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BUSINESS AND HUMAN RIGHTS IN CAMBODIA 2021

A compendium of instruments and materials

PART III

HUMAN RIGHTS STANDARDS:

The Impacts of Business on Specific Human Rights



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RAOUL WALLENBERG INSTITUTE
OF HUMAN RIGHTS AND HUMANITARIAN LAW

BUSINESS AND HUMAN RIGHTS IN CAMBODIA
A compendium of instruments and materials

Photo

Tailors work on a production line in a garment factory in Cambodia

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INTRODUCTION TO COMPENDIUM

The subject covered in this Compendium has developed very fast in the last 20 years. The idea that businesses have social responsibilities is not new; it has been discussed in universities since the 1960s under the name 'business ethics'. The notion of corporate social responsibilities (CSR) however became prominent in the 1990s as a response to criticism that economic globalization is not fair in how it spreads benefits and risks. Therefore ideas of CSR, corporate accountability, corporate citizenship, responsible business conduct and corporate sustainability, have attracted wide support, initially from civil society groups and then from some leading businesses and industry associations as well as governments and international organizations.

'Business and human rights' (BHR) is a smaller, specialized part of the broader CSR idea: it is focused on negative impacts from business activities without denying positive impacts, it is based on the authoritative international standards developed by states in human rights treaties, and often emphasizes the importance of legal accountability of businesses and states. Since it emerged in the early 1990s, BHR has emphasized the core idea that human rights are minimum entitlements for individuals and communities grounded in human dignity as well as principles necessary to create societies that are more just. Thus human rights grounded in international law have produced the necessary and globally relevant discourse of ethics and justice to challenge and guide business conduct. As this compendium shows, human rights are relevant to all industries, in all countries. They apply to the workplace (e.g. working hours, health and safety) and surrounding communities (e.g. right to land, right to security), and are meant to protect men, women and all groups in society at higher risk of harm (e.g. children, people with disabilities).

Some protections against business abuses already exist in national laws. When these laws are effective, BHR merely reinforces the importance of compliance with local laws. However, legal systems are not perfect as the laws have gaps and more often are not adequately enforced for a multitude of reasons. What makes BHR important is to put the spotlight on how businesses take advantage of these gaps (resulting in business impunity) at both international law and domestic law levels. BHR then stresses that such regulatory and governance gaps should be closed to ensure access to justice for victims and corporate compliance with human rights norms. This Compendium points to recent policy developments in international organizations (e.g., in the UN), in regions (e.g. the EU), and in advanced economies which all point to the conclusion that governments are increasingly willing to play a stronger role in promoting CSR and regulating businesses.

This is a significant change in the last 10 years. At the international level, the UN SDGs (2015) emphasize the role of the private sector in achieving the development goals and the importance of human rights as both means and ends of development. The UN has adopted the UNGPs (2011), marking the first time the UN member states have agreed to a CSR instrument. In another notable change, international economic agreements – both investment and trade agreements – that have been crucial to the liberalization of the global economy are increasingly referring to labour and human rights, and responsible business conduct. Also in this last decade, the European Union – the largest trading block in the world – is emerging as the most active regulatory space with a direct impact on transnational corporations (TNCs) based there and their global value chains. Finally, industrialized states where TNCs are domiciled have for some time promoted and supported the voluntary uptake of CSR and some seem ready to regulate CSR through incentives and sanctions. In this shifting legal and policy landscape, the UN is currently negotiating a BHR treaty that can harmonize and further enhance regulations in BHR.

Remarkable as they are, the solution to corporate unaccountability is not only a legal one. Many agree that law is part of the solution but much more is needed to achieve in practice responsible business conduct and effective enjoyment of human rights. There are many reasons why the law is a limited tool in BHR; one of them is that TNCs or global supply chains are so complex, dynamic, and mobile that they make a very difficult regulatory target. That means that they can and sometimes do escape jurisdiction of their home and host states, can successfully exploit competition among states for trade and investment, and have the resources and power to defend their interest against lawmakers and civil society critics. Nevertheless, businesses make their own calculations and respond to legal, economic and social pressures. That means business compliance with human rights norms and applicable laws depends on how strong these three sources of influence are and whether they reinforce each other or not. This explains why for the last 30 years some TNCs adopted CSR voluntarily, engaged in self-regulation, entered into multistakeholder initiatives and partnerships for development, and sometime even supported new laws on BHR. So understanding and teaching BHR often requires not only attention to law and legal expertise, but insights from other disciplines to understand how regulations emerge (the process of law-making and norm-making) and whether and how businesses respond to these norms (compliance with law and observance of human rights in practice). It is essential to recall that the entire BHR movement happened because of pressure from civil society organizations; which documented abuses and increased the visibility of corporate and governmental wrongdoing among fellow citizens, consumers, investors, companies themselves and the media.

Therefore, understanding and teaching BHR is often about placing the law, and compliance with it, in its proper context. From declaring human rights at the UN or in a national constitution to people actually enjoying their human rights that are affected by businesses is a long way that lawyers, political scientists, management scholars, sociologists and media specialists might want to travel together. This is why the Compendium has in mind teachers from these five academic disciplines. We hope the selection of materials is accessible and understandable to all five of them and that BHR can be a theme that can stimulate cross-disciplinary teaching and collaborations.

Aim and audiences of the compendium

The compendium is meant to be an aid for lecturers to prepare classes and seminars on business and human rights in Cambodia. A secondary audience could be *researchers* that are new to the topics but look for authoritative reference points from which to start reading and researching human rights aspects. Expected users are teachers from five disciplines: lecturers not only from law faculties, but also from political science, business administration, sociology, and media & communications.

Size and structure of the compendium

The Compendium is a ‘cases and materials’ type of book, and not a textbook. Therefore it is a resource not meant for students who would benefit from a more explanatory, introductory type of book.

The compendium runs for around 800 pages. As may be clearer from the introduction above, BHR is a recent, extremely diverse and highly dynamic area. It’s an emerging scientific field in itself that combines many bodies of law (human rights law, constitutional law, labour law, civil law, criminal law, even environmental law and many others), covers all industries, all human rights, and all countries. The legal framework for BHR is only beginning to emerge now and it will take a long time to do so. Meanwhile one must account for business practice and civil society activism, which will allow one to understand what the specific responsibilities in BHR are, how they are implemented by businesses, and what monitoring mechanisms are being created. There is a lot of experimentation taking place, often by leading businesses, civil society and even governments working together. Academic works sometimes even struggle to keep pace with developments on the ground.

The compendium has 3 parts and 28 chapters. Part I covers the highly diversified legal framework in BHR, Part II is a deep dive into the systems companies set up to respect human rights, and Part III further contextualizes what corporate responsibility entails regarding specific human rights each of them with their own specificities. Each chapter is split into two sections – International materials and Cambodian sources – to ensure maximum relevance for teachers and students.

Part I. **Human rights frameworks** The laws and policies for responsible business conduct	**Part II.** **Human rights due diligence** The management of	**Part III.** **Human rights standards** The impacts of business on specific human rights

With so much material to cover and with due regard to the complexity of the issues, the authors of the compendium made some careful choices.

Compendium size: One choice was to allow the compendium to take its space and grow to 800 pages, but we advise the teachers to begin by reading only the chapters which are the most interesting for them. We could have produced a much smaller compendium instead of delivering 28 chapters out of which half are dedicated to specific human rights. For example, we could have eliminated some of those 14 chapters altogether, but that would also have reduced the choice for teachers with widely different backgrounds. Teachers should therefore use the compendium more as an encyclopedia and therefore 'pick and choose' materials as required by their teaching situation.

Chapter size: Another choice was to also let each chapter take its space and go to 20-30 pages if needed. We carefully selected materials for high quality: we aimed only for most recent materials from authoritative sources. But again, giving systematically a voice to 4 groups of sources – government, business, civil society, and academia – unavoidably took space. We worked systematically and included, for example, 1 – law and policy (international conventions, soft law instruments, reports from UN treaty body and special rapporteurs, national laws, judicial decisions); 2 – documents from businesses (e.g. corporate policies, examples of systems, CSR reports, industry guidance); 3 – materials from NGOs (e.g. case studies of corporate abuses, analysis, advocacy campaigns, collaborations with businesses); 4 – academic writings. These sources are referred to as 'Instruments' in the structure below

The state	The company	The civil society	The academia

Selection of passages: Yet another choice was in how we selected the most relevant and important part from each material. Far from an arbitrary and rushed selection, we tried to identify important and original ideas/data; we would expect teachers to find these worth highlighting in presentations and class discussions. We encountered a trade-off when making the selections: if too short, they become incomprehensible (leading the teacher either to the original source or more likely to stop using the compendium) and if too long, the compendium would grow vastly beyond its current significant length.

Structure of chapters: we chose to standardize the format of each chapter to create familiarity for teachers. The same components as well as the same order are used consistently throughout the chapters.

Introduction (summary of chapter by the compendium authors)
Main aspects (bullet points on key issues covered in the chapter)
Background (general and accessible information about the topic of the chapter)
Instruments (from 4 sources)
Questions (for class discussions)
Further readings

Support for teachers

In sum, each instrument was carefully selected for relevance and quality, and passages were excerpted to give the reader key aspects that should not be missed from any lecture/seminar. These key aspects and sources are the 'building blocks' and interesting bits – it is up to the teacher to select, emphasize and combine building blocks in the best way for their audience and academic discipline.

Taking these choices together, the major priority for the authors was to enable the teachers' choice of topics and angles, and to through careful selection highlight the most important aspects that would in our estimation save 50%-70% of preparation time for the teacher.

Further priorities have been about the searchability of the compendium. The compendium is long at around 800 pages. It will be uploaded on-line as an open access publication. The e-compendium will be available in PDF format enabling searches through keywords and possibly in Website format for easier and speedier navigation through chapters.

To increase usability and reader-friendliness we omitted references (footnotes and endnotes) in order to simplify and shorten the text. Readers are invited to consult the original materials to access all references.

Contributions and quality assurance

Radu Mares has drafted the sections containing international materials in all chapters. Cambodia-based authors, as identified in each chapter, have drafted the sections containing Cambodia-related materials. The sections containing Cambodia-related materials have benefited from internal peer review coordinated by Prof. Kenneth Paul Charman and Soy Kimsan, with contributions from Sao Socheata. An evaluation of the Compendium from a teacher perspective has also taken place during the *9th Annual Ten December Academy - Training School on Business and Human Rights* organised by the RWI in December 2020. Sen Mostafa, programme officer at RWI, has organised and coordinated the entire process that lead to the development of Cambodia-related sections. Elina Hammarström, research assistant at RWI, has proofread and formatted the entire manuscript.

PART



HUMAN RIGHTS STANDARDS

THE IMPACTS OF BUSINESS ON SPECIFIC HUMAN RIGHTS

15. CHILD LABOUR AND CHILDREN RIGHTS

Chea Sophal, Radu Mares

Introduction

Child labour is one of the most sensitive issues for consumers in developed countries. The employment of children in supplier factories in Asia producing for Nike was one of the big scandals of the early 1990s. Since then, child labour has become the symbol of exploitative working conditions in global supply chains. Hundreds of millions of children still work in different sectors – from agriculture and to artisanal mining to fashion clothing and surgical instruments – some of which are producing goods sold in developed countries. Children's rights and working condition for children are regulated in international law. The UN Convention on the Rights of the Child is the most ratified human rights treaty ever (Chapter 1). The ILO specifies permissible ages for employment while taking into account the level of development in the country and the type of work. Leading companies have two decades of experience with fighting child labour and commonly found it necessary to engage in multistakeholder partnerships (chapter 5) to deal with root causes of child labour. For such businesses, child labour is a zero-tolerance issue that triggers most serious responses going all the way to terminating the relationship with suppliers. At the same time, such quick termination risks putting children at even greater risk as they seek jobs in even more dangerous industries (e.g. brick making, sex industry). Therefore the UNGPs emphasize that the appropriate corrective action (chapter 11) is to exercise influence over the suppliers and work together with stakeholders to offer education to children, jobs to parents (chapter 17), and/or involve the government and international organizations to find durable solutions. Conducting a proper human rights impact assessment (chapter 9) is indispensable to understand the root causes of child labour (e.g. poverty) and to respond appropriately.

Under Cambodian law, the minimum age of employment is 15 years, while 12-year old children can perform light work. UNICEF has indicated that 19 percent of Cambodia's nearly four million children aged 5-17 were economically active in 2014.[445] Internationally, Cambodia ratified the main international treaties on child labour, such as ILO Conventions 138 and 182, as well as the UN Convention on the Rights of the Child. Child labour normally takes place in the informal economy, in remote areas, and in other sectors hidden from the public view. Child labour is defined as any form of paid and unpaid labour that affects the psychosocial, physical, social and ethical development of a child under the age of 18, particularly their education. Child work on the other hand is a form of educational activity that equips the child with life skills that are productive to child's future and that are a part of their family-based skills.

445 UNICEF, *A Statistical Profile of Child Protection in Cambodia* (2020) https://www.unicef.org/cambodia/media/711/file/Cambodia_Report_Final_web_ready_HIGH.pdf%20.pdf.

Main Aspects

- ✓ Causes and effects of child labour
- ✓ Corrective measures to eliminate child labour
- ✓ International law standards
- ✓ Obligations of states
- ✓ Responsibilities of corporations
- ✓ Reporting standards
- ✓ Audit standards
- ✓ Business reports
- ✓ Privatization of public services
- ✓ Young workers

Background

ILO, Trade Unions and Child Labour[446]

Child labour is employment or work carried out by a child below the minimum legal working age set by a country in accordance with ILO Convention 138 (generally 14 or 15 years with possible exceptions for light work from the ages of 12 or 13); or any work undertaken by a child below the age of 18 that constitutes a worst form of child labour as defined by ILO Convention 182. This includes work or economic activities which are likely to harm the health, safety or morals of children. (…)

Child labour includes economic activities carried out by children, whether paid or unpaid, in the formal or informal economy, for a few hours or full time, casual or regular, legal or illegal. It also includes work performed by child domestic workers. It excludes chores undertaken in their own home, or other light work for a few hours, which does not interfere with the child's education, safety, and development. This is referred to as children in employment. (…)

Child labour is about the denial of a child's right to education. It is about the exploitation of the most vulnerable, disadvantaged and marginalised in society. Child labour is not children performing small tasks around the house, nor is it children participating in work appropriate to their level of development and which allows them to acquire practical skills and learn responsibility. Child labour is work which contravenes national and international standards concerning the work of children. It is work that kills the human resources of a nation and undermines its future development.

Effective elimination of child labour requires global responses that address inequalities, both within and between States. It requires decent work for adults, access to free, compulsory, quality basic education for all, and effective poverty reduction strategies, which provide social protection to the most vulnerable households. Employment strategies which ensure that parents and young persons of legal working age have the possibility of decent work are a key factor in tackling poverty and child labour. Adults who are in decent employment and enjoy a fair income are far less likely to send their children to work.

446 International Labour Organisation (ILO), Trade Unions and Child Labour - A tool for Action (2016) http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_463161.pdf.

Why is child labour a trade union issue?

- Child labour is a violation of fundamental human rights;
- Child labour means a loss of jobs for adults;
- Children provide cheap substitute labour;
- Child labour can weaken the bargaining power of unions;
- Child labourers will be less healthy in their adult working life;
- Child labour brings an increase in societal and individual violence and insecurity;
- Where unions are present, child labour is absent;
- Child labour perpetuates poverty;
- A child's right to education in non-negotiable.

ILO, World Report on Child Labour[447]

What drives children to work?

Poor households, without access to credit, are less likely to be able to postpone children's involvement in work and invest in their education, and more likely to have to resort to child labour in order to meet basic needs and deal with uncertainty. Exposure to shocks can have a similar impact on household decisions. Households typically respond to what they regard as a temporary reduction in their income by either borrowing or drawing down savings, but when these options are not available, or not available on the scale required, parents may have to resort to child labour. (…)

It is abundantly clear from this evidence that continued progress against child labour will require national policies that help to make households less vulnerable to the effects of poverty and economic shocks. Establishing national social protection floors as a fundamental element of national social security systems is particularly important in this context. A well-designed social protection floor can offer basic income security throughout the life cycle, both providing a buffer against shocks and income fluctuations as and when they occur and ensuring access to essential health care and other social services. Social finance schemes such as microcredit and microinsurance can play an important complementary role in making sure that vulnerable families do not find that the financial services and facilities they need are closed to them. Taken together, national social protection floors and complementary social finance mechanisms can reduce the need for families, in effect, to sacrifice the long-term benefits from education for the immediate benefits from child labour.

(…) specific social protection instruments can be used to mitigate the economic vulnerabilities associated with child labour. Particular attention is given to instruments that theory suggests are relevant from a child labour perspective – cash and in-kind transfer programmes, public employment programmes, social health protection, social protection for people with disabilities, income security in old age and unemployment protection.

447 International Labour Organisation (ILO), *World Report on Child Labour, Economic Vulnerability, Social Protection and the Fight Against Child Labour* (2013) http://www.ilo.org/ipecinfo/product/download.do?type=document&id=19565.

Instruments

ILO, Minimum Age Convention[448]

Article 2

3. The minimum age specified in pursuance of paragraph 1 of this Article shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years.

4. Notwithstanding the provisions of paragraph 3 of this Article, a Member whose economy and educational facilities are insufficiently developed may, after consultation with the organizations of employers and workers concerned, where such exist, initially specify a minimum age of 14 years.

Article 3

1. The minimum age for admission to any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardize the health, safety or morals of young persons shall not be less than 18 years.

2. The types of employment or work to which paragraph 1 of this Article applies shall be determined by national laws or regulations or by the competent authority, after consultation with the organizations of employers and workers concerned, where such exist.

3. Notwithstanding the provisions of paragraph 1 of this Article, national laws or regulations or the competent authority may, after consultation with the organizations of employers and workers concerned, where such exist, authorize employment or work as from the age of 16 years on condition that the health, safety and morals of the young persons concerned are fully protected and that the young persons have received adequate specific instruction or vocational training in the relevant branch of activity.

Article 6

This Convention does not apply to work done by children and young persons in schools for general, vocational or technical education or in other training institutions, or to work done by persons at least 14 years of age in undertakings, where such work is carried out in accordance with conditions prescribed by the competent authority, after consultation with the organizations of employers and workers concerned, where such exist, and is an integral part of

(a) A course of education or training for which a school or training institution is primarily responsible;

(b) A programme of training mainly or entirely in an undertaking, which programme has been approved by the competent authority; or

(c) A programme of guidance or orientation designed to facilitate the choice of an occupation or of a line of training.

Article 7

1. National laws or regulations may permit the employment or work of persons 13 to 15 years of age on light work which is--

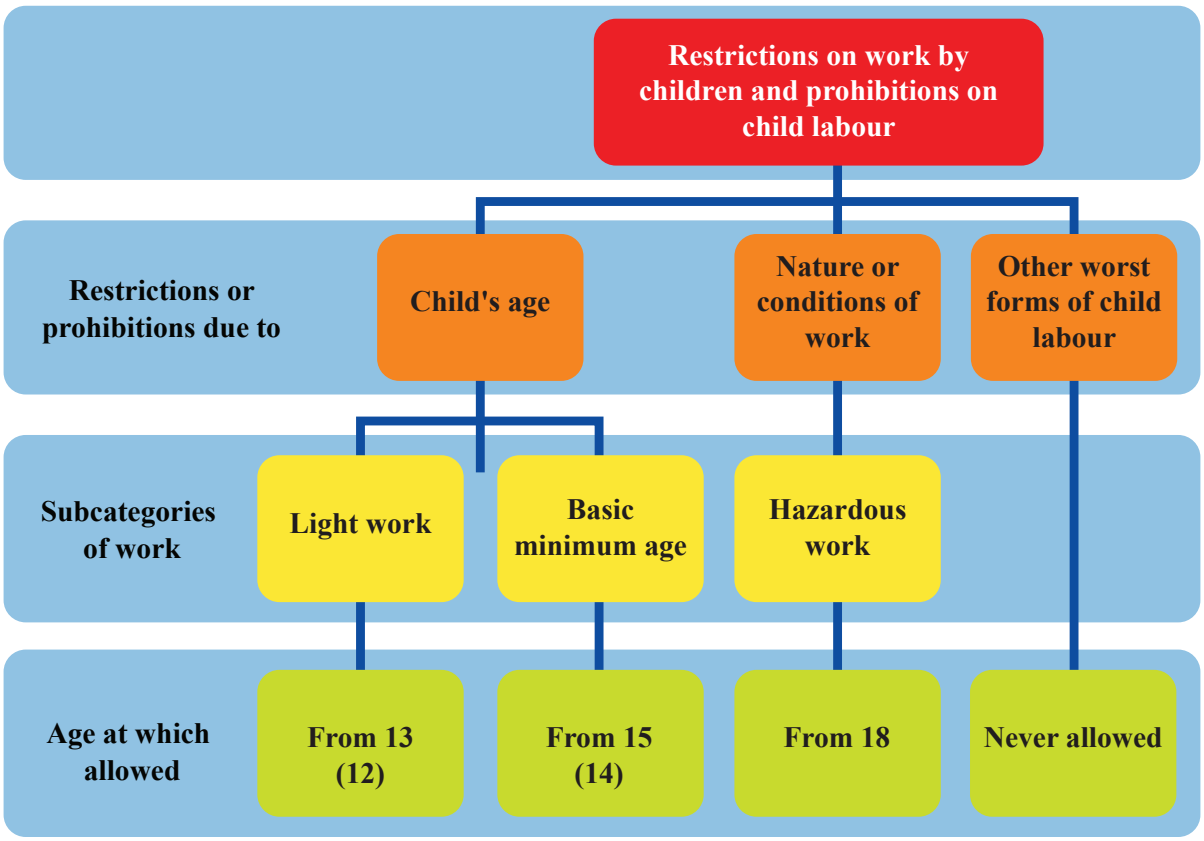
448 International Labour Organisation (ILO), *Minimum Age Convention (No. C138),* (1973) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C138.

(a) Not likely to be harmful to their health or development; and

(b) not such as to prejudice their attendance at school, their participation in vocational orientation or training programmes approved by the competent authority or their capacity to benefit from the instruction received. (…)

4. Notwithstanding the provisions of paragraphs 1 and 2 of this Article, a Member which has availed itself of the provisions of paragraph 4 of Article 2 may, for as long as it continues to do so, substitute the ages 12 and 14 for the ages 13 and 15 in paragraph 1 and the age 14 for the age 15 in paragraph 2 of this Article.

Graphic Summary[449]



ILO, Worst Forms of Child Labor Convention[450]

Article 2

For the purposes of this Convention, the term child shall apply to all persons under the age of 18.

Article 3

For the purposes of this Convention, the term the worst forms of child labour comprises:

(a) All forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;

449 International Labour Organisation (ILO), *How to Do Business with Respect for Children's Right to be Free from Child Labour: ILO-IOE Child Labour Guidance Tool for Business* (2015) http://www.ilo.org/ipec/Informationresources/WCMS_IPEC_PUB_27555/lang--en/index.htm.

450 International Labour Organisation (ILO), *Worst Forms of Child Labour Convention (No. 182),* (1999) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C182.

(b) The use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

(c) The use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

(d) Work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

Article 7

1. Each Member shall take all necessary measures to ensure the effective implementation and enforcement of the provisions giving effect to this Convention including the provision and application of penal sanctions or, as appropriate, other sanctions.

2. Each Member shall, taking into account the importance of education in eliminating child labour, take effective and time-bound measures to:

   (a) Prevent the engagement of children in the worst forms of child labour;

   (b) Provide the necessary and appropriate direct assistance for the removal of children from the worst forms of child labour and for their rehabilitation and social integration;

   (c) Ensure access to free basic education, and, wherever possible and appropriate, vocational training, for all children removed from the worst forms of child labour;

   (d) Identify and reach out to children at special risk; and

   (e) Take account of the special situation of girls.

3. Each Member shall designate the competent authority responsible for the implementation of the provisions giving effect to this Convention.

UN, Convention on the Rights of the Child[451]

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

   (a) Make primary education compulsory and available free to all;

   (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

   (c) Make higher education accessible to all on the basis of capacity by every appropriate means;

   (d) Make educational and vocational information and guidance available and accessible to all children;

   (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

451 *Convention on the Rights of the Child* (1989) http://www.ohchr.org/en/professionalinterest/pages/crc.aspx.

Article 32

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

   (a) Provide for a minimum age or minimum ages for admission to employment;

   (b) Provide for appropriate regulation of the hours and conditions of employment;

   (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

UN Committee on Rights of the Child, General Comment No. 16[452]

4. It is necessary for States to have adequate legal and institutional frameworks to respect, protect and fulfil children's rights, and to provide remedies in case of violations in the context of business activities and operations. In this regard, States should take into account that:

   a. Childhood is a unique period of physical, mental, emotional and spiritual development and violations of children's rights, such as exposure to violence, child labour or unsafe products or environmental hazards may have lifelong, irreversible and even transgenerational consequences;

   b. Children are often politically voiceless and lack access to relevant information. They are reliant on governance systems, over which they have little influence, to have their rights realized. This makes it hard for them to have a say in decisions regarding laws and policies that impact their rights. In the process of decision-making, States may not adequately consider the impact on children of business-related laws and policies, while, conversely, the business sector often exerts a powerful influence on decisions without reference to children's rights;

   c. It is generally challenging for children to obtain remedy – whether in the courts or through other mechanisms – when their rights are infringed upon, even more so by business enterprises. Children often lack legal standing, knowledge of remedy mechanisms, financial resources and adequate legal representation. Furthermore, there are particular difficulties for children in obtaining remedy for abuses that occur in the context of businesses' global operations.

Provision of services for the enjoyment of children's rights

33. Business enterprises and non-profit organizations can play a role in the provision and management of services such as clean water, sanitation, education, transport, health, alternative care, energy, security and detention facilities that are critical to the enjoyment of children's rights. The Committee does not prescribe the form of delivery of such services but it is important to emphasize that States are not exempted from their obligations under the Convention when they outsource or privatize services that impact on the fulfilment of children's rights.

452 Committee on the Rights of the Child, *General Comment No. 16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights* (2013) http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f16&Lang=en.

34. States must adopt specific measures that take account of the involvement of the private sector in service delivery to ensure the rights enumerated in the Convention are not compromised. They have an obligation to set standards in conformity with the Convention and closely monitor them. Inadequate oversight, inspection and monitoring of these bodies can result in serious violations of children's rights such as violence, exploitation and neglect. They must ensure that such provision does not threaten children's access to services on the basis of discriminatory criteria, especially under the principle of protection from discrimination, and that, for all service sectors, children have access to an independent monitoring body, complaints mechanisms and, where relevant, to judicial recourse that can provide them with effective remedies in case of violations. The Committee recommends that there should be a permanent monitoring mechanism or process aimed at ensuring that all non-State service providers have in place and apply policies, programmes and procedures which are in compliance with the Convention.

Children's rights and global operations of business

41. States have obligations to engage in international cooperation for the realization of children's rights beyond their territorial boundaries. The preamble and the provisions of the Convention consistently refer to the "importance of international cooperation for improving the living conditions of children in every country, in particular in the developing countries". General comment No. 5 emphasizes that "implementation of the Convention is a cooperative exercise for the States of the world". As such, the full realization of children's rights under the Convention is in part a function of how States interact. Furthermore, the Committee highlights that the Convention has been nearly universally ratified; thus realization of its provisions should be of major and equal concern to both host and home States of business enterprises.

42. Host States have the primary responsibility to respect, protect and fulfil children's rights in their jurisdiction. They must ensure that all business enterprises, including transnational corporations operating within their borders, are adequately regulated within a legal and institutional framework that ensures that they do not adversely impact on the rights of the child and/or aid and abet violations in foreign jurisdictions.

43. Home States also have obligations, arising under the Convention and the Optional Protocols thereto, to respect, protect and fulfil children's rights in the context of businesses' extraterritorial activities and operations, provided that there is a reasonable link between the State and the conduct concerned. A reasonable link exists when a business enterprise has its centre of activity, is registered or domiciled or has its main place of business or substantial business activities in the State concerned. When adopting measures to meet this obligation, States must not violate the Charter of the United Nations and general international law nor diminish the obligations of the host State under the Convention.

International Finance Corporation, Performance Standard 2[453]

Child Labor

21. The client will not employ children in any manner that is economically exploitative, or is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral, or social development. The client will identify the presence of all persons under the age of 18. Where national laws have provisions for the employment of minors, the client will follow those laws applicable to the client. Children under the age of 18 will not be employed in hazardous work. All work of persons under the age of 18 will be subject to an appropriate risk assessment and regular monitoring of health, working conditions, and hours of work.

453 International Finance Corporation (IFC), Performance Standard 2 – Labor and Working Conditions (2012) https://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Document.pdf?MOD=AJPERES.

Guidance Notes[454]

GN96. With regard to child labor and forced labor as defined in Performance Standard 2, the client needs to exercise due diligence in its supply chain to avoid benefit or financial gain from these practices. Clients should make particular effort and engage in additional diligence when such practices are prevalent or known to exist within certain stages of the supply chain, in specific industries or in geographic areas. Financial gain from child labor is a specific risk when the cost of labor is a factor in the competitiveness of the client's goods or materials. Clients should utilize their influence to the fullest extent to eradicate child labor and forced labor in their supply chain. (…)

GN97. Where the client discovers forced labor and child labor in the supply chain, the client should seek professional advice on the appropriate steps to take to address this issue. In the case of child labor, immediately removing children from their work is likely to worsen their financial condition. Rather, clients should immediately remove children from tasks that are dangerous, harmful, or inappropriate given their age. Children who are over the national school-leaving age should be moved to non-harmful tasks. Children under the national school-leaving age must only work in legal activities outside school hours, and in some cases it may be appropriate to provide compensation to cover their loss of wages. Implementing processes such as purchasing procedures will ensure that specific requirements on child labor, forced labor and work safety issues are included in orders and contracts with suppliers.

UNICEF, Children's Rights and Business Principles[455]

The objective of UNICEF's children's rights and business agenda is to promote the corporate responsibility to respect and support children's rights in the work place, market place and community in conjunction with the government duty to protect and safeguard children's rights.

Respect: Avoiding any infringement of human rights, including children's rights, and addressing any adverse human rights impact with which the business is involved. The corporate responsibility to respect applies to the business's own activities and to its business relationships, linked to its operations, products or services.

Support: In addition to respecting human rights, voluntary actions that seek to advance human rights, including children's rights, through core business activities, strategic social investment and philanthropy, advocacy and public policy engagement, working in partnership and other collective action.



454 International Finance Corporation (IFC), *Guidance Notes: Performance Standards on Environmental and Social Sustainability* (2012) https://www.ifc.org/wps/wcm/connect/e280ef804a0256609709ffd1a5d13d27/GN_English_2012_Full-Document.pdf?MOD=AJPERES.

455 UNICEF, *CSR Corporate Social Responsibility & UNICEF-Children's Rights and Business Principles* (2012) http://www.unicef.org/csr/principles.htm.



2. Contribute to the elimination of child labour, including in all business activities and business relationships

The corporate responsibility to respect includes respect for the rights in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work. Actions for all business include:

a. Eliminating child labour

Do not employ or use children in any type of child labour. Establish robust age-verification mechanisms as part of recruitment processes and ensure that these mechanisms are also used in the value chain. Be aware of the presence of all children in the workplace. In removing children from the workplace, measures to ensure protection of affected children, and, where appropriate, decent work for adult household members should be pursued. Do not put pressure on suppliers, contractors and subcontractors that are likely to result in abuses of children's rights.

b. Preventing, identifying and mitigating harm to young workers and protecting them from work that is prohibited for workers under 18 years old or beyond their physical and psychological capacity

Prevent, identify and mitigate harm to young workers and protect them from work that is prohibited for workers under 18 years old or beyond their physical and psychological capacity. Protect children from hazardous work, which is likely to harm their health, safety and morals. Prevent and eliminate workplace hazards or remove children from such workplaces. Children in hazardous work should be removed immediately from the source of the hazard and protected against loss of income as a result of such interventions. Be mindful that children of working age may face different risks in the workplace than adults, and that girls may face different risks than boys. Respect, in particular, children's right to information, freedom of association, collective bargaining, participation, non-discrimination, privacy and protection from all forms of workplace violence – including physical, mental and other humiliating punishment, bullying and sexual abuse.

The corporate commitment to support includes:

c. Working with governments, social partners and others to promote education and sustainable solutions to the root causes of child labour

i. Work with business peers, communities, child rights organizations, trade unions and governments to promote children's education and sustainable solutions to the root causes of child labour.

ii. Support broader community, national and international efforts to eliminate child labour, including through social mobilization and awareness raising, and programmes to eradicate child labour that are designed and carried out in cooperation with local community members and children.

iii. Work in partnership with other companies, sectoral associations and employers' organizations to develop an industry-wide approach to address child labour, and build bridges with trade unions, law enforcement authorities, labour inspectorates and others.

iv. Establish or participate in a task force or committee on child labour in representative employers' organizations at the local, state or national level.

v. Support the development and implementation of a national action plan against child labour as part of key policy and institutional mechanisms to combat child labour at the national level.

vi. Participate in programmes to promote youth employment, skills development and job training opportunities for young workers above the minimum age for employment.

vii. Seek to concentrate production in the formal economy and avoid informal working arrangements that may contribute to child labour.

Global Report Initiative, Sustainability Reporting Guidelines[456]

The GRI Sustainability Reporting Guidelines (the Guidelines) offer Reporting Principles, Standard Disclosures and an Implementation Manual for the preparation of sustainability reports by organizations, regardless of their size, sector or location.

Child Labor

a. Operations and suppliers identified as having significant risk for incidents of child labor

Report operations and suppliers considered to have significant risk for incidents of:

- Child labor
- Young workers exposed to hazardous work

b. Report operations and suppliers considered to have significant risk for incidents of child labor either in terms of:

- Type of operation (such as manufacturing plant) and supplier
- Countries or geographical areas with operations and suppliers considered at risk

c. Report measures taken by the organization in the reporting period intended to contribute to the effective abolition of child labor.

456 Global Reporting Initiative, *G4 Sustainability Reporting Guidelines* (2013) https://www.globalreporting.org/resourcelibrary/GRIG4-Part1-Reporting-Principles-and-Standard-Disclosures.pdf.

Social Accountability 8000[457]

SA8000 is a voluntary standard for auditable third-party verification, setting out the requirements to be met by organisations, including the establishment or improvement of workers' rights, workplace conditions and an effective management system. However, certification is only available per specific worksite. The foundational elements of this Standard are based on the UN Declaration of Human Rights, conventions of the ILO, international human rights norms and national labour laws.

Social Accountability Requirements

1. Child Labour

Criteria:

1.1 The organization shall not engage in or support the use of child labour as defined above.

1.2 The organization shall establish, document, maintain and effectively communicate to personnel and other interested parties, written policies and procedures for remediation of child labourers, and shall provide adequate financial and other support to enable such children to attend and remain in school until no longer a child as defined above.

1.3 The organization may employ young workers, but where such young workers are subject to compulsory education laws, they shall work only outside of school hours. Under no circumstances shall any young worker's school, work and transportation time exceed a combined total of 10 hours per day, and in no case shall young workers work more than 8 hours a day. Young workers may not work during night hours.

1.4 The organization shall not expose children or young workers to any situations – in or outside of the workplace – that are hazardous or unsafe to their physical and mental health and development.

Ethical Trading Initiative, Base Code[458]

4: Child labour shall not be used

4.1 There shall be no new recruitment of child labour.

4.2 Companies shall develop or participate in and contribute to policies and programmes which provide for the transition of any child found to be performing child labour to enable her or him to attend and remain in quality education until no longer a child; "child" and "child labour" being defined in the appendices.

4.3 Children and young persons under 18 shall not be employed at night or in hazardous conditions.

4.4 These policies and procedures shall conform to the provisions of the relevant ILO standards.

IKEA, The IKEA Way of Preventing Child Labour[459]

The IKEA Group of Companies (IKEA) acknowledges the fact that child labour does exist in various countries. However, IKEA does not accept child labour, and works actively against it. The complexity of the child labour problem requires a consistent, long-term effort to create broad-based and enduring developments in order to reach our goal; to ensure that no products delivered to IKEA are manufactured by child labour.

457 Social Accountability International, *SA8000 - Social Accountability 8000 International Standard* (2014) http://sa-intl.org/_data/n_0001/resources/live/SA8000%20Standard%202014.pdf.

458 Ethical Trading Initiative, *The ETI Base Code* (2014) http://s3-eu-west-1.amazonaws.com/www.ethicaltrade.org.files/shared_resources/eti_base_code_english.pdf?ppXz9ivoyynr1uTTo5e.Z5n.ZHaQvQfN.

459 IKEA, *The IKEA Way on Preventing Child Labour and Supporting Young Workers* (2007) http://www.ikea.com/ms/nl_BE/about_ikea/pdf/IWAY_preventing_child_labour.pdf.

Implementation

All actions to avoid child labour shall be implemented by taking the child's best interests into account. IKEA requires that all suppliers shall recognise the U.N. Convention on the Rights of the Child, and that the suppliers comply with all relevant national and international laws, regulations and provisions applicable in the country of production. Suppliers are obliged to take the appropriate measures to ensure that no child labour occurs at suppliers' and their sub-contractors' places of production.

If child labour is found in any place of production, IKEA will require the supplier to implement a corrective action plan. If corrective action is not implemented within the agreed time-frame, or if repeated violations occur, IKEA will terminate all business with the supplier concerned. The corrective action plan shall take the child's best interests into consideration, i.e. family and social situation and level of education. Care shall be taken not merely to move child labour from one supplier's workplace to another, but to enable more viable and sustainable alternatives for the child's development.

Young Workers

IKEA supports the legal employment of young workers.

Young workers of legal working age have, until the age of 18, the right to be protected from any type of employment or work which, by its nature or the circumstances in which it is carried out, is likely to jeopardise their health, safety or morals.

IKEA therefore requires all its suppliers to ensure that young workers are treated according to the law; this includes measures to avoid hazardous jobs, night shifts and ensure minimum wages. Limits for working hours and overtime should be set with special consideration to the workers' young age.

Monitoring

All suppliers are obliged to keep IKEA informed at all times about all places of production (including their sub-contractors). Any undisclosed production centres found would constitute a violation of this code of conduct.

Through the General Purchasing Conditions for the supply of products to the IKEA Group of Companies, IKEA has reserved the right to make unannounced visits at any time to all places of production (including their sub-contractors) for goods intended for supply to IKEA. The IKEA Group furthermore reserves the right to assign, at its sole discretion, an independent third party to conduct inspections in order to ensure compliance with "The IKEA Way on Preventing Child Labour".

H&M, Sustainability Report[460]

Addressing Child Labour

Child labour is a salient human rights issue. Today, it is rare to find any workers below the statutory minimum age in our suppliers' factories. We have taken a clear stance against all use of child labour for many years. It is a minimum requirement for all factories producing for the H&M group, and we continuously monitor compliance.

In 2016, we updated our risk assessment for new and existing raw materials to further integrate the human rights risk perspective, including the risk of child labour. The risk of child labour in our value chain is known to be connected to raw materials.

460 H&M, The H&M Group Sustainability Report (2016) https://sustainability.hm.com/content/dam/hm/about/documents/en/CSR/2016%20Sustainability%20report/HM_group_SustainabilityReport_2016_FullReport_en.pdf.

We also continued to make sure our Child Labor Policy was implemented, and engaged in initiatives that strengthened children's rights. See Modern Slavery Statement for more details. If we discover any person below the minimum age working in any of our business partner's factories, we have a clear policy in place that guides us to act in the best interests of the child. This can include ensuring the individual enrols in school, compensation to the family for the lost income and partnering with civil society organisations. For more information on our policies here.

We conducted an assessment on mica – an ingredient most commonly found in cosmetic products – to support our ongoing strategy development on the risks of child labour associated with its production in India.

We also entered a collaboration with the Centre for Child Rights and Corporate Social Responsibility (CCR CSR) in a project to prevent child labour and protect young workers in our supplier factories in Myanmar. The programme provides training in child labour awareness, prevention and remediation in the workplace, as well as effective child protection at work and in the community. The training is for both managers and workers, and has so far reached 309 management staff and 660 workers. The CCR CSR also produced a baseline report and a final report from this project.

H&M, Policy on Child Labour[461]

What Is Expected Of Business Partners

Business partners are required to have systems in place to ensure that child labor is not employed directly by the business partner or by any partner/sub-contractor.

If child labor is confirmed in a business partner's operations (directly or via partner/sub-contractor), we request the business partner to ensure that measures are taken in the best interest of the child. In cooperation with the child's family, employer and other relevant parties, the business partner is required to seek a satisfactory solution, taking into consideration the child's age, social situation, education etc. The solution should always aim to improve, not worsen, the child's situation and shall be maintained for the child until the child reaches legal age of working.

Any cost related to the solution need to be covered by the business partner and the business partner is also required to compensate the child's family for lost income – as a minimum the prevailing minimum wage.

H&M reserves the right to seize cooperation with business partners that violate this policy.

Amnesty International, This Is What We Die For[462]

UNICEF estimated in 2014 that approximately 40,000 boys and girls work in all the mines across southern DRC, many of them involved in cobalt mining. The children interviewed by researchers described the physically demanding nature of the work they did. They said that they worked for up to 12 hours a day in the mines, carrying heavy loads, to earn between one and two dollars a day. Even those children who went to school worked 10 – 12 hours during the weekend and school holidays, and in the time before and after school. The children who were not attending school worked in the mines all year round. For example, Paul, aged 14, started mining at the age of 12 and worked in tunnels underground. He told researchers he would often "spend 24 hours down in the tunnels. I arrived in the morning and would leave the following morning."

Other children said that they worked in the open, in high temperatures, or in the rain. As with adult miners, they were exposed to high levels of cobalt on a consistent basis, but did not even have gloves or face masks to wear. The children interviewed for this report complained of being frequently ill. "There is lots of dust, it is very easy to catch colds, and we hurt all over," Dany, a 15-year-old boy, told researchers.

461 H&M, *Policy on Child Labour* (2014) http://sustainability.hm.com/content/dam/hm/about/documents/masterlanguage/CSR/Sustainability%20Commitment/Child%20labour%20policy.pdf.

462 Amnesty International, '*This Is What We Die For': Human Rights Abuses in the Democratic Republic of the Congo Power the Global Trade in Cobalt* (2016) www.amnesty.org/en/documents/afr62/3183/2016/en.

Several children said that they had been beaten, or seen other children beaten, by security guards employed by mining companies when they trespassed on those companies' mining concessions. Security guards also demanded money from them.

Most children indicated that they earned between 1,000-2,000 Congolese Francs per day (US$1-2). Children who collected, sorted, washed, crushed and transported minerals were paid per sack of minerals by the traders. The children had no way of independently verifying the weight of the sacks or the grade of the ore, and so had to accept what the traders paid them, making them susceptible to exploitation.

It is widely recognized internationally that the involvement of children in mining constitutes one of the worst forms of child labour, which governments are required to prohibit and eliminate. The nature of the work that researchers found that the children do in artisanal cobalt mining in the DRC is hazardous, and likely to harm children's health and safety.

The children said that they had to work, since their parents had no formal employment and could not afford school fees. The DRC Child Protection Code (2009), provides for free and compulsory primary education for all children. However, because of a lack of adequate funding from the state, most schools still charge parents a monthly amount to cover costs, such as teacher salaries, uniforms and learning materials. In Kolwezi, NGO staff told researchers, this amount varies between 10 - 30,000 Congolese Francs (US$10-30) per month, which is more than many can afford. Some children do not attend school and work full time, others attend school but work out of school hours, on weekends and holidays.

US, Class Action Suit Regarding Child Labour in Cobalt Mining[463]

1. Defendants [Apple, Alphabet, Dell, Microsoft and Tesla] are knowingly benefiting from and aiding and abetting the cruel and brutal use of young children in Democratic Republic of Congo ("DRC") to mine cobalt, a key component of every rechargeable lithium-ion battery used in the electronic devices these companies manufacture. The young children mining Defendants' cobalt are not merely being forced to work full-time, extremely dangerous mining jobs at the expense their educations and futures; they are being regularly maimed and killed by tunnel collapses and other known hazards common to cobalt mining in the DRC.

89. (…) Defendants Apple, Alphabet, Dell, Microsoft and Tesla have been and continue to be unjustly enriched as a result of the wrongful conduct alleged herein. Defendants have unjustly benefited by receiving DRC cobalt at prices reflecting that a significant portion of Defendants' cobalt supply chain is mined by children performing extremely hazardous work for 2 to 3 U.S. dollars per day and, remarkably, in many cases even less than that. Defendants are knowingly benefiting and being unjustly enriched from the unlawful use of forced child labor in their cobalt supply chains at the expense of Plaintiffs and the Class Members who are being paid below starvation wages to risk their lives and health to mine cobalt for Defendants. Further, as previously alleged, the cobalt supply chain "ventures" Defendants participate in use deception and misrepresentations to hide the true facts of Defendants abuse of Plaintiffs and the Class Members to continue to obtain unfairly low-priced cobalt. Between the parties, it would be unjust and inequitable for Defendants Apple, Alphabet, Dell, Microsoft and Tesla, already incredibly rich companies run by extremely rich executives, to get a windfall and retain the benefits from their abuse of Plaintiffs and the Class Members.

90. Accordingly, Plaintiffs seek full restitution of enrichment, benefits, and ill-gotten gains Defendants Apple, Alphabet, Dell, Microsoft and Tesla acquired as a result of the wrongful conduct alleged herein.

463 United States, Class Action Suit Regarding Child Labour in Cobalt Mining, US District Court for the District of Columbia, Case 1:19-cv-03737 (filed 12/15/2019) http://iradvocates.org/sites/iradvocates.org/files/stamped%20-Complaint.pdf.

Khan et al, NGOs and CSR Interventions into Third World Child Labour[464]

A field study focused on a Western-led Corporate Social Responsibility (CSR) intervention into Pakistan's soccer ball industry is used to explore the dynamics surrounding local Non-Governmental Organization (NGO) staff charged with implementation. (…)

Our field study reveals that local NGO staff charged with implementing a Western-derived CSR intervention, as they often are, operate within a set of complex post-colonial conditions that entail them having to work through multiple subject positions and sometimes conflicting rationalities. For example, they are working for and representing international NGOs and being asked to implement a particular solution to a CSR problem – in this field study the elimination of child labor from the soccer ball industry. However, they are also part of the local community with a sense-making frame that includes an awareness of the post-colonial conditions noted earlier. They are cognizant of, and perhaps share, the suspicions of Western interventions and the promulgated modes of modernization within the local community. The intervention is not addressing the needs of local people for a living income and poverty alleviation, and local values and traditions that could be part of the solution are being ignored and diminished. (…)

As has been noted, current CSR approaches regarding the TW, especially codes of conduct, are made in the West and exported to the rest. There is an inherent ethnocentrism to much CSR as well as a thinly disguised self-interest masquerading as universal benevolence (Banerjee, 2008). It purports to offer a universalistic ethic, whilst in fact resting upon localized Western specificities of history, culture, politics, and ethics. In our field study, the whole analysis, development of plans, and solutions are Western-led and input from the TW is restricted to local business and other elites, who are often themselves participants in Western neo-colonial projects such as modernization through neo-liberal models of development. What is missing is the voice of local people, particularly those at the grassroots levels who are the supposed target of CSR interventions. (…)

Our field work revealed an example of what a locally and indigenously informed CSR agenda might look like when female stitchers articulated a very clear set of goals and priorities: good pay, steady work, and proper sanitation. These were different priorities from the Western concerns with child labor. In fact, the issue of child labor was far less problematical for local women and their communities than it was for Western advocates, especially given that the work was part time, took place at homes in the context of families, and did not disrupt schooling. We witness a deflection from these goals and those of labor representation onto the single, measurable goal of child labor elimination. It might well be that the local women would prefer not to see their children working in this manner, but that is not the most pressing objective they envisage. They might also envisage other goals, such as help from employers with expenses relating to marrying off their children, as legitimate. A corporation being responsible for such things may appear strange in the context of Western CSR approaches, but might be a legitimate CSR and development goal under a post-colonial CSR approach. (…)

Our case study also provides another instance of the negativities attendant upon outside interventions. For the sake of placating Western consumer and advocacy sentiments by zeroing in on a one-point reform agenda (to eliminate child labor), an entire home economy was ravaged, throwing women off work, and plunging subsistence household incomes even further below the poverty line. The complexities of child labor being interwoven with other parts of the local economy (e.g. women's employment) and cultural arrangements (e.g. women preferring home based to factory based employment), not to mention the post-colonial hostilities of the local populations to outside Western interventions, were all lost to the self-appointed social engineers who concocted the CSR intervention. And this is our point. It is hard to fathom how outsiders, no matter how well meaning they may be, are able to encompass such complexities, available as common knowledge to local insiders, that if not taken into account are likely to lead to poorly conceived and executed outsider interventions ushering in major changes that have net negative and sometimes catastrophic consequences in the indigenous community. The role of outside advocates and external interventionists needs to be limited and at least mediated by, if not led by, input from local agents and particularly from the subaltern classes. (…)

464 Farzard Rafi Khan, Robert Ian Westwood & David M. Boje, 'I Feel Like a Foreign Agent: NGOs and Corporate Social Responsibility Interventions into Third World Child Labor', Human Relations 63(9) 2010 www.researchgate.net/publication/228365595_'I_feel_like_a_foreign_agent'_NGOS_and_corporate_social_responsibility_interventions_into_Third_World_child_labor.

Another contribution of our study is the inclusion of the voices of local actors: NGO staff, business people, and workers. Often such actors, particularly the latter, are in positions of subalterneity and remain voiceless both in local political dynamics and international research. It is the sedimentation of the traumas of post-colonial conditions in the consciousness of such people that colors their phenomenal world and informs their sense-making. Any analysis failing to attend to such experiences and understandings is deficient, just as any practice that does not take them into account runs the risk of being unaligned with genuine local concerns. Future research needs to also incorporate local voices and the sense-making frameworks through which engagements with the West, and CSR interventions in particular, are made meaningful and responded to. (…)

Thomas, Addressing Child Labor in Agriculture Supply Chains[465]

This paper briefly reviews the historic gains that have been made over the past twenty-five years in the global fight against child labor. The progress made in such a relatively short period of time should serve to strengthen the resolve to carry the fight forward. The reality is however that there is a long and hard road ahead to meet the goal of eliminating child labor, even in its worst forms. Nowhere is that more true than in the agricultural sector. (…)

Progress achieved within a relatively short timeframe

Eliminating child labor requires addressing its root causes. The global strategy to eliminate child labor set out in The Hague Roadmap provides excellent guidance on action required to be taken to address the root causes and to make sustainable progress. This global strategy needs to be applied to rural areas and to agriculture workplaces, plantations and farms. Addressing child labor in agriculture supply chains is an important component of this global strategy. This paper highlights a few ways to address child labor more effectively in agriculture supply chains. It does not attempt to be exhaustive or comprehensive. It stresses the importance of responsible business operations and supply chain management, providing decent work for adults, supporting rural community development, and for the efforts undertaken by business to link to wider public policies adopted to eliminate child labor. (…)

Recognition is given to the fact that the needs of countries and regions differ and that there is no single policy that by itself will end the worst forms of child labor. Thus the global strategy set out in The Hague Roadmap emphasizes the importance of taking a strategic integrated approach to eradicate child labor, and the importance of moving forward simultaneously on all four of the following priority areas: 1) Ensuring enactment and enforcement of adequate laws and regulations; 2) Promoting decent employment of adults and young persons – including the protection of fundamental principles and rights at work, fair wages, and occupational safety and health; 3) Improving and extending social protection to guard against economic and social risks and lack of income; and 4) Providing accessible, affordable, quality education or skill training for all children. The Brasilia Declaration reinforces this comprehensive strategy and stresses the importance of addressing the root causes of child labor and of targeting those children in the most vulnerable and hazardous situations. (…)

The persistence of child labor in agriculture is not surprising given the deep rooted causes. Poverty, few livelihood alternatives, insufficient education systems, seasonal work, migratory lifestyles, cultural practices, low levels of awareness, low unionization, inadequate or unenforced labor laws, lack of decent work for adults, unfair labor contracts, low productivity, and labor intensive technology are among the main causes of child labor in agriculture. (…)

The main stakeholders involved in agriculture supply chains include: large, often multinational food or commodity product suppliers, smallholder famers and their out-grower associations, cooperatives, food processing companies, retailers, agriculture input industries (i.e. pesticides, seed, and feed), industry and trade associations, restaurants and catering companies, consumer associations, and private social auditing firms. The reality is that supply chains offer important avenues to reach all types of agriculture undertakings to address the causes as well as the existence of child labor. Thus business has and should use this comparative advantage. (…)

465 Constance Thomas, 'Addressing Child Labor in Agriculture Supply Chains within the Global Right against Child Labor', *U.C. Davis Journal of International Law & Policy* 21:1 (2014) https://jilp.law.ucdavis.edu/issues/volume-21-1/Thomas.pdf.

The importance of coherence among public and private actors to address root causes of child labor

(…) attention often turns to child labor in agriculture in global supply chains with which consumers feel a direct link. Little attention is paid to child labour in neglected sub-sectors of agriculture such as vegetable cultivation, cattle raising, or wood production. The media are interested in child labor in coffee, in sugar, in cocoa, in cotton and garments, in mining such as blood diamonds. These are indeed important areas that deserve more concerted effort to tackle the child labor issues. Companies engaged in these areas are at high risk of exposure and have tended to join multi-stakeholder initiatives and other associations and to take a myriad of uncoordinated actions to address child labor in their supply chains. However, little attention is paid to the root causes of child labor and the attendant development issues: rural under-development and poverty, and lack of access to land, services and rights. Well intended corporate contributions are often ad hoc, disconnected from public services, or duplicative. This is why more strategic action and coordination is required.

Within the strategic focus on the elimination of child labor in agriculture, coherence of policy and action among public and private actors and other stakeholders is needed. This means recognizing that action taken to address child labor in global supply chains alone, even if done more effectively, is insufficient to fully tackle the problem. Children move from harvesting to fishing to domestic work and many are not only working in global supply chains but are producing for local and national markets. The corporate driven supply chain responses need to dovetail with wider locally based and owned policies addressing child labor and the responses to the causes of child labor. Business cannot be considered to be complying with its obligation to eliminate child labor if it is only displacing children out of one situation of child labor into another.

Gupta, An Empirical Examination of a Multinational Ethical Dilemma[467]

Today's global marketplace presents a variety of ethical dilemmas for multinational corporations. This ethical decision-making process becomes particularly challenging when the ethical standards in the company's home country are higher than those in host markets. One global ethical issue that has received significant attention in international research is that of child labor, particularly the minimum age of employment. This article examines the issue of corporate ethical policies on the minimum age for child labor in emerging markets by using the universalist versus relativist ethical framework. Study results show that while both home and host consumers overwhelmingly prefer the universalist approach, the relativist option is acceptable only when the context of the host country is explained to both groups. (…)

Results from this study present MNCs with compelling evidence against the temptation to alter universal ethical standards regarding minimum age for child labor to accommodate host country norms and practices. Findings show that despite the lower ethical standards of the host country, both home and host country consumers expect high ethical standards for child labor practices from MNCs entering host markets. Consumers in both populations show their disapproval of the relativist ethical strategy through both their negative evaluation of the company and decreased purchase intention of products made by the firm. (…)

This study found that both home and host consumers prefer the universalist ethical approach to the minimum age of child labor when MNCs enter host markets with lower ethical standards. However, if MNCs opt to pursue the relativist ethical approach to the minimum age of child labor and adapt to the local market, explaining the adaptation to the consumer using the context of the host country's business or social environment improves consumer attitude for home and host consumers, and purchase intent for home consumers. (…)

467 Shruti Gupta, Julie Pirsch & Tulay Girard, 'An Empirical Examination of a Multinational Ethical Dilemma: The Issue of Child Labor', *Journal of Global Marketing* 23(4) 2010 www.researchgate.net/publication/232837803_An_Empirical_Examination_of_a_Multinational_Ethical_Dilemma_The_Issue_of_Child_Labor.

Background (Cambodia)

UNICEF, Statistical Profile of Child Protection in Cambodia[468]

The term 'child labour' is often defined broadly as work that deprives children of their childhood, their potential and their dignity, and that is harmful to their development. Not all work done by children is classified as child labour; children involved in child labour represent a subset of those who are working. Whether or not particular forms of work are considered 'child labour' depends on the child's age, the type and hours of work performed, the conditions under which it is performed and national legislation. Therefore, the definition of child labour varies from country to country as well as among sectors within countries.

In Cambodia, the Labour Law (1997) allows children as young as 12 years old to work in light and non-hazardous employment that does not interfere with their education. The minimum legal age for general employment in the country is 15 years and 18 years for hazardous work (as defined in the law). Child labour takes many different forms. However, a priority is to eliminate without delay the worst forms of child labour as defined by Article 3 of ILO Convention No. 18: "labour that jeopardizes the physical, mental or moral well-being of a child, either because of its nature or because of the conditions in which it is carried out (also known as 'hazardous work')".

Children of Cambodia[469]

Main problems faced by children in Cambodia:

Poverty

Around 30% of the population lives below the poverty line in Cambodia…This poverty touches children most of all, who as a result suffer from malnutrition and marginal life condition.

Right to health

In Cambodia the situation is serious and the health of children is poor. AIDS is rampant and unfortunately affects many children…

Right to water

Access to potable water is a very serious problem in Cambodia that affects rural zones in particular... only around 16% of the population has access to potable water, and … around 80% of Cambodians live in the country. Because of this, numerous children die from diarrhoeal illness and hygiene remains equally problematic: households and even schools are not always equipped with toilets.

Right to education

Currently, more than 10% of Cambodian children do not go to school. Access to education for young girls is even more restricted since only 20% of them go to a secondary school…

468 UNICEF Cambodia and Division of Data, Research and Policy, *A Statistical Profile of Child Protection in Cambodia* (2018) https://www.unicef.org/cambodia/media/711/file/Cambodia_Report_Final_web_ready_HIGH.pdf%20.pdf.

469 Humanium, *Children of Cambodia: Realizing Children's Rights in Cambodia* (2020) https://www.humanium.org/en/cambodia/.

Instruments (Cambodia)

Labour Law[470]

Article 173:

A Prakas of the Ministry in Charge of Labour shall determine the different types of work that are hazardous or too strenuous and that shall be prohibited to children aged less than eighteen years.

The Prakas shall also establish the special conditions under which minors can be employed in insalubrious or hazardous establishments where the staff is exposed to arrangements harmful to their health.

Article 177:

2. The allowable minimum age for wage employment is set at fifteen years.

3. The minimum allowable age for any kind of employment or work, which, by its nature, could be hazardous to the health, the safety, or the morality of an adolescent, is eighteen years. The types of employment or work covered by this paragraph are determined by a Prakas (ministerial order) of the Ministry in Charge of Labour, in consultation with the Labour Advisory Committee.

4. Regardless of the provisions of paragraph 2 above, the Ministry in Charge of Labour can, after having consulted with the Labour Advisory Committee, authorize the generation of occupation or employment for adolescents aged fifteen years and over on the condition that their health, safety, or morality is fully guaranteed and that they can receive, in the corresponding area of activity, specific and adequate instruction or vocational training.

4. Regardless of the provisions of paragraph 1 above, children from twelve to fifteen years of age can be hired to do light work provided that:

    a) The work is not hazardous to their health or mental and physical development.

    b) The work will not affect their regular school attendance, their participation in guidance programs or vocational training approved by a competent authority.

5. Prakas issued by the Ministry in Charge of Labour in consultation with the Labour Advisory Committee will determine the types of employment and establish the working conditions, particularly the maximum number of hours of work authorized as per paragraph 4 above.

6. After having consulted with the Labour Advisory Committee, the Ministry in Charge of Labour can wholly or partially exclude certain categories of occupation or employment from having to implement this article if the implementation of this article for these types of occupation or employment create considerable difficulties.

Law on Education[471]

Article 31:

Every citizen has the right to access qualitative education of at least 9 years in public schools free of charge. The Ministry in charge of education shall gradually prepare the policy and strategic plans to ensure that all citizens obtain qualitative education as stipulated by this law.

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470 Cambodia, *Labour Law* (1997), https://sogi.sithi.org/temp.php?url=media_view2.php&mid=121#:~:text=Cambodian%20Labour%20Law&text=This%20Law%27s%20purpose%20is%20to,in%20terms%20of%20job%20opportunity.

471 Cambodia, *Education Law* (2007) http://www.moeys.gov.kh/images/moeys/laws-and-regulations/48/EducationLaw-EN.pdf.

Criminal Code[472]

Article 339: Subjecting minor to working conditions harmful to his or her health

Subjecting a minor to working conditions harmful to his or her health or physical development shall be punishable by imprisonment from two to five years and a fine from four million to ten million Riels.

Article 340: Aggravating circumstances as a consequence of the death of the minor

The offences defined in Article 339 (Subjecting minor to working conditions harmful to his or her health) of this Code shall be punishable by imprisonment from seven to fifteen years if it results in the death of the victim.

Prakas on Category of Occupation and Light Work[473]

Article 2:

Light work is the work that does not affect the health as well as mental and physical development of the employed children and does not affect their regular school attendance, involvement in orientation programs or vocational trainings required by the competent authorities.

Light work categories are:

1) Light work in the agriculture sector such as raising animals, caring for small livestock animals – but not catching and slaughtering those animals – growing plants, harvesting, picking up fruit – but not climbing to pick up – as well as cleaning.

2) Clearing grass and preparing soil

3) Recording goods

4) Working at some shopping malls such as selling booth, vegetables and fruit selling stall, or news stand and stall of other similar goods.

5) Receiving, packing, selecting and classifying goods as well as assembling light things, including opening or taking goods out of the package.

6) Sweeping, mopping, and preparing dining table such as preparing plates, spoons, forks, knifes etc.

7) Manual installation work, which is an easy work, but not welding metal or iron, or working with any product causing hazardous risk.

8) Painting wall or things with proper protective equipment but not spraying paint.

9) Easy work such as sewing, putting goods into plastic bag, folding carton, or polishing and cleaning glass or ceramics, trimming garment, or assembling all parts of garment or cleaning something dirty on the garment or attaching brand, or attaching price tag.

472 Cambodia, Criminal Code of the Kingdom of Cambodia (2009) http://sithi.org/admin/upload/law/Criminal_Code_Book_with_cover_Jan_2014.pdf.

473 Cambodia, Prakas on Category of Occupation and Light Work Permitted for Children from 12 to 15, No. 002/08 (2008) https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=93403&p_country=KHM&p_count=148&p_classification=04&p_classcount=15

10) Preparing or selecting each type of garments for washing

11) Checking products

12) Working as messenger within the organization

13) Receiving letters or sending out packages, as well as distributing information and documents

14) Filing books in the library

15) Lifting, carrying and holding light things

Prakas on Working and Living Conditions in Brick-Making[474]

Item 6

Children aged less than 15 years of age shall not be employed to work at all in brick-making site even though helping their parent work.

Children aged more 15 years of age but he is less 18 years of age shall prohibit to employ some hazardous work such as work of break wood, soil-work, soil impact work, work in brick-making machinery.

Prakas on the Prohibition of Hazardous Child Labour[475]

Para 2:

The hazardous works shall assume jeopardy to a child's health, security, or morals as follows:

1. Smelting, blowing, casting, rolling, stamping or welding metal

2. Deep-sea and off-shore fishing

3. Diving for marine products such as sponge, pearls, sand and shells

4. Logging

5. Charcoal burning

6. Operating steam boilers, air receivers, gas cylinders, acetylene generators, conveyors and carrying out quarrying operations such drilling, igniting (with fuse or electricity), blasting, crushing and splitting stones

7. Operating power-driven woodworking machines

8. Operating cranes, hoists, scaffold winches or other lifting machines

9. Lifting, carrying, handling and moving of heavy loads as prescribed by MOSALVY's Ministerial order No.124 dated June 15, 2001

474 Cambodia, *Prakas on Working and Living Conditions in Brick-Making Enterprise,* No. 309 (2017) http://www.cncc.gov.kh/tcncc-prakas-4-7-19.

475 Cambodia, *Prakas on the Prohibition of Hazardous Child Labour, No.106/04* (2004) http://ilo.org/dyn/natlex/docs/ELECTRONIC/93363/109111/F-972039822/KHM93363%20Eng.pdf.

10. Firefighting

11. Operating or assisting to operate (including starting, stopping, adjusting, feeding, or any other activity involving physical contact associated with the operation) transportation equipment such as bulldozers, pile driving equipment, trailers, road rollers, tractor lifting appliances, excavators, loading machines, trucks, buses, and taxis

12. Maintenance of heavy machinery

13. Work which is carried out underground, underwater, in a cavern, in a tunnel, mining and mine excavation, or quarry

14. Handling explosives, corrosives, fireworks or inflammable material, with the exception of work carried out in gas stations servicing

15. Work carries out at construction sites, except in designated and safe areas for a child are specifically permitted by a labour inspector

16. Demolition work

17. Work carries out on a ladder or scaffold at a height of over 2.5 meters (such as for painting, repairing, or building structures, pruning trees, picking fruit).

18. Work involving exposure to pathogenic agents such as work in laboratories or handling sewage

19. Work involving exposure to harmful chemical, physical, electromagnetic or ionizing agents such as

    - Asbestos
    - Benzene
    - Cadmium
    - Mercury
    - Lead/zinc metallurgy, white lead, lead in paint
    - Tar, asphalt, bitumen
    - Radioactive substances and self-luminous compounds
    - Infra-red and ultraviolet rays, laser, radio-frequency emissions

20. Work involving exposure to fumes, dust, gas and other ambient substances likely to cause harm to the respiratory system

21. Handling and spraying pesticides and herbicides

22. Operating power-driven spinning and winding machines

23. Bleaching, dying and finishing of textiles using chemicals

24. Applying electrical fittings, including work as linemen and cable jointers

25. Work nearby furnaces or kilns as part of the manufacturing process of glass, ceramics or bricks

26. Production of alcoholic beverages such as spirits, beer and wine

27. Work in entertainment such as bartenders, masseurs, dancers, and as waiters in nightclubs, massage parlours, dance for guest entertainment out of art performance and places where alcoholic beverages are served. For vocational training and employer's training can employ the child.

28. Work related to gambling such as dealers, croupiers, bookies and bet takers

29. Work related to the production, processing or transportation of drugs or pharmaceutical products

30. Tanning (processing)

31. Lifeguards in swimming pools and resorts

32. Work in a blacksmith's workshop

33. Work in abattoirs (slaughterhouses) and meat rendering

34. Extracting lard and oil

35. Work as security guards

36. Work in dangerous sports such as jockeys, horse-trainers, and martial arts instructors or at shooting ranges

37. Work as embalmers

38. Work carried out under conditions of excessive heat, cold, vibration, sound and abnormal lighting that could endanger

Prakas on Procedure for Recruitment of Young Workers[476]

Article 5:

Before employing a young worker/employee in an enterprise/establishment, the employer shall comply with the following:

- The employer shall thoroughly and properly check 3 of the following documents:
    - Cambodian Identification Card
    - Family Record Book or Family Book
    - Birth Certificate or certified copy of Birth Certificate
    - Diploma or Certificate

476 Cambodia, Prakas on Procedure for Recruitment of Young Workers/Employees at Enterprises/Establishments, No.469/15 (2015) http://www.huskyandpartners.com/images///Law%20Library/Labor%20and%20Employment/20190610-Prakas%20On%20Procedure%20for%20Recruitment%20of%20Young%20WorkersEmployees%20at%20Enterprises%20Establishments_2015_En.pdf.pdf.

- The employer shall interview the young worker/employee with the acknowledgement and assurance from their parents or guardian to verify and assess the documents and the physical appearance of the young worker/employee.

- The employer shall have an employment contract with consent of the parents or guardian of the young worker/employee in accordance with Article 181 of the Labour Law.

- In case of suspecting that the worker/employee is below the legally required age, the employer shall send the documents to the Department of Child Labour and the Department of Occupational Health of the Ministry of Labour and Vocational Training to certify the identity, fitness and health conditions that can be allowed for employment.

- The employer shall send documents that have a list of names of young workers/employees and application form for being certified to the Department of Child Labour of the Ministry of Labour and Vocational Training to authorize the use of young worker/employee.

- The employer shall have a book for listing the names of young workers/employees from 15 years of age to under 18 years of age at the enterprise, factory, establishment.

Article 6:

When the young worker/employee is employed, the employer of establishment, factory, enterprise shall respect the procedures stipulated in International Conventions, Labour Law and Prakas related to child labour as follows:

- Shall not work in dangerous working conditions and the worst form of child labor.

- Shall have proper vocational training

- Shall not work overtime on Sunday, public holidays and between 22:00 pm and 5:00 am.

- The employer must respect the regulations and other standards related to child rights

Ministry of Social Affairs, Action Plan on Violence against Children[477]

Child Labour

The National Action Plan on the Elimination of Worst Forms of Child Labour (2016-2025) determines Child Labour as any forms of paid and unpaid labour that affect psychosocial, physical, social and ethical development of the child under the age of 18, particular their education. Child work is a form of educational activity that equip the child with life skills that are productive to child's future and is a part of the family based skills that are not considered as child labour. (…)

Child Labour is a complicated social phenomenon that is connected with the socio-economic and social attitude. Poverty and low education are key factors that contribute to child labour in Cambodia. Families with low income, lack of skills and low education are more likely to exploit child labour in order to sustain and support their daily living condition. Therefore, child labour are prevalence across different geographical areas, economic activities

477 Ministry of Social Affairs, Veterans and Youth Rehabilitation, Action Plan to Prevent and Respond to Violence against Children 2017-2021 (2017) http://www.mosvy.gov.kh/article/395.

and in other forms of labour sectors. The 2013 Labour Force and Child Labour Survey indicated that children age between 15-17 years old worked in average 3 hours per day or 21 hours per month. Among four million children age 15-17 years, 775,245 (19%) were child labourers and among them 6% worked in hazardous forms, 4.9% engaged in other forms of child labour and 8.2% worked in a safe working condition.

The distribution of child labour in various labour sectors in 2012 indicated that approximately 50.4% of children worked in agriculture, forestry and fishery, 19% worked in manufacturing sector, 14.7% worked in commerce and mechanic sectors, 3.7% in construction and 5.1% worked in accommodation and food sectors.

US, Findings on Worst Forms of Child Labour in Cambodia[478]

In 2019, Cambodia made a minimal advancement in efforts to eliminate the worst forms of child labour. The government, in conjunction with the ILO, conducted its first nationwide survey of child labour since 2012, with data scheduled for release in 2020. In addition, the government signed an agreement expanding funding to allow the International Labour Organization's Better Factories Cambodia program to extend its monitoring mandate to additional sectors, including to formal subcontracting factories where child labour is found. However, despite new initiatives to address child labour, Cambodia is receiving an assessment of minimal advancement because the government failed to take active measures to investigate, prosecute, convict, and sentence public officials who participate in or facilitate the worst forms of child labour, including commercial sexual exploitation of children and debt-based forced labour in brick kilns... Children in Cambodia engage in the worst forms of child labour, including in forced labour in brickmaking and in commercial sexual exploitation, sometimes as a result of human trafficking. Insufficient resources may hamper the labour inspectorate's capacity to enforce child labour laws, especially in rural areas where the majority of child labourers work. In addition, continuing challenges in accessing basic education and the absence of a compulsory education requirement increase children's vulnerability to involvement in the worst forms of child labour.

In 2019, the government announced an ambitious plan to eliminate child labour in the brick industry by the end of the year, and conducted a census of all 486 operational kilns in the country to document the prevalence of child labour in the brickmaking sector. Although the government will not publish results from the census until late 2020, the government inspectors announced that no child labour or debt bondage was found at these kilns and, therefore, inspectors did not issue any fines. However, in 2019 independent researchers documented at least 638 cases of child labour at brick kilns, in addition to situations of debt bondage at 464 operational kilns. Following completion of the government census, officials required brick kiln owners to sign contracts with 1,259 brick kiln family workers, agreeing not to loan them any money.

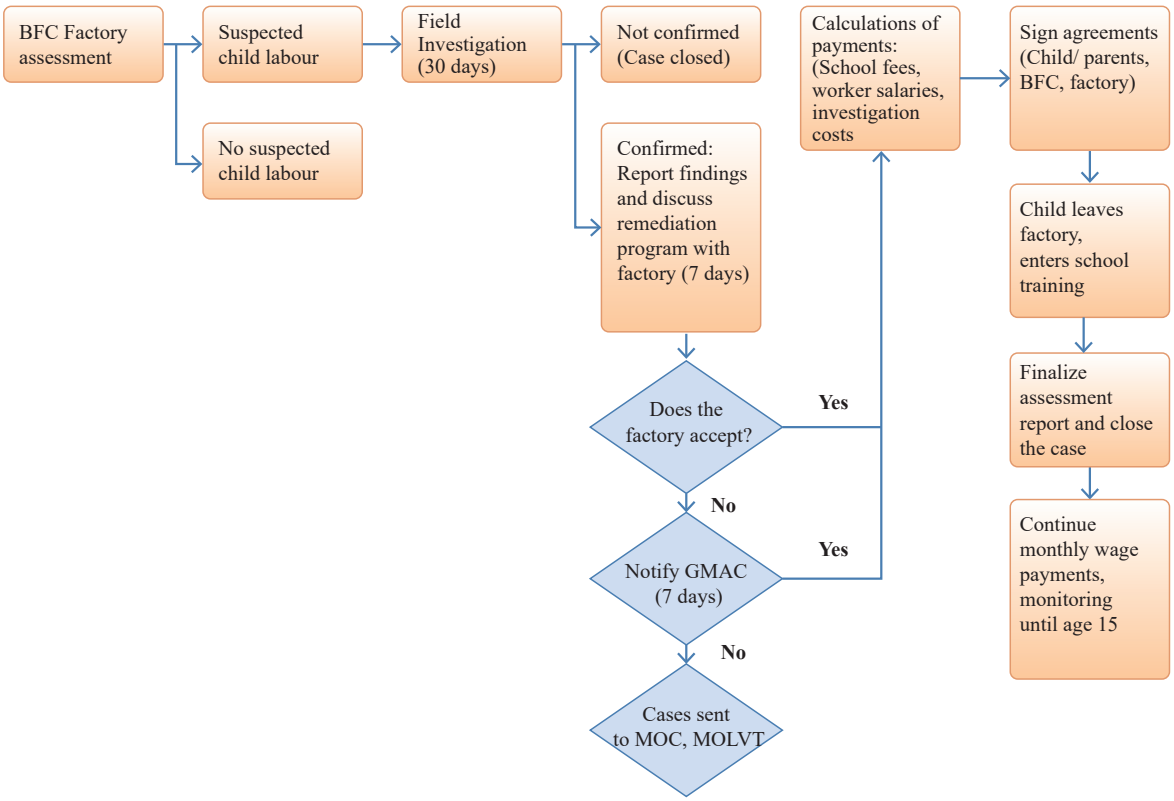
Better Factories Cambodia, Child Labour Remediation in Garment and Textiles[479]

The effective abolition of child labour is a goal of the ILO and BFC's tripartite partners in Cambodia—Government, GMAC, and unions…To help combat this, BFC encourages factories to develop effective recruitment practices. In addition, BFC factory monitors observe the entire workplace, review documents, and interview workers for indications that the factory employs children below 15 years old.

478 United States Bureau of International Labour Affairs, *2019 Findings on the Worst Forms of Child Labour* (2019) https://www.dol.gov/sites/dolgov/files/ILAB/child_labor_reports/tda2019/Cambodia.pdf.

479 Better Factories Cambodia, *BFC Child Labour Protocol* (2020) https://betterwork.org/wp-content/uploads/2019/01/Child-labour-protocol-BFC.pdf.

BFC Child Labour Investigation and Remediation Process



LICADHO, Built on Slavery Debt Bondage: Cambodia's Brick Factories[480]

This report brings to light the widespread use of debt bondage in Cambodian brick factories and the role it plays in encouraging and sustaining child labour. The two practices are closely related and together are responsible for trapping multiple generations of families in a repeating cycle of poverty and servitude.

Brick factory workers all start out poor and because of a variety of factors such as unemployment, landlessness, sickness, and poor education and skills, they turn to brick factory work as a solution to their immediate problem of not being able to provide for themselves. Brick factory owners exploit their poverty and desperation and provide working conditions that mean that it is very unlikely that they will ever escape their poverty. Because of the debts they owe and the low rates of pay, most are only just able to subsist. They are unable to save any money for contingencies such as pregnancy or sickness or injury that require medical treatment and when such events occur they become more indebted. Furthermore, because they are paid per brick made rather than receiving a salary, there is a strong inducement to allow their children to work alongside them in order to increase the family income. One consequence of this is that the children are unable to go to school or drop out of school early and most remain without even basic literacy and numeracy skills. As a result the children become trapped in the same situation as their parents and the most likely outcome for the children is that they will inherit their parents' debt and eventually pass that debt on to their own children.

480 Cambodian League for the Promotion and Defense of Human Rights (LICADHO), *Built on Slavery Debt Bondage and Child Labour in Cambodia's Brick Factories* (2016) https://www.licadho-cambodia.org/reports/files/221LICADHO_Built_On_Slavery_Report_ENG.pdf.

The main beneficiaries of this system are the factory owners who, conceivably in perpetuity, profit from a cheap and biddable workforce, and the buyers of bricks – from private individuals building their own homes to Cambodian and international companies undertaking largescale construction projects – who are able to purchase bricks for a price far below the true value of the labour that goes into making them.

Whilst the poverty that propels people into brick factory work is a complex issue to solve, the impunity that enables their ongoing exploitation is not. Both debt bondage and child labour are illegal, with harsh penalties for the use of debt bondage in particular. However, both persist, usually in full view and in the full knowledge of the authorities who carry at least some of the responsibility for eliminating them. Those authorities and the police must report and take legal action against brick factory owners whose businesses rely on debt bondage and child labour. They must be supported in doing so by the courts, the government and the purchasers of bricks. Until this occurs, this brutal form of contemporary slavery will continue to flourish inside Cambodia.

Demetriadi & McCready, Child Labour Ranking Index[481]

Consulting firm Verisk Maplecroft has ranked Cambodia 28th in the world and the highest risk in Southeast Asia for the use of child labour in its 2020 index. The Southeast Asia region as a whole faired poorly, with seven countries deemed at 'extreme' or 'high' risk.

Children in both Cambodia and Myanmar (ranked 30th), the worst scorers in Southeast Asia, were deemed at 'extreme risk' of being inducted into labour. Laos (50), Thailand (70), the Philippines (81), Indonesia (83) and Vietnam (83) were all also deemed 'high-risk' countries for child labour.

Hong, How Should Multinational Corporations Accommodate Child Workers?[482]

Tourists can easily observe many children on the street in Cambodia involved in economic activities such as scavenging, begging and polishing shoes. Cambodia has also been known as "a country of origin, transit and destination for trafficking in children for the purposes of commercial sexual exploitation and various forms of work, including forced labour and begging." Cambodian children are traded to other Southeast Asian countries, such as Thailand and Malaysia, for the purpose of bonded labour or sex trafficking. Sexual exploitation of children and bonded labour are serious and notorious problems in Cambodia. Children are usually forced to work due to extreme poverty in their families, and many carry the additional burden of paying off family debts.

Although schooling up to nine years of age is free to all citizens of Cambodia based on Article 68 of the Constitution, education is not really free. There are extra costs, such as uniforms, books, and admission fees, and public school teachers also demand unofficial fees to supplement their low incomes; none of these contributes to affordable education for families. Because of this expensive "free" education, families tend to send only male children, or no children, to school to save money. (…)

Social responsibility is a complicated term to define. It has much a deeper meaning than being just a simple procedure, one paragraph of a corporation's code of conduct, or a single policy. Corporations have been adopting a disengaging strategy to address the child labour issue by eliminating child workers from their suppliers' factories.

481 Alexi Demetriadi & Alastair McCready, 'Child Labour Index: Cambodia Highest Risk in Region for Underage Workers', *Southeast Asia Globe* (2020) https://southeastasiaglobe.com/child-labour-index-southeast-asia/.

482 Ryan Haerim Hong, *Helping Child Workers: How Should Multinational Corporations Accommodate Child Workers in Southeast Asian Countries to which They Outsource?* (2013) https://surface.syr.edu/cgi/viewcontent.cgi?article=1085&context=honors_capstone.

However, they have not considered the consequences of children losing their jobs. Additionally, many companies naively claim that their products are "free of child labour"; however, with the approach they take to address the child labour practices, their products are never truly free of child labour, due to the concatenating structure of the supply chain. It is impossible to completely eliminate child labour from the entire supply chain when outsourcing to developing countries, where child labour is prevalent.

Beresford, Child Labour and Gender Discrimination in the Garment Industry[483]

We found that: (i) the falsification of ID certificates is a widespread practice among minors, allowing them to bypass the requirement demanded by factories of being 18 years old; and (ii) caring duties remain the main reason why women leave the factory. These results make clear how, notwithstanding the improvement in the factory-level implementation of labour rights, the eradication of child labour is far from complete and gender relations still strongly discriminate against the career prospects of rural women. In both cases, the persistence of practices in contrast with core BFC labour standards suggests that factory-level monitoring alone is not able to improve structural conditions in the sending communities.

Questions

1. What is child labour and why are there several minimum ages for work?
2. What are the restrictions for young workers from 15 to 18 years old?
3. What are the rationales for prohibiting child labour?
4. What measures should employers take to prevent child labour at their workplaces? How could employers avoid recruiting underage workers or engaging in child labour?
5. What are the types of work to which the children can contribute? What are the age requirements for those types of work?
6. What is the problem with a brand terminating the contracts of suppliers caught using child labour?
7. Why do international brands prefer using multistakeholder partnerships to tackle child labour?
8. Should child labour be restricted and controlled or can it be beneficial to children? What is the relationship between child labor and vocational training?

Further Readings

- International Labour Organisation (ILO), *Global Estimates of Child Labour - Results and Trends, 2012-2016* (2017) http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575499.pdf.
- Human Rights and Business Dilemmas Forum, *Child Labour,* https://hrbdf.org/dilemmas/child-labour/#.WtRnqS5ubDA.
- International Labour Organisation (ILO), *How to Do Business with Respect for Children's Right to Be Free from Child Labour: ILO-IOE Child Labour Guidance Tool for Business* (2015) http://www.ilo.org/ipec/Informationresources/WCMS_IPEC_PUB_27555/lang--en/index.htm.

483 Melanie Beresford et al, *Child Labour and Gender Discrimination in the Garment Industry of Kong Pisei,* Cambodia (2014) https://www.researchgate.net/profile/Laura_Prota/publication/258841013_Cambodia's_garment_industry_labour_standards_the_view_from_below/links/5c5487c592851c22a3a13c1c/Cambodias-garment-industry-labour-standards-the-view-from-below.pdf.

- International Labour Organisation (ILO), *Business and the Fight against Child Labour - Experience from India, Brazil and South Africa* (2013) www.ilo.org/ipec/Informationresources/WCMS_IPEC_PUB_23484/lang--en/index.htm.
- International Labour Organisation (ILO), *Global Estimates of Child Labour: Results and Trends, 2012-2016* (2017) https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575499.pdf.
- International Labour Organisation (ILO), *Ending Child Labour by 2025: A Review of Policies and Programmes* (2018) http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_653987.pdf.
- *Towards Eliminating the Worst Forms of Child Labour in Cambodia by 2016: An Assessment of Resource Requirements, Understanding Children's Work* (2009) http://ucw-project.org/attachment/child_labour_CambodiaII20110627_163036.pdf.
- The Walt Disney Company, *International Labour Standards Programme Manual* (2019) https://www.thewaltdisneycompany.com/app/uploads/2020/01/ILS-Program-Manual.pdf.
- The Walt Disney Company, *The Code of Conduct for Manufacturers, available in 50 languages,* https://thewaltdisneycompany.com/app/uploads/Manufacturer-Code-of-Conduct-Translations.pdf.
- CAMFEBA, *CAMFEBA Plan of Action on the Elimination of Child Labour (WF), (CAMFEBA-PAECL) in Cambodia* (2012-2016) (2012) https://www.camfeba.com/Child%20Labour%20files/Publication/CAMFEBA%20POA/Final%20-%20CAMFEBA%20POA08-08-12%20(Eng)%20Edit%20by%20AV%20Third.pdf.
- CAMFEBA, *Combating Child Labour at Workplace (Guide for Employers)* (2012) https://www.camfeba.com/Child%20Labour%20files/Publication/Guide%20Book/Guide%20on%20CL-last%20edition%2006%20Aug%2012%20(Eng)%20Edit%20by%20AV.pdf.
- Constance Moy Piau, *The Effects of Migration on School Attendance and Work Activity of Children in Cambodia* (2009) https://repository.library.georgetown.edu/bitstream/handle/10822/553867/piauConstance.pdf?sequence=1&isAllowed=y.
- CCR CSR, *Child Labour Remediation Services* (2020) https://www.ccrcsr.com/sites/default/files/CCR%20CSR%20Child%20Labour%20Services%202020.pd.
- FiA Working Group for Gender and Child Labour in the Fisheries Sector, *Action Plan for Gender Equality Promotion and Child Labour Elimination in the Fisheries Sector 2016-2020* (2015) http://extwprlegs1.fao.org/docs/pdf/cam167591.pdf.
- BFC, *Guide to the Cambodian Labour Law for the Garment Industry* (2019) https://betterwork.org/wp-content/uploads/2020/03/Cambodian-Labour-Law-Guide2019.pdf

16. FORCED LABOUR AND HUMAN TRAFFICKING

Vann Yuvaktep, Radu Mares

Introduction

Forced labour and human trafficking are often subsumed under the general umbrella term of 'modern slavery' in recognition of the diverse ways in which people are exploited and threatened. Modern slavery happens in all countries, both developed and developing states. For leading companies, modern slavery is a zero-tolerance issue on par with child labour and triggers most serious responses going all the way to terminating the relationship with suppliers. Modern slavery can be hidden deep inside global supply chains (e.g. agriculture, construction, mining sectors) (chapter 28) and therefore the very detection of such abuses requires joint efforts by leading companies and civil society groups (chapter 5). Leading companies promote the 'employer pays principle' in recognition of how their recruitment practices can contribute to forced labour, particularly when migrant workers are involved (chapter 21). Forced labor is one area where national regulations with transnational effects (chapter 4) were adopted in the last decade, first in the US and then in the UK. The ILO has almost a century old convention on the abolition of forced labour; it also has a very recent instrument that calls directly on private and public actors to do 'due diligence', which is in line with the UNGPs (chapters 7-14). Even international trade law has long prohibited forced labour, not necessarily because of being an inhumane practice but because forced labor is free labour distorting international competition. Prison labor might or might not amount to forced labour depending on circumstances, but remains a sensitive issue.

In Cambodia, as in other developing countries, modern slavery has been a serious issue for decades. Abuses take the form of trafficking of persons into forced marriages abroad, forced child labor in the construction industry, forced labour and trafficking in the fishing industry at sea, and trafficking for sexual exploitation in both domestic and foreign contexts. There have been several Cambodian laws and international/regional efforts to combat modern slavery. However, Cambodia remains a vulnerable country as a source, transit, and destination country for human trafficking due to poverty, the demand in other countries for workers through seemingly-attractive-but-trapped job offers, and the booming construction and tourism sector.

Main Aspects

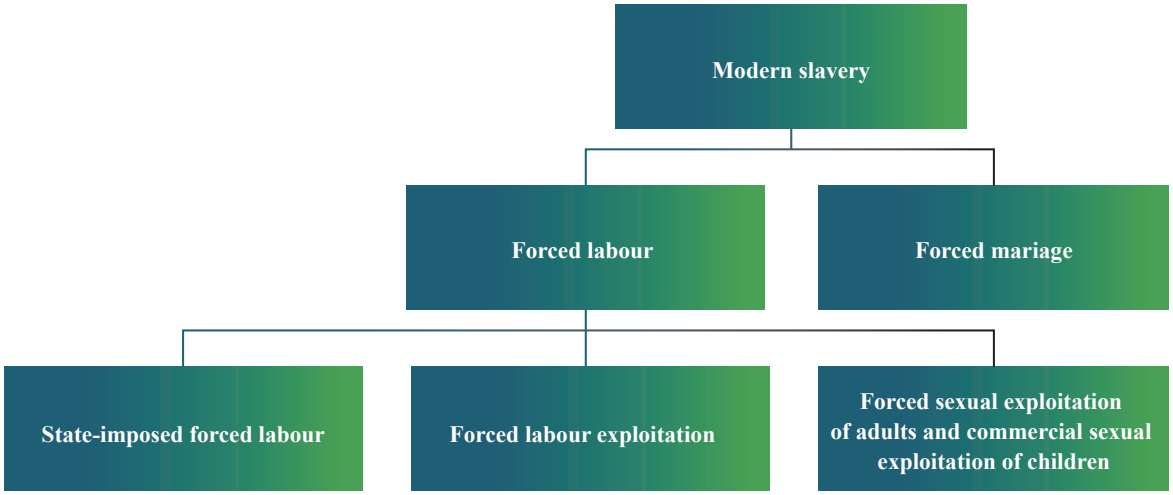
- ✓ Types of forced labour (modern slavery)
- ✓ Forced labour in supply chains
- ✓ Prison labour

- ✓ Recruitment agencies
- ✓ Corporate reports
- ✓ Good business practices
- ✓ Corrective actions in supply chains
- ✓ Trade law measures regarding forced labour
- ✓ Recruitment fees ('employer pays' principle)
- ✓ Migrant workers
- ✓ Risks in agriculture and sporting events

Background

ILO, Global Estimates of Modern Slavery: Forced Labour and Forced Marriage[484]

(…) modern slavery covers a set of specific legal concepts including forced labour, debt bondage, forced marriage, other slavery and slavery like practices, and human trafficking. Although modern slavery is not defined in law, it is used as an umbrella term that focuses attention on commonalities across these legal concepts. Essentially, it refers to situations of exploitation that a person cannot refuse or leave because of threats, violence, coercion, deception, and/or abuse of power.



Forced labour

Forced labour of adults is defined, for purposes of measurement, as work for which a person has not offered him or herself voluntarily (criterion of "involuntariness") and which is performed under coercion (criterion of "menace of penalty") applied by an employer or a third party. The coercion may take place during the worker's recruitment process to force him or her to accept the job or, once the person is working, to force him or her to do tasks that were not part of what was agreed to at the time of recruitment or to prevent him or her from leaving the job.

484 International Labour Organisation, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (2017) http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf.

This study examined different forms of forced labour, distinguishing between forced labour imposed by private actors (such as employers in private businesses) and that which was imposed by states. Of the 24.9 million victims of forced labour, 16 million were in the private economy, another 4.8 million were in forced sexual exploitation, and 4.1 million were in forced labour imposed by state authorities.

An estimated 16 million people were in forced labour in the private economy in 2016. More women than men are affected by privately imposed forced labour, with 9.2 million (57.6 per cent) female and 6.8 million (42.4 per cent) male. Half of these men and women (51 per cent) were in debt bondage, in which personal debt is used to forcibly obtain labour. This proportion rises above 70 per cent for adults who were forced to work in agriculture, domestic work, or manufacturing.

Among cases where the type of work was known, the largest share of adults who were in forced labour were domestic workers (24 per cent). This was followed by the construction (18 per cent), manufacturing (15 per cent), and agriculture and fishing (11 per cent) sectors.

Most victims of forced labour suffered multiple forms of coercion from employers or recruiters as a way of preventing them from being able to leave the situation. Nearly one-quarter of victims (24 per cent) had their wages withheld or were prevented from leaving by threats of non-payment of due wages. This was followed by threats of violence (17 per cent), acts of physical violence (16 per cent), and threats against family (12 per cent). For women, 7 per cent of victims reported acts of sexual violence.

There were an estimated 4.1 million people in state-imposed forced labour on average in 2016. They included citizens recruited by their state authorities to participate in agriculture or construction work for purposes of economic development, young military conscripts forced to perform work that was not of military nature, those forced to perform communal services that were not decided upon at the community level and do not benefit them, or prisoners forced to work against their will outside] the exceptions established by the ILO supervisory bodies.

Conclusions and way forward

Ending modern slavery will require a multi-faceted response that addresses the array of forces – economic, social, cultural, and legal – that contribute to vulnerability and enable abuses. (…)

Stronger social protection floors are necessary to offset the vulnerabilities that can push people into modern slavery. Extending labour rights in the informal economy – where modern slavery is most likely to occur – is needed to protect workers from exploitation. Given that a large share of modern slavery can be traced to migration, improved migration governance is vitally important to preventing forced labour and protecting victims.

Additionally, the risk and typology of modern slavery is strongly influenced by gender, and this must also be taken into account in developing policy responses. Addressing the root causes of debt bondage, a widespread means of coercion, is another necessary element of forced labour prevention, while improved victim identification is critical to extending protection to the vast majority of modern slavery victims who are currently unidentified or unattended. Finally, we know that much of modern slavery today occurs in contexts of state fragility, conflict, and crisis, pointing to the need to address the risk of modern slavery as part of humanitarian actions in these situations. (…)

International cooperation in addressing modern slavery is essential given its global and cross-border dimensions. Alliance 8.7, a multi-stakeholder partnership committed to achieving Target 8.7 of the Sustainable Development Goals, has an important role to play in this regard. The Global Estimates indicate that the majority of forced labour today exists in the private economy. This underscores the importance of partnering with the business community – alongside employers' and workers' organisations, and civil society organisations – to eradicate forced labour in supply chains and in the private economy more broadly. Cooperation should be strengthened between and among governments and with relevant international and regional organizations in areas such as labour law enforcement, criminal law enforcement, and the management of migration in order to prevent trafficking and to address forced labour across borders.

Instruments

ILO, Forced Labour Convention[485]

Article 2

1. For the purposes of this Convention the term forced or compulsory labour shall mean 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.

2. Nevertheless, for the purposes of this Convention, the term forced or compulsory labour shall not include--

   a) any work or service exacted in virtue of compulsory military service laws for work of a purely military character;

   b) any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;

   c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;

   d) any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;

   e) minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.

Article 4

1. The competent authority shall not impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations. (…)

Article 13

1. The normal working hours of any person from whom forced or compulsory labour is exacted shall be the same as those prevailing in the case of voluntary labour. (…)

Article 14

1. With the exception of the forced or compulsory labour provided for in Article 10 of this Convention, forced or compulsory labour of all kinds shall be remunerated in cash at rates not less than those prevailing for similar kinds of work either in the district in which the labour is employed or in the district from which the labour is recruited, whichever may be the higher. (…)

485 International Labour Organisation, Forced Labour Convention (No. 29) (1930) https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029.

ILO, Abolition of Forced Labour Convention[486]

Article 1

Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress and not to make use of any form of forced or compulsory labour:

a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;

b) as a method of mobilising and using labour for purposes of economic development;

c) as a means of labour discipline;

d) as a punishment for having participated in strikes;

e) as a means of racial, social, national or religious discrimination.

ILO, Protocol to the Forced Labour Convention[487]

Article 2

The measures to be taken for the prevention of forced or compulsory labour shall include:

a) educating and informing people, especially those considered to be particularly vulnerable, in order to prevent their becoming victims of forced or compulsory labour;

b) educating and informing employers, in order to prevent their becoming involved in forced or compulsory labour practices; (…)

c) protecting persons, particularly migrant workers, from possible abusive and fraudulent practices during the recruitment and placement process;

d) supporting due diligence by both the public and private sectors to prevent and respond to risks of forced or compulsory labour; and

e) addressing the root causes and factors that heighten the risks of forced or compulsory labour.

Article 3

Each Member shall take effective measures for the identification, release, protection, recovery and rehabilitation of all victims of forced or compulsory labour, as well as the provision of other forms of assistance and support.

ILO, Forced Labour Recommendation[488]

8. Members should take measures to eliminate abuses and fraudulent practices by labour recruiters and employment agencies, such as:

(a) eliminating the charging of recruitment fees to workers;

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486 International Labour Orgaisation, Abolition of Forced Labour Convention (No. 105) (1957) http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C105.

487 International Labour Organisation, Protocol to the Forced Labour Convention, 1930 (2014) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:P029

488 International Labour Organisation, Forced Labour (Supplementary Measures) Recommendation (No. 203), (2014) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:3174688.

(b) requiring transparent contracts that clearly explain terms of employment and conditions of work;

(c) establishing adequate and accessible complaint mechanisms;

(d) imposing adequate penalties; and

(e) regulating or licensing these services.

ILO, Private Employment Agencies Convention[489]

Article 7

1. Private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers.

2. In the interest of the workers concerned, and after consulting the most representative organizations of employers and workers, the competent authority may authorize exceptions to the provisions of paragraph 1 above in respect of certain categories of workers, as well as specified types of services provided by private employment agencies.

3. A Member which has authorized exceptions under paragraph 2 above shall, in its reports under article 22 of the Constitution of the International Labour Organization, provide information on such exceptions and give the reasons therefor.

International Covenant on Civil and Political Rights[490]

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3. (a) No one shall be required to perform forced or compulsory labour;

(b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

(iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;

(iv) Any work or service which forms part of normal civil obligations.

489 International Labour Organisation, Private Employment Employment Agencies Convention (No. 181) (1997) http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312326.

490 International Covenant on Civil and Political Rights (1966) http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

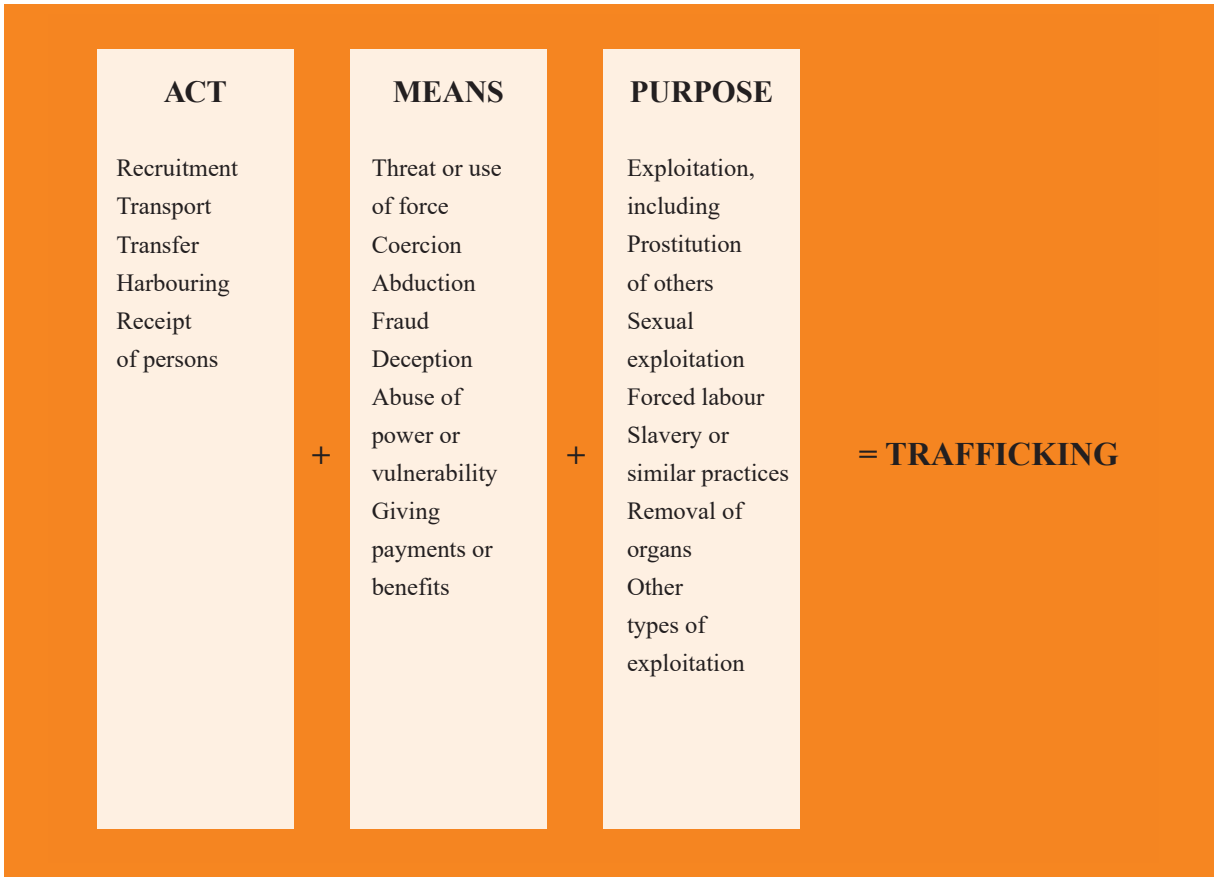
'Palermo Protocol' to the UN Convention against Transnational Organized Crime[491]

Article 3: Use of terms

(a) "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;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

UN Office on Drugs and Crime, Elements of Human Trafficking[492]



In addition to the criminalization of trafficking, the Trafficking in Persons Protocol requires criminalization also of:

- Attempts to commit a trafficking offence
- Participation as an accomplice in such an offence
- Organizing or directing others to commit trafficking.

491 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000) www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx.

492 UN Office on Drugs and Crime, Human Trafficking https://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html

UN, Sustainable Development Goals[493]

Goal 8. Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all

8.7 Take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms.

International Finance Corporation, Performance Standards[494]

Forced Labor

22. The client will not employ forced labor, which consists of any work or service not voluntarily performed that is exacted from an individual under threat of force or penalty. This covers any kind of involuntary or compulsory labor, such as indentured labor, bonded labor, or similar labor-contracting arrangements. The client will not employ trafficked persons.

Supply chain

27. Where there is a high risk of child labor or forced labor15 in the primary supply chain, the client will identify those risks consistent with paragraphs 21 and 22 above. If child labor or forced labor cases are identified, the client will take appropriate steps to remedy them. The client will monitor its primary supply chain on an ongoing basis in order to identify any significant changes in its supply chain and if new risks or incidents of child and/or forced labor are identified, the client will take appropriate steps to remedy them.

IFC Guidance Notes[495]

GN71. Clients need to avoid any type of physical or psychological coercion of workers, such as unnecessary restrictions on movement or physical punishment that create a situation whereby the worker feels compelled to work on a non-voluntary basis. Examples of such practices include locking workers in their workplace or worker housing. Clients may not retain worker's identity documents, such as passports, or personal belongings; such actions may, in effect, amount to a forced labor-like situation. Workers should have access to their personal documents, including government-issued documents such as passports, at all times. Security personnel employed by the client may not be used to force or extract work from workers.

GN72. Clients should avoid practices that have the effect of creating unpayable debt obligations, such as excessive charges for travel, housing and meals as part of the employment relationship. Clients should also exercise diligence with regard to key contractors and subcontractors so that they do not knowingly benefit from practices that lead to bonded or indentured status of workers.

GN73. Clients should clearly recognize and communicate worker's freedom of movement in employment contracts, including access to personal documents at all times. Contracts need to be provided in the workers' language and need to be understood by them.

493 UN General Assembly, Transforming Our World: The 2030 Agenda for Sustainable Development, A/RES/70/1 (2015) https://sustainabledevelopment.un.org/post2015/transformingourworld.

494 International Finance Corporation (IFC), Performance Standard 2 – Labor and Working Conditions (2012) https://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Document.pdf?MOD=AJPERES.

495 International Finance Corporation (IHC), Guidance Notes: Performance Standards on Environmental and Social Sustainability (2012) https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/publications_policy_gn-2012.

GN74. Trafficked persons and migrant workers who lack legal status in a country may be particularly vulnerable to forced labor situations, for example through debt bondage to "recruiters and brokers" who charge exorbitant fees to place workers. Clients should inquire about and address these issues with contractors who supply labor so that they do not benefit from these coercive practices. Diligence should also be exercised when the client's project is situated in an export processing zone (EPZ) since EPZs are often exempt from national labor laws or have weak enforcement of such law. Migrant workers, particularly girls and young women, are one of the groups that have been identified as more vulnerable to human trafficking and forced labor. Several institutions are addressing issues of migrant vulnerability, including the ILO and the IOM.

GN75. There are circumstances where prison labor and labor from correctional facilities will be considered to be forced labor. If prisoners are working and a private company benefits, then work will only be acceptable where the prisoners have demonstrably volunteered for the work and they are paid at a rate which is equivalent to the prevailing market rate for that job. If prison labor comprises an important and irreplaceable part of the client's supply chain, the client should provide a detailed review demonstrating that the proposed prison labor meets the above requirements.

UK, Modern Slavery Act[496]

Section 54: Transparency in supply chains

(1) A commercial organisation within subsection (2) must prepare a slavery and human trafficking statement for each financial year of the organisation. (…)

(4) A slavery and human trafficking statement for a financial year is

(a) a statement of the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place—

(i) in any of its supply chains, and

(ii) in any part of its own business, or

(b) a statement that the organisation has taken no such steps.

(5) An organisation's slavery and human trafficking statement may include information about

(a) the organisation's structure, its business and its supply chains;

(b) its policies in relation to slavery and human trafficking;

(c) its due diligence processes in relation to slavery and human trafficking in its business and supply chains;

(d) the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk;

(e) its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate;

(f) the training about slavery and human trafficking available to its staff.

496 United Kingdom, Modern Slavery Act (2015) http://www.legislation.gov.uk/ukpga/2015/30/section/54/enacted.

California, Transparency in Supply Chains Act[497]

The disclosure described in subdivision (a) shall, at a minimum, disclose to what extent, if any, that the retail seller or manufacturer does each of the following:

(1) Engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery. The disclosure shall specify if the verification was not conducted by a third party.

(2) Conducts audits of suppliers to evaluate supplier compliance with company standards for trafficking and slavery in supply chains. The disclosure shall specify if the verification was not an independent, unannounced audit.

(3) Requires direct suppliers to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the country or countries in which they are doing business.

(4) Maintains internal accountability standards and procedures for employees or contractors failing to meet company standards regarding slavery and trafficking.

(5) Provides company employees and management, who have direct responsibility for supply chain management, training on human trafficking and slavery, particularly with respect to mitigating risks within the supply chains of products.

WTO, General Agreement on Tariffs and Trade[498]

GATT Article XX: General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (…)

(e) relating to the products of prison labour;

US, Tariff Act[499]

"All goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited, and the Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision.

"Forced labor", as herein used, shall mean all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily."

***

The Trade Facilitation and Trade Enforcement Act of 2015 was signed by the President on February 24, 2016. The law repealed the "consumptive demand" clause in 19 U.S.C. § 1307. The clause had allowed importation of certain forced labor-produced goods if the goods were not produced "in such quantities in the United States as to meet the consumptive demands of the United States." Repeal of the consumptive demand exception should enhance CBP's ability to prevent products made with forced labor from being imported into the United States.

497 California, *Transparency in Supply Chains Act* (2010) https://oag.ca.gov/sites/all/files/agweb/pdfs/cybersafety/sb_657_bill_ch556.pdf.

498 World Trade Organization, *General Agreement on Tariffs and Trade* (GATT 1947) https://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm#articleXX.

499 United States, *Tariff Act of 1930* (19 U.S.C. § 1307), Section 307, https://www.cbp.gov/trade/trade-community/programs-outreach/convict-importations.

Know the Chain, Forced Labor Action Compared[500]

In 2016, KnowTheChain benchmarked 60 large global companies from three high-risk sectors (information & communications technology, food & beverage, and apparel & footwear) on the transparency of their efforts to eradicate forced labor from their global supply chains. Each company received a score out of 100 possible points following an evaluation of the company's public disclosure against seven themes: commitment and governance; traceability and risk assessment; purchasing practices; recruitment; worker voice; monitoring; and remedy.

Good Practice Examples

Seeking support from local NGOs to educate workers

Primark publishes its code of conduct in 39 languages, covering all major languages used at its production facilities. Primark requires its suppliers to display the code in the workplace in all relevant worker languages and to communicate the code to workers. In key sourcing countries, Primark works with local NGOs who facilitate and support groups of factory workers to create a series of posters to "empower […] workers to take ownership of the code", support peer-to-peer learning, participatory methods, and performance and role-play programs related to the code.

Using technology to engage and empower supply chain workers

As part of its New Ventures pilot, Nike has developed apps to support workers both inside and outside of factories, for example with management communications, pay and leave management, grievance systems, and engagement programs. The pilot reached more than 30,000 workers at 10 footwear and apparel contract factories in three countries. For example, in China, Nike piloted a smartphone service at three factories which provided a direct communication channel between contract factory workers and management and provided workers with direct access to their personal human resources information, including salary, attendance, and annual leave. Workers at one factory reported a 25% improvement in the quality of the worker-management relationship over the course of the nine months' pilot.

Reimbursing Recruitment Fees Reimbursing recruitment fees

Apple's Supplier Code of Conduct requires that "[w]orkers shall not be required to pay employers' or their agents' recruitment fees or other similar fees to obtain their employment. If such fees are found to have been paid by workers, such fees shall be repaid to the worker. Supplier shall ensure that the third-party recruitment agencies it uses are compliant with the provisions of this Code and the law." Apple discloses that, since 2008, "more than US $25.6 million in excessive recruitment fees have been repaid to foreign contract workers by suppliers as a result of our efforts."

Cisco has adopted the EICC Code of Conduct, which states that "workers shall not be required to pay employers' or agents' recruitment fees or other related fees for their employment and if any such fees are found to have been paid by workers, such fees shall be repaid to the worker." In 2014, Cisco discovered that factory workers were paying excessive recruitment fees at one of its supplier locations and secured the return of US $251,000 to impacted migrant workers.

500 Know the Chain, *Forced Labor Action Compared: Findings From Three Sectors* (2017) https://knowthechain.org/wp-content/uploads/KTC_CrossSectoral-Findings_Final.pdf.

Coca-Cola, Modern Slavery Statement[501]

Risks in Agriculture

One potential area of risk for forced labor and human trafficking is agriculture. The Company and local subsidiaries do not typically purchase agricultural ingredients directly from farms, nor does the Company own farms or plantations. But, as a major buyer of agricultural ingredients, such as sugar, the Company strives to ensure human rights are respected across these ingredient supply chains. In 2013, the Company has made a commitment to sustainably source 100% of priority agricultural ingredients, which range from sugarcane to tea to citrus fruits by 2020. To this end, in 2013 the Sustainable Agriculture Guiding Principles ("SAGP") was published. The SAGP, which build on the Company's Supplier Guiding Principles, prohibit forced labor and human trafficking.

Additionally, the Company determined to make it a goal to conduct country level studies (or "country studies") on forced labor, child labor, and land rights looking at a priority crop, sugar, in top markets where sugar is sourced. The studies - which are research efforts, not audits - enable us to better understand the sugar sourcing supply chain and to give visibility on how suppliers and bottling partners are addressing these three risks which are considered higher social risk factors in agricultural supply chains. (…)

These country studies are not an objective in and of themselves. It was expected, setting out that this would be a journey that would require significant collaboration with suppliers, bottlers and key stakeholders to carefully examine human rights risks and to improve efforts to prevent forced labor and human trafficking in the operations and supply chain. These studies were an important tool for facilitating an internal and external conversation on human rights impacts, including the risk of forced labor and human trafficking, deeper in the supply chain.

Mega-Sporting Events

Another area of identified risk related to forced labor in the value chain is the sponsorship of megasporting events. Mega-sporting events, like the Olympics or World Cup, inspire athletes and fans alike, but have in some instances also been associated with human rights challenges. As sponsors of such events, the Company advocates for transparent and accountable administration that respects the human rights of all those involved - from those building event venues to the athletes themselves. (…) Qatar, the site of an upcoming FIFA World Cup in 2022, has faced concerns about human rights issues, particularly with regards to migrant workers. The Coca-Cola Company has operations in Qatar, including a bottling plant which the Company hopes can be a positive example for responsible business conduct in the region. It is policy that employees retain possession of their passports and identification papers and personal lockers are provided to ensure safe-keeping. Salaries are paid directly to workers' bank accounts which reduces opportunity for third parties to take deductions from workers' salaries. Quarterly payroll reviews are conducted by management for contingent workers to ensure adherence to local regulations. Responsible recruitment as well as employee well-being programs like summer hydration practices, first aid and safety training and pro-active attempts to get visas for female workers resulted in The Coca-Cola Bottling Company being named one of the Best Employers within the Gulf Cooperation Council (GCC) for best recruitment practices and employee engagement in November 2016.

Global Reporting Initiative, Sustainability Reporting Guidelines[502]

The GRI Sustainability Reporting Guidelines (the Guidelines) offer Reporting Principles, Standard Disclosures and an Implementation Manual for the preparation of sustainability reports by organizations, regardless of their size, sector or location.

501 Coca-Cola, Modern Slavery statement (2017) https://www.coca-cola.co.uk/content/dam/journey/gb/en/hidden/PDFs/human-and-workplace-rights/Modern-Slavery-Act-Statement-FY2016-Coca-Cola.pdf.

502 Global Reporting Initiative, *G4 Sustainability Reporting Guidelines* (2013) https://www.globalreporting.org/resourcelibrary/GRIG4-Part1-Reporting-Principles-and-Standard-Disclosures.pdf.

Forced or Compulsory Labor

Operations and suppliers identified as having significant risk for incidents of forced or compulsory labor, and measures to contribute to the elimination of all forms of forced or compulsory labor

a. Report operations and suppliers considered to have significant risk for incidents of forced or compulsory labor either in terms of:

    - Type of operation (such as manufacturing plant) and supplier
    - Countries or geographical areas with operations and suppliers considered at risk

b. Report measures taken by the organization in the reporting period intended to contribute to the elimination of all forms of forced or compulsory labor.

Responsible Recruitment Gateway, Leadership Group for Responsible Recruitment[503]

The Leadership Group for Responsible Recruitment is a collaboration between leading companies and expert organisations to drive positive change in the way that migrant workers are recruited. Together, our aim is bold - the total eradication of fees being charged to workers to secure employment.

