, experience has shown that the doctrine of separation of church and State also has the capacity to cause human rights harm even if only as an unintended consequence.[62] It is questionable whether any formal constitutional arrangement in itself can provide complete protection against the human rights harm that can be caused by some religious laws. This is particularly true when one reflects on the extent to which religious laws apply *de facto* as well as *de jure* within so many jurisdictions. A blanket refusal to engage in any manner or form with these laws on the basis that they are inherently incompatible with human rights risks abandoning those who sustain human rights harm

[61] See, for example, the recommendations of the Committee on the Rights of the Child to Egypt and Nigeria: UN Docs CRC/C/15/ADD 145 (2001); CRC/C/NGA/CO/3-4 (2010).

[62] Depending on the manner in which it is interpreted, the doctrine can enable a religious community to exist as a separate entity within the State, governed for all intents and purposes by religious laws, not all of which would be rights compatible. See, for example, Stolzenberg, NM, 'Is there such a thing as non-State law? Lessons from Kiryas Joel' in Helfand, MA (ed), *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism*, Cambridge University Press, 2015, concerning the Satmar community, a branch of the Hasidic movement in Judaism, which established the village of Kiryas Joel in New York State. See also, the discussion in Corkery, M, and Silver-Greenberg, J, 'In religious arbitration, scripture is the rule of law' The New York Times, 3 November 2015, available at https://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html, accessed on 18 August 2018.

due to the application of these laws. Irrespective of whether those concerned subjects themselves voluntarily to regulation by religious laws or are compelled to do so either by the State or community pressure, to refuse to engage with these laws risks depriving these individuals of human rights protection and allows the State to evade its obligations to respect and protect the rights of everyone within its jurisdiction. Viewed against this backdrop, the conceptual framework can be useful in mapping out the parameters and objectives of any State engagement with religious law. For the moment, it is formulated at a relatively high level of generality. It needs to be tested in the light of relevant State practice. This section undertakes a preliminary assessment in the light of the practice of ASEAN States. It begins by mapping out in general terms some key features of this State practice prior to identifying some of the insights it provides in terms of the opportunities, risks, and challenges associated with operationalizing the conceptual framework.

The first observation that can be made about ASEAN States is that they are characterised by a remarkable level of diversity in terms of religious belief and related constitutional arrangements. In terms of religious diversity, one finds that Buddhists comprise the largest religious community in Thailand,[63] Cambodia,[64] Myanmar,[65] Laos[66] and Singapore,[67] while Muslims comprise the largest religious community in Brunei,[68] Indonesia,[69] and Malaysia,[70] with Roman Catholics the largest in the Philippines.[71] This diversity exists not only between States but also within States with every ASEAN State being home to several distinct religious communities of varying sizes.[72] In addition to this, one has to factor in the diversity that exists *within* religious communities especially on matters

[63] In 2010, the religious composition of its population was 93.6% Buddhist, 4.9% Muslim, 1.2% Christian, 0.2% Others: see, *Keeping the Faith* (note 4 above), at 483.
[64] In 2014, the religious composition of its population was 96% Buddhist, 3.5% Muslim, 0.5% Bahai, Jewish, Vietnamese Cao Dai, and Christian: see, *Keeping the Faith* (note 4 above), at 101.
[65] In 2014, the religious composition of its population was 89% Buddhist, 4% Christian, 4% Muslim, 1% Animist, 2% Other: see, *Keeping the Faith* (note 4 above), at 321.
[66] In 2005, the religious composition of its population was 66.8% Buddhist, 30.9% Other (Animist), 1.5% Christian, 0.03% Muslim, 0.02% Bahai: see, *Keeping the Faith* (note 4 above), at 197.
[67] In 2015, the religious composition of its population was 42.5% Buddhist, 14.6% Christian, 14.9% Muslim, 8.5% Taoist, 14% Hindu, and the remainder were of other faiths: see, *National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Singapore*, 28 October 2015, UN Doc A/HRC/WG.6/24/SGP/1, at para 3.
[68] In 2011, the religious composition of its population was 78.8% Muslim, 8.7% Christian, 7.8% Buddhist, and 4.7% Other: see, *Keeping the Faith* (note 4 above), at 56.
[69] In 2014, the religious composition of its population was 87.18% Muslim, 9.87% Christian, 1.69% Hindu, 0.72% Buddhist, 0.05% Confucian, and 0.13% Other: see, *Keeping the Faith* (note 4 above), at 139.
[70] In 2010, the religious composition of its population was 61.3% Muslim, 19.8% Buddhist, 9.2% Christian, 6.3% Hindu, 1.3% Confucianism and other traditional Chinese religions, 1% unknown, 0.7% no religion, 0.4% Other religion: see, *Keeping the Faith* (note 4 above), at 235.
[71] In 2010, the religious composition of its population was 80.6% Roman Catholic, 5.65% Islam, 2.7% Evangelical, 2.4% Iglesia ni Cristo, 1.7% Protestant and Non-Catholic Churches, 1% Iglesia Filipina Independiente, 0.7% Seventh Day Adventist, 0.7% Bible Baptist Church, 0.5% United Church of Christ in the Philippines, 0.4% Jehovah's Witness, 0.08% None, 4.2% Others/Non-reported: see, *Keeping the Faith* (note 4 above), at 363. In the remaining ASEAN State, Vietnam, the religious composition of its population in 2009 was 81.69% non-religious, 7.93% Buddhist, 6.62% Roman Catholic, 1.67% Hoa Hao, 1.01% Cao Dai, 0.22% Others: *Keeping the Faith* (note 4 above), at 525.
[72] See, notes 63-71 above.

of doctrine.[73] Aside from the diversity of religious beliefs, there is also considerable diversity in terms of constitutional arrangements on religion.[74] While all ASEAN States have constitutions that afford some level of protection to religious freedom,[75] there are some important differences concerning State/religion relations. Almost a third of ASEAN States have a State religion. In Cambodia, the State religion is Buddhism while in Brunei and Malaysia it is Islam. Although there is no State religion in Myanmar or Thailand, there is some recognition of the "special position of Buddhism"[76] or the fact that the State "shall patronize and protect Buddhism and other religions"[77] in their Constitutions. The Philippines is alone among ASEAN States in recognising the doctrine of separation of church and State in its Constitution.[78] While the principle of secularism is a core principle of governance in Singapore, there is no constitutional recognition of the doctrine.[79] Of the remaining ASEAN States, the Indonesian Constitution neither declares it to be a secular State nor a State based on a particular religion.[80] It simply asserts that the "State shall be based upon the belief in the One and Only God" and that religion is the first of five pillars of the State known as *Pancasila*.[81] In relation to Laos and Vietnam, their Constitutions map out the nature and level of protection afforded to religious freedom but do not confer any official status on any religion(s) within their jurisdictions.[82] Notwithstanding the remarkable diversity that exists in ASEAN States both in terms of religious beliefs and constitutional arrangements, one significant area of common ground is that the overwhelming majority of these States afford some recognition to religious law.[83]

This state of affairs merits reflection as it demonstrates that recognition of religious law is neither dependent on nor a consequence of any particular constitutional arrangement. The existence or non-existence of a State religion, for example, is not a deciding factor. This is borne out by the fact that while Brunei, Cambodia, and Malaysia recognise religious law,[84] so too do States such as Indonesia, Myanmar, Singapore, and Thailand which do not

[73] For example, in Thailand, there are two sects of Buddhism, Theravada, and Majayana while in Cambodia, Muslims follow four branches of Islam: the Shafi'i branch, the Salafi (Wahhabi) branch, the Iman-San branch, and the Kadiani branch: see, *Keeping the Faith* (note 4 above), at 485 and 105 respectively.
[74] See the discussion of these constitutional arrangements in Neo, JL, 'Synthesis Report' in *Keeping the Faith* (note 4 above).
[75] See, further, Neo (note 74 above).
[76] See, s.361 of the Constitution of Myanmar: *Keeping the Faith* (note 4 above), at 321.
[77] Although this refers to the position that prevailed under the previous Constitution: *Keeping the Faith* (note 4 above), at 483.
[78] See, *Keeping the Faith* (note 4 above), at 363.
[79] See, *National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Singapore*, 28 October 2015, UN Doc A/HRC/WG 6/24/SGP/1, at para 6.
[80] See, *Keeping the Faith* (note 4 above), at 140.
[81] See note 4 above.
[82] See, *Keeping the Faith* (note 4 above), at 197-208 and 527-9.
[83] Brunei, Cambodia, Indonesia, Malaysia, Myanmar, the Philippines, Singapore, and Thailand: *Keeping the Faith* (note 4 above), at 57-68, 141, 387-9, 327, 342-3, 420, 499, 265, 277-9.
[84] See, *Keeping the Faith* (note 4 above), at 58-74, 123-124, 237, 273, 265, 277-279; *National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Malaysia*, 6 August 2013, UN Doc A/HRC/WG 6/17/MYS/1, at paras 131-136.

have a State religion.[85] Further, there is not always a direct correlation between the type of religious law recognised and the religious beliefs of the majority of the population in a State. While the religious law recognised in Brunei, Malaysia, Indonesia, and Cambodia reflect the religious beliefs of the majority of its population, Thailand, Singapore, and the Philippines all afford some level of recognition to the religious laws of minorities while Myanmar grants some recognition to the religious laws of numerous religious communities.[86] At times, recognition even seems to be at odds with the constitutional arrangements in a particular State. This is true of the Philippines where one might have thought that the separation of Church and State would have precluded it recognising Sharia law in the Autonomous Region of Muslim Mindanao.[87] Ultimately, it seems that recognition of religious law in these States is not dependent on the existence of particular constitutional arrangements but on a more diffuse range of factors such as the particular history of the State,[88] past colonial experience,[89] "power-political considerations,"[90] the "increased piety" of a ruler,[91] the maintenance of societal harmony[92] and/or the prevention or resolution of inter-communal conflict.[93]

A second general observation to be made about ASEAN States is that the recognition granted to religious law varies considerably in scope.[94] The most extensive level of recognition can be seen in Brunei where Sharia law applies not only to personal status matters such as marriage, divorce, and inheritance but also to the criminal sphere where religious "deviance," blasphemy, apostasy, and sexual "deviance" are all forbidden.[95] Some of these offences, which attract punishments such as stoning and whipping, apply not only to Muslims but also to non-Muslims.[96] In other States, the recognition of religious law is subject to greater limitations in terms of the matters it can regulate, the part of

[85] See, *Keeping the Faith* (note 4 above), at 141, 327, 342, 420, 423, 499.
[86] See, *Keeping the Faith* (note 4 above), at 342-3.
[87] See, *Keeping the Faith* (note 4 above), at 398, 387-9.
[88] See, for example, Myanmar, *Keeping the Faith* (note 4 above), at 327, 342.
[89] See, for example, Brunei, Indonesia, *Keeping the Faith* (note 4 above), at 57, 141.
[90] See, for example, Brunei, *Keeping the Faith* (note 4 above), at 89.
[91] See, for example, Brunei, *Keeping the Faith* (note 4 above), at 89.
[92] See, for example, *Report of the Working Group on the Universal Periodic Review: Singapore*, 15 April 2016, UN Doc A/HRC/32/17, at paras 11, 7.
[93] See, for example, Thailand, *Keeping the Faith* (note 4 above), at 499.
[94] Aside from the formal recognition of religious laws within ASEAN States, one also has to acknowledge the more informal role of religious law in the drafting, interpretation and implementation of general State law given its potential impact on human rights. In the Philippines, for example, one finds that decisions of the National Appellate Matrimonial Tribunal of the Catholic Church in the Philippines concerning the validity of marriages are given persuasive effect in civil courts ostensibly on the basis that this harmonises "our civil law with the religious faith of our people:" see, *Keeping the Faith* (note 4 above), at 382-2 (and seemingly without any enquiry into the manner in which tribunals conducted the proceedings). In other instances, religious law influences the formulation of general State law but the law is presented as addressing issues of public order or public morality rather than pertaining to religion as such. This can be seen, for example, in Indonesia where regional laws regulating the wearing of the headscarf, the sale of alcohol, and the criminalisation of 'Un-Islamic' behaviour are portrayed as addressing public order concerns, combating social ills, and/or protecting public morality: see, *Keeping the Faith* (note 4 above), at 151.
[95] See, *Keeping the Faith* (note 4 above), at 58, 62-74.
[96] See, *Keeping the Faith* (note 4 above), at 57, 62, 64, 74.

the State in which it can apply and/or to those to whom it can apply. In Malaysia, for example, Sharia law applies to Muslims[97] predominantly in civil law matters[98] although it is also given indirect effect in the criminal sphere through the prohibition on extra-marital sex, drinking, and gambling.[99] For the most part, recognition of religious law in ASEAN States tends to be limited to civil law matters and to adherents of the particular religion in question. This can be seen, for example, in Singapore[100] and Myanmar.[101] On occasion, recognition is limited to particular geographical regions within a State, such as in Thailand and the Philippines, as well as being restricted to personal status matters.[102] This brief overview demonstrates the very wide variation that exists concerning the nature and level of recognition afforded to religious law in ASEAN States. The question then arises as to what are the implications of these various forms of recognition from a rights perspective and, specifically, from the perspective of the international human rights obligations of ASEAN States.

According to the doctrine of State responsibility, ASEAN States will be held responsible for any violation of their international obligations caused by their recognition of religious law. As all ASEAN States have ratified at least three of the core UN human rights treaties, there is a gateway for establishing a relationship between religious law and international human rights law in the region. The diversity of religious belief, constitutional arrangements, and patterns of recognition within ASEAN suggest that the region has the potential to provide important insights into the viability of the conceptual framework currently emerging within the international human rights system.

The discussion that follows is organised thematically. It begins by testing some of the assumptions underpinning the conceptual framework to see whether they are supported by State practice. Here, attention focuses on some of its core assumptions. The first is that there is a global consensus on the relevant normative human rights standards. The second is that religious law is not homogenous or set in stone but is capable of evolving in line with these standards. The third is that the State is an agent for change in ensuring the compatibility of religious and international human rights law. The paper proceeds to examine some of the opportunities associated with the conceptual framework notably in terms of the human rights benefits that can accrue when States engage positively with the framework. It then examines the challenges posed by the framework including those relating to intra-religious pluralism (or the absence thereof), the need for the State to

[97] *National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Malaysia*, 6 August 2013, UN Doc A/HRC/WG 6/17/MYS/1, at para 132.
[98] For example, in areas such as succession, inheritance, betrothal, marriage, divorce, dowries, maintenance, adoption, legitimacy, guardianship, gift and partitions: see, *Keeping the Faith* (note 4 above), at 265.
[99] See, *Keeping the Faith* (note 4 above), at 265, 277-279.
[100] See, *Keeping the Faith* (note 4 above), at 141, 170, 160 (Indonesia), 420, 423, 445-446 (Singapore).
[101] Where the laws of Buddhists, Muslims, Hindus, and Christians concern marriage, divorce and inheritance are recognised by its courts: see, *Keeping the Faith* (note 4 above), at 327, 342.
[102] In Thailand, it applies in the four southern provinces of Pattani, Narathiwas, Yala, and Satun: *Keeping the Faith* (note 4 above), at 499. In the Philippines, it applies in the Autonomous Region of Muslim Mindanao, see, *Keeping the Faith* (note 4 above), at 398, 387-9.

respect the autonomy of religious communities especially in matters of doctrine while simultaneously instigating reform of religious laws that are not rights compliant, and the need for on-going and effective oversight of the interpretation and application of religious law. It concludes by examining the risks associated with the conceptual framework especially against a backdrop in which religion, national identity, and nationalism can be closely interwoven, and where developments in one State can have a 'demonstration' effect in other States or even on normative developments within the entire ASEAN regional human rights system.

4.1 Testing the assumptions underpinning the conceptual framework

The first assumption is that there is a global consensus on normative human rights standards. The practice of some, though by no means all, ASEAN States would challenge this assumption in two ways. The first relates to the conception of human rights as inalienable rights that inhere in all human beings by virtue of their humanity and without discrimination of any kind. This conception does not go unchallenged within the ASEAN region.[103] In recent years, Brunei has advanced a concept of human rights that is grounded firmly in religious doctrine. This is evident, for example, from Sultan Hassanal Bolkiah's statement that by adopting the Penal Code 2013, Brunei "uphold(s) human rights with the Al-Quran as our foothold."[104] It was also borne out by the State Mufti's comments that "Islam has its own human rights" which unlike human rights claims "stipulated by humans" would "never change through the times" and that the only human rights that could be considered truly universal are those "stated in Syariah law."[105] While the extent to which Islamic law can support a theory of human rights has been the subject of some academic debate, there is also recognition that it would be a theory where rights are accorded not by virtue of one's humanity but in line with a strict classification dependent on criteria such as religion or gender.[106] For the present, Brunei is the only State within ASEAN that adheres to such an approach although one cannot exclude its possible influence on other ASEAN States (see further, below). Brunei's approach represents the first challenge to the assumption that there is a consensus on the normative human rights standards and it is a fundamental one as it calls into question the very concept of human rights embedded in the international human rights framework.

The second challenge is not as extensive as the first as it is confined to *specific* normative standards. This is apparent from the contestations that have taken place, for example, about LGBT (lesbian, gay, bisexual, transgender) rights especially during the Universal Periodic Review (UPR) process.[107] In these instances, calls for the recognition of LGBT

[103] Vietnam adheres to a socialist concept of human rights and Brunei adheres to a religious concept of human rights; see, *Keeping the Faith* (note 4 above), at 529.
[104] *Keeping the Faith* (note 4 above), at 58.
[105] *Keeping the Faith* (note 4 above), at 58.
[106] See, Shestack, JJ, 'The jurisprudence of human rights' in Meron, T (ed), *Human Rights in International Law: Legal and Policy Issues*, Oxford: Clarendon Press, 1984; Bielefeldt, H, 'Muslim voices in the human rights debate' *Human Rights Quarterly*, 1995, Vol 17, No 4, pp 587-617, at 587.
[107] For a discussion, see further, Quane, H, 'The significance of an evolving relationship: ASEAN States and the global human rights mechanisms' *Human Rights Law Review*, 2015, Vol 15, No 2, pp 283-311, at 283, 292-295.

rights have been rejected by several ASEAN States on various grounds such as public morality or the conservative nature of their respective societies. It demonstrates a certain tendency to define public morality in line with the religious beliefs of the population especially in matters of sexuality and the potential for State recognition of religious law to compound this by conferring legitimacy on these beliefs. While one cannot downplay the significance of this second challenge, one also has to acknowledge that the challenge does not emanate from all ASEAN States as Vietnam and the Philippines were commended during the UPR process for their approach to LGBT rights.[108] Nevertheless, what emerges from this brief overview is that the assumption that there is a consensus on relevant normative human rights standards is one that does not hold up to close scrutiny.

At the same time, the conceptual framework may contain within it the seeds of a strategy for reaching the necessary level of consensus. In its approach to the sharing of good practice and in stipulating the requisite features of a rights-compliant law reform process, for example, the conceptual framework seems to encourage a *dialogue* on the relevant normative standards, albeit one that is subject always to the caveat that there can be no erosion of the fundamental tenets of these normative standards. Admittedly, the prospects for implementing such a strategy remain uncertain. While global human rights mechanisms, especially the UPR process, have delivered modest human rights benefits in recent years and can operate as a source of external scrutiny and pressure for change, ultimately change must be effected by action at the national level. This demonstrates the centrality of other aspects of the conceptual framework (notably the role of the State and national stakeholders) as well as the need to view the framework in a holistic manner requiring sustained action across its various components simultaneously.

The second assumption underpinning the conceptual framework is that religious law is not homogenous or set in stone but capable of evolving in line with international human rights standards. There are aspects of ASEAN State practice that challenge this assumption but there are also aspects that support it. The position of Brunei has already been outlined and it suggests that religious law is unchanging. On occasion, Malaysia also has challenged the capacity of religious law to change although its recent establishment of a committee to review laws relating to women's rights under Islamic family law would suggest that the latter is capable of evolution.[109] A second aspect of relevant State practice relates to the variations that exist within and between States that recognise religious law. For example, Sharia law regulates certain civil law matters such as marriage, divorce, and inheritance in the Philippines, Singapore, Thailand, and Laos, while in Brunei and Malaysia it applies not only in the civil law but also the criminal law spheres. Further, there can be variations even within the same State as can be seen in Malaysia where some of its constituent states permit apostasy while others do not.[110] These variations are significant as they suggest

[108] Quane (see note 107 above).
[109] *Report of the Working Group on the Universal Periodic Review: Malaysia*, 5 October 2009, UN Doc A/HRC/11/30, at para 29.
[110] See, *Keeping the Faith* (note 4 above), at 243-5, 264.

that religious law is not a homogenous body of law that applies uniformly irrespective of local or national conditions.[111]

A third aspect of ASEAN State practice relates to reservations to human rights treaties on grounds of religious law. It is interesting to note that not all States that recognise religious law have felt the need to enter such reservations. Indonesia is a case in point[112] albeit this does not mean that all its laws are rights compliant. Even where a reservation has been entered, it is significant that some have been withdrawn, at least in part, although it has to be acknowledged that some of the most important reservations still remain in place.[113] At the very least, the partial removal of these reservations suggests that religious law is capable of evolving over time. More generally, this is borne out by the general practice of some ASEAN States such as Indonesia which asserted that its involvement with the OIC Independent Permanent Human Rights Commission would "accentuate the compatibility of Islam with human rights and democracy."[114] On balance, the practice of ASEAN States would lend some qualified support to the second assumption underpinning the conceptual framework.

The third assumption is that the State will act as an agent for change to promote the compatibility of religious law and international human rights law. While occasionally ASEAN States demonstrate a certain willingness to comply with some recommendations concerning religious law (see further, below), State practice suggests that they are not particularly enthusiastic about being cast exclusively in such a role. This is evident especially in the practice of Singapore where it is very explicit in its resistance to pushing rights at the expense of societal harmony.[115] Further, while the conceptual framework envisages co-opting religious leaders into a rights-compliant law reform process, the practice of ASEAN States would tend to suggest that they prefer to co-opt religious leaders for State goals rather than human rights goals.[116]

4.2 Opportunities associated with the conceptual framework

The conceptual framework presents certain opportunities from a rights perspective. At a minimum, it provides an overarching framework within which to locate the various recommendations from international human rights bodies rather than viewing them as *ad hoc* and desegregated recommendations. The framework locates them within *a process* working towards not simply the protection of specific rights or specific groups of rights-holders but the broader goal of aligning religious law and international human rights law. In this way, it has the potential to have a more significant impact on the day to day lives

[111] See also, the approach of a Muslim-majority States, such as Indonesia, which show that apostasy and polygamy laws are not inherently required where Sharia law is recognised by the State: *Keeping the Faith* (note 4 above), at 147, 160.
[112] See, *Keeping the Faith* (note 4 above), at 144.
[113] See further, Quane (note 107 above), at 283, 300-303.
[114] *Report of the Working Group on Universal Periodic Review: Indonesia*, 5 July 2012, UN Doc A/HRC/21/7, at 16.
[115] See, *Report of the Working Group on Universal Periodic Review: Singapore*, 11 July 2011, UN Doc A/HRC/18/11, at paras 7-14.
[116] Singapore, Laos, Myanmar, and Vietnam: *Keeping the Faith* (note 4 above), at 546, 426-427, 351-2.

of a considerable portion of the population and the effective enjoyment of the full range of their human rights. A more holistic approach can also facilitate a more thorough going rights assessment of State actions where the full implications of these actions may not be immediately apparent when viewed in isolation but can become more readily apparent when viewed within the broader context of the conceptual framework. At the very least, the framework can provide an impetus for making explicit the need to reconcile religious law and international human rights law and in recommending ways of doing so.

ASEAN State practice demonstrates a certain willingness to comply with some, though by no means all, of the recommendations of international human rights bodies. The recommendations in question can be grouped thematically. The first group relates to specific religious laws that are deemed to be incompatible from a rights perspective. A good illustration is religious law that permits child marriages. In these instances, the TMBs recommend increasing the age of marriage and in the case of Singapore it complied with this recommendation, thereby bringing one aspect of religious law into line with the requirements of international human rights law.[117]

The second group of recommendations relates to awareness raising and capacity building. There has been some movement in this area. Indonesia, for example, has undertaken capacity building initiatives and gender sensitive training with a view to eliminating discrimination against women.[118] Brunei has undertaken an Awareness Forum on CEDAW,[119] while Malaysia has conducted awareness training programmes on gender equality and children's rights with the substantial involvement of NGOs and civil society.[120]

A third group of recommendations builds on the previous ones. It includes recommendations to undertake a systematic review of existing laws, including religious laws, to make sure they are rights compliant, to undertake a study on comparative jurisprudence on how it may be possible to ensure compliance, and to harmonise religious and civil law. There are some examples of State compliance with these recommendations. Singapore, for example, has undertaken a study of comparative jurisprudence especially in relation to gender and family law in Islam,[121] and has used its Presidential Council for Religious Harmony to review Sharia law in line with human rights,[122] while Malaysia has established an inter-agency committee to review existing laws deemed discriminatory against women in Islamic

[117] See, UN Doc CEDAW/C/SGP/CO/4 Rev 1 (2012).
[118] *Report of the Working Group on the Universal Periodic Review: Singapore*, 11 July 2011, UN Doc A/HRC/18/11, at para 95.7.
[119] *National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Brunei Darussalam,* 30 January 2014, A/HRC/WG 6/19/BRN/1, at para 95.
[120] *National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Malaysia*, 6 August 2013, UN Doc A/HRC/WG 6/17/MYS/1, at para 78.
[121] *Report of the Working Group on the Universal Periodic Review: Singapore*, 11 July 2011, UN Doc A/HRC/18/11, at para 48.
[122] On the evolving interpretation and application of Sharia law: see, *National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Singapore*, 28 October 2015, UN Doc A/HRC/WG 6/24/SGP/1, at paras 55, 56, 66.

family law,[123] has organised programmes of harmonisation of religious and civil law, and has established a Sharia community comprised of experts from different backgrounds for talks between Muslim and non-Muslim scholars.[124] A fourth group of recommendations relate to the withdrawal of reservations to human rights treaties. These recommendations have elicited a mixed response from the ASEAN States. To date, Singapore and Malaysia have withdrawn some though not all of their reservations.[125] Pressure continues to be exerted on ASEAN States, indeed all States, to withdraw their reservations.

While this review of aspects of ASEAN State practice indicates some modest human rights outcomes, care needs to be taken not to overstate its significance. As previously noted, Singapore has been categorical in asserting that it would not push human rights at the cost of societal harmony.[126] Therefore, while it has complied with some of the recommendations, compliance is always subject to the caveat that there are limits to what it is prepared to do in response to these recommendations. Nevertheless, these examples of compliance suggest that there may be modest opportunities or *openings* to advance rights protection. In assessing their true significance, it may be useful to bring to mind Philip Alston's call to view progress in the human rights sphere in the medium to long term.[127]

4.3 Challenges associated with operationalizing the conceptual framework

ASEAN State practice demonstrates some of the challenges faced in implementing the conceptual framework. These go beyond the general challenges encountered in the implementation of any human rights. They emanate from the *specific context* of religious law and global human rights standards. These challenges are distinct yet interconnected. The first challenge relates to intra-religious pluralism. Implicit in the conceptual framework is the idea that there is a plurality of views about matters of doctrine within a religious community and that this can facilitate the evolution of religious law in line with international human rights standards. One challenge is how to nurture this pluralism when a dominant group within a religious community wants to eliminate it and elicits the support of the State in doing so. This is particularly relevant in an ASEAN context. Restrictions on intra-

[123] *Report of the Working Group on the Universal Periodic Review: Malaysia*, 5 October 2009, UN Doc A/HRC/11/30, at para 57.
[124] *National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Malaysia*, 6 August 2013, UN Doc A/HRC/WG 6/17/MYS/1, at para 136.
[125] See, *Compilation prepared by the Office of the UNHCHR in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to council resolution 16/21: Singapore*, 20 November 2015, UN Doc A/HRC/WG 6/24/SGP/2, at 3; *National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Brunei Darussalam*, 30 January 2014, A/HRC/WG 6/19/BRN/1, at para 14; *Report of the Working Group on the Universal Periodic Review: Malaysia*, 4 December 2013, UN Doc A/HRC/25/10, at para 25; *Report of the Working Group on the Universal Periodic Review: Malaysia: Addendum,* 4 March 2014, UN Doc A/HRC/25/10/Add.1, at para 10.
[126] See, for example, *National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Singapore*, 28 October 2015, UN Doc A/HRC/WG 6/24/SGP/1, at para 5.
[127] See note 31 above.

religious pluralism exist in several ASEAN States such as Brunei,[128] Myanmar,[129] Malaysia,[130] and Indonesia[131] where non-dominant sects may be labelled 'deviant,' denied membership of the religious community, prosecuted for their particular religious beliefs, or have their right to manifest their religion restricted.[132] The treatment of the Ahmadiyyah who risk the death penalty for their religious beliefs in Brunei,[133] whose activities are restricted in Indonesia[134] (albeit the State has indicated a commitment to ensure that they are able to practise their faith),[135] or who are deemed to be non-Muslim in other States is one such example.[136] Increasing restrictions on intra-religious pluralism through apostasy laws, defamation of religion laws and similar measures will only serve to silence sections of the religious community and impede the level of intra-community debate needed to bring about a reconciliation of religious law and international human rights law.

A second challenge stems from the level of popular support that may exist for religious laws notwithstanding their human rights impact. This is borne out by the situation in several ASEAN States. There is broad support within Brunei for its approach to religious law and its rejection of religious pluralism and equal rights for Muslims and non-Muslims.[137] In Singapore, resistance to reform of certain religious laws is attributed to members of the religious community rather than the State itself. Against this backdrop, the conceptual framework suggests that the State should act as a driver for change to ensure the compatibility of religious law with international human rights law. Here, one encounters the second challenge. Even if a State is willing to do so, how can it act as a driver for change while simultaneously respecting the autonomy of religious communities especially in matters of doctrine? The need to respect the autonomy of religious communities to facilitate respect for freedom of religion of their members is well-established in international human rights law. Admittedly, at the level of general principle it may be possible to address this challenge. To the extent that religious law is recognised by the State, it effectively becomes 'State' law albeit it may also exist concurrently as a form of religious 'non-State' law. As a form of State law, the State cannot evade its international obligations by relying on a provision of its own national law irrespective of the original source of

[128] See, *Keeping the Faith* (note 4 above), at 62, 66-68. For example, the Penal Code prohibits any questioning of the Hadith that are considered 'authentic.'
[129] See, *Keeping the Faith* (note 4 above), at 322, 336-7, in relation to new Buddhist sects that are not recognised by the State or the Buddhist Sangha.
[130] See, *Keeping the Faith* (note 4 above), at 280, 249; *Report of the Working Group on the Universal Periodic Review: Malaysia*, 5 October 2009, UN Doc A/HRC/11/30, at paras 34, 46; *Report of the Working Group on the Universal Periodic Review: Malaysia*, 4 December 2013, UN Doc A/HRC/25/10, at paras 66, 75.
[131] See, *Keeping the Faith* (note 4 above), at 150-151, 172.
[132] See also, Vietnam, where participation in the independent factions of Cao Dai, Hoa Hao, and Buddhism is actively discouraged or banned: *Keeping the Faith* (note 4 above), at 541-2.
[133] See, *Keeping the Faith* (note 4 above), at 67.
[134] See, *Keeping the Faith* (note 4 above), at 150-1, 172; *Report of the Working Group on Universal Periodic Review: Indonesia*, 14 May 2008, UN Doc A/HRC/8/23, at para 51.
[135] *Report of the Working Group on Universal Periodic Review: Indonesia*, 5 July 2012, UN Doc A/HRC/21/7, at para 76.
[136] Others would include the Ismaili Muslims.
[137] *Keeping the Faith* (note 4 above), at 79, 90.

that particular national law.[138] For a religious community, it suggests that recognition of its religious law may come at the cost of some loss of autonomy. This is the position at the level of general principle. In practice, one must acknowledge that arguments of religious freedom and religious autonomy will invariably be raised, in all likelihood with some success, to resist any attempts to challenge the dominant views within a religious community and to operate as a block on the State acting as a driver for change.

A third challenge relates to the recognition of religious courts and how they are integrated into the State justice system. In the Philippines, for example, the Sharia courts are partially autonomous but an appeal is permitted to the Supreme Court on which an expert in Sharia law (a Mufti or Islamic Jurisconsultant position) is a member.[139] In other instances, religious courts are fully integrated within the justice system.[140] In both instances, one has to ask how the judges are appointed, what training is provided, and what standards do they apply? Whether the State appoints and trains the judges directly or permits the community to do so, it cannot evade a central challenge. This is whether its role in the appointment and training of judges invariably entails it endorsing a particular sect within a religious community and, in doing so, undermines its capacity to act as a 'neutral arbiter'[141] in the exercise of religion. Further, the experience in some ASEAN States would suggest that it may enable conservative rather than pluralist interpretations of religion to prevail[142] and have significant implications for those who do not subscribe to the views of the majority within the religious community.[143]

A fourth challenge relates to the need for ongoing and effective oversight of the interpretation and application of religious law. Recognition of religious law is just one stage in the process, not the end stage. The State must remain vigilant to ensure that religious law is not only compliant with human rights when it is first recognised but remains so over time and in the light of changing circumstances on the ground.[144] It must also be alert to the risk posed by the rise of fundamentalist groups advocating restrictive interpretations of religious law which would violate human rights,[145] and the possibility of these groups effectively hijacking existing structures of religious law to impose these

[138] International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts (2001), Art 3*. This provision is regarded as codifying customary international law and is therefore binding on all States.
[139] On the court structure, see, *Keeping the Faith* (note 4 above), at 388-389.
[140] Thailand: *Keeping the Faith* (note 4 above), at 499. A certified Muslim cleric sits in a trial together with the judges of the State courts in cases concerning Sharia law.
[141] See, e.g. *Report of the Special Rapporteur on Freedom of Religion or Belief*, 22 December 2011, UN Doc A/HRC/19/60, at para 66.
[142] See, by analogy, experience with the Defamation of Religion Law in Indonesia whereby it can provide "a mechanism through which officially recognized religious bodies are able to define the contents of religious orthodoxy:" *Keeping the Faith* (note 4 above), at 150-151, 175-6, 171, 172. Such laws can have an impact in terms of establishing and patrolling the perimeters of religion and inhibiting its dynamic development with potentially wide-ranging implications for human rights generally.
[143] See Indonesia and Malaysia.
[144] There is some recognition of this by ASEAN States. See, for example, *Report of the Working Group on Universal Periodic Review: Indonesia*, 14 May 2008, UN Doc A/HRC/8/23, at para 10.
[145] See, for example, CEDAW and Indonesia.

interpretations more generally. Finally, one has to consider the structure and resources of the State itself in assessing its capacity to ensure effective oversight. In this regard, the experience of Indonesia is instructive. Decentralisation has led to the adoption of religious laws by decentralised entities notwithstanding the general prohibition on them doing so[146] yet the sheer number of these laws is such as to prevent effective oversight on the part of the State.[147] It demonstrates that effective oversight requires a high level of commitment in terms of resources as well as political will.

4.4 The risks associated with operationalizing the conceptual framework

The discussion so far has focussed on specific aspects of the conceptual framework and the challenges and opportunities associated with it. At this point, it may be useful to step back and assess any fundamental risks that it may pose. A core feature of the framework is that it permits the State to establish a plurality of legal systems within its territory to regulate certain matters on the basis of religious affiliation. The emphasis here is less on the *existence* of these legal systems and more on ensuring that they *operate* in a manner that is compatible with international human rights standards. In this respect, it differs fundamentally from the approach adopted under the European Convention on Human Rights. The European Court of Human Rights (ECtHR) has found that the *very existence* of a plurality of legal systems to be incompatible with the Convention irrespective of the manner in which they operate.[148] Admittedly, on this point, the ECtHR is out of step not only with the global human rights mechanisms but also other regional human rights mechanisms.[149] While the ECtHR's approach may offer an alternative framework for dealing with religious law, it is not one that would find widespread support among international human rights bodies. The latter focus instead on ensuring that religious law operates in a manner compatible with global human rights standards, no doubt for reasons of pragmatism[150] as well as principle.[151]

Nevertheless, this core feature does present certain risks not least because of the interplay between religion, national identity and/or nationalist tendencies including in the ASEAN States.[152] Against this backdrop, one has to assess the significance of State recognition of religious laws and the fact that it is permitted under the conceptual framework. Specifically, one has to evaluate the potential of State recognition to heighten the significance of

[146] The exception is Aceh which has a special status and which can adopt laws concerning religion: see, *Keeping the Faith* (note 4 above), at 170.
[147] See, *Keeping the Faith* (note 4 above), at 162, 169, 163.
[148] See, *Refah Partisi (The Welfare Party) and others v Turkey*, Applications Nos 41340/98, 41342/98, 41344/98, Chamber, Judgment, 31 July 2001, at paras 70, 72, subsequently confirmed by the Grand Chamber.
[149] See, Quane (note 34 above), at 690-1.
[150] For example, it is estimated that a considerable proportion of the world's population are affected by the *de facto* or *de jure* operation of religious law: see, ICHRP Report (note 42 above), at 43-59; Perry (note 9 above), at 72.
[151] For example, the principle that the State has discretion as to how it organises its own legal system subject only to the requirement that it complies with its international human rights obligations.
[152] Myanmar, Singapore, Malaysia, the Philippines, Thailand, Brunei, Indonesia, and Vietnam. See, *Keeping the Faith* (note 4 above), at 348-352, 470, 75, 542-3, 548, 502-3, 290; *National Report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Brunei Darussalam,* 30 January 2014, A/HRC/WG.6/19/BRN/1, at para 102.

religious identity, reinforce inter-communal divisions, impede the development of a sense of civic citizenship, and encourage ethno-nationalism. Aside from this, one has to consider the possibility that recognition of religious law in one State can influence practice in other States. This is what is known as the potential 'demonstration' effect of State practice. The adoption of Brunei's Penal Code 2013 is a case in point. Already, it has been referred to as a 'role model' by some Malaysian politicians who seem keen to introduce similar legislation in their own country[153] while Brunei's State Mufti has declared that it should be "an example for the rest of Southeast Asia."[154] This tendency could be further accentuated by the initiative of Brunei's Chief Islamic Judge in establishing a network of Sharia courts whose members include representatives of Sharia courts in Malaysia, Singapore, Thailand, Indonesia, and the Philippines.[155] This could lead to greater uniformity in the interpretation of Sharia law within the region. However, given Brunei's approach to Sharia law and the very concept of human rights, it risks being an interpretation that is difficult to reconcile with global human rights standards. Further, the potential demonstration effect of Brunei's practice may affect not only the implementation of human rights at the national level. It may also affect the prospects for reaching a consensus on normative standards at the regional level within the nascent ASEAN human rights system.

Ultimately, one has to undertake a rigorous risk/benefit analysis of the conceptual framework for reconciling religious law and international human rights law that is beginning to emerge from the practice of UN human rights bodies. Can it deliver more in human rights outcomes than it risks? Is it a pragmatic response to the realities of human rights promotion and protection on the ground? Can it harness the pull of religious law in the push for the more effective protection of human rights on the ground? Can it facilitate a genuine dialogue between global and local standards to encourage a reconciliation of the two and enable international human rights law to move beyond debates about universality and cultural relativism? The conceptual framework is still at an early stage in its development. Clearly, its further development requires careful analysis of these and related questions. In responding to them, invaluable insights can be gained from experience within ASEAN States.

5.0 Conclusion

The starting point for this chapter is the rise in identity politics and the heightened significance of religious beliefs which pose considerable challenges for the effective promotion and protection of human rights. This is a global trend but it is also one that is very much in evidence in Southeast Asia. It is significant not only in terms of the threats it poses to specific rights or rights-holders but also at a more general level in terms of its potential to roll back some of the recent human rights gains in the region. Arguably, a multi-faceted yet holistic approach is needed in responding to these threats. This chapter has sought to outline one possible component to this approach. It is one

[153] See, *Keeping the Faith* (note 4 above), at 85.
[154] See, *Keeping the Faith* (note 4 above), at 87.
[155] See, *Keeping the Faith* (note 4 above), at 84-85.

that responds specifically to the threats that can emanate from some religious laws when they are recognised and integrated within a State legal system. It is based on the conceptual framework for reconciling religious law and international human rights law that is discernible from the practice of UN human rights bodies. While this framework acknowledges that aspects of religious law can cause human rights harm, it also adheres to the belief that religious law has a capacity to evolve in a way that is compatible with international human rights standards and seeks to promote an inclusive and participatory dialogue between all the stakeholders with a view to determining how this can be done. It acknowledges that there are no simple or quick fix solutions to rendering religious law and international human rights law compatible. However, by mapping out the overarching objective and how it can be achieved, it may offer a pragmatic, principled, and coherent approach to a phenomenon that is a feature of the everyday lives of so many people and one that has a significant impact on the exercise of their human rights.

At present, the framework is articulated at a very high level of generality. Drawing on the experience of ASEAN States, this chapter has sought to test the assumptions underpinning the framework and identify opportunities, risks, and challenges associated with operationalizing it. ASEAN State practice would tend to challenge some of the assumptions underpinning the framework such as the willingness of States to act as a "driver for change" to ensure the compatibility of religious and international human rights law. It also identifies some of the challenges associated with applying the framework not least given the restrictions on religious pluralism that exist in the region and the inherent tension between the State acting as a driver for change while simultaneously being required to respect the autonomy of religious communities especially in matters of doctrine under international human rights law. There are also risks associated with any framework permitting the existence of parallel religious and secular legal systems including its potential to reinforce inter-communal divisions and impede the development of a sense of civic citizenship. Clearly, this demonstrates the need for a careful risk/benefit analysis of the framework. However, in doing so, one also has to factor in its potential to deliver tangible benefits not only in relation to particular rights but in a more systemic manner by addressing the formal and informal structures that advance or undermine the protection of human rights within a State and by identifying potential openings for advancing the protection of human rights.

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CHAPTER THREE:

THE QUESTION OF MYANMAR

MYANMAR'S BIFURCATED GOVERNMENT: HUMAN RIGHTS CHALLENGES UNDER AN NLD ADMINISTRATION

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Abstract

The National League for Democracy's resounding victory in Myanmar's 2015 general elections and its initial flurry of activity after forming a government the following year raised hopes of sweeping human rights reforms in the country. As these hopes fade, scholars, diplomats, human rights advocates, and civil society debate the extent to which the NLD's reform agenda has been hamstrung by the persistent power and influence of Myanmar's military. This paper examines the implications of Myanmar's current constitutional dispensation in relation to potential NLD-backed human rights initiatives. The 2008 Constitution, which was authored by Myanmar's then military rulers, creates a bifurcated government in which elected officials and military commanders control two distinct spheres of authority, without adequate mechanisms to resolve disputes between the two camps. In particular, the military's control of three key ministries has major implications for civilian-led initiatives to address pressing human rights concerns. These challenges, however, do not absolve the NLD government of its responsibility, clearly established by international law, to address human rights violations in Myanmar. Moreover, notwithstanding the significant constraints imposed by the 2008 Constitution, the NLD government possesses the power to see through wide-ranging reforms and should act swiftly and decisively to advance human rights goals in the country.

1.0 Introduction

On 8 November 2015, Aung San Suu Kyi's National League for Democracy (NLD) routed the military-backed Union Solidarity and Development Party (USDP) in nationwide polls in Myanmar, paving the way for a historic handover of power to the first freely-elected civilian-led government in more than five decades. The optimism engendered by this momentous sea change was tempered, however, by doubts regarding the NLD's inheritance. Aung San Suu Kyi is constitutionally barred from the presidency and the military retains sweeping powers in law and in practice.

Halfway through its first term at the helm of government, NLD's pre-election reform agenda—including its commitments to improve the human rights situation in the country—has largely stalled. Human rights are arguably more imperilled now than they were under the military-backed government of former President Thein Sein. Commentators debate the degree to which the current state of affairs reflects NLD's own shortcomings as opposed to military intransigence, obstruction, or subterfuge.

Regardless, the hopes and fears surrounding the transition to civilian rule in Myanmar are rooted in its constitution which was authored by the military and passed in a sham referendum in 2008. The 2008 Constitution is the product of an as-yet-unexplained decision by Myanmar's military rulers to cede broad political power and open the door to

multi-party politics.[1] It set the stage for the transformative Thein Sein presidency and the ground-breaking 2015 elections. The 2008 Constitution offers the NLD real opportunities to exercise executive and legislative powers and to advance goals relating to democracy and human rights. At the same time, it carefully circumscribes the authority of elected officials and protects entrenched military interests and prerogatives.

This paper examines the implications of Myanmar's current constitutional dispensation in relation to potential NLD-led human rights initiatives. The 2008 Constitution creates a bifurcated government in which elected officials and military commanders control two distinct spheres of authority. Neither the Constitution nor Myanmar's legislative framework provide adequate mechanisms to resolve disputes between the two camps and frequent clashes over human rights issues are likely. In particular, the military's control of the Defence, Home Affairs, and Border Affairs ministries places frequent perpetrators of human rights abuses—soldiers, police officers, prison authorities, and local government officials, among others—under the authority of the military Commander-in-Chief. The NLD government's inability to direct, discipline, or discharge these authorities will impede efforts to resolve issues relating to the peace process, political prisoners, the persecution of minority groups, military and police abuses, land disputes, corruption, and a host of other pressing human rights concerns.

These challenges, however, do not absolve the NLD government of its responsibility to meaningfully address human rights violations in Myanmar. This paper considers the NLD's obligations under international law in light of the current political and institutional context in Myanmar, with a particular reference to principles of State responsibility. It concludes by recommending concrete steps that the NLD government could take, within the limitations laid out by the 2008 Constitution, to uphold Myanmar's obligations under international law and safeguard human rights. Ultimately, however, constitutional reform is a necessary precondition for the development of a legal and institutional framework that adequately protects human rights and enables compliance with Myanmar's obligations under international law.

2.0 The 2008 Constitution and Myanmar's bifurcated government

The vast majority of the 2008 Constitution's 457 articles concern the functions of government institutions under the control of civilian authorities. The Constitution provides for regular elections and describes in great depth the legislative, executive, and judicial powers exercised by elected officials and civilian appointees. Viewed in the context of the recently-concluded five decades of military rule, the 2008 Constitution represents a remarkable surrendering of powers by Myanmar's erstwhile ruling generals.

[1] Zin, M, and Joseph, B, 'The opening in Burma: The democrats' opportunity' *Journal of Democracy*, 2012, Vol 23, No 4, pp 104-119; Taylor, RH, 'Myanmar: From army rule to constitutional rule?' *Asian Affairs*, 2012, Vol 43, No 2, pp 221-236; Jones, L, 'Explaining Myanmar's regime transition: The periphery is central' *Democratization*, 2014, Vol 21, No 5, pp 780-802; and Bünte, M, and Dosch, J, 'Myanmar: Political reforms and the recalibration of external relations' *Journal of Current Southeast Asian Affairs*, 2015, Vol 34, No 2, pp 3-19.