Aims

The Leadership Group for Responsible Recruitment aims to drive positive change in the recruitment industry with three objectives:

- Create Demand for responsible recruitment by raising awareness about the positive benefits of ethical practices and developing tools to help companies implement the Employer Pays Principle
- Increase Supply of ethically sourced labour by creating an enabling environment and supporting the development and implementation of systems to identify and use ethical recruitment agencies
- Advocate for improved protection for migrant workers by brokering dialogue to promote the effective regulation and enforcement of the recruitment industry

The Employer Pays Principle [504]

Reflecting the Dhaka Principles for Migration with Dignity, the Employer Pays Principle is a commitment to ensure that no worker should pay for a job and is increasingly being adopted by companies across a range of industry sectors and locations.

Launched in May 2016, the Employer Pays Principle states that: No worker should pay for a job - the costs of recruitment should be borne not by the worker but by the employer.

Adoption of the Employer Pays Principle across all industries is fundamental to combatting exploitation, forced labour and trafficking of migrant workers in global supply chains and represents an important step in achieving the UN Sustainable Development Goal of decent work for all.

503 Responsible Recruitment Gateway, Leadership Group for Responsible Recruitment (2016) https://www.ihrb.org/employerpays/leadership-group-for-responsible-recruitment.

504 Responsible Recruitment Gateway, The Employer Pays Principle, https://www.ihrb.org/employerpays/the-employer-pays-principle.

Six Steps to Responsible Recruitment: Implementing the Employer Pays Principle[505]

Step 3: Integrate and act on the risk assessments

Be systematic:

- Involve staff whose work raises potential impacts on workers in finding ways to address them.
- Identify ways to share learning across different operating sites / functions / departments about effective prevention and mitigation options.

Prioritise your responses:

- Prioritise responses to assessment findings based on those that will result in the most severe impacts to workers.
- Determine severity according to scale (how grave the impact is), scope (how many workers are affected) and whether it can be effectively remedied.

Understand your responsibility

- A company's responsibility to act is determined by its involvement in a human rights risk or impact, not its ability to influence a situation.
- Where at risk of causing an impact directly, take the necessary steps to prevent it. For example, require recruitment agents to itemise, including with receipts, all expenses they incur in the recruitment process, and provide workers with receipts for any expenses they incur in their recruitment.
- Where at risk of contributing to an impact, take the necessary steps to avoid that contribution. Use your leverage with the party causing the impact to mitigate any remaining risk. For example, in the absence of ethical recruitment agencies in a country, undertake as much direct recruitment of migrant workers as possible.
- Where at risk of an impact on a migrant worker being directly linked to your company's operations, products or services through a business relationship, use your leverage with the party at cause to mitigate the risks.

Create and use leverage with business relationships:

- In each situation, think about the many forms leverage can take, whether via traditional commercial leverage, leverage through collective action with business partners and peers, or leverage via bilateral or multi-stakeholder engagement and collaboration with governments, civil society and other stakeholders.
- Initial steps to identify and build leverage could include:
    - Build into new supplier agreements the expectation for them to prevent, mitigate and remediate recruitment-related impacts on migrant workers.
    - Establish a clear labour cost structure with suppliers and / or recruitment and employment agents.
    - Identify key personnel at suppliers responsible for hiring decisions and gauge their willingness and ability to align with the EPP policy.

505 IHRB & Leadership Group for Responsible Recruitment, *Six Steps to Responsible Recruitment: Implementing the Employer Pays Principle* (undated) https://www.ihrb.org/uploads/member-uploads/Six_Steps_to_Responsible_Recruitment_-_Leadership_Group_for_Responsible_Recruitment.pdf.

- Where possible, reduce the number of recruitment agencies with which your supplier engages to enable more effective monitoring and targeting of training resources.

- Consider carefully whether to terminate a relationship where fees and other impacts on migrant workers caused by the third party. It may be beneficial to continue to work within the business relationship to remediate the impacts and build their capacity to meet the Employer Pays Principle in practice.

ILO, Fair Recruitment Initiative[506]

Partners

This multi-stakeholder initiative is implemented in close collaboration with governments, representative employers' and workers' organizations, the private sector and other key partners. (…) ILO social partners and their affiliates play a central role in the design and implementation of this initiative, including International Trade Union Confederation (ITUC) and affiliates, and the International Organisation of Employers (IOE) and affiliates, in particular the World Employment Confederation (WEC).

The Context[507]

In today's globalized economy, workers are increasingly looking for job opportunities beyond their home country in search of decent working conditions. In addition, millions of workers migrate internally. Public and private employment agencies, when appropriately regulated, play an important role in the efficient and equitable functioning of labour markets.

However, concerns have been raised about the growing role of unscrupulous employment agencies, informal labour intermediaries and other operators acting outside the legal and regulatory framework that prey especially on low-skilled workers. Reported abuses involve one or more of the following: deception about the nature and conditions of work; retention of passports; deposits and illegal wage deductions; debt bondage linked to repayment of recruitment fees; threats if workers want to leave their employers, coupled with fears of subsequent expulsion from a country. A combination of these abuses can amount to human trafficking and forced labour. Despite the existence of international labour standards relating to recruitment, national laws and their enforcement often fall short of protecting the rights of workers, and migrant workers in particular.

The Response

In response to those challenges, the International Labour Organization (ILO) launched in 2014 a global "Fair Recruitment Initiative" to:

- help prevent human trafficking and forced labour
- protect the rights of workers, including migrant workers, from abusive and fraudulent practices during the recruitment and placement process (including pre-selection, selection, transportation, placement and safe return)
- reduce the cost of labour migration and enhance development outcomes for migrant workers and their families, as well as for countries of origin and destination

506 International Labour Organisation (ILO), Fair Recruitment Initiative (2015) http://www.ilo.org/global/topics/fair-recruitment/lang--en/index.htm.

507 International Labour Organisation (ILO), *Fostering Fair Recruitment Practices, Preventing Human Trafficking and Reducing the Costs of Labour Migration* (undated) http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_320405.pdf.

Human Rights Watch, Hidden Chains - Forced Labor in Thailand's Fishing Industry[508]

This report documents forced labor and other human rights abuses in the Thai fishing sector. It identifies poor working conditions, recruitment processes, terms of employment, and industry practices that put already vulnerable migrant workers into abusive situations—and often keep them there. It assesses government efforts to address labor rights violations and other mistreatment of migrant fishers. It also highlights improvements and shortcomings in Thai law and the operational practice of frontline agencies that allow victims of forced labor to fall through gaps in existing prevention and protection frameworks…

Many of the human rights problems in Thailand's fishing industry are common to migrant workers in sectors throughout Thailand's economy, whose exploitation is aggravated, and sometimes caused, by the government's haphazard national policies on labor migration.

In its migration policies, the Thai government has sought to balance negative public attitudes about migration and alleged national security concerns about migrants with strong economic demand for low-cost labor. The result has been contradictory and inconsistent migration policymaking. Its current orientation toward stronger controls and crackdowns on irregular migration have proven ineffective and merely pushed migrants toward more expensive and less safe border crossings, increasing profits for smugglers and traffickers.

ILO, How Policy and Technology Can Impact Work in the Fishing Industry[509]

Background

In 2014, international media reports detailed extensive labour abuses in Thailand's fishing industry. In the same year, the U.S. State Department, in its Human Trafficking Report, downgraded Thailand to the bottom rung: Tier 3. In 2015, the European Commission (EC) issued Thailand a "yellow card" for illegal, unregistered, and unregulated (IUU) fishing practices.

With the threat of sanctions against its fishing industry a possibility, Thailand proceeded to implement measures aimed at reducing and eliminating abuses in the fishing and seafood sectors, and to conform with the International Labour Organization's (ILO) Work in Fishing Convention (No. 188, 2007). In January 2019, Thailand ratified the Work in Fishing Convention (No. 188, 2007), and became the first country in Asia to ratify the Convention, strengthening minimum labour standards for fishers employed on vessels at sea.

These measures have met with some success. In June 2018, the U.S. State Department upgraded Thailand in its human trafficking report from a "watch list" to Tier 2, and in 2019, the EC lifted the yellow card after judging that Thailand had successfully addressed gaps in its fisheries legal framework and its monitoring and surveillance systems. (…)

The Thai government encoded these standards and more in the Protection of Labourers in Fishing Act, which came into force in November 2019. Some measures were already part of Thai labour laws, such as minimum working age, medical insurance, maximum working hours and rest periods, written work agreement, regular pay (via bank account transfer for fishers), safety equipment for work, and compensation for work-related deaths or injuries. New measures in the Act include annual health check-ups, repatriation from a foreign port to Thailand, and social security-type benefits.

508 Human Rights Watch, *Hidden Chains - Rights Abuses and Forced Labor in Thailand's Fishing Industry* (2018) www.hrw.org/report/2018/01/23/hidden-chains/rights-abuses-and-forced-labor-thailands-fishing-industry.

509 ILO, *Less is More - How Policy and Technology Can Impact the Thai Labour Market for Work in Fishing* (2019) https://shiptoshorerights.org/wp-content/uploads/Less-is-More_EN.pdf.

Understanding Employer Demands for Labour

For the employers interviewed for this report, five key elements were said to influence their demands for migrant workers.

1. A perceived labour deficit in the fishing sector;
2. Cost of wages;
3. Necessity of paying advances to employees;
4. Costs associated with compliance; and
5. Costs of capital investment.

Conclusions and Recommendations

1. The Thai fishing industry fleet has failed in the aggregate to invest in labour-saving technologies. This puts more pressure on an already dysfunctional labour market.

The Thai commercial fishing fleet is overdue for modernisation to improve labour-, energy-, and cost-efficiency. Modest investments in power-hauling equipment reduce the size of fishing crews and thereby help bring the labour market into balance. In other sectors, reducing the workforce can produce conflict between workers and employers — and their representative organisations — but the fishing industry, with poor working conditions and low wages, will continue to face chronic labour shortages. Long-term solutions that reduce demand for new workers, and improve working conditions and wages can satisfy in the aggregate both workers and vessel owners.

2. There is a lack of financial credit to the fishing industry. Lenders want guarantees to re-enter an inherently risky industry.

Thai commercial bank lending to vessel owners has fallen to near zero with the global exposure of labour abuses in Thai fishing and the subsequent uncertainty in the industry. A programme of reconfiguration will prompt threshold questions from vessel owners: "Who will lend me the money?" and "What will happen if I cannot pay it back?" Commercial lenders will ask, "Which institutions will guarantee loans to qualified borrowers?" and "Will the proposed lending programme be big enough to make development and marketing of a new lending product for vessels worthwhile for the bank?"

3. There is a wide-ranging absence of high-quality information.

The interviews conducted for this report all pointed to the need for more effective, regular, and public communication between governments (both Thai and foreign), vessel owners, recruitment agents, and migrant workers. (…)

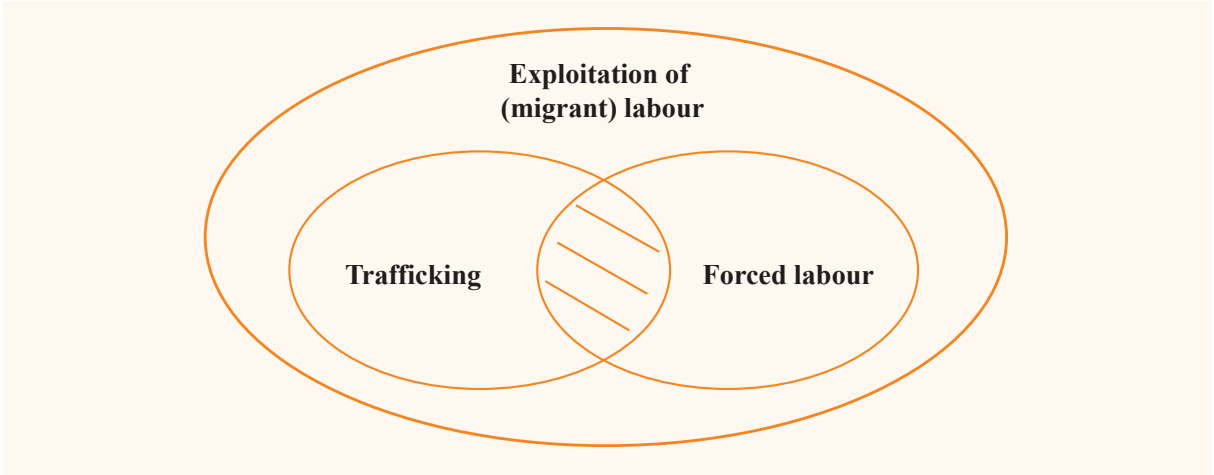
Jokinen & Ollus, Exploitation of Migrant Workers[510]

Labour trafficking – or trafficking for the purposes of forced labour – seems to be on the increase globally (…). The increasingly mobile work force, freedom of movement within the European Union and the global economic disparities, act as driving factors for high levels of migrants who, without adequate protection from illegal recruitment practices and the abuse by unscrupulous employers, risk becoming victims of trafficking. In many

510 Natalia Ollus, Anniina Jokinen and Matti Joutsen (eds.), *Exploitation of migrant workers in Finland, Sweden, Estonia and Lithuania: Uncovering the Links Between Recruitment, Irregular Employment Practices and Labour Trafficking,* European Institute for Crime Prevention and Control (2013) http://lft.ee/admin/upload/files/HEUNI%20report%2075%2015102013.pdf.

labour intensive sectors, migrant labour is considered a cheap alternative to domestic labour. Employers may look for cost-saving measures by re-organising the division of labour, e.g. through increasing the use of temporary and part-time contracts, and by demanding increased flexibility from the workers. Problems occur when this creates an unequal labour market, where those most vulnerable have to accept work on any terms. At worst, migrant workers may become victims of trafficking for forced labour.

Trafficking for forced labour can be regarded as the most severe form of exploitation, while more subtle forms of coercion represent less serious forms of exploitation. These less serious forms of exploitation can lead up to more serious acts and create conditions where trafficking for forced labour may take place. We argue that trafficking for forced labour takes place precisely in this context of exploitation of migrant labour in general. Therefore, in order for us to uncover and understand labour trafficking, we must scrutinize the broader context of exploitation of migrant workers. (…) Forced labour does not necessarily entail trafficking. Forced labour may exist without trafficking, but many jurisdictions require that for the crime of labour trafficking to be fulfilled, there must be exploitation that amounts to forced labour (or equivalent exploitation). Trafficking for forced labour hence exists where trafficking in human beings and forced labour overlap. Overall, both crimes can be seen to take place in the context of exploitation of (mainly migrant) labour.



Indicators of forced labour include physical or sexual violence or the threat of such violence, restriction of movement of the worker, debt bondage or bonded labour, withholding wages or refusing to pay the worker at all, retention of passports and identity documents, and the threat of denunciation to the authorities. In addition, trafficking in human beings can be analysed also based on whether forms of deception or coercion were used during recruitment or transportation, whether the recruitment took place by abusing the person's vulnerability, whether exploitative conditions prevailed at work, and whether coercion or abuse of the vulnerability of the migrant worker occurred at destination.

Trafficking for forced labour and labour exploitation in Sweden: Examples from the Restaurant and the Berry Industries

Among the workers who have entered Sweden within the framework of the new policy, the situation of seasonal berry-pickers from Asian and East European countries, in particular, has been emphasized for the exploitative conditions faced by the workers. Forms of abuse include the non-payment of wages or very low wages, excessive working days and various forms of coercion such as physical force and threats. The restaurant industry, which also employs a high number of low-skilled migrant workers, is characterized by similar working conditions of low wages and long working hours. (…)

Challenges

The report highlights a number of challenges in preventing and combating migrant labour exploitation.

A first challenge stems from Swedish labour immigration policy, according to which work permits for non-EU citizens are tied to the employers. That is, labour immigrants must remain with the same employer during the first two years, or find a new employer within three months, and in the same occupation during the first four years, or else they can be deported from Sweden. Arguably, this requirement places the employees in a situation of dependency towards their employer. Workers who are exploited by unscrupulous employers may be reluctant to complain for fear of losing their employment and thereby their right of residence in Sweden.

The second challenge stems from the fact that many migrants who are subject to exploitation do not always consider themselves to be victims. Working in Sweden often represents an opportunity to escape poor economic circumstances and improve the living standard of themselves and their families. Therefore, many labour immigrants are willing to accept poorer working conditions than those enjoyed by the local population.

A third challenge relates to the lack of experience in regard to trafficking for forced labour in Sweden. The police, prosecutors and judges in Sweden may fail to detect cases of forced labour due to a lack of knowledge about the crime. Additionally, the concept of forced labour is rather complex – the distinction between a voluntary and a forced employment situation is difficult to define – and the legislation lacks a clear definition. The low number of convictions for trafficking for forced labour in Sweden may also be a result of the courts' tendency to compare the working conditions of the victims with the prevailing conditions in the home country, considering that they do not experience worse conditions in Sweden than those they had at home.

A fourth challenge, related to the berry industry, highlights the lack of accountability of the various economic actors involved. Unregulated workers from Europe are considered to be self-employed and 'free movers', and regulated workers from Asia are formally employed by Asian recruitment agencies, leading to a situation where the actors in Sweden – berry buyers and merchants – do not need to assume the full responsibility for the pickers' labour conditions.

Raj-Reichert, The Powers of a Social Auditor in a Global Production Network[511]

The Verite´ report (2014) was damning and posed risks to industry for three reasons. First, the report concluded over a quarter of electronics workers, the majority foreign workers, in Malaysia to be in situations of forced labour. Investigations comprising undercover interviews with 501 workers (87% foreign workers) in over 100 factories throughout Malaysia found 28% of all workers (32% among foreign workers) in forced labour. Using guidelines set by the International Labour Organisation (ILO), the report focused on six aspects of forced labour: (1) high recruitment fees resulting in debt bondage through over-time work and wage deductions; (2) withholding foreign worker passports by labour agents; (3) restricting movement and instituting fear and insecurity by employers; (4) prohibiting foreign workers from breaking employment contracts, changing employers or returning home before the end of their contracts; (5) deceptive recruitment on wages or type of work and (6) excessive dependency by foreign workers on labour agents for housing, medical care, food, transport, legal status, employment status and other welfare issues. Although the names of firms, their factory locations or the outsourcing firms to suppliers were not revealed, because forced labour was found to be 'widespread' and in different locations, factory sizes and production lines of goods and components, the findings casted a wide net implicating many types of firms from brands to first and lower tier suppliers operating directly or outsourcing in Malaysia. 'What was most shocking to us was that this was happening in modern facilities, some of which were owned and operated by major international brands. This work has led us to conclude that forced labour in this industry is systemic and that every company operating in this sector in Malaysia faces a high risk of forced labour in their operations.'

511 Gale Raj-Reichert, 'The Powers of a Social Auditor in a Global Production Network: The Case of Verité and the Exposure of Forced Labour in the Electronics Industry', *Journal of Economic Geography* 20 (2020) www.econstor.eu/bitstream/10419/206686/1/Full-text-article-Raj-Reichert-The-powers-of.pdf.

The Verite´ report was the most comprehensive on the details of forced labour in the electronics industry thus far. Before the report forced labour was rarely publicly associated with the electronics industry. It was more often reported in lower value added or lower cost industries, such as agriculture, fishing, domestic work, mining and garments. Verite´'s report, however, showed forced labour occurring in a high value added and technologically advanced industry. It was not hidden away but occurred in sprawling modern EPZs in a middle-income country where hi-tech factories, surrounded by electronic gates, barbed-wires, metal detectors and security guards were monitored and audited multiple times a year by social auditors and government agencies. (…)

Verite´, whose exposure of forced labour in Malaysian electronics subsequently changed labour governance practices in the electronics industry, mobilised power resources of credible information to exercise powers of expert authority and acts of dissimulation across various networked relationships in the GPN [global production networks]. This paper puts forth a multi-power framework of analysis to understand the micro-politics of GPNs. (…)

Verite´ straddles a hybrid SAO [social auditing organisations] profile of firm and extra-firm characteristics which contributes to its ability to hold different types of relationships in the GPN, harness different power resources and exercise different modes of relational power. It is emphasised that actors in GPNs have multiple relationships and therefore need to be understood for their interactions and outcomes, through conflicts, tensions and cooperation, to reveal the micro-politics of GPNs. Thus, the second contribution is a multi-power analysis which examined overt and covert modes of power across Verite´'s different sets of networked relationships—namely the powers of expert authority and dissimulation—which brought about changes to labour governance practices by industry actors. Verite´ did so by mobilising power resources of credible information on forced labour in factories through its subcontractor relationships with local auditors. Its various subcontracted ties to the US federal government to investigate working conditions in Malaysian electronics and advising on forthcoming regulatory amendments aimed at banning forced labour in federal supply chains gave Verite´ the power resource of legitimacy. Both power resources were necessary for exercising the power of expert authority over the electronics industry's conduct of self-governing practices. More covertly, Verite´ simultaneously exercised acts of dissimulation through its confidential client–auditor relationships with global lead firms for access to factory workers in order to gain credible information on working conditions through its investigations.

Hence, its hybrid profile helped Verite´ gain legitimacy and credibility as an NGO and a quasi-state actor (extra-firm actor characteristics) while its business client relationships as an auditor (firm actor characteristics) is tied to its exercise of power vis-a`-vis global lead firms and the RBA. The case study illustrates how powers to change practices in a GPN can be a complex process involving different resources of power and the simultaneous exercise of different modes of relational power across varying sets of relationships.

Davidson, New Slavery and Human Trafficking[512]

For almost a decade now, politicians, journalists, NGO workers and even some academics have been telling us that human trafficking is a vastly profitable global criminal business that claims millions of victims at any given moment in time, and that represents one of the most serious human rights problem in the contemporary world. 'Trafficking' is commonly described as a modern slave trade, and anti-trafficking campaigners call on us to restate our opposition to slavery and reaffirm our commitment to the defence of human rights and freedom. These are rousing and apparently politically progressive calls. Yet, as a number of critical scholars and activists have noted, the figure of the 'trafficking victim', especially of the 'trafficked sex slave' has actually been worked to most effect in the service of extremely conservative moral agendas on prostitution, gender and sexuality and in support of more restrictive immigration policies and tighter border controls (…).

512 Julia O'Connell Davidson, 'New Slavery, Old Binaries: Human Trafficking and the Borders of Freedom', *Global Networks* 10:2 (2010) https://modernslavery.yale.edu/sites/default/files/pdfs/new_slavery_old_binaries_0.pdf.

(…) problems arises from the fact that 'trafficking', like slavery, is a concept that requires us to think in terms of 'inappropriate' exploitation and of 'force'. And, as Moravcsik points out in relation to slavery, these are slippery notions: 'What constitutes inappropriate economic exploitation depends partly on what alternatives were or could have been envisaged within a given situation … [and similarly] what counts as force … and what restrictions any society might have to invoke under certain circumstances are left to be determined in context.'

'Trafficking' is an umbrella term for a process that can lead to a variety of outcomes. In theory, it intersects with an array of other markets, institutions and practices (labour markets, prostitution, marriage, benefit fraud, organ trading, child adoption, independent child migration to name but a few), some of which may be socially tolerated and legally regulated, others of which may be illegal, stigmatized and/or socially contested. To ring fence 'trafficking' would therefore require us to make a judgement about what constitutes appropriate and inappropriate exploitation, and what counts as force, in a huge number of vastly different contexts. Throw in the fact that social norms pertaining to these markets, institutions and practices differ from country to country, and the task looks even more hopeless.

The enormity of these problems can be illustrated by looking at one of the possible outcomes of 'trafficking' listed in the protocol, namely slavery. In a world where slavery is nowhere legally recognized, so that nobody is actually formally assigned the legal status of slave, what is slavery and who is a slave? Anti-slavery activists who have played an important role in promulgating the 'trafficking as modern slavery' discourse, hold that new slavery can be distinguished from other forms of oppression and labour exploitation that are widespread in the contemporary world through reference to its three essential elements. First, is its involuntary nature, in the sense that the slave cannot 'walk away from the situation they're in and someone's controlling their free will'. Second, is 'severe economic exploitation', which Bales describes as the absence of a wage, or payment of wages in a form that either covers only the most basic necessities for daily survival, or that can be clawed back by the employer. Third, there is violence or the prospect of violence. (…)

Talk of 'trafficking as modern slavery' generates an illusion of political consensus, for nobody is in favour of slavery. Indeed, 'the fight against slavery is one of the very few human rights imperatives that attracts no principled dissent'. Yet, if 'modern slavery' does not exist as a legal status or a prior category, but must be defined instead through reference to judgements about where, on a continuum and in different contexts, 'appropriate' exploitation ends and 'inappropriate' exploitation begins, then it is in reality a hugely contentious and highly political concept. (…) A political space, in Rancière's terms, opens up and with it the potential for political alliances between those (both migrant and non-migrant) who share an interest in transforming existing social and legal constructions of 'freedom' and 'restriction'. Because discourse on 'trafficking as modern slavery' defuses this potential, deconstructing it is an urgent political task.

Background (Cambodia)

Parliamentary Institute of Policy, Migration, Trafficking & Sexual Exploitation[513]

All provinces in Cambodia are sources of human trafficking as reported by previous studies and happens both inside and outside Cambodia. Trafficking within Cambodia is often for the purpose of commercial sexual exploitation in respect of which young women have been transported to work in brothels, massage parlors or karaoke bars in some urban cities such as Phnom Penh, Sihanoukville, Poipet, Koh Kong or Siem Reap. Sexual exploitation of street children, especially by tourists, has also been reported. The data of NCCT [National Committee for Counter Trafficking in Persons] in 2016 showed that 524 businesses operating in Cambodia, had been targeted, of which 71 were convicted of human and sexual trafficking.

Human trafficking outside of Cambodia is often in the form of: i) trafficking for marriage; ii) forced labor on fishing vessels and domestic work; and iii) forced begging.

513 Parliamentary Institute of Policy, *Migration, Human Trafficking Prevention and Sexual Exploitation* (2017) https://pic.org.kh/images/2017Research/20171227_Migration,%20Human%20Trafficking%20Prevention%20and%20Sexual%20Exploitation_En.pdf.

Trafficking for marriage: Trafficking for marriage has happened to some Cambodian women who entered into a brokered marriage with Chinese, Korean or Taiwanese men. These women have sought a better life by marrying foreign men, but they have ended up being abused by their husbands or families-in-law and, in the worst scenario, they have been forced into prostitution. Some women have been promised a factory job, but have been deceived and forced into marriage against their will. In 2016, Chinese authorities reported that about 7,000 Cambodian women had been married to Chinese men, but only 100 were reported to have done so legally. The report of NCCT showed there were 1,541 legal marriages between Cambodians and foreigners in 2016.

Forced labor on fishing vessels: Forced labor has become worse for migrant workers who are engaged in the fishing industry in countries like Thailand, Malaysia, Indonesia, Somalia, Vietnam and Taiwan. These migrant workers can be forced to work from 16 to 18 hours a day on fishing vessels with no way of escape. (…) According to the ILO Bangkok, from June to October 2014, more than 22,000 Cambodians had registered to work in the fishing industry in Thailand.

Forced domestic labor: Forced domestic labor is another crime. Cambodian workers were reported to have been trafficked to Malaysia, the Middle East and Singapore to work as nannies, maids and carers. Even though they received pay three times higher than in Cambodia, these migrant workers suffered serious abuse, and were often reported to have mental problems upon returning home. In 2015, 8,000 Cambodian domestic workers were working in Malaysia.

Forced begging: Cambodian children are reported to be trafficked for begging in neighboring countries like Thailand and Vietnam. In 2014, about 80 percent of child beggars in Thailand were Cambodian.

Trafficking for commercial sexual exploitation: Women used to be considered as the sole victims in the sex industry, but recently boys and young men have also fallen into the victim category. Street children, especially boys, are often identified as the victims of sexual abuse by foreign nationals. Young Vietnamese girls have also been reported to be trafficked to brothels in Cambodia. The data of NCCT showed that 298 victims of sex trafficking were rescued in Cambodia in 2016 and children and minors were among those victims.

NCCT, Guidelines for Identification of Victims of Human Trafficking[514]

Why does a victim of human trafficking and sexual exploitation hesitate to be identified?

(…) In some other cases, the perpetrators may be those who have a close relationship with the victim such as relatives, friends, romantic partners or persons who have authority over them. Victims often feel ashamed (…) Some of the victims committed crimes in the process of being trafficked, which makes them worried about potential punishment or prosecution for such offences. Victims are often concerned about their safety and potential further loss if they have to be involved in the official complaint and prosecution process. This process requires money and time with little hope of successful prosecution and/or compensation for victims. (…) Consequently, most of the victims request only emergency assistance or rehabilitation or safe living options rather than filing complaints against the perpetrators and other accomplices. (…)

Instruments (Cambodia)

Constitution of the Kingdom of Cambodia[515]

Article 36: Khmer citizens of both sexes have the right to choose any employment according to their ability and to the needs of the society. (...)

514 National Committee for Counter Trafficking in Persons (NCCT), *Guidelines on Forms and Procedures for Identification of Victims of Human Trafficking for Appropriate Service Provision* (2015) http://un-act.org/wp-content/uploads/2016/08/ID_Guidelines_Cambodia.pdf.

515 Cambodia, *Constitution of the Kingdom of Cambodia* (1993) https://www.wipo.int/edocs/lexdocs/laws/en/kh/kh009en.pdf.

Article 46: Human trafficking, exploitation of prostitution and obscenities which affect the dignity of women shall be prohibited. (...)

Labor Law[516]

Article 1: This law governs relations between employers and workers resulting from employment contracts to be performed within the territory of the Kingdom of Cambodia...

Article 15: Forced or compulsory labor is absolutely forbidden in conformity with the International Convention No. 29 on the forced or compulsory labor, adopted on June 28, 1930 by the International Labor Organization and ratified by the Kingdom of Cambodia on February 24, 1969. This article applies to everyone, including domestics or household servants and all workers in agricultural enterprises or businesses.

Article 16: Hiring of people for work to pay off debts is forbidden.

Law on Suppression of Human Trafficking and Sexual Exploitation[517]

Article 1: Objective of this Law

The objective of this law is to suppress the acts of human trafficking and sexual exploitation in order to protect the rights and dignity of human beings, to improve the health and welfare of citizens, to preserve and enhance good national customs, and to implement the UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, or other international instruments or agreements with regard to human trafficking that the Kingdom of Cambodia has ratified or signed.

Article 4: Criminal Responsibility

(…) An accomplice and instigator of the felonies or misdemeanors stipulated in this law shall be punished and liable to the same punishment as a principal who commits it.

An accomplice and instigator shall include, but not be limited to the form of organizing or directing another to commit any of the felonies or misdemeanors stipulated in this law.

When a representative, agent, or employee for a legal entity or a principal commits any offense stipulated in this law in the scope of its business, or in the interest of the legal entity or the principal, the legal entity or the principal shall be punished with fine and additional penalties in accordance with the punishment stipulated in the relevant article.

MOU between Cambodia and Thailand on Cooperation for Eliminating Trafficking[518]

Article 5: The Parties shall undertake educational and vocational training programs, in particular for children and women, to increase the opportunity for employment and hence reduce vulnerability to trafficking.

516 Cambodia, *Labor Law* (1997) https://www.ilo.org/dyn/travail/docs/701/labour.

517 Cambodia, *Law on Suppression of Human Trafficking and Sexual Exploitation* (2008) https://www.unodc.org/res/cld/document/khm/2008/law_on_suppression_of_human_trafficking_and_sexual_exploitation_html/Cambodia_03_-_Law-on-Suppression-of-Human-Trafficking-and-Sexual-Exploitation-15022008-Eng.pdf.

518 MOU between the Government of the Kingdom of Cambodia and the Government of the Kingdom of Thailand on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking (2003) https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/70625/91165/F1583258935/KHM70625.pdf. See also http://un-act.org/publication/memorandum-of-understanding-between-the-government-of-the-kingdom-of-thailand-and-the-government-of-the-kingdom-of-cambodia-on-bilateral-cooperation-for-eliminating-trafficking-in-children-and-women-a/.

Article 6: The Parties shall make best effort to prevent trafficking in children and women through the following preventive measures:

(a) Increase of social services such as assistance in job searching and income generating and provision of medical care to children and women vulnerable to trafficking;

(b) Reform of educational and vocational training programs to improve their linkage with job opportunities;

(c) Enhancement of public awareness and understanding on the issue of trafficking in children and women; and

(d) Dissemination of information to the public on the risk factors involved in trafficking of children and women and on the businesses that are exploitative to children and women.

Article 9: The relevant governmental agencies where appropriate, in cooperation with non-government organizations, shall provide trafficked children, women and their immediate family, if any, with safe shelter, health care, access to legal assistance, and other imperative for their protection.

Article 10: The law enforcement agencies of both countries, especially at the border, shall work in close cooperation to uncover domestic and cross border trafficking of children and women.

US Department of State, Trafficking in Persons Report[519]

Cambodia: Tier 2 Watch List

The Government of Cambodia does not fully meet the minimum standards for the elimination of trafficking but is making significant efforts to do so. These efforts included continuing to prosecute and convict traffickers; establishing a new five-year action plan to combat trafficking; and developing and utilizing new victim identification and data collection technologies. However, the government did not demonstrate overall increasing efforts compared to the previous reporting period. Authorities did not improve insufficient efforts to collect or share key information on law enforcement efforts. Corruption continued to impede law enforcement operations, criminal proceedings, and victim service provision. Amid insufficient government oversight and accountability measures, authorities did not investigate credible reports of official complicity with unscrupulous business owners who subjected thousands of men, women, and children throughout the country to human trafficking in entertainment establishments and in brick kilns. (…)

Prioritized Recommendations: (…)

- Amend regulations on labor recruitment licensure and contract requirements to include strengthened language on worker protections and labor rights.
- Strengthen efforts to inspect private labor recruitment agencies and their sub-licensed brokers for fraudulent recruitment and other trafficking indicators.
- Increase public awareness on proper travel document application procedures to facilitate safe, legal migration. (…)

Prevention: (…)

The Ministry of Labor and Vocational Training (MOLVT) maintained a separate action plan aimed at reducing child labor and debt bondage in the service, agricultural, mining, and energy sectors by 2025 through awareness raising, legal action, and collaboration with civil society funded in part through the national budget. There was no ban on the imposition of worker-paid recruitment or placement fees. Observers noted the high costs, complex

519 US Department of State, *Trafficking in Persons Report* (2020) https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf.

administrative requirements, and restrictive provisions inherent to the formal migration process drove a majority of Cambodian labor migrants to pursue informal pathways to working abroad. (…) Officials and NGO observers noted labor officials' insufficient inspections of private recruitment agencies, and the ability of these agencies to sub-license their names to independent brokers, continued to perpetuate widespread labor exploitation. (…)

Trafficking Profile

As reported over the past five years, human traffickers exploit Cambodian men, women, and children in forced labor and sex trafficking in Cambodia and abroad. They also subject victims from other countries to trafficking in Cambodia, and they use Cambodia as a transit point to exploit victims from other countries to trafficking elsewhere in Asia. Cambodian adults and children migrate to other countries within the region and increasingly to the Middle East for work; traffickers force many to work on fishing vessels, in agriculture, in construction, in factories, and in domestic servitude—often through debt-based coercion—or exploit them in sex trafficking. Migrants using irregular migration channels, predominantly with the assistance of unlicensed brokers, are at an increased risk of trafficking, although those using licensed recruiting agents also become victims of forced labor or sex trafficking. Companies operating under the auspices of the Japanese government's "Technical Intern Training Program" have exploited Cambodian nationals in forced labor in food processing, manufacturing, construction, and fishing. (…)

Traffickers continue to recruit significant numbers of Cambodian men and boys in Thailand to work on fishing boats and exploit them in forced labor on Thai-owned and -operated vessels in international waters. Cambodian victims escaping from their traffickers have been identified in Malaysia, Indonesia, Mauritius, Fiji, Senegal, South Africa, and Papua New Guinea. (…) Traffickers recruit a significant number of women from rural areas under false pretenses to travel to China to enter into marriages with Chinese men. [The] men force some of these women to work in factories or exploit them in sex trafficking to repay [debts]. Cambodian women serving willingly as illegal surrogates for Chinese families are vulnerable to confinement and domestic servitude. (…)

Nestle, Responsible Sourcing of Seafood at Nestle[520]

In 2015, Nestlé launched a Thailand Action Plan for the Responsible Sourcing of Seafood, detailing our commitment to eliminating labor and human rights abuses in the seafood supply chain in Thailand. This was developed based on an assessment of recruitment practices and migrant labor conditions in our Thai seafood supply chain carried out by our implementation partner, Verité, on our behalf. (…)

Responsible Recruitment

In working on labor rights abuses in our supply chains, we have found that such abuses can only be solved by addressing unethical recruitment practices. A key focus of our strategy therefore is on the responsible recruitment of workers throughout our seafood supply chain. We expect that workers in our supply chains are recruited responsibly, meaning that they do not pay for a job, are not indebted or coerced to work, and have freedom of movement. As of 2018, all of our Thai seafood suppliers implemented responsible recruitment initiatives. (…)

At the end of 2018 and beginning of 2019, Verité conducted two multi-stakeholder consultations with 23 individuals from civil society, local government, and the Association of Cambodian Recruitment Agencies (ACRA) in Phnom Penh, Cambodia to improve the migrant workers' recruitment practices. (…)

In 2019, an action plan was developed including capacity building on ethical recruitment for commune leaders, NGOs and the Cambodia Anti-Trafficking Commission; training for NGOs on how to document labor risks among vulnerable populations; cooperation building on disseminating information and accessing grievance mechanism(s) between Thai and Cambodian NGOs, and other relevant stakeholders, and increasing the capacity of NGOs to monitor compliance of Private Employment Agencies to their Code of Conduct.

520 Nestle, *Responsible Sourcing of Seafood at Nestle* (2019) https://www.nestle.com/sites/default/files/2020-04/nestle-responsible-sourcing-seafood-progress-report-2019.pdf. See also, e.g. Verité, Assessment Report (2015) https://www.verite.org/wp-content/uploads/2016/11/NestleReport-ThaiShrimp_prepared-by-Verite.pdf; Nestle, *Modern Slavery and Human Trafficking Report 2018: Advancing Human Rights at Nestle* (2018) https://www.nestle.co.uk/sites/g/files/pydnoa461/files/2019-12/modern-slavery-report-2018.pdf.

In 2019, Nestlé also initiated a partnership with the Fair Hiring Initiative, Inc. (TFHI), to conduct capacity building for ethical and fair recruitment for agencies and employers who are enrolled in TFHI's 'On The Level' certification program pilot. The aim of this partnership is to increase the number of responsible recruitment agents and therefore responsibly recruited workers in the industry.

Thai Union, Transparency Statement under UK Modern Slavery Act[521]

This statement is written in compliance with the requirements under the UK Modern Slavery Act 2015, with particular reference to Section 54 Transparency in Supply Chains. The purpose of this statement is to describe efforts by Thai Union Group PCL (Thai Union) to prevent, detect, and remedy violations of human rights, particularly modern slavery and forced labor within our operations and supply chains. The statement covers periods up to 31 May 2019. (…)

1. About Thai Union

Thai Union Group PCL (Thai Union) … is regarded as the world's largest producer of shelf-stable tuna products with annual sales exceeding THB 133.3 billion (US$ 4.1 billion) and a global workforce of over 47,000 people (…)

2. Thai Union's Supply Chains

Seafood supply chains are complex, particularly where multiple species are involved. Thai Union is a processor. Globally, we do not own fishing vessels and own a very small number of aquaculture farms. Seafood raw materials are therefore sourced from suppliers from oceans and aquaculture operations around the world (…)

3. Thai Union's Commitment on Human Rights and Sustainability

Thai Union's mission is to be a seafood industry's leading agent of change, making a real positive difference to our consumers, our customers and the way the category is managed. … [We] are taking a leading role in tackling human & labor rights abuses, including modern slavery and human trafficking within the seafood industry in Thailand and globally. (…)

5. Policies on Modern Slavery, Human Trafficking, and Human Rights

5.1 Human Rights Policy

Launched in 2018, the policy states the commitment to use our commercial leverage and leadership role to address human rights issues not in our value chain but also in the wider global seafood industry. In line with the previously issued Business Ethics and Labor Code of Conduct, the Human Rights Policy reiterates our commitment to respect universal human rights, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.

5.2 Business Ethics and Labor Code of Conduct (CoC)

Launched in 2015, the Business Ethics and Labor Code of Conduct (CoC) embodies our commitment to conduct business with integrity, openness, and respect for universal human rights and core labor principles throughout our operations. The CoC is based on 12 Fundamental Principles grounded in internationally recognized standards. The Code is applicable to all Thai Union employees, suppliers, and any sub-suppliers employed by primary suppliers in business with Thai Union. In particular, the Code states:

521 Thai Union, *UK Modern Slavery Act Transparency Statement* 2018, https://www.thaiunion.com/files/download/sustainability/policy/UK-Modern-Slavery-Act-Statement-2018.pdf. Note that Thai Union's migrant workforce in Thailand is primarily composed of workers from Myanmar and Cambodia.

- All laws and regulations are complied with in the countries in which the supplier operates.
- Forced labor, whether in the form of indentured labor, bonded labor or other forms, is not acceptable. Mental and physical coercion, slavery and human trafficking are prohibited. (…)

5.3 Vessel Code of Conduct (VCoC) & Vessel Improvement Program (VIP)

To further mitigate the risks, including forced labor and modern slavery on the supplying vessels, we introduced the Vessel Code of Conduct (VCoC) in December 2017. … This code will be applicable to vessels from which Thai Union sources around the world. The VCoC must be signed by suppliers before we enter into a business relationship and by all of our existing suppliers. (…)

5.6 Ethical Migrant Recruitment Policy

Migration and recruitment of migrant workers is recognized as one of the highest risk areas for workers to become involved in human trafficking, forced labor or debt bondage. Thai Union's migrant workforce in Thailand is primarily composed of workers from Myanmar and Cambodia. Recognizing this, Thai Union has focused on reducing the potential for abuse and extortion by agents and brokers in recruitment of migrant workers. (…)

Liberty Global Asia, Compensating Trafficking Victims in Thailand and Cambodia[522]

(…) The full extent of human trafficking in Cambodia is unknown because few reliable statistics are available. Cambodia has a population of over 16 million with a young labour force.(...) It is a destination for many trafficked Vietnamese women and children, a source for countries such as Thailand, Malaysia, China, Indonesia and South Africa and internal trafficking within Cambodia also takes place from rural to urban areas.(...) The Global Slavery Index 2018 estimated the number of victims of modern slavery in Cambodia to be 261,000.(…)

The lack of data and information sharing means it is difficult to fully assess where Cambodia stands in relation to prosecution and protection of victims of trafficking. Data from civil society continues to indicate serious and systemic flaws in the criminal justice system resulting in a low number of convictions and lack of payment of compensation awards. The reasons for this vary but amongst the most significant factors are the high numbers of cases settled out of court, lack of faith in the judicial system, hesitancy by victims to initiate or cooperate with court proceedings due to social stigma, and lengthy court proceedings.

UNODC, Human Trafficking from Cambodia, Lao PDR and Myanmar to Thailand[523]

2.6.3 Legal and semi-legal operators

In the context of smuggling and trafficking operations from Cambodia to Thailand, it is often difficult to differentiate between criminal operators and individuals and businesses that offer legal or semilegal services. This is particularly the case with labour hire agencies and recruitment agents, which play an important role in facilitating both regular and irregular migration from Cambodia to Thailand.

Although Cambodia has instituted a licensing system that authorises private businesses to recruit Cambodian workers for Thai employers, some service providers do not fully comply with regulatory requirements. Others operate completely outside the licensing system. But even when labour recruitment agents operate within the legal framework, it is not uncommon for Cambodian workers who use official channels to end up in trafficking situations once they reach Thailand. (…)

522 Liberty Global Asia, *Turning Possibilities into Realities: Compensating Victims of Trafficking under Anti-Trafficking Legal Frameworks in Thailand and Cambodia* (2018) https://static1.squarespace.com/static/53038dd2e4b0f8636b5fa8c3/t/5b7fdca60ebbe8d5b49e25c1/1535106264552/viccompreport_update_0816.pdf.

523 UN Office on Drugs and Crime (UNODC), *Trafficking in Persons from Cambodia, Lao PDR and Myanmar to Thailand* (2017) https://www.unodc.org/documents/southeastasiaandpacific/Publications/2017/Trafficking_in_persons_to_Thailand_report.pdf.

2.6.4 Persons aiding and facilitating smugglers and traffickers

Corrupt officials: The corruption of border guards, police and other officials plays a vital part in enabling and facilitating irregular migration from Cambodia to Thailand. Allegations of the involvement of corrupt individuals in trafficking in persons and smuggling of migrants are long-standing. Some sources suggest that trafficking in persons, especially trafficking in women and children, could not occur with the ease and on the scale it does without corruption.

Travel agents, carriers, et cetera: Smuggling of migrants and trafficking in persons from Cambodia to Thailand involve a range of individuals and businesses that may not be directly connected to the perpetrators and their networks but offer specialised services needed to transport migrants, transfer funds or otherwise facilitate irregular migration. These may include travel agencies, bus and transport companies, taxis and drivers, other transport providers, hoteliers and other accommodation providers, as well as financial institutions and agents used to transfer money. Using informal agents appears to be particularly common for remittance transfers.

Urbina, 'Sea Slaves': The Human Misery That Feeds Pets and Livestock[524]

Lang Long's ordeal began in the back of a truck. After watching his younger siblings go hungry because their family's rice patch in Cambodia could not provide for everyone, he accepted a trafficker's offer to travel across the Thai border for a construction job. (…) But when he arrived, Mr. Long was kept for days by armed men in a room near the port at Samut Prakan, more than a dozen miles southeast of Bangkok. He was then herded with six other migrants up a gangway onto a shoddy wooden ship. It was the start of three brutal years in captivity at sea.

The misery endured by Mr. Long … is not uncommon in the maritime world. … In interviews, those who fled recounted horrific violence: the sick cast overboard, the defiant beheaded, the insubordinate sealed for days below deck in a dark, fetid fishing hold. (…)

While forced labor exists throughout the world, nowhere is the problem more pronounced than here in the South China Sea, especially in the Thai fishing fleet, which faces an annual shortage of about 50,000 mariners, based on United Nations estimates. The shortfall is primarily filled by using migrants, mostly from Cambodia & Myanmar. Many of them, like Mr. Long, are lured across the border by traffickers only to become so-called sea slaves in floating labor camps. (…)

Supply and Demand

The boat that delivered Mr. Long to captivity and subsequently rescued him was known as a "mothership." Carrying everything from fuel and extra food to spare nets and replacement labor, these lumbering vessels, often over a hundred feet long, function as the roving resupply stores of the marine world. Motherships are the reason that slow-moving trawlers can fish more than 1,500 miles from land. They allow fishermen to stay out at sea for months or years and still get their catch cleaned, canned and shipped to American shelves less than a week after netting.

But once a load of fish is transferred to a mothership, which keeps the cargo below deck in cavernous refrigerators, there is almost no way for port-side authorities to determine its provenance. It becomes virtually impossible to know whether it was caught legally by paid fishermen or poached illegally by shackled migrants.

Bar codes on pet food in some European countries enable far-flung consumers to track Thai-exported seafood to its onshore processing facilities, where it was canned or otherwise packaged. But the supply chain for the 28 million tons of forage fish caught annually around the globe, about a third of all fish caught at sea and much of it used for pet and animal feed, is invisible before that.

524 Ian Urbina, '"Sea Slaves': The Human Misery That Feeds Pets and Livestock', *New York Times* (27 July 2015) http://www.sopawards.com/wp-content/uploads/2016/05/The-Outlaw-Ocean.pdf.

Sasinan Allmand, the head of corporate communications for Thai Union Frozen Products, said that her company does routine audits of its canneries and boats in port to ensure against forced and child labor. The audits involve checking crew members' contracts, passports, proof of payment and working conditions. "We will not tolerate any human trafficking or any human rights violation of any kind," she said. Asked whether audits are conducted on the fishing boats that stay at sea, like the one where Mr. Long was captive, she declined to respond.

Human rights advocates have called for a variety of measures to provide greater oversight, including requiring all commercial fishing ships to have electronic transponders for onshore monitoring and banning the system of long stays at sea and the supply ships that make them possible. But their efforts have gotten little traction. (…)

Some pet food companies are trying to move away from using fish. Mars Inc., for example, which sold more than $16 billion worth of pet food globally in 2012, roughly a quarter of the world's market, has already replaced fishmeal in some of its pet food and will continue in that direction. By 2020, the company plans to use only non-threatened fish caught legally or raised on farms and certified by third-party auditors as not being linked to forced labor. Though Mars has been more proactive on these issues than many of its competitors, Allyson Park, a Mars spokeswoman, conceded that the fishing industry has "real traceability issues" and struggles to ensure proper working conditions. This is even more challenging, she said, since Mars does not purchase fish directly from docks but further up the supply chain. Over the past year, Mars received more than 90,000 cartons of cat and dog food from the cannery supplied by one of the boats where Lang Long was held captive, according to the Customs documents.

Zimmerman et al, Health and Human Trafficking in the Mekong Sub-Region[525]

In Cambodia, the main government agencies responsible for the referral and protection of victims are the Ministry of Interior and the Department of Anti-Trafficking and Juvenile Protection (whose main role is to interview victims, conduct investigations and provide protection), and the Ministry of Social Affairs, Veterans and Youth, which provides direct assistance and reintegration, family tracing for unaccompanied minors and vocational training). Other government agencies involved are the Ministry of Foreign Affairs and International Cooperation and relevant embassies and consulates overseas who work with local authorities and international agencies in destination countries to identify and repatriate Cambodian victims of trafficking.

Recruitment Stage

Awareness of trafficking: Over the past decade, significant resources have been invested in "awareness raising" to prevent human trafficking. Participants were asked: "Before you left home, had you ever heard about "human trafficking?" Less than half (44.1%) of all participants (from the various countries of origin) reported that they had previously heard about "trafficking." Thailand was the country with the highest proportion of nationals who had heard about trafficking (65.4%), followed by Cambodia (46.2%), the Lao People's Democratic Republic (39.7%), Viet Nam (38.9%) and Myanmar (32.8%). (…)

Reasons for leaving home: People often have multiple reasons for migrating for work (...) Participants were asked (…) The most common reasons cited were that "I didn't earn enough money in my job" (42.5%), "I know others who left and earned money" (37.9%), and "I could not find a job nearby" (23.8%). Thirty-five participants (3.2%, n=35 of 1102) reported: "I was abducted." Nineteen of the 35 were under 18 years old, and 27 of the 35 were female.

Recruitment: Participants were asked, "Who do you think is responsible for getting you into the trafficking situation?" and were invited to offer more than one answer. Just over half (50.7%) stated that they themselves were responsible. When participants implicated others, "brokers" or recruitment agents (33.9%) were most commonly cited.

525 Cathy Zimmerman et al., *Health and Human Trafficking in the Greater Mekong Subregion: Findings from a Survey of Men, Women and Children in Cambodia, Thailand and Viet Nam,* London School of Hygiene and Tropical Medicine (LSHTM) International Organization for Migration (IOM) (2014) https://publications.iom.int/system/files/pdf/steam_report_mekong.pdf.

Of the 420 participants who offered more than one response, participants were most likely to name themselves (65.7%, n=276 of 420) and a broker (52.6%, n=221 of 420) as the individuals who were primarily responsible for the trafficking. (…)

Questions

1. What is the difference between forced labour and human trafficking? What is the relation between them and why are they treated together under the 'modern slavery' term?
2. How is modern slavery different from slavery?
3. How forced labor and human trafficking happen in businesses in Cambodia?
4. Is the issue of human trafficking a domestic, transboundary or regional issue? Who are the key players in combating human trafficking in all these situations and in different industries?
5. What are the obligations and challenges for the government in regulating the issues of forced labor and human trafficking in Cambodia?
6. What are the legal and moral responsibilities for businesses that engage in human trafficking and/or forced labor? What should companies do concretely to comply with their responsibilities?
7. How far should these legal and moral responsibilities extend regarding modern slavery in their supply chains?

Further Readings

- Human Rights and Business Dilemmas Forum, *Forced Labour* (undated) https://hrbdf.org/dilemmas/forced-labour/#.Wtc5qC5ubDA.
- International Finance Corporation (IFC), *Guidance Notes: Performance Standards on Environmental and Social Sustainability* (2012) https://www.ifc.org/wps/wcm/connect/e280ef804a0256609709ffd1a5d13d27/GN_English_2012_Full-Document.pdf?MOD=AJPERES.
- UK Home Office, *Transparency in Supply Chains - A Practical Guide* (2015) www.gov.uk/government/uploads/system/uploads/attachment_data/file/471996/Transparency_in_Supply_Chains_etc__A_practical_guide__final_.pdf.
- Kamala D. Harris, *The California Transparency in Supply Chains Act - A Resource Guide, Attorney General California Department of Justice* (2015) https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf.
- Business & Human Rights Resource Centre, *Modern Slavery Registry* http://www.modernslaveryregistry.org/.
- Fair Labor Association, *Addressing Risks Of Forced Labor In Supply Chains* (2017) http://www.fairlabor.org/sites/default/files/documents/reports/addressing_forced_labor_in_supply_chains_august_2017.pdf.
- International Labour Organisation (ILO), *General Principles & Operational Guidelines for Fair Recruitment* (2016) http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_536755.pdf.
- International Labour Organisation (ILO), *Ship to Shore Rights: Baseline Research on Fishers and Seafood Workers in Thailand* (2018) https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/publication/wcms_619727.pdf.

- Mars, *Thai Fish Supply Chain Human Rights Action Plan* (2016) https://css.undercurrentnews.com/wp-content/uploads/2016/09/thaifishery1.pdf.

- UK Government, *Modern Slavery Statement* (2020) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/875800/UK_Government_Modern_Slavery_Statement.pdf.

- Genevieve LeBaron & Andreas Rühmkorf, 'Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance', Global Policy 8(3) (2016) https://www.researchgate.net/publication/312068663_Steering_CSR_Through_Home_State_Regulation_A_Comparison_of_the_Impact_of_the_UK_Bribery_Act_and_Modern_Slavery_Act_on_Global_Supply_Chain_Governance.

- Andrew Crane et al., 'Governance Gaps in Eradicating Forced Labor: From global to domestic supply chains', *Regulation & Governance* 13:1 (2019) www.researchgate.net/publication/316822320_Governance_gaps_in_eradicating_forced_labor_From_global_to_domestic_supply_chains.

- Peter Vandergeest & Melissa Marschke, *Modern Slavery and Freedom: Exploring Contradictions through Labour Scandals in the Thai Fisheries* (2019) www.researchgate.net/publication/336419219_Modern_Slavery_and_Freedom_Exploring_Contradictions_through_Labour_Scandals_in_the_Thai_Fisheries.

- Tehmina Khan, 'Slavery and Sustainable Development', in W. Leal Filho et al. (eds.), *Responsible Consumption and Production, Encyclopedia of the UN Sustainable Development Goals* (2020) https://link.springer.com/content/pdf/10.1007/978-3-319-95726-5_300130.pdf.

- Royal Government of Cambodia, *Policy on Labor Migration for Cambodia* (2014) http://www.mekongmigration.org/wp-content/uploads/2008/05/PDF1.42MB.pdf.

- Kiranee Tammapiban-udom, *Legal Measures to Prevent Human Rights Infringement in the Product Supply Chain: A Focus on Thai Fishery Industry* (2015) https://so05.tci-thaijo.org/index.php/TBLJ/article/view/112489/87632.

- UN-ACT, *Human Trafficking Vulnerabilities in Asia: A Study on Forced Marriage Between Cambodia and China* (2016) http://un-act.org/wp-content/uploads/2016/08/Final_UN-ACT_Forced_Marriage_Report.pdf.

- International Labour Organisation (ILO), *Caught at Sea: Forced Labor and Trafficking in Fisheries* (2013) https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_214472.pdf.

- ECPAT International, *Cambodia – Country Overview: A Report on the Scale, Scope and Context of the Sexual Exploitation of Children* (2018) https://www.ecpat.org/wp-content/uploads/2018/04/ECPAT-Country-Overview-Cambodia.pdf.

- Chenda Keo, et al., *Human Trafficking and Moral Panic in Cambodia* (2014) https://www.researchgate.net/publication/273807827_Human_Trafficking_and_Moral_Panic_in_Cambodia.

- Business & Human Rights Resource Centre, *Cambodia: Blood Bricks Project Looks into Modern Slavery in the Brick-Making Industry: Some Companies Respond* (2018) https://www.business-humanrights.org/en/cambodia-blood-bricks-project-looks-into-modern-slavery-in-the-brick-making-industry-some-companies-respond.

- Betti Rosita Sari, *The Human Trafficking of Cambodian Women and Children for Sex Industry: Internal and External Case Study* (2010) https://jkw.psdr.lipi.go.id/index.php/jkw/article/view/285/160.

- Liberty Asia, *Legal Gap Analysis of Thailand's Anti-Trafficking Legislation* (2017) http://un-act.org/publication/view/legal-analysis-human-trafficking-thailand/.

- Environmental Justice Foundation, *Thailand's Seafood Slaves* (2015) https://ejfoundation.org/resources/downloads/EJF-Thailand-Seafood-Slaves-low-res.pdf.

- Oxfam International, *Supermarket Responsibilities for Supply Chain Workers' Rights* (2018) https://s3.amazonaws.com/oxfam-us/www/static/media/files/Supermarket_Responsibilities_for_Supply_Chains_Rights_report.pdf.

- Praxis Labs, Tracking Progress: *Assessing Business Responses to Forced Labor and Human Trafficking in the Thai Seafood Industry* (2019) http://www.praxis-labs.com/uploads/2/9/7/0/29709145/09_hu_report_final.pdf.

- International Justice Mission, *Labor Trafficking in Cambodia* (2016) https://www.ijm.org/documents/studies/labor_trafficking_in_cambodia_-_a_review_of_the_pjss_response_ijm_2016.pdf.

- Fiona David, et al., *Migrants and Their Vulnerability: To Human Trafficking, Modern Slavery and Forced Labor* (2019) https://publications.iom.int/system/files/pdf/migrants_and_their_vulnerability.pdf.

- Laura S. Johnson, *Trafficking Victim Protection Frameworks in Cambodia, Indonesia, Lao PDR, Thailand, and Viet Nam: A Resource for Practitioners* (2020) https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwic3Oa64vfsAhWYaCsKHbO3Crc4ChAWMAR6BAgDEAI&url=https%3A%2F%2Fwww.winrock.org%2Fwp-content%2Fuploads%2F2020%2F08%2FVictim-protection-frameworks-in-SE-Asia-NEXUS-winrock-final-1.pdf&usg=AOvVaw3keCblvC6P4gyEXEmF7QMz.

17. LIVING WAGES

Prom Savada, Naim Sakona, Radu Mares

Introduction

Low wages – sometimes not covering even the basic necessities of a life with dignity – is an issue in many countries, both developing and developed states. Today, the international standard is that of a 'living wage' in recognition that minimum legal wages are often artificially low and disconnected from the real costs of living. This is part of the Decent Work Agenda promoted by the ILO and the UN Agenda 2030 (chapter 2). Increasing wages through the actions of individual companies alone can be difficult because remuneration levels are heavily influenced by labour market supply and demand, involve macroeconomic aspects, are affected by competitive pressures in supply chains, and might defy simple regulatory solutions. Extremely low wages trigger other labour violations such as excessive overtime (chapter 18) as workers feel compelled to work extra hours to make ends meet. Becoming tired due to excessive hours in turn can trigger accidents (chapter 20). After years of experimentation with more simple solutions, leading companies have forged new multistakeholder partnerships (chapter 5) and indicate that systemic problems can only be addressed through a collaboration of public and private actors to raise remuneration levels within the entire industry. In developed countries, labour unions and management negotiate to set appropriate wage levels; in this process, freedom of association, collective bargaining and the right to strike are essential (chapter 19). When states repress trade unions, possibly acting on the belief that this creates a favorable environment for trade and investment (chapter 3), workers are deprived of a key tool to achieve minimum wages. There has also been progress in the development of methodologies that make it possible to calculate living wages.

Cambodia upholds the fundamental human right of equal pay for equal work and puts in place an annual minimum wage setting for workers in textile, garment and footwear sectors. As a result, the minimum wage has been increasing since 1997. However, to achieve a decent work for workers, they should be able to receive a living wage in case the minimum wage fails to do so. For that reason, unions and workers in Cambodia have continued pushing every year for the government and manufacturing companies to narrow the gap between the minimum wage and the living wage as soon as possible, claiming that the current speed of minimum wage increment is unlikely to provide workers a living wage. However, achieving a living wage is a complicated and ambitious process considering the fast-changing economy in Cambodia as well as globally. Unlike regulating 'minimum wage', achieving 'living' wage would require participation from all relevant stakeholders to address current barriers to living wage together.

Main Aspects

- ✓ Wage, minimum wage, living wage, low pay (1/3 of median wage)
- ✓ Coverage of minimum wage: national, by industry, by occupation
- ✓ Method of calculation: factors for determining minimum/living wage

- ✓ Forms of pay: piece rate pay, payment in kind
- ✓ Excluded or vulnerable workers (domestic workers, migrant workers, young workers)
- ✓ Social protection (minimum wages and income transfers)
- ✓ Collective bargaining
- ✓ Overtime
- ✓ Relation to legal system (labour inspection, conciliation/arbitration)
- ✓ Minimum wage commissions
- ✓ Relation to market efficiency, productivity, employment, inflation, labour flexibility, comparative advantage of states in international trade
- ✓ Minimum wage: needs of workers and economic considerations
- ✓ Multi-stakeholder collaboration and industry-wide action (response to systemic problems)
- ✓ Purchasing practices of buyer companies

Background

ILO, Wages[526]

Wages means "remuneration or earnings, however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by national laws or regulations, which are payable in virtue of a written or unwritten contract of employment by an employer to an employed person for work done or to be done or for services rendered or to be rendered". (ILO Protection of Wages Convention, 1949 (No. 95), Article 1)

In many cases, total wages or earnings include different components, such as:

- basic pay
- annual bonuses
- tips
- in-kind benefits
- productivity and performance pay
- allowances and premiums for non-standard work hours or dangerous work.

The fact that total wages or earnings are made of different components raises the question of which components should count towards compliance with the minimum wage. Should the minimum wage apply to workers' total earnings – or should it apply only to some of its components? Convention No. 131 does not explicitly indicate the elements to be included in the minimum wage. But clarity is needed for a minimum wage policy to be operational.

In some countries, only basic wages are taken into account for the purpose of minimum wages. In other countries, most other wage components are also included. While both options are possible, a problem arises in cases where the basic wage constitutes only a very small part of total earnings (in which case a minimum wage that applies only to the basic wage is not very meaningful) or when the components of the minimum wage are left undefined. In some countries with no clear legal definition of what the minimum wage should include, this question tends to end up in court.

526 International Labour Organisation (ILO), Minimum Wage Policy Guide (2016) www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/genericdocument/wcms_508566.pdf.

ILO, Minimum Wages[527]

Minimum wages have been defined as "the minimum amount of remuneration that an employer is required to pay wage earners for the work performed during a given period, which cannot be reduced by collective agreement or an individual contract". This definition refers to the binding nature of minimum wages, regardless of the method of fixing them. Minimum wages can be set by statute, decision of a competent authority, a wage board, a wage council, or by industrial or labour courts or tribunals. Minimum wages can also be set by giving the force of law to provisions of collective agreements.

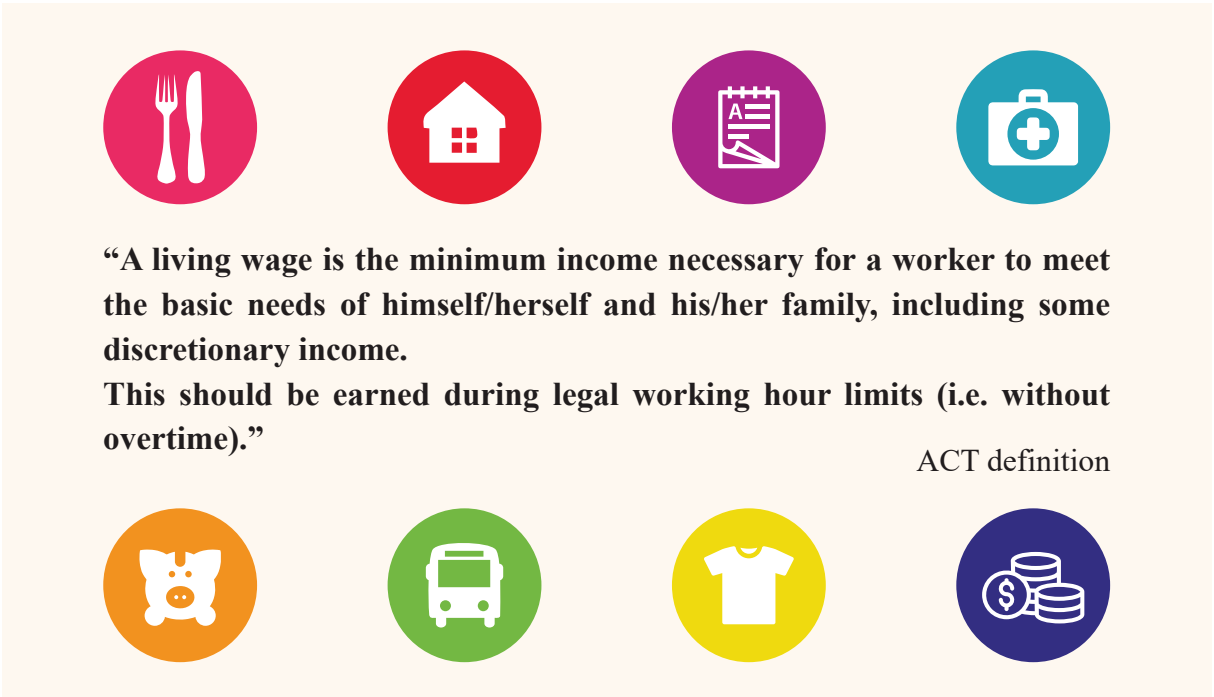
Minimum wage systems should not be seen or used in isolation, but should be designed in a way to supplement and reinforce other social and employment policies. Several types of measures can be used to tackle income and labour market inequality, including pro-employment policies, social transfers, and creating an enabling environment for sustainable enterprises. The purpose of a minimum wage, which sets a floor, should also be distinguished from collective bargaining, which can be used to set wages above an existing floor.

Living Wage

A Living Wage is: 'The remuneration received for a standard workweek by a worker in a particular place sufficient to afford a decent standard of living for the worker and her or his family. Elements of a decent standard of living include food, water, housing, education, health care, transportation, clothing, and other essential needs including provision for unexpected events.' [528]

The concepts of "living wage" and "living income" are both about achieving a decent standard of living for households. The idea of a living wage, however, is applied in the context of hired workers (in factories, on farms, etc.), whereas living income is discussed in the context of any income earner, such as self-employed farmers.[529]

ACT (Action, Collaboration, Transformation): how does ACT define a living wage?[530]



527 International Labour Organisation (ILO), Minimum *Wages Policy Guide, 'Definition and purpose'* (2016) https://www.ilo.org/global/topics/wages/minimum-wages/definition/WCMS_439072/lang--en/index.htm#2.

528 Global Living Wage Coalition, *What is a Living Wage?,* www.globallivingwage.org/about/what-is-a-living-wage.

529 Global Living Wage Coalition, *Living Income,* www.globallivingwage.org/about/living-income.

530 ACT (Action, Collaboration, Transformation) (2018) https://actonlivingwages.com/living-wages

Marinakis, The Role of ILO in the Development of Minimum Wages[531]

The history of minimum wages started a few years before the creation of the ILO. At the beginning of the 20th century, very few countries were experimenting with this new instrument, with the limited scope of protecting workers in low-paying industries or activities. (…) Some sceptics thought there was no need to introduce a minimum wage, as collective bargaining would develop with the expansion of industrialisation providing a bilateral instrument for wage fixing. In fact, this trend did not happen, and minimum wages proved to be a very useful instrument for guiding wage determination, while protecting less skilled workers.

The concept of minimum wages evolved during the years, particularly during the 1960s, when it was conceived as an instrument for economic development. (…) During the 1980s and 1990s, the call for flexibility was incorporated into the stabilization and adjustment programmes. Minimum wages were seen as a source of rigidity which impeded labour market efficiency, rather than a useful instrument as a wage floor which guaranteed a decent standard of living. (…) While at the creation of the Organization wages were part of the core values, the reaffirmation of the ILO's mission during the 1990s did not include the issue of wages e.g. the Declaration of Fundamental Principles and Rights at work of 1998 made no reference to this issue.

However, most recently, perhaps in view of signs of revival of "living wage" concerns in some countries since the turn of the millennium, the 2008 ILO Declaration on Social Justice for a Fair Globalization refers to a minimum living wage. (…) At the beginning of the 21st century, more than 90 per cent of the countries have a minimum wage, being one of the most extensively applied labour policies. The very existence of the minimum wage as part of the basic policy tools is not under question any more, but the remaining challenge is to arrive to a broad consensus on its correct implementation.

Instruments

The Universal Declaration of Human Rights[532]

Article 23: (…) (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

International Covenant on Economic, Social and Cultural Rights[533]

Article 7: The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

531 Andrés Marinakis, *The Role of ILO in the Development of Minimum Wages,* International Institute for Labor Studies (2009) https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_180793.pdf.

532 *Universal Declaration of Human Rights* (1948) www.ohchr.org/en/udhr/pages/searchbylang.aspx.

533 *International Covenant on Economic, Social and Cultural Rights* (1966) www.ohchr.org/en/professionalinterest/pages/cescr.aspx.

ILO, Minimum Wage Fixing Convention[534]

Article 3

The elements to be taken into consideration in determining the level of minimum wages shall, so far as possible and appropriate in relation to national practice and conditions, include

(a) the needs of workers and their families, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups;

(b) economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment.

Article 4

1. Each Member which ratifies this Convention shall create and/or maintain machinery adapted to national conditions and requirements whereby minimum wages for groups of wage earners covered in pursuance of Article 1 thereof can be fixed and adjusted from time to time.

2. Provision shall be made, in connection with the establishment, operation and modification of such machinery, for full consultation with representative organisations of employers and workers concerned or, where no such organisations exist, representatives of employers and workers concerned.

3. Wherever it is appropriate to the nature of the minimum wage fixing machinery, provision shall also be made for the direct participation in its operation of

   (a) representatives of organisations of employers and workers concerned (…) on a basis of equality;

   (b) persons having recognised competence for representing the general interests of the country and appointed after full consultation with representative organisations of employers and workers concerned (…).

ILO, Minimum Wage Fixing Recommendation[535]

6. The minimum wage fixing machinery provided for in Article 4 of the Convention may take a variety of forms, such as the fixing of minimum wages by

   (a) statute;

   (b) decisions of the competent authority, with or without formal provision for taking account of recommendations from other bodies;

   (c) decisions of wages boards or councils;

   (d) industrial or labour courts or tribunals; or

   (e) giving the force of law to provisions of collective agreements.

534 International Labour Organisation (ILO), *Convention Concerning Minimum Wage Fixing, with Special Reference to Developing Countries (no. 131)* (1970) www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312276.

535 International Labour Organisation (ILO), *Recommendation concerning Minimum Wage Fixing, with Special Reference to Developing Countries (No. 135)* (1970) www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:::NO:12100:P12100_ILO_CODE:R135:NO.

7. The consultation provided for in paragraph 2 of Article 4 of the Convention should include, in particular, consultation in regard to the following matters:

   (a) the selection and application of the criteria for determining the level of minimum wages;

   (b) the rate or rates of minimum wages to be fixed;

   (c) the adjustment from time to time of the rate or rates of minimum wages;

   (d) problems encountered in the enforcement of minimum wage legislation;

   (e) the collection of data and the carrying out of studies for the information of minimum wage fixing authorities.

ILO, Declaration on Social Justice for a Fair Globalization[536]

(…) the ILO has the solemn obligation to further among the nations of the world programmes which will achieve the objectives of full employment and the raising of standards of living, a minimum living wage and the extension of social security measures to provide a basic income to all in need (…)

I. (…) the four equally important strategic objectives of the ILO, through which the Decent Work Agenda is expressed (…):

   (ii) developing and enhancing measures of social protection – social security and labour protection – which are sustainable and adapted to national circumstances, including: (…)

      - policies in regard to wages and earnings, hours and other conditions of work, designed to ensure a just share of the fruits of progress to all and a minimum living wage to all employed and in need of such protection

ILO, Minimum Wage Policy Guide[537]

Setting and adjusting minimum wage levels

Setting and adjusting the level is perhaps the most challenging part of minimum wage fixing. If set too low, minimum wages will have little effect in protecting workers and their families against unduly low pay or poverty. If set too high, minimum wages will be poorly complied with and/or have adverse employment effects.

To be meaningful, minimum wages have to be set at a level that covers the needs of workers and their families, while taking into account economic factors. Assessing whether existing rates are sufficient to meet the needs of workers and their families can be challenging. First, needs of workers and their families cannot be considered in a vacuum; they must be understood in relation to a country's level of economic and social development, taking into account the views of social partners. Secondly, whether a minimum wage is sufficient to cover family needs depends on the size of one's family, which varies across workers. It also depends on how many family members earn the minimum wage, and on the local cost of living. Because of all these reasons, adequate minimum standards of living should be ensured through the combination of a minimum wage and social security measures. Yet some useful benchmarks can be used for the purpose of fixing minimum wages.

536 International Labour Organisation (ILO), *Declaration on Social Justice for a Fair Globalization* (2008) www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_371208.pdf.

537 International Labour Organisation (ILO), *Minimum Wage Policy Guide* (2016) www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/genericdocument/wcms_508566.pdf.

Absolute estimates of needs of workers and their families can be constructed by estimating the average cost of basic but decent life style for a worker and his or her family by adding up the cost of food, housing, and other essential expenses like for health, education of children, and participation in the social life of the community. This is the approach usually taken in estimating national poverty lines or "living wage" thresholds.

Measuring the needs of workers and their families

Assessing the needs of workers and their families, for the purpose of setting the minimum wage, can be complex for three principle reasons tied to: the measurement of the minimum income level, the household size, and the number of household members working. (…)

a. Income benchmarks – what are the needs of an individual?

The definition of needs is a relative concept. There can be basic needs, higher needs, and so on. The definition of these different types of needs can also vary across and within countries. For example, should allowance for recreation be considered as part of basic needs – or are they higher needs? The difficulty of pinning down what constitutes what type of need explains why there is no universal definition that is widely accepted. (…)

b. Household size: How many people's needs can or should be met?

Household size varies across workers and also through the lifetime of a worker. During the working lifetime of an individual, it is common that a wage earner's family comprises both adults and dependants. But how many dependents? How many people's needs should be met? Considering the potential multiplicity of situations, what is the best approach to estimate the size of a household? Three possible options are presented below:

- consider the national average
- consider two adults and two minors as a structure that ensures population replacement
- consider the average household size of lower-income households, given that minimum wages generally aim to protect these groups and that poorer households tend to be larger. (…)

c. Labour force participation rates: how many people work in a household?

How many people work in a household? This question is important to determine how many people's needs should be met through one minimum wage. The answer is of course different if two adult members earn a minimum wage as opposed to only one adult. (…)

Given all these different situations, as well as the methodological aspects, what is the most appropriate way to estimate the number of income earners per household for purposes of the minimum wage fixing process? Four possible model scenarios are presented here:

- Only one full-time worker, in order to ensure that a household covers its basic needs with one minimum wage.
- All working-age adults in a household work full time. For example, in a family with two adults and two children, the two adults would work full time.
- The average at the national level, taking into consideration that in many households there is more than one income earner and that not all workers work full time.
- The average among lower-income families, in case the number of workers differs from the average family.

Our discussion shows that there are no unambiguous ways to determine whether a minimum wage meets the needs of workers and their families. The answer will always depend on what criteria are used to determine the needs of workers and their families in a given country, the household size of workers, as well as the number of workers per household. It is important for policy makers, however, to have a clear understanding of the living standard that minimum wage earners can afford, and to try to agree on minimum income benchmarks that should be reached through minimum wages and other policies such as income transfers.

Monitoring the effects of minimum wages

Monitoring the effects of minimum wages is a key element of an evidence-based system. Findings from rigorous impact assessment studies should find their way back to Governments and social partners, and inform subsequent rounds of adjustment or changes to the system.

Governments and social partners should have access to studies on the effects of minimum wages on variables such as wages, employment, informality, hours of work, gender pay gaps, income inequality or poverty. Studies should also monitor effects on prices and on the different elements of aggregate demand, including household consumption, investment or the competitiveness of exports. (…)

More controversial is the debate on the employment effects, which have been found to vary across countries and studies. A recent World Bank overview concluded that "although the range of estimates from the literature varies considerably, the emerging trend in the literature is that the effects of minimum wages on employment are usually small or insignificant (and in some cases positive)." But differences in findings across countries and studies point towards the importance of country-specific programmes for monitoring the employment effects of minimum wages, particularly on vulnerable workers and enterprises.

How to enforce minimum wages?

High rates of non-compliance have negative consequences not only for workers and their families, whose rights are violated, but also for compliant employers, as it gives non-compliant enterprises an illegitimate cost advantage. Compliance can be increased through a number of implementation measures, including:

- information and awareness raising campaigns
- capacity building activities for employers' and workers' representatives
- empowering workers to claim their rights through individual complaints as well as collective action
- measures to formalize the informal economy
- targeted labour inspections
- sanctions that function as a deterrent to non-compliance
- monitoring and responsible purchasing practices within global supply chains
- public employment programmes that pay minimum wages

The extent of non-compliance can also vary depending on the design of minimum wage policies and the number of rates, and also depends on the effectiveness of the entire process of designing and implementing minimum wage policies, from fixing the right level and rate structure in the first place, in full consultation with employers' and workers' organizations. This is why a comprehensive approach is necessary.

Payment in kind

Payment in kind is non-cash remuneration received by an employee for work performed. This can include: food, drink, fuel, clothing, footwear, free or subsidized housing or transport, electricity, car parking, nurseries or crèches, low or zero-interest loans or subsidized mortgages.

The ILO Protection of Wages Convention, 1949 (No. 95) allows "for the partial payment of wages in the form of allowances in kind in industries or occupations in which payment in the form of such allowances is customary or desirable because of the nature of the industry or occupation concerned" (Article 4.1). In such cases, it calls however for measures to ensure that: (a) "such allowances are appropriate for the personal use and benefit of the worker and his family"; and (b) "the value attributed to such allowances is fair and reasonable".

It must be kept in mind that payment in-kind tends to limit the financial income of workers. (…) There is also a risk of abuse. Hence, even in those industries or occupations in which such a method of payment is long-established and well-received by the workers concerned, there is a need for safeguards and legislative protection. This can be done in different ways:

- Prohibiting in-kind payments as part of the minimum wage. In Spain, the legislation allows for the inclusion in the wage of payments in kind up to 30 per cent, but prohibits it as part of the minimum wage. In Cambodia, in-kind payment cannot be considered as part of the minimum wage.
- Allowing a maximum percentage of the wage: While no Conventions or Recommendations fix a specific threshold for payments in kind, the ILO Committee of Experts has expressed doubt concerning payment in kind that exceeds 50 per cent of the wage. Most countries have lower thresholds, with many not allowing in-kind payments exceeding 30 per cent of the wage. (…)
- Valuing in-kind payments at cost or less than the cost to employers: In order to preclude employers from profiting from the provision of payment in kind, some countries explicitly state that employers may not charge more than the actual cost of the goods provided. Other countries use the price a worker would pay for a product, service or housing if he or she were to buy it. (…)

Piece rate pay

Piece rate pay occurs when workers are paid by the unit performed (e.g. the number of tee shirts or bricks produced) instead of being paid on the basis of time spent on the job. (…)

In developing countries, workers relying on piece rate wages often constitute a vulnerable section of workers, with many working in the informal economy. Large numbers are women. Piece rate pay is also frequent in the textile, garment, footwear and leather industries, and in global supply chains. (…)

In some countries, piece rate workers must be paid a "fair wage". In the U.K. piece rate can only be used in limited situations when the employer does not know how many hours the worker does work (e.g. as with some home workers).

A fair wage for piece rate workers in the United Kingdom

Employers are obliged to implement the following method:

- Find out the average number of tasks or pieces completed per hour; for example workers may produce on average 12 shirts per hour.
- Divide this number by 1.2 so that new workers won't be disadvantaged if they're not as fast as the others yet; in our example we divide 12 shirts by 1.2 which is equal to 10 shirts produced.
- Divide the hourly minimum wage rate by that number to work out the fair rate for each piece of work completed. If the minimum wage rate is £6.70, workers must be paid at least 67p per shirt they make (£6.70 divided by 10).

ILO, Labour Protection in a Transforming World of Work[538]

2.1. Wage policies

25. During the 1980s and 1990s, support for minimum wage policies weakened. High inflation and the shift from import-substitution industrialization to export-led growth policies in many parts of the developing world led many countries to discontinue adjustments to the minimum wage, leading to a fall in their real value. Debates on labour flexibility and the perceived role of minimum wages and other labour protection policies in contributing to unemployment and informality resulted in a decline in the standing of the minimum wage as a mechanism of labour protection. The decline in unionization and collective bargaining coverage, the pressures caused by globalization and the financial markets and the availability of new technologies weakened workers' ability to bargain for higher wages.

26. [in 16 high-income countries] the share of worker compensation in gross domestic product (GDP) (the so-called labour share) declined from a peak of about 75 per cent in the mid1970s to less than 65 per cent just before the outbreak of the global economic and financial crisis. Although there is no universal trend, studies and reports have also documented the decline in labour shares in various large emerging economies and most regions of the world. This downward trend in the labour share is reflected in the decoupling of wage growth from productivity growth in many parts of the world (…). The main causes of these trends vary from country to country, but they have been attributed to factors including labour-reducing technological changes, the intensification of global trade, pressures to maximize shareholder value, weaker labour market institutions and the reduced bargaining power of workers.

27. The decoupling of wages and productivity growth has been accompanied in recent years by an increase in wage inequality, with greater stagnation for workers at the bottom of the wage distribution, who are primarily low-skilled and in a weaker position to negotiate wage increases and thus have a greater need for mechanisms of institutional support, such as collective bargaining and minimum wages. (…)

28. To combat low-paid work and rising poverty, and as a means to increase the purchasing power of workers, more countries have turned to the minimum wage as a policy tool over the past decade. The renewed attention on the minimum wage is also partly due to the emergence of empirical evidence showing that minimum wages, when well-designed and implemented, help protect workers and have limited impact either on employment or inflation. (…)

3.1.1. Minimum wages

46. (…) Coverage is affected, for example, by the type of minimum wage system that is in place in a country. Some countries have a national minimum wage that applies to all waged workers in a country (with some exceptions), whereas other countries have systems that apply only to selected industries or occupations. About half of the 151 countries and territories reviewed in a recent ILO study have a minimum wage system that applies uniform coverage on a national or regional basis; the remaining countries implement systems with multiple rates that vary by industry or occupation. (…)

47. Even in countries that provide a national or regional uniform rate, there are groups of workers that are sometimes excluded, such as domestic workers, family members, young people, apprentices, disabled workers, workers in free trade zones, agricultural workers and workers in micro- and small enterprises. (…)

538 International Labour Organisation (ILO), *Labour Protection in a Transforming World of Work* (2015) https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_358295.pdf.

48. With regard to the level of protection, the challenge is to set minimum wages in a balanced way that takes into account a host of factors, including: the needs of workers and their families; the general level of wages in the country; the cost of living; social security benefits; the relative living standards of different social groups; and economic factors such as levels of productivity and possible adverse effects on employment if the minimum wage is set too high. (…)

49. The issue of compliance deserves more attention than it has sometimes received in the past. A recent [article] found that one third of the 326 million wage earners who were legally covered in the 11 countries under study were paid less than the legal minimum, indicating a significant degree of non-compliance. In addition, the authors found that, in nine of the countries, the average wages of female workers earning sub-minimum wages was lower than those of male workers, such that the depth of violation was more pronounced among women. This was also true of ethnic and racial minorities and informal workers. (…)

52. The issue of how much is paid is more complicated when it involves overtime. Overtime is an issue of both payment and working hours. Because overtime may need to be paid at a higher rate than regular working hours, disagreement between employers and workers can frequently lead to formal legal complaints about payment. (…)

53. Wage protection is facilitated when there are social actors and legal institutions to support workers. Trade unions play a vital role in guaranteeing that workers are paid in full and in a timely manner. (…) Labour inspectorates and labour arbitration or courts are also critical when violations of wage protection provisions take place. (…)

1.1.2. Making work pay: Extending minimum wage protection

115. The Minimum Wage Fixing Convention, 1970 (No. 131), does not prescribe a particular model of minimum wage system or the level at which a minimum wage should be fixed; rather, it offers member States some flexibility in the implementation of its principles and leaves decisions to national authorities, in consultation with the social partners. Designing the appropriate minimum wage policy involves a number of policy challenges. The 2014 General Survey on minimum wage systems highlighted some of the policy issues that were likely to pose difficulties for national constituents, including:

    (i) the definition of the concept of wages and the identification of the elements of remuneration to be included in the minimum wage, particularly in relation to benefits in kind (such as housing and food), for example in the case of domestic workers;

    (ii) the exclusion of specific categories of workers from the application of the Convention, notably when frequently applied to categories such as domestic workers, agricultural workers, young workers or other groups that may need protection from unduly low wages;

    (iii) the application of the principle of equal pay for work of equal value, especially when minimum wages differ by sector or occupation, or differ on the basis of age, disability or the migrant status of the workers concerned;

    (iv) compliance with the requirement that employers' and workers' organizations should be fully consulted at all stages of the development and implementation of the system;

    (v) the joint consideration of the needs of workers and their families and of economic factors; and

    (vi) the establishment of dissuasive sanctions and the allocation of adequate resources for labour inspection services.

ILO, Global Wage Report[539]

Minimum wages

One measure introduced to reduce wage inequality and working poverty in many countries in recent years has been the establishment or strengthening of minimum wages. The level and distribution of wages are determined by a wide range of factors. Choices that are made in education, childcare or migration policies can affect the supply of male and female workers of different skill levels to the labour market, while trade policies or technological innovations can change the relative demand for workers with different levels of qualifications.

Labour market institutions also have a significant impact on wages and wage inequality. Collective bargaining allows groups of workers to negotiate higher wages with employers, and this can have a particularly large impact for workers in the lower half of the distribution who may have less individual bargaining power. In many countries, however, collective bargaining coverage remains relatively low or has contracted. Several countries have accordingly turned towards new or stronger minimum wage setting mechanisms. As the OECD has pointed out, "the recent crisis and the longer-running trend of rising inequality have added new momentum to minimum-wage debates".

The setting of minimum wages is a balancing act; it should be based on statistical evidence and done in full consultation with social partners and, where appropriate, with their direct participation on an equal footing. Recent evidence shows that when minimum wages are set at an adequate level, taking into account the needs of workers and their families as well as economic factors, they can raise the wages of low-paid workers – many of whom are women – without significant negative effects on jobs. This has been the finding, for example, of the UK Low Pay Commission (2014) and of the first evaluation of the new national minimum wage in Germany.

After reviewing the existing literature, a World Bank study concluded that "although the range of estimates from the literature varies considerably, the emerging trend in the literature is that the effects of minimum wages on employment are usually small or insignificant (and in some cases positive)". In high-income countries, a review of about 70 studies shows that findings are varied but the most frequent finding is that employment effects are close to zero and too small to be observable in aggregate employment or unemployment statistics. Similar conclusions emerge from meta-studies (quantitative studies of studies) in the United States, the United Kingdom, and in developed economies in general.

These findings, however, remain controversial; other reviews conclude that employment effects are less benign and that minimum wages reduce employment opportunities for less-skilled workers. In developing countries, findings also seem more mixed and country-specific, which points towards the importance of monitoring the effects of minimum wages at country level. An additional concern in developing countries is that instead of causing lower employment, minimum wages that are too high may cause employees to be displaced from the formal to the informal economy.

Global Living Wage Coalition, Methodology for Estimating a Living Wage[540]

This methodology has been used to estimate living wages in nine countries for a multi-national corporation while it was being developed and has now been used to estimate living wage for over 30 additional locations globally for the GLWC, with strong uptake and interest among both local and international stakeholders. (…)

The living wage methodology has two main components. The first component estimates cost of a basic but decent lifestyle for a worker and his/her family in a particular place. The second component determines if the estimated living wage is being paid to workers. (…)

539 International Labour Organisation (ILO), *Global Wage Report 2016/17 - Wage inequality in the workplace* (2017) www.ilo.org/global/research/global-reports/global-wage-report/lang--en/index.htm (references omitted).

540 Global Living Wage Coalition, *The Anker Methodology for Estimating a Living Wage* (2018) www.globallivingwage.org/about/anker-methodology.

I. Estimating the Cost of a Basic but Decent Lifestyle for Workers and Families

In the first step, living costs are divided into three categories: food, housing, and other essential needs.

Food costs are estimated based on: (i) a low cost nutritious diet that meets World Health Organization (WHO) recommendations on calories, macronutrients, and micronutrients and is consistent with local food preferences and a country's development level; and (ii) local food prices for the types, qualities, and quantities of foods that workers typically buy based on new data collection that involves workers and key informants. (…)

Housing costs are estimated using international (UN-HABITAT) and national standards for decency (e.g. dwellings located outside slums and unsafe areas that have permanent walls, roofs that do not leak, and adequate ventilation; amenities such as electricity, water, and sanitary toilet facilities; and sufficient living space so parents can sleep separately from children). (…)

Lastly for practical reasons, cost of other essential needs is estimated using an extrapolation method based on secondary household expenditure data. This is then "post checked" to make sure that sufficient funds are included for health care, education, and transportation. (…)

Total cost per capita of a basic but decent standard of living is then scaled up to arrive at a cost for a typical family size in the area. A small margin is then added to provide for unexpected events and emergencies such as illnesses and accidents, to help ensure sustainability and avoidance of the perpetual poverty trap. To arrive at the living wage estimate, the estimated total cost of a decent standard of living for a typical family is then defrayed over the typical number of full-time equivalent workers per family for that location. (…)

This methodology is a practical compromise between separately estimating cost of each and every expense families have, and the most common approach currently used for estimating living wage in developing countries, which uses just two expense groups (food costs based on a model diet and nonfood costs based on secondary data). Using normative standards for decent housing and estimating housing costs separately (not as part of nonfood costs, as in typical methodologies) ensures that living wage estimates enable workers to afford decent housing. In contrast, typical methodologies rely on available expenditure data to estimate housing costs and so replicate current (often substandard) housing conditions. Our methodology also better allows for different living wage estimates for rural and urban areas, as housing costs are usually the most important cause of differences in living costs.

II. Determining if a Living Wage is Being Paid

To determine if a worker receives a living wage, the methodology takes into account how workers are paid. For example: (i) overtime pay is excluded because living wage needs to be earned in standard working hours; (ii) productivity bonuses and allowances are excluded unless they are guaranteed; (iii) mandatory taxes are taken into consideration because sufficient disposable income is required so workers can afford a decent living standard; and (iv) fair and reasonable value for in-kind benefits provided is taken into consideration, because in-kind benefits reduce the amount of cash income workers need for a decent living standard. However, since too great a reliance on non-monetary benefits hinders empowerment and free choice, the methodology includes rules on how to value in-kind benefits to ensure that their value is fair and reasonable.

The methodology also include guidances on how to check wage levels in different labour situations (e.g. standard employment, temporary or seasonal labour, piece rate).

Involvement of Local Stakeholders

The process of estimating a living wage for a particular location involves consultation with and the participation of local stakeholders, including trade unions and employer organisations when present. The goal of the estimation process is to obtain a credible living wage estimate that stakeholders are likely to view as legitimate and reasonable regardless of whether or not local employers feel they can pay this living wage. Local stakeholders are closely involved in the collection of local food and housing costs, based on visits to workers' homes and places where workers shop for food; workers provide information on local preferences and living conditions; employers and workers provide information on in-kind benefits, bonuses, and deductions from pay; and, before final conclusions are taken, stakeholders are asked to provide feedback and suggestions on preliminary living wage estimates.

ACT (Action, Collaboration, Transformation)[541]

Background

ACT (Action, Collaboration, Transformation) is a ground-breaking agreement between global brands and retailers and trade unions to transform the garment and textile industry and achieve living wages for workers through collective bargaining at industry level linked to purchasing practices.

Collective bargaining at industry level means that workers in the garment and textile industry within a country can negotiate their wages under the same conditions, regardless of the factory they work in, and the retailers and brands they produce for. Linking it to purchasing practices means that payment of the negotiated wage is supported and enabled by the terms of contracts with global brands and retailers.

ACT is the first global commitment on living wages in the sector that provides a framework through which all relevant actors, including brands and retailers, trade unions, manufacturers, and governments, can exercise their responsibility and role in achieving living wages.

ACT members have agreed the following the principles:

- A joint approach is needed where all participants in global supply chains assume their respective responsibilities in achieving freedom of association, collective bargaining and living wages.
- Agreement on a living wage should be reached through collective bargaining between employers and workers and their representatives, at industry level.
- Workers must be free and able to exercise their right to organize and bargain collectively in accordance with ILO Conventions.

Memorandum of understanding between ACT corporate signatories and INDUSTRIALL Global Union on establishing within global supply chains freedom of association, collective bargaining and living wages

Goals and Purpose

This Memorandum of Understanding (MoU) aims at creating a cooperation between IndustriALL Global Union and ACT (Action Collaboration Transformation) corporate signatories ("We") in order to achieve living wages for workers in the global textile and garment industry supply chains through mature industrial relations, freedom of association and collective bargaining. (…)

541 ACT (Action, Collaboration, Transformation), What is ACT? (2018) https://actonlivingwages.com/fact-sheet.

There are two sustainable mechanisms that we consider have the capacity to deliver freedom of association, collective bargaining and living wages to any scale, while setting a level playing field:

- Industrywide collective agreements
- National minimum wage fixing enforcement mechanisms

Framework for Action

We recognise that business security and commitment to production countries and suppliers are a key enabler for paying living wages in conjunction with all other pillars of our joint approach. (…)

4) Corporate signatories will work to ensure that their respective purchasing practices support long-term partnerships with manufacturers in support of ethical trade. We, ACT corporate signatories and IndustriALL, will jointly design a strategy for this which takes into account the nature of the industry.

5) Corporate signatories will ensure that their purchasing practices facilitate the payment of a living wage as defined in this document

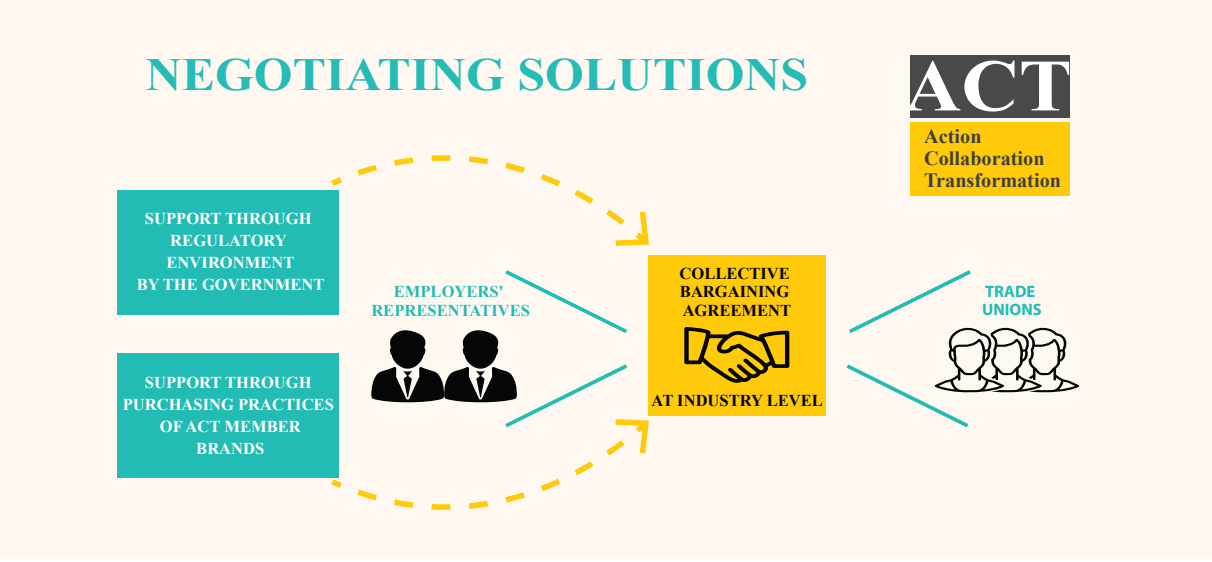
7) The corporate signatories will exchange the necessary information for this programme regarding their strategic supplier factories with IndustriALL for the purpose of effective implementation in the target countries.

8) The corporate signatories will work with their supplier factories and IndustriALL will work with its affiliated unions in target countries to bring them together to negotiate towards a living wage.

9) We will provide capacity building to both groups in support of this process, including training of managers and workers on freedom of association and collective bargaining.

14) IndustriALL and ACT signatories will make joint approaches to governments in support of higher minimum wage outcomes, including brand commitments to continued sourcing, taking into account the gap between the minimum wage and a living wage, cost of living increases, productivity and efficiency gains and the development of the skills of workers, carried out in cooperation with unions at workplace level.

Negotiating solutions[542]



542 ACT, *Negotiating Solutions,* https://actonlivingwages.com/country-activities.

Ethical Trading Initiative, A Living Wage for Workers[543]

Why is living wage rising on the global agenda?

- The rising phenomenon of "the working poor" since the 2008 recession – ie working people who are unable to make ends meet because wages are too low.
- The gap between national minimum wages and cost of living increasing
- The growing awareness and concern of consumers about working conditions (heightened further by incidents such as the Rana Plaza collapse)
- The continued development of international standards for business and ethics.

What are the challenges to achieving living wages?

- Wage levels come about through a complex economic process of labour supply and demand, through negotiations, established policy norms, the power relations between workers and employers etc. Artificially setting wages may be impracticable or may lead to unintended consequences.
- If overall budgets are not increased, increasing wages for some workers could lead to others being laid off or not recruited – ie increased unemployment
- Lower skilled workers, may be priced out of the job market because the value they add is not seen to be equivalent to the new higher level of wages
- Companies may be unwilling or unable individually to increase the prices they pay to suppliers for products
- In a top down approach, if higher prices are paid, suppliers may not pass price increases on to workers, particularly if workers have no bargaining power.

What can brands and retailers do?

It is important for companies to look beyond definitions and calculation methodologies and to think about inclusive mechanisms that ensure that a living wage is a product of a process of negotiation which is able to respond to externalities over time, and how this is accommodated in the value chain. As part of this process it is vital to consider the particular rate of pay in a particular location and industry. Companies should:

- Build long term, mutually trusting relationships with suppliers and work together to understand the drivers of prevailing wage levels and how they can be influenced
- Consult with workers/managers to calculate living wage levels for the area/industry
- Advocate for mechanisms to set national minimum wages that equate to living wages
- Ensure cost of living wages are accommodated throughout the value chain and if necessary in product price
- Improve workers' collective bargaining power and ensure their right to freedom of association is respected.

543 Ethical Trading Initiative, A Living Wage for Workers (2018) https://www.ethicaltrade.org/issues/living-wage-workers.

- Incentivise employers to pay living wages – eg by increasing orders to those suppliers.
- Improve productivity and efficiency to enable the value chain to accommodate wage growth.
- Mitigate the impact of wage increases on unemployment or other unintended consequences in your supply chains.
- Join forces with other ETI members, companies, NGOs and trade unions, to share lessons on working towards living wages.

Nike, Sustainable Business Report[544]

Fair compensation, meaningful benefits

Every contract factory worker in our supply chain has the right to a standard of living that's adequate to support them and their families. We, like many other brands, have committed to work with our suppliers to progressively meet employees' basic needs, including some discretionary income. We believe that the wages can increase as overall factory operational efficiency improves.

A better run factory should be more profitable and should then be able to pay higher wages, in exchange for benefits such as lower turnover, higher productivity, and better quality product. Workers are key to delivering on the promise of high quality and high productivity, and need to be compensated accordingly.

Since FY15, we have partnered with a leading academic, factory management, workers, and third-party experts to see if we could increase the value created in a factory and see it shared between management and workers.

Our pilot tested three different approaches, each focusing on productivity improvements, shared value creation, and employee engagement.

After collecting baseline data, we spent a full year building the foundation of a better running factory, which included all key areas within our Lean 2.0 approach. These covered line operations, supervisory skills, leader standard work, relief teams, engagement and communication processes, social dialogue, stress resilience activities, and management skills. During the second year, we tested different ways to align compensation with Lean principles, make pay more transparent to workers, and empower workers to participate in decision-making and problem-solving.

The results show that worker agency – their ability to voice their views and opinions – was important to good business performance. Collaborative problem solving between workers and supervisors increased, while self-reported levels of stress fell. Key business metrics, like turnover, productivity, and profitability, all improved. And, importantly, take-home pay went up.

H&M, Fair Living Wage Strategy[545]

The people making H&M group's products should have good working conditions and earn a fair living wage. For us, this is indisputable and the reason why we have developed a global fair living wage strategy.

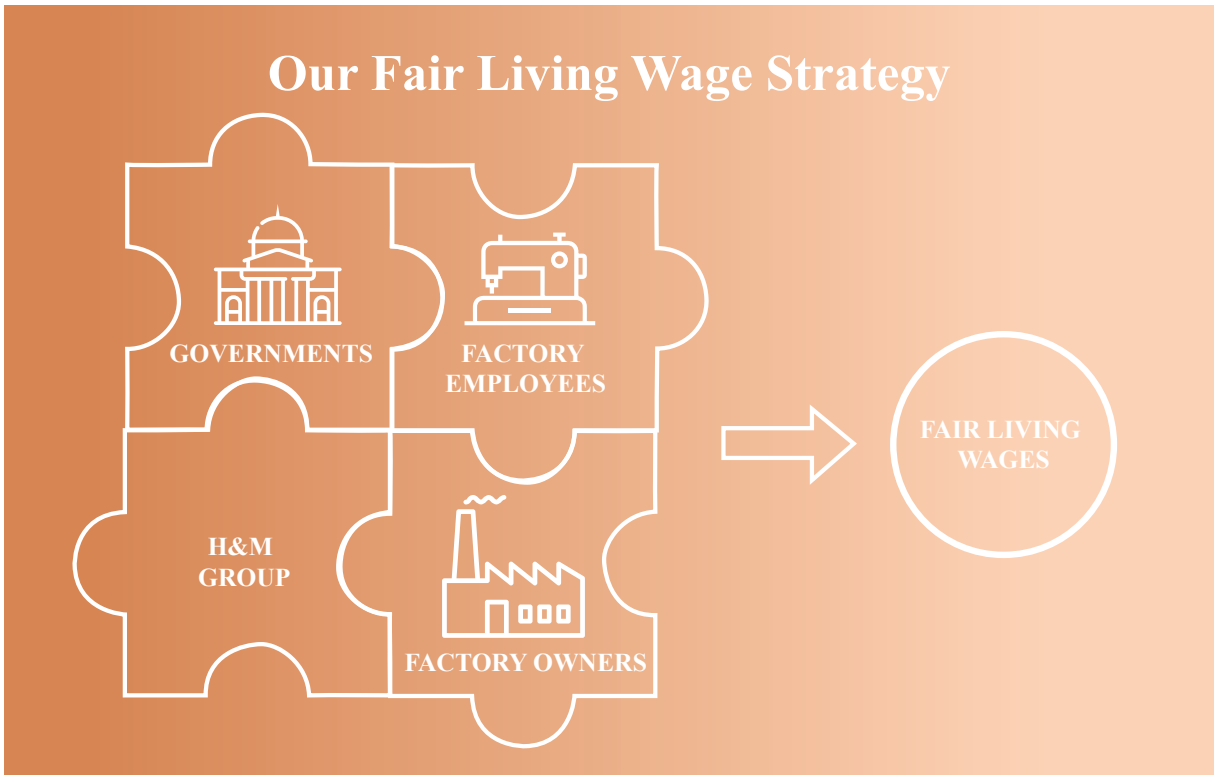
We define a fair living wage as one which satisfies the basic needs of workers and their families as well as providing some discretionary income. A fair living wage should be revised annually, and negotiated regularly.

544 Nike, *FY16/17 Sustainable Business Report* (2017) https://sustainability-nike.s3.amazonaws.com/wp-content/uploads/2018/05/18175102/NIKE-FY1617-Sustainable-Business-Report_FINAL.pdf.

545 Kayte Lawton and Matthew Pennycook, Beyond The *Bottom Line - The Challenges and Opportunities of a Living Wage* (2013) www.resolutionfoundation.org/app/uploads/2014/08/Beyond_the_Bottom_Line_-_FINAL.pdf.

Improved workplace dialogue and industrial relations – where freedom of association is respected, where workers' representatives have a voice and where trade unions can negotiate and bargain collectively – are preconditions for lasting improvements for the garments workers in all areas of working conditions, including fair living wages, but also for stable and predictable production markets. That is what our Fair Living Wage strategy, that we developed in 2013, is built upon. Here's how we work:

- We engage in dialogue with local governments to further develop the legal framework needed for improved industrial relations.
- We engage with factory owners to enable them embracing the importance of well-functioning industrial relations as well as implementing well-functioning wage management system. Improved wage management systems and workplace dialogue are implemented at an increasing number of factories and countries.
- We train workers and management about their rights and responsibilities and facilitate the democratic election of employee representatives through trade unions or worker committees. For example, in 2017, 100% of the garment manufacturer units in Bangladesh producing for us, conducted democratic election of worker representatives. In total, 2,882 persons were elected and 40% of those were women.
- We ensure that we maintain good purchasing practices by being long-term and stable business partners which helps enable factories to pay a fair living wage.
- To really drive our fair living wage strategy forward we also collaborate with industry experts, NGOs, unions, stakeholders and other brands. One example is our collaboration through ACT (Action, Collaboration, Transformation) (…)



Lawton and Pennycook, Challenges and Opportunities of a Living Wage[546]

Key findings

For over a decade the living wage has served as a rallying cry for decent pay above the national minimum. Harnessing the power of social norms, it has raised the profile of working poverty and has broadened the debate about low pay. Much of the idea's power lies in its simplicity; the view that working people should be paid enough to afford a minimum acceptable standard of living. And much of its vibrancy lies in a bottom-up, community organising approach, which has caught the imagination in a world in which worker empowerment was often assumed to be in serial decline.

The question is: how can public policy support a civil society campaign without undermining these great strengths? The answer will not be a Whitehall [British government] diktat and nor is it likely to be a single, simple policy ruse. Government will need to find ways of working in partnership with business, workers and civil society and adopt a mixture of approaches, leading by example, unleashing data into the hands of campaigners, raising the heat on social norms, and finding new ways to reward local areas for innovation.

Reynaud, The ILO and the Living Wage - A Historical Perspective[547]

The objective, as it was stated, is to provide or ensure to all workers either "an adequate living wage", in Part XIII of the Treaty of Versailles [1919], or "a minimum living wage", in the Philadelphia Declaration [1944] as well as in the 2008 Declaration, which just quoted the previous Declaration. But further to these solemn statements, the concept of a living wage does not appear in ILO's instruments related to the closely linked question of minimum wages, which concern the machinery of "minimum wage fixing".

Recently, there has been a renewed interest in the living wage, notably among multi-national enterprises and NGOs. (…) From the beginning the notion of a living wage was linked to that of a minimum wage, and we will see how the principle, from an objective, became a criterion among various criteria in minimum wage fixing and was finally subsumed under the criterion of the "needs of workers and their families".

The Treaty of Versailles [establishing the International Labour Organization states in] the preamble: "[…] whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required: as, for example, […], the provision of *an adequate living wage1, [...]."*

The Declaration of Philadelphia was adopted by the International Labour Conference during its 26th Session in Philadelphia on 10 May 1944 (…): "(d) policies in regard to wages and earnings, hours of work and other conditions of work calculated to ensure a just share of the fruits of progress to all, and *a minimum living wage to all employed and in need of such protection".*

Wages are an especially important issue for the ILO since its origin. They are essential for workers as the source of their livelihood and, at the same time, low wages are used in some countries as a comparative advantage in international trade. The tension between these two dimensions is closely linked to the very reason for establishing the Organization in 1919: to avoid social unrest that could imperil "the peace and harmony of the world" in improving labour conditions, in the context of international economic competition and free trade. With the experience of the pre-WWI economic globalization – the "first globalization" –, it was clear for the negotiators at the Paris Conference that to improve labour conditions worldwide an international labour organization was

546 Kayte Lawton and Matthew Pennycook, Beyond The Bottom Line - The Challenges and Opportunities of a Living Wage (2013) www.resolutionfoundation.org/app/uploads/2014/08/Beyond_the_Bottom_Line_-_FINAL.pdf.

547 Emmanuel Reynaud, The International Labour Organization and the Living Wage – a Historical Perspective (2017) https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_557250.pdf.

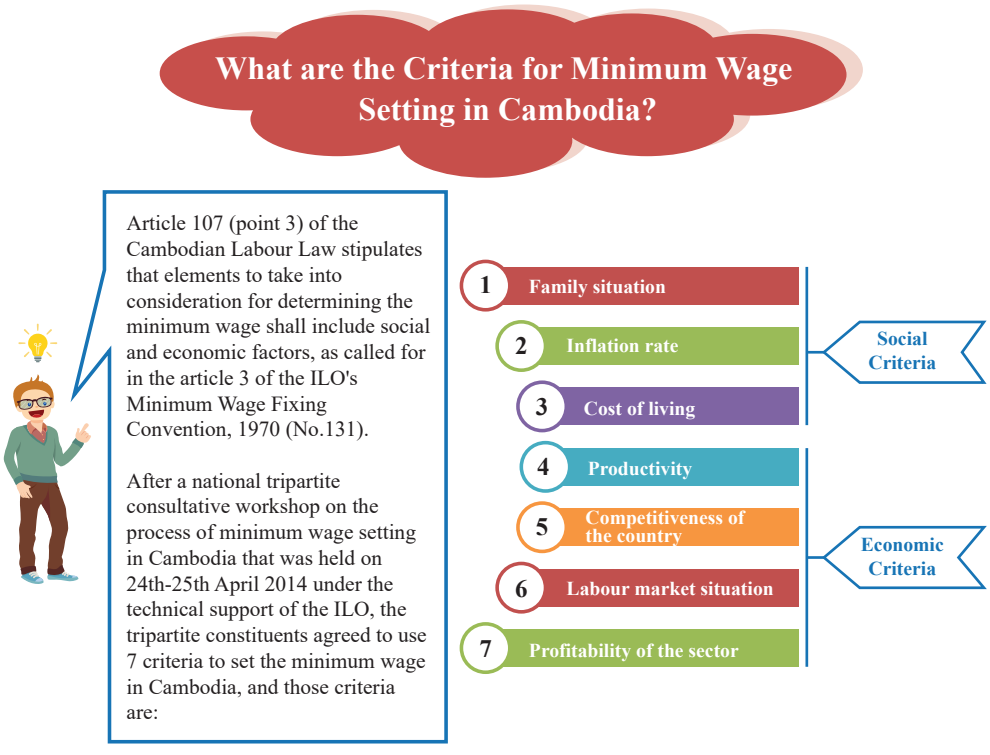
needed, as "the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries" (Treaty of Versailles, Part XIII, preamble, par. 3). Among the urgent priorities for improvement, they identified wages and set an ambitious objective for them: the provision of an adequate living wage, understood as a minimum wage.

The explicit aim [of the International Labour Office, the permanent secretariat of the ILO] was to measure the extent of social dumping, the comparative advantage of reducing the cost of production through wages limitation. (…) [At the 1927 ILO Conference], Britain, as a major industrialized country with minimum wage legislation, was obviously keen to have other countries adopt such legislation and ensure a level playing field in international trade. Other delegates had a very cautious reaction to the initial proposal, even though it was a "modest one", only dealing with minimum wage fixing machinery. After discussion, revision and clarification, the proposal was finally adopted with the clear understanding that it had a very limited scope: the intention was in no way to fix wages or an international minimum by a convention, but just to set general principles for national governments to establish minimum wage-fixing machinery. (…)

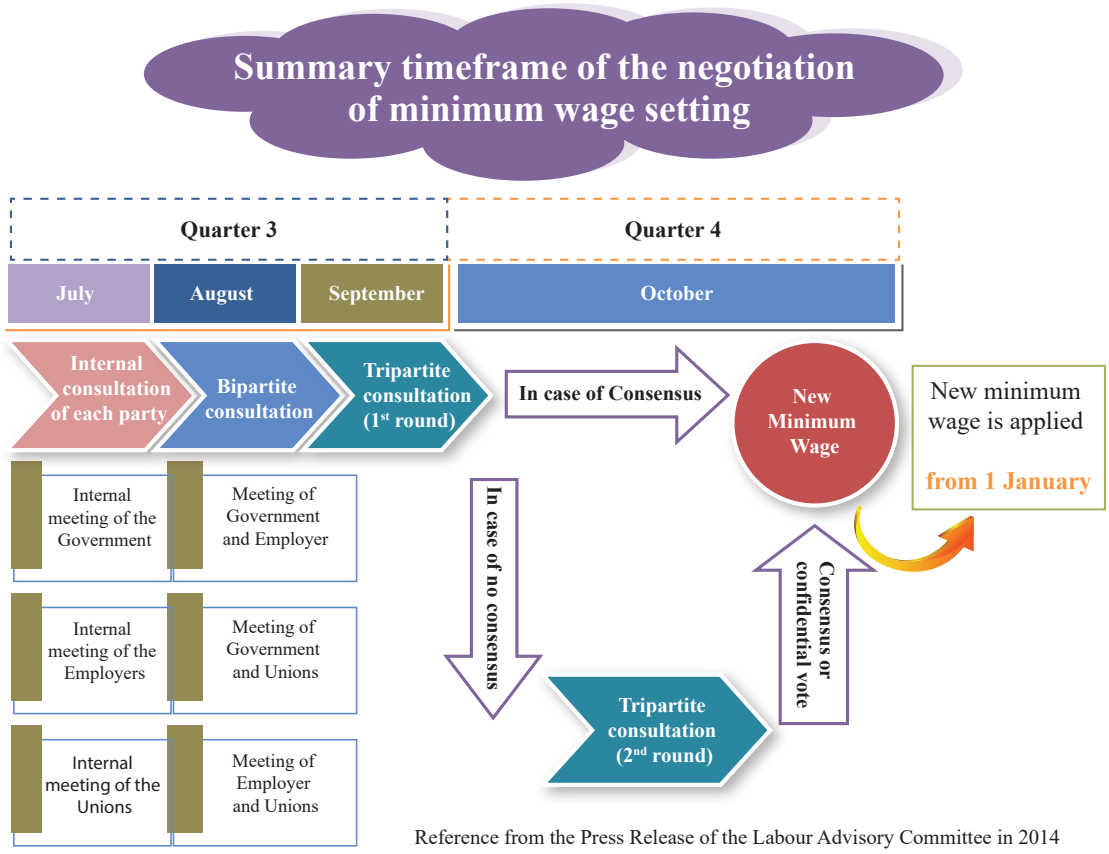
The issue of minimum wages came back on the agenda of the ILO in the 1960s. The context was dramatically different from the 1920s, especially with the substantial expansion of ILO membership and a corresponding wider variety of interests represented with the great number of new Nation States in the previously colonized territories. (…) This led to the adoption by the Conference in June 1970 of the Convention 131 and Recommendation 135 on Minimum Wage Fixing. The objective of a "living wage" is re-introduced in these instruments under the notion of "the needs of workers and their families" as a criterion to determine the level of minimum wages, taking into account the general level of wages in the country, the cost of living, social security benefits and the relative living standard of other social groups. But economic factors should also be taken into consideration in fixing minimum wage levels, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment.

Background (Cambodia)

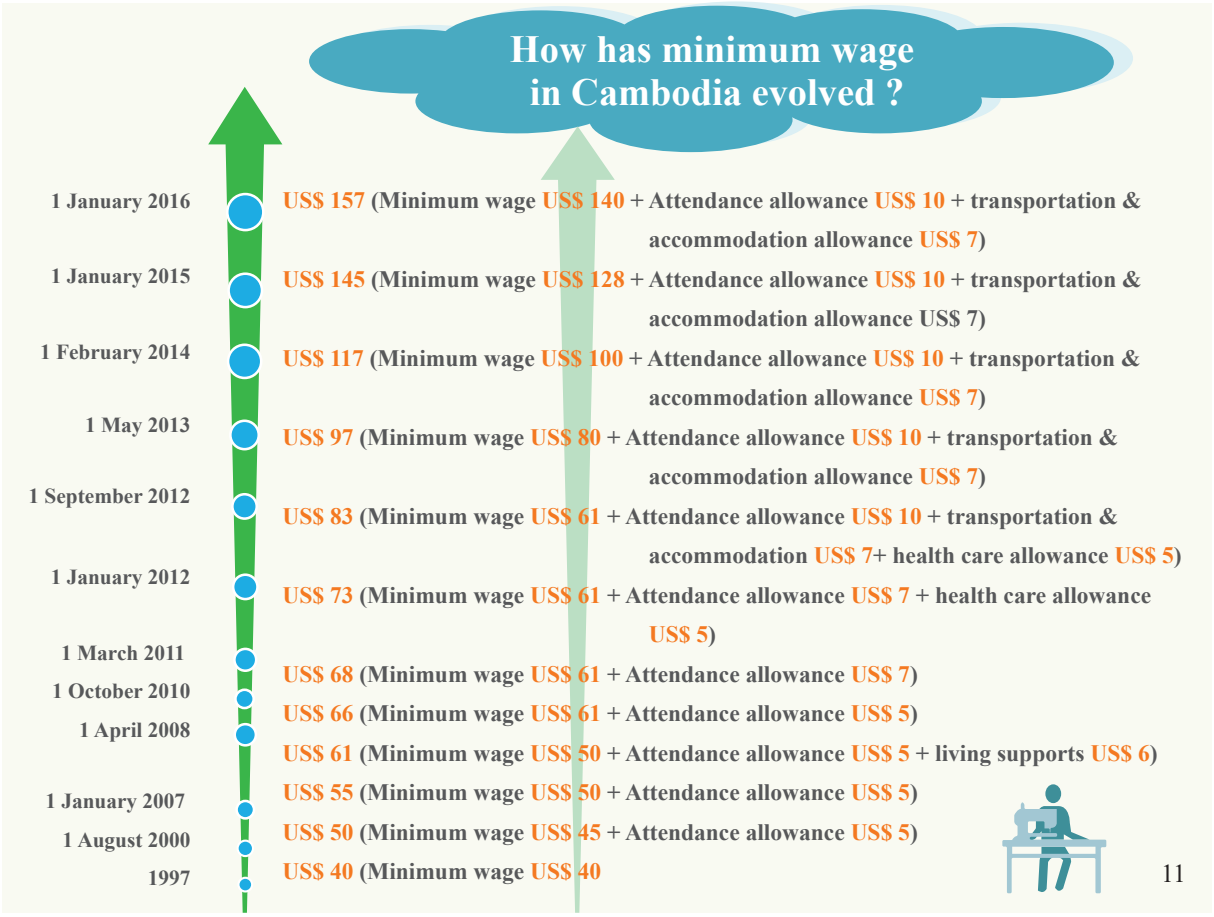
Minimum Wage Setting in Cambodia[548]



548 International Labour Organisation (ILO) & the Cambodian Ministry of Labour and Vocational Traning, Minimum Wage Setting in Cambodia (2016) http://www.mlvt.gov.kh/index.php?option=com_k2&view=item&task=download&id=327_7a51a37c2d55e9437295115a2d15a019&Itemid=236&lang=en



Reference from the Press Release of the Labour Advisory Committee in 2014 9



11

Instruments (Cambodia)

Labour Law[549]

Article 103: Wage includes, in particular:

- actual wage or remuneration;
- overtime payments;
- commissions;
- bonuses and indemnities;
- profit sharing;
- gratuities;
- the value of benefits in kind;
- family allowance in excess of the legally prescribed amount;
- holiday pay or compensatory holiday pay;
- amount of money paid by the employer to the workers during disability and maternity leave.

Wage does not include:

- health cares;
- legal family allowance;
- travel expenses;
- benefits granted exclusively to help the worker do his or her job.

Article 104: The wage must be at least equal to the guaranteed minimum wage; that is, it must ensure every worker of a decent standard of living compatible with human dignity.

Article 105: Any written or verbal agreement that would remunerate the worker at a rate less than the guaranteed minimum wage shall be null and void.

Article 107: The guaranteed minimum wage is established without distinction among professions or jobs. It may vary according to region based on economic factors that determine the standard of living.

The minimum wage is set by a Prakas (ministerial order) of the Ministry in Charge of Labor, after receiving recommendations from the Labor Advisory Committee. The wage is adjusted from time to time in accordance with the evolution of economic conditions and the cost of living. Elements to take into consideration for determining the minimum wage shall include, to the extent possible:

a) the needs of workers and their families in relation to the general level of salary in the country, the cost of living, social security allowances, and the comparative standard of living of other social groups;

b) economic factors, including the requirements of economic development, productivity, and the advantages of achieving and maintaining a high level of employment.

549 Cambodia, *Labour Law* (1997) http://www.cambodiainvestment.gov.kh/the-labor-law-of-cambodia_970313.html

Article 108: For task-work or piecework, whether it is done in the workshop or at home, the wage must be calculated in a manner that permits the worker of mediocre ability working normally to earn, for the same amount of time worked, a wage at least equal to the guaranteed minimum wage as determined for a worker.

Article 357: The Labor Advisory Committee has the mission primarily to study problems related to labor, the employment of workers, wages, vocational training, the mobility of labor force in the country, migrations, the improvement of the material and moral conditions of workers and the matter of labor health and safety.

The Labor Advisory Committee has the following duties:

- formulate recommendations on the guaranteed minimum wage;
- render advice beforehand in order to extend the scope of a collective agreement or, if there is no collective agreement, give advice eventually on any regulation concerning the conditions of employment in a given profession or in a certain sector of activity.

Article 369: Those guilty of violating the provisions of Articles (…) 104 [guaranteed minimum wage] (…) are liable to a fine of sixty-one to ninety days of base daily wage or to imprisonment of six days to one month.

Prakas on Minimum Wage for Textile, Garment and Footwear Sector[550]

Article 1: To add $3 on top of $187 (One Hundred and Eighty Seven US Dollars) proposed by the National Minimum Wage Council as the monthly minimum wage for workers in textile, garment and footwear sectors for 2020.

The minimum wage for workers in textile, garment and footwear sector for 2020 shall be set officially as $190 (One hundred and Ninety US Dollars only) per month. (…)

DFDL, Cambodia Legal Update: Law on Minimum Wage[551]

The Law on Minimum Wage was promulgated on 6 July 2018 and now guarantees a minimum wage for employees covered by the provisions of the Labour Law. A tripartite National Council on Minimum Wage ("NCMW"), comprised of the government, employer representatives, and employee representatives, will be established to study, research and provide recommendations on the determination of minimum wages and other benefits for persons covered by the Labour Law. Subject to the discretion of the NCMW, key factors in determining the minimum wage include (1) social considerations (such as inflation rates and living expenses); and (2) economic considerations (such as productivity, competition, job market status and profitability of a particular industry). The discussions on minimum wages by the NCMW must be undertaken annually (unless decided otherwise by the NCMW) and in accordance with the procedures set out in this new law.

Based on the NCMW's recommendation, the minimum wage will be determined by a Prakas issued by the Ministry of Labour and Vocational Training ("MLVT") and must take effect from 1 January of the subsequent year. The MLVT may prioritize implementation of the minimum wage based on economic activity, industry sector or region. (…)

550 Cambodia, Prakas No. 389/19 On Minimum Wage Determination for Workers in Textile, Garment and Footwear Sectors for 2020 (2019) https://www.camfeba.com/legal/Prakas/2019/Prakas%20No.%20389%20on%20Minimum%20Wage%20on%202020_EN.pdf.

551 DFDL, Cambodia Legal Update: Law On Minimum Wage dated 6 July 2018 ("Law on Minimum Wage") (2018) https://www.dfdl.com/resources/legal-and-tax-updates/cambodia-legal-update-law-on-minimum-wage-dated-6-july-2018-law-on-minimum-wage/#:~:text=The%20Law%20on%20Minimum%20Wage,provisions%20of%20the%20Labour%20Law.&text=Any%20agreement%2C%20whether%20written%20or,will%20be%20null%20and%20void.

World Bank, Growth in Cambodia Remains Strong[552]

Driven mainly by resilient construction and garment sectors, Cambodia's economic growth remains strong, projected to reach 6.9 percent in 2017 and 2018, according to a new World Bank report. While the outlook remains favorable, there are some signs of moderation, in particular in the construction sector (…). Garment exports are facing strong completion. Due to US dollar appreciation, rising labor costs, and competition from other regional low-wage countries, growth in garment exports decelerated, expanding at 8.4 percent year-on-year in 2016, compared with 12.3 percent in 2015. (…)

The report highlighted key areas that will help safeguard Cambodia's strong growth:

- Boosting labor productivity to compensate for rising real wages. A top priority will be to improve the quality of basic education and to promote vocational and technical skills, while reducing energy costs to attract and compete in high value-added and more sophisticated manufacturing;
- Improvements in public service delivery, given that the public sector is a major service provider and a key facilitator for private sector development;

Enhanced efforts to improve public investment management legal framework and implementation capacity in order to scale up government-financed capital spending to compensate for a gradual reduction in development partner-funded public capital investment.

ILO, Strong Export and Weak Employment in the Cambodian Garment Sector[553]

3. Employment and wages

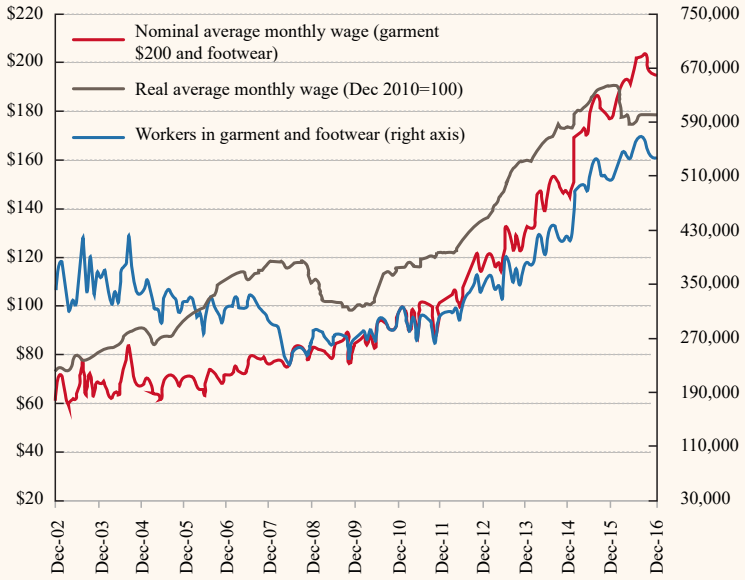
(…) The minimum wage of the garment and footwear sector increased every year between 2013 and 2017, rising from US$ 80 in 2013, to US$ 100 in 2014, to US$ 128 in 2015, to US$ 140 in 2016 and US$ 153 from 1 January 2017. The rising minimum wage in recent years has generated increasing discussion of the need to monitor wage trends and to ensure sustainable wage policy in this largest exporting sector. The increase in the minimum wage has contributed to improving living conditions of hundreds of thousands of low-paid workers, but at the same time economic factors must be taken into account in adjusting wages.

Largely due to these minimum wage increases, the average monthly earnings (including overtime) of Cambodia's garment and footwear workers increased from US$ 145 in 2014, to US$ 175 in 2015 and to US$ 195 in 2016. If this average monthly wage is calculated in inflation-adjusted (real) terms, the real average monthly wage of these workers rose from US$ 127 in 2014 to US$ 151 in 2015 and to US$ 163 in 2016, expressed in 2010 prices. In other word, real average monthly wages/earnings were 8.0 per cent higher in 2016 than they were in 2015; this rate of real average monthly wage growth was down from 19.3 per cent the previous year.

552 World Bank, Growth in Cambodia Remains Strong (2017) https://www.worldbank.org/en/news/press-release/2017/05/17/growth-in-cambodia-remains-strong-while-productivity-improvements-needed-going-forward.

553 International Labour Organisation (ILO), Cambodian Garment and Footwear Sector Bulletin: What Explains Strong Export and Weak Employment Figures in the Cambodian Garment Sector? (2017) https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_555290.pdf.

Figure 11: Employment, nominal and real average monthly wage (garment and footwear)

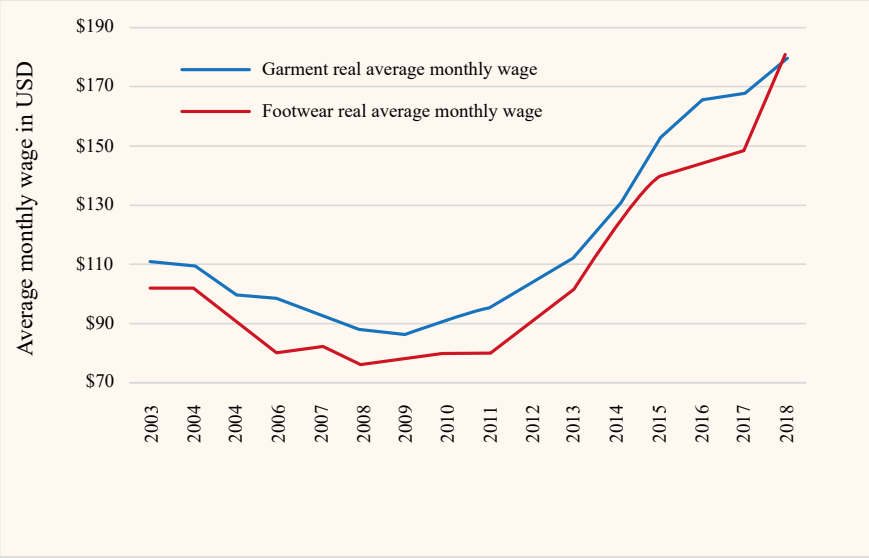


Source: Cambodia's Ministry of Commerce, National Institute of Statistics (NIS) of the Ministry of Planning (of Cambodia)

Schill, The Footwear Sector – New Opportunities for Cambodia?[554]

Employment and wages in the footwear sector Cambodia's main competitors in footwear production in Southeast Asia are Vietnam and Indonesia (see table 1). These three countries also have similar minimum monthly wages in the sector: Cambodia (US$182), Vietnam (varies across regions, US$180 in Vinh Duong, US$171 in Dong Nai), Indonesia (varies across regions, US$193 West Java, US$272 Banten). Monthly wages in both the garment and footwear sectors have almost become equal for the first time in 2018. Before that, the wage in the footwear sector has been consistently lower than in the garment sector.

Figure 8: Real average monthly wage in the garment and footwear sector in Cambodia 2003 - 2018



554 Andrea Schill, Better Factories Cambodia, The Footwear Sector – New Opportunities for Cambodia? (2019). https://www.mercator-kolleg.de/fileadmin/MPC-Daten/PDF-Dateien/Paper_ILO_Schill.pdf

Banerji et al., Review of H&M Group's Roadmap to Fair Living Wage[555]

Executive Summary

H&M group has taken bold action in becoming the first apparel brand to address the complex wage issue and set significant public goals to help achieve what it terms "fair, living wages" (FLW) for garment workers. It has sought to deliver its Fair Living Wage Roadmap (FLWR) amid challenging market conditions, political instability and intense stakeholder scrutiny. (…)

The Roadmap has four interlocking components:

- H&M group action to improve its purchasing practices and planning to enable suppliers to pay a Fair Living Wage.
- Supporting suppliers in developing fair and legal contracts and establishing pay structures that enable a Fair Living Wage.
- Developing better industrial relations, focusing on worker representation through social dialogue at factory level to empower workers to negotiate improved pay and labour conditions.
- Encouraging government to set up tri-partite process that sets minimum wages through a fair negotiation with labour market stakeholders and reviewing annually.

The goals H&M defined in 2013 were:

- By 2014, develop a roadmap addressing H&M's purchasing practices to improve existing price method and improve purchasing plans.
- By 2014, implement and evaluate in three model factories the Fair Wage Method, and by 2018 all H&M's strategic suppliers should have well-functioning pay structures.
- In 2013, launch an industrial relations project in Cambodia, and in 2014 expand H&M group's existing social dialogue project in Bangladesh to cover 15% of suppliers' factories and by 2018 100%.

3.4 Implementation

H&M group sought to influence change among suppliers, workers, its own purchasing practices, and within the governments of production countries.

3.4a Suppliers: Effective wage management structures.

(…) H&M group piloted the FWN's Fair Wage Method (FWM), based on the 12 Dimensions of a Fair Wage, in three pilot factories: two in Bangladesh and one in Cambodia. The FWM is a comprehensive system encompassing 12 key aspects that combine to achieve fair wages, based on extensive research by Professor Daniel Vaughan-Whitehead and associates. Following the pilot, H&M group engaged with the FWN to help deliver the FWM in 336 strategic factories in Bangladesh, Cambodia, India, Turkey, Vietnam and Pakistan. This brought about numerous improvements, including implementation of wage grids, reforms of pay systems, shift from piece rates to basic wage plus bonuses, reduction of working hours without wage loss for workers, and fair wage remediation plans signed by both employers' and workers' representatives. Based on this experience, H&M group subsequently

555 Sabita Banerji, Katharine Earley & Peter McAllister, *Ethical Trading Initiative (ETI), Review of H&M Group's Roadmap to Fair Living Wage* (2018) https://www.ethicaltrade.org/sites/default/files/shared_resources/ETI-HM%20FLWR%20Review_0.pdf

developed its own, slightly less comprehensive Wage Management System (WMS), in order to reach more workers by making the requirements more readily understandable for suppliers, and a clearer business case for suppliers to participate. By training a further 190 factories on H&M group's own system, the company reached a combined total of 500 factories by the end of 2018.

4.4 Observations: Suppliers – Wage Management Systems

(…) The FWN's own 2017 evaluation of 198 of the 336 suppliers implementing the FWM found that while there was definitely room for improvement on remunerating workers in line with their skills and workplace dialogue, wages had typically risen in participating factories. In Cambodia, wages at the 19 participating factories had risen by an average of 16%, compared to the initial assessment in 2016, which could be partially attributable to the FLWR but also reflects a general trend in Cambodia. (…)

The Garment Worker Diaries study, a 2016-2017 research project on garment workers' wages in Bangladesh and Cambodia, led by Microfinance Opportunities (MFO), has also found that "by almost every variable, workers are better off in H&M group factories". (…)

4.6 Observations: Company – Purchasing practices

(…) H&M group has shared this approach through a workshop in Cambodia with all ACT members, through which members explored how to take wages out of the price equation. It has also introduced an app to help calculate wage components, including cost per minute and factory efficiency. Once the wage element is set aside, suppliers and H&M group can look at where else they can make savings instead. H&M group describes this as a "scientific" process for establishing purchasing practices that support decent wages. (…)

4.7 Observations: governments – minimum wage advocacy

(…) In Cambodia, around 50% of all garment workers work for ACT member suppliers, most of whom supply H&M group. The company therefore perceived a strategic advantage in opting to use ACT as a primary vehicle to help achieve its ambitions on minimum wage advocacy as well as its purchasing practices ambitions. However, CCC considers that this has also slowed the rate of progress on H&M group's original Roadmap commitments. The campaign group also suggests that ACT, despite its good intentions, ought to agree binding goals, in a similar way to the Bangladesh Accord on Fire and Building Safety, in order to drive concrete progress. This is a matter for ACT as a whole to consider, rather than H&M group in particular. (…)

Edwards et al, Corporate Commitments to Living Wages in the Garment Industry[556]

Over the last decade, leading global corporations in the garment industry have begun to make commitments to deliver living wages to the workers that make their clothes. For instance, in 2013 the Swedish multinational fashion retailer H&M published its Fair Living Wage Roadmap which set public goals for the payment of a 'fair living wage' in its supply chains. PVH, the global apparel company, worth US $9.7 billion, that owns brands like Tommy Hilfger and Calvin Klein, has 'a goal of paying all workers no less than a living wage.' Primark's supplier code of conduct now requires that 'living wages are paid'. Major multinational corporations (MNCs) are also increasingly signing up to participate in and co-operate with external initiatives that aim to achieve living wages for workers through a variety of means. These include, for example, schemes, agreements and wage commitments promoted by organisations such as the International Labour Organisation (ILO) and multi-stakeholder initiatives (MSIs) such as ACT (Action, Collaboration, Transformation) and the Fair Labor Association's Fair Compensation strategy. (…)

556 Remi Edwards, Tom Hunt & Genevieve LeBaron, Corporate Commitments to Living Wages in the Garment Industry, SPERI & University of Sheffield (2019) https://www.central-cambodia.org/wp-content/uploads/2019/06/Corporate_Commitments_to_Living-1.pdf

- ACT (Action, Collaboration, Transformation): ACT is an agreement between global corporations and IndustriALL global union. It aims to implement industry-level national collective bargaining agreements (efforts are currently focused in Cambodia and Turkey) in an effort to secure a wage that companies will take into account in their purchasing practices.

- Fair Labor Association Fair Compensation Programme: This programme offers companies a Workplace Code of Conduct to be drawn upon and also a Wage Data Collection Toolkit that enables corporations to benchmark suppliers' wage payment and progress based a number of wage indicators such as the Asia Floor Wage, World Bank gross national income per capita and prevailing industry wages. It increases visibility of wage benchmarks but does not offer a broad strategy for living wage payment.

- German-Dutch Sustainable Textiles Cooperation Agreement: These initiatives are German and Dutch state initiatives that aim to harmonise sustainability requirements and assist companies in implementing due diligence. Companies may opt into both simultaneously. The German initiative announced a 2018 Partnership Initiative on Living Wages in Cambodia and Indonesia, aiming to raise wages above the minimum wage, defining a living wage as one that allows 'a worker to have a dignified existence'.

Sotheary, Unions: Change Minimum Wage Law[557]

More than 40 unions have joined together to ask the Labor Ministry to make changes to 10 articles in the draft Minimum Wage Law, saying the law did not cover all sectors and restricted the rights of union representatives in wage negotiations among a host of other issues. More than 50 members from the 40 unions, along with international civil society organizations, met yesterday to discuss the law and review its six chapters and 33 articles. (…)

"The point that we will strongly discuss is article 9, which says that the minimum wage may vary by region or economy," he said. "We cannot accept this because if the minimum wage varies by region, investors will see the opportunity and only invest in areas that are far away. It will affect the national minimum wage negotiations, which may decrease from $153 to $120."

Unions also plan to ask the ministry to remove article 28 of the law, which lays out punishment for individuals or organizations that do research on wages in the country. The law says that only the National Council for Wages has the right to study wages in Cambodia and anyone found doing their own investigation will be fined 10 million riel (about $2,500). "It's a terrible thing that is unacceptable for the country and the wage law should not have made it because it is similar to the union law, which restricts the freedom of unions," he said. (…)

WageIndicator Foundation, Living Wage Series - Cambodia[558]

The living wage is based on the concept that work should provide an adequate income to cover the necessary living costs of a family. WageIndicator uses prices from the cost of living survey to calculate living wage in more than 60 countries. The living wage is an approximate income needed to meet a family's basic needs including food, housing, transport, health, education, tax deductions and other necessities.

The following table summarises the varying expenditure and income needs for the three commonly occurring family household compositions.

557 Pech Sotheary, 'Unions: Change Minimum Wage Law', *Khmer Times* (13 December 2016) https://www.khmertimeskh.com/62966/unions-change-minimum-wage-law/.

558 WageIndicator Foudation, *Living Wage Series - Cambodia - January 2018 - In Riel, per Month* (2018) https://wageindicator.org/salary/living-wage/archive-no-index/cambodia-living-wage-series-january-2018-country-overview.

Expenditure and living wage calculation (monthly rates in riel)

	Typical family	Standard family	Single-adult
	from-to	from-to	from-to
Food	666300-930400	567000-791900	141800-198000
Housing	508900-837400	508900-837400	171100-269600
Transport	40000-80000	40000-80000	20000-40000
Health	40000-100000	40000-100000	10000-25000
Education	80000-150000	80000-150000	0
Other costs	66800-104900	61800-98000	17200-26600
Total Expenditure	1402000-2202700	1297700-2057300	360100-559200
Net Living Wage	737895-1159316	720944-1142945	360100-559200
Gross Living Wage	804300-1263700	785800-1245800	392500-609500

Family living wages (monthly rates in riel)

There is not a single answer to what is the adequate cost of living. The result is complex, as the cost of living varies by household composition, location, and employment pattern. The following table presents the Living Wage estimates for a set of most common family household compositions and under different assumptions about working hours.

	from-to
Typical family (two parents + 2.7 children, 1.9 working)	804300-1263700
Standard family (two parents + 2 children, 1.8 working)	785800-1245800
Two parents and two children, 2 working	707300-1121200
Two parents and two children, 1.5 working	943000-1495000
Two parents and two children, 1 working	1414500-2242500
Two parents and three children, 1.9 working	829900-1299500
Two parents and four children, 1.9 working	915300-1418700
Single-adult without children, 1 working	392500-609500

Living wages in context (monthly rates in riel)

The Minimum Wage is a national legally binding obligation on employers which often make no reference to a living standard. Living Wage describes the adequate living standard. The common goal of the many living wage campaigns currently taking place all over the world is to lift Minimum Wages levels to those of the Living Wages. WageIndicator presents Living Wages jointly with Minimum Wages, aiming to raise awareness concerning the remaining differences in levels. Living Wages are presented in context with other wage indicators including prevailing wages of workers over recent years.

	2015	2016	2017	2018
Minimum wage	512000	560000	612000	680000
Living Wage - Single Adult	.-.	.-.	.-.	392500-609500
Living Wage - Typical Family	.-.	.-.	.-.	804300-1263700
Real wage of low-skilled worker	.-.	.-.	.-.	159500-517300
Real wage of medium-skilled worker	.-.	.-.	.-.	883700-1245700
Real wage of high-skilled worker	.-.	.-.	.-.	1398800-2007200

IndustiALL, Adidas, Get off the Sidelines![559]

On 29 October, demonstrators in New York City called on major sports brand Adidas to join ACT, the global initiative on living wages. By refusing to join ACT, Adidas is effectively standing in the way of progress towards a living wage for garment workers. (…)

At the rally outside the Adidas flagship store in New York City, around 40 trade unionists called on the sports brand to help reform the industry and stop producing products through poverty wages.

"We are demonstrating here today in solidarity with garment workers in Cambodia and Myanmar and to tell Adidas to get off the sidelines and join ACT, the global initiative on living wages," (…)

"Suppliers in countries like Cambodia, Myanmar and Vietnam need to know that big brands, including Adidas, are on board," says Christina Hajagos Clausen, IndustriALL garment director.

IndustriALL, Unions Demand Sectoral Bargaining to Achieve Living Wages[560]

IndustriALL Global Union garment unions in Cambodia have welcomed a raise in the monthly minimum wage from US$182 to US$190 but reiterated calls for sectoral collective bargaining as a means to reach a living wage. (…)

IndustriALL and its affiliates held two days of meetings and discussed strategies for achieving a living wage through linking brands' purchasing practices with a sectoral collective bargaining agreement. The affiliates welcomed the ACT brands' purchasing practice commitments as they agreed that poor purchasing practices lead to excessive overtime, underpaid wages and short-term contracts. In a roundtable discussion "Towards a living wage" IndustriALL affiliates together with major brands sourcing from Cambodia (H&M, Inditex, Primark, Next and Fastretailing) discussed how to achieve better wages in the Cambodian garment sector. (…)

Athit Kong, President of CCAWU and IndustriALL textile and garment sector co-chair, stated: "As Cambodian trade unions, we will continue our fight for better wages and acknowledge the support by the 20 global brands and retailers who have made a public commitment to reform their purchasing practices and actively support sectorial collective bargaining. But for a living wage to become a reality for thousands of Cambodian garment workers – brands such as Adidas, Timberland, North Face need to get off the sidelines and make the same commitment to work with IndustriALL and national trade unions."

IndustriALL, Garment Unions Step Closer to a Living Wage[561]

As part of IndustriALL's living wage campaign garment unions in Cambodia and Myanmar met last week on 20 - 22 August 2018 to develop and agree on joint demands and strategy for national sectoral bargaining in the apparel and footwear sector. Garment unions also discussed and debated brand purchasing practices and their impact on wages and working conditions. The workshops are part of a global programme between IndustriALL Global Union and the Friedrich Ebert Stiftung (FES), which focuses on technical assistance for IndustriALL's garment affiliates in strengthening their living wage campaigns.

559 IndustiALL, Adidas, Get off the Sidelines! (2019) http://www.industriall-union.org/adidas-get-off-the-sidelines.

560 IndustriALL, Cambodian Unions Demand Sectoral Bargaining to Achieve Living Wages (2019) http://www.industriall-union.org/cambodian-unions-demand-sectoral-bargaining-to-achieve-living-wage.

561 IndustriALL, Garment unions in Cambodia and Myanmar Step Closer to a Living Wage (2018) http://www.industriall-union.org/garment-unions-in-cambodia-and-myanmar-step-closer-to-a-living-wage.

Bird et al., Resilience and Sustainable Poverty Escapes in Rule Cambodia[562]

The labor market has also grown and structurally transformed towards wage-based employment in manufacturing and services sectors and increased diversity in rural incomes. Growth in textile and apparel exports, the tourism and agriculture sector, and agricultural commodities (e.g., paddy rice and cassava) have helped drive poverty reduction, with employment growth in garments and construction providing low skill, low barrier to entry work, particularly for large numbers of poorly educated rural women. (…)

Non-agricultural self-employment and wage income: Increasingly important pathways

Households are increasingly dependent on self-employment and wage income (panel data analysis) and poverty escapes rely on non-farm activities (qualitative analysis). In the panel data, employment of the household head in non-farm sector (palm juice/ sugar production, small business/petty trade, land sales, migration) is associated with a 71% lower risk of impoverishment relative to a sustained escape from poverty in the regression results. Income sources have changed since 2008 with wages becoming markedly more important in 2011 (5% of all income), 2014 (22% of all income) and 2017 (23% of all income). Seeking work as a casual agricultural laborer is adopted as a coping strategy by some following harvest failure or other shocks, as it will provide a daily income, but for others from poorer households, casual work is an important component of a diversified livelihood (life history interviews) and casual agricultural work is identified in 14 of the 60 life history interviews. (…)

Phon et al, Impact of Increased Minimum Wage on Labor Market and Economy[563]

I. Introduction

This paper will describe and analysis the impact of labor force in Cambodia and minimum wage constraints in most sectors, especially in labor market, sustainable growth, economic and clearer image of the current labor and future trends by observing the following key economical demographic trends, recent labor market trends, key characteristics of the labor market and lessons from dynamic analysis (demand & supply side) in terms of job, skills content and growth. This also will discover some factors and other than educations that are restricting labor force advancement. These reviews are about the employment and possibility and productivity implications and acquaintances between patterns of growth, productivity and employment intensity and which growth is inclusive to sustainable economy growth of Cambodia. (…)

VI. Economic Impacts from minimum wage and labor force movements in Cambodia

(…) the unemployment rate of Cambodia is still lesser than 1 percent since 2008 -2016 whiles the gain of labor forces are significantly increased every years too. As the result of this, we can say that the minimum wage setting seems not effect too much to labor forces and trade till now while the some definitions of labor needs are not defined well too. (…) In Cambodia, most of workers are women who migrated from provinces, Hence this means that the increase of minimum wage can make women getting more benefits than men in this garment sector. (…)

Market equilibrium with minimum wage regulation and labor force still have occurred many critical issues to close it while the public policies and unions still update all the time as these. Furthermore, worker union still keens to gain more salary to the workers while the government tries to ignore them. Even on 6 July, 2015, the rental regulation was passed to help the worker ‘s expenditure or students and low income earners on rental room, banning from landlord of increasing rent fee in two years after contract signed. (…)

562 Kate Bird, Vathana Roth & Vidya Diwakar, *Resilience and Sustainable Poverty Escapes in Rule Cambodia* (2018) https://dl.orangedox.com/5yPnhU.

563 Phon Sophat and Khan Sophy and Pich Chansothi, *The Simultaneous Impacts of the Increased Minimum Wage on the Labor Market and Economy Growth in Cambodia: Inside-Outside Model or Monopoly-Union Model?,* Thammasat University and Cambodia Econometric Association (2017) https://mpra.ub.uni-muenchen.de/88075/1/MPRA_paper_88075.pdf

VII. Challenges and some implications

The minimum wage regulation seems fine for worker and labor force and it makes better for welfare of people or worker in which the higher demand of employment in market while the cheap labor burst more capital fly to Cambodia and opportunities to invest. However, some challenges still occurred in this emerging country as well as applied regulations of local garment factories and companies and workers unions, lack of skilled labors and human resource development, social protection to fight vulnerabilities, inequality of gender, healthy industrial environments and well-timed and trustworthy labor market figures. (…)

Questions

1. How large is the gap between the minimum legal wage and the living wage in Cambodia. How does this gap vary by industry? In what industry is the gap the smallest?
2. Do you think that the current Cambodian minimum wage setting mechanism is likely to achieve living wage in the near future?
3. What are the challenges for businesses to achieve living wage for workers in garment and footwear sectors in Cambodia?
4. Who are the relevant stakeholders that can do more to achieve living wage in Cambodia?
5. Would multistakeholder partnerships be likely to achieve progress on wages in Cambodia?

Further Readings

- International Labour Organisation (ILO), *Minimum Wage Systems: General Survey of the Reports on the Minimum Wage Fixing Convention, 1970 (No. 131), and the Minimum Wage Fixing Recommendation, 1970 (No. 135)* (2014) www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_235287.pdf.
- Shift, *The Human Rights Opportunity, 15 Real-Life Cases of How Business is Contributing to the Sustainable Development Goals by Putting People First* (2018) www.shiftproject.org/media/resources/docs/TheHumanRightsOpportunity_Shift-07-17-2918.pdf?utm_source=website&utm_medium=button-SDGs&utm_campaign=SDGs_Download-PDF.
- The Global Living Wage Coalition, *Real World Strategies for Living Wage Implementation - Case Studies* (2018) www.globallivingwage.org/implementation.
- ACT (Action, Collaboration, Transformation), *Collective bargaining at industry level* (2018) https://actonlivingwages.com/wp-content/uploads/2018/09/ACT_COMMS_Brief_Industry_Bargaining_Web.pdf.
- Ethical Trading Initiative, *Base Code Guidance: Living Wages* (2016) www.ethicaltrade.org/sites/default/files/shared_resources/eti_living_wage_guidance_2.pdf.
- The Fair Labor Association (FLA), *The FLA's Fair Compensation Strategy* (2018) http://www.fairlabor.org/global-issues/fair-compensation.
- Ethical Trading Initiative, Wages and Purchasing Theories (2014) www.ethicaltrade.org/issues/living-wage-workers/wages-and-purchasing-theories.
- Joint Ethical Trading Initiatives, Living Wages In Global Supply Chains - A New Agenda for Business (2015) www.ethicaltrade.org/sites/default/files/shared_resources/living-wages-in-global-supply-chains.pdf.

- Living Wage Foundation, *Become A Living Wage Employer* (2018) www.livingwage.org.uk/faqs#t136n3356.
- International Labour Organisation (ILO), *Global Dialogue Forum on Wages and Working Hours in the Textiles, Clothing,* Leather and Footwear Industries (2014) www.ilo.org/sector/activities/sectoral-meetings/WCMS_241471/lang--en/index.htm.
- Labour Behind the Label, H&M: *Fair Living Wages Were Promised,* Poverty Wages are the Reality (2018) http://labourbehindthelabel.net/wp-content/uploads/2018/09/HMreport-corrected.pdf.
- Asia Floor Wage Alliance, *A Short History at the Brink of Transition* (2017) https://asia.floorwage.org/resources/essays-and-reports/afwa-a-short-history-on-the-brink-of-transition/at_download/file.
- H&M, *A Guideline to Factory Wage Management System* (2017) http://sustainability.hm.com/content/dam/hm/about/documents/masterlanguage/CSR/2017%20Sustainability%20report/WMS%20Guideline.pdf.
- Fair Wage Network*, Fair Wage Method* www.fair-wage.com/en/fair-wage-approach-menu/definition-of-fair-wages.html.
- Cambodia, *Law on Minimum Wage* (2018) (in Khmer), http://www.mlvt.gov.kh/index.php?option=com_k2&view=item&id=957:%E1%9E%85%E1%9F%92%E1%9E%94%E1%9E%B6%E1%9E%94%E1%9F%8B-%E1%9E%9F%E1%9F%92%E1%9E%8A%E1%9E%B8%E1%9E%96%E1%9E%B8%E1%9E%94%E1%9F%92%E1%9E%9A%E1%9E%B6%E1%9E%80%E1%9F%8B%E1%9E%88%E1%9F%92%E1%9E%93%E1%9E%BD%E1%9E%9B%E1%9E%A2%E1%9E%94%-E1%9F%92%E1%9E%94%E1%9E%94%E1%9E%9A%E1%9E%98%E1%9E%B6&Itemid=207&lang=en.
- Carlos Sobrado et al., *Where Have All the Poor Gone? ambodia Poverty Assessment* (2013) http://documents1.worldbank.org/curated/en/824341468017405577/pdf/ACS45450REVISE00English0260May02014.pdf.
- Ravindra Hewa Kuruppuge & Indika Prasanna, *Living Wage in Asia, University of Peradeniya & Sabaragamuwa University of Sri Lanka* (2014) https://www.researchgate.net/publication/282367015_Living_Wage_in_Asia.
- Anannya Bhattacharjee & Ashim Roy, *Bargaining in the global commodity chain: the Asia Floor Wage Alliance,* https://ler.la.psu.edu/gwr/documents/BhattacharjeeandRoyBargainingintheGCCtheAsiaFloorWageAlliance.pdf.
- *Cambodia Garment Workers' Strike Turns Deadly, Aljazeera* (2014) https://www.aljazeera.com/economy/2014/1/3/cambodia-garment-workers-strike-turns-deadly.
- Labour Behind the Label, *A Living Wage is a Human Right* (undated) https://labourbehindthelabel.org/campaigns/living-wage/.
- Fast Retailing, *Monitoring and Evaluation of Production Partner Factories* (2020) https://www.fastretailing.com/eng/sustainability/labor/partner.html.
- Office of the United Nations High Commissioner for Human Rights in Cambodia, *A Human Rights Analysis of the Draft Law on Minimum Wage* (2018) https://cambodia.ohchr.org/sites/default/files/Analysis%20of%20Minimum%20Wage%20Law%20EN%20FINAL%20for%20PUBLICATION.pdf
- Khuon Narim, 'Garment Industry Minimum Wage Raised by $2 for 2021, Camboja News (2020) https://cambojanews.com/garment-industry-minimum-wage-raised-by-2-for-2021/
- Fashion Revolution, *Reality Check: Will the new minimum wage in Cambodia make a difference for garment workers?* (2017) https://www.fashionrevolution.org/reality-check/.

18. WORKING HOURS

Chea Sophal, Radu Mares

Introduction

Excessively long working hours are a symbol of exploitative working conditions. In industries that have outsourced production to low wage countries (e.g. textiles, footwear, electronics) and that respond to fast changing consumer preferences (e.g. 'fast fashion' industry), employees in supplier factories work excessive hours, especially during peak periods. National laws and international standards that prescribe 40-48 hours working weeks and allow a moderate amount of overtime are routinely disregarded. Excessive overtime makes workers tired, which in turn can trigger accidents (chapter 20). Leading companies recognize that merely increasing audits on suppliers is unlikely to be successful and therefore offer support to factories' management to increase their productivity. Migrant workers (chapter 21) are particularly exposed to overtime as they might feel inclined to work longer hours to maximize their income for a few years in factories before returning home. How voluntary such overtime is remains questionable if workers are remunerated at exploitatively low levels in the first place (chapter 17). Leading companies have developed indicators to ensure that overtime is actually voluntary. They also recognize that their own purchasing practices – the way they place orders with suppliers – can create unnecessary peak periods when workers must work extra-long hours to meet deadlines. Brands doing better forecasting and planning as part of their due diligence (chapters 8-14) can reduce such peak periods in supplier factories.

Cambodia has not yet ratified ILO conventions related to working time (i.e. Convention No. 1 on Working Hours (Industry), and Convention No.30 on Hours of Work (Commerce and Offices)). Cambodian Labour Law regulates working hours at eight hours per day or 48 hours per week. However the majority of workers in the garment sector work excessive hours. The law automatically exempts some sectors from its general overtime limits and allows higher limits (two hours per day and 200-300 hours per year). Even so, the most common non-compliance is that garment factories allow more than maximum 2 hours of overtime during the peak production period. Cambodia does not have collective bargaining agreements favourable to employees, as most of these agreements simply reconfirm minimum legal provisions without added protections on working hours. To improve the situation, working hour limits and the entitlement of flexible working hours could probably be covered under the establishments' internal regulations or employment contracts.

Main Aspects

- ✓ Hours of work (per day and per week)
- ✓ Overtime: voluntary/forced

- ✓ Overtime compensation
- ✓ Part-time work
- ✓ "Zero-hours" contracts (on-call work, hiring workers with no guarantee of work)
- ✓ Principle of weekly rest
- ✓ Principle of equal treatment (of part-time workers with full-time workers)
- ✓ Work– life balance and health of workers
- ✓ Exceptional circumstances (that justify overtime)
- ✓ Record keeping (and falsification of working hours)
- ✓ Purchasing practices (of buyer companies)
- ✓ Paid annual leave

Background

ILO, Labour Protection in a Transforming World of Work[564]

55. Long working hours not only have profound consequences on workers who have little influence over their jobs or work environment (such as domestic workers), but they also affect workers who have more discretion and who receive higher compensation (such as bankers and lawyers). For others, often the problem is not that they have too many hours, but rather that they have too few, affecting their income security, or hours that are so varied that it is difficult for them to organize their personal and family responsibilities.

56. Long working hours prompted the first regulations on working time; today most countries have national limits on working time, overtime, overtime pay and annual leave. Nevertheless, many workers do not benefit from these protections either because they are self-employed and thus excluded from the scope of labour laws, because they are in an occupational category that is sometimes exempted from the law, or because they work in informal or formal employment arrangements where the law is not complied with.

68. Two other important challenges in working time are variable and unpredictable hours, especially on-call work, and the growing encroachment of work into personal time as a result of information technologies. On-call work is characterized by short advance notice of schedules, large fluctuations in work hours and little or no input by workers into the timing of work. In the retail sector, the growth of unpredictable schedules is due in part to the development of sophisticated software used to track the flow of customers, allowing managers to assign just enough employees to handle the anticipated demand. (…)

72. New information and communication technologies increasingly permit employees to work at any time and from anywhere. Yet work-related telephone calls and email contacts outside of regular business hours can have negative effects on workers' mental health and work–life balance. (…)

29. (…) Limits on working hours are an important component of workplace safety, as excessive working hours are associated with greater risk of accidents at work. The health literature has long recognized that working longer than 48 or 50 hours a week on a sustained basis can be detrimental to an individual's health. Limits on working hours are also needed to allow workers to balance work and personal responsibilities. (…)

564 International *Labour Organisation (ILO), Labour Protection in a Transforming World of Work* (2015) https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_358295.pdf.

Instruments

Universal Declaration of Human Rights[565]

Article 24: Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

ILO, Hours of Work Convention[566]

Article 2: The working hours of persons employed in any public or private industrial undertaking or in any branch thereof, other than an undertaking in which only members of the same family are employed, shall not exceed eight in the day and forty-eight in the week, with the exceptions hereinafter provided for (…)

ILO, Part-Time Work Convention[567]

Article 4

Measures shall be taken to ensure that part-time workers receive the same protection as that accorded to comparable full-time workers in respect of:

(a) the right to organize, the right to bargain collectively and the right to act as workers' representatives;

(b) occupational safety and health;

(c) discrimination in employment and occupation.

Article 5

Measures appropriate to national law and practice shall be taken to ensure that part-time workers do not, solely because they work part time, receive a basic wage which, calculated proportionately on an hourly, performance-related, or piece-rate basis, is lower than the basic wage of comparable full-time workers, calculated according to the same method.

Article 6

Statutory social security schemes which are based on occupational activity shall be adapted so that part-time workers enjoy conditions equivalent to those of comparable full-time workers; these conditions may be determined in proportion to hours of work, contributions or earnings, or through other methods consistent with national law and practice.

565 *Universal Declaration of Human Rights* (1948) www.ohchr.org/en/udhr/pages/searchbylang.aspx.

566 International Labour Organisation (ILO), *Hours of Work (Industry) Convention (No. 1) - Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week* (1919) www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C001.

567 International Labour Organisation (ILO), *Part-Time Work Convention (No. 175)* (1994) www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C175.

ILO, Declaration on Social Justice for a Fair Globalization[568]

I. (…) the four equally important strategic objectives of the ILO, through which the Decent Work Agenda is expressed (…):

(ii) developing and enhancing measures of social protection – social security and labour protection – which are sustainable and adapted to national circumstances, including: (…)

- policies in regard to wages and earnings, hours and other conditions of work, designed to ensure a just share of the fruits of progress to all and a minimum living wage to all employed and in need of such protection

ILO, Survey Concerning Working-Time Instruments[569]

3. The number of hours worked, the length and number of rest periods and how they are organized in a day, week, month or year, have important consequences for both workers and employers. The regulation of working time and rest periods also plays an important role in upholding the principle, enshrined in the Treaty of Versailles of 1919 and in the Declaration of Philadelphia of 1944, that labour is not a commodity and should not be regarded merely as an article of commerce. (…) The ILO has adopted a number of instruments covering specific aspects of working time and particularly hours of work, weekly rest, paid annual leave, night work and part-time work. Moreover, a number of sectoral ILO instruments contains provisions on working time.

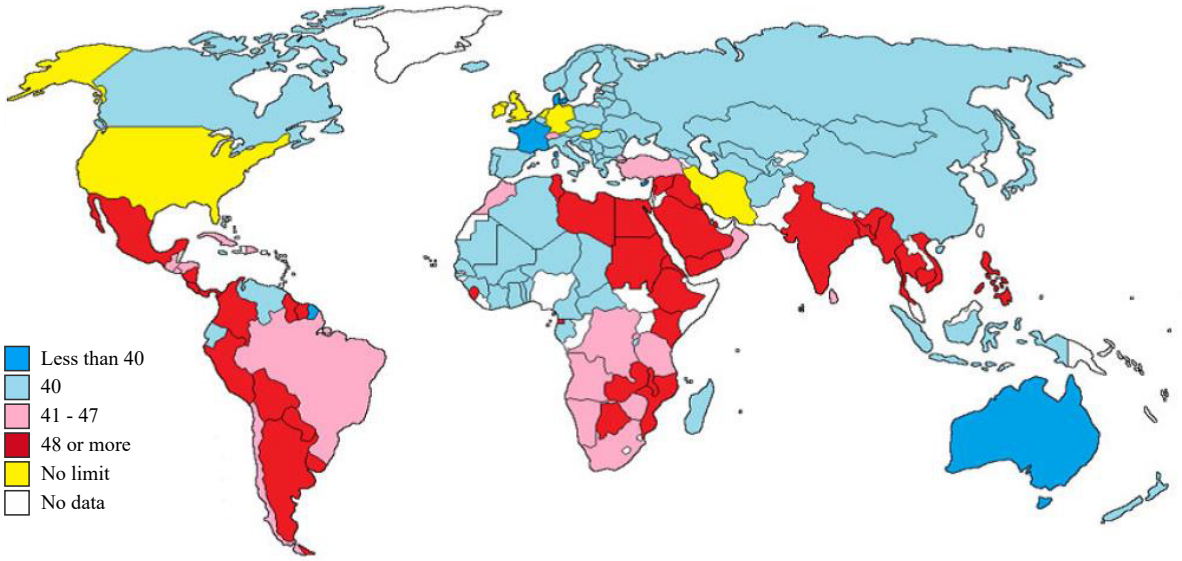
7. The regulation of working time is all the more important given the transformations currently taking place in the world of work. Some of these changes have been facilitated by developments and improvements in technology and communications which are disrupting, and even contributing to the elimination of, many of the traditional time and space dimensions in work. Work today is increasingly performed at any time and almost anywhere, which has consequences for the organization of work and production with the development, among others, of a "24/7" society. While in today's world of work the agricultural and manufacturing sectors continue to be very important, by 2013 nearly half of all employment around the world was located in the burgeoning services sector. In contrast to other sectors, the nature of the services sector often means it must respond to fluctuating demands and to time periods that are both shorter and often less predictable. However, in a world of instant communications and sophisticated technology, even the manufacturing industry is not immune from the pressures of being able to respond "on demand" to changing consumer trends (for example, in fashion, but also in many other commodities) through "in time" production. This, in turn, imposes demands for organizational flexibility which may require workers to work in non-traditional ways (or in non-standard employment) which are characterized, among other aspects, by variability of time (across a day, week, and/or a longer period). These are all part of the pressures arising out of globalization. There is no doubt that market competition has intensified and created pressure for enterprises to become efficient and reduce costs, and technologies have allowed the enormous increase in the transnational provision of global services. While this has positive effects in terms of increased labour market participation and productivity, it may also have negative effects on workers' health and well-being, as the boundaries between work and private life tend to become blurred. This has always been a feature of work for women, who have traditionally carried out much of their unpaid work from home (such as taking in laundry, and child-minding); with new technologies the phenomenon of "home-working" has increased exponentially.

568 International Labour Organisation (ILO), ILO *Declaration on Social Justice for a Fair Globalization* (2008) www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_371208.pdf.

569 International Labour Organisation (ILO), *General Survey Concerning Working-Time Instruments - Ensuring Decent Working Time for the Future (2018)* www.ilo.org/ilc/ILCSessions/107/reports/reports-to-the-conference/WCMS_618485/lang--en/index.htm.

[working hours]

Figure 1.6 Statutory normal weekly hours around the world (2017)



178. First, the Committee observes that, with regard to the variable distribution of normal hours of work, the daily limit of nine and ten hours per day allowed by Conventions Nos 1 and 30, respectively, are not given effect in a number of countries. Moreover, the Committee observes that the averaging of hours of work over periods longer than a week has become a frequent practice in many countries, and that the reference period used to calculate hours of work may be as long as one year. In this regard, the Committee recognizes that flexible modern working-time arrangements, such as the averaging of hours of work, may call into question the relevance of certain restrictions imposed by the Conventions on the maximum duration of daily and weekly hours of work. However, the Committee wishes to emphasize the importance of reasonable limits and protective safeguards in devising such flexible arrangements so as to ensure that modern working time arrangements are not prejudicial to the health of workers or to the necessary work– life balance (…)

179. Second, the Committee observes that the circumstances justifying recourse to exceptions to the normal statutory hours of work are not always clearly defined, or go beyond those recognized in the Conventions. In this respect, the Committee wishes to emphasize the fundamental importance of limiting recourse to overtime to clear and well-defined circumstances.

[weekly resting time]

202. The principle of uniformity enshrined in Article 2(2) of Convention No. 14 and 6(2) of Convention No. 106 refers to the collective character of weekly rest with a view to ensuring, wherever possible, that it is taken at the same time by all workers on the day established by tradition or custom. The social purpose of this principle is to enable workers to take part in community life and in the special forms of recreation available on certain days.

[overtime]

266. (…) certain provisions of international labour Conventions seek occasionally to protect workers against what might initially appear to be their own "preferences", for instance in case they are tempted (for reasons of securing an additional financial gain) to renounce elementary protection rights, especially in terms of hours of work, weekly rest and annual holidays. Accordingly, the Committee has consistently called for workers who are deprived of their weekly rest to be granted compensatory rest in all cases, irrespective of any monetary compensation. [principle of weekly rest]

[annual leave]

Article 12 of Convention No. 132 provides that 'Agreements to relinquish the right to the minimum annual holiday with pay prescribed in Article 3, paragraph 3, of this Convention or to forgo such a holiday, for compensation or otherwise, shall, as appropriate to national conditions, be null and void or be prohibited.'

374. Emphasizing the importance of workers effectively benefiting from their right to a period of relaxation and leisure every year, the Committee encourages all governments to take the necessary measures to ensure that paid annual leave rights are effectively enjoyed and that monetary compensation is offered in lieu of annual leave only in the case of any unused leave upon termination of employment.

[part-time work]

550. (…) A number of factors have contributed to the development of part-time work over the years. It allows employers greater flexibility in planning work, aligning schedules with peaks in demand and retaining workers who cannot commit to full-time work. For the workers, part-time work can help to reconcile family, educational or other obligations, while providing an income, and may at some point lead to full-time employment. Governments have also developed policies to encourage part-time work, particularly for certain groups in the labour market, such as women, young people, the long-term unemployed, and also to encourage older workers to remain in employment. Policies to promote part-time work have also been used to assist workers with family responsibilities.

551. Research suggests that part-time work is used by employers for three different reasons: as a recruitment and retention strategy based on workers' preferences; to provide optimal staffing and operational flexibility adapted to the demand for labour across the day, week or season; and to create a secondary, less remunerated and more precarious pool of workers, through the generation of low-paid, low-skilled jobs, sometimes by circumventing regulations or collective agreements that protect the wages and other working conditions of full-time workers. Part-time work may also be used by lawmakers as an instrument of employment policy in the fight against unemployment.

Ethical Trading Initiative, The Base Code[570]

6. Working hours are not excessive

6.1 Working hours must comply with national laws, collective agreements, and the provisions of 6.2 to 6.6 below, whichever affords the greater protection for workers. Sub-clauses 6.2 to 6.6 are based on international labour standards.

6.2 Working hours, excluding overtime, shall be defined by contract, and shall not exceed 48 hours per week.*

570 Ethical Trading Initiative, The ETI Base Code (2014) www.ethicaltrade.org/sites/default/files/shared_resources/eti_base_code_english.pdf.

6.3 All overtime shall be voluntary. Overtime shall be used responsibly, taking into account all the following: the extent, frequency and hours worked by individual workers and the workforce as a whole. It shall not be used to replace regular employment. Overtime shall always be compensated at a premium rate, which is recommended to be not less than 125% of the regular rate of pay.

6.4 The total hours worked in any 7 day period shall not exceed 60 hours, except where covered by clause 6.5 below.

6.5 Working hours may exceed 60 hours in any 7 day period only in exceptional circumstances where all of the following are met:

- this is allowed by national law;
- this is allowed by a collective agreement freely negotiated with a workers' organisation representing a significant portion of the workforce;
- appropriate safeguards are taken to protect the workers' health and safety; and
- the employer can demonstrate that exceptional circumstances apply such as unexpected production peaks, accidents or emergencies.

6.6 Workers shall be provided with at least one day off in every 7 day period or, where allowed by national law, 2 days off in every 14 day period.

* International standards recommend the progressive reduction of normal hours of work, when appropriate, to 40 hours per week, without any reduction in workers' wages as hours are reduced.

Ethical Trading Initiative, Working Hours Clause - Interpretation[571]

Introduction

- The primary aim of clause 6 of the Base Code is to ensure that workers do not work excessive hours; that workers have at least one day off per week; and that any overtime is voluntary and is properly compensated.
- The underlying principle behind this part of the Base Code is the preservation of workers' health and workplace safety. (…)
- The ETI Base Code clause on Working Hours must be considered in conjunction with all other aspects of the Base Code, including those related to wages and freedom of association.
- The ETI Base Code applies to all categories of workers, including those who may not be covered by national labour law provisions (for example, agricultural workers).

Exceptional circumstances

Finally, the employer must be able to demonstrate that exceptional circumstances apply. Exceptional circumstances refer to unforeseen events, including but not limited to: (…)

- unexpected production peaks: this typically relates to last minute changes to orders, or increases beyond the control of the supplier but does not include foreseeable seasonal production peaks.

571 Ethical Trading Initiative, Working Hours Clause - Interpretation (2014) www.ethicaltrade.org/sites/default/files/shared_resources/eti_base_code_clause_6_interpretation_english_0.pdf

How can the company ensure that overtime is voluntary?

When an employer requires workers to work overtime, the employer should clearly communicate to workers that they are free to refuse and that there will be no negative repercussions if they do. To avoid coercion, the employer should ensure that:

- if transportation is provided, it is available at the end of the normal work day or shift so that workers who choose not to perform overtime can leave the facility;
- the facility doors or gates are unlocked to allow workers to leave freely at the end of their work day;
- if daily production targets are used, they are achievable within the standard working hours so employees do not feel pressured to work overtime in order to meet them;
- overtime requests are not always directed at the same workers;
- the company's internal policies clearly state that workers are free to refuse overtime;
- workers are given sufficient notice of overtime work so alternative arrangements can be made if workers are not able to perform the work; and
- workers' agreement to perform overtime work is documented.

Are there limits on daily working?

The ETI Base Code does not provide specific regulation on the number of hours per day that can be worked. Nevertheless employers should seek to avoid long working days as these may put a worker's health at risk. There is a duty in the Base Code and national law to provide a safe system of work, which must prevent excessively long work shifts or continuous working. This is because of the health and safety risks that arise from excessive working time. In many countries national law will contain provisions related to either maximum daily working hours, minimum daily rest hours and rest days. It should be remembered that ILO Convention No 1 (1919) called for the adoption of an 8-hour maximum day.

Nike, Sustainability Report 2012[572]

Excessive Overtime

We continue to evaluate why excessive overtime is a persistent issue in contract factories. During FY11, more than two-thirds (68 percent) of the excessive overtime incidents identified and analyzed through audits of 128 factories were attributable to factors within Nike's control, primarily forecasting or capacity planning issues, shortened production timelines and seasonal spikes. However, it is unclear how often these factors are directly linked to one of our brands, as some factories also produce products for many other brands. In factories for which multiple brands place orders, it is very difficult to isolate the root cause of production-capacity planning bottlenecks. As a result, we will begin to explore ways to create internal systems that allow us to isolate Nike-caused capacity spikes and imbalances that can contribute to a factory's inability to effectively manage production planning. In addition, we will begin the process of creating new tools and reporting mechanisms for apparel factories to proactively communicate with Nike when their production team is approaching overtime limits that would be in violation of our standards. We have instituted these reporting requirements in NIKE Brand footwear factories already, and have seen marked improvement in the management of excessive overtime as a result.

572 Nike, *FY10/11 Sustainable Business Performance Summary* (2012) www.unglobalcompact.org/system/attachments/15435/original/NIKE_SUSTAINABLE_BUSINESS_REPORT_FY10-11_FINAL.pdf?1337190353.

We recognize that excessive overtime is a serious issue – in terms of both hours worked and days on the job without a break. We are focusing on these areas through continued analysis of root causes, which has led us to identify and address key business processes upstream from the factory. Variability is one of those root causes. Some of the key variables we have assessed include: seasonality in styles, the lack of predictability in consumer or product demand, and the impact of global economic challenges. We are working to develop our abilities to successfully respond to these real variables without negatively impacting factories or workers.

We are addressing these issues throughout our product-creation process, including via improved forecasting alignment, which involves coordination across geographies, categories and product engines to get the right information and decisions made at the right time. We're also optimizing our sourcing base in footwear and apparel to handle fluctuations in capacity and to adopt and implement the technologies needed to respond to the demand for emerging styles and products.

Outside of those items influenced by Nike, in some places overtime is expected by both workers and factories, tied to broken models of compensation in which the only way workers can earn more is by working more hours. We recognize that excessive overtime is not sustainable from a worker or business point of view, as the costs are high for both. We are working with factories to build an understanding of these costs in terms of workers' health and safety, productivity and quality of life, and as a contributing factor to labor turnover. We will continue to track our impact on excessive overtime at factories and believe that the inclusion of excessive overtime in our Sourcing & Manufacturing Sustainability Index will elevate the issue and help us to recognize where and when these issues arise and to factor this aspect of factory performance into our sourcing decisions.

Nike, Sustainability Report 2018[573]

Sustainable Sourcing

Excessive Overtime (EOT) is a cross-sector issue which can have an impact on the health and quality of life of workers. It also can result in errors and rework, often making the additional hours unproductive. One of the requirements of the NIKE Code Leadership Standards is to eliminate excessive working hours and ensure that workers at our supplier factories do not work more than 60 hours a week, and have at least one full day off in every seven.

As we work toward our target of 100 percent of factories being bronze-rated, increased monitoring has shown that the facilities where EOT is most likely to occur tend to be factories that are multi-brand, where NIKE represents a small percent of their overall production.

EOT is a persistent challenge across industries in many of the countries where our suppliers operate. The biggest problems are underdeveloped management systems and a failure to enforce local laws on working hours.

While the number of factories with incidents of EOT remains steady, this doesn't mean that the same factories are always responsible. In fact, a low rate of repeat findings is what makes it so challenging to predict and anticipate where EOT will occur. For example, of all factories with an EOT finding at the end of FY17, only three were repeat offenders. In fact, 11 of the 23 factories with EOT incidents during FY17 resolved the issues and went on to return a bronze rating by the end of the year. (…)

573 Nike, *FY1617 Sustainable Business Report* (2018) https://sustainability-nike.s3.amazonaws.com/wp-content/uploads/2018/05/18175102/NIKE-FY1617-Sustainable-Business-Report_FINAL.pdf.

Apple, Supplier Responsibility Report[574]

Working Hours Falsification

Our Working Hours policy is based on International Labour Organization and Responsible Business Alliance (RBA) standards that limit working hours to no more than 60 hours a week. Also, suppliers can offer overtime only on a voluntary basis and factories must give employees one full day of rest for every six days worked.

We launched a Working Hours Program in 2011 to better manage working hours across our vast supply base. In 2012, the weekly working hours of more than 1 million supplier employees were monitored. Since then, coverage of employees monitored in the program has expanded year over year and, in 2017, the working hours of 1.3 million people were tracked on a weekly basis.

If falsification of employee working hours is discovered, the violation is escalated to the supplier CEO and the supplier is placed on immediate probation. The supplier's ethics policy and management systems are then thoroughly reviewed to identify the root causes and systemically correct them. The supplier is required to undergo regular audits to ensure the reviewed policy is implemented to prevent future violations. In addition, the supplier must revise all records to reflect an accurate accounting of hours worked by their employees. In 2017, we uncovered 38 cases of falsification of working hours data. In all cases, suppliers were placed on immediate probation. Our suppliers' compliance for overall working hours for the year was 94 percent.

H&M Group, Sustainability Repor[575]

Improving Purchasing Practices

In 2016, we had the internal launch of our updated strategy on purchasing practices. This helps ensure we consistently engage with our business partners in a fair and transparent way. We recognize that our buying practices affect the ability of our suppliers to provide decent pay and conditions for their workers. This is why we constantly look for ways to improve purchasing practices and prioritise our actions according to feedback from suppliers and other stakeholders.

Highlights of our work include:

- We are working to make our measurement of capacity as accurate as possible. This helps improve planning and order placement processes and helps our suppliers use their capacity better. By ensuring capacity is not overbooked, we reduce the risk of excessive overtime and strengthen our long-term partnerships and commitments with specific suppliers. (…)

Fair Labor Association, Annual Report[576]

Hours of Work

(…) in 2016, FLA assessors found more than three-quarters of all facilities in need of improvement regarding excessive hours of work. To be in full compliance with the FLA Workplace Code of Conduct, facilities must base their production planning on a regular workweek of no more than 48 hours, and total hours per employee must not exceed 60 per week, or legal limits, whichever is lower, with special hours-of-work considerations for young, elderly, or pregnant workers, where required by law. In addition, the FLA code requires all overtime work to be voluntary, although in half of all facilities visited in 2016, assessors found that overtime work was mandatory. More than a third of all facilities also failed to provide one rest day in every seven to their workers, or to provide annual leave in accordance with local law.

574 Apple, *Supplier Responsibility, Progress Report* (2018) www.apple.com/supplier-responsibility/pdf/Apple_SR_2018_Progress_Report.pdf

575 H&M Group, *Sustainability Report* (2017) https://about.hm.com/content/dam/hmgroup/groupsite/documents/masterlanguage/CSR/reports/2017%20Sustainability%20report/HM_group_SustainabilityReport_2017_FullReport.pdf

576 Fair Labor Association, *Annual Report* (2017) www.fairlabor.org/sites/default/files/documents/reports/2017_fla_apr.pdf.

Vietnam: 18 assessments, 42,139 workers

Among the 18 factories visited by the FLA in Vietnam, assessors recorded that 13 failed to provide workers with one day of rest in every seven, and half of all facilities required workers to work overtime. (…)

Indonesia: 8 assessments, 22,245 workers

Among the more common widespread findings in Indonesia, FLA assessors found that seven of eight factories failed to compensate workers correctly for their overtime. In some cases, factories calculated overtime using an outdated minimum wage as base pay; in other cases, factories did not provide the legally required 200 percent premium wage rate for overtime conducted on a scheduled rest day. Furthermore, working through a rest day without a compensatory day off within any seven-day period violates FLA hours-of-work standards, which assessors found in two of the factories with overtime pay issues. (…)

Barrientos, Economic and Social Upgrading in Global Production Networks[577]

Social upgrading is the process of improvement in the rights and entitlements of workers as social actors, which enhances the quality of their employment (…)

Social upgrading can be subdivided into two components: measurable standards and enabling rights. Measurable standards are those aspects of worker well-being that are more easily observable and quantifiable, including type of employment (regular or irregular), wage level, social protection and working hours. They can also include data on sex and unionization, such as the percentage of female supervisors or the percentage of union members in the workforce.

However, measurable standards are often the outcome of complex bargaining processes, framed by the enabling rights of workers. These are less easily quantified, such as freedom of association, the right to collective bargaining, non-discrimination, voice and empowerment. Lack of access to enabling rights undermines the ability of workers – or specific groups of workers, such as women or migrants – to negotiate improvements in their working conditions that can enhance their well-being.

Background (Cambodia)

Peng et al, Labour and Employment Law[578]

Normal working hours may not exceed eight hours a day or 48 hours in a week. "Night work" under the Cambodian Labour law represents a period of at least eleven consecutive hours that includes the interval between 2200 and 0500 hour. Besides continuous work that is performed by rotating teams who sometimes work during the day and sometimes at night, the work at the enterprise can always include a portion of night work.

Overtime may not exceed 2 hours a day and employers are required to get permission from the Ministry in charge of labour. The limit is at 200 hours in a year. Under special circumstances, this limit may be increased to 300 hours of overtime per year. Businesses in the textiles, garments, sportswear, and fishery production fields automatically operate on this increased basis. Employees who work eight consecutive hours are entitled to 1 hour lunch break according a general practice of private sector employee in Cambodia and it is normally stated in an internal regulation of each enterprise of establishment. The Labour Law prohibits employers from using the same worker for more than six days per week and grant employees to have weekly time off for a minimum of twenty-four consecutive hours.

577 Stephanie Barrientos et al. 'Economic and Social Upgrading in Global Production Networks', *International Labour Review* (2011) www.researchgate.net/publication/228278108_Economic_and_Social_Upgrading_in_Global_Production_Networks_A_New_Paradigm_for_a_Changing_World.

578 Hor Peng et al (eds.), *Introduction to Cambodian Law, Cambodian Labour and Employment Law, Konrad-Adenauer-Stiftung* (2012), 285-312 http://www.kas.de/wf/doc/kas_31083-1522-1-30.pdf?120720080906

Asia Floor Wage Alliance et al, Precarious Work in the H&M Global Supply Chain[579]

Regulations governing overtime require that it be limited to exceptional or urgent work and limited to twelve hours per week—or approximately two hours per day. Regulations also stipulate that overtime should be voluntary and employers should not penalize workers who refuse overtime work. Required overtime rates differ based upon whether overtime is performed during the week, a weekly day off (typically Sunday) or on a public holiday… Almost all garment workers in Cambodia exceed the 48-hour work-week, often without taking paid evening breaks during overtime shifts ... 87% of garment workers surveyed engaged in overtime work in order to meet their basic needs.

Instruments (Cambodia)

Labour Law[580]

Article 137

In all establishments of any nature, whether they provide vocational training, or they are of a charitable nature or liberal profession, the number of hours worked by workers of either sex cannot exceed 8 hours per day, or 48 hours per week.

Article 139

If workers are required to work overtime for exceptional and urgent jobs, the overtime hours shall be paid at a rate of fifty percent higher than normal hours. If the overtime hours are worked at night or during weekly time off, the rate of increase shall be one hundred percent.

Article 139 New

In case of special urgency which requires workers to work overtime other than the usual working hours, the overtime hours shall be paid at an increased rate of 50% (fifty percent). Working overtime at night between 22:00h to 5:00h or weekly time off, shall be additionally paid at an increased rate of 100% (one hundred percent).

Article 139 (as amended)

Night work performed as overtime is paid at 200% of the rate for normal working hours that are not worked at night (a 100% increase in addition to the basic wage).

Article 140

The Ministry in Charge of Labor can issue a Prakas (ministerial order) authorizing an extension of the daily hours in order to make up for hours lost following mass interruptions in the work or a general slowdown from either accidental causes or acts of God, notably bad weather or because of holidays, local festivals, or other local events, in the following cases:

a) Making up for lost hours will not be authorized for more than 30 days per year and will be implemented within fifteen days after the return to work. For agricultural enterprises this period is extended to one month.

579 Asia Floor Wage Alliance et al, *Precarious Work in the H&M Global Supply Chain,* 51 (2016) Workers' Voices from the Global Supply Chain https://www.academia.edu/29903731/Precarious_Work_in_the_H_and_M_Global_Value_Chain.

580 Cambodia, *Labour Law* (1997), https://sogi.sithi.org/temp.php?url=media_view2.php&mid=121#:~:text=Cambodian%20Labour%20Law&text=This%20Law%27s%20purpose%20is%20to,in%20terms%20of%20job%20opportunity.

b) The extension of the daily working hours cannot exceed one hour.

c) Hours of work cannot exceed ten hours per day.

Article 144

For the purposes of this law, the term "night" represents a period of at least eleven consecutive hours that includes the interval between 2200 and 0500 hour.

Article 144 (as amended)

Night work performed during normal working hours (non-overtime hours) is paid at 130% of the rate for normal working hours that are not worked at night.

Article 147

Weekly time off shall last for a minimum of 24 consecutive hours. All workers shall be given in principle a day off on Sunday.

Article 141

The employer may determine the allocation of working hours within the forty-eight hour working week in order to allow for a break on Saturday afternoon or any other equivalent approach, on the condition that the extra hours do not exceed one hour per day of the regular schedule. However, the employer must not extend the normal working day beyond 9 hours in order to do this.

Article 162

In case the public holiday falls on Sunday, workers will have the following day off.

Prakas on Overtime Work besides Regular Working Hours[581]

Article 4

Overtime work must be conducted based on volunteer principles. Owners of enterprises shall not force or take any disciplinary action against workers who do not voluntarily accept overtime work.

Prakas on the Allocation of Working Hours besides the Normal Week[582]

Article 2

The owners of establishments, who wish to allocate working time, need set as follows: (1) the allocation of working hours should not exceed 48 hours per week in 12 consecutive weeks; (2) the working hours should not exceed 10 hours; and (3) the extend of working hours should not exceed one hour per day.

581 Cambodia, *Prakas on Overtime Work besides Regular Working Hours, No. 80/99* (1999) https://www.arbitrationcouncil.org/download/prakas-80-99-on-over-time-work-besides-regular-working-hours/#.

582 Cambodia, *Prakas on the Allocation of Working Hours besides the Normal Week with the Average of 12 Weeks,* No. 143/002 (2002) https://www.arbitration-council.org/download/prakas-143-02-on-the-allocation-of-working-hours-besides-the-normal-week-with-the-average-of-12-weeks/#.

Prakas on Derogation of Prohibition of Children from Performing Night Work[583]

Article 1

Children aged from 16 to less than 18 years may be employed to perform night works in iron and steel factories, glass factories, paper factories, sugar factories, and gold ore refineries that must continuously operate day and night. The only one purpose of employing children to perform the night works is to apprentice or provide them with professional training.

Article 2

In all cases, the working hours for young workers should not more be more than 8 hours per day. The young workers must be given at least 13 consecutive hours off between shifts.

Article 3

Employers who want to employ children to perform the night works shall ask for a prior approval from the Labour Inspector. After receiving the request, the Labour Inspector shall make decisions by each case based on reasons for employing.

Prakas on Light Work Permitted for Children Aged from 12 to 15[584]

Article 4

The daily working duration shall not exceed 4 hours for children having school days and not exceed 7 hours for school-free days.

The total actual working duration shall not exceed 12 hours per week for school days and not exceed 35 hours per week for school-free week. (…)

Article 5

Children aged from 12 to 15 shall not be allowed to work from 20:00 to 06:00 am.

Article 6

Children aged from 12 to 15 are entitled to receive a break of at least 14 consecutive hours within a period of 24 hours.

Arbitration Council, Award No. 10/04 – Eternity Apparel[585]

Additionally, Article 01 of Prakas 80 SALVY dated 10 March 1999 stipulates, "The owner or director of an enterprise/establishment covered by the Labour Law may seek MoSALVY's permission to extend the working hours beyond the regular working hours." In cases that an enterprise/establishment requests overtime work, the Labour Inspectorate allows it, saying, "in order to ensure workers' health, the Labour Inspectorate allows only two hours of overtime work per day."

583 Cambodia, *Prakas on Derogation of Prohibition of Children from Performing Night Work*, No. 144/02 (2002) https://www.arbitrationcouncil.org/download/prakas-144-02-on-derogation-of-prohibition-of-children-from-performing-night-work/#.

584 Cambodia, *Prakas on Category of Occupation and Light Work Permitted for Children Aged from* 12 to 15, No. 002/08 (2008) https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/93403/109145/F839062124/KHM93403%20Eng.pdf.

585 Arbitration Council, *Arbitral Award 10/04 – Eternity Apparel* (2004) https://www.arbitrationcouncil.org/arbitral-decision/arbitral-award/#.

Therefore, although the Labor Law fails to explicitly limit the overtime hours in case of an irregular urgent matter, the Arbitration Council finds that the company may not ask its employees to work overtime for the number of hours longer than ten hours per day [including the regular working hours].

Furthermore, Article 04 of Prakas 017 SALVY dated 18 July 2000 states, "workers who volunteer to work overtime as is requested by the employer, are entitled to food allowances of 1,000 riels per day or otherwise to a free meal. Accordingly, for their voluntary and lawful overtime work, workers are entitled to 1,000 riels per day in addition to their wages for the duration of overtime work set forth in Article 139 of the Labor Law.

IFC, Tackling Childcare[586]

Flexible time and work location: Standard working hours can create difficulties for employees in fulfilling their childcare duties, such as picking up children from school on time. Most of the employees at Hagar Catering work from 6 a.m. to 3 p.m. so they have enough time to attend to children's needs after work. Sathapana Bank provides flexible working time to employees to take care of their children. A female employee of ACLEDA Bank was living far from the branch and had a long commute. She had no one to care for her child and requested to move to another branch; the bank agreed to her request.

Breastfeeding room and nursing breaks: As stated in Article 185 of the Labor Law, female workers who are nursing their child should be given breaks during working hours. It should be a separate break and not deducted from their normal break time. Companies are meant to provide a nursing room on their premises, especially those with more than 100 female workers who are legally mandated to provide such a facility... Every female worker who breastfeeds her children must be given a one-hour break during the working hours for one year. This is applicable to all workers regardless of the size of the company. The breaks must be longer than the normal breaks provided for in the Labor Law, and should be mutually decided between the employer and women workers. If there is no agreement, the breaks shall be taken at the midpoint of the respective work shift.

Collective Bargaining Agreement [re Airport Workers][587]

The CBA between airport employees union and Cambodia Airport Management Services provided that "the weekly working duration varies from 40 hours to 48 hours. The daily shift per day is a combination of four consecutive working hours per day and up to 10 consecutive working hours per day but not more than 10 hours per day.

Human Rights Watch, Work Faster or Get Out[588]

Key Concerns for Women Workers

Factory managers also often failed to make reasonable accommodations for pregnant workers such as more frequent bathroom breaks or lighter work without loss of pay. Many found it difficult to work long hours, including overtime, without adequate breaks to rest or use washrooms. Many interviewees said workers often resigned from factories as their pregnancy progressed because managers harassed them for being "slow" and "unproductive."

586 International Finance Corporation (IFC) et al., Tackling Childcare: Employer-Supported Childcare in Cambodia, (2020) https://www.ifc.org/wps/wcm/connect/9b7cf6e6-eab0-40a4-bfa2-2c55fdcaac3b/Tackling+Childcare-Cambodia.pdf?MOD=AJPERES&CVID=neA2eTN.

587 Prake, Collective Bargaining Agreement between International Airport Independence Employees Union Siem Reap Airport and Cambodia Airport Management Services (2011) https://prake.org/labour-law/collective-agreements-database/collective-bargaining-agreement-between-international-airport-independence-employees-union-siem-reap-airport-cambodia-tourism-industry-worker-trade-union-and-cambodia-airport-management-services.

588 Human Rights Watch, "Work Faster or Get Out": Labour Rights Abuses in Cambodia's Garment Industry (2015) https://www.hrw.org/sites/default/files/reports/cambodia0315_ForUpload.pdf.

Factory 1, a direct supplier to H&M, subcontracts work to many smaller factories. Team leaders in factory 1 allegedly told workers that they should work Sundays, their day off, at an unauthorized subcontractor to help meet production targets and supplement their incomes because factory 1 was not going to provide them with any opportunities for overtime work. In their Sunday and public holiday work at the unauthorized subcontractor, they worked on H&M garments but without overtime pay. By outsourcing the work to a subcontractor, factory 1 was able to bypass labor law provisions governing overtime wages and a compensatory day off for night shifts or Sunday work.

Human Rights Watch also spoke to five workers from a subcontractor factory supplying factory 1. Workers knew their factory was "sharing business" and was producing for H&M because the managers had discussed the brand name and designs with them. When they had rush orders, the workers report that they were not permitted to refuse excessive overtime, including on Sundays and public holidays, and were not paid overtime wage rates.

Keeton-Olsen, The Workers Organizing for a Better Future in Cambodia[589]

When Srun Sokthy started at Chu Hsing Garment Co. Ltd in 2007, Sokthy's basic wage was US$35 per month. Through union negotiations and her decades of work, she now earns US$210 per month base pay, with another US$100 in overtime – a combined total that exceeds the national minimum wage for garment workers of US$182 per month.

CCADWU and other local unions represented in the factory banded together to gain further benefits: a US$10 per month stipend for transportation, early leave for pregnant workers, and establishment of a US$20,000 accident and emergency fund that's paid for by the company. "We got even better benefits than what's provided by the law. It's all through the negotiations with the union," Sokthy says.

Between her job as a garment worker and caring for two young sons, Sokthy's only respite is her hour-long lunch break, spent in a canteen or at her family's dorm a few minutes' walk from the factory on the outskirts of Phnom Penh. However, she says her life has improved since she joined the independent trade union, CCADWU.

Woodbury, Bricked In[590]

Another component to the occupational environment of brick kiln workers relates to the logistical and social aspects of their work. As all interviewed brick kiln workers are paid according to the amount produced, otherwise known as piece work, the workers experience a high pressure to produce. They work seven days of the week, on average eight hours a day. Occasionally, workers will skip lunch breaks to work longer hours. This pressure to produce is also fueled by the desire to pay off loans owed to the employer. Irregular working schedules were commonplace as the demand for work ebbed and flowed based on different factors. For example, the availability of work relied on the proper functioning of the vacuum extruder brick machines to mold the bricks and trucks for delivering the finished bricks. When either of these items needed repair, work was halted.

589 Danielle Keeton-Olsen, 'The Workers Organizing for a Better Future in Cambodia', *Equal Times* (7 July 2020) https://www.equaltimes.org/the-workers-organising-for-a?lang=en#.XwRnG0FoTIU.

590 Polly Woodbury, *Bricked In: Occupational Health and Safety Concerns of Cambodian Brick Kiln Workers* (2020) https://digital.lib.washington.edu/researchworks/bitstream/handle/1773/45733/Woodbury_washington_0250O_21915.pdf?sequence=1&isAllowed=y.

Questions

1. Why do you think excessive working time remains a problem in global supply chains after 30 years of CSR?
2. What have international brands do to reduce working hours in supplier factories?
3. Can international brands ever cause excessive working hours in supplier fcatories? How?
4. What amount of overtime can employer require under the law of Cambodia?
5. Why is there a prohibition of night work from 22:00 to 05:00 for young workers from 15 to 18 years?
6. What is the work arrangement for working mothers who has just returned from maternity leave?

Further Readings

- Eurofound & the International Labour Office, *Working Anytime, Anywhere: The Effects on the World of Work* (2017) www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_544138.pdf.
- The Joint Ethical Trading Initiatives, *Guide to Buying Responsibly* (2017) www.ethicaltrade.org/sites/default/files/shared_resources/guide_to_buying_responsibly.pdf.
- International Labour Office (ILO), *The Effects of Working Time on Productivity and Firm Performance: A Research Synthesis Paper* (2011) www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_187307.pdf.
- BNG Legal, *Guide to Cambodian Labour Law for NGOs* (2010) http://bnglegal.com/wp-content/uploads/2013/04/Labor-Law-Guide-for-NGOs.pdf.
- Better Factories Cambodia, Guide to Cambodian Labour Law for Garment Industry (2020) Better Work, https://betterwork.org/wp-content/uploads/2020/07/Cambodian-Labour-Law-Guide_FINAL-2020_16-07-2020.pdf.
- Allard K. Lowenstein International Human Rights Clinic, *Tearing Apart at the Seams: How Widespread Use of Fixed-Duration Contracts Threatens Cambodian Workers and the Cambodian Garment Industry* (2011) Yale Law School, https://law.yale.edu/sites/default/files/documents/pdf/Intellectual_Life/Cambodia_TearingApartattheSeams.pdf.
- Sophorn Tuos et al., *Study on Living and Working Conditions of Domestic Workers in Cambodia* (2010) http://www.idwfed.org/en/resources/ilo-study-on-living-and-working-conditions-of-domestic-workers-in-cambodia/@@display-file/attachment_1.
- Raymond Robertson et al (eds), *Globalization, Wages and the Quality of Jobs: Five Country Studies* (2009) http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.893.5670&rep=rep1&type=pdf#page=116.
- Asian Institute of Technology and Mekong Migration Network, *Job in SEZs: Migrant Garment Factory Workers in Cambodia* (2019) http://dds.ait.ac.th/wp-content/uploads/sites/19/2019/08/Policy-Brief-Cambodia-En2.pdf.
- Ivan Franceschini, *Outsourcing Exploitation: Chinese and Cambodian Garment Workers Compared* (2018) https://www.academia.edu/36328909/Outsourcing_Exploitation_Chinese_and_Cambodian_Garment_Workers_Compared.
- GMAC, *Legal Pointer: Leave* (2013) https://gmac-production.s3-ap-southeast-1.amazonaws.com/Publication/monthly-legal-pointer-volume-13th-eng.pdf.

19. FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING

Chea Sophal, Radu Mares

Introduction

Freedom of association of workers means the right to form or join a labour union; it includes also the right to collective bargaining to determine working conditions, and the right to strike to apply pressure most effectively for the interests of workers. The ILO considers freedom of association a fundamental right and its unique tripartite structure – workers, employers and states – presupposes independent labour unions. Therefore ILO expects member states to respect freedom of association simply because they are members of the organization, even if they did not ratify the relevant conventions. This right is considered an 'enabling right' because all other rights at work (chapter 15-23) can be promoted through organized labour or, on the contrary, those rights can be undermined if the collective voice of workers is repressed. At one extreme, worker unions can create highly adversarial relations that can lead to work stoppages, while at the other end of the spectrum worker unions are a factor of stability in 'mature' industrial relation systems. Leading companies seeking sustainable improvements of working conditions in supplier factories increasingly recognize that worker representatives and labour unions are indispensable: they are the best monitors as they are permanently on the factory floor and understand better than any external auditor the actual situation. Therefore leading companies see respect for union activities as part of the solution in a package of measures containing also social audits, support for productivity offered to the supplier's managers, and responsible purchasing practices (chapter 11). Such responsible companies refrain from intimidation and any anti-union activity while remaining careful to not interfere and actively support such unions; that would risk compromising the autonomy of the worker unions. In countries where unions are restricted by law, companies have promoted alternative ways to ensure worker representation, for example through worker representatives or consultative worker-management committees. Most credible multistakeholder partnerships focused on worker issues cannot exclude labour unions (chapter 5). There has been some tension between NGOs promoting better worker conditions and labour unions claiming to be the sole legitimate representatives of labour interests; this however is a minor conflict, easily solvable through collaboration. Worker unionization has been on the decline globally, even in developed countries with previously higher rates of unionization. A further complicating factor has been the outsourcing of production to low wage countries, which made it impossible for workers in supplier factories to bargain with company representatives that made the key decisions (i.e. the brands in industrialized countries). In other words, the trasnationalisation of business operations through globalization (chapter 3) has not been matched sufficiently by internationalization of industrial relations. To counteract this trend international labour federations have approached transnational companies to conclude new agreements, the so-called 'global framework agreements'. These are meant to guarantee freedom of association throughout the supply chain and get the transnational company to persuade suppliers to work in good faith with local labour unions.

Cambodia has ratified all (eight) core international labour conventions as identified by the ILO, including the Convention no. 87 on freedom of association and Convention 98 on collective bargaining. Both conventions and national laws namely Cambodian Labour Law and Law on Trade Union recognize the right of all workers to pursue their rights and interests regarding employment collectively. Freedom of association applies to workers but also to employers.

Main Aspects

- ✓ Freedom of association
- ✓ Collective bargaining
- ✓ Right to strike
- ✓ Restrictions on the right to strike
- ✓ Strikes in essential services
- ✓ Labour market
- ✓ Coverage of workers
- ✓ Trade unions and civil liberties
- ✓ Political strikes
- ✓ Sympathy strikes and internationalization of production
- ✓ Rights of enterprises (conflict with trade union rights)
- ✓ Export processing zones
- ✓ Use of force (against striking workers)
- ✓ Anti-union discrimination
- ✓ Collective agreements (with non-union workers)
- ✓ Workers' representatives (relation to freedom of association)
- ✓ Alternative channels of worker representation (where law prohibits freedom of association)
- ✓ Employment relationship (as foundation for collective bargaining)

Background

ITUC, The UNGPs and the Right to Form or Join Trade Unions[591]

Active violations by employers

- Interrogation or surveillance of workers concerning their support for trade unions;
- Surveillance of trade union activities;
- Intimidation of workers by threatening the loss of their livelihood;

591 International Trade Union Confederation (ITUC) et al., *The UN Guiding Principles on Business and Human Rights and the Human Rights of Workers to Form or Join Trade Unions and to Bargain Collectively* (2012) www.ituc-csi.org/IMG/pdf/12-11-22_ituc-industriall-ccc-uni_paper_on_due_diligence_and_foa.pdf.

- Intimidation of vulnerable workers such as migrant workers;
- Physical intimidation of trade union supporters;
- Screening for trade union supporters during recruitment;
- Creating, circulating or using "blacklists" of trade union supporters
- Dismissal of trade union supporters;
- Discrimination against trade union supporters through demotions, less favourable assignments, less favourable conditions of work, reduction of wages, benefits, opportunities for training, transfers, and relocation;
- Non-extension of employment contracts to trade union supporters on fixed term and temporary employment;
- Interference in the decision process by which workers choose whether to be represented by a trade union or by which they choose among different trade union organisations;
- Anti-union campaigns and "union avoidance" activities, including by engaging professional consultants;
- Actively pursuing legal and administrative delays in the process by which trade unions obtain recognition;
- Isolation of workers from trade union organisers/ representatives, including where workers live on premises owned by the company or where work is performed in places where access is restricted such as private business complexes or export processing zones (EPZs); (…)

In addition to the above list there is a range of activities that involve the employer establishing or promoting alternatives to trade unions.

Sometimes employers create joint labour management committees, employee councils or other structures that require worker representatives. The danger is that these structures and the "worker representatives" serving on them become substitutes for independent and representative trade union structures. They can also become obstacles for workers seeking to form or join their own organisations.

Sometimes these practices are not intended to discourage workers from forming or joining trade unions. They can also be part of an effort to show that freedom of association is respected in countries where the government does not protect this right. (…)

Where there is reason to believe that the business enterprise is misusing worker representative structures to avoid or hinder trade unions, the business enterprise should make a clear written and verbal statement to workers that they have the right to join the trade union, and that the worker representative structure in question does not replace this.

Avoiding the legal obligations of the employer

Despite a range of different legal systems, the employment relationship is a universal concept which recognises that workers, in a position of subordination and dependency to the person or enterprises for whom they perform work, are in an inherently unequal power relationship. For this reason a distinct form of law (employment law or labour law) based on the recognition of an employment relationship, seeks to balance this unequal power by creating a range of rights and obligations intended to protect the worker while recognising the mutual obligations of both employers and employees. The employment relationship remains one of the most important means by which society protects its interest in fairness and in the stability of economic relationships as well as in the respect for human rights at work. (…)

An increasing amount of work is now being performed outside of a direct, ongoing employment relationship that protects these rights. This work is, instead, being performed in triangular relationships where an intermediary, such as an agency or labour broker, supplies workers, recognised as employees of the intermediary, to a user enterprise where they work alongside employees of the "user enterprise". In these situations, the introduction of multiple employers at the same workplace can effectively deny genuine collective bargaining. Changes in business operations can also be used by business enterprises to end collective bargaining structures and relationships. Sub-contracting arrangements are used to increase the distance between workers and the legal entity which controls their wages and working conditions so that meaningful collective bargaining is not possible.

Sometimes employers seek to evade the obligations that the law places on employers by disguising the existence of an employment relationship such as by treating the worker as being self-employed. Temporary work, including casual work and seasonal work, as well as work performed under fixed term or short term contracts, is often based on relationships that make it practically impossible for the workers concerned to exercise their rights to join or form trade unions and to bargain collectively.

The duty to bargain

Business enterprises cannot respect the right to collective bargaining by merely refraining from doing harm. Respecting the rights of workers to bargain collectively means accepting that there is a duty to bargain where workers want to exercise this right. Although collective bargaining must be voluntary if it is to be genuine, this does not mean that business enterprises can refuse to collectively bargain because they "voluntarily" chose not to do so. It is only necessary that the outcome be voluntarily agreed by the parties. Legally mandated bargaining by independent parties is not a violation of a human right.

The right to collective bargaining applies to workers not enterprises. If a business enterprise is to respect the right of workers to bargain collectively, then it must accept that it has a duty to bargain. This is the essence of what it means to bargain in good faith. Accepting the duty to bargain means that the business enterprise must accept reasonable times and venue for bargaining, participate in meetings, give serious consideration and a response to proposals, and provide reasons for its responses. Moreover, the business enterprises should make every reasonable attempt to reach agreement.

Instruments

The Universal Declaration of Human Rights[592]

Article 20

1. Everyone has the right to freedom of peaceful assembly and association.

2. No one may be compelled to belong to an association.

Article 23

4. Everyone has the right to form and to join trade unions for the protection of his interests.

International Covenant on Economic, Social and Cultural Rights[593]

Article 8 [Right to form and join trade unions without restriction]

592 Universal Declaration of Human Rights (1948) www.ohchr.org/en/udhr/pages/searchbylang.aspx

593 International Covenant on Economic, Social and Cultural Rights (1966) www.ohchr.org/en/professionalinterest/pages/cescr.aspx.

1. The States Parties to the present Covenant undertake to ensure:

   (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

   (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

   (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

   (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State. (…)

International Covenant on Civil and Political Rights[594]

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right. (…)

ILO, Freedom of Association and Protection of the Right to Organise Convention[595]

Preamble

Considering that the Preamble to the Constitution of the International Labour Organisation declares "recognition of the principle of freedom of association" to be a means of improving conditions of labour and of establishing peace;

Considering that the Declaration of Philadelphia reaffirms that "freedom of expression and of association are essential to sustained progress";

Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

594 International Covenant on Civil and Political Rights (1966) www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

595 International Labour Organisation (ILO), Freedom of Association and Protection of the Right to Organise Convention (No. 87) (1948) www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C087.

Article 3

1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 10

In this Convention the term organisation means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.

ILO, Right to Organise and Collective Bargaining Convention[596]

Article 1

1. Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.

2. Such protection shall apply more particularly in respect of acts calculated to--

   (a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership;

   (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours.

Article 4

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

ILO, Declaration on Fundamental Principles and Rights at Work[597]

The International Labour Conference (…)

2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

   (a) Freedom of association and the effective recognition of the right to collective bargaining; (…)

596 International Labour Organisation (ILO), *Freedom of Association and Protection of the Right to Organise Convention (No. 87)* (1948) www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C087.

597 International Labour Organisation (ILO), *Right to Organise and Collective Bargaining Convention (No. 98)* (1949) www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C098.

ILO, Declaration on Social Justice for a Fair Globalization[598]

I. (…) the four equally important strategic objectives of the ILO, through which the Decent Work Agenda is expressed (…):

(iv) respecting, promoting and realizing the fundamental principles and rights at work, which are of particular significance, as both rights and enabling conditions that are necessary for the full realization of all of the strategic objectives, noting:

– that freedom of association and the effective recognition of the right to collective bargaining are particularly important to enable the attainment of the four strategic objectives; and

– that the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and that labour standards should not be used for protectionist trade purposes.

UN Global Compact, Ten Principles[599]

Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

ILO, General Survey on the Fundamental Conventions[600]

51. Freedom of association and collective bargaining, which are now set out in most of the constitutions of member States, are of vital importance for the social partners, as they enable them to establish rules in the field of working conditions, including wages, to pursue more general claims and to reconcile their respective interests with a view to ensuring lasting economic and social development. In the Committee's opinion, strong and independent workers‟ organizations are essential to compensate the legal and economic inferiority of workers. Furthermore, employers' organizations are particularly important for the protection of interests of small enterprises. Workers' and employers' organizations are major tools for labour market governance and for the development of industrial relations systems that are vectors of stability, progress and economic and social prosperity. They also make it possible to ensure the effective application of labour legislation through the denunciation of violations of the law wherever necessary. In addition, these organizations participate in consultation machinery for the definition of economic and social policy and the formulation of draft labour legislation. It is therefore essential to ensure their independence in relation to the public authorities and political parties, as recalled by the resolution adopted by the Conference in 1952 concerning the independence of the trade union movement.

[Committee of Experts and Committee on Freedom of Association]

52. Conventions Nos 87 and 98 are among those which have received the most ratifications. As additional proof of their importance, all member States, even if they have not ratified the Conventions in question have, on the one hand, an obligation arising from the very fact of membership in the ILO to respect, to promote and to realize the principles concerning fundamental rights which are the subject of these Conventions and, on the other hand, can be called upon to provide explanations to the Committee on Freedom of Association which, as a tripartite body of the Governing Body, has had the mandate since 1951 to examine complaints alleging violations of the principles of freedom of association presented by workers‟ or employers‟ organizations against a member State. The Committee of Experts attaches particular importance to the decisions of the

598 International Labour Organisation (ILO), ILO Declaration on Social Justice for a Fair Globalization (2008) www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_371208.pdf.

599 United Nations Global Compact, *Ten Principles* (2004) https://www.unglobalcompact.org/what-is-gc/mission/principles.

600 International Labour Organisation (ILO), *General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization* (2012) www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_174846.pdf.

Committee on Freedom of Association. As a tripartite body, the legitimacy of the recommendations and principles of the Committee on Freedom of Association is accentuated by the consensus that prevails in its work and the expertise in industrial relations provided by the Government, Employer and Worker members who sit on the Committee in their individual capacity. (…)

Main difficulties concerning the scope of application

58. The principal difficulties relating to the scope of application of Convention No. 87 concern the interpretation given by the legislation in certain countries to the exceptions authorized by Article 9, paragraph 1, of the Convention, namely the armed forces and the police and, more generally, the application of the Convention to public servants and to certain other categories of workers. The application of the Convention to fire service personnel, prison staff, magistrates and teachers has also been the subject of special attention by the Committee. It is the same for the application of the Convention to workers in the informal economy, migrant workers, domestic workers, workers in export processing zones, as well as workers engaged under a disguised labour relationship (in the form of service contracts, for example). The Committee has also noted that a number of the sectors and groups of workers excluded from the right to organize and related rights are often predominantly female. The Committee therefore considers that it is important to examine the gender implications of the application of the Conventions to ensure that there is no direct or indirect discrimination against women. In the view of the Committee, all of these categories of workers should benefit from the rights and guarantees set forth in the Convention.

Trade union rights and civil liberties

59. (…) the fundamental rights that are necessary for the exercise of freedom of association, with particular reference to: (i) the right to freedom and security of person and freedom from arbitrary arrest and detention; (ii) freedom of opinion and expression, and in particular freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers; (iii) freedom of assembly; (iv) the right to a fair trial by an independent and impartial tribunal; and (v) the right to protection of the property of trade union organizations. The ILO supervisory bodies have since unceasingly stressed the interdependence between civil liberties and trade union rights, emphasizing that a truly free and independent trade union movement can only develop in a climate free from violence, pressure and threats of any kind against the leaders and members of such organizations.

Recognition of the most representative trade unions

96. In an attempt to establish a proper balance between imposed trade union unity, which is incompatible with the Convention, and the excessive multiplication of trade unions, the legislation in some countries establishes the concept of the "most representative trade unions", which are granted a variety of rights and advantages. There are different methods to determine the most representative trade unions and the manner in which they jointly or separately engage in collective bargaining. In the view of the Committee, this concept is not in itself contrary to the principle of freedom of association, but must be accompanied by certain conditions, namely: (i) the determination of the most representative organizations must be based on objective, pre-established and precise criteria, so as to avoid any possibility of bias or abuse; and (ii) the distinction should be limited to the recognition of certain preferential rights (for example, for such purposes as collective bargaining, consultation by the authorities or the designation of delegates to international organizations).

The right to strike

117. Strikes are essential means available to workers and their organizations to protect their interests, but there is a variety of opinions in relation to the right to strike. While it is true that strike action is a basic right, it is not an end in itself, but the last resort for workers‟ organizations, as its consequences are serious, not only for employers, but also for workers, their families and organizations and in some circumstances for third parties. In the absence of an express provision in Convention No. 87, it was mainly on the basis of Article 3 of the

Convention, which sets out the right of workers‟ organizations to organize their activities and to formulate their programmes, and Article 10, under which the objective of these organizations is to further and defend the interests of workers, that a number of principles relating to the right to strike were progressively developed (…). This position of the supervisory bodies in favour of the recognition and protection of the right to strike has, however, been subject to a number of criticisms from the Employers‟ group in the Committee on the Application of Standards of the International Labour Conference.

Employers' group

The Employers‟ group in the Conference Committee considers that neither the preparatory work for Convention No. 87, nor an interpretation based on the Vienna Convention on the Law of Treaties, offers a basis for developing, starting from the Convention, principles regulating in detail the right to strike.

According to the Employer members, the right to strike has no legal basis in the freedom of association Conventions. In their view, Convention No. 87 at most contains a general right to strike, which nonetheless cannot be regulated in detail under the Convention. They consider that when the Committee of Experts expresses its views in detail on strike policies, especially on essential services, it applies a "one-size-fits-all" approach that fails to recognize differences in economic or industrial development and current economic circumstances. They add that the approach of the Committee of Experts undermines tripartism and ask it to reconsider its interpretation of the matter. In 2011, the Employer members reiterated their position, considering that the observations of the Committee of Experts on the right to strike and essential services are not in conformity with the text, the preparatory work and the history of the negotiation of Convention No. 87. (…)

Workers' group

The Worker members of the Conference Committee (…) stated that the right to strike is an indispensable corollary of the right to organize protected by Convention No. 87 and by the principles enunciated in the ILO Constitution. In their view, without the right to strike, freedom of association would be deprived of its substance. They added that strike objectives could not be limited only to the conflicts linked to the workplace or the enterprise, particularly given the phenomena of enterprise fragmentation and internationalization. This was the logical consequence of the fact that trade union activities should not be limited to strictly occupational questions. This was the reason why sympathy strikes should be possible, as well as strikes at the sectoral level, the national and the international level. Finally, they considered that by considerably limiting the scope of action of trade unions, by legal or administrative restrictions, governments and employers might find themselves increasingly faced with spontaneous actions. (…)

Finally, they indicated that the Committee of Experts had developed its views on this question in a very cautious, gradual and balanced manner, and that it would be preferable that the general consensus established in this regard was not shaken up.

119-122. (…) the Committee of Experts has never considered the right to strike to be an absolute and unlimited right, and that it has sought to establish limits to the right to strike in order to be able to determine any cases of abuse and the sanctions that may be imposed. (…) elements concerning the peaceful exercise of the right to strike, its objectives and the conditions for its legitimate exercise, which may be summarized as follows: (i) the right to strike is a right which must be enjoyed by workers‟ organizations (trade unions, federations and confederations); (ii) as an essential means of defending the interests of workers through their organizations, only limited categories of workers may be denied this right and only limited restrictions may be imposed by law on its exercise; (iii) the objectives of strikes must be to further and defend the economic and social interests of workers and; (iv) the legitimate exercise of the right to strike may not result in sanctions of any sort, which would be tantamount to acts of anti-union discrimination. Accordingly, subject to the restrictions authorized, a general prohibition of strikes is incompatible with the Convention, although the supervisory bodies accept the prohibition of wildcat strikes. Furthermore, strikes are often called by federations and confederations which, in the view of the Committee, should be recognized as having the right to strike. Consequently, legislation which denies them this right is incompatible with the Convention.

["political strikes"]

124. In the legislation of several countries, "political strikes" are explicitly or tacitly deemed unlawful. 268 The Committee considers that strikes relating to the Government's economic and social policies, including general strikes, are legitimate and therefore should not be regarded as purely political strikes, which are not covered by the principles of the Convention. In its view, trade unions and employers' organizations responsible for defending socio-economic and occupational interests should be able to use, respectively, strike action or protest action to support their position in the search for solutions to problems posed by major social and economic policy trends which have a direct impact on their members. Moreover, noting that a democratic system is fundamental for the free exercise of trade union rights, the Committee considers that, in a situation in which they deem that they do not enjoy the fundamental liberties necessary to fulfil their mission, trade unions and employers' organizations would be justified in calling for the recognition and exercise of these liberties and that such peaceful claims should be considered as lying within the framework of legitimate trade union activities, including in cases when such organizations have recourse to strikes.

["sympathy" strikes]

125. With regard to so-called "sympathy" strikes, the Committee considers that a general prohibition of this form of strike action could lead to abuse, particularly in the context of globalization characterized by increasing interdependence and the internationalization of production, and that workers should be able to take such action, provided that the initial strike they are supporting is itself lawful. (…)

128. In this context, the Committee has noted with concern the potential impact of the recent case law of the Court of Justice of the European Communities (CJEC) concerning the exercise of the right to strike, and particularly the fact that in recent rulings the Court has found that the right to strike could be subject to restrictions where its effects may disproportionately impede an employer's freedom of establishment or freedom to provide services. (…) the European Trade Union Confederation (ETUC) drew the Committee's attention to its particular concerns with respect to the impact of recent decisions of the Court of Justice of the European Union (Viking, Laval, Ruffert and Luxembourg) on freedom of association rights and the effective recognition of collective bargaining. (…)

143. EPZs. A number of countries establish a special system of industrial relations in EPZs which specifically or indirectly prohibits strikes in such zones. 332 In the view of the Committee, such prohibitions are incompatible with the principles of non-discrimination which must prevail in the implementation of the Convention. (…)

167. (…) Collective bargaining is one of the principal and most useful institutions developed since the end of the nineteenth century. As a powerful instrument of dialogue between workers" and employers" organizations, collective bargaining contributes to the establishment of just and equitable working conditions and other benefits, thereby contributing to social peace. It also provides a basis for preventing labour disputes and determining procedures for the settlement of certain specific problems, particularly in the context of adjustment processes in the event of economic crisis or cases of force majeure, as well as worker mobility programmes. Collective bargaining is therefore an effective instrument which facilitates adaptation to economic, socio-political and technological change. The principal elements of Convention No. 98, with which most national law and practice is now aligned, are the following: (i) the principle of the independence and autonomy of the parties and of free and voluntary bargaining; (ii) the effort made, in the context of the various bargaining systems, to reduce to a minimum any possible interference by the public authorities in bipartite negotiations; and (iii) the primacy accorded to employers and their organizations and to trade unions as the parties to negotiations.

[burden of proof and anti-union discrimination]

192. One of the main difficulties in relation to allegations of discrimination in general, and of anti-union discrimination in particular, relates to the burden of proof. In practice, placing on workers the burden of proving that the act in question occurred as a result of anti-union discrimination may constitute an insurmountable obstacle to establishing liability and ensuring an appropriate remedy. In response, certain States have decided to strengthen the protection of workers by requiring the employer, under certain conditions, to prove that the act of alleged anti-union discrimination was caused by factors other than trade union activity or membership. (…)

199. (…) two [restrictive] trends to which the Committee draws attention. The first is the tendency for the legislature in several countries to give precedence to individual rights over collective rights in employment matters. This tendency runs counter to ILO principles, and particularly the Collective Agreements Recommendation, 1951 (No. 91), which recalls the principle of the binding effects of collective agreements and their primacy over individual contracts of employment (with the exception of provisions in the latter which are more favourable to the workers covered by the collective agreement). Secondly, in certain countries, direct agreements between employers and groups of non-unionized workers are much more numerous than the collective agreements concluded with the representative organizations of workers. This shows that the obligation to promote collective bargaining within the meaning of Article 4 is not yet fully respected.

Negotiation in good faith

208. The principle of negotiation in good faith, which is derived from Article 4 of the Convention, takes the form, in practice, of various obligations on the parties involved, namely: (i) recognizing representative organizations; (ii) endeavouring to reach agreement; (iii) engaging in real and constructive negotiations; (iv) avoiding unjustified delays in negotiation; and (v) mutually respecting the commitments made and the results achieved through bargaining. (…)

Content of collective bargaining

215. Conventions No. 98, 151 and 154 and Recommendation No. 91 focus the content of collective bargaining on terms and conditions of work and employment, and on the regulation of relations between employers and workers and their respective organizations. The concept of "conditions of work" covers not only traditional working conditions (the working day, additional hours, rest periods, wages, etc.), but also subjects that the parties decide freely to address, including those that are normally included in the field of terms and conditions of employment in the strict sense (promotion, transfer, dismissal without notice, etc.). In practice, although conditions of work remain essential issues addressed by most collective agreements, the range of the subjects addressed has progressively broadened to reflect the evolution of industrial relations. Agreements increasingly frequently cover issues related, for example, to recruitment levels, safety and health, restructuring processes, training, discrimination and supplementary social security benefits. Agreements are also sometimes used to institutionalize procedures on dispute settlement machinery, and to prevent strikes. Finally, they may also be used, where appropriate, to obtain arrangements for the benefit of workers, particularly with regard to their welfare (enterprise doctors, works stores, loan agreements, housing assistance, etc.). Whatever the content, the Committee considers that measures taken unilaterally by the authorities to restrict the scope of negotiable issues are generally incompatible with the Convention; and that tripartite discussions for the preparation, on a voluntary basis, of guidelines for collective bargaining are a particularly appropriate method of resolving these difficulties.

[Collective agreements with non-unionized workers]

240. In practice, the Committee has recalled on several occasions that, where there exists a representative trade union and it is active within the enterprise or branch of activity concerned, the authorization for other workers‟ representatives to bargain collectively not only weakens the position of the trade union, but also undermines ILO rights and principles on collective bargaining. Despite this principle, several States continue to promote or allow non-unionized workers' representatives to conclude collective agreements, even where there exists in the sector or enterprise concerned a trade union that is more able to guarantee the independence of its positions in relation to the employer. Recalling the principle that the use of machinery for voluntary negotiation has to be encouraged, the Committee considers that if, in the course of collective bargaining with the trade union, the enterprise offers better working conditions to nonunionized workers, there would be a serious risk of undermining the negotiating capacity of the trade union and giving rise to discriminatory situations in favour of the nonunionized staff; furthermore, it might encourage unionized workers to withdraw from the union. Emphasizing that collective bargaining is a fundamental right recognized in many national constitutions, and therefore accorded a high legal ranking, the Committee calls on governments to take measures to prevent direct agreements with non-unionized workers being used for anti-union purposes (…),

Machinery and procedures to facilitate and promote collective bargaining

241. The Collective Bargaining Recommendation, 1981 (No. 163), proposes a series of means to facilitate and promote collective bargaining, in accordance with Article 4 of Convention No. 98. These include measures with a view to: (i) facilitating the establishment and growth, on a voluntary basis, of free, independent and representative employers‟ and workers‟ organizations; (ii) establishing procedures for the recognition of the most representative organizations; (iii) ensuring that collective bargaining is possible at any level whatsoever; (iv) enabling negotiators to obtain appropriate training and the parties to have access to the information required for meaningful negotiations (such as information on the economic situation of the enterprise, on condition, however, that the objectivity and confidentiality of such financial data is subject to reasonable guarantees); and (v) taking measures adapted to national conditions so that procedures for the settlement of labour disputes assist the parties to find a solution to the dispute themselves. Moreover, the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), encourages the development of voluntary conciliation and arbitration machinery, one of the principal characteristics of which should be the joint nature of the machinery, voluntary recourse to the procedures, which should be expeditious and free of charge; and calls on the parties to abstain from strikes and lockouts while voluntary conciliation and arbitration procedures are in progress.

Extension of collective agreements

245. The Collective Agreements Recommendation, 1951 (No. 91), indicates that, where appropriate, having regard to established collective bargaining practice, "measures, to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain stipulations of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement." 595 National laws or regulations may make the extension of the collective agreement subject to the following, among other, conditions: (i) that the collective agreement already covers a number of the employers and workers concerned which is, in the opinion of the competent authority, sufficiently representative; (ii) that, as a general rule, the request for extension of the agreement shall be made by one or more organizations of workers or employers who are parties to the agreement; and (iii) that the employers and workers to whom the agreement would be made applicable should be given an opportunity to submit their observations. 596 The Committee considers that the extension of collective agreements is not contrary to the principle of voluntary collective bargaining and is not in violation of Convention No. 98.

[Compulsory arbitration]

247. Compulsory arbitration in the case that the parties have not reached agreement is generally contrary to the principles of collective bargaining. In the Committee's opinion, compulsory arbitration is only acceptable in certain specific circumstances, namely: (i) in essential services in the strict sense of the term, that is those the interruption of which would endanger the life, personal safety or health of the whole or part of the population; (ii) in the case of disputes in the public service involving public servants engaged in the administration of the State; (iii) when, after protracted and fruitless negotiations, it becomes obvious that the deadlock will not be broken without some initiative by the authorities; or (iv) in the event of an acute crisis. However, arbitration accepted by both parties (voluntary) is always legitimate. In all cases, the Committee considers that, before imposing arbitration, it is highly advisable that the parties be given every opportunity to bargain collectively, during a sufficient period, with the help of independent mediation

Inditex-IndustriAll, Global Framework Agreement[601]

The main purpose of the Agreement remains ensuring respect of Human Rights within the labor and social environment, by promoting decent work throughout Inditex's Supply Chain. (…)

The terms and conditions of the Agreement shall apply throughout the Inditex supply chain including in workplaces not represented by IndustriALL Global Union affiliated trade unions . IndustriALL Global Union and Inditex undertake to inform other trade unions in these latter places of the terms and conditions hereunder agreed.