Equally important, however, are the sectors of State authority declared by the Constitution to be off-limits to Myanmar's new civilian leaders. The Constitution clearly repudiates civilian control over the armed forces, cedes control of key ministries to the military Commander-in-Chief, and establishes military leaders as the final authority in various other contexts. In these areas—poorly defined and lightly described in the Constitution—the military continues to exercise unchecked power.

2.1 The Defence Service

Myanmar's 2008 Constitution flies in the face of democratic principles relating to civilian-military relations. Article 20 explicitly spurns the principle of civilian control of the armed forces, declaring the Defence Service's "right to independently administer and adjudicate all affairs of the armed forces." The Constitution also gives the Commander-in-Chief of the Defence Services—who is chosen by a military-controlled National Defence and Security Council, described below—final authority in all matters relating to military justice.

Beyond these sweeping grants of authority, the 2008 Constitution provides few details about the military's powers or functions. Whereas Chapter 4 of the Constitution, concerning the Legislature, and Chapter 5, concerning the Executive, each stretch approximately 50 pages in the English language version, Chapter 7, which concerns Defence Services, is contained in a single page. This lack of detail in essence creates a black box in which the military can operate without civilian oversight or constitutional limitation.

2.2 Legislative branch

During the Thein Sein administration, Parliament became "one of the key power centers and [a] driver of reform," with MPs proposing, debating, and passing laws with a great deal of independence.[2] The relatively robust nature of parliamentary practice surprised Myanmar watchers, who had expected the USDP-dominated body to serve as a military rubber stamp.[3] Parliament's unexpected autonomy was embodied most prominently in the person of lower house speaker, Shwe Mann, a USDP MP and former military joint chief-of-staff, who angered military leaders with his independence and apparent alliance with Aung San Suu Kyi.

The military's encroachment into the legislative branch of government under the 2008 Constitution is straightforward: 25% of MPs in both the upper and lower houses of Parliament are "Defence Services personnel nominated by the Commander-in-Chief of the Defence Services." Twenty-five percent of representatives in the 14 regional and state legislatures are likewise appointed by the Commander-in-Chief. Constitutional amendments must be backed by more than 75% of Parliament, handing military MPs an

[2] Bünte, M, 'Burma's transition to quasi-military rule: From rulers to guardians?' *Armed Forces & Society*, 2013, Vol 40, No 4, pp 742-764, at 754.

[3] Egreteau, R, 'Patterns of military behavior in Myanmar's new legislature' *Asia Pacific Bulletin*, 2013, p 233; and Egreteau, R, 'The continuing political salience of the military in post-SPDC Myanmar' in Cheesman, N, Farrelly, N, and Wilson, T (eds), *Debating Democratization in Myanmar*, Singapore: Institute of Southeast Asian Studies, 2014, at 259-284.

effective veto over changes to the charter. Nevertheless, the NLD's landslide victory in the 2015 election allows it to control Myanmar's legislative agenda and pass bills without a coalition partner.

2.3 Executive branch

On its face, the 2008 Constitution provides for an executive of branch of government led by a civilian president who "takes precedence over all other persons throughout the Republic of the Union of Myanmar." In reality, the Constitution—by placing key ministries under military control—partitions the executive into civilian and military camps under distinct lines of authority.

The Constitution stipulates that the Commander-in-Chief nominates "suitable Defence Services personnel" to be the ministers of Defence, Home Affairs, and Border Affairs. The President is obligated to appoint the Commander-in-Chief's nominees. The Constitution explicitly states that the appointees are "not required to retire or resign from the Defence Services," thereby ensuring that they remain firmly within the military hierarchy and under the direct line of command of the Commander-in-Chief. Together the Defence, Home Affairs, and Border Affairs ministries control all State security services, most local government functions, and key administrative bodies and processes, and are arguably the most powerful ministries in the cabinet.

The Defence Ministry represents the military within the cabinet and the official government structure. The Border Affairs Ministry is primarily responsible for security and development in ethnic minority areas, a key portfolio given the economic and political significance of ethnic homelands. The Border Affairs Ministry also plays a vital role in internal security, with a subnational structure that extends the military's presence throughout the country.[4] The 2008 Constitution's ceding of the Home Affairs Ministry to the military represents perhaps the greatest encroachment of military control into areas that, in democracies, are typically administered by civilian authorities. The Home Affairs Ministry controls prisons, the police force, the fire services, and a special investigations unit. Additionally, the Home Affairs Ministry's General Administration Department (GAD) is the primary institution implementing government policies at the local level throughout the country, and has been described as the "paramount government presence" at the subnational level.[5] The GAD administers a wide range of activities including tax collection, land management, various registration processes, demographic data collection, and local dispute resolution.[6] For most

[4] Nixon, H, Joelene, C, Saw, KPC, et al, *State and Region Governments in Myanmar*, Myanmar Development Resource Institute-Centre for Economic and Social Development and the Asia Foundation, 2013, available at https://asiafoundation.org/resources/pdfs/StateandRegionGovernmentsinMyanmarCESDTAF.PDF, accessed on 11 August 2018.

[5] Saw, KPC, and Arnold, M, *Administering the State in Myanmar: An Overview of the General Administration Department*, Myanmar Development Resource Institute, Centre for Economic and Social Development, and the Asia Foundation, 2014, available at https://asiafoundation.org/resources/pdfs/GADEnglish.pdf, accessed on 11 August 2018, at 14.

[6] Saw and Arnold (see note 5 above).

Myanmar citizens, GAD officials are the primary point of contact with the government.[7]

It should be noted that, although the NLD now controls the presidency, in the long run this is not guaranteed. The president is chosen by Parliament from a list of three nominees, one of whom will be appointed by Parliament's military MPs. Should the NLD's dominance fade in the future, the presidential selection process established by the Constitution could still allow the military to control the presidency with the cooperation of coalition partners holding a mere 25% of parliamentary seats.

2.4 Judicial branch

Of the three branches of government, the judicial branch, court martials aside, is the only one that is assigned exclusively to civilian authorities by the 2008 Constitution. However, scholars and human rights organizations have highlighted the military's persistent *de facto* influence over justice processes. In particular, military authorities have been accused of pressuring judges and threatening or harassing litigants, lawyers, and witnesses. Human rights observers are concerned that military authorities have at times bribed, intimidated, or secured the transfer of judges or witnesses, and delayed court proceedings.[8] At least in the short term, the extraordinary power and influence of the military may trump the constitutional framework which denies the military an official role in civilian justice processes.

In addition to direct military interference in trials, human rights organizations have identified an outsized influence of the police, under the military-controlled Ministry of Home Affairs, over justice processes.[9] The author of this paper has monitored and researched multiple cases in which police or intelligence agents under the authority of the Home Affairs Ministry have monitored, harassed, or threatened criminal defendants, their family members, witnesses, lawyers, and courtroom observers.

The 2008 Constitution circumscribes the judiciary's reach by shielding military authorities from judicial accountability. The Constitution sets out a broad and ambiguously-worded amnesty provision protecting all "members" of past or current governments from accountability for "any act done in the execution of their respective duties."[10] It also, as described above, establishes military justice as the sole prerogative of the military, stating that on such matters, "the decision of the Commander-in-Chief of the Defence Services

[7] Walcher, A, *The State of Local Governance: Trends in Myanmar*, United Nations Development Programme, 30 July 2015, available at http://www.mm.undp.org/content/myanmar/en/home/library/poverty/TheStateofLocalGovernanceChin/the-state-of-local-governance--trends-in-myanmar.html, accessed on 11 August 2018.

[8] The author has monitored cases involving these types of actions, the details of which have been withheld because of security and confidentiality concerns.

[9] Bugher, M, Zawacki, B, and Hueting, L, *Right to Counsel: The Independence of Lawyers in Myanmar*, Geneva and Bangkok: International Commission of Jurists, 2013, available at http://www.icj.org/myanmar-lawyers-still-face-restrictions-despite-increased-independence-2/.

[10] International Center for Transitional Justice, *Impunity Prolonged: Burma and its 2008 Constitution*, New York: International Center for Transitional Justice, September 2009, available at https://www.ictj.org/sites/default/files/ICTJ-Myanmar-Impunity-Constitution-2009-English.pdf, accessed on 11 August 2018.

is final and conclusive." In practice, military justice is a "black hole," and little to nothing is known about the administration of trials in court martials.[11]

2.5 The National Defence and Security Council and emergency powers

Much has been written about Myanmar's National Defence and Security Council (NDSC), with some commentators going so far as to raise concerns that it could "provide a legal channel for the military to reimpose direct military rule."[12] However, the 2008 Constitution provides few details about the NDSC's functions and powers. In truth, the influence of the NDSC primarily lies outside of its formal powers and instead rests in its role as a super-cabinet bringing together the most powerful office-holders from both sides, military and civilian, of Myanmar's bifurcated government.

The NDSC is comprised of 11 members, six of whom serve in, or are appointed by, the military. The Constitution provides few details about the NDSC's procedures and functions, which primarily involve advisory actions on matters such as the amnesty of prisoners, the severing of diplomatic relations, and military operations. The NDSC's most impactful formal role perhaps relates to the administration of states of emergency. However, the President is ultimately responsible for declaring states of emergency. It therefore appears that fears that a military-dominated NDSC would use the Constitution's emergency powers to execute a "constitutional coup" are overblown or else reflect the balance of power during the Thein Sein-era, when the interests of the President and the military were perceived to be closely aligned.[13] Acknowledging these limits to the NDSC's constitutional powers, however, does not preclude the possibility of an extra-constitutional power grab by military officials, potentially coordinated from within the military's NDSC membership.

3.0 Fault lines on human rights issues

The human rights challenges facing Myanmar are immense. Armed conflict and abuses by the Myanmar military and various armed groups threaten populations in many parts of the country; ethnic and religious minorities confront various forms of discrimination and persecution; and many citizens face challenges securing livelihoods and exercising fundamental rights and freedoms. Moreover, the legal and institutional framework inherited by the NLD has been deeply scarred by decades of military misrule.

The military's continuing power and influence, both in law and in practice, represents the single greatest threat to human rights in Myanmar. However, it has also become obvious

[11] Crouch, M, 'The judiciary in Myanmar' in Simpson, A, Farrelly, N, and Holliday, I (eds), *Routledge Handbook of Contemporary Myanmar*, New York: Routledge, 2017, at 248-256.
[12] Nehru, V, 'Myanmar's military keeps firm grip on democratic transition' Carnegie Endowment for International Peace, 2 June 2015, available at http://carnegieendowment.org/2015/06/02/myanmar-s-military-keeps-firm-grip-on-democratic-transition-pub-60288, accessed on 11 August 2018.
[13] Crouch, M, 'The constitution, emergency powers, and the rule of law in Myanmar' in Duell, K (ed), *Myanmar in Transition: Policy, People and Processes*, Singapore: Konrad-Adenauer-Stiftung, 2013, at 45-56.

that the NLD is not a reliable ally on human rights issues. The NLD has demonstrated a devastating failure of moral leadership in relation to a number of issues, including, most prominently, the persecution and ethnic cleansing of the Rohingya ethnic minority in Rakhine State. However, on some issues, the military has contributed to solving human rights challenges. In recent years the military has taken some positive steps towards greater transparency, accountability, and cooperation with civilian authorities. Nevertheless, understanding the fault lines between military and civilian authorities will be key to evaluating the NLD's human rights record.

3.1 Military abuse in conflict zones

The impotence of Myanmar's civilian leaders to protect human rights is perhaps most pronounced in relation to abuses committed by military personnel and other State security forces in conflict zones. For decades, human rights organizations and others have documented abuses perpetrated by military personnel against civilians in Myanmar.[14] Under the Thein Sein government, human rights groups accused the military of indiscriminate attacks, extrajudicial executions, the destruction and theft of civilian property, torture, sexual violence, and forced labour in Kachin State, Shan State, and elsewhere.[15] Since the inauguration of the NLD government, similar reports have continued to emerge from ethnic areas.[16]

In October 2016, Rohingya militants attacked border police outposts in northern Rakhine State, precipitating a vicious counterinsurgency offensive by State security forces. In 2016 and 2017, Myanmar army soldiers, as well as police, border guard forces, and armed Buddhist civilians, attacked the Rohingya civilian population throughout the region,

[14] Harvard Law School International Human Rights Clinic, 'Policy memorandum: Preventing indiscriminate attacks and wilful killings of civilians by the Myanmar military' Harvard Law School International Human Rights Clinic, 2014, available at http://hrp.law.harvard.edu/wp-content/uploads/2014/03/2014.03.24-IHRC-Military-Policy-Memorandum-FINAL.web_.pdf, accessed on 11 August 2018.

[15] Ta'ang Women's Organization, *Trained to Torture: Systematic War Crimes by the Burma Army in Ta'ang Areas of Northern Shan State (March 2011-March 2016)*, Burma Partnership, available at http://www.burmapartnership.org/wp-content/uploads/2016/06/Trained-to-Torture-English_for-Web.pdf, accessed on 11 August 2018.

[16] Kachin Women's Association of Thailand (KWAT), 'Statement of KWAT's 17th anniversary denouncing escalating Burma Army offensives to seize control of Kachin State's natural resources' Burma Partnership, 9 September 2016, available at http://www.burmapartnership.org/2016/09/statement-on-kwats-17th-anniversary-denouncing-escalating-burma-army-offensives-to-seize-control-of-kachin-states-natural-resources/; Network for Human Rights Documentation (Burma), *Report on the Human Rights Situation in Burma: January-June 2016*, Thailand: Network for Human Rights Documentation (Burma), 2016, available at http://www.burmapartnership.org/wp-content/uploads/2016/08/Jan-june16eng.pdf; Shan Human Rights Foundation, 'Burma army must be held accountable for extrajudicial killing of seven villagers in Mong Yaw' Shan Human Rights, 13 July 2016, available at http://shanhumanrights.org/index.php/news-updates/249-burma-army-must-be-held-accountable-for-extrajudicial-killing-of-seven-villagers-in-mong-yaw; Women's League of Burma, 'Ongoing Tatmadaw offensives and impunity for war crimes undermine new Panglong peace initiative' Burma Partnership, 16 June 2016, available at http://www.burmapartnership.org/2016/06/ongoing-tatmadaw-offensives-and-impunity-for-war-crimes-undermine-new-panglong-peace-initiative/; and Amnesty International, '"All the civilians suffer." Conflict, displacement, and abuse in Northern Myanmar' Amnesty International, 14 June 2017, available at https://www.amnesty.org/en/documents/asa16/6429/2017/en/, all accessed on 11 August 2018.

displacing approximately 700,000 and leaving thousands dead. Human rights groups and UN experts accused government forces of extrajudicial killings, torture, rape, and destruction of civilian property, among other human rights violations.[17] A fact-finding mission established by UN Human Rights Council is due to present its final report in September 2018 and is expected to recommend action by the International Criminal Court.

As described above, the 2008 Constitution explicitly rejects the concept of civilian oversight of the armed forces. At times during the Thein Sein administration, the military appeared to flex its muscles and fall back on the autonomy guaranteed by the Constitution. This seemed to be the case in relation to the military's offensive against the Kachin Independence Army (KIA) in northern Myanmar. On two occasions, one in late 2011 and the other in early 2012, military commanders in northern Myanmar appeared to disregard directives from Thein Sein to halt offensive operations against the KIA.[18]

Since the transfer of power to the NLD, the NLD's inability to direct or control the military has been taken as axiomatic, with government interlocutors reporting that Aung San Suu Kyi is unable to secure meetings with Commander-in-Chief Min Aung Hlaing. There has been no indication of the military seeking or responding to direction from the NLD on its operations in ethnic minority areas. Little is known about the planning of recent operations in northern Rakhine State, but it is likely that decision-making regarding counterinsurgency campaigns and attacks on civilians at the height of the crisis was contained within the military chain of command and did not involve direct consultation with the NLD. Nevertheless, the NLD has provided cover to the military's campaign of ethnic cleansing by denying access to UN investigators, journalists, diplomats, and humanitarian actors, establishing and empowering a series of investigatory bodies that have whitewashed abuses, and contributed to a disinformation campaign aimed at redirecting blame for the crisis to the Rohingya population itself.

The military has also asserted itself in ways that appear to contradict NLD policy relating to the peace process. In the weeks and days leading up to the Union Peace Conference, which opened on 31 August 2016, the military escalated attacks on the KIA, one of the major ethnic armed organizations (EAOs) and a participant in the conference. In the following two years, sustained and intense attacks on the KIA have continued to undermine peace efforts. Moreover, the military's outright rejection of ethnic demands for federal powers and insistence on early disarmament, demobilization, and reintegration

[17] Amnesty International, "'My world is finished.' Rohingya targeted in crimes against humanity in Myanmar' Amnesty International, 18 October 2017, available at https://www.amnesty.org/en/documents/asa16/7288/2017/en/; and United Nations Office of the High Commissioner for Human Rights (OHCHR), *Flash Report: Report of OHCHR Mission to Bangladesh*, OHCHR, 2017, available at http://www.ohchr.org/Documents/Countries/MM/FlashReport3Feb2017.pdf, all accessed on 11 August 2018.

[18] International Crisis Group, *A Tentative Peace in Myanmar's Kachin Conflict* (Asia Briefing No 140), Yangon, Jakarta, and Brussels: International Crisis Group, 13 June 2013, available at https://www.crisisgroup.org/asia/south-east-asia/myanmar/tentative-peace-myanmar-s-kachin-conflict, accessed on 11 August 2018.

(DDR) of ethnic armed organizations, have stripped Aung San Suu Kyi of leverage and bargaining chips to employ in negotiations with ethnic leaders. The ritual postponement of peace summits has evolved into stagnation, with no clear timeframe or plan for advancing the peace process.

Although there have been promising signs of cooperation between civilian and military authorities in some areas,[19] generally they do not touch upon the military's internal affairs or its alleged perpetration of human rights abuses. The Constitution provides few points of entry for addressing abusive conduct and recent developments do not indicate a willingness by the military to compromise on such issues.

3.2 Politically-motivated prosecutions and political prisoners

The release of more than 1,000 political prisoners from 2011 to 2013 was one of the hallmarks and crowning achievements of the Thein Sein administration. However, progress on the issue of political prisoners stalled during the second half of his presidency. A commission assigned with resolving the situation of political prisoners was paralyzed by government intransigence, dissolved, and then reconstituted without key civil society participants.[20] Towards the end of Thein Sein's administration, politically motivated arrests accelerated, creating a new class of political prisoners.[21]

The NLD's track record on the political prisoner issue has been a mixed bag. The swift pardon of more than 200 political prisoners within weeks of taking office was encouraging. However, the NLD has not conclusively dealt with this issue and, instead has continued to use repressive laws to arrest, prosecute and imprison journalists, activists and others expressing critical or dissenting opinions. As of May 2018, the Assistance Association for Political Prisoners (Burma) estimates that 36 political prisoners are serving prison sentences and a further 57 are behind bars awaiting trial.[22]

The power to resolve the fate of Myanmar's remaining political prisoners rests primarily, although not entirely, with the NLD. The 2008 Constitution provides for two separate means of releasing political prisoners. The President has authority to grant "pardons," a power which, to date, has operated in tandem with a provision in the Criminal Procedure Code concerning the suspension or remission of sentences. An "amnesty," however,

[19] International Crisis Group, 'Myanmar's new government: Finding its feet?' (Asia Report No 282), International Crisis Group, 29 July 2016, available at https://www.crisisgroup.org/asia/south-east-asia/myanmar/myanmar-s-new-government-finding-its-feet, accessed on 11 August 2018.

[20] Amnesty International and Human Rights Watch, 'Myanmar: Prisoner committee should not be smokescreen' Amnesty International and Human Rights Watch, 9 February 2015, available at https://www.amnesty.org/en/press-releases/2015/02/myanmar-prisoner-committee-should-not-be-smokescreen/, accessed on 11 August 2018.

[21] Amnesty International, 'New expression meets old repression: Ending the cycle of political arrests and imprisonment in Myanmar' Amnesty International, 24 March 2016, available at https://www.amnesty.org/en/documents/asa16/3430/2016/en/, accessed on 11 August 2018.

[22] Assistance Association for Political Prisoners (Burma), 'Monthly chronology of May 2018 and current political prisoners list' Assistance Association for Political Prisoners (Burma), available at http://aappb.org/2018/06/7329/, accessed on 11 August 2018.

requires the consent of the NDSC. Moreover, the Home Affairs Ministry's control over the Prisons Department means that it could engineer administrative delays or construct procedural hurdles to stand in the way of the release of political prisoners. More worrying is the ability of the military-controlled Myanmar Police Force to arrest or re-arrest individuals and initiate new criminal prosecutions on political grounds contrary to the policy direction of an NLD-led administration.

3.3 Land rights

Resolving concerns relating to land rights and security of tenure in Myanmar is vital to the country's long-term peace, stability, and development. For decades, the Myanmar military has been one of the chief perpetrators of land rights violations, often confiscating land from vulnerable communities to use for military installations, development projects, or military-linked business endeavours. Recent reports by human rights organizations indicate that these problems continued during the Thein Sein administration.[23]

Since the 2008 Constitution came into effect, the contestation of land issues has more frequently been resolved through legal and political processes. Two new laws regarding land tenure—both passed by the Thein Sein government in 2012—are imperfect, but have provided a means for contesting land grabs. A parliamentary Farmland Investigation Commission received and investigated complaints regarding land grabbing and issued a report claiming that approximately 250,000 acres of land had been illegally confiscated by the military. To date, the NLD has not made good on its bold commitments to resolve conflicts relating to land tenure. Addressing unresolved land grab disputes will require an interrogation of the actions of past governments and confrontation of entrenched economic interests, perhaps setting the stage for a clash with the military.

3.4 Persecution of ethnic and religious minorities

The persecution of ethnic and religious minorities in Myanmar takes many forms. The Rohingya Muslim minority undoubtedly faces the most severe forms of abuse. Human rights organizations have suggested that violence against the Rohingya, restrictions on movement and humanitarian aid, and various other forms of repression may constitute ethnic cleansing, crimes against humanity, apartheid, or even genocide.[24] Religious

[23] Shan Human Rights Foundation, 'Rampant land grabbing continues' Democracy for Burma, 31 October 2012, available at https://democracyforburma.wordpress.com/2012/10/31/shan-human-rights-foundation-shrframpant-land-grabbing-continues/; and Karen Human Rights Group, "'With only our voices, what can we do?" Land confiscation and local response in southeast Myanmar' Karen Human Rights Group, 2015, available at http://khrg.org/sites/default/files/full_with_only_our_voices._-_english.pdf, both accessed on 11 August 2018.

[24] Smith, M, "'All you can do is pray." Crimes against humanity and ethnic cleansing of Rohingya Muslims in Burma's Arakan State' Human Rights Watch, 22 April 2013, available at https://www.hrw.org/report/2013/04/22/all-you-can-do-pray/crimes-against-humanity-and-ethnic-cleansing-rohingya-muslims; Lindblom, A, Marsh, E, Motala, T, et al, 'Persecution of the Rohingya Muslims: Is genocide occurring in Myanmar's Rakhine State?' Allard K Lowenstein International Human Rights Clinic, Yale Law School, 2015, available at http://www.fortifyrights.org/downloads/Yale_Persecution_of_the_Rohingya_October_2015.pdf; and Amnesty International, "'Caged without a roof." Apartheid in Myanmar's Rakhine State' Amnesty International, 21 November 2017, available at https://www.amnesty.org/en/documents/asa16/7484/2017/en/, all accessed on 11 August 2018.

minorities throughout Myanmar have also suffered various types of persecution and discrimination, often experienced in interactions with township-level officials under the GAD, who, as described above, are the primary point of contact between citizens and the government.

The persecution of ethnic and religious minorities is typically driven by laws and policies that could be repealed or amended by civilian-controlled bodies, but implemented, in full or in part, by authorities under the control of the military. For example, four repressive "race and religion laws" passed in 2015 by a parliament under pressure from Buddhist nationalist groups are implemented and enforced, to varying degrees, by authority from the General Administration Department and other military-controlled bodies.[25] Many forms of persecution experienced by the Rohingya are rooted in the denial of citizenship under the 1982 Citizenship Law, a piece of legislation that could be unilaterally amended by the NLD. Stripped of citizenship, the Rohingya have been denied freedom of movement and have suffered other forms of persecution imposed by military and police personnel as well as officials from the Home Affairs and Border Affairs Ministries.[26]

4.0 State responsibility and Myanmar's bifurcated government

State responsibility is an area of law that informs the determination of when a State has violated its obligations under international law. The International Law Commission (ILC) codified principles of State responsibility in the Draft Articles on the Responsibility of States for Wrongful Acts (Draft Articles), a document which was adopted by the UN General Assembly in 2001.[27] The Draft Articles clearly articulate that a State is responsible for violations of international law obligations committed by any State institution. Article 4 states:

> (1) The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other function, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> (2) An organ includes any person or entity which has that status in accordance with the internal law of the State.

In a commentary to the Draft Articles, the ILC makes clear that the lack of executive control over a State organ does not exempt a State from responsibility for the actions of that organ. The State is responsible even in a situation in which the perpetrating organ "is

[25] Amnesty International and International Commission of Jurists, 'Myanmar: Parliament must reject discriminatory 'race and religion' laws' Amnesty International and International Commission of Jurists, 3 March 2015, available at https://www.amnesty.org/en/documents/asa16/1107/2015/en/, accessed on 11 August 2018.
[26] 'Caged without a roof' (see note 24 above).
[27] International Law Commission, 'Draft articles on responsibility of states for internationally wrongful acts' in *Yearbook of the International Law Commission 2001: Report of the International Law Commission on the Work of Its Fifty-third Session*, New York and Geneva: United Nations, 2007.

constitutionally independent and that the central government has no means of compelling it to abide by the State's international obligations."

The status of the Defence Services and subordinate military divisions and units as "State organs" per the terms of the Draft Articles is unquestionable, given their treatment by the 2008 Constitution and various other domestic laws. Likewise, the three military-controlled ministries and the various departments and bureaus underneath them are established by law and operate with the authority of the State, and are therefore also State organs. For these reasons, violations of international law obligations, including international human rights law and international humanitarian law, by military-controlled bodies are attributable to the State of Myanmar.

It is beyond the scope of this paper to fully examine the breadth of Myanmar's obligations under international human rights law and international humanitarian law. Despite the NLD-led government's accession to the International Covenant on Economic, Social and Cultural Rights in October 2017, Myanmar remains a laggard in terms of treaty ratification, a fact which limits opportunities for victims of human rights violations to seek redress. Nevertheless, international law plays a significant role in protecting human rights in Myanmar. Myanmar's human rights record is monitored by intergovernmental organizations such as the UN Office of the High Commissioner for Human Rights and the International Labour Organization. A UN-mandated special rapporteur regularly reports on the human rights situation in Myanmar, but has been denied access to the country by the government since December 2017. Myanmar's human rights record, and that of every other country in the world, is examined every four-and-a-half years as part of the Human Rights Council's Universal Periodic Review.

In practice, the discord between the unitary international obligations of the Myanmar State and the bifurcated nature of the government will be most clearly visible in interactions with bodies and processes such as these. Elected officials and NLD appointees (such as Aung San Suu Kyi and representatives of the President's Office, Ministry of Foreign Affairs, and the Attorney General's Office) will be responsible for responding to questions and concerns about human rights violations committed by institutions and bodies answerable to the Commander-in-Chief. These officials will have difficulty offering good faith assurances of reform in areas where the civilian administration lacks formal authority. In the future, as Myanmar's engagement with the international legal order likely deepens and additional international mechanisms and processes come into play, these fault lines could become more prominent.

It should be noted that Myanmar's situation in this regard is far from unique. Other States likewise have institutions (police forces, paramilitary groups, intelligence agencies) that are not subject to oversight or are otherwise unaccountable to the executive. Countries with federal governments also face issues regarding international obligations and the constitutional delegation of powers. Many of the most frequently cited human rights violations in the United States (for example, those relating to executions, incarceration, and

policing) are perpetrated by state or local authorities in areas where the federal government has no constitutional authority.

5.0 Opportunities for the NLD to advance human rights objectives

The NLD should honour the sweeping mandate it received from voters in 2015 by acting with purpose and urgency to entrench democratic gains and advance human rights objectives using the powers granted by the 2008 Constitution. To this end, the NLD-led government could and should pursue a wide range of initiatives.

First, the NLD-led civilian government should undertake a robust program of legislative reform to create a legal framework that safeguards and promotes human rights. With a solid parliamentary majority, the NLD has nearly unlimited power to draft, repeal, or reform legislation. Encouragingly, the NLD has signalled that legislative reform will be a priority and has identified more than 100 laws requiring amendment. However, to date, Parliament has few significant legislative accomplishments and has been hampered by shortcomings in experience and expertise.

Among the laws that should be prioritized for repeal or amendment are the Penal Code, the Peaceful Assembly and Peaceful Procession Law, the Citizenship Law, the Telecommunications Law, the Unlawful Association Act, and the Official Secrets Act. More controversially, the NLD could use its legislative power to alter or diminish the powers of military-controlled institutions. For example, Parliament could amend the Defence Services Act or cut its budget. It is unclear whether such actions would be met with a constitutional challenge based on Art 20 of the Constitution, which establishes the autonomy of the military. Regardless, there would undoubtedly be significant political consequences if the NLD attempted these types of reforms unilaterally.

Second, the NLD should accelerate Myanmar's integration of international law into its own legal framework and deepen its engagement with the international community. Myanmar's civilian leaders should recognize the potentially powerful role that international norms and processes can play in restraining military abuses of power and catalysing the development of domestic institutions. The NLD-led government should immediately reverse its decision to deny access to the UN special rapporteur and fact-finding mission and should follow through on the commitment of the prior administration to allow the UN Office of the High Commissioner for Human Rights to establish an office in Myanmar. The NLD government should also accede to key human rights treaties as soon as reasonably possible, beginning with the ICCPR.[28]

Third, Myanmar's new government should implement fundamental justice sector reforms. As described above, although the 2008 Constitution nominally establishes the independence of courts and provides for the executive to play the leading role in judicial

[28] During the Thein Sein administration, Myanmar signed but did not accede to the ICESCR.

appointments, in practice the military and police exert considerable influence on the administration of justice. The NLD should view a strong, independent, and professional justice sector as a bulwark against military overreach. Among other initiatives, the NLD-led government should adopt policies to combat corruption and interference in justice processes, develop a judicial code of conduct in line with international standards, revise the process for appointing and promoting judges, reform the Attorney General's Office, amend the Bar Council Act, ensure lawyers' access to clients and information, and improve legal education.[29]

Fourth, the NLD-led government should reform and empower government commissions and other bodies with an ability to promote human rights standards, beginning with the Myanmar National Human Rights Commission (MNHRC). Currently, the MNHRC—formed by Thein Sein in 2011 and governed by a 2014 law—is institutionally weak, insufficiently independent, and disinclined to examine abuses by the military.[30] An empowered and independent MNHRC could serve a watchdog function, including over military-controlled institutions. The government should also consider establishing a commission tasked with finally resolving the situation of political prisoners in Myanmar, or reconstituting the previous body assigned this task, and ensure that it has the necessary resources, powers, and membership to fulfil its mandate. Unfortunately, the 'Investigation Commission' established by the NLD in 2017 to investigate the conflict in Rakhine State was laughable in its lack of independence and failure to credibly report on abuses. A subsequent investigative body, announced by the NLD in May 2018, will certainly also lack credibility so long as the government continues to deny access to the UN fact-finding mission. These failures cast doubt on the NLD's commitment to using investigative bodies to promote human rights goals.

Fifth, the NLD-led government should protect and empower civil society. The NLD should view civil society as an ally in its mission to ensure clean rights respecting governance. However, to date, the NLD's actions, including restrictions on NLD MPs attending civil society events, betray territoriality and suspicion towards civil society.

Finally, and perhaps most importantly, the NLD should provide decisive and courageous moral leadership on human rights issues. To the extent that the civilian government lacks the constitutional powers to halt human rights violations, officials must clearly and promptly condemn actions which breach Myanmar's obligations under international law. To date, the NLD has spectacularly failed in this regard, most notably through its

[29] International Commission of Jurists, 'Implementable plans from the ICJ to the new parliament and government' International Commission of Jurists, 3 May 2016, available at http://www.icj.org/wp-content/uploads/2016/06/Myanmar-Recommendation-to-NLD-Gvt-Advocacy-Analysis-Brief-2016-ENG.pdf, accessed on 11 August 2018.

[30] *Suspicious Minds: The Myanmar National Human Rights Commission's Trust Deficit*, Progressive Voice, Smile Education and Development Foundation, and Action Committee for Democracy Development, 2017, available at https://progressivevoicemyanmar.org/wp-content/uploads/2017/11/Report-on-MNHRC-Eng1.pdf, accessed on 11 August 2018.

unwillingness to acknowledge or condemn the persecution and ethnic cleansing of the Rohingya ethnic minority. Aung San Suu Kyi and other senior government officials have also failed to forcefully call for a halt to human rights abuses by military personnel in conflict zones in Kachin and Shan States.

It is important to recognize that limits to the powers of civilian authorities are not only legal. The military must ultimately be the NLD's partner in efforts to promote democracy and human rights in Myanmar. Accommodating military interests may be a legitimate and advisable strategy in certain limited circumstances, despite constitutional powers that allow civilian authorities to act unilaterally.

Over the past decade, Myanmar has experienced remarkable and unexpected upheaval and reform. Myanmar's civilian leaders now hold more power to shape the country's future than at any time since the military coup of 1962. This is a cause for great hope. However, the unchecked powers granted to the military by the 2008 Constitution fundamentally compromise the NLD's ability to govern. Although the NLD currently has the power to implement numerous human rights initiatives, ultimately, constitutional reform is necessary to enable Myanmar to uphold its obligations under international law.

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ABBREVIATIONS AND ACCRONYMS

DDR	Disarmament, demobilization, and reintegration
EAO	Ethnic armed organizations
GAD	General Administration Department
KIA	Kachin Independence Army
ILC	International Law Commission
MNHRC	Myanmar National Human Rights Commission
NDSC	National Defence and Security Council
NLD	National League for Democracy
USDP	Union Solidarity and Development Party

INTERNATIONAL RULES AND LOCAL REALITIES BEYOND RECOGNIZED STATES: ETHNIC ARMED ORGANIZATIONS AND HUMANITARIAN NORMS IN MYANMAR*

Stan Jagger

Abstract

Despite roles in local administration and service provision in areas they control or influence, long-standing non-State ethnic armed organizations (EAOs) in southeast Myanmar still present a threat to the safety of the populations they claim to represent. Landmines and underage recruitment comprise two persistent issues. EAOs have undertaken a variety of actions, policies, and agreements to demonstrate varying degrees of compliance, or actions towards compliance, with humanitarian norms applying to these issues. Overall, there has been more acceptance for the norm prohibiting underage recruitment than the provision to end the use of landmines. This paper contends that the extent of EAO compliance (or lack thereof) and the differences in acceptance between these two humanitarian norms are significantly influenced by varying perceptions of legitimacy from different international and local stakeholders, by localized economic agendas, and by EAO geographic dispersion, and organizational decentralization. This paper concludes by suggesting potential ways EAOs might further increase compliance with humanitarian norms, thereby improving the protection of people in their areas of control.

1.0 Introduction

International humanitarian law has traditionally been understood as applying to the actions of recognized States and their armed forces. However, armed non-State actors have been the focus of increasing efforts to raise awareness and compliance with humanitarian norms to protect civilians from the effects of armed conflict.[1] Landmine use and underage recruitment were selected in this study as two indicators of a wider compliance with humanitarian norms by ethnic armed organizations (EAOs) in southeast Myanmar, as they have been the focus of efforts by international NGOs such as the International Campaign to Ban Landmines and Geneva Call, and local human rights and community-based organizations. Landmine use and underage recruitment have also been deployed as indicators of wider norm compliance in studies of non-State armed groups and humanitarian norms in other regions.[2] These two issues were also deployed because they

* Field work for this paper was assisted by a 2012 grant from the New Zealand Peace and Disarmament Education Trust (PADET).

[1] Bangerter, O, 'Reasons why armed groups choose to respect international humanitarian law or not' *International Review of the Red Cross*, 2011, Vol 93, No 882, pp 453-484; Bellal, A, and Casey-Maslen, *Rules of Engagement: Protecting Civilians through Dialogue with Armed Non-State Actors*, Geneva, Switzerland: ADH Geneva, 2011; and Geneva Call, 'What we do' Geneva Call, 2017, available at https://genevacall.org/what-we-do/, accessed on 12 August 2018.

[2] Jo, H, and Bryant, K, 'Taming of the warlords: Commitment and compliance by armed opposition groups in civil wars' in Risse, T, Ropp, SC, and Sikkink, K (eds), *The Persistent Power of Human Rights: From Commitment to Compliance*, Cambridge, UK: Cambridge University Press, 2013, pp 239-258; and Sjoberg, A-K, 'Dealing with the devil? Humanitarian engagement with non-state actors: The case of the National Liberation Army, Colombia' *Annual Convention of the International Studies Association*, San Francisco, 2008.

have met with different levels of policy, expressions of compliance, and practical action from EAOs. NGO, Geneva Call, which specializes in engagement with armed groups on such issues, defines the concept of humanitarian norms as the international humanitarian law (IHL) and international human rights law (IHRL) standards relevant to armed non-State actors (ANSAs).[3, 4]

This paper is based on periods of research conducted between 2012 and 2014 on the borders of Myanmar. Primary data was gathered through approximately 60 semi-structured interviews and three focus group discussions. Interview respondents included members of EAOs, local civil society organizations (CSOs), national and international NGOs that engaged with EAOs on landmine use and underage recruitment, as well as journalists and academics. Reports from local and international humanitarian and human rights organizations also provided valuable information and opportunities to triangulate data from interviews. For their safety and security, respondents remain anonymous. All interview data remains on file with the author. Due to varying expressions of compliance, accessibility, and the availability of information, those EAOs and the actors engaging with them who participated in this study, are mainly active in the southeast of Myanmar adjacent to the Thai-Myanmar border. The main EAOs considered in this paper are the Karen National Union/Karen National Liberation Army (KNU/KNLA), the Karenni National Progressive Party/Karenni Army (KNPP/KA), the New Mon State Party/ Mon National Liberation Army (NMSP/MNLA), and the Democratic Karen Buddhist/ Benevolent Army (DKBA). Consequently, a limitation in geographic scope of the present study lies in the absence of significant EAOs operating in the north and northeast of Myanmar adjacent to the China border.

First, this paper describes the international law applicable to non-State armed groups and the means by which EAOs may express compliance with it, followed by a discussion of the theories and gaps in the literature which this article seeks to fill. The literature on humanitarian engagement, the governance roles of armed groups, and the political economy of civil wars brings forward three central influencing factors: perceived legitimacy, economic agendas, and the geographic dispersion or decentralization of armed groups. The empirical sections outline the context of EAOs in Myanmar, then consider cases of landmine use and the recruitment of children involving EAOs in southeast Myanmar. In each of these sections, the factors enabling or impeding EAO compliance are explored together with the variety of means by which EAOs have attempted to demonstrate compliance or move towards compliance. Finally, some potential ways to involve EAOs, their welfare wings, and civil society to further protect civilians from landmines and underage recruitment are briefly explored.

[3] Although the terms 'armed non-state actor' or 'non-state armed group' are often used interchangeably in the literature on humanitarian norms and engagement with armed rebel groups, the long established ethnic rebel armed groups in Myanmar are more often referred to by local media, civil society organizations, and researchers (and by the groups themselves) as 'ethnic armed organizations' (EAOs) or 'ethnic armed groups.'
[4] Decrey-Warner, E, Somer, J, and Bongard, P, 'Armed non-state actors and humanitarian norms: Lessons from the Geneva call experience' in Perrin, B (ed), *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organisations, and the Law*, Vancouver, Canada: UBC Press, 2012, pp 73-86, at 83.

2.0 International humanitarian law and international human rights law applicable to armed non-State actors and a means of demonstrating compliance

International humanitarian law acknowledges the obligations of armed groups specifically in Common Article Three to the four Geneva Conventions of 1949, and more specifically in Additional Protocol II 1977 to the Geneva Conventions, applying to the protection of civilians in non-international armed conflicts.[5] Common Article Three applies the four Geneva Conventions to the protection of civilians in "conflicts not of an international character." It therefore extends the obligations of the Geneva Conventions to non-State armed groups as well as the armed forces of recognised States. Additional Protocol II 1977 expands on Common Article Three and specifies the actors that are bound by its obligations. As well as the armed forces of recognised States, it includes "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."[6] Additional Protocol II includes basic requirements for armed groups to be recognised as parties to an armed conflict with obligations under the Geneva Conventions, including a level of organization, control over territory, and the ability to implement the obligations in the Protocol. The EAOs considered in the present study meet these criteria in terms of organization, territorial control, and capacity to implement obligations. However, unlike Common Article Three, Additional Protocol II has not been universally ratified. The range of States that have not ratified Protocol II, for example, include the USA, China, Russia, India, Syria, and Myanmar.[7]

Armed groups are not able to formally join State-based IHL and IHRL treaties such as the Ottawa treaty prohibiting landmine use or the Optional Protocol to the Convention on the Rights of the Child applying to children and armed conflict (OPAC). However, armed groups do have a variety of means through which they can express compliance with IHL and IHRL. These include: special or bilateral agreements between armed groups and the States they are in conflict with; inclusion of IHL/IHRL within ceasefire or peace agreements; unilateral declarations of adherence to IHL by armed groups; action plans with UN agencies; and inclusion of IHL in armed groups' internal regulations or codes of conduct.[8]

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[5] Mack, M, *Compliance with International Humanitarian Law by Non-State Actors in Non-International Armed Conflicts*, New York, NY: Harvard University, 2003.

[6] Article 1, Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

[7] International Committee of the Red Cross, 'States Party to the Geneva Conventions and the Additional Protocols' International Committee of the Red Cross, 2011, available at https://www.icrc.org/por/assets/files/annual-report/current/icrc-annual-report-map-conven-a3.pdf, accessed on 12 August 2018.

[8] Florquin, N, Bongard, P, and Richard, E, 'Options for engagement: Armed groups and humanitarian norms' in Small Arms Survey (ed*), Small Arms Survey 2010: Gangs, Groups and Guns*, Cambridge, UK: Cambridge University Press, 2010, pp 305-333, at 310-313; Mack, M, and Pejic, J, *Increasing Respect for International Law in Non-International Conflicts*, Geneva, Switzerland: International Committee of the Red Cross, 2008, at 16-29; and Sivakumaran, S, 'Binding armed opposition groups' *International and Comparative Law Quarterly*, 2006, Vol 55, pp 369-394, at 387-393.

3.0 Theoretical perspectives on humanitarian norms and armed non-State actors

This paper considers the socially constructed concept of perceived legitimacy and the material role of economic resources and geographical dispersion to build a theoretical framework to better understand the factors that influence armed groups and their actions relating to humanitarian norms. As such, it seeks to contribute to the intersection between literature on engagement with armed groups regarding their international humanitarian law obligations,[9] and the growing body of literature addressing the governance roles of armed groups.[10]

Writers addressing influences on armed groups that encourage or impede their compliance with international norms have already identified several factors including leadership, concerns about legitimacy, capacity, and the role of local civil society. For example, Claude Bruderlein, in an early work on non-State armed groups and their humanitarian obligations, states that there are two main reasons for a lack of compliance: the capacity of the group to implement humanitarian norms and the willingness of leadership to do so.[11] Olivier Bangerter, a former negotiator with armed groups for the International Committee of the Red Cross, also argues that commitment of the armed group leadership is vital to gain compliance with humanitarian norms.[12] However, as this paper later points out, even where commitments to uphold IHL or IHRL are forthcoming from armed group leadership, one must still consider the detrimental influences of local economic agendas and the dispersion or decentralization of such units.

Nicholas Florquin, Pascal Bongard, and Emilia Richard point out there are few legal incentives for armed groups to comply with IHL. However, other incentives include bringing humanitarian assistance into their areas of control, claiming the moral high ground over their opponents, and responding to their support base.[13] These practical incentives further contribute to perceptions of legitimacy for the armed group. However, recognized States often object to external actors engaging with armed groups to comply with international law because, as Dawn Steinhoff points out, "the political legitimacy that an insurgent group gains from legal recognition can be more harmful to a state than any loss in the state's ability to apply domestic laws."[14]

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[9] Bangerter, O, 'Disseminating and implementing international humanitarian law within organized armed groups: Measures armed groups can take to improve respect for international humanitarian law' in Odello, M, and Beruto, GL (eds), *Non-State Actors and International Humanitarian Law: Organized Armed Group – A Challenge for the 21st Century*, Milan, Italy: FrancoAngeli, 2010, pp 187-212; Bellal and Casey-Maslen (see note 1 above); Mack and Pejic (see note 8 above); and Sassoli, M, 'Taking armed groups seriously: Ways to improve their compliance with international humanitarian law' *Journal of International Humanitarian Legal Studies*, 2010, Vol 1, No 1, pp 5-51.

[10] Mampilly, ZC, *Rebel Rulers*, Ithaca, NY: Cornell University Press, 2011; and Podder, S, 'Non-state armed groups and stability: Reconsidering legitimacy and inclusion' *Contemporary Security Policy*, 2013, Vol 34, No 1, pp 16-39.

[11] Bruderlein, C, *The Role of Non-State Actors in Building Human Security: The Case of Armed Groups in Intra-State Wars*, Geneva, Switzerland: HD Centre for Humanitarian Dialogue, 2000, at 7.

[12] Bangerter (see note 1 above).

[13] Florquin et al (see note 8 above), at 306-307.

[14] Steinhoff, D, 'Talking to the enemy: State legitimacy concerns with engaging non-state armed groups' *Texas International Law Journal*, 2010, Vol 45, pp 297-322, at 317.

Civil society actors involved in service and welfare provision to constituencies, or advocacy related to the causes of non-State armed groups, are important actors in this regard. David Petrasek[15] and Andreas Wigger[16] among others, have identified how civil society actors close to armed groups may encourage improved behaviour as beneficial to the group's and their constituencies' overall cause. Perceptions of legitimacy and the influence of EAO associated civil societies is where the literature on armed groups and humanitarian norms converge with research addressing the governance roles and political economy of rebel groups.