IndustriALL Global Union will work with Inditex to help secure full compliance with the following standards (…):

1. No Forced Labour.
2. No Child Labour.
3. No Discrimination.
4. Respect for Freedom of Association and Collective Bargaining.
5. No Harsh or Inhumane Treatment.
6. Safe and Hygienic Working Conditions.
7. Wages are paid.
8. Working Hours are Not Excessive.
9. Regular Employment
10. Traceability of production
11. Health and Safety of products
12. Environmental Awareness
13. Confidentiality of information
14. Code implementation
    - Transparency
    - Reference to national legislation, Conventions and Agreements
    - Verification of compliance
    - Ethics Committee and Whistleblowing Channel

601 Inditex-IndustriAll, *Global Framework Agreement* (2014) www.industriall-union.org/sites/default/files/uploads/documents/GFAs/signed_gfa_inditex_-_english.pdf.

Inditex and IndustriALL Global Union agree to an annual review of the application of the Agreement and accordingly will create a committee comprised of three representatives from Inditex and three representatives from IndustriALL Global Union to undertake that annual review.

To facilitate the on-going review of Freedom of Association and the Right to Bargain Collectively and the annual review of the Agreement, Inditex undertakes to provide reasonable information on its supply chain to the IndustriALL Global Union.

Inditex and IndustriALL Global Union undertake to inform each other of any breach of the Agreement, as soon as the breach is discovered, to enable the earliest possible implementation of a remediation action plan.

Annex 1 - Code Of Conduct For Manufacturers And Suppliers Inditex Group

4. Respect for freedom of association and collective bargaining

Manufacturers and suppliers shall ensure that their employees, without distinction, have the right of association, union membership and collective bargaining. No retaliation may arise from the exercise of such right and no remuneration or payment whatsoever may be offered to the employees in order to hinder the exercise of such a right. Likewise, they shall adopt an open and collaborative attitude towards the activities of Trade Unions.

Workers' representatives shall be protected from any type of discrimination and shall be free to carry out their representative functions in their workplace.

Where the rights to Freedom of Association and Collective Bargaining are restricted under law, the appropriate channels to ensure a reasonable and independent exercise of such rights must be designed.

10. Traceability of production

Manufacturers and suppliers shall not assign any work to third parties without the prior written authorization of Inditex. Those who outsource any work shall be responsible for the enforcement of the Code by these third parties and their employees.

Likewise, manufacturers and suppliers shall apply the principles of this Code to any homeworker involved in their supply chain, and shall give transparency to the locations and working conditions of said homeworkers.

14. Code implementation

14.3 Verification of compliance

Manufacturers and suppliers shall authorize Inditex and/or any third parties the former might appoint, to monitor the appropriate enforcement of the Code. For these purposes, they shall provide the required means and the appropriate access to the facilities and documentation required to ensure this verification.

14.4 Committee of Ethics and Whistleblowing Channel

This Code is aligned with the principles and values that are included in the Inditex Code of Conduct and Responsible Practices, which regulates a Committee of Ethics and Whistleblowing Channel to ensure its enforcement.

In this sense, and in order to ensure the enforcement of the Code of Conduct for Manufacturers and Suppliers, the Committee of Ethics can act at its own initiative or following a formal complaint made in good faith by a manufacturer, supplier or other interested third party that might have any direct relationship or commercial or professional interest with Inditex.

IndustriALL, Agreement with H&M Proves Instrumental in Resolving Conflicts[602]

A global framework agreement (GFA) signed between IndustriALL Global Union and Swedish clothing company H&M has been an accelerator in reinstating sacked workers at garment factories in both Myanmar and Pakistan just a couple of months after it came into force.

The GFA, which was signed in November 2015, serves to protect the labour rights of 1.6 million workers in H&M's global supply chain.

In Myanmar, the GFA was key to getting trade unionists back to work, as well as achieving trade union recognition at the Jiale Fashion factory in Yangon.

Eight union leaders were sacked at the garment factory in October 2015, leading to a month-long strike. The Confederation of Trade Unions in Myanmar (CTUM) reported the dispute to IndustriALL's South East Asia regional office, which invoked the GFA with the H&M Sustainability offices in Yangon and Sweden, especially as the case raised issues on freedom of association.

H&M Sustainability then pushed for dialogue through both their local office in Yangon and Jiale Fashion's owners in Hong Kong. H&M Sustainability, IndustriALL and CTUM were involved throughout the process until an agreement was reached between workers and the factory.

As well as reinstating the dismissed workers, the factory agreed to recognize the factory trade union, the Jiale Basic Labour Organization, which is affiliated to CTUM and IndustriALL through the Industrial Workers Federation of Myanmar (IWFM).

Khaing Zar, assistant general secretary of IWFM said: "Building trust between workers and management is the key to industrial peace. The formation of the Workers' Coordinating Committee at the factory will improve workplace cooperation and, of course, the biggest achievement is the recognition of the trade union at Jiale Fashion."

IndustriALL textile director Christina Hajagos-Clausen said: "The GFA is founded upon a shared belief that well-structured industrial relations are essential to a stable and sustainable production model. This type of collaboration is crucial for lasting improvements for the garment workers in H&M's supply chain."

In November 2015, 88 workers at the Denim Clothing Company (DCC) factory in Pakistan were sacked for demanding their rights. The dispute began when five worker representatives were sacked on the spot for asking to discuss issues such as a lack of social security, insurance, and salaries below the minimum wage that often were paid late. When 83 of their colleagues stood up for them, they also lost their jobs.

As part of the newly signed GFA with H&M, both parties worked to bring the 88 workers back to work through joint negotiations with IndustriALL Pakistani affiliate NTUF and the local management at Denim Clothing. All workers were reinstated with full pay from 26 November, the date they had been fired. (…)

Indonesia, Freedom of Association Protocol[603]

Article 1

a. The parties are those who sign this protocol. They comprise of Unions, Brands and Suppliers.

b. Workers are all those who carry out waged work.

602 IndustriALL Global Union, *Agreement with H&M Proves Instrumental in Resolving Conflicts* (2016) www.industriall-union.org/agreement-with-hm-proves-instrumental-in-resolving-conflicts-0.

603 Indonesia, *Freedom of Association Protocol* (2011) https://cleanclothes.org/resources/recommended-reading/freedom-of-association-protocol-indonesia/at_download/file.

c. Suppliers are companies that provide goods or services to the brands.

d. Brands are legal persons or entities that are registered as owning trademark rights.

e. Unions are organisations formed from, by and for workers, whether within or outside of companies, with the aim to promote, defend and protect workers' rights and interests as well as to increase the welfare of workers and their families. (…)

Article 4

Suppliers (…) are obliged to implement freedom of association including, inter alia:

1. Give workers freedom to form unions within the company premises.

2. Acknowledge the existence of the various unions in the company without discrimination.

3. Not interfere in any way with unions carrying out their organisational activities provided that these activities do not contravene protocol determinations, the CBA or other applicable laws and regulations.

4. Release union representatives or members from their work duties for the purpose of undertaking union organisational activities, with continued provision of all rights to which the particular worker is normally entitled. (…)

10. There must be no intimidation in any form whatsoever, including demotions, transfers, wage reductions, criminalisation, provision of a work load outside of the worker's capabilities, suspension or sacking of members and/or union organisers, perpetrated against union members or representatives undertaking organisational activities throughout the period of their leadership.

Article 5

(1) Suppliers shall facilitate the implementation of union activities within the company in such ways as:

a. Unions may make use of company meeting space if requested at least 3 days in advance provided that such a meeting space is available. For urgent needs, companies are obliged to provide a meeting room as long as such a room is available (and not in current use).

b. Unions may make use of communication facilities such as telephones, fax and internet within the company as long as such facilities are available and in accordance with regulations and procedures as applies to other users within the company.

c. Unions may make use of company vehicles if requested 3 days in advance provided that such a vehicle is available. For urgent needs, the company loan out a vehicle if such a vehicle is available on that day and not in current use. (…)

g. The company must assist in deducting union fees from the wages of union members every month and within a period of time jointly agreed upon or at the latest within 10 work days the amount must be given to the relevant union leader depending on the administration processes within the company.

(2) a Suppliers are obliged to provide a space or room that is appropriate, hygienic and strategic within the company premises to be used as a union secretariat together with furnishings to support the union's activities, including two sets of desks and desk chairs, filing cabinets or cupboards and a table and chairs for guests.

b. In the case that the company is limited in its ability to provide for the above facilities and fittings, then the company is obligated to make a refurbishment plan with the union's agreement within a timeframe of 6 months.

(3) Suppliers have the obligation to support and facilitate union activities during working hours including:

a. Routine scheduled meetings, such as meetings between union representatives as well as between union representatives and members.

b. Ad hoc meetings as may be required, both between union representatives and between union representatives and members, providing three days' prior notice to the company.

c. Union educational activities, both scheduled and unscheduled, providing two days' prior notice to the company.

Article 6

(1) The parties have the obligation to produce a Collective Bargaining Agreement (CBA) within a time frame of not more than six months after the formation of a union in accordance with applicable legal requirements.

(2) In negotiating a CBA, Unions and Companies shall adhere to the following:

a. Companies shall not reject an invitation from unions to negotiate to produce or renew an agreement.

b. Companies shall not undertake any form of intimidation against the union delegates in the CBA negotiating team.

c. During CBA negotiations, union delegates in the negotiation team are to be relieved of their daily work load in accordance with a jointly agreed upon schedule.

d. During CBA negotiations, union delegates in the negotiating team are to be given freedom to carry out surveys so as to gather data to support the negotiations.

e. The negotiating team must be given access to information concerning company conditions so as to obtain supportive data, as far as that access does not breach confidentiality provisions as provided by law or by contract with a third party.

Article 8

(1) To supervise implementation of this FOA Protocol, the parties are obligated to form an FOA Protocol Supervision and Dispute Settlement Committee no later than 90 working days after the signing of this Protocol.

(2) FOA Protocol Supervision and Dispute Settlement Committees will be established at company and national levels. (…)

ACT (Action, Collaboration, Transformation)[604]

Background

ACT (Action, Collaboration, Transformation) is a ground-breaking agreement between global brands and retailers and trade unions to transform the garment and textile industry and achieve living wages for workers through collective bargaining at industry level linked to purchasing practices.

604 ACT (Action, Collaboration, *Transformation), What is ACT?* (2018) https://actonlivingwages.com/fact-sheet.

Collective bargaining at industry level means that workers in the garment and textile industry within a country can negotiate their wages under the same conditions, regardless of the factory they work in, and the retailers and brands they produce for. Linking it to purchasing practices means that payment of the negotiated wage is supported and enabled by the terms of contracts with global brands and retailers.

ACT is the first global commitment on living wages in the sector that provides a framework through which all relevant actors, including brands and retailers, trade unions, manufacturers, and governments, can exercise their responsibility and role in achieving living wages.

ACT members have agreed the following the principles:

- A joint approach is needed where all participants in global supply chains assume their respective responsibilities in achieving freedom of association, collective bargaining and living wages.
- Agreement on a living wage should be reached through collective bargaining between employers and workers and their representatives, at industry level.
- Workers must be free and able to exercise their right to organize and bargain collectively in accordance with ILO Conventions.

Memorandum of understanding between ACT corporate signatories and INDUSTRIALL Global Union on establishing within global supply chains freedom of association, collective bargaining and living wages

Goals and Purpose

This Memorandum of Understanding (MoU) aims at creating a cooperation between IndustriALL Global Union and ACT (Action Collaboration Transformation) corporate signatories ("We") in order to achieve living wages for workers in the global textile and garment industry supply chains through mature industrial relations, freedom of association and collective bargaining. (…)

There are two sustainable mechanisms that we consider have the capacity to deliver freedom of association, collective bargaining and living wages to any scale, while setting a level playing field:

- Industrywide collective agreements
- National minimum wage fixing enforcement mechanisms

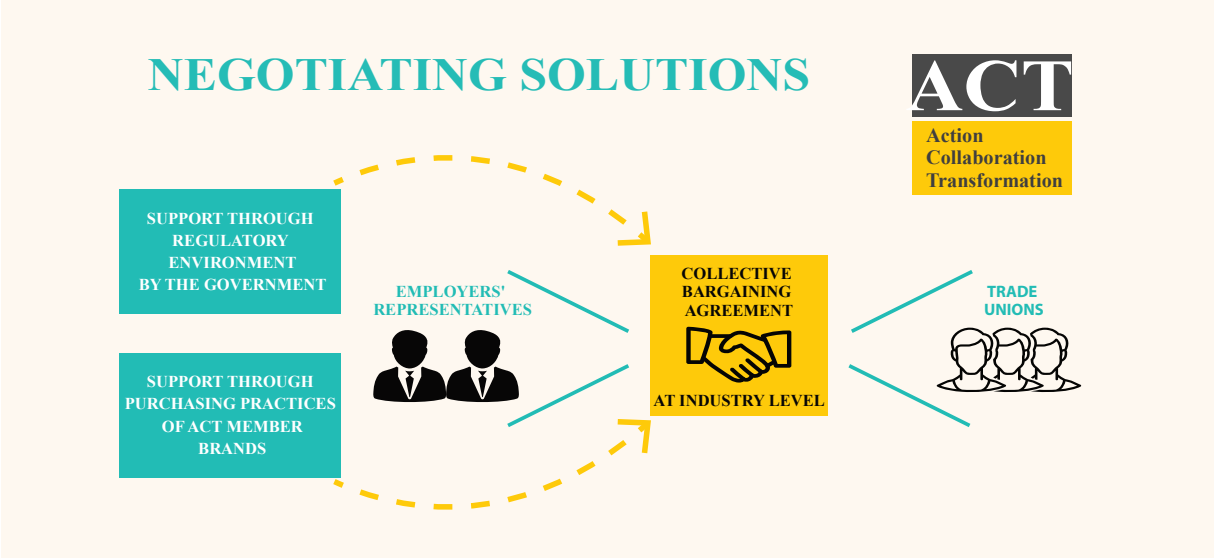
Framework for Action

We recognise that business security and commitment to production countries and suppliers are a key enabler for paying living wages in conjunction with all other pillars of our joint approach. (…)

8) The corporate signatories will work with their supplier factories and IndustriALL will work with its affiliated unions in target countries to bring them together to negotiate towards a living wage.

9) We will provide capacity building to both groups in support of this process, including training of managers and workers on freedom of association and collective bargaining.

Negotiating solutions[605]



Bangladesh Accord, Transition to the RMG Sustainability Council[606]

The Accord on Fire and Building Safety in Bangladesh (Bangladesh Accord) is an independent, legally binding agreement between brands and trade unions to work towards a safe and healthy garment and textile industry in Bangladesh. The Accord covers factories producing Ready-Made Garments (RMG) and at the option of signatory companies, home textiles and fabric & knit accessories.

The Rana Plaza factory building collapsed on 24 April 2013, killing 1,133 people and critically injuring thousands more; in the years prior to the Rana Plaza building collapse, numerous fatal factory fires occurred in Bangladesh. The Accord was created to enable a working environment in which no worker needs to fear fires, building collapses, or other accidents that could be prevented with reasonable health and safety measures.

*

The functions of the local office of the Accord on Fire and Building Safety in Bangladesh have transitioned to the RMG Sustainability Council (RSC). RSC is a newly established not-for-profit company in Bangladesh created and governed by global apparel companies, trade unions, and manufacturers. The RSC was officially registered in Bangladesh on May 20, 2020 to be a permanent safety monitoring and compliance body in the RMG sector in Bangladesh.

The Accord signatory companies and unions and the Bangladesh Garment Manufacturers and Exporters Association (BGMEA) agreed to establish the RSC through a Memorandum of Understanding (MoU) signed on May 8, 2019. To ensure that the safety progress achieved by the Accord since 2013 is sustained and potentially expanded, the MoU prescribes that the RSC inherits all operations, staff and infrastructure of the local Bangladesh Accord office.

The RSC will continue with factory inspections, remediation monitoring, safety training, and a safety & health complaints mechanism at the RMG factories supplying to Accord signatory companies. These programs will be implemented in accordance with the protocols and procedures developed by the Accord, which have also been inherited by the RSC. (…)

605 ACT, *Negotiating Solutions*, https://actonlivingwages.com/country-activities.

606 Bangladesh Accord, *Transition to The RMG Sustainability Council* (RSC) (2020) https://bangladeshaccord.org/updates/2020/06/01/transition-to-the-rmg-sustainability-council-rsc.

The independence of the existing safety & health complaints mechanism that is available to workers in factories supplying to Accord signatory companies shall also be safeguarded under the RSC. (…)

The Accord company and union signatories are confident that the global companies, trade unions, and manufacturers governance model of the RSC will prove effective to ensure they collectively take responsibility for workplace safety in Bangladeshi RMG exporting factories. The Accord signatories additionally recognize that to achieve and maintain safe workplaces requires the full participation of the workforce, sustainable purchasing practices, and strong accountability instruments. Accordingly, the Accord company and union representatives on the RSC Board are committed to safeguard the key characteristics of the Accord program including: that workers play an active role in advancing workplace safety and their right to freedom of association is protected; brands and retailers negotiate commercial terms to make remediation financially feasible; all inspection results and remediation activities are publicly disclosed; and the escalation protocol is effectively implemented to ensure that suppliers comply with the safety requirements.

Bangladesh Accord, The Launch of the Sustainability Council[607]

Today the functions of the Bangladesh offices of the Accord on Fire and Building Safety in Bangladesh have transitioned to the RMG Sustainability Council (RSC), a permanent national organisation with equal representation from RMG manufacturers, global apparel companies, and trade unions representing garment workers.

The RSC will initially conduct it's workplace safety programs at the 1600+ RMG factories covered under the Accord, but is envisaged to eventually cover all RMG exporting garment factories. The RSC aspires to also encompass industrial relations, skills development and environmental standards.

Since mid-2013, Bangladeshi RMG factories have made significant improvements in workplace safety. More than 1200 Accord covered factories have completed more than 90% of the remediation of their Corrective Actions Plans. Through the work of the RSC, covered factories will be able to complete their CAPs and ensure that all outstanding safety issues are remediated and verified as correctly fixed, and that the labour-management Safety Committees in the factories are equipped and empowered to monitor and address workplace safety on a daily basis.

Rubana Huq, President of the BGMEA and industry representative on the RSC Board of Directors, said: "The RSC is an unprecedented national initiative and through our collective efforts with the brands and trade unions we will make sure that Bangladesh remains one of the safest countries to source RMG products from."

China Rahman, General Secretary of the IndustriALL Bangladesh Council and trade unions representative on the RSC Board of Directors, said: "Together with our Bangladeshi trade union affiliates we will help ensure workers in RMG factories have safe workplaces and have access to remedy to address safety concerns and exercise the right to safe workplaces. We will work to ensure that workers to have trust in the newly established RSC"

Roger Hubert, H&M and brand representative on the RSC Board of Directors, said: "With the establishment of the RSC, brands can continue to honour their supply chain responsibilities that they have committed to through the Accord signed with the trade unions. The RSC will provide the assurance that workplace safety will continue to be addressed throughout out Bangladeshi RMG supply chain."

Know the Chain, Forced Labour Action: Findings from Three Sectors[608]

Good Practice Examples: Addressing Restriction to Freedom of Association

607 Accord on Fire and Building Safety in Bangladesh, *RMG Industry brands, manufacturers, and unions launch joint RMG Sustainability Council (RSC) in Bangladesh to sustain workplace safety* (2020) www.business-humanrights.org/sites/default/files/documents/RSC%20press%20release%20FINAL%20%281%20June%202020%29.pdf-converted.pdf.

608 Know the Chain, *Forced Labor Action Compared: Findings From Three Sectors* (2017) https://knowthechain.org/wp-content/uploads/KTC_CrossSectoralFindings_Final.pdf.

In cases where freedom of association is restricted by law, such as China and Vietnam, H&M addresses this issue directly with its supplier factories as well as on industry and government levels. The company further works to empower workers with awareness about their labor rights and helps its suppliers establish functioning and democratically elected workplace representation.

Adidas encourages suppliers to maintain a "non-interference" environment where trade union activities are not only allowed, but also stimulated through effective systems of worker-management communication and collective bargaining. The company recognizes the challenges that workers might face in forming trade unions, particularly in countries such as China and Vietnam, where the creation of independent trade unions is prohibited by law.

Since these are major sourcing countries for the company, it has engaged with workers directly in order to identify parallel means for worker representation through direct worker-led elections, as well as to track the emergence of more representative state unions and the role of sectoral level collective agreements.

Further, Adidas has designed training modules to address freedom of association practices. Examples range from worker representative training in China in partnership with labor NGOs (these allow for the free election of worker representatives to welfare committees) to the development and dissemination of materials on strike management in Vietnam with the ILO.

The company also requires suppliers to issue "Right to Organize guarantees" to workers declaring their freedom to form and join unions of their own choosing in order to prevent direct infringement of rights or the workers' freedom to exercise them. They have done this especially in situations when they discover direct infringement of rights (namely Indonesia, Sri Lanka, the Philippines, El Salvador, and Honduras).

Johnston & Land-Kazlauskas, Collective Bargaining in the Gig Economy[609]

'Gig' or platform-based work represents one of the most recent, highly-publicized labour market trends. Attributed to the increased demand for flexibility on the part of employers, better labour market efficiency and, in some cases the desire for greater flexibility on the part of workers, gig and platform-based work is one type of non-standard work facilitated through technology and digital markets, on-demand. Despite its relatively small size the gig economy has the potential to rapidly change the way work is organized and performed, to alter the content and quality of jobs, and to reshape industries. This paper examines challenges to freedom of association and the effective recognition of the right to collective bargaining for workers in the gig economy, and explores the broad range of strategies that gig-economy workers are using to build collective agency, and to promote effective regulation of gig work.

The benefits and costs of gig and platform work for employers, workers, and society remain highly contested. Advocates contend that digital labour platforms can economically benefit socially marginalized groups including the unemployed, geographically isolated, and refugees. For firms, gig work combines technological innovation with various contractual relationships that can reduce transaction and labour costs, provide 'numerical flexibility' in the face of fluctuating demand, and increase competitiveness. However, like non-standard employment more broadly, work content and work arrangements in the gig economy are diverse. Despite the possible benefits, jobs in the gig economy can also be structured in ways that can negatively impact workers (unpredictable scheduling, inconsistent earnings, unreliable long-term employment prospects) and firms (unfair competition, lower productivity and absenteeism).

We begin with an overview of gig and platform work and the structural and institutional challenges that gig- and platform-based workers in building collective, group agency. (…) The four organizational structures we explore (union renewal strategies and new organizing initiatives, worker forums, worker centres, and cooperatives) represent a comprehensive list of organizations that are actively organizing and supporting gig economy workers. Given the rapid turnover of the on-demand workforce, we view the tenacity and adaptive strategies of workers' organizations as vital to developing a sustainable and dynamic labour movement. (…)

609 Hannah Johnston and Chris Land-Kazlauskas, *Organizing On-Demand: Representation, Voice, and Collective Bargaining in the Gig Economy, ILO Conditions of Work and Employment Series No. 94* (2019) www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_624286.pdf..

We maintain that technological innovation (including through the 4th industrial revolution) and collective bargaining are not mutually exclusive; an inability to conceive of their coexistence is nothing more than a failure of the imagination. (…)

Hayter, Industrial Relations in Emerging Economies[610]

Theoretical Perspectives on the Institutionalization of Industrial Relations

Theoretical perspectives of industrial relations have their origins in the response to the 'labour problem' that emerged in industrializing countries in the late nineteenth and early twentieth centuries. Faced with child labour, low wages, long working hours and hazardous working conditions, early trade unions used the 'method' of collective bargaining to improve working conditions. The gradual and incremental structuring of production relations through processes such as collective bargaining was seen as a means of 're-balancing the institutions of capitalism in order to bring about more stability, efficiency, justice and human values to the employment relationship'. (…)

Fox (1974) identified three 'frames of reference' in industrial relations that held very different assumptions about the nature of work, employment relations and conflict, resulting in different theoretical and explanatory approaches: unitarism, pluralism and Marxism (also known as the radical approach).

The unitarist perspective assumes that there is no difference in interests between an employer and employee. All actors and organizations share the same goals. Industrial relations is thus characterized by the ordering of common interests, the outcome of which is harmonious employment relations. This view is typical of human resource management according to which it is possible for employment policies and practices to align the interests of employees and employers (Lewin, 2001).

A pluralistic approach accepts conflict as an innate characteristic of employment relations and seeks pragmatic means to contain it (see, e.g., Fox, 1966; Clegg, 1979). According to this perspective, workers and employers with different interests require processes that help identify both common ground and potential trade-offs. Collective bargaining is seen as a principal means for keeping conflict within tolerable bounds. The incremental structuring of employment relations occurs as the result of an ongoing compromise between employers and employees, and their representative organizations. Employment relations is embedded in a stable system within which the interests of employers and workers can be reconciled. This institutionalization of employment relations also constitutes part of the broader corporatist social contract and is seen as the 'ideal' form for managing industrial conflict in the course of a country's economic development. From this perspective, a rise in unofficial 'wildcat' strike action or social disorder is simply an indicator of an institutional lag.

A radical perspective of industrial relations sees conflict as an inherent characteristic of employment relations, and inevitable given the nature of capitalist development. The focus is on the nature of the capitalist society and the fundamental division between capital and labour. Employment relations under capitalism involves the control and deployment of labour in order to generate profit so that firms can continue to accumulate capital. (…)

Unlike the rich comparative literature that exists on developed economies, the study of the institutionalization of industrial relations in emerging economies is a less-developed subject of enquiry. Comparative studies on the role of trade unions in development from the 1950s and 1960s focused on the question of whether the growth of independent trade unions and collective bargaining contributed to, or impaired, development.

One view held that effective unions would secure a wage that was higher than the marginal product of labour and thus divert the scarce resources available for investment into consumption (Mehta, 1957). Moreover, the labour-intensive production on which these economies relied to generate economic growth would be frustrated if hours of work were too short and wages above internationally competitive levels. Unions would also make it difficult to fire unproductive workers. According to this view, collective bargaining was only appropriate after a sufficient level of industrialization had been achieved.

610 Susan Hayter, Industrial relations in emerging economies (2015) www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_624902.pdf (references omitted).

Galenson (1959, 1962), in comparative studies on the role of labour in developing countries, came to a very different view. Independent trade unions did not impair the investment function, instead they played an important role in securing a committed workforce (through improvements in working conditions and job security). The positive engagement of workers in production and change would offset any consumptionist pressure:

'Independent trade unionism and satisfactory economic development are by no means antithetical. On the contrary, we believe that independent unions can make a major contribution to development by giving the individual worker a sense of personal dignity and a means of redressing his grievances. It is quite understandable for government leaders who are concentrating on the achievement of economic goals in the face of what must sometimes appear to be impossible odds to be impatient with intractable, 'irresponsible' representatives of workers. There is an ever-present temptation to silence them and to substitute paternalism for bargaining and conflict. But the price may be very high indeed: the loss to the nation of the creative energies of free men who feel themselves masters of their own fates rather than cogs in a vast, impersonal machine.'

The liberalization of markets [in 1980sand 1990s] posed new demands for labour market flexibility, which in turn eroded employment security at the core (of labour markets). The economic reforms generated higher levels of unemployment and inequality and the context for organized labour became increasingly unfavourable. Unions were often portrayed as 'privileged special-interest groups' and market-distorting institutions' that pushed up wages at the cost of all those excluded from the labour market and surviving at the periphery. This legitimized policies to remove and reduce union power (rather than expand labour protection to those excluded).

Cambodian has ratified all core International Labour Standards including the two important conventions namely Convention No. 87 on Freedom of Association and Protection of the Right to Organize and Convention 98 on Right to Organize and Collective Bargaining. Freedom of association is defined as workers' right to create organizations (trade unions) that represent them. It also applies to the organizations of employers. Collective bargaining is defined as the process of negotiation between employees and employers in particular on working conditions and terms of employments. Both conventions and national laws namely Cambodian Labour Law and Law on Trade Union recognize the right of all workers to form and join trade unions and bargain collectively. This collection covers the main aspects below.

Background (Cambodia)

Hall, The ILO's BFC Programme[611]

III. Labor Rights in the Cambodian Constitution and the 1997 Labour Code

The Cambodian Constitution and Cambodia's Labor Code articulate a range of labor rights. Article 36 of the Cambodian Constitution states that "Khmer citizens of either sex shall have the right to form and to be members of trade unions. The organization and conduct of trade unions shall be determined by law." Article 41 of the Constitution establishes that "Khmer citizens shall have freedom of expression, press, publication, and assembly." Article 42 states that "Khmer citizens shall have the right to establish associations and political parties. These rights shall be determined by law. Khmer citizens may take part in mass organizations for mutual benefit to protect national achievements and social order." Chapter XI of the 1997 Labor Code deals in detail with the various legal rights of workers to organize, the protections guaranteeing labor union freedom, and representation of workers in the workplace. Article 266 states that "workers and employers, without distinction whatsoever, have the right, without previous authorization, to form professional organizations [labor unions and employer associations] of their choosing." Article 267 establishes the right "to draw up their own charter and administrative regulations, as long as they are not contrary to existing laws and public policy; to freely elect their representatives; to formulate their plan of action."

611 John A. Hall, The ILO's Better Factories Cambodia Programme: A Viable Blueprint for Promoting International Labour Rights? (2018) https://www-cdn.law.stanford.edu/wp-content/uploads/2018/03/hall.pdf.

The 1997 Labor Code is extremely comprehensive and detailed, and covers a wide range of labor standards, from wages and hours to health and safety issues, in addition to basic labor rights.

ETI, Freedom of Association in Company Supply Chains[612]

Benefits of freedom of association

Freedom of association is good for people, good for society, good for business and good for morale.

Good for people: Workers who combine their interests by approaching their employer together as a group can help to balance the power inherent in any employment relationship. This encourages people to speak their minds without fear of reprisal. The relative security of numbers allows individuals to express themselves more openly and adds to the value of information that is exchanged.

Good for society: Rights to freedom of association and collective bargaining are called 'enabling rights', because they enable citizens to organise in order to realise other human rights and they underpin the democratic process. Not only do these rights directly assist with the improvement of living and working conditions, they contribute more broadly to economic and social development. In developing countries, freedom of association and collective bargaining can help establish a stable foundation for growth.

Good for business: Extensive research stretching back to the 1930s has demonstrated that, at the individual company level, employee engagement and the feeling of being valued contribute to increased quality, productivity and performance… Good industrial relations are generally characterised by:

- Trust
- Mutual confidence between employees and their
- managers, and managers and their employees
- Good interpersonal relations
- Realistic working agreements and arrangements
- A willingness to work together

Good for morale: A dialogue-based workplace empowers and engages its workers, enhancing morale and leading to improvements in performance. By contrast, a subdued and disempowered workforce will tend towards low engagement and underperformance.

Ideas of dialogue and negotiation may run counter to crude management approaches based on unilateral decision-making and action. Problems often result from managers' nervousness about losing authority. But authoritarian management leaves little or no space for workers to express their needs and aspirations or for dialogue. Typical results are unhappy workers, rapid employee turnover, poor motivation and low productivity. Where a company encounters these issues in its supply chain, the first place to look is at the workplace management style. Tackling such problems at the root can be very beneficial for all concerned.

612 John A. Hall, The ILO's Better Factories Cambodia Programme: A Viable Blueprint for Promoting International Labour Rights? (2018) https://www-cdn.law.stanford.edu/wp-content/uploads/2018/03/hall.pdf.

Instruments (Cambodia)

Constitution of the Kingdom of Cambodia[613]

Article 36:

(…) Khmer citizens of either sex shall have the right to form and to be member of trade unions.

The organization and conduct of trade unions shall be determined by law.

Article 37:

The right to strike and to non-violent demonstration shall be implemented in the framework of a law.

Article 42

Khmer Citizens have the rights to establish associations and political parties. These rights shall be determined by law.

Khmer citizens may take part in mass organizations to work together to protect national achievement and social order.

Labour Law[614]

Article 266:

Workers and employers have, without distinction whatsoever and prior authorization, the right to form professional organizations of their own choice for the exclusive purpose of studying, promoting the interests, and protecting the rights, as well as the moral and material interests, both collectively and individually, of the persons covered by the organization's statutes.

Professional organizations of workers are called "workers' unions".

Professional organizations of employers are called "employers' associations".

Article 268

In order for their professional organization to enjoy the rights and benefits recognized by this law, the founders of those professional organizations must file their statutes and list of names of those responsible for management and administration, with the Ministry in Charge of Labor for registration. All requests for registration shall be appended with the statement of constitution of the organization.

If the Ministry in Charge of Labor does not reply within two months after receipt of the registration form, the professional organization is considered to be all ready registered. A copy of the statutes and the list of names of those responsible for management and administration shall be sent to the Labor Inspector's Office where the organization was established, as well as to the Office of the Council of Ministers, to the Ministry of Justice and to the Ministry of Interior. The filing will be renewed when there are changes in the statutes or management.

613 Cambodia, *Labour Law* (1997) http://www.sithi.org/admin/upload/law/Labor%20Law%201997.%20ENG.pdf.

614 Cambodia, *Law on Trade Unions* (2016) http://www.sithi.org/admin/upload/law/trade_union_law_eng.pdf.

Law on Trade Unions[615]

Article 5: Rights to Establish and to Join a Union or an Employer Association

All workers and employers have, without any distinction whatsoever, the rights to form a union or an employer association of their own choice for the exclusive purpose of study, research, training, promotion of interests, and protection of the rights and the moral and material interests, both collectively and individually, of the persons covered by union or employer association statutes.

Workers have the right to:

- Take part in the formation of a union;
- Be a member of a union and under its rules;
- Participate in the legitimate activities of the union of which he or she is a member;
- Seek and hold an office in any union of which he or she is a member and under its rules;
- Take part in the election of representatives at the workplace where there is a regulation stipulating such election;
- Be elected or appointed and serve as a workplace representative when there is a regulation stipulating for such election or appointment; and
- May exercise any other rights provided for in this law.

Employers have the right to:

- Take part in the formation of an employer association;
- Be a member of any such association according to its rules;
- Participate in the legitimate activities of the association of which they are a member;
- Hold an office in that association according to its rules; and
- May exercise any other rights provided for in this law.

Any unions or employer associations that include both employers and workers are forbidden.

Arbitration Council, Naga World (Employer) vs. Union[616]

Issues in dispute

(From the Non-Conciliation Report of the Ministry of Labour and Vocational Training)

1. The workers demand that the employer refrain from discriminating against staff members taking part in strike action organised by the union and respect the right of staff members dismissed based on strike participation, to join union activities. The employer claims they do not discriminate based on race, in promotion, wage increase or dismissal.

615 Cambodia, *Law on Trade Unions* (2016) http://www.sithi.org/admin/upload/law/trade_union_law_eng.pdf.

616 Arbitration Council, *AC Award #028/14 Naga World Limited vs. Khmer Workers' Labour Right Supports Union at Naga World* (3 March 2014) https://www.arbitrationcouncil.org/download/028-14-naga-world/?wpdmdl=9211&refresh=5fafa04336edb1605345347.

2. The workers demand that the employer comply with the internal work rules and the Labour Law on taking disciplinary action and clearly define misconduct. The employer claims it has complied with the internal work rules and Labour Law.

3. The workers demand that the employer reinstate 8 staff members (…) and provide all reinstated employees with back pay. The employer claims it does not dismiss the workers based on discrimination as alleged. The dismissals were each based on different misconduct of each individual.

Decision and order

Issue 2 & 3:

Order the employer to reinstate Um Phalla and provide back pay for wages and benefits from the date of dismissal to the date of reinstatement and order the employer to punish Um Phalla in accordance with the internal work rules. (…) - Order the employer to pay Mr Jesus M. Pingul termination compensation:

1) Compensation in lieu of the 3-month prior notice

2) Indemnity for dismissal which is equal to 6 months‟ worth of wages and perquisites

3) Payment in lieu of unused annual leave

4) Damages which is equal to the indemnity for dismissal

5) Outstanding wages

ILO CFA, Case of Cambodian Alliance of Trade Unions (CATU)[617]

Allegations: The complainant organization denounces the refusal to register a trade union at a garment factory; acts of anti–union discrimination following a strike, including dismissals, forced transfers, suppression of benefits and false criminal charges; the use of military force on striking workers; and alleges that section 269 of the Labour Act imposes excessive requirements for the determination and election of union leadership.

B. The Government's Reply

109. In its communication dated 30 May 2017, the Government indicates that it has never banned or delayed any trade union registration, that unions with properly completed and submitted applications containing all required documents are considered as having been registered and that, if there is a mistake in the application, the Registrar notifies the applicant of the need to make a rectification, which should not, however, be considered as a barrier for trade union registration. Furthermore, with the adoption of the 2016 Act on Trade Unions, the procedure for registration was reformed and simplified, in particular: (i) the registration period has been shortened from 60 to 30 days and a trade union will thus be considered as duly registered if the applicant does not receive any information from the Registrar within 30 days following the application; (ii) the Prakas No. 249 on Registration of Trade Unions and Employers' Associations, issued on 27 June 2016, provides the details of the procedure, as well as a list of required documents and templates; and (iii) the authority to register trade unions has been delegated from the Ministry of Labour and Vocational Training (MLVT) in Phnom Penh to every Provincial Department of Labour and Vocational Training, which aims at saving the time and expenses of the applicants. The Government adds that the new Act on Trade Unions is aimed at protecting the legal rights of all interested persons covered by the Labour Act, including personnel working in the air and maritime transportation, ensuring the right to collective bargaining, promoting harmonious labour relations and contributing to the development of decent work and enhancement of productivity and investment. In order to ensure proper understanding of the law, a number of training courses for employers and workers have been conducted by the MLVT in collaboration with trade unions and employers' associations. (…)

617 ILO Committee on Freedom of Association, Case No. 3121 (Cambodia) – Cambodian Alliance of Trade Union (CATU) (27 February 2015) https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50001:0::NO::P50001_COMPLAINT_FILE_ID:3240014; ILO Committee on Freedom of Association, Report No 383, October 2017 Concerning Case No 3121 (Cambodia) - Complaint date: 27-FEB-15 - Follow-up, https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3523597.

C. The Committee's conclusions

113. With regard to the alleged obstacles to registration and the refusal to register a trade union at the factory level (recommendation (a)), the Committee notes the Government's indication that the application for registration of CATU at the garment factory was received in March 2015 and the trade union was successfully registered in April 2015 within the time limit prescribed by law. The Committee welcomes this development and requests the Government to confirm that the concerned workers were duly informed of the union's successful registration and that they can exercise legitimate union activities freely and without any interference. Further noting the Government's statement that, with the adoption of the Act on Trade Unions, 2016 and the Prakas No. 249 on Registration of Trade Unions and Employers' Associations, the registration procedure has been improved, simplified and made more accessible to the applicants, the Committee expects that this legislative reform will contribute to ensuring a simple, objective, transparent and rapid procedure for trade union registration in practice and will prevent the formulation of additional administrative obstacles. The Committee invites the Government to provide a copy of the Prakas No. 249 and refers the legislative aspects of this case to the Committee of Experts on the Application of Conventions and Recommendations. (…)

The Committee's recommendations

118. In light of its foregoing conclusions, the Committee invites the Governing Body to approve the following recommendations:

(a) The Committee welcomes the registration of the factory trade union and requests the Government to confirm that the concerned workers were duly informed of the union's successful registration and that they can exercise legitimate union activities freely and without any interference. The Committee expects that the adoption of the new Act on Trade Unions, 2016 and the Prakas No. 249 on Registration of Trade Unions and Employers' Associations will contribute to ensuring a simple, objective, transparent and rapid procedure for trade union registration in practice and will prevent the formulation of additional administrative obstacles. The Committee invites the Government to provide a copy of the Prakas No. 249 and refers the legislative aspects of this case to the Committee of Experts on the Application of Conventions and Recommendations.

(b) The Committee urges the Government once again to take the necessary measures to review section 269 of the Labour Act and section 20 of the new Act on Trade Unions, in consultation with the social partners, in order to ensure that the law does not infringe workers' right to elect their officers freely. The Committee requests the Government once again to take all necessary measures to ensure in the future that the notification requirement in section 3 of the Prakas No. 305 does not amount to a requirement for authorization by the employer to create a trade union or is not otherwise misused to halt trade union formation. The Committee refers the legislative aspects of this case to the Committee of Experts. (…)

ILO CFA, Effect Given to Recommendations[618]

[re Case of Cambodian Alliance of Trade Unions]

26. In its communication dated 1 October 2018, the Government indicates that following the adoption of the 2016 Law on Trade Unions (LTU), the registration procedure has been simplified and reformed and that Prakas No. 249 on Registration of Trade Unions and Employers' Associations, 2016, ensures a simple, objective, transparent and rapid procedure for trade union registration. In particular, it contains detailed information and assistance for newly established trade unions on how to obtain registration and provides a list of required documents and templates as samples and guidelines. The Government clarifies that the requirements listed in the Prakas should not be considered as additional administrative obstacles or a burden in the exercise of

618 International Labour Organisation (ILO), *Effect given to the Recommendations of the Committee and the Governing Body-Report No. 389*, June 2019, Case No. 3121 (Cambodia) – Complaint date 27 Feb. 2015 Follow Up, https://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3998885.

the right to freedom of association since by providing certain information, such as social security numbers and employment book numbers, the Ministry of Labour and Vocational Training (MLVT) can ensure that each worker is properly registered with the Ministry and the National Social Security Funds, so as to provide workers with full protection under the labour law. The Government also states that the simplification and reform under the LTU have resulted in an increase in the number of trade union registrations in 2017, both for local unions and for workers' federations and confederations.

36. The Committee further notes that in a communication dated 5 April 2019, the Government informs that six trade union leaders who led the general strike in December 2013 were sentenced to a suspended two-and-a-half year imprisonment and ordered to jointly pay 35 million Cambodian Riels (US$8,661) as compensation to the plaintiffs for instigating intentional violence with aggravating circumstances, instigating acts of causing damage with threats and obstructing road traffic. The Government reiterates that in line with Convention No. 87, violent actions during strikes are not protected by national legislation and indicates that the cases of the six trade unionists are currently pending before the Court of Appeal. The Committee recalls in this regard that it had previously expressed concern at the acts of violence on both sides during the December 2013 and January 2014 demonstrations and emphasized that while the principles of freedom of association do not protect abuses consisting of criminal acts while exercising the right to strike [see Compilation, op. cit., para. 965], freedom of association can only be exercised in conditions in which fundamental rights, and in particular those relating to human life and personal safety, are fully respected and guaranteed [see Compilation, op. cit., para. 82]. The Committee requests the Government to provide information on the outcome of the appeal proceedings concerning the six trade unionists, including a copy of the judgment once rendered, and trusts that no trade unionist will be sanctioned for having exercised their trade union activities. (…)

GMAC, Legal Pointer: Collective Bargaining Agreement[619]

7.1 Importance of CBA

CBA is made by the worker/employee party or professional organization of workers/employees and employer party or professional organization of employers in engaging in a new obligation. There are also some reasons that need to be found out and noted in creating a CBA whether what benefits the creation of the CBA have for the parties. According to its content it is to create obligation for the parties.

Although the creation of the CBA is tied to a new obligation, we can also in principle show that it has some remarkable benefits such as:

1. Benefits for workers/employees in the enterprise/establishment: Generally, we can say that workers/employees will get better benefits than the law during the validity of the CBA because the points set out in the CBA is better than those set out in the law. For example: the employer and workers/employees can set out in the CBA an agreement to provide lunch allowance of 2000 Riels or free lunch during the validity of the CBA for 2 years while this is the benefit that the workers/employees get better than the law and it is an obligation of the employer.

2. Benefits for the employer: In principle, the employer also gets some benefits: sustainability of industrial relations and production of the enterprise/establishment. The reason why we can dare to claim this is because during the length of the CBA, the workers/employees cannot demand more benefits than those set out in this CBA. On the other hand, the employer can determine a CBA stipulating the procedure of resolving a dispute, negotiation and some procedures. For example: the employer can set out an agreement stating that during the validity of the CBA, the workers/employees cannot demand more benefits than those already set out.

619 Garment Manufacturers Association in Cambodia (GMAC), *Legal Pointer: Collective Bargaining Agreement* (2017) https://www.gmac-cambodia.org/public/pdf_file/1505141709.pdf.

Consequence: Although, in principle, we have observed that the creation of CBA in the enterprise/establishment can have a positive impact for both parties, we have also observed that there are not many factories/enterprises making a negotiation to create CBA because (1) union with the most representative status cannot prevent unregistered unions or minority unions from demanding more benefits, (2) unions cannot reach a consensus: popularity remain the major topic for the parties; (3) law enforcement is still limited when the union violates the CBA.

Nuon & Serrano, Building Union in Cambodia: History, Challenges, Strategies[620]

Right to strike

The Labour Code also grants workers the right to strike and to participate in non-violent demonstrations5 but to the limit of minimum service guaranteed in all enterprise. The law also requires that for a strike to be legal it must first exhaust the process of conciliation, arbitration, and the strike vote. However, the process is frequently ignored by workers. The police are sometimes called to suppress the strike or demonstration and have been known to use violence.

Members' motivations to join a union

Asked why they join unions, the reasons most frequently cited are: (a) the benefits derived from union membership; (b) improvement in working conditions; (c) enhanced job security; and (d) belief in the principles and objectives of unionism. (…)

When asked about the benefits they are getting from their union, at least half of the unionised respondents cite the following as the most common: (a) improved working conditions; (b) more benefits; (c) union education and training activities; (d) less intimidation and harassment from employer; and (e) grievances addressed at the workplace. (…)

Memorandum of Understanding on Industrial Relations in Garment Industry[621]

In the interest of promoting harmonious industrial relations in Cambodia, we, the undersigned parties[622] representing workers and employers in the garment industry, have committed today to improve industrial relations in the garment industry. This solemn agreement, referred to as the MoU, has been reach freely and in good faith, and commits the parties to respect and adhere to certain key principle, and to follow up these principles with a number of concrete steps and actions.

This text specifies these principles and commitments.

1) Parties agree to adhere to national law;

2) Both parties support CBA in order to achieve certainty and predictability, and to protect rights and terms and conditions of work for both parties;

3) Both parties support the (Most Representative Status (MRS) as the exclusive bargaining agent on behalf of all workers in the enterprise. Minority unions can participate in the process by choice but along with all employees must respect the authority of the MRS union, and have no right to initiate or disrupt bargaining or to object to any CBA reached by MRS union.

620 Veasna Nuon & Melisa Serrano, Building Union in Cambodia: History, Challenges, Strategies (2010) http://library.fes.de/pdf-files/bueros/singapur/07907.pdf.

621 Memorandum of Understanding on Improving Industrial Relations in the Garment Industry, Sunway Hotel, Phnom Penh (28 September 2010) http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-phnom_penh/documents/genericdocument/wcms_145234.pdf.

622 The parties to the MOU on Improving Industrial Relations in the Garment Industry include Garment Manufacturers' Assocation in Cambodia (GMAC), Cambodian National Confederation (CNC), National Union Alliance Chamber of Cambodia (NACC), Cambodian Confederation of Trade Unions (CLC), Cambodian Confederation of Unions (CCU), and Khmer Youth Federation of Trade Union (KYFTU).

4) A CBA negotiated by MRS union applies to all employees in the enterprise and no strike or lockout should be permitted by any group during the term of the CBA. No further claims shall be lodged by either party during the term of the agreement.

Collective Bargaining Agreement [Tourism and Airport Industries][623]

Article I: Union's Recognition

1.1 The Employer recognizes the union, a legal representative of employees recognized by Ministry of Labor … as a sole collective negotiating body relating to general terms and conditions for all employees covered by this Agreement as defined under Article 4 of this Agreement.

1.2 Employees with the entitlement to recruit, to terminate and/or to enact any disciplinary measure are not allowed to join the Union and are not covered by this CBA.

Article 2: Efficiency of the Collective Bargaining Agreement

2.1 In case of change of management or shareholders, Employer shall always comply with this Collective Bargaining Agreement.

2.2 In case of change the Chief Executive Officer or shareholders, Employer shall inform the Union Leaders. (…)

Article 4: Union's Rights

4.1 If required in writing by the concerned staff, maximum two CAMS employees are entitled in each case of conflict to attend the meeting before dismissal and other individual conflict. Employer will not deduct remuneration for the time spent at the meeting. In case that the conflict cannot be solved by the parties, both parties are entitled to request the presence of their lawyer in the meeting.

4.2 Employer shall not deduct remuneration of the 2 union leaders who participate in the meeting with the Employer or with the related institutions for the resolution of any labour conflict.

4.3 In case of conflict between employee and Employer and if required, the Union and the Employer will organize such meeting as soon as possible in order to minimize trouble to operations.

4.4 The Employer must not interfere in the Union's internal affairs and gives to employees the free choice of union leaders.

4.5 Upon Union request and upon members written authorization, the Employer will deduct from the salary of employees Union members the Union fee and transfer it to Union bank account. The Union provides to the Employer the Union members name list and the list of Union members who authorize this deduction with their fingerprint and signature.

4.6 The Employer provides one table, six chairs and one board for the Union and worker representatives' library. Union provides and files the national and international law books, health documents, and relevant books concerned with Union affairs in order that employees can read while out of their working hours. Employee can have access into this room. The union shall be responsible for the usage of this room.

623 *Collective Bargaining Agreement between International Airport Independence Employees Union Siem Reap Airport Cambodia Tourism Industry Worker Trade Union and Cambodia Airport Management Services* (2011) https://www.ilo.org/legacy/english/inwork/cb-policy-guide/cambodiacompanyagreementairtransport.pdf.

4.7 Employer shall provide per year a total of 12 days of paid leave per year for training for each Union. The attribution of "Union training leave" to which ever Union leader is done between Union leaders; the Employer shall not interfere.

Article 5: Management Rights

5.1 Subject only to the limitations contained in this CBA and in compliance with the legal requirements, the Employer retains the exclusive rights to manage its business (but not limited to) the rights to determine the methods and means by which its operations are to be carried on, to assign direct the workforce and to conduct its operations in a safe and effective manner.

Rullo, Empowering Women's Labor Mobilization in Cambodia[624]

It is clear that global apparel brands are increasingly leveraging their unique positions of political, economic, and social influence to constitute active forces of transformative change. This study reveals that brands sourcing from Cambodia have taken important action in other politically volatile domestic contexts to create conditions that better support the meaningful labor organization of garment workers.

Although women workers make up the majority of the global garment sector workforce—most of the brand initiatives explored here do not adequately respond to the particular needs of women workers, nor are they intentionally designed to target the very real gender-specific barriers to freedom of association that women garment workers regularly face.

Drawing on and confirming the previously explored feminist arguments of Okin, MacKinnon, and Tsing, this work demonstrates that women garment workers are attempting to organize within political and economic contexts where patriarchal attitudes continue to negatively shape their experiences—contributing to grave barriers to their access to positions of leadership in labor organizing. Global apparel brand action that particularly empowers women's agency by fostering their access to union leadership positions and space for labor mobilization would be a welcome and transformative component to help fill the political vacuum of justice that both Wettstein and Hsieh argue MNCs should play a more pronounced role to address.

Additionally, if CEDAW and other instruments of international human rights law provide that governments should leverage positive special measures in political realms to combat the forces of structural and historical gender inequality, this study argues that special measures of a similar spirit—in the form of positive corporate-led action to protect FOA—should correspondingly be leveraged by actors of global enterprise within economic realms to fill the vacuum of government failure, especially when governments demonstrate oppressive and authoritarian behavior.

Gone are the days when popular global brands can ignore the egregious repercussions of their choices to operate in politically challenging contexts. A unique alchemy of forces is needed to spark action among global apparel brands to intervene in politically charged issues to pressure governments to comply with their FOA rights obligations. This perfect storm of conditions is not only possible, but as proven here, is increasingly becoming a reality.

624 Mathew Rullo, Empowering Women's Labour Mobilization in Cambodia: The Role of Global Enterprise (2017) https://academiccommons.columbia.edu/doi/10.7916/D8HX1QX5/download.

Lowenstein, Fixed-Duration Contracts Threaten Workers and Garment Industry[625]

6. Labor Unions

Cambodia's garment industry developed hand-in-hand with international monitoring of labor rights. This contributed to an explosion of union activity. Countless unions have sprung up, merged, split, and organized themselves into a variety of union federations. Their numbers, however, belie the difficulties they face in representing their membership.

Although freedom of association is protected by the Cambodian Constitution and Labor Law and is one of the key areas that the ILO-BFC evaluates, labor unions operate within a complex and treacherous terrain in Cambodia. Recent history has shown that those who speak out against labour conditions in Cambodia may do so at their own peril. Violence against union leaders, exemplified by the assassinations of Hy Vuthy on February 24, 2007, Chea Vichea on January 22, 2004, and others, has had a significant chilling effect on union activism.

There are independent unions in Cambodia that devote themselves to worker advocacy and that do so free from government or manufacturer influence, but there are also a number of "yellow unions," unions that receive financial support from the government or employers for advocating positions that subordinate worker concerns to the desires of manufacturers. Despite these challenges, the independent unions have been surprisingly unified in speaking out against the widespread use of FDCs and the impact that FDCs have on freedom of association.

Questions

1. What is freedom of association and why is it important?
2. What are the challenges to freedom of association in Cambodia?
3. What can companies do to respect freedom of association at work? Can a company promote freedom of association of workers and what problems may this entail?
4. What are the obligations of the government regarding freedom of association?
5. Can civil society contribute to the promotion of freedom of association in Cambodia?
6. Why is worker membership in trade unions declining globally?
7. What have trade unions done in response the outsourcing of production and the 'race to the bottom' in the global economy?
8. Do trade unions in developed and developing countries have the same interests? Can they collaborate to match the power of transnational corporations? How?

Further Readings

- International Labour Organisation (ILO), Giving a Voice to Rural Workers, General Survey Concerning the Right of Association and Rural Workers' Organizations Instruments (2016) www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_343023.pdf.
- International Labour Organisation (ILO), Collective Bargaining in the Public Service, General Survey Concerning Labour Relations and Collective Bargaining in the Public Service (2013) www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_205518.pdf.

625 Allard K. Lowenstein, Tearing apart at the Seams: How Widespread Use of Fixed-Duration Contracts Threatens Cambodian Workers and the Cambodian Garment Industry (2011) https://law.yale.edu/sites/default/files/documents/pdf/Intellectual_Life/Cambodia_TearingApartattheSeams.pdf.

- International Labour Organisation (ILO), Freedom of Association - Compilation of Decisions of the Committee on Freedom of Association (2018) www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/freedom-of-association/WCMS_632659/lang--en/index.htm (on-line version at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:70001:0::NO:::).
- Felix Hadwiger, Global Framework Agreements - Achieving Decent Work in Global Supply Chains, ILO Background paper (2015) www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/meetingdocument/wcms_434248.pdf.
- Friedrich-Ebert-Stiftung, What Is a Global Framework Agreement? (2018) [video, 5.45 minutes] www.youtube.com/watch?v=UkKYp4Q6tTM.
- IndustriAll, Global Framework Agreements (database) www.industriall-union.org/issues/pages/global-framework-agreements-gfa.
- International Labour Organisation (ILO), Decent Work in Global Supply Chains, International Journal of Labour Research (2015) www.ilo.org/actrav/info/international-journal-labour-research/WCMS_433853/lang--en/index.htm.
- Renault & IndustriALL, Global Framework Agreement on Developing Life at Work (2019) www.industriall-union.org/sites/default/files/uploads/documents/GFAs/Renault/GFA2019/acm_du_9_juillet_en.pdf.
- Mark Anner, 'CSR Participation Committees, Wildcat Strikes and the Sourcing Squeeze in Global Supply Chains', British Journal of Industrial Relations, 56:1 (2018) https://www.researchgate.net/publication/320882051_CSR_Participation_Committees_Wildcat_Strikes_and_the_Sourcing_Squeeze_in_Global_Supply_Chains_CSR_Participation_Committees_Wildcat_Strikes.
- Felix Hadwiger, Global framework agreements - Achieving decent work in global supply chains, ILO Background paper (2015) www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/meetingdocument/wcms_434248.pdf.
- CNV International, Supporting AGT Companies in Understanding and Promoting Freedom of Association – A Good Practice Video from Cambodia [video, 3:47 minutes] https://youtu.be/C1gBeGfX3M0.
- International Labour Organisation (ILO), The Global Legal Database on Industrial Relations (IRLex) (2020) https://www.ilo.org/asia/projects/WCMS_507552/lang--en/index.htm.
- Philippa Smales, The Right to Unite: A Handbook on Domestic Worker Rights across Asia (2010) http://apirnet.ilo.org/resources/the-right-to-unite-a-handbook-on-domestic-worker-rights-across-asia/at_download/file1.
- Alexander Ski, Trade Unions' Freedom of Association in Cambodia: A Study on the Trade Union Law and its Possible Implications on Trade Unions in the Cambodia Garment Industry, (2017) Master Thesis in Labour Law, Lund University https://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=8912909&fileOId=8912916.
- Veasna Noun, Assessment of Freedom of Association of Workers at the E Garment Factory (Cambodia), (2013) https://www.fairlabor.org/sites/default/files/documents/reports/egarment_investigationreport_nuon_0.pdf.
- GMAC Bulletin 2018, 13 https://www.gmac-cambodia.org/public/pdf_file/1503973387.pdf.
- Fabiana Avelar Pereira, Global Collective Agreements: A Response to Urgent Global Labour Concerns, Lund University (doctoral dissertation) (forthcoming 2021).

20. HEALTH AND SAFETY

Chea Sophal, Radu Mares

Introduction

Health and safety (H&S), in the workplace as well as in local communities affected by hazardous industries, is a highly detailed and technical area. However, companies implementing their CSR commitments have found it relatively easier to make progress in H&S compared with other areas such as living wages (chapter 17), excessive overtime (chapter 18) and freedom of association (chapter 19). The biggest disaster in the textile industry happened in Bangladesh in 2013 (Rana Plaza) and the result has been one of the most advanced multistakeholder initiatives (chapter 5) endowed with a binding arbitration system to hold participating companies accountable (chapter 7). The right to refuse dangerous work without fearing the loss of jobs is now a better accepted principle. Worker-management committees focused on H&S are probably the most accessible form of improving workplace dialogue and possibly a first step towards building more 'mature' industrial relations, particularly in countries where labour unions are suppressed in law or in practice. Industrial disasters affecting local communities require an emphasis on disaster preparedness and early warning systems as part of human rights due diligence (chapter 10). Local communities often need to seek justice in courts abroad to obtain remediation for widespread pollution and industrial accidents due to weaknesses in the judicial systems in their own countries (chapters 6 and 29).

In 2018, Cambodia recorded 200 deaths of people as a result of work-related accidents while 34,608 workers were injured. Cambodia has not yet ratified ILO Conventions 155 and 187 dedicated to occupational safety and health. The Cambodian Labour Law and other general ministerial regulations set the requirements for all workplaces to be safe, health and hygienic for workers. There is room for Cambodia to improve OSH aspects through developing the Safety Act and putting in place more regulations for occupational safety and health. The International Labour Organization records 2.78 million deaths and 374 million fatal work-related injuries each year as a result of occupational accidents or work-related diseases. The right to a safe and healthy workplace is central to efforts to ensure decent work.

Main Aspects

- ✓ Risks to business
- ✓ International law standards
- ✓ Responsibilities to record and notify

- ✓ Designer and manufacturer responsibility
- ✓ Right to refuse unsafe work
- ✓ Safety and health culture
- ✓ Corrective measures
- ✓ Co-operation between management and workers
- ✓ Health and Safety Committees, and freedom of association
- ✓ Binding arbitration
- ✓ Business reports
- ✓ Standards for Occupational Health and Safety Management

Background

ILO, Safety and Health at Work[626]

Every day, people die as a result of occupational accidents or work-related diseases – more than 2.78 million deaths per year. Additionally, there are some 374 million non-fatal work-related injuries and illnesses each year, many of these resulting in extended absences from work. The human cost of this daily adversity is vast and the economic burden of poor occupational safety and health practices is estimated at 3.94 per cent of global Gross Domestic Product each year.

Hofmann, 100 Years of Occupational Safety Research[627]

The focus on occupational safety over the last 100 years has contributed significantly to saving thousands of lives. In the early 1900s, workplace deaths and injuries were quite common. (…) Clearly, the workplace has become safer. Technological improvements, work design changes, the use of personal protective equipment, and improvements in the broader safety culture of organizations have led to significant advances. That said, however, there are still too many incidents in the workplace. (…) At the outset, one must acknowledge that the field of occupational safety and health is quite broad spanning multiple disciplines and fields of study including, but not limited to, law, engineering, medicine, public health, business, and psychology.

Legislation on worker health and safety in the United Kingdom originated as a political response to social problems resulting from the Industrial Revolution and the associated poor working conditions in factories. The Factory Acts of 1833 and 1844 addressed specific working conditions for children (1833) and for women (1844). These acts established several basic protections such as limits on the number of hours worked, the securement of some class of machinery, and basic record keeping and inspections. Additional improvements were included in the Factory Acts of 1867, 1891, and 1895 along with advances in inspections of workplaces, requirements for accident reporting, and provisions for fire escape. (…)

Starting with initiatives dating back to the mid-1800s, we provide a high-level review of the key trends and developments in the application of applied psychology to the field of occupational safety. Factory laws, basic worker compensation, and research on accident proneness comprised much of the early work. Thus, early research and practice very much focused on the individual worker, the design of their work, and their basic protection.

626 International *Labour Organisation (ILO), Safety and Health at Work* (2019) www.ilo.org/global/topics/safety-and-health-at-work/lang--en/index.htm.

627 David A. Hofmann, Micheal J. Burke & Dov Zohar, '100 Years of Occupational Safety Research: From Basic Protections and Work Analysis to a Multilevel View of Workplace Safety and Risk', Journal of Applied Psychology (2017) https://goal-lab.psych.umn.edu/orgpsych/readings/16.%20Occupational%20Health%20and%20Safety/Hofmann,%20Burke,%20&%20Zohar%20(2017).pdf.

Gradually and over time, the focus began to navigate further into the organizational context. One of the early efforts to broaden beyond the individual worker was a significant focus on safety-related training during the middle of the 20th century. Toward the latter years of the 20th century and continuing the move from the individual worker to the broader organizational context, there was a significant increase in leadership and organizational climate (safety climate) research. Ultimately, this resulted in the development of a multilevel model of safety culture/climate.

Instruments

ILO, Occupational Safety and Health Convention[628]

(…) the term health, in relation to work, indicates not merely the absence of disease or infirmity; it also includes the physical and mental elements affecting health which are directly related to safety and hygiene at work.

Part III. Action at the national level

Article 12

Measures shall be taken, in accordance with national law and practice, with a view to ensuring that those who design, manufacture, import, provide or transfer machinery, equipment or substances for occupational use.

(a) Satisfy themselves that, so far as is reasonably practicable, the machinery, equipment or substance does not entail dangers for the safety and health of those using it correctly;

(b) Make available information concerning the correct installation and use of machinery and equipment and the correct use of substances, and information on hazards of machinery and equipment and dangerous properties of chemical substances and physical and biological agents or products, as well as instructions on how known hazards are to be avoided;

(c) Undertake studies and research or otherwise keep abreast of the scientific and technical knowledge necessary to comply with subparagraphs (a) and (b) of this Article.

Article 13

A worker who has removed himself from a work situation which he has reasonable justification to believe presents an imminent and serious danger to his life or health shall be protected from undue consequences in accordance with national conditions and practice.

Part IV. Action at the level of the undertaking

Article 16

1. Employers shall be required to ensure that, so far as is reasonably practicable, the workplaces, machinery, equipment and processes under their control are safe and without risk to health.

2. Employers shall be required to ensure that, so far as is reasonably practicable, the chemical, physical and biological substances and agents under their control are without risk to health when the appropriate measures of protection are taken.

628 International Labour Organisation (ILO), *Occupational Safety and Health Convention (No. 155)* (1981) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C155.

3. Employers shall be required to provide, where necessary, adequate protective clothing and protective equipment to prevent, so far as is reasonably practicable, risk of accidents or of adverse effects on health.

Article 18

Employers shall be required to provide, where necessary, for measures to deal with emergencies and accidents, including adequate first-aid arrangements.

Article 19

There shall be arrangements at the level of the undertaking under which

(a) Workers, in the course of performing their work, co-operate in the fulfilment by their employer of the obligations placed upon him;

(b) Representatives of workers in the undertaking co-operate with the employer in the field of occupational safety and health;

(c) Representatives of workers in an undertaking are given adequate information on measures taken by the employer to secure occupational safety and health and may consult their representative organisations about such information provided they do not disclose commercial secrets;

(d) Workers and their representatives in the undertaking are given appropriate training in occupational safety and health;

(e) Workers or their representatives and, as the case may be, their representative organisations in an undertaking, in accordance with national law and practice, are enabled to enquire into, and are consulted by the employer on, all aspects of occupational safety and health associated with their work; for this purpose technical advisers may, by mutual agreement, be brought in from outside the undertaking;

(f) A worker reports forthwith to his immediate supervisor any situation which he has reasonable justification to believe presents an imminent and serious danger to his life or health; until the employer has taken remedial action, if necessary, the employer cannot require workers to return to a work situation where there is continuing imminent and serious danger to life or health.

Article 20

Cooperation between management and workers and/or their representatives within the undertaking shall be an essential element of organisational and other measures taken in pursuance of Articles 16 to 19 of this Convention.

Article 21

Occupational safety and health measures shall not involve any expenditure for the workers.

ILO, Protocol to the Occupational Safety and Health Convention[629]

Systems for recording and notification

629 International Labour Organisation (ILO), Protocol of 2002 to the Occupational Safety and Health Convention, 1981 (2002) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0:::55:P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:SUP,en,P155,/Document.

Article 2

The competent authority shall, by laws or regulations or any other method consistent with national conditions and practice, and in consultation with the most representative organizations of employers and workers, establish and periodically review requirements and procedures for:

(a) The recording of occupational accidents, occupational diseases and, as appropriate, dangerous occurrences, commuting accidents and suspected cases of occupational diseases; and

(b) The notification of occupational accidents, occupational diseases and, as appropriate, dangerous occurrences, commuting accidents and suspected cases of occupational diseases.

Article 3

The requirements and procedures for recording shall determine:

(a) The responsibility of employers:

  (i) To record occupational accidents, occupational diseases and, as appropriate, dangerous occurrences, commuting accidents and suspected cases of occupational diseases;

  (ii) To provide appropriate information to workers and their representatives concerning the recording system;

  (iii) To ensure appropriate maintenance of these records and their use for the establishment of preventive measures; and

  (iv) to refrain from instituting retaliatory or disciplinary measures against a worker for reporting an occupational accident, occupational disease, dangerous occurrence, commuting accident or suspected case of occupational disease;

(b) The information to be recorded;

(c) The duration for maintaining these records; and

(d) Measures to ensure the confidentiality of personal and medical data in the employer's possession, in accordance with national laws and regulations, conditions and practice.

Article 4

The requirements and procedures for the notification shall determine:

(a) The responsibility of employers:

  (i) to notify the competent authorities or other designated bodies of occupational accidents, occupational diseases and, as appropriate, dangerous occurrences, commuting accidents and suspected cases of occupational diseases; and

  (ii) To provide appropriate information to workers and their representatives concerning the notified cases;

(b) Where appropriate, arrangements for notification of occupational accidents and occupational diseases by insurance institutions, occupational health services, medical practitioners and other bodies directly concerned;

(c) the criteria according to which occupational accidents, occupational diseases and, as appropriate, dangerous occurrences, commuting accidents and suspected cases of occupational diseases are to be notified; and

(d) The time limits for notification.

ILO, Promotional Framework for Occupational Safety and Health Convention[630]

Article 2

1. Each Member which ratifies this Convention shall promote continuous improvement of occupational safety and health to prevent occupational injuries, diseases and deaths, by the development, in consultation with the most representative organizations of employers and workers, of a national policy, national system and national programme.

2. Each Member shall take active steps towards achieving progressively a safe and healthy working environment through a national system and national programmes on occupational safety and health by taking into account the principles set out in instruments of the International Labour Organization (ILO) relevant to the promotional framework for occupational safety and health.

Article 5

1. Each Member shall formulate, implement, monitor, evaluate and periodically review a national programme on occupational safety and health in consultation with the most representative organizations of employers and workers.

2. The national programme shall:

   (a) Promote the development of a national preventative safety and health culture;

   (b) Contribute to the protection of workers by eliminating or minimizing, so far as is reasonably practicable, work-related hazards and risks, in accordance with national law and practice, in order to prevent occupational injuries, diseases and deaths and promote safety and health in the workplace;

   (c) Be formulated and reviewed on the basis of analysis of the national situation regarding occupational safety and health, including analysis of the national system for occupational safety and health;

   (d) Include objectives, targets and indicators of progress; and

   (e) Be supported, where possible, by other complementary national programmes and plans which will assist in achieving progressively a safe and healthy working environment.

3. The national programme shall be widely publicized and, to the extent possible, endorsed and launched by the highest national authorities.

(…) the term a national preventative safety and health culture refers to a culture in which the right to a safe and healthy working environment is respected at all levels, where government, employers and workers actively participate in securing a safe and healthy working environment through a system of defined rights, responsibilities and duties, and where the principle of prevention is accorded the highest priority.

630 International Labour Organisation (ILO), *Promotional Framework for Occupational Safety and Health Convention (No. 187)* (2006) http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C187.

Accord on Fire and Building Safety in Bangladesh[631]

About The Accord[632]

The Accord on Fire and Building Safety in Bangladesh (the Accord) was signed on May 15th 2013. It is a five year independent [prolonged until May 2021], legally binding agreement between global brands and retailers and trade unions designed to build a safe and healthy Bangladeshi Ready Made Garment (RMG) Industry. The agreement was created in the immediate aftermath of the Rana Plaza building collapse that led to the death of more than 1100 people and injured more than 2000. In June 2013, an implementation plan was agreed leading to the incorporation of the Bangladesh Accord Foundation in the Netherlands in October 2013.

The agreement consists of six key components:

1. A five year legally binding agreement between brands and trade unions to ensure a safe working environment in the Bangladeshi RMG industry

2. An independent inspection program supported by brands in which workers and trade unions are involved

3. Public disclosure of all factories, inspection reports and corrective action plans (CAP)

4. A commitment by signatory brands to ensure sufficient funds are available for remediation and to maintain sourcing relationships

5. Democratically elected health and safety committees in all factories to identify and act on health and safety risks

6. Worker empowerment through an extensive training program, complaints mechanism and right to refuse unsafe work.

The Accord on Fire and Building Safety in Bangladesh[633]

Governance:

1. (…) The agreement shall be governed by a Steering Committee (SC), which shall have equal representation chosen by the trade union signatories and company signatories (maximum 3 seats each) and a representative chosen by the International Labor Organization (ILO) acting as a neutral chair and independent advisory member. (…)

2. Administration and management of the program will build on the existing structures, policies and programs developed under the preceding Accord, and shall be implemented in such a way as to not contravene Bangladesh law, and shall be oriented toward the aim of handing the work over to a credible national regulatory body at the end of this Agreement.

631 Accord on Fire and Building Safety in Bangladesh (2018) https://bangladesh.wpengine.com/wp-content/uploads/2020/11/2018-Accord.pdf; Accord on Fire and Building Safety in Bangladesh (2013) https://bangladesh.wpengine.com/wp-content/uploads/2018/08/2013-Accord.pdf.

632 Accord on Fire and Building Safety in Bangladesh, About, http://bangladeshaccord.org/about/.

633 Accord on Fire and Building Safety in Bangladesh (2018) https://bangladesh.wpengine.com/wp-content/uploads/2020/11/2018-Accord.pdf.

Dispute resolution:

3. Any dispute between the parties to, and arising under, the terms of this Agreement shall be presented to and decided by the SC. The Steering Committee shall adopt a revised Dispute Resolution Process (DRP) to specify the timelines and procedures involved when disputes are presented to the SC, with the aim to establish a fair and efficient process. The decision making process of the SC shall be supported by a member of Accord secretariat who will perform an initial investigation for the parties and present facts and their recommendations.

The DRP will also incorporate the opportunity for parties to participate in a mediation process in order to make arbitration unnecessary where there is no resolution of the dispute by the SC. Upon request of either party, the decision of the SC may be appealed to a final and binding arbitration process. (…)

Remediation:

7. Where corrective actions are identified by the CSI as necessary to bring a factory into compliance with building, fire and electrical safety standards, the signatory company or companies that have designated that factory as their supplier shall require the factory to implement these corrective actions according to a defined schedule that is mandatory and time-bound, with sufficient time allotted for all major renovations.

9. Signatory companies shall make reasonable efforts to ensure that any workers whose employment is terminated as a result of a factory termination or relocating triggered by Accord activities, are offered employment with safe suppliers.

10. Signatory companies shall require their supplier factories to respect the right of a worker to refuse work that he or she has reasonable justification to believe is unsafe, without suffering discrimination or loss of pay, including the right to refuse to enter or to remain inside a building that he or she has reasonable justification to believe is unsafe for occupation.

Transparency and reporting:

14. The SC shall make publicly available and regularly update information on key aspects of the program, including:

    a. A single aggregated list of all suppliers in Bangladesh (including sub-contractors) used by signatory companies, based on data which shall be provided to the SC and regularly updated by each of the signatory companies. Information linking specific companies to specific factories will be kept confidential.

    b. Written Inspection Reports, which shall be developed by the CSI for all factories inspected under this program, shall be disclosed to interested parties and the public as set forth in paragraph 6 of this Agreement.

    c. Public statements by the CSI identifying any factory that is not acting expeditiously to implement remedial recommendations shall be issued as per an escalation procedure determined by the SC.

    d. Quarterly Aggregate Reports that summarize both aggregated industry compliance data as well as a detailed review of findings, remedial recommendations, and progress on remediation and training to date for all factories at which inspections and training have been completed.

Supplier incentives:

16. Each signatory company shall require that its suppliers in Bangladesh participate fully in the inspection, remediation, health and safety and training activities, as described in the Agreement. If a supplier fails to do so, the signatory will promptly implement a notice and warning process in accordance with the Escalation Protocol established by the SC leading to termination of the business relationship.

17. In order to induce factories to comply with upgrade and remediation requirements of the program, participating brands and retailers will negotiate commercial terms with their suppliers which ensure that it is financially feasible for the factories to maintain safe workplaces and comply with upgrade and remediation requirements instituted by the CSI. Each signatory company may, at its option, use alternative means to ensure factories have the financial capacity to comply with remediation requirements, including but not limited to joint investments, providing loans, accessing donor or government support, through offering business incentives or through paying for renovations directly.

18. Signatory companies to this agreement are committed to maintaining a long-term sourcing relationship with Bangladesh, as is demonstrated by their commitment to this three-year program.

Alliance for Bangladesh Worker Safety[634]

The Members commit to:

- Support the implementation of the National Tripartite Plan of Action on Fire Safety for the Ready-Made Garment Sector in Bangladesh (NAP);
- Empower workers to take an active role in their own safety, and to be able to speak out about unsafe conditions without any risk of retaliation;
- Work with factories that ensure a safe working environment, with each Member committing not to source from any Factory that the Member has deemed to be unsafe;
- Rapid implementation that is results-focused and non-bureaucratic;
- Providing safety inspection, and safety and empowerment training for 100% of Factories in the Members respective supply chains;
- A common standard for safety inspections and safety and worker empowerment training;
- Use of transparency to create accountability for all stakeholders involved;
- Sharing of information on training, current and future fire and building safety inspections and remediation actions;
- Strive to end unauthorized subcontracting within their supply chains, and review their internal policies to ensure application of best practices for addressing unauthorized subcontracting;
- Independent monitoring and verification of their work;
- Inclusion of diverse stakeholders in decision making and collaboration in implementation;
- A Bangladeshi focus, with a framework that engages and builds capacity of key stakeholders, including the Government of Bangladesh and Bangladeshi industry; and • Commitment of substantial financial resources to accomplish these tasks, as well as encouraging and assisting in the establishment of sustainable mechanisms to meet these objectives.

In seeking to achieve these objectives, the Alliance recognizes the importance of building partnerships with the Bangladeshi government, the Bangladesh Garment Manufacturers and Exporters Association ("BGMEA"), the Bangladesh Knitwear Manufacturers and Exporters Association ("BKMEA"), workers' rights organizations, other RMG buyers' groups (including the Accord on Fire and Building Safety in Bangladesh ("the Accord")), and others who support safer work conditions in Bangladesh RMG Factories.

634 Alliance for Bangladesh Worker Safety, *Members Agreement,* http://www.bangladeshworkersafety.org/files/Alliance-Member-Agreement-FINAL.pdf.

To this end, the Members agree to the financial commitments and the components of the worker safety program described below. The Alliance Members are fully committed to creating conditions for the benefit of workers in the Bangladesh RMG industry that are not only safe but sustainable, with appropriate and careful oversight and regulation by the Bangladeshi government. The Members of the Alliance recognize that their role is to provide meaningful material assistance to reach these goals and to assist in the creation of a self-reliant Bangladesh RMG industry, while recognizing that ultimately the responsibility for and control over the industry and the safety of its workers rests with the sovereign nation of Bangladesh, its government and its people.

IFC, Performance Standards 4 on Community Health, Safety and Security[635]

1. Performance Standard 4 recognizes that project activities, equipment, and infrastructure can increase community exposure to risks and impacts. In addition, communities that are already subjected to impacts from climate change may also experience an acceleration and/or intensification of impacts due to project activities. While acknowledging the public authorities' role in promoting the health, safety, and security of the public, this Performance Standard addresses the client's responsibility to avoid or minimize the risks and impacts to community health, safety, and security that may arise from project related-activities, with particular attention to vulnerable groups. (…)

Community health and safety

5. The client will evaluate the risks and impacts to the health and safety of the Affected Communities during the project life-cycle and will establish preventive and control measures consistent with good international industry practice (GIIP),[636] such as in the World Bank Group Environmental, Health and Safety Guidelines (EHS Guidelines) or other internationally recognized sources. The client will identify risks and impacts and propose mitigation measures that are commensurate with their nature and magnitude. These measures will favor the avoidance of risks and impacts over minimization. (…)

Community exposure to disease

9. The client will avoid or minimize the potential for community exposure to water-borne, water-based, water-related, and vector-borne diseases, and communicable diseases that could result from project activities, taking into consideration differentiated exposure to and higher sensitivity of vulnerable groups. (…)

10. The client will avoid or minimize transmission of communicable diseases that may be associated with the influx of temporary or permanent project labor.

Emergency preparedness and response

11. (…) the client will also assist and collaborate with the Affected Communities, local government agencies, and other relevant parties, in their preparations to respond effectively to emergency situations, especially when their participation and collaboration are necessary to respond to such emergency situations. If local government agencies have little or no capacity to respond effectively, the client will play an active role in preparing for and responding to emergencies associated with the project. The client will document its emergency preparedness and response activities, resources, and responsibilities, and will disclose appropriate information to Affected Communities, relevant government agencies, or other relevant parties.

635 International Finance Corporation (IFC), *Performace Standards 4, Community Health, Safety and Security* (2012) https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards/.

636 Defined as the exercise of professional skill, diligence, prudence, and foresight that would reasonably be expected from skilled and experienced professionals engaged in the same type of undertaking under the same or similar circumstances globally or regionally.

Security personnel

12. When the client retains direct or contracted workers to provide security to safeguard its personnel and property, it will assess risks posed by its security arrangements to those within and outside the project site.

International Organization for Standardization, ISO 4500[637]

This document specifies requirements for an occupational health and safety (OH&S) management system, and gives guidance for its use, to enable organizations to provide safe and healthy workplaces by preventing work-related injury and ill health, as well as by proactively improving its OH&S performance.

This document is applicable to any organization that wishes to establish, implement and maintain an OH&S management system to improve occupational health and safety, eliminate hazards and minimize OH&S risks (including system deficiencies), take advantage of OH&S opportunities, and address OH&S management system nonconformities associated with its activities.

This document helps an organization to achieve the intended outcomes of its OH&S management system. Consistent with the organization's OH&S policy, the intended outcomes of an OH&S management system include:

a) continual improvement of OH&S performance;

b) fulfilment of legal requirements and other requirements;

c) achievement of OH&S objectives.

Success factors

The implementation of an OH&S management system is a strategic and operational decision for an organization. The success of the OH&S management system depends on leadership, commitment and participation from all levels and functions of the organization.

The implementation and maintenance of an OH&S management system, its effectiveness and its ability to achieve its intended outcomes are dependent on a number of key factors, which can include:

a) top management leadership, commitment, responsibilities and accountability;

b) top management developing, leading and promoting a culture in the organization that supports the intended outcomes of the OH&S management system;

c) communication;

d) consultation and participation of workers, and, where they exist, workers' representatives;

e) allocation of the necessary resources to maintain it;

f) OH&S policies, which are compatible with the overall strategic objectives and direction of the organization;

g) effective process(es) for identifying hazards, controlling OH&S risks and taking advantage of OH&S opportunities;

637 International Organization for Standardization, ISO 45001:2018 Occupational Health and Safety Management Systems — Requirements with Guidance for Use, https://www.iso.org/obp/ui/#iso:std:iso:45001:ed-1:v1:en.

h) continual performance evaluation and monitoring of the OH&S management system to improve OH&S performance;

i) integration of the OH&S management system into the organization's business processes;

j) OH&S objectives that align with the OH&S policy and take into account the organization's hazards, OH&S risks and OH&S opportunities;

k) compliance with its legal requirements and other requirements.

AngloAmerican, Code of Conduct[638]

We believe that robust processes for the management of safety, health and the environment are a fundamental element of good management practice, and essential for creating a safe and productive place to work and for maintaining our licence to operate.

Safety

We believe that all injuries are preventable – our aim is that 'zero harm' comes to those who work within and around our operations. We take personal responsibility to maintain a safe and secure place of work – our operations should have fundamentally safe, well-designed and well-maintained plants, equipment and infrastructure, with effective safety management systems.

We comply with all applicable safety laws in addition to our own policies and requirements. We ensure that all our staff are appropriately trained to manage their own safety and that safety standards are consistently applied across our operations. We are rigorous in learning from incidents and in preventing recurrences. We expect our consultants, agents, contractors and suppliers to follow our policies and requirements on safety.

Always

- Know the safety requirements and emergency procedures that apply to your work, including the Personal Protective Equipment (PPE) you must wear.
- Identify, assess and manage critical risks.
- Look out for your fellow workers and raise any potential safety issues with your line manager.
- Deal with safety issues honestly and openly.
- Report any accident, injury or illness.
- Close out and act on any learning from safety incidents.
- Stop work if you think it is unsafe.

Never

- Start work you are not qualified to perform.
- Ignore a safety issue, however small it may seem.
- Turn a blind eye if safety controls are not in place, not being followed or don't work.
- Assume someone else will report a risk or concern; safety is everyone's personal responsibility.

638 AngloAmerican, Our Code of Conduct – Our Values in Action (2016) http://www.angloamerican.com/~/media/Files/A/Anglo-American-PLC-V2/documents/approach-and-policies/sustainability/our-code-of-conduct-english.pdf.

Health

Providing healthy work environments is a legal and moral imperative for us and constitutes an investment in the productivity of our business.

All employees and contractors should be able to return home fit and well at the end of each shift and remain so during the course of their working lives. Our most important focus is on eliminating health hazards at their source. We believe that investing in wellness programmes that support healthy lifestyles and emotional resilience promotes employee engagement and productivity. We also endeavour to support employees who are managing long-term physical or psychological conditions.

We believe that long-term contractors should benefit from the same health standards as employees. We comply with all applicable health laws in addition to our own policies and requirements.

Always

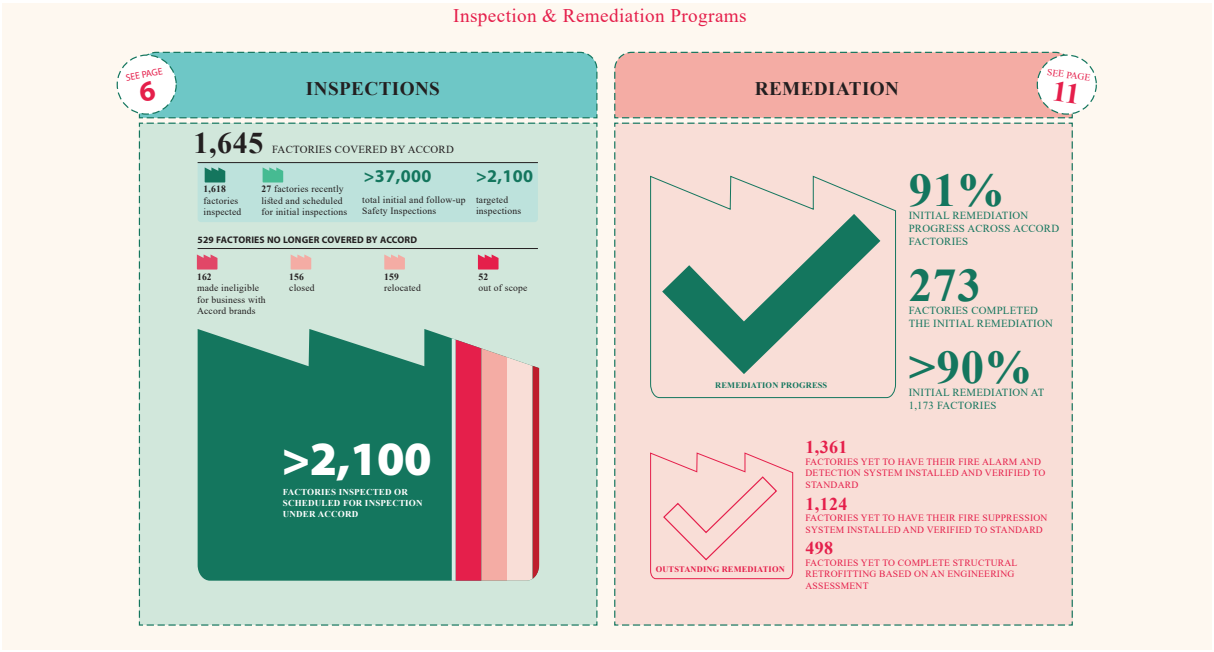
- Take personal responsibility for your own health by wearing the necessary personal protective equipment (PPE) and adhering to mandated work processes.
- Take appropriate preventative measures for any infectious diseases prevalent in the area(s) where you are working.
- Proactively identify health risks and report these to your manager.
- Ensure that the correct controls are in place when undertaking daily tasks.

Never

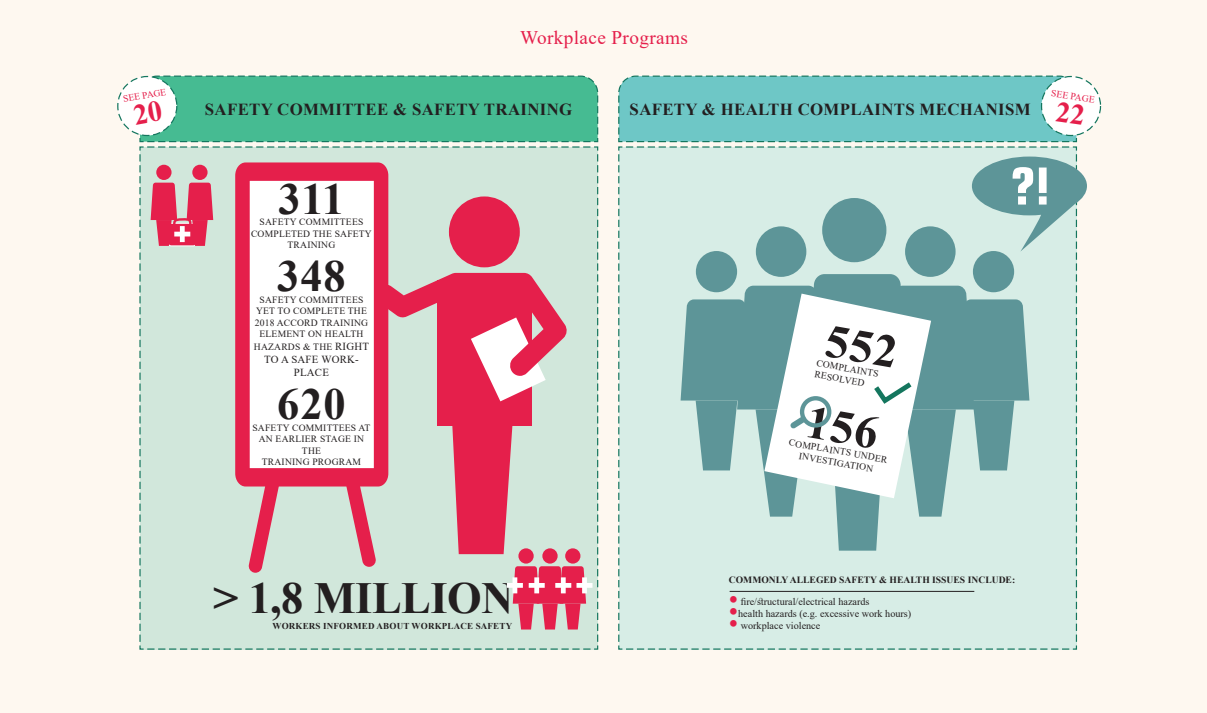
- Fail to adhere to mandatory PPE requirements.
- Ignore a failure in controls – take responsibility for reporting these and preventing harm.

Bangladesh Accord, Quarterly Aggregate Report[639]

Key milestones



639 Accord on Fire and Building Safety in Bangladesh, *Quarterly Aggregate Report on remediation progress and status of workplace programs at RMG factories covered by the Accord* (2020) https://bangladesh.wpengine.com/wp-content/uploads/2020/02/Accord_Quarterly_Aggregate_Report_January2020.pdf.



Bangladesh Accord, The Accord Handbook for Safety Committees[640]

This handbook aims to support joint worker-management Safety Committees to effectively contribute to workplace safety at garment factories in Bangladesh. The handbook is distributed to Safety Committees being supported and trained by the Accord on Fire and Building Safety in Bangladesh (the 'Accord'), but can be of use for any factory Safety Committee in the Ready-Made-Garment and related industries in Bangladesh. The book is based on the Safety Committee training curriculum that the Accord offers to Safety Committees.

Factory-level Safety Committees are an essential part of any factory's health and safety program. In order for a Safety Committee to be effective, both the worker and management representatives on the Safety Committees must be aware of their roles and responsibilities to identify, prevent and address safety concerns at the factory on an ongoing basis. (…)

The Accord protects workers' rights to:

- Refuse work they believe to be unsafe
- Participate in the work of their factory Safety Committee
- File a complaint with the Accord when they see a safety problem in their factory
- Protection against reprisal for reporting safety-related matters
- Not be subjected to reprisal for Freedom of Association in relation to protecting their own safety. This means that workers have the right to be involved in making their workplace safe and healthy, individually as well as collectively through a trade union, and can do so without retaliation or discrimination. (…)

640 Bangladesh Accord, *The Accord Handbook for Safety Committees* (2020) https://bangladesh.wpengine.com/wp-content/uploads/2020/05/Handbook-for-Safety-Committees-EN-spread.pdf

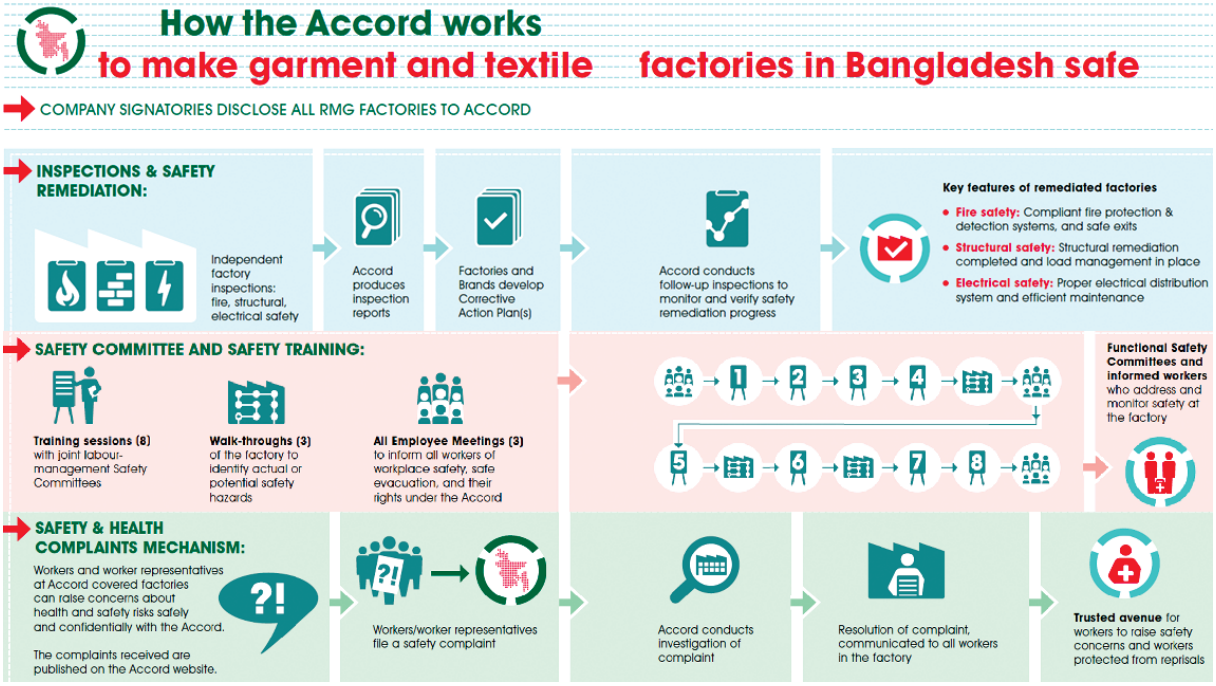
The inspection and remediation program focuses on fire, electrical and structural inspections at factories and working with factories and brands to remediate the identified safety hazards.

The Accord workplace program focuses on making workers aware of safety hazards and how to respond to them, their rights to a safe workplace and involving workers in the efforts to make factories safe. The key elements of the workplace program include

i. training joint worker-management Safety Committees in all Accordcovered factories;

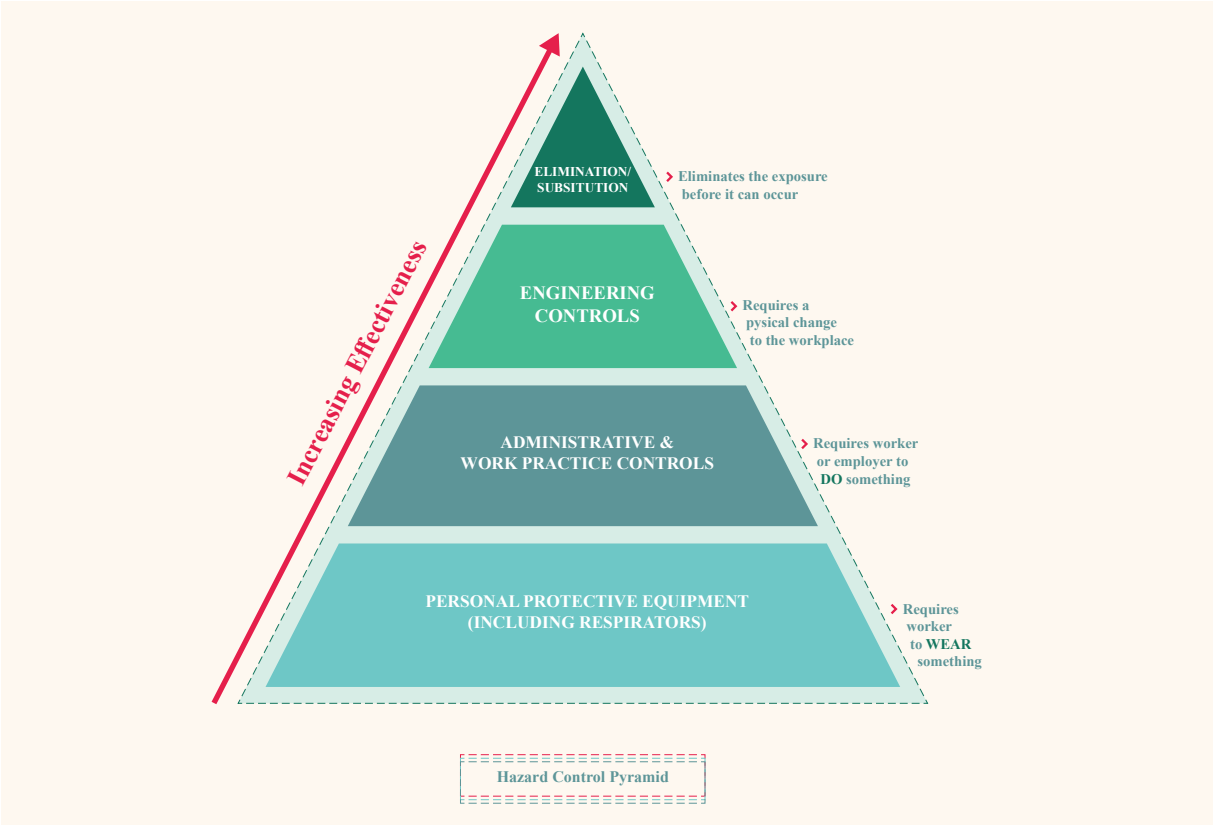
ii. holding informational sessions for all workers in the factory on health and safety rights and

iii. providing workers with an independent complaints mechanism for raising health and safety issues without fear of reprisal.



Hazard Controls

Knowing the hazards that exist in your factory is only the first step in reducing the hazards at work. Some hazards can be totally eliminated, and that is obviously the best approach to take with hazards. But many hazards cannot be totally eliminated, so we need to reduce or control those hazards. There are four levels of hazard control, as shown in this illustration, called the Hazard Control Pyramid:



Global Report Initiative, Sustainability Reporting Guidelines[641]

Occupational Health and Safety

G4-LA5 Percentage of total workforce represented in formal joint management–worker health and safety committees that help monitor and advise on occupational health and safety programs

a. Report the level at which each formal joint management-worker health and safety committee typically operates within the organization.

b. Report the percentage of the total workforce represented in formal joint management-worker health and safety committees.

G4-LA6 Type of injury and rates of injury, occupational diseases, lost days, and absenteeism, and total number of work-related fatalities, by region and by gender

a. Report types of injury, injury rate (IR), occupational diseases rate (ODR), lost day rate (LDR), absentee rate (AR) and work-related fatalities, for the total workforce (that is, total employees plus supervised workers), by:

   - Region
   - Gender

641 Global Reporting Initiative, *G4 Sustainability Reporting Guidelines* (2013) https://www.globalreporting.org/resourcelibrary/GRIG4-Part1-Reporting-Principles-and-Standard-Disclosures.pdf

b. Report types of injury, injury rate (IR), occupational diseases rate (ODR), lost day rate (LDR), absentee rate (AR) and work-related fatalities for independent contractors working on-site to whom the organization is liable for the general safety of the working environment, by:

- Region
- Gender

c. Report the system of rules applied in recording and reporting accident statistics.

G4-LA7 Workers with high incidence or high risk of diseases related to their occupation

a. Report whether there are workers who are involved in occupational activities who have a high incidence or high risk of specific diseases.

G4-LA8 Health and safety topics covered in formal agreements with trade unions

a. Report whether formal agreements (either local or global) with trade unions cover health and safety.

b. If yes, report the extent, as a percentage, to which various health and safety topics are covered by these agreements.

Human Rights Dilemmas, Health and Safety as Work[642]

Risks to businesses

Legal risks

Most countries have legislation providing for OHS protections. If a company is found to have breached any legislation surrounding limitations on health and safety then it could face penalties. Penalties could include fines, remediation, and restitution for employees or compensation. (…)

Operational risks and risks to business continuity

Poor health and safety practices and unsafe workplaces increase the risk of accidents in workplaces, resulting in interruptions at work, work stoppages or employee shortages. There are direct and indirect risks for companies:

Direct risks include:

- The loss of essential staff
- Business disruption due to accidents
- Damage to products or machinery and equipment
- Increased insurance premiums
- The costs of improving workplace systems

642 Human Rights and Business Dilemmas Forum, *Health and Safety at Wor*k, https://hrbdf.org/dilemmas/health-and-safety/#.YBl6DTmg82z.

Indirect risks include:

- Decrease in job satisfaction and morale
- An increase in absenteeism
- The need, at times, to train a replacement employee while a worker is sick or injured
- Loss of reputation within a supply chain

Suggestions for Responsible Business

Adopting a forward-looking human rights compliance policy with procedures to match

Policy

- Compliance with national laws concerning health and safety, such as the provision of protective clothing and equipment, ensuring machinery is in good working condition and regulating temperature and ventilation. Where local laws differ from company policy, the higher standard should prevail. Company policy on health and safety should be guided by ILO Conventions on health and safety
- If there are no national health and safety laws or if laws are weak or poorly enforced, the company policy should commit to international standards, ILO Convention No. 155, on Occupational Safety and Health, ILO Recommendation No. 164, on Occupational Safety and Health and ILO Convention No. 174, on the Prevention of Major Industrial Accidents
- Committing to voluntary international health and safety guidelines including OHSAS18001 and complementary standards including the International Organization for Standardization's 14000 and 14001. The Occupational Health and Safety Assessment Series assist organizations in managing health and safety risks in their operations. Companies that have adopted the OHSAS standard include Coca-Cola, Lexmark and IBM
- Ensuring that company health and safety policies are tailored to the particular risks in the industry or sector
- A grievance mechanism, in line with the Ruggie Framework, which allows employees to raise issues in relation to health and safety
- Supplier contracts with the MNC must require compliance with the MNC's social policy, as well as to maintain a grievance process to address claims in relation to health and safety. For example, Rio Tinto's Health, Safety, Environment and Quality (HSEQ) management system standard requires that "principal contractors, suppliers and others with whom it has a substantial involvement" must comply with this standard

Procedure

- Implement a health and safety programme to ensure the realisation of the policy by having a comprehensive management system in place. GE, for example, has a comprehensive Environmental, Health and Safety (EHS) management system that focuses on four key building blocks. These building blocks include (1) operational responsibility and accountability relating to EHS performance, (2) programmes that are applicable to the company's global operations, (3) effective training and the tools and (4) metrics. (…)
- Monitor the prevalence of accidents and ill-health within an industry and the social and economic context in order to gauge underlying risks of the workplace and how health and safety issues apply to particular industries and workplaces

- Effectively communicate any health and safety policy, associated guidance and procedures to personnel and, if relevant, to suppliers, subcontractors and business partners
- Provide employees with regular training and awareness building to sensitise them to the risk of accidents and the related dangers of working long hours without breaks. This should also foster awareness and shared responsibility and accountability in relation to health and safety practices
- Continually review and improve health and safety policies and procedures to ensure that they are in-line with best practice and to train managers accordingly. Dow monitors health and safety policies through its Environment, Health and Safety Committee. The committee's functions include the review of health and safety policies and the management of health and safety practices. The committee reports back to the company's board of directors so it is able to fulfil its responsibilities in respect to the environmental health and safety policy
- Implementation of grievance procedures for both employees and for suppliers. They can be internal or they could be at the industry-level (e.g. ombudsperson)

ILO, Guide on Investigation of Occupational Accidents and Diseases[643]

Accident investigation checklist

1. Action to be taken upon notification of the accident (…)

2. Gather information

   A. Upon arrival at the site identify the employer and worker representatives and explain the purpose of the visit.

   B. For each injured worker, collect the following information (this list is not exhaustive):

      - The precise details and severity of the injuries and how they were caused, as well as the worker's job title, employment history at the site, date of birth and contact information
      - Where and when the accident happened
      - Details of the work activity in which the injured worker was engaged and the system of work in use at the time of the accident
      - Details of the equipment that was in use, including make, model and serial number, as well as other equipment, such as ladders, scaffolding, electric cables and personal protective equipment
      - Information on the exact condition of the equipment in use, including location, guarding arrangements and position of control switches, before and after the accident
      - The names, contact information and position of other workers at the scene and information on the activities and systems of work in which they were engaged
      - The system of work that would normally have been used to carry out the activity in which the injured person was engaged, and any differences from the system of work that was being followed at the time of the accident
      - The environmental conditions at the time of the accident, e.g. day or night, weather conditions
      - The general conditions at the workplace, including housekeeping, lighting and noise levels, vehicle movement, ventilation equipment, welfare facilities.

643 International Labour Organisation (ILO), *Investigation of Occupational Accidents and Diseases - A Practical Guide for Labour Inspectors* (2015) http://www.ilo.org/labadmin/info/pubs/WCMS_346714/lang--en/index.htm.

C. Obtain the following documents (this list is not exhaustive):

(…)

D. Interview the witnesses:

- Identify all witnesses and, once the planning has been completed, begin the interviews.
- Use the PEACE model (Plan, Engage, Account/Challenge, Closure, Evaluate).
- Use "TED" (open) questions to obtain information.
- Use closed questions to clarify facts or obtain specific information.

3. Analyse the information obtained

Complete the timeline to establish the sequence of what happened and conduct a fault tree analysis to identify why it happened. Keep asking "why" questions until no more meaningful information is obtained.

4. Identify risk control measures

Identify all of the preventive control measures that would have broken the chain of cau¬sation and determine which of them are to be implemented in the future, following, if possible, the hierarchy of controls: Elimination, Substitution, Engineering controls, Admin¬istrative controls, Personal Protective Equipment.

5. Monitor implementation of the action plan

Ensure that the agreed actions designed to improve working conditions have been com¬pleted, including, among other things, by conducting follow-up visits.

6. Complete report(s)/document information

Background (Cambodia)

ILO, Evaluation of the ILO's Strategy on Occupational H&S[644]

Occupational Safety and Health in Cambodia

The right to a safe and healthy working environment is at the heart of efforts to ensure full and productive employment, in conditions of security and human dignity. Attention is drawn to this right in the ILO Constitution, and has been reaffirmed both in the 1944 Declaration of Philadelphia and the more recent Declaration on Social Justice for a Fair Globalization (2008). Although Cambodia is yet to ratify key ILO Conventions on the subject, protection of individual rights to occupational safety and health (OSH) are covered in the 1997 Labour Law (LL), which together with the general requirement for all workplaces to be safe, healthy and hygienic for workers, also sets out a number of special provisions relating to inter alia, workplace medical care, access to safe drinking water, noise levels, lighting, heat and ventilation. Many of these are supported by accompanying ministerial regulations, or prakas, which elaborate further on the responsibilities of the firm and the entitlements of the worker.

The LL also seeks to define workplace accidents, as well as the responsibilities of the employer with regard to accident response and injury-related compensation. Responsibility for OSH labour inspection lies with the Department of Occupational Health in the Ministry of Labour and Vocational Training (MoLVT).

644 International Labour Organisation (ILO), *Independent Evaluation of the ILO's Strategy on Occupational Safety and Health: Workers and Enterprises Benefit from Improved Safety and Health Conditions at Work* (2013) https://www.ilo.org/eval/Evaluationreports/Strategyandpolicyevaluations/WCMS_226411/lang--en/index.htm

Cambodia is currently implementing its first OSH Master Plan, which came into force in April 2009 and covers the four-year period to 2013.36 This plan sets out a vision for the labour market in the country under which it will seek to institutionalize a preventative health and safety culture in the workplace, as well as support enterprise level initiatives and programmes both to raise awareness on OSH issues and develop practical systems for accident and injury prevention (in compliance with the labour law and OSH inspection requirements).

The Master Plan defines six areas for priority action: (1) Strengthen national OSH systems; (2) improve safety and health inspection and compliance with Labour Law; (3) promote OSH activities by employers' and workers' organizations; (4) implement special programmes for hazardous occupations; (5) extend OSH protection to small enterprises, and rural and informal economy workplaces; and (6) promote collaborative actions with hazardous child labour and HIV/AIDS projects for stronger compliance.

In addition to this master plan, the Cambodian Royal Government has many other laws and regulations regarding the protection of workers as regards healthy and safety at work. However, the implementation of these laws and regulations is still limited, and workers face many problems related to OSH.

Instruments (Cambodia)

Labour Law[645]

Article 229:

All establishments and work places must always be kept clean and must maintain standards of hygiene and sanitation or generally must maintain the working conditions necessary for the health of the workers.

The Ministry in Charge of Labor and other relevant ministries shall prepare a Prakas (ministerial order) to monitor the measures for enforcing this article in all establishments subject to the provisions of this Chapter, particularly regarding:

- the quality of the premises;
- cleaning;
- hygienic arrangements for the needs of personnel;
- beverages and meals;
- lodging of the personnel, if applicable;
- work stations and the seating arrangements;
- ventilation and sanitation;
- individual protective instruments and work clothes;
- lighting and noise levels in the workplace.

Article 230:

All establishments and work places must be set up to guarantee the safety of workers. Machinery, mechanisms, transmission apparatus, tools, equipment and machines must be installed and maintained in the best possible safety conditions. Management of technical work utilizing tools, equipment, machines, or products used must be organized properly for guaranteeing the safety of workers.

645 Cambodia, *Labour Law* (1997) https://www.ilo.org/dyn/travail/docs/701/labour.

The Prakas covered in Article 229, shall also determine the measures for enforcing this article, particularly regarding:

- risks of falling;
- moving heavy objects;
- protection from dangerous machines and apparatus;
- preventive measures to be taken for work in confined areas or for work done in an isolated environment;
- risks of liquids spilling;
- fire prevention.

Article 284:

The missions of the shop steward are as follows:

- (…)
- to make sure the provisions relating to the health and safety of work are enforced;
- to suggest measures that would be beneficial to contribution towards protecting and improving the health, safety and working conditions of the workers in the establishment, particularly in case of work-related accidents or illnesses (…)

Prakas on Occupational Hygiene and Safety in Garment and Shoe Factories[646]

Article 4: Use of Chemicals

(…) For the sake of worker and public safety, the employers shall:

- Train their staff properly on how to use chemicals before assigning them to work [with the chemicals];
- Ensure that all chemicals are only used in an isolated area where there is no emission to other places;
- Set up an air pump-out system which ensures that the outgoing air does not impact on public environment;
- Ensure that people working with chemicals are equipped with sufficient and effective protective equipment;
- Ensure that emergency exits are in place;
- Health and safety signs and warehouse regulations shall be written in a simple way, posted properly in a prominent place, and always be kept in a good state.

Article 5: Workplace Safety Training for Workers

The employers of all garment and shoe enterprises/factories/handicraft workshops shall have the obligation to necessarily train their workers and worker representatives on hygiene, workplace safety and health issues relevant to the work in each position.

646 Cambodia, *Prakas on Conditions of Occupational Hygiene and Safety in Garment and Shoe Factories No.307/07 KB/Pr.K* (2007) https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=&p_isn=93391&p_classification=14.02.

- The training shall explain to the workers:
    - Risks caused by physical factors (heat, noise, light, rays, vibration, etc.);
    - Risks of chemicals, biological and mechanical substances, electricity, fire;
    - Possible risks caused by night work;
    - Effective preventive measures;
    - Behavior in an emergency, when it comes to a rescue of victim
- The training shall be provided:
    - At the start of work;
    - When there is a job transfer;
    - When production techniques or machines are changed, or when new raw materials are allocated;
    - After workers take long time off (more than one month).
- The training shall be conducted by a genuine technician during working hours, and the workers attending the training shall be entitled to normal wages.

Law on Construction[647]

Article 9

Every construction shall comply with the fire safety regulations, as determined in the building technical regulations and provisions of fire prevention and extinguishment.

The classifications, types, and sizes of construction that requires fire safety certification shall be determined by an inter-ministerial Prakas by the Minister of Land Management, Urban Planning and Construction and the Minister of Interior.

Article 42

If it is necessary to ensure public security, safety, and order, the competent authority can assign a construction controller to check building or demolition works.

The construction owner, construction users, persons involved in building works, including a real estate developer, a builder and a construction certifier shall give cooperation to the construction controller.

The competent authority may decide to suspend, modify, halt, or require the demolition of a construction, or take other necessary measures if the building or demolition work has been found not to comply with the building technical regulations and other existing regulations.

Article 47

A construction which is used for non-residential purposes requires a quality and safety control within a maximum period of 5 (five) years from the day when the certificate of occupancy is issued. Quality and safety control shall be further conducted regularly once every 5 (five) years, at the latest.

647 Cambodia, *Law on Construction,* promulgated by the Royal Kram No NS/RKM/1119/019 (2019) https://data.opendevelopmentcambodia.net/en/dataset/law-on-construction/resource/c1a1d889-c027-4c4f-a4dc-c3eb0c2eeaf2.

A construction which is used for residential purposes requires a quality and safety control within a maximum period of 10 (ten) years from the day when the certificate of occupancy is issued. Quality and safety control shall be further conducted regularly once every 10 (ten) years, at the latest.

Quality control and certification of the quality and effectiveness of the construction's fire prevention and extinguishment system shall be conducted once every 2 (two) years.

Hazardous construction equipment requires a control once a year. The types of hazardous construction equipment shall be determined by a Prakas of the Minister of Land Management, Urban Planning and Construction.

A construction owner or a building manager has an obligation to hand over the result of the construction's safety and quality control to the competent authority within a period of 1 (one) month, after the deadline for the conduct of the construction's quality and safety control.

Article 48

The competent authority may require a quality and safety control if there exists a risk to human life, property or effect on public security or order.

Article 49

Construction safety and quality control shall be conducted by construction controllers or certifiers who hold a license granted by the Minister of Land Management, Urban Planning and Construction.

Every expense for construction safety and quality control shall be borne by a construction owner.

For a co-owned building, the owners of all private units shall be jointly responsible for every expense for construction safety and quality control, in proportion to the sizes of private units.

FLA, Occupational Health and Safety Assessment of Huey Chuen[648]

The investigation was carried out through individual and group interviews with a large number of stakeholders, direct observation and testing, citing and reviewing of appropriate documentation, job task analysis and risk assessment. A thorough review of the PUMA and FLA Codes of Conduct was undertaken. A review of all Cambodian Labor Laws and Prakas1 was undertaken and relevant internationally recognized standards are referenced where the local standards were inadequate or none existed. (…)

- The possibility that such fainting and subsequent illness might be attributable to the use of raw materials or chemicals at the workplace without proper ventilation

There is a strong possibility that the fainting and illnesses reported are due to the chemicals used in the factory. There are a large number of fans attempting to dilute the organic solvents but this does not appear to be sufficient in some areas. Associated with this is the high ambient temperature which would add to the vapours though evaporation. This should be formally tested. The workers are being exposed to the chemicals through inhalation, absorption through their skin and ingestion. There are multiple pots of organic solvents open. Smell is not a good indicator of ppm (concentration in the air – parts per million) of a solvent but there was a strong smell of solvents near to where the workers were applying this. It was particularly noticeable where the temperature was above 400 C. The personal protective equipment is inadequate and inappropriate. (…)

648 Fair Labour Association, *Occupational Health and Safety Assessment of Huey Chuen (Cambodia) Co., Ltd,* (2011) https://www.fairlabor.org/sites/default/files/documents/reports/ohsa_report_07.18.11.pdf.

- The extent to which use, handling and storage of raw materials and chemicals at the plant are consistent with national and international law and practice, the FLA Workplace Code of Conduct and benchmarks, and the PUMA Code of Conduct and other standards

The storage and handling of chemicals does not comply with international standards. Chemicals are incorrectly stored. Chemicals are poorly labelled. Not all Material Safety Data Sheets are available in Khmer or English. Workers have not been trained in the use of the chemicals. They are not using appropriate PPE and are unaware of the hazards. Despite repeated requests and searching the specific company's web sites not all MSDS were available. Toluene is being used in the factory.

Better Factories Cambodia, An Industry and Compliance Review[649]

Occupational Safety and Health

The cluster covering Occupational Safety and Health (OSH) requirements is the largest cluster with eight different compliance points covering a total number of 60 compliance questions. Consistent with last year's findings, many areas related to OSH contin¬ue to be a challenge for garment factories and are often the result of a lack of proper policies, proce¬dures and division of roles and responsibilities on OSH. This suggestion is supported by the analysis in this report that links factories' performance on legal OSH matters to the quality of their OSH manage¬ment systems. This analysis suggest that the better factories do on their OSH management systems, the lower their non-compliance on legal OSH issues. This is not an issue that is typical just for Cambodia, but a general situation in the global supply chain for garment production. Non-compliance levels in the OSH cluster remain high and in general have gone up slightly in most of the compliance points. (…)

In total, BFC covers 68 questions that are related to OSH:

- 13 questions that relate to Emergency Preparedness;
- 7 questions that relate to Health Services and First Aid,
- 9 questions that relate to general Occupational Safety and Health,
- 6 questions that relate to OSH Management Systems,
- 7 questions on Welfare Facilities;
- 3 questions on Work Accommodation,
- 19 questions on for Worker Protection,
- 4 questions on Working Environment.

Management Systems and OSH Compliance

Better Work has in-depth experience in assess¬ing occupational safety and health in hundreds of garment factories in different countries. This experi¬ence has taught us that factories struggle to sus¬tainably improve their performance on occupational safety and health since often improvements made are 'quick fixes' that are not necessarily supported with proper management systems and training of those involved in ensuring safe and healthy work¬places. As a result, Better Work has started to look at the quality of management systems relating to OSH in factories. All Better Work programmes, including BFC, have introduced factories perfor¬mance on management systems in 2015 as a way to link compliance with the quality of their systems. For factories to do

649 Better Factories Cambodia, *Annual Report 2018: An Industry and Compliance Review* (2018) https://betterwork.org/wp-content/uploads/2018/12/BFC-Annual-Report-2018.pdf.

well on occupational safety and health, they should have proper policies and proce¬dures in place that are known and understood to all management and workers so that they can be ap¬plied every moment, every day. Although manage¬ment systems are not legal requirements, there is a strong correlation between performance on OSH management systems and performance on legal OSH related issues. This confirms that proper OSH management systems uphold compliance. This section provides an analysis that underpins those findings. There are six OSH management system questions that BFC looks at during its assessment as an information question:

1. Does the employer adequately assign accountability to management for carrying out health and safety responsibilities?
2. Does the employer adequately communicate and implement OSH policies and procedures?
3. Does the employer adequately investigate, monitor and measure OSH issues to identify root causes and make necessary adjustments to prevent recurrence?
4. Is there an adequate emergency preparedness procedure?
5. Is there an adequate hazard/risk management and control procedure?
6. Is there an adequate accident investigation procedure?

CCHR, Health and Safety Policy[650]

This is the Health and Safety Policy (the "Policy") of the Cambodian Center for Human Rights ("CCHR"). CCHR will implement this policy to ensure and maintain safe and health working conditions for CCHR employees.

Day to day responsibility for ensuring this policy is put into practice is delegated to the CCHR Finance and Administration Director.

All CCHR employees must:

- Cooperate on health and safety matters;
- Not interfere with anything provided to safeguard their health and safety;
- Take reasonable care of their own health and safety; and
- Report health and safety concerns to the CCHR Finance and Administration Director.

Merk, Country Study Cambodia: Labour Standards in the Garment Supply Chain[651]

g. Safe and healthy working conditions

A safe and hygienic working environment shall be provided, and best occupational health and safety practice shall be promoted, bearing in mind the prevailing knowledge of the industry and of any specific hazards. Appropriate attention shall be paid to occupational hazards specific to this branch of the industry and assure that a safe and hygienic work environment is provided for. Effective regulations shall be implemented to prevent accidents and minimize health risks as much as possible (following ILO Convention 155). Physical abuse, threats of physical abuse, unusual punishments or discipline, sexual and other harassment, and intimidation by the employer are strictly prohibited. Occupational health and safety are major issues in the Cambodian garment industry, including unsafe conditions, mass fainting incidents and collapsing factories.

650 Cambodian Center for Human Rights, *Health and Safety Policy* (undated) https://cchrcambodia.org/resource/eng/cchr_policies/HEALTH%20AND%20SAFETY%20POLICY.pdf.

651 Jeoren Merk, *Country Study Cambodia: Labour Standards in the Garment Supply Chain,* CNV International (2016) https://www.cnvinternationaal.nl/_Resources/Persistent/0e05eebdbf4a1a6c31409dc12aee83b8f532a4b5/20161102%20CNV%20CS%20Cambo_clickable%20extern%20ENG%20DEF.pdf.

Laws and regulations

- All establishments and workplaces must maintain standards of hygiene and sanitation necessary for the health of workers and must guarantee the safety of workers (Article. 230 Labour Law).
- Article 248 of the Labour Law defines work related to accidents (accident or illness which happens on the job, during work hours or while travelling to or from work).
- All employers are responsible for work-related injuries (Labour Law: Article. 249). Workers who usually work alone are not responsible for work-related injuries incurred by fellow workers who occasionally work with them (Labour Law: Article. 251).
- The Labour Law provides for a compulsory insurance system for work-related accidents to be managed under the NSSF (Labour Law: Article. 256).
- Labour Law-issued health and safety regulations do not apply to workplaces run by family members if the work does not involve the use of a boiler, mechanical or electric motors, or an industry that is not classified as dangerous or unsanitary (Labour Law: Article. 228).

Stakeholders' opinions and analyses of implementation

There are many occupational health and safety concerns in Cambodia's garment industry. It is a topic that requires more attention from employers and employees alike. Many workplaces are hot, noisy, and poorly lit. There is often little ventilation, the uncontrolled and undeclared use of chemicals, excessive dust, as well as a lack of preventive education and little access to personal protective equipment.

A report commissioned by Better Work and IFC on fire safety, building and worker safety risks, identified a number of significant dangers, including: Unprotected fire hazard materials and equipment, fire hazard activities, inadequate automatic fire suppression systems, inappropriate means of escape, improperly maintained electrical installations, lack of emergency awareness and training, ineffective firefighting equipment, substandard building construction and design, and poor building maintenance.

Three safety hazards have been highlighted over the past few years:

a. Factory collapses: In 2013, the Wing Star factory, a supplier of Asics, partly collapsed and killed two workers and injured several others. The incident raised concerns about building standards in the sector, especially since a similar accident had happened 17 months earlier, where two workers were killed and seven were seriously injured.

b. Mass fainting: Malnutrition has been regarded as one of the possible causes behind mass fainting, together with poor working conditions (for instance, excessive overtime, stress, heat, inadequate ventilation). The mass fainting of workers has become a regular occurrence in garment and shoe factories in Cambodia. Incidences range from dozens to several hundred workers at a time. The incidents have taken place at numerous suppliers, including those supplying Puma, Adidas, H&M and Polo Ralph Lauren. Research suggests there is no single cause for these incidents, but that a number of potential factors play a role, including overheated workplaces, under-nutrition, and the lack of access to quality food. A report by the CLEC and LBL states that fainting can be attributed to the insufficient diets of many Cambodians; in many cases factory workers consume only some 1600 calories per day (at least 500 less than the daily recommendation). The study found that roughly one-third of all workers, who spend, on average, US$1.50 on food per day, were medically malnourished. Body Mass Index figures indicated that 33% of Cambodian workers are medically underweight and at risk, and 25% seriously so (these kinds of figures have used to diagnose anorexia in the UK).71 Another research report noted that 67% of the factories have linked poor nutrition to lower productivity. The study also found that many manufacturers are willing to provide meals as long as the associated expenses do not exceed 2,000 riel (€0.36).

c. Safe transport: Another concern is the often-unsafe forms of transport that workers are forced to depend on when commuting to and from work, which includes flatbed trucks and minivans, which are annually involved in a high number of traffic accidents. In 2014, for instance, 73 garment workers died in crashes during their commutes, an almost 10% increase over the 67 fatalities recorded in 2013.73 In 2015, the number of casualties rose dramatically to 130 fatalities and 7,000 injuries.74 Cambodian law considers these accidents to be work-related.

US Department of State, Cambodia Human Rights Report[652]

e. Acceptable Conditions of Work

An April 2017 survey conducted by the BWTUC [The Building and Wood Workers Trade Union Confederation (BWTUC)] estimated there were 200,000 citizens working in the construction industry; 89 percent of 1,010 respondents did not have contracts, most never received bonuses or severance pay, and only 9 percent were enrolled with the National Social Security Fund (NSSF). Work-related injuries and health problems were common. Most large garment factories producing for markets in developed countries met relatively high health and safety standards as conditions of their contracts with buyers. Working conditions in small-scale factories and cottage industries were poor and often failed to meet international standards. The Department of Occupational Safety and Health (OSH) reported 2,533 work-related injuries in the first six months of the year, up slightly from 2017; of these injuries, 444 were the result of road accidents, since employers often transported garment workers to and from work in the back of unsafe open-bed trucks.

Mass fainting remained a problem. The NSSF reported 1,350 workers fainted in 13 factories in the first six months of the year, up from 415 workers fainting in eight factories in the same period in 2017. There were no reports of serious injuries due to fainting. Observers reported excessive overtime, poor health, insufficient sleep, poor ventilation, lack of nutrition, pesticide in nearby rice paddies, and toxic fumes from the production process all contributed to mass fainting.

The BFC reported that complying with OSH standards was a growing challenge in the garment export sector largely due to improper company policies, procedures, and poorly defined supervisory roles and responsibilities. The BFC reported increased noncompliance in every OSH variable measured, including exposure to chemicals and hazardous substances, emergency preparedness, OSH management systems, welfare facilities, worker environment, worker protection, and worker accommodations.

Hsu et al, Occupational Safety and Health for Cambodian Entertainment Sector[653]

Cambodia has developed booming textile, garment, tourism, and entertainment service industries since the mid-1990s. The 2007 global financial crisis pushed many garment workers, who lost their jobs, into the entertainment sector. Entertainment workers are typically engaged informally by their employers and are subjected to long working hours, sexual harassment, and violence. Many who sell beverages are forced into excessive alcohol consumption as part of their work. Many are also expected by their employers and clients to provide sexual services. To address unsafe and unhealthy working conditions for these workers, an innovative occupational safety and health regulation was adopted in 2014. (…)

652 U.S Department of State, *Cambodia 2018 Human rights Report* (2018) https://www.justice.gov/eoir/page/file/1298511/download.

653 Lee-Nah Hsu, Richard Howard, Anna Maria Torriente & Chuong Por, 'Promoting Occupational Safety and Health for Cambodian Entertainment Sector Workers', *New Solutions: A Journal of Environmental and Occupational Health Policy* (2016) http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/article/wcms_502315.pdf.

In Cambodia, these sector workers also include those engaged by the producers and sellers of beverages, such as hostesses, singers, waitresses, bartenders, and others. This category of workers, however, also includes workers who exchange sex for money.3 This officially accepted term in Cambodia was coined partly in order to develop HIV programs for sex workers, given that the sex trade is illegal in the country. The term has enabled the health ministry, as well as a range of international and national civil society organizations, to conduct on-site HIV prevention, care, support, and treatment services mostly for those who engaged in commercial sex prior to 2007. (…)

The Cambodian Food Service Workers Federation (CFSWF) is a trade union established in December 2007 and registered with the Ministry of Labour and Vocational Training. It is a member of the Cambodian Labour Confederation, one of the largest Cambodian labor union confederations with a membership of more than 60,000. With the facilitation of the ILO, based on findings of the ILO study, the CFSWF developed workplace programs and began working with the beer promotion workers, on protecting their rights and improving their work conditions with the beer companies. CFSWF has accepted many women entertainment workers in restaurants, pubs, karaoke clubs, and other entertainment venues as members. CFSWF empowered them by organizing them into workers unions and encouraged them to participate in social work and promoted them to be women union leaders. CFSWF trained them on issues relating to gender, sexual harassment, workplace violence, OSH, and workers' rights, and provided them with legal assistance when they faced sexual harassment or violations of workers' rights at work.

This marked a significant step for entertainment workers. Membership with the Food and Service Workers Federation enabled entertainment workers to negotiate a labor agreement to protect their OSH rights in accordance with the country's labor laws. Once entertainment workers found a collective voice, through trade union membership, they were in a position to get the attention of entertainment-sector employers. This led to a process of negotiation and an agreement that a national policy on work conditions and OSH for workers in the entertainment sector was needed. (…)

The Minister of Labour supported the proposed regulation and signed it into law as "Ministerial Regulation on Working Conditions, Occupational Safety and Health Rules of Entertainment Service Enterprises, Establishment and Companies" on 20 August 2014. (…)

The Minister of Labour and Vocational Training indicated that initially, the government will encourage voluntary compliance with the regulation on the part of "all the people, especially the entertainment establishment owners." However, if there is persistent failure to comply, then penalties will be imposed in accordance with the regulation. An action plan to train key stakeholders on the regulation and on ways to deal with challenges faced by the sector in its implementation has been developed by the Ministry of Labour and Vocational Training. The Ministry, with the external support of the ILO and funding from the ILO and the Global Fund to fight AIDS, TB, and malaria, began disseminating this regulation nationally since the beginning of 2015 to inform and familiarize the industry, its customers, and labor inspectors. Meanwhile, the minister has made provisions to allocate from his own budget, although limited, to facilitate monitoring and implementation. In addition, a regulation implementation guideline has been developed jointly with the Ministry, the employers, and workers trade unions.

As expressed by the Regional Director for Asia and the Pacific of the ILO, "Cambodia's effort to protect entertainment workers is "ground breaking," as it dares to reach into a sector where most governments fail to provide adequate protection. Entertainment workers in Cambodia, as well as elsewhere in Asia and the Pacific region, face similar labor-related violations which are in violation of workers' rights under the International Labour Conventions. These Conventions apply to all workers, including those in informal settings. Cambodia, in adopting this OSH regulation, has demonstrated an innovative approach and leadership from the labor sector, to protect the OSH of entertainment workers. This is a transformative approach to HIV prevention while strengthening labor rights and OSH among these workers.

Questions

1. Why do you think leading companies have advanced faster in dealing with H&S issues compared with other labour rights (e.g. discrimination, freedom of association)?
2. Why do industrial disasters where so many workers are killed or injured continue to happen in the garment industry?
3. What type of measures does the government adopt to improve H&S protections?
4. Are trade unions or civil society groups effective in promoting H&S? What roles do they play and are they collaborating?
5. Why did Cambodia not ratify the ILO Conventions on H&S? How would ratification improve the situation for workers?

Further Readings

- International Labour Organisation (ILO), *Codes of Practice* (2019) www.ilo.org/safework/info/standards-and-instruments/codes/lang--en/index.htm.
- International Labour Organisation (ILO), *International Labour Law and Domestic Law: A Training Manual for Judges, Lawyers and Legal Educators: Occupational Safety and Health* (2018) www.ilo.org/safework/info/instr/WCMS_618606/lang--en/index.htm.
- International Labour Organisation (ILO), *Occupational Safety and Health within Sustainable Sourcing Policies of Multinational Enterprises – Summary of Research Findings Focusing on Agriculture and Textile* (2018) www.ilo.org/safework/projects/WCMS_635148/lang--en/index.htm.
- International Labour Organisation (ILO), *The ASEAN Occupational Safety and Health Network: Good Occupational Safety and Health Practices 2008/2009* (2009) https://www.ilo.org/asia/publications/WCMS_120410/lang--en/index.htm.
- Cambodia, *Prakas on Working Conditions, Occupational Safety and Health of Entertainment Service Enterprises, Establishments and Companies,* No.194/14 KB/Pr.K (2014) Ministry of Labour and Vocational Training, https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_344809.pdf.
- Tsuyoshi Kawakami, *Participatory approaches to improving safety, health and working conditions in informal economy workplaces. Experiences of Cambodia, Thailand and Viet Nam* (2007) https://www.ilo.org/global/topics/safety-and-health-at-work/resources-library/publications/WCMS_110307/lang--en/index.htm.
- Tsuyoshi Kawakami (ed.), *Good Practices in Safety, Health and Working Conditions: Home Workers, Farmers and Construction Workers in Cambodia, Mongolia, and Thailand* (2006) https://www.ilo.org/asia/publications/WCMS_BK_PB_311_EN/lang--en/index.htm.
- Department of Occupational Health and Safety Ministry of Labour and Vocational Training of Cambodia, *The Overview of Occupational Safety and Health in Cambodia* (2011) http://58.82.155.201/AEC/pdf/laws1/2sa/2cam/3.SA-CAM-03.pdf.
- Theany Choeurng & Atith Kong, *OSH Legal Resources Handbook* (2013) https://amrc.org.hk/sites/default/files/OSH%20LRH_text%20only.pdf. Better Factories Cambodia, Fire Safety Guidelines: A Tool to Prevent Accidents and Catastrophic Loss of Life and Properties in Factories, (2013) http://ticambodia.org/library/wp-content/files_mf/1452223343902.FIRESAFETYGUIDELINES.FINALEng.pdf.
- Cambodian National Legislation on Occupational Safety and Health (2020) https://www.ilo.org/dyn/natlex/natlex4.listResults?p_lang=en&p_country=KHM&p_classification=14.

21. MIGRANT WORKERS

Chea Sophal, Radu Mares

Introduction

Exploitation of migrant workers can go as far as severe mistreatment, human trafficking and modern slavery (chapter 16) and is taking place in various industries (e.g. construction, domestic workers). The UN Convention on Migrant Workers remains the least ratified among the UN core human rights treaties. In law and in practice migrant workers often receive insufficient protection and are recognized as a vulnerable group at high risk of exploitation. Therefore, leading companies have recently engaged in large multistakeholder initiatives (chapter 5), which develop comprehensive packages of measures and specific principles such as the 'employer pays principle'. Extraterritorial laws combatting human trafficking and forced labour (chapter 4) further support efforts throughout the supply chain to improve the protection of migrant workers. Trade unions (chapter 19) have not always been successful in addressing the rights of this group of workers, while domestic workers – who are predominantly women (chapter 23) – face difficulty in becoming unionized due to their workplace not being the factory floor. According to the UNGPs and other soft law instruments (chapter 2), companies are expected to undertake their human rights due diligence in a participatory manner (chapter 14) and with special attention to vulnerable groups (chapter 8-13) – such as indigenous people (chapter 22), persons with disabilities (chapter 24) and children (chapter 15). Cooperation between states – the sending, transit and receiving countries – is indispensable for creating an enabling environment (chapter 1 and 2) for more responsible business conduct throughout the global supply chains. Recruitment agencies, which have for decades been covered by ILO Conventions, pose particular challenges and require specific attention from companies that rely on their services. Understanding the root causes of migration – from poverty to climate change (chapter 29) – and employing new technologies is essential for finding innovative ways to protect migrant workers.

According to reports from the Ministry of Labour and Vocational Training (MoLVT), 1.2 million Cambodians are working overseas, mainly in Thailand, Malaysia, Singapore, Hong Kong, South Korea, Japan, and Saudia Arabia. Annually they provide remittances of around $2 billion to their families. There are several reasons for migrating to work overseas such as lack of local jobs, higher wages, and following friends or relatives. The main sectors in which Cambodian migrants work include the construction and service sectors. Cambodia has also been sending Khmer labourers to work abroad through bilateral agreements as well as Memorandums of Understanding (MoUs) with receiving states. Some MoUs have been revoked due to grave violations of human rights and abuse of Cambodian migrant workers. Several stakeholders can support Cambodian migrant workers to facilitate their access to information, education, access to justice and social protection.

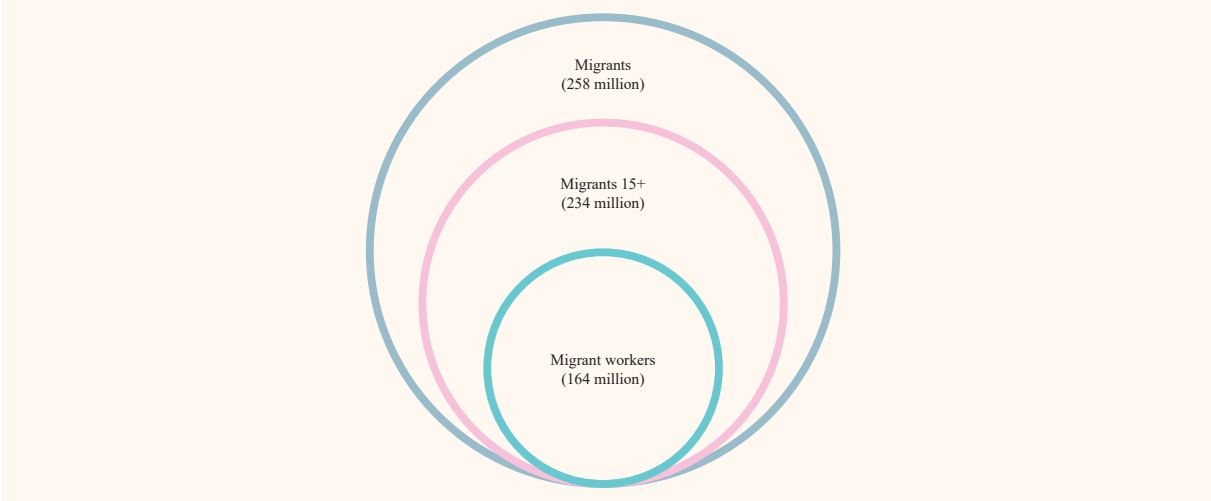
Main Aspects

- ✓ Migration (documented migration or irregular migration)
- ✓ Causes of migration
- ✓ Migrants and refugees (separate legal frameworks)
- ✓ Human trafficking and labor exploitation
- ✓ Unfair competition
- ✓ Benefits for countries of origin and countries of employment
- ✓ Principle of equality of treatment (remuneration, conditions of work, terms of employment, medical care, children education)
- ✓ Right to property
- ✓ Right to be informed (of conditions applicable)
- ✓ Employer pays principle (no recruitment fees on workers)
- ✓ Consultation and cooperation among states regarding migration (and ensuring sound, equitable, humane and lawful conditions of migration)
- ✓ Recruitment agencies (temporary work agencies)
- ✓ Remediation mechanisms
- ✓ Reporting laws (corporate transparency)
- ✓ Digital tools in supply chains (form of worker empowerment)
- ✓ Sustainable development and migration
- ✓ Climate change and migration

Background

ILO, Global Estimates on International Migrant Workers[654]

Global estimates of the stock of international migrants and migrant workers, 2017



654 International Labour Organization (ILO), *Global Estimates on International Migrant Workers – Results and Methodology* (2018) www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_652001.pdf.

Men constitute a larger proportion of migrant workers. In 2017, the stock of male migrant workers was estimated to be 95.7 million, while the corresponding estimate for female migrant workers was 68.1 million, or 58.4 and 41.6 per cent, respectively, of all migrant workers. (…) The higher proportion of men among migrant workers may also be explained by other factors, including the higher likelihood of women to migrate for reasons other than employment (for instance, for family reunification), as well as by possible discrimination against women that reduces their employment opportunities in destination countries. Societal stigmatization, the discriminatory impacts of policies and legislation and violence and harassment not only undermine women's access to decent work but can also result in low pay, the absence of equal pay and the undervaluation of female-dominated sectors. (…)

When disaggregating migrant workers by age group, it is found that while youth workers (aged 15-24) and older workers (aged 65 plus) constitute 8.3 per cent and 5.2 per cent, respectively, of migrant workers, prime-age adults constitute 86.5 per cent. This age composition holds for male and female migrant workers alike. The fact that the overwhelming majority of migrant workers consist of prime-age adults suggests that some countries of origin are losing the most productive part of their workforce, which could have a negative impact on their economic growth. On the other hand, destination countries benefit from receiving prime-age workers as they are increasingly faced with demographic pressures. It is important to note, however, that the emigration of prime-age individuals may provide a source of remittances for countries of origin. (…)

Of the 164 million migrant workers worldwide, 111.2 million (67.9 per cent) are employed in high-income countries, 30.5 million (18.6 per cent) in upper middle-income countries, 16.6 million (10.1 per cent) in lower middle-income countries and 5.6 million (3.4 per cent) in low-income countries.

UN, Global Compact for Migration[655]

4. Refugees and migrants are entitled to the same universal human rights and fundamental freedoms, which must be respected, protected and fulfilled at all times. However, migrants and refugees are distinct groups governed by separate legal frameworks. Only refugees are entitled to the specific international protection defined by international refugee law. This Global Compact refers to migrants and presents a cooperative framework addressing migration in all its dimensions.

7. This Global Compact presents a non-legally binding, cooperative framework that builds on the commitments agreed upon by Member States in the New York Declaration for Refugees and Migrants. It fosters international cooperation among all relevant actors on migration, acknowledging that no State can address migration alone, and upholds the sovereignty of States and their obligations under international law.

8. This Global Compact expresses our collective commitment to improving cooperation on international migration. Migration has been part of the human experience throughout history, and we recognize that it is a source of prosperity, innovation and sustainable development in our globalized world, and that these positive impacts can be optimized by improving migration governance. The majority of migrants around the world today travel, live and work in a safe, orderly and regular manner. Nonetheless, migration undeniably affects our countries, communities, migrants and their families in very different and sometimes unpredictable ways.

15. We agree that this Global Compact is based on a set of cross-cutting and interdependent guiding principles:

    (a) *People-centred.* The Global Compact carries a strong human dimension, inherent to the migration experience itself. It promotes the well-being of migrants and the members of communities in countries of origin, transit and destination. As a result, the Global Compact places individuals at its core;

    (b) *International cooperation.* (…);

655 UN, *Global Compact for Safe, Orderly and Regular Migration, A/CONF.231/3* (2018) https://undocs.org/en/A/CONF.231/3.

(c) *National sovereignty.* The Global Compact reaffirms the sovereign right of States to determine their national migration policy and their prerogative to govern migration within their jurisdiction, in conformity with international law. Within their sovereign jurisdiction, States may distinguish between regular and irregular migration status, including as they determine their legislative and policy measures for the implementation of the Global Compact, taking into account different national realities, policies, priorities and requirements for entry, residence and work, in accordance with international law;

(d) *Rule of law and due process.* (…);

(e) *Sustainable development.* The Global Compact is rooted in the 2030 Agenda for Sustainable Development, and builds upon its recognition that migration is a multidimensional reality of major relevance for the sustainable development of countries of origin, transit and destination, which requires coherent and comprehensive responses. Migration contributes to positive development outcomes and to realizing the goals of the 2030 Agenda for Sustainable Development, especially when it is properly managed. The Global Compact aims to leverage the potential of migration for the achievement of all Sustainable Development Goals, as well as the impact this achievement will have on migration in the future;

(f) *Human rights.* The Global Compact is based on international human rights law and upholds the principles of non-regression and non-discrimination. By implementing the Global Compact, we ensure effective respect for and protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle. We also reaffirm the commitment to eliminate all forms of discrimination, including racism, xenophobia and intolerance, against migrants and their families;

(g) *Gender-responsive.* The Global Compact ensures that the human rights of women, men, girls and boys are respected at all stages of migration, that their specific needs are properly understood and addressed and that they are empowered as agents of change. It mainstreams a gender perspective and promotes gender equality and the empowerment of all women and girls, recognizing their independence, agency and leadership in order to move away from addressing migrant women primarily through a lens of victimhood;

(h) *Child-sensitive*. The Global Compact promotes existing international legal obligations in relation to the rights of the child, and upholds the principle of the best interests of the child at all times, as a primary consideration in all situations concerning children in the context of international migration, including unaccompanied and separated children;

(i) *Whole-of-government approach.* The Global Compact considers that migration is a multidimensional reality that cannot be addressed by one government policy sector alone. To develop and implement effective migration policies and practices, a whole-of-government approach is needed to ensure horizontal and vertical policy coherence across all sectors and levels of government;

Objectives for safe, orderly and regular migration

1. Collect and utilize accurate and disaggregated data as a basis for evidence-based policies
2. Minimize the adverse drivers and structural factors that compel people to leave their country of origin
3. Provide accurate and timely information at all stages of migration
4. Ensure that all migrants have proof of legal identity and adequate documentation
5. Enhance availability and flexibility of pathways for regular migration
6. Facilitate fair and ethical recruitment and safeguard conditions that ensure decent work
7. Address and reduce vulnerabilities in migration
8. Save lives and establish coordinated international efforts on missing migrants
9. Strengthen the transnational response to smuggling of migrants

10. Prevent, combat and eradicate trafficking in persons in the context of international migration
11. Manage borders in an integrated, secure and coordinated manner
12. Strengthen certainty and predictability in migration procedures for appropriate screening, assessment and referral
13. Use migration detention only as a measure of last resort and work towards alternatives
14. Enhance consular protection, assistance and cooperation throughout the migration cycle
15. Provide access to basic services for migrants
16. Empower migrants and societies to realize full inclusion and social cohesion
17. Eliminate all forms of discrimination and promote evidence-based public discourse to shape perceptions of migration
18. Invest in skills development and facilitate mutual recognition of skills, qualifications and competences
19. Create conditions for migrants and diasporas to fully contribute to sustainable development in all countries
20. Promote faster, safer and cheaper transfer of remittances and foster financial inclusion of migrants
21. Cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration
22. Establish mechanisms for the portability of social security entitlements and earned benefits
23. Strengthen international cooperation and global partnerships for safe, orderly and regular migration

Harsdorff, Towards an ILO Approach to Climate Change Adaptation[656]

Climate change is already occurring and is having increasingly large impacts on enterprises and workers, and on economic and social development. In the longer-term, the increase in average temperatures, the alteration of rainfall patterns and rises in sea level will be the most significant effects. In the short-to-medium term, the impacts are mostly caused by erratic weather patterns and extreme events such as storms, floods and droughts. In most regions these impacts on the world of work are negative, disrupting businesses, destroying workplaces and undermining income opportunities. In poor countries and communities the impacts on income generation, employment and social security can be particularly devastating. Those who have done least to cause the problem stand to lose the most.

To prevent unmanageable and potentially uncontrollable climate changes, the causes of such change needs to be tackled and measures to reduce further greenhouse gas emissions are needed urgently. In parallel, countries, communities and enterprises have to adapt to the climate change that is already underway as a result of emissions since the industrial revolution, in order to try to prevent losses and exposure.

The United Nations Framework Convention on Climate Change (UNFCCC) and the Intergovernmental Panel on Climate Change (IPCC) have produced authoritative definitions of adaptation. The IPCC has also concluded, in its 4th Assessment Report, that adaptation is intricately linked to sustainable development. Based on these definitions and the link to sustainable development the ILO interprets its role in climate change adaptation as: "Reducing vulnerability of workers, enterprises and governments to the effects of climate change and enhancing capacity at individual and society level to respond to, prepare for and adapt to climate change in ways which enhance development and social inclusion". This emphasizes the view that reducing vulnerability must play a central role in adaptation efforts and also that the large investments needed to adapt to climate change should be seized as an opportunity to build a more sustainable society, rather than as defensive expenditure designed to reduce losses.

656 Marek Harsdorff et al., *Towards an ILO Approach to Climate Change Adaptation, International Labour Organisation (ILO)* (2010) https://www.ilo.org/employment/Whatwedo/Publications/working-papers/WCMS_174612/lang--en/index.htm.

Relevant ILO programmes and approaches include (…) Displacement and migration: There is increasing evidence of climate change becoming an additional driver of migration, both internal and across borders. The latter is likely to become more prominent as an adaptation option and ILO Conventions offer guidelines for the migration process. (…)

"While migration can be a manifestation of acute vulnerability, it can also represent an adaptation strategy since it can: help to reduce risk to lives, livelihoods and ecosystems; contribute to income diversification; and enhance overall capacity of households and communities to cope with the adverse effects of environmental and climate change. Migration has been used for millenniums as an adaptation strategy and is likely to be of growing importance in the future."

The ILO has a specific mandate with regard to international migration and is promoting a rights-based approach. While the Office would need to work closely with other agencies and organizations to address some of the likely challenges to arise from climate related migration and displacement, it should make sure that standards are at the centre of the debate and action. Indeed, beyond the protection of the rights of migrant workers contained in Conventions 97 and 143, these two instruments provide for sound and sustainable migration policies based on cooperation between states (countries of origin and countries of destination), social dialogue in the formulation and implementation of migration policies and the promotion of integration policies. (…)

Instruments

UN, Convention on the Rights of Migrant Workers[657]

Preamble

Taking into account the fact that migration is often the cause of serious problems for the members of the families of migrant workers as well as for the workers themselves, in particular because of the scattering of the family,

Bearing in mind that the human problems involved in migration are even more serious in the case of irregular migration and convinced therefore that appropriate action should be encouraged in order to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights,

Considering that workers who are non-documented or in an irregular situation are frequently employed under less favourable conditions of work than other workers and that certain employers find this an inducement to seek such labour in order to reap the benefits of unfair competition,

Article 25

1. Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration and:

   (a) Other conditions of work, that is to say, overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work which, according to national law and practice, are covered by these terms;

   (b) Other terms of employment, that is to say, minimum age of employment, restriction on home work and any other matters which, according to national law and practice, are considered a term of employment.

657 *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (1990) www.ohchr.org/en/professionalinterest/pages/cmw.aspx.

2. It shall not be lawful to derogate in private contracts of employment from the principle of equality of treatment referred to in paragraph 1 of the present article.

3. States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity.

Article 28

Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.

Article 30

Each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned. Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child's stay in the State of employment.

Article 33

1. Migrant workers and members of their families shall have the right to be informed by the State of origin, the State of employment or the State of transit as the case may be concerning:

   (a) Their rights arising out of the present Convention;

   (b) The conditions of their admission, their rights and obligations under the law and practice of the State concerned and such other matters as will enable them to comply with administrative or other formalities in that State. (…)

Article 35

Nothing in the present part of the Convention shall be interpreted as implying the regularization of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularization of their situation (…)

Part IV: Other Rights of Migrant Workers and Members of their Families who are Documented or in a Regular Situation

Article 37

Before their departure, or at the latest at the time of their admission to the State of employment, migrant workers and members of their families shall have the right to be fully informed by the State of origin or the State of employment, as appropriate, of all conditions applicable to their admission and particularly those concerning their stay and the remunerated activities in which they may engage as well as of the requirements they must satisfy in the State of employment and the authority to which they must address themselves for any modification of those conditions.

Part VI: Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families

Article 64

1. (…) the States Parties concerned shall as appropriate consult and co-operate with a view to promoting sound, equitable and humane conditions in connection with international migration of workers and members of their families.

2. In this respect, due regard shall be paid not only to labour needs and resources, but also to the social, economic, cultural and other needs of migrant workers and members of their families involved, as well as to the consequences of such migration for the communities concerned.

Article 68

1. States Parties, including States of transit, shall collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation. The measures to be taken to this end within the jurisdiction of each State concerned shall include:

   (a) Appropriate measures against the dissemination of misleading information relating to emigration and immigration;

   (b) Measures to detect and eradicate illegal or clandestine movements of migrant workers and members of their families and to impose effective sanctions on persons, groups or entities which organize, operate or assist in organizing or operating such movements;

   (c) Measures to impose effective sanctions on persons, groups or entities which use violence, threats or intimidation against migrant workers or members of their families in an irregular situation.

2. States of employment shall take all adequate and effective measures to eliminate employment in their territory of migrant workers in an irregular situation, including, whenever appropriate, sanctions on employers of such workers. The rights of migrant workers vis-à-vis their employer arising from employment shall not be impaired by these measures.

ILO, Migration for Employment Convention[658]

Article 3

1. Each Member for which this Convention is in force undertakes that it will, so far as national laws and regulations permit, take all appropriate steps against misleading propaganda relating to emigration and immigration. (…)

Article 6

1. Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of the following matters:

   (a) in so far as such matters are regulated by law or regulations, or are subject to the control of administrative authorities--

      (i) remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age for employment, apprenticeship and training, women's work and the work of young persons;

658 *International Labour Organization (ILO), Migration for Employment Convention (No. 97) (1949) www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312242.*

(ii) membership of trade unions and enjoyment of the benefits of collective bargaining;

(iii) accommodation;

(b) social security (that is to say, legal provision in respect of employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities, and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:

(i) there may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

(ii) national laws or regulations of immigration countries may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension;

(c) employment taxes, dues or contributions payable in respect of the person employed; and

(d) legal proceedings relating to the matters referred to in this Convention.

IOM, Migration and the 2030 Agenda: A Guide for Practitioners[659]

Goal 10: Reduce inequality within and among countries

Target 10.7: Facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies.

What does target 10.7 mean?

Orderly migration: There is no definition of this term within the 2030 Agenda. This document will use IOM's definition of orderly migration: "the movement of a person from his or her usual place of residence to a new place of residence, in keeping with the laws and regulations governing exit of the country of origin and travel, transit and entry into the host country." This underlines a State's right to regulate entry as a basis for being able to ensure migrants' proper treatment, granting rights, enforcing law and managing relationships with host communities.

Regular migration: IOM defines regular migration as "migration that occurs through recognized, authorized channels." The regularity of migration does not solely refer to the method used to cross a country's border, as migrants can enter a country through regular channels, but find themselves in an irregular situation after a period of time.

Safe migration: There is no common definition for the concept of safe migration. A migrant can be in an unsafe situation while or after having migrated through regular channels; conversely, a migrant can be in a situation that is both safe and irregular. A migrant's situation can change from safety to unsafety throughout the various phases of their migratory process, and thus the definition should encompass all stages of the process, including at the country of origin, transit, country of first asylum and country of destination. Further, safe migration should also be considered for internal migration, and also for those left behind who do not finish their intended journey. Safe migration is not a static concept and is one that primarily is concerning the well-being of and reduction of risk for migrants. The needs of different categories of migrants, as well as factors which could make any migrant vulnerable, should also be considered.

659 International Organization of Migration (ILO), *Migration and the 2030 Agenda: A Guide for Practitioners* (2018) www.migration4development.org/sites/default/files/en_sdg_web.pdf

ILO, General Principles and Operational Guidelines for Fair Recruitment[660]

Scope

These principles and guidelines are intended to cover the recruitment of all workers, including migrant workers, whether directly by employers or through intermediaries. They apply to recruitment within or across national borders, as well as to recruitment through temporary work agencies, and cover all sectors of the economy. Implementation of these principles and guidelines at the national level should occur after consultation between the social partners and the government.

Responsibilities of enterprises and public employment services

15. Enterprises and public employment services should respect human rights when recruiting workers, including through human rights due diligence assessments of recruitment procedures, and should address adverse human rights impacts with which they are involved.

    15.1 All enterprises and public employment services should respect human rights in their recruitment processes wherever they operate, independently of the abilities and/or willingness of States to fulfil their human rights obligations.

    15.2 They should undertake due diligence regarding their recruitment activities.

    15.3 When they are not practising direct recruitment, enterprises should engage workers only through compliant labour recruiters, including public employment services and private recruitment agencies. Where it is not feasible to verify directly the conduct of all the parties involved in recruitment, there should, at a minimum, be a contractual obligation requiring labour recruiters to work with third parties operating in accordance with legal requirements, and these principles and guidelines. The enterprise should have in place a procedure for evaluating other parties involved in the recruitment process.

    15.4. Enterprises and public employment services should respect internationally recognized human rights, including those expressed in international labour standards, in particular the right to freedom of association and collective bargaining, and prevention and elimination of forced labour, child labour and discrimination in respect of employment and occupation, in the recruitment process.

    15.5. Enterprises and public employment services should not retaliate against or blacklist workers, in particular those who report recruitment abuses or fraudulent recruitment practices anywhere along their supply chain, and should provide special protections for whistle-blowers pending the investigation or resolution of a grievance or dispute.

16. Enterprises and public employment services should undertake recruitment to meet established labour market needs and never as a means to displace or diminish an existing workforce, lower wages or working conditions, or otherwise undermine decent work.

17. No recruitment fees or related costs should be charged to, or otherwise borne by, recruited workers and jobseekers.

    17.1. Workers and jobseekers should not be charged any fees or related recruitment costs by an enterprise, its business partners or public employment services for recruitment or placement, nor should workers have to pay for additional costs related to recruitment.

660 International Labour Organisation (ILO), *General Principles & Operational Guidelines for Fair Recruitment* (2016) http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_536755.pdf.

17.2. Enterprises and public employment services should communicate this policy externally via guidelines and other means including contracts to all prospective and current business partners and relevant stakeholders. Enterprises should determine whether private employment agencies and other labour recruiters charge recruitment fees to workers or impose other related costs on them, and should not engage workers through agencies and other labour recruiters known to charge recruitment fees or related costs to workers.

18. Enterprises and public employment services should not retain passports, contracts or other identity documents of workers.

18.1. Enterprises and public employment services should not interfere with workers' free and complete access to their own passports, identity documents and residency papers, including their employment contracts, paying careful attention to the situation of migrant workers.

IHRB, Dhaka Principles for Migration with Dignity[661]

The Dhaka Principles provide a roadmap that traces a migrant worker from recruitment, through employment, to the end of contract. They provide key principles that employers and migrant recruiters should respect at each stage in the process to ensure migration with dignity.



Core Principle A: All workers are treated equally and without discrimination

Migrant workers should be treated no less favourably than other workers performing the same or similar work. Moreover, migrant workers should be protected from any discrimination that would constitute a violation of human rights.

661 Institute for Human Rights and Business, *Dhaka Principles for Migration with Dignity* (2012) www.ihrb.org/dhaka-principles/downloads-translations.

Core Principle B: All workers enjoy the protection of employment law

Migrant workers should have a legally recognised employment relationship with an identifiable and legitimate employer in the country where the work is performed.

Principle 1: No fees are charged to migrant workers

The employer should bear the full costs of recruitment and placement. Migrant workers are not charged any fees for recruitment or placement.

Principle 2: All migrant worker contracts are clear and transparent

Migrant workers should be provided with written contracts in a language each worker understands, with all terms and conditions explained clearly, and the worker's assent obtained without coercion.

Principle 3: Policies and procedures are inclusive

Migrant workers' rights should be explicitly referred to in employer and migrant recruiter public human rights policy statements, relevant operational policies and procedures addressing human rights responsibilities.

Principle 4: No migrant workers' passports or identity documents are retained

Migrant workers should have free and complete access to their own passport, identity documents, and residency papers, and enjoy freedom of movement.

Principle 5: Wages are paid regularly, directly and on time

Migrant workers should be paid what they are due on time, regularly and directly.

Principle 6: The right to worker representation is respected

Migrant workers should have the same rights to join and form trade unions and to bargain collectively as other workers.

Principle 7: Working conditions are safe and decent

Migrant workers should enjoy safe and decent conditions of work, free from harassment, any form of intimidation or inhuman treatment. They should receive adequate health and safety provision and training in relevant languages.

Principle 8: Living conditions are safe and decent

Migrant workers should enjoy safe and hygienic living conditions, and safe transport between the workplace and their accommodation. Migrant workers should not be denied freedom of movement, or confined to their living quarters.

Principle 9: Access to remedy is provided

Migrant workers should have access to judicial remedy and to credible grievance mechanisms, without fear of recrimination or dismissal.

Principle 10: Freedom to change employment is respected, and safe, timely return is guaranteed

Migrant workers should be guaranteed provision for return home on contract completion and in exceptional situations. They should not, however, be prevented from seeking or changing employment in the host country on completion of first contract or after two years, whichever is less.

IHRB, Six Steps to Responsible Recruitment[662]

Employer Pays Principle: No worker should pay for a job – the costs of recruitment should be borne not by the worker but by the employer

Step 2. Assess the risks of workers being charged recruitment-related fees

(…)

Draw on Expertise:

- Assess relevant data – there may be relevant information available about worker retention, job suitability and performance that is linked to recruitment processes and the risks of worker-paid fees.
- Ascertain what information exists within suppliers / business relationships (e.g. are recruitment processes included in existing audits?).
- Through discussion with suppliers, workers, labour brokers, unions and NGOs, assess the average level and types of fees currently being paid by workers to secure their job, and ascertain when these fees are being paid and to whom.

Consult migrant workers and their legitimate representatives:

- Understand migrant workers' views about how fees and other impacts via the recruitment process affect them.
- Demonstrate you take the concerns of migrant workers seriously. This helps build mutual understanding and creates opportunities to work together to identify potential impacts and suitable ways to address them.

Understand your operating context:

- Identify countries/locations of operation with laws/regulations on migrant worker recruitment fees that are absent, weak or unenforced or which actively conflict with the EPP.
- Make a country-by-country inventory of the recruitment process and legally required fees.
- Develop an indicative recruitment pricing structure of what you believe to be the genuine costs of recruitment in each operating location.

Review your business relationships:

- Assess the risks of your company practices contributing to recruitment fees being charged by a business relationship.
- Assess the risks of being directly linked to the charging of a migrant worker recruitment fee in connection with company operations, products or services – including via a relationship one or more step removed from the company, such as deeper within the supply chain.
- Establish robust screening and selection processes for key business relationships, such as suppliers and sending and receiving country recruitment and employment agents, including assessing their ability to comply with the policy and whether additional oversight may be required.

662 Leadership Group for Responsible Recruitment and IHRB, *Six Steps to Responsible Recruitment - Implementing the Employer Pays Principle* (2018) www.ihrb.org/uploads/member-uploads/Six_Steps_to_Responsible_Recruitment_-_Leadership_Group_for_Responsible_Recruitment.pdf.

Step 3. Integrate and act on the risk assessments

(…)

Create and use leverage with business relationships:

- In each situation, think about the many forms leverage can take, whether via traditional commercial leverage, leverage through collective action with business partners and peers, or leverage via bilateral or multi-stakeholder engagement and collaboration with governments, civil society and other stakeholders.

- Initial steps to identify and build leverage could include:

  - Build into new supplier agreements the expectation for them to prevent, mitigate and remediate recruitment-related impacts on migrant workers.

  - Establish a clear labour cost structure with suppliers and / or recruitment and employment agents.

  - Identify key personnel at suppliers responsible for hiring decisions and gauge their willingness and ability to align with the EPP policy.

  - Where possible, reduce the number of recruitment agencies with which your supplier engages to enable more effective monitoring and targeting of training resources.

  - Consider carefully whether to terminate a relationship where fees and other impacts on migrant workers caused by the third party. It may be beneficial to continue to work within the business relationship to remediate the impacts and build their capacity to meet the Employer Pays Principle in practice.

Step 6: Remedy recruitment-related impacts early and directly

Establish or participate in remedy processes:

- Develop and adopt appropriate and transparent procedures for receiving, escalating and resolving worker grievances, including ensuring confidential channels of communication for migrant workers to raise grievances regarding the recruitment process.

- Remedy means restoring migrant workers adversely impacted during the recruitment lifecycle to the situation they would have been in had the impact not occurred. Where that is no longer possible, compensation or other forms of remedy may be used to try to make amends. This is distinct from corrective action and other procedures focused on preventing recurrence, though this is also important.

- Ensure any grievance mechanism you develop or participate in satisfies the effectiveness criteria of the UN Guiding Principles on Business & Human Rights, that they are: legitimate; accessible; predictable; equitable; transparent; rights-compatible; a source of continuous learning; and, based on engagement and dialogue.

- Develop or review any mechanism in consultation with workers and their legitimate representatives, as well as staff, departments and other internal stakeholders to understand any cultural differences and build their support and buy in.

Know the Chain, Findings from Three Sectors[663]

Good Practice Examples: Remedy for migrant workers

Adidas discloses a summary of the human rights complaints it has received and details on the outcomes of remediation processes, which include several cases of remedy for migrant workers. For example, in 2013 and 2014, Adidas worked with its suppliers in Taiwan to remedy poor working conditions of migrant labor by eliminating wage deductions made by employment agencies, returning passports and bank books, and relocating migrant workers to safer and higher-quality dormitories.

Coca-Cola, Modern Slavery Statement[664]

Policy and Due Diligence Enhancements

Recognizing that migrant workers are particularly vulnerable to exploitation and human trafficking, in 2014, the Company reviewed policies and due diligence activities with the aim of better protecting such workers throughout the supply chain. The Company publicly committed to three principles related to the recruitment and employment of migrant workers:

1. Employment terms are represented in a truthful, clear manner and m the language understood by workers prior to employment;
2. Worker does not pay recruitment, placement or transportation fees; and
3. Worker has access to personal identity documents.

These principles, along with the overall prohibition of forced labor, create a framework for responsible and transparent recruitment and employment practices. These practices were built into the Company's audit protocol at the beginning of 2015 and conducted auditor training sessions around the world to familiarize third party auditors with the new expectations. The Company continues to do refresh auditor training as needed, including in Africa, Hong Kong and Latin America in 2016.

Centre for Sport and Human Rights, The Mega-Sporting Event Lifecycle[665]

Mega-sporting events (MSE) are the pinnacle of global sport, but cannot stand apart from their very significant social impacts – both positive and negative. Sporting events can enhance freedoms and celebrate human dignity, but can also amplify discrimination and abuse. It is critical to ensure that the world of sport is in full alignment with the UN Guiding Principles on Business and Human Rights (UN Guiding Principles) and other international human rights and related instruments, principles, and standards.

All organisations, including those in the world of sport, are responsible for respecting human rights. Through preventing potential negative human rights impacts linked to major events, and providing adequate remedies for abuses that do occur, all organisations involved in delivering a mega-sporting event can better harness sport's potential for good.

663 Know the Chain, *Forced Labor Action Compared: Findings From Three Sectors* (2017) https://knowthechain.org/wp-content/uploads/KTC_CrossSectoralFindings_Final.pdf.

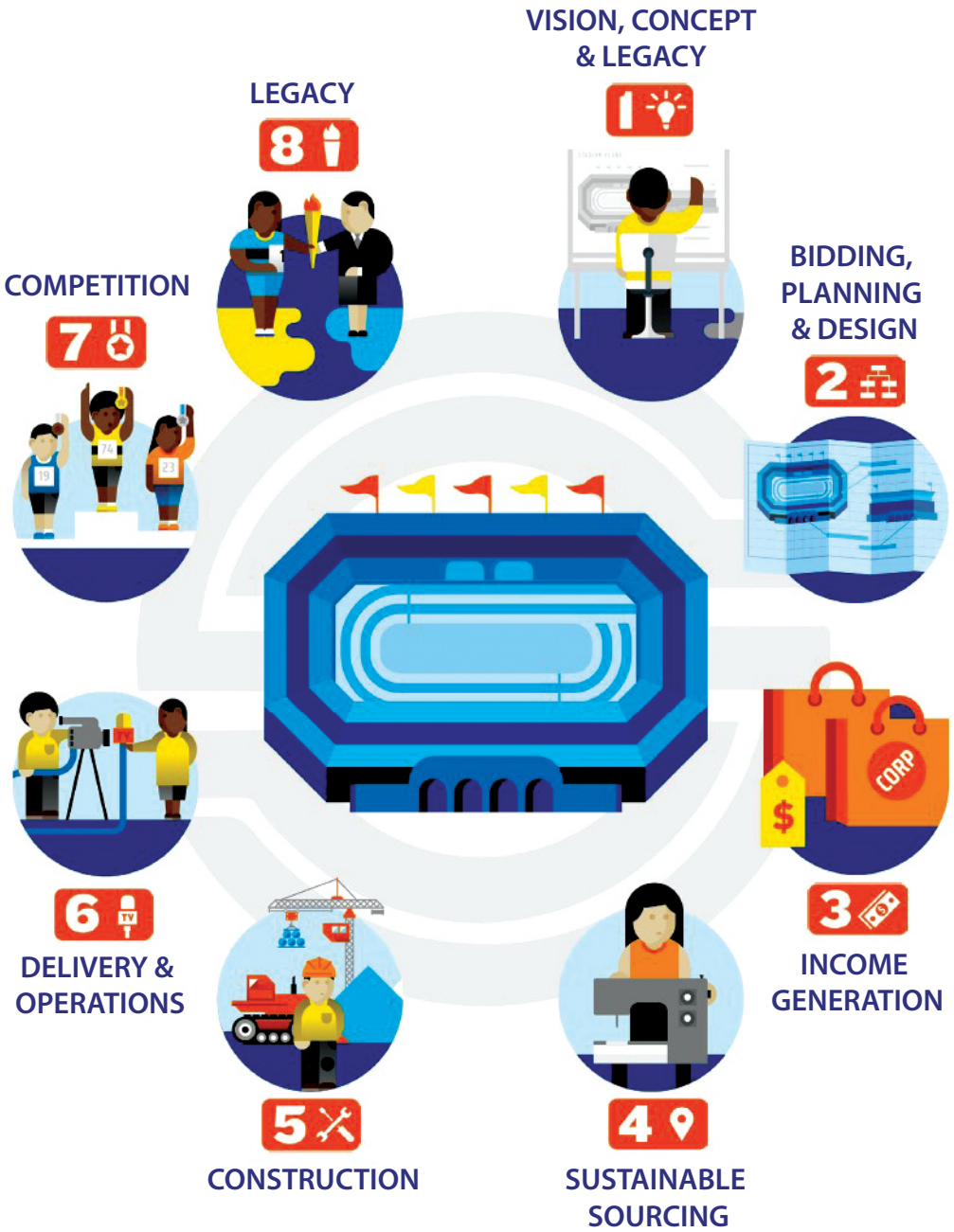
664 Coca-Cola, *Modern Slavery Statement* (2017) www.coca-cola.co.uk/content/dam/journey/gb/en/hidden/PDFs/human-and-workplace-rights/Modern-Slavery-Act-Statement-FY2016-Coca-Cola.pdf.

665 Centre for Sport and Human Rights, *The Mega-Sporting Event Lifecycle - Embedding Human Rights from Vision to Legacy* (2018) https://www.sporthumanrights.org/en/resources/mega-sporting-event-lifecycle-embedding-human-rights-from-vision-to-legacy.

The lifecycle for a mega-sporting event also serves as a microcosm for the whole range of business and human rights issues. With the large amount of public investment associated with these events, and their impacts on local communities, mega-sporting events should be delivered to exemplary standards in all respects – especially with regard for human rights.

The capacity of mega-sporting events to promote human rights is enhanced by the fact that sport is inherently tied to sporting values and fair play, and sport's history of providing a stage for progressive interventions in issues such as community relations, discrimination, gender equality and personal and social development.

This guide presents the lifecycle of a mega-sporting event, with specific elements of good practice at each stage that those involved in hosting the event should integrate into their planning, delivery and legacy in order to ensure a rights-compliant event.



Farbenblum et al., Transformative Technology for Migrant Workers[666]

Digital worker engagement platforms are ameliorating information asymmetries, empowering migrant workers and driving systemic reforms in at least five new ways.

First, these digital platforms are enabling migrant workers, service providers, and business to undertake activities they are already engaged in, but more quickly, cheaply, efficiently and, sometimes, more safely. For example, the Australian Fair Work Ombudsman's *Record My Hours* app provides an automated geofencing functionality to enable workers to securely and automatically document their working hours at a particular worksite.

Second, digital platforms allow organizations to engage with workers at unprecedented scale. For example, worker reporting tools within the supply chain context are enabling suppliers and buyers to engage with tens of thousands of workers across a workforce.

Third, technology is enabling people to do things that were previously impossible. For instance, CDM's *Contratados platform* allows for the sharing of knowledge and experiences among workers from different home villages working in different locations across the US who were previously unconnected. Significant advancements in technology itself are also making new activities possible and extending the realm of possibilities for low-income migrant workers. These include, for example, the ubiquitous penetration of smartphones that are becoming more affordable with improved features. Further relevant developments not covered in this report include the use of blockchain in migrant contract verification, payment systems and supply chain tracing, the use of biometric technology to register a migrant worker's presence at a worksite, and developments in relation to digital ID.

Fourth, by expanding the realm of possible action by migrant workers, technology can lead to broader structural and policy change. For example, having empowered migrant workers with information to make informed choices about who they work for through Contratados, Centro de los Derechos del Migrante is considering consequences for their advocacy for visa portability that would enable migrant workers to change employers in the country of employment while remaining on the same visa.

Fifth, technology enables organizations to undertake their core activities in fundamentally different ways. For example, OUR's *WorkIt app* facilitates a new approach to worker organizing that is primarily online, potentially transforming the offline work of traditional worker organizing into support for the online platform and training of online organizers. Legislators and industry groups are recognizing that worker engagement platforms offer tremendous potential but also have a number of significant limitations and pose new risks to workers. This report has explored a range of practical, ethical, and legal challenges associated with digital tools for migrant workers that warrant deeper consideration. (…)

The initiatives profiled in this report demonstrate that digital technology offers unprecedented and amplified opportunities for migrant worker engagement, empowerment, and justice. However, technology cannot fix structural inequalities, missing institutional capacity or a lack of human intent. Indeed, worker engagement platforms will rarely, if ever, fix a problem quickly or in isolation. Technology's transformative potential will ultimately be realized through responsible and well-considered approaches to the funding, development, and implementation of platforms that respond to migrant workers' vulnerabilities and the structural drivers of exploitation. Effective initiatives will be those that are integrated with strong offline programs with a well-conceived theory of change to deliver meaningful outcomes to migrant workers.

666 Bassina Farbenblum et al, *Transformative Technology for Migrant Workers – Opportunities, Challenges, and Risks* (2018) www.opensocietyfoundations.org/sites/default/files/transformative-technology-for-migrant-workers-20181107.pdf.

Jureidini, Corruption in Migrant Labour Recruitment[667]

Why are prospective low-skill, low-income migrant workers, particularly from Asian and African countries, required to pay private recruitment agencies (PRAs) in labour origin countries for being recruited, while most higher-skilled workers and professionals do not pay? The general assumption by some labour economists is that it is exploitative, but, because low-skilled labour supply far outstrips labour demand, the labour market works in alleviating unemployment in countries of origin and filling jobs in labour destination countries. (…)

Another myth is that the exploitation and corruption in the recruitment process is located in countries of origin and perpetrated by private recruitment agencies. In reality, the recruitment exploitation begins in the destination countries where companies tendering for a contract decide not to pay recruitment costs in order that their tender can be more price-competitive. Thus, the exploitation and corruption is systemic between both destination and origin countries with all stakeholders involved directly or indirectly, wittingly or unwittingly. (…)

The presence and level of kickback payments/bribes and payment of expenses to representatives of employer companies at destination. It is well known in the recruitment industry that recruitment agencies compete with one another by offering bribes to representatives of employers in order to procure labour supply contracts. These kickback bribes can range from US$400-1,500 per worker. In addition to the kickback payments, recruitment agencies are often required to fund the trips of employer representatives to the origin countries by paying for flight upgrades, or even airfares, 5 star hotels, food and sometimes 'entertainment'. The trips are ostensibly for skills testing and selection of recruits. Employer personnel often ask agents for the hotel and food receipts so they can claim them from their companies on return, even though they had not paid. The funds for the kickback payments and employer travel expenses are built into the charges that agencies foist upon the low-skilled migrant workers as part of the "recruitment costs". The extent of the kickback and other payments to personnel of the employing company will also be factors in the differences that migrant workers pay.

Worker payments used to pay various local officials in origin and destination countries to process paperwork more quickly or to prevent deliberate delays. There are kickback payments to "a range of government officials in both origin and destination countries to fraudulently approve a host of applications or facilitate discretionary decisions including, but not limited to, foreign worker quotas, demand set attestations, visas, medical certificates, and work permits." There is little or no oversight of such fraudulent practices by origin or destination country governments.

Recommendations

- Repeal laws and regulations in origin countries that allow recruitment agencies to charge migrant workers and criminalize charges to workers.
- To show commitment to eradicating corruption, both origin and destination countries should ratify relevant international conventions and activate existing penal codes towards the recruitment industry.
- Establish accredited, proven ethical recruitment agencies that do not charge workers as exclusive migrant labour suppliers to destination countries.
- Establish serious, binding bilateral and multi-lateral agreements specifically banning the employeepays model and introducing an employer-only-pays model.
- Mandatory reimbursement of charges to workers by employers who could in turn claim reimbursement from recruitment agencies involved.
- Increased electronic/internet government-to-government recruitment.

667 Ray Jureidini, 'Transnational Culture of Corruption in Migrant Labour Recruitment' in McAuliffe, M. and M. Klein Solomon (Conveners) (2017) Ideas to Inform International Cooperation on Safe, Orderly and Regular Migration, International Organization for Migration, https://publications.iom.int/system/files/pdf/transnational_culture.pdf.

- Project tenders should include a separate detailed and transparent 'Labour Recruitment Cost Analysis' within bidding proposals that detail variable and fixed costs of recruitment, including labour costs of subcontractors. Lowest bids should be more carefully scrutinized to ascertain whether cost reductions are at the expense of migrant workers being recruited.
- Calculate and establish international standards for reasonable commissions for agencies involved in low-skilled migrant labour recruitment.
- Legislative reform is insufficient. The commercial sector must be targeted for compliance with ethical-legal standards and prosecuted for corrupt practices. For example, employing companies need oversight of personnel in human resources, procurement and facilities management departments to identify fraudulent transactions.

Background (Cambodia)

ILO, Recruitment Fees and Related Costs[668]

In Cambodia, the legal framework regulating overseas recruitment is Sub-Decree No. 190 on The Management of the Sending of Cambodian Workers Abroad through Private Recruitment Agencies, adopted in 2011. The Sub-decree outlines the responsibilities of private recruitment agencies for recruitment, job matching, pre-departure training, and the safe return of migrant workers. In 2013, eight Prakas (i.e., ministry-level decrees) were adopted to support Sub-Decree 190. These Prakas provided greater clarity to authorities and recruitment agencies on their roles and responsibilities. It should be noted that at the time of developing the eight Prakas, there were discussions about another Prakas that would specify the costs permitted to be charged to migrant workers and the maximum or "ceiling" fees that recruitment agencies are allowed to charge. However, this was not adopted. As of today, there are no official maximum service fees that recruitment agencies are allowed to charge…the Government is planning to fill this important gap by putting an official cap on allowable fees.

The Association of Cambodian Recruitment Agencies (ACRA), and the Manpower Association of Cambodia (MAC) have worked with the Ministry of Labour and Vocational Training, with the technical assistance of the ILO/TRIANGLE in ASEAN, to develop and adopt a Code of Conduct for Cambodian private recruitment agencies. The Code, which was launched in January 2020, marks a significant step forwards; it reflects increasing recognition and understanding that recruitment fees and related costs must be limited to those permissible by the law. They must also not be excessive and only be charged in the interests of the migrant workers. In addition, recruitment agencies must take steps to reduce the cost, and commit to moving towards a "zero fee" recruitment model.

Migration Displacement and Briefing Note Series II[669]

With regard to labour migration within the region, South East Asia has been characterised as one labour migration system with two groupings of states – emigration and immigration. Emigration states include The Philippines, Cambodia, Myanmar, Lao PDR, Vietnam, and Indonesia whilst immigration states are those that are more developed in the region: Singapore, Brunei, Malaysia and Thailand. Labour migration flows extend out from the region to destinations in the Middle East, Africa and Europe.

668 International Labour Organisation (ILO), *Recruitment Fees and Related Costs: What Migrant Workers from Cambodia, the Lao's People's Democratic Republic, and Myanmar Pay to Work in Thailand* (2020) https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_740400.pdf.

669 Sharon Pickering & Rebecca Powell, *Migration Displacement and Briefing Note Series II: State of Evidence,* High Harm, High Volume Migration https://www.monash.edu/__data/assets/pdf_file/0009/1298403/briefing-note-series-II-high-harm-high-volume-migration.pdf.

Instruments (Cambodia)

ASEAN Declaration on the Rights of Migrant Workers[670]

General Principles

1. Both the receiving states and sending states shall strengthen the political, economic and social pillars of the ASEAN Community by promoting the full potential and dignity of migrant workers in a climate of freedom, equity, and stability in accordance with the laws, regulations, and policies of respective ASEAN Member Countries;

2. The receiving states and the sending states shall, for humanitarian reasons, closely cooperate to resolve the cases of migrant workers who, through no fault of their own, have subsequently become undocumented;

3. The receiving states and the sending states shall take into account the fundamental rights and dignity of migrant workers and family members already residing with them without undermining the application by the receiving states of their laws, regulations and policies; and

4. Nothing in the present Declaration shall be interpreted as implying the regularisation of the situation of migrant workers who are undocumented.

Obligations of Receiving States

Pursuant to the prevailing laws, regulations and policies of the respective receiving states, the receiving states will:

5. Intensify efforts to protect the fundamental human rights, promote the welfare and uphold human dignity of migrant workers;

6. Work towards the achievement of harmony and tolerance between receiving states and migrant workers;

7. Facilitate access to resources and remedies through information, training and education, access to justice, and social welfare services as appropriate and in accordance with the legislation of the receiving state, provided that they fulfil the requirements under applicable laws, regulations and policies of the said state, bilateral agreements and multilateral treaties;

8. Promote fair and appropriate employment protection, payment of wages, and adequate access to decent working and living conditions for migrant workers;

9. Provide migrant workers, who may be victims of discrimination, abuse, exploitation, violence, with adequate access to the legal and judicial system of the receiving states; and

10. Facilitate the exercise of consular functions to consular or diplomatic authorities of states of origin when a migrant worker is arrested or committed to prison or custody or detained in any other manner, under the laws and regulations of the receiving state and in accordance with the Vienna Convention on Consular Relations.

670 *ASEAN Declaration on the Protection and Promotion on the Rights of Migrant Workers* (2007) http://un-act.org/wp-content/uploads/2016/02/ASEAN-Declaration-Protection-Migrant-Workers.pdf.

Obligations of Sending States

Pursuant to the prevailing laws, regulations and policies of the respective sending states, the sending states will:

11. Enhance measures related to the promotion and protection of the rights of migrant workers;

12. Ensure access to employment and livelihood opportunities for their citizens as sustainable alternatives to migration of workers;

13. Set up policies and procedures to facilitate aspects of migration of workers, including recruitment, preparation for deployment overseas and protection of the migrant workers when abroad as well as repatriation and reintegration to the countries of origin; and

14. Establish and promote legal practices to regulate recruitment of migrant workers and adopt mechanisms to eliminate recruitment malpractices through legal and valid contracts, regulation and accreditation of recruitment agencies and employers, and blacklisting of negligent/unlawful agencies.

Sub-Decree on Sending of Cambodian Workers Abroad[671]

Chapter 3: Recruitment Agency

Article 6:

Any agency recruiting Cambodian workers to work abroad shall obtain an authorization for free according to the PRAKAS of the Ministry of Labor and Vocational Training except otherwise specified by other regulations.

Procedures to grant authorization shall be determined by a Prakas from the Minister of Labor and Vocational Training.

Recruitment agencies shall respect all applicable laws and regulations of the Kingdom of Cambodia.

Article 7:

To obtain authorization, the recruitment agencies shall fulfil the following requisite conditions:

a) Have an office with clear address and sufficient staff, office materials, communication and transportation means;

b) Have a training center with appropriate size, which consists of:

- a building equipped with materials and equipment for vocational and language training to meet the standard skills and demand of the job market and for pre-departure orientation training in accordance with the guideline;
- proper accommodation and dining areas that ensure good health, sanitation and safety; and
- internal rules to be recognized by the Ministry of Labor and Vocational Training.

671 Cambodia, *Sub-Decree on the Management of the Sending of Cambodian Workers abroad through Private Recruitment Agencies (No.190)* (2011) http://www.mekongmigration.org/wp-content/uploads/2020/08/sub-degree-190-migration-managment-1.pdf.

c) Have language teachers to provide language training that meets the standard skills and demand of the worker receivers;

d) Enter into a contract with the Ministry of Labor and Vocational Training on the duty and procedures of job placement service operation;

e) Deposit a guaranty money properly according to the guidelines as stipulated in Articles 8 and 10 of this subdecree;

f) Have a permanent representative in the receiving country.

Anukret on the Export of Khmer Labour to Work Overseas[672]

Article 1:

With the objectives of improving living conditions of people and enhancing their professional skills, while the job market in the country is inadequate to absorb the unemployed and the under employed, and to raise revenues for the State, the Royal Government shall authorize the export of Khmer labor to work overseas.

Article 5:

The Receiver Party shall specified the followings in their requests:

- start and termination date of the work
- nature of the work
- location of the work site
- number of workers and skills required
- salaries and other remunerations including lodging accommodation, food, clothing, medical care and other basic living necessities.
- Means of transport of labour to and from.

Upon receipt of the request, the Provider Party shall provide to the Receiver Party within 45 days a response indicating whether they can fulfil the terms of the request or whether they need to discuss further the matter.

The Receiver Party shall provide to the Provider Party within 30 days a response indicating whether to accept the terms in its entirety or in part. If there is no reply past a 30 days period and there is further follow up discussion, the Provider Party shall deem that the Receiver Party have given up their request.

Royal Government of Cambodia, National Employment Policy[673]

To oversee and protect migrant workers in obtaining decent employment and skill recognition

In line with strategic priorities of the Policy on Labour Migration for Cambodia 2014, provide support to Objective 3 “reviewing and harnessing benefits obtained from labour migration for development”, in particular upon return of the migrant workers to the country and their re-integration processes.

672 Cambodia, *Anukret on the Export of Khmer Labour to Work Overseas (No. 57)* (1995) https://www.asean.org/wp-content/uploads/2016/05/C2_Sending-Khmer-Labour.pdf.

673 The Royal Government of Cambodia, *National Employment Policy 2015-2025* (2015) https://asean.org/storage/2016/05/National-Employment-Policy-2015-2025-of-the-Royal-Government-of-Cambodia.pdf.

Measures

1. Governance of labour migration.
2. Protect and empower migrant workers.
3. Strengthen service provision for social and economic re-integration for returned migrants…
4. Improve information management system on migrant workers sent abroad and those who have returned.
5. Enforce and promote the implementation of the Labour Law, Immigration Law and other regulations related to the management of foreign manpower who come to work in Cambodia.

6.2 Protection and empowerment of women and men migrant workers

Since 2011, the MOLVT has given significant attention to increasing the protection of migrant workers prior to departure. Prakas No. 57 ensures that private recruitment agencies must satisfy a range of minimum requirements in order to obtain a license, with Prakas No. 250 and 251 instituting regular monitoring processes for private recruitment agencies, and suspending their license if they fail to comply. Currently, MOLVT is formulating checklists to outline more specific criteria for inspections of recruitment agencies.

Sub-decree 190, Prakas No. 46, and the effective delivery of MOLVT national standardised Pre-Departure Orientation materials, can ensure that each migrant worker is informed of their rights at work and workplace practices, culture and tradition in destination countries, financial literacy, health awareness, and how to access rights both at home and abroad. The Prakas ensures that trainers from recruitment agencies must be certified, and that migrant workers receive a pre-departure orientation certificate as proof of completion as a pre- requisite to migration. The MOLVT has conducted training-of-trainers for pre-departure training, and will monitor its quality and assess its effectiveness.

In January 2014, the MOLVT opened a Migrant Worker Resource Centre (MRC) at the Department of Employment and Manpower in Phnom Penh. Amongst its other functions, this MRC receives migrant worker grievances as per the complaints mechanism outlined in Prakas No. 249. Complaints received to date relate to conditions prior to departure (for example, costs or delays in deployment) or while abroad (for example, pay or work).

ACRA & MAC, Code of Conduct for Cambodian Private Recruitment Agencies[674]

1. Respect for, and implementation of national laws and fundamental principles and rights at work.

1.1 Private recruitment agencies must comply with all applicable legislation, regulations, multilateral and bilateral agreements on labour migration, and policies related to the recruitment of migrant workers in origin, transit and destination countries. This explicitly prohibits trafficking in persons, forced labour, and child labour, includes the right to freedom of association and collective bargaining and respect for equality of treatment and non-discrimination…

4. Respect for and enforcement of recruitment and employment contracts

4.1 Written contracts should be in Khmer language that the migrant worker can understand, the language of the receiving country and English, or explained clearly to the worker…and be enforceable in origin and destination countries.

674 Association of Cambodian Recruitment Agencies (ACRA) and Manpower Association of Cambodia (MAC), *Code of Conduct for Cambodian Private Recruitment Agencies* (2020) https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/publication/wcms_735867.pdf.

4.2 Migrant workers' agreements to the terms and conditions of recruitment and employment should be voluntary and free from deception or coercion.

4.3 Recruitment and employment contracts must be clear and transparent, at a minimum include the type of work, address of the workplace and information about working conditions, rest and leave time, wages, social insurance, living conditions, compliant procedures and dispute settlement procedures.

Social Protection across Borders: Roles of Mekong Countries of Origin[675]

2.1 Migration from Cambodia to Thailand, Malaysia and Japan

As of May 2019, 243,465 Cambodian nationals migrated to Thailand through processes established under a Memorandum of Understanding (MOU) signed between Cambodia and Thailand in 2015. Meanwhile, 158,828 Cambodians are completing the nationality verification process as part of the registration process for undocumented migrants inside Thailand. A further 9,126 Cambodians have migrated temporarily to Thailand as seasonal workers. Including undocumented workers, there are an estimated 400,000 to 500,000 Cambodian nationals working in Thailand. The majority are employed in the fisheries, agriculture, livestock, construction, manufacturing and service sectors, including domestic work.

Cambodia officially began sending workers to Malaysia in 1998. Between 1998 and 2016, 46,541 documented migrant workers migrated to Malaysia, of whom 86% were women and 70% domestic workers. More recent figures from 2017 put the number of documented Cambodian workers in Malaysia at 5,995, the overwhelming majority of whom (4,643) are women. In 2011, following widely reported cases of Malaysian employers abusing their Cambodian domestic workers, the Cambodian government issued a moratorium on the "first time" migration of domestic workers to Malaysia. Despite the ban, more than 8,000 Cambodian nationals were believed to have continued their employment in Malaysia. The ban was eventually lifted in 2015 when the Cambodian government signed an MOU with its Malaysian counterparts concerning the recruitment of domestic workers and a separate agreement concerning migrant workers in nondomestic work sectors. According to the Immigration Department of Malaysia, migrant workers from Cambodia are currently permitted to work in construction, on plantations, in agriculture, and in the service and manufacturing sectors.

Cambodia began sending workers to Japan in 2007 under the TITP. As of December 2017, 6,180 Cambodian workers had been recruited under the programme. In 2018, an additional 3,328 Cambodian workers migrated to Japan under the TITP.15 All the recruitment agencies interviewed by MMN for the study stated that the number is expected to grow rapidly, as migrants see Japan and the Republic of Korea as attractive destination countries in terms of safety and benefits. Currently, migrant workers in Japan are permitted to engage in 133 categories of work under 77 sectors. For Cambodians, agriculture (34%), textile (26%), construction (18%) and food manufacturing (11%) are among the most popular.

IOM, World Migration Report[676]

Migration involves high proportions of irregular migration, mostly in relation to economic factors such as poverty and lack of employment. Irregular migration flows such as those from Cambodia and the Lao People's Democratic Republic to destinations including Thailand and Malaysia are often facilitated by smugglers. Smugglers also play a significant role in irregular migration out of the sub-region, with Vietnamese migrants moving to Europe, for example, often using smugglers to reach their destinations. Mixed migration flows exist (involving movements of people with and without international protection needs), as do migration flows underpinned by mixed motivations. Many migrants face exploitation in South-East Asia, stemming from their irregular status. Migrant workers in

675 Mekong Migration Network, *Social Protection Across Borders: Roles of Mekong Countries of Origin in Protecting Migrants' Rights* (2019) http://www.mekongmigration.org/wp-content/uploads/2019/09/Book_Social-Protection-Across-Borders_for-Web.pdf.

676 Compulsory Insurance Scheme Applicable to Trainees under Japan's Technical Internship Training Program (TITP).

particular industries also face forced labour, exploitation and serious abuse (for example, in the fishing, agriculture, construction and manufacturing industries). In addition to smuggling, trafficking of persons continues to be a challenge in South-East Asia, with nearly half of all victims in Asia (46%) trafficked within the sub-region. Large numbers of people are trafficked for both sexual exploitation and forced labour, with a larger share of females trafficked for sexual exploitation in 2016. Countries such as Malaysia and Thailand had more victims of forced labour than sexual exploitation in 2016.

Chairattana et al, Route of Migration from Myanmar and Cambodia to Thailand[677]

Cambodian migrant workers are employed mainly in construction, manufacturing and general labour work. According to the survey by the IOM and Association of Cambodian Recruitment Agencies (ARCM), the majority of Cambodian respondents said that they worked as construction workers, while 23 and 19 percent of them worked in the manufacturing, and general labour work sectors, respectively. Moreover, the proportion of Cambodian workers employed in the Thai fishery sector is relatively low, accounting for only 13 percent. The percentage of Cambodian workers in this sector has significantly decreased due to the reduction in the local commercial fishing fleet and the permanent closing of informal factories in many coastal provinces.

The fishery sector jobs along with other sectors tend to be segregated by gender. Cambodian men tend to work as seafarers or construction workers, while Cambodian women work in food processing, garment workers, and in the service sectors. In Rayong where the FAIR Fish project is located, the percentage of Cambodian migrant workers was evenly distributed between various sectors, with a higher percentage working in the fishery sector – (28 percent), followed by 12 percent in domestic work, and 10 percent in industrial work. The predominance of Cambodian migrants working in the fishery sector is due to the fact that Rayong has a long coastline where lots of fishing communities and small processing factories are located. (…)

For Cambodian migrant workers, Thailand is among the popular destinations for both regular and irregular Cambodian workers because of geographical proximity, cultural similarity, higher wages, and prior migration by friends and family members. The main employment sectors which employ migrant workers are construction and manufacturing. In addition, the number of Cambodian workers in the Thai fishery sector tends to be decreasing because of the reduction of the commercial fishing fleet and the closing of factories in Thailand's coastal provinces.

Along the Thailand-Cambodia border, there are seven main international checkpoints, 10 border trade checkpoints, and several small unofficial crossing points, called "Chong Anu Lom" in Thai, scattered along the porous border, which are frequently used by locals. MOU Cambodian workers are only allowed to cross the border at the Aranyaprathet- Poipet international checkpoint, whereas irregular Cambodian workers are able to enter Thailand through all checkpoints by using a tourist visa and then acquire documents later, or walk through forest or small stream along the border, taking irregular channels. The most frequently used migration routes are the "East- to-West" and " South- to- North" routes. The East- to-West route has highest volume as the infrastructure to border is well constructed. On the other hand, the route to the northern border is less popular because of geographical obstacles and political unrest.

Chhay, Migration-Decision Making and Social Status: Cambodian Female Workers[678]

Prior to discussing the main findings on the decision-making and social status issues of Cambodian female migrant workers in Malaysia, it is important to mention several keys factors and actors which make migration to Malaysia possible. First, it was through the efforts of the Cambodian government, which established agreements with Malaysia in 1997 and 2015, that the flow of migrant workers to Malaysia was initiated and coordinated. Later, procedures, regulations, and laws established by the MoLVT enabled the establishment of recruitment agencies. In an improvement over the early stages of Cambodian migration to Malaysia, the MoLVT now monitors the training process of each recruitment agency before workers are permitted to depart for Malaysia. (…)

677 Siwat Chairattana & Thawatchai Khanawiwat, *The Report on the Route of Migration from Myanmar and Cambodia to Thailand* (2020) Plan International Thailand, The Fostering Accountability in Recruitment for Fishery Workers Project, https://plan-international.org/publications/route-migration-thailand#download-options.

678 Chhunly Chhay, *Migration-Decision Making and Social Status: Cambodian Female Migrant Workers in Malaysia* (2019), Kent State University, https://etd.ohiolink.edu/apexprod/rws_etd/send_file/send?accession=kent1564689869848654&disposition=inline

At the family level, migrant workers feel more empowered and respected by parents and family members. Family members value their opinion in decision-making. Obviously, this is a result of their financial support which has raised the family's standard of living, helped to repay outstanding debt and supported the education of their siblings or children. At the societal level (which refers to the neighbourhood), however, their social status is very much linked to their economic success. The most important point is that Cambodian society as a whole needs to acknowledge the contribution and sacrifice of the female migrants, including their achievement in overcoming social and cultural barriers to support their family financially, rather than focusing on negative speculation such as prostitution.

(…) I think further studies should focus on the following areas and topics. First, there should be an in-depth comparative study between single and married Cambodian migrant workers in either the domestic work sector or the industry sector. Second, it is common that married couples who migrate to work in foreign countries leave their children in the care of their parents or in-laws. There should be comparative studies on married women who migrate with or without their husband, since the families (especially the children) experience different psychological and socio-economic impacts. Third, more focus should be placed on the returnees, particularly on the impact of their overseas work on their social status, standard of living, and psychological wellbeing after their return. Fourth, the economics and pattern of transformation of the household, which results from the financial support of Cambodian migrant women should be evaluated through time and space. Last, but not least, Cambodia is relatively new to the migration experience, especially in the external sense. However, it appears that the government (and the MoLVT in particular) has made significant improvement in providing information, training, and measures to assist migrant workers in overcoming irregularities and challenges upon working in Malaysia. This work has been accomplished in coordination with related NGOs in Cambodia and Malaysia, as well as with the Cambodian Embassy in Malaysia.

However, as stressed in several studies, it is imperative to continue strengthening the regulations and implementation of related laws, sub-decrees, and contents of the MoU with Malaysia in order to ensure a positive experience for those Cambodians who break cultural barriers and social norms in order to earn a better living and improve the standard of living for their family and for Cambodia as a whole.

Sakulsri et al, Exploring the Experiences of Cambodian Labour Migrants[679]

The Cost of Migration

The participants in the study indicated that there are substantial differences in costs between going through informal and formal recruiters to get into Thailand legally. For Cambodian workers, where private recruitment agencies are the primary agents facilitating the process at the origin site, migrating for work under the MOUs requires approximately a three-month time period and a total expense of between $250 and $600. These costs are typically borne by the migrant workers through a combination of upfront payments and payroll deductions, with the services of a Thai private employment agency to complete the bureaucratic hurdles on the receiving end.

Migrants borrow money from banks, micro-finance institutions, and relatives in order to obtain passports and visas, and also pay their informal guides. If the migrants do not have enough money to prepare their documents or pay their informal guides, the business owner normally provides loans to them…

Working and Living Conditions

Most migrant workers were allowed to live at the workplace dormitory where all services were provided by the employer. However, in-depth interviews with migrants revealed that good living conditions depend on agreements with the employer and whether he/she respects the law. Generally, the migrants stayed in crowded rental rooms in

679 Teeranong Sakulsri et al, 'Exploring the Experiences of Cambodian Labour Migrants: The Journey to Thailand under the Framework of Bilateral Agreements', *Journal of Mekong Societies* (2020) https://so03.tci-thaijo.org/index.php/mekongjournal/article/view/226515.

order to save money and have funds to send back to their families in Cambodia. For those who were living alone, it was unsafe for them but they had felt they had little choice. The majority of migrants wanted the employer to give them an on-site dormitory with or without charge because they believed that it would be more secure than living outside in rental rooms.

Conclusions

In the past two and half decades, Thailand's economic growth has generated employment opportunities and absorbed millions of workers from other countries, mainly from the Mekong sub-region. Cambodian people, especially unskilled labourers, have benefited from this important opportunity by getting regular jobs that bring in income for their families back home. Many Cambodians migrated to work in Thailand because of several push factors in Cambodia, including the lack of employment opportunities; rising debts to private money lenders, banks, and MFIs; rising health costs; hope for earning income for house building or renovation; having small land plots and crop failures; and encouragement from relatives and neighbours who already work or worked in Thailand. (…)

Remittances were used to pay off debt to the banks/MFIs/ relatives, to support family at home, and to assist parents in emergencies such as health problems or children's needs. Other uses included savings in order to buy land, future small business investment, and farm vehicles. Generally, migrants could remit substantially from their salary to their parents or relatives at home, and they did so twice a year – for the Khmer New Year and the Phchum Ben festival. However, the most common way to remit was through Kasikorn Thai Bank as it has links to local money transfer agencies in Cambodia. (…)

The findings of the study indicate that migration systems are generally composed of the governance system, which is also coordinated by migrants, migrant families, agencies and employers working together through bilateral labor agreements and governing migration between the two countries. An investment in hands-on public awareness of documentation and trusted channels is needed so that prospective migrants and their families can be fully informed before making the decision to migrate. There need to be laws and standards in both the sending country and the receiving country (Thailand) which specify the costs and duration of the process to import labor, and this information should be publicly disseminated to the relevant offices/agencies/ personnel in both countries.

Questions

1. How would you describe work experience of Cambodian migrant workers abroad?
2. What are the most common concerns raised by Cambodian migrant workers?
3. What are the needs of migrant workers prior to migrating, while working abroad, and upon return in regards to social protection?
4. What policies and programmes are in place for migrant workers to access social protection in countries of origin and destination?
5. What are the main sectors that Cambodian migrant workers work in?
6. What recruitment-related costs and fees do migrant workers from Cambodia working in Thailand pay for?

Further Readings

- International Organization for Migration (IOM), *World Migration Report 2018* (2018) http://publications.iom.int/system/files/pdf/wmr_2018_en.pdf.
- Institute for Human Rights and Business, *Migration with Dignity: Implementing the Dhaka Principles* (2017) www.ihrb.org/dhakaprinciples/implementation-guidance.
- Leadership Group for Responsible Recruitment, *Catalysing Business Leadership - Theory of Change* (2018) www.ihrb.org/uploads/member-uploads/LGRR_Theory_of_Change.pdf.
- Institute for Human Rights and Business, *Responsible Recruitment Resource Bank* www.ihrb.org/employerpays/employer-pays-resource-bank.
- University of New South Wales, Human Rights Clinic, *International Obligations Regarding Migrant Workers – A Guide for Countries of Origin* (2016) www.law.unsw.edu.au/sites/law.unsw.edu.au/files/Guide_to_International_Obligations_Regarding_Migrant_Workers_-_UNSW_Human_Rights_Clinic.pdf.
- Amnesty International, *Exploited for Profit, Failed by Governments - Indonesian Migrant Domestic Workers Trafficked to Hong Kong* (2013) www.amnesty.org/download/Documents/12000/asa170292013en.pdf.
- International Labour Organization (ILO), 'Climate Change and Labour: The Need for a "Just Transition"', *International Journal of Labour Research, 2:2* (2010) www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_153352.pdf.
- International Labour Organization (ILO), *Migrant Workers Convention (No. 143)* (1975) www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C143.
- International Labour Organization (ILO), *Technical Note: Labour Mobility and Regional Climate Adaptation* (2016) www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_534341.pdf.
- International Labour Organization (ILO), *Guide on Developing an International Labour Migration Statistics Database in ASEAN* (2015) www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/publication/wcms_374212.pdf.
- ILO Committee of Experts on the Application of Conventions and Recommendations, *Promoting Fair Migration: General Survey Concerning the Migrant Workers Instruments, conference paper* (2016) www.ilo.org/ilc/ILCSessions/105/reports/reports-to-the-conference/WCMS_453898/lang--en/index.htm.
- International Trade Union Confederation, Counting the Cost of Modern-Day Slavery in Qatar: What Price is Freedom?, ITUC Frontlines Report (2015) www.ituc-csi.org/IMG/pdf/qatar_en_web.pdf.
- Amnesty International, Reality Check: The State of Migrant Workers' Rights with Four Years to Go until the Qatar 2022 World Cup (2019) www.amnesty.org/en/documents/mde22/9758/2019/en/.
- FIFA, *Sustainability Strategy - World Cup Qatar 2022* (2020) https://resources.fifa.com/image/upload/fifa-world-cup-qatar-2022tm-sustainability-strategy-executive-summary.pdf?cloudid=bl0bgeroqdmxjme4sy7h.

- The Asia Foundation, *Cambodia's Labour Migration Analysis of the Legal Framework* (2011) https://asiafoundation.org/resources/pdfs/LegalFrameworkLabourTrafficking.pd.
- International Labour Organization (ILO), *Covid-19: Impact on Cambodian Migrant Workers* (2020) https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/briefingnote/wcms_752836.pdf.
- Piyasiri Wickramasekara, *Effective Return and Reintegration of Migrant Workers with Special Focus on ASEAN Member States* (2019) https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/publication/wcms_733917.pdf.
- Benjamin Harkins & Meri Åhlberg, *Access to Justice for Migrant Workers in South-East Asia* (2017) https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=597aec374&skip=0&query=migrant%20workers&coi=KHM.
- World Food Programme (WFP), *Vulnerability and Migration in Cambodia* (2019) https://docs.wfp.org/api/documents/WFP-0000105976/download/.
- Global Alliance Against Traffic in Women, *Access to Justice from the Perspectives of Cambodian Migrant Workers in Thailand* (2017) http://un-act.org/wp-content/uploads/2017/07/Access_Unknown_GAATW-1.pdf.
- UNESCO, UNDP, IOM and UN-Habitat, *Overview of Internal Migration in Cambodia* (2018) https://bangkok.unesco.org/sites/default/files/assets/article/Social%20and%20Human%20Sciences/publications/Brief%202%20-%20Country%20Brief%20-%20Cambodia.pdf.
- Maryann Bylander, *Migration Disruption: Crisis and Continuity in the Cambodian Mass Returns* (2014) Lewis & Clark College, https://www.academia.edu/33848088?swp=rr-rw-wc-15584110.
- Serey Sok, *Cambodian Workers in Malaysia: Challenges and Constraints in Achieving Appropriate Working and Living Conditions,* MIT-UTM Malaysia Sustainable Cities Programme, Massachusetts Institute of Technology, https://malaysiacities.mit.edu/sites/default/files/documents/Sok.pdf.
- *Memorandum of Understanding between the Government of Malaysia and the Government of the Kingdom of Cambodia on the Recruitment and Employment of Workers* (2015) http://un-act.org/wp-content/uploads/2017/01/MOU_Cambodia_Malaysia_Labour_Migration.pdf.
- International Labour Organization (ILO), Triangle in ASEAN Programme Quarterly Briefing Note 1 (2020) https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/genericdocument/wcms_735105.pdf.

22. INDIGENOUS PEOPLE

Tuy Sophorn, Radu Mares

Introduction

Indigenous people are under human rights law recognized as a vulnerable group in need of special protections. Specific to their situation is their culture and identity, which is intrinsically linked to the land and natural resources they have used for centuries. Indigenous people are directly affected by developmental projects that are meant to integrate them in mainstream modern society, or by industrial activities (extractive industries such as mining, oil and gas (chapter 28), forestry or other large infrastructure projects such as dams). This poses a grave danger to indigenous peoples' way of life and their very survival as a group and as individuals. The main international standard in this area is 'free, prior and informed consent' (FPIC) that requires indigenous people to be actively engaged in economic decisions affecting their life. Under law, the FPIC it is not a right to veto but neither it is merely about providing some information and a brief consultation. It is a rigorous process of consultation requiring serious and good-faith efforts to reach an agreement. The ILO and the UN adopted international instruments for indigenous people and there is significant jurisprudence from the regional human rights systems (Inter-American and European systems) (chapter 6). They protect important interests through the right to land (chapter 25), right to benefit-sharing from economic activities (chapter 5), and cultural rights. Leading companies increasingly recognize the high vulnerability of this group and implement 'enhanced' due diligence measures commensurate with high risks of harm (chapters 7-14). Violence against leaders of indigenous peoples, and human rights defenders and environmental defenders more broadly, is a pervasive phenomenon. Companies are increasingly expected to protect such defenders as part of their social responsibility.

There are 24 different indigenous peoples in Cambodia and the estimated population is between 200,000 and 400,000. Cambodia ratified the relevant UN treaty – the Convention International Convention on the Elimination of All Forms of Racial Discrimination (CERD) - in 1983. In article 5, the CERD obligates ratifying states 'to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law…'. Cambodia has however not ratified the ILO treaty on this issue, that is, the Indigenous and Tribal Peoples Convention, 1989 (No. 169).

Main Aspects

- ✓ Criteria for indigenousness (self-identification, descent, distinct circumstances)
- ✓ Individual and collective rights
- ✓ Sovereignty of states and self-determination of indigenous people
- ✓ Right to development (including to develop priorities and strategies for development)

- ✓ Intellectual property rights
- ✓ Environmental protection and conservation
- ✓ Free prior informed consent (FPIC) (unanimity, veto?)
- ✓ Consultation process
- ✓ Right to land and land tenure systems
- ✓ Ownership of resources (subsurface resources and other)
- ✓ Remedies and compensation for resources
- ✓ Right to return to traditional lands (following displacement once the reason for displacement ceases)
- ✓ Respect for the laws, customs and institutions of indigenous peoples (and their compatibility with international human rights)
- ✓ Gender equality
- ✓ Cultural diversity and common heritage of hu¬mankind
- ✓ Impact assessment (social, spiritual, cultural and environmental impacts)
- ✓ Benefit sharing (from exploitation of natural resources)
- ✓ Participatory monitoring (of compliance with agreements)
- ✓ Indigenous communities (divisions, dissent, representativeness)

Background

IFC, Guidance Note 7 – Indigenous People[680]

GN2. Many Indigenous Peoples' cultures and identities are inextricably linked to the lands on which they live and the natural resources on which they depend. In many cases, their cultures, identities, traditional knowledge, and oral histories are connected to, and maintained through the use of, and relationships with, these lands and natural resources. These lands and resources may be sacred or have a spiritual significance. Use of sacred sites and other places of cultural significance may have important functions for the conservation and sustainable use of the natural resources upon which Indigenous Peoples rely for their livelihoods and well-being. Thus, project impacts on lands, forests, water, wildlife, and other natural resources may affect their institutions, livelihoods, economic development, and their ability to maintain and develop their identities and cultures. (…)

GN7. The Performance Standard applies to groups or communities of Indigenous Peoples who maintain a collective attachment to distinct habitats or ancestral territories, and the natural resources therein. This may include:

- Communities of Indigenous Peoples who are resident upon the lands affected by the project as well as those who are nomadic or who seasonally migrate over relatively short distances, and whose attachment to ancestral territories may be periodic or seasonal in nature;
- Communities of Indigenous Peoples who do not live on the lands affected by the project, but who retain ties to those lands through traditional ownership and/or customary usage, including seasonal or cyclical use. This may include Indigenous Peoples resident in urban settings who retain ties to lands affected by a project;

680 International Finance Corporation (IFC), *Guidance Note 7 – Indigenous People* (2012) www.ifc.org/wps/wcm/connect/4b976700498008d3a417f6336b93d75f/Updated_GN5-2012.pdf?MOD=AJPERES.

- Communities of Indigenous Peoples who have lost collective attachment to lands and territories in the project area of influence, occurring within the concerned group members' lifetime, as a result of forced severance, conflict, involuntary resettlement programs by governments, dispossession from their lands, natural calamities or incorporation into an urban area but who retain ties to lands affected by a project;

- Groups of Indigenous Peoples who reside in mixed settlements, such that the Affected Indigenous Peoples only form one part of the more broadly defined community; or

- Communities of Indigenous Peoples with collective attachment to ancestral lands located in urban areas.

GN17. Clients should adopt ICP approaches that build upon existing customary institutions and decision-making processes utilized by the Affected Communities of Indigenous Peoples. However clients should assess the capacity of the existing institutions and decision-making processes to deal with the wide array of new issues introduced by the project. In many situations, projects introduce issues that existing institutions and decision-making processes are poorly equipped to address. Inadequate capacity and experience may result in decisions and outcomes that have detrimental consequences for the Affected Communities and project relations with them. Specifically, poor processes, decisions, and outcomes may lead to challenges to existing institutions, decision-making processes, and recognized leadership, and to disputes over agreements between the Affected Communities of Indigenous Peoples and the project. Building awareness and capacity to address issues that can reasonably be predicted to occur can strengthen both Affected Communities and project agreements with them. Such capacity building can be done in a number of ways, including but not limited to involving competent local organizations such as civil society organizations (CSOs) or government extension agencies; contracting with academic or research organizations undertaking applied or action research involving communities; linking up with existing support programs for local communities run by government or other agencies; and providing resources and technical support for local municipal authorities in facilitating community engagement and strengthening.

GN18. Clients should keep in mind that the communities of Indigenous Peoples are not necessarily homogeneous and there can be divergent views and opinions within them. Experience demonstrates that: the views of the traditional elders or leaders may differ from those who have received formal education; the views of the elderly may differ from those of the youth; and the views of men may differ from women. Nonetheless in many cases, community elders or leaders, who are not necessarily the elected officials of these communities, play a key role. Furthermore, some segments of the community such as women, youth, and the elderly, may be more vulnerable to project impacts than others. The consultation should take into account the interests of these segments in the community while being cognizant of traditional cultural approaches that may exclude segments of the community from the decision-making process.

GN19. The ICP processes with and within Affected Communities of Indigenous Peoples will frequently span an extended period of time. Providing adequate information to the members of the indigenous community about a project's potential adverse impacts and proposed minimization and compensation measures may involve an iterative process involving various segments of the community. Thus, (i) consultation should start as early as possible in the risks and impacts assessment process; (ii) client engagement processes should aim to ensure that the entire population of Affected Communities of Indigenous Peoples is aware of and understands the risks and impacts associated with project development; (iii) project information should be made available in an understandable format, using indigenous languages where appropriate; (iv) the communities should have sufficient time for consensus building and developing responses to project issues that impact upon their lives and livelihoods; and (v) clients should allocate sufficient time to fully consider and address Indigenous Peoples' concerns and suggestions about the project in the project design and implementation.

Instruments

UN Declaration on the Rights of Indigenous Peoples[681]

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, wellbeing and integral development as peoples,

Article 5 - Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 7 - (…) Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 10 - Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 23 - Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

681 *United Nations Declaration on the Rights of Indigenous Peoples* (2007) www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.

Article 29 - Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination. (…)

Article 31 - Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage… They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. (…)

Article 44 - All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 46 - Nothing in this Declaration may be interpreted as … authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

ILO Indigenous and Tribal Peoples Convention[682]

Recognising the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live, and

Noting that in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live, and that their laws, values, customs and perspectives have often been eroded, and

Calling attention to the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international cooperation and understanding,

Article 1

1. This Convention applies to:

   (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

   (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

682 International Labour Organisation (ILO), *Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169)* (1989) www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

Article 6

2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Article 7

3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities. (…)

Article 8

1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.

2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

Article 14

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect. (…)

Article 15

2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Article 16

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.

2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

3. Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.

4. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

IFC, Performance Standard 7 on Indigenous People[683]

1. Performance Standard 7 recognizes that Indigenous Peoples, as social groups with identities that are distinct from mainstream groups in national societies, are often among the most marginalized and vulnerable segments of the population. In many cases, their economic, social, and legal status limits their capacity to defend their rights to, and interests in, lands and natural and cultural resources, and may restrict their ability to participate in and benefit from development. Indigenous Peoples are particularly vulnerable if their lands and resources are transformed, encroached upon, or significantly degraded. Their languages, cultures, religions, spiritual beliefs, and institutions may also come under threat. As a consequence, Indigenous Peoples may be more vulnerable to the adverse impacts associated with project development than nonindigenous communities. This vulnerability may include loss of identity, culture, and natural resource-based livelihoods, as well as exposure to impoverishment and diseases.

4.-5. There is no universally accepted definition of "Indigenous Peoples." (…) In this Performance Standard, the term "Indigenous Peoples" is used in a generic sense to refer to a distinct social and cultural group possessing the following characteristics in varying degrees:

- Self-identification as members of a distinct indigenous cultural group and recognition of this identity by others;
- Collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories;
- Customary cultural, economic, social, or political institutions that are separate from those of the mainstream society or culture; or
- A distinct language or dialect, often different from the official language or languages of the country or region in which they reside.

Avoidance of Adverse Impacts

9. Adverse impacts on Affected Communities of Indigenous Peoples should be avoided where possible. Where alternatives have been explored and adverse impacts are unavoidable, the client will minimize, restore, and/or compensate for these impacts in a culturally appropriate manner commensurate with the nature and scale of such impacts and the vulnerability of the Affected Communities of Indigenous Peoples. The client's proposed actions will be developed with the ICP [Informed Consultation and Participation] of the Affected Communities of Indigenous Peoples and contained in a time-bound plan, such as an Indigenous Peoples Plan, or a broader community development plan with separate components for Indigenous Peoples.

683 International Finance Corporation (IFC), Performance Standard 7: Indigenous Peoples (2012) https://www.ifc.org/wps/wcm/connect/115482804a0255db96f-bffd1a5d13d27/PS_English_2012_Full-Document.pdf?MOD=AJPERES (references omitted).

Participation and Consent

10. The client will undertake an engagement process with the Affected Communities of Indigenous Peoples as required in Performance Standard 1. This engagement process includes stakeholder analysis and engagement planning, disclosure of information, consultation, and participation, in a culturally appropriate manner. In addition, this process will:

    - Involve Indigenous Peoples' representative bodies and organizations (e.g., councils of elders or village councils), as well as members of the Affected Communities of Indigenous Peoples; and
    - Provide sufficient time for Indigenous Peoples' decision-making processes. (…)

12. There is no universally accepted definition of FPIC [Free, Prior, and Informed Consent] … FPIC builds on and expands the process of ICP described in Performance Standard 1 and will be established through good faith negotiation between the client and the Affected Communities of Indigenous Peoples. The client will document:

    (i) the mutually accepted process between the client and Affected Communities of Indigenous Peoples, and

    (ii) evidence of agreement between the parties as the outcome of the negotiations. FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree.

Circumstances Requiring Free, Prior, and Informed Consent

Impacts on Lands and Natural Resources Subject to Traditional Ownership or Under Customary Use

14. If the client proposes to locate a project on, or commercially develop natural resources on lands traditionally owned by, or under the customary use of, Indigenous Peoples, and adverse impacts can be expected, the client will take the following steps:

    - Document efforts to avoid and otherwise minimize the area of land proposed for the project;
    - Document efforts to avoid and otherwise minimize impacts on natural resources and natural areas of importance to Indigenous People;
    - Identify and review all property interests and traditional resource uses prior to purchasing or leasing land;
    - Assess and document the Affected Communities of Indigenous Peoples' resource use without prejudicing any Indigenous Peoples' land claim. The assessment of land and natural resource use should be gender inclusive and specifically consider women's role in the management and use of these resources;
    - Ensure that Affected Communities of Indigenous Peoples are informed of their land rights under national law, including any national law recognizing customary use rights; and
    - Offer Affected Communities of Indigenous Peoples compensation and due process in the case of commercial development of their land and natural resources, together with culturally appropriate sustainable development opportunities, including:
        - Providing land-based compensation or compensation-in-kind in lieu of cash compensation where feasible.
        - Ensuring continued access to natural resources, identifying the equivalent replacement resources, or, as a last option, providing compensation and identifying alternative livelihoods if project development results in the loss of access to and the loss of natural resources independent of project land acquisition.

- Ensuring fair and equitable sharing of benefits associated with project usage of the resources where the client intends to utilize natural resources that are central to the identity and livelihood of Affected Communities of Indigenous Peoples and their usage thereof exacerbates livelihood risk.

- Providing Affected Communities of Indigenous Peoples with access, usage, and transit on land it is developing subject to overriding health, safety, and security considerations.

Relocation of Indigenous Peoples from Lands and Natural Resources Subject to Traditional Ownership or Under Customary Use

15. The client will consider feasible alternative project designs to avoid the relocation of Indigenous Peoples from communally held lands and natural resources subject to traditional ownership or under customary use. If such relocation is unavoidable the client will not proceed with the project unless FPIC has been obtained as described above. Any relocation of Indigenous Peoples will be consistent with the requirements of Performance Standard 5. Where feasible, the relocated Indigenous Peoples should be able to return to their traditional or customary lands, should the cause of their relocation cease to exist. (…)

Private Sector Responsibilities Where Government is Responsible for Managing Indigenous Peoples Issues

21. Where the government has a defined role in the management of Indigenous Peoples issues in relation to the project, the client will collaborate with the responsible government agency, to the extent feasible and permitted by the agency, to achieve outcomes that are consistent with the objectives of this Performance Standard. In addition, where government capacity is limited, the client will play an active role during planning, implementation, and monitoring of activities to the extent permitted by the agency.

22. The client will prepare a plan that, together with the documents prepared by the responsible government agency, will address the relevant requirements of this Performance Standard. The client may need to include

    i. the plan, implementation, and documentation of the process of ICP and engagement and FPIC where relevant;

    ii. a description of the government-provided entitlements of affected Indigenous Peoples;

    iii. the measures proposed to bridge any gaps between such entitlements, and the requirements of this Performance Standard; and

    iv. the financial and implementation responsibilities of the government agency and/or the client.

UN Special Rapporteur, Extractive Industries and Indigenous Peoples[684]

2. Despite such negative experiences, looking towards the future it must not be assumed that the interests of extractive industries and indigenous peoples are entirely or always at odds with each other. In the course of his examination of situations across the globe, the Special Rapporteur has found that in many cases indigenous peoples are open to discussions about extraction of natural resources from their territories in ways beneficial to them and respectful of their rights. A number of situations have been brought to the attention of the Special Rapporteur in which indigenous peoples have agreed to industrial-scale resource extraction within their territories or have even themselves taken initiatives for mining or development of oil or gas.

3. On the other hand, there are certainly cases in which resource extraction is simply incompatible with indigenous peoples' own aspirations and priorities for development, or may impede their access to lands and natural resources critical to their physical well-being and the integrity of their cultures and livelihoods. (…)

684 James Anaya, *Extractive industries and indigenous peoples, Report of the Special Rapporteur on the rights of indigenous peoples, A/HRC/24/41* (2013) www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A-HRC-24-41_en.pdf

4. (…) the prevailing model of resource extraction is one in which an outside company, with backing by the State, controls and profits from the extractive operation, with the affected indigenous peoples at best being offered benefits in the form of jobs or community development projects that typically pale in economic value in comparison to profits gained by the corporation.

A preferred model: resource extraction and development through indigenous peoples' own initiatives and enterprises

8. In contrast to the prevailing model in which natural resource extraction within indigenous territories is under the control of and primarily for the benefit of others, indigenous peoples in some cases are establishing and implementing their own enterprises to extract and develop natural resources. This alternative of indigenous-controlled resource extraction, by its very nature, is more conducive to the exercise of indigenous peoples' rights (…)

Regulation of extraterritorial activities of companies

47. The Special Rapporteur has observed that in many cases in which extractive companies have been identified as responsible for, or at least associated with, violations of the rights of indigenous peoples, those violations occur in countries with weak regulatory regimes, and the responsible companies are domiciled in other, typically much more developed, countries. Even if States are not obligated under international law to regulate the extraterritorial activities of companies domiciled in their territory in order to compel or promote conformity with human rights standards, strong policy reasons exist for them to do so, as affirmed by the Guiding Principles on Business and Human Rights. These reasons include, in addition to preserving the States' own reputation, the simple morality of exercising the State regulatory power to advance human rights and reduce human turmoil whenever possible.

Due diligence by extractive companies to respect indigenous peoples' rights

53. Given their independent responsibility to respect human rights, business enterprises, including extractive companies, should not assume that compliance with State law equals compliance with the international standards of indigenous rights. On the contrary, companies should perform due diligence to ensure that their actions will not violate or be complicit in violating indigenous peoples' rights, identifying and assessing any actual or potential adverse human rights impacts of a resource extraction project.

54. Such due diligence entails identifying with particularity, at the very earliest stages of planning for an extractive project, the specific indigenous groups that may be affected by the project, their rights in and around the project area and the potential impacts on those rights. This due diligence should be performed preliminarily at the very earliest stages of determining the feasibility of the project, in advance of a more complete project impact assessment in later stages of planning or decision-making about the project. Additionally, extractive companies should employ due diligence to avoid acquiring tainted assets, such as permits previously acquired by other business enterprises in connection with prospecting for or extracting resources in violation of indigenous peoples' rights.

65. As is now generally understood, environmental and human rights impact assessments are important preconditions for the implementation of extractive operations. Indigenous peoples should have full access to the information gathered in impact assessments that are done by State agencies or extractive companies, and they should have the opportunity to participate in the impact assessments in the course of consultations or otherwise. States should ensure the objectivity of impact assessments, either by subjecting them to independent review or by requiring that the assessments are performed free from the control of the promoters of the extractive projects.

Indigenous participation through representative institutions

70. A defining characteristic of indigenous peoples is the existence of their own institutions of representation and decision-making, and it must be understood that this feature makes consultations with indigenous peoples very different from consultations with the general public or from ordinary processes of State or corporate community engagement. The Special Rapporteur notes cases in which companies and States have bypassed indigenous peoples' own leadership and decision-making structures out of misguided attempts to ensure broad community support. Where indigenous peoples are concerned, however, international standards require engagement with them through the representatives determined by them and with due regard for their own decision-making processes. Doing so is the best way of ensuring broad community support. Indigenous peoples should be encouraged to include appropriate gender balance within their representative and decision-making institutions. However, such gender balance should not be dictated or imposed upon indigenous peoples by States or companies, anymore than indigenous peoples should impose gender balance on them.

71. It may be that in some circumstances ambiguity exists about which indigenous representatives are to be engaged, in the light of the multiple spheres of indigenous community and organization that may be affected by particular extractive projects, and also that in some instances indigenous representative institutions may be weakened by historical factors. In such cases indigenous peoples should be given the opportunity and time, with appropriate support from the State if they so desire it, to organize themselves to define the representative institutions by which they will engage in consultations over extractive projects.

UN Expert Mechanism on Indigenous Peoples, Free, Prior and Informed Consent[685]

Rationale

11. Free, prior and informed consent as provided for in the Declaration has three major rationales. First, it seeks to restore to indigenous peoples control over their lands and resources (…). Second, the potential for free, prior and informed consent to restore indigenous peoples' cultural integrity, pride and self-esteem is reflected in article 11 of the Declaration. (…) Third, free, prior and informed consent has the potential to redress the power imbalance between indigenous peoples and States, with a view to forging new partnerships based on rights and mutual respect between parties (…).

Nature of free, prior and informed consent as a human rights norm

12. The Declaration recognizes collective rights and protects collective identities, assets and institutions, notably culture, internal decision-making and the control and use of land and natural resources. The collective character of indigenous rights is inherent in indigenous culture and serves as a bulwark against disappearance by forced assimilation.

13. Free, prior and informed consent operates fundamentally as a safeguard for the collective rights of indigenous peoples. Therefore, it cannot be held or exercised by individual members of an indigenous community. (…)

14. Free, prior and informed consent is a manifestation of indigenous peoples' right to self-determine their political, social, economic and cultural priorities. It constitutes three interrelated and cumulative rights of indigenous peoples: the right to be consulted; the right to participate; and the right to their lands, territories and resources. Pursuant to the Declaration, free, prior and informed consent cannot be achieved if one of these components is missing.

685 UN Expert Mechanism on the Rights of Indigenous Peoples, *Free, Prior and Informed Consent: A Human Rights-Based Approach* (2018) https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/245/94/PDF/G1824594.pdf?OpenElement.

15. States' obligations to consult with indigenous peoples should consist of a qualitative process of dialogue and negotiation, with consent as the objective (…). The Declaration does not envision a single moment or action but a process of dialogue and negotiation over the course of a project, from planning to implementation and follow-up. (…)

18. The Human Rights Committee has also elaborated on indigenous peoples' right to participate in a way that goes beyond consultation, noting that participation in the decision-making process must be "effective". The supervisory bodies of the International Labour Organization (ILO) have underlined the interconnection between consultation and participation. Participation connotes more than mere consultation and should include the development of initiatives by indigenous peoples. "In this sense, the intertwined concepts of consultation and participation are mechanisms to ensure that indigenous peoples can decide their own priorities for the process of development and exercise control over their own economic, social and cultural development".

Constituent elements of free, prior and informed consent

20. As affirmed in the Declaration, decisions to grant or withhold consent must be free. The term "free" is understood as addressing both direct and indirect factors that can hinder indigenous peoples' free will. To that end, for a process of consultation to be genuine in the form of a dialogue and negotiation towards consent, the following should occur or the legitimacy of the consultation process may be called into question:

    (a) The context or climate of the process should be free from intimidation, coercion, manipulation (see A/HRC/18/42, annex, para. 25) and harassment, ensuring that the consultation process does not limit or restrict indigenous peoples' access to existing policies, services and rights;

    (b) Features of the relationship between the parties should include trust and good faith, and not suspicion, accusations, threats, criminalization (see A/HRC/39/17), violence towards indigenous peoples or prejudiced views towards them;

    (c) Indigenous peoples should have the freedom to be represented as traditionally required under their own laws, customs and protocols, with attention to gender and representation of other sectors within indigenous communities. Indigenous peoples should determine how and which of their own institutions and leaders represent them. They should therefore enjoy the freedom to resolve international representation issues without interference;

    (d) Indigenous peoples should have the freedom to guide and direct the process of consultation; they should have the power to determine how to consult and the course of the consultation process. This includes being consulted when devising the process of consultation per se and having the opportunity to share and use or develop their own protocols on consultation. They should exert sufficient control over the process and should not feel compelled to get involved or continue;

    (e) Indigenous peoples should have the freedom to set their expectations and to contribute to defining methods, timelines, locations and evaluations.