Authors studying the dynamics of rebel governance point to the combination of social and material factors through which rebel groups seek to build legitimacy. Zachariah Mampilly makes the point that it is "by replicating some of the functions and forms of the nation-state" that a rebel group can "derive support for its political authority and achieve some form of legitimacy."[17] Sukanya Podder, in a similar vein, identifies armed group legitimacy as being predicated on the "ability to meet every day needs of civilians" and how its "ability to access different types of resources impact on its socio-political legitimacy."[18] For example, long established EAOs in southeast Myanmar (KNU, NMSP, and KNPP) have operated administrative and welfare services, to varying degrees of sophistication and effectiveness for decades, in areas they control or contest with the central State and its armed forces.[19]

The positive role of perceived legitimacy has been most evident in EAOs seeking to portray themselves as representative of local constituencies through the provision of welfare services and claims to uphold human rights. For example, in 2013 and 2014, KNU and KNPP developed policies requiring international NGO assistance in their areas comply with international humanitarian and human rights standards.[20] These activities

[15] Petrasek, D, *Ends and Means: Human Rights Approaches to Armed Groups*, Versoix, Switzerland: International Council on Human Rights Policy, 2000, at 25-27.
[16] Wigger, A, 'Engaging and negotiating with organised armed groups: A field perspective' in Odello, M, and Beruto, GL (eds), *Non-State Actors and International Humanitarian Law. Organized Armed Groups: A Challenge for the 21st Century*, Milan, Italy: FrancoAngeli, 2010, pp 81-90, at 87-88.
[17] Mampilly (see note 10 above), at 9.
[18] Podder (see note 10 above), at 20, 26.
[19] Falla, J, *True Love and Bartholomew: Rebels on the Burmese Border*, Cambridge, UK: Cambridge University Press, 1991; Jolliffe, K, *Ethnic Conflict and Social Services in Myanmar's Contested Regions*, Yangon, Myanmar: Asia Foundation, 2014; and South, A, *Mon Nationalism and Civil War in Burma: The Golden Sheldrake*, London, UK: Routledge-Curzon, 2003.
[20] Senior staff member of an international humanitarian agency, interview, Hpa-an, 26 August 2014; Country director of an international humanitarian agency, interview in Yangon, 6 September 2013. For example, "The KNU respects and promotes the implementation of International Humanitarian Law, Refuge Law, and Human Rights Law as they relate to both the delivery and the receipt of humanitarian aid in Kawthoolei" (Office of the Supreme Headquarters, KNU, 'Policy on Humanitarian Operation in Ceasefire Zone' 25 March 2013, available at https://kdhwtestsite.files.wordpress.com/2008/02/130325-knu-policy-on-humanitarian-operation-in-ceasefire-zone-final-hq-e.pdf, accessed on 12 August 2018). See, Karen National Union, 'Policy on Humanitarian Operation in Ceasefire Zone' which stated: "The delivery of humanitarian assistance, in accordance with the international norms and standards, shall respect human rights" (Office of the Supreme Headquarters, KNU, Kawthoolei, 'Karen National Union (KNU) Policy for Humanitarian Assistance' 11 June 2014); and Karen National Union, 'Policy on Humanitarian Operation in Ceasefire Zone.'

comprise examples of non-State armed groups mirroring the functions of a recognised State as identified by Mampilly and Podder respectively, to build perceptions of legitimacy with constituencies and international actors. However, in other instances, such as those examined in this article, local perceptions of legitimacy may also depend on EAOs portraying themselves as credible armed actors to constituencies they claim to protect or represent, and to opponents whose attacks they wish to discourage. Such immediate pressures may override the less tangible incentives offered by limited international legitimacy through compliance with humanitarian norms on landmine use or underage recruitment.

Literature addressing the political economy of civil wars have identified negative impacts on civilians where armed groups have access to external finances or resources, thus reducing their reliance on local populations for supplies and support.[21] In the case of the issues under consideration in this paper, an example of negative effects on EAO-civilian relations and consequently on EAO humanitarian norm compliance, results from the use of landmines to protect resources and external business interests. Lack of centralized control or cohesion and armed group diffusion across large areas of territory have been considered as factors contributing to the success or failure of armed groups and the trajectory of their insurgencies.[22] EAOs in Myanmar have also been viewed through these lenses.[23] This focus is also relevant to the present study. Geographical dispersion and decentralized organizational structure, when combined with localized economic motivations, can shape the actions of autonomous EAO units or commanders and negatively influence the safety of civilians exposed to armed groups deploying landmines to secure economic resources or accepting recruits under the age of 18. It is this framework of perceptions of legitimacy, local economic imperatives, and decentralization and geographic dispersion that is applied to understanding the factors influencing the extent of humanitarian norm compliance by EAOs in southeast Myanmar that are traced through the empirical sections of this article below.

4.0 Context of ethnic armed conflicts in Myanmar

Unresolved tensions at independence in 1948 between the new government and a host of evolving ethnic, political, and communist organizations rapidly escalated into armed conflict as the new government attempted to consolidate itself, establish a unitary state, and suppress opposition.[24] Preventing disintegration of this unitary state has since been

[21] Beardsley, K, and McQuinn, B, 'Rebel groups as predatory organizations: The political effects of the 2004 tsunami in Indonesia and Sri Lanka' *Journal of Conflict Resolution*, 2009, Vol 53, No 4, pp 624-645; Keen, D, *The Economic Functions of Violence in Civil Wars*, Oxford, UK: Oxford University Press, 1999; and Weinstein, JM, *Inside Rebellion: The Politics of Insurgent Rebellion*, Cambridge, UK: Cambridge University Press, 2007.

[22] Kenny, PD, 'Structural integrity and cohesion in insurgent organizations: Evidence from protracted conflicts in Ireland and Burma' *International Studies Review*, 2010, Vol 12, No 4, pp 533-555; and Staniland, P, *Networks of Rebellion: Explaining Insurgent Cohesion and Collapse*, Ithaca, NY: Cornell University Press, 2014.

[23] Brenner, D, 'Inside the Karen insurgency: Explaining conflict and conciliation in Myanmar's changing borderlands' *Asian Security*, 2018, Vol 14, No 2, pp 83-99; Jolliffe, K, *Ceasefires, Governance and Development: The Karen National Union in Times of Change*, Yangon, Myanmar: Asia Foundation, 2016; and Kenny (see note 22 above).

[24] Lintner, B, *Burma in Revolt: Opium and Insurgency since 1948*, Chiang Mai, Thailand: Silkworm Books, 1999;

the driving force for the Tatmadaw (Myanmar army) leading to its direct control of the State from 1962 to 2011. Myanmar-focused scholars[25] have made the point that the civil wars, while having a basis in long-standing ethnic, social, and political grievances, have over the decades increasingly taken on an economic dynamic. This is due to internal and external State demands for resources from within conflict areas, the need for EAOs and government forces to be self-funding, and the increasing fragmentation of EAOs and consequent competition over the control of resources. A consequence of EAO fragmentation and local economic agendas has been a proliferation of government-aligned border guard forces (former EAOs that have come under direct Tatmadaw command) and militias.[26] All these factors affect EAO relations with civilian populations. While EAOs have largely been pushed to the geographic margins, decades of military and political struggle have also forged the development of parallel State-like (and sometimes overlapping with the State) administrative and welfare organs within established EAOs.[27]

In 2015, the government claimed it had reached a 'nationwide ceasefire agreement' (NCA) with the country's EAOs. However, signatories to the NCA in October 2015 included only eight out of approximately 20 significant EAOs still active in the country although KNU and DKBA, and later, the NMSP (in 2018) did finally become signatories. Despite the existence of an elected civilian government (the NLD) since 2016, the constitutionally guaranteed role of the Tatmadaw in government and its control over military actions on the ground has resulted in little political progress beyond shaky ceasefires with NCA signatory EAOs, while fighting has continued with other non-NCA signatory EAOs.[28]

5.0 EAOs and landmines

Landmines have been used extensively by both the Tatmadaw and EAOs during the decades of Myanmar's civil wars. Between 1999 and 2015, there were 3,693 recorded landmine casualties in Myanmar, of which 419 were fatal.[29] However, the real toll may

Smith, M, *Burma: Insurgency and the Politics of Ethnicity*, London, UK: Zed Books, 1999; Smith, M, *State of Strife: The Dynamics of Ethnic Conflict in Burma*, Washington, DC: East-West Centre, 2007; Thant Myint-U, *The Making of Modern Burma*, Cambridge, UK: Cambridge University Press, 2001; and Thant Myint-U, *The River of Lost Footsteps: Histories of Burma*, New York, NY: Farrar, Straus and Giroux, 2006.

[25] Kramer, T, *Neither War Nor Peace: The Future of the Cease-fire Agreements in Burma*, Amsterdam, Netherlands: Transnational Institute, 2009; Sherman, J, 'Burma: Lessons from the cease-fires' in Ballentine, K, and Sherman, J (eds*), The Political Economy of Armed Conflict: Beyond Greed and Grievance*, Boulder, CO: Lynne Rienner, 2003, pp 225-255; Smith (see note 24 above); and Woods, K, 'Ceasefire capitalism: Military-private partnerships, resource concessions and military-state building in the Burma-China borderlands' *Journal of Peasant Studies*, 2011, Vol 38, No 4, pp 747-770.

[26] Buchanan, J, *Militias in Myanmar*, Washington DC: Asia Foundation, 2016.

[27] Callahan, M, *Political Authority in Burma's Ethnic Minority States: Devolution, Occupation, and Coexistence*, Washington, DC: East-West Centre, 2007; and Jolliffe, K, *Ethnic Armed Conflict and Territorial Administration in Myanmar*, Yangon, Myanmar: Asia Foundation, 2015.

[28] Choudhury, A, 'Myanmar's violent road to 'peace" Oxford Tea Circle, 7 June 2018, available at https://teacircleoxford.com/2018/06/07/myanmars-violent-road-to-peace/, accessed on 12 August 2018; and Davis, A, 'A vision for war without end in Myanmar' Asia Times, 30 May 2018, available at http://www.atimes.com/article/a-vision-for-war-without-end-in-myanmar//?cn-reloaded=1, accessed on 12 August 2018.

[29] Landmine and Cluster Munition Monitor, 'Landmine Monitor Report: Myanmar/Burma, December 2016' International Campaign to Ban Landmines-Cluster Munition Coalition (ICBL-CMC), 2017.

be much higher as not all incidents are reported. As well as inflicting death and injury, landmines also deny access to land, water, or freedom of movement for civilians living in contaminated areas. Landmines continue to provide the militarily weaker EAOs with a cheap and convenient weapon to hold territory or delay pursuing forces and over decades have often become central to their strategy.[30] Landmine use, production, or stockpiling was acknowledged by all EAOs considered by this paper. EAO leadership often cited the fragility of ceasefire arrangements and other EAOs still in armed conflict with the government as reasons for maintaining stockpiles of landmines.[31]

EAOs have been involved in *ad hoc* de-mining but often for military or economic purposes rather than to protect civilians.[32] This point was reiterated in several interviews.

> They will go in and try to clear the landmines, sometimes their own landmines and sometimes enemy landmines. And it's just for them to reuse or to take back to base. It's not like civilian de-mining.[33]

> They often remove those mines and relay them. As a military outfit, I don't think you could call anything they do humanitarian de-mining. They may do it in some cases for the benefit of civilians.[34]

> In terms of providing warnings to civilians about areas they have mined, EAOs have largely relied on verbal warnings rather than signs or fencing.[35]

> Long ago if they [KNPP] knew about the mines that are there, they informed people "don't go there." They don't set up signs.[36]

> A significant means of early warning is verbal warnings from armed groups to village leaders, saying, "Ok, we've mined this path or this area going up that hill or that valley." Physical signs [marking such areas] are pretty limited.[37]

However, attempting to increase local legitimacy and support may also play a part in EAOs

[30] Landmine and Cluster Munition Monitor (see note 29 above); and Selth, A, 'Landmines in Burma: Forgotten weapons in a forgotten war' *Small Wars & Insurgencies*, 2001, Vol 12, No 2, pp 19-50.
[31] Interviews with members of the leadership of EAOs: Sangkhlaburi, 13 November 2012; Mae Sot, 4 December 2012; and Mae Hong Son, 23 December 2012.
[32] Geneva Call and DCA Mine Action, *Humanitarian Impact of Landmines in Burma/Myanmar*, Geneva, Switzerland: Geneva Call, 2011, at 24; and Karen Human Rights Group, *Uncertain Ground: Landmines in Eastern Burma*, Thailand: KHRG, 2012, at 10.
[33] A local member of an international NGO involved in mine action and education, interview in Chiang Mai, 28 November 2012.
[34] Country director of an international mine action NGO, interview in Yangon, 6 September 2013.
[35] A local member of an international NGO involved in mine action and education, interview in Chiang Mai, 28 November 2012; senior staff member of an INGO working with EAOs and associated welfare organizations on the Thai-Burma border, interview in Chiang Mai, 3 October 2014; a member of the leadership of an EAO, interview in Mae Sot, 4 December 2012.
[36] Member of a local NGO 'A' involved in MRE in Karenni state, interview in Loikaw, 3 September 2014.
[37] Senior member of an NGO working with EAOs and EAO-associated welfare organizations on the Thai-Burma border, interview in Chiang Mai, 3 October 2014

at least warning civilians of the location of landmines. "Only the DKBA let the civilians know, 'You can't go there.' They need to protect their name because people support them as of right now."[38] The KNLA and DKBA have also been reported as sometimes placing signs to warn of mined areas, often with economic value, although this has been inconsistent.[39]

The main activity undertaken by EAO-associated welfare actors to ameliorate the landmine problem in southeast Myanmar has been through facilitating mine risk education (MRE). A 2011 report into the landmine situation there identified 15 community-based organizations (CBOs) that were able to conduct MRE in conflict-affected areas. Ten out of 15 CBOs in the report had cross-border access and facilitated via non-State EAOs.[40] The role of EAO-associated welfare actors in conducting MRE was also identified in interviews:[41] "[W]e try to discuss with the KNPP, because … they have a group who is doing MRE."[42] This recalls Podder and Mampilly's identification of service provision by armed groups to build legitimacy and Petrasek and Wigger's points about the role of armed group-associated civil societies. However, civil society's role in the provision of MRE is less direct advocacy to EAO leaders than mere service provision. On the other hand, it was also indicated that advocacy was sometimes expressed to EAO leaders through informal channels.[43]

Despite new bilateral ceasefires since 2012 with EAOs in southeast Myanmar, international mine action NGOs have yet to start de-mining in former conflict areas,[44] although limited non-technical surveys (NTS) have been conducted in a few instances.[45] However, these

[38] Former DKBA soldier, interview in Mae Sot, 21 October 2012.
[39] Geneva Call and DCA Mine Action (see note 32 above); Karen Human Rights Group, *Abuses Since the DKBA and KNLA Ceasefires: Forced Labour and Arbitrary Detention in Dooplaya* (KHRG #2012-F2), Thailand: KHRG, 2012; and Karen Human Rights Group, *The Impact of Anti-Personnel and Other Mines in Southeast Myanmar Since the January 2012 Ceasefire*, Thailand: KHRG, 2014.
[40] Geneva Call and DCA Mine Action (see note 32 above), at 19.
[41] Local member of an INGO involved in MRE in Karenni state, interview in Loikaw, 2 September 2014; member (with access to EAO areas) of a local NGO involved in MRE in Karenni state, interview in Loikaw, 4 September 2014; senior member of a Karen cross-border CBO involved in MRE, interview in Chiang Mai, 12 October 2014; and a local member of an international NGO involved in mine action and education, interview in Chiang Mai, 28 November 2012.
[42] Local member of an INGO involved in MRE in Karenni state, interview in Loikaw, 2 September 2014; member (with access to EAO areas) of a local NGO involved in MRE in Karenni state, interview in Loikaw, 4 September 2014.
[43] Senior member of an INGO network engaging with EAOs in Burma on the landmine issue, interview in Bangkok, 12 October 2014; local member of an INGO involved in MRE in Karenni state, interview in Loikaw, 2 September 2014; and member (with access to EAO areas) of a local NGO involved in MRE in Karenni state, interview in Loikaw, 4 September 2014.
[44] Crowther, G, Dresner, J, and Aron, M, 'Mine action in Burma: Building trust and incremental gains' *Journal of Conventional Weapons Destruction*, 2017, Vol 21, No 2, pp 38-43, at 39.
[45] "The term non-technical survey encompasses all non-technical means, including desk assessments, analysis of historical records and a wide range of other information gathering and analysis functions, as well as physical visits to field locations. All elements of the nontechnical process revolved around identifying, accessing, collecting, reporting and using information to help define where mines/ERW are to be found, as well as where they are not, and to support land cancellation, reduction and clearance decision-making processes" (United Nations Mine Action Service (UNMAS), *International Mine Action Standard: Non-Technical Survey*, New York, NY: UNMAS, 2013).

have been limited and tightly controlled by the government and military in terms of where they are permitted to operate.[46]

Another difficulty in conducting surveys of mined areas lies in the need of some EAOs to control their resources by the use of landmines.[47] This reflects the point often made in political economy-focused studies of armed groups, such as by Keen or Weinstein (as mentioned earlier in this article), concerning the negative impacts of EAO economic agendas on civilian populations exposed to them. However, a point of difference is that these threats to civilian safety occurred through a more indirect route. In other words, by laying landmines, EAOs sought merely to secure economic resources; their aim was not to directly target populations or drive them from resource-rich areas.

> Maybe there is a forest and they want to protect it, they don't want people to do logging or anything like that, they go, "Oh, we have planted the landmines."[48]

> They may also have perceived benefits in landmines in terms of protecting resources, and obviously land allocation is a huge sticking point.[49]

Compounding the problem of landmine use for economic purposes is the lack of cohesion and central control in some EAOs. For example, DKBA, which operated in conjunction with the Tatmadaw in Karen State against KNU between 1994 and 2010, was noted for its loose decentralized command structure and autonomous, and often economically motivated, actions.[50] A consequence of this was the use of landmines by some commanders for localized economic objectives. For example, in 2009 and 2010, two of the four DKBA brigades deployed landmines in an area of Karen state where they were undertaking gold mining activities.[51]

In terms of external humanitarian engagement with EAOs on landmines, the International Campaign to Ban Landmines (ICBL) facilitated an MRE programme with the KNU in the early 2000s. The project included development of teaching materials and posters to raise awareness of the problem. The local partner working with the ICBL on KNU's MRE initiatives was a local medical NGO that had won acceptance from KNU.[52] This

[46] Country director of an international mine action NGO, interview in Yangon, 6 September 2013; and representative of an international mine action NGO, interview in Yangon, 15 September 2014.
[47] Geneva Call and DCA Mine Action (see note 32 above), at 13; Karen Human Rights Group (see note 32 above), at 34-35, 41.
[48] A local member of an international NGO involved in mine action and education, interview in Chiang Mai, 28 November 2012.
[49] Country director of an international mine action NGO, interview in Yangon, 6 September 2013; a local member of an international NGO involved in mine action and education, interview in Chiang Mai, 28 November 2012.
[50] Karen Human Rights Group (KHRG), *Abuse Under Orders: The SPDC and DKBA Armies Through the Eyes of Their Soldiers*, Thailand: KHRG, 2001; Kenny (see note 22 above); and South, A, *Burma's Longest War: Anatomy of the Karen Conflict*, Amsterdam, Netherlands: Transnational Institute/Burma Centre Netherlands, 2011.
[51] Karen Human Rights Group (see note 32 above), at 34-35, 41.
[52] Moser-Puangsuwan, Y, 'Mine risk education in Kawthoolei liberated area: An experiment in creating a program of MRE in a non-state-controlled area of Burma' *Journal of ERW and Mine Action*, 2004, Vol 8, No 2.

again reiterates the point raised by Petrasek and Wigger respectively about the role of trusted local CSOs to access and influence armed group leadership. In relation to differing international and local perceptions of legitimacy, however, concern was expressed by KNU at the time that the program could be "a covert attempt to create opposition to their policies within their own constituency."[53]

5.1 EAO statements and expressions of humanitarian norm compliance regarding landmines

No EAOs in southeast Myanmar have formally renounced landmine use or entered into formal agreements with UN agencies or INGOs (international NGOs) involving action plans for surveys and clearance. However, some EAOs have issued statements limiting their landmine use out of concern for civilian populations, both individually and in statements as an EAO coalition through the Democratic Alliance of Burma (DAB).[54] The DAB statement claimed its EAO members "must temporarily continue to use landmines for defending their peoples," but also urged them to:

(1) Take all possible measures to prevent harm to villagers and refugees;
(2) Seek ways and means to reduce landmine use to a minimum;
(3) Subject the use of landmines to strict rules and supervision; and
(4) Work together with the civilian population to reduce the risk of landmines.[55]

KNPP, in a 2006 unilateral statement also claimed that, "our use of landmines is extremely limited and steps are taken to avoid civilian casualties."[56]

While these claims may be debateable, in terms of EAOs trying to shape perceptions, these statements portray the groups as being essentially protective of their constituency in line with their claims to representativeness and legitimacy. However, as regards local legitimacy, an international humanitarian actor engaging with EAOs explicitly identified the link between perceptions of legitimacy and landmine use: "Their political legitimacy to a certain extent depended on landmine use."[57] Landmines enable militarily weaker EAOs to hold territory and be perceived as credible conflict actors by their opponents and, to some extent, by those they claim to represent. This in turn may eventually help gain them an EAO seat at the negotiating table.

[53] Moser-Puangsuwan (see note 52 above).
[54] The DAB was an EAO alliance (including the KNU, KNPP, NMSP, and other EAOs and pro-democracy Burman groups such as the ABSDF) formed in the late 1980s which is now defunct having been superseded by other EAO alliances involved in negotiations towards the Nationwide Ceasefire Agreement in 2015, and into signatory and non-signatory EAO blocs since then.
[55] Geneva Call, 'Democratic Alliance of Burma issues its position on landmines' Geneva Call, 8 June 2007, available at https://genevacall.org/democratic-alliance-burma-issues-position-landmines/, accessed on 18 August 2016.
[56] Karenni National Progressive Party, 'Statement no 02/06: Statement on the use of landmines' available at http://theirwords.org/media/transfer/doc/1_mm_knpp_ka_2006_12-0990488def9ef0266e1175df6b9743d7.pdf, accessed on 12 August 2018.
[57] Senior member of an INGO network engaging with EAOs in Burma on the landmine issue, interview in Bangkok, 12 October 2014.

From early 2000, Geneva Call engaged with Myanmar EAOs to promote their deed of commitment (DoC) to end landmine use. Essentially a form of unilateral declaration, the DoC comprises one means available to non-State armed groups to express compliance with international humanitarian norms.[58] In the early stages of Geneva Call's global promotion of the DoC on landmines in Myanmar, the Arakan Rohingya National Organization (ARNO) and the National Unity Party of Arakan (NUPA), two smaller EAOs in western Myanmar, approached the NGO to sign the DoC.[59] As mentioned previously, this brings to mind the potential legitimacy that can be gained from joining such agreements. However, despite being the first EAOs to sign the DoC (in 2003), neither are now militarily active. These examples suggest groups with a small political and military impact or presence, may view such agreements as a way to bolster their perceived legitimacy. Nevertheless, this may not be matched by their real military presence on the ground. More recently, in relation to Geneva Call's advocacy role on landmines, KNU leadership pointed specifically to the NGO's influence to explain their reduced landmine use.[60]

A formal agreement that has more recently acknowledged landmine use by EAOs and the Tatmadaw is the NCA and its accompanying code of conduct. Negotiated by the government and the Tatmadaw with a subset of eight EAOs between 2013 and 2015, the NCA recalls another means of compliance with humanitarian norms outlined earlier in this article – the inclusion of IHL/IHRL norms in peace or ceasefire agreements between governments and non-State armed groups. Chapter Three of the NCA specifically mentions landmine use. [61] The Tatmadaw and EAOs agree to:

> Undertake de-mining activities to clear mines laid by troops from all sides in accordance with the progress of the peace process and coordinate mine action activities in close consultation with the Government of the Republic of the Union of Myanmar.[62]

However, while a positive sign, there are no specific references to EAO or Tatmadaw obligations in IHL or IHRL, or further details about the prohibition of landmine use, clearance, fencing, or landmine signage.[63]

In summary, EAO use, production, and stockpiling of landmines has continued despite local and international humanitarian advocacy to ameliorate or prohibit their use. The few

[58] Geneva Call has engaged with armed groups globally on humanitarian norms since the early 2000s. Initially, it focused on the issue of landmines and developed a DoC for armed groups that reflected the State-based Ottawa treaty banning landmine use by States. Geneva Call has since also developed further DoC applying to armed non-State actors addressing the issues of children affected by armed conflict and gender-based violence.
[59] Representative of Geneva Call, interview, 16 August 2013.
[60] A member of KNU leadership, email correspondence, 8 November 2013.
[61] The Nationwide Ceasefire Agreement between the Government of the Republic of the Union of Myanmar and Ethnic Armed Organizations, Chapter III, ss.5(a) and (e).
[62] The Nationwide Ceasefire Agreement between the Government of the Republic of the Union of Myanmar and Ethnic Armed Organizations, Chapter III, s.5(e).
[63] The lack of specific details on mine action and the absence of reference to IHL or IHRL was also commented on by an observer to the drafting of the NCA, interview, 21 October 2014.

EAOs that relinquished their use in the past, while seeking international legitimacy through the making of unilateral declarations, were not or are no longer militarily significant. Instead, EAO welfare organizations and CSOs, sometimes working in conjunction with INGOs, undertake MRE to ameliorate the effects of EAO and Tatmadaw landmine use. Further, EAOs were much more likely to warn civilians verbally of possible landmines over other physical forms of warning like signage or fencing. To justify their use, EAOs claim military necessity, the protection of economic resources, and the maintenance of local perceptions of legitimacy (both to opponents and constituents), the sum of which has tended to impede further progress towards the serious restriction of EAO landmine use.

6.0 EAOs and underage recruitment

Up to the early 2000s, virtually all EAOs in the southeast of Myanmar were identified as having children in their armed wings. In 2002, a Karenni Army general estimated that up to 20% or 200-250 of his force of 1000-1200 soldiers may have been underage. Similarly, a KNU leader in 2002 also acknowledged that out of a total estimated force of 3-5000, 150 were children, albeit mostly in non-combat roles. Former DKBA soldiers claimed 40-50% of new recruits were under 18 in 2002. Children were also observed manning MNLA checkpoints, although total numbers are unknown.[64] These self-admitted numbers and external observations clearly indicate that children were in the ranks or have been associated with EAOs in the past. Thus, KNU/KNLA, KNPP/KA, and DKBA, in addition to the Tatmadaw, remained on the UN's list of armed actors still using child soldiers in Myanmar in 2016.[65]

Potential reasons for children joining EAOs include revenge, family or ethnic loyalty, as well as economic pressures, and the need to meet recruitment quotas imposed by EAOs.[66] These themes were reiterated in interviews for this study.[67] The sending of children in place of economically more productive adults to meet EAO recruitment quotas was also raised.[68] Another path by which children are recruited involves EAO-associated institutions such as schools or training centres as illustrated by KIO/KIA in northern Myanmar.[69] In a related point, post-2010 DKBA moved children from its ranks into DKBA-associated

[64] Human Rights Watch, "*My Gun was as Tall as Me." Child Soldiers in Burma*, New York, NY: Human Rights Watch, 2002, at 124, 137, 133-134, 144-145.
[65] Office of the Special Representative of the Secretary General for Children and Armed Conflict, 'Myanmar' 20 April 2016, available at https://childrenandarmedconflict.un.org/countries-caac/myanmar/, accessed on 10 September 2016.
[66] Child Soldiers International, *Chance for a Change: Ending the Recruitment and Use of Child Soldiers in Myanmar*, London, UK: Child Soldiers International, 2013; and Human Rights Watch, *Sold to be Soldiers: The Recruitment and Use of Child Soldiers in Burma*, New York, NY: Human Rights Watch, 2007.
[67] Former EAO child soldier via translator, interview in Mae Sot, 21 October 2012; local member of an NGO that worked in KIO controlled areas of Kachin state, interview in Yangon, 22 August 2013; senior member of a UN agency working on child soldier issues, interview in Yangon, 13 December 2012; and director of a CBO working with former child soldiers, interview in Mae Sot, 30 August 2012.
[68] Senior member of a UN agency working on child soldier issues, interview in Yangon, 13 December 2012.
[69] Child Soldiers International, *A Dangerous Refuge: Ongoing Child Recruitment by the Kachin Independence Army*, London, UK: Child Soldiers International, 2015, at 16-20.

education and medical programs rather than keeping them as regular soldiers.[70] These examples demonstrate the often indirect connections or pathways by which children may become involved with armed groups.

A significant issue for some of the larger EAOs (e.g. pre-2010 DKBA when it was larger and the KNLA) is geographic dispersion and decentralized command structures. Local commanders may still recruit children or ignore the age of new recruits despite central policies demanding they refrain from doing so. DKBA was noted for its decentralized command system and for extractive relations with civilian populations which included the enforcement of recruitment quotas by local commanders.[71] Similarly, the seven KNLA brigades are spread over extensive and sometimes non-contiguous areas of southeast Myanmar adjacent to the Thai border from northern Karen state to Mon state and into the Tanintharyi region. As such, brigades often have considerable autonomy in their local operations. In addition, due to differing opinions and divisions between brigades, the KNU is fragmented, with some members joining the NCA and different factions contesting its internal leadership.[72] Organizational cohesion and the actions of local commanders in the case of KNLA were also raised in interviews[73] as were isolated incidents of underage recruitment by KNLA.[74] Recent human rights reports likewise noted the latter.[75]

6.1 EAO statements and expressions of humanitarian norm compliance regarding underage recruitment

Unlike the issue of landmines, most EAOs have been sensitive to criticism over the recruitment of children. Underage recruitment in EAOs has been highlighted in the past through reports by local and international human rights NGOs and UN agencies.[76] The potential loss of international and local legitimacy for contravening this international norm has proved a concern for EAOs although their Tatmadaw opponents have also been criticized for the same offence.[77] Recalling the literature on humanitarian engagement with

[70] Former DKBA soldier, interview in Mae Sot, 21 October 2012; consultant and researcher working on child soldier and IDP issues who had accessed DKBA areas in 2013, interview, 6 December 2013; and director of a CBO working with former child soldiers, interview in Mae Sot, 30 August 2012.

[71] Karen Human Rights Group, *Forced Recruitment by DKBA Forces in Pa'an District* (KHRG #2008-B8), Thailand: KHRG, 24 September 2008; Kenny (see note 22 above); and South (see note 50 above).

[72] Brenner (see note 23 above); and Jolliffe (see note 23 above).

[73] Director of a CBO working with former child soldiers, interview in Mae Sot, 30 August 2012; former staff member of a local human rights NGO who engaged with EAOs on the child soldier issue, interview, 2 June 2015.

[74] Members of an international humanitarian agency, interview in Hpa-an, 26 August 2014.

[75] Karen Human Rights Group, *The Death of Saw Hpah Mee (13 November 2015)* (KHRG #16-4-NB1), Thailand: KHRG, 21 July 2016; and Karen Human Rights Group, *Forced Recruitment of a Child Soldier by KNLA in Kyainseikgyi Township*, *Dooplaya District* (KHRG #15-17-NB1), Thailand: KHRG, 23 October 2015.

[76] Human Rights Education Institute of Burma, *Forgotten Future: Children Affected by Armed Conflict in Burma*, Chiang Mai, Thailand: HREIB, 2008, at 56-62; Human Rights Watch (see note 66 above), at 94-117; and United Nations Human Rights Council, 'Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict, Radhika Coomaraswamy' 28 June 2012, A/HRC/21/38, available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-38_en.pdf, accessed on 12 August 2018, at 20.

[77] Child Soldiers International, *Under the Radar: Ongoing Recruitment and Use of Children by the Myanmar Army*, London, UK: CSI, 2015; Human Rights Watch (see note 66 above); Office of the Special Representative of the Secretary General for Children and Armed Conflict (see note 65 above).

armed groups, Florquin et al, pointed out that incentives for armed groups to comply with IHL include the "moral high ground." Concerns about legitimacy have also been applied as part of the humanitarian strategy to engage with EAOs.

> The strategy we used with them – in the annual reports of the Secretary General they have a list of the non-State armed groups, 8 or 9, so I said to them, "See, you know it could happen to you, you could be on the list and it's very difficult to delist once you are on the list."[78]

Sensitive to criticism over this issue, KNU, KNPP, and NMSP released statements and developed policies in the 2000s to formally prohibit underage recruitment.[79] Employing another means of expressing compliance with IHL/IHRL through the use of internal regulations, KNU/KNLA issued orders to commanders in 2003 not to recruit children under 18 years of age.[80,81] Accordingly, in 2006, KNPP stated that,

> In view of the fact that our Constitution clearly prohibits the recruitment of child soldiers, we, the KNPP, would publicly like to reiterate our stance that we do not conscript underage youths, or even adults, to be soldiers in the movement against the Burmese regime.[82]

A member of KNPP leadership reiterated this position in an interview: "According to the constitution we also prohibit the Karenni Army to recruit young people under the age of 18." Likewise, NMSP leadership stated: "We understand … in the constitution of NMSP and also MNLA [that] this is the policy. They already include the child protection policy [and the] child protection law."[83]

In 2007, the KNU and KNPP through engagement with UNICEF, declared their compliance with the policy via unilateral declaration in a DoC.[84] However, at the time, this engagement with EAOs was opposed by the Myanmar government due to concerns about the potential legitimacy it could confer on them.[85] As the Director of a local NGO put it: "They [the Myanmar government] did not like UNICEF in Burma to get involved because they think it gives legitimacy to the armed groups, so it stopped."[86] The verification

[78] Director of a local human rights NGO who engaged with EAOs on the child soldier issue, interview in Mae Sot, 15 September 2012.
[79] Human Rights Watch (see note 66 above).
[80] These orders were also mentioned by a Director of a CBO working with former child soldiers, interview in Mae Sot, 30 August 2012.
[81] Human Rights Watch (see note 66 above), at 102-103; Child Soldiers International (see note 66 above), at 30.
[82] Karenni National Progressive Party, 'Statement no 01/06: Statement on the use of child soldiers' 31 August 2006, available at http://theirwords.org/media/transfer/doc/mm_knpp_ka_2006_13-d977939e975759722973c131c83edf89.pdf, accessed on 12 August 2018.
[83] A member of the leadership of an EAO, interview in Sangkhlaburi, 13 November 2012.
[84] Human Rights Watch (see note 66 above).
[85] A member of an international humanitarian NGO involved in engagement with EAOs, interview, 19 September 2013; former staff member of a local human rights NGO who engaged with EAOs on the child soldier issue, interview, 2 June 2015.
[86] Director of a local human rights NGO who engaged with EAOs on the child soldier issue, interview in Mae Sot, 15 September 2012.

process required by the UN action plan was, therefore, unable to proceed without the acquiescence of the host State. This is further evidence of the significance of perceived legitimacy, not only to armed groups, but also to the recognised State in conflict with it. This reflects Steinhoff's point about opposition from recognised States to engage with IHL and armed groups due to concerns that such groups may gain perceived legitimacy as a result of it.

A local Burmese-led, but at the time Thai-based NGO,[87] is notable here for sustained engagement with EAOs on the child soldier issue prior to the international role of Geneva Call from around 2010 onwards. Most of this work was conducted cross-border or in third-party States due to the Myanmar government's objection to humanitarian engagement with EAOs inside the country. This engagement involved meeting leadership to advocate for, and convince them of, the value of complying with the norms to protect and refrain from recruiting children, and to allow such actors to undertake training with the EAO.[88] It also involved related human rights training with local communities and foot soldiers.[89]

To justify non-implementation, some interviewees mentioned existing orders and EAO internal regulations. In addition, the role of autonomous local commanders (in geographically dispersed and less cohesive EAO units) was also mentioned.

> They pointed to regulations that they had, but it was unclear how they were enforced, and the consequences for breaching any of the codes … Some acknowledged there were children in their ranks, and that they were sort of recruited by some rogue elements within the army.[90]

Since 2010/2011, Geneva Call has engaged with Myanmar EAOs on the child soldier issue. Between 2012 and 2014, KNPP, NMSP, and KNU as well as the Chin National Front and the Pa'O National Liberation Organization issued unilateral declarations in the form of the Geneva Call's DoC to protect children from the effects of armed conflict.[91] The DoC requires EAOs to not only prohibit direct recruitment of children, but also to take measures to demobilise those still in their ranks, and to protect children from the effects of armed conflict more broadly.[92] Geneva Call's approach to EAOs involved meeting with leadership to identify common ground in terms of the protection of children and civilians,

[87] Anonymity for security reasons is maintained for this organization as it has been for individuals and other local CSOs interviewed for this paper.
[88] A member of a local human rights NGO who engaged with EAOs on the child soldier issue, interview in Chiang Mai, 23 October 2012.
[89] Director of a local human rights NGO who engaged with EAOs on the child soldier issue, interview in Mae Sot, 15 September 2012.
[90] Former staff member of a local human rights NGO who engaged with EAOs on the child soldier issue, interview, 2 June 2015.
[91] Geneva Call, 'Burma/Myanmar' Geneva Call, 2015, available at http://www.genevacall.org/where-we-work/burma-myanmar/, accessed on 5 August 2016.
[92] 'Deed of Commitment under Geneva Call for the Protection of Children from the Effects of Armed Conflict,' available at https://genevacall.org/wp-content/uploads/dlm_uploads/2013/12/DoC-Protecting-children-in-armed-conflict.pdf, accessed on 13 August 2018, at 2.

and what Geneva Call could, and could not, offer the EAO in terms of cooperation and incentives.[93] An observer also pointed to the influence of perceived international legitimacy: "There was a sense that signing this commitment held more weight. That they were bringing some legitimacy."[94]

However, EAO funding and capacity to implement such measures may also inhibit effective implementation. EAO leaders mentioned a lack of funding support to address the issues they had committed to. This was also mentioned in relation to changes in the priorities of international donors who moved funds away from border-based health and education CSOs to INGOs and national NGOs working inside Myanmar through government channels.[95] Recalling Bruderlein's point about the lack of capacity of some armed groups to practically implement agreements: "The demobilization of child soldiers requires not only the withdrawing of their weapons, but also the provision of educational and nutritional programmes for years to come."[96]

As with landmines, non-recruitment of children has also been included within the NCA. EAOs and government forces are to "avoid killing or maiming, forced conscription, rape or other forms of sexual assault or violence, or abduction of children."[97] However, the agreement does not express a minimum age of recruitment or specify obligations for armed actors to provide support to demobilized children in their areas of control.

7.0 Challenges and opportunities in addressing landmines and underage recruitment

Developments with EAOs on these two issues over the last five to six years reflect the host State's recent practice. Myanmar has not joined the Ottawa treaty banning landmines, just as EAOs have persisted in their use of landmines. Recent armed conflicts in Kachin, Shan, and Rakhine states have often featured reports of new landmine use by all armed actors and the resulting casualties.[98]

However, since 2012, the Tatmadaw has entered into an action plan with the UN to remove children from its ranks. In the case of EAOs, the new civilian government, with

[93] Representative of Geneva Call, interview, 16 August 2013.
[94] Former staff member of a local human rights NGO who engaged with EAOs on the child soldier issue, interview, 2 June 2015.
[95] A member of the leadership of an EAO 'A,' interview in Sangkhlaburi, 13 November 2012; a member of the leadership of an EAO 'B,' interview in Sangkhlaburi, 13 November 2012; and a senior staff member of a local human rights NGO who engaged with EAOs on the child soldier issue, interview in Chiang Mai, 23 October 2012.
[96] Bruderlein (see note 11 above), at 16.
[97] The Nationwide Ceasefire Agreement between the Government of the Republic of the Union of Myanmar and Ethnic Armed Organizations, III, s.9(n).
[98] Nyein Nyein, 'Landmine campaigners urge action as casualties continue to rise' The Irrawaddy, 4 April 2018, available at https://www.irrawaddy.com/news/landmine-campaigners-urge-action-casualties-continue-rise.html, accessed on 12 August 2018; and Vrieze, P, 'Myanmar villagers caught in crossfire as Kachin conflict flares' UNHCR, 9 April 2018, available at http://www.unhcr.org/news/latest/2018/4/5acb37464/myanmar-villagers-caught-crossfire-kachin-conflict-flares.html, accessed on 12 August 2018.

agreement from the Tatmadaw, may now potentially allow a similar formal UN process and implement action plans to formally verify the removal of children from EAOs (at least NCA signatories), especially if they have already unilaterally declared through a DoC to do so. Recently, UNICEF resumed engagement with KNU (an NCA and Geneva Call DoC signatory) to end all underage recruitment.[99] This is a potential step towards the KNU eventually being removed from the UN's list of armed groups still using child soldiers.

One potential way forward on the landmine issue is the initial removal of landmines from non-strategic areas frequently used by civilians.[100] In past periods of conflict, mines were laid in all areas and now pose a constant threat to civilians while no longer serving a military purpose. In the meantime, landmines currently defending or demarcating EAO or government areas could remain while lengthy ceasefire negotiations continue.[101] This humanitarian mine clearance would therefore not threaten the present strategic interests of armed actors, and could also serve as a trust-building exercise with the oversight or active involvement of EAO authorities and support from associated welfare organizations and CSOs. Such activities would move EAOs towards compliance with international humanitarian norms and further build local legitimacy through commitments to protect civilian populations within their areas of control.

In addition, the role of local CSOs as potential partners to international mine action NGOs, will be important especially when they are able to access post-conflict areas. At such a time, international actors would need to negotiate with both government and EAOs, grasp which actors have knowledge of mined areas and which have the authority to clear them. This issue came to the fore in 2016 when the Myanmar military proposed mine clearance pilot projects in Karen state to NCA signatory EAOs.[102]

8.0 Conclusion

Overall, among EAOs in southeast Myanmar, there has been more acceptance of the humanitarian norm applying to the non-recruitment of children than the prohibition on landmine use. Concerns about legitimacy and the advocacy of local civil society in conjunction with international agencies have promoted the norm against underage recruitment and its broad acceptance by the EAOs considered in this article. Such EAOs have issued statements, internal regulations, and unilateral declarations in the form of DoCs to uphold this norm. However, isolated instances of underage recruitment often associated with EAO geographic dispersion and decentralization are still reported, despite

[99] Burma News International, 'UNICEF and KNU raise awareness on use of child soldiers' Burma News International, 16 September 2016, available at http://bnionline.net/news/karen-state/item/2314-unicef-and-knu-raise-awareness-on-use-of-child-soldiers.html, accessed on 18 September 2016.

[100] A small initiative to do this type of humanitarian de-mining in EAO areas was started on the Thai-Myanmar border but it suffered from lack of funding and the loss of its local director in 2014.

[101] International technical de-mining consultant working with a local CBO, personal communication in Mae Sot, 25 June 2014.

[102] Mizzima News, 'Myanmar military proposes Karen State as a pilot area for removal of landmines' Mizzima News, 16 September 2016, available at http://www.mizzima.com/news-domestic/myanmar-military-proposes-karen-state-pilot-area-removal-landmines, accessed on 12 August 2018.

its prohibition by central leadership.

Landmines have remained central to the defensive and military capacity of most significant EAOs. Use of landmines to protect resources, to safeguard localized economic agendas or on behalf of external business interests, has further complicated the landmine contamination problem and increased the risk to civilians. Moreover, geographic dispersion and organizational cohesion of EAOs in conjunction with the use of landmines to secure resources (as seen in the case of KNLA and DKBA) comprise other factors identified in this study impeding the restriction of landmine use.

The perception of legitimacy continues to be a significant factor in facilitating international attempts to improve EAO humanitarian norm compliance. This is most evident in EAO engagement on the child soldier issue and work on MREs. To some extent, the role of EAO-associated civil societies differs from the focus on advocacy to armed groups as cited, for example, by Petrasek and Wigger. Accordingly, local civil society close to EAOs often prefer to promote the prohibition of child recruits while playing more of a service role through MRE in the case of landmines. Thus, a trusted local CSO working with the International Campaign to Ban Landmines on a MRE program was able to engage with KNU. Likewise, civil society groups associated with KNPP have provided MRE to constituencies at risk from threats EAOs themselves were implicated in.

However, as Mampilly points out, armed groups seeking to gain support and legitimacy with both international actors and local populations also face competing priorities.[103] In this regard, Podder raises the concept of "local socio-political legitimacy" for armed groups.[104] In the case of EAOs in Myanmar, the influence of perceived legitimacy reflects this divergence between international support for the prohibition of landmine use and underage recruitment, and the local perceptions of both constituencies and government army opponents where being seen as a credible armed actor remains a priority.

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[103] Mampilly (see note 10 above), at 9.
[104] Podder (see note 10 above), at 15.

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ABBREVIATIONS AND ACRONYMS

ANSA	Armed non-State actors
ARNO	Arakan Rohingya National Organization
CBO	Community-based organizations
CSO	Civil society organizations
DAB	Democratic Alliance of Burma
DKBA	Democratic Karen Buddhist/Benevolent Army
DoC	Deed of commitment
EAO	Ethic armed organizations
ICBL	International Campaign to Ban Landmines
IHL	International humanitarian law
IHRL	International human rights law
INGO	International non-governmental organizations
KNPP/KA	Karenni National Progressive Party/Karenni Army
KNU/KNLA	Karen National Union/Karen National Liberation Army
MRE	Mine risk education
NCA	Nationwide ceasefire agreement
NTS	Non-technical surveys
NMSP/MNLA	New Mon State Party/Mon National Liberation Army
NGO	Non-governmental organizations
NUPA	National Unity Party of Arakan
OPAC	Optional Protocol to the Convention on the Rights of the Child applying to children and armed conflict

CHAPTER FOUR:

TECHNOLOGY AND HUMAN RIGHTS PROTECTION

MIGRANT WORKERS AND THE INFORMATION GAP: LEARNING FROM ICT-BASED INITIATIVES TO STRENGTHEN TRANSPARENCY AND THE ACCOUNTABILITY OF AGENCIES RECRUITING INDONESIAN MIGRANT WORKERS

Sri Aryani[*] *and M Irsyadul Ibad*[**]

Abstract

Particularly common in Southeast Asia, private actors play a vital role in facilitating aspiring migrant workers to work abroad. At some level, their services become indispensable and, in the case of Indonesia, private recruitment agencies—both in an aspiring worker's country of origin and in destination countries—are indeed legal. In fact, by law informal workers must use recruitment agency services. However, stories of abusive and exploitative practices by unscrupulous agents abound, many leading to mistreatment or even greater violations of migrant workers' human rights. Moreover, the Indonesian government has failed to hold these agencies to account.

This paper critically analyses a CSO-initiated model (PantauPJTKI) to monitor recruitment agencies by examining two components: recruitment practice enforcement and migrant workers' participation in the process. In the context of a rights-based recruitment agency framework, a particular emphasis is placed on the accountability of duty-bearers and the informed and empowered participation of migrant workers in key labour migration processes and decisions. The paper concludes that while current initiatives are not enough to encourage more ethical practices, an integration of government policies and monitoring systems such as PantauPJTKI, could serve to give migrant workers a platform and empower this hitherto marginalized group.