21. Any free, prior and informed consent process must also be prior to any other decisions allowing a proposal to proceed and should begin as early as possible in the formulation of the proposal. (…) the "prior" component of free, prior and informed consent should entail:

    (a) Involving indigenous peoples as early as possible. Consultation and participation should be undertaken at the conceptualization and design phases and not launched at a late stage in a project's development, when crucial details have already been decided;

    (b) Providing the time necessary for indigenous peoples to absorb, understand and analyse information and to undertake their own decision-making processes (…).

22. Consultation in the free, prior and informed consent context should be "informed", implying that:

(a) The information made available should be both sufficiently quantitative and qualitative, as well as objective, accurate and clear;

(b) The information should be presented in a manner and form understandable to indigenous peoples, including translation into a language that they understand. (...) The substantive content of the information should include the nature, size, pace, reversibility and scope of any proposed project or activity; the reasons for the project; the areas to be affected; social, environmental and cultural impact assessments; the kind of compensation or benefit-sharing schemes involved; and all the potential harm and impacts that could result from the proposed activity;

(c) Adequate resources and capacity should be provided for indigenous peoples' representative institutions or decisions-making mechanisms, while not compromising their independence. Such institutions or decision-making processes must be enabled to meet technical challenges — including, if necessary, through capacity-building initiatives to inform the indigenous peoples of their rights in general — prior or parallel to the process of consultation. (…)

Consent

26. (…) Indigenous peoples may withhold their consent in a number of situations and for various purposes or reasons:

(a) They may withhold consent following an assessment and conclusion that the proposal is not in their best interests. Withholding consent is expected to convince the other party not to take the risk of proceeding with the proposal. (…);

(b) Indigenous peoples may withhold consent temporarily because of deficiencies in the process. Such deficiencies often consist of non-compliance with the required standards for the consent to be free, prior and informed. Indigenous peoples may seek adjustment or amendment to the proposal, including by suggesting an alternative proposal;

(c) Withholding consent can also communicate legitimate distrust in the consultation process or national initiative. This is generally the situation in countries where there is insufficient recognition of indigenous peoples or protection of their rights to lands, resources and territories. Cases of indigenous peoples being harassed, and even being killed for resisting "trap-like" consultation offers are numerous.

44. Agreements on consent should include detailed statements of the project, its duration and the potential impacts on the indigenous peoples, including their lands, livelihoods, resources, cultures and environments; provisions for mitigation, assessment, and reimbursement for any damages to those resources; statements of indemnification of indigenous peoples for injuries caused to others on their lands; methods and venues for dispute resolution; detailed benefit-sharing arrangements (including investment, revenue sharing, employment and infrastructure); and a timetable of deliverables, including opportunities to negotiate continuing terms and licences. As a matter of best practice, any form of consent should include a detailed description of the process of notice, consultation and participation that preceded the consent.

45. As a dynamic process, the implementation of free, prior and informed consent should also be monitored and evaluated regularly. Such agreements should "include mechanisms for participatory monitoring" (…). The implementation of free, prior and informed consent should also include accessible recourse mechanisms for disputes and grievances, devised with the effective participation of indigenous peoples, including judicial review.

55. Some concerns have been raised about the many guidelines on free, prior and informed consent, including that the language used is often imprecise and sometimes introduces ambiguities, for example with respect to the point at which impact assessments are required or when consultation should begin. Sometimes these guidelines do not address the issue of indigenous peoples wishing to define their own consent process and to control aspects of the impact assessments. In addition, there is sometimes ambiguity in the event that consent is not forthcoming.

57. Indigenous peoples are also establishing their own protocols for free, prior and informed consent, particularly in North America and Latin America (…). These protocols are an important tool in preparing indigenous peoples, States and other parties to engage in a consultation or free, prior and informed consent process, setting out how, when, why and whom to consult. The establishment of these protocols is an instrument of empowerment for indigenous peoples (…).

61. Indigenous peoples also raise concerns about "consultation fatigue"; "manufactured" consent; limits put on consultation; a lack of a common understanding of international standards relating to free, prior and informed consent; an increase in encroachments of extractive industries; and a lack of structural change to ensure free, prior and informed consent at the institutional level.

62. National human rights institutions play an important role in contributing towards the implementation of free, prior and informed consent. As bodies acting independently from the Government, some with an expertise in the area of indigenous peoples, they can and do fulfil many roles in the consent context. For example, in Argentina, the national human rights institution intervened in a project by ArSat Co. Telecommunications, where it had several roles, including as general coordinator of the whole process, facilitator and guarantor controlling compliance with the legal framework. Its engagement included an open consultation process that overcame three years of roadblocks. (…)

Expert Mechanism advice No. 11 on indigenous peoples and free, prior and informed consent

9. States should ensure that indigenous peoples have the resources and capacity to effectively engage in consultation processes by supporting the development of their own institutions, while not compromising the independence of those institutions. States and the private sector should promote and respect indigenous peoples' own protocols, as an essential means of preparing the State, third parties and indigenous peoples to enter into consultation and cooperation, and for the smooth running of the consultations.

10. States should ensure equality throughout the process and that the issue of the imbalance of power between the State and indigenous peoples is addressed and mitigated, for example employing independent facilitators for consultations and establishing funding mechanisms that allow indigenous peoples to have access to independent technical assistance and advice.

11. States should engage broadly with all potentially impacted indigenous peoples, consulting with them through their own representative decision-making institutions, in which they are encouraged to include women, children, youth and persons with disabilities, and bearing in mind that the governance structures of some indigenous communities may be male dominated. During each consultation, efforts should be made to understand the specific impacts on indigenous women, children, youth and persons with disabilities.

12. States should ensure that the free, prior and informed consent process supports consensus building within the indigenous peoples' community, and practices that might cause division should be avoided, including when indigenous peoples are in situations of vulnerability like economic duress. Special attention should be given in this regard to indigenous peoples representing distinct sectors in the community, including dispersed communities and indigenous peoples no longer in possession of land or who have moved to urban areas.

Inter-American Court of Human Rights, Saramaka People v. Suriname[686]

3. The Commission asked the Court to determine the international responsibility of the State for the violation of Articles 21 (Right to Property) and 25 (Right to Judicial Protection) (…)

12. The representatives submitted an additional and rather detailed, three-and-a-half page account of certain facts not contained in the application, regarding the alleged "ongoing and continuous effects" associated with the construction of the Afobaka dam. Accordingly, under the heading of "Facts" in their brief containing pleadings, motions, and evidence, the representatives described, inter alia, the following alleged facts: the lack of consent by the Saramaka people for said construction; the names of the companies involved in the construction of the dam; various figures regarding the amount of area flooded and the number of displaced Saramakas from the area; the compensation that was awarded to those displaced persons; the lack of access to electricity of the so-called "transmigration" villages; the painful effect the construction had on the community; the reduction of the Saramaka people's subsistence resources; the destruction of Saramaka sacred sites; the lack of respect for the interred remains of deceased Saramakas; the environmental degradation caused by foreign companies that have received mining concessions in the area, and the State's plan to increase the level of the dam to increase power supplies, which will presumably cause the forcible displacement of more Saramakas and which has been the object of a complaint filed by the Saramakas before domestic authorities in the year 2003. (…)

121. In accordance with this Court's jurisprudence as stated in the Yakye Axa and Sawhoyamaxa cases, members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land they have traditionally used and occupied for centuries. Without them, the very physical and cultural survival of such peoples is at stake. Hence the need to protect the lands and resources they have traditionally used to prevent their extinction as a people. That is, the aim and purpose of the special measures required on behalf of the members of indigenous and tribal communities is to guarantee that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States. (…)

127. Nevertheless, the protection of the right to property under Article 21 of the Convention is not absolute and therefore does not allow for such a strict interpretation. Although the Court recognizes the interconnectedness between the right of members of indigenous and tribal peoples to the use and enjoyment of their lands and their right to those resources necessary for their survival, said property rights, like many other rights recognized in the Convention, are subject to certain limitations and restrictions. In this sense, Article 21 of the Convention states that the "law may subordinate [the] use and enjoyment [of property] to the interest of society". Thus, the Court has previously held that, in accordance with Article 21 of the Convention, a State may restrict the use and enjoyment of the right to property where the restrictions are: a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society. In accordance with this Article, and the Court's jurisprudence, the State will be able to restrict, under certain circumstances, the Saramakas' property rights, including their rights to natural resources found on and within the territory.

129. In this particular case, the restrictions in question pertain to the issuance of logging and mining concessions for the exploration and extraction of certain natural resources found within Saramaka territory. Thus, in accordance with Article 1(1) of the Convention, in order to guarantee that restrictions to the property rights of the members of the Saramaka people by the issuance of concessions within their territory does not amount to a denial of their survival as a tribal people, the State must abide by the following three safeguards: First, the

686 Inter-American Court of Human Rights, *Saramaka People v. Suriname* (2007) www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf.

State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan (hereinafter "development or investment plan") within Saramaka territory. Second, the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment. These safeguards are intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people.

148. The State further argued that the "concessions which were provided to third parties did not affect [Saramaka] traditional interests". The evidence before the Tribunal suggests not only that the level of consultation referred to by the State was not enough to guarantee the Saramakas' effective participation in the decision-making process, but also that the State did not complete environmental and social impact assessments prior to issuing said concessions, and that at least some of the concessions granted did affect natural resources necessary for the economic and cultural survival of the Saramaka people. (…)

151. The observations of the Saramaka witnesses are corroborated by the research of expert witnesses Dr. Robert Goodland and Dr. Peter Poole, both of whom visited the concessions and surrounding areas between 2002 and 2007. In general, Dr. Goodland stated that "the social, environmental and other impacts of the logging concessions are severe and traumatic", and that the "[l]ogging was carried out below minimum acceptable standards for logging operations." Dr. Goodland characterized it as "among the worst planned, most damaging and wasteful logging possible." Dr. Poole added that it was "immediately apparent to [him] that the logging operations in these concessions were not done to any acceptable or even minimum specifications, and sustainable management was not a factor in decision-making."

152. Dr. Goodland and Dr. Poole both testified that the logging companies built substandard bridges in their concessions and that these bridges unnecessarily blocked numerous creeks. Because these creeks are the primary source of potable water used by members of the Saramaka people, "water necessary for drinking, cooking, washing, irrigation, watering gardens, and catching fish is not available. [Furthermore,] subsistence farms become less productive or so unproductive that they have to be abandoned." According to Dr. Goodland, these large areas of standing water render the forest incapable of producing traditional Saramaka agricultural crops. Dr. Poole reached the same conclusions. (…)

154. In conclusion, the Court considers that the logging concessions issued by the State in the Upper Suriname River lands have damaged the environment and the deterioration has had a negative impact on lands and natural resources traditionally used by members of the Saramaka people that are, in whole or in part, within the limits of the territory to which they have a communal property right. The State failed to carry out or supervise environmental and social impact assessments and failed to put in place adequate safeguards and mechanisms in order to ensure that these logging concessions would not cause major damage to Saramaka territory and communities. Furthermore, the State did not allow for the effective participation of the Saramakas in the decision-making process regarding these logging concessions, in conformity with their traditions and customs, nor did the members of the Saramaka people receive any benefit from the logging in their territory. All of the above constitutes a violation of the property rights of the members of the Saramaka people recognized under Article 21 of the Convention (…).

155. The Court must also analyze whether gold-mining concessions within traditional Saramaka territory have affected natural resources that have been traditionally used and are necessary for the survival of the members of the Saramaka people. According to the evidence submitted before the Court, the members of the Saramaka people have not traditionally used gold as part of their cultural identity or economic system. Despite possible individual exceptions, members of the Saramaka people do not identify themselves with gold nor have

demonstrated a particular relationship with this natural resource (…). [Nevertheless], because any gold mining activity within Saramaka territory will necessarily affect other natural resources necessary for the survival of the Saramakas, such as waterways, the State has a duty to consult with them, in conformity with their traditions and customs, regarding any proposed mining concession within Saramaka territory, as well as allow the members of the community to reasonably participate in the benefits derived from any such possible concession, and perform or supervise an assessment on the environmental and social impact prior to the commencement of the project. (…)

156. The Court recognizes that, to date, no large-scale mining operations have taken place within traditional Saramaka territory. Nevertheless, the State failed to comply with the three safeguards when it issued small-scale gold mining concessions within traditional Saramaka territory. That is, such concessions were issued without performing prior environmental and social impact assessments, and without consulting with the Saramaka people in accordance with their traditions, or guaranteeing their members a reasonable share in the benefits of the project. As such, the State violated the members of the Saramaka peoples' right to property (…).

UN Global Compact, The Business Reference Guide[687]

Business benefits from developing an indigenous peoples' rights policy in the following ways:

- It publicly confirms the business' commitment to meeting its responsibility to respect the rights of indigenous peoples, and demonstrates good business practice;
- It provides a consistent and concrete global policy for all company managers and workers, irrespective of individual country managers that may change regularly;
- It assists the business in identifying policy gaps and areas of risk;
- It can provide a differentiator for business, resulting in competitive advantage;
- It builds trust with external stakeholders, and can assist the business in understanding and meeting stakeholder expectations, which in turn support social licence to operate and helps prevent potential project delays, stoppage or cancelations;
- It can provide reputational benefits, especially given the increasing level of stakeholder attention to the issue of community consent and indigenous peoples' rights, particularly among investors;
- It provides guidance for managers and workers in relation to matters that may impact the rights of indigenous peoples;
- It provides operational guidance and risk management in environments where the rights of indigenous peoples may not be well understood;
- It contributes to sustainable development;
- It provides good will and long-term economic benefits, especially for businesses seeking to develop lands and resources; and
- It helps companies to meet their commitments under the UN Global Compact (for participant businesses).

687 UN Global Compact, *The Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples* (2013) www.unglobalcompact.org/docs/issues_doc/human_rights/IndigenousPeoples/BusinessGuide.pdf.

Anaya & Puig, Mitigating State Sovereignty: The Duty to Consult[688]

Some commentators and activists argue that the duty to consult entails an absolute right to give or withhold consent that can altogether trump the exercise of state sovereignty. By contrast, others have argued that it entails but a minimum duty to discuss with indigenous peoples' important decisions that affect them, with ultimate state decision-making power remaining substantially unaltered. Drawing upon Professor Macklem's theory emphasizing the emancipatory power of human rights law in providing tools to safeguard against (but also advocate within) the state, we demonstrate how the consultation duty functions as a mitigating force against the exercise of state sovereignty. We also explain how the contours of the international law duty to consult (as opposed to the political or aspirational postulates often associated with the duty) are determined by its context and purpose as a counterweight to the power of business enterprises. This counterweight guards against state decisions that might be contrary to the interests or wellbeing of indigenous peoples, but it does not—nor can it within the system of international law of which it is part—entirely override state sovereignty. Hence, the duty entails more than a mere right to be informed and heard but less than the right of veto.

Despite their acknowledged importance and underlying rationale, adequate consultation procedures continue to elude governments, which often analogize them to referenda or notice-and-comment processes. Some business enterprises also reject them because of unpredictable outcomes, added costs and delays, or simply unawareness or shortsightedness. In turn, business forecasts and concepts like 'legitimate-backed expectations' are often used to constrain the scope of consultations and frame the resulting choices as violations of internationally protected property or contract 'rights'. At the core of such arguments are often investment instruments, some of which may provide extensive protections to foreign investors without the adequate policy and regulatory space to ensure the protection of human rights.

In this complex setting, how shall we understand the nature, reach, and limits of the duty to consult? Here, we also examine this question by describing two consultation processes in Latin America [Mexico and Costa Rica]. (…)

Governments and business enterprises are beginning to recognize that consultations are not optional, but rather that states are required to implement consultations in a manner consistent with their human rights obligations. (…) Despite this progress, different aspects of the duty remain subject to misconception, debate, or confusion. Generally, the problem can be attributed to limited institutional capacity in many countries, the novelty of this important topic, and of course, the resulting policy implications and other relevant consequences derived from different legal interpretations or normative understandings. In this section, we describe three main interpretive strains and derivative arguments that inform the debate: the instrumentalist, the consent-veto, and the minimalist approaches to consultations.

i. The Instrumentalist Approach

State authorities often characterize the consultation process as another participatory mechanism, rendering it with limited capacity to achieve its safeguard function against human rights violations. Hence, the process is analogized to notice-and-comment and referendum procedures that are already familiar in domestic law, without close attention to satisfying specific international standards. (…)

A problem—perhaps not exclusive to this context—is that 'central' authorities are often motivated by common social goals, such as building critical infrastructure, expanding economic benefits, or simply attracting private investment to marginalized communities. These motivations can easily translate into general indicators or markers i.e., FDI influx, GDP growth or Gini index. As a result of the incentives of this governance logic, states may ignore the consensus-building role that consultations oblige and instead use the process to legitimize specific projects. Moreover, with the growing demands on governments, from human rights protection to trade negotiations, the resulting pressures often result in the oversimplification of participation, with a corresponding preference for procedural formalism over substance. Hence, we term this first position an *instrumental approach*.

688 S. James Anaya and S. Puig, 'Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples', 67 *University of Toronto Law Journal 435* (2017) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2876760.

ii. The Consent – Veto Power Approach

As the main beneficiaries, it should not come as a surprise that indigenous peoples have forcefully advanced attention to implementing consultations. (…)

Within such maximalist interpretations, the process of consultation and the related objective of achieving 'free, prior, and informed consent'13 is understood in the context of 'indigenous sovereignty'. Advocates for indigenous peoples assert a freestanding 'right to consent' as part of the consultation norm. Accordingly, protecting a choice of giving or withholding consent—not specifically safeguarding human rights—is the key objective of the process under this approach. It is an approach similar to that used to motivate the early indigenous rights movement by assertion of a right by indigenous peoples to exercise full sovereignty. Although in many ways defensible, this approach is in strong tension with how international law recognizes sovereignty among states, as well as contrary to existing domestic constitutional arrangements. (…)

Notwithstanding its deep concern for the advancement of the rights of indigenous peoples, the consent-veto approach tends to reduce the key outcome of the process to obtaining or withholding consent, instead of safeguarding human rights. Ironically, it suggests a more limited protective role of the consultation as it assumes that state oversight expires once consent is obtained. More importantly, it eliminates the governments' policy space to make important decisions without indigenous peoples' consent—something that is difficult to reconcile with the basic idea of state sovereign decision-making and prevailing understandings of *pluralistic democracy*.

iii. The Minimalistic Approach

Many business enterprises tend to favor a narrow view of the duty to consult. In some circumstances, the state and business enterprise's preferences align with what we term the 'check-the-box' or *minimalistic approach*.

This approach regards consultation processes as a sizeable bureaucratic obstacle that hinders productive activity. Accordingly, consultations are reduced to obtaining input to validate the measure with ultimate state decision-making power remaining substantially unaltered. For some callous corporate interests, consultations are of limited utility and a symptom of the expansive modern regulatory state. From this point of view, consultations are at minimum costly processes that delay projects. At worst, they are rent-seeking mechanisms that provide certain groups with the opportunity to extract underserved benefits.

Nevertheless, because in many places consultations are novel, and the particular authority and mechanisms to implement them are often vague and indeterminate, the consultation process can be perceived as arbitrary. (…) Moreover, disagreements around the consultation process and the applicability (or not) of specific requirements are problematized as potential violations of 'rights of investors'—in particular the 'fair-and-equitable treatment' standard.

[This approach is] animated by a preference for deregulation and an enhanced view of economic liberalism. The ideas of risk reduction, free markets, and economic efficiency inform the position that the state should show restraint unless a 'market failure' exists with respect to indigenous peoples.21 If private individuals within indigenous communities are able and willing to enter freely into a transaction (even if marginalized and vulnerable) they will benefit from the transaction and the economic spillovers. According to this approach, instead of adding burdensome processes like consultations, states should minimize the risks and red tape to encourage long-term commitment of financial resources in indigenous communities. (…)

In terms of discursive tradition, this view of consultations can be situated within what has been termed a 'neo-liberal' approach to international relations and domestic policy. At the same time, this position is often rooted in a classical version of legal realism in international law and relations. For one, this approach is deeply cynical of the role of international human rights law, as well as the goals of the authorities that demand consultations. With its focus on economic and political power (including the power of both governmental and nongovernmental actors),

this approach serves to counter a rights-based discourse by emphasizing the complexities of a world in which actors compete for business opportunities and foreign investment. Moreover, rightly or wrongly, corporate actors perceive indigenous peoples as too technically unsophisticated to decide questions relevant to the project and state authorities as self-interested or corrupt—in part as a result of the economic liberalism that informs their view.

Mitigating Sovereignty: Consultation within a Human Rights Framework

In Professor Macklem's words: "International law [historically] excluded indigenous peoples, for example, from the outset from its distribution of sovereign power and included them within the sovereign power of states established on the territories they had inhabited since time immemorial. This process of exclusion and inclusion is an ongoing one. International law continues to exclude and include indigenous peoples in its distribution of sovereign authority by refusing to recognize that they possess a right of self-determination entitling them to acquire sovereign statehood… [However, i]ndigenous rights in international law speak to some of the adverse consequences of international law's exclusion of indigenous peoples from its distribution of sovereign authority."

Ultimately, consultations serve a protective role for indigenous peoples within an international legal system in which power is distributed among sovereign independent states. Consultations serve to mitigate the consequences of the power disparities between indigenous peoples and states, whose interests are often aligned with corporations or similar economic actors. Consultations therefore attempt to attain a balancing function by safeguarding the human rights of indigenous peoples within a state-centric world that international law itself supports. (…)

Like Professor Macklem, we believe that international law has the capacity to overcome its imperial origins and become a modern instrument of justice. Our interpretive approach is grounded in contemporary legal realism and informed by a sense of global pluralism—one that celebrates the emancipatory power that human rights law gives to different actors and the tools it provides to safeguard against (but also within) the state. (…)

Finally, to fulfill its protective function, the duty to consult entails a process that brings together different stakeholders and actors potentially affected by a proposed project. Hence, to enable the correct implementation of the duty, indigenous peoples are certainly the key constituency of consultations. However, the consultation process should also include the business enterprise, if any, behind the project that the state seeks to advance. The participation of the business enterprise aims to enable the main objective of the process—obtaining agreement on just terms to safeguard human rights. (…)

There are clear tensions between indigenous peoples, the state, and business enterprises around the implementation of particular development projects that are of concern to each. The duty to consult indigenous peoples arises at the epicenter of these tensions, which are heightened by globalization.

Kemp & Owen, Corporate Readiness and Applying FPIC in Mining[689]

Where there are strong points of incompatibility between domestic law and FPIC, a one-off, company-supported indigenous consent process could be considered invalid, or viewed as a threat to state sovereignty.

In many contexts, indigenous or tribal peoples cannot engage openly about human rights, or assert a right to FPIC. Several jurisdictions have rejected the veto rights attached to FPIC on the grounds that the state does not recognize indigenous people. The constitution of Papua New Guinea, for example, acknowledges the customary rights of landowners, but in our experience, both the state and developers resist the application of international standards in which landowners would be attributed the status of indigenous peoples. In addition, where oppressive politics are an established fact, operationalizing FPIC for a single mining project exposes indigenous or tribal peoples to the risk of harassment or persecution by the state. Recent case studies in Southeast Asia indicate that some states are either unwilling or incapable of managing dissent around resource development projects. While many states have ratified core human rights treaties, their ability to uphold basic human rights in the context of resource development is an ongoing issue.

689 Deanna Kemp and John R. Owen, 'Corporate Readiness and the Human Rights Risks of Applying FPIC in the Global Mining Industry', Business and Human Rights Journal, 2 (2017) https://www.researchgate.net/publication/311445647_Corporate_Readiness_and_the_Human_Rights_Risks_of_Applying_FPIC_in_the_Global_Mining_Industry.

Where the host country context is less compatible with the principles and functional requirements of FPIC, the human and financial resources required to address inherent power imbalances is far greater. However, issues arise in terms of what is an appropriate allocation to address these imbalances, and which party is best placed to provide the resources. For example, in the context of a low-capacity jurisdiction, a mining company may be willing to allocate resources to support an FPIC process. It is likely, however, that a company-resourced FPIC process will invite criticism over the privatization of rights and remedies, as has occurred with project-level, non-judicial grievance mechanisms. When responsibilities to support and protect human rights-related responsibilities are seen as privatized, questions arise about the nature of 'consent' and the degree to which we can be assured that it was given 'freely'.

In our experience, the range of human and financial resources required to support complex engagement and negotiation processes with indigenous peoples varies. This investment often requires, for example, provision of support for dissenting groups, access to technical knowledge and experts, improvement of state or corporate engagement processes, the appointment of independent facilitators to resolve conflict between parties and external monitors to document intent, and impact of an FPIC process, including unintended consequences. (…)

Background (Cambodia)

Sovannara et al, Indigenous People: Political Rights, Culture, Education and Health[690]

Cambodia is home to 24 different indigenous peoples. With an estimated population of 200,000 to 400,000 overall, indigenous peoples are generally estimated to account for 1 to 2 percent of the national population although they are not clearly disaggregated in national census data. Compared with its neighbors in Southeast Asia, Cambodia has the smallest ethnic minority population, both relatively and in absolute numbers. Over half of the indigenous population is found in the north-eastern provinces of Ratanakiri and Mondulkiri. Indigenous groups from south-western and north-eastern provinces of Cambodia have similar cultural practices. Their livelihoods are based on animal husbandry and rotation (shifting) cultivation. Collection of non-timber forest products from the natural forest and weaving are the main sources of income. Indigenous peoples depend on forest products for their livelihoods, without destroying the land and forest that have been preserved by their ancestors. They have strong unity and respect for their customary law, practices and religion that bring blessings of good health and high-yielding crops.

Neth et al, Impacts of Economic Development on Indigenous Livelihoods[691]

There are many factors that affect community livelihoods (capabilities, assets, and activities) and community enthusiasm to accept changes in their livelihoods, as well as the dynamic relationship between these. (…) Indigenous communities often do not even figure in the large-scale economic development plans, and they are only rarely consulted. Also, small-scale land grabbing by the rich and politically influential has become common practice in indigenous regions, as the country's infrastructure improves and indigenous areas be¬come more accessible. Communal land-titling programs for indigenous communities exist, but there is little protection for indigenous land, even under interim protective measures.

Instruments (Cambodia)

Constitution of Cambodia[692]

Article 31. Khmer citizens are equal before the law, enjoying the same rights, liberties and duties regardless of race, color, sex, language, beliefs, religions, political tendencies, birth origin, social status, wealth or other situations…

690 Lim Sovannara, Kem Keothyda, *Indigenous People: Political Rights, Culture, Education and Health Care* (2015) https://www.pic.org.kh/images/2015Research/20160407_Indigneous%20Peoples%20Political%20Rights%20Culture%20Education%20and%20Health%20Care_EN.pdf.

691 Baromey Neth, Sam Ol Rith, & Makoto Yokohari, *Development without Conformity: Impacts of Large-scale Economic Development on Indigenous Community Livelihoods in Northeastern Cambodia* (2013) http://iserd.net/ijerd42/42014.pdf.

692 Cambodia, Constitution of the Kingdom of Cambodia (1993) https://www.ccc.gov.kh/detail_info_en.php?_txtID=791.

Land Law[693]

Article 23. An indigenous community is a group of people that resides in the territory of the Kingdom of Cambodia whose members manifest ethnic, social, cultural and economic unity and who practice a traditional lifestyle, and who cultivate the lands in their possession according to customary rules of collective use. (…)

Article 24. An individual who meets the ethnic, cultural and social criteria of an indigenous community, is recognized as a group member by the majority of such group, and who accepts the unity and subordination leading to acceptance into the community shall be considered to be a member of the indigenous community and is eligible to have the benefit of the rights, guarantees and protections provided by this law.

Article 25. The lands of indigenous communities are those lands where the said communities have established their residences and where they carry out traditional agriculture. The lands of indigenous communities include not only lands actually cultivated but also includes reserved necessary for the shifting of cultivation which is required by the agricultural methods they currently practice and which are recognized by the administrative authorities. (…)

Article 26. Ownership of the immovable properties described in Article 25 is granted by the State to the indigenous communities as collective ownership. This collective ownership includes all of the rights and protections of ownership as are enjoyed by private owners. (...)

Article 27. For the purposes of facilitating the cultural, economic and social evolution of members of indigenous communities and in order to allow such members to freely leave the group or to be relieved from its constraints, the right of individual ownership of an adequate share of land used by the community may be transferred to them. Immovable property that is subject to such private individual ownership cannot fall under the general definition of public properties of the State.

Article 28. No authority outside the community may acquire any rights to immovable properties belonging to an indigenous community.

Law on Forestry[694]

Article 11. The Permanent Forest Estates shall be managed with the objective to increase to the maximum extent the social, economic, environmental, and cultural heritage benefits for the Kingdom of Cambodia and its people according to the principle of sustainable forest management. Ministry of Agriculture, Forestry and Fisheries shall classify, register and set boundaries for all forests within the Permanent Forest Estates. In carrying out these activities, Ministry of Agriculture, Forestry and Fisheries shall coordinate with concerned local communities, concerned authorities and the Ministry of Land Management Urban Planning and Construction in order to assist in registration of land property of indigenous community and preparation of the national land use map. (…)

Article 15. Concessionaires shall have the right to manage and conduct Forest Products & By-products harvesting operations within their concession, while ensuring that the operation does not interfere with the following:

1- Customary user rights taking place on land property of indigenous community that is registered with the state consistent with the Land law; and

2. Customary access and user rights practiced by communities residing within, or adjacent to forest concessions."

693 Cambodia, *Land Law* (2001) http://www.sithi.org/temp.php?title=Land-Law-&url=law_detail.php&lg=&id=17.

694 Cambodia, *Law on Forestry* (2002) https://data.opendevelopmentmekong.net/laws_record/law-on-forestry.

Article 16. The Forest Concession Agreement shall at a minimum include:

1- The date the concession is granted and the duration for which it is granted;

2- The location of the forest concession, indicating the identification of community owned property…;

3- A written statement that the concessionaire shall respect legal rights of others and not enter, to harvest Forest Products & By-products, in any special management areas, indigenous community property area or community forests; (…)

Protected Areas Law[695]

Article 4. (...) The management of the protected area shall have to guarantee the rights of the local communities, indigenous ethnic minorities and the public to participate in the decision-making on the sustainable management and conservation of biodiversity.

Article 6. Officials of the Nature Protection and Conservation Administration have the following rights and duties: (…)

5. Promote education and dissemination among the public and coordinate with local indigenous communities to participate in the preparation and implementation of community protected areas. Detailed rights and duties of natural protection and conservation agency's officials shall be determined by Prakas of the Ministry of Environment." (…)

Article 11. Each protected area shall be divided into four (4) management zoning systems as the following:

1. Core zone: management area(s) of high conservation values containing threatened and critically endangered species, and fragile ecosystems…

2. Conservation zone: management area(s) of high conservation values containing natural resources, ecosystems, watershed areas, and natural landscape located adjacent to the core zone. Access to the zone is allowed only with prior consent of the Nature Conservation and Protection Administration at the area with the exception of national security and defense sectors. Small-scale community uses of non-timber forest products (NTFPs) to support local ethnic minorities' livelihood may be allowed under strict control, provided that they do not present serious adverse impacts on biodiversity within the zone.

3. Sustainable use zone: management area(s) of high economic values for national economic development and management, and conservation of the protected area(s) itself thus contributing to the local community, and indigenous ethnic minorities' livelihood improvement. After consulting with relevant ministries and institutions, local authorities, and local communities in accordance with relevant laws and procedures, the Royal Government of Cambodia may permit development and investment activities in this zone in accordance with the request from the Ministry of Environment.

4. Community zone: management area(s) for socio-economic development of the local communities and indigenous ethnic minorities and may contain existing residential lands, paddy field and field garden or swidden (Chamkar). Issuing land title or permission to use land in this zone shall have prior agreement from the Ministry of Environment in accordance with the Land Law. This management area does not cover the Apsara authorities and other authorities designated and management area(s) to which the Royal Government has allocated the tasks." (…)

695 Cambodia, Protected Areas Law (2008) http://www.cambodiainvestment.gov.kh/law-on-nature-protection-area-protected-areas-law_080104_080104.html.

Article 18. The Nature Protection and Conservation Administration shall develop for individual protected area an action plan to be approved by the Ministry of Environment and in accordance with the NPASMP. Process for the development of the Plan shall involve coordination and consultations with local authority, local community, indigenous ethnic minorities' community and stakeholders. (…)

Article 21. Local communities, indigenous ethnic minority communities, the public and civil society are encouraged to participate fully in the provision of and access to information relevant to the protected area management, conservation and development.

Article 22. The State recognizes and secures access to traditional uses, local customs, beliefs, and religions of the local communities, and indigenous ethnic minority groups residing within and adjacent to the protected areas. Access to traditional uses of natural resources and customary practices of local community and indigenous ethnic minority groups on family scale may be allowed within sustainable use zone and conservation zone following guidelines which shall be prescribed in the Prakas of the Ministry of Environment. (…)

Article 26. Local communities and indigenous ethnic minorities may not have the rights to clear or work forestlands in the community protected areas allocated to it, pursuant to the agreements with the Ministry of Environment, to practice agricultural farming or to claim title over the land, or to sell, lease, pawn, donate, share, divide or transfer the areas under its own management to any person or legal entity. Community protected area regulations shall be established by local community and indigenous ethnic minorities acknowledged by local authority and endorsed by the Nature Conservation and Protection Administration of the Ministry of Environment. Allocation of more farmlands to local community and indigenous ethnic minorities shall be determined by a sub-decree. (…)

Article 31. The Ministry of Environment shall, in collaboration with local communities, indigenous ethnic minorities, national and international organizations and NGOs, rehabilitate and restore the environment in degraded areas within the protected area.

Sub-Decree on the Procedure of Registration of Land of Indigenous Communities[696]

Article 1. The purposes of this Sub-Decree are to determine principles, procedures, and mechanisms for the registration of land of indigenous communities as collective title.

Article 2. The objectives of this Sub-Decree are to provide indigenous communities with legal rights over land tenure, to ensure land tenure security, and to protect collective ownership by preserving the identity, culture, good custom and tradition of each indigenous community.

Article 3. This Sub-Decree has the scope of application for indigenous communities which have legally been established as legal entity in the territory of the Kingdom of Cambodia.

Sub-Decree on Community Forestry Management[697]

Article 2. The objectives of this Sub-Decree include the following:

- To implement the Forestry Law and other legislation regarding Local Community management of forest resources;
- To define the rights, roles and duties of the Forestry Administration Responsible Authorities, CF Communities (…) and other stakeholders involved in Community Forestry management;

696 Cambodia, *Sub-Decree on Procedure of Registration of Land of Indigenous Communities, No. 83* (2009) http://www.nea.gov.kh/nweb/law_reg/5molm/6_sd_83_ank.pdf.

697 Cambodia, *Sub-Decree on Community Forestry, No. 79* (2013) http://www.cambodiainvestment.gov.kh/sub-decree-79-on-community-forestry-management_031202.html.

- To establish procedures to enable Communities to manage, use and benefit from forest resources, to preserve their culture, tradition and improve their livelihoods;

- To ensure user rights for a CF Community under a Community Forest Agreement;

- To support the Royal Government of Cambodia's policies of poverty alleviation and decentralization; (...)

Ministry of Industry, Indigenous Peoples Planning Framework[698]

(…) 6. National Policy on the Development of Indigenous People: The Policy was approved by the Council of Ministers April 24, 2009 and sets out government policies related to indigenous peoples in the fields of culture, education, vocational training, health, environment, land, agriculture, water resources, infrastructure, justice, tourism and industry, mines and energy. Together with the Land Law (2001) this policy gives recognition to the rights of indigenous peoples to traditional lands, culture and traditions (…)

13. Despite that Cambodia has a Policy that recognizes the right of indigenous people to culture, education, vocational training, health, environment, land, agriculture, water resources, infrastructure, justice, tourism and industry, mines and energy, there a few decrees, sub-decree or procedure that specifically safeguards or protect the interest of the indigenous peoples…Otherwise, the main gap between the World Bank's requirements and the policies of the Government of Cambodia relates to the absence of sector specific decree or standard operating procedures. (…)

(…) In relation to health policy, the Health Strategic Plan 2008-15 has no specific mention of indigenous peoples or the identification of measures to address the specific health barriers that they face. Ethnic minorities are mentioned once in relation to cross cutting challenges. The Rectangular Strategy is the guiding policy document in Cambodia and sets-out a broad social protection framework. The Rectangular Strategy Phase III (2013) has two brief references to indigenous peoples related to land registration/ titling and does not mention ethnic minorities. The National Strategic Development Plan (NSDP) 2014-2018 specifically mentions both indigenous peoples and ethnic minorities several times. Priority is focused on strengthening the existing national targeting mechanism (ID-Poor), enhancing targeting efficiency, reducing inclusion and exclusion errors, particularly of ethnic minorities. The NSDP mentions that an area of particular concern is the north-eastern provinces, where indigenous communities mainly dwell, these provinces are predominantly rural and to an extent 'un-integrated' in the national mainstream. Related to health the NSDP focuses on ensuring equitable access to quality health services…

Royal Government of Cambodia, National Strategic Development Plan[699]

Challenge 4 - Reach out-of-school children and build non-formal education system.

- Response 4: Measures to reduce the number children out of school with a specific focus on children from indigenous communities, children with disabilities, and children from poorer families, through targeted programs (…)

4.62 During the Fifth Legislature, RGC will intensify land reforms, focusing on strengthening the management, organization, utilization and distribution of lands that will contribute to reducing poverty, ensuring food security, protecting the environment and natural resources, and socio-economic development, within a market framework. RGC will focus on the following priorities: (…)

698 Cambodian Ministry of Industry and Handicraft, Indigenous Peoples Planning Framework: *Water Supply and Sanitation Improvement Project* (2018) http://www.mih.gov.kh/File/UploadedFiles/9_27_2018_4_43_56.pdf.

699 Royal Government of Cambodia, *National Strategic Development Plan 2014-2018* (2014) http://planipolis.iiep.unesco.org/sites/planipolis/files/ressources/cambodia_nsdp_2014-2018.pdf.

3. Accelerating land registration and issuance of land titles including for state lands, private lands and indigenous community lands through regular land registration process and further implementing the "Old Policy-New Action" policy giving priority to land titling in dispute-free areas in order to guarantee security of title and ensure confidence in land ownership (…) 4.63 To implement RGC's priority policies for the Fifth Legislature, the Ministry of Land Management, Urbanization, and Construction (MLMUC) will take actions as follows: (…) Continue registering land titles for indigenous communities (…)

4.165 (…) Measures to reduce the number children out of school with focus on indigenous children, children with disabilities, and children from poor families.

CEDAW Committee, Concluding Observations on Cambodia[700]

(…) it reiterates its previous concern about the lack of court cases on discrimination against women in the State party and the fact that there are significant barriers to access by women and girls to justice and effective remedies for violations of their rights, particularly for rural women, indigenous women (…) It also regrets the lack of representation of women belonging to ethnic minority groups and indigenous women in political and public life (…) The Committee welcomes the adoption of the action plan to prevent child marriage and teenage pregnancy in Ratanakiri Province for the period 2017–2021, which is aimed at ethnic communities and focused on increased prevention and response interventions. Nevertheless, it expresses concern that the rate of child marriage remains high in indigenous and rural communities and regrets the lack of measures adopted by the State.

Cambodia Indigenous Peoples Alliance, Situation of Indigenous Peoples[701]

2. The lack of appropriate legal recognition of 'indigenous people in Cambodia is among the reason for having no reliable statistical data on indigenous peoples. Further, it has been established and recognized that non-recognition of indigenous peoples' profound relationship to their lands, territories and resources leads to gradual deterioration of their indigenous societies. This is profoundly true in Cambodia. Indigenous communities are recognized from their language but many of them have lost their ability to speak their own tongue affecting their confidence to declare their indigeneity. The loss of language is a result of long history of discrimination and lack of legal recognition of indigenous peoples that persists until today.

3. There are, however, laws and policies that refer to indigenous peoples in Cambodia and use varying terms such as 'indigenous communities', 'indigenous ethnic minorities' and 'highland peoples', but these effectively describe the same peoples. They include Bunong, Kui, Tompourn, Kroeung, Brov, Karvèt, Stieng, Kroal, Mil, Karchak, Por, Khoan, Chorng, Sui, Thmoun, Loun, Soauch, Rodè, Khe, Ro Orng, Spong, Loeun, Charay and Samrè. It is believed there are other communities of indigenous peoples that are yet to be identified and added in this list.

4. Among the main issues of indigenous peoples in Cambodia are the loss of their rights to land through economic land concessions (ELCs) and land conflicts, population growth and in-migration. The degradation of forest and general loss of their rights to their lands have gravely affected their impoverishment, education and health. (…)

8. RGC's Forest Law of 2002 and Land Law of 2001 recognise indigenous peoples' traditional use of land and the latter allows indigenous peoples to apply for community land titling (CLT). However, the process to apply for community land titling have been particularly challenging for indigenous peoples. As of December 2017, among 458 indigenous villages in fifteen (15) provinces, only nineteen (19) of them have their land registered as indigenous collective land titles or 16,271 hectares of land for 1,774 families. (…)

700 UN Committee on the Elimination of Discrimination Against Women, *Concluding Observations on the Sixth Periodic Report of Cambodia* (2019) http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsglfl%2FiazrVw%2BcyfdY9GxZ5bSfxXA5KrNzKiYSQz0rFB5gi2CnbaBYZjQXYsuDPG8zwJOMQYrnR0kzrDfbbRUOLlP9FY3Pa3qLqF8UVCDJxW.

701 Cambodia Indigenous Peoples Alliance (CIPA), Cambodia Indigenous Youth Association (CIYA) & Asia Indigenous Peoples Pact (AIPP), *Situation of Indigenous Peoples in Cambodia, Submission for the 3rd Cycle of Universal Periodic Review of Cambodia* (2019) https://www.upr-info.org/sites/default/files/document/cambodia/session_32_-_january_2019/js1_upr32_khm_e_main.pdf.

11. There have been 267 economic land concessions (ELC) granted in 2016x amounting to over 2 million hectares across Cambodia. These ELCs involve development projects such as large-scale agribusiness, mining and hydro-power development projects. At least 98 of these ELCs involve the lands, territories and resources (LTR) of indigenous peoples. None of these development initiatives that involve indigenous territories have gone through the process of FPIC. ELCs have always been discussions between companies and the RGC. (…)

12. Furthermore, these 98 ELCs are mainly for rubber and other industrial plantations. The ELCs in Ratanakiri province alone cover 21% of the total provincial land areas. There are also two (2) dams currently operating while three (3) dams are under construction, and 7 are planned to be built along the Sesan Rivers. The Lower Sesan II (LS2) inaugurated in September 2017 resulted to fully submerging Kbal Romeas village in Stung Treng province, and displacing 83 families. Aside from the immediate impact of displacement, dams affect the overall land and water ecology of the affected areas. Studies have proven that indigenous peoples' survival and overall wellbeing are tied to their LTR; lack of access and control over lands, and cutting ties from their LTR causes irreparable damage to indigenous peoples' culture and tradition, livelihood, education, and health and overall development and wellbeing.

Minority Rights Group, World Directory of Minorities and Indigenous Peoples[702]

The government recognizes community land titles (CLTs) through the Land Law of 2001, but the titles have been difficult to obtain. However, corruption and inefficiency among government officials have served to delay CLT issuance. The complexity and high costs of a communal land application - amounting to US$70,000 for each title - are also major barriers. The authorities have, however, taken some steps against illegal logging, which once again is particularly affecting the north-east region inhabited by indigenous communities. Nevertheless, it is thought that illegal logging has reduced the country's forest cover from 13.1 million hectares in the 1973 to 8.7 million hectares in 2014. Sadly, the process appears to be accelerating: based on satellite imagery, the rate of forest clearance increased by 30 per cent in 2016 compared with the year before. Those defending their rights to land and a healthy environment are also under threat of targeted violence: Cambodia is one of the most dangerous places to be environmental rights defender, with many killed for their work in recent years, including indigenous activists. The government regularly targets environmental defenders through arbitrary detention and judicial harassment.

The Lower Sesan 2 dam in Stung Treng province, one of the biggest dam projects in the country was completed in 2017 and has displaced some 5,000 people including indigenous Bunong and ethnic Lao since its operations began. As with other megaprojects, it has caused widespread devastation to local environments, livelihoods and cultural traditions, with some communities completely uprooted as a result of flooding.

Socfin, Policy for Responsible Management[703]

3.2 Responsible development of its operations

The Socfin Group commits to eliminate deforestation and to respect the rights and consent of local communities in all its operations and supply chains. To that purpose the Socfin Group commits to:

(…) Respect the right of indigenous populations and local communities to give or withhold their Free, Prior and Informed Consent (FPIC) to all operations affecting the land or resources on which they have legal, community or customary rights.

702 Minority Rights Group International, World Directory of Minorities and Indigenous Peoples - Cambodia: Indegenous Peoples (2017) https://www.refworld.org/docid/5b9b75bf7.html.

703 Socfin, Socfin Group Policy for Responsible Management (2017) https://www.socfin.com/sites/default/files/2018-12/2017_03_22_Policy_responsible_management.pdf.

3.3 Respect of Human Rights

The Socfin Group commits to:

- Respect and support the Universal Declaration of Human Rights,
- Recognise and respect the rights of all workers, including the workers of its subcontractors, temporary workers and migrant workers,
- Recognise and respect the rights of local and indigenous communities,
- Maintain a transparent and open dialogue with local populations.

Hak et al, Impact of Government Policies and Corporate Land Grabs[704]

This article has argued that the Cambodian government incoherent laws and policies on ELCs and CLTs undermined indigenous people's access to common land. The ELCs in the two villages did not provide significant benefits to local people in terms of employment opportunities and poverty alleviation as expected in the government's proclaimed goals of long-term investment in agriculture. They in fact further diminished communities' forest resources through logging and forest clearance. Indigenous villagers are being restrained from accessing their common land by the government laws and policies such as the Forestry Law of 2002, which prohibits land clearance inside protected areas. Yet, their common land was encroached upon by corporations, powerful elite, and landless in-migrants. (…) Likewise, the ELCs did not provide monetary compensation or jobs to the local communities. Instead, the companies employed Khmer in-migrants who exacerbated communal land grabbing. The loss of common resources upon which indigenous livelihoods used to rely severely weakens their adaptive capacity and ecological resilience.

Moreover, the ELC-influenced policy drive for cash crop production in the study commune resulted in further livelihood transitions and land use changes that culminated in income inequality and social differentiation. This cash crop trend pushed the transitions of indigenous people's livelihoods relying on natural resources (in 2003) to livelihoods relying on cash crops (in 2012) to livelihoods struggling to be resilient in the face of price downturns (in 2018). While the crop boom stimulated economic growth, the practice exacerbated the diminishing state of forest and land resources. This process, driven by the state-sponsored market economy, also resulted in economic inequality. While the better-off households substantially improved their income through amassing more land, poor households earned very little or even suffered losses from their cash crop cultivation. This widening income inequality and social differentiation is likely to further reduce economic and social resilience among the indigenous communities.

With limited exit strategies, poor indigenous farmers will continue to be threatened with commons grabbing and ensuing "resilience grabbing" by market forces of land commodification. In the face of external threats (including intrusions by in-migrants) and increasing pressure on access to land and forest resources, there is definitely a need to strengthen transnational social movements and human rights advocacy and implement land titling strategies that benefit the poorest and most vulnerable groups in rural Cambodia. Otherwise indigenous people's land areas will continue to recede and the success of their livelihood transitions will remain precarious at best.

To conclude, this article reveals that land grabbing adversely affects communal solidarity and local governance effectiveness. It also demonstrates how commons grabbing—including land sales within the indigenous communities—undermines livelihood resilience and limits the capacity of indigenous people to deal effectively with policies and strategies implemented by much more powerful forces. The Khmer-dominated Cambodian government continues to operate with a different understanding of law, legality, and conflict resolution, and multinational and domestic corporations (through the acquisition of ELCs) wield tremendous economic and political power to pursue their interests with impunity and at the expense of customary landholders. (…)

704 Sochanny Hak, John McAndrew & Andreas Neef, *Impact of Government Policies and Corporate Land Grabs on Indigenous People's Access to Common Lands and Livelihood Resilience in Northeast Cambodia* (2018) https://res.mdpi.com/d_attachment/land/land-07-00122/article_deploy/land-07-00122.pdf.

Pen & Chea, Failure to Secure Indigenous Peoples' Rights to Access Land[705]

The majority of the challenges identified in this report derive from a failure to apply the domestic legal framework – these are, the laws, policies and regulations that the government itself has developed. The granting and management of economic and other land concessions in Cambodia suffers from a lack of transparency and adherence to existing laws. Many of the legal frameworks on these matters are relatively well-developed on paper, but the challenge of correctly implementing the procedure of Collective Land Titling remains large.

The experience gathered in Sre Ktum and Samuth Krom illustrates that community empowerment is key to claiming resources through administrative procedures such as Collective Land Tilting, Community Forestry and Community Protected Areas. However, the weak leadership, by-laws and internal rule enforcement procedures created serious internal problems and internal conflict, while various external forces first led to the dissolving of community land, then to the alienation of indigenous land. Partnership monitoring should be put in place to ensure that indigenous land is fully protected after granting the title, which would in turn strengthen community organization and economic development.

An appropriate community administrative procedure should be developed and provided as on-job training, with an additional plan and a small fund supporting an adequate adaptation of the Indigenous Community Committee. On the other hand, the functioning of the Indigenous Communities Committee is closely related to each individual family's livelihood as well as to community funds, which should be aimed at improving effective land use rather than having community members solving their financial problems by selling land to outsiders – against by-laws and tradition. The experience gathered in the village of Samuth Krom has provided a valuable lesson on the importance of strong collaboration between communities and local administrative authorities in order to prevent ELCs or others from taking indigenous land. Social empowerment can sometimes be stronger than legal papers, such as in Sre Ktum where policy makers and implementers have explored the practical approach, using interim protective measures in the right way and at the right time, according to the Land Law. Still, indigenous land security needs to be further addressed, especially as regards legal titling procedures in the context of large-scale land grabbing by ELCs.

Questions

1. Given its ratification record of international treaties, what are Cambodia's international obligations for respecting, protecting and fulfilling the rights of the indigenous people?
2. What does 'free, prior and informed consent' mean?
3. What should the company and the government do if indigenous people reject a business project on the lands they inhabit?
4. Can the Cambodian economy develop without harming indigenous people?
5. Where would you look for best practice on how to strike the right balance between economic development and indigenous peoples' rights?

705 Ratana Pen & Phalla Chea, Failure of International and National Policies to Secure the Indigenous Peoples' Rights to Access Land and Resources (2015) https://ticambodia.org/library/wp-content/files_mf/1453192908LARGESCALELANDGRABBINGINCAMBODIA.pdf.

Further Readings

- Food And Agriculture Organization (FAO), *Voluntary Guidelines on the Responsible Governance of Tenure (VGGT) of Land, Fisheries and Forests in the Context of National Food Security* (2012) (Khmer Version) https://landportal.org/node/43232.
- UN Expert Mechanism on the Rights of Indigenous Peoples, *Good Practices and Challenges, Including Discrimination, in Business and in Access to Financial Services by Indigenous Peoples, in Particular Indigenous Women and Indigenous Persons with Disabilities* (2017) www.undocs.org/en/a/hrc/36/53.
- Victoria Tauli-Corpuz, R*eport on Attacks and Criminalisation of Indigenous Human Rights Defenders,* Report of the UN Special Rapporteur on the rights of indigenous peoples A/HRC/39/17 (2018) http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/39/17.
- Victoria Tauli-Corpuz, *Impacts of Climate Change and Climate Finance on Indigenous Peoples' Rights,* Report of the UN Special Rapporteur on the rights of indigenous peoples A/HRC/36/46 (2017) http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/36/46.
- UN, World Conference on Indigenous Peoples (2014) www.un.org/development/desa/indigenouspeoples/about-us/world-conference.html.
- UN Permanent Forum on Indigenous Issues, www.un.org/development/desa/indigenouspeoples/.
- International Council on Mining and Minerals (ICMM), *Good Practice Guide: Indigenous Peoples and Mining* (2015) https://www.icmm.com/website/publications/pdfs/social-performance/2015/guidance_indigenous-peoples-mining.pdf.
- OECD, *Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector,* 'ANNEX B: Engaging with Indigenous Peoples' (2017) www.oecd-ilibrary.org/governance/oecd-due-diligence-guidance-for-meaningful-stakeholder-engagement-in-the-extractive-sector_9789264252462-en.
- Survival, *The World's Threatened Tribal Peoples,* www.survivalinternational.org/tribes.
- Alejandro Fuentes, *Exploitation of Natural Resources and Protection of Indigenous Peoples' Communal Property over Traditional Lands and Territories: A Summary of the Inter-American Court of Human Rights' Safeguards,* Raoul Wallenberg Institute for Human Rights and Humanitarian Law, Research Brief (2016) https://rwi.lu.se/app/uploads/2017/04/ExploitationNaturalResources_2016.pdf.
- Rio Tinto, *Why Cultural Heritage Matters* (2011) www.riotinto.com/documents/ReportsPublications/Rio_Tinto_Cultural_Heritage_Guide.pdf.
- Cultural Survival, Quarterly Magazine https://www.culturalsurvival.org/publications/cultural-survival-quarterly/back-issues
- គោលនយោបាយជាតិស្តីពីការអភិវឌ្ឍសហគមន៍ជនជាតិដើមភាគតិច (2009) https://web.archive.org/web/20190712225752/http://ebooks.libraryrule.com:80/images/pdf_file_item/a0ef14d817e9190a33e2389e11639c50.pdf
- ជនជាតិភាគតិច និងជនជាតិដើមភាគតិច (2019) https://opendevelopmentcambodia.net/km/topics/ethnic-minorities-and-indigenous-people/
- Diana Vinding and Cæcilie Mikkelsen (eds.), *The Indigenous World* 2016, https://www.iwgia.org/images/publications//0740_THE_INDIGENOUS_ORLD_2016_final_eb.pdf.

- Cambodian Center for Human Rights (CCHR), *Cambodia: Land in Conflict: An Overview of the Land Situation* (2013) https://cchrcambodia.org/admin/media/report/report/english/CCHR%20Report%20%20Cambodia%20Land%20in%20Conflict%20An%20Overview%20of%20the%20Land%20Situation%20ENG.pdf.
- FIDH (International Federation for Human Rights), *Cambodia Land Cleared for Rubber Rights Bulldozed: The Impact of Rubber Plantations by Socfin-KCD on Indigenous Communities in Bousra, Mondulkiri* (2011) https://www.fidh.org/IMG/pdf/report_cambodia_socfin-kcd_low_def.pdf.
- Inclusive Development International, *Vietnamese Argibusiness Giant HAGL Destroys Indigenous Lands* (2020) https://www.inclusivedevelopment.net/vietnamese-agribusiness-giant-destroys-indigenous-lands/.
- International Work Group for Indigenous Affairs (IWGIA), *Information Received from Non-Governmental Organizations with ECOSOC Consultative Status* (2007) https://www.un.org/esa/socdev/unpfii/documents/6_session_tebtebba_iwgia.pdf.
- Men Prachvuthy, *Land Acquisition by Non-Local Actors and Consequences for Local Development,* RUPP (2011) http://www.landgovernance.org/assets/2014/07/Cambodia_landacquisition_impacts_indigenouspeople.pdf.
- Men Prachvuthy, *Impacts of Economic Land Concessions on the Livelihoods of Indigenous Communities in Northeast Provinces of Cambodia* (2011) http://www.landgovernance.org/assets/2014/07/Cambodia_landacquisition_impacts_indigenouspeople.pdf.
- Inclusive Development International et al., *Re: Complaint Concerning IFC investment in Dragon Capital Group and VEIL (Project no. 10740 and 20926),* [letter to Meg Taylor, Vice President of the Office of the Compliance Advisor Ombudsman, International Finance Corporation] (2014) http://www.cao-ombudsman.org/cases/document-links/documents/ComplainttoCAOreDragonCapital-HAGL.pdf.
- Natalie Bugalski & Thuon Ratha, *A Human Rights Impact Assessment of Hoang Anh Gia Lai Economic Land Concessions in Ratanakiri, Cambodia* (2015) https://www.iss.nl/sites/corporate/files/CMCP_28-_Bugalski___Ratha.pdf.
- Paul Michael Taylor, *Ethnic Minorities and Indigenous Peoples of Cambodia* (2006) https://www.researchgate.net/publication/331976861_Ethnic_Minorities_and_Indigenous_Peoples_of_Cambodia.
- The NGO Forum on Cambodia, *Indigenous People Rights Project* (2013) https://www.ngoforum.org.kh/indigenous-people-rights-project/.
- Royal Government of Cambodia, *National Strategic Development Plan 2019-2023* (2019) http://www.mop.gov.kh/DocumentEN/NSDP%202019-2023%20in%20English.pdf.
- Office of the UN High Commissioner for Human Rights Cambodia, *Economic Land Concessions in Cambodia: A Human Rights Perspective* (2007) https://cambodia.ohchr.org/en/economic-social-rights/economic-and-other-land-concessions.
- UNDP, *Human Development Report Cambodia - Sustaining Natural Resources for All* (2019) http://hdr.undp.org/sites/default/files/nhdr_cambodia.pdf.

23. GENDER

Ngouv Muy Seo, Radu Mares

Introduction

Gender discrimination as distinguished from sex discrimination draws attention to the fact that unequal treatment is the result of socially constructed roles rather than mere biological characteristics. Women are still treated unequally in the workplace, in developed and developing countries alike, as evidenced by statistics showing a persistent pay gap. Outside the workplace, girls and women are subjected to various forms of discrimination. Such unequal treatment is further compounded when there are multiple grounds for discrimination (e.g. color, ethnicity, race, sexual orientation, disability (chapters 22 and 24)) exist simultaneously. This phenomenon is the issue of 'intersectionality' when several forms of discrimination intersect and compound the negative impact. Affirmative action – or more favorable treatment of a group – can be established in law and corporate policy as a way to reverse systemic inequities and patterns of discrimination that deny in practice the equality of opportunities to one group. The economic empowerment of women – especially in local communities affected by large industrial and agricultural projects – has long been a rather uncontroversial aspect in CSR as businesses see it as a positive contribution to society (chapters 5 and 8). Empowerment in the workplace, including in terms of career promotion on equal terms with men, is also an area where leading businesses have adopted special measures. Transnational enterprises that have outsourced production to low wage countries are linked to gender-based discrimination as the labour force of suppliers may in some industries be predominantly female (e.g textiles). It is recognized that these jobs have created financial independence for women, but it is also known that the discriminatory treatment can be both severe and difficult to document (just as infringements of freedom of association (chapter 19)). As part of their responsibilities to eliminate exploitative working conditions (chapters 15-21), companies are expected to perform impact assessments (chapter 9) and take corrective measures (chapter 11) that identify and respond to the particular factors of risk women workers are exposed to, including transportation at night time, childcare facilities, medical evaluations and so on.

In Cambodia, women account for approximately 52% of the total population, and play a significant role in economic growth and sustainable development. Nonetheless, gender discrimination, gender stereotyping, as well as cultural and social barriers remain persistent problems for women in Cambodia, making them more vulnerable to violence, exploitation and harassment in various spheres of economic, social and private life. Particularly, women are likely to experience violence in the workplace as a result of their work and economic status. The Royal Government of Cambodia has been committed to promoting gender equality in both public and private sectors. Some recent key commitments adopted in 2019 include the National Policy on Gender Equality, and the third National Action Plan to Prevent Violence against Women. Internationally, Cambodia has ratified key human rights treaties guaranteeing women's rights and gender equality, particularly the Convention on the Elimination of All Forms of Discrimination against Women, and its Optional Protocol on individual complaints. Regionally, Cambodia has endorsed a number of ASEAN instruments (the 2004 Declaration on the Elimination of Violence against Women in ASEAN, the 2013 ASEAN Declaration on the Elimination of Violence against Women and the

Elimination of Violence Against Children, and the ASEAN Regional Plan of Action on the Elimination of Violence against Women). This chapter explains different forms of discrimination and various areas in and outside the workplace where unequal treatment persists.

Main Aspects

- ✓ Discrimination against women, gender equality, women rights and gender mainstreaming
- ✓ Direct and indirect discrimination
- ✓ Differential treatment (affirmative action)
- ✓ Discrimination by public or private actors
- ✓ 'Intersectionality' (intersecting forms of discrimination and their compounded negative impact)
- ✓ 'Inherent requirements of the job'
- ✓ Causes of gender inequality
- ✓ 'Sex' and 'gender'
- ✓ Women's rights and cultural diversity
- ✓ Economic empowerment, protections in employment, right to work, pay gap (gap in wages)
- ✓ Principle of "equal remuneration for work of equal value"
- ✓ Rural women
- ✓ Night work
- ✓ Resettlement (displacement from land)
- ✓ Obligations of states (to respect, protect and fulfil women's rights)

Background

UN, The Beijing Declaration and Platform for Action[706]

The Platform for Action is an agenda for women's empowerment. It aims at (…) removing all the obstacles to women's active participation in all spheres of public and private life through a full and equal share in economic, social, cultural and political decision making. This means that the principle of shared power and responsibility should be established between women and men at home, in the workplace and in the wider national and international communities. Equality between women and men is a matter of human rights and a condition for social justice and is also a necessary and fundamental prerequisite for equality, development and peace.

Critical areas of concern:

1. The persistent and increasing burden of poverty on women.
2. Inequalities and inadequacies in and unequal access to education and training.
3. Inequalities and inadequacies in and unequal access to health care and related services.

706 UN, *The Beijing Declaration and Platform for Action, The Fourth World Conference on Women* (1995) www.un.org/womenwatch/daw/beijing/platform.

4. Violence against women.

5. The effects of armed or other kinds of conflict on women, including those living under foreign occupation.

6. Inequality in economic structures and policies, in all forms of productive activities and in access to resources.

7. Inequality between men and women in the sharing of power and decision-making at all levels.

8. Insufficient mechanisms at all levels to promote the advancement of women.

9. Lack of respect for and inadequate promotion and protection of the human rights of women.

10. Stereotyping of women and inequality in women's access to and participation in all communication systems, especially in the media.

11. Gender inequalities in the management of natural resources and in the safeguarding of the environment.

12. Persistent discrimination against and violation of the rights of the girl child.

UN, Working Group on Discrimination against Women in Law and in Practice[707]

Economic and social participation

38. In its reports, the Working Group has demonstrated how women still face structural disadvantages and discrimination in the economic and social spheres throughout their life cycle. Social and cultural barriers still prevent many girls from completing their education, and legal discrimination, entrenched inequalities in wages and labour force participation and caring responsibilities prevent women from participating equally in economic and social life. Women do 2.6 times more unpaid care and domestic work than men. Older women suffer from a gender pension gap, making them particularly vulnerable to poverty, and all women face the persistent risk of sexual harassment and other forms of gender-based violence in schools, workplaces and other public places, in addition to the home (see A/HRC/26/39).

39. Indeed, women continue to be paid less than men for work of equal value and are severely underrepresented in top leadership in decision-making bodies in business, finance and trade, including in international institutions such as the International Monetary Fund and the World Trade Organization, and in cooperatives and trade unions. Furthermore, women have been grossly underrepresented in the formulation of the macroeconomic policies that have led to rocketing inequality, austerity measures and the undermining of care services on which women are more dependent than men. Today, there are more girls in schools than ever before, but one out of five adolescent girls is still out of school. Moreover, women's higher educational achievements worldwide have not always translated into corresponding leadership positions or even equality in the economic field. While more women have entered the workforce, they still represent only 49 per cent of working age women, against 75 per cent of working age men. Globally, the gender pay gap still stands at 23 per cent. Women often have access only to vulnerable forms of employment; the majority of women in developing countries are employed in the informal sector or in family businesses, and do not always receive wages directly. In countries where women's income mainly comes from agricultural activities, they generally have very limited ownership of land.

40. While women's economic empowerment has proven to be among the least controversial issues relating to gender equality, the underlying cultural, social and political causes of economic inequality have not been successfully and fundamentally tackled. Women's economic and social rights will never be fulfilled if the necessary infrastructure for care services, enforcement of equal pay for work of equal value, and regulation of women's labour rights in the informal sector, in which many women are employed globally, are not put in place.

707 UN, *Report of the Working Group on the Issue of Discrimination against Women in Law and in Practice A/HRC/38/46* (2018) https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/132/85/PDF/G1813285.pdf?OpenElement.

UN Committee on Discrimination against Women, Recommendation No. 28[708]

5. Although the Convention [UN Convention on Elimination of Discrimination against Women] only refers to sex-based discrimination, interpreting article 1 together with articles 2 (f) and 5 (a) indicates that the Convention covers gender-based discrimination against women. The term "sex" here refers to biological differences between men and women. The term "gender" refers to socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women. This social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors and can be changed by culture, society and community. The application of the Convention to gender-based discrimination is made clear by the definition of discrimination contained in article 1. This definition points out that any distinction, exclusion or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women of human rights and fundamental freedoms is discrimination, even where discrimination was not intended. This would mean that identical or neutral treatment of women and men might constitute discrimination against women if such treatment resulted in or had the effect of women being denied the exercise of a right because there was no recognition of the pre-existing gender-based disadvantage and inequality that women face. (…)

9. Under article 2, States parties must address all aspects of their legal obligations under the Convention to respect, protect and fulfil women's right to non-discrimination and to the enjoyment of equality. The obligation to respect requires that States parties refrain from making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment by women of their civil, political, economic, social and cultural rights. The obligation to protect requires that States parties protect women from discrimination by private actors and take steps directly aimed at eliminating customary and all other practices that prejudice and perpetuate the notion of inferiority or superiority of either of the sexes, and of stereotyped roles for men and women. The obligation to fulfil requires that States parties take a wide variety of steps to ensure that women and men enjoy equal rights de jure and de facto, including, where appropriate, the adoption of temporary special measures in line with article 4, paragraph 1, of the Convention. (…)

13. Article 2 is not limited to the prohibition of discrimination against women caused directly or indirectly by States parties. Article 2 also imposes a due diligence obligation on States parties to prevent discrimination by private actors. (…) The appropriate measures that States parties are obliged to take include the regulation of the activities of private actors with regard to education, employment and health policies and practices, working conditions and work standards, and other areas in which private actors provide services or facilities, such as banking and housing.

16. (…) States parties shall ensure that there is neither direct nor indirect discrimination against women. Direct discrimination against women constitutes different treatment explicitly based on grounds of sex and gender differences. Indirect discrimination against women occurs when a law, policy, programme or practice appears to be neutral in so far as it relates to men and women, but has a discriminatory effect in practice on women because pre-existing inequalities are not addressed by the apparently neutral measure. Moreover, indirect discrimination can exacerbate existing inequalities owing to a failure to recognize structural and historical patterns of discrimination and unequal power relationships between women and men.

18. Intersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual

708 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, CEDAW/C/GC/28* (2010) https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/GC/28&Lang=en.

orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them. (…)

Instruments

The Universal Declaration of Human Rights[709]

Article 2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (…)

Convention on the Elimination of All Forms of Discrimination against Women[710]

Article 1: For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2: States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (…)

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

   (a) The right to work as an inalienable right of all human beings;

   (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;

   (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;

   (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;

   (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;

   (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

709 *Universal Declaration of Human Rights* (1948) www.ohchr.org/en/udhr/pages/searchbylang.aspx.

710 *Convention on the Elimination of All Forms of Discrimination against Women* (1979) www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx.

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

   (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

   (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

   (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

   (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

Article 14

1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy (…).

2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

   (a) To participate in the elaboration and implementation of development planning at all levels; (…)

   (b) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;

   (c) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self employment;

   (d) To participate in all community activities;

   (e) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes; (…)

ILO, Discrimination (Employment and Occupation) Convention[711]

Article 1

1. For the purpose of this Convention the term discrimination includes--

   (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; (…)

711 International Labour Organisation (ILO), *Discrimination (Employment and Occupation) Convention (No. 111),* (1958) www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111.

ILO, Equal Remuneration Convention[712]

Article 2: 1. Each Member shall (…) ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value. (…)

UN, Sustainable Development Goals[713]

20. Realizing gender equality and the empowerment of women and girls will make a crucial contribution to progress across all the Goals and targets. The achievement of full human potential and of sustainable development is not possible if one half of humanity continues to be denied its full human rights and opportunities. Women and girls must enjoy equal access to quality education, economic resources and political participation as well as equal opportunities with men and boys for employment, leadership and decision-making at all levels. We will work for a significant increase in investments to close the gender gap and strengthen support for institutions in relation to gender equality and the empowerment of women at the global, regional and national levels. All forms of discrimination and violence against women and girls will be eliminated, including through the engagement of men and boys. The systematic mainstreaming of a gender perspective in the implementation of the Agenda is crucial.

Goal 5. Achieve gender equality and empower all women and girls

5.1 End all forms of discrimination against all women and girls everywhere

5.2 Eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation

5.3 Eliminate all harmful practices, such as child, early and forced marriage and female genital mutilation

5.4 Recognize and value unpaid care and domestic work through the provision of public services, infrastructure and social protection policies and the promotion of shared responsibility within the household and the family as nationally appropriate

5.5 Ensure women's full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic and public life

5.6 Ensure universal access to sexual and reproductive health and reproductive rights as agreed in accordance with the Programme of Action of the International Conference on Population and Development and the Beijing Platform for Action and the outcome documents of their review conferences

5.a Undertake reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance and natural resources, in accordance with national laws

5.b Enhance the use of enabling technology, in particular information and communications technology, to promote the empowerment of women

5.c Adopt and strengthen sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels

712 International Labour Organisation (ILO), *Equal Remuneration Convention (No. 100)* (1951) www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C100.

713 UN General Assembly, Transforming Our World: The 2030 Agenda for Sustainable Development, A/RES/70/1 (2015) https://sustainabledevelopment.un.org/post2015/transformingourworld.

ILO, General Survey on the Fundamental Conventions[714]

Direct and indirect discrimination

744. Direct discrimination occurs when less favourable treatment is explicitly or implicitly based on one or more prohibited grounds. It includes sexual harassment and other forms of harassment. (…)

745. Indirect discrimination refers to apparently neutral situations, regulations or practices which in fact result in unequal treatment of persons with certain characteristics. It occurs when the same condition, treatment or criterion is applied to everyone, but results in a disproportionately harsh impact on some persons on the basis of characteristics such as race, colour, sex or religion, and is not closely related to the inherent requirements of the job. In referring to the "effect" of a distinction, exclusion or preference, it is clear that intention to discriminate is not an element of the definition in the Convention, which covers all discrimination irrespective of the intention of the author of a discriminatory act. The Convention also covers situations in which inequality is observed in the absence of a clearly identifiable author, as in some cases of indirect discrimination or occupational segregation based on sex. Challenges related to structural discrimination therefore need to be addressed under the Convention.

Distinctions, exclusions or preferences based on inherent requirements

828. (…) In no circumstances should the same requirement involving one or more of the grounds of discrimination be applied to an entire sector of activity or occupation, especially in the public service. Careful examination of each individual case is required. The general exclusion of certain jobs or occupations, including in export processing zones or the public service, from the scope of the measures intended to promote equality of opportunity and treatment is contrary to the Convention.

829. Most of the cases regarding the application of Article 1(2) [of ILO Discrimination Convention (111)] addressed by the Committee have related to distinctions based on sex, religion, political opinion or national extraction restricting access to employment and occupation. The complexity of some of the examples illustrates the importance of providing full particulars on the practical application of this provision in order to be able to assess adequately which cases can be deemed to be non-discriminatory within the meaning of the Convention, and the Committee has regularly requested such information.

830-831. There are very few instances where the grounds listed in the Convention actually constitute inherent requirements of the job. For example, distinctions on the basis of sex may be required for certain jobs, such as those in the performing arts. (…) Restrictions for a narrow range of jobs associated with particular religious or political institutions or non-profit organizations and organizations specifically promoting the well-being of an ethnic group may be acceptable. Criteria such as political opinion, national extraction and religion may be taken into account as inherent requirements of certain posts involving special responsibilities. (…)

UN Working Group, Discrimination against Women in Economic and Social Life[715]

Discriminatory legislation in a number of States continues to obstruct women's enjoyment of equal rights and access to economic opportunity and resources. The roles and responsibilities assigned to women and men on the basis of stereotypes relegate women to a subordinate status and limit their economic opportunities. A significant number of countries have adopted anti-discrimination measures, but these have not resulted in equality of opportunity in women's economic and social lives.

714 International Labour Organisation (ILO), *General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization* (2012) www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_174846.pdf (references omitted).

715 UN Working Group on Discrimination against Women in Law and in Practice, *Eliminating Discrimination against Women in Economic and Social Life with a Focus on Economic Crisis, A/HRC/26/39* (2014) https://www.ohchr.org/Documents/Issues/Women/WG/A.HRC.23.50_English.pdf.

Women are disproportionately concentrated in informal and precarious employment; they are exposed to multiple forms of discrimination; the wage gap persists; maternity protections have not been fully and effectively implemented; and in many countries women do not have equal rights and access to resources. There has been little attention the negative impacts of the business sector on women's enjoyment of human rights. Care functions are disproportionately allocated to women and create a major barrier to women's full participation in economic market activity. Violence against women is another obstacle to women's equal opportunity. Austerity measures taken by some States in response to economic crisis have had a disparate impact on women, increasing the precarity of their employment and their burden of unpaid care work.

8. This report focuses on the gender aspects of economic and social rights. These rights have particular significance for women, who are disproportionately affected by economic and social marginalization and poverty. Women's right to equality in economic and social rights is substantive, immediate and enforceable. It concerns the division of existing resources, not the development of resources, and therefore the principle of progressive realization does not apply. (…)

30. Alternatives to austerity have been applied successfully in some countries. Counter-cyclical approaches in general have helped reduce the depth and duration of the impact and leverage a more rapid recovery. The Swedish recovery programme focused on avoiding labour market exclusion, particularly for women, and maintaining paid parental leave and day-care subsidies, recognized as particularly beneficial to women workers. Iceland stands out as a pioneer in adopting policies to protect women in the recent crisis, mainstreaming gender in its recovery measures, and appointing a working group to evaluate the impact of the economic crisis from a gender perspective and ensure that gender equality principles are reflected in State-led initiatives to restore the economy.

46. The gender wage gap persists: women's wages represent between 70–90 per cent of men's wages in most countries. Research shows that differences in women's working hours, which are lower than men's, cannot justify the wage gap, and the wage gap cannot be attributed solely to a motherhood penalty. Furthermore, wage gaps remain substantial despite women' gains in education. Indeed, wage gaps are usually wider between men and women with tertiary education.

70. Export processing zones are delineated industrial estates with special incentives set up to attract foreign business and trade. They are feminized work enclaves in which women make up the majority of workers, up to 100 per cent in some cases. Women workers face particularly harsh employment conditions. Normal labour laws are usually not applied. Whether de jure or de facto, there is a lack of union organization and, typically, women's wages are 20–50 per cent lower than men's. Furthermore, these zones are a health hazard for women, with overextended working hours, rights violations relating to pregnancy protection, maternity leave or childcare, and sexual harassment.

72. Extractive industries, as well as, increasingly, biofuel, agribusiness and real estate projects, are land intensive, and land dispossession has disproportionately displaced women. Women, who make up 70–80 per cent of the world's small-scale farmers, lose their livelihood, often do not receive compensation paid to landowners, who are male, and are the last in line for formal employment in the industries. As primary carers, they are deprived of shelter and the ability to feed their families. The arrival of a transient, largely male workforce also increases prostitution, sexual violence and sexually transmitted disease. Mismanagement of extractive projects can also lead to severe violations of human rights that are manifested in unique ways for women, including murder, torture, rape and sexual violence at the hands of security forces brought in to impose order.

OECD, Guidelines for Multinational Enterprises[716]

Commentary on Employment and Industrial Relations

54. The reference to the principle of non-discrimination with respect to employment and occupation in paragraph 1e is considered to apply to such terms and conditions as hiring, job assignment, discharge, pay and benefits, promotion, transfer or relocation, termination, training and retirement. (…)

UN, Women's Empowerment Principles[717]

1. Leadership Promotes Gender Equality

   - Affirm high-level support and direct top-level policies for gender equality and human rights.
   - Establish company-wide goals and targets for gender equality and include progress as a factor in managers' performance reviews.
   - Engage internal and external stakeholders in the development of company policies, programmes and implementation plans that advance equality.
   - Ensure that all policies are gender-sensitive – identifying factors that impact women and men differently – and that corporate culture advances equality and inclusion.

2. Opportunity, Inclusion and Non-discrimination

   - Pay equal remuneration, including benefits, for work of equal value and strive to pay a living wage to all women and men.
   - Ensure that workplace policies and practices are free from gender-based discrimination.
   - Implement gender-sensitive recruitment and retention practices and proactively recruit and appoint women to managerial and executive positions and to the corporate board of directors.
   - Assure sufficient participation of women – 30% or greater – in decision-making and governance at all levels and across all business areas.
   - Offer flexible work options, leave and re-entry opportunities to positions of equal pay and status.
   - Support access to child and dependent care by providing services, resources and information to both women and men.

3. Health, Safety and Freedom from Violence

   - Taking into account differential impacts on women and men, provide safe working conditions and protection from exposure to hazardous materials and disclose potential risks, including to reproductive health.
   - Establish a zero-tolerance policy towards all forms of violence at work, including verbal and/or physical abuse and prevent sexual harassment.
   - Strive to offer health insurance or other needed services – including for survivors of domestic violence – and ensure equal access for all employees.

716 OECD, *Guidelines for Multinational Enterprises* (2011) http://www.oecd.org/daf/inv/mne/48004323.pdf.

717 UN Global Compact and UN Women, *Women's Empowerment Principles – Equality Means Business* (2011) www.unglobalcompact.org/library/65.

- Respect women and men workers' rights to time off for medical care and counseling for themselves and their dependents.
- In consultation with employees, identify and address security issues, including the safety of women traveling to and from work and on company-related business.
- Train security staff and managers to recognize signs of violence against women and understand laws and company policies on human trafficking, labour and sexual exploitation.

4. Education and Training

- Invest in workplace policies and programmes that open avenues for advancement of women at all levels and across all business areas, and encourage women to enter nontraditional job fields.
- Ensure equal access to all company-supported education and training programmes, including literacy classes, vocational and information technology training.
- Provide equal opportunities for formal and informal networking and mentoring.
- Articulate the company's business case for women's empowerment and the positive impact of inclusion for men as well as women.

5. Enterprise Development, Supply Chain and Marketing Practices

- Expand business relationships with women-owned enterprises, including small businesses, and women entrepreneurs.
- Support gender-sensitive solutions to credit and lending barriers.
- Ask business partners and peers to respect the company's commitment to advancing equality and inclusion.
- Respect the dignity of women in all marketing and other company materials.
- Ensure that company products, services and facilities are not used for human trafficking and/ or labour or sexual exploitation.

6. Community Leadership and Engagement

- Lead by example – showcase company commitment to gender equality and women's empowerment.
- Leverage influence, alone or in partnership, to advocate for gender equality and collaborate with business partners, suppliers and community leaders to promote inclusion.
- Work with community stakeholders, officials and others to eliminate discrimination and exploitation and open opportunities for women and girls.
- Promote and recognize women's leadership in, and contributions to, their communities and ensure sufficient representation of women in any community consultation.
- Use philanthropy and grants programmes to support company commitment to inclusion, equality and human rights.

7. Transparency, Measuring and Reporting

- Make public the company policies and implementation plan for promoting gender equality.
- Establish benchmarks that quantify inclusion of women at all levels.
- Measure and report on progress, both internally and externally, using data disaggregated by sex.
- Incorporate gender markers into ongoing reporting obligations.

Gender Equality: Gender equality describes the concept that all human beings, both women and men, are free to develop their personal abilities and make choices without the limitations set by stereotypes, rigid gender roles, or prejudices. Gender equality means that the different behaviours, aspirations and needs of women and men are considered, valued and favoured equally. It does not mean that women and men have to become the same, but that their rights, responsibilities and opportunities will not depend on whether they are born female or male.

Gender Mainstreaming: Gender mainstreaming is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in any area and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension in the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and social spheres, such that inequality between women and men is not perpetuated.

Empowerment: Empowerment means that people – both women and men – can take control over their lives: set their own agendas, gain skills (or have their own skills and knowledge recognized), increase self-confidence, solve problems, and develop self-reliance. It is both a process and an outcome.

Women's Empowerment Principles, Gender Gap Analysis Tool (WEPs Tool)[718]

The WEPs Tool is a business-driven tool designed to help companies from around the world assess gender equality performance across the workplace, marketplace, and community.

OECD, Due Diligence Guidance for Responsible Business Conduct[719]

Q2. How can an enterprise integrate gender issues into its due diligence?

Applying a gender perspective to due diligence means thinking through how real or potential adverse impacts may differ for or may be specific to women. For example, it is important to be aware of gender issues and women's human rights in situations where women may be disproportionately impacted:

- In contexts where women face severe discrimination.
- In contexts where the enterprise's activities significantly affect the local economy, environment and access to land and livelihoods.
- In conflict and post-conflict areas.
- In sectors and global supply chains in which large numbers of women are employed, such as apparel, electronics, tourism, health and social care, domestic work, agriculture and fresh cut flowers.

718 Women's Empowerment Principles, *Gender Gap Analysis Tool* (2018) https://weps-gapanalysis.org.

719 OECD, *Due Diligence Guidance for Responsible Business Conduct* (2018) http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf.

Additionally it involves adjusting, as appropriate, the actions that enterprises take to identify, prevent, mitigate and address those impacts to ensure these are effective and appropriate. For example,

- Collecting and assessing sex-disaggregated data and understanding whether enterprise activities impact differently on men and women.
- Developing, designing and evaluating gender sensitive and gender responsive policies and plans to mitigate and address real and potential adverse impacts identified.
- Identifying overlapping/ accumulated vulnerabilities (e.g. indigenous, illiterate, female worker).
- Developing gender sensitive warning systems and protection of whistleblowers.
- Supporting women's equal and meaningful participation in consultations and negotiations.
- Assessing whether women benefit equitably in compensation payments or other forms of restitution.
- Consulting women outside the presence of men and facilitating separate spaces for women to express opinions and provide input on business decisions.
- Identifying gender-specific trends and patterns in actual or potential adverse impacts that have been overlooked in the due diligence processes.
- Assessing whether grievance mechanisms are gender-sensitive, taking into consideration the obstacles that may prevent women from accessing them.

ILO, Promoting Equity: Gender-Neutral Job Evaluation for Equal Pay[720]

Causes of wage discrimination

A great number of studies have examined the causes of this pay gap and have led to the identification of two sets of factors. The first concerns the characteristics of individuals and of the organizations in which they work. The following are among the most important of these factors:

- Educational level and field of study;
- Work experience in the labour market and seniority in the organization or in the job held;
- Number of working hours;
- Size of organization and sector of activity.

Part of the pay gap could thus be abolished through policies aimed directly at these dimensions such as, for example, adopting flexible working hours in the workplace so as to allow parents to balance work and family responsibilities, making it possible for mothers to continue in their careers without interruption, thus gaining more work experience and seniority.

Even when this first set of factors is taken into account, however, econometric studies have repeatedly found an unexplained residual gap between the average wages of women and men. (…) In other words, the wage discrimination targeted by Convention No. 100 does not correspond to the whole wage gap that is observed, but only to a portion of it.

720 International Labour Organisation *(ILO), Promoting Equity: Gender-Neutral Job Evaluation for Equal Pay: A Step-by-Step Guide* (2008) www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_122372.pdf.

The residual gap reflects wage discrimination based on sex resulting from a second set of factors (…):

- Stereotypes and prejudices with regard to women's work;
- Traditional job evaluation methods designed on the basis of the requirements of male-dominated jobs;
- Weaker bargaining power on the part of female workers who are less often unionized and hold a disproportionate number of precarious jobs.

Rio Tinto, Why Gender Matters[721]

A key objective of the Rio Tinto Communities policy and standard is to "build enduring relationships with our neighbours that are characterised by mutual respect, active partnership and long term commitment". To effectively achieve this, gender, diversity and human rights considerations must be integrated into the management and planning of all Communities work and across all sections of the business.

Gender refers to the different roles, rights, responsibilities and resources of women and men and the relations between them. A gender focus highlights the complex and often unequal power relationships between men and women which exist in almost every culture and many workplaces. While a holistic focus on gender equality is required, women require particular attention because of the mining industry's characteristics – its "male" orientation and particular impacts on women. (…)

There is also increasing evidence that women and girls often suffer from discrimination, experience disproportionately negative consequences as a result of mining, and tend to be less likely than men to benefit from the economic and employment opportunities that mining can bring. (…)

While Rio Tinto cannot be expected to change deeply entrenched gender inequalities alone, we do have a responsibility to ensure that our actions do not exacerbate or distort existing inequalities or create new issues in the communities in which we operate. Our corporate commitments to diversity and human rights require that we move beyond impact mitigation to a position where we proactively strive to improve the situation of impacted and affected people – women and men, girls and boys – in all locations where our operations and projects are based.

The approach [of Rio Tinto] can be divided into four inter-related phases, with inclusive engagement sitting at the centre, as a cross cutting theme that relates to all the other phases:

Inclusive engagement

Ensure that women and men from different social groups are consulted and can participate in engagement and development in meaningful ways.

1. Know and understand

- Develop gender insights through specific consultation with women's and men's groups and discuss the findings with community members.
- Integrate gender issues into all baseline assessments: baseline communities assessments (BCAs), social impact assessments (SIAs) and social risk assessments (SRAs).
- Consider gender impacts for different stages of mine life (including closure).
- Identify barriers and constraints to participation along gender lines.

721 Rio Tinto, *Why Gender Matters* (2009) www.riotinto.com/documents/ReportsPublications/Rio_Tinto_gender_guide.pdf.

2. *Plan and implement*

- Consider and integrate gender issues in the Communities strategy and multi-year plans.
- Align gender considerations in the Communities multi-year plans with other operational plans within the business unit.
- Use gender sensitive methodologies to plan and implement community engagement and programme initiatives.
- Develop other operational plans and standard operating procedures with potential gender impacts in mind.

3. *Monitor, evaluate and improve*

- Use a monitoring framework that includes gender sensitive indicators, underpinned by credible data, which is updated regularly.
- Plan programmes and projects to promote gender equality, and to measure progress against gender sensitive indicators.
- Develop participatory monitoring and evaluation processes where possible, that are inclusive of both women and men.

4. *Report and communicate*

- Publicly report on what action each site is taking to address gender issues and the outcomes of these actions.
- Present gender-disaggregated data for key performance areas in site reports.
- Communicate this information to the community.

Vodafone, Sustainable Business Report[722]

Sustainable business strategy

The three global transformation goals are:

- Women's empowerment;
- Energy innovation; and
- Youth skills and jobs.

Women's empowerment

We are strongly committed to diversity and inclusion. That commitment includes an aspiration to become the world's best employer for women by 2025. We also recognise the transformative effects of mobile technology for women in low-income emerging markets. Getting a mobile phone for the first time can enhance a woman's physical and economic security, education, skills, access to employment opportunities and her (and her children's) health and wellbeing. Our goal is to bring the benefits of mobile to an additional 50 million women living in emerging markets, including women in some of the world's poorest communities. (…)

722 Vodafone, *Sustainable Business Report* (2017) http://www.vodafone.com/content/dam/vodafone-images/sustainability/downloads/sustainablebusiness2017.pdf.

Equality of opportunity between men and women is a key indicator of long-term social stability and economic advancement. By empowering women and promoting gender equality we can enable communities, economies and businesses – including our own – to prosper.

Women and men enter the workplace as young adults with equivalent skills and in broadly equal numbers; however, as their careers evolve, a much greater proportion of men than women enter middle and senior-level roles. A significant proportion of women either leave the formal workforce altogether or remain within it but in more junior roles than their male peers. This 'leaky pipeline' of female talent is evident worldwide; only four out of more than 190 countries have equal numbers of male and female legislators, senior officials and managers.

Maternity represents a significant inflection point for many women. A lack of support through pregnancy and childbirth and the challenge of balancing childcare with working life accounts for the departure of large numbers of women from the workplace. Women often experience difficulties in rejoining the workforce after taking a career break to bring up children or support their family. Others may return to work but find fewer opportunities for promotion and progression than their male counterparts. This is a lost opportunity. A new study from KPMG indicates that, at a global level, if more skilled women on a career break were encouraged and able to re-enter the workplace (and on the assumption that they would not displace others in doing so), the maximum potential boost to economic activity worldwide would be around €103 billion, with the potential addition to total household earnings in the region of €290 billion. (…)

We employ more than 108,000 people and are one of the largest foreign investors in many of the countries in which we operate. We also provide employment opportunities for hundreds of thousands of people across our global supplier base of more than 17,000 companies. (…)

Programmes such as our ground-breaking global maternity policy and our ReConnect initiative to bring women back into the workforce after a career break are designed to address the challenge of the 'leaky pipeline' and maximise our ability to recruit, retain and develop women at every level of our workforce. (…)

Worldwide, there are an estimated 55 million skilled women of middle-management level and above who are not in work following a career break, often after having children. This isn't just a lost opportunity for women and their families; it also means that businesses such as Vodafone are missing out on a huge pool of potential talent, insight and experience. However, getting back into work can be difficult; in recent research, 80% of women who have taken a career break said more support was needed to help them return successfully to the workplace.

In 2017, Vodafone launched ReConnect (…) The programme includes training, coaching and induction programmes to refresh and enhance professional skills to help returners prepare for re-entry to the workplace and progress their careers. Our target is to hire 1,000 ReConnect women over three years in areas such as Technology, Commercial, HR, Finance, Legal, External Affairs, Customer Operations and Business Intelligence & Analytics. This will increase the number of women in management roles; around 10% of all of our external management hires worldwide will be recruited through the ReConnect programme.

ReConnect joiners will be able to take advantage of flexible working options and a phased return to work, such as a four-day week for the first six months. (…) "I felt like my career break wiped clean all of my previous career achievements; it was as if I had never worked. It is very hard being a working mum but it is manageable with the right support. ReConnect gave me this." (…)

Research by KPMG indicates that recruiting and training new employees to replace women who do not stay in the workforce after having a baby could cost businesses worldwide up to US$47 billion every year. We are focused on ensuring that working parents are encouraged and supported to return to work for us after the birth of a child and can be confident that they have the potential to grow their careers while raising a family.

In 2016, we became one of the first organisations in the world to introduce a global minimum maternity policy. This applies to employees at all levels in every country in which we operate, including countries with little or no paid statutory maternity leave. Over 4,000 of our female employees have gone on maternity leave over the last two years; all were eligible to benefit from the policy, which offers at least 16 weeks fully paid maternity leave, plus full pay for a 30-hour week for the first six months.

We offer flexible working, part-time working and homeworking policies across many of our local markets – taking advantage of Vodafone's remote working technologies – which are designed to make it easier for women and men to balance family and work commitments. Examples of individual local market flexible working practices include:

- Vodafone Italy employees are encouraged to work from home for one day each week;
- Vodafone Turkey employees benefit from flexible working hours and can choose earlier or later start or finish times to help them balance work and personal commitments; and
- full-time employees of Vodafone India can take an unpaid sabbatical (from 90 days to more than one year) to look after children or family members or to develop skills and interests.

IFC, Handbook for Preparing a Resettlement Action Plan[723]

Special Assistance for Women and Vulnerable Groups

Women comprise a disproportionately large number of the poor in most countries. Gender discrimination limits women's access to resources, opportunities, and public services necessary to improve the standard of living for themselves and their families. As a result, women are often the first to suffer when resettlement is planned or executed badly. Women tend to rely more heavily than men do on informal support networks, such as the help of friends, neighbors, or relatives for child care. Women with children also have less physical mobility to travel to find ways of earning a livelihood.

For these reasons, the sponsors' efforts to maintain the social continuity of communities affected by a project—whether through the physical design of new sites, measures to prevent the disintegration of the community, or the provision of specialized social services at those sites—are important. Some of the immediate and practical initiatives that can be considered to improve women's adaptation to the resettlement site include:

- ensuring that land titles and compensation entitlements are issued in the name of both spouses;
- reducing women's workloads by providing, for example, standpipes, hand pumps, grinding mills, woodlots, fuel efficient stoves, ox carts, and plows;
- improving health services by providing training for village midwives, primary health care centers, child spacing/family planning counseling, clean water supply, and sanitation training;
- improving family services by providing immunizations, child care for wage-earning women, primary schools, inputs for food-crop production, and housing; and
- increasing incomes by setting up credit groups, skills training, and access to markets.

723 International Finance Corporation (IFC), *Handbook for Preparing a Resettlement Action Plan* (2002) www.ifc.org/wps/wcm/connect/22ad720048855b-25880cda6a6515bb18/ResettlementHandbook.PDF?MOD=AJPERES..

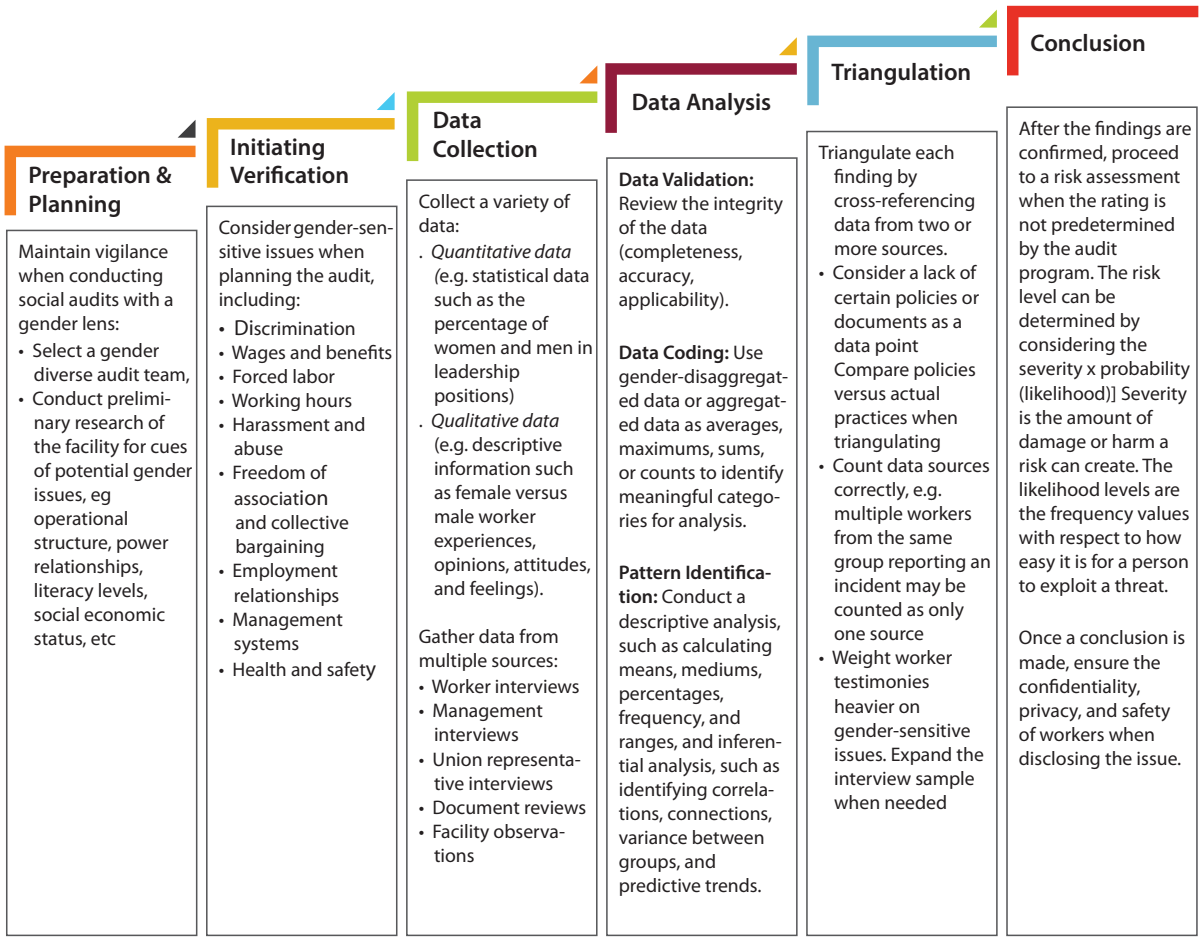
However, the social or legal status of women is likely to remain circumscribed and, thus, their ability to improve their own and their family's livelihoods will be compromised without longer-term "strategic" efforts to change gender discrimination. Some strategic initiatives that can improve women's livelihoods in their new settings include:

- improving educational opportunities (providing literacy and numeracy training, promoting girls' education);
- improving access to productive assets (credit, legal reform);
- improving participation in decision-making (support for women's interest groups); and
- promoting equal opportunity for women's employment.

BSR, Gender Equality in Social Auditing Guidance[724]

This guide provides practical guidance and tips for social auditors on how to identify gender-sensitive issues during a social audit. (…) The guide contains four sections: I) process for identifying and assessing gender-sensitive issues; II) gender-sensitive worker interview techniques; III) tips for reporting gender-sensitive issues; and IV) verification measures for different code-of-conduct categories.

Process for Identifying and Assessing Gender-Sensitive Issues



724 Business for Social Responsibility (BSR), *Gender Equality in Social Auditing Guidance – Summary* (2018) www.bsr.org/en/our-insights/report-view/gender-equality-in-social-auditing-guidance

ActionAid, Close the Gap![725]

The causes

Women's economic inequality is not natural or inevitable. The permanent subsidy to the global economy that poor women's work represents is a human-made, structural problem: a direct consequence of policies, laws, systems and power structures that prevent women from achieving their true potential and living decently rewarded and dignified lives. There are at least four major structural causes that drive this injustice.

1. Growth at any cost: economic policies fuel inequality in work

Free trade and the rapid globalisation of markets, together with the expansion of many corporations' supply chains in developing countries, have undoubtedly created unprecedented opportunities for women to access paid work. However, this has still far too often been on unequal and highly exploitative terms.

For instance, women in developing countries often work in Export Processing Zones (EPZs) that attract foreign direct investment, and create demand for cheap labour to manufacture inputs that enter the value chains of multinational corporations. (...)

2. Caring for our people: not counted, not rewarded

Across countries, and regardless of income, women are excessively responsible for unpaid care work, while men are primarily engaged in market-based activities.

Care work includes cooking, cleaning, collecting firewood, taking care of children, the ill and the elderly. It is absolutely central to the proper functioning and wellbeing of societies, as well as to the reproduction of the workforce. It is nonetheless completely invisible in national accounts and statistics. It is taken for granted as a subsidy provided by 'women's work', but it is not really regarded as 'work', thus enjoying little recognition or reward. (...)

3. Financing for gender equality: short of the mark

In recent years, states, donors and businesses have all talked about investing more in women and girls. But while more money to support women and girls is of course a good thing, these investments have too often not materialised or have had very limited impacts. (…)

4. Women's voices: silenced and ignored

That fact that women's work is subsidising the world economy at a massive scale is also a reflection of gender discrimination at all levels of decision-making as well as the fact that voices of human rights defenders, both women and men, are silenced and ignored.

All over the world advances in respect for women and worker's rights have been achieved largely as a result of the work of feminist organisations and trade unions. However, governments and businesses continue to undermine rights to association and union representation, while union leaders and women human rights defenders suffer violence and harassment as a result of their work. (…)

Women's limited representation, voice and leadership are both cause and consequence of gender inequality. While men can be important advocates for change, the lack of women in positions of power means that they are not able to advance politically, express their demands in political processes, or influence the law or resource allocation directly. (…)

725 ActionAid, *Close the Gap! The Cost of Inequality in Women's Work* (2015) www.actionaid.org.uk/sites/default/files/publications/womens_rights_on-line_version_2.1.pdf.

ILO, Survey Concerning Working-Time Instruments[726]

International regulation of night work: An evolving rationale

400. When it became evident that industrialization in its first stages was drawing heavily on women and child shift workers, often under arduous working conditions, attempts began to be made to regulate night work. For example, dating back to the middle of the nineteenth century, night work of women was prohibited in the United Kingdom in 1844. However, it was not until the beginning of the twentieth century that international efforts on this issue began to produce results.

401. Immediately upon its creation, the ILO adopted international standards on night work aimed at protecting vulnerable categories of workers, such as young persons and women in industry. The Night Work (Women) Convention, 1919 (…). The rationale behind these instruments was the need to protect categories which were assumed to be physically weaker, more exposed to the hazards of night work and more susceptible to exploitation. More specifically, medical studies at that time argued that industrial work by women was detrimental to their health and linked to various pathologies, such as chronic anaemia and tuberculosis due to sunlight deprivation. It was also argued that night work of women was immoral and disruptive of family values.

402. Convention No. 4 therefore prohibits the employment of women (without distinction of age) during the night in any public or private industrial undertaking. (…)

404. The question of a revision of Convention No. 89 arose during the 1970s when doubts were raised concerning the appropriateness of maintaining special protective measures for women in light of the principle of equal treatment and non-discrimination between men and women in employment. The debate revolved around two main positions. On the one hand, those who advocated the maintenance of restrictions considered that women still need to be protected for a variety of reasons, or that the restrictions should be extended to men, rather than repealed. In their view, night work was abnormal and inherently detrimental to the health and welfare of all workers, and special protection for women from night work was still justified, as women still bore the main responsibility for family and household work. In contrast, those advocating the lifting of night work restrictions argued that the prohibition contravened the principle of equality because different treatment for men and women in this respect had no objective basis. It was argued that the prohibition of night work prevented women from obtaining certain jobs, and often hindered their access to higher wages and premium payments. Moreover, the ban on night work of women was not in line with contemporary conditions and impeded industrialization. Repealing the restrictions on night work would therefore have a positive impact on job creation, production, economic growth and standards of living.

406. In its 2001 General Survey, the Committee concluded that the gender-specific prohibition of industrial work during the night should progressively become irrelevant, and that it should be replaced by laws and practices that offer adequate protection to all workers. This is, however, subject to the understanding that national, regional and sectoral conditions and progress in achieving the elimination of discrimination vary considerably, and therefore that some women workers will still need protection, along with the pursuit of genuine conditions of equality and non-discrimination.

407. The Committee observes that many countries have since moved towards the removal of the prohibition of night work of women in industry in light of the principles of nondiscrimination and equality of treatment in employment and occupation. (…)

726 International Labour Organisation (ILO), General Survey Concerning Working-Time Instruments - Ensuring Decent Working Time for the Future (2018) www.ilo.org/ilc/ILCSessions/107/reports/reports-to-the-conference/WCMS_618485/lang--en/index.htm (references omitted).

409 (…) the Committee has recalled that general protective measures for women workers, such as blanket prohibitions, in contrast with special measures aimed at protecting maternity, are increasingly regarded as obsolete and unnecessary infringements on the fundamental principle of equality of opportunity and treatment between men and women.

415. (…) protective measures for women should be limited to the protection of maternity in the strict sense, and provisions relating to the protection of persons working under hazardous or difficult conditions, including night work, should be aimed at protecting the health and safety of both men and women at work, while taking account of gender differences with regard to specific risks to their health. With a view to repealing discriminatory protective measures applicable to women's employment, the Committee has recognized that it may be necessary to examine what other measures, such as improved health protection of both men and women, adequate transportation and security, as well as social services, are necessary to ensure that women can work on an equal footing with men.

[The Protocol to Convention No. 89, and Convention No. 171 were adopted in 1990.]

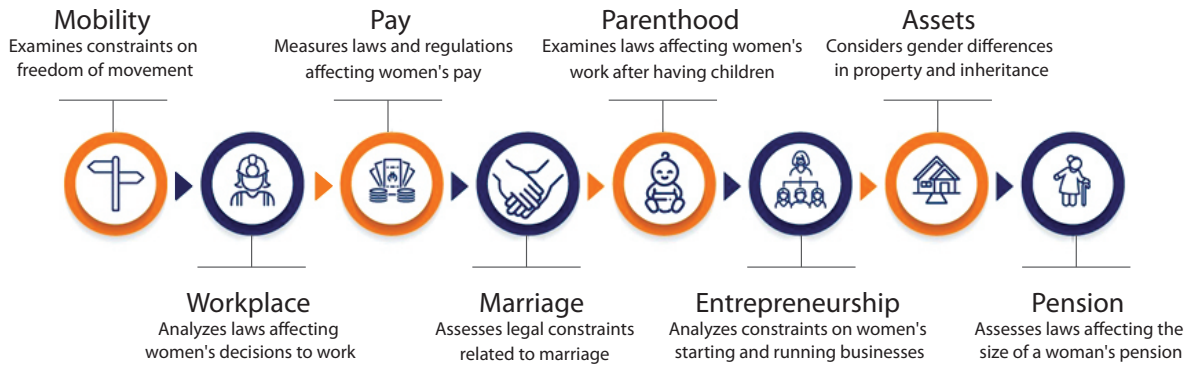
417. The Protocol to Convention No. 89 gives greater flexibility to the Convention through the possibility of introducing exceptions from the prohibition of night work and variations in the duration of the night period agreed between the organizations representative of the employers and workers concerned. While maintaining the focus on the protection of women from arduous working conditions, it therefore opens the possibility for women to work at night under certain well-specified conditions.

418. On the other hand, Convention No. 171 is not devised as a gender-specific instrument, but focuses on the protection of all night workers, thereby shifting the emphasis from a specific category of workers and sector of economic activity to the protection of night workers irrespective of gender in almost all branches and occupations. It demonstrates the major shift that has occurred over time from a purely protective approach concerning the employment of women to one based on promoting genuine equality between women and men and eliminating discriminatory law and practice.

World Bank, Women, Business and the Law [727]

Women, Business and the Law 2020 is the sixth in a series of studies that analyze laws and regulations affecting women's economic opportunity in 190 economies. Eight indicators—structured around women's interactions with the law as they begin, progress through, and end their careers—align with the economic decisions women make at various stages of their lives. The indicators are Mobility, Workplace, Pay, Marriage, Parenthood, Entrepreneurship, Assets, and Pension.

Eight indicators measure legal differences between men and women as they transition through different stages of working life



727 World Bank, *Women, Business and the Law* (2020) https://openknowledge.worldbank.org/bitstream/handle/10986/32639/9781464815324.pdf.

What does the women, business and the law Index measure?

Mobility

1. Can a woman choose where to live in the same way as a man?
2. Can a woman travel outside her home in the same way as a man?
3. Can a woman apply for a passport in the same way as a man?
4. Can a woman travel outside the country in the same way as a man?

Workplace

1. Can a woman get a job in the same way as a man?
2. Does the law prohibit discrimination in employment based on gender?
3. Is there legislation on sexual harassment in employment?
4. Are there criminal penalties or civil remedies for sexual harassment in employment?

Pay

1. Does the law mandate equal remuneration for work of equal value?
2. Can women work the same night hours as men?
3. Can women work in jobs deemed dangerous in the same way as men?
4. Are women able to work in the same industries as men?

Marriage

1. Is there no legal provision that requires a married woman to obey her husband?
2. Can a woman be head of household in the same way as a man?
3. Is there legislation specifically addressing domestic violence?
4. Can a woman obtain a judgment of divorce in the same way as a man?
5. Does a woman have the same rights to remarry as a man?

Parenthood

1. Is paid leave of at least 14 weeks available to mothers?
2. Does the government administer 100% of maternity leave benefits?
3. Is paid leave available to fathers?
4. Is there paid parental leave?
5. Is dismissal of pregnant workers prohibited?

Entrepreneurship

1. Does the law prohibit discrimination in access to credit based on gender?
2. Can a woman sign a contract in the same way as a man?
3. Can a woman register a business in the same way as a man?
4. Can a woman open a bank account in the same way as a man?

Assets

1. Do men and women have equal ownership rights to immovable property?
2. Do sons and daughters have equal rights to inherit assets from their parents?
3. Do female and male surviving spouses have equal rights to inherit assets?
4. Does the law grant spouses equal administrative authority over assets during marriage?
5. Does the law provide for the valuation of nonmonetary contributions?

Pension

1. Are the ages at which men and women can retire with full pension benefits equal?
2. Are the ages at which men and women can retire with partial pension benefits equal?
3. Are the mandatory retirement ages for men and women equal?
4. Are periods of absence due to child care accounted for in pension benefits?

Findings

- Better performance in the areas measured by the Women, Business and the Law index is associated with more women in the labor force and with higher income and improved development outcomes.
- Since 2017, 40 economies have enacted 62 reforms enhancing gender equality. (…)
- On average, women have just three-fourths of the legal rights afforded to men.
- With a recent reform to parental leave, Canada joins seven other economies that score 100 on the Women, Business and the Law index: Belgium, Denmark, France, Iceland, Latvia, Luxembourg, and Sweden.

World Economic Forum, Global Gender Gap Report[728]

Since 2006 the Global Gender Gap Index has been measuring the extent of gender-based gaps among four key dimensions (Economic Participation and Opportunity, Educational Attainment, Health and Survival, and Political Empowerment) and tracking progress towards closing these gaps over time. (…)

2. Across the four subindexes, on average, the largest gender disparity is—once again—the Political Empowerment gap. Despite being the most improved dimension this year (driving the overall positive performance) only 24.7% of the global Political Empowerment gap has been closed in 2020. The second-largest gap is on Economic Participation and Opportunity; 57.8% of this gap has been closed so far, which represents a slight step back since last year. Progress towards closing the Educational Attainment and Health and Survival gaps is more advanced: 96.1% and 95.7%, respectively, of these gaps have been closed to date, both marginally improved since last year.

728 World Economic Forum, *Global Gender Gap Report* (2020) http://www3.weforum.org/docs/WEF_GGGR_2020.pdf.

4. In parallel to improving representation of women among political leaders, the number of women in senior roles within the Economic Participation and Opportunity dimension has also increased. Globally, 36% of senior private sector's managers and public sector's officials are women (about 2% higher than the figure reported last year). Despite this progress, the gap to close on this aspect remains substantial as only a handful of countries are approaching parity.

5. In contrast to the slow but positive progress in terms of leadership positions, women's participation in the labour market is stalling and financial disparities are slightly larger (on average), explaining the step back registered by the Economic Participation and Opportunity subindex this year. On average, only 55% of adult women are in the labour market, versus 78% of men, while over 40% of the wage gap (the ratio of the wage of a woman to that of a man in a similar position) and over 50% of the income gap (the ratio of the total wage and non-wage income of women to that of men) are still to be bridged. Further, in many countries, women are significantly disadvantaged in accessing credit, land or financial products, which prevents opportunities for them to start a company or make a living by managing assets.

7. Projecting current trends into the future, the overall global gender gap will close in 99.5 years, on average, across the 107 countries covered continuously since the first edition of the report. Lack of progress in closing the Economic Participation and Opportunity gap leads to an extension of the time it will be needed to close this gap. At the slow speed experienced over the period 2006–2020, it will take 257 years to close this gap. (…)

UN, Women's Rights Are Human Rights[729]

[Women's rights versus cultural diversity]

The universality of human rights and their validity in a given local context have often been contested through relativist discourses that brand them as foreign ideas incompatible with local culture. However, the Special Rapporteur in the field of cultural rights has warned against discourses that disregard the fact that culture is not static and changes over time. She also points to women's lack of influence in decision-making processes which define the culture of any given community.

(…) the question of universality has often been raised when States have tried to justify violations of women's rights in the name of culture. The Special Rapporteur on violence against women in her report on cultural practices within the family that are violent towards women highlights female genital mutilation, so-called honour killings of women, son preference and witch hunting as examples of customs that have been defended under the pretext of being part of a given culture. Stereotypes and cultural norms which dictate prescriptive roles for women in society also have a negative impact on women's enjoyment of their human rights. For instance, girls' lack of access to education has sometimes been justified on the presumption that, as mothers and wives, they will not enter the workforce and thus do not require education.

[Gender equity and gender equality]

The term "gender equity" has sometimes been used in a way that perpetuates stereotypes about women's role in society, suggesting that women should be treated "fairly" in accordance with the roles that they carry out. This understanding risks perpetuating unequal gender relations and solidifying gender stereotypes that are detrimental to women. The Committee on the Elimination of Discrimination against Women has emphasized (…) that "States parties are called upon to use exclusively the concepts of equality of women and men or gender equality and not to use the concept of gender equity in implementing their obligations under the Convention." As the legal term used in the Convention, gender equality cannot be replaced by equity, which is a concept conditioned by subjective criteria.

729 Office of the UN High Commissioner for Human Rights, *Women's Rights are Human Rights* (2014) www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf (references omitted).

Some stakeholders have also favoured the language of equity on the misunderstanding that gender equality means the same or identical treatment of men and women, rather than taking into account the actual circumstances of men and women. As explained above, substantive equality, which is the standard to be met under human rights law, requires measures to achieve equality of results. This may mean that women and men are not always treated in exactly the same manner, in order to redress historical discrimination and/or take account of women's biological differences.

Equity is the moral imperative to dismantle unjust differences based on principles of fairness and justice. It requires a focus on the most disadvantaged and the poorest. Many [development organizations] have made equity a central part of their agenda. However, from a human rights perspective, relying on equity has certain risks because its definition is a malleable concept that is not legally binding. While equity may denote justice, it may dilute rights claims if considered separately from equality and non-discrimination and risks being defined arbitrarily according to political and ideological expedience.

[Gender]

Gender refers to socially constructed identities, attributes and roles for women and men. (…) Gender constructions are dynamic and fluid; they change over time and can be different in different cultures. As an example of socially learned differences, women's role in most societies has traditionally been to take care of the household and the children, whereas the role of men has been to provide for the family by working outside the home. In most societies, these traditional perceptions of women's and men's roles have changed and are constantly evolving.

Analysing international law and international human rights law from a gender perspective is important, because gender analysis helps us understand how women and men experience human rights violations differently as well as the influence of differences such as age, class, religion, culture and location. It highlights and explores hierarchical and unequal relations and roles between and among males and females, the unequal value given to women's work, and women's unequal access to power and decision-making as well as property and resources. Gender mainstreaming or integration helps assess the impact of different laws, policies and programmes on groups of men and women, as explained in the box below.

Martignoni & Umlas, Gender-Responsive Human Rights Due Diligence[730]

Gender is a category of analysis that can be used to render visible relationships of power and domination. The term 'gender' is used to describe the socially constructed differences between people that are: attributed throughout the life cycle; learned, not innate; changeable for any given society over time and manifested with wide variations both within and between cultures. Gender influences the opportunities and resources accessible to people in all societies and has historically resulted in a hierarchical distribution of power and rights that favours men and disadvantages women and people with non-binary gender identities, such as transgender and intersex persons. (…)

The often-used 'gender lens' metaphor is not helpful as it implies laying a filter over 'regular HRDD' – that is, simply putting 'gender glasses' on the process. The concept of 'gender responsive human rights due diligence' better captures the give and take relationship between the company and its environment and the need to embed throughout the HRDD process an awareness of and response to what is going on in each context - which could be as wide as the marketplace or as specific as an individual factory or farm.

Gender-responsive HRDD requires companies to take a holistic approach to their operating environments by identifying, preventing, mitigating and accounting for the ways in which their actions or omissions may differently affect men, women and gender non-conforming people. This means that businesses must go beyond minimum standards to respect human rights and also consider ways in which they might use their influence in specific situations to facilitate human rights guarantees by identifying, confronting and helping to dismantle structural forms of inequality. (…)

730 Joanna Bourke Martignoni & Elizabeth Umlas, *Gender-Responsive Human Rights Due Diligence, Geneva Academy of International Humanitarian Law and Human Rights* (2018) www.geneva-academy.ch/joomlatools-files/docman-files/Academy%20Briefing%2012-interactif-V3.pdf.

In a report on corporate HRDD, the UN Working Group on Business and Human Rights noted that 'some business platforms suggest that addressing root causes is the next frontier for business'. The same report points to examples in which companies are collaborating with other stakeholders precisely to 'address specific and complex issues in supply chains' and other 'systemic issues'. This bodes well for the kind of work needed for a truly gender-responsive due diligence, which could extend to company engagement at the policy advocacy level: for example, by supporting reform of discriminatory laws. (…)

Many of the employment opportunities that have emerged from trade liberalization in various sectors of the global economy are highly gender-segregated and, as a general rule, women and girls are more likely to be concentrated in precarious jobs characterized by unequal remuneration, poor working conditions, an absence of social security coverage and low levels of unionization. For this and many other reasons, the adoption of gender-responsive HRDD processes by business has the potential to play a crucial role in rendering visible, preventing, monitoring and remedying gendered inequalities on a number of scales, from the local to the national and transnational. (…)

The programmes and initiatives reviewed in this section could be seen as contributing to the rethinking of gender in supply chains going on in many quarters. They suggest that, while there is no simple answer to what gender-responsive HRDD in GSCs looks like, companies might want to consider certain starting points:

- recognizing embedded gender norms and structural violence that form the backdrop to supply-chain sourcing in many industries
- looking outside the workplace to understand what happens within it
- not simply 'adding workers' voices' to social auditing but centering supply-chain labour rights programmes on workers' own participation in preserving these rights
- ensuring independent and gender-responsive investigation of gender-related rights violations
- advocating for gender equality in sourcing-country laws
- seeing the whole context – focusing on cross-cutting rights violations and how these can reinforce each other
- understanding the company's own place in this context and its impact on existing norms

Background (Cambodia)

Rectangular Strategy for Growth, Employment, Equity and Efficiency, Phase IV[731]

2.3. The Four Strategic Rectangles

Rectangle 1- Human Resource Development

Human resource development is considered the priority of the Rectangular Strategy in every stage, and in particular, has become the first priority in the stage 3 and stage 4, aimed at improving education, vocational skills, competence, entrepreneurship, creativity, innovation, virtue, morality, patriotism and sense of responsibility, health and physical fitness, women's roles and social protection. With this regard, human resource development in the 6th Legislature of the National Assembly will continue to focus on: 1). strengthening of the quality of education, science, and technology sectors; 2). vocational training; 3). enhancement of public health service and nutrition; and 4). strengthening of gender equity and social protection.

731 Royal Government of Cambodia, *Rectangular Strategy for Growth, Employment, Equity and Efficiency: Building the Foundation Toward Realizing the Cambodia Vision 2050, Phase IV* (2018) http://cnv.org.kh/wp-content/uploads/2012/10/Rectangular-Strategy-Phase-IV-of-the-Royal-Government-of-Cambodia-of-the-Sixth-Legislature-of-the-National-Assembly-2018-2023.pdf.

Side 4. Improving Gender Equity and Social Protection

The Royal Government's strategic goal is to strengthen gender equity and social protection to enhance social-economic situation and strengthen women's role in the society who are the backbone of the economy and society. As a result, the Royal Government has achieved some great results such as mainstreaming gender equity in policy framework and national development plan, reducing gender gap in education, vocational training and civil service; widening women entrepreneurship initiative, reducing domestic violence and sexual abuse against women and children, uplifting social morality, women dignity and Cambodian family, and improving legal service for women and children. With regard to the social protection, the Royal Government has put in place and implemented the "Social Protection Policy Framework 2016-2025" which is comprehensive and respond to actual level of national development along with the reestablishment of its management institutions. In particular, the Royal Government is implementing the food reserve program, school feeding program, scholarship program, cash support to pregnant women and children of the poor families which are part of social assistance system; and has put in place health equity fund, national social security on healthcare and occupational risks for workers-employees under the labor law, healthcare insurance scheme for civil servants, retirees and veterans, and Persons with Disabilities Foundation.

Exploring the Opportunities for Women-Owned SMEs in Cambodia[732]

Women own the majority of businesses in Cambodia (61 percent). As a result, their contribution to the private sector development can hardly be overlooked. This research shows that 90 percent of the SMEs managed by women were profitable last year. Most of them expect growth or at least stable development (84 percent) in the future, affirming that women are motivated and capable to establish and lead businesses. In the long-term, this will help them become independent and fulfill their aspirations.

Nevertheless, a high level of motivation and impressive statistics on economic participation do not necessarily translate into full access to equal opportunities. This research reveals that Cambodian social norms and gender disparities in access to education still prevent women from expanding their opportunities. Consequently, women tend to face more obstacles in terms of access to markets and information, and operational issues of their businesses....

1.4.2 Key Constraints Faced by Women-owned Businesses

Social and Cultural Constraints

For women, a high level of participation in the economy does not necessarily imply that they are able to fully utilize the opportunities and benefits, compared to men. Research and discussions with SMEs and stakeholders have revealed that Cambodian social norms and gender relations pose barriers to women's economic empowerment and growth; they prevent women from expanding their opportunities. Although women are nominally guaranteed equal rights with men, unlike their male counterparts, women are seen as having a lower status in society (see Box 2).

Women's subordination to men under the Chbab Srey (traditional Code of Women) limits their economic independence and opportunities. Though Cambodian society has become more open and women are taking on more dominant roles in the economy, the effects of Chbab Srey still perpetuate negative gender stereotypes. Consequently, they prevent women from developing and succeeding in businesses.

Traditional and gender norms assigned to girls and young women (early marriage, household chores, taking care of younger siblings, etc.) result in limited educational opportunities. Consequently, women often enter the labor market with fewer educational qualifications and skills than men. (...)

732 International Finance Corporation, *Exploring the Opportunities for Women-owned SMEs in Cambodia* (2019) https://www.ifc.org/wps/wcm/connect/9e469291-d3f5-43a5-bea2-2558313995ab/Market+Research+Report+on+Women_owned+SMEs+in+Cambodia.pdf?MOD=AJPERES&CVID=mOU6fpx.

Instruments (Cambodia)

Constitution of the Kingdom of Cambodia[733]

Article 31: The Kingdom of Cambodia recognizes and respects human rights as stipulated in the United Nations Charter, the Universal Declaration of Human rights and the covenants and conventions related to human rights, women's rights and children's rights.

Article 36: Khmer citizens of either sex shall enjoy the right to choose any employment according to their ability and the needs of the society. Khmer citizens of either sex shall receive equal pay for the same work... Khmer citizens of either sex shall have the right to obtain social security and other social benefits as determined by law. Khmer citizens of either sex shall have the right to form and to be members of trade unions. (...)

Article 45: All forms of discrimination against women shall be abolished. The exploitation of women in employment is prohibited. Men and women are equal in all fields especially with respect to marriage and family matters.

Article 46: Trading human beings, the exploitation of prostitution and obscenity, which affect the reputation of women, shall be prohibited.

The termination of a woman's employment because of her pregnancy is prohibited. Women shall have the right to take maternity leave with full pay and with no loss of seniority or other social benefits.

The State and society shall provide opportunities to women, especially for those living in rural areas without adequate social support, so that they can obtain employment and medical care, send their children to school and have decent living conditions.

Labor Law[734]

Article 12: Except for the provisions fully expressing under this law, or in any other legislative text or regulation protecting women and children... no employer shall consider on account of: race, color, sex, creed, religion, political opinion, birth, social origin, membership of workers' union or the exercise of union activities; to be the invocation in order to make a decision on: hiring, defining and assigning of work, vocational training, advancement, promotion, remuneration, granting of social benefits, discipline or termination of employment contract. (...)

Article 182: In all enterprises covered by Article 1 of this law, women shall be entitled to a maternity leave of ninety days. After the maternity leave and during the first two months after returning to work, they are only expected to perform light work. The employer is prohibited from laying off women in labor during their maternity leave or at a date when the end of the notice period would fall during the maternity leave.

Article 183: During the maternity leave as stipulated in the preceding article, women are entitled to half of their wage, including their perquisites, paid by the employer. Women fully reserve their rights to other benefits in kind, if any (...)

Article 184: For one year from the date of child delivery, mothers who breast-feed their children are entitled to one hour per day during working hours to breast-feed their children. (...) The exact time of breastfeeding is to be agreed between the mother and the employer. (...)

Article 186: Managers of enterprises employing a minimum of one hundred women or girls shall set up, within their establishments or nearby, a nursing room and a crèche (day-care center). If the company is not able to set up a crèche on its premises for children over eighteen months of age, female workers can place their children in any crèche and the charges shall be paid by the employer.

733 Cambodia, *Constitution of the Kingdom of Cambodia* (1993) https://pressocm.gov.kh/en/archives/9539.

734 Cambodia, *Labor Law* (1997) https://www.ilo.org/dyn/travail/docs/701/labour.

National Strategic Development Plan[735]

3.4 Improving gender equity and social protection

B. Planned Actions to Implement the Prioritized Policies

4.90 The priority activities are: Women in Education and Economic Development

The MOWA will continue to lead the coordination in mainstreaming gender in programs and education systems and promoting women's economic empowerment and improving the living conditions of the community through:

- Strengthening the creative, innovative, and inclusive entrepreneurial and business development services of the Women Development Centers.
- Increasing the opportunity, the friendly environment, the peace and the possibility of women getting the suitable jobs, the development of technical and vocational skills, including digital technology following the women's needs and market demand, in particular the standard techniques.
- Expanding partnerships with the private sector and relevant partners in promoting entrepreneurship and potential development, experience and techniques to increase product productivity and reach national and regional markets.
- Increasing the participation of girls in education at the higher levels, especially in education, science, technology, engineering, creative arts, and mathematics.
- Promoting vocational trainings, supporting small and medium enterprises, including the National Entrepreneurship Fund and the Center for Entrepreneurship Development responding to gender equality (...)

Neary Rattanak IV: Five Year Strategic Plan for Gender Equality[736]

The Millennium Development Goal Acceleration Framework (MAF) was developed to accelerate achieving CMDG Goal 3, focusing on women's economic empowerment and mobilizing public institutions, the private sector and development partners. Its three strategies are: 1) Strengthening vocational skills for women based on market demand; 2) Developing micro, small and medium enterprises; and 3) Improving livelihoods in rural areas. (...)

1.1. Women's Economic Empowerment

Strategic Objective

Improve women's status in the economy, particularly in formal employment, with increased incomes, livelihoods and social protection, and equal economic and social rights and opportunities.

Strategies (…)

2. Mainstream gender in the assessments for human resource development related to ASEAN integration and ensure inclusion of vulnerable groups.

735 Royal Government of Cambodia, *National Strategic Development Plan 2019-2023* (2019) http://www.mop.gov.kh/en-us/Home/Download/85bc808d-ea30-4f5f-95af-766e8490c3c5.

736 Ministry of Women's Affairs, *Neary Rattanak IV: Five Year Strategic Plan for Gender Equality and Women's Empowerment 2014-2018* (2014) https://www.kh.undp.org/content/dam/cambodia/docs/DemoGov/NearyRattanak4/Cambodian%20Gender%20Strategic%20Plan%20-%20Neary%20Rattanak%204_Eng.pdf.

3. Innovate models for cooperating with the private sector, particularly in developing 'green' social enterprises.

4. Promote the establishment and implementation of the National Employment Policy (NEP) and programs that include opportunities for women.

5. Expand women's benefit through improved working conditions, social protection and labour standards.

6. Facilitate women's equal access to the arbitration council for resolving labour disputes.

7. Facilitate women's equal access to vocational training at public, private or NGO facilities.

8. Increase understanding of how to create and strengthen women's formal enterprises.

9. Facilitate women's equal access to business services relevant for MSMEs.

10. Enhance networking capacity of women entrepreneurs.

11. Equip women with skills and competencies to manage their households in a socially and environmentally sustainable manner.

12. Ensure women's access to secure financial services.

13. Improve women's economic opportunities so that they have the choice to work, earn income and invest in livelihoods.

14. Promote and address women migrant workers' challenges in the process of developing migration policies and other migration programs.

15. Ensure the reduction of migration-related risks for Cambodian women workers.

CEDAW, Concluding Observations on the Sixth Periodic Report of Cambodia[737]

Employment

36. The Committee welcomes the high rate of participation by women in the labour force in the State party. Nevertheless, it remains concerned about:

    (a) The high concentration of women in low-wage and unskilled jobs, including in the textile, garment and footwear industries and the construction sector, where women are employed on short-term or fixed-duration contracts, which undermines their ability to bargain collectively through trade unions and precludes them from basic labour protection and benefits, such as maternity leave and paid leave;

    (b) The high concentration of women in the informal employment sector, including domestic work, where they continue to be excluded from labour and social security protection, such as minimum wages, overtime compensation and maternity leave;

    (c) Limited opportunities for women to pursue their careers in the formal employment sector owing to the disproportionate burden of household and childcare responsibilities placed on them;

737 UN Committee on the Elimination of Discrimination against Women, *CEDAW Concluding Observations on Cambodia* (2019) https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fKHM%2fCO%2f6&Lang=en.

(d) The absence of a comprehensive law that defines and effectively prohibits violence and harassment, including sexual harassment, in the workplace, which is reportedly prevalent in the State party, particularly in the garment industry and while commuting to and from work;

(e) The inadequate guarantee in national legislation of the principle of equal pay for work of equal value;

(f) The situation of Cambodian women who migrate abroad to work in low-paid sectors such as manufacturing, domestic work, hospitality and agriculture, where they frequently experience abuse and exploitation.

Replies of Cambodia to the List of Issues for the Sixth Periodic Report[738]

Employment

80. In 2018, the RGC made significant improvements in women's workers' rights and benefits as follows: 1) Employees who are more than 3 month's pregnant are allowed to leave 15 minutes early from work, 2) Female workers are entitled for free health care during pregnancy and post delivery, 3) Female workers who are pregnant will receive 400,000 Riels for each child at the time of birth, 800,000 Riels for twins, and 1,200,000 Riels for triplets. For triplets, they will also receive 5,000,000 Riels from the Prime Minister, and 4) Female workers will receive 120 per cent of their salary during their 3 month maternity leave, which is equal to USD 218 per month, compared to the monthly minimum wage of USD 182.

81. The RGC has focused on dialogue and cooperation (bilateral, trilateral and multilateral partnerships) through organizing annual consultative workshops to monitor and evaluate labour regulations and policy implementation. MoLVT has organized workshops to discuss drafting the policy on minimum wage and managing the complaint process through the Arbitration Council. Working conditions in the garment industry in Cambodia have improved as a result of the tripartite dialogue mechanism through the exchange of experiences and lesson learned of the Better Factories Cambodia program. MoLVT is currently implementing different policy frameworks to improve the health and safety of female workers in the agriculture and construction sectors.

82. Under the 2016 Law on Trade Unions, in 2018 MoLVT registered 4,621 trade unions with 13,863 leaders, of which 4,853 or 35 per cent are women.

Worker's Information Center, Employment and Women Garment Workers[739]

Box A: Women Workers' Living Conditions

- Rented room fee between USD20 to USD45 (non-negotiable & increased)
- Room are generally small, unhygienic, and unsafe
- Cost of living (foods, house utilities) have increased
- Workers (92%) access private water (1,200Riels per cubic or 2,500 per cement tank)
- Workers (50.7%) experienced theft or break-in at accommodation (mostly during day time)
- Workers (38.9%) reported experiencing sexual harassment (82% reported this was verbal harassment while 12% reported this was inappropriate behavior i.e. whistle, stare at women's movement and body)
- The sexual harassment took place on the way to and from work (54%), at the place of residence (24%) and at workplace (14%).

738 UN Committee on the Elimination of Discrimination against Women, *Replies of Cambodia to the List of Issues and Questions in Relation to the Sixth Periodic Report of Cambodia* (2019) https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fRLI%2fKHM%2f37384&Lang=en.

739 Worker's Information Center, *Women and Employment: Cambodia Women Garment Workers' Experience, Shadow Report for Working Group 74th Session of the CEDAW Committee* (2019) https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fCSS%2fKHM%2f37334&Lang=en.

(...) even though there has been a minimum wage increase over the past several years, the working and living conditions (see Box A) of women workers have not improved.

(...) When women workers had pain during their menstruation, the supervisor does not allow sick leave to workers, instead asking them to endure the pain as this is the regular (monthly) women issue. (...)

The law on labour (article 186) requires enterprises to set up a nursing room or day-care-centre if the enterprise employing minimum of one hundred women or girls. Five (5) out of 23 factories provide no such facility while the rest, provide either nursing room or day-care-centre without employing a person at the centre. CARE project baseline survey with over 500 workers showed that 44% spend more than USD10 per week on childcare.

"I've asked administrator to request the employer to have day-care-centre at our factory, if not possible, maybe provide financial support to mother to put the baby at the place outside the factory."

Sexual harassment in the workplace is another significant issue for women workers. CARE International Cambodia study report in March 2017 on The Prevalence and Productivity Cost of Sexual Harassment to the Cambodian Garment Industry found nearly one (1) in three (3) female garment factory workers report experiencing sexually harassing behaviour at the workplace.

Solidarity Center Cambodia, Labor Rights and Gender[740]

Gender Based Violence in the World of Work

5.2. It is notoriously difficult to map out the full extent of gender-based violence in the world of work since the subject is culturally taboo and it is often difficult for victims to speak up. (...) Better Factories Cambodia found only two cases of physical and verbal sexual harassment in their study. However they found forms of harassment, such as threatening and throwing objects in 12% of factories. On the other hand, a 2017 report CARE report found that one third of female workers in the garment industry experience sexual harassment at work. (...) Research by ActionAid in Cambodia found that half of garment workers interviewed had experienced or witnessed harassment in the workplace.

5.3. Harassment in the entertainment industry is similarly increasing. Women working in casinos are generally harassed by managers, but also increasingly by customers. One of the union leaders reported that within a two-month period a hiring official threw a water bottle to a dealer leaving bruises on her face. Only after it had happened five times did the company issue a warning.

5.4. In 2018, nine women leaders from seven unions in Cambodia, representing the garment sector, conducted interviews and held focus groups with 83 women garment workers to gather information about the scope and incidence of GBV in garment and apparel sectors. Of these respondents:

(i) 48% self- identified as targets of gender-based violence at work;

(ii) 87% experienced verbal harassment or unwanted touching based on their gender;

(iii) 47% had a supervisor or manager force them to become their mistress or "second wife" with the understanding that it would improve working conditions;

(iv) 28% reported that someone at work forced them to sleep with them to extend a contract, fix their sewing machine or obtain a bonus;

(v) 35% reported their managers to be the perpetrators of GBV;

740 Solidarity Center Cambodia, *Alternative Report on Labor Rights and Gender for Submission to the CEDAW Committee* (2019) https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fCSS%2fKHM%2f37341&Lang=en.

(vi) 24% reported sewing machine mechanics to be perpetrators of GBV;

(vii) 72 % of workers were on short-term contracts

(viii) 17 out of 49 workers reported having direct experience with or seen verbal violence against pregnant workers.

Maternity and Paternity Protection

7.6. In practice, many factories routinely use short-term contracts for all staff regardless of length of employment, and fire pregnant women at some point prior to the birth of their child to avoid their legal obligations.

7.7. (...) many women working in the garment industry report that their short-term contracts were not renewed after the employer discovered that they were pregnant. This is also born out by cases reported in the mainstream media. In cases where this is challenged at the Arbitration Council, the burden of proof to establish the pregnancy discrimination is on the employee, not the employer. This makes proving such discrimination very difficult. In the interviews conducted by WUN in 2019, they found 36 reports of alleged discrimination on the basis of both pregnancy and maternity, including:

i. Pre-employment urine tests (...)

ii. Dismissal of pregnant women (...)

iii. Non-renewal of pregnant women's contracts (...)

iv. Requiring excessive overtime work from pregnant workers in order to pressure them to quit.

v. Changing worker's position after becoming aware of pregnancy,

vi. Dismissal of returning FDC worker after requesting breast feeding breaks or lighter duties (...)

Cambodian NGO Committee on CEDAW, Submission to CEDAW[741]

J. Employment

New research conducted in 2019 by 8 unions who belong to the Women Union Network show how pervasive the misuse of fixed duration (short-term) contracts is. A total of 192 interviews were conducted of 46 men and 146 women who had filed complaints with their respective unions. 32 of the complaints were discrimination against pregnant women or breastfeeding mothers, and the rest show a restriction of women's right to join unions or misuse of fixed duration contracts. The termination of fixed duration contracts was used as a vehicle to retaliate against union members or end the employment of new mothers since no reason is required for non-renewal and the burden is on the worker to prove that the employer had an illegal intent.

(...) Additional research produced in 2019 based in part on interviews of 83 workers from 6 factories found that 72% were on fixed duration contracts and 28% had been forced to have sex by someone at work in exchange for extending a contract, having their sewing machine fixed, or to obtain a bonus. 46% said they had been forced to have regular sex with their supervisor or manager in exchange for improved working conditions. 87% reported experiencing verbal harassment or unwanted touching in the workplace based on their gender. (...)

Safety while commuting is another key issue for the mainly female factory worker sector. (...) Moreover, lack of safe transport prevents workers from using child care and breastfeeding facilities in those factories that adhere to the legal requirement to provide them. (...)

741 The Cambodian NGO Committee on CEDAW (NGO-CEDAW), *Submission by NGO-CEDAW for the 74th session of CEDAW Committee for the review of Cambodia's Compliance with CEDAW* (2019) https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fCSS%2fKHM%2f37361&Lang=en.

ACLEDA Bank, Environmental and Social Sustainability Report[742]

The following are key principles in ACLEDA's corporate social responsibility policy:

Staff

- ACLEDA is an 'equal opportunity' employer. Apart from those jobs which involve a higher physical risk (e.g. guards and messengers) appointment to all positions at every level is based entirely on merit regardless of gender or physical disability. (...)
- The Audit and Compliance Committee under the chairmanship of the Board of Director has been specifically tasked with the responsibility of setting and monitoring the Bank's moral and ethical standards and respect for human rights. (...)

Community

ACLEDA recognises that playing our part as good citizens in the community in which we abide is vital to our mutual interests and prosperity. Major initiatives we are taking are:

- ACLEDA practices equality in its lending irrespective of gender or race: 55.10% of our borrowing customers are female. (...)
- In 2019, ACLEDA Bank Plc. took part in important social and humanitarian activities through the following donations:

1. Sponsored Events
    - Diamond sponsor of the Cambodia Women Entrepreneurs Association (CWEA) to support their program "Cambodia Women Entrepreneurship Day" under the title: "Women Business Growth during Digital Era". (...)
    - Donation to the Cambodian Women Entrepreneurs Association on their Gala 7th Anniversary. (...)

J Trust Royal Bank, Remuneration and Benefits[743]

Medical & Insurance Plan

J Trust Royal offers our employees the accidental and health care coverage being provided by well-known medical and insurance company. The coverage is also extended to employee's spouse and children.

Baby Delivery Allowance

Childbirth allowance is being offered to provide financial assistance to our female employee who gives birth to newborns.

Variety of Leaves

In addition to annual leave entitlement, J Trust Royal offers our employees with other types of leave which include paid maternity, compassionate, study leave and flexible unpaid leave.

742 ACLEDA Bank Plc, *Environmental and Social Sustainability Report* (2019) https://www.acledabank.com.kh/kh/eng/bp_sustainabilityreport.

743 J Trust Royal Bank, Career: *Remuneration and Benefits* (2020) https://jtrustroyal.com/en/careers/remuneration-and-benefits/.

Khmer Times, Interview with TrueMoney's Chief Strategy Officer [744]

(...) TrueMoney has around 40 percent of women in its workforce.

(...) TrueMoney is an equal opportunity employer and has not implemented any specific initiatives, such as gender-based hiring policies to achieve its gender-balance success. Instead, we have adapted our workplace to ensure that we assist women in applying for leadership positions within the company.

In addition, the overall pool of female applicants applying for the roles we offer has also increased organically as more women are completing higher education and more role models are promoted in the industry.

Looking to the future I believe that if other companies want to achieve a gender-balanced workforce like TrueMoney they need to most importantly empower their female staff at the leadership level. Promoting and empowering strong female leaders is by far the most effective way of achieving a true gender-balance goal at any company.

Better Factories Cambodia, Promoting Gender Equality: Gender Strategy[745]

Labour Participation

The increasing labour participation of women in the economy changes social norms, beliefs and perceptions of gender roles, albeit slowly. Female participation in the labour market is 79.2% compared to 86.7% for men, but a large share of women are employed in vulnerable employment. Vulnerable employment is the sum of own-account work and unpaid contributing family work and typically means long working hours, low productivity and lack of access to social protection. Women's labour participation is also constrained because of their reproductive role, whereas having children is usually a push factor for men towards employment, it has the reverse effect on women. On average, Cambodian women earn 71% of what men earn, in other words the gender annual earning gap is 29%.

Segregation

Across the world, women, regardless of age, are often overrepresented in sectors and positions where pay tends to be moderate. This is also the case in Cambodia. Two types of segregation are evident:

- Horizontal segregation, which relates to the high concentration of women in sectors such as manufacturing and agriculture.
- Vertical segregation, which refers to the high concentration of women in lower ranking positions (the large majority of female garment workers are sewers and most female farmers have more limited access to land and assets).

3. Gender Dynamics in the Cambodian Garment Sector

Workforce and Worker's Profile

The garment and footwear industry in particular are characterized by a number of specific gender dimensions. The workforce in both industries is comprised of over 80% women. (...) The move to a new environment with which they are unfamiliar, makes many women vulnerable for discrimination and exploitation. (...)

744 Harrison White, Financial Technology Sector Promotes Strong Female Leadership, Khmer Times, *Interview with TrueMoney's Chief Strategy Officer Frandara (Dara) Khuon* (2020) https://www.khmertimeskh.com/50764034/financial-technology-sector-promotes-strong-female-leadership/?fbclid=IwAR0nmxL8yajf3-2D2LyXcqTDBjblqGyVIcDdzPaTO_GuSfb17HtVz7FjzZA.

745 International Labor Organization (ILO) and International Finance Corporation (IFC), *Better Factories Cambodia: Promoting Gender Equality: Gender Strategy 2017-2018* (2018) https://betterwork.org/wp-content/uploads/2018/02/Gender-Strategy-2017-18.pdf.

Recruitment

Women are generally recruited for and mainly occupy the lower paid and lower skilled jobs (sewing machine operator) as opposed to men who dominate the higher paid jobs that require more skills and/or are physically heavier (maintenance, repair of machine, washing processes, cutting and printing, loading and unloading containers). Proof of direct discrimination is low, and only in 6% of the factories was gender a factor in hiring decisions in 2015. (…) Explanations for indirect discrimination – employers' prejudice - have been documented by many: young women are perceived to be more productive than old workers, women are cheaper and more obedient as well as the stereotyping that certain jobs, such as mechanic or manager, are inappropriate for women or because they "cannot do the job". Career advancement opportunities in the industry are rare, especially for women due to various reasons, including the widespread perception amongst both women and men that women don't make as good supervisors/managers because of gender stereotypical characteristics as well as their responsibilities at home. The senior management in most factories is most likely male and foreign.

Working Conditions

The working conditions in factories put high pressure on women's reproductive role. A Cambodian garment worker usually works 6 days a week from 7am to 11am, has a one hour lunch break, and continues from 12pm to 4pm and around 80% of workers work regular over time of two hours a day, commute time not included. (...) In 2015, one quarter of the employers did not provide the breaks or remuneration for breastfeeding correctly. Even if workers are able to take paid time off to breastfeed, the majority won't take time off because there is no facility (or refrigerator to lactate at work or go home earlier, because there is no transportation available outside regular working hours. (...) many new mothers do not return to the factory after their maternity leave ends, because they are not fit enough yet or cannot combine work and care. However, a large share of these women do return to the sector a little later (usually to a different factory), missing out on the benefits they had gained with their seniority.

Interestingly, women garment workers in Cambodia earn more money on average compared to male garment workers (...) This could be attributed to women spending more money to support their family a phenomenon that has also been found by economists worldwide.

Sexual Harassment

Harassment and sexual harassment is prevalent, but underreported because of a lack of mechanisms to address the issues within factories and because of internalized norms that make it 'normal' for people to be treated this way. (...)

The BFC assessment data show that cases of sexual harassment are difficult to identify. There are inevitable limitations to factory assessments – e.g limited time available to build trust, mixed worker interviews, stigmatisation of the victim and lack of formal reporting mechanisms - that are likely to cause underreporting. (...)

Trade Unions

Leadership positions in union confederations, federations and factory level unions are dominated by men. In 2011, all but one leader and intermediate leader of the union confederations were men. More women are increasingly becoming representatives at the factory level, but they are far from being equally represented. (...)

4. Our Approach

As women are often in subordinate positions compared to men, many initiatives are focused on women's empowerment. Empowerment is the process of enhancing the capacity of individuals or groups to make choices and to transform those choices into desired actions and outcomes. It implies women and men and girls and boys setting their own agendas, gaining skills, and increasing self-reliance. It is a process and an outcome. Women's empowerment implies an expansion in women's ability to make strategic life choices in a context where this ability was previously denied to them.

To sustainably change gender inequalities in societies, engagement of men and boys is crucial. Men have specific obstacles to overcome, especially the fact that for many a move towards gender equality is against their short-term interests. In most policies that seek to address gender imbalances, men are implicitly present as "the problem". When men are present only as a background category in a policy discussion about women, it is difficult to raise issues about men's and boys' interests or problems. If large numbers of men are to support and implement gender equality initiatives, it will be necessary to speak in concrete, positive ways to their concerns, interests, hopes and problems.

Better Factories Cambodia, Lessons from Factory Compliance Assessment[746]

(…) Better Work's 2015 impact assessment (hereafter 'impact study'), led by Tufts University, revealed the importance of addressing gender equality issues – in particular quality jobs and increased skill sets for women – not only for women's empowerment but also for better business outcomes and development indicators. (…) The study established a baseline in 2016 that covers 73 randomly selected Cambodian factories and included a survey of 1,500 workers and interviews with 50 managers. (…)

The relevant baseline findings are included in this report, confirming compliance findings and providing contextual information in addition to that captured by our factory compliance assessments. Additionally, as part of our analysis, we take stock of legal provisions and practices relating to gender equality.

The interconnectedness of gender equality themes



Discrimination

Preventing sexual harassment; tackling contractual discrimination (recruitment and occupational segmentation) bridging the gender wage gap



Paid Work & Care

Sexual and reproductive health and rights (including pregnancy related healthcare and nutrition); maternity protection; breastfeeding; childcare



Voice & Representation

Representation of women workers in factories' committee (including Better Work worker-management committee) and trade unions, union federations and employer organization; voice in collective bargaining processes



Leadership & Skill Development

Career opportunity in factories (e.g line supervisors and management position); leadership positions in governments, trade unions and employers organizations, financial literacy and household budget planning bridging the gender wage gap

746 International Labor Organization (ILO) and International Finance Corporation (IFC), Better Factories Cambodia: Towards Gender Equality: Lessons from factory compliance assessments 2017-2018 (2018) https://betterwork.org/wp-content/uploads/2018/04/Toward-Gender-Equality-2017-18.pdf.

The analysis also shows the interconnected nature of the four themes, and why it is that any approach to improve non-compliance rates for a specific question will need to consider more than that single issue to be transformative.

For instance, the highest reported non-compliance rate (i.e. for functioning nursing rooms and childcare) points to much wider issues, namely the challenge to combine paid work and care. Motherhood seems to be defined by the challenge of combining work and care.

Enabling women and men to combine paid work and care in decent ways is detrimental to achieving gender equality.

With a short duration of maternity leave, the return to work is challenging as women struggle to find adequate childcare options and cannot combine (exclusive) breastfeeding an infant with work in a garment factory. Non-compliance rates are not expected to improve much unless women start being closer to their children whilst at work and can and continue to breastfeed – a vicious circle.

The challenge to combine paid work and care leads to (sometimes unconscious) restricted opportunities for promotions and skills development, which in turn leads to a limited number of women in leadership positions. Successful strategies combatting sexual harassment and discrimination at work have been linked to a higher number of women in leadership positions, underlining the importance of creating circumstances in which women can reach their full potential.

A fair representation of women and men in leadership positions is also needed within trade unions. Not only are more female leaders needed to address women specific issues, breaking the stereotypical assumption that mainly men are involved with union activities (and "trouble makers") is equally important to combat discrimination.

CARE International, I Know I Cannot Quit[747]

In Cambodia, traditional gender norms mean that women are expected to be moral, invisible, and hardworking, and to carry a societal obligation to support their family. This carries into women's work within the garment industry, where women are expected to adjust to harmful, sexist gender norms that exclude, harass, ostracise or devalue their contribution.

When there are limited institutionalised means of empowering women and ensuring a workplace is free of violence, women's individual coping mechanisms come into play to protect safety and dignity at work. This means that women carry the burden of preventing double victimisation – first, they may be subject to harassment or violence and second, they may experience the victim shaming and blaming that ensues. This mental stress of self-regulation by women is a productivity cost to the industry and an indication that existing mechanisms to address sexual harassment are not effectively reducing, preventing or addressing workplace violence for women. Sexual harassment productivity costs may be evidence of ineffective action by employers and duty bearers.

"If it's not violent, they [the garment factory] give a warning. They say that if a worker has three warnings, then they should be fired. But I've never seen that happen at my factory…"

"The men around here, they see it happening, they hear us calling for help, but they don't help us. They are scared of the bad boys, because sometimes they carry knives or guns."

747 CARE International, *'I Know I Cannot Quit': The Prevalence and Productivity Cost of Sexual Harassment to the Cambodian Garment Industry* (2017) https://insights.careinternational.org.uk/media/k2/attachments/SHCS_Full_Technical_Report_March_2017.pdf.

The social and economic costs of sexual harassment in the workplace are high, as acts of workplace violence affect not only direct survivors and perpetrators, but also indirect victims, factories and society at large. Evidenced in this study, sexual harassment can discourage women and men from working (absenteeism and turnover) and reduce productivity. Furthermore, the qualitative data shows harmful and discriminatory societal norms that support victim shaming and blaming, which may prevent women from discussing or reporting harassment or violence in the workplace and community. In the absence of a minimum level of protective or preventative measures in the garment industry, women workers shared in interviews they have little means to protect themselves nor receive appropriate support from factory management and duty bearers in the community.

CARE Cambodia, Legal Analysis: Sexual Harassment in Cambodia[748]

The study finds certain gaps and challenges must be addressed in order to improve the prevention and response to sexual harassment in workplaces.

On the duty bearer side, all types of respondents reported: a lack of awareness of SH by the duty bearers (whether SH is an issue and it is against the law); no clear definition of SH in the workplace; negative attitudes of certain duty bearers toward SH and victims (i.e. delaying the response, not taking it seriously, blaming victim); not all work settings have SH policies and complaint procedures; no meaningful cooperation from employers of entertainment settings; lack of collaboration and coordination among duty bearers (i.e. MoLVT-GF, MoT-Entertainment settings); and no budget to address the issue thoroughly.

On the public/victim side, there are four main obstacles: lack of general awareness people on SH and its impacts; regarding SH as a joke or blaming the victim; lack of trust in legal and judicial systems (stemming from a lack of response or forced meditation outside the judicial process); fear of further hurt or that the perpetrator will seek revenge or that they may themselves get in trouble.

Ty et al, A Study of Women Entrepreneur Development[749]

"The majority of Cambodian men believe that Cambodian women are naturally timid, docile, and less capable than they are. The fact that these same men may have wives, mothers and sisters who run businesses, work in private and government organizations, and share equally in family decision-making has nothing to do with the dominant notion of abstract Cambodian womanhood. This view permeates to the highest levels of the political apparatus."

Cambodian women, historically, have played an important role in society not only as family chiefs but also as contributors to key sectors of Cambodia's economy such as agriculture, garments industry, local markets and the informal economy. That role was greatly increased by the effects of the Pol Pot era, when many more men than women were killed and remaining women had to struggle with the social and personal implications of the gender imbalance and with the need to take a greater role in the labour market. (…)

Cultural barriers define the role of women in the economy. They are expected to work inside the house in providing domestic services while men are expected to be household leaders and to work outside the house. This situation, ambivalent as it is, nevertheless determines the opportunities women have to receive education and to gain inherited income for entrepreneurial activities and they have to struggle against the expectation that they will confine themselves to household duties. Women, consequently, have tended to end up in low-skill and low-income jobs, both because of restricted choice and because women's work tends to be lowly valued. These gender issues are embedded in the culture and structural in nature. Since Cambodia is a hierarchically ordered society with strong

748 CARE Cambodia, *Legal Analysis: Sexual Harassment in Cambodia* (2015) http://ticambodia.org/library/wp-content/files_mf/1459134069ff000a_f907ab0d-cd704844b47d7651a13ae23f.pdf.

749 Makararavy Ty, Chhuntek Sov, John Walsh & Pacapol Anurit, '*A Study of Women Entrepreneur Development in Small and Medium Enterprises in Cambodia: Challenges and Opportunities', Journal of Global Management Research* (2009) https://www.researchgate.net/publication/283354255_A_STUDY_OF_WOMEN_ENTREPRENEUR_DEVELOPMENT_IN_SMALL_AND_MEDIUM_ENTERPRISES_IN_CAMBODIA_CHALLENGES_AND_OPPORTUNITIES_UNE_ETUDE_SUR_LE_DEVELOPPEMENT_DES_FEMMES_ENTREPRENEURS_DANS_LES_PETITES_ET_MOYENNES_.

notions of power and status, this reflects both on the condition of social relations and the relations of production. Not only is it very difficult for women to control the resources necessary to organize a business effectively, they must also defer to social norms in their choices in the personal sphere. Consequently, it is socially unacceptable that Cambodian woman marry to a man who has lower education. This attitude limits girls in pursuing further education since it reduces their ability to marry and is rarely supported by their families. Further, women are not encouraged to have higher position than their husbands, although it is acceptable for women to be involved in trade to support the family and also allow their husbands to maintain a low salary but high status government position. Cambodian women are expected to confine themselves to the domestic world and there is little if any concept of them seeking fulfillment in outside the house activities.

Questions

1. What are the common forms of gender discrimination at workplace?
2. What does 'intersectionality' mean in the context of discrimination? Why is it important to recognize intersectional discrimination? Can you give examples from Cambodia?
3. What are the responsibilities and roles of business sector in promoting gender equality at workplace? Can you find examples of best practice in Cambodia?
4. How do social or cultural norms affect women in employment?
5. Are there gaps in Cambodia's laws or policies on women's rights and gender equality in relations to employment? What about in implementation and enforcement?
6. What are the impact and importance of Cambodia endorsing UN and ASEAN instruments on gender equality?
7. What is 'intersectionality'? Can you give concrete examples in Cambodia?

Further Readings

- Committee on Economic, Social and Cultural Rights, General Comment No. 24 on State Obligations under the International Covenant on Economic, *Social and Cultural Rights in the Context of Business Activities* (2017) http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f24&Lang=en.
- Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25 on Temporary Special Measures* (2004) www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf.
- International Labour Organisation (ILO), *Global Wage Report: Analysing the gender pay gap* (2019) www.ilo.org/global/publications/books/forthcoming-publications/WCMS_645341/lang--en/index.htm.
- Shift et al., The Human Rights Opportunity, *15 Real-Life Cases of How Business is Contributing to the Sustainable Development Goals by Putting People First* (2018) www.shiftproject.org/media/resources/docs/TheHumanRightsOpportunity_Shift-07-17-2918.pdf?utm_source=website&utm_medium=button-SDGs&utm_campaign=SDGs_Download-PDF.
- United Kingdom, *Gender Pay Gap Service* (database) https://gender-pay-gap.service.gov.uk/.
- OECD, Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector, *'ANNEX C - Engaging with Women'* (2017) www.oecd-ilibrary.org/governance/oecd-due-diligence-guidance-for-meaningful-stakeholder-engagement-in-the-extractive-sector_9789264252462-en.

- Megan Bastick & Tobie Whitman, *A Women's Guide to Security Sector Reform, Inclusive Security and DCAF* (2013) www.inclusivesecurity.org/wp-content/uploads/2015/09/WGTSSR-Web.pdf.
- International Labour Organisation (ILO), *Women at Work: Trends 2016* (2016) www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_457317.pdf.
- ActionAid, *Stitching a Better Future - Is Vietnam's Boom in Garment Manufacturing Good for Women?* (2018) www.actionaid.org.uk/publications/stitching-a-better-future.
- UN Security Council, Resolution 1325 (2000) [on Women, Peace and Security] https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/720/18/PDF/N0072018.pdf?OpenElement.
- Coca Cola, Women Economic Empowerment www.coca-colacompany.com/5by20
- CARE International, *Sexual Harassment and Garment Manufacturing in the Mekong: Legal Frameworks* (2018) https://www.care.org.au/wp-content/uploads/2018/11/STOP_Regional-legal-frameworks_Nov2018.pdf.
- Asian Development Bank, *Country Partnership Strategy: Cambodia 2014-2018* (2014) https://www.adb.org/sites/default/files/linked-documents/cps-cam-2014-2018-ga.pdf.
- Asian Development Bank, *Promoting Women's Economic Empowerment in Cambodia* (2015) https://www.adb.org/sites/default/files/publication/156499/promoting-womens-economic-empowerment.pdf.
- Fabiana Avelar Ramos Mateus Pereira, Female Representation in Trade Unions: *The Case of the Cambodian Garment Industry, Master Thesis, Lund University* (2016) http://lup.lub.lu.se/luur/download?func=downloadFile&recordOId=8894766&fileOId=8894767.
- ActionAid *Cambodia et al. Factsheet – UPR 2018 – Cambodia: 3rd Cycle Universal Periodic Review* (2018) https://www.upr-info.org/sites/default/files/general-document/pdf/final_versions_merged.pdf.
- Leang Lo & Op Vibol, *Legal Analysis: Sexual Harassment in Cambodia* (2015) http://ticambodia.org/library/wp-content/files_mf/1459134069ff000a_f907ab0dcd704844b47d7651a13ae23f.pdf.
- Ministry of Women's Affairs, *National Action Plan to Prevent Violence Against Women 2014-2018* (2014) https://cambodia.unfpa.org/sites/default/files/pub-pdf/NAPVAW2014-2018%28Eng%29.pdf.
- Ministry of Women's Affairs, *Cambodia Report on the Occasion of the 25th Anniversary of the Fourth World Conference on Women and the Adoption of the Beijing Declaration and Platform for Action* (1995) (2019) https://asiapacificgender.org/sites/default/files/documents/Cambodia%20(English).pdf.
- OECD, *Aid-for-Trade: Case Study - Women Entrepreneurs in Cambodia* (undated) https://www.oecd.org/aidfortrade/47803414.pdf.
- Parliamentary Institute of Cambodia, *Background Paper: Empowerment of Women in Cambodia* (2019) https://www.pic.org.kh/images/2019Research/20191227_Empowerment%20of%20Women%20in%20Cambodia-En.pdf.
- Ly Ratana, 'The Role of International Labor Organization Convention 189 in Strengthening Cambodia's Negotiating Position with Malaysia when Finalizing the Memorandum of Understanding Concerning the Protection of Cambodian Migrant Domestic Workers', Cambodian Yearbook of Comparative Legal Studies (Special Edition) (2015) https://pub.cshl.rule.edu.kh/publication/58.
- Royal Government of Cambodia, *National Employment Policy 2015-2025* (2015) http://khmerebookfreedownload.blogspot.com/2015/10/cambodia-national-employment-policy.html.

- Tuy Sophorn, 'Discrimination against Women in Accessing Higher Education in Cambodia', *Journal of Southeast Asian Human Rights* (2019) https://jurnal.unej.ac.id/index.php/JSEAHR/article/view/8402.
- Special Rapporteur on the situation of human rights in Cambodia, Annual reports of the *Special Rapporteur on the situation of human rights in Cambodia* (2017-2020) https://cambodia.ohchr.org/en/un-human-right-mechanisms/annual-report-of-special-rapporteur.
- World Bank, *Cambodia - Women and Work in the Garment Industry, Justice for the poor; J4P Washington, D.C. World Bank Group* (2006) http://documents.worldbank.org/curated/en/142891468239357709/Cambodia-Women-and-work-in-the-garment-industry.
- British American Tobacco *Cambodia, Corporate Social Investment* (2020) http://www.bat-cambodia.com/group/sites/BAT_9KDJ5W.nsf/vwPagesWebLive/DO9KDJDQ?opendocument.

24. PERSONS WITH DISABILITIES

Hing Vandanet, Radu Mares

Introduction

Persons with disabilities are among the vulnerable groups – together with for instance women and girls (chapter 23), migrant workers (chapter 21), indigenous people (chapter 22) – due to the discrimination they have suffered in and outside the workplace. Human rights have made an important contribution to the design and implementation of measures to achieve equality for persons with disabilities. Indeed there has been a shift from the 'medical model' to the social and 'human rights models' of disability, and the major UN Convention in this area is based on the human rights model. The UN Convention on the Rights of Persons with disabilities is one of the widely ratified UN human rights treaties. Leading companies have experimented with more inclusive workplaces, partly to comply with new laws but also to obtain the business benefits of employing workers with disabilities. Empirical evidence regarding the valuable contributions made by workers with disabilities is essential to dispel prejudice and the principle of 'reasonable accommodation' has been developed to counter simplistic notions that workers with disabilities place impossible burdens on employers. Collaboration with public authorities and civil society groups (chapter 5) remains important to create additional incentives for businesses to hire persons with disabilities and to make it more feasible for them to enter the labour market. This chapter deals with different forms of discrimination and various areas in and outside the workplace where unequal treatment persists. As with other discriminated groups, it is important to realise that unequal treatment is further compounded when there are multiple grounds for discrimination (e.g. color, ethnicity (chapter 22), race, sexual orientation, gender (chapter 23) etc. in place simultaneously – this is the issue of 'intersectionality' where several forms of discrimination intersect and compound the negative impact.

In Cambodia, the perception that persons with disabilities are a burden to their family and society is slowly changing. Developments in the legal framework and state policies have improved the protection of the employment rights of persons with disabilities. The way of treating persons with disabilities is now shifting from sympathy to a rights-based approach. This is also thanks to the dedicated work of international and non-governmental organizations to voice rights of the person with disabilities. Today, persons with disabilities have more opportunities to be employed and to make a living, which contributes to them feeling more empowered and valued due to their increased independence and ability to work. Yet, there remains a lot more work to be done. Persons with disabilities continue to face challenges including discrimination, prejudice, judgement and being undervalued in the workplace, which can heavily influence their daily life and affect their wellbeing. Thus, it is essential for employers to better understand the rights of persons with disabilities and to swiftly comply with the relevant Cambodian regulations and policies.

Main Aspects

- ✓ Principle of reasonable accommodation (individual reasonable adjustments)
- ✓ Disproportionate burden
- ✓ Essential functions of the job
- ✓ Principle of confidentiality
- ✓ Universal design (of goods, services, equipment and facilities)
- ✓ Right to work (and to just conditions of work)
- ✓ Non-discrimination and equality of opportunity
- ✓ Discrimination (direct and indirect discrimination)
- ✓ Principle of equality (formal equality, substantive equality, inclusive equality, equality of opportunities and of results)
- ✓ Work environment (that is open, inclusive and accessible to persons with disabilities)
- ✓ Individual autonomy
- ✓ Full and effective participation and inclusion in society
- ✓ Disability models (charity model, medical model, rights model)
- ✓ Employment quotas (and quota laws)
- ✓ Rehabilitation-before-benefit principle
- ✓ Trade unions and persons with disabilities (role of trade unions, relation to disabilities movement)
- ✓ Legislation protecting rights of persons with disabilities (constitutional law, civil law, labour law, criminal law)

Background

WHO & World Bank, World Report on Disability[750]

More than a billion people are estimated to live with some form of disability, or about 15% of the world's population (based on 2010 global population estimates). This is higher than previous World Health Organization estimates, which date from the 1970s and suggested around 10%. (…)

The number of people with disabilities is growing. This is because populations are ageing – older people have a higher risk of disability – and because of the global increase in chronic health conditions associated with disability, such as diabetes, cardiovascular diseases, and mental illness. (…)

The International Classification of Functioning, Disability and Health (ICF), adopted as the conceptual framework for this Report, defines disability as an umbrella term for impairments, activity limitations, and participation restrictions. Disability refers to the negative aspects of the interaction between individuals with a health condition (such as cerebral palsy, Down syndrome, depression) and personal and environmental factors (such as negative attitudes, inaccessible transportation and public buildings, and limited social supports).

750 World Health Organization (WHO) and *World Bank, World Report on Disability* (2011) www.who.int/disabilities/world_report/2011/report.pdf.

ILO, Achieving Equal Employment Opportunities through Legislation: Guidelines[751]

Disability as a human rights issue

For a long time, disability was treated primarily as a social welfare issue. This reflected the widely held belief that people with disabilities needed care and assistance, being unable and incapable of living their own lives such that they were deserving of protection and were supported generally through social security systems. As a corollary, people with disabilities were seen as objects of social welfare, charity and care and not as subjects in their own right capable of making their own personal decisions, let alone entitled to the full enjoyment of the right to work. Due to their marginalized position in society and resulting invisibility, as well as widespread prejudice, people with disabilities did not fully enjoy their human rights, including the right to decent work.

The human rights charters and conventions adopted from the mid-1940s to the late 1960s (…) do not specifically mention people with disabilities. It is only since the 1970s that the disadvantages faced by disabled persons, their social exclusion and discrimination against them were increasingly perceived to constitute a human rights issue. The shift from a social-welfare approach to one based on human rights is reflected in explicit reference to persons with disabilities in human rights charters, conventions and initiatives adopted since the 1980s. (…)

The central concept of 'disability' is not defined but the Preamble [of CRPD] affirms the social construction of 'disability' by recognizing that "disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others". This represents a significant shift from the more traditional approach in which disability is seen as linked to an individual's impairment.

Similar shifts from a social welfare to a human rights law approach and from segregated to inclusive service provision are taking place on a regional and national level. (…)

The concept of disability

In this discussion, two opposing views can be distinguished. On the one hand, there are those who situate the problems of disability in the impairment of the person concerned, while paying little or no attention to his or her physical or social environment. This is referred to as the individual or medical model of disability.

On the other hand, there are those who perceive disability as a social construct: disabilities result from the failure of the physical and social environment to take into account the needs of particular individuals and groups. According to this social model of disability, society creates disabilities by accepting an idealised norm of the physically and mentally perfect person and by organizing society on the basis of this norm.

A third model of disability has recently emerged: the human rights model that lies at the core of the CRPD. Going beyond the social model of disability, this approach encompasses the values for disability policy that acknowledges the human dignity of disabled persons and provides for civil and political as well as economic, social and cultural rights. It recognizes some intersecting grounds of discrimination, such as the connection between disability and gender, or between disability and indigenous or ethnic identity as leading to discrimination and offers a roadmap for change.

Examples

According to the individual model of disability, a person with a mobility impairment is disabled as a result of an individual impairment. He or she can try to overcome the functional limitations which come along with this by undergoing medical or paramedical treatment and/or by using medical or paramedical aids, such as a wheelchair or crutches.

751 International Labour Organisation (ILO), Achieving Equal Employment Opportunities for People with Disabilities through Legislation: Guidelines (2014) www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_322685.pdf.

According to the social model of disability, a mobility impairment should be seen in the context of the surrounding society and environment. Reducing or overcoming the limitations on activities and restrictions to participation associated with mobility impairment implies taking away societal barriers, and ensuring that the built environment is accessible.

According to the human rights model of disability, impairment is part of human diversity, a person's human dignity is central, the individual should be involved in all decisions affecting him or her and the main 'problem' lies outside the person, and in society.

Both the social and individual models of disability have proven to have advantages and constraints, depending on the aim of the legislation. The individual or medical model can be particularly helpful in such fields as rehabilitation medicine and social security law, while the social model can be instrumental in tackling the root causes of exclusion, disadvantage and discrimination. The social model recognises that the answer to the question of whether a person can be classified as disabled, is intrinsically related to such factors as culture, time and environment.

The emerging human rights approach, codified in the CRPD, provides a framework to examine the interaction of the impairment and the society which gives rise to a disability and to develop a roadmap for change.

Defining disability in legislation

The definition of disability, which determines who will be recognized as a person with a disability, and hence protected by the relevant legislation, is very much dependent on the goal being pursued by the particular law or policy. Thus, there is no single definition of disability which can be used in all labour and social legislation. In many cases, non-discrimination legislation does not contain a definition, but adopts the definition contained in social security law. The two different approaches to definition are as follows.

- Wording aimed at a narrow, identifiable beneficiary group. This approach usually involves providing a list of conditions or types of impairments. These impairments are generally long lasting or permanent in nature and impair a person's daily life or capacity to participate in employment. This should be used if the aim is to craft laws to provide financial or material support to disabled individuals, or employers of disabled people. A limited, impairment-related definition of disability (individual model) thereby ensures that support is targeted at those who are most in need.
- Broadly inclusive wording aimed at protection from discrimination on the grounds of disability. This broader definition of the protected group (social model) should be used in anti-discrimination laws because many people, including those with minor or temporary disabilities, people associated with people with disabilities and those who are wrongly assumed or perceived to have a disability, can be affected by disability-based discrimination.

Different forms of discrimination

Discriminatory behaviour arises when an employer treats a (candidate) worker adversely or less favourably on the ground that he or she has a disability, where the disability has no, or hardly any, effect on job performance and should be regarded as irrelevant. Various forms of discrimination can be distinguished, including:

Direct discrimination occurs when a person is treated less favourably than another similarly situated person because of a particular characteristic protected by non-discrimination law, such as race or sex. Example: An employer advertises for a job and states in the advertisement "no blind people should apply".

Indirect discrimination occurs when an apparently neutral situation, regulation or practice in fact results in unequal treatment of persons with certain characteristics. It occurs when the same condition, treatment or criterion applies to everyone, but has a disproportionately harsh impact on some persons on the basis of certain characteristics. Intention to discriminate is not required for indirect discrimination to be judged to have occurred. Example: An

employer advertises for a job and states in the advertisement: only people with a driving licence should apply. This requirement does not expressly exclude disabled people and appears to be neutral on an initial examination. However, people with certain kinds of disabilities cannot acquire a driving licence and will be unable to apply for the job. If the requirement of having a driving licence is unnecessary for the job, in that the job rarely requires the worker to drive, and taxis can be hired or public transport used for the few occasions when vehicular travel is required, the requirement will amount to indirect discrimination and is incapable of being justified.

Harassment occurs when unwanted conduct related to a protected ground takes place with the purpose or effect of violating the dignity of a person and/or of creating an intimidating, hostile, degrading, humiliating or offensive environment. An example is verbally abusive behaviour by a work colleague directed at a person's protected characteristic or ground such as sex, disability or ethnic status.

Discrimination by reason of association occurs where a person is treated less favourably than another person not due to their having a protected or particular characteristic but rather due to their connection or relationship with a person who has such a characteristic. It is particularly in the case of those who have caring responsibilities for persons with disabilities that this form of discrimination is likely to occur. (…)

Instruments

Convention on the Rights of Persons with Disabilities[752]

Article 2: Definitions

"Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation;

"Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;

"Universal design" means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. "Universal design" shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.

Article 4: General obligations

1. (…) States Parties undertake: (…)

(e) To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;

(f) To undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in article 2 of the present Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities (…)

(g) To undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost; (…)

752 *Convention on the Rights of Persons with Disabilities* (2006) www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx#27.

Article 9: Accessibility

2. States Parties shall also take appropriate measures to: (…)

(b) Ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities; (…)

Article 21: Freedom of expression and opinion, and access to information

States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion (…) including by: (…)

(c) Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities; (…)

Article 25: Health

States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. (…)

(d) Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care; (…)

Article 27 - Work and employment

1. States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation, to, inter alia:

(a) Prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions;

(b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;

(c) Ensure that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others;

(d) Enable persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;

(e) Promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;

(f) Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;

(g) Employ persons with disabilities in the public sector;

(h) Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;

(i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace;

(j) Promote the acquisition by persons with disabilities of work experience in the open labour market;

(k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities. (…)

CRPD Committee, General Comment No 6 (Equality and non-discrimination)[753]

2. The Committee is concerned that the laws and policies of States parties still approach disability through charity and/or medical models, despite the incompatibility of those models with the Convention. The persistent use of such paradigms fails to acknowledge persons with disabilities as full subjects of rights and as rights holders. (…)

7. (…) Discrimination has occurred and continues to occur, including in brutal forms such as non-consensual and/or forced systematic sterilizations and medical or hormone-based interventions (e.g. lobotomy or the Ashley treatment), forced drugging and forced electroshocks, confinement, systematic murder labelled "euthanasia", forced and coerced abortion, denied access to health care, and mutilation and trafficking in body parts, particularly of persons with albinism.

The human rights model of disability and inclusive equality

8. Individual or medical models of disability prevent the application of the equality principle to persons with disabilities. (…) these early soft-law human rights instruments paved the way for an equality approach to disability, they were still based on the medical model of disability, as impairment was seen as a legitimate ground for restricting or denying rights. They also include language that is now considered inappropriate or obsolete. A further step was taken in 1993 with the adoption of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, which proclaimed "equality of opportunities" a fundamental concept of disability policy and law. (…)

10. Equalization of opportunities, as a general principle of the Convention under article 3, marks a significant development from a formal model of equality to a substantive model of equality. Formal equality seeks to combat direct discrimination by treating persons in a similar situation similarly. It may help to combat negative stereotyping and prejudices, but it cannot offer solutions for the "dilemma of difference", as it does not consider and embrace differences among human beings. Substantive equality, by contrast, also seeks to address structural and indirect discrimination and takes into account power relations. It acknowledges that the "dilemma of difference" entails both ignoring and acknowledging differences among human beings in order to achieve equality.

11. Inclusive equality is a new model of equality developed throughout the Convention. It embraces a substantive model of equality and extends and elaborates on the content of equality in: (a) a fair redistributive dimension to address socioeconomic disadvantages; (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality; (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and (d) an accommodating dimension to make space for difference as a matter of human dignity. The Convention is based on inclusive equality.

753 Committee on the Rights of Persons with Disabilities, *General Comment No 6, Article 5: Equality and Non-Discrimination* (2018) https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/6&Lang=en.

Article 6 on women with disabilities

36. Women and girls with disabilities are among those groups of persons with disabilities who most often experience multiple and intersectional discrimination. (…) While only article 6 mentions the term "multiple discrimination", multiple and intersectional discrimination may occur in any combination of two or more grounds. Article 6 is a binding equality and non-discrimination article that prohibits discrimination against women and girls with disabilities and obliges States parties to promote equality of both opportunity and outcomes. Moreover, article 6, like article 7 [children with disabilities], must be regarded as illustrative, rather than exhaustive, setting out obligations in respect of the two prominent examples of multiple and intersectional discrimination.

CRPD Committee, General Comment No 2 (Accessibility)[754]

13. (…) It is important that accessibility is addressed in all its complexity, encompassing the physical environment, transportation, information and communication, and services. The focus is no longer on legal personality and the public or private nature of those who own buildings, transport infrastructure, vehicles, information and communication, and services. As long as goods, products and services are open or provided to the public, they must be accessible to all, regardless of whether they are owned and/or provided by a public authority or a private enterprise. Persons with disabilities should have equal access to all goods, products and services that are open or provided to the public in a manner that ensures their effective and equal access and respects their dignity. This approach stems from the prohibition against discrimination; denial of access should be considered to constitute a discriminatory act, regardless of whether the perpetrator is a public or private entity. (…)

ILO, Promoting Diversity and Inclusion - A Practical Guide[755]

Reasonable Accommodation is normally viewed as an individualized adjustment to the working environment in response to the specific requirements of a worker. Whereas accessibility entails taking general measures in anticipation of the needs of a range of workers, including those who may be expected to work for the company in the future, reasonable accommodation will typically be a response to an individual request.

Model Policy on Reasonable Accommodation

We, the leaders of [insert company name] are committed to:

- ensuring equality for all persons in the workplace;
- respecting the diversity of all workers;
- fostering an organizational culture characterised by inclusivity and respect for fundamental rights and dignity;
- a policy of zero tolerance towards discrimination;
- creating and maintaining a working environment free of discrimination that is unlawful or prohibited by company policy.

The company should provide reasonable accommodation to workers who require workplace modification to be able to perform their jobs on the same basis as other workers. The company acknowledges that, as a general principle, denial of a reasonable accommodation is a form of discrimination.

754 Committee on the Rights of Persons with Disabilities, *General Comment No 2, Article 9: Accessibility* (2014) https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/033/13/PDF/G1403313.pdf?OpenElement.

755 International Labour Organisation (ILO), *Promoting diversity and inclusion through workplace adjustments - A practical guide* (2017) www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_536630.pdf.

Thus, the company is committed to providing individual workers with accommodation where this is both reasonable and necessary, and recognizes that reasonable accommodation should be provided where the accommodation requested does not impose a disproportionate burden. In this context, the needs of both the worker and the company should be considered.

Definitions

"Reasonable Accommodation" - Necessary and appropriate modification and adjustments not imposing a disproportionate burden, where needed in a particular case, to ensure that all persons have access to, can participate or advance in, employment or a specific occupation.

"Disproportionate burden" - In determining whether the accommodation requested will give rise to a disproportionate burden, the company should take into account factors such as:

- financial and other costs;
- the resources of the company;
- the company's organization or functioning;
- the possibility of obtaining funding from a third party for the accommodation;
- the potential benefits of the accommodation to persons other than the individual making the request;
- the obligations of the company to protect the safety and health of the individual making the request and any other person who may be affected;
- the rights and freedoms of others

"Qualified to Perform the Essential Functions of the Job" - An individual should be qualified to perform the essential functions of the job. This means that the worker should:

- satisfy essential job requirements regarding educational background, employment experience, skills, licenses, and any other qualification standards that are job-related;
- be able to perform those tasks that are essential to the job, but which may need a reasonable accommodation to enable the worker to do so.

"Essential Functions of the Job" - Essential (or "core") functions are the fundamental job duties or requirements of a particular job. Essential functions cannot be eliminated or substantially modified without changing the nature of the job. Essential functions do not include the secondary tasks of a job. Factors to consider in determining whether a function is essential include:

- whether the primary reason that the position exists is to perform that function;
- the number of other workers available to perform the function or among whom the performance of the particular function can be distributed;
- the degree of expertise or skill required to perform the function;
- the judgement of the company concerning which functions are essential, and the written job description prepared before advertising or interviewing for a job;
- the actual work experience of present or past workers in the job;
- the proportion of time required by the worker to perform the function in question;
- the consequences of not requiring that a worker perform a specific function.

(…) In principle, the company is committed to providing reasonable accommodation:

- when a worker needs an accommodation to perform his/her job;
- when a worker needs an accommodation to enjoy equal access to any benefits of employment, to use any company equipment or facilities, or to participate in any aspect of the company's culture or activities (e.g., being able to participate in the annual company retreat, to take part in training courses or to participate in meetings to inform and/or consult with company staff).

ILO, Achieving Equal Employment Opportunities through Legislation: Guidelines[756]

The guidelines focus on the main types of civil and labour law and related policy currently in place to promote employment opportunities for persons with disabilities. Particular attention is paid to non-discrimination legislation and quota laws, and measures which have been introduced to maximize their practical impact. (…)

Anti-discrimination laws

Laws aimed at prohibiting discrimination on ground of disability in the labour market should:

- explicitly refer to disability as a prohibited ground;
- exercise caution in defining disability;
- cover all forms of discrimination:
  - direct discrimination;
  - indirect discrimination;
  - harassment;
  - discrimination by association;
  - instruction to discriminate;
  - victimisation.
- make provision for reasonable accommodation, stating that its denial is a form of discrimination and defining what this involves while recognizing the justification of 'disproportionate burden';
- allow for genuine occupational requirements or inherent requirements of the job, which are to be applied narrowly;
- stipulate that the burden of proof shifts to the person who allegedly discriminated, once the complaining party has provided facts suggesting the existence of discrimination;
- be accompanied by social policy measures; and
- allow for affirmative action measures.

756 International Labour Law (ILO), *Achieving Equal Employment Opportunities for People with Disabilities through Legislation: Guidelines* (2014) www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_322685.pdf.

Quota laws

Quota laws should:

- be framed as affirmative action measures linked to non-discrimination;
- be aimed at assisting disabled job-seekers to get jobs;
- be backed up with a payment, such as a compensatory levy and an effective enforcement mechanism to encourage compliance by employers;
- offer employers other optional ways of meeting the quota obligation, in addition to recruiting disabled persons and/or paying a levy;
- be based on clearly identified policy goals and be targeted at a clearly specified group of people with disabilities;
- be based on a registration/identification system which guarantees real benefits to those identified as disabled;
- be tailored to the economic situation and employment pattern in the State in question.

The eventual success of equal opportunities legislation and policy measures is often highly dependent on:

- information campaigns, including general and technical information and advice; and
- employment support measures.

The effectiveness of such legislation and policy also depends on the extent to which they reflect the varying interests and needs of groups in society which are affected. To ensure that these interests and needs are adequately taken into account, extensive systematic consultation should take place with the key stakeholders – organizations of disabled persons, employer and worker organizations, service providers as well as relevant government ministries. Consultations should ideally be formalized through existing bodies or through task forces set up for the purpose.

Principle of equality

The principle of equality, as well as its corollary, namely the prohibition of discrimination, can be defined in various ways in law.

Formal equality - In a formal approach to equality, persons who are situated alike should be treated in the same way. Such an approach frequently ignores individual and contextual differences and disadvantages, as if these were irrelevant. The denial of identical treatment is prohibited, but there is no requirement to make accommodations or adjustments. This approach, therefore, falls short of meeting the support needs of some disabled people.

Equality of opportunity - Another way in which equality may be conceptualised is through equality of opportunity. This concept provides for equal chances, but not necessarily equal results. In this way of looking at equality, the importance of individual and group differences is acknowledged and account is taken of external barriers experienced by disabled people, which may inhibit social participation. Both stereotypes and structural barriers are seen as obstacles to full participation. In this approach, disability is ignored, if stereotypes are the basis for action, and taken into account if changes to the social or built environment are necessary to promote access and inclusion and resources are required to ensure that persons with disabilities can make use of the opportunities provided, such as through the provision of reasonable accommodation.

Equality of results - Equality of results is concerned with securing the same outcomes for all. When equality is viewed in this way, individual and group differences are acknowledged. For example, account is taken of any additional costs a disabled worker has, in examining the question of whether they receive equal pay. This concept of equality has several weaknesses. It does not clearly indicate where responsibility lies for meeting the needs of disabled persons so as to guarantee true equality of results – with the State, with the private sector or with the individual. In addition, it is not clear in this approach whether an individual's merits are understood to justify unequal results. This approach could be used to justify unequal pay for persons with disabilities in employment, for example through their exemption from minimum wage provisions, if the desired result is to maximize the number of employees with disabilities. Equality of results can be used, however, as an indicator of the effectiveness of measures taken to achieve equality of opportunity.

The concept of equality of opportunity is now the most frequently applied in national legislation and is particularly important for persons with disabilities.

Affirmative action

A distinction should be made between social policy measures, which are always permitted, and affirmative action measures, which deviate from the equal treatment norm and therefore need a justification.

Social policy

Respect for human dignity requires the formulation of a social policy, such as a policy to combat illiteracy, unemployment, underemployment and homelessness or increase women's access to income-generating activities. Such policies are closely related to the promotion of equality of opportunity or equality of results. The beneficiaries of these policies are notably the underprivileged segments of society. Examples:

- Offering an occupational rehabilitation programme to a worker after a serious work accident constitutes a social policy measure. The programme seeks to ensure that the worker can remain an active member of the workforce and will not be confronted with unemployment.

- Offering funding from a public authority to employers to enable them to adapt their work premises to allow access to persons with disabilities.

Affirmative action measures

Affirmative action measures – sometimes called positive action - are aimed at ensuring equality of opportunity in practice, taking into account the diversity of the persons concerned. They are often aimed at historically disadvantaged groups that have been subject to long-standing, entrenched discrimination, with a view to halting discrimination, redressing the effects of past discrimination and restoring a balance. Employers can be required by the States to introduce such measures. Affirmative action is traditionally perceived as a response to social, structural or institutional discrimination experienced, and as a justified exception to the principle of equal treatment. In other words, affirmative action is not discrimination. Affirmative action measures seek to promote equality of opportunity and are aimed at overcoming structural disadvantage experienced by groups. Such measures are not intended to cater for the needs of single individuals and are thus distinct from reasonable accommodation (…). Affirmative action measures are to be regularly examined to ensure they are still needed and remain effective and are intended to last until there has been compensation for, or catching up from a structurally disadvantaged position. Examples:

- Obliging employers to employ a certain number or percentage of workers with a work disability (a quota) or requiring them to set a specific target constitutes an affirmative action measure. The measure could restrict the opportunities of employers to hire (and fire) employees on the basis of that employee's individual assessment and can require the employer, to treat disabled workers differentially (…).

- Health and safety legislation could be amended to allow positive support for the reintegration of persons with disabilities into the workforce. It could also prevent the application of health and safety legislation in an overly protectionist form which could result in the denial of access of persons with disabilities to equal treatment in employment.

Non-Discrimination Legislation (disability law)

Enterprises of every size should be covered by the non-discrimination provisions. The only exception to the basic right to non-discrimination should be linked to inherent requirements of the job.

The prohibition of discrimination does not make all forms of differentiation among workers and job applicants illegal. Employers can require that employees and job applicants possess certain skills or competencies which are legitimate, in view of the nature of the job concerned or the context in which the job is carried out. Such genuine occupational requirements may result in the exclusion of persons with particular disabilities from a job, but this does not constitute discrimination. Inherent requirements of a job – Examples:

- A taxi company requiring job applicants to have a driving licence, for example, excludes blind people as well as people who, due to a medical condition, no longer have a driving licence. Such a licence requirement on the part of the taxi company is legitimate and proportionate and therefore constitutes a genuine or justifiable occupational requirement.
- An accountancy practice advertises a position where it requires a high standard of mathematics from applicants. This could exclude applicants who are dyslexic. Due the requirements of the position, however, this requirement is legitimate and proportionate and therefore constitutes a genuine or justifiable occupational requirement.

Reasonable accommodation

Disability can sometimes affect an individual's ability to carry out a job in the usual or accustomed way. The obligation to make a reasonable or effective accommodation, or the right to be accommodated, is often found in modern disability non-discrimination law although its origins were in the context of non-discrimination legislation regarding religion. For example, the United States Civil Rights Act 1964 (Title VII) requires employers to reasonably accommodate the religious beliefs of employees which are sincerely held, unless this would impose an undue hardship on the employer. Reasonable accommodation for persons with disabilities in the workplace has its origins in this provision. Disability non-discrimination legislation increasingly requires employers and others to take account of an individual's disability and to make efforts to cater for the needs of a disabled worker or job applicant, and to overcome the barriers erected by the physical and social environment. This obligation is known as the requirement to make a reasonable accommodation. The failure to provide a reasonable accommodation to workers and job applicants, who face obstacles in the labour market, is not merely a bad employment practice but is increasingly perceived as an unacceptable form of employment discrimination and therefore unlawful, as provided for in the CRPD.

The law should define closely what is meant by reasonable accommodation, so that misinterpretation is avoided and employers clearly understand what they must do.

A disabled worker or job applicant claiming a reasonable accommodation should demonstrate that:

- he or she is (otherwise) qualified for the job; and
- the employer (or other party) was aware of his or her needs; and
- with an accommodation, he or she could (safely) perform the essential functions of that particular job. (…)

An employer is only exempted from this obligation in cases where he/she can prove that:

- they were not aware of the disability; or
- he/she was not aware of the need for an individual accommodation; or
- an effective accommodation, enabling the disabled worker/job applicant to perform the essential functions of a job, is not available; or
- the requested accommodation imposes a 'disproportionate burden' on the employer.

Disproportionate burden

The 'defence' or justification for not accommodating a disabled person needs to be drafted carefully. Otherwise, unscrupulous employers would have recourse to this in order to avoid any obligation. Much litigation might ensue and the very valuable support of reasonable accommodation would be denied to many persons with disabilities. The fact that the workplace or work schedule would be inconvenienced clearly does not amount to a 'disproportionate burden'.

In practice, the question as to what constitutes a disproportionate burden very much depends on the context of the case concerned, and is not merely dependent on the financial costs of an accommodation, the financial resources available or financial compensation schemes. It depends on such factors as its practical implications, effects on the overall work process, the size of the enterprise, number of disabled workers already employed, public funding available and length of the envisaged employment contract.

Burden of proof

- Non-discrimination law should stipulate that the burden of proof shifts to those considered to have discriminated once the person who considers him or herself wronged has provided facts from which it may be presumed that discrimination has taken place.
- Once the burden of proof has shifted to the person who is alleged to have discriminated against the complainant, evidence must be provided in the form of a valid non-discriminatory justification for the treatment.

Quotas

Under quota schemes, employers employing a specified minimum number of persons are obliged to ensure that a certain percentage (a quota) of their workforce is made up of people with disabilities. Such schemes first emerged in Europe in the aftermath of the First World War, and initially war veterans who were disabled as a result of military action were the only beneficiaries. These schemes typically exempted small employers. In the post Second World War period, quota schemes were extended to cover disabled civilians, and were adopted in many countries throughout the world. The exemption for small employers was, however, often maintained.

Many commentators assert that quota systems do not fit well within the employment rights approach of many countries that have introduced sophisticated non-discrimination legislative provisions for persons with disabilities within the labour market, including reasonable accommodation. Quotas are still provided in many countries, however, in spite of the employment rights approach, due to the view that this system is required to counteract the low employment rates of persons with disabilities.

ILO, Labour Market Inclusion of People with Disabilities[757]

International frameworks on social development and on human rights commit to inclusion of persons with disabilities. This is essential to ensure the principle of "leaving no-one behind" of the 2030 Agenda for Sustainable Development and also makes important contributions to economic development. As ILO estimates have shown, if the employment of persons with disabilities, as a group, could be raised to the level of persons without disabilities, then economies could benefit from between three to seven per cent increase of GDP. (…)

Until the end of the XX century, but still in many cases today, policies in many OECD countries, including G20 members, were biased towards relatively generous and easily accessible disability benefits with little or no emphasis on the drivers behind these unbalances. Policy objectives are now shifting in these countries towards the search for a new balance between two simultaneous goals: i) to provide an adequate and secure income for those who cannot work and their families; while ii) providing good incentives and supports to work for those who can. Just when this turn in policies started being implemented a new challenge emerged. The fast increase in G20 advanced countries in the number of disability benefit claims because of mental health problems, often at a relatively young age, is the added challenge that makes disability policies a moving target for policy makers. The combination of these multiple challenges makes working-age disability policy today one of the biggest and most complex social and labour market challenges for policy makers.

(…) many policy measures are relevant for all persons with disabilities, whether they seek to enter, stay or re-enter the labour market. These can include non-discrimination legislation, mandated quotas in employment or training, provision of workplace adjustments, inclusive public employment services as well as fostering disability-confident employers who recognize the talent and skills of persons with disabilities.

A. Demand side: promoting disability inclusion within the private and public sector.

A.1. Private-sector employment

The private sector is a key actor in promoting the employment of persons with disabilities. In addition to a robust legal framework, which will be dealt with in a later section, experience shows the importance of engaging the private sector and building the confidence of companies to hire and retain workers with disabilities. Increasingly, employing persons with disabilities is understood to be a part of wider workforce diversity which has concrete economic benefits for private companies, including more effective problem solving, increased innovation, staff commitment and a more positive reputation among clients, business partners and society at large. (…) Advice on appropriate workplace adjustment and corresponding financial supports should be easy to obtain because employers understandably shy away from cumbersome administrative procedures and contacts. (…)

B. Supply side: ensuring that persons with disabilities have the skills as demanded by the labour market

B.2. Vocational rehabilitation for people who acquire a disability

(…) The evidence shows that the longer the absence from work, the more challenging it will be to bring the person back into the labour market. Therefore, in recent years, a number of G20 countries have focused on increasing rehabilitation options at an early stage, as well as strengthening rehabilitation requirements. In Austria, for instance, vocational rehabilitation became compulsory in 1996 and each claim for a disability benefit is automatically treated as a request for rehabilitation. Early intervention kicks in when the present job cannot be resumed. Hungary follows, since 2008, a similar rehabilitation-before-benefit principle with a comprehensive rehabilitation process. (…)

757 International Labour Organisation (ILO), *Labour Market Inclusion of People with Disabilities* (2018) www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_646041.pdf.

C. Making the environment more enabling

(…) One key element of disability discrimination legislation is the obligation to provide reasonable accommodation (individual reasonable adjustments), an issue that is of particular relevance for labour inclusion. The Job Accommodation Network (JAN) from the U.S. is a good example of a programme that has contributed to the effective implementation of the obligation to provide reasonable accommodation in the workplace.

Another legal measure, used in more than 50 countries worldwide, but not universally accepted, is employment quotas which require employers (usually, private and public) to retain or hire people with disabilities. Annex 1 reflects the use of quotas in the G20 countries. Several countries use a quota-levy system, which requires companies to pay a levy if they don't meet the established quota and in some countries there is also the option to meet the quota by to buying goods and services from sheltered workshops or other companies with a significant share of workers with disabilities. (…)

Traditionally, disability benefit systems were built on the principle of providing benefits for people who could not be expected to work. Accordingly, the entitlement was related to the existence of a disability and proof of inability to work. Most people with disabilities, if provided with the adequate supports, have full working capacity while some have permanently or temporarily partially-reduced work capacity. To make the best use of people's work capacity, disability systems should start with an assessment of the employment possibilities of a person applying for a benefit and provide adequate employment supports to try to establish or maintain the claimant's connection to the workforce. The assessment and corresponding supports should be done quickly so as to avoid claimants being inactive for too long and losing contact with the labour market. Early intervention is of critical importance for people with disabilities and particularly for persons with mental health conditions.

ILO, Trade Union Action on Decent Work for Persons with Disabilities[758]

In many countries and contexts, disability is often understood as the "inability to work". This idea needs to be challenged directly.

Persons with disabilities have shown they can work productively in all sectors and contexts. Even in difficult circumstances, where they have faced discrimination and social exclusion and do not have the support of services, there are still many cases of persons with disabilities working productively.

Furthermore, the right of persons with disabilities to decent work without discrimination is established both through universal human rights' frameworks that determine the right of all to work, as well as through the United Nations' Convention on the Rights of Persons with Disabilities, which specifically targets disability-related discriminations.

[For trade unions] working towards disability is a path to modernizing the trade union by engaging with contemporary social issues, expanding membership and wider partnerships. (…)

Trade union work on disability is often disconnected. (…) This is exacerbated at the international level through a more profound disconnection between the labour movement and the disability sector. (…)

Working on disability moves trade unions away from class-based issues to identity-based issues. A discussion of trade union actions in the UK has raised how identity-based challenges like gender, disability, or ethnicity can be hard for trade unions to raise because they have been used to class, or occupation-based identities. One example of this potential risk is collective bargaining agreements that specify work duties in a way that makes individual adjustments difficult. This can make it challenging to raise seemingly "individual" issues around disability or other identity groups.

758 International Labour Organisation (ILO), *Trade Union Action on Decent Work for Persons with Disabilities - A Global Overview* (2017) www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_608665.pdf.

- Addressing disability gives the trade union an opportunity to move away from the traditional trade-union subject of the non-disabled man working full-time.
- Adopting an intersectional viewpoint understands and tackles the way multiple discriminations interact and compound each other.

(…) Because disability is created in part by barriers in society and in employment, working on disability is about removing these barriers. This supports persons with disabilities as a group, and it also supports other workers by ensuring freedom of expression, accessibility and inclusivity in employment, workplaces and unions themselves.

Global Business and Disability Network, Model Self Assessment Tool[759]

Aligned with the 10 principles of the ILO Global Business and Disability Network (GBDN) Charter, this model self-assessment tool helps companies to identify areas for improvement in its efforts to become more inclusive of persons with disabilities.

While the tool can be used as it stands, global companies or national business and disability networks might want to customise it to adapt the tool to the particular circumstances of the company and national contexts, for instance by adding references to compliance with quota legislation, where it exists.

If you decide to use the tool online, after having answered to all questions, you will get an automatically generated file which contains your answers and indicates the areas for improving your company's disability inclusion policies and practices. Global companies can collect the answers from their subsidiaries and undertake an internal benchmarking exercise. Similarly, national business and disability networks can use it to facilitate the peer to peer learning among its members.

ILO, Moving Towards Disability Inclusion: Stories of Change[760]

The human rights-based approach

Over the past decades there has been a dramatic shift in the way persons with disabilities are viewed. Where once they were seen as passive recipients of aid, often geared to their impairment-related health needs, today people with disabilities are viewed as people with the same rights as non-disabled persons. This human rights-based approach recognizes that disability is an important dimension of humankind and affirms that all people have certain inalienable civil, political, economic, social and cultural rights, including labour rights.

Promoting inclusive workplaces

The ILO helps businesses and employers learn how to go beyond the ethical and human rights case to the business case for hiring people with disabilities through its Global Business and Disability Network. (…)

One challenge many companies face is not knowing where to find persons with disabilities with the skills required in a particular field. Others shy away from hiring candidates with disabilities in part because they are not sure what "accommodations" they will need to do the job. Employers may think they have to buy expensive equipment or adapt office space, but the reality is quite different. Most workers with disabilities require no special accommodations and the cost for those who do is minimal or much lower than many employers believe.

Companies often benefit from supporting each other by sharing their experiences and good practices on hiring and retaining workers with disabilities. In the process they are discovering the potential of people with disabilities to make significant contributions to a diverse and productive workforce. (…)

759 Global Business and Disability Network, *Model Self Assessment Tool* (2018) www.businessanddisability.org/wp-content/uploads/2018/11/GBDNSelfAssesmentTool.pdf.

760 International Labour Organisation (ILO), *Moving Towards Disability Inclusion: Stories of Change* (2015) www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_423412.pdf.

Among the many issues that emerged were: employers' low awareness of tax incentives for hiring disabled persons; inaccessible workplaces; negative attitudes and perceptions about people with disabilities; disabled persons lacking the skills and qualifications needed by employers; and the lack of a database on disabled job seekers.

One of the important outcomes of the roundtable was the validation of the need to establish a network of Zambian employers and key stakeholders to help facilitate the employment of disabled women and men. (…)

While emphasis will be on improving the demand side of the labour market, the supply side will be promoted by engaging an employment agency to prepare and develop skills and confidence of persons with disabilities in addition to managing a database of persons with disabilities to act as a link with potential employers.

ILO, Inclusion of Youth with Disabilities: The Business Case[761]

The Eureka Call Centre Systems in Singapore

The performance of the non-disabled employee's was actually 50–70 per cent of what those with visual impairments were able to achieve. The Eureka representative recalled that one after another, all the non-disabled agents dropped out. Eureka also found that their disabled employees were punctual, rarely absent and enthusiastic about their work. Within a year of starting the initiative, the Eureka call centre was almost entirely run by visually impaired staff and its previous annual turnover rate of approximately 40 per cent had plunged to 2 per cent. (…)

By reinventing their company, Eureka discovered various strategies that led to positive results. They found that traditional retention incentives, such as monetary reward, recognition and career advancement, held little sway over their agents with disabilities. Rather, a sense of belonging, security and a fun social environment at the work place were more important factors in recruitment and retention. Eureka managers also quickly learned that their employees' social lives were largely intertwined with their work lives. The managers thus adapted the work environments to include after-work leisure activities such as karaoke and massage machines, picnic lunches and even trips abroad.

For companies interested in replicating or adapting this initiative, Eureka recommends consideration for the following points:

- Equal footing. Training expectations and standards for key performance indicators (KPIs) should not be lowered for people with disabilities. Training and selection must be focused on ensuring productivity gains and meeting KPIs. The Eureka experience has shown that people with disabilities eventually learn to function at the same, if not higher, productivity level than non-disabled persons.

- Encouragement. Many people with disabilities do not have the benefit of job experience. As a result, they sometimes experience low confidence, low self-esteem and benefit from encouragement. All management staff are expected to be understanding of the needs and restrictions of people with disabilities and how important encouragement is for staff performance.

- Innovate and adapt. Disabilities vary. Among the visually impaired, someone may be totally blind, another may have tunnel vision, while yet another can see only large fonts in yellow on black colour contrast. Among the physically impaired, there are wheelchair users and others who have a single finger for their hand. Companies should be prepared to invest in technologies that are essential to "level the playing field," as far as productivity among people with disabilities is concerned.

761 International Labour Organisation (ILO), *Inclusion of Youth with Disabilities: The Business Case* (2014) www.ilo.org/skills/pubs/WCMS_316817/lang--en/index.htm.

- Inclusive designing. When building applications for people with disabilities, it is best to involve them from the beginning on with any project. They will give better suggestions than others who can only try to imagine what it is like to be in their shoes.(…)

- Prepare non-disabled staff. Orient other staff to include and welcome new staff members with disabilities. Communicate the inclusive changes planned to all employees in the company. Some trainees with disabilities may have a longer learning curve and management must be prepared to give more time and patience during their training. Have non-disabled employees who will be working closely with someone with a disability attend a course on how to work with people with specific disabilities.

- Recruitment. Seek out various channels of reaching people with disabilities, such as voluntary welfare organizations, hospitals and schools.

Useful insights for employing youth with disabilities

Undertaking an initiative to support the employment of youth with disabilities might be perceived as daunting by many employers. But paramount among the many insights that industry leaders have offered throughout the featured cases is the realization that such an initiative is not as challenging as it might seem. The following points were identified throughout the featured cases as important when planning an employment initiative for youth with disabilities.

- Focus on what youth with disabilities can do, not what they can't. Both employers and employees stand to gain the most from their relationship by capitalizing on people's skills and talents. Like with any other young person, focus on your young disabled candidates or employees' aptitudes and not on their disabilities.

- Outline specific programme objectives and designate a timeline. Start small; begin with a pilot phase and think long-term, not just recruitment. Give consideration for on-going policies, performance management systems, wage reviews, disciplinary systems and separation practices. Question every assumption you have about your jobs, how they are structured and what has to be done.

- Consider creating an expert panel. Depending on the complexity and ambition of the initiative, companies might want to consider establishing an expert panel composed of senior company staff, disability specialists, academics, and researchers and practitioners who can provide important guidance in developing a programme prototype and objectives.

- Involve participants' support network from the beginning. Including family members of youth with intellectual disabilities from the initial interview can enhance participant success. This is also a good time to address logistical issues such as how participants will get to and from work.

- Offer flexible and inclusive training options. (…)

- Ensure adequate supervision and support an engaging work environment. (…)

- Ensure senior support and remove bias against people with disabilities. Be sure that company executives support the initiative and organize skill-building workshops to sensitize non-disabled staff on working with individuals with disabilities. These efforts will help the initiative achieve long-term success.

- Do not exaggerate what a programme can deliver. Set high standards and hold participants and training staff accountable but be careful not to fall short of expectations, which can affect the credibility.

- Hiring, advancement and retention practices. (…)

ILO, Business as Unusual[762]

The Accor Group – Leading hotel operator

The Group's internal efforts to encourage diversity are based on four pillars: diversity of origin; gender equality; the inclusion of people with disabilities; and diversity of age. These pillars were formalised within the Group in 2011 by way of an International Diversity Charter, released in 15 languages. (…)

Other important lessons include the good practice of being sensitive to the attitude of all staff (not only of disabled people) towards activities addressing disability in the workplace. Staff members often have experience with people with disabilities outside of the workplace, some of which can be negative. It is therefore important for management and Disability and Inclusion teams to recognise that disability can be a sensitive subject for many.

IBM – International Business Machines Corporation

IBM has developed a strategy that addresses different aspects of the business' approach to people with disabilities. There are three core aspects: Attitude, Accessibility and Accommodation, or the 3 A's.(…)

IBM's most recent strategy focuses on the third 'A': Attitudes. Now that the company has developed policies and tools, the focus is on maximizing their efficiency by engaging employees and managers to tackle any prejudice against people with disabilities, expelling myths and improving attitudes toward the recruitment and retention of employees with disabilities. The message often heard in IBM is that people with disabilities are 'a reservoir of untapped talent', whose inclusion can only increase profits. Reports on the recruitment of people with disabilities, however, do not reflect this message. For IBM, the reason for this mismatch between policy and practice lies in unconscious bias and the inertia of attitudes towards people with disabilities. (…)

L'Oréal Group

The Disability Initiatives Trophies: Held every two years, the internal competition started as a local event and quickly evolved into a global initiative. The event hosts the Group's various subsidiaries from over 60 countries under one roof to share success stories about local disability inclusion projects. In this way, the many subsidiaries are recognized for their efforts while at the same time having the ability to share best practices and learn from one another. (…)

SOFOFA (Federation of Chilean Industry)

In 2012, SOFOFA put in place a "Business Strategy for labour inclusion of people with disabilities". The desired outcome of the Strategy is the development of new and improved services offered by SOFOFA to its membership in the area of disabilities. To start the process, a survey was conducted to identify the main barriers faced by enterprises when hiring people with disabilities and to have concrete elements to design policies that would promote labour inclusion of people with disabilities. The result of the survey also constituted a baseline analysis against which progress can be measured in the future. The main identified barriers were taken into account to develop the following five tools, in the form of publications, designed to support employers:

1) Making the business case for hiring people with disabilities. The results of the survey offered a compelling business case to hire people with disabilities and identifies the benefits for the company that decides to give a chance to diversity policies.

762 International Labour Organisation (ILO), *Business as Unusual: Making Workplaces Inclusive of People with Disabilities* (2014) www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_316815.pdf.

2) Step by step protocol for enterprises wishing to incorporate people with disabilities in their workforce. This protocol provides a roadmap on motivating employers in hiring and maintaining an employee with disabilities and promoting his or her personal growth. The protocol contains practical examples and success cases of employers in hiring persons with disabilities.

3) Employers´ Guide for an inclusive approach to prevention of occupational risks. This guide promotes the adoption of health and safety policies within enterprises, taking into account a diverse workforce, with a particular emphasis on labour inclusion of people with disabilities.

4) Employers' Guide to legal incentives and government programs to promote the inclusion of people with disabilities. Too often small and medium enterprises are not aware of the legal advantages, grants, and benefits offered by the government to those companies willing to hire people with disabilities. In very simple terms, this guide takes the reader through the main incentives offered by the Chilean government and provides a step by step explanation as to how to access these benefits.

5) A Guide for people with disabilities looking for a job. This Guide was inspired by an ILO Guide produced in its regional office in Asia, and has been adapted to Chile. The Guide aims to encourage people with disabilities to seek productive and remunerated work.

Key drivers for the employment of people with disabilities

- Corporate Social Responsibility. Initiatives on disability inclusion, and projects related to people with disabilities, although still largely absent in CSR, are increasingly mentioned in companies' annual CSR reports.
- Personal commitment from the founder or CEO of the company. This is quite often the case and raises the prevalent issue of long lasting commitment by the company.
- Financial incentives. This is usually an interesting incentive for small and medium enterprises. Grants to compensate for expenses linked to reasonable accommodation are particularly important to ensure that these expenses do not lead to candidates with disabilities not being employed.
- Pressure from society. As more companies (and organisations in general) become more disability-inclusive, the level of societal pressure put on other companies increases. The work of DPOs as well as of NGOs advocating for people with disabilities can play an instrumental role in increasing this pressure.
- Legislation. (…) this is usually the most relevant initial driver (…).

Employment quota legislation

For most companies, the initial driver for employing more people with disabilities is national legislation, most often so-called quota legislation that obliges companies with more than a certain number of employees to employ a set percentage of disabled employees in their workforce.

As a general rule, companies do not support quota legislation. However, many company representatives would also admit that in the absence of such a driver, most companies would not even start considering the employment of people with disabilities.

This is not the only paradox with quota legislation. Quota legislation, even in those few countries where it is effective, risks undermining the idea that people with disabilities should be employed for the same reasons as non-disabled employees, that is for their skills and talent. (…)

Another disadvantage of quota systems is that employees with disabilities are obliged to reveal their disability, as employers need to be able to show to the relevant public authority how many people with disabilities are employed in order to meet the quota. This raises obvious privacy-related issues, as people with disabilities often do not want to declare their disability. This is especially the case for invisible disabilities, such as psychosocial disabilities.

Non-discrimination legislation

While disability non-discrimination legislation has a more indirect impact on the employment of people with disabilities, especially when compared to quota legislation, it has a potentially very relevant systemic impact. For enterprises, complying with national disability non-discrimination legislation often results in the need to revise their internal practices to ensure that none of these directly or indirectly discriminate against people with disabilities. While this does not automatically lead to the employment of people with disabilities, experience has shown that it can make an important contribution.

Furthermore, non-discrimination legislation leads companies to ensure that their current employees with disabilities and those that got disabled at a later point are given the same opportunities as other employees and are provided with reasonable accommodation, if required. Disability non-discrimination legislation also has a positive impact on the environmental barriers – attitudinal and physical amongst others – that often prevent people with disabilities from accessing education and training.

Public procurement legislation

Other legislative measures promoting the employment of people with disabilities include public procurement procedures that give private companies better chances to sell their products or services to the public sector if these companies are inclusive of people with disabilities. (…)

Disability-inclusive business environments

In order for disability inclusion in workplaces to be successful, it is also essential that companies can operate in a policy environment that is conducive and enabling. One frequent issue raised by companies is that they cannot find people with disabilities that have the skills the companies require. To address this issue, government policies on vocational education and training inclusive of students and trainees with disabilities, are required. Furthermore, to ensure adequate matching of job vacancies with the skills and ambitions of jobseekers with disabilities, effective employment and placement agencies as well as NGOs providing services to people with disabilities are instrumental. (…)

ILO, Reporting on Disability: Guidelines for the Media[763]

Tips on promoting the positive portrayal of people with disabilities

It is very important that both journalists and communications professionals connect disability issues with human dignity and rights. Here are some tips for promoting the positive portrayal of persons with disabilities:

- Support the human rights-based approach. (…)
- Focus on the person, not the impairment. In describing a person with a disability, focus on the individual and not on their particular functional or physical limitations. (…)

763 ILO, *Reporting on disability: Guidelines for the media* (2015) www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_127002.pdf

- Emphasize ability, not the disability (unless it is critical to the story). For example, Mr. Jones uses a wheelchair, walks with crutches instead of Mr. Jones is wheelchair-bound, is differently-abled. Avoid emotional words such as "unfortunate", "pitiful". Avoid sad music or melodramatic introductions when reporting on disability. Never refer to individuals with disabilities as the disabled.

- Show persons with disabilities as active in society. Portraying people with disabilities as active members of society and not as passive and dependent helps to break down barriers and opens up opportunities.

- Allow people with disabilities to speak for themselves. (…)

- Don't overemphasize disabled 'heroes'. Even though the public may admire 'superheroes', portraying people with disabilities as superstars raises unrealistic expectations that all people with disabilities should achieve this level.

MYTH: Disability is a health issue.

FACT: Health is important for everyone – whether disabled or not. But health is not the only, or in some cases, most important issue. For many people with disabilities, participation in work, education, politics, among other spheres of life, is equally important. Focusing only on the impairment or on the disabled person as someone to be 'cured' is called the 'medical model' of disability. This approach often overlooks the abilities of the disabled person. By contrast, the 'social model' sees the barriers to participation arising from the way a society is built and organized, and attitudes and mistaken assumptions about disabled persons, in combination with the individual's impairment. Over the past decades, there has been a dramatic shift in how disability is perceived and persons with disabilities have started to be viewed as rights holders. (…)

MYTH: Persons with disabilities are unable to meet performance standards, thereby making them an employment risk.

FACT: Employers of disabled workers consistently report that, as a group, people with disabilities perform on par or better than their non-disabled peers on measures such as productivity, safety and attendance. In addition, people with disabilities are more likely to stay on the job. The costs of job turnover, such as lost productivity and expenses related to recruitment and training, are well known to most employers.

MYTH: Considerable expense is necessary to make workplace adjustments for workers with disabilities.

FACT: Making reasonable adjustments in the workplace refers to measures or actions taken by employers to help disabled people work or to take part in training on the same basis as non-disabled individuals. Most workers with disabilities require no special adjustments and the cost for those who do is minimal or much lower than many employers believe. Studies by the Job Accommodation Network in the United States have shown that 15 per cent of accommodation measures cost nothing, 51 per cent cost between $1 and $500, 12 per cent cost between $501 and $1,000, and 22 per cent cost more than $1,000.

Trewin, Considerations for AI Fairness for People with Disabilities[764]

AI has been shown to help improve the lives of people with disabilities in a number of different environments whether it be navigating a city, re-ordering prescriptions at a local pharmacy through a telephone or text service, or facilitating public safety. Almost everyone in the greater community is directly connected with someone with a disability whether it be a family member, a colleague, a friend, or a neighbor. While AI technology has significantly improved the lives of those in the disabled community, there are always ways in which we can continue to advocate for fairness and equality and challenge the status quo. (…)

764 Shari Trewin et al., *Considerations for AI Fairness for People with Disabilities* (2019) http://sigai.acm.org/static/aimatters/5-3/AIMatters-5-3-09-Trewin-accesible.pdf.

We describe some of the opportunities and risks across four emerging AI application areas: employment, education, public safety, and healthcare, identified in a workshop with participants experiencing a range of disabilities. (…)

In many existing situations, non-AI solutions are already discriminatory, and introducing AI runs the risk of simply perpetuating and replicating these flaws. For example, people with disabilities may already face discrimination in hiring opportunities. With AI-driven hiring systems, models that recognize good candidates by matching to the existing workforce will perpetuate that status quo. In education, an AI system that draws inferences based on a student's online interactions might misinterpret speed for competency, if the student is using assistive technologies. In public safety, AI systems might misinterpret a person with a cog nitive disability as a potential threat. In AI systems for healthcare, where speech characteristics can be used to diagnose cognitive impairments, a person with a speech impediment can be misdiagnosed.

To avoid such erroneous conclusions and potentially damaging outcomes, a number of steps are proposed. AI systems should be prioritized for fairness review and ongoing monitoring, based on their potential impact on the user in their broader context of use. They should offer opportunities to redress errors, and for users and those impacted to raise fairness concerns. People with disabilities should be included when sourcing data to build models. Such "outlier" data - the edge cases - will create a more inclusive and robust system. From the perspective of people with disabilities, there can be privacy concerns with self-identification, but there can be risk of exclusion from the data models if users opt not to participate or disclose. There are methods provided to increase participation while protecting user privacy, such as the personal data preferences standard. In deploying the AI application, it is critical to test the UI and system preferences with outlier individuals. Users should be able to pursue workarounds, and ultimately override the system where models may be unreliable.

Background (Cambodia)

UNICEF, Situation Analysis for Disability-Inclusive Governance[765]

Cambodia remains one of the poorest countries in Asia, with a growing inequality between urban and rural settings. Around 90 percent of Cambodia's poor live in rural areas. Poverty is a key challenge for many adults and children with disabilities who face challenges associated with limited access to services, discrimination, and fewer opportunities to participate in the community. The ratification of the Convention on the Rights of Persons with Disabilities (CRPD) and recent adoption of the National Disability Strategic Plan 2014-2018 (NDSP) are indications of the commitment of the Royal Government of Cambodia (RGC) to addressing the rights and improving the daily life of people living with disability. However, it is widely recognized that on-going external financial and technical support is needed to fully implement the CRPD and NDSP.

When a person with a disability has access to health care, education, vocational training, employment or self-employment, and development initiatives on an equal basis with others, and is included in community activities, they can enjoy their rights and a better quality of life. Nevertheless, women, girls, boys and men with disabilities, particularly those in rural and remote areas, may face many challenges in their daily lives, including: poverty and unsustainable livelihoods; discrimination and negative attitudes from all levels of society; limited access to appropriate services and education; inaccessibility of physical infrastructure; limited access to appropriate services for adults and children with severe disabilities, sensory disabilities, and/or intellectual disability; limited services for older persons with disabilities; and, parents often do not have access to adequate and up-to-date knowledge about disability or their rights, how to raise a child with a disability, or where to go for advice and assistance. Children with disabilities in institutional care are particularly vulnerable and excluded. Women and girls with disabilities may also face more discrimination and negative attitudes, fewer opportunities to access health care and education, and increased vulnerability to physical, emotional and sexual violence. Furthermore, youth with disabilities face many challenges in accessing higher education and employment opportunities, and older persons with disabilities have limited or no access to appropriate services.

765 Sheree Bailey AM and Sophak Kanika Nguon, *Situation Analysis for Disability-Inclusive Governance and Community Development in Cambodia, UNICEF Cambodia* (2014) https://www.dfat.gov.au/sites/default/files/cambodia-disability-inclusive-governance-community-development-sit-analysis.pdf.

At the national level, key ministries and agencies play an important role in coordination, planning, capacity building, monitoring and evaluation. The lead ministry on disability is the MoSVY which has the overall responsibility of ensuring the welfare and well-being of adults and children with disabilities and other vulnerable groups in Cambodia. MoSVY's Department of Welfare for Persons with Disabilities (DWPD) was established to lead and manage disability-related work. UNICEF's Child Protection programme provides support to the DWPD to promote and coordinate CBR. The role of the DWPD includes to: develop policies, laws and other legal frameworks related to the welfare of persons with disabilities; promote and oversee the effective implementation of the Disability Law; promote the implementation of international treaties related to disability; develop plans of action for physical rehabilitation including the production and distribution of orthotics and prosthetics and other mobility devices, vocational training and job placement; develop plans of action for CBR, arts and sport, and the development of Braille and Sign languages; and, organize the Cambodian Day and Cambodian Sports Day for Persons with Disabilities. (…)

SIDA, Disability Rights in Cambodia[766]

Compared with other countries in the region, Cambodia has a relatively complex governmental structure focused on people with disability. This includes two inter-Ministerial, multi-stakeholder coordination bodies (the DAC and NDCC), three government institution; the DAC Secretariat, the Department of Welfare of Persons and the Persons with Disabilities Foundation - all linked to the Ministry of Social Affairs Veterans and Youth Rehabilitation (MoSVY). In addition there are numerous overlapping committees, sub-committees and working groups. As most of these bodies do not meet regularly, their effectiveness is questionable. Also, the overlap of functions between different institutions results in unclear accountabilities (…)

Cambodia has a relatively large civil society community focused on people with disability. This is largely result of the landmine legacy, which led to the influx and high levels of support of International NGOs (INGO) in the 1990's.

Instruments (Cambodia)

Constitution of the Kingdom of Cambodia[767]

Article 31: The Kingdom of Cambodia shall recognize the respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the Covenants and conventions related to human rights, women's and children's rights. Every Khmer citizen shall be equal before the law, enjoying the same rights, freedom and fulfilling the same obligations regardless of race, color, sex, language, religious, belief, political tendency, birth origin, social status, wealth or other status. (…)

Law on the Protection and the Promotion of the Rights of Persons with Disabilities[768]

Preface

The Law on the Protection and the Promotion of Rights of Persons with Disabilities is very important in addressing the issues facing people with disabilities in society together with the implementation of other Royal Government Policies in promoting the welfare of people with disabilities. These include the National Strategic Plan and policies of other ministries, institutions and authorities at all levels. This law will protect and promote the basic rights of people with disabilities, reduce discrimination, provide equal opportunities for employment.

766 Swedish International Development Agency (SIDA), 'Disability Rights in Cambodia', in Human Rights Based Approach at Sida Compilation of Briefs on Persons with Disabilities (2015) C202351_Sida_framsidor.indd.

767 Cambodia, Constitution of the Kingdom of Cambodia (1993) https://pressocm.gov.kh/en/archives/9539.

768 Cambodia, Law on the Protection and the Promotion of the Rights of Persons with Disabilities, Royal Kram No. NS/RKM/0709/010 (2009) http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=86089.

Article 2: The purposes of this law are as follow:

- To protect the rights and freedoms of persons with disabilities;
- To protect the interests of persons with disabilities;
- To prevent, reduce and eliminate discrimination against persons with disabilities;
- To rehabilitate physically, mentally and vocationally in order to ensure that persons with disabilities are able to participate fully and equally in activities within society.

Article 4: Key terms

(…) Persons with Disabilities: refers to any persons who lack, lose, or damage any physical or mental functions, which result in a disturbance to their daily life or activities, such as physical, visual, hearing, intellectual impairments, mental disorders and any other types of disabilities toward the insurmountable end of the scale.

Chapter 7: Employment and Vocational Training

Non-Discrimination

Article 33: Persons with disabilities who have the required qualifications and competence to carry out the duties, role and responsibilities of a particular position have the right to be employed without discrimination, including employment as civil servants, workers, employees, apprentices or interns.

Quota

Article 35: Ministries and state institutions that recruit civil servants to be employed, shall employ persons with disabilities as stated in article 33 of this law, in accordance with the appropriate set quota.

The set quota and recruitment process shall be determined by Sub-decree.

Reasonable Accommodation

Article 38: Legal entities shall arrange a reasonable accommodation for persons with disabilities who apply for employment as workers, employees, apprentices or interns except where such accommodation constitutes an excessive burden.

Article 49: All provisions of international treaties relating to the laws on the protection and the promotion of the rights of persons with disabilities to which the Kingdom of Cambodia is a party shall be implemented together with this national law. In case of any provisions that contradict the provisions of this law, the provisions of those international treaties shall be considered as the principle provisions.

National Strategic Development Plan[769]

Managing and developing human resources and institution

Recruitment has been prioritized for female candidates with 20% to 50% of annual employment requirement, and 2% of disability staffs of total officials' number within Ministries and Institutions (…)

769 Royal Government of Cambodia, *National Strategic Development Plan 2019-2023*, http://www.mop.gov.kh/en-us/Home/Download/85bc808d-ea30-4f5f-95af-766e8490c3c5.

Table 2.44: Achievements on promoting welfare people with disabilities

N°	Indicator	2014	2015	2016	2017	2018	TOTAL
1	Persons with disabilities eceived vocational training for (persons)	158	478	205	123	117	1,081
2	Community poor people with disabilities receiving policy subsiby (persons)	0	0	3,133	6,658	8,658	
3	Community with disabilities receiving physical rehabilitation services (persons)	25,485	27,175	30,249	26,325	25,864	135,098
4	Persons with disabilities eceived medical recabilitation services (persons)	35,291	53,673	27,254	82,596	56,112	254,926

Universal Periodic Review, State Report[770]

2,576 persons with disabilities have been employed in public ministries/institutions with a rate of nearly 2%, while 2,124 persons with disabilities have been employed in private sectors with the percentage of 5.53%. In addition, 3,133 persons with disabilities in communities have been recognized as the poor to receive state policy scheme. And 205 persons with disabilities have received vocational trainings from non-governmental organizations.

Preston et al, When "Best" is Far from Good Enough [re H&M][771]

H&M is not only one of the leading fast fashion brands, but also has a long record of verbal commitments in the field of ensuring better working conditions for the workers stitching their clothes.

Union discrimination: All the interviewees said workers trying to form an independent union are forced to resign. In addition, male workers at the factory are not considered permanent employees and are solicited through a recruitment agency. All male workers are confined to the ironing department, are strictly monitored and easily terminated, therefore it is especially hard for them to form a new union. This practice is illegal under Article 12 of the Labour Law which prohibits gender discrimination; especially gender discrimination used to limit freedom of association.

"There is no discrimination in hiring, compensation, access to training, promotion, termination or retirement on the grounds of gender or sexual orientation, race, color, age, pregnancy, marital status, religion, political opinion, nationality, ethnic origin, caste, disease or disability." From H&Ms Sustainability Commitment

Disability Action Council, Promoting Social Inclusion in Cambodia[772]

The rationale of the project is to bring closer social science research and policy making, to stimulate public- driven policy innovations, and to support evidence-based and inclusive policy design in the select countries in South-east Asia. (…)

770 Human Rights Council, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21, A/HRC/WG.6/32/KHM/1* (2018) https://digitallibrary.un.org/record/1655575?ln=en.

771 Joel Preston, CENTRAl and Carin Leffler, *Future In Our Hands, "When Best is Far From Good Enough", Framtiden i vare hender* (2016) https://www.central-cambodia.org/wp-content/uploads/2016/09/When-best-is-far-from-good-enough-ENG-2016.pdf.

772 Disability Action Council Cambodia, *Final Report, 'Promoting Social Inclusion in Cambodia'* (2017) https://bangkok.unesco.org/sites/default/files/assets/article/Social%20and%20Human%20Sciences/publications/PROMOTING%20SOCIAL%20INCLUSION%20IN%20CAMBODIA.pdf.

Social Inclusion and Disability in Cambodia

Cambodia's recent history, including war, genocide and widespread poverty, resulted in a significant number of persons with disabilities. Continuing issues with land mines, traffic and other accidents, old age, poor nutrition and rising non-communicable diseases results in the continuing vulnerabilities of the population. Persons with disabilities have not always been included in all aspects of life: sometimes due to physical restrictions, sometimes policy barriers and other times due to discrimination and lack of understanding. (…)

Situation in Cambodia

Economic processes

- Private sector has limited understating on persons with disabilities.
- Persons with disabilities cannot access bank loans to conduct business or support their living.
- The vast majority of persons with disabilities that graduated from university are not able to find job because they do not have equitable access to the labour market.
- The government has developed quotas for the employment of persons with disabilities in public and private offices. These quotas are far from being reached.
- It is very challenging for persons with disabilities to get enrolled in an internship program. Most internship programs demand in the terms of reference a healthy body, which includes the absence of a disability in the understanding of the employer.

Political processes

- The government lacks offering accessible services to persons with disabilities. Challenges include:
- No access to welfare programs
- No 'poverty card' for persons with disabilities that enables them to get access to social security assistance
- Many doctors are not aware of disability related conditions and show a lack of interested in treating persons with disabilities.
- There is no supply of support materials for the inclusion of persons with disabilities. Specialized assistive devices are not available.
- Documents in Braille are not available.
- The government budgeting and spending for the inclusion of persons with disabilities is not transparent.

Social processes

- Persons with disabilities are discriminated within society. Stigma and prejudices are widespread.
- Therefore persons with disabilities are not encouraged to participate in community events. Society does not encourage them to participate.
- The local authorities do not sufficiently create awareness about persons with disabilities, their needs and possible contribution in mainstream society.
- Persons with disabilities lack access to any kind of assistance mechanisms in local communities.

Civic processes

- Persons with disabilities do not proactively seek support from the government or inform the government about their needs. This is due to the treatment they experience and the low esteem they develop.
- As a result persons with disabilities experience limited access to public services, e.g. public transport, general accessibility of public services
- Persons with disabilities have no representation in local governments.
- There is no coherent and comparable data on persons with disabilities within local governments or the national government.

Cultural processes

- There is still a widespread believe among persons with disabilities that they experience an impairment due to misdoings in previous lives.
- Children with disabilities experience less support from their parents than their peers without disabilities.
- Many parents do not send their children with disabilities to school because they fear that bullying will harm their children.
- Persons with disabilities get fewer years in education than their peers without disabilities.
- The law gives children the right to education except for children with disabilities.
- Persons with hearing impairment lack access to hearing aids and Sign Language interpretation.
- Persons who are blind to not have access to Braille books or other audio devices.
- A school will only setup a special class for children with disabilities if their number is at least five children. If the number is lower than five children with disabilities they will be rejected.