1.0 Introduction

Various studies have already analysed the role of the agents assisting migrant workers to navigate the complex bureaucracy of labour migration, thus, enabling them to become 'paper migrants' (i.e. documented or those who have managed to fulfil all governmental requirements by submitting the necessary documents).[1] Agents not only connect migrants with future employment abroad, but also assist in overcoming logistical challenges, often becoming a primary contact if the migrant faces problems overseas, or even offering emotional support.[2]

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[*] Justice Without Borders (JWB), Indonesia. The views and opinions expressed in this article are those of the authors and do not necessarily reflect the official policy or position of JWB.

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[1] Goh, C, Wee, K, and Yeoh, BSA, 'Migration governance and the migration industry in Asia: Moving domestic workers from Indonesia to Singapore' *International Relations of the Asia-Pacific*, 2017, Vol 17, No 3, pp 401-433; Lindquist, J, 'The elementary school teacher, the thug, and his grandmother: Informal brokers and transnational migration from Indonesia' *Pacific Affairs*, 2012, Vol 85, No 1, pp 69-89; Lindquist, J, 'Brokers, channels, infrastructure: Moving migrant labor in the Indonesian-Malaysian oil palm complex' *Mobilities*, 2017, Vol 12, No 2, pp 213-226; and Xiang, B, 'Predatory princes and princely peddlers: The state and international labour migration intermediaries in China' *Pacific Affairs*, 2012, Vol 85, No 1, pp 47-68.

[2] Battistella, G, 'Migration in Asia: In search of a theoretical framework' in Battistela, G (ed), *Global and Asian*

These intermediary actors can be both helpers and exploiters[3] – asymmetric relationships and dependency may put migrant workers in a particularly vulnerable position which could escalate violation of their rights and lead to abuse[4] even though both host and home countries have mechanisms in place to monitor and supervise such processes.[5] The key point then revolves around how effective the monitoring system is and whether a different approach would be more effective. The enforcement of rights and responsibilities, including ensuring the accountability of relevant duty-bearers, along with the informed and empowered participation of migrant workers in key processes and decisions, comprise two of the four main principles of a rights-based recruitment governance framework.[6]

Borrowing the above framework, this article attempts a critical analysis of the Indonesian government's mechanisms to ensure accountability, and a CSO-initiated (civil society organization) model to monitor recruitment agencies as part of an effort to empower migrants. Next, this article looks further at two components: recruitment practice enforcement and migrant worker participation. Accordingly, common recruitment practices in Indonesia are explored, especially how they contribute to the further vulnerability of migrant workers. The following section delineates the role and obligations of the government in monitoring recruitment agencies, in the process revealing some of the weaknesses including how inadequate enforcement may exacerbate abuse. Next, the model of PantauPJTKI as a participatory monitoring tool will be analysed, particularly how it contributes to the more effective supervision of agencies. The final section discusses how participation, empowerment, and accountability can improve recruitment practices in Indonesia.

2.0 Unscrupulous practices of private actors in Indonesia's recruitment agencies

Recruitment practices are extremely complex, involving various actors, routes, and channels. In Indonesia, Law No 18/2017[7] recognizes at least three types of channels: (1)

Perspectives on International Migration, Switzerland: Springer International Publishing, 2014, pp 1-25; Elrick, T, and Lewandowska, E, 'Matching and making labour demand and supply: Agents in Polish migrant networks of domestic elderly care in Germany and Italy' *Journal of Ethnic and Migration Studies*, 2008, Vol 34, No 5, pp 717-734; Lindquist, J, 'Labour recruitment, circuits of capital and gendered mobility' *Pacific Affairs*, 2010, Vol 83, No 1, pp 115-132; Lindquist 2012, 2017 (see note 1 above); Xiang, B, 'Labor transplant: 'Point-to-point' transnational migration in East Asia' *South Atlantic Quarterly*, 2012, Vol 111, No 4, pp 721-739; and Xiang, B, 'Predatory princes and princely peddlers: The state and international labour migration intermediaries in China' *Pacific Affairs*, 2012, Vol 85, No 1, pp 47-68.

[3] Agunias, DR, 'Regulating private recruitment in the Asia-Middle East labour migration corridor' 2012, available at https://www.migrationpolicy.org/pubs/Labor-recruitment.pdf; Aryani, S, *Perempuan Pekerja Rumah Tangga Migran Dalam Global Care Chain: Studi Kualitatif tentang Pekerja Rumah Tangga Indonesia di Singapura Sri Aryani*, Universitas Indonesia, 2012; and Castles, S, and Miller, MJ, *The Age of Migration: International Population Movements in the Modern World*, 3rd ed, London: Palgrave-McMillan, 2003.

[4] Elrick and Lewandowska (see note 2 above).

[5] International Organization for Migration (IOM), *Labour Migration from Colombo Process Countries: Good Practices, Challenges, and Way Forward*, IOM, 2011, available at http://publications.iom.int/system/files/pdf/colomboprocessstudy_final.pdf, accessed on 17 August 2018.

[6] Farbenblum, B, 'Governance of migrant worker recruitment: A rights-based framework for countries of origin' *Asian Journal of International Law*, 2017, Vol 7, No 1, pp 152-184.

[7] Also on migrant workers, Law No 18/2017 replaced Law No 39/2014. The former replaced the wording

those who use recruitment agency services; (2) those joining government-to-government programs in which the government facilitates placements to specific countries; and (3) those self-arranging work abroad.

In practice, these three recruitment schemes often involve individuals serving as intermediaries. Formal recruitment practices only recognize *petugas lapangan* or field officers, as an extension of recruitment agencies on the ground – they can only represent one recruitment agency. Aspiring migrant workers must therefore register with certified field officers or recruiters (also called *sponsor dalam*) using the government's registration system. However, the *sponsor dalam* do not necessarily have a direct connection to aspiring migrant workers. Instead, many may find themselves talking to a *sponsor luar* who provides them with information, makes promises, and takes care of their documentation once they have agreed to work abroad.

In some instances, sponsors do not only approach the workers themselves but also their families by offering *uang saku* or pocket money as a bonus if a family agrees to allow an aspiring migrant worker to leave. Payment of this fee usually occurs in two instalments: before approval is given and once the aspiring worker passes a medical examination. In reality, this pocket money will be added to his/her migration cost, thus raising the amount of money a worker will need to reimburse to the agent through salary deductions.

The *sponsor luar's* connection to the migrant worker can take various forms including a neighbour, friend, relative, or even the head of the village. For this kind of service, recruitment agencies pay the sponsor up to US$250 per person.[8] Despite the work they do to fulfil legal requirements, *sponsor luars* are technically considered illegal. Accordingly, use of this practice blurs the demarcation between legal and illegal, formal and informal arrangements.[9]

These practices are problematic for several reasons. First, recruitment at the village level is often a one person operation leaving sponsors free to provide biased information. Despite this, information from this source may be more trusted than official advice from field officers. Further, since the latter may only be connected to one or limited numbers of recruitment agencies, aspiring migrant workers will generally rely on sponsors, who may be attached to many more, to choose a recruitment agency.

Second, brokerage fees increase the cost of migration significantly, often causing it to surpass the government mandated ceiling. While technically illegal, charging excessive fees for Indonesian migrant workers going to Asia Pacific countries such as Singapore, Hong Kong, and Taiwan, is common. In Singapore, migrant workers usually toil for six months without pay to cover this cost while in Hong Kong they reimburse it by surrendering half their salary for five months. In Taiwan, the fee can take from 6-10 months to repay.

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of PPTKIS with Perusahaan Perekrutan Pekerja Migran Indonesia (P3MI). For consistency, the authors have decided to use 'PPTKIS.'

[8] The Institute of Ecosoc Rights and Trade Union Rights Centre, *Menangani Perbudakan Modern Dari Desa: Rancang Bangun Peraturan Daerah Berbasis Perlindungan*, 2008.

[9] Lindquist 2010 (see note 2 above); and Lindquist 2012 (see note 1 above).

To ensure all costs are covered, both sponsors and recruitment agencies apply various techniques to force migrant workers to continue working until the debt is paid. Where a migrant worker returns home before the salary deduction is complete, both recruitment agencies and the sponsor may refuse to hand over his/her personal documents (e.g. education certificates and land deeds) until at least some of the money is repaid. It has also been reported that recruitment agencies may dispatch returning migrant workers to other locations upon arrival at the airport, or even detain them at their premises until they agree to be flown elsewhere.

Third, because sponsors depend on large numbers of clients to make their businesses viable, fabrication of migrant worker documents to ensure eligibility is common,[10] again increasing their vulnerability. For example, in 2013, the Indonesian Regional Representatives Council (DPD) highlighted the massive falsification of identity papers of prospective migrant workers.[11] Likewise in 2016, hundreds of Indonesian migrants in Hong Kong were at risk of immigration sanctions leading the local Indonesian Consulate General in conjunction with the central government, to develop a single identity number. As migrant worker passports were hastily modified, such persons risked being accused of entering Hong Kong under falsified documents. Indeed, one Indonesian migrant worker has been jailed while others await charges.[12]

Systemic misconduct can also be seen at private recruitment agencies, ranging from breach of contract to failure to provide proper training, or failure to include clients in mandatory insurance schemes. By law, prospective migrant workers in informal sectors must seek the aid of recruitment agencies including those employed by individuals. As the majority of Indonesians work in informal sectors,[13] by default, recruitment agencies play a vital role in the labour migration industry. As of 2018, there were 443 active agencies listed providing various services including training, document facilitation, the provision of health examinations, and job placement.

2.1 Role and obligations of the Indonesian government: Regulating private recruitment

2.1.1 Ensuring the accountability of recruitment agencies: Regulating and monitoring private recruitment agencies

Indonesian law does not acknowledge the role of individual recruitment brokers; such practices are considered illegal. Instead, the government is mandated to monitor and supervise the practices of recruitment agencies although it has to be said, most responsibility

[10] The age, address, name, marital status, identity card, and even pictures of migrants may be fabricated (Ecosoc - note 8 above, at 19).
[11] DPD RI, Keputusan Dewan Perwakilan Daerah Republik Indonesia No 13 /DPD RI/ I /2013-2014 Tentang Hasil Pengawasan Dewan Perwakilan Daerah Republik Indonesia Atas Pelaksanaan Undang-Undang Republik Indonesia No 39 Tahun 2004 Tentang Penempatan dan Perlindungan T, 2013.
[12] Kenlim, B, 'Koreksi Data, BMI Dipenjara, Salah Siapa' Voice of Migrant, 2016, available at https://issuu.com/infest/docs/buletin_voice_of_migrants__vom__bmi_f32cb6c3dacab0, accessed on 17 August 2018.
[13] BNP2TKI (National Agency for the Placement and Protection of Indonesian Migrant Workers), 'Official Data of Indonesian Migrant Workers Placement' available at http://www.bnp2tki.go.id/uploads/data/data_01-02-2016_122032_Laporan_Pengolahan_Data_BNP2TKI_TAHUN_2015.pdf, accessed on 17 August 2018.

to protect workers is shared with the agencies themselves. Indeed, the government often relies on agencies to solve migrant worker problems. Thus, when faced with an issue such as unpaid wages, the government will generally contact her/his recruitment agency and ask it to take responsibility.

In addition to the contract between employers and workers, this joint liability is also reflected in the existence of placement agreements which hold recruitment agencies accountable for individual migrant workers. Placement agreements also regulate other agency obligations, e.g. the law fixes a ceiling on placement costs. Each sector and country has a specific cost structure which is based on two considerations: (1) the destination country, and (2) a worker's experience. Thus, an individual with experience working in a particular country will be charged less than a newcomer.

To oversee the performance of recruitment agencies, the government introduced various licensing regimes. However, given that most requirements are administrative in nature, these systems impact little on the actual quality of protection accorded to workers. Nevertheless, licenses are valid for three years and are subject to renewal afterwards. In addition, agents having their licenses suspended are not permitted to subsequently renew them. Similar to a first application, renewals also require fulfilment of administrative dossiers. Official obligations to supervise do not necessarily require renewal of a licence.

Finally, in 2014, the government released its official guideline on the supervision of recruitment agencies. This obliged labour inspectors to supervise agencies in Indonesia; diplomatic officials have a similar obligation in destination countries.[14] Accordingly, the law mandates agency supervision in all three phases of migration: pre-employment, employment, and post-employment. However, as Rahayu points out, the only feasible phase for governmental supervision is pre-employment[15] due to the difficulties evaluating agencies outside the country's jurisdiction. Likewise, transnational practices and transactions between private actors in Indonesia and host countries are challenging to monitor, leaving migrant workers at great risk of exploitation. For example, cases of overcharging include Indonesian agencies selling loans to aspiring workers to finance their migration costs, financing companies in a host country, and forcing migrant workers to pay double the costs stipulated by law.

While the government is aware of its obligation to monitor and supervise, its capacity and methodology to do so appear inadequate to the task. As such, the government's monitoring system, both on national and sub-national levels, only inspect the administrative and operational aspects of recruitment agencies. In East Java, for example, supervision merely

[14] Government Regulation No 14/2014 mandates BNP2TKI as the state agency for migrant worker protection. It implements a PPTKIS monitoring system. However, the Ministry of Manpower is the main regulator in this sector.

[15] Rahayu, MD, and Isbandono, PI, *Pengawasan Terhadap PPTKIS (Pelaksana Penempatan Tenega Kerja Indonesia Swasta) oleh Dinas Tenaga Kerja, Transmigrasi dan Kependudukan Provinsi Jawa Timur: Studi pada Pra-Penempatan Tenaga Kerja Indonesia Ke Luar Negeri*, Jakarta: Universitas Negeri Surabaya, 2010.

entails completing a check list questionnaire. Similarly, district and provincial offices lack adequate standards and methods to assess the performance of agencies and the quality of service provided to aspiring migrant workers. Further, many labour inspectors only offer limited supervision of the recruitment process.[16]

On a national level, BNP2TKI (the National Authority for the Placement and Protection of Indonesian Overseas Workers) has implemented a 'rating system' since 2015[17] but this too only focuses on administrative formalities whilst neglecting the actual experience of migrant workers. In consequence, it fails to reveal even common problems faced by migrant workers during the recruitment process. These weaknesses were acknowledged by the Audit Board of the Republic of Indonesia (BPK) who found that the PPTKIS's recruitment processes were not supported by government administered transparent systems.[18] Moreover, BPK indicated that this lack of protection was also prevalent in the cost of recruitment. Further, it highlighted the great number of migrants entering brokerage, often resulting in illegal recruitments, i.e. recruitments lacking job orders, using expired job orders, or exceeding the number of workers detailed therein. BPK also indicated that the services provided by recruitment agencies in the pre-departure phase were inadequate. They also discovered improper or inadequate health examinations and pre-departure education/training systems, leading to a high number of migrant workers being returned home due to poor health or because they lacked the requisite skills. Finally, they determined some agencies had failed to enlist migrant workers in the mandatory insurance system, effectively robbing them of opportunities to claim compensation for future harm or injury.

2.1.2 Information and empowerment: A lack of accessible information on placement agencies

Information can empower migrant workers especially at the decision-making stage. Indeed, research conducted by the Indonesian Migrant Workers Resources Center (PSDBM) shows that such an absence of accessible information can be found both at home and in host countries. Highlighting the absence of publicly available information by government bodies on the sub-national and national levels, as well as in destination countries, this research also indicates how recruitment agencies control information despite an official obligation to provide it. In the midst of authority decentralization, sub-national Departments of Employment (on the district and provincial levels) have also proved themselves incapable of providing the necessary information to potential migrant workers including their rights at each stage of the process, recruitment mechanisms, and cost structures.[19]

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[16] Harahap, LW, *Peranan Pemerintah Dalam Pengawasan Perusahaan Pelaksana Penempatan Tenaga Kerja Indonesia di Luar Negeri: Studi pada PPTKIS di Medan*, Medan: Universitas Sumatera Utara, 2010; and Husni, L, 'Perlindungan hukum terhadap tenaga kerja Indonesia di luar negeri' 2010, available at: http://download.portalgaruda.org/article.php?article=281558&val=7175&title=PERLINDUNGAN%20HUKUM%20TERHADAP%20TENAGA%20KERJA%20INDONESIA%20DI%20LUAR%20NEGERI, accessed on 12 September 2016.

[17] The rating system was imposed under the Head of BNP2TKI's Decree No 39/2015.

[18] Badan Pemeriksa Keuangan (BPK), *Pemeriksaan Kinerja atas Penempatan dan Perlindungan Tenaga Kerja Indonesia (TKI) di Luar Negeri Pada Semester II Tahun 2010*, Jakarta: Badan Pemeriksa Keuangan, 2010.

[19] Ibad, MI, Muthahhari, N, Ikhtiyarini, P, et al, *Buruh Migran Menggugat: Laporan Pemantauan Keterbukaan Informasi Publik di Sektor Migrasi Ketenagakerjaan*, Yogyakarta: Pusat Sumber Daya Buruh Migran-Infest Yogyakarta, 2013.

Husni[20] estimates that only 33% of Indonesian migrant workers are adequately aware of Law No 39/2004; even so, this is only limited to its administrative aspects, e.g. required dossiers such as passports, medical check-up certifications, and working visas. In particular, information on the number of jobs available, cost structure, and the basic skills required for various jobs are commonly difficult to access.[21]

Likewise, a CSO's independent report on public information disclosure illustrates a similar phenomenon with migrant workers, their families, and aspiring workers recording difficulties in gaining information at national and local levels. Indeed, this information is not publicly available even at the district level of major dispatching areas such as Banyumas, Cirebon, Cilacap, Banyuwangi, and Indramayu. Similarly, the Indonesian Migrant Workers Union (SBMI) found that the majority of violations, e.g. fraud, unpaid salary, overcharging, and debt bondage, were caused by a wholesale ignorance of the facts. Unsurprisingly, brokers often limited information to buttress their own interests regardless of the safety of the migrant workers under their care,[22] a situation that also commonly occurs at the national level.[23]

3.0 PantauPJTKI

3.1 Initial concept and implementation of the pilot phase

To fill this information gap, an IT-based platform enabling Indonesian migrant workers to review recruitment agency services was launched in 2013.[24] This platform was entitled PantauPJTKI (Recruitment Agency Watch).[25]

Adopting the TripAdvisor model, PantauPJTKI operated under three basic premises. First, PantauPJTKI would serve as a channel to give its users a voice by providing a space to review the services of recruitment agencies. Second, this platform would offer incentives to agencies for better practices. Third, reviews penned by migrant workers would enable their counterparts to compare recruitment agencies by quality of service. Based on the assumptions that most aspiring workers faced an information deficit regarding certified recruitment agencies and to counter initial reluctance to use it, this platform was intentionally given a practical design to make it more user friendly.[26]

The project went through three main phases. The first focused on infrastructure and application development during which the application passed through alpha, beta, pilot, and

[20] Husni (see note 16 above).
[21] Ibad (see note 19 above).
[22] Kuswanto, W, 'Rembug desa peduli TKI: SBMI Banyuwangi hubungkan komunitas dan desa' 2016, available at https://buruhmigran.or.id/2016/03/31/rembug-desa-peduli-tki-sbmi-banyuwangi-hubungkan-desa-dan-komunitas/, accessed on 31 August 2016.
[23] Ibad (see note 19 above).
[24] This initiative was a collaborative effort of TIFA Foundation and INFEST.
[25] Originally named PPTKIS under the legislation, Indonesians commonly refer to it as PJTKI. PJTKI was used to breed familiarity among users.
[26] Following an administrative evaluation by BNP2TKI, an annual list of PPTKIS was released. However, the list does not include blacklisted PPTKIS as the evaluation excludes user-experiences that could otherwise have been used to help inform candidates seeking to choose a recruitment agency.

release versions. As the main potential users, migrant workers were invited to participate at every stage of the process, from business model and questionnaire formulation to application testing of the beta and release versions. Questions related to migrant worker rights and the duties of placement agencies as regulated by law and other government provisions, e.g. ministerial decrees. The development phase also included promotional activities to introduce the platform in selected destination countries such as Malaysia, Singapore, and Hong Kong.

PantauPJTKI was targeted at all migrant workers including those currently abroad and returned workers. To ensure greater outreach, PantauPJTKI was introduced both online (through various social media outlets and indexed by search engines) and in face-to-face meetings by engaging with migrant worker unions and SBMI.

Together, the two methods significantly improved the number of visits and reviews. During May to December 2014, PantauPJTKI received more than 1,900 reviews although only about 930 were published[27] (mainly from migrant workers in Hong Kong and the Middle East). An increase in interaction between users and INFEST-SBMI (the platform administrator) was also noted. Frequently asked questions included requests for recruitment agency recommendations while clients already in destination countries often used the platform to report personal experiences.[28]

As a result, recruitment agencies also offered feedback. Realizing the functionality of this platform and its potential impact on the market, some provided new information, e.g. license status, addresses, registration certificates, while others responded to migrant worker complaints. By contrast, several agencies reported PantauPJTKI for defamation, demanding removal of some negative migrant worker reviews.

3.2 Monitoring accountability: Violations of rights, bad service, and common practices of recruitment agencies in Indonesia

One key result of this initiative is data. Collected data in PantauPJTKI indicates that overall, reviewers ranked recruitment agency services as 'average' with 29% describing their agencies as 'bad' and 8.3% reporting 'extremely bad' service. By contrast, the number of reviewers defining their agencies as 'good' was 15.9%. A mere 0.96% were impressed enough to call their agencies 'extremely good.' In addition, 26.1% of reviewers opined that agencies offered poor explanations and/or translations of their employment contracts, despite the fact most contracts were written in foreign languages such as Arabic, English, or Cantonese.

[27] All reviews submitted to the platform were checked by the administrator before publication for, e.g. identity verification, working period dates, and types of reviews (as a number of people used the review section of some PPTKIS to report other PPTKIS). INFEST also excluded reviews from migrants who departed before 2018 due to the incompatibility of previous and current regulations as referenced by the questionnaire.
[28] As the administrator of PantauPJTKI, some migrants also used INFEST's listed phone number to acquire more information on PPTKIS or job vacancies abroad.

As regards, comparing contract statements with real-life employment situations, 20% of reviewers described the performance of their agencies as 'bad,' with 7% condemning them as 'extremely bad.' Moreover, most migrant workers (70%) recruited by agencies left Indonesia without insurance. An even more surprising fact emerged when it was revealed that more than half of reviewers (53%) never even signed an employment contract.

An analysis of cost structures paid by migrant workers before and after departure recorded an indication of widespread overcharging. In 2013, data shows that 97% of migrant workers in Hong Kong had been overcharged with many required to pay more than twice the official cost.[29] Further, despite Ministry of Manpower Regulation No 22/2014 specifically excluding agency fees in Indonesia and abroad from a migrant worker's cost, such charges are still regularly included. Moreover, the submission of official documents by recruitment agencies to government offices are also commonly added costs requiring reimbursement.

In short, the above analysis demonstrates that PantauPJTKI was able to monitor recruitment practices using a rights-based system. Unlike the government's monitoring system, PantauPJTKI sought to examine more substantive issues including legal provisions, agency obligations, overcharging, and inhumane treatment. Whilst it was commonly assumed unscrupulous practitioners have always been a part of the migrant worker landscape, no systematic data had ever been collected. Thus, PantauPJTKI's data can now serve as a baseline for both NGOs and regulatory bodies to investigate specific recruitment agencies. At the same time, it can also act as a depository of cases, trends, and unscrupulous agency practices.

3.3 Voicing migrant workers' experiences: An empowerment perspective

A key element of this platform was to give migrant workers a voice. In this regard, most NGOs and migrants consider it to be a powerful and empowering tool. Never before have migrants been asked or given the space to air their opinions on matters so vital to their wellbeing. Now, they feel they are finally being heard.

In addition, given the limited channels and access to helpdesk services, migrant workers have even taken to using the platform to seek advice with aspiring workers often exploiting its resources to, e.g. pick an agency. Despite this, with more structural problems looming on the labour migration horizon, easy access to information may not be the panacea most hope it will be.

Accordingly, although a powerful tool, this paper believes without further opportunity to contribute to change, such platforms can only have a limited impact. While its original intent to incentivize better practices among recruitment agencies was admirable, research shows achieving such a goal is impossible in the current climate. Primarily, this is due to asymmetry in the industry, a vast inequality in power relations, and recruitment agencies'

[29] The cost ceiling is regulated by the Ministry of Manpower through Ministerial Decree No 98/2012.

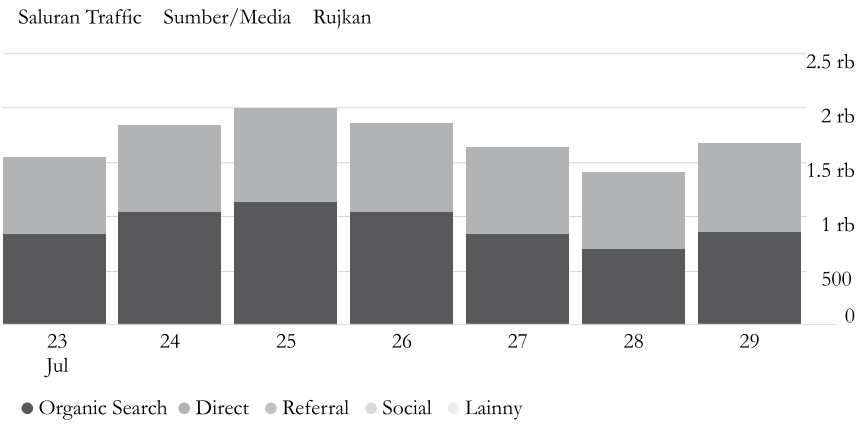
monopoly on information, all of which serves to marginalize migrant workers. Thus, without adequate law enforcement, incentives alone cannot and will not push the industry to improve.

4.0 Improving aspiring migrant workers' access to information

In the midst of a dearth of official information, PantauPJTKI has become an alternative source of reference for migrant worker candidates. This can be seen from the number of daily visitors – about 500-1,000[30] – and of these, many are new and unique.

Although PantauPJTKI was designed to collect feedback from users regarding the performance of PPTKIS recruiting them, this platform also collects questions from migrant candidates seeking to verify information on certain PPTKIS and to procure details for particular positions. Significantly, the editor does not publish these types of comments; instead, he/she will reply directly to the email or contact provided by the reviewer.[31]

Figure 1: Google Analytics Record of PantauPJTKI[32]



Offline interaction also occurs between migrant workers (including aspiring, active, and ex-workers) and administrators who often receive requests about migration procedures or from users seeking to verify the performance of certain PPTKIS. This interaction indicates that PantauPJTKI has become a viable and increasingly popular alternative source of information for migrant workers. In addition, PantauPJTKI has become a forum to which workers may report placement procedural issues and labour disputes involving overseas employers.[33]

[30] Interview with the Knowledge Management Officer of INFEST on 20 July 2018. The Google Analytics platform was used to identify the number of visitors.
[31] INFEST documents questions asked by users and codifies them into a "frequently asked questions" (FAQ) document. Based on these questions, it developed a series of 'how to' or guidelines especially to answer specific questions related to placement processes.
[32] This table was last updated on 29 July 2018.
[33] Interview with Ridwan Wahyudi (Manager of PantauPJTKI) on 27 August 2018.

5.0 Participation, empowerment, and accountability in recruitment practices

This paper contends that migrant workers' participation and empowerment in ensuring the accountability of recruitment practices can improve the labour migration industry. However, current initiatives, including PantauPJTKI, are simply not enough. More advocacy, integration of government policies, and monitoring systems are required for sustained improvement.

In particular, the government's current efforts in this regard are insufficient to ensure accountability. Similarly, while online platforms provide an alternative supplementary monitoring system, both PantauPJTKI and the government have failed to consider host and home actors as equally significant and accountable. Acting alone, their actions may lack potency but in conjunction, the two players could significantly impact the behaviour of recruitment agencies. Thus, while the government may restrict itself to monitoring actors within its jurisdiction, CSO initiatives have the flexibility to reach out to destination countries.

As the industry is transnational by its very nature, it is argued that any monitoring system can only have a real impact if transnational violations are also recorded. Consequently, platforms reviewing recruitment agencies in placement countries, or at least providing information linking such businesses to a country of origin are necessary to offer a greater understanding of transnational practices as in many cases, a migrant worker's vulnerability can be traced back to the unethical practices of an agency in his/her host country.

Therefore, even though PantauPJTKI's online platform does appear to offer a viable alternative to the government's formal monitoring system, this research shows that, alone, it is insufficient to the task of pressuring recruitment agencies to offer better and more ethical services. Consequently, this paper argues that PantauPJTKI would be better able to engender change if its platform were integrated into the government's formal monitoring systems. Already it has been able to provide basic information to candidates resulting in an increased understanding of the recruitment process. Moreover, it also responds to requests for more information by posting additional guidelines generated from users' frequently asked questions.

Integrating these mechanisms, including connecting formal control systems such as licensing regimes, would enable migrants to voice their aspirations and participate in the decision-making process which would, in turn, encourage solidarity. In short, giving migrant workers a wider platform to voice their opinions about recruitment agency services could also serve to prevent similar adverse outcomes, in the long run, contributing to the empowerment of this hitherto marginalized group. This is particularly vital in the early stages before a decision to migrate is even made.

6.0 Conclusion

It can therefore be seen that the government's current monitoring system as well as access to existing information is inadequate to ensure the accountability of recruitment agencies and empower migrant workers. While the CSO online platform helps to fill this

gap, this initiative alone cannot solve the problem without the more formal involvement of monitoring and licensing systems. Such an integration of existing systems would not only provide channels for migrants to participate in decision-making processes, but would also ensure greater accountability amongst recruitment agencies, hopefully leading to more ethical practices.

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ABBREVIATIONS AND ACRONYMS

BNP2TKI	National Agency for the Placement and Protection of Indonesian Migrant Workers
BPK	Audit Board of the Republic of Indonesia
CSO	Civil society organization
PantauPJTKI	Recruitment Agency Watch
PSDBM	Indonesian Migrant Workers Resources Center
PPTKIS	Pelaksana Penempatan Tenega Kerja Indonesia Swasta or Indonesian private manpower placement companies
SBMI	Indonesian Migrant Workers Union

BENEFITS AND DESIGN NECESSITIES OF DIGITAL MONITORING SYSTEMS FOR THE PROTECTION OF HUMAN RIGHTS IN ASEAN DETENTION CENTRES

Richard Frank Lancaster

Abstract

Detention centres in developing nations are high risk areas for human rights violations such as interrogational torture. Whilst international law and many domestic constitutions and criminal procedural codes specifically prohibit these actions, they are still prevalent. Many ASEAN nations have poor records regarding the protection of detainee rights, with the region as a whole experiencing prison overcrowding, low financial resources for detention centres, and high rates of corruption. These problems cause major difficulties in combatting such abuse, specifically in monitoring the movements of officers and in the effective protection of records. Many ASEAN nations also have structures of governance, particularly relating to prisons and remand prisons, which make reform challenging.

Documentary research was conducted using a variety of sources to examine how digital methods of data collection and data-basing could be beneficial to reduce human rights violations in detention centres, and indeed, it was found that technology could help to encourage a culture of transparency and accountability. It may also allow for a greater ability to collect evidence to support prosecutions for human rights abuses. However, such digital monitoring systems (DMS) must be fit for purpose with a particular focus on accuracy, infallibility, and confidentiality.

In the modern world, technological solutions to human rights issues are increasingly viable due to a reduction in the price of components and more widespread knowledge of the design and implementation of systems. Whilst DMS must be designed to meet the needs of individual situations, this research could aid development of a metric by which potential DMS could be evaluated in the design process. This paper concludes there is a need for further academic and practical inquiry into the use of technology to create implementable DMS to improve human rights in the detention centres of developing nations.

1.0 Introduction

Within criminal justice systems, detention centres are high risk areas for human rights violations[1] and can provide a private space for such acts which, without public scrutiny, can be denied or manipulated to the benefit of those in power. A wide variety of facilities may be classed as detention centres, ranging from prisons to psychiatric hospitals. For the purpose of this research, detention centres are defined as any place in which the State holds people against their will, for any period of time, out of public view. Whilst developing nations in all regions experience similar problems resourcing detention centres, ASEAN nations collectively possess several unique characteristics. For example, prisons

[1] Harding, TW, and Bertrand, D, 'Preventing human rights violations in places of detention: A European initiative' *Health and Human Rights*, 1995, Vol 1, No 3, at 234.

in this region are extremely overcrowded and contain large numbers of female prisoners, a fact often attributed to the harsh penalties associated with drug crimes.[2] This in turn leads to an overwhelmed court system and long periods of pre-trial detention.[3] Many ASEAN nations also detain large numbers of immigrants, often in inadequate facilities, as many countries lack policies to protect refugees.[4] Finally, again due to draconian drug laws, several ASEAN nations use compulsory detention as part of sentencing regimes.[5]

1.1 Torture and other rights violations

Torture and summary execution are among the most severe human rights violations occurring in detention centres.[6] Violation of these rights is prohibited under international law by the Convention Against Torture[7] and the International Covenant on Civil and Political Rights.[8] However, due to difficulties in collecting evidence,[9] many of these violations go unprosecuted and remain classed as 'allegations' making exact statistics difficult to obtain. The Human Rights Commission of Malaysia has stated that from 2000 to 2013, an average of 19 people each year died in police custody.[10] In their 2017/2018 report, Amnesty International[11] made specific reference to torture in detention and suspicious deaths in detention in 7 and 4 out of 10 ASEAN nations respectively. Notably, in this report (as several countries experiencing deaths in detention were not discussed specifically), summary executions by security personnel in public were also discussed.

In 2010, Wu and Vander Beken[12] discussed the use of torture in China to obtain confessions, discovering it was a pervasive problem in criminal investigations. Such confessions are particularly useful for police departments aiming to 'solve' high profile crimes. Indeed, many criminal justice systems reward officers for meeting conviction quotas and offer

[2] FIDH (International Federation for Human Rights), 'Behind the walls: A look at conditions in Thailand's prisons after the coup' 2017, available at https://www.fidh.org/IMG/pdf/rapport_thailand_688a_web.pdf, accessed on 25 July 2018.

[3] 'Philippines: The penitentiary system' Prison Insider, available at https://www.prison-insider.com/countryprofile/prisonsinphilippines?s=le-systeme-penitentiaire#le-systeme-penitentiaire, accessed on 25 July 2018.

[4] 'Thailand immigration detention' Global Detention Project, available at https://www.globaldetentionproject.org/countries/asia-pacific/thailand, accessed on 25 July 2018.

[5] Kamarulzaman, A, and McBrayer, JL, 'Compulsory drug detention centres in East and Southeast Asia' *International Journal of Drug Policy*, 2015, Vol 26, No 1, at 33.

[6] Mangoli, RN, and Tarase, GM, 'A study of human rights violation by police in India' *International Journal of Criminology and Sociological Theory*, 2010, Vol 3, No 2, at 401.

[7] UN General Assembly, 'Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' *United Nations Treaty Series,* 1984, Vol 1465, at 85.

[8] UN General Assembly, 'International Covenant on Civil and Political Rights' *United Nations Treaty Series*, 1966, Vol 999, at 171.

[9] Rojanaphruk, P, 'Little compensation for torture victims forum told' The Nation, 27 June 2013, available at http://www.nationmultimedia.com/national/Little-compensation-for-torture-victims-forum-told-30209196.html, accessed on 4 September 2014.

[10] 'Death in police custody' SUHAKAM, 2013, available at http://www.suhakam.org.my/death-in-police-custody/, accessed on 14 June 2018.

[11] 'Amnesty International report 2017/18: The state of the world's human rights' Amnesty International, 2018, available at https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF, accessed on 14 June 2018.

[12] Wu, W, and Vander Beken, T, 'Police torture in China and its causes: A review of literature' *The Australian and New Zealand Journal of Criminology*, 2010, Vol 43, No 3, at 557.

promotions or performance related pay, thus, one could argue, exacerbating the use of torture. Moreover, in many developing countries, poor training for the physical aspects of crime investigation can put pressure on officers to seek confessions as an alternative means of inquiry. Police departments in authoritarian states may also act as political enforcers, using rights violations to control citizens.[13]

The proposed solution to torture and other human rights violations within criminal justice systems generally utilizes three elements, summed up clearly by Sottas: "[1] training for State agents; [2] mechanisms allowing for the periodic visit of places of detention; and [3] the prosecution and conviction of guilty parties."[14] Whilst this approach is discussed in much of the existing literature, it can often be difficult to implement in developing nations.

There are two main issues with regard to implementing Sottas' three pronged approach in developing nations: (1) a lack of financial and human resources, and (2) high levels of corruption within criminal justice systems. Both issues may be pertinent in the monitoring of police actions and the prosecution of officer-related rights violations. Unfortunately, while effective monitoring is necessary to aid such prosecutions,[15] many police departments in developing nations cannot afford the man hours necessary to ensure its efficacy.[16] Additionally, the extra workload required to ensure records are kept to a high standard may be considered a stressing factor,[17] or may simply be abandoned due to high levels of absenteeism.[18] This lack of resources allows police departments to excuse poor record keeping and permits national oversight bodies to excuse inadequate investigation of such accusations.[19] Where records are maintained, corruption within departments makes it easy to complete forms incorrectly, alter, or have records conveniently 'disappear' as necessary.[20] Where no records exist, the prosecution of officers becomes even more difficult. Therefore, it is important to investigate methods to assist the implementation of Sottas'[21] three pronged approach, particularly in developing nations.

1.2 Digital monitoring systems

Digital monitoring systems (DMS) are used widely in commerce, logistics, human resources,

[13] Vicaro, MP, 'A liberal use of torture: Pain, personhood, and precedent in the US federal definition of torture' *Rhetoric & Public Affairs*, 2011, Vol 14, No 3, at 401.
[14] Sottas, E, 'The socioeconomic and cultural causes behind torture' in *ACAT-France Report: A World of Torture*, 2011, at 313.
[15] Mayerfeld, J, 'Playing by our own rules: How US marginalization of human rights law led to torture' *Harvard Human Rights Journal*, 2007, Vol 20, at 89.
[16] Clegg, I, Hunt, R, and Whetton, J, *Policy Guidance on Support to Policing in Developing Countries*, University of Wales 2000.
[17] Wang, Y, Zheng, L, Hu, T, et al, 'Stress, burnout and job satisfaction: Case of police force in China' *Public Personnel Management*, 2014, Vol 43, No 3, at 325.
[18] Vicaro (see note 13 above), at 401.
[19] Rafiqul, M, and Solaiman, SM, 'Torture under police remand in Bangladesh: A culture of impunity for gross violations of human rights' *Asia-Pacific Journal on Human Rights and the Law*, 2003, Vol 2, at 1.
[20] Huang, QF, 'Another thought on the prevention of interrogational torture: From the angle of restricting the interrogatory power [yetan zhizhi xingxunbigong: congzhiyue xunwenquan de jiaodu]' J*ournal of National Procurators College*, 2002, Vol 36, at 81.
[21] Sottas (see note 14 above), at 309.

and other fields of business. Within the last few decades, the various components of DMS have reduced in price and the skills required for their design and implementation have become more widespread. This has made bespoke designs more feasible and DMS a cost-effective alternative to traditional 'human input' systems. DMS are favoured in business as their use reduces both the man hours needed to input data and the fallibility (or dishonesty) of human input systems.[22] Because existing literature emphasizes the importance of both effective monitoring systems and dependable evidence to prevent/prosecute human rights violations,[23] and these needs are akin to those of businesses utilizing DMS, it is believed such systems may help guide preliminary research into their use in detention centres. Thus, in this regard, existing DMS templates may have the potential to overcome some of the problems facing developing nations.

2.0 Methodology

This research aims to discover the potential benefits of using DMS in detention centres. As discussed previously, DMS may help to overcome difficulties in preventing rights violations at detention centres, specifically in developing countries. As it takes many forms, it is hoped this preliminary analysis will guide future researchers to design working prototypes of DMS as possible avenues for development must be identified and discussed with respect to their potential benefits and pitfalls.

To this end, qualitative secondary research was also undertaken including an exploration of the existing literature and knowledge on a variety of existing DMS and current theories concerning human rights violations in detention centres, to develop a metric for the purpose of judging the appropriateness of DMS in this regard. Although discussion will be limited to police officers in police stations, it is contended the findings would be similarly applicable to other types of detention centres such as prisons, immigration detention centres, and secure psychiatric facilities.

This metric should prove valuable to inform further research in the field, start policy discussions on the use of technology to combat human rights violations, as well as to assist the evaluation of potential DMS through the development process. Similarly, DMS used in current business applications will be evaluated to aid the identification of specific DMS components which may prove beneficial to future research.

3.0 Findings

3.1 Design necessities

Technology has the potential to overcome some financial and human limitations in the protection of human rights in detention centres. However, technology gives rise its own problems which must be understood in order to develop effective DMS. Many complications with specific DMS may only become apparent during trial implementations.

[22] SAVI, 'Best practices in improving container management and increasing supply chain efficiencies' available at http://www.savi.com/wp-content/uploads/Savi_WhitePaper-final-1212130439PM1.pdf, accessed on 2 August 2016.

[23] Sottas (see note 14 above), at 309.

Others may be accounted for in the design process, such as those emanating directly from the types of technology used. With an understanding of technology and the theory concerning human rights violations in detention centres, some intuitive problems which designers may already be aware of, could also arise. These problems fit into two main categories: implementation problems and fallibility problems.

3.2 Implementation problems

In order for a DMS to be have any benefit, it must be feasible to implement, particularly in countries suffering high levels of human rights abuse in detention centres. The following implementation problems do not consider the effectiveness of DMS at addressing rights abuses. Instead, they focus on arguments against their real world implementation.

3.2.1 Cost

If a DMS under consideration is prohibitively expensive, its use may be unjustifiable. For example, the expensive training, human monitoring, and oversight systems used to prevent human rights abuses in many developed countries, cannot be transplanted to developing nations due to much lower State budgets.[24] One of the main aims of DMS is that it should be possible to implement at a lower cost than the man-hours required to perform a similar level of monitoring using human systems. Therefore, if a DMS cannot meet this requirement, it may be unfeasible to implement. Whilst a system could be designed using cheaper components, one should also consider the cost of maintenance and replacement over time. Accordingly, the cost of implementation of various DMS may be subject to cost benefit analyses. A more effective DMS may well cost more. Thus, compromise between the cost and effectiveness of potential DMS may be necessary. It is also important to consider that while a DMS may initially be expensive, the cost of its use over time may actually be lower than human systems over the same period.

3.2.2 Data security

Technological systems aimed at monitoring movement within detention centres require the collection of data. Thus, centralized data storage and third party access to this data would also be beneficial to the protection of rights (for reasons which will be discussed later). In the modern world, however, concerns surrounding data security are now common, covering all aspects of life from personal data communicated online, financial and commercial data in industry, to government data on national security or the personal data of citizens.[25] Many technological systems have found largely effective ways of addressing these issues. For example, in the modern world it is considered safe in many circumstances to input credit card and other personal data for online payments.[26] Similar methods of data security could be used to ensure it is no longer a significant issue for potential DMS. For example, data regarding the movements of a detainee/officer/visitor/lawyer could

[24] Clegg, Hunt, and Whetton (see note 16 above).
[25] National Audit Office 'The UK cyber security strategy: Landscape review' 12 February 2013, available at https://www.nao.org.uk/wp-content/uploads/2013/03/Cyber-security-Full-report.pdf, accessed on 27 July 2016.
[26] Miyazaki, AD, and Fernandez, A, 'Internet privacy and security: An examination of online retailer disclosures' *Journal of Public Policy & Marketing*, 2000, Vol 19, No 1, at 54.

be assigned a code number to create anonymity which could later be cross-referenced to personal information when accusations are made, but it is also vital to take steps to keep this information confidential. Although some jurisdictions may not consider this data confidential at all, it would still be preferable to limit the availability of sensitive personal information to the public or media. While full discussion of data security methods is beyond the scope of this preliminary research, more detailed investigation into advanced data security methods is necessary to prevent criticism of DMS arising in this regard.

3.2.3 Workload

The use of any DMS must not hinder the daily work of police officers. If the DMS takes an excessive amount of time, restricts the movement of staff around a detention centre, or prevents them from responding quickly to emergencies, it may be considered impractical. In many developing countries, concern has already been raised about the workload of police officers due to widespread understaffing. In Thailand, the suicide rate of police officers is twice the national average and is generally considered to be caused by work-related stress.[27] Similarly, if a DMS is so complex that officers and administrative workers cannot understand how to perform their appointed tasks, it would be unfeasible to implement. Notably, this does not necessarily restrict the DMS from being complex, just that the individual's role in using the system be quick, simple, and intuitive. Moreover, it must be quick and easy for one officer or administrative worker to train their counterparts to use the DMS. The cost effectiveness of a DMS would be limited if all police officers required lengthy and expensive training programs to use it. In particular, police officers in developing countries, especially in provincial divisions, may not be sufficiently tech-literate to use complex DMS. Therefore, the design process must ensure the DMS does not restrict the primary work of the officers using it, and that it can be used easily by anyone after a short and localized training program.

3.2.4 Public policy

Whilst the implementation problems discussed previously all have clear solutions, public policy problems are more complex. This refers to a potential lack of support for a DMS from those in positions of power. As discussed previously, rights violations in detention centres often benefit the powerful. Confessions resulting from the torture of suspects helps to 'solve' high profile cases,[28] and deaths in custody can be used to silence dissidents, human rights defenders, and others posing a threat to the regime.[29] Other implementation problems, in particular cost and workload, even when minimized, may allow policy makers to argue against their implementation. Also, it is important to note that in many countries, public support for the rights of those in detention centres is low, specifically those perceived as criminals.[30] The 21st century 'drug wars' in Thailand and the Philippines,

[27] 'Suicide rate among Thai police among the highest in the country' Pratchatai English, 14 June 2016, available at http://www.prachatai.com/english/node/6257, accessed on 5 August 2016.
[28] Wu and Vander Beken (see note 12 above), at 557.
[29] Vicaro (see note 13 above), at 401.
[30] Kumar, NK, *Human Rights Violations in Police Custody*, Cochin University of Science and Technology, 2004, available at https://dyuthi.cusat.ac.in/xmlui/bitstream/handle/purl/927/Dyuthi-T0127.pdf?sequence=11, accessed on 12 June 2018.

in which thousands of suspected drug users and dealers were summarily executed by police,[31] serve as clear examples of governments rejecting the implementation of pro-human rights policies, and doing so with significant public support. Such instances, along with countless examples of human rights abuses in criminal justice which occur not as a matter of public policy but due to a combination of low funding and high political and public pressure to be 'tough on crime,' show that policy makers do not always regard the protection of human rights as a priority.

One possible method for reducing public policy resistance to implementation is to provide international support and reward. International support is common in police reform for human rights purposes. For example, the Organization for Security and Co-operation in Europe (OSCE) assists with reform and training to strengthen police forces in Europe, particularly former members of the Soviet Union which may have a history of authoritarianism in the criminal justice system.[32] Accordingly, support could be provided in the form of external payments to cover the costs of design and implementation and any initial training. This would effectively negate cost arguments against DMS. Regarding international rewards, DMS implementation could be made a condition to membership of a regional intergovernmental organization which would then purvey economic benefits. For example, this technique is utilized by the European Union to promote respect for human rights in prospective member nations.[33] Thus, by tackling the first three implementation problems, the strength of arguments against DMS implementation could be reduced. In addition, to counteract the resistance of those in positions of power, a structure of support and reward could be built. Such a structure would benefit from the involvement of intergovernmental organizations and human rights defenders.

Governance structures overseeing detention centres are also key to understanding public policy resistance to the implementation of DMS in detention centres. As different centres have different governing structures, for the sake of clarity, prisons will be used as an example. In ASEAN nations, there is of course variance in the management and political structures of countries but they tend to fall into two key groups: unified control and separated control. In both groups, individual detention centres exist under a hierarchy of governmental control. In a unified control structure, the tip of the hierarchy would be a single government ministry, for example in Cambodia, the 23 civilian prisons are under the control of the Ministry of Interior.[34] By contrast, the Philippines utilizes a separated control structure. Thus, while district, city, and municipal jails, which handle short term

[31] Sombatpoonsiri, J, and Arugay, A, 'Duterte's war on drugs: Bitter lessons from Thailand's failed campaign' The Conversation, 29 September 2016, available at http://theconversation.com/dutertes-war-on-drugs-bitter-lessons-from-thailands-failed-campaign-66096, accessed on 17 June 2018.

[32] Downes, M, 'Police reform in Serbia: Towards the creation of a modern and accountable police service' OSCE Mission to Serbia and Montenegro, 2004, available at https://www.osce.org/serbia/18310?download=true, accessed on 10 June 2018.

[33] Blitz, BK, 'Post-socialist transformation, penal reform and justice sector transition in Albania' *South East European and Black Sea Studies*, 2008, Vol 8, No 4, at 345.

[34] 'Cambodia: The penitentiary system' Prison Insider, available at https://www.prison-insider.com/countryprofile/prisons-cambodia-en?s=le-systeme-penitentiaire#le-systeme-penitentiaire, accessed on 25 July 2018.

sentences, are overseen by the Minister of the Interior, prison farms, which handle longer term sentences, are under the control of the Minister of Justice.[35] Regarding reform, both structures have their strengths and weaknesses. In a unified control structure, a single body would be capable of implementing reform over the entire system. However, if such a body decided against implementing a DMS, it would be difficult to pursue the matter further. By contrast, in a separated control structure, each body would only be able to implement or prevent implementation of a DMS in the detention centres it controls, meaning that whilst several processes may need to take place, a single body would not be able to prevent implementation in the entire system.

It is also crucial to consider which parts of government oversee detention centres, in particular, prisons. In Myanmar, there is currently no Ministry of Justice; instead, the executive branch of government exercises extensive control over the judiciary. Accordingly, the Assistance Association for Political Prisoners (AAPP) recommended that a Ministry of Justice be established to ensure an independent judiciary as a prerequisite for sustainable prison reform. The AAPP further discussed the importance of "creating a clear distinction between police and prison administration and their roles in the criminal justice sector" which would help to move the focus of detention towards rehabilitation rather than retribution. Prison systems with such a focus, as long as they also separate themselves from potentially 'tough on crime' executives who may use harsh treatment of detainees as a political tool, can be beneficial for the implementation of reforms aimed to protect prisoners' human rights.[36]

3.3 Fallibility problems

Fallibility problems are much more difficult to define clearly at this stage. One of the problems with existing human input monitoring systems in developing countries is the ease with which officers are able to input false information, alter, or destroy it at a later date. Indeed, Huang refers to the writing of police records in China as "police creative work."[37] Whilst DMS utilizing restricted access centralized databases can easily protect against the alteration or destruction of information, it is also vital to prevent the falsification of data in the first place.

There are several interesting considerations with regards to making a DMS infallible. First, a DMS may never be considered perfect as some degree of fallibility is inevitable. It is important to limit this fallibility as much as possible and ideally identify when the DMS has collected data in error. A DMS may collect false information either due to intentional misuse or faults within the system itself. These two distinct problems should be considered independently. While DMS, like human systems, may fail, engineering may limit this. Many important technological systems, such as NASA's 'Water Wall' space life support systems,

[35] Prison Insider (see note 3 above).
[36] Assistance Association for Political Prisoners (Burma) 'Prison conditions in Burma and the potential for prison reform' 2016, available at http://www.burmalibrary.org/docs23/AAPPB-2016-09-Prison_Conditions+Reform-en-red.pdf, accessed on 25 July 2018, at 45.
[37] Huang (see note 20 above), at 82.

prevent potential issues by the use of redundancy.[38] Thus, if one element of the system malfunctions, a back-up element takes over its job in the interim.[39] Redundancy design could be used in DMS to help limit fallibility due to hardware or software failures within the system.

Poor DMS design may result in data not being collected when it should, or vice versa. One likely cause of such a fault is due to 'scanning distances' which refers to the distance at which hardware can collect data from an individual. If DMS can collect data by scanning individuals when in proximity to a certain location, in theory it would be possible for individuals to move past 'check points' without being scanned due to the receiver being out of range.[40] Similarly, false positives may occur if individuals are within range of a scanner but do not actually pass the check point. From this example it can be seen that DMS must be designed with the technological capacities of components and potential fallibility problems in mind. Through consideration of existing systems used in business and their strengths and weaknesses regarding the protection of human rights in detention centres, it may be possible to identify potential fallibility problems which could then be used to guide the design process.

Intentional manipulation of DMS is more complicated. Whilst a DMS must obviously be designed to be as 'fool-proof' as possible, other elements of the process must also be taken into account. First, officers could be given inaccurate or limited information about the workings of the system to disguise its limitations, thus reducing the confidence of those who may otherwise seek to fool it. Alternatively, this information could be used to 'trap' officers who may attempt to outwit the DMS using an identifiable method. While not ideal solutions, such options may be considered in the design process.

Second, some fallibility problems could be accounted for by disciplinary processes, thus increasing the potential risks to officers attempting to falsify data. For example, if the DMS requires the use of wearable devices, officers not wearing their devices or wearing those of another individual could face certain sanctions. Finally, with the aid of psychological research, it is possible a DMS could be created to exploit the psychology of corruption to its advantage.

In conclusion, the methods by which a DMS could be made 'infallible' are specific to the type of technology used and cannot be discussed in detail at this stage, but again, one cannot ignore the fact a more 'infallible' DMS may be more expensive to implement, making compromises necessary.

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[38] Flynn, MT, Cohen, MM, Matossian, RL, et al, 'Water Walls architecture: Massively redundant and highly reliable life support for long duration exploration missions' 2012, available at https://www.nasa.gov/sites/default/files/files/Flynn_2012_PhI_WaterWalls.pdf, accessed on 12 August 2016.

[39] Hornis, H, 'Redundancy in technological systems' Pepperl and Fuchs, available at http://files.pepperl-fuchs.com/selector_files/navi/productInfo/doct/tdoctb082__usa.pdf, accessed on 27 July 2016.

[40] 'RFID tag maximum read distance' SkyRFID, 2015, available at http://skyrfid.com/RFID_Tag_Read_Ranges.php, accessed on 14 June 2018.

4.0 Benefits

Some benefits of the use of DMS in detention centres were discussed in the introduction – these will now be considered in more detail. Any implementation of DMS would need to overcome a cost-benefit analysis; therefore its benefits must be maximized in the design process.

Although at this stage, it is too early to develop a specific prototype DMS and cost it for implementation, generally speaking, a DMS must aim to be cheaper to implement than an equivalent human system in terms of man hours and equipment. As discussed previously, compromises may be necessary between the cost of a DMS and its efficacy. Whilst implementation costs may initially be high, the cost averaged over time may actually be low especially when compared to the cost of a human input system. Considering that the full time salary of a non-commissioned Thai police officer is approximately US$2,200 per annum,[41] after several years of use, an initially expensive DMS may indeed be more economical, particularly considering that some technologies used for monitoring are less expensive than others. The variety of potential DMS and their components will be discussed further in section 5.0 below with respect to existing systems already being utilized in business environments.

A DMS is capable of recording more data than a human in his/her professional capacity, and could potentially record the movements of all officers, detainees, lawyers, and visitors in a detention centre. It would then be possible to output maps of individuals' movements over time, similar to 'LoJacking' which is used by private companies and law enforcement to map the movement of stolen goods, particularly vehicles.[42] This detailed information would allow accusations and accounts to be corroborated or refuted with accurate physical evidence. This could prove especially beneficial in the prosecution or defence of officers implicated in rights abuses, while also reducing the deniability of senior officers and departments. Ideally, such systems should act as a deterrent rather than solely to prosecute offences. In human monitoring systems, officers are aware of the data being collected and how it can be manipulated. Under a DMS system, officers will be much less aware of what data is being collected and if or how they can manipulate it, thus, reducing the confidence of officers seeking to manipulate evidence.

A centralized computerized database holds many advantages over paper-based systems or even localized computer systems. One obvious benefit is the removal of data from local offices, thus preventing the possibility of data being manipulated or deleted by officers with a conflict of interests. On well-developed DMS, automated analyses of data could be performed on a large scale. Anomalies could be highlighted automatically limiting the time needed to observe such data. Finally, data could potentially be accessed (but not

[41] Moore, CG, 'The high cost of badly paid cops' Christopher G Moore Blog, 2014, available at http://cgmoore.com/blog/view.asp?id=784, accessed on 11 June 2016.

[42] Ayres, I, and Levitt, SD, 'Measuring positive externalities from unobservable victim precaution: An empirical analysis of Lojack' National Bureau of Economic Research, 1997, available at http://www.nber.org/papers/w5928.pdf, accessed on 6 June 2016.

altered) by a number of parties including senior police officials, national human rights commissions, investigative bodies, regional or international intergovernmental offices, and non-governmental organizations. This would allow for a greater division of responsibility in advocacy and greater transparency.

5.0 Similar systems

To get an idea of what DMS in detention centres may look like, as well as its potential pitfalls, it is useful to consider similar systems in other fields. Many areas of business and commerce utilize technology to monitor the movement of goods and personnel due to reduced costs and increased accuracy.[43] Three interesting areas to consider are logistics/shipping, human resources, and retail. Although the DMS used by individual companies or organizations may vary, the central concepts and techniques underpinning them are often similar and may be analysed to gain ideas about which types of DMS may be effective at monitoring the movement of people in detention centres.

Logistics and shipping companies, as well as retail companies, frequently use technology to monitor the movement of goods on a local, national, or international scale, often through the use of barcode technologies.[44] This involves allocating a barcode or electronic tag to materials which can then be read by specific mobile devices. As materials move around or between sites, these barcodes are scanned and information about their location uploaded to a centralized system which can be viewed by interested parties such as company staff or customers.[45] Systems like this can also be used to input the number of items in each location, such as in retail stock checking. These systems use a variety of hardware and software but the general process is similar.

Human resources departments of large companies and organizations often monitor when their employees arrive and leave the workplace. A wide variety of systems are available to perform this task but again the central concept remains the same. A 'timeclock' station assigns a unique identification to each employee which they must input upon starting or finishing work.[46] The level of accuracy of these systems varies depending on the nature of the identification. At the lower end of the accuracy scale are PIN numbers as employees could input the numbers of other employees in a practice known as 'buddy punching.'[47] The US Department of the Interior[48] discusses more accurate systems of identification

[43] SAVI (see note 22 above).

[44] Hong-Ying, S, 'The application of barcode technology in logistics and warehouse management' *First International Workshop on Education Technology and Computer Science*, Wuhan, China, March 2009.

[45] 'Materials tracking, and logistics technologies: Increasing efficiency and cost effectiveness of the materials management process' Atkins Global, 2012, available at http://www.atkinsglobal.com/~/media/Files/A/Atkins-Corporate/north-america/services-documents/applied-technologies/Atkins-materials-tracking-logistics-technologies.pdf, accessed on 14 June 2016.

[46] 'Human resource management system user guide' Colorado State University, 2007, available at http://www.hrs.colostate.edu/pdfs/hr-system-user-guide-8-time.pdf, accessed on 22 June 2016.

[47] Quinn, G, 'The disadvantages of traditional on the clock punch in systems' mitrefinch, 2016, available at http://advancesystemsinc.com/the-disadvantages-of-traditional-on-the-clock-punch-in-systems/, accessed on 15 July 2016.

[48] 'United States geological survey manual' US Department of the Interior, 2016, available at https://www2.

in several scenarios described below. Identification cards afford a higher level of accuracy as cards must be physically handed to another employee. At the far end of the accuracy scale lies non-transferable identification such as fingerprints and retina or facial scanning, collectively referred to as biometrics. For example, some organizations use these methods to allow access to secure areas. Thus, organizations dealing with hazardous or expensive materials may require employees to scan ID cards, fingerprints, or retinas for entry. For example, the Centres for Disease Control and Prevention (CDC) use such systems to limit access to areas containing hazardous biological material. Beyond simply limiting access, these systems also allow the CDC to monitor which employees accessed certain areas at specific times, for example, in the event of contagion.[49]

These systems were all developed to meet precise needs, and as the necessary hardware components have become more widely available, they have since been adapted for other applications. Whilst none were specifically designed to prevent rights violations in detention centres, their effectiveness in this regard may be evaluated by examining how effectively they meet the benefit and design guidelines discussed in this research – this would allow greater understanding of the possibilities and problems facing future DMS designers.

As mentioned previously, accessible databases used in barcode systems improve accountability.[50] Customers are able to check the location of products throughout the delivery process and can notify the company of problems or delays. While the benefit of using centralized databases accessible to third parties is undeniable in logistics applications, they would not be ideal for use in detention centres as such systems require direct human input. In other words, if no one scans the barcode of an item as it moves, the data will not be collected. Thus, officers wishing to hide their movements could simply not scan their 'barcodes' or the data equivalent in this case. Accordingly, it becomes obvious that systems designed to monitor detention centres must collect data automatically without the need for human input.

Similarly, the use of access cards or identification systems to enter secure locations may also be applied to detention centres, for example, to unlock doors. This would prevent unregistered movement of individuals in certain areas, making the falsification or omission of data more difficult.[51] However, a system using the opening of electronic doors to register information may also permit more than one individual to pass through without similarly registering their information, thus increasing its fallibility. The use of electronically locking doors may also inhibit the quick movement of officers which may trigger the workload implementation problem discussed previously.

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usgs.gov/usgs-manual/, accessed on 10 March 2016.

[49] 'Lab contagion factsheet' Centers for Disease Control and Prevention, available at http://www.cdc.gov/about/pdf/facts/cdcfastfacts/lab-contagion-factsheet.pdf, accessed on 17 June 2016.

[50] Atkins Global (see note 45 above).

[51] 'United States geological survey manual' US Department of the Interior, 2016, available at https://www2.usgs.gov/usgs-manual/, accessed on 10 March 2016.

Time-clocks and electronic lock systems are useful for the variety of identifying information they may request but systems using non-transferrable information such as fingerprint, retina or face scanning, are more secure and infallible. Further, such systems also have the benefit of encouraging more accurate and vigilant data collection. Again, however, their use may interrupt workflow and create workload problems, e.g. by requiring officers to repeatedly scan biometric data. Verifying data can also take time and department efficiency may be affected if doors must re-lock for every person. Moreover, biometric scanners are expensive and may not meet the low cost requirement of a potential DMS. Likewise, as such systems require active data input, without other safeguards to ensure data is collected, information may be lost. Again, this seems to suggest automated systems would be more beneficial than those requiring users to actively input data.

6.0 Conclusion

The fight against human rights violations in detention centres could clearly benefit from the use of DMS to overcome the current problems of restrictive funding and corruption evident in the human monitoring systems of ASEAN nations and other developing countries. Whilst systems designed for business scenarios are unsuitable for applications discussed in this paper, they do provide a useful framework to aid development of DMS at this early stage.

By considering the benefits and design necessities of DMS, it is possible to develop a preliminary evaluation metric for potential applications. As many different types of DMS could be used to monitor detention centres, an evaluation metric to inform design prior to implementation is vital to aid the research and design process, thus ensuring such systems will meet real world needs prior to costly implementation.

To distance itself from potential downfalls, a DMS in development must aim to achieve the potential benefits of the system taking into account design necessities. As such, potential DMS must meet the following five requirements as effectively as possible:

(1) *The DMS must be cheap to implement.* The cost must be low enough that after accounting for repairs and maintenance, it is still more cost effective than a human monitoring system.
(2) *Data must be stored in a centralized data bank which is accessible yet secure.* Preferably the data should only be accessible to a finite number of parties to increase accountability.
(3) *The DMS must be sufficiently simple and easy to use to avoid impeding the work of police departments.* It must therefore be usable by individuals who are not necessarily tech-literate, and it must also be possible for one officer to easily train another to use the system.
(4) *Data collection must be automated and individualized.* This will prevent, to an extent, the omission or falsification of data collected by the DMS.
(5) *Data collected by the DMS must be detailed.* Such detail must be sufficient to create a clear account of the movements of all individuals within the detention centre.

The above criteria for effective and implementable DMS in detention centres can be used as a metric to evaluate potential systems during the design process.

As mentioned previously, however, political elements potentially opposing implementation are also of key importance particularly in ASEAN nations where a variety of detention centre governance structures may create additional problems for DMS implementation.

7.0 Recommendations

Recommendations will now be made to direct further research in this field. First, this paper has clearly shown the untapped potential of technology in the fight against human rights violations in detention centres. As such, further research should aim to develop specific DMS to meet the assessment metrics developed within. This DMS could then be used to inform policy and support discussion regarding the use of technology to protect human rights. Second, research into the cost and efficacy of various individual DMS components is necessary to identify those that will be of most use in detention centres. As hardware systems require more detailed design, a suitable system should be found prior to the development of the necessary software. In addition, development could be aided by considering existing systems in the field of business.

Preliminary investigation into component specifications suggests that the use of Radio-Frequency Identification (RFID) tags may be suitable for DMS in detention centres. RFID tags are currently used in many applications, for example workplace access cards. RFID Arena[52] discusses the applications and specifications of the technology in detail. In addition, RFID cards are able to work at a distance so would be able to collect data automatically, thus ensuring data would be collected for all. Further, RFID tags could be made non-transferable through the use of non-removable wristbands, similar to ankle bracelets used for monitoring individuals sentenced to house arrest.[53] Such a system would require no human input and little additional work or training for the majority of officers. RFID technology also has the benefit of being relatively cheap, with tags selling wholesale for less than US$1/unit.[54] It is therefore suggested these preliminary observations relating to the use of RFID in DMS be further investigated through detailed consideration of the specifications and cost of various components.

At this stage, it becomes imperative to design and cost a complete DMS in detail. This prototype DMS could then be used to support policy discussions; it could even be used for a trial implementation. A prototype DMS is particularly necessary to further discussions and to counter criticisms or concerns with concrete ideas rather than abstract speculation. To support successful real world implementation of DMS in ASEAN detention centres,

[52] 'Benefits of implementing RFID in supply chain management' RFID Arena, 2013, available at http://www.rfidarena.com/2013/11/14/benefits-of-implementing-rfid-in-supply-chain-management.aspx, accessed on 4 June 2016.
[53] Hirbyand, J, 'How does a house arrest ankle bracelet work?' The Law Dictionary, available at http://thelawdictionary.org/article/how-does-a-house-arrest-ankle-bracelet-work/, accessed on 27 March 2016.
[54] 'Atlas RFID store' Atlas RFID, available at https://www.atlasrfidstore.com/, accessed on 3 June 2016.

it is especially vital to pair the technical development of a DMS with relevant expertise in penal reform. As such, development would require input from, and consultation with, regional governmental and non-governmental organizations to find the best course of action, including prerequisites in terms of the management and governance structure of detention centres, necessary reforms prior to implementation, or DMS design features which may help to overcome public policy problems.

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CHAPTER FIVE:

BUSINESS, THE ENVIRONMENT, AND HUMAN RIGHTS

SEA CHANGE ON THE HORIZON? WHY FORCED LABOUR AND HUMAN TRAFFICKING IN THAILAND'S FISHING INDUSTRY IS CATALYZING NEW COLLABORATIVE GOVERNANCE EFFORTS

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Abstract

In the last few years, Thailand's fishing industry has been in the global spotlight with continued international attention on human rights abuses taking place on fishing vessels and in fish processing areas. Recently, the Thai government, suppliers, and retailers have been spurred into action to eliminate forced labour and human trafficking from seafood supply chains, including through new multi-stakeholder initiatives (MSIs). This paper explores examples of collaboration between the public sector, industry, and civil society to combat forced labour and the trafficking of migrant workers in Thailand's fishing industry, a human rights issue which embodies the "globalization gap" as identified in the UN's Protect, Respect, and Remedy framework.

This paper uses a conceptual framework based on collaborative governance to conduct qualitative research using case studies of select MSIs. Through this research, I identify the main motivations, individual and shared, of the different stakeholders as well as their capacity for joint action. There seems to be widespread acceptance among private sector, public sector, and civil society actors that collaboration is necessary to effectively address the issue of human trafficking and forced labour in seafood supply chains, aligning with the Thai government's recent *pracharat* (public-private-people partnership) initiative, but to date, there is limited research on (i) how such collaboration emerges, and (ii) the factors facilitating constructive collaboration. The central argument of this paper is that it is necessary to understand the conditions that give rise to, facilitate, or inhibit, constructive cross-sectoral collaborative arrangements, particularly where they intend to address complex, multi-scale governance issues. The intention of this paper is to help address this knowledge gap. It is hoped that by drawing on case studies of promising MSIs to address forced labour and human trafficking issues, the rights of migrant workers in Thailand's fishing industry may be upheld.

1.0 Introduction

In recent years, Thailand's fishing industry has been in the global spotlight regarding human rights abuses and working conditions on fishing vessels and in fish processing areas. Trafficking, forced labour, child labour, unscrupulous recruitment, exploitative employment practices, and abject working conditions have all been documented in the country's fisheries industry.[1] Testimonies indicate that victims are being denied multiple

[*] Master's candidate, International Development Studies, Chulalongkorn University.

[1] ILO Tripartite Action to Protect Migrants within and from the GMS from Labour Exploitation (TRIANGLE) and Asian Research Centre for Migration (ARCM), *Employment Practices and Working Conditions in Thailand's Fishing Sector*, Bangkok: ILO, 2015; Chantavanich, S, Jayagupta, R, Laodumrongchai, S, et al, 'A survey of migrant worker employment practices in the Thai tuna processing sector (English version)' 2014; and Srakaew, S, *A Report on Migrant Children and Child Labourers in Thailand's Fishing and Seafood Processing Industry*, Labor Rights Protection Network and terre des hommes Germany, 2015.

rights including just and favourable work conditions, adequate standards of living, freedom of movement, liberty and security. Even when removed from exploitative situations, they may face further rights violations trying to access assistance, such as detention and deportation, prosecution for status offences, or even being re-trafficked. Low skilled migrant workers from neighbouring countries are still falling through the cracks, despite numerous international, regional, and national legal frameworks in place to protect their rights.

The complex web of linkages around migrant worker labour exploitation and trafficking in the Thai fishing industry involves a range of actors along the supply chain including boat captains in the Gulf of Thailand, industry players, corrupt officials, and consumers half a world away. But in many ways, the very forces of globalization giving rise to Thailand's prominence as a global seafood exporter and its reliance on low-skilled migrant labour are the same forces which now make it a subject of global scrutiny. As such, the government of Thailand, industry, and civil society (NGOs and CSOs) have spurred into action to address forced labour and human trafficking, and generally improve working conditions in the industry. Some of this action is being pursued collaboratively through multi-stakeholder initiatives (MSIs), such as the Shrimp Sustainable Supply Chain Task Force (SSSCTF), the Good Labour Practices (GLP) Programme, the 'Demonstration Boat' project, and a handful of others (see Annex 1 for key terms). There seems to be widespread acceptance among relevant private sector, public sector, and civil society players that greater collaboration is necessary to effectively address the issue of human trafficking and forced labour in seafood supply chains, but there is limited research to date on (i) why different stakeholders are motivated to pursue such collaboration, and (ii) the factors for constructive collaboration.

Informed by independent research, this paper hopes to address that knowledge gap by illuminating the motivating factors behind stakeholders' collaborative efforts to combat forced labour and trafficking in Thailand's fishing and seafood processing industry and better protect workers' rights. The central argument of this paper is that it is necessary to understand what draws stakeholders to sit together at the table, and what they respectively bring to the table, in order to address a complex governance issue such as trafficking and forced labour in the fishing and seafood industry.

This paper does not provide a deep dive into past and present collaboration between different stakeholders. Rather, what is presented is a brief and current picture of the situation. Time, resources and capacity were factors limiting the scope and depth of this research, however, insights from this 'snapshot' are still worth capturing, reflecting upon, and ultimately, learning from. In order to move the bar forward on any human rights and governance issue, raising awareness of forced labour and human trafficking in Thailand's fishing industry is not enough. It is equally important to understand what action is being taken, how, and by whom.

2.0 Background

Thailand is one of the world's leading seafood exporters.[2] Tuna, frozen shrimp, and even ingredients in pet food on grocery shelves in the US and Europe can be traced back through complex supply chains to suppliers in Thailand's fishing industry. In the last few years, this industry, and the Thai government, has come under fire for being linked with human trafficking and forced labour, particularly of migrant workers. A number of high profile stories in international media exposed the world to "modern day slavery" being practiced in the Thai fishing industry, some reporters even garnered the Pulitzer Prize. Around the same time, the European Union (EU) issued Thailand a yellow card warning for illegal, unreported, and unregulated (IUU) fishing – a major threat to over €342 million worth of seafood exports. In 2014 and 2015, Thailand was also downgraded in the annual US Trafficking in Persons (TIP) Report to Tier 3, a ranking shared with North Korea and Somalia. And most recently, Thailand underwent its second Universal Periodic Review (UPR) in May 2016. Each of these events individually have impact, but together, they created the perfect storm to encourage Thailand to overhaul its fishing industry.

It is challenging to investigate the actual prevalence of forced labour and trafficking across the industry, although a 2013 ILO study found that among fishers surveyed, 17% were found to be in forced labour.[3] Migrants, mainly from neighbouring Myanmar and Cambodia,[4] working in different segments of the industry, predominantly experience these situations, which are often intertwined or overlapping. Onboard fishing vessels, workers are more vulnerable to harsh conditions and abuse due to their isolation,[5] particularly those on long-haul vessels which may be at sea for months or even years at a time.[6] Media and NGO reports have captured fishers' testimonies of physical abuse, excessive working hours, poor living standards, injuries, and even deaths at sea. Extreme situations reflect cases where migrant workers, who may have voluntarily entered Thailand, were introduced by means of coercion or deception into a situation of trafficking for labour exploitation or forced labour and maintained in that situation by threats, debt-bondage and/or physical violence.[7] Irregular migrants from Myanmar appear to disproportionately report experiencing exploitation or severe working conditions as fishers, compared to Cambodian and Thai workers.[8] Factors that enhance migrant workers' vulnerability to forced labour and trafficking include limited language skills, lack of training, lack of enforcement of safety and labour standards, lack of documentation, low education levels, and a lack of awareness about their rights.[9]

[2] Srakaew (see note 1 above).
[3] International Labour Organization (ILO), *Caught at Sea: Forced Labour and Trafficking in Fisheries*, Geneva: ILO, 2013.
[4] ILO and ARCM (see note 1 above).
[5] ILO 2013 (see note 3 above).
[6] ILO and ARCM (see note 1 above).
[7] ILO and ARCM (see note 1 above).
[8] ILO and ARCM (see note 1 above).
[9] ILO and ARCM (note 1 above); and ILO 2013 (note 3 above); and Srakaew (note 1 above).

The factors behind this situation are numerous. Thailand is one of the top ten destination countries in the region with 3.5 million migrants within its borders, mostly from Myanmar. In particular, migrant workers in the Thai fishing and fish processing industry picked up in the early 1990s. A destructive typhoon in 1989 led to abandonment of the sector by Thai crews and, due to Thailand's rapid development in the period that followed, fewer Thais were willing to engage in such work. Since then, commercial fishing crews are largely comprised of foreigners.[10] There is a high prevalence of undocumented workers in the fishing sector from Myanmar, Lao PDR, and Cambodia for several reasons: the complexity of the official registration process; a wish to change employers; or simply being out to sea during the registration period.[11] This situation puts them in a vulnerable situation with both employers and Thai authorities. Having been trafficked into forced labour, due to their undocumented status, such individuals may be identified as "illegal" and subsequently arrested, detained and deported without recognition of their status as a victim of trafficking.[12] As such, in this industry, many migrant workers do not complain about their working conditions. Part of this could be related to a lack of awareness about their rights. Part of it is also likely related to the limitations of the grievance channels in place. While some migrant workers may submit complaints regarding working conditions to their employer, irregular migrants, particularly from Myanmar, were more likely to submit complaints to NGOs to avoid detection by authorities.[13] Thus, attempts by business to cut labour costs in the face of economic pressures, coupled with the existing vulnerabilities of irregular migrants, create an "enabling environment" for forced labour and other forms of labour exploitation.[14]

From this overview, it is evident that the issue of human trafficking and forced labour in Thailand's fishing industry extends beyond the country, and even the region. It involves transnational flows of people, money and products that crisscross the globe, in effect, it forms a governance gap created by globalization. The following sections highlight some of the actions (not necessarily collaborative) that the government of Thailand, industry, international organizations, and NGOs have taken in recent years.

3.0 Government of Thailand

While further measures are needed, the government has taken notable action to crack down on trafficking and related corruption and improve regulation of the fishing industry. In light of the aforementioned "perfect storm," the government declared a "zero tolerance" policy on human trafficking. This entailed a number of regulatory and

[10] IOM and ARCM, *Assessing Potential Changes in the Migration Patterns of Myanmar Migrants and their Impacts on Thailand*, Bangkok: IOM, 2016.
[11] ILO and ARCM (see note 1 above); Robertson, P, *Trafficking of Fishermen in Thailand*, Bangkok: IOM, 2011; and Sorajjakool, S, *Human Trafficking in Thailand: Current Issues, Trends, and the Role of the Thai Government*, Chiang Mai: Silkworm Books, 2013.
[12] According to a 2013 study conducted by the Mekong Migration Network, only 3% of respondents and migrants who were arrested and detained by Thai authorities reported being asked screening questions about labour abuse, trafficking, or refugee status.
[13] ILO and ARCM (see note 1 above).
[14] ILO and ARCM (see note 1 above).

institutional measures introduced over the past year, including the revision of the 2014 Ministerial Regulation concerning Labour Protection in Sea Fishery Work, amendments to the anti-trafficking law, and the establishment of the Command Center to Combat IUU Fishing (CCCIF) and Labour Coordination Centres.[15] Thailand and Myanmar also recently agreed to a new MOU to begin regularizing the status of Myanmar migrant workers in Thailand. In recognition of these efforts, Thailand was upgraded to the Tier 2 Watchlist in the US TIP Report released in July 2016. Annex 2 briefly presents the legislative and institutional framework relevant to anti-trafficking and labour governance in the fishing industry.

With the integration of the ASEAN Economic Community (AEC) and projected labour trends, the scale of migration in the region will likely increase. Countries in the region, including Thailand, will need to prepare to manage this likelihood which "will require policies that align with national development strategies and international standards promoting fair recruitment, decent and productive employment and social protection."[16]

4.0 The fishing and seafood industry in Thailand

Major industry players including Nestle, Walmart, Charoen Pokphand (CP) Foods and Thai Union have also shared the limelight in the international media about "modern day slavery" in seafood supply chains. This unfavourable light coupled with the global sustainable development agenda has catalysed these companies to respond seriously to allegations linking their products with human trafficking and environmentally detrimental practices such as IUU.

Whether considering an ethical line or their bottom line, major companies are now pushing for strengthened standards among their suppliers and improved working conditions.[17] For example, CP launched a "3P" (policy-practice-partnership) strategy to guide labour practices across the company's operations. It also committed to: a direct hiring policy for foreign workers across all factories to lessen the need for a labour recruitment agency; establishing a Thai-Cambodian Coordination Center staffed with interpreters; and setting up a "quality of life" development centre to address fishers' grievances and assist victims of trafficking. Similarly, Thai Union is rolling out its Sea Change Sustainability Strategy which focuses on safe and legal labour, responsible sourcing, marine conservation, and caring for our communities. This strategy is being implemented with input from NGOs, such as Project Issara, Migrant Workers Rights Network (MWRN), and the Labour Promotion Network (LPN).[18] Additionally, Thai Union pro-actively brought all its pre-processing

[15] MOFA, 'Press release: Thai government, Nestle and Thai Union to launch 'demonstration boat' to protect fishery workers' rights' MOFA, 2016, available at http://www.mfa.go.th/main/en/media-center/14/65812-Thai-Government,-Nestlé-and-Thai-Union-to-launch-'.html, accessed on 18 August 2018.

[16] UNESCAP, 'Press release: New UN report says migrants are a critical factor in Asia-Pacific countries' development' UNESCAP, 29 February 2016.

[17] van Dam, E (Communication Manager of Issara Institute), interview on 9 March 2016.

[18] Ramsden, N, 'New Thai law forces Sainsbury, Tesco supplier to lay off under-18 workers' Undercurrent News, 28 January 2016, available at https://www.undercurrentnews.com/2016/01/28/new-thai-law-forces-sainsbury-tesco-supplier-to-lay-off-under-18-workers/, accessed on 18 August 2018.

in-house to lessen the risk of its supply chain being tainted with trafficking and forced labour and enacted a zero recruitment fee policy.[19]

Industry associations also help encourage responsible business practices among members. For example, the Thai Frozen Foods Association (TFFA) is implementing a policy to eliminate child labour and forced labour from its members' facilities and affiliated primary processors within two years.[20] Basic commitments for TFFA members include: complying with national laws regarding child labour and forced labour; complying with international standards (ILO Convention 182); pledging to not support or work with others who use child labour or forced labour; and committing to establishing an internal monitoring system to identify and address child labour or forced labour among members and their suppliers.[21] Additionally, as of January 2016, TFFA required all members to bring shrimp pre-processing in-house.[22]

In the context of Thailand's fishing industry, industry players themselves can be considered the strongest pressure for change within the industry. In particular, international distribution companies are uniquely positioned to influence suppliers in Thailand.[23] Lisa Rende Taylor of the Issara Institute has been quoted as saying,

> Global brands and retailers can do so much good without bringing too much risk upon themselves by simply enforcing their supplier standards, which typically prohibit forced and child labour … If local businesses realise that non-compliance results in loss of business, it has the potential to bring about huge positive change in the lives of migrant workers and trafficking victims.

CP has said in a statement that it will try using its commercial weight to influence the Thai government and explore alternatives for Thai fishmeal by 2021. Additionally, internationally-known companies such as CP and Thai Union can show other governments, such as those in the EU, that change is happening in the industry and in Thailand. Thai Union's Global Director of Sustainability, Dr Darian McBain explained, "It is one thing to regulate, but it is another to demonstrate impact."[24]

5.0 Intergovernmental organizations and non-governmental organizations

Intergovernmental organizations (IOs) and donors, and international and local NGOs

[19] Undercurrent News, 'Thai shrimp firms pledge to stop using peeling sheds' Undercurrent News, 21 December 2015, available at https://www.undercurrentnews.com/2015/12/21/thai-shrimp-firms-pledge-to-stop-using-peeling-sheds/, accessed on 15 August 2018; and McBain, D (Global Sustainability Manager of Thai Union Group), interview on 9 September 2016.
[20] Undercurrent News 2015 (see note 19 above).
[21] TFFA, 'Thai Frozen Foods Association's policy and implementation concerning child labor and forced labor' TFFA, 2016, available at http://www.thai-frozen.or.th/labor_info03(en).php, accessed on 15 August 2018.
[22] Undercurrent News 2015 (see note 19 above).
[23] ILO and ARCM (see note 1 above).
[24] McBain (see note 19 above).

have also been involved in catalysing the Thai government and companies in the seafood industry into action. As such, they are not just watchdogs on behalf of public interest or marginalized groups, but also important collaborators with technical expertise and resources needed by both governments and the private sector. The International Labour Organization (ILO) and donors, such as USAID and the EU, implement assistance programs to build institutional capacity in Thailand and the region to address trafficking and improve workers' living and working conditions throughout the industry. Local NGOs such as Project Issara, the Labour Rights Protection Network (LPN), and the Migrant Workers Rights Network (MWRN) also conduct research, provide technical guidance to factories to improve conditions, and provide direct assistance to migrant workers and victims of trafficking in the industry.

There are far more actions being undertaken that were not mentioned here. The intention of this overview was to highlight some initiatives and measures that government agencies, private companies, and NGOs have advanced recently. The next section will explore the collaborative aspect of their efforts to eliminate human trafficking and forced labour for Thailand's fishing and seafood industry.

6.0 Collaborative efforts underway

The importance of cross-sectoral partnership and collaboration to more effectively address human trafficking and labour abuses of migrant workers in Thailand has been raised by nearly all stakeholders. This reflects recognition of the complexity of the issue and the need for an 'all hands on deck' approach in collaboratively developing solutions. Each partner has their own unique strengths, capabilities, and problem-solving perspectives to bring to the table.[25] Added benefits of collaboration include reducing the resource implications for the individual entities involved.[26] Thailand's recent *pracharat* policy (public-private-people partnership) reflects a shared sense of responsibility and capability for more effective governance.[27] Currently, there is much political will and anticipation around these initiatives. This section highlights a few prominent initiatives underway, as well as individual and shared motivations of different stakeholders involved, and their capacity for joint action.[28]

[25] Robertson (see note 11 above).

[26] Ruggie, J, 'Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development – Protect, Respect and Remedy: A framework for business and human rights. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporates and other business enterprises, John Ruggie' 2008.

[27] MOFA, 'Press release: Government's response to migrant workers' strike at Golden Prize Canning Plant' MOFA, 2016, available at http://www.mfa.go.th/main/en/media-center/14/64894-Government's-Response-to-Migrant-Workers'.html, accessed on 18 August 2018.

[28] This analysis is the result of independent research conducted in 2016, involving a desk review as well as several semi-structured interviews, and meetings with representatives from the ILO, Thai Union, Project Issara, CCCIF, TOFA, and USAID Oceans and Fisheries Partnership. As many collaborative initiatives have recently been launched, the research did not aim to assess impact but rather, to understand the motivations for collaboration according to different stakeholders. A brief overview of key multi-stakeholder initiatives (MSIs) that are underway to address labour issues in Thailand's fishing and seafood industry are presented in Table 1.

Table 1: Key Multi-stakeholder Initiatives to Address Labour Issues in Thailand's Fishing and Seafood Industry

MSI	Mission/Objectives	Partners
ILO Good Labour Practices (GLP) Programme ***2010 – 2015***	Better understanding of existing labour laws and regulations; Highlighting critical labour issues; Improving understanding of benefits of voluntary good practices; Promoting culture of compliance and OSH; Improving industry capacities to address labour issues through training and CB activities; Promoting workplace cooperation and ensuring workers have a voice.	Government (Department of Labour Protection and Welfare, Department of Fisheries), industry, workers organizations, seafood buyers, NGOs – expansion planned to include research foundations and institutes
ILO/EU Combatting Unacceptable Forms of Work in the Thai Fishing and Seafood Industry ***2015 - 2019***	Operation platform for project partners/ stakeholders to exchange information and share experiences on implementation of activities, challenges and limitations, and serve as a networking platform to strengthen cooperation among stakeholders. Key objectives of the project: Strengthen labour standards in legal, policy and regulatory framework in the fishing and seafood sectors; Enhance capacity of the Thai government to more effectively identify and act against human trafficking and other labour rights abuses in these sectors; Improve compliance with fundamental principles and core labour standards in these industries through GLP Programme; Enhance access to support services for workers and victims of labour abuses through engaging CSOs and trade unions.	Ministry of Labour, Ministry of Foreign Affairs, Department of Labour Protection and Welfare, Command Center for Combatting Illegal Fishing (CCCIF), Marine Department, Department of Fisheries, Social Security Office, State Enterprise Workers' Relations, Stella Maris Seafarers Center – Sriracha, Migrant Working Group, Human Rights and Development Foundation, Thai Trade Union Congress, National Fisheries Association of Thailand, Thai Tuna Industry Association, Thai Overseas Fisheries Association, Thai Frozen Foods Association, Thai Food Processors' Association, Employers' Confederation of Thailand, European Union Delegation, ILO
Shrimp Sustainable Supply Chain Task Force ***Launched July 2014***	An international industry alliance to ensure Thailand's seafood supply chain is free of illegal and forced labour through accountability, verification, and transparency. Objectives: Implement track and trace systems with international verification; Drive Thai port codes of conduct with international recognition; Drive fishery improvement projects.	Cosco, Morrisons, Brakes, Sodexo, WWF, TRF, CPR, EJF, Lyons Seafoods, MRG, TUF, Oxfam, Underwriters Laboratories, Sustainable Fish Partnership

MSI	Mission/Objectives	Partners
USAID Oceans and Fisheries Partnership ***Launched September 2015***	Increasing the ability of regional fishery organizations to conserve marine biodiversity and combat IUU fishing in the Asia-Pacific region. Objectives: Develop financially sustainable regional catch documentation and traceability systems to combat IUU fishing and seafood fraud; Expand use of CDT system to priority diversity areas; Strengthen human and institutional capacity of regional organizations; Enhance PPPs to conserve biodiversity, promote sustainable fisheries management, and combat IUU fishing and seafood fraud.	USAID, SEAFDEC, CTI-CFF, FAO, Anova Seafood, GFTC, ANCORS, UN-ACT, WWF-CTI, WWF, Smithsonian Institute, Swedish Embassy
Issara Institute's Strategic Partners' Program ***Launched in January 2016***	Work directly with retailer and supplier partners to conduct supply chain analysis and make improvements where issues are found related to human trafficking and labour abuses.	Lyons Seafoods, Seafarms, Thai Union, Walmart, Walmart Foundation, IJM, USAID, Fishwise, lovefrankie, World Vision, M&C Saatchi, raks thai, Humanity United, Anesvad, LPN, Slavefree Seas, The Freedom Fund, Marks and Spencer, Tesco, Waitrose, ASDA, Sustainable Trade Initiative, Thai Department of Special Investigation (DSI)
Multi-stakeholder Initiative for Accountable Supply Chain of Thai Fisheries (MAST) ***Launched in March 2016***	Labor Rights Promotion Network Foundation (LPN) and TLCS Legal Advocate Company have jointly launched MAST to support the reform of Thai fisheries to eliminate human trafficking and forced labour, as well as IUU fishing practices, with civil society, industry and governments. Immediate goals include: creation of a Thai fishermen's union; the establishment of centres at ports to provide services to fishermen; and strengthening public awareness of migrant worker living conditions.	National Fisheries Association of Thailand, Pair Trawlers Association of Thailand, Coalition of Peeling Sheds

MSI	Mission/Objectives	Partners
Demonstration Boat Training ***Launched in March 2016***	This project aims to raise awareness among fishing boat owners, captains, and crews about best practices concerning the rights of fishery workers using an actual model boat that meets all requirements of the new Ministerial Regulation.	Department of Fisheries, Thai Union Group, Nestle, partner NGOs

7.0 Individual motivations

Each type of stakeholder (public, private, or non-governmental) has its own motivations for engaging in collaboration, either through partnerships or MSIs. Some motivating factors are similar, such as international pressure and public perception, while others relate to the particular position of the stakeholder.

First, the government is motivated by public perception, diplomatic pressure, and sourcing and sustainability concerns that may negatively impact the country's US$7 billion seafood and fishing industry. In particular, it is the combination of these different motivations which prompted prioritization of the issue by the country's top leadership. "[The downgrade to Tier 3] was a low point for the country and its reputation abroad," noted a Bangkok Post editorial. While there are still many areas for improvement, a promising pace has been set. As Jason Judd, Senior Project Officer at ILO explained, "If you think of the US and the UK in terms of shareholders, then [the Thai Government] is thinking 'our market is under threat.'"[29] Neighbouring Cambodia and Myanmar have also called on Thailand to step up efforts to monitor and protect workers in its fishing industry, many of whom originate from these countries.[30] Essentially there are both economic and political motivations for the Thai government to take action, and it can act more effectively by engaging the technical expertise and resources of other sectors.

Public companies, such as Thai Union, want to mitigate risk and respond to pressure from shareholders and consumers.[31] Public perception, particularly negative coverage in the media, is a major motivating factor to act, both unilaterally and in collaboration. Industry players may be motivated to collaborate with public agencies, such as the Central Command Centre for Illegal Fishing, ILO, or NGOs, to drive measures forward that will have greater impact on the overall industry.[32] Emma van Dam of NGO Issara Institute said, "The retailers we work with want to know what is happening in their supply chains,

[29] Judd, J (Senior Project Officer of ILO's 'Combatting unacceptable forms of work in the Thai fishing and seafood industry'), interview on 30 August 2016.
[30] NNT, 'Thailand and Cambodia co-chair meeting for bilateral cooperation' Pattaya Mail, 27 August 2016, available at http://www.pattayamail.com/thailandnews/thailand-cambodia-co-chair-meeting-bilateral-cooperation-146712, accessed on 24 August 2018; and Titthara, M, 'Thailand asked to stop abuse' Khmer Times, 10 August 2016, available at http://www.khmertimeskh.com/news/28271/thailand-asked-to-stop-abuse/, accessed on 24 August 2018.
[31] Judd (see note 29 above).
[32] McBain (see note 19 above).

but it is so complex that they don't have that visibility. Even before the major story in the Guardian broke last year, retailers were already talking to us – the interest was already there to go 'beyond audit.'"[33] While companies may have their own private initiatives, collaboration with other stakeholders can amplify the impact of these internal measures and help legitimize their intentions and efforts to the public.

For local NGOs, such as the Issara Institute, MWRN, and LPN, organizational motivations driving them to collaborate are often at the core of their mission: empowering workers, particularly migrants; advocating for workers' rights; providing technical support to help industry or government pursue positive change; and expanding understanding of the issue among various audiences. Certainly they are positioned so they may work with industry and government as much as hold them accountable to relevant law and voluntary commitments.[34]

International and intergovernmental actors also have their own motivations for supporting multi-stakeholder collaboration. ILO's tripartite approach specifically aims to help build relationships and consensus among different parties. The overarching goal is to push these parties closer toward international standards regarding worker rights and working conditions. The US and EU, both major destinations for seafood and seafood products from Thailand, are not just applying diplomatic pressure on Thailand, they are also providing technical assistance to support capacity-building and collaboration. The USAID Oceans and Fisheries Partnership is building the seafood traceability capacity of ASEAN countries in order to combat IUU, promote sustainable fisheries, and improve transparency and regulation of labour conditions on fishing vessels throughout the region.[35]

8.0 Shared motivations

The scale and complexity of labour governance in the supply chain are the primary factors motivating government, industry, and NGOs to work together. As ILO Senior Program Officer, Jason Judd explained:

> It is hard for the old players, meaning unions, CSOs, and government, to get a handle of what's happening at sea … While the garment industry has had twenty years to figure it out, seafood buyers today have had to get a quicker handle on what is happening at sea. NGOs and unions aren't equipped for that either … Another aspect is the distended, fractured nature of the supply chain: Who is responsible for what? There are questions of authority and jurisdiction, especially with the fluidity of the vessels and therefore labour.[36]

[33] van Dam (see note 17 above).
[34] ILO, 'Project document template: Combatting unacceptable forms of work in the Thai fishing and seafood industry (Better Fisheries Programme)' 2015.
[35] Donnelly, M (communications manager) and Satapornvanit, A (Human Welfare Specialist for the USAID Oceans and Fisheries Partnership), interviews on 23 September 2016.
[36] Judd (see note 29 above).

Dr Darian McBain, Global Sustainability Director of Thai Union, echoed the need for a holistic, coordinated approach from an industry perspective:

> With human trafficking which is linked to forced labour, you need collaboration because the issue is rarely limited to one company. If Thai Union takes strong action, which it has, the problem will still exist. The problem is bigger than Thai Union, you need to look at the whole picture, the entire industry.[37]

There is a shared recognition of the need and value of drawing on different perspectives and knowledge in formulating policies or solutions. Thailand's Minister of Labor, Sirichai Ditthakul, has been quoted as saying, "I believe that to solve these problems [IUU fishing and supply chains free of abuse], success can only be achieved through cooperation" at the signing ceremony for the ILO Combatting Unacceptable Forms of Work in the Thai Fishing and Seafood Industry project (2016). Dr McBain of Thai Union also explained,

> We … have found that partnership and open engagement with all parties delivers practical and meaningful improvements … We are now extending this approach … across a broad range of issues facing the global fishing industry so that our sustainability action plans benefit from expertise and knowledge beyond our own.[38]

Local NGO Issara Institute conducts inclusive workplace assessments and collects data, which Communications Manager, Emma van Dam, cited as the main reason why retailers trust them to conduct independent evaluations and research. She emphasized: "[Issara Institute's] approach is inclusive labour monitoring, meaning we prioritize workers' voices and their empowerment. The value of our model is our independence – we are not trying to make business feel good, we are trying to work with them productively to make changes."[39]

Additionally, each stakeholder faces different constraints, such as time or funding. There can be either internal or external pressure to demonstrate that funds and other resources were expended wisely and efficiently. Furthermore, each player brings different resources, knowledge, and influence to the table. They have a shared motivation to collaborate in order to draw on each other's strengths and complement each other's weaknesses to develop workable solutions. And certainly, public pressure and perception is a motivating factor for any organization, to some degree. Collaboration with stakeholders in other sectors can help lend legitimacy to governmental or private commitments and efforts to

[37] McBain (see note 19 above).
[38] Undercurrent News, 'Thai Union launches sustainability strategy for consultation' Undercurrent News, 22 February 2016, available at https://www.undercurrentnews.com/2016/02/22/thai-union-launches-sustainability-strategy-for-consultation/, accessed on 18 August 2018.
[39] van Dam (see note 17 above).

address the issue. Increased legitimacy can come from a variety of actors being involved,[40] particularly influential actors. For example, Dr McBain of Thai Union said, "The Royal Thai Government gives us credibility for our efforts in the media, because if we say something, no one will believe us."[41]

9.0 Capacity for joint action

Beyond the independent and shared motivations for stakeholders to work together, it is important to also consider the overall capacity for joint action among the parties involved. This research indicates that enhanced capacity for joint action comes from the resources, knowledge, and leadership that different stakeholders bring to the table.

Enhanced potential for finding more effective solutions collaboratively allows parties to pool resources and foster mutual learning from different perspectives.[42] ILO and donor-funded projects such as USAID Oceans generally play an enabling role by providing technical support and resources to the Thai government and even NGOs and trade unions. This enabling role can come in the form of research and analysis, policy recommendations, the development of practical tools (such as a catch documentation traceability system), or capacity building and training.[43] Data, tools, and training can help enhance government and an industry player's capacity to act. Local NGOs such as Project Issara also provide resources and knowledge, by conducting studies, undertaking independent assessments of workplaces, or collecting and analysing data. For example, Project Issara uses data collected from its hotline service (for migrants and victims of trafficking) to inform a better understanding of supply chains, and its work with suppliers and retailers. Additionally, it can be easier for NGOs to conduct pilot projects, or test different models for service delivery to assist victims of trafficking, for example.[44]

In addition to resources and technical expertise, leadership and power are other elements that enhance the capacity for joint action. As highlighted earlier, the ILO possess strong "convening power." Dr McBain explained from Thai Union's perspective, "The ILO name brings people to the table. If Thai Union launched something on our own, for example, our competitors wouldn't want to be part of it. ILO is a convener."[45] For example, ILO's leadership in bringing together multiple stakeholders under its Good Labour Practices (GLP) programme led to the successful establishment of customised labour guidelines that are being rolled out to processing-packing factories and shrimp peeling sheds.[46] A

[40] Albareda, L, Lozano, JM, Tencati, A, et al, 'The changing role of governments in corporate social responsibility: Drivers and responses' *Business Ethics: A European Review*, 2008, Vol 17, No 4, pp 347-363; and Roloff, J, 'Learning from multi-stakeholder networks: Issue-focused stakeholder management' *Journal of Business Ethics*, 2008, Vol 82, No 1, pp 233-250.
[41] McBain (see note 19 above).
[42] Rasche, A, 'Collaborative governance 2.0' *Corporate Governance: The International Journal of Business in Society*, 2010, Vol 10, No 4, pp 500-511.
[43] ILO (see note 34 above); and Donnelly (see note 35 above).
[44] van Dam (see note 17 above).
[45] McBain (see note 19 above).
[46] ILO (see note 34 above).

related element is the network of relations that stakeholders maintain, which they also bring to the MSI table.[47]

MSIs help create space and opportunities for developing constructive working relationships. Intergovernmental organizations such as the ILO or international donors have an important role by convening key players and facilitating constructive dialogue and relationship-building. Through these working groups and meetings, necessary discussions must take place and plans must be formulated. As Jason Judd of ILO explained in 2016,

> Different stakeholders are forced to have difficult conversations and form working relationships. Government and industry are both under enormous pressure, which militates against consensus-building. It is a challenge getting parties to focus and really discuss. This takes time and patience to understand the interests and constraints of the others.

In another example, the Shrimp Sustainable Supply Chain Task Force (SSSCTF), initially comprised of a small but diverse group of stakeholders, successfully established standards for shrimp feed supply chain audits. Having achieved this initial objective, the SSSCTF has expanded to a bigger group with eight different sub-groups.[48] Relationship- and trust-building are key to enhancing the quality of interactions between stakeholders and therefore the potential for constructive collaboration.

Despite notable changes made recently by policymakers and companies, continued attention and research is needed on this issue. The ILO and ARCM (2015)[49] point out that labour force trends mean that migrants will likely remain at the core of the labour force on Thai fishing boats and in its fish processing industry. There is further international pressure to continue addressing trafficking and forced labour of migrant workers in the fish and seafood industry supply chains. In addition, the US government recently passed the Trace Facilitation and Trade Enforcement Act of 2015, barring all imports of goods made with convict, forced, or indentured labour, closing a loophole in the US Tariff Act of 1930 which allowed these products (such as from the mining, garment, and seafood industries) if consumer demand could not be met without them. Lastly, the Thai government is considering membership to the Trans-Pacific Partnership (TPP) which may have implications for social and labour protection if the country attempts to enhance its attractiveness to foreign investment. In essence, this is a timely and necessary opportunity to explore the emerging collaborative governance responses among sectors to address trafficking and forced labour and to make the Thai fisheries industry a safe and fair place of employment for all workers.

10.0 Analysis

Much of the focus on anti-trafficking centres around the role of governments. More

[47] ILO (see note 34 above).
[48] McBain (see note 19 above).
[49] ILO and ARCM (see note 1 above).

attention is now being paid to the private sector as understanding about corporate social responsibility shifts from public charity to supply chain responsibility.[50] There is a greater sense of "corporate citizenship" demanding public responsibility of private companies. The pressure from shareholders, general public opinion, and consumer choice can move multinational companies to assume a political role in global society.[51] Non-State actors (NSAs) such as companies, civil society organizations, and even consumers, have a role to play in countering trafficking, with the "declining significance of borders and nation-states."[52] Donohue (2004)[53] states:

> The engagement of non-governmental actors in the pursuit of public missions is by no means new. But it is becoming more important for several reasons: First, and the most obvious, the fact that a large part of the world's population lives in areas where the formal state is weak. The second reason is widespread loss of confidence in the mid-20th century version of the centralized state; and, the third, subtlest, and perhaps most important reason is that a growing fraction of collective tasks in a complex, interconnected, information-dense world—knit together and energized by powerful market forces—simply cannot be accomplished (well, or at all) by government acting alone.

Essentially, as a governance issue, trafficking and forced labour in the global seafood supply chain is too complex and dispersed to be effectively handled by a single sector. As NGO, Verite's Director of Training, Lydia Long, has said,

> Most of the contributing factors are entrenched and tied up in knotty combinations of economic drivers, porous borders, inadequate legal protections and weak enforcement of those that exist, endemic occupation hazards, murky chains of custody, and significant under-capacity to control risk along those chains. Measurable impact will come only from a full court press of combined efforts.[54]

It can be said that this kind of governance gap, created by the forces of globalization, challenges the statist model of governance.[55] Furthermore, greater connectivity and visibility across the globe has strengthened the impact of public opinion and consumer choice (as well as NGOs and civil society organizations as they inform and influence these)

[50] Spence, L, and Bourlakis, M, 'The evolution from corporate social responsibility to supply chain responsibility: The case of Waitrose' *Supply Chain Management: An International Journal*, 2009, Vol 14, No 4, pp 291-302.
[51] Donaghey, J, Reinecke, J, Niforou, C, et al, 'From employment relations to consumption relations: Balancing Labor governance in global supply chains' *Human Resources Management*, 2014, Vol 53, No 2, pp 229-252.
[52] Shelley, L, *Human Trafficking: A Global Perspective*, Cambridge: Cambridge University Press, 2010.
[53] Donahue, J, *On Collaborative Governance*, Corporate Social Responsibility Initiative Working Paper No 2, Cambridge, MA: Harvard University, 2004.
[54] Long, L, 'From the field: Verite in Thailand' Verite, 2016, available at https://www.verite.org/from-the-field-verite-in-thailand/, accessed on 18 August 2018.
[55] Macdonald, K, *The Politics of Global Supply Chains*, Cambridge, UK: Polity Press, 2014.

on private firms and industries, generally elevating social responsibility expectations of the private sector. Additionally, this is an example where intergovernmental bodies, such as the ILO, or other governments can set standards or "general behavioural prescriptions intended to apply across national borders … filling gaps in global regulation and substituting for the declining governance capability of nation-states."[56]

Aspects of these MSIs and collaborations build the capacity of government, particularly to establish and enforce a strong legal and regulatory framework. But governments typically must stretch already limited resources even if combating trafficking is a national priority. Additionally, regulation of labour and working conditions in the commercial fishing industry and seafood supply chain spans scales and geographies. It does require a more holistic approach or else the problem will persist somewhere in the industry. The approach to effective collaboration is recognizing and encouraging the roles that different stakeholders play. As Dr McBain explained from the perspective of Thai Union,

> For industry, we are the practical implementers; NGOs are our critical friends driving change, and regulators in government must bring the bottom of the market up to standard. ILO shares a bigger picture perspective, helping move towards international standards.[57]

In terms of working together, there are several factors that can influence how constructive collaboration is. Relying on too many actors with diverse agendas can lead to weak solutions, or solutions that are not truly inclusive.[58] One of the key factors that Dr McBain takes into account when deciding whether to join a MSI is whether the outcomes are clear: "If the outcomes are not clear, or do not align with our priorities, then we won't join." She voiced concern about the potential impact of initiatives that are not clear, and explained that narrower focus seems to support more achievable outcomes.[59] A related consideration are the dynamics between actors and maintaining the right balance of power, according to ILO's Jason Judd. He explains that in the case of the ILO's tripartite mechanism for stakeholder cooperation, "All parties are equal. Governments, unions, and CSOs together – it's messy, but they're working together. As far as I know, this is the only place where this is happening." He stressed that if the balance of power in the room is not right, the solutions proposed will be equally "lopsided."[60]

Collaboration alone does not make for more effective solutions – there must be focus on the nature of the stakeholders and the quality of their interactions.[61] As mentioned earlier, relationship- and trust-building are key to enhancing the quality of interactions between stakeholders, and therefore the potential for constructive collaboration. As demonstrated

[56] Donaghey et al (see note 51 above).
[57] McBain (see note 19 above).
[58] Rasche (see note 42 above).
[59] McBain (see note 19 above).
[60] Judd (see note 29 above).
[61] Rasche (see note 42 above).

by this current situation, multinational companies are increasingly aligning themselves with, rather than fighting, social movement activists and NGOs, and promoting partnerships.[62] For example, Dr McBain explained that Thai Union is working to turn "defensive or hostile relationships [with NGOs] into positive ones."[63] To do this, she stressed that "you must meet face to face and discuss how we can work together … If you have a focused solution, we can work with you." While INGOs may have more international perspectives and help move the approach to aligning with international standards, she agreed that you can get real outcomes and change working with NGOs that know the problem on the ground. For example, she credited the Migrant Workers Rights Network and Andy Hall with driving Thai Union to adopt a zero recruitment fee policy.[64] Dr McBain has also said that companies must stand up for human rights defenders, because "even if you won't always agree with what they say, their right to investigate needs to be protected against anything that would limit free speech."[65] Likewise, many local NGOs have actively sought ways to foster constructive relationships with industry. Project Issara, for example, emphasizes that it does not take a "name and shame" approach, and rather seeks to establish productive relationships with industry players and ask "how we can help?"[66]

11.0 Additional research needs and concluding remarks

While there remains far more to be discovered about the experiences of migrant workers and victims of trafficking, there also needs to be more research on the response – by actors in the public, private, and civic sectors, either working separately or in partnerships. There is a rapidly expanding number of MSIs and partnerships in Thailand to address human trafficking, labour abuses and IUU fishing in the fisheries industry. Increasingly, there is recognition of the various resources, insights, and approaches that the three sectors (public, private, and civil) can put on the table in support of developing innovative and effective solutions. And generally, there needs to be greater research on labour governance in seafood supply chains, for example, how labour rights fit in among price, quality, and quantity by consumer choices and sourcing decisions by buyers.[67]

As these initiatives proceed, there will be more opportunity to assess their impact. These evaluations should be practical and learning-oriented, with the results shared among the growing "community of practice" dedicated to bettering labour conditions and upholding worker rights in the industry. In addition to sharing knowledge and lessons learned from specific initiatives, a broad assessment of the collective impact across these initiatives could

[62] Gilbert, DU, Rasche, A, and Waddock, S, 'Accountability in a global economy: The emergence of international accountability standards' *Business Ethics Quarterly*, 2011, Vol 21, No 1, pp 23-44; and O'Rourke, A, 'Public-private partnerships: The key to sustainable microfinancing' *Law and Business Review of the Americas*, 2006, Vol 12, available at https://scholar.smu.edu/lbra/vol12/iss2/4.
[63] Ramsden 2016 (see note 18 above).
[64] McBain (see note 19 above).
[65] Ramsden, N, 'Thai Union's McBain: Companies must stand up for human rights defenders' Undercurrent News, 22 August 2016, available at https://www.undercurrentnews.com/2016/08/22/thai-unions-mcbain-companies-must-stand-up-for-human-rights-defenders/, accessed on 15 August 2018.
[66] van Dam (see note 17 above).
[67] Judd (see note 29 above).

be useful. It could contribute toward a better understanding of the landscape of solutions to global governance issues. Rasche (2010) argues for a move towards "Collaborative Governance 2.0," necessitating a reflection on the current collaborative efforts to understand what is needed to ensure that such voluntary initiatives have greater impact. A variety of isolated initiatives must be avoided, or else they will not be sustainable in the long run. A bigger picture perspective can allow relevant stakeholders to see where their initiatives may be complementary, where they may be duplicative, and how overall, greater efficiency and effectiveness can be achieved.

In conclusion, there is opportunity now in Thailand to better understand the different ways in which government, the private sector, and civil society are collaborating to address complex governance issues. As in the case of trafficking and forced labour in Thailand's fishing and seafood industry, there are greater governance challenges that lie at the intersection of the public sector, private industry, and civil society. It is necessary to dive deeper into the rich landscape of collaborative efforts between these stakeholders in order to assess what can work and why within a given context. Understanding the solution is just as critical as understanding the problem. Why? These past few years, the global spotlight has been on the Thai seafood processing and fishing industry, just like it was on the garment industry in years prior. Next year, the spotlight may shift to the poultry industry. Solutions are being tested, relations are being formed and a new model of governance is emerging through the collaborative action that is ongoing, yielding valuable lessons to help minimize future governance gaps.

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ABBREVIATIONS AND ACRONYMS

AEC	ASEAN Economic Community
ARCM	Asian Research Centre for Migration (Chulalongkorn University)
ASEAN	Association of Southeast Asian Nations
CCCIF	Command Center to Combat IUU Fishing
CDT	Catch Documentation Traceability
CP	Charoen Pokphand Foods
CSO	Civil society organizations
DLPW	Department of Labor Protection and Welfare (Thailand)

DOF	Department of Fisheries (Thailand)
DSI	Department of Special Investigation (Thailand)
EJF	Environmental Justice Foundation
EU	European Union
FAO	Food and Agriculture Organization
GLP	Good Labour Practices
ILO	International Labour Organization
IJM	International Justice Mission
IUU	Illegal, unreported, and unregulated fishing
LPN	Labour Promotion Network
MAST	Multi-stakeholder Initiative for Accountable Supply Chain of Thai Fisheries
MSI	Multi-stakeholder Initiative
MOU	Memorandum of Understanding
MWRN	Migrant Workers Rights Network
NGO	Non-governmental organization
SEAFDEC	Southeast Asia Fisheries Development Center
SSSCTF	Shrimp Sustainable Supply Chain Task Force
TFFA	Thai Frozen Foods Association
TIP	Trafficking in Persons
TUF	Thai Union Foods
UNESCAP	United Nations Economic and Social Commission for Asia and the Pacific
UNIAP	United Nations Inter-Agency Project on Human Trafficking
UNODC	United Nations Office on Drugs and Crime
UPR	Universal Periodic Review
USAID	United States Agency for International Development
WWF	Worldwide Fund for Nature (formerly World Wildlife Fund)

ANNEX 1: KEY TERMS

This section defines the main concepts and terms used in this document, drawing primarily on international legal instruments, standards, and guidelines where relevant.

Collaborative governance

There are several definitions of collaborative governance as this concept is relatively new and still evolving. The conceptual framework for this research draws on the definition provided by Emerson et al (2011) which defines collaborative governance broadly as: "the processes and structures of public policy decision making and management that engage people constructively across the boundaries of public agencies, levels of government, and/or the public, private and civic spheres in order to carry out a public purpose that could not otherwise be accomplished."[68]

[68] Emerson, K, Nabatchi, T, and Balogh, S, 'An integrative framework for collaborative governance' *Journal of*

Forced labour

The International Labour Organisation (ILO) has defined forced labour as: "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[69] Further, ILO developed a set of indicators and survey guidelines intended to support frontline officials in identifying persons who may be in a forced labour situation. These indicators include:

- abuse of vulnerability
- deception
- restriction of movement
- isolation
- physical and sexual violence
- intimidation and threats
- retention of identity documents
- withholding of wages
- debt bondage
- abusive working and living conditions
- excessive overtime[70]

Forced labour and labour exploitation are separate but related crimes from trafficking in persons in that trafficking requires an action (recruitment, transport, transfer, harbouring, or receipt of a person) and, in the case of adult victims, a means (deception, force, coercion, etc.).[71] Trafficking in persons is defined further below.

Irregular migration

Irregular migration is often the result when demand for labour migrants in countries of destination and the supply of labour in countries of origin exceed the volume of migrants officially permitted by governments, and legal means to enable people to migrate are limited. Migrants may have an irregular (never illegal) status because they: (i) entered a country without authorization; (ii) entered legally but are staying and working without authorization; or (iii) entered the country and were authorized to work but their work violates regulations concerning the employer, type of work, or hours worked.[72]

Migrant worker

According to the International Convention on the Protection of the Rights of All Migrant Workers and their Families (1990), "a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a State of which he or she is not a national."

Public Administration Research and Theory, 2011, Vol 22, No 1, pp 1-29, at 2.

[69] ILO Forced Labour Convention, 1930 (No 29).

[70] ILO Special Action Programme to Combat Forced Labour (SAP-FL), as quoted by ARCM, Institute of Asian Studies, and Chulalongkorn University, *Employment Practices and Working Conditions in Thailand's Fishing Sector*, Bangkok: ILO, 2015.

[71] Asia-Europe Meeting (ASEM), 'Background paper on human rights and trafficking in persons' *ASEM Seminar on Human Rights*, 2015.

[72] UNESCAP, *UN Asia-Pacific Migration Report: Migrants' Contribution to Development*, UNESCAP, 2015, at 26.

Multi-stakeholder initiative (MSI)

Multi-stakeholder initiatives are seen in diverse settings and scales. Defined broadly, MSIs typically involve a broad range of stakeholders, possess an internal governance structure and mechanisms for fair functioning of the initiative, and a common pursuit or goal. They may take different forms, such as: standards, certification systems, joint stakeholder initiatives, roundtable dialogues, common codes of conduct, or joint funding for research and innovation.

Trafficking in persons (TIP)

The 2000 UN Protocol to Suppress, Prevent and Punish Trafficking in Persons, Especially Women and Children (hereafter, UN Trafficking Protocol) under the Transnational Organized Crime Convention provides the definition for trafficking in persons:

> Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[73]

For children (defined as under the age of eighteen years), the definition of "trafficking in persons" does not require the use of force, deception or any other means – only the action and purpose elements. For adults, the means element operates to nullify any "consent" to exploitation given on behalf of the victim.[74]

It is important to note that with this international legal definition, the concept of trafficking does not just refer to the process by which a person is moved into a situation of exploitation but also includes the maintenance of that person in a situation of exploitation. Therefore, traffickers may include the recruiter, broker, transporter, as well as *the individual or entity involved in initiating or sustaining the exploitation.*[75]

Furthermore, it should be noted that where the document refers to "public" or "governmental" actors or entities, this may also include intergovernmental organizations such as ILO, or foreign governmental donors, such as USAID.

[73] UN Trafficking Protocol, 2000.
[74] ASEM (see note 71 above).
[75] ASEM (see note 71 above).

ANNEX 2: TABLE OF INSTITUTIONAL, LEGAL, AND REGULATORY FRAMEWORK

	Laws/Conventions Ratified by Thailand (binding)	Policies/Agreements (generally non-binding)	Institutions
International	ILO Forced Labour Convention (1930); ILO Abolition of Forced Labour Convention (1957); ILO Minimum Age Convention; UN Convention on the Laws of the Seas; ILO Worst Forms of Child Labour Convention 1999; UN Convention on the Rights of the Child; UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000)		ILO; IOM; UN treaty committees; Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime
Regional	ASEAN Convention against Trafficking in Persons, especially Women and Children (2015)	ASEAN Declaration against Trafficking in Persons Particularly Women and Children (2004); Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW) (2007); ASEAN Plan of Action against Trafficking in Persons, Especially Women and Children (2015)	The Colombo Process on Overseas Employment and Contractual Labour for Countries of Origin in Asia; ASEAN Forum on Migrant Labour; ASEAN Committee on the Implementation of the ACMW; ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC); ASEAN Intergovernmental Commission on Human Rights (AICHR); ASEAN Senior Officials Meeting on Transnational Crime (SOMTC); ASEAN Senior Labour Officials Meeting (SLOM)

	Laws/Conventions Ratified by Thailand (binding)	Policies/Agreements (generally non-binding)	Institutions
Bilateral		MOU between Lao PDR and Thailand on Employment Cooperation (2002); MOU between Lao PDR and Thailand on Cooperation to Combat Trafficking in Persons, Especially Women and Children (2005); MOU between Cambodia and Thailand for Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking (2003, updated in 2014); MOU between Myanmar and Thailand to Combat Trafficking in Persons, Especially Women and Children (2009)	
National	Thai Vessel Act (1938); Act Governing the Right to Fish in Thai Waters (1939); Fisheries Act (1947); Recruitment and Job-Seekers Protection Act (1985); Civil and Commercial Code (CCC); Public Limited Company Act (1992); Labour Protection Act (1998, amended in 2008 and 2010); Alien Workers Act; Child Protection Act (2003); Anti-Trafficking in Persons Act (2008); Ministerial Regulation concerning Labour Protection in Sea Fishery Work (2014)	Thai Labour Standards (TLS) No 8001-2553 (2010); SET Principles of Corporate Governance for Registered Companies (2006); 11th National Development Plan (2012 - 2016); Department of Fisheries Good Labour Practices for the Shrimp and Seafood Industries and the Fishing Sector	Department of Employment; Department of Labour Protection and Welfare; Department of Fisheries; Marine Department; Immigration Bureau; Ministry of Public Health; Port Authority; Royal Thai Marine Police; Royal Thai Navy; Ministry of Social Development and Human Security; National Human Rights Commission of Thailand; Rights and Liberties Department; Labour Coordination Centres

MEASURES SEEKING TO REMEDY HUMAN RIGHTS ABUSES AND TO IMPROVE THE EFFECTIVENESS OF THE NATIONAL HUMAN RIGHTS COMMISSION OF THAILAND UNDER THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS*

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Abstract

The economic integration of ASEAN nations has increased dramatically over the past two decades leading to economic prosperity and rapid development. However, natural resource extraction and exploitation not only triggers environmental degradation, it is also likely to exacerbate corporate involvement in human rights violations. In order to hold businesses to account, this paper seeks to examine remedies for victims of corporate human rights abuses by using the effectiveness theory to analyse the role of the National Human Rights Commission of Thailand (NHRCT) under the UN Guiding Principles of Business and Human Rights. Accordingly, this paper questions whether the NHRCT is able to address the governance gaps in remedial provisions for victims of corporate human rights abuses particularly in transboundary cases.

To this end, the study analyses legal documentation and focuses on the case of the Dawei Special Economic Zone in Myanmar to assess the NHRCT on its structural effectiveness and the effectiveness of its remedial outcomes. Further, because Principle 31of the UN's Guiding Principles and the Paris Principles currently lack a victim's perspective, they are deemed insufficient to evaluate national human rights institutions especially pertaining to remedial outcomes of corporate human rights violations. Thus, it is contended that a new set of indicators is necessary to evaluate their effectiveness.

1.0 Background

By the end of 2015, establishment of the ASEAN Economic Community (AEC) had increased investment flow in the region and resulted in a single market and production base.[1] This economic integration led to businesses, within and without ASEAN, investing in the area encouraged by strong governmental support. According to the 2012 United Nations Conference on Trade and Development's (UNCTAD) World Investment Report, four ASEAN member States (Indonesia, Malaysia, Thailand, and Vietnam) were in the global top twenty list of countries attracting investments from transnational corporations. Economic integration brings vital development activity to the area, likely involving the

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[1] Association of Southeast Asian Nations, *ASEAN Economic Community*, available at http://www.asean.org/communities/asean-economic-community, accessed on 17 August 2018.

building of hydropower dams and fossil fuel-fired power stations, in addition to an expansion of the mining industry and the establishment of industrial zones.[2]

In seeking meaningful redress for human rights violations in ASEAN, the 2013 study, 'Corporate accountability in ASEAN: A human rights-based approach,' assessed the impact of business on human rights in ASEAN and documented cases of violations in relation to business activities (see Table 1 below).[3] In so doing, it saw a shift from a corporate social responsibility (CSR) approach toward principles of corporate accountability. The latter model entails strong legal obligations upon businesses to protect human rights and efficient legal measures to avoid conflicts between governments, companies, and bottom-line societies.[4]

Table 1: Human Rights Violations as a Consequence of Business Activities

Extractives	Industrial Development and Manufacturing	Energy (Hydropower)	Agriculture
1. Didipio Gold and Copper Project, Philippines 2. Shwe Gas, Myanmar 3. Lynas Corporation, Malaysia 4. PT Meares-Soputan Mining in Sulawesi, Indonesia	1. Asahi Kosei, Malaysia 2. Dawei Deepwater Seaport and Special Economic Zone, Myanmar 3. Kikomas (subsidiary of Nike), Serang, Banten, Indonesia 4. Songkhla facility, Phatthana Seafood Co Ltd, Thailand	1. Xayabouri Dam Project, Laos 2. Nam Maung 3 Dams, Laos	1. Koh Kong, Cambodia 2. Chet Boren, Kratie, Cambodia 3. Lao-Indochina, Laos 4. Chorp, Steung Treng, Cambodia

Regarding the corporate responsibility concept, CSR has been widely discussed among governments, business, and civil society. On 1 March 2009, the ASEAN Socio-Cultural Community (ASCC) blueprint obviously adopted CSR terms in several sections and initiated CSR networks. Moreover, in 2010, five ASEAN member nations established the ASEAN CSR Network to promote and enable responsible business conduct with the purpose of achieving sustainable, equitable, and inclusive social, environmental, and economic development in the region.

Although the CSR concept has been initiated in ASEAN, this has not prevented corporate violations of human rights. As one of several landmark cases in this regard, the Dawei Xayabouri Dam Project provides compelling evidence of weak CSR implementation in the region. The project was heavily criticized because of a lack of adequate stakeholder consultation and consent to the project, mainly from civil society. As a result, such blatant disregard of CSR led to suggestions that legally binding institutions of corporate

[2] Middleton, C, and Pritchard, A, *Corporate Accountability in ASEAN: A Human Rights-Based Approach*, Bangkok, Thailand: Asian Forum for Human Rights and Development (FORUM-ASIA), 2013, at 8.
[3] Middleton and Pritchard (see note 2 above), at 40.
[4] Middleton and Pritchard (see note 2 above), at 40.

accountability should be further developed and implemented in ASEAN.

CSR is problematic in the region mostly due to the way human rights disputes are handled. For example, the ASEAN Intergovernmental Commission on Human Rights (AICHR) lacks any serious power to cope with human rights abuses occurring inside the area because its main function is to promote (not protect) human rights as illustrated by Arts 1.4 and 1.6 of its Terms of Reference.[5] At the national level, particularly as regards judicial State-based grievance mechanisms, a wide range of national tiered court systems and specialized courts (e.g. industrial labour courts and consumer courts) exists. State-based non-judicial mechanisms include, e.g. ombudsmen and national human rights institutions (NHRI).

In the matter of human rights institutions, NHRI are emphasized by the UN's Guiding Principles on Business and Human Rights (UNGP). This instrument was unanimously introduced by the UN Human Rights Council, consolidating the pre-existing 'Respect, Protect, and Remedy' framework introduced by Professor John Ruggie in 2005, as part of his mandate as Special Representative of the UN Secretary-General for Business and Human Rights.[6] The most significant elements of the UNGP focus on a State's duty to protect human rights, and a company's need to conduct due diligence to assess the potential human rights impacts of their activities. Principles 25 to 31 of the UNGP focus on access to effective remedies for victims of business-related human rights abuses. In that context, this paper tries to find better ways to measure the effectiveness of the National Human Rights Commission of Thailand (NHRCT) and to assess whether it offered an effective remedy to victims of corporate human rights abuses on Dawei SEZ.[7]

The paper is organized as follows: part 2 describes the legal frameworks regarding the case, that is, the UNGP, the Principles Relating to the Status of National Institutions (Paris Principles), the Constitution of Thailand,[8] and the National Human Rights Commission Act BE 2542 (1999); part 3 discusses the effectiveness theory; part 4 analyses the case study in more detail; and part 5 lays down some concluding thoughts.

[5] Kaewjullakarn, S, and Kovudhikulrungsri, L, 'What legal measures should ASEAN apply to help the Rohingya?' *Proceeding – Kuala Lumpur International Business, Economics and Law Conference 6*, 2015, Vol 4, pp 3-4.
[6] Ford, J, *Business and Human Rights: Bridging the Governance Gap*, Chatham House, 2015, available at https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20150922BusinessHumanRightsFordV2.pdf, accessed on 18 August 2018.
[7] Note that there has recently been an attempt to implement and strengthen extraterritorial human rights obligations by the Asia Pacific Forum on Women, Law and Development which established the Bangkok Declaration on Extraterritorial Human Rights Obligations. This roundtable discussion recognized that the implementation of extraterritorial obligations since the creation of the ASEAN Economic Community was likely to increase cross-border cooperation. Therefore, legal measures to handle the activities of corporations and business enterprises are required. See, Asia Pacific Forum on Women, Law and Development, 'Bangkok Declaration on Extraterritorial Human Rights Obligations' 2014, available at http://apwld.org/bangkok-declaration-on-extraterritorial-human-rights-obligations/, accessed on 18 August 2018.
[8] Articles 246 and 247 of the Constitution of Thailand BE 2560 provide details regarding membership and the duties of the Commission.

2.0 Legal frameworks

2.1 International framework

Several international initiative guidelines function as frameworks to protect human rights affected by business operations, namely the UN Global Compact and the OECD Guidelines for Multinational Enterprises – both recognise that companies can cause adverse impacts on human rights. Additionally, in 2011, the Human Rights Council endorsed the UNGP encouraging Thailand to do the same. This endorsement, in turn, led to the establishment of a working group on business and human rights. However, the government has given little formal reaction or even specifically referenced the UN framework, neither through formal declarations nor court judgments.[9] In terms of NHRCT, it currently expands its mandates and functions to business-related human rights violations which will be explored later.

2.1.1 Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' framework

Introduced by Professor John Gerard Ruggie, the UNGP were unanimously welcomed in June 2008 and consist of three pillars: protect, respect, and remedy. Each pillar is defined in a concrete and actionable way to enable governments and companies to meet their duties and responsibilities, thus preventing corporate human rights abuses while also empowering businesses to accommodate remedies following said violations. The first pillar covers the State's duty to protect human rights; meaning that the State must prevent, investigate, punish, and redress human rights abuses occurring as part of business operations within its territory. Moreover, the UNGP suggest that States must also oblige companies domiciled in their territory to respect human rights in other countries in terms of their business activities.

The second pillar refers to the corporate responsibility to respect human rights. The UNGP provide that businesses must prevent, mitigate and, where appropriate, remedy human rights abuses they cause or contribute to. In addition, businesses have a duty to mitigate any impacts relevant to their operations, products, or services, even if the outcomes were produced by their suppliers or business partners. The third pillar concerns access to remedies. As such, States have a duty to provide access to effective remedies such as introducing initial, appropriate measures to ensure that a State-based domestic judicial mechanism is capable of dealing with and effectively addressing business-related human rights abuses, and to refrain from any action that may create barriers to a victim's access to remedies. Additionally, the UNGP reaffirm that even though States must provide effective State-based judicial mechanisms, they should also have non-judicial grievance mechanisms in place to supplement the process.[10]

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[9] Human Rights Resource Centre, *Business and Human Rights in ASEAN: A Baseline Study*, Depok, Indonesia: Human Rights Resource Centre, 2013, available at http://hrrca.org/wp-content/uploads/2015/09/Business-and-Human-Rights-in-ASEAN-Baseline-Study-ebook.pdf, accessed on 16 August 2018, at 383.

[10] 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. Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' framework (A/HRC/17/31)' 21 March 2011, available at https://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf, accessed on 29 July 2016.

Note that Principle 27 of the UNGP suggests three mechanisms whereby potential victims of human rights abuses can access effective remedies: (1) State-based judicial mechanisms, (2) State-based non-judicial mechanisms, and (3) non-State-based grievance mechanisms. The latter category includes mechanisms provided by businesses, industry associations, multi-stakeholder groups, and international bodies. Regarding State-based non-judicial grievance mechanisms, the commentary to the UNGP emphasizes the important role NHRI play in helping victims gain access to remedies as a supplement to State-based judicial systems, which is the focus of this paper. In terms of remedy, Principle 31 provides eight effectiveness criteria[11] to design, revise, or access non-judicial grievance mechanisms.

2.2 Why are NHRI important?

The Vienna Declaration and Programme of Action 1993 (Vienna Declaration) proposed the formation of NHRI on the basis of the Paris Principles which set out the minimum international standards for such organizations. To function effectively based on a broad mandate, for example, NHRI should be independent of government and possess adequate powers of investigation.[12] The Vienna Declaration proposes no specific models or structures for this, and so each State has the right "to choose the framework that best suits its particular needs at [the] national level." At the ICC's 10th International Conference, held on 10 October 2010, 80 NHRIs were fully accepted as having a broad enough mandate as laid out in the Paris Principles, meaning that their duties extended to business and human rights violations and abuses. The Edinburgh Declaration also affirms that NHRI play a key role in implementing human rights protection in the corporate sphere.

There are several reasons why it is necessary to have a non-judicial mechanism such as NHRI in place to supplement State mechanisms, particularly in developing countries. First, State judicial organizations often fail to provide effective protection mechanisms due to a lack of political and economic will to bring cases against the State and corporations. Second, there is often a shortage of resources in terms of human, financial, and institutional capacity to implement and monitor social and environmental regulations. Third, misconduct of State authorities themselves can lead to a lack of effective remedies being available. Competition for and among business ventures could also be cited as a reason why local authorities prefer not to exercise their power over corporations.[13] As regards NHRIs from Southeast Asia, Indonesia, Malaysia, Myanmar, the Philippines, Thailand, and India all participated in an international dialogue organized by the ASEAN Intergovernmental Commission on Human Rights.[14]

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[11] Under Principle 31, non-judicial grievance mechanisms should be: (1) legitimate, (2) accessible, (3) predictable, (4) equitable, (5) transparent, (6) rights-compatible, (7) a source of continuous learning, and (8) based on engagement and dialogue.

[12] Office of the United Nations High Commissioner for Human Rights (OHCHR), *National Human Rights Institutions: History, Principles, Roles and Responsibilities*, New York and Geneva: OHCHR, 2010, available at: http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf, accessed on 29 July 2016, at 15-16.

[13] Center for Transboundary Legal Development*, Company-Community Conflicts: The Effectiveness of Outcomes of Non-Judicial Conflict Resolution. An Exploratory Report*, Netherlands: Tilburg University, 2013, at 5-6.

[14] 'About the Asia Pacific Forum' Asia Pacific Forum, available at http://www.asiapacificforum.net/about/, accessed on 18 August 2018.

2.3 The National Human Rights Commission of Thailand

The NHRCT was established through the post-coup Constitution of 1997 but its Commission was only initiated in 2001. Under the current Constitution (2017), s.6 governs the institution's role and mandate. This paper will now examine the Dawei SEZ case which the NHRCT investigated in 2012 – it offered testimony at a public hearing in 2014.

The NHRCT became a member of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) in 2004; it was accredited an 'A' status from 2012-2014. However, since 2016, Thailand has been downgraded to a 'B'[15] highlighting the NHRCT's inability to monitor and investigate human rights violations in a timely and dignified manner, and its lack of quasi-judicial independence.[16] Another reason for Thailand's drop in status could also be its current constitutional crisis and the fact it remains under a military regime.

According to its tasks and mandates, the NHRCT is governed by two main domestic legal frameworks: the Constitution of the Kingdom of Thailand (2007) and the National Human Rights Commission Act 1999 (BE 2542). Although the NHRCT was formed under the 1997 Constitution and the Commission has been in operation since 2001, only the 2007 Constitution provided it with authority to submit cases and opinions to the Constitutional Court and the Administrative Court including the ability to file lawsuits to the Court of Justice on behalf of a complainant. Article 15 of Thailand's National Human Rights Commission Act 1999 details several powers and duties of the Commission, for example, to promote and respect human rights; to examine and report acts that violate human rights as well as to propose appropriate remedial measures; to propose policies and recommendations in terms of laws, rules, and regulations for the promotion and protection of human rights; to promote human rights particularly in the areas of education and research; to promote co-operation and cooperate with other agencies such as governmental and non-governmental organizations; to prepare an annual report to submit to the National Assembly; and to offer opinions in cases where Thailand is a party.[17]Also, s.15 gives the NHRCT the power to receive and examine petitions of human rights violations.[18]

As can be seen, the NHRCT's tasks and mandates serve to promote (not protect) human rights. For this reason, it has been widely criticized as a toothless tiger. However, recently the NHRCT has attempted to enhance its capacity and effectiveness by acting independently from the government, particularly regarding human rights violations related to transnational business. Accordingly, the NHRCT set a new regional standard

[15] There are currently three levels of accreditation: 'A' (Voting Member: complies fully with the Paris Principles); 'B' (Observer Member: does not or has not yet fully complied with the Paris Principles); and 'C' (Non-member: does not comply with the Paris Principles).
[16] Draper, J, 'Downgrading of Thai human rights body a wake-up call' The Nation, 4 February 2016, available at http://www.nationmultimedia.com/opinion/Downgrading-of-Thai-human-rights-body-a-wake-up-ca-30278458.html, accessed on 18 August 2018.
[17] National Human Rights Commission Act 1999 (BE 2542), s.15.
[18] National Human Rights Commission Act 1999, s.15.

by accepting three example cases: the Koh Kong sugar plantation, the Xayaburi Dam project, and the Dawei SEZ project.

3.0 Effectiveness theory

3.1 Effective remedies

The basic right to remedies has two dimensions: procedural and substantive. The former entails unhindered and equal access to justice while the latter wipes out the consequences of the wrong committed as reflected in a general principle of law.[19] The right to an effective remedy is laid down in numerous international instruments such as Art 8 of the Universal Declaration of Human Rights, Art 2 of the International Covenant on Civil and Political Rights, Art 6 of the International Convention on the Elimination of all Forms of Racial Discrimination, Art 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art 19 of the Convention on the Rights of the Child, and Art 24 of the Convention on the Protection of All Persons from Enforced Disappearance.[20] Thailand has ratified all the aforementioned international human rights instruments.

The Guiding Principles also realize the importance of effective remedy for business-related human rights violations as laid out in Principle 25.[21] According to the UNGP, the core elements of remedies should be "both procedurally sound and provide a just substantive outcome."[22] Remedies range from "apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative such as a fine) as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition."[23]

NHRI-provided remedies may be in the form of an apology, changing business or government policies, offering recommendations to government and parties, releasing a public statement, and/or making a report to government, etc.[24]

3.2 Effectiveness of NHRIs

Two main instruments test the effectiveness of grievance mechanisms, particularly NHRI: the Paris Principles and Principle 31 of UNGP. In order to perform effectively, NHRI must first comply with international minimum standards as established by the ICC, an

[19] Van Boven, T, 'Victims' rights to a remedy and reparation: The new United Nations principles and guidelines' in Freeman, et al (eds), *Reparations for Victims of Genocide, War Crimes, and Crimes*, Netherlands: Koninklijke Brill NV, 2009, pp 19-40, at 24.
[20] Van Boven (see note 19 above), at 22.
[21] Principle 25 states: "As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction, those affected have access to effective remedy."
[22] UNGP, Commentary to Principle 25.
[23] UNGP (see note 22 above).
[24] Brodie, M, 'Pushing the boundaries: The role of national human rights institutions in operationalising the 'Protect, Respect and Remedy' framework' in Mares, R (ed), *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation*, The Raoul Wallenberg Institute Human Rights Library, Vol 39, pp 245-272, at 254.

international proceeding that evaluates whether the minimum requirements set by the Paris Principles and Principle 31 of UNGP are being met. Essentially, the ICC enables these institutions to implement UNGP.

The Paris Principles stipulate that all national human rights institutions should meet a minimum standard while also providing additional principles only applying to institutions with "quasi-jurisdiction" competence. It should be noted that quasi-jurisdiction mandates are optional and not part of the " minimum requirement." The Paris Principles outline two main functions of NHRI including protection and promotion mandates. Protection ensures effective mechanisms are in place to investigate and monitor human rights, and promotion refers to the provision of education and the distribution of publications and other media to publicise human rights. Further, the Principles also discuss training and capacity-building activities.

According to the Paris Principles, to be an effective human rights institution, NHRI should comprise of six significant features:

(1) *Mandate and competence*. Article 2 provides that a "national institution shall be given as broad a mandate as possible" on "any situation of violation of human rights which it decides to take up" (Art 3(a)(ii)).
(2) *Autonomy* from the government. For example, accountability to the State could be achieved through the submission of annual reports. However, an NHRI's independence may be questioned if it receives government funding.
(3) *Independence* in both operational and financial matters. Operational independence enables an institution to act without external interference, while financial independence would permit an organization to have its own premises and hire staff.
(4) *Pluralism* ensures effective operation.
(5) *Adequate resources*. Funding should be secured to prevent a government from penalizing NHRIs for taking action against it.
(6) *Adequate powers of investigation* would enable NHRIs to consider any question falling within its competence. Thus, an NHRI should ideally be able to hear any person and obtain any information/document it sees fit.[25]

However, it should be mentioned that the above six benchmarks were designed to measure the structure of an organization. From these facts, UNGP Principle 31 could support the functions of NHRCT. Providing another benchmark to design, revise, or assess non-judicial grievance mechanisms, Principle 31 of UNGP lays out seven criteria:

(1) *Legitimate*. Requires the grievance mechanism to be trusted by stakeholders. For example, non-interference helps to build trust.
(2) *Accessible*. Requires NHRIs to provide assistance to those facing barriers to access. Such difficulties may include a lack of awareness, language barriers,

[25] The Paris Principles were adopted by General Assembly Resolution 48/134 of 20 December 1993.

illiteracy, cost, physical access, or fear of retribution.

(3) *Predictable*. Requires the inclusion of clear procedures including time frames for each stage, clarity on the types of process, available outcomes, and types of implementation.

(4) *Equitable*. Ensures affected stakeholders will have access to adequate information, advice, and expertise to enable fair, informed, and respectful engagement with the process.

(5) *Transparent*. Entails regular contact among affected parties about the progress of their proceeding through the use of statistics, case studies, or more detailed information to establish legitimacy and trust among parties and other affected groups.

(6) *Be rights-compatible*. Ensures outcomes and remedies are in line with internationally recognized human rights.

(7) *A source of continuous learning*. Requires continuous self-evaluation to prevent future harm.

While both the Paris Principles and the UNGP contain criteria to analyse the function of NHRIs to maintain their effectiveness, the following case study was chosen to evaluate whether they do in fact cover a gap in victim remedies.

4.0 Case study and analysis: the Dawei Deep Seaport and Special Economic Zone Project

4.1 Background of the case

The Dawei Deep Seaport and Special Economic Zone Project (Dawei SEZ) was designed to be Southeast Asia's largest industrial complex costing more than US$50 billion and is a combination of several investment proposals including a deep seaport, a large petrochemical industrial complex, heavy, medium, and light industrial zones as well as a road/pipeline/rail link to Bangkok. All proposed projects are located within Myanmar's southernmost region. The run up to this project entailed several Memorandum of Understandings (MOU) including one between Myanmar and Thailand in May 2008 which occurred on the side lines of an ASEAN ministerial meeting, and another between the Myanmar Port Authority (MPA) and the Italian-Thai Development Public Co Ltd (ITD) which provided the right to conduct a ground survey for the possibility of constructing the deep seaport and road link to Thailand.

According to the strict rules and regulations laid out in environmental and human rights frameworks, some part of these projects had to be relocated to Myanmar (Dawei) as mentioned by Thailand's ex-Prime Minister, Abhisit Vejjaiva, in January 2011 when he said, "some industries are not suitable to … Thailand. Therefore, they [have] decided to set up in Dawei." Another concern was that the project drafted its own legal framework to ensure its attractiveness to potential investors.

Predictably, in terms of potential human rights abuse and environmental damage, the proposed development plans are likely to produce an enormous amount of toxic emissions leading to air pollution and water contamination. Further, the project would involve the forced relocation of thousands of people; yet processes to enable stakeholders to access

information or participate in decision-making process were not provided.[26]

4.2 The role of the NHRCT

Dawei Development Association (DDA) lodged a complaint with NHRCT on March 2013 regarding the "violation of human rights and community rights related to the Dawei Special Economic Zone Project." In 2015, the NHRCT submitted a report detailing it's opinion and policy recommendations to Thailand's Council of Ministers on 25 December 2015. In summary, it accepted that the Dawei Project had caused several human rights violations without fair and just compensation or remedy and that it was possible the Italian-Thai Development Public Company were operating without regard to its international human rights obligations despite Thailand's endorsement of the International Convention on Civil and Political Rights and the ASEAN Human Rights Declaration.

Accordingly, the actions of ITD are likely to contradict the UNGP, one of the main instruments used by the NHRCT to gauge human rights infringement by businesses. As such, the NHRCT emphasized the human rights violations arising from transnational projects by some Thai companies, stating that the country needed to investigate such situations and seek resolutions, e.g. by providing effective remedies to affected people or areas. It therefore recommended that ITD should consider providing fair and just compensation to the affected local people in line with Principles 11, 13, 17, 18, 22, 23, and 27 of UNGP.[27] To summarize, the Sub-committee on Community Rights recommended ITD provide compensation and remedies to the affected villagers and that Thailand's relevant agencies should establish mechanisms or regulations to oversee the transnational investment by Thai investors.[28]

4.3 Analysis

The NHRCT became a member of the ICC in 2004. During the period, 2012-2014, it was accredited with an 'A' status meaning it was deemed fully compliant with the Paris Principles. The ranking also gave Thailand the right to fully participate in sessions of the Human Rights Council, take the floor on any agenda item, submit documentation, and take up separate seating.[29] However, the NHRCT was downgraded to a 'B' in 2015 and 2016 for failing to address longstanding "functional and structural problems" relating to circumstances under its military regime.[30] As previously explained, this paper intends to apply Principle 31 as a framework to evaluate the effectiveness of NHRCT as applicable

[26] FORUM-ASIA, *Corporate Accountability in ASEAN: A Human Rights-Based Approach*, Bangkok: FORUM-ASIA, 2013, at 45-46.

[27] National Human Rights Commission of Thailand, 'Report on the complaint consideration for proposed policy recommendations. Community rights: The case of Dawei Deep Seaport and Special Economic Zone project in Myanmar which Thailand has signed the MOU to co-develop and it has violated the human rights of Dawei people' 23 November 2015, available at http://mekongwatch.org/PDF/daweiNHRCT_ReportFull_ENG.pdf, accessed on 17 August 2018.

[28] For further information, see note 27 above.

[29] 'GANHRI Sub-Committee on Accreditation (SCA)' GANHRI, available at https://nhri.ohchr.org/EN/AboutUs/GANHRIAccreditation/Pages/default.aspx, accessed on 17 August 2018.

[30] Southeast Asia Research Centre, 'The protection capacity of national human rights institutions in Southeast Asia' 2016, at 4.

to victim remedies related to corporate human rights violations.

In 2012-2014, the NHRCT's full compliance with the Paris Principles was based on its success in three particular areas: competence and responsibility, composition and guarantees of independence and pluralism, and methods of operation. At that stage, it seemed the NHRCT was an effective institution with a broad mandate provided by s.15 of Thailand's National Human Rights Act 1999, particularly subsection (2).[31] The NHRCT's effectiveness will now be analysed with respect to Principle 31 of UNGP.

Legitimate and transparent. As noted above, legitimacy requires that grievance mechanisms be trusted by stakeholders to encourage use. In simple terms, a human rights institution must stand up for the rights of voiceless people against a dominant power. In the Dawei SEZ case, the complainants were the Foundation for Ecological Recovery, SEM Sikkaalai, and Dawei Development Association, all of which had a legitimate right to file a complaint to the NHRCT under Art 24 of the National Human Rights Commission Act 1999. Further, the NHRCT also had the power and duty to hear the case under ss.15(1), (2), and (3). All in all, this case illustrates that affected stakeholders trusted in the power of the NHRCT (through its opinions and policy recommendations) to have a positive impact on those affected by the development. In addition, transparency requires that parties be informed about the progress of proceedings. In this regard, the NHRCT built confidence and trust by publishing its recommendations and by regularly informing parties of its progress.

Accessibility necessitates the erosion of barriers such as language limitations, illiteracy, or fear of reprisal. In the Dawei SEZ case, much of the affected population were Burmese speaking with Burmese as their mother language. NHRCT overcame those barriers by organizing public hearings in Burmese, investigating the case with fact-finding teams, and by conducting in-depth interviews with local people. Moreover, to overcome a lack of awareness or education, NHRCT promoted public awareness of human rights under ss.18(3) and (4). Further, it provided channels for online complaints, reducing inaccessibility.[32]

Predictability necessitates two main elements: the use of clear procedures and outcomes and a means of monitoring the implementation of any outcomes. In March 2013, DDA lodged a complaint to NHRC regarding violations of "human rights and community rights related to the Dawei Special Economic Zone Project." After a two-year investigation, on 23 November 2015, NHRCT issued a report proposing policy recommendations. Whilst

[31] Section 15(2) states that the Commission has the powers and duties:
> to examine and report the commission or omission of acts which violate human rights or which do not comply with obligations under international treaties relating to human rights to which Thailand is a party, and propose appropriate remedial measures to the person or agency committing or omitting such acts for taking action. In the case where it appears that no action had been taken as proposed, the Commission shall report to the National Assembly for further proceeding.

[32] 'Complaints' [in Thai], National Human Rights Commission of Thailand, available at http://www.nhrc.or.th/Complaints/Online-complaints.aspx, accessed on 18 August 2018.

seemingly a long period of time, Arts 22-30 of the National Human Rights Commission Act 1999 outline the procedure and period of that examination process.

However, it is proposed that the outcome and enforcement as espoused by the NHRCT lacked effectiveness. To examine this case, NHRCT set up an ad hoc commission called "the Sub-committee on Community Rights" which, together with the NHRCT itself, proposed policy recommendations to ITD, the Council of Ministry, the Ministry of Foreign Affairs, the Ministry of Commerce, the Stock Exchange of Thailand, the Bank of Thailand, and other relevant agencies in line with s.15(3). The recommendations suggested that ITD provide fair and just compensation to affected villagers and that the remedial process be open. It is suggested that in this case, the outcome remedy was insufficient because it lacked a victim's perspective.

Equitability guarantees aggrieved parties reasonable access to sources of information, advice, and the expertise necessary to engage in a grievance process on fair and equitable terms as provided by ss.15(3) and (4) of the legislation.

Rights-compatibility ensures that outcomes and remedies conform to international human rights laws and standards. The NHRCT and its Sub-commission on Community Rights recommended that the ITD provide compensation and remedy to affected villagers as well as urging the relevant agencies to establish mechanisms (adopting the UNGP) to regulate corporations. Although the outcomes and remedies are in line with internationally recognized human rights, as a report[33] by the DDA mentions, only 15% of households received compensation and only 3% were given full payment. In addition, other problems such as corruption and a lack of transparency in the payment process were prevalent. This emphasizes the need for adequate enforcement mechanisms.

A source of continuous learning requires a continuous process of self-evaluation to prevent future harm and to ensure mechanisms are working effectively. This could be achieved by collecting data about the nature of grievances to identify systemic causes and may entail the Commission requiring a person or agency to perform his or its duties using appropriate methods to prevent recurrence of similar human rights violations.[34]

As regards the Dawei SEZ case, one could say the NHRCT failed to meet all seven criteria. Further, it is suggested that although the NHRCT was granted an 'A' status, its actions were insufficient and failed to meet the standards of the UNGP framework. Moreover, although in some respects, it could be said to have met the 7 benchmarks under Principle 31 of the UNGP, it seems that, from the perspective of the victims, the NHRCT did not function well enough. As a result, this paper finds that while objectively adequate, Principle 31 of the UNGP and the Paris Principles lack a victim's perspective and as such, their

[33] Dawei Development Association (DDA), *Voices from the Ground: Concerns Over the Dawei Special Economic Zone and Related Projects*, DDA, 2014, available at http://www.burmalibrary.org/docs19/Voices_from_the_ground-en-red.pdf, accessed on 16 August 2018.
[34] National Human Rights Commission Act 1999, s.28(3).

evaluation of outcome remedies may prove unsatisfactory.

5.0 Conclusion

As regards the effectiveness of the NHRCT in the Dawei SEZ case, this paper contends that the organization, while adequate in some respects, failed to function well enough. Although awarded an 'A' status at the time, this cannot and did not guarantee the NHRCT's effectiveness overall. Similarly, while the Paris Principles ensure an institution's effectiveness, the criteria fail to address and satisfy outcomes from a victim's perspective.

This paper is of the opinion that the Paris Principles and Principle 31 of UNGP should measure the effectiveness of NHRIs using two features: (1) structural effectiveness, and (2) effectiveness of remedial outcomes covering both procedural matters and substantive outcomes in line with the principle of rights-compatible grievances. Additionally, in assessing the effectiveness of institutions, victim and stakeholder perspectives should also be included. Although Principle 31 was well-designed to include a wide range of criteria to assess non-judicial State-based grievance mechanisms, the criteria only covered procedural matters; substantive issues such as the ability to seek effective remedies were omitted. Consequently, this study suggests introducing a new set of indicators on effective remedies.

In the business and human rights arena, the assessment of effective outcomes should be a given, particularly those rendered by NHRIs. While the UNGP identifies NHRIs as a major tool to supplement the judicial system, it is undeniable that stakeholder access to remedies, whether complainants or non-complainants, is often ignored. Thus, if a key measure of effectiveness is whether a complainant achieves his/her ultimate goal, this surely necessitates the securing of appropriate victim remedies, a fundamental aspect of international human rights law.

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ABBREVIATIONS AND ACRONYMS

AEC	ASEAN Economic Community
AICHR	ASEAN Intergovernmental Commission on Human Rights
ASCC	ASEAN Socio-Cultural Community
ASEAN	Association of Southeast Asian Nations
CSR	Corporate social responsibility
Dawei SEZ	The Dawei Deep Seaport and Special Economic Zone project
DDA	Dawei Development Association
ICC	International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights
ITD	Italian-Thai Development Public Co Ltd
NHRCT	National Human Rights Commission of Thailand
NHRI	National human rights institutions
Paris Principles	Principles Relating to the Status of National Institutions
UNCTAD	United Nations Conference on Trade and Development
UNGP	UN Guiding Principles on Business and Human Rights
Vienna Declaration	Vienna Declaration and Programme of Action 1993

RESPONSIBILITY OF BUSINESS ENTERPRISES IN VIETNAM TO PROTECT THE ENVIRONMENT: A CRITICAL ANALYSIS OF THE UN HUMAN RIGHTS DUE DILIGENCE PROCESS

Chuyen Duc Nguyen

Abstract

While Vietnam is forging ahead economically, rapid development has also resulted in environmental pollution and human rights abuses. Although corporate social responsibility is becoming more widespread, the majority of businesses in Vietnam (most of which are small to medium sized) do not practice it unless directed to do so by transnational corporations. This, despite the UN Guiding Principles on Business and Human Rights affirming that business enterprises have a responsibility to respect human rights and States must ensure they do so. Accordingly, the objectives of this paper are to: (1) analyse the human rights due diligence (HRDD) process described in the UN Guiding Principles; (2) rationalize why business enterprises in Vietnam should apply such processes as an essential standard in the field of environmental protection; and (3) introduce steps for companies to follow in order to integrate HRDD processes into their practical operations and outline the many advantages of HRDD.

1.0 Introduction

Although still an emerging economy, in the last few decades since 'Doi Moi' (Renewal), Vietnam has experienced high economic growth and the trend is projected to continue. Vietnam has also set itself the target of becoming an industrialized nation before 2020. As such, it is trying to attract more foreign direct investment with the objective of promoting rapid economic development. However, rapid economic growth without good governance can give rise its own challenges including environmental pollution which threatens both the country's living environment and the eco-system.

The UN Guiding Principles on Business and Human Rights (Guiding Principles) affirm that business enterprises have a responsibility to respect human rights and States have a duty to ensure they do so. Thus, the former must "avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur,"[1] and seek measures to "prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."[2] To fulfil this responsibility, business enterprises should have policies in place to respect human rights, a human rights due diligence (HRDD) process, and remedial measures to address any adverse impacts they have caused or contributed to.[3] It is clear business enterprises are expected not only to

[1] United Nations Human Rights Office of the High Commissioner (OHCHR), *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (A/HRC/RES/17/4), New York and Geneva: OHCHR, 2011, available at https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf, accessed on 15 August 2018, Principle 13.
[2] OHCHR 2011 (see note 1 above).
[3] OHCHR 2011 (see note 1 above), Principle 15.

obey the domestic laws of the locations in which they operate, but also internationally recognised human rights. Thus, in cases where States fail to fulfil their obligations to protect human rights, the burden may increasingly fall on companies to be more proactive to avoid involvement in human rights abuses or violations.

This paper analyses why business enterprises in Vietnam should carry out HRDD as part of their responsibility to respect human rights and avoid involvement in human rights abuse and studies the heightened risks now facing human rights as a result of the actions of enterprises in Vietnam.

2.0 Overview of corporate social responsibility in Vietnam

The following section examines the practical issues facing enterprises wishing to conduct corporate social responsibility (CSR) in Vietnam in order to ascertain to what extent businesses are actually practising responsible business and how they respond to CSR and human rights issues.

The World Bank defines CSR as "the commitment of business to contribute to sustainable economic development – working with employees, their families, the local community and society at large to improve the quality of life, in ways that are both good for business and good for development."[4]

There are three main aspects to this definition. First, an enterprise's objectives should not only focus on maximizing profit, but should also contribute to sustainable economic and environmental development. This means, amongst other issues, that it is also responsible for environmental protection in the communities where it operates. Second, to a certain extent, a business should also consider creating favourable conditions for its employees' families and the local community. Such considerations should include a just and due wage, safe working conditions, and adequate healthcare. Finally, enterprises should conduct business in a manner that both harmonizes it's and society's sustainable development. For instance, businesses should respect the principle of equal competitiveness and refrain from such practices as bribery to gain illegal preferential conditions.

According to the Vietnam Chamber of Commerce (VCCI), CSR was first introduced by transnational corporations (TNCs) which asked their suppliers to implement codes of conduct as a condition for establishing a business partnership.[5] In 2003, the World Bank introduced CSR to the government through its program, 'Strengthening developing country governments' engagement with corporate social responsibility.'[6] The program aimed to explore the potential roles of the public sector in developing countries to strengthen and encourage CSR. Accordingly, it focused on Vietnam's footwear and garment industry and conducted a survey with 24 Vietnamese enterprises operating in these sectors, eventually

[4] The World Bank's working definition of corporate social responsibility. Ward, H, 'Public sector roles in strengthening corporate social responsibility: Taking stock' The World Bank, January 2004, available at http://documents.worldbank.org/curated/en/548301468313740636/pdf/346560CSR1Taking1Stock.pdf, accessed on 15 August 2018.

[5] Ward (see note 4 above).

[6] Ward (see note 4 above).

discovering that 18 enterprises (9 textile and 9 footwear companies) were implementing one or more codes of conduct. Among these, 11 utilized 2 or more codes of conduct, and 2 firms applied 6.[7] Most surveyed companies admitted to following such codes because TNCs from developed countries required it.

In addition, the research results revealed contradictions between domestic laws and TNC codes of conduct, potentially leading to management challenges. It also advised the Vietnamese labour inspectorate to become more familiar with the demands of CSR and encouraged a better understanding of the distinctions between CSR and labour law regulations. Further, CSR-driven supply chain requirements have the potential to supplant domestic legislation, even when they do not directly conflict with it. For example, in Vietnam, labour legislation allows the employment of workers younger than 18 contradicting some codes of conduct requiring workers in specific fields to be aged 18 or older.[8] Significantly, the report highlighted the vital advantage enterprises involved in CSR have over their counterparts, such as higher levels of competitiveness and productivity gains from contented and healthier workers.

Similarly, in 2012, Brigitte Hamm also showed that CSR in Vietnam was largely driven by western TNCs (as the parent companies) through the application of codes of conduct inflicted on local firms in its supply chains.[9] However, CSR in Vietnam has mainly focused on the environment at the expense of acceptable labour standards which, on the whole, have not been given adequate consideration.[10] To meet the requirements of global economic integration, the Vietnamese government attempted to increase CSR through regulations in legislation such as the labour law and its union law reforms.[11] It also appears that TNCs and their associations, e.g. the European and American Chambers of Commerce, have in their investment negotiations with the Vietnamese government, encouraged it to pay more attention to a more friendly investment environment and raise wages to counter the increasing number of wildcat strikes.[12]

The major actor responsible for promoting CSR in Vietnam seems to be its Chamber of Commerce and Industry (VCCI), which was founded in 1963 in Hanoi. As an independent, non-governmental organization, the VCCI enjoys the status of a judicial person, is financially autonomous, and represents over 12,000 enterprises including business associations operating in Vietnam. Its Office for Business Sustainable Development plays a main role in CSR projects, such as CSR Week, CSR Awarding, CSR newsletters, CSR multi-stakeholder conferences, and policy dialogues linking project activities with existing networks such as Global Compact Vietnam and the Vietnamese Business Council

[7] Ward (see note 4 above).
[8] Ward (see note 4 above), at 21.
[9] Hamm, B, 'Corporate social responsibility in Vietnam: Integration or mere adaptation' *Pacific News*, 2012, No 38, pp 4-8, available at http://www.humanrights-business.org/files/csr_in_vietnam_brigitte_hamm.pdf, accessed on 15 August 2018.
[10] Hamm (see note 9 above).
[11] A Labor Code (Law No 10/2012/QH13) adopted by the National Assembly of the Socialist Republic of Vietnam on 18 June 2012, s.3.
[12] Hamm (see note 9 above), at 6.

for Sustainable Development, in addition to assisting other partners to implement CSR activities.[13]

Despite this, the VCCI has been seen by some as a weak actor in this field, partly due to a lack of external funding and potentially also because of corruption.[14] Nonetheless, the VCCI is currently the main partner of many international CSR initiatives such as:

(1) *Global Compact Network (GCNV)*. Founded in 2007 as a local part of the United Global Compact by the VCCI and the UN. Funded by the Spanish Agency for International Corporation and Unilever Vietnam, it aimed to be a "national corporate social responsibility center of excellence." Having over 95 members, it consists of national and international companies, and non-governmental organizations, in addition to academic, UN, and government agencies.[15] However, the GCNV's role has diminished since sponsors withdrew their financial support.[16]

(2) *United Nations Industrial Development Organization (UNIDO)*. Aimed at "helping Vietnamese SMEs [small or medium sized enterprises] adapt and adopt corporate social responsibility for improved linkages with global supply chains in sustainable protection." Funded by the European Commission's Switch-Asia-Program, this aims to improve the environmental and social performance of Vietnamese SMEs, enhance their international competitiveness through a better understanding of corporate social and environmental standards, and strengthen cooperation between Europe and Asia.[17] As such, UNIDO cooperates with ministries, civil society organizations, professional associations, and local networks to achieve its goals.[18]

(3) *Fair Labor Association (FLA)*.[19] Introduced the 'Promoting Sustainable Corporate Social Responsibility in Vietnam' project in conjunction with the VCCI in April 2012. Funded by the US Department of State, it aims to provide technical assistance and guidance to improve working conditions and social compliance programs at 50 clothing and footwear factories in Vietnam. Other collaborators include the Ministry of Labor, War Invalids and Social Affairs, and the Vietnam General Confederation of Labor.

[13] See, 'Corporate social responsibility: Adapt, adopt, improve CSR' [in Vietnamese], available at http://www.csr-vietnam.eu/index.php?id=12; and 'VCCI' available at http://vcci.com.vn/gioi-thieu-vcci/20101231062348185/chuc-nang-nhiem-vu.htm, both accessed on 15 August 2018.

[14] Hamm (see note 9 above), at 6.

[15] 'Global Compact Vietnam Network' available at http://www.globalcompactvietnam.org/detail.asp?id=22, accessed on 13 August 2018.

[16] Hamm (see note 9 above), at 3.

[17] 'UNIDO' available at http://www.csr-vietnam.eu/, accessed on 13 August 2018.

[18] UNIDO (see note 17 above).

[19] 'Fair Labor Association' available at -projects/project/promoting-sustainable-corporate-social-responsibility-vietnam, accessed on 13 August 2018.

Aside from the international CSR initiatives mentioned above which Vietnamese associations have partnered with, other international and national NGOs also operate to promote and enhance CSR in the country, e.g. OXFAM International. OXFAM in Vietnam focuses on improving the livelihoods of rural people and migrant workers in urban areas, reducing the country's vulnerability and increasing its adaptability to disasters and climate change, empowering women to gain more control over their lives, and empowering communities and civil society to participate in public society to encourage social and economic development in the country.[20] In addition, the Center for Development and Integration (CDI) works to ensure that Vietnam's "social and economic development benefits all its citizens."[21]

For the time being, most CSR initiatives operating in Vietnam are funded by international partners and/or required by western TNCs, whereas SMEs operating domestically, which are not part of such supply chains, seem not to be so engaged. However, the number of enterprises becoming involved in CSR initiatives is mounting partly because global economic integration increasingly requires enterprises to pay due attention to socially sustainable development in the local communities in which they operate, but also because CSR increases competitiveness as some customers may prefer to consume goods produced from businesses with adequate CSR policies.

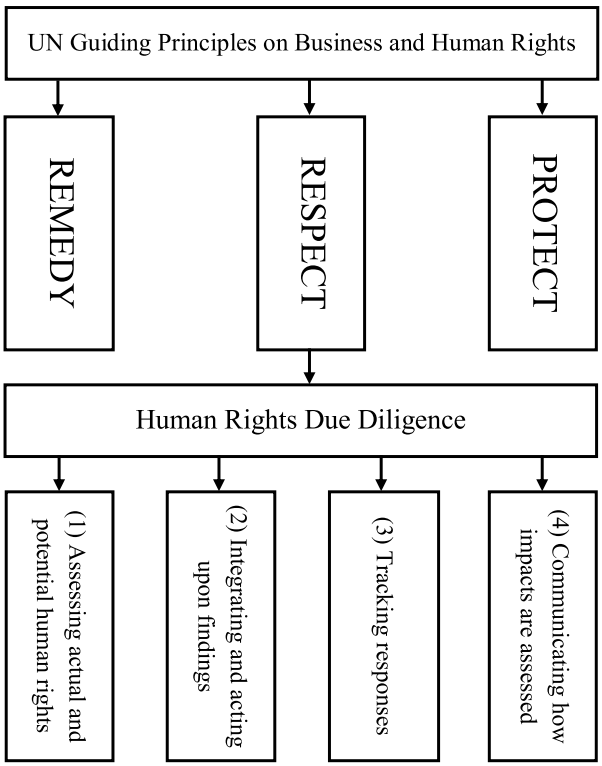
3.0 The human rights due diligence process and its role in CSR as regards environmental protection

This section examines the definition and process of HRDD and its use as a model for enterprises to follow to respect human rights and strengthen their CSR. To do so, this paper will base HRDD processes on the Guiding Principles on Business and Human Rights and clarify the critical features firms should carry out to fulfil their responsibilities in this regard. Figure 1 (below) illustrates a model of the HRDD process as part of the UN's 'Protect, Respect, Remedy' framework.

[20] Oxfam Vietnam currently works with the government, communities, civil society organizations, and other NGOs to promote equality, human development, and economic well-being through social and economic change. See, 'Vietnam' Oxfam International, available at http://www.oxfam.org/en/vietnam, accessed on 15 August 2018.

[21] 'Vietnam Center for Development and Integration' available at http://www.cdivietnam.org/cdien/, accessed on 15 August 2018.

Figure 1: Human Rights Due Diligence as Part of the UN's 'Protect, Respect, Remedy' Framework



The UN Guiding Principles on Business and Human Rights are based on a three-pillar foundation: (1) the State's duty to protect human rights; (2) a business enterprise's responsibility to respect human rights; and (3) a victim's access to remedial mechanisms.[22] Although the Guiding Principles are not considered a legally binding instrument, they are a global standard of practice to which all States and businesses should adhere to.[23] Corporate responsibility to respect human rights requires that, dependent on their size and specific circumstance, companies should: (i) have policy commitments to respect human rights which have been approved at the highest levels; (ii) have HRDD processes to identify, prevent, mitigate, and account for the ways they address impacts on human rights, and that such a process should cover adverse impacts the businesses may cause or contribute to through their activities or those directly linked to their operations; and (iii) have remedial mechanisms for victims of business-related human rights abuses which the company caused or contributed to. To do so, firms should establish or participate in effective operational-level grievance mechanisms to enable those affected to raise the issue and access remedies.[24]

[22] OHCHR 2011 (see note 1 above), General Principles.
[23] OHCHR 2011 (see note 1 above).
[24] OHCHR 2011 (see note 1 above), Principles 15, 16, 17, 22, and 29.

3.1 Definition of human rights due diligence

Corporate Responsibility to Respect Human Rights: An Interpretive Guide (*An Interpretive Guide*) defines HRDD as "an ongoing management process that a reasonable and prudent enterprise needs to undertake, in the light of its circumstances (including sector, operating context, size and similar sectors) to meet its responsibility to respect human rights."[25]

As mentioned above, HRDD processes are not an absolute standard but should instead be applied in the specific context of each enterprise. Thus, as regards means for implementation, one must also take into consideration the size, sector, location, ownership, and structure of business enterprises. As Ruggie put it, the Guiding Principles "are not intended as a tool kit, simply to be taken off the shelf and plugged in." Rather, they "reflect the fact that we live in a world of […] 80,000 transnational enterprises, 10 times as many subsidiaries and countless millions of national firms, most of which are small and medium-sized enterprises."

3.2 The human rights due diligence process

According to the Guiding Principles, corporate HRDD processes comprise of four main points:

(1) Assessing actual and potential human rights impacts;
(2) Integrating and acting upon the findings;
(3) Tracking responses;
(4) Communicating how impacts are addressed.

3.2.1 Assessing actual and potential human rights impacts

As explained in *An Interpretive Guide*, an "actual human rights impact" is an adverse impact that has already occurred or is occurring.[26] And a "potential human rights impact" is an adverse impact that may occur but has not yet done so.[27] In order to assess actual and potential impacts on human rights, the HRDD process should draw on "internal and/or independent external human rights expertise" and "involve meaningful consultation with potentially affected groups and other relevant stakeholders."[28] This initial step is necessary to identify and assess actual and potential adverse human rights impacts which companies are or may be involved in. This step is vital to assess human rights impacts on individuals or groups that may be at a heightened risk of abuse, e.g. women and ethnic minorities, but should also be subject to periodic review prior to new activities, relationships, major decisions, or changes in businesses' operations.[29]

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[25] OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (HR/PUB/12/02), New York and Geneva: OHCHR, 2012, available at https://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf, accessed on 15 August 2018, at 6.
[26] OHCHR 2012 (see note 25 above), at 5.
[27] OHCHR 2012 (see note 25 above), at 5.
[28] OHCHR 2012 (see note 25 above), at 36.
[29] OHCHR 2012 (see note 25 above), at 36.

3.2.2 Integrating and acting upon the finding

The second step of HRDD requires business enterprises to "integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action."[30]

In *An Interpretive Guide*, the term "integration," as used in Principle 19, is explained as "the *micro* process of taking the findings about a particular potential impact, identifying who in the enterprise needs to be involved in addressing it, and securing the effective action."[31] The integration of human rights policies throughout its organization may be challenging for some companies because it requires particular actions to be taken to address the findings. To address the issue effectively, the integration process requires the impact to be assigned to an "appropriate level and function" within a company. The assigned department, through its activities, including internal decision-making and budget allocations, must then carry out the supervising process and effectively respond to the adverse impacts mentioned. Such effective responses include appropriate actions depending on whether the company "causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship."[32]

This step also entails taking into account the extent of enterprise linkages in addressing the adverse impact, i.e. even if not directly contributing to the impact, whether it was directly linked to the company's operations, products, services, or business relationships. Therefore, if an enterprise has influence to prevent or mitigate the impact, it should find a way to exercise it. However, if its influence is not strong enough to prevent or mitigate the adverse event, it should consider severing the relationship.[33]

3.2.3 Tracking effective responses

This step verifies whether adverse human rights impacts are being or have been addressed in an effective manner and requires business enterprises to act based on specific assessment methods such as appropriate qualitative and quantitative indicators and feedback from both internal and external sources including affected stakeholders.[34]

As mentioned in *An Interpretive Guide*, tracking is vital to ensure "what gets measured gets managed." In other words, it is necessary for a business to know whether its policies are being implemented effectively or if it has responded correctively to the adverse human rights impacts as identified and integrated in previous HRDD steps. Tracking results will allow businesses to ascertain whether to apply certain measures and when to adjust them to optimize their effectiveness. Moreover, tracking human rights issues and responses also help to "highlight repeated problems that may require more systemic changes to policies

[30] OHCHR 2011 (see note 1 above), Principle 19.
[31] OHCHR 2012 (see note 25 above), at 47.
[32] OHCHR 2011 (see note 1 above), Principle 19.
[33] OHCHR 2011 (see note 1 above), at 21-22.
[34] OHCHR 2011 (see note 1 above), Principle 20.

or processes, and it brings out best practices that can be disseminated across the enterprise to further reduce risk and improve performance."[35]

3.2.4 Communicating how impacts are addressed

The three previous steps were designed to enable businesses to identify actual and potential adverse human rights impacts, to integrate actions, and to track their responses to the event. Such steps supply companies with sufficient information to communicate with alleged victims and external stakeholders as to how they have addressed actual and potential business-related human rights abuses.

Principle 21 of the Guiding Principles clearly states that business enterprises should be prepared to communicate externally how they have addressed human rights impacts or concerns which they have caused during their operations or which have been raised by, or on behalf of, affected stakeholders. Such communications should: (1) be easily accessible to their alleged victims and stakeholders; (2) provide sufficient and adequate information to assess the businesses' response to the specific human rights impact involved; and (3) not expose any risks to affected stakeholders, including the "legitimate requirements of commercial confidentiality."

Communication can be in a variety of forms, such as online dialogues, in-person meetings, consultations with affected stakeholders and the public, and/or annual reports to name but a few. Depending on the specific characteristics of each enterprise, businesses should choose the most suitable form of communication and provide a measure of transparency and accountability to individuals or groups of stakeholders who have been, are being, or will be impacted by the adverse event.[36]

3.3 Important role of human rights due diligence for business enterprises in Vietnam

At the international level, HRDD has been endorsed or employed by individual governments, business enterprises and associations, civil society, worker organizations, national human rights institutions, and investors. Additionally, it has been drawn upon by such multilateral institutions as the International Organization for Standardization[37] and the Organization for Economic Cooperation and Development (OECD) to develop their own initiatives in the business and human rights domain.[38] Indeed, other United Nations special procedures, for instance, the Global Compact,[39] have invoked it extensively.

In the current context of business enterprises in Vietnam, most small and medium sized firms lack adequate and sufficient policy systems to identify, prevent, and mitigate

[35] OHCHR 2012 (see note 25 above), at 53.
[36] OHCHR 2011 (see note 1 above), at 24.
[37] 'ISO 26000:2010 – Social responsibility' International Organization for Standardization, available at https://www.iso.org/iso-26000-social-responsibility.html, accessed on 15 August 2018.
[38] OECD, *OECD Guidelines for Multinational Enterprises*, OECD Publishing, 2011, available at http://www.oecd.org/daf/inv/mne/48004323.pdf, accessed on 15 August 2018.
[39] 'The power of principles' United Nations Global Compact, available at https://www.unglobalcompact.org/what-is-gc/mission/principles, accessed on 15 August 2018.

adverse human rights impacts which they may contribute to or be involved in during their operations.[40] Moreover, local governments in many areas lack the capacity to supervise and enforce compliance with domestic law let alone internationally recognized human rights. Indeed, published surveys, cases, and research papers have repeatedly shown that many companies break environmental protection regulations for profit. Such incidents not only put enterprises at risk of legal hearings and punishments, but in the long run, may also affect their reputations. Further, as mentioned above, most SMEs in Vietnam do not engage in CSR initiatives unless required to by TNCs as part of contractual codes of conduct. Accordingly, this enforced application of many different standards may cause conflict and overlap.

In such cases, the HRDD process would serve as a good model to companies and especially SMEs in Vietnam enabling them to identify, prevent, and mitigate adverse human rights impacts as a result of their operations whilst ensuring full compliance with local laws, thus minimizing the risk of involvement in human rights abuses, and strengthening their CSR.

4.0 Human rights due diligence as an essential standard in environmental protection

According to the Guiding Principles, business enterprises have a wide range of responsibilities to respect human rights, including those provided in the "International Bill of Human Rights[41] and the principles concerning fundamental rights set out in the International Labor Organization's Declaration on Fundamental Principles and Rights at Work."[42] Whilst irrefutable that all human rights should be respected, nevertheless, several TNCs have caused environmental disasters such as the one caused by Formosa in Central Vietnam in 2016 which affected the lives of millions of people. Accordingly, business enterprises domiciled in Vietnamese territory should focus HRDD on environmental protection as this area is considered at high risk of adverse human rights impacts.

This paper will now analyse the current legal and institutional frameworks governing this field, point out their limitations, and identify obstacles to implementing CSR. Next, methods to integrate HRDD will be examined in order to enable companies to identify, prevent, and mitigate adverse impacts on the environment and respect human rights. Finally, the advantages enterprises may gain both domestically and internationally when applying HRDD will be explored.

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[40] Small and medium-sized enterprises (SMEs) in Vietnam account for 99% of all business establishments nationwide (Agency for SMEs Development, 2006), cited by Mai Thi Thanh Thai, *The Internationalization of Vietnamese Small and Medium-Sized Enterprises*, University of St Gallen, Switzerland, 2008, at 1. The research also indicated that SMEs in Vietnam face numerous difficulties such as a lack of managerial and marketing skills, a lack of financial resources, and other governmental constraints such as corruption, a weak legal system, and a bureaucratic administrative system (see, Mai Thi Thanh Thai, at 37-39).

[41] The International Bill of Human Rights includes the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

[42] OHCHR 2011 (see note 1 above), Principle 12.

4.1 Environmental protection in Vietnam

The following section will focus on industrial pollution, the legal and institutional frameworks to combat environmental violations, and the limitations of such frameworks in Vietnam which may actually create obstacles for enterprises attempting to comply with environmental regulations and CSR obligations. Thus, integrating HRDD as an essential standard will serve as a model to help enterprises better comply with and exercise their responsibility to the environment.

4.1.1 Industrial pollution

Over the last ten years, Vietnam's rapid economic growth rate and its associated industrialization, urbanization, and increased exploitation of natural resources without due consideration to protecting the environment, has caused serious environmental pollution. According to the Vietnam's head of the Environmental Police Department of the Public Security Ministry, industrial zones are destroying the environment, killing rivers, and creating "cancer villages" in which numerous residents have already been contaminated by toxic substances discharged by companies, many of whom have since lost their lives.[43] He further stated that over a million cubic metres of wastewater was being discharged daily from industrial zones accounting for 35% of the country's discharged waste, over 75% of which was either improperly treated or released directly into the environment.[44] Official figures show that environmental police departments in 22 locales collected fines of VND2.5 billion (US$120,000) whilst inspectors from the Vietnam Environmental Administration similarly accumulated VND1.7 billion (US$81,000) in fines after inspecting only 51 industrial zones.[45] Moreover, he supposed these amounts of money were very small compared with the real cost of dealing with environmental damage. The inspections also proved that only 143 out of 232 industrial zones nationwide had installed wastewater treatment systems.[46] Therefore, it seems, to save costs, many companies intentionally break environmental protection laws by discharging untreated wastewater directly into rivers, canals, or underground. Others used the wastewater for fire-fighting or dug wells to store it.[47]

Yet more official figures on environmental pollution caused by companies released by the Vietnam Environmental Administration show a high number of enterprises continue to violate the Law on Environmental Protection, e.g. out of 429 industrial zones inspected nationwide, inspectors found 157 enterprises violating environmental regulations including discharging untreated wastewater into canals and rivers, thus causing serious contamination.[48]

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[43] 'Rising industrial pollution rings Vietnamese alarm bells' CleanBiz.Asia, available at http://www.cleanbiz.asia/news/rising-industrial-pollution-rings-vietnamese-alarm-bells#.UUtW_RngKb8.
[44] CleanBiz.Asia (note 43 above).
[45] CleanBiz.Asia (note 43 above).
[46] CleanBiz.Asia (note 43 above).
[47] CleanBiz.Asia (note 43 above).
[48] 'Major enterprises named and shamed over pollution exploits' Vietnam Environment, 8 January 2013, available at http://sustainasia.wordpress.com/2013/01/08/major-enterprises-named-and-shamed-over-pollution-exploits/, accessed on 18 August 2018.

As Vietnam's largest trade hub, Ho Chi Minh City increasingly suffers from such pollution. As a result, its water supply has been jeopardized due to excessive pollution in the Saigon and Dong Nai rivers, the main water supply for more than 10 million city dwellers which, as representatives from water supply plants claim, is now intermittently treated with chemicals to ensure usability. This rampant flouting of environmental laws can be laid partly at the door of the authorities failing to control and monitor enterprises.[49] Indeed, if seriously polluted, water plants may even halt supply for several hours, during which time untreated water will be mixed with stored water in the tanks to ease the pollution.[50]

The World Bank's 2007 'Socio-Economic Development Program Report' officially warned Vietnam about its serious industrial pollution problem, noting that "the still poor Vietnam of today could choose to sacrifice clean air and water and biodiversity to achieve faster growth, but the richer Vietnam of tomorrow would regret that choice." Combating industrial pollution in Vietnam will be an uphill battle requiring governmental intervention to either create mechanisms such as effective regulatory regimes, or to strengthen or enforce existing mechanisms to ensure severe punishment is meted out to violators.

4.1.2 The legal framework regulating environmental protection in Vietnam

Vietnam's National Assembly adopted the Law on Environmental Protection on 23 June 2014 and it came into effect on 1 January 2015. Since then, various decrees, instructions, and ministerial decisions have been issued under its auspices. Indeed, many significant changes and updates have been made to further improve environmental protection with regard to industrial activities.[51]

The law's main aim is to provide a legal framework for environmental protection to enable sustainable development.[52] Accordingly, it places an onus on organizations and individuals to engage in the prevention of environmental degradation and pollution.[53] It also clearly states that those who damage the environment will be liable for damages, including criminal prosecution.[54]

In addition, the government also issued the 'National Strategy for Environmental Protection until 2010 with a vision to 2020'[55] which launched 36 programs, projects, and schemes to prevent pollution, and control and improve the environment. Likewise, in 2004, the Vietnam Communist Party enacted No 41-NQ/TW Politburo Resolution on

[49] 'HCMC water supply in trouble due to increasing pollution in Saigon and Dong Nai rivers' Vietnam Environment, 7 September 2011, available at http://sustainasia.wordpress.com/2011/09/07/hcmc-water-supply-in-troubles-due-to-increasing-pollution-in-saigon-and-dong-nai-rivers/, accessed on 18 August 2018.
[50] Vietnam Environment (note 49 above).
[51] Chapter V: Environmental Protection in Production, Business and Service Activities; and Chapter XIII: Waste Management.
[52] Environmental Protection Law 2014.
[53] Environmental Protection Law 2014.
[54] Environmental Protection Law 2014.
[55] 'National Strategy for Environmental Protection Until 2010 and Vision Toward 2020' Socialist Republic of Vietnam, May 2003.

environmental protection to counter its accelerated industrialization and modernization.

While not exhaustive, the above provisions constitute the main legal framework defining the country's strategic direction in this regard. Together, they provide the legal regulations which enable central and local authorities, organizations, and individuals to coordinate measures to protect the environment and develop sustainability.

At the international level, Vietnam has also ratified several international conventions[56] aimed at protecting the environment, namely:

(1) *Basel Convention on the Control of Transboundary Movement of Hazardous Waste and Their Disposal:* focuses on the transport and treatment of hazardous waste (Vietnam ratified this in 1995);
(2) *Kyoto Protocol and the Clean Development Mechanism*: provides for the trading of emissions (Vietnam ratified this in 2002); and
(3) *Stockholm Convention on Persistent Organic Pollutants:* responds to the need to manage, reduce, and eliminate persistent organic pollutants posing health and environmental concerns (Vietnam ratified this in 2002).

4.1.3 The institutional framework regulating environmental protection in Vietnam

To implement, oversee, and enforce regulations, various competent authorities, at both the local and national levels, have been established. The Ministry of Natural Resources and the Environment (MoNRE) is the main state authority responsible for environmental protection. It also cooperates with other ministries, such as the Ministry of Planning and Investment, the Ministry of Agriculture and Rural Development, the Ministry of Industry, the Ministry of Fisheries, the Ministry of Construction, the Ministry of Transport, the Ministry of Health, the Ministry of Defense, and the Ministry of Public Security.[57] For example, MoNRE cooperates with the Ministry of Health to direct, guide, and supervise the management of medical waste and environmental protection work in medical establishments, food safety and hygiene, and burial services.[58] The law also outlines the responsibilities of the People's Committee at the provincial, district, and commune levels for State management of environmental protection in line with its competences and localities.[59]

4.1.4 Limitations of legal and institutional frameworks

According to the National Strategy Report for Environmental Protection, the system of environmental management has yet to be completed either vertically from central to local or horizontally across ministries.[60] Further, environmental management capacities such as human, technical, and physical resources as well as management mechanisms, remain

[56] The list is not exhaustive; only the core conventions concerning environmental protection have been listed.
[57] Environmental Protection Law, 23 June 2014, taking effect on 1 January 2015.
[58] Environmental Protection Law 2014.
[59] Environmental Protection Law 2014.
[60] National Strategy (see note 55 above).

inadequate and ineffective.[61] Moreover, the division of responsibilities between central and local agencies for environmental and natural resource management was found to have overlapped while gaps between real requirements and responding activities have yet to be met.[62] The report further recognized that coordination across line ministries at the central level and within line departments at the provincial/city level was ineffective despite the fact complex environmental issues require inter-sectoral approaches.[63] As a result, this constitutes a core environmental challenge for a country in the process of industrialization and modernization. Furthermore, high levels of corruption are believed to play a large role in degrading the environment. Thus, in order to cut costs and avoid investing in industrial waste treatment systems, some enterprises were known to bribe environmental inspectors and discharge untreated water from their factories directly into rivers and/or channels.

In sum, the enforcement of laws in Vietnam remains highly uneven, with problems such as a lack of manpower and financial resources and the obstructions posed by vested interests being cited as the main reasons.

5.0 Integrating human rights due diligence as an essential standard and its advantages to business enterprises in Vietnam

Having discussed HRDD's role in preventing adverse human rights impacts, the following section will ask how business enterprises in Vietnam can actually integrate the process into their practical operations and to what extent this process may prove advantageous to them.

5.1 Integrating human rights due diligence

To begin with, it would be pertinent to acknowledge that integrating human rights policies and management systems into enterprises operating in emerging markets may seem a Herculean task with challenges coming from both State authorities and the enterprises themselves. Aside from internal bureaucratic and organizational challenges in governmental institutions,[64] most Vietnamese enterprises are SMEs facing fierce foreign and domestic competition. Indeed, many domestic enterprises struggle daily to survive.[65] As such, the main barriers to implementing HRDD are a lack of financial resources, modern technology, and advanced managing and marketing skills, and an overall inadequate awareness of CSR. However, such challenges are not unusual and may be managed gradually. As Ruggie puts it,

> Guiding Principles, by itself, will not bring business and human rights challenges to an end. But it will mark the end of the beginning: by

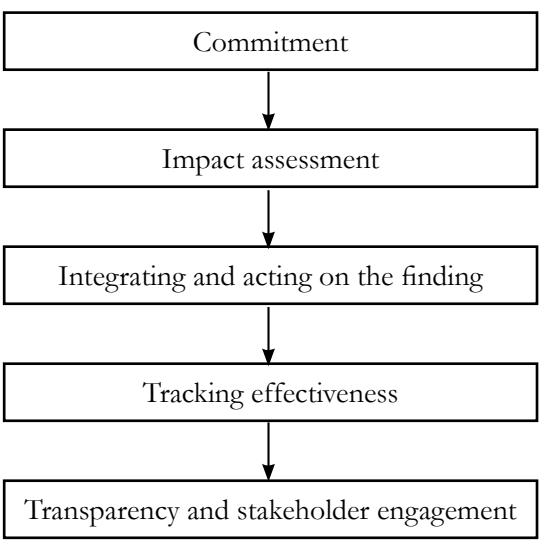
[61] National Strategy (see note 55 above), at 9.
[62] National Strategy (see note 55 above), at 9.
[63] National Strategy (see note 55 above), at 9.
[64] OHCHR 2012 (see note 25 above), at 7.
[65] According to newly published statistics from the VCCI, in the past 10 years, Vietnam saw strong growth in the number of newly established business enterprises with 700,000 registered, but in early 2013, just 300,000 of these remained in operation. See, 'More than half of businesses have gone' [in Vietnamese], Vietnam.net, 30 May 2013, available at http://vietnamnet.vn/vn/kinh-te/119793/qua--nu-a-so--doanh-nghiep-da--ra-di.html, accessed on 15 August 2018.

> establishing a common global platform for action, on which cumulative progress can be built, step by step, without foreclosing any other promising longer-term developments.[66]

HRDD requires a systematic approach.[67] Enterprises should take the first step by delivering a clear public commitment. A commitment to respect human rights should be at core of this. Next, enterprises should set measurable aims to enable them to work systematically towards achieving and maintaining the commitment.[68] The aims and the practical activities geared towards respecting human rights should be appropriate to the size, products, and services of individual enterprises. Further, guidance should also be provided in a simple easy-to-read document to ensure compliance with national legal requirements and other standards.

The integration of HRDD should follow five main steps: (1) commitment, (2) impact assessment, (3) integrating and acting on the finding, (4) tracking effectiveness, and (5) transparency and stakeholder engagement. These steps are detailed as follows:

Figure 2: The 5 Steps of Human Rights Due Diligence



5.1.1 Commitment

Through a public statement, enterprises in Vietnam should express a commitment to

[66] 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' (A/HRC/17/31) 21 March 2011, available at https://www.business-humanrights.org/sites/default/files/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf, accessed on 15 August 2018, at 5.

[67] Ethical Trading Initiatives Norway, *A Guide to Human Rights Due Diligence in Global Supply Chains*, Oslo: IEH, 2013, at 8.

[68] Ethical Trading Initiatives Norway (see note 67 above).

respect human rights,[69] focusing on environmental protection. The statement should: be endorsed by senior management and/or the board; be expressed publicly both internally and externally; specify the expectation of personnel, business partners, and other parties directly linked to the company's operations, products, or services; and integrate due diligence into core business processes and decision-making.[70]

In particular, the statement should include a commitment to comply with applicable laws, regulations, and administrative practices in Vietnam, taking into account relevant international environmental agreements, principles and standards, in order to protect the environment, public health and safety, together with an agreement to conduct its activities in a way that contributes to sustainable development.

5.1.2 Impact assessment

Even though the regulations of the Law on Environmental Protection and its implementing documents provide that an enterprise conducting an investment project may impact the environment, such enterprises must still carry out an environmental impact assessment (EIA). However, whether another EIA is compulsory under the HRDD process is debatable. Despite the fact Vietnam has introduced an appropriate legal framework on environmental protection and an institutional framework to monitor its implementation, it is discouraging to note that pollution is still rampant as can be seen in the case of the Formosa Steel Company (Taiwan). Located in the Ha Tinh province of central Vietnam, this company discharged untreated wastewater with high levels of toxicity into the sea causing an environmental disaster that killed more than 70 tons of fish, destroyed the coral system, and adversely affected millions of locals working in the fishing industry. Several reasons may account for this disaster including bad management, corruption, and a lack of transparency in disclosing environmental protection information to outsiders such as stakeholders and civil society.

Therefore, to avoid such outcomes, enterprises in Vietnam should carry out EIAs as provided in the HRDD process. This would entail companies identifying and assessing any actual or potential adverse human rights impacts on environmental protection in both their own activities or in their business relationships.[71] Firms should also compile a risk management report that takes into consideration the risks facing both its employees and the business as a whole. Further, priorities regarding areas where the risk of adverse human rights impacts are most significant must be outlined to enable an appropriate and adequate response.

Once a potential or actual adverse impact has been identified, enterprises should engage in meaningful consultation with potentially affected groups and other relevant stakeholders in order to agree upon and implement measures to mitigate, avoid, or remedy such impacts.[72]

[69] OHCHR 2011 (see note 1 above), Principle 16.
[70] OHCHR 2011 (see note 1 above), Principle 16. Also, see the commentary to Principle 16.
[71] OHCHR 2011 (see note 1 above), Principle 18.
[72] OHCHR 2011 (see note 1 above), Principle 18.

5.1.3 Integrating and acting on the findings

Based on findings from the impact assessment step, enterprises should adapt policies and processes to prevent or mitigate any actual or potential impact to which it may contribute, then integrate them across relevant internal functions and processes.[73] This would require enterprises to assign responsibility to address the impacts in question at the appropriate level and function within the organization, while also imbedding such impacts in its decision-making, budget allocations, and oversight processes.[74]

Integrating human rights policies may be the most challenging step for companies as it requires action to address the findings. However, there are several methods and instruments which business enterprises in Vietnam may utilize to implement and accelerate the integration:

(1) Include criteria related to human rights commitments in human resources processes like recruitment, hiring, and performance appraisal;
(2) Train employees on business principles and codes of conduct, including sharing dilemmas on human rights and understanding the impact of certain business decisions;
(3) Develop long-term incentives, including non-financial appraisals and bonuses (e.g. make bonuses dependent on lowering the number of complaints over time or improving employee engagement scores);
(4) Install strong disincentives for conduct that contradicts human rights policy (i.e. impose disciplinary measures for human rights abuses);
(5) Organize capacity to cope with human rights dilemmas and improve performance (e.g. train specific employees, introduce corporate risk and responsibility committees, ethics committees);
(6) Make human rights part of oversight systems including supporting policies, procedures, monitoring, and other oversight mechanisms;
(7) Include human rights principles in contracts with business partners, (e.g. suppliers, joint venture partners, contractors) and train and monitor the company's own buyers in these relationships.[75]

5.1.4 Tracking effectiveness

Business enterprises should track the effectiveness of their response based on qualitative and quantitative indicators, and internal and external feedback and reports.[76] For example, after a specific period of time, to improve unsatisfactory labour conditions in a company's facilities, the enterprise must examine to what extent the problem has been improved or remediated, e.g. by collecting feedback from its employees, compiling reports, and gathering

[73] OHCHR 2011 (see note 1 above), Principle 19.
[74] OHCHR 2011 (see note 1 above).
[75] Institute for Human Rights and Business (IHRB), *The 'State of Play' of Human Rights Due Diligence: Anticipating the Next Five Years*, London, UK: IHRB, 2011, available at http://www.ihrb.org/about/programmes/due-diligence.html, accessed on 18 August 2018, at 25.
[76] OHCHR 2011 (see note 1 above), Principle 20.

communications from assigned persons responsible for addressing such problems as well as from NGOs, other relevant authorities, and stakeholders.

5.1.5 Transparency and stakeholder engagement

Business enterprises should also communicate externally how adverse impacts on environmental protection have been addressed[77] by providing indicators identifying and addressing the problem. Moreover, this information must be accurate and sufficient to evaluate the adequacy of the company's response, and be easily accessible to those affected by the event, and other intended audiences and stakeholders.[78] Finally, communication should be regular, open, and honest about the risks and challenges faced by the company.[79]

5.2 Advantages of implementing human rights due diligence

Following an examination of CSR issues in Vietnam and the HRDD process under the Guiding Principles, and how integrating this process as an essential standard on environmental protection may be achieved, this paper will now delineate several main advantages of applying HRDD.[80]

First, conducting appropriate HRDD should help business enterprises reduce the risk of legal claims against them because it demonstrates they took reasonable steps to avoid involvement with adverse human rights impacts. However, the presence of such processes is not conclusive and one "should not assume that, by itself, this will automatically and fully absolve them of liability for causing or contributing to human rights abuses."[81] Second, business enterprises will be able to identify and manage potential adverse human rights impacts on local communities. Third, customers and business partners will be reassured enterprises are paying adequate attention to human rights, thus ensuring little risk of a customer boycott or business relationships being disrupted. Fourth, HRDD creates friendly relations between a business, its employees, and the wider community based on ongoing engagement and communication as regards business-related adverse human rights impacts. Fifth, enterprises will be able to demonstrate not only compliance with Vietnamese laws, but also respect for internationally recognized human rights standards. This is important because corporate responsibility to respect human rights exists independently from the duty to comply and respect laws where enterprises operate. Sixth, enterprises already utilizing HRDD will be able to attract other business more easily and establish long-term business relationships especially as regards TNC supply chains. Seventh, utilizing HRDD contributes positively to anti-corruption, improves labour conditions, and protects the environment from pollution. Eighth, internalizing HRDD processes will serve to protect an enterprise's reputation not only in Vietnam but also in

[77] OHCHR 2011 (see note 1 above), Principle 21.
[78] OHCHR 2011 (see note 1 above). See, the commentary to Principle 21.
[79] Ethical Trading Initiatives Norway (see note 67 above), at 17.
[80] These advantages were devised by the author based on the OHCHR's Guiding Principles, its interpretative guide on the Guiding Principles, and from a general analysis of the Vietnamese context (except where otherwise indicated).
[81] OHCHR 2011 (see note 1 above). See also the commentary to Principle 17.

the international trading environment. Ninth, HRDD helps to raise employee awareness of respect for human rights which will enable them to recognize the risks and report such issues to management which may then seek appropriate solutions. And finally, HRDD protects employees, company assets, and communities from potentially negative impacts by providing a safe and secure operating environment.[82]

6.0 Conclusion

Most CSR initiatives in Vietnam are currently funded by international partners and/or required by western TNCs, whereas SMEs operating domestically and not involved in TNC supply chains are generally not so engaged. However, the number of companies adopting CSR initiatives is mounting because global economic integration requires enterprises, at a minimum, to pay due attention to human rights.

As such, the HRDD process under the UN Guiding Principles on Business and Human Rights were examined. This process enables business enterprises to identify, prevent, mitigate, and explain how they have addressed their adverse human rights impacts through a defined process: assessing actual and potential human rights impacts, integrating and acting upon the finding, tracking responses, and communicating how those impacts have been addressed. However, in Vietnam, most business is conducted by SMEs wielding inadequate and insufficient human rights policies. Accordingly, they will be unable to identify, prevent, and mitigate adverse human rights impacts they contribute to or are involved in. Moreover, local governments have been unable to supervise and enforce existing environmental regulations. Consequently, this paper endorses HRDD as a viable model for Vietnamese business enterprises to implement in their practical operations to avoid implication in human rights abuses, strengthen their CSR, and achieve sustainable development.

A brief analysis of the current environmental pollution situation as a result of business activity in Vietnam indicates the legal and institutional frameworks governing these fields are inadequate which partly explains why human rights abuse in business is still so widespread and why enterprises still face difficulty implementing CSR. Therefore, integrating HRDD processes as an essential standard would strengthen a company's CSR by enabling businesses to identify, prevent, and mitigate adverse human rights impacts whilst also minimizing the risks of becoming involved in such events. Consequently, this paper advocates the use of five steps (commitment, impact assessment, integrating and acting on the finding, tracking effectiveness, and transparency and stakeholder engagement), the use of which could lead to a plethora of benefits including increased business advantages both domestically and internationally.

[82] IPIECA, *Human Rights Due Diligence Process: A Practical Guide to Implementation for Oil and Gas Companies*, 2012, available at http://www.ipieca.org/publication/human-rights-due-diligence-process-practical-guide-implementation-oil-and-gas-companies, at 3.

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ABBREVIATIONS AND ACCRONYMS

CSR	Corporate social responsibility
FLR	Fair Labor Association
GCNV	Global Compact Network Vietnam
HRDD	Human rights due diligence
IDI	Center for Development and Integration
MNE	Multinational enterprise
MoNRE	Ministry of Natural Resources and Environmental
NGO	Non-governmental organization
OECD	Organization for Economic Cooperation and Development
SMEs	Small and medium-sized enterprises
TNC	Transnational corporation
UNIDO	United Nations Industrial Development Organization
VCCI	Vietnam Chamber of Commerce and Industry

THE RIGHT TO CLEAN WATER IN VIETNAM: THE NEED FOR A NEW LAW TO PREVENT AND CONTROL WATER POLLUTION

Thi To Uyen Nguyen

Abstract

This paper offers an overview of the right to clean water in Vietnam. First, referencing previous studies, it briefly summarises the meaning of environmental rights and the right to clean water. Next, in the context of Vietnam's current period of industrialization/modernization, the extent of water pollution in the country is assessed and especially its impact on human rights. Thereafter, the nation's legal framework to control and prevent water pollution is analysed with an emphasis on the present regime's limitations, overlaps, and gaps, specifically the lack of a practical enforcement mechanism. Such shortcomings seriously impact the right to clean water in particular and environmental rights in general. In conclusion, this paper contends that environmental rights, including the right to clean water, must be guaranteed with policies and future legislation preferably following a human rights-based approach as distinct from Vietnam's current laws on environmental protection and water resources. Therefore, following the example already set by other nations in the region, it is argued that a separate law on preventing and controlling water pollution is vital.

1.0 Introduction

Water pollution is present in almost all Vietnam's rivers and impacts directly on its population's right to access clean water. Water is vital to the environment and plays an essential role in sustaining human life. Consequently, the negative impact of water pollution on many aspects of socio-economic development and on natural eco-systems can be vast. While the government may believe current laws on environmental protection and water resource management are sufficient to prevent and control water pollution, their efficacy in this regard has been questioned by others.

This paper exposes how the population's right to clean water has been adversely impacted by excessive water pollution. It also provides an overview of the connection between human rights, especially the right to clean water, and water pollution in Vietnam. Thereafter, this paper will illustrate the limitation of current laws preventing and controlling water pollution by critically analysing the Law on Environmental Protection (No 55 of 2014) and the Law on Water Resources (No 17 of 2012). Finally, following the example already set by many other countries in the region, it will point out the need to formulate a specific law on the issue.

1.1 Overview of the right to a healthy environment and the right to clean water

There are two facets to a right to a healthy environment: substantive rights and procedural rights. Substantive rights may be summarized as "the right to life, the right to health, the right to an adequate standard of living and the right to privacy."[1] Clearly, substantive

[1] Atapattu, S, 'The right to a healthy life or the right to die polluted? The emergence of a human right to a healthy environment under international law' *Tulane Environmental Law Journal*, Vol 16, No 1, pp 65-125, at 96.

environmental rights are closely related to human rights and it is generally accepted that the right to a healthy environment also includes the right to clean food, water, safe sanitation, and the right to benefit equitably from the conservation and sustainable use of natural resources. In addition, one could argue that the right to a healthy environment includes:

> the right to be free from pollution; the right to protection and preservation of the air, soil, water, sea-ice, flora and fauna, and biological diversity and ecosystem; the right to safe and healthy food and water; the right to adequate housing, land tenure, and living conditions in a healthy environment; the right to a safe and healthy working environment and the right to timely assistance in the event of nature or catastrophes.[2]

As content rights, the aforementioned are not only the right of present generations but also of future ones.

However, procedural rights are also vital and include: the right to freedom of expression and association, the right to access information, the right to participate in decision-making processes, and the right to access justice. Such rights are found in international human rights law and are present in the legislation of most nations. They are significant because they "contribute to the development of [the] decision-making process which is transparent and participatory and which holds the government entity in question accountable for its actions."[3] In terms of environmental issues, these rights can be seen as "the right to access information affecting one's environment, the right to participate in decisions affecting the environment, and the right to seek redress in the event one's environment is impaired."[4] All these rights are noted in many provisions of international documents such as, e.g. the World Charter for Nature, the Rio Declaration, the Draft Principles on Human Rights and the Environment, the Stockholm Declaration, UN General Assembly Resolution of 1990, and the European Charter on Environment and Health of 1989. These rights play a vital role in promoting the participation of all concerned communities. With increased participation, the role of the community becomes ever more important in the protection of the environment, for example, to detect and denounce violations, review environmental policy, advocate and advise policy related to environmental protection, and to disseminate information to the wider community.

The right to clean water should be regarded as a key environmental right. According to the World Health Organization, about 1.2 billion people worldwide live without clean water, while 2.6 billion lack a viable water source due to inadequate water supply services, and this number is growing.[5] Further, the United Nations estimates that 2.6 billion people in 48 countries will be living in conditions of water scarcity by 2025.[6] The right to water should

[2] Atapattu (see note 1 above), at 97.
[3] Atapattu (see note 1 above), at 90.
[4] Atapattu (see note 1 above), at 91.
[5] 'Water and sanitation: Factsheet' World Health Organization (WHO), available at http://www.wpro.who.int/vietnam/topics/water_sanitation/factsheet/en/, accessed on 25 September 2016.
[6] 'Clean water must be a factor of human rights' [in Vietnamese], VACNE, available at http://www.vacne.org.vn/nuoc-sach-phai-la-mot-yeu-to-cua-nhan-quyen/2185.html, accessed on 25 July 2016.

be considered a human right for several reasons. First, clean water reduces the spread of water-borne infectious disease across the globe. For example, millions contract diarrhoea from polluted water sources causing the deaths of 1.8 million people annually, including many children under five.[7] Second, in many countries, laws on water privatization have led to problems such as high water prices, regular water outages, limited water services, the breaking of water supply contracts, and pollution. In Bolivia, Ghana, and some other countries, privatization has proven especially unfair to the poor who suffer greatly from water shortages. Third, climate change has and will continue to cause a global scarcity of water resources and extreme pollution. Combined with population growth, it is likely no country will be "immune" to the impending water crisis.[8]

Approaching the problem from a human rights angle will be a step in the right direction to building a worldwide regulatory framework on individual rights to water—humanity's most essential natural resource—which would encourage people to coordinate their activities to create responsible governmental institutions thereby ensuring a steady and reliable supply of clean and safe water for all.

In Vietnam, although legal provisions covering community participation in environmental protection are available, mechanisms to enforce them are lacking. With particular regard to preventing and controlling water pollution, the following sections will evaluate the problem of water pollution in Vietnam and analyse its existing regulations and suggest that the enhanced participation of various stakeholders is vital to ensure adequate environmental protection.

2.0 Water pollution in Vietnam

2.1 Overview of water resources and water pollution in Vietnam

Vietnam has 108 river basins, 3,450 rivers (many of which are longer than 10 kilometres), and streams including 9 major river systems (with an acreage larger than 10,000 km^2).[9] In terms of river water, the annual total water volume of these river basins amounts to about 830-840 billion cubic metres per year, 37% of which is endogenous water. 63% flows through the territory of Vietnam from neighbouring countries, such as China, Laos, Cambodia, and Thailand. The total amount of potential groundwater is about 63 billion cubic metres a year, concentrated mainly in the northern and southern plains and the central highlands.[10] In addition, Vietnam also boasts 2,900 lakes and reservoirs with a total holding capacity of 65 billion cubic meters in operation, under construction, or

[7] WHO (see note 5 above).
[8] 'Water privatization' Wikipedia, available at https://en.wikipedia.org/wiki/Water_privatization; Siregar, PR, 'World Bank and ADB's role in privatizing water in Asia' Circle of Blue, available at http://www.circleofblue.org/wp-content/uploads/2012/06/WorldBank_ADB_Privatization_Asia.pdf; 'Water privatization in Ghana' Christian Aid, available at https://www.citizen.org/documents/XtianAidWater.pdf; and Grusky, S, 'Privatization tidal wave IMF/World Bank water policies and the price paid by the poor' *The Multinational Monitor*, 2001, Vol 22, No 9, available at http://multinationalmonitor.org/mm2001/01september/sep01corp2.html, all accessed on 29 September 2016.
[9] Department of Water Resource Management (DWRM), 'Vietnam surface water report' DWRM, 2012, at 3.
[10] DWRM (see note 9 above), at 6.

planned. The annual total amount of water being exploited is about 81 billion cubic metres, approximately 10% of the country's annual average water supply.[11]

Like many countries in the world, Vietnam is now facing serious challenges related to the pollution and depletion of water resources, especially in industrial and urban areas where the majority of rivers and lake systems are already heavily polluted. Confirming this, a Department of Water Resource Management report also asserts that agricultural chemicals (pesticides, herbicides, and fertilizers), animal feed and their residue are regularly deposited on river beds and ponds.[12] Moreover, levels of water pollution seem to be intensifying since Vietnam detected environmental violations by Formosa Vietnam, a steel plant built by the Taiwanese corporation, Formosa Plastics, which illegally discharged toxic industrial waste into the ocean through drainage pipes, thereby poisoning not only Vietnam's mainland river basins and lakes but also its coastline.

Playing an essential role in the sustenance of human life, water can therefore be seen as the most vital part of the environment with the right to clean water paramount. The different types of water pollution in Vietnam are: (1) surface water, (2) ground water, and (3) sea water.

Surface water pollution. Most major rivers in Vietnam are polluted, especially the middle and downstream areas of river basins. In particular, levels of river pollution are rising rapidly, especially in the dry season when water flow reduces. However, large cities with dense populations such as Hanoi and Ho Chi Minh City and industrial areas are also seriously affected due to unprocessed domestic sewage and industrial waste water. Indeed, such devastation has led to the virtual death of rivers, ponds, streams, and lakes.[13]

Groundwater pollution. Groundwater resources also face many problems such as salinity, pesticide contamination, and contamination from harmful substances. Over-exploitation of resources coupled with insufficient planning have conspired to lower groundwater levels, particularly in the Mekong Delta and the northern plains. This phenomenon has also increased saltwater intrusion in coastal areas. Moreover, the effect of organizations and individuals drilling and exploiting underground water without deference to local regulations has also helped to raise underground water pollution to dangerously high levels. In addition, this water source is also adversely affected by animal waste, poultry disease, and landfill.[14]

Sea water pollution. Recently, sea water in Vietnam has also shown numerous signs of

[11] DWRM (see note 9 above), at 7.
[12] DWRM (see note 9 above), at 10-19.
[13] 'Environmental news' [in Vietnamese], DVE, available at thanthienmoitruong .com/tin-tuc/21/thuc-trang-o-nhiem-moi-truong-nuoc-ta-hien-nay.html, accessed on 29 September 2016.
[14] 'Full text of the report on the current situation of the national environment in the period 2011-2015' [in Vietnamese], Enhancing Environmental Information, General Department of the Environment, 2016, available at http://cem.gov.vn/VN/TINTRANGCHU_Content/tabid/330/cat/115/nfriend/3749540/language/vi-VN/Default.aspx, accessed on 23 August 2018, at Chapter 4.

pollution caused by contaminated river basin water and economic development activities in estuaries and coastal areas. Environmental disasters such as the one caused by Formosa on the central coast of Vietnam has also had a noticeable effect. Sea water is polluted mainly by suspended solids, nitrates, nitrites, coliform, oil, and some heavy metal elements.[15]

To summarize, Vietnam's water resources are affected by numerous adverse factors with levels of contamination now rising to uncontrollable levels.

2.2 The causes of water pollution

The causes of water pollution are many and varied, e.g. the by-products of manufacturing and simple life activities. While pollution can occur naturally by such phenomenon as rain which could potentially flood filthy waste and harmful organisms into the environment, man-made sources of water pollution, e.g. harmful emissions from domestic activities, industry, and agriculture, arguably deposit many more contaminants into water supplies. Department of Water Resources Management statistics show that 70% of industrial parks in Vietnam lack waste facilities or run substandard wastewater facilities. Out of the nation's 639 industry clusters (smaller industrial parks or estates), only 42 possess a concentrated wastewater system. In addition, almost all craft villages throughout the country discharge wastewater directly into rivers, canals, and ponds.[16]

Inadequacies in knowledge and management can also cause serious water pollution. Those living in river basins are largely uninterested in the consequences of water pollution or the degradation and depletion of water resources, even though such outcomes also directly impact their production and lives. According to Nguyen Van Bay, Director of the Department of Water Resources Management (DWRM) under the Ministry of Natural Resources and the Environment (MONRE), much contamination can be blamed on limited financial resources, poor awareness, and a general lack of compliance with the law. In other words, the industrialization/urbanization process and its resulting limitations in management, planning, policy making, law enforcement, and finance technology has led inexorably to this situation.[17]

Finally, climate change and trans-boundary agents can also contribute to water pollution. Vietnam is one of the most severely affected countries in this regard, exacerbating an already dire situation. Thus, the effects of climate change, e.g. droughts, occur more regularly, causing water supplies to be further depleted, directly impacting agriculture and water supply in both residential areas and hydropower production. Moreover, geographical reality means Vietnam's two main rivers will always be under intense pressure and threatened by external factors leading to an increased depletion of water resources and transboundary pollution.[18]

[15] See note 14 above.
[16] DWRM (see note 9 above), at 58.
[17] Nguyen Van Bay, interview, 9 August 2016.
[18] DWRM (see note 9 above), at 20-21.

2.3 The problem with ensuring the right to clean water in Vietnam

Water is an essential resource for the survival and development of humanity and forms the foundation for sustainable development. However, in its liquid form, contaminated water spreads quickly, impacting all aspects of economic and social life, especially the health of the population. According to the National Institute of Occupational and Environmental Health, about 17.2 million people (equivalent to 21.5% of the total population) drink untreated and untested well water in Vietnam. Indeed, statistics from the Ministry of Health and the Ministry of Natural Resources and Environment reveal that 9,000 people die from contaminated water and poor sanitary conditions each year. In some locales, it is estimated that 40-50% cases of cancer and gynaecological inflammation could be due to the use of contaminated water.[19] Thus, water pollution impacts negatively on public health, causes significant damage to the economy, adversely affects natural eco-systems, and reduces the possibility of using available water resources, all of which raises the potential for public conflict.

From a legal perspective, the limitations and gaps in Vietnam's current laws aggravate the situation, seriously impacting the right to clean water in particular and the right to a healthy environment in general.

3.0 Vietnam's legal framework to control and prevent water pollution

Water pollution control is mentioned in several guidelines and policies of the Communist Party, thus proving that Vietnam has been interested in the daily right of people to access clean water/sanitation systems for a while. Accordingly, the State must create the conditions, rules, investment projects, or inject the appropriate funds to improve the nation's water supply. The right to clean water means every person should be able to access affordable sanitary water and that such resources be sufficient for one's daily needs. Moreover, sanitation must also be safe, hygienic, and affordable, all of which requires sturdy laws to control and prevent water pollution.

A constitutional amendment in 2013 confirmed that: water resources are public property, although represented and under the unified management of the State (Art 53); the State promulgates environmental protection policies to manage and use natural resources effectively and sustainably; the State protects nature and biodiversity, takes proactive measures to prevent natural disasters, and responds to climate change; the State encourages environmental protection activities while developing and using new and renewable energy; the State requires organizations and individuals causing environmental pollution, natural resource depletion, and weakening biodiversity, to be dealt with severely and to be responsible for overcoming and compensating such damage (Art 63).[20]

[19] 'Need of law on water pollution control' Vietnam Breaking News, 25 June 2014, available at https://www.vietnambreakingnews.com/2014/06/need-of-law-on-water-pollution-control/, accessed on 25 July 2016.
[20] Constitution of the Socialist Republic of Vietnam 2013, available at http://thuvienphapluat.vn/van-ban/EN/Bo-may-hanh-chinh/Constitution-dated-November-28-2013-of-the-socialist-republic-of-Vietnam/221949/tieng-anh.aspx, accessed on 29 September 2016.

Guiding regulations of the 2013 Constitution were expressed in laws and sub-laws, including a system of legal documents on environmental protection and laws on water resources, irrigation, dikes, fisheries, the protection and development of forest resources, biodiversity, land, hydrometeorology, minerals, and climate change. The prevention and control of water pollution is mainly mentioned in: water management provisions; water quality assurance and control of potential pollution emission provisions; the responsibilities of involved agencies, organizations, and individuals; supporting tools such as standards, regulations, inspection programs, monitoring and financial instruments as well as science and technology regulations on the management of particular conventions; technical regulations; environmental monitoring of water provisions; and community participation provisions. These are detailed in, e.g. the Law on Water Resources 2012, the Law on Environmental Protection 2014, the Law on Natural Resources, Sea, and Islands Environment 2015, the Law on Fisheries 2003, the Law on Inland Waterways Transport 2004, and the Law Amending Some Articles of the Law on Inland Waterways Transport 2014.[21]

This paper will now analyse and evaluate the limitations, overlaps, and gaps in the legal provisions.

3.1 Policies to prevent and control water pollution

While protecting a nation's water supply—as acknowledged in government policies on water in the areas of, e.g. transportation, fisheries, irrigation, agriculture, and industry—does comprise a vital role in economic and social development activities in Vietnam, it is approached as a component of water usage and requirements to ensure water quality often do not explicitly mention it.

Water resources are systematically exploited by various industries such as sea transport, farming, fishing, irrigation works, agriculture, electricity, and waterway transport. Therefore, water resource management policies should accommodate the different requirements of these industries in addition to controlling the agents causing water pollution.

The Law on Water Resources 2012 refers to water as a national resource and contains regulations on extraction, management and sustainable use, the prevention of pollution and adverse impacts on water resources. The intent of these regulations was to unify water resource management in conjunction with administrative and area management to uniformly manage the quantity and quality of such resources, whether surface or groundwater, on land, in estuaries, or territorial seawater, in combination with the management of other natural resources. However, the provisions fail to embrace an integrated approach, ignoring ecological considerations, instead focusing on specific resources like surface water, groundwater, or wastewater.[22]

[21] 'Index' Thu Vien Phapluat, available at http://thuvienphapluat.vn/en/index.aspx, accessed on 29 September 2016.

[22] Law on Water Resources (No 17 of 2012), available at http://thuvienphapluat.vn/van-ban/EN/Tai-nguyen-Moi-truong/Law-No-17-2012-QH13-on-water-resources/145310/tieng-anh.aspx, accessed on 29 September 2016.

By contrast, the Law on Environmental Protection deems water a vital component of the environment. Thus, its protection is necessary to ensure and retain the basic functions of the environment as a whole. Water protection regulations, on the other hand, focus mainly on preventing and controlling emissions into the environment. While the Law on Environmental Protection takes into account such factors as the load capacity of rivers and mandates oriented management of discharge quotas, the regulations stop short of prescribing principles and many of its provisions have not been implemented in practice. Thus, although mentioned in a diverse range of development management policies, the idea of preventing and controlling water pollution under an overall ecological approach remains at the level of a guideline only, lacking specific provisions.[23] For example, Art 4 of the Law on Water Resources stipulates that the purpose of State policies on water resources is:

(1) To ensure that water resources are managed, protected, exploited, and used reasonably in an effective manner whilst satisfying the demands of socio-economic sustainable development, national defence, and security.
(2) To invest in and organize basic survey and planning of water resources; to build a system of observation to oversee water resources including a water resource database; to improve forecast capacities on water resources, water source pollution, floods, drought, salinization, sea-level rise, and other harmful effects caused by water; to support the development of water sources and the development of infrastructure facilities.
(3) To prioritize investment in research, exploration, exploitation of water sources, incentive policies for water exploitation investment projects to supply living and production water to people in mountainous areas, ethnic minority groups, border areas, islands, areas suffering from difficult or extremely difficult socio-economic conditions, or areas where fresh water is scarce.
(4) To invest and adopt mechanisms to encourage organizations and individuals to invest in research and advanced science and technology applications to manage, protect, and develop water sources, and exploit, use water resources effectively, treat waste water for re-use, handle sewage, process saline and brackish water into fresh water, collect, use rain water, supply artificial underground water, rehabilitate polluted, deteriorated, or depleted water sources, and prevent, combat against, and overcome the harmful effects caused by water.
(5) To ensure State budgets for operations of basic survey and planning of water resources, protection of water resources, prevention control and the remedy of harmful effects caused by water.[24]

[23] Law on Environmental Protection (No 55 of 2014), available at http://thuvienphapluat.vn/van-ban/EN/Tai-nguyen-Moi-truong/Law-No-55-2014-QH13-on-environmental-protection/257403/tieng-anh.aspx, accessed on 29 September 2016.
[24] Law on Water Resources 2012, Art 4.

As can be seen, these regulations only focus on water as one of many natural resources instead of focusing on preventing and controlling water pollution.

3.2 Water resource management policy

Vietnam's water resource management policy is clearly expressed in its planning tools and water investigation plan. However, it has not resolved the relationship between the country's general planning, river basin planning, and water resource intercity and provincial level planning. It also fails to clearly define the responsibilities of involved agencies during investigations, or fully assess water resources in inter-provincial areas.[25]

As regards environmental protection planning, the rules lack detail, fail to show a link between national and provincial level planning, and neglect to pinpoint where environmental protection planning stands against its counterparts such as biodiversity and water resource planning.[26]

A common fault of all establishment and implementation planning regulations is that they lack sufficient definition as to responsibilities and sanctions in the event parties do not participate in implementation planning. Moreover, regulations on the responsible participation of representatives of other agencies, organizations, and individuals are absent. Further, planning is often at the macro level and does not identify and assign detail to the management, implementation, and responsibility of various ministries, branches, and localities.[27]

Water quality management provisions now focus on managing river water with other sources only faintly provided for elsewhere in other principles. At the same time, management direction for other sources of water, especially ponds and lakes in inner cities, fail to assign usage functions.

There is also a shortage of regulations covering water pollution resulting from agricultural activities (e.g. cultivation and husbandry), forestry operations, and silviculture. For example, agricultural waste management regulations only seek to control the solid waste from the packaging of plant protection products whilst neglecting the pesticide residue of such activities.[28]

In addition, provisions covering compensation for damages have not been implemented, again due to a lack of guidance regulations determining pollution abatement costs, the extent of injuries, the degradation of eco systems, whether a facility has in fact polluted the environment, and those calculating the costs of environmental restoration, all of which are exacerbated by a scarcity of adequate and timely data on the environment.[29]

[25] See, Law on Water Resources 2012, Arts 11-24.
[26] See, Law on Water Resources 2012, Arts 14-20.
[27] See, Law on Water Resources 2012, Chapter 3.
[28] See, Law on Water Resources 2012, Arts 33-38.
[29] See, 'Decree No 201/2013/ND-CP detailing the implementation of a number of articles of the Law on Water Resources' Thu Vien Phapluat, available at http://thuvienphapluat.vn/van-ban/EN/Tai-nguyen-Moi-truong/Decree-No-201-2013-ND-CP-detailing-the-implementation-of-the-Law-on-Water-Resources/252534/tieng-anh.aspx, accessed on 29 September 2016.

3.3 Regulations governing supporting tools to prevent and control water pollution

Although the issue of water quality is mentioned in the Law on Water Resources 2012 and the Law on Environmental Protection 2014, the rules only refer to the responsibilities of involved parties in the coordination, management, and building of laws; there are no provisions on the responsibility of persons or organizations failing to perform their responsibilities. Similarly, although there are many water management agencies, specialized departments solely responsible for managing water pollution are lacking. Such limitations are reflected in the fact that water pollution control is regulated by a patchwork of legal provisions but an actual law on this most vital of issues is again missing. In addition, the responsibilities of the Ministry of Natural Resources and the Environment, the Ministry of Agriculture and Rural Development, and a number of other ministries and agencies have not been unified resulting in overlap. This situation is exacerbated by a failure of organizations (e.g. the National Council on Water Resources, the Committee of River Basin Planning Management, the Environmental Protection Committee, and the Offices of River Basins) to promote their roles although this is hardly surprising considering most members merely work part-time and perhaps lack focus. Furthermore, the law does not determine the validity of petitions resulting from consultations with river basin organizations. Thus, there is no binding responsibility on member organizations to coordinate and supervise the use, exploitation, and protection of water resources in river basins.

As regards, environmental impact assessments (EIA), currently no responsible mechanism exists to regulate consultations, the responsible formulation of appraisal reports, or synthetic and transboundary EIAs. The rules also do not specify the manner or content of public consultations on strategic environmental assessments, and fail to define the responsibilities of organizations and individuals in the processing and settlement of community EIAs.

Moreover, the Law on Environmental Protection does not define integrated controlling tools (i.e. the integrated environmental permit) as pertaining to facilities in operation. Most are based solely on the environmental impact assessment. Similarly, the Law on Water Resources contains no detailed regulations on monitoring and supervision, and while the environmental protection law does define the monitoring responsibilities of agencies, organizations, and individuals, no specific guidelines on how to implement the programs (e.g. list of activities, environmental monitoring networks, coordination mechanisms, and data transmissions between monitoring systems) are provided. Even companies which may potentially be a source of large amounts of damaging emissions are under no automatic obligation to continuously monitor wastewater. Similarly, while the law on agriculture demands a monitoring system, mechanisms to govern it have been neither developed nor implemented. This has led to a duplication of monitoring systems, wasting already scarce resources. In addition, construction-oriented regulations to monitor environmental changes are also lacking. Further, there are no detailed regulatory guidelines on environmental or water usage reporting.

Both the Law on Environmental Protection and the Law on Water Resources contain sections on the provision of financial support to investigate, plan, use, and protect water resources. However, investment in these activities must comply with the Law on State Budgets in accordance with the annual budget allocation resolutions of the National Assembly.

As regards community participation, the Law on Environmental Protection defines the right of communities affected by impending developments to evaluate the results of assessments including, e.g. the types of waste that will be released into the environment, treatment technology, and environmental protection solutions, which should be displayed publicly at the site of the proposed development. However, it appears implementation of this right is purely tokenistic. Further, the Law on Water Resources contains no specific provisions for community involvement at the planning and supervisory stages in addition to failing to name the agency responsible for the reception and handling of community recommendations.

Regarding indirect support tools, regulations or guidelines on the appraisal of environmentally-friendly technology are noticeably absent. Likewise, there is a paucity of prescribed sanctions on water pollution violations carried out by state management officials. All such cases are handled according to the Law on Officers and Civil Servants. Most significantly though, according to the Director of the Institute of Science for Environmental Management (VEA), Dr Pham Van Loi, there are still no specific regulations to control water pollution despite the great harm it wreaks on people's lives and health.[30]

It can therefore be seen that the Law on Environmental Protection only provides a framework of regulations while the Law on Water Resources refers mainly to water as a national resource. While both are vital to protect water resources, it could be argued they are limited to principle and the statement of unfeasible regulations. In addition, other legal provisions overlap. The content of such provisions are also too general in scope lacking much needed detail and fail to control pollution sources or identify responsibility as regards prevention. Therefore, law enforcement is limited because it is difficult to know "what to do" and "who will do it." Such difficulties comprise the main reason for the drafting of a law specifically to prevent and control water pollution in Vietnam.

In summary, although Vietnam has some laws, decrees, and regulations on water pollution control as mentioned above, there are currently no specific provisions regulating the occurrence. In addition, it is obvious that existing legislation has proved itself unequal to the task. While inadequacies exist in many stages of the process, prevention, in particular, has not been given due attention. Moreover, water processing is also woefully short of guidance, especially provisions on processing technology. Further, the role of the community in monitoring is unclear.

[30] Pham Van Loi, interview, 9 August 2016.

Many countries around the world have passed specific laws controlling water pollution. For example, Japan adopted its Water Pollution Control Act (Law No 138) in 1970 to strictly regulate water quality standards.[31] Likewise, China introduced the Law on the Prevention and Control of Water Pollution in 1984 to tackle water pollution and serious water pollution events.[32] In Thailand, environmental regulations controlling water pollution include its Enhancement and Conservation of National Environmental and Quality Act (BE 2535) which was implemented in 1992.[33] Similarly, in 2004, the Philippines' Clean Water Act created the National Water and Air Pollution Control Commission.[34]

Many experts, such as Nguyen Ngoc Ly (Director of the Centre for Environmental and Community Research (CECR)) and Nghiem Vu Khai (Vice President of the Viet Nam Union of Science and Technology Association (VUSTA)) believe Vietnam should systematize all provisions on water pollution control into one consistent document.[35] The main reason for the above proposal is that environmental rights, including the right to clean water, must be guaranteed, preferably, by discarding the current approach as espoused by the Law on Environmental Protection and the Law on Water Resources, and drafting an entirely separate law to prevent and control water pollution.

4.0 Formulating a new law to prevent and control water pollution

In order to formulate such legislation, first, scientific research needs to be conducted on the urgent problems currently facing Vietnam's water supply or at selected hotspots to determine the root cause of the pollution and to trend forecasting events. In addition, a literature review of existing international studies should be implemented, followed by a regulatory impact assessment. Finally, policies should be formulated according to standard methods to determine whether to amend the current law or draft new legislation.

According to the director of CECR, Nguyen Ngoc Ly, although water pollution has been institutionalized in several legal documents, the problem has not been solved and indeed, now seems to have spun out of control. She also commented that the Law on Environmental Protection and the Law on Water Resources are too generic, resulting in poor enforcement. Furthermore, inconsistent provisions controlling water pollution in these laws create confusion about whom, what, and how they target the problem. Moreover, current laws do not detail the technology used in water pollution treatment. As

[31] 'Water Pollution Control Law' Ministry of the Environment, Government of Japan, available at https://www.env.go.jp/en/laws/water/wlaw/index.html, accessed on 29 September 2016.
[32] 'Law of the People's Republic of China on Prevention and Control of Water Pollution' china.org.cn, available at http://www.china.org.cn/government/laws/2007-04/17/content_1207459.htm, accessed on 29 September 2016.
[33] 'Water pollution legislation and responsible ministers' WEPA, available at http://www.wepa-db.net/policies/measures/currentsystem/thailand.htm, accessed on 29 September 2016.
[34] 'Philippine Environment Laws – Republic Act No 3931, An Act creating the National Water and Air Pollution Control Commission' Chan Robles Virtual Law Library, available at http://www.chanrobles.com/RA3931.htm#.V_DIaKNh3-Y, accessed on 29 September 2016.
[35] Nguyen Ngoc Ly (Director of the Centre for Environmental and Community Research (CECR)) and Nghiem Vu Khai (Vice President of the Viet Nam Union of Science and Technology Association (VUSTA)), interview at *Policies and Law on Controlling Water Pollution Conference*, Hanoi, 8 May 2016.

she pointed out, this could lead to State money being spent on outdated technology which, added to the corruption often plaguing such transactions, could mean the squandering of State funds.[36]

As such, the new law should be addressed from the viewpoint of human rights. As Mrs Ly put it, while the Law on Environmental Protection could still provide a general legal framework and the Law on Water Resources could still govern the use of water resources, establishment of a new law on water pollution control could effectively support both. Furthermore, she pointed out that the new legislation was also expected to focus on measures to manage water pollution on Vietnam's shores to prevent contaminated water running into lakes and rivers.[37]

In conclusion, water pollution is present in all Vietnam's rivers, both big and small, but current legislation has proved itself ineffective to prevent or control it. Thus, it is vital to build an environmental monitoring system and introduce detailed measures to guarantee the provision of clean water. Crucially, this should entail formulating a specific law to control water pollution in conjunction with relevant State agencies and scientists. In the long term, this would help to ensure national sustainable development.

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[36] Nguyen Ngoc Ly (Director of the Centre for Environmental and Community Research (CECR)), interview in Hanoi, 9 August 2016.

[37] Nguyen Ngoc Ly (see note 36 above).

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ABOUT SHAPE-SEA

Strengthening Human Rights and Peace Research and Education in ASEAN/Southeast Asia (SHAPE-SEA) was launched on February 2015 in Bangkok, Thailand. It is a collaboration between the ASEAN University Network–Human Rights Education (AUN-HRE) which boasts thirty member-universities, and the Southeast Asian Human Rights Studies Network (SEAHRN) which has twenty-two members.

The overall aim of SHAPE-SEA is to contribute to the improvement of the human rights and peace situation in ASEAN/Southeast Asia through applied research and education. The core themes of the programme are: (1) ASEAN and Human Rights, (2) Business Accountability, (3) Peace and Security, (4) Governance and Justice, and (5) Academic Freedom. Its main areas of work are Research, Education, Academic Partnership and Public Advocacy, and Publications.

The programme focuses on supporting research on innovative and critical projects in the arena of human rights and peace, and exploring ways this knowledge may be disseminated to university students throughout Southeast Asia/ASEAN. As such, it is directly involved and engaged with universities in the region to play a more significant role in the sustainability of human rights protection by contributing research to increase knowledge on human rights and peace and incorporating these issues into university education. The programme also creates space for knowledge-building and dissemination through the production and publication of research amongst the academic community and other human rights and peace stakeholders.

SHAPE-SEA Secretariat is hosted by the Institute of Human Rights and Peace Studies (IHRP) at Mahidol University. The programme is supported by the Swedish International Development Cooperation Agency (SIDA) and the Norwegian Centre for Human Rights (NCHR).

ABOUT SEAHRN

The Southeast Asian Human Rights and Peace Studies Network (SEAHRN) is an independent consortium of scholars from 23 university-based institutions conducting study programs, education, research, and outreach activities on human rights and peace. Established in October 2009, it has 14 founding members from 6 Southeast Asian countries, namely, Indonesia, Laos, Malaysia, the Philippines, Thailand, and Vietnam. SEAHRN is currently convened by Dr Azmi Sharom of the Faculty of Law, Universiti Malaya and is co-convened by Atty Ma Ngina Gonzaga of the Ateneo de Manila Human Rights Centre.

SEAHRN envisions a Southeast Asia where the culture and values of human rights and peace are instilled through higher education. Its mission is to build regional cooperation on human rights and peace and conflict in higher education to contribute to the better promotion and protection of human rights in Southeast Asia. It also aspires to lend a Southeast Asian voice to the human rights discourse and to contribute to the growing knowledge on peace and conflict in the region.

SEAHRN has the following objectives:

(1) To strengthen human rights education at the university level in Southeast Asia through faculty and course development;
(2) To enhance knowledge and develop deeper understanding of human rights in Southeast Asian countries through collaborative research;
(3) To achieve excellent regional academic and civil society cooperation in realizing human rights in Southeast Asia; and
(4) To conduct public advocacy through critical engagement with civil society actors, governments, and intergovernmental bodies in Southeast Asia.

SEAHRN has since organized the following:

- Workshop on Teaching Human Rights (February 2010);
- First International Conference on Human Rights and Peace in Southeast Asia (October 2010, Bangkok);
- Workshop on Academic Research in Human Rights and Peace and Conflict (July 2011);
- Training on Academic Research in Human Rights and Peace and Conflict (October 2011);
- Second International Conference on Human Rights and Peace and Conflict in Southeast Asia (October 2012, Jakarta);
- Third International Conference on Human Rights and Peace and Conflict in Southeast Asia (October 2014, Kuala Lumpur); and

- Fourth International Conference on Human Rights and Peace and Conflict in Southeast Asia: Reclaiming Lost Ground (October 2016, Bangkok).

SEAHRN also published its first book, *Human Rights in Southeast Asia Series 1: Breaking the Silence* in October 2011 containing select papers from the 2010 Conference. Following its second international conference, two books were published in the Human Rights and Peace in Southeast Asia series, namely, *Series 2: Defying the Impasse* and *Series 3: Amplifying the Voices*, also containing select conference papers. The third international conference resulted in two more books, *Series 4: Challenging the Norms* and *Series 5: Pushing the Boundaries*.

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‘Protecting the Powerless, Curbing the Powerful’ is a phrase that perfectly sums up one of the key reasons we have laws on human rights and peace. Yet such ideals appear to be on the wane, not just in Southeast Asia, but across the world. Everywhere, right wing demagogues are either victorious or making inroads into the corridors of power. Principles of human rights are seen as a hindrance and talk of peace has been replaced by calls for war. In such an environment, it is even more vital that voices calling for human rights and peace are heard, not just to defend these hard-fought ideals, but as a method to solve many of the woes faced by the world today.

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