Disability Rights Initiative Cambodia, Final Programme[773]

Component 2: Supporting Disabled People's Organizations to Raise Their Voice and Protect the Rights of All Persons with Disabilities

The main achievement under Component 2 is the improved capacity of DPOs in terms of advocating for the rights of persons with disabilities at national and sub-national level. They are recognized as a strong voice to represent the needs and issues of persons with disabilities in Cambodia by sectoral government ministries, organizations and institutions. (…) Some 73 DPOs including 10 WWDFs have been registered and work to promote and advocate the rights of persons with disabilities in their communities (an increase from 64 DPOs and seven WWDF in 2013). CDPO/DPOs are recognized by sectoral government ministries, organizations and institutions as representatives of persons with disabilities in Cambodia. Most of provincial DPOs were invited to be members of disability working groups at provincial, district and commune levels…

The improved capacity of CDPO/DPOs to advocate with policy makers, as well as the local government authority, to include disability in policies and strategic plans/programmes is the most significant change in terms of behaviour changes/practices. For example, persons with disabilities have access to commune programmes, such as WASH,

773 Disability Rights Initiative Cambodia (DRIC), *Final Programme Narrative Report Reporting Period: December 2013-March* 2018 (2018) http://mptf.undp.org/document/download/20174.

income generation activities (agricultural activities funded by the Provincial Department of Rural Development), and physical infrastructure (road infrastructure, ramps, ID poor cards, social security funds, etc.). Another good example was the case of 19 women with disabilities who were fired from a footwear factory in Kampong Speu province. They received an unfair pension from the factory and CDPO/DPOs advocated with the employer to provide them with a reasonable pension that could help them start their own businesses.

Employment opportunities for persons with disabilities have increased, particularly within government ministries. DRIC supported CDPO to facilitate the mobilization of resources from different sectors, and to exchange and learn from each other through an informal employment working group consisting of government representatives, the national employment agency, UN agencies, the private sector, DPOs and NGOs. The aim is to improve the sustainable employment of persons with disabilities and to ensure that recruitment practices and workplaces are physically and culturally inclusive. As a result, persons with disabilities have been employed by several private sector companies, such as Aeon Mall, the Micro Finance Institute and other industries, such as garment and shoe factories.

Palmer & Williams, Employment Protection Laws for Disabled People[774]

Several mechanisms via which the introduction of the law reduced employment of the disabled are explored. We find that the most plausible mechanism is that employers reduce their demand for disabled labor in order to avoid the cost of workplace accommodations for disabled workers. We also find that families respond to the reduced employment of their disabled members by providing unpaid work and roles within the family home, and by providing income transfers to non-resident disabled family members. (…)

In order to better understand why employment of disabled persons fell in response to the disability law, we investigate several mechanisms that could potentially be in play. An important mechanism relevant to our study but not previously explored is a reduction in the labour supply of disabled persons due to family support lowering their (financial) need to work. Mechanisms uncovered in the existing literature include demand and supply side channels. On the supply side, previous studies have found evidence of a compositional change in terms of reduced ability to work and increased rate of welfare receipt amongst the disabled; in terms of the demand side, there is evidence that 20Note that the 85 respondents who report being an employer are omitted from the sample used to model the probability of being an employee and the probability of being self-employed. 17 employers reduce their demand for disabled workers in anticipation of high costs of accommodation relative to the cost of not complying with the law. (…)

Using a difference in-difference estimation strategy, we find that the disability law was not successful at improving the level of employment amongst disabled persons in Cambodia. We estimate that employment amongst disabled persons was reduced by around 9 percentage points in the four years after the law was introduced. The adverse impact of the law on employment was greater for women than men (14 percentage points versus 6 percentage points). However, these overall effects mask significant differences in the distribution of impacts across the formal and informal sectors. (…)

Laminchhane, Disability, Education and Employment in Developing Countries[775]

On employability and occupational choices and compared them for people with and without disabilities in Cambodia. The results indicate that gender and years of schooling are major determinants of employability and occupational choices, regardless of disability status. Moreover, for people with disabilities, gender and years of schooling are positively correlated with occupational choice, as the higher the years of schooling, the greater the likelihood of gaining employment in white-collar jobs.

774 Michael Palmer and Jenny Williams, *Are Employment Protection Laws for Disabled People Effective in a Developing Country? Evidence from Cambodia* (2017) https://mpra.ub.uni-muenchen.de/87944/1/MPRA_paper_87944.pdf.

775 Kamal Laminchhane, *Disability, Education and Employment in Developing Countries, Cambridge University Press* (Cambridge, 2015) https://www.cambridge.org/ca/academic/subjects/law/human-rights/disability-education-and-employment-developing-countries-charity-investment.

Gartrell, The Exclusion of Disabled People from Work in Cambodia[776]

The disabled people's social status effectively shapes their work patterns through (mis)conceptions that associate 'disability' with 'inability' to work and to be employable. This paper illustrates how geographical processes fix disabled people in their socio-spatial place, which together with ideological and structural inequalities distinguish and entrench their poverty from that of other social groups.

In the absence of social networks or, more importantly, relationships with people who can see their ability and capacity, accessing employment is difficult. With social networks, physical and other barriers to employment become less significant. For example, only one disabled man had 'big work' in the village. He was employed by an NGO as a guard and gained his position through social networks developed while living on the Thai–Cambodian border (…) They were employed in fields where physical disability was most likely to be a problem, reinforcing stereotypes of limited ability; to employ them in more physically appropriate tasks would challenge the social hierarchy of work. The discriminatory attitudes of employers discouraged disabled people, helping to keep them in their place of low status, while believing they were 'helping'. When in the workforce disabled people were not considered able to work at one hundred per cent capacity and must prove themselves before they were socially accepted.

Questions

1. What is 'intersectionality'? Can you give concrete examples in Cambodia?
2. What are the responsibilities and roles of business in promoting the rights of persons with disabilities?
3. What kind of programs should be developed to enable persons with disabilities to realize their full potential and access to employment opportunities? Can you give examples?
4. What does a shift from medical and social approach to disability to the human rights model mean for Cambodia?

Further Readings

- International Labour Organisation (ILO), *Vocational Rehabilitation and Employment (Disabled Persons) Convention (No. 159)* (1983) www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312304.
- International Labour Organisation (ILO), *Vocational Rehabilitation and Employment (Disabled Persons) Recommendation (No. 168)* (1983) www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R168
- International Labour Organisation (ILO), *Code of Practice on Managing Disability in the Workplace* (2001) www.ilo.org/public/english/standards/relm/gb/docs/gb282/pdf/tmemdw-2.pdf.
- International Labour Organisation (ILO), *Making Apprenticeships and Workplace Learning Inclusive of Persons with Disabilities, Policy Brief* (2018) www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_633257.pdf.
- Committee on the Rights of Persons with Disabilities, *General Comment No 3, Article 6: Women and Girls with Disabilities* (2016) https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/3&Lang=en.

776 Alexandra Gartrell, 'A Frog in a Well: The Exclusion of Disabled People from Work in Cambodia', *Disability & Society,* 25:3 (2010) https://www.researchgate.net/publication/248912810_%27A_Frog_in_a_Well%27_The_Exclusion_of_Disabled_People_from_Work_in_Cambodia.

- International Labour Organisation (ILO), *Decent Work for Persons with Disabilities: Promoting Rights in the Global Development Agenda* (2015) www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_430935.pdf.
- Microsoft, *AI for Accessibility projects* (2020) www.microsoft.com/en-us/ai/ai-for-accessibility-projects?activetab=pivot1%3aprimaryr2.
- International Labour Organisation (ILO), *Global Business and Disability Network* (videos) www.businessanddisability.org/index.php/en/resources/videos.
- *The Valuable 500*, https://www.thevaluable500.com/.
- *Business Disability Forum*, https://businessdisabilityforum.org.uk/.
- International Labour Organisation (ILO), *Disability - A Human Rights Issue* (2014) www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_229918.pdf.
- European Commission, *European Disability Strategy 2010-2020: A Renewed Commitment to a Barrier-Free Europe* (2010) https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0636:FIN:en:PDF.
- Juanjo Cordero et al., *Disability and Corporate Social Responsibility Reporting: An Analysis Comparing Reporting Practices of 40 Selected Multinational Enterprises* (2014) www.businessanddisability.org/wp-content/uploads/2014/08/ILO_CSRDisability.pdf.
- Adam Tweed, Ethics, Machine Learning and Disabilities, AbilityNet (2019) https://abilitynet.org.uk/news-blogs/ethics-machine-learning-and-disabilities.
- *List of Disability-related NGOs in Cambodia,*
- https://www.jica.go.jp/activities/issues/social_sec/pdf/cam_annex.pdf.
- International Labour Organisation (ILO), *Inclusion of People with Disabilities in Cambodia,* Fact Sheet, https://www.ilo.org/wcmsp5/groups/public/@ed_emp/@ifp_skills/documents/publication/wcms_115096.pdf.
- Betsy Vanleit, 'Using the ICF to Address Needs of People with Disabilities in International Development: Cambodian Case Study', *Disability and Rehabilitation* (2008) https://www.tandfonline.com/doi/pdf/10.1080/09638280701800251?casa_token=Vwn1qGMcAQgAAAAA:vF42BSvlG-vDzhiMcBsMFg8sw_6Glx6WtE5qGgnk_OqXLLuC_K_MAYrlHpb0jCZOBtghCiKBK6vKdGI.
- Cambodia, *Sub-Decree on Establishment of the Social Security Schemes on Health Care for Persons Defined by the Provisions of the Labour Law Royal Government, 01 ANK.BK* (2016) Unofficial translation by NSSF, https://www.arbitrationcouncil.org/resources/laws-regulations/sub-decree/.
- Cambodia, *Prakas on Organization and Functions of the Secretariat of Disability Action Council, No. 561* (2011) http://ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=93346&p_country=KHM&p_count=152&p_classification=08&p_classcount=4.
- Alexandra Gartrell, Emma Calgaro, George Goddard & Ngin Saorath, "Disaster Experiences of Women with Disabilities: Barriers and Opportunities for Disability Inclusive Disaster Risk Reduction in Cambodia", Global Environmental Change (2020) https://www.researchgate.net/publication/343359794_Disaster_experiences_of_women_with_disabilities_Barriers_and_opportunities_for_disability_inclusive_disaster_risk_reduction_in_Cambodia.

25. LAND ISSUES AND RELOCATION

Tuy Sophorn, Radu Mares

Introduction

Land rights and access to land is an aspect of the right to property and is essential to secure the livelihoods for rural populations. In international law, the land rights of indigenous people are strongly emphasized due to their special situation and increased vulnerability (chapter 22). Rural communities, even when not indigenous, are at higher risk of harm as they rely on agriculture for their livelihood and therefore might be competition for resources with new large agribusiness and industrial projects. Forced relocation, insufficient compensation, police brutality (chapter 26), intimidation and threats raise serious human rights issues and are a quite common occurrence. Indeed large agricultural projects, industrial activities in the extractive (mining, oil and gas) and forestry sectors, and other large infrastructure projects (e.g. dams) are notorious for causing massive displacement of rural communities. A heavy responsibility lies with financial institutions (e.g. development banks, commercial banks, investment funds) that enable such projects. As a result of sustained criticism, the World Bank has developed a special policy on how to relocate communities with respect for their rights and in a way that maintains or improves their livelihood. This policy is now an authoritative soft law instrument (chapter 2) that is used by multistakeholder initiatives such as the Equator Principles and by commercial banks that fund high-risk projects in developing countries. Paying attention to impacts on women (chapter 23) is particularly important to avoid grave abuses and to maximize the chances for successfully rebuilding livelihoods in new places. Massive relocation is sometimes labelled 'land grabbing' as a way to impress how states and businesses might collude, often through corrupt practices, and disregard the legitimate interests and rights of local populations. Understanding the political economy of land and the co-existence of formal and customary land laws is essential and can be achieved through social and human rights impact assessments (chapter 9). Such assessments are often required by development banks as a condition for financing. Then companies and investors can perform human rights due diligence (chapters 6-14), address root causes of potential abuses and come up with sustainable solutions often involving multiple stakeholders (chapter 5). Environmental degradation (chapter 29) has accompanied poorly designed large agricultural and industrial projects in states where there are gaps in the legal framework (chapter 1) and where judicial institutions are less effective (chapter 6).

After the Khmer Rouge regime, Cambodian citizens' private land ownership rights were installed and formalized in 1989. As Cambodia transitioned to a free market economy, the Constitution of the Kingdom of Cambodia (1993) and Land Law (1992) allowed Khmer citizens to apply for land certificates. For developing the economy in Cambodia, the Royal Government of Cambodia granted nearly 2,657,470 hectares as Economic Land Concessions (ELCs) to private companies in 2012. However, many ELCs were approved in non-compliance with the legal requirements. In many cases, the grant of ELCs adversely impacted on human rights, lives and livelihoods of hundreds of poor villager families in rural areas. LICADHO stated that: "The root causes of land conflicts have been well-documented: a corrupt and politically-obedient judicial system, the misuse of armed forces, including soldiers, as well as collusion between well-connected companies and authorities. This toxic cocktail has been fueling conflicts throughout the country for too long".[777]

777 Ibid.

Main Aspects

- ✓ Displacement (physical or economic)
- ✓ Resettlement (voluntary or involuntary)
- ✓ Compensation options (land-based, in cash or in kind)
- ✓ Land rights and tenure rights (legal or traditional)
- ✓ Expropriation (role of government and legal process)
- ✓ Principle of improving or at least restoring the standards of living of displaced persons
- ✓ Livelihood
- ✓ Benefit sharing
- ✓ Plans (Resettlement Action Plan and Livelihood Restoration Plan)
- ✓ Gender equality
- ✓ Agriculture investments (large and small scale)
- ✓ 'Land grabbing'
- ✓ 'Resource curse'
- ✓ Responsibility of foreign investors and home states
- ✓ Extraterritorial human rights obligations (of home states)

Background

Shift, The Human Rights Opportunity[778]



778 Shift et al., *The Human Rights Opportunity, 15 real-life cases of how business is contributing to the Sustainable Development Goals by putting people first* (2018) www.shiftproject.org/media/resources/docs/TheHumanRightsOpportunity_Shift-07-17-2918.pdf?utm_source=website&utm_medium=button-SDGs&utm_campaign=SDGs_Download-PDF

IFC, Handbook for Preparing a Resettlement Action Plan[779]

IFC will continue to adhere to a number of basic principles for addressing the adverse effects of involuntary resettlement associated with its investment projects. These principles are:

- Involuntary resettlement should be avoided.
- Where involuntary resettlement is unavoidable, all people affected by it should be compensated fully and fairly for lost assets.
- Involuntary resettlement should be conceived as an opportunity for improving the livelihoods of the affected people and undertaken accordingly.
- All people affected by involuntary resettlement should be consulted and involved in resettlement planning to ensure that the mitigation of adverse effects as well as the benefits of resettlement are appropriate and sustainable.

Common types of resettlement and the issues associated with them include:

Rural resettlement—Displacement of people in rural areas typically results from a project's acquisition of farm land, pasture, or grazing land or the obstruction of access to natural resources on which affected populations rely for livelihoods (for example, forest products, wildlife, and fisheries). Major challenges associated with rural resettlement include: requirements for restoring income based on land or resources; and the need to avoid compromising the social and cultural continuity of affected communities, including those host communities to which displaced populations may be resettled.

Urban resettlement—Resettlement in urban or periurban settings typically results in both physical and economic displacement affecting housing, employment, and enterprises. A major challenge associated with urban resettlement involves restoration of wage-based or enterprise-based livelihoods that are often tied to location (such as proximity to jobs, customers, and markets). Resettlement sites should be selected to maintain the proximity of affected people to established sources of employment and income and to maintain neighborhood networks. In some cases, the mobility of urban populations and the consequent weakening of social safety nets that are characteristic of rural communities require that resettlement planners be especially attentive to the needs of vulnerable groups.

Linear resettlement—Linear resettlement describes projects having linear patterns of land acquisition (highways, railways, canals, and power transmission lines). In sparsely populated rural areas, a linear project such as an electric transmission line may have minimal impact on any single landholder. Compensation is characterized by a large number of small payments for the temporary loss of assets such as standing crops. If well designed, linear projects can easily avoid or minimize the demolition of permanent structures. Conversely, in a densely populated urban area, a linear project such as a road upgrading may require the demolition of structures along the project right-of-way, thereby significantly affecting large numbers of people. Linear resettlement contrasts with site-specific resettlement because of the problems that frequently arise when resettlement actions have to be coordinated across multiple administrative jurisdictions and/or different cultural and linguistic areas.

Site-specific Resettlement—Site-specific resettlement is associated with discrete, nonlinear projects such as factories, ports, highway interchanges, hotels, commercial plantations, etc., where land acquisition encompasses a fixed area. However, site-specific resettlement associated with mining and other extractive industries such as oil and gas may require progressive land acquisition over long periods. As a result, displacement of communities may occur in phases over a number of years, even decades. Communities threatened with displacement at some future date often prefer to remain in place until resettlement is absolutely necessary. The major challenge in such incremental resettlement is maintaining a consistent approach to compensation and income restoration over the life of the project. Similarly, the creation of reservoirs for hydropower and irrigation projects can result in significant economic and physical displacement of rural communities. In the event that it considered investment in a project with such potentially large and controversial effects, IFC would require that project to support development initiatives to reestablish the affected people in significantly improved social and economic conditions.

779 International Finance Corporation (IFC), *Handbook for Preparing a Resettlement Action Plan* (2002) www.ifc.org/wps/wcm/connect/22ad720048855b-25880cda6a6515bb18/ResettlementHandbook.PDF?MOD=AJPERES.

Instruments

Universal Declaration of Human Rights[780]

Article 17

1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

UN, Declaration on the Rights of Peasants and People Working in Rural Areas[781]

Article 1

1. For the purposes of the present Declaration, a peasant is any person who engages or who seeks to engage alone, or in association with others or as a community, in small-scale agricultural production for subsistence and/or for the market, and who relies significantly, though not necessarily exclusively, on family or household labour and other non-monetized ways of organizing labour, and who has a special dependency on and attachment to the land. (…)

3. The present Declaration also applies to indigenous peoples and local communities working on the land, transhumant, nomadic and semi-nomadic communities, and the landless, engaged in the above-mentioned activities.

4. The present Declaration further applies to hired workers, including all migrant workers regardless of their migration status, and seasonal workers, on plantations, agricultural farms, forests and farms in aquaculture and in agro-industrial enterprises.

Article 2

3. (…) States shall consult and cooperate in good faith with peasants and other people working in rural areas through their own representative institutions, engaging with and seeking the support of peasants and other people working in rural areas who could be affected by decisions before those decisions are made, and responding to their contributions, taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.

4. States shall elaborate, interpret and apply relevant international agreements and standards to which they are a party in a manner consistent with their human rights obligations as applicable to peasants and other people working in rural areas.

5. States shall take all necessary measures to ensure that non-State actors that they are in a position to regulate, such as private individuals and organizations, and transnational corporations and other business enterprises, respect and strengthen the rights of peasants and other people working in rural areas.

780 *Universal Declaration of Human Rights* (1948) www.ohchr.org/en/udhr/pages/searchbylang.aspx.

781 *Declaration on the Rights of Peasants and Other People Working in Rural Areas* (2018) https://digitallibrary.un.org/record/1650694?ln=en.

Article 3

2. Peasants and other people working in rural areas have the right to determine and develop priorities and strategies to exercise their right to development.

3. States shall take appropriate measures to eliminate conditions that cause or help to perpetuate discrimination, including multiple and intersecting forms of discrimination, against peasants and people working in rural areas.

Article 5

1. Peasants and other people working in rural areas have the right to have access to and to use in a sustainable manner the natural resources present in their communities that are required to enjoy adequate living conditions, in accordance with article 28 of the present Declaration. They also have the right to participate in the management of these resources.

2. States shall take measures to ensure that any exploitation affecting the natural resources that peasants and other people working in rural areas traditionally hold or use is permitted based on, but not limited to:

   (a) A duly conducted social and environmental impact assessment;

   (b) Consultations in good faith, in accordance with article 2.3 of the present Declaration;

   (c) Modalities for the fair and equitable sharing of the benefits of such exploitation that have been established on mutually agreed terms between those exploiting the natural resources and the peasants and other people working in rural areas.

Article 15

1. Peasants and other people working in rural areas have the right to adequate food and the fundamental right to be free from hunger. This includes the right to produce food and the right to adequate nutrition, which guarantee the possibility of enjoying the highest degree of physical, emotional and intellectual development.

2. States shall ensure that peasants and other people working in rural areas enjoy physical and economic access at all times to sufficient and adequate food that is produced and consumed sustainably and equitably, respecting their cultures, preserving access to food for future generations, and that ensures a physically and mentally fulfilling and dignified life for them, individually and/or collectively, responding to their needs. (…)

4. Peasants and other people working in rural areas have the right to determine their own food and agriculture systems, recognized by many States and regions as the right to food sovereignty. This includes the right to participate in decision-making processes on food and agriculture policy and the right to healthy and adequate food produced through ecologically sound and sustainable methods that respect their cultures. (…)

Article 16

1. Peasants and other people working in rural areas have the right to an adequate standard of living for themselves and their families, and to facilitated access to the means of production necessary to achieve them, including production tools, technical assistance, credit, insurance and other financial services. They also have the right to engage freely, individually and/or collectively, in association with others or as a community, in traditional ways of farming, fishing, livestock rearing and forestry and to develop community-based commercialization systems.

2. States shall take appropriate measures to favour the access of peasants and other people working in rural areas to the means of transportation, and processing, drying and storage facilities necessary for selling their products on local, national and regional markets at prices that guarantee them a decent income and livelihood.

3. States shall take appropriate measures to strengthen and support local, national and regional markets in ways that facilitate, and ensure that peasants and other people working in rural areas have, full and equitable access and participation in these markets to sell their products at prices that allow them and their families to attain an adequate standard of living.

4. States shall take all appropriate measures to ensure that their rural development, agricultural, environmental, trade and investment policies and programmes contribute effectively to protecting and strengthening local livelihood options and to the transition to sustainable modes of agricultural production. States shall stimulate sustainable production, including agroecological and organic production, whenever possible, and facilitate direct farmer-to-consumer sales. (…)

Article 17

1. Peasants and other people living in rural areas have the right to land, individually and/or collectively (…)

4. Peasants and other people working in rural areas have the right to be protected against arbitrary and unlawful displacement from their land or place of habitual residence (…)

6. Where appropriate, States shall take appropriate measures to carry out agrarian reforms in order to facilitate broad and equitable access to land and other natural resources necessary to ensure that peasants and other people working in rural areas enjoy adequate living conditions, and to limit excessive concentration and control of land, taking into account its social function. (…)

Article 18

1. Peasants and other people working in rural areas have the right to the conservation and protection of the environment and the productive capacity of their lands, and of the resources that they use and manage.

2. States shall take appropriate measures to ensure that peasants and other people working in rural areas enjoy, without discrimination, a safe, clean and healthy environment. (…)

IFC, Performance Standard 5 on Land Acquisition[782]

1. Performance Standard 5 recognizes that project-related land acquisition and restrictions on land use can have adverse impacts on communities and persons that use this land. Involuntary resettlement refers both to physical displacement (relocation or loss of shelter) and to economic displacement (loss of assets or access to assets that leads to loss of income sources or other means of livelihood) as a result of project-related land acquisition and/or restrictions on land use. Resettlement is considered involuntary when affected persons or communities do not have the right to refuse land acquisition or restrictions on land use that result in physical or economic displacement. (…)

3. To help avoid expropriation and eliminate the need to use governmental authority to enforce relocation, clients are encouraged to use negotiated settlements meeting the requirements of this Performance Standard, even if they have the legal means to acquire land without the seller's consent.

782 International Finance Corporation (IFC), *Performance standard 5 – Land Acquisition and Involuntary Resettlement* (2012) https://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Document.pdf?MOD=AJPERES (references omitted).

5. This Performance Standard applies to … Certain project situations requiring evictions of people occupying land without formal, traditional, or recognizable usage rights; (…) While some people do not have rights over the land they occupy, this Performance Standard requires that non land assets be retained, replaced, or compensated for; relocation take place with security of tenure; and lost livelihoods be restored.

Project Design

8. The client will consider feasible alternative project designs to avoid or minimize physical and/or economic displacement, while balancing environmental, social, and financial costs and benefits, paying particular attention to impacts on the poor and vulnerable.

Compensation and Benefits for Displaced Persons

9. When displacement cannot be avoided, the client will offer displaced communities and persons compensation for loss of assets at full replacement cost and other assistance to help them improve or restore their standards of living or livelihoods, as provided in this Performance Standard. Compensation standards will be transparent and applied consistently to all communities and persons affected by the displacement. Where livelihoods of displaced persons are land-based, or where land is collectively owned, the client will, where feasible, offer the displaced land-based compensation. The client will take possession of acquired land and related assets only after compensation has been made available and, where applicable, resettlement sites and moving allowances have been provided to the displaced persons in addition to compensation. The client will also provide opportunities to displaced communities and persons to derive appropriate development benefits from the project.

(…) Payment of cash compensation for lost assets may be appropriate where

(i) livelihoods are not land-based;

(ii) livelihoods are land-based but the land taken for the project is a small fraction of the affected asset and the residual land is economically viable; or

(iii) active markets for land, housing, and labor exist, displaced persons use such markets, and there is sufficient supply of land and housing.

(…) If circumstances prevent the client from providing land or similar resources as described above, alternative income earning opportunities may be provided, such as credit facilities, training, cash, or employment opportunities. Cash compensation alone, however, is frequently insufficient to restore livelihoods.

(…) Documentation of ownership or occupancy and compensation arrangements should be issued in the names of both spouses or heads of households, and other resettlement assistance, such as skills training, access to credit, and job opportunities, should be equally available to women and adapted to their needs. Where national law and tenure systems do not recognize the rights of women to hold or contract in property, measures should be considered to provide women as much protection as possible with the objective to achieve equity with men.

12. Where involuntary resettlement is unavoidable, either as a result of a negotiated settlement or expropriation, a census will be carried out to collect appropriate socioeconomic baseline data to identify the persons who will be displaced by the project, determine who will be eligible for compensation and assistance, and discourage ineligible persons, such as opportunistic settlers, from claiming benefits. (…)

Private Sector Responsibilities Under Government-Managed Resettlement

30. Where land acquisition and resettlement are the responsibility of the government, the client will collaborate with the responsible government agency, to the extent permitted by the agency, to achieve outcomes that are consistent with this Performance Standard. In addition, where government capacity is limited, the client will play an active role during resettlement planning, implementation, and monitoring, as described below.

31. In the case of acquisition of land rights or access to land through compulsory means or negotiated settlements involving physical displacement, the client will identify and describe government resettlement measures. If these measures do not meet the relevant requirements of this Performance Standard, the client will prepare a Supplemental Resettlement Plan that, together with the documents prepared by the responsible government agency, will address the relevant requirements of this Performance Standard (the General Requirements and requirements for Physical Displacement and Economic Displacement above). The client will need to include in its Supplemental Resettlement Plan, at a minimum

    (i) identification of affected people and impacts;

    (ii) a description of regulated activities, including the entitlements of displaced persons provided under applicable national laws and regulations;

    (iii) the supplemental measures to achieve the requirements of this Performance Standard as described in paragraphs 19–29 in a way that is permitted by the responsible agency and implementation time schedule; and

    (iv) the financial and implementation responsibilities of the client in the execution of its Supplemental Resettlement Plan.

(…) The government often plays a central role in the land acquisition and resettlement process, including the determination of compensation, and is therefore an important third party in many situations. Experience demonstrates that the direct involvement of the client in resettlement activities can result in more cost-effective, efficient, and timely implementation of those activities, as well as in the introduction of innovative approaches to improving the livelihoods of those affected by resettlement.

FAO, Voluntary Guidelines on the Responsible Governance of Tenure of Land[783]

4. Rights and responsibilities related to tenure

4.1 States should strive to ensure responsible governance of tenure because land, fisheries and forests are central for the realization of human rights, food security, poverty eradication, sustainable livelihoods, social stability, housing security, rural development, and social and economic growth.

4.3 All parties should recognize that no tenure right, including private ownership, is absolute. All tenure rights are limited by the rights of others and by the measures taken by States necessary for public purposes. Such measures should be determined by law, solely for the purpose of promoting general welfare including environmental protection and consistent with States' human rights obligations. Tenure rights are also balanced by duties. All should respect the long-term protection and sustainable use of land, fisheries and forests.

4.4 Based on an examination of tenure rights in line with national law, States should provide legal recognition for legitimate tenure rights not currently protected by law. Policies and laws that ensure tenure rights should be non-discriminatory and gender sensitive. (…)

4.6 States should remove and prohibit all forms of discrimination related to tenure rights, including those resulting from change of marital status, lack of legal capacity, and lack of access to economic resources. In particular, States should ensure equal tenure rights for women and men, including the right to inherit and bequeath these rights. Such State actions should be consistent with their existing obligations under relevant national law and legislation and international law, and with due regard to voluntary commitments under applicable regional and international instruments.

783 Food and Agriculture Organization (FAO), *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (2012) www.fao.org/publications/card/en/c/I2801E/.

4.8 Given that all human rights are universal, indivisible, interdependent and interrelated, the governance of tenure of land, fisheries and forests should not only take into account rights that are directly linked to access and use of land, fisheries and forests, but also all civil, political, economic, social and cultural rights. In doing so, States should respect and protect the civil and political rights of defenders of human rights, including the human rights of peasants, indigenous peoples, fishers, pastoralists and rural workers, and should observe their human rights obligations when dealing with individuals and associations acting in defence of land, fisheries and forests.

4.9 States should provide access through impartial and competent judicial and administrative bodies to timely, affordable and effective means of resolving disputes over tenure rights, including alternative means of resolving such disputes, and should provide effective remedies, which may include a right of appeal, as appropriate. (…)

4.10 States should welcome and facilitate the participation of users of land, fisheries and forests in order to be fully involved in a participatory process of tenure governance, inter alia, formulation and implementation of policy and law and decisions on territorial development, as appropriate to the roles of State and non-state actors, and in line with national law and legislation.

3. Guiding principles of responsible tenure governance

3.2 Non-state actors including business enterprises have a responsibility to respect human rights and legitimate tenure rights. Business enterprises should act with due diligence to avoid infringing on the human rights and legitimate tenure rights of others. They should include appropriate risk management systems to prevent and address adverse impacts on human rights and legitimate tenure rights. Business enterprises should provide for and cooperate in non-judicial mechanisms to provide remedy, including effective operational-level grievance mechanisms, where appropriate, where they have caused or contributed to adverse impacts on human rights and legitimate tenure rights. Business enterprises should identify and assess any actual or potential impacts on human rights and legitimate tenure rights in which they may be involved. States, in accordance with their international obligations, should provide access to effective judicial remedies for negative impacts on human rights and legitimate tenure rights by business enterprises. Where transnational corporations are involved, their home States have roles to play in assisting both those corporations and host States to ensure that businesses are not involved in abuse of human rights and legitimate tenure rights. States should take additional steps to protect against abuses of human rights and legitimate tenure rights by business enterprises that are owned or controlled by the State, or that receive substantial support and service from State agencies.

12. Investments

12.6. (…) States should consider promoting a range of production and investment models that do not result in the large-scale transfer of tenure rights to investors, and should encourage partnerships with local tenure right holders.

OECD-FAO, Guidance for Responsible Agricultural Supply Chains[784]

Model enterprise policy for responsible agricultural supply chains

6. Tenure rights over and access to natural resources

We will respect legitimate tenure right holders and their rights over natural resources, including public, private, communal, collective, indigenous and customary rights, potentially affected by our activities. Natural resources include land, fisheries, forests, and water.

784 OECD-FAO, *Guidance for Responsible Agricultural Supply Chains* (2016) www.oecd-ilibrary.org/agriculture-and-food/oecd-fao-guidance-for-responsible-agricultural-supply-chains_9789264251052-en

To the greatest extent possible, we will commit to transparency and information disclosure on our land-based investments, including transparency of lease/concession contract terms, with due regard to privacy restrictions.

We will give preference to feasible alternative project designs to avoid or, when avoidance is not possible, minimise the physical and/or economic displacement of legitimate tenure right holders, while balancing environmental, social, and financial costs and benefits, paying particular attention to adverse impacts on the poor and vulnerable.

We are aware that, subject to their national law and legislation and in accordance with national context, states should expropriate only where the rights at issue are required for a public purpose and should ensure a prompt, adequate and effective compensation.

When holders of legitimate tenure rights are negatively affected, we will seek to ensure that they receive a prompt, adequate and effective compensation of their tenure rights being negatively impacted by our operations.

Measures for risk mitigation and prevention along agricultural supply chains

6. Tenure rights over and access to natural resources

Risk mitigation measures

- Identify rights holders - who consist not only of holders of officially recognised tenure rights, but also of public, private, communal, collective, indigenous and customary tenure rights that may not have been officially registered and titled, including women's tenure rights - and other relevant stakeholders, including through local and open consultations.

- Establish a committee representative of the relevant stakeholders to advise on impact assessments, particularly on initial phases (screening and scoping) and on management, monitoring and contingency plans. Special consideration should be given to ensuring the adequate representation of indigenous peoples, local communities and marginalised groups.

- Consider feasible alternative investments if proposed investments lead to the physical and/or economic displacement of local communities, recognising that states should expropriate only where rights to land, fisheries or forests are required for a public purpose and that they should clearly define the concept of public purpose in law.

- When tenure right holders are negatively impacted by operations, work with the government to ensure that tenure rights holders receive a fair, prompt and appropriate compensation for those tenure rights negatively impacted by the operations by:

    - holding good-faith, effective and meaningful consultations on the compensation offered and ensuring consistent and transparent application of compensation standards

    - giving preference to land-based compensation, that is commensurate in quality, size and value, and otherwise providing compensation at full replacement cost for lost assets - including assets other than land (crops, water resources, irrigation infrastructure and land improvements) - and other assistance to help them improve or restore their standard of living or livelihoods

    - monitoring the implementation of the compensation arrangement.

- Where government capacity is limited, play an active role in the resettlement planning, implementation and monitoring.

African Union, Guiding Principles on Large Land Based Investments in Africa[785]

Principle 1: LSLBI [Large scale land based investments] respect the existing, customarily-defined rights of local people and communities to land and land related resources.

This means recognizing the legitimacy of these rights irrespective of whether those rights have been formally registered or not. Investor governments also have a responsibility to support investment practices which are in line with the aspirations of host countries and respectful of human and other rights. Investors have the obligation of abiding by local, national and international laws and guidelines to ensure that activities related to their enterprises do not cause harm to communities in any way. On their part, local communities must take the responsibility to seek information and participate in negotiations and decision making regarding LBLSI.

Principle 3: Member States establish and maintain a legislative environment and institutional arrangements to govern LSLBI and to protect the rights of relevant stakeholders.

All stakeholders affected by LSLBI, in particular affected communities, have the right to access the services of land administration systems. Member States should therefore ensure that legal, judicial, and institutional arrangements relating to land and LSLBI are functional and accessible at local levels wherever LSLBI are considered. All this requires Government and local authorities to consider options for strengthening their own legal, technical and negotiating capacity before entering into contract negotiations. This includes legislation and institutions beyond land, such as those related to foreign investment, financial and tax incentives, environmental issues and labor laws, among others. (…)

Principle 4: Member States have the responsibility to promote transparency of all parties throughout the investment process.

States should require investors to disclose comprehensive project information in accessible form to parties affected by the LSLBI. This includes information about the identity of the parties involved, including the investor and its owners, financial intermediaries and backers; about the concession area and nature of rights; about investment plans and expected risks and opportunities, costs and benefits; about assessment and mitigation of potentially negative impacts. There should be a presumption by all parties that results of impact assessment studies and investment contracts should be disclosed. States have a key role in establishing effective institutions to handle such public disclosure and to promote multi-stakeholder involvement in the processes of these institutions.

State agencies and investors should also be required to seek the prior, informed participation of affected communities with respect to all decisions which have consequences for communities.

Corrupt practices in the context of LSLBI contribute significantly to observed impacts of LSLBI, including unauthorized conversion of customary land to commercial land in the interests of LSLBI. Measures should be put in place and implemented to make corruption in the conduct of LSLBI a punishable offence. Corruption can further be avoided by ensuring that decisions on LSLBI follow prescribed process.

Contracts entered by government and communities with investors should clearly identify the rights and obligations of all parties. These rights should be formulated in specific and enforceable terms and should provide effective arrangements for monitoring compliance and sanctioning non-compliance including contract termination in case of material noncompliance.

785 African Union, *Guiding Principles on Large Scale Land Based Investments in Africa* (2014) www.uneca.org/sites/default/files/PublicationFiles/guiding_principles_eng_rev_era_size.pdf.

Principle 11: Promoting gender equality in land governance in national laws is a prerequisite to ensuring that LSLBI promote sustainable development.

Gender equity is established as fundamental to the achievement of sustainable development. Governments will need to recognize the skewed nature of control over resources and access to opportunities against women, and ensure the equal right of women and men to the enjoyment of all human rights, while acknowledging differences between women and men and taking specific measures aimed at accelerating de facto equality when necessary.

Accordingly, Member States should ensure that women and girls' equal tenure rights and access to land, fisheries and forests are clearly protected in national laws independent of the individual's civil and marital status. In the absence of such provisions LSLBI, will almost invariably result in the further marginalisation of women and girls. Such marginalisation would negatively impact aspirations of Member States with respect to sustainable development.

Principle 14: LSLBI are commercially viable and profitable businesses, structured to provide maximum benefit to the national economy and improve the livelihoods of local communities.

Firstly, States need to ensure that LSLBIs are financially and economically viable, then at the same time negotiate and leverage greater value from LSLBI to the whole economy in the form of technology improvements, markets, infrastructure, and creation of decent jobs especially for youth.

In-depth analyses of profitability must include opportunities for smallholder producers who are at the core of Africa's development, especially where smallholder farmers and/or small-scale businesses are part of the LSLBI business model. LSLBI should neither distort, monopolise local markets nor squeeze out local and smaller businesses. (…)

Principle 16: The amount of land allocated for an LSLBI project is increased gradually based on the demonstrated capacities of the investor to effectively utilize more land.

Evidence to date indicates that most investors do not have the technical, financial and other capacities to develop most of the land allocated to them. The size of LSLBI should be based on analyses of the optimal land size for a particular investment, taking into consideration investor capacities. There is little or no value to States in bringing excessive tracts of land under an investor all at once as this fuels speculation in land and unwarranted displacement of communities. (…)

World Bank, Resettlement Fact Sheet[786]

The World Bank's Involuntary Resettlement Policy

- Involuntary Resettlement refers to two distinct but related processes. Displacement is a process by which development projects cause people to lose land or other assets, or access to resources. This may result in residential dislocation, loss of income, or other adverse impacts. Resettlement generally refers to the process by which those adversely affected are assisted in their efforts to improve, or at least to restore, their incomes and living standards.

- All persons losing assets or use of resources as a direct result of a Bank-supported project are referred to as 'displaced persons' entitled to compensation and/or other forms of assistance.

786 World Bank, *Resettlement Fact Sheet* (undated) http://pubdocs.worldbank.org/en/628991425483120559/resettlement-fact-sheet.pdf.

- The Bank's policy extends beyond the corresponding laws of most countries (including those of industrialized democracies) in two key respects: a) a requirement that opportunities be provided to affected persons to improve (or at least restore) incomes or livelihoods reflects recognition that mere compensation for assets may not provide sufficient opportunity to restore livelihoods; and b) because the ultimate purpose of the Bank policy is to protect livelihoods and living standards, the Bank's policy coverage includes affected persons who may lack legal title or rights to the land they occupy or the resources they use. It also includes tenants, artisans, and wage earners whose livelihoods or living standards would be adversely affected as a direct result of the project.

- For all projects involving land acquisition, the Bank requires preparation of an explicit plan to guide land acquisition and resettlement processes. These plans include arrangements for monitoring these activities, and procedures for responding to complaints received from affected persons.

- The policy does not include persons opportunistically invading a proposed project site after an eligibility cut-off date is declared, for the purpose of obtaining assistance. (…)

The Bank's policy also recognizes that projects involving land acquisition also can provide opportunities to significantly improve livelihoods and living standards. Poor housing conditions can be improved. Business or employment skills can be provided. In some instances, benefit-sharing schemes can be devised. Through careful project design, land acquisition and even involuntary resettlement can be turned into a development opportunity.

World Bank, Shortcomings in Resettlement Projects[787]

Acting on internal World Bank reports that identified serious shortcomings in the implementation of its resettlement policies, the World Bank today [2015] released a plan that will improve the oversight and management of resettlement practices to ensure better protection of people and businesses affected by Bank-funded projects.

Three reports, which reviewed over two decades of World Bank projects involving possible resettlements, found that oversight of those projects often had poor or no documentation, lacked follow through to ensure that protection measures were implemented, and some projects were not sufficiently identified as high-risk for populations living in the vicinity.

"We took a hard look at ourselves on resettlement and what we found caused me deep concern," said World Bank Group President Jim Yong Kim. "We found several major problems. One is that we haven't done a good enough job in overseeing projects involving resettlement; two, we haven't implemented those plans well enough; and three, we haven't put in place strong tracking systems to make sure that our policies were being followed. We must and will do better."

IFC, Handbook for Preparing a Resettlement Action Plan[788]

Components of a Resettlement Action Plan

IFC requires a resettlement action plan (RAP) for any project that results in either the physical or the economic displacement of people. The scope and level of detail of resettlement planning will vary with circumstances, depending on the project's complexity and the magnitude of its effects. As a minimum requirement, a RAP must ensure that the livelihoods of people affected by the project are restored to levels prevailing before inception of the project.

787 World Bank, *World Bank Acknowledges Shortcomings in Resettlement Projects, Announces Action Plan to Fix Problems,* Press release (2015) www.worldbank.org/en/news/press-release/2015/03/04/world-bank-shortcomings-resettlement-projects-plan-fix-problems.

788 International Finance Corporation (IFC), *Handbook for Preparing a Resettlement Action Plan* (2002) www.ifc.org/wps/wcm/connect/22ad720048855b-25880cda6a6515bb18/ResettlementHandbook.PDF?MOD=AJPERES.

However, simple restoration of livelihood may be insufficient to protect affected populations from adverse project impacts, especially induced effects such as competition for resources and employment, inflation, and the breakdown of social support networks. For this reason, IFC seeks to promote the improvement of the living standards of people affected by the project. Thus, resettlement activities should result in measurable improvements in the economic conditions and social well-being of affected people and communities.

This section describes a recommended approach to effective RAP preparation. The essential components of a RAP are the following:

1. identification of project impacts and affected populations;
2. a legal framework for land acquisition and compensation;
3. a compensation framework;
4. a description of resettlement assistance and restoration of livelihood activities;
5. a detailed budget;
6. an implementation schedule;
7. a description of organizational responsibilities;
8. a framework for public consultation, participation, and development planning;
9. a description of provisions for redress of grievances; and
10. a framework for monitoring, evaluation, and reporting.

1. Identification of Project Impacts and Affected Populations

Affected populations and impacts should be identified through a series of steps :

1. thematic maps that identify such features as population settlements, infrastructure, soil composition, natural vegetation areas, water resources, and land use patterns;
2. a census that enumerates the affected people and registers them according to location;
3. an inventory of lost and affected assets at the household, enterprise, and community level;
4. socioeconomic surveys and studies of all affected people (including seasonal, migrant, and host populations), as necessary;
5. analysis of surveys and studies to establish compensation parameters, to design appropriate income restoration and sustainable development initiatives, and to identify baseline monitoring indicators; and
6. consultation with affected populations regarding mitigation of effects and development opportunities. (…)

2. Legal framework

The legal framework of a RAP describes all laws, decrees, policies and regulations relevant to the resettlement activities associated with a project. Many countries have legislation and policies governing land expropriation and compensation for affected assets. However, policy governing resettlement is often poorly defined, if not altogether lacking. IFC requires the project sponsor to identify, review, and abide by all laws of the host country that are applicable to land acquisition and involuntary resettlement including:

- the scope of the power of eminent domain and the nature of compensation associated with it, both the procedures for assessing compensation values and the schedule for making compensation payments;
- the legal and administrative procedures applicable, including the appeals process and the normal time for such procedures;
- land titling and registration procedures; and
- laws and regulations relating to the agencies responsible for implementing resettlement and those related to land compensation, consolidation, land use, environment, water use, and social welfare. (…)

The sponsor must ensure that all affected households and enterprises receive clear title to their new sites free of registration fees, licensing fees, or customary tribute payments. Special provisions may have to be made for households headed by women and children and other vulnerable groups in circumstances where local law or custom does not fully recognize their rights to own or register land, assets, or enterprises. Such provisions may be difficult to implement if the host government does not recognize private ownership of land. Nevertheless, the sponsor should make every effort to reach agreements with host governments that ensure the security of affected people's ownership of land and assets.

4. Livelihood Restoration

In cases where resettlement affects the income-earning capacity of the displaced families, compensation alone does not guarantee the restoration or improvement of their living standards. As noted in the introduction, IFC encourages project sponsors to undertake resettlement as a sustainable development initiative, that is, an initiative that leads to an improved standard of living for project affected people. (…)

Land-based livelihoods—Resettlement sites may require dependable access to grazing land, forest, and water resources; physical preparation of farm land (clearing, leveling, creating access routes, and soil stabilization); fencing for pasture or cropland; agricultural inputs (seeds, seedlings, fertilizer, irrigation); veterinary care; small-scale credit including rice banks, cattle banks, and cash loans; and access to markets.

Wage-based livelihoods—Wage earners in the community may benefit from skills training and job placement, provisions made in contracts with project subcontractors for employment of qualified local workers, unemployment insurance, and small-scale credit to finance startup enterprises. Sponsors should provide sufficient lead time for training of affected people to enable them to compete for jobs related to the project.

Enterprise-based livelihoods—Established and nascent entrepreneurs and artisans may benefit from credit or training (business planning, marketing, inventory, and quality control) to expand their business and generate local employment. Sponsors can promote local enterprise by procuring goods and services for their projects from local suppliers.

ICMM, Land Acquisition and Resettlement: Lessons Learned[789]

Responsibly undertaking resettlement activities is one means by which companies can positively contribute to development.

In a number of countries there has been an increase in legislation regulating land access and resettlement however, most countries still have limited applicable laws dealing with only some of the relevant issues, for example compensation, expropriation and building standards. Areas that are often poorly addressed include community engagement, livelihoods, monitoring and evaluation, and reporting. As a result, the reality is that mere compliance with national requirements does not always enable a company to fully address key social risks and challenges.

789 International Council of Mining and Metals (ICMM), *Land Acquisition and Resettlement: Lessons Learned* (2015) www.icmm.com/website/publications/pdfs/social-and-economic-development/9714.pdf.

Restoring sustainable livelihoods

Best practice requires companies to improve, or at least restore, the livelihoods and standards of living of displaced persons. A livelihood is defined as a means of securing the necessities of life. Many projects in the past used to consider the resettlement process complete when the impacted households were given replacement houses or paid cash compensation. However, in the majority of cases where cash compensation is given, resettled households struggle to attain their former standard of living.

Currently, there is increasing recognition that livelihood restoration requires a focus beyond just income, and that other social factors such as education, health and social cohesion serve to sustain living standards over time. Despite this recognition and the development of social performance standards, livelihood restoration is often not being properly planned and fails to restore or improve livelihoods sustainably.

Where this occurs, it can lead to significant community dissatisfaction and threaten the project's social licence to operate. The role of women in contributing to the livelihood of the household is also not always given sufficient consideration, which may result in women losing access to land and common property resources, lowering income and status.

Challenges

- Projects generally change the whole economic context of an area, resulting in the influx of economic migrants and inflation of prices. So even if the same resources are available, the households' standard of living can still drop significantly.

- Projects are often managed by engineers focused on construction with a limited understanding of the complexity of local livelihoods. They have a tendency to focus on short-term solutions, including cash compensation, and a lack of appreciation that livelihood restoration and implementation of alternative livelihoods is a long-term process. This often means that livelihood restoration is seen as a luxury the project cannot afford. (…)

- A failure to properly integrate displaced livelihoods into host communities can result in jealousy, isolation and an ongoing dependency on the company.

- There is often conflict post-resettlement over resources where assumptions were made on shared use of natural resources such as forests and water resources without negotiating a firm agreement. (…)

- Many companies fail to consider the loss of access to common property such as pasture, forests and water bodies at resettlement sites resulting in disproportionate impacts on the livelihoods of poorer and marginalised groups, including Indigenous Peoples.

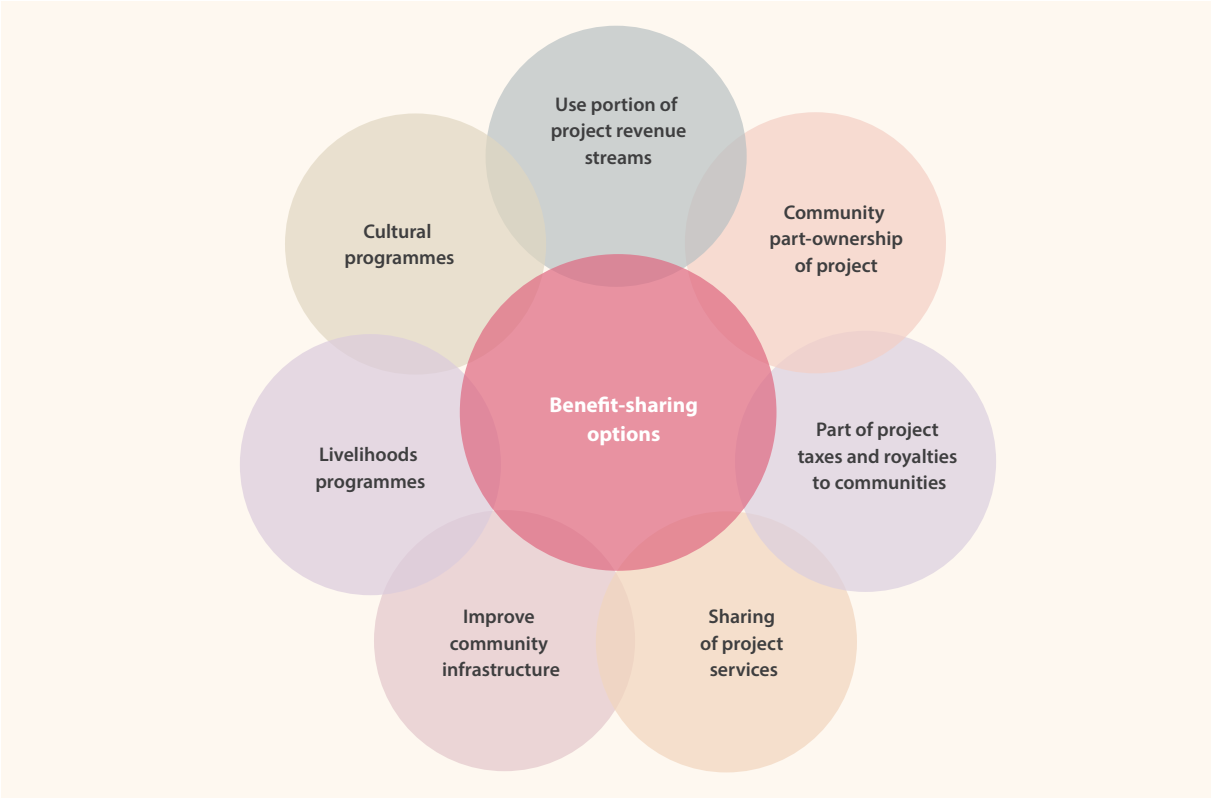
- Acquiring replacement land can be very expensive in many countries as pressure on land increases and prices escalate.

Benefit sharing and community development

In addition to addressing the negative impacts caused by resettlement activities, companies should support affected communities to benefit from opportunities arising from the mining project. Although the concepts of compensation and sharing benefits often overlap in practice, they are conceptually different.

Compensation is focused primarily on redressing loss or damage that can be attributed to the impacts of a project (eg loss of access to land and assets).

Benefit sharing on the other hand aims to promote broader economic participation in projects, for example through royalty streams linked to production, provision of employment, business opportunities, and community development projects that strengthen community cohesion and provide sustainable community-led services.



Challenges

- There is still often a lack of realism about the complexity of social issues and the effort, time and resources required to address these properly. It is easy to spend money, but not so easy to make a real and sustainable difference.

- Some companies still have the notion that community development can be properly undertaken by merely making ad hoc donations and undertaking unco-ordinated short-term initiatives. (…)

Borras, Land Grabbing and Human Rights: The Involvement of European Entities[790]

Key messages

(i) European Union-based corporate and financial entities are important actors in land deals in countries outside the EU, contributing to and/or are responsible for human rights abuses. (…) :

(b) land grabs are multi-layered and complex processes, in which a land deal involves many actors via investment webs implicating diverse types of public and private actors (which cannot be clearly separated), and "nationality" of land deals is never a straightforward issue; and

(c) EU actors are involved in land grabs and related human rights violations at different points in investment webs. (...)

(ii) There are five key mechanisms of institutional platforms through which land grabbing that leads to human rights violations or threats of violations occurs, namely:

(a) EU-based private companies involved in land grabbing through various forms of land deals;

790 Saturnino Borras et al., Land Grabbing and Human Rights: The Involvement of European Corporate and Financial Entities in Land Grabbing Outside the European Union, European Parliament's Subcommittee on Human Rights (2016) www.europarl.europa.eu/RegData/etudes/STUD/2016/578007/EXPO_STU(2016)578007_EN.pdf

(b) Finance capital companies from the EU, including public and private pension funds, involved in land grabbing;

(c) Land grabbing via public-private partnerships (PPPs);

(d) EU development finance involved in land grabbing; and

(e) EU companies involved in land grabbing, which are taking advantage of EU policies and gaining control of resources through the supply chain. (…)

(iii) The human rights abuses, violations and impacts of land grabs involving EU actors directly point and relate to the EU's and EU Member States' (MS) extraterritorial human rights obligations. For each of the different mechanisms, they have to ensure compliance with their human rights obligations by:

(a) Respecting human rights and doing no harm through direct or indirect interference,

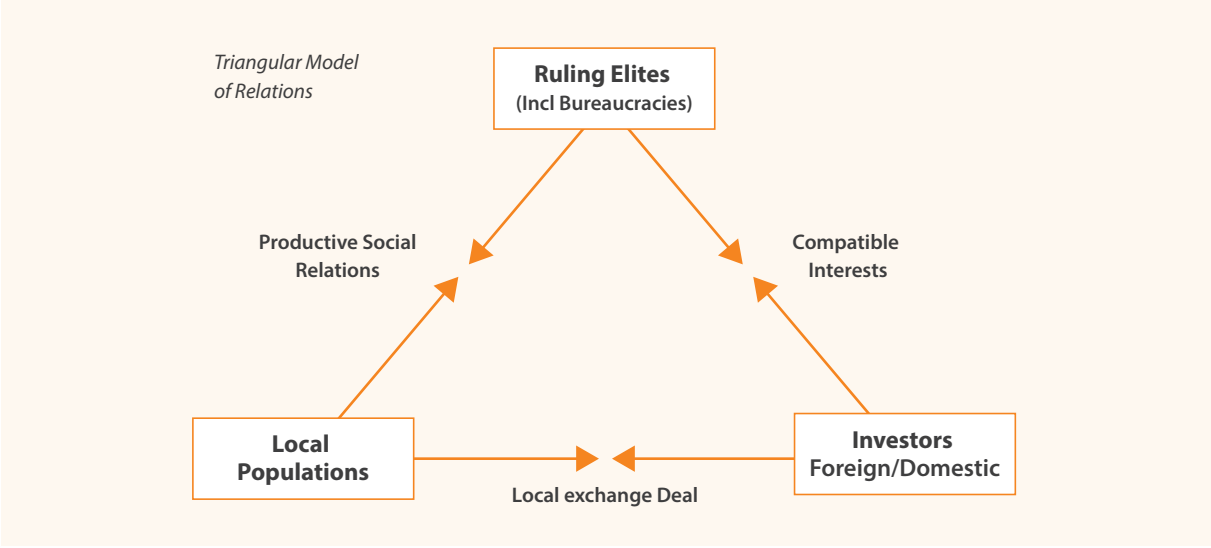
(b) Protecting human rights, especially through accountability and regulatory mechanisms for corporate and financial actors, and

(c) Fulfilling human rights, by creating a conducive environment for the realisation of human rights.

The EU and EU MS also must ensure accountability and remedy mechanisms, as part of their obligations to protect and fulfil.

Buur, The Political Economy of Land and Natural Resource Investments in Africa[791]

Model of Triangular Relations



The paper argues that, in order to acquire a better understanding of the relationship between land rights and natural resource investment, we need to understand investments as involving three-way relations between investors, local populations and ruling elites. A dominant discourse in the existing literature has focused on the appropriation – or grabbing – of land and natural resources in Africa. Initially, it concentrated on foreign investors and displaced smallholders, but this has been broadened in recent studies to include a more diverse set of actors, such as domestic investors and state actors (…).

791 Lars Buur, Malin J. Nystrand and Rasmus Hundsbæk Pedersen, *The Political Economy of Land and Natural Resource Investments in Africa: An Analytical Framework,* DIIS Working Paper (2017) http://pure.diis.dk/ws/files/828227/DIIS_WP_2017_2.pdf (references omitted).

Related to this, the resource curse literature, originating in studies of extractive sector investments, has placed a great deal of emphasis on the unequal power relations between governments and international companies when negotiating contracts. Generally, the preoccupation with foreign actors in the literature of both land-grabbing and the resource curse has tended to obscure the nuances of variations among actors, the importance of domestic actors having been downplayed. The different interests of domestic actors – the state and political and economic elites, as well as local populations – are only gradually being uncovered.

The paper focuses on relations between the local populations, investors and ruling elites, the three main groups of actors involved in the implementation of large-scale natural resource investments. The paper (i) outlines the divergent interests of each actor; (ii) analyses the potential exchanges of material and non-material benefits between them; and (iii) discusses the potential for convergences in actors' positions, which, we argue, is required for the implementation of investment projects. (…)

In the literature on land-grabbing and CSR, much of the focus has been on relations between foreign investors and local populations. In much of the extractive literature, on the other hand, the ruling elite–investor relationship has often been considered the most important, as large-scale investments in land and natural resources usually involve ruling elite approval. The ruling elite–local population relationship has in many instances passed under the radar, even though at a deep structural level it may be the most important, as it sets the tone for how the investor–local population relationship unfolds. Drawing on each of these bodies of literature, the model suggests analysing investment projects through the analysis of specific exchanges of benefits, resources and rights. These exchanges are complex, as they are at the same time project-specific and embedded in longer term relations between the three groups of actors.

Lehavi, Land Law in the Age of Globalization and Land Grabbing[792]

Is land becoming a global commodity? Who are the actors shaping such a cross-border market for real estate and who remains excluded from participating in it? Which types of interrelations do local and supranational legal systems have in ordering property rights and other legal interests in what is otherwise considered the quintessential location-fixed asset? How are law, economics, politics, and culture likely to interact in the context of land in an age of increasing globalization?

Background (Cambodia)

Special Rapporteur on Human Rights in Cambodia, Report[793]

Since taking up my functions as Special Rapporteur in 2009, I have consistently received information about the human rights issues related to land concessions, including forced evictions, poorly planned resettlement and relocation, environmental destruction and unsustainable exploitation of natural resources, and threats to indigenous peoples' livelihood, culture and traditions, among others. An increasing number of cases have also come to my attention in which individuals and communities claiming their rights to land, land activists, and other human rights defenders have been harassed, threatened or criminalized based on challenges to the granting and management of economic and other land concessions. (…)

II. Monitoring land concessions during the last two decades

10. Subsequently, as the impact of economic land concessions and corresponding human right violations continued to affect more communities, Peter Leuprecht's successor, Yash Ghai, further examined the problem with a focus on human rights violations committed by land concession companies against rural communities, especially indigenous

792 Amnon Lehavi, *Land Law in the Age of Globalization and Land Grabbing* (2017) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2545844.

793 Surya P. Subedi, *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia,* A/HRC/21/63/Add.1 (2012) https://www.ohchr.org/documents/hrbodies/hrcouncil/regularsession/session21/a-hrc-21-63-add1_en.pdf?fbclid=IwAR0mPEN_xCmMZDr4hNT_mDGWHCMzrqkZH2WOKDUEHagAcoLV0fYRjwS8wks.

peoples. The result of this work, the 2007 SRSG Report, provided an update on key developments since the 2004 SRSG Report, including the revised legal and regulatory framework for the granting and management of ELCs, and implementation of this framework. In the report's introduction, SRSG Ghai noted that the impact of ELCs continued to mirror patterns documented in the 2004 SRSG Report, insofar as concessions had been detrimental to the livelihoods of rural communities. Communities had drawn little benefit from land concessions and had no effective remedy when their rights were violated. (…)

E. Land title and possession rights

49. The Khmer Rouge regime which ruled Cambodia between 1975 and 1979 saw the dissolution of all private ownership, the results of which are still being felt today. Many millions of Cambodians still lack documentation and the full recognition of their ownership rights that comes with a land title. In recognition of the absence of widespread land registration and titling, Chapter 4 of the Land Law recognises the possession rights of those people who have enjoyed peaceful, uncontested possession of their land commencing prior to the 2001 Land Law, but are not yet formally recognized as owners of the land. If an occupant can prove that they have legitimate possession rights they are entitled to request a land title for their land and thus have their possession converted into full ownership rights. (…)

G. Brief overview of available land dispute resolution mechanisms

55. There are five formal conflict resolution mechanisms in Cambodia for disputes relating to land rights: the Commune Councils, the Administrative Committees, the Cadastral Commission, the National Authority for Land Conflict Resolution (NALDR), and the court system. The Commune Councils only ―reconcile differences of opinion among citizens of communes, but do not make decisions.114 Though not a requirement, in practice most cases go to the Commune Councils before they go to higher levels. (…)

Instruments (Cambodia)

Constitution of the Kingdom of Cambodia[794]

Article 44. All persons, individually or collectively, shall have the right to ownership. Only Khmer legal entities and citizens of Khmer nationality shall have the right to own land. Legal private ownership shall be protected by law. Expropriation shall be possible only if public utility demands in the cases stipulated by the law and if prior appropriate and fair compensation is granted.

Land Law[795]

Article 4. The right of ownership, recognized by Article 44 of the 1993 Constitution, applies to all immovable properties within the Kingdom of Cambodia in accordance with the conditions set forth by this law.

Article 5. No person may be deprived of his ownership, unless it is in the public interest. An ownership deprivation shall be carried out in accordance with the forms and procedures provided by law and regulations and after the payment of fair and just compensation in advance.

Article 26. Ownership of the immovable properties described in Article 25 is granted by the State to the indigenous communities as collective ownership. This collective ownership includes all of the rights and protections of ownership as are enjoyed by private owners. But the community does not have the right to dispose of any collective ownership that is State public property to any person or group.

794 Cambodia, *Constitution of the Kingdom of Cambodia* (1993) https://pressocm.gov.kh/en/archives/9539.

795 Cambodia, *Land Law* (2001) http://www.cambodiainvestment.gov.kh/KM/5701.html.

The exercise of all ownership rights related to immovable properties of a community and the specific conditions of the land use shall be subject to the responsibility of the traditional authorities and mechanisms for decision-making of the community, according to their customs, and shall be subject to the laws of general enforcement related to immovable properties, such as the law on environmental protection.

Article 30. Any person who, for no less than five years prior to the promulgation of this law, enjoyed peaceful, uncontested possession of immovable property that can lawfully be privately possessed, has the right to request a definitive title of ownership. In case the granting of a definitive title to ownership is subject to an opposition, the claimant has to prove that he himself fulfills the conditions of peaceful, uncontested possession for no less than five years over the contested immovable property or to prove that he purchased the immovable property from the original possessor or his legal beneficiary or from the person to whom the ownership was transferred, or from their successors.

Law on Expropriation[796]

Article 1. This law aims to define an expropriation in the Kingdom of Cambodia by defining the principles, mechanisms, procedures of expropriation, and fair and just compensation for any public physical infrastructure construction, rehabilitation, and expansion project for the public interests, national interests and development of Cambodia.

Article 8. The state shall buy any part of the immovable property remaining after the expropriation for fair and just compensation as proposed by the immovable property's owner and/or holder of real right to the immovable property who cannot live near the project area or cannot build a residence or conduct any businesses.

Article 16. Prior to making any expropriation project proposal, the Expropriation Committee shall conduct a public survey by recording of a detailed description of all entitlements of the owners of and/or of the holder of real right to immovable property and other properties subject to compensation as well as recording of all relevant issues. In conducting the survey, the Expropriation Committee shall organize public consultations at the Capital, Municipal-Provincial, and District-Khan authority levels with Commune/Sangkat councils and Village or community representative to be affected by the expropriation to provide specific and concise information and collect inputs from all stakeholders regarding the proposed basic public infrastructure project. (…)

Sub-Decree on Economic Land Concessions[797]

Article 4. An economic land concession may be granted only on a land that meets all of the following five criteria:

1. The land has been registered and classified as state private land in accordance with the Sub decree on State Land Management and the Sub decree on Procedures for Establishing Cadastral Maps and Land Register or the Sub decree on Sporadic Registration.

2. Land use plan for the land has been adopted by the Provincial-Municipal State Land Management Committee and the land use is consistent with the plan.

3. Environmental and social impact assessments have been completed with respect to the land use and development plan for economic land concession projects.

4. Land that has solutions for resettlement issues, in accordance with the existing legal framework and procedures. The Contracting Authority shall ensure that there will not be involuntary resettlement by lawful land holders and that access to private land shall be respected.

796 Cambodia, *Law on Expropriation* (2010) https://www.mef.gov.kh/documents/laws_regulation/expropriation-law-en.pdf.

797 Cambodia, *Sub-Decree on Economic Land Concessions* (2005) http://www.cambodiainvestment.gov.kh/sub-decree-146-on-economic-land-concessions_051227.html#:~:text=The%20objectives%20of%20this%20sub,concessions%20entered%20into%20prior%20to.

Sub-Decree on Social Land Concessions[798]

Article 2. The following terms have the meanings defined below:

(a) "Social land concession" is a legal mechanism to transfer private state land for social purposes to the poor who lack land for residential and/or family farming purposes.

(b) "Social concession land" is the land that is the subject of a social land concession.

(c) "Family farming" refers to family cultivation or animal-raising to meet basic needs.

Article 3. Social land concessions may be granted for one or more of the following social purposes:

1. Provide land for residential purposes to poor homeless families
2. Provide land to poor families for family farming The Khmer version is the official version of this document.
3. Provide land to resettle families who have been displaced resulting from public infrastructure development.
4. Provide land to the families suffering from natural disaster.
5. Provide land to repatriated families.
6. Provide land to demobilized soldiers and families of soldiers who were disabled or died in the line of duty.
7. Facilitate economic development
8. Facilitate economic land concessions by providing land to workers of large plantations (chamkar) for residential purposes or family farming.
9. Develop areas that have not been appropriately developed.

Article 7. A National Social Land Concession Program may be initiated by one or more concerned ministries or institutions in situations that are not suitable for a local social land concession program, in particular, in any of the following situations:

- Where there is a program to develop land in remote areas without sufficient local residents to develop the land.
- Where there is a program to resettle large groups of families, such as urban squatters, or displaced persons.
- Where there is a social land concession program that may link to the economic concession in order to develop agro-industry.
- Where there is new or existing development program, such as a donor or investor supported program that is coordinated by the national level…"

798 Cambodia, *Sub-Decree on Social Land Concessions* (2003) http://www.cambodiainvestment.gov.kh/sub-decree-19-on-social-land-concessions_030319.html.

Council for Land Policy, Land Policy "White Paper"[799]

Land Policy of the Royal Government, known as "Land White Paper" is an analytical document of the situation of land tenure, land use, and land and natural resources management, plus the implementation of the existing rules and regulations pertaining to land to be responsive to the pace of socio-economic development and to the Strategy of Staged Development to make sure that land and natural resources managements are effective, productive, and sustainable for later generations.

Land Policy is a Land Reform Program of the Royal Government which is used to strengthen land and natural resources management that the majority of the people depends upon to sustain their livelihoods and in generating income. Land and natural resources management would be highly effective when integrating the needs for developing land-related sectors and other sectors of the economy and the society in a smooth manner. (...) In this context, the Land Policy or "The Land White Paper" shall pay attention in particular to:

- social, economic, cultural, and environmental aspects
- equity and justice to every citizen throughout the country
- preserving dignity and human rights
- reducing poverty and gender inequality
- promoting the implementation of measures to ensure sustainability of development
- guaranteeing land tenure security
- promoting cross-sector cooperation and multidisplinary relationship
- enforcement of implementing law and norms
- respecting custom, culture and preserving cultural heritage and history (…)

Parliamentary Institute of Cambodia, Land Dispute Resolution[800]

1. Introduction

In Cambodia, land dispute cases have been resolved both through the court system and outside the court system. With regard to land dispute resolution outside the judicial system in Cambodia, the Cadastral Commission (CC) has played a significant role in resolving land dispute cases since its creation in 2002. In addition to the CC, there are relevant key actors and state institutions involved in out-of-court land dispute resolution.

This briefing note shall provide a concise description of land dispute resolution mechanisms outside the judicial system in Cambodia. (…)

2. Land dispute resolution mechanisms outside the judicial system in Cambodia

Besides resolving disputes through the court system, Alternative Dispute Resolution (ADR) is considered as another approach which is employed to settle disputes. It is a settlement mechanism that people can use as an alternative to cope with disputes outside the judicial system. ADR has been used to resolve family issues, neighborhood disputes, and environmental, commercial and industrial disputes. (…)

799 Council for Land Policy, Land Policy "White Paper" (2012) http://onemapcambodia.blogspot.com/p/land-policy-white-paper.html.

800 Parliamentary Institute of Cambodia (PIC), Kham Vanda and Sou Sorphea, Land Dispute Resolution Outside Judicial System in Cambodia and the Philippines, Briefing Note (2015) https://tile.loc.gov/storage-services/service/gdc/gdcovop/2018333257/2018333257.pdf.

2.1 Key actors / state institutions involved in land dispute resolution outside the judicial system in Cambodia

It has been observed that when there is a land dispute case in Cambodia, the disputants tend to get involved with a number of key actors or institutions for resolving their disputes outside the court system as follows:

(i) Community

The resolution of conflicts outside the judicial system has been rooted in Cambodian tradition, with many disputes normally being resolved based on local culture or practice. For example, village elders or village chiefs are approached to help settle disputes in the village. (…)

(ii) Civil society organizations

Recently, ADHOC, a non-governmental organization, has become involved in land dispute resolution. It has established an Alternative Dispute Resolution (ADR) programme to contribute to small-scale conflict resolution since 2013. It has offered neutral, cost-free, human rights-based mediation services. Between 2013 and 2014, ADHOC was seized of 157 cases, most cases concerning conflicts within the family or land disputes. As a result of its mediation process, ADHOC mediators helped disputants/parties reach an agreement in 70% of the total number of cases.

(iii) Government institutions

The Cambodian government has established institutional mechanisms to cope with land disputes outside the judicial system ranging from the sub-national to the national level (…)

- Commune Dispute Resolution Committee (CDRC): This committee was established by the communes/ Sangkats in 2006. One of its tasks is to mediate/conciliate land disputes outside the court system, if the parties agree to these processes (…)
- The Maisons de la Justice: this institution was created in 2006 with a number of key tasks including: (i) to provide training and/or technical advice to commune councils on conciliation and certain legal matters regarding disputes, (ii) to assess the demand for legal information at the district and commune level, (iii) to disseminate necessary legal information to the public in the district, (iv) to conciliate and mediate disputes at the request of the parties, and (v) to provide referral services to disputants whose cases cannot be solved at the lower level (…)

Socfin, Sustainability Report[801]

1.2 General profile

Socfin Cambodia is implanted in the Kingdom through two companies: Socfin-KCD and Coviphama both with their head quarter based in Phnom Penh. Socfin-KCD is operating through two Economic Land Concessions (ELC), Varanasi and Sethikula, and Coviphama through one ELC of the same name. Socfin_KCD and Coviphama develop and manage rubber plantations in Mondulkiri Province. Socfin-KCD started producing rubber in 2015, whereas the younger plantation in Coviphama started producing in its more mature plot since 2018. In 2018, Socfin Cambodia completed the construction of its rubber factory located in the Socfin-KCD plantation. It currently only processes Socfin Cambodia's production, and local small holders are planned to be integrated into the process in 2019-2020. (…)

801 Socfin, *Sustainability Report 2018* (2018) https://www.socfin.com/sites/default/files/2019-09/2019%2009%2005%20SocfinCambodia-2018Sustainability Report-Final_1.pdf.

3.4 Compliance with legal requirement

All activities of the company comply with national policies, laws and regulations relating to environment and social management. The company's development and activities thoroughly follow the Environmental Impact Assessment Law and the Master plan for Economic Land Concessions, in full transparency with the Royal Government of Cambodia. (…)

3.7.1 External grievance procedure

This process, designed for external stakeholders (including local communities, NGOs, civil societies, etc.) has been detailed in Socfin Cambodia's 2017 sustainability report which is available on socfin.com.

In 2018, no grievance has been presented to the company through this channel.

Given the local context, land related grievances are not addressed through this mechanism but through an independent mediation process which is a pilot project in Cambodia. Until final agreements are reached, this process is fully confidential. (…)

7.3.3 Mediation

Some claims from the local population related to land ownership, resurfacing mainly in 2015, are being addressed within dependent third parties to ensure a transparent and effective process. In 2016 and 2017, Socfin Cambodia has engaged with GIZ, an independent and neutral organization specialized in land rights in rural areas to map conflict areas. From these initial contacts, the concept of a mediation was developed.

CAO, Assessment Report VEIL II Project[802]

In February 2014, local members of 15 villages in Ratanakiri Province in Cambodia lodged a complaint with CAO with the support and assistance of five international and Cambodian NGOs – Inclusive Development International (IDI), Equitable Cambodia (EC), Cambodian Indigenous Youth Association (CIYA), Indigenous Rights Active Members (IRAM) and Highlanders Association (HA). The complaint raises concern about impacts on 17 villages, and provides detailed information about 13 of these villages. The complaint raises a range of environmental and social concerns about HAGL's Cambodia operations, including impacts on water sources and fish resources, loss of land, lack of compensation, lack of information disclosure and engagement with the people, threat to spiritual, cultural and indigenous practices, as well as use of child labor. The complaint further alleges non-compliance with IFC policies and procedures and with Cambodian laws. The Complainants requested that CAO keep their identities confidential. (…)

The Company's perspective

HAGL maintains that throughout its investment process in Cambodia, it has always complied with host country laws and regulations. The company expressed the desire to address the communities' concerns pro-actively, and said that in pursuing a resolution to these concerns, they would put the communities' interests first. The Company shared its vision that the communities surrounding its plantations be significantly better off as a result of the Company's presence, and that the communities should feel the benefit of their presence soon. The Company recognizes that it had not put greater focus on developmental opportunities for local communities earlier in the development of their operations. Finally, the Company declared a moratorium on further land clearance activities in the area of 13 communities that are listed by name in the complaint.

802 Compliance Advisor Ombudsman (CAO), CAO *Assessment Report: Complaint Regarding IFC's VEIL II Project (20926)* (2014) http://www.cao-ombudsman.org/cases/document-links/documents/VEILII-01FinalAssessmentReportMay2014.pdf.

Areas of agreement

During this early engagement around the assessment of the complaint, a few areas of agreement are starting to emerge from both the Company and the Complainants:

- Both the Company and the Complainants are willing to engage in a dispute resolution process facilitated by CAO.
- Both the Company and the Complainants seek to find solutions in keeping with Cambodian laws and regulations.
- The Company and the Complainant representatives are eager to see the concerns resolved in a timely manner.
- The Company recognizes the importance of halting land clearance activities that are affecting the communities to allow for fruitful dialogue.

Bugalski & Thuon, A Human Rights Impact Assessment (Hoang Anh Gia Lai)[803]

Key findings on the impacts on the right of self-determination

(…) HAGL's business activities, and no attempt was made by any actor to seek their free prior and informed consent for a project with serious and direct effects on their lands, territories and natural resources. The failure to consult or negotiate with local residents also amounts to non-compliance with the requirements of Cambodian Sub-decree No. 146 and the concession agreements.

The use of police and military as security guards intimidated people and precluded their free expression of opposition to the project. In some cases, threats of violence and other forms of retribution for attempts to enter concession boundaries or to oppose the company's activities have been more explicit, infringing several other human rights, including the right to security of person recognized in article 9 of the ICCPR.

The confiscation of lands and destruction of forest resources within the communities' customary territory is a serious violation of their right of self-determination, and to control and pursue their own economic, social and cultural development. These actions also violate Cambodian Land and Forestry Laws as well as the terms of concession agreements. The communal and household losses, including the loss of access to productive resources, has meant a fundamental deprivation of the communities' means of subsistence. These acts and omissions contravene Article 1 of the ICCPR and the ICESCR, as well as several articles of UNDRIP, including 26(2) and 32(2).

Impacts on Right to Adequate Standard of Living

The loss of productive land and natural resources described above has meant that living standards have been impacted in several ways. Most starkly, there have been considerable impacts on access to food and livelihood resources in villages affected by HAGL's concessions.

Impacts on right to food

Key informants from all of the thirteen villages affected by HAGL's concessions reported an adverse change in the quantity, quality and type of food available in their village as a result of the company's activities. In particular, these changes were attributed to loss of productive land, streams and access to forests, which were the main source of people's food prior to the company's presence in the area. (…) over 90 percent of households interviewed said that they were able to access a full range of food, including wild fruit, vegetables and animals, from the forest for household consumption. (…)

803 Natalie Bugalski & Ratha Thuon, *A Human Rights Impact Assessment: Hoang Anh Gia Lai Economic Land Concessions in Ratanakiri Province, Cambodia* (2015) https://www.iss.nl/sites/corporate/files/CMCP_28-_Bugalski___Ratha.pdf.

Key findings of impacts on the right to adequate standard of living

The confiscation of lands and destruction of forests and other productive resources has resulted in a retrogression in the enjoyment of the right to an adequate standard of living of affected people, and violated Cambodian law. In particular, the loss of access to household and communal resources, including farming and grazing land, animals, fruit and vegetables sourced from the forest, and fish from streams has meant a reduction in food resources available for household consumption. Loss of reserved lands for rotational agriculture further poses a risk to future food security. The confiscation and destruction of these productive resources for present and future use has also meant a loss of sovereignty of affected communities over their food system, which people felt had successfully provided them with healthy and culturally appropriate food in a sustainable manner. Households that lost chamka and/or rice fields have suffered from the most serious impacts on their right to food. (…)

Access to Remedy

Despite the fear of retribution for expressing opposition to the project, eleven out of the thirteen affected villages have submitted a complaint about the concession and the company's activities in an effort to reclaim their land. Most of these communities have submitted at least one petition and/or made at least one verbal complaint to local authorities, usually at the commune and district levels. In some cases, villagers complained verbally to company workers.

None of the key informants thought that their villages had received an adequate response to their complaints or a resolution of their grievances. Most of the complaints, both verbal and written, have been ignored. For example, Kam village submitted a petition with approximately 150 thumbprints to the Ministry of Agriculture, Forestry and Fisheries, but received no response, and then later another complaint through the Cambodian NGO Adhoc that was reported in the media, but still received no resolution. A villager from Srae Angkrong 3 said: "To get our land back, we made countless complaints with thumbprints to local authorities. The complaint to commune office was rejected. Then, we submitted complaint to district office, but the district authority said they did not have ability to resolve the problem. When our complaint reached provincial level, we were told that land was granted to the company and shown some legal document." (…)

Key findings on access to remedy

Affected people have so far not received effective remedies for human rights violations that they have suffered, although they hope to do so through the ongoing mediation process. While many communities and households have submitted complaints to local authorities and the company, these have either been ignored, met with threats or addressed through offers of inadequate compensation without negotiation. No communities or households have attempted to bring a lawsuit through Cambodia's court system, despite strong grounds under Cambodian law. (…)

Sokhom, Land Disputes in Four Provinces of Cambodia[804]

1.2 Problem Statement

Current situation of land dispute in Cambodia is very critical. There are many factors have caused the disputes including conflict setting, land history and political condition which make it exceptionally hard to solve. Moreover, land disputes are widespread and are seen as a serious issue for stability and wellbeing of the country; however due to the many factors and interests involved they are not being easily solved. Concerns about land disputes have been raised for the country in general as local and international media have covered. Although it is an emergency issue to overcome, it takes much time and effort to gradually solve with the mission to find out the differences measures and approaches to deal with.

804 Hean Sokhom, A Study on Land Disputes in Four Provinces of Cambodia: Mapping, Impacts, and Possible Solutions, NGO Forum on Cambodia (2015) http://ngoforum.org.kh/files/5308155d9421e8c8436b13d783eef490-Report--Study-on-Land-Disputes-in-Four-Provinces-of-Cambodia-Eng.pdf.

3.5 Impact

Although the government has tried to reconstruct and improve land management since 1989, land ownership remains a highly controversial issue in Cambodia. In the same time, the rapid economic growth there has been increasing demand for land, whereas in the country more than 80% of population is practicing the subsistent agriculture in the rural area leads to the rising land tenure insecurity. (…)

Land dispute caused landlessness. There are no reliable national data on the number of landless people in Cambodia, but it is estimated landlessness rose from 20% to 40% of the rural households were landless in 2009. Involuntary landlessness and near landlessness are considered primary contributors to poverty and weak human development in Cambodia. Young families and women-headed households are most likely to be landless or near-landless . In an Oxfam's survey sample, one in eight families was landless while 21% or one in five women-headed households was landless. (…)

12. Impact from land dispute

This part attempts to examine the impacts of the disputes on the target areas, mainly on the effect that the resolution process had on the villagers, communities and institutions involved. Although local officials stated that the outcome of the land dispute resolution caused less impact on people's livelihoods and community as a whole, villagers proved that it strongly affected their daily life and the future of their children (See table 13).

Impact varied by geographic location, nature of land dispute, people involved and outcome as well. The specific objective of the economic land concession is to develop the intensive agricultural and agro-industrial activities. The aim is to generate state or provincial revenues through economic land taxes and increase the employment in the rural areas for the poverty reduction. It is true that the company provides the employment opportunity for villagers. However, the employment is occasionally by season, but not long term contracted employment. The wage of the workers is about 14,000 Riels or 3.5 US $ per day. (…)

Touch & Neef, Land Grabbing and Agrarian-Environmental Transformations[805]

3 Economic Land Concessions and Local Resistance: Two Case Studies from Kratie Province and Koh Kong Province (...)

3.3 Local Resistance to Economic Land Concessions for Tourism Development: The Case of Tianjin Union Development Group in Koh Kong

(…) Botum Sakor National Park, which has 171,250 hectares of land, is situated to the west of the town of Koh Kong, with more than 50 per cent of its borders lying along the Cambodian coast. The park is rich in virtually untouched forest.

On 9 May 2008, the Royal Cambodian Government, represented by the minister of environment, signed a long-term lease contract of 99 years with a Chinese company, Tianjin Union Development Group Company Ltd (TUDG), for the construction of a commercial development zone and large resort to attract tourists. The project covered more than 36,000 hectares in the Kiri Sakor and Botum Sakor districts and involved investment capital of about US$ 4 billion. The contract was signed by the environment minister, approved by the minister of economy and finance, and witnessed by the minister of commerce, which is a testament to the high importance the RGC assigns to this project. The leased land covers a large portion of the coast in Kiri Sakor and Botum Sakor districts, including areas that are critical for the conservation and protection of the environment, as well as 12 villages in five communes. In August 2011, the government issued a sub-decree to reclassify an additional 9,100 hectares as a sustainable-use zone and granted a second land concession to TUDG to develop a water reservoir and power plant.

805 Siphat Touch & Andreas Neef , *Land Grabbing, Conflict and Agrarian-Environmental Transformations: Perspectives from East and Southeast Asia* (2015) https://www.iss.nl/sites/corporate/files/CMCP_16-_Touch_and_Neef.pdf.

The villages affected by the project have been in this location for generations. The community members belong to families that settled in the area before the Sihanouk regime in the 1960s, those who relocated during or after the Khmer Rouge regime and others who arrived in the 1980s (after the fall of the Khmer Rouge). More families moved in later, following the private purchase of land plots. The government formally recognised these villages in the 1990s after the end of the civil war. According to the district officials involved in the assessment of the occupied land, the project affects a total of 1,163 families inhabiting residential land and tending to orchards in Kiri Sakor's three communes. (…)

The relocation site spreads over 4,000 hectares of land located outside the investment project of TUDG, deep inside the Botum Sakor National Park and a significant distance from the coast. According to local authorities, the government issued a sub-decree to excise this forested area from the park for this purpose. (…)

While compensation packages differ, most relocated families have been offered residential land of 50 m by 100 m, a constructed wooden house of 6.5 m by 7.5 m, plus a plot of farmland of two hectares. The offered farmland is forested land, in some cases adjacent to the residential land, but as of late November 2012, most of the relocated families reported not having received the promised two hectares of farmland. Villagers of Prek Khyong, Tanoun commune, reported that they had heard they would be given two hectares but most of them were still waiting for the land to be allocated to them at the time of our survey. Regarding this agricultural land, they expressed concerns that they would get dense forestland, which would require much time and labour to clear and prepare for farming while facing labour shortages. (…)

Ingalls et al, State of Land in the Mekong Region[806]

Economic Land Concession

Economic Land Concessions (ELCs) are large tracts of land granted by the government to domestic or foreign companies through specific contracts for agricultural and agro-industrial production. Contracts cover areas of up to 10,000 hectares (Royal Government of Cambodia, 2005) and the maximum concession period has reduced from 99 years to now 50 years. (…) They also aimed to develop so-called "under-utilized" land in order to increase employment in rural areas and generate State revenue at national and sub-national levels. But ELCs have not met these expectations: they often overlapped land that was already cultivated or used by smallholder farmers, resulting in land conflicts on farmland or common pool resources and thus exerting a direct, negative impact on the livelihoods of these farmers. These conflicts are exacerbated by the movement of land-poor migrants from lowland areas seeking available lands in the peripheral uplands for their livelihoods. These internal migrations clearly demonstrate the genuine need for land by smallholder farmers, a phenomenon that has not been adequately addressed in the land reform. Well aware of these problems, the government issued an important directive in 2012, Order 01, with three measures aiming to strengthen and increase the effectiveness of the management of ELCs. Order 01 established a moratorium on the granting of new ELCs, a titling campaign (see below) as well as a full review of existing ELCs in an effort to discover which companies were in violation of the contract they signed with the government. A contract typically requires the companies to properly demarcate their land, sort out social conflicts peacefully, and effectively operate their ELCs within one year of their approved Master Plan. Since Order 01 was issued, there has been a real effort by the government to improve the management of ELCs in the country. The work conducted under this reform is still ongoing. In order to offer more specific details to the public, a few organizations are monitoring ELC development based on data available in the public domain (Royal Gazette, Sub-decrees, business registration, and contract, etc.). But the recent evaluation of concessions initiated in 2012 has considerably changed the agro-industrial development landscape in Cambodia and has made the work of these organizations rather tedious.

806 Micah L. Ingalls et al., *State of Land in the Mekong Region,* Centre for Development and Environment, University of Bern and Mekong Region Land Governance (Bern, Switzerland and Vientiane, Lao PDR, with Bern Open Publishing, 2018) https://www.mrlg.org/publications/state-of-land-in-the-mekong-region-2/.

Social Land Concessions

Social Land Concessions (SLCs) are tools the government has promoted to address the problem of landlessness and near landlessness. They constitute a legal mechanism to transfer private State land for social purposes to the poor who lack land for residential and/or family farming purposes. The national SLC programme differentiates between three types of concessions: one managed by the government to address civil poor landlessness; a second managed by the government to address the demobilization of soldiers from the Royal Armed Forces; and a third co-managed between the government and donor organizations also to address civil poor landlessness. Full ownership rights to SLC land are only acquired after 5 years and full occupation and use of the allocated land. According to the Ministry of Land Management, Urban Planning and Construction (MLMUPC), as of June 2014 the total number of recipients of Social Land Concessions for all three programmes was 12,374 families in respect of 113,167 ha of land registered (for settlement, infrastructure and agriculture). This represents only 5 percent of the total area granted as Economic Land Concessions. (…)

Borras et al, Land Grabbing and Human Rights[807]

Trade policies, including the EU's Everything But Arms Initiative (EBA):

(…) An illustrative example of how trade policies can act as a driver/trigger for land grabs is the EU's Everything But Arms Initiative (EBA). The initiative was adopted in 2001 by the EU with the stated intention of promoting development in the world's least developed countries (LDCs) by granting duty-free and quota-free access to the European market. Market access for sugar was fully liberalized by October 2009, which is especially relevant as the EU guarantees a minimum sugar price higher than the world market price (Equitable Cambodia et al., 2013, p. 20). The EU has claimed that the EBA has had positive effects but the case of Cambodia shows that this initiative has been a driver of land grabbing and human rights violations in Cambodia (see Box 8).

Box 8: 'Everything But Arms' EU policy and land grabbing in Cambodia

EBA has been a key driver of land grabbing for sugar cane plantations in Cambodia. According to the companies involved in sugar cane plantations, the EU initiative EBA has been a primary motivator for their land acquisitions and operations in Cambodia (Equitable Cambodia et al., 2013, p. 22). And while sugar cane holding were negligible before EBA became effective, today round 100 000 hectares of land are under agro-industrial sugar cane production. Consequently, all exports have been progressively directed towards the EU. (…)

Questions

1. How does respect for the right to land influence the enjoyment of other human rights?
2. Are there any legal protections for those without formal property rights to land under 2001 Land Law against forced evictions by the State?
3. What are the international standards and best practices regarding dispossession and compensation for land?
4. What are best practices in Cambodia when it comes to land issues and balancing different economic activities competing for land?
5. Can you elaborate on gender aspects related to land possession in Cambodia?

807 Saturnino M Borras et al, *Land Grabbing and Human Rights: The Involvement of European Corporate and Financial Entities in Land Grabbing Outside the European Union* (2016) http://www.europarl.europa.eu/RegData/etudes/STUD/2016/578007/EXPO_STU(2016)578007_EN.pdf.

Further Readings

- Via Campesina, *UN Declaration on the Rights of Peasants and Other People Working in Rural Areas – Book of Illustrations* (2020) https://viacampesina.org/wp-content/uploads/2020/04/UNDROP-Book-of-Illustrations-l-EN-l-Web.pdf.
- International Finance Corporation (IFC), *Guidance Note 5 - Land Acquisition and Involuntary Resettlement* (2012) www.ifc.org/wps/wcm/connect/4b976700498008d3a417f6336b93d75f/Updated_GN5-2012.pdf?MOD=AJPERES.
- Asian Development Bank, *Safeguard Policy Statement (Safeguard Requirements 2: Involuntary Resettlement)* (2009) www.adb.org/sites/default/files/institutional-document/32056/safeguard-policy-statement-june2009.pdf.
- OECD & FAO, *Pilot Project on the Implementation of the OECD-FAO Guidance for Responsible Agricultural Supply Chains* (2019) http://mneguidelines.oecd.org/Pilot-project-on-the-implementation-of-the-OECD-FAO-Guidance-for-Responsible-Agricultural-Supply-Chains-FINAL-REPORT.pdf.
- New Alliance for Food Security and Nutrition, *Analytical Framework for Land-Based Investments in African Agriculture* (2015) www.growafrica.com/sites/default/files/Analytical-framework-for-land-based-investments-in-African-agriculture_0.pdf.
- Oxfam, Land grabbing, An animated guide (video 2:22 min) www.oxfamamerica.org/take-action/campaign/food-farming-and-hunger/land-grabs/.
- Coca-Cola, *The Coca-Cola Company Commitment - Land Rights and Sugar* (2013) www.coca-colacompany.com/content/dam/journey/us/en/private/fileassets/pdf/2013/11/proposal-to-oxfam-on-land-tenure-and-sugar.pdf.
- La Via Campesina - International Peasant's movement, https://viacampesina.org/en/.
- Radu Mares, *From Charity to Institutional Development: Reflections on Newmont's CSR Strategies and Conflict-Avoidance in Ghana* (2012) www.researchgate.net/publication/288824639_From_charity_to_institutional_development_Reflections_on_Newmont's_CSR_strategies_and_conflict-avoidance_in_Ghana.
- Asongu & Nguena, *Foreign Land Acquisitions: Lessons, Policies and Implications* (2014) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2586628.
- Christian Häberli, *Foreign Direct Investment in Agriculture: Land Grab or Food Security Improvement?* (2015) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2556244.
- អង្គការទិន្នន័យអំពីការអភិវឌ្ឍ, សម្បទានដីសង្គមកិច្ច, ២០១៥, https://opendevelopmentcambodia.net/km/topics/social-land-concessions/.
- អង្គការទិន្នន័យអំពីការអភិវឌ្ឍ, ការកាន់កាប់ដីធ្លី និងការចេញប័ណ្ណកម្មសិទ្ធិ, ២០១៥, https://opendevelopmentcambodia.net/km/topics/land-tenure-and-titling/.
- ក្រសួងរៀបចំដែនដី នគរូបនីយកម្ម និងសំណង់, គោលនយោបាយដីធ្លី "សៀវភៅសដីធ្លី" ២០១៥, https://data.opendevelopmentmekong.net/dataset/a6877cff-5fea-4c52-bbc2-258f12ab730d/resource/f030466c-90e4-4352-b13f-7df434d7371e/download/land-policy__2012.pdf.
- Cambodian Human Rights and Development Association (ADHOC), *Report: Land Situation in Cambodia in 2013* (2014) https://www.adhoccambodia.org/report-land-situation-in-cambodia-in-2013-2/.
- Cambodia, *Land Portal,* https://landportal.org/regions/cambodia.

- Cambodia Development Watch, *Boeung Kak Lake Lease Agreement* (2007) http://ngoforum.org.kh/files/cambodian_development_watch_magazine_year_iii_no._1_june_2007_e.pdf.
- Cambodian Center for Human Rights (CCHR), កំណែទម្រង់ដីធ្លី, ២០១៤, https://cchrcambodia.org/admin/media/analysis/analysis/khmer/CCHR_Updated_Briefing_Note_Land_Reform_March_2014_KHM.pdf
- Council for Land Policy, *Declaration of the Royal Government on Land Policy* (2009) http://extwprlegs1.fao.org/docs/pdf/cam155657.pdf.
- Daniel Fitzpatrick, '*Fragmented Property Systems', 38(1) University of Pennsylvania Journal of International Law* (2016) https://scholarship.law.upenn.edu/jil/vol38/iss1/3/.
- Community Legal Education Clinic, *Business and Human Rights in ASEAN: The Implications of the Koh Kong Sugar Plantation and Factory Case in Cambodia for Due Diligence and Remedies* (2013) http://www.clec.org.kh/proact.php?actID=80&pID=1#.X3g062gzbIU
- Cambodian League for the Promotion and Defense of Human Rights (LICADHO), *On Stony Ground: A Look into Social Land Concessions* (2015) http://www.licadho-cambodia.org/collection/30/lased_social_land_concession.
- Royal Government of Cambodia, *National Strategic Development Plan 2019-2023* (2019) http://www.mop.gov.kh/DocumentEN/NSDP%202019-2023%20in%20English.pdf.
- Andreas Neef, Land Rights Matter Anchors to Reduce Land Grabbing, *Dispossession and Displacement: A Comparative Study of Land Rights Systems in Southeast Asia and the Potential of National and International Legal Frameworks and Guidelines* (2016) https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2_Downloads/Fachinformationen/Analyse/Analysis_60_Land-Policy-Study.pdf

26. PROVISION OF SECURITY

Hing Vandanet, Radu Mares

Introduction

Businesses require support from security forces – private security companies, police, even the military – in order to conduct their operations safely. Indeed, they sometimes operate in unstable environments, sometimes even in volatile environments and war zones. It is part of their human rights responsibility to ensure the safety of their employees (chapter 20). At the same time, hiring security forces has to be done responsibly to avoid situations where innocent citizens are brutalized by security forces when they merely seek to exercise their human rights of freedom of association, expression and assembly (chapter 19) and have legitimate grievances about environmental degradation (chapter 29), land dispossession (chapter 25) or working conditions (chapters 17-21). During the last 20 years, a number of multistakeholder initiatives (chapter 5) have emerged to offer guidance on how to provide security without infringing on human rights. Specific provisions have been developed for public or private security forces, at different stages of engagement – from screening and selection to training on rules of engagement to reporting abuses and cooperating with judicial mechanisms (chapter 6) – in times of peace or armed conflict. Most abuses tend to occur in the extractive industries (mining, oil and gas) and agriculture sector (including forestry) given that such industries cannot easily relocate. Businesses are expected to perform enhanced human rights due diligence in such settings of high risk (chapters 7-14) and the responsibility of 'home states' to advise and regulate (chapter 4) companies operating in conflict areas is clearly recognized in the UNGPs (chapter 2). There have been legal cases in home state courts (chapter 6) where transnational companies have had to answer to abuses committed by security forces going as far as torture, killings, rape and other abuses reaching the level of violations of customary international law, war crimes and crimes against humanity (chapter 1). Given the seriousness of such abuses, even leading companies are quite secretive about their performance in the area of security, likely because full transparency could easily trigger legal liability (chapter 6). Such companies however recognize the importance of conflict analysis and human rights due diligence as a way to identify root causes of conflict and take proactive measures in partnership with stakeholders (chapter 5).

In Cambodia, most common instances of business-related abuse are related to land. These are areas of potential economic growth or investment involving rich investors, politicians, local authorities and/or armed forces or private security. There have been reports about the security forces using violence against people or workers. Peace, development, and human rights are three key dimensions of welfare and prosperity and the question often posed is which one should come first. Peace is a popular political message in Cambodia. Some would argue that if there is no peace there is no development or human rights either. However, others would argue that violations of human rights are the root cause of instability and insecurity; and that such violations therefore jeopardize peace and inhibit development.

Main Aspects

- ✓ Public and private security
- ✓ Private Military and Security Companies (PMSCs)
- ✓ Private Security Companies (PSCs)
- ✓ Obligations of states
- ✓ Responsibilities of corporations
- ✓ Use and control of weapons and equipment
- ✓ Screening of personnel
- ✓ Training
- ✓ Risk assessments
- ✓ Complaint mechanisms
- ✓ Certification standards
- ✓ Business reports

Background

Bernard, Business, Violence and Conflict[808]

Businesses can have both positive and negative effects on communities in conflict-affected or high-risk areas. They may contribute to the violence, but they may also be the victims of it, or even assist in the relief and prevention of further violence. This issue of the Review examines the relationship between business and conflict, the rules that regulate companies' activities in the context of conflict, efforts to highlight the rights and responsibilities of companies, States and civil society in this field and the options open to humanitarian agencies that want to enter into dialogue with companies.

One particular type of business enterprise which is, by definition, more exposed to armed conflict and other situations of violence is private military and security companies (PMSCs). Following the recent era in which mercenaries hired out their services as soldiers of fortune in the African conflicts, the wars in the Balkans, in Iraq, and in Afghanistan have seen the emergence of new structures providing military and security-type services: PMSCs. In the face of growing demand, there has been an increase in the number of PMSCs, which have extended their range of services to include security, logistics, maintaining and operating military equipment, intelligence, training of police and armed forces, and detention-related activities, to name a few. In fact, one can speak of a veritable private military and security industry that is providing an ever broader range of services, increasingly today in the field of maritime security in response to piracy (delivery of ransom money, negotiations, sea patrols, and so on). This multifaceted and quickly evolving nature of the services provided by PMSCs poses significant challenges to developing a coherent legal framework governing their activities

Instruments

Voluntary Principles on Security and Human Rights[809]

(…) voluntary principles to guide Companies in maintaining the safety and security of their operations within an operating framework that ensures respect for human rights and fundamental freedoms.

808 Vincent Bernard, 'Editorial: Globalisation Will Only Mean Progress if it Is Responsible', *Special Issue: Humanitarian Debate: Law, Policy, Action – Business, Violence and Conflict,* International Review of the Red Cross 887 (2012) https://www.icrc.org/en/international-review/business-violence-and-conflict.

809 *Voluntary Principles on Security and Human Rights* (2000) https://www.voluntaryprinciples.org/the-principles/.

Risk Assessment

(…) accurate, effective risk assessments should consider the following factors:

- Identification of security risks. Security risks can result from political, economic, civil or social factors. Moreover, certain personnel and assets may be at greater risk than others. Identification of security risks allows a Company to take measures to minimize risk and to assess whether Company actions may heighten risk.

- Potential for violence. Depending on the environment, violence can be widespread or limited to particular regions, and it can develop with little or no warning. Civil society, home and host government representatives, and other sources should be consulted to identify risks presented by the potential for violence. Risk assessments should examine patterns of violence in areas of Company operations for educational, predictive, and preventative purposes.

- Human rights records. Risk assessments should consider the available human rights records of public security forces, paramilitaries, local and national law enforcement, as well as the reputation of private security. Awareness of past abuses and allegations can help Companies to avoid recurrences as well as to promote accountability. Also, identification of the capability of the above entities to respond to situations of violence in a lawful manner (i.e., consistent with applicable international standards) allows Companies to develop appropriate measures in operating environments.

- Rule of law. Risk assessments should consider the local prosecuting authority and judiciary's capacity to hold accountable those responsible for human rights abuses and for those responsible for violations of international humanitarian law in a manner that respects the rights of the accused.

- Conflict analysis. Identification of and understanding the root causes and nature of local conflicts, as well as the level of adherence to human rights and international humanitarian law standards by key actors, can be instructive for the development of strategies for managing relations between the Company, local communities, Company employees and their unions, and host governments.

- Equipment transfers. Where Companies provide equipment (including lethal and non-lethal equipment) to public or private security, they should consider the risk of such transfers, any relevant export licensing requirements, and the feasibility of measures to mitigate foreseeable negative consequences, including adequate controls to prevent misappropriation or diversion of equipment which may lead to human rights abuses. In making risk assessments, companies should consider any relevant past incidents involving previous equipment transfers.

Interactions between companies and public security

Companies should use their influence to promote the following principles with public security: (a) individuals credibly implicated in human rights abuses should not provide security services for Companies; (b) force should be used only when strictly necessary and to an extent proportional to the threat; and (c) the rights of individuals should not be violated while exercising the right to exercise freedom of association and peaceful assembly, the right to engage in collective bargaining, or other related rights of Company employees as recognized by the Universal Declaration of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work.

- In cases where physical force is used by public security, such incidents should be reported to the appropriate authorities and to the Company. Where force is used, medical aid should be provided to injured persons, including to offenders. (…)

- Companies should hold structured meetings with public security on a regular basis to discuss security, human rights and related work-place safety issues. Companies should also consult regularly with other Companies, host and home governments, and civil society to discuss security and human rights. Where Companies operating in the same region have common concerns, they should consider collectively raising those concerns with the host and home governments. (…)

- Companies should record and report any credible allegations of human rights abuses by public security in their areas of operation to appropriate host government authorities. Where appropriate, Companies should urge investigation and that action be taken to prevent any recurrence.
- Companies should actively monitor the status of investigations and press for their proper resolution.

Interactions between companies and private security

Where host governments are unable or unwilling to provide adequate security to protect a Company's personnel or assets, it may be necessary to engage private security providers as a complement to public security. In this context, private security may have to coordinate with state forces, (law enforcement, in particular) to carry weapons and to consider the defensive local use of force. (…)

- Private security should observe the policies of the contracting Company regarding ethical conduct and human rights; the law and professional standards of the country in which they operate; emerging best practices developed by industry, civil society, and governments; and promote the observance of international humanitarian law.(…)
- Companies should consult and monitor private security providers to ensure they fulfil their obligation to provide security in a manner consistent with the principles outlined above. Where appropriate, Companies should seek to employ private security providers that are representative of the local population.

Voluntary Principles Initiative, Governance Rules[810]

Participation criteria

All Participants are expected to meet the following criteria:

1. Publicly promote the Voluntary Principles;
2. Proactively implement or assist in the implementation of the Voluntary Principles;
3. Attend the Annual Plenary Meeting and, as appropriate and commensurate with resource constraints, other sanctioned extraordinary and in-country meetings;
4. Communicate publicly, at least annually, on efforts to implement or assist in the implementation of the Voluntary Principles;
5. Prepare and submit to the Steering Committee, one month prior to the Annual Plenary Meeting, an Annual Report on efforts to implement or assist in the implementation of the Voluntary Principles according to criteria determined by the Participants;
6. Participate in dialogue with other Voluntary Principles Participants;
7. Subject to legal, confidentiality, safety, and operational concerns, provide timely responses to reasonable requests for information from other Participants with the aim of facilitating comprehensive understanding of the issues related to implementation or assistance in implementation of the Voluntary Principles.

810 Voluntary Principles Initative, *Governance Rules* (2018) http://www.voluntaryprinciples.org/wp-content/uploads/2018/04/VPI_Governance_Rules_-_April_2018.pdf.

Corporate pillar reporting guidelines

The Corporate Pillar Reporting Guidelines are divided into four sections:

(A) Commitment to the Voluntary Principles;

(B) Policies, Procedures and Related Activities;

(C) Country Implementation; and

(D) Lessons and Issues.

Sections A-C set forth expected reporting commitments and Section D is optional.

NGO pillar reporting guidelines

The NGO Pillar Reporting Guidelines are divided into five sections:

(A) Commitment to the Voluntary Principles;

(B) Procedures;

(C) Promotion of the Voluntary Principles;

(D) Country Implementation; and

(E) Lessons and Issues.

Sections A-E set forth expected reporting commitments and Section E is optional.

Government pillar reporting guidelines

The Government Pillar Reporting Guidelines are divided into four sections:

(A) Commitment to the Voluntary Principles;

(B) Policies, Procedures and Related Activities;

(C) Implementation; and

(D) Lessons and Issues.

Sections A-C set forth expected reporting commitments and Section D is optional.

Voluntary Principles Initiative, Corporate Pillar Verification Framework[811]

Key Performance Indicators

(…) a significant component of the accountability framework for any participating organization is the selection of a suite of organizationally appropriate performance indicators. Participants are encouraged to select indicators that will provide a reasonably accurate representation of the implementation. To guide this work the following categories should be considered.

811 Voluntary Principles Initative, *Corporate Pillar Verification Framework* (2015) http://www.voluntaryprinciples.org/wp-content/uploads/2015/05/Corporate-Pillar-Verification_Framework-May-2015.pdf.

1. Participant Commitments
2. Risk Assessment
3. Public Security
4. Private Security
5. Process to manage allegations
6. Engagement with stakeholders

It is the responsibility of Participants to develop a set of valid selection criteria to ensure that any assessment is a reasonably representative sample. This may involve the inclusion of a proportional number of problem locations and lower risk ones. It also involves the evaluation of a statistically relevant representative sample size.

Voluntary Principles Initiative, Model Clauses[812]

D. Screening with respect to Security and Human Rights

The Government Security Force agrees to ensure that Government Security Force personnel who have faced credible allegations that they committed violent crimes or were involved in human rights abuses, will not be assigned duties in and around the project area. Any Government Security Force personnel active in and around the project area, who is found later to be credibly implicated in human rights abuses, will be removed from the area and will be dealt with in accordance with applicable national and international law.

F. Use and Control of Weapons and Equipment

Company shall not be required to, and Government Security Force shall not request that, Company provide lethal weaponry, including hard ammunition, or make any payment in order to procure such weapons, weaponry, or ammunition. Government Security Force agrees that no support, including any payments, provided by Company shall be used for lethal weaponry or other lethal equipment. Government Security Force agrees that any equipment provided by Company will not be used for any other purpose than that contemplated by this agreement and will only be used when personnel are on duty, or as otherwise specified in this Agreement.

G. Investigation of Security Incidents

Government Security Force agrees to promptly advise Company of any security incident involving use of weapons or use of force, and of any alleged human rights violation or abuse in which Government Security Force personnel was involved while performing their duties in relation to the Company's property, facilities or personnel. Government Security Force will promptly investigate, report, and resolve all such incidents, potential violations or abuses in accordance with applicable national and international law. Government Security Force will regularly inform Company of progress in the investigation or proceedings following the investigation. During the course of the investigation or proceedings, Government Security Force agrees to suspend the personnel under investigation or being prosecuted from his/her duty in and around the project area. (…)

If the Government Security Force or appropriate official investigation finds that Government Security Force personnel used disproportionate force, violated or contravened the Security and Human Rights Standards, human rights and/or international humanitarian law, or agreements on use of weapons or other equipment, personnel shall be subject to appropriate disciplinary action by the Government Security Force and/or be reported to the appropriate authorities, and Government Security Force shall take appropriate action to prevent recurrence.

812 Voluntary Principles Initative, *Model Clauses for Agreements Between Government Security Forces and Companies with Respect to Security and Human Rights* (2016) https://respect.international/wp-content/uploads/2017/10/Model-Clauses-for-Agreements-between-Government-Security-Forces-and-Companies-with-respect-to-Security-and-Human-Rights.pdf.

H. Transparency

The Parties agree to make their security arrangements transparent and accessible to the public, subject to any overriding safety and security concerns.

Voluntary Principles Initiative, Implementation Guidance Tools[813]

What is risk assessment?

Risk is simply "the impact of uncertainty on objectives". A risk assessment is about identifying, analysing and evaluating those uncertainties. The objective of the VPs is to ensure that security is managed in a way that respects human rights and humanitarian law. Therefore, a VPs risk assessment is about assessing the uncertainties that could impact this objective, and identifying how to address them.

Risk assessments are conducted across a range of activities and the approaches to doing so are now fairly standardized (e.g. the ISO31000 international risk management standard is a set of easy-to understand principles). A VPs risk assessment follows these standards; the only difference is that it is VPs-specific. As such, the tools described in this module can be easily integrated into existing risk management approaches and methods. Similarly, existing tools and approaches can be adapted in order to better reflect the VPs.

VPs risk assessment looks at both security risks to the company and human rights risks to communities in which the company is operating. (…)

Case Study: Managing equipment transfers

A company operating in West Africa routinely gets asked by the military for fuel, the use of company vehicles, and other equipment. The military is under-resourced and it cannot adequately protect local citizens or the company without these extra resources. The company must therefore transfer equipment from time to time in order to manage security risks. The company identified that this poses a number of other risks, particularly the risk that equipment transferred could be used to carry out human rights abuses. The company also found in the past that fuel provided to the military can get bunkered (i.e. illegally sold on for profit), and vehicle parts stripped (from engines to tyres) and similarly sold on.

To manage these risks, the company put in place a number of safeguards. It has made clear to the military its expectations around conduct and only transfers non-lethal equipment. It has placed tracking equipment on all vehicles so that it knows the whereabouts of its vehicles at all times. It also provides its own paid drivers to the military when vehicles are transferred so that agreements around their use can be assured and to ensure that the vehicles are not used inappropriately. Finally, it works with its peer companies to track the amount of fuel transferred so that it can control the risk of fuel being bunkered. These safeguards have so far proven very effective in managing human rights risks.

Addressing Security and Human Rights Challenges in Complex Environments[814]

Working with public security forces

Security actors may have very different attitudes to human rights than found in VPs member companies' home states.

813 Voluntary Principles Initiative, *Implementation Guidance Tools* (2011) http://www.voluntaryprinciples.org/wp-content/uploads/2013/03/VPs_IGT_Final_13-09-11.pdf.

814 Geneva Centre for the Democratic Control of Armed Forces (DCAF) & International Committee of the Red Cross (ICRC), *Addressing Security and Human Rights Challenges in Complex Environments* (2016) http://securityhumanrightshub.com/sites/default/files/publications/ASHRC_Toolkit_V3.pdf.

Good Practices

Communicate company's adherence to the VPs and include this commitment in agreements with the host government to facilitate acceptance by national security actors

- Prepare a clear statement of policy that stipulates the enterprise's human rights expectations of its partners or parties directly linked to its operations. The statement should also be publicly available to enhance its weight (GPs: 16). It "provides a starting point from which the enterprise can better leverage respect for human rights". (UNIG: 27)
- Communicate company policy regarding ethical conduct and human rights to public security forces. (VPs: 3)
- Consult national laws to identify existing norms reinforcing VPs standards and make reference to them in any contracts or agreements with host state actors.
- Include VPs in contracts/agreements/MoUs with the host government. The existence of "contracts or other formal agreements can play an important role in requiring or creating incentives for those other parties to respect human rights". Effective "communication between the company staff that draw up the contract, departments that will be involved in its execution and those that have oversight of human rights issues" is essential. (UNIG: 47-48)

Meet regularly with the management of public security forces

- "Establish a pattern of regular, formal meetings with public security providers in order to exchange security information and address concerns regarding human rights and (international) humanitarian law." (IGTs: 40)

Focus on common values

- Focus the dialogue on concepts like "operational excellence," "best practice", "respect for human life and dignity" or other shared values. Also, "establishing camaraderie between the public provider and the company security manager on the basis of shared or similar experiences in public service can be very effective" in making the case for VPs relevance and importance. (IGTs: 41, 47)
- Work with local public security force commanders to establish mutually agreed Rules of Engagement for the use of force under human rights and international humanitarian law. "These rules then should become a part of any training the public security forces do prior to deployment to the company's facilities." (MIGA: III-8)

Case Study: Human Rights Training In Cameroon

In Cameroon, as in many countries, oil and gas operations are considered a national asset, with public security forces charged with the responsibility for the safety and security of extractive operations. (…) A training programme was developedaround five key elements.

Firstly, the training focused on practical situations the soldiers of the BIR have commonly encountered in the past. The programme was based on everyday situations such as local protests and road blocks rather than general principles of human rights (FFP, 2013: 2).

Secondly, the joint process identified common values such as honour, respect and ensuring human security, which were used in the training to 'translate' the aim of human rights standards into the local discourse (ibid.).

Thirdly, the training material was adapted to the local context. For instance, the programme approached concepts such as 'human security' from the perspective of the family, since the initial scoping study identified the deep importance of family to Cameroonians (ibid. 4).

Fourthly, the joint process provided a platform for the BIR participants to present and discuss their own operational experience. BIR soldiers and commanders could review their peers' challenges and share personal good practices.

Lastly, the joint-process found a suitable medium through which all affected actors could best be reached that was designed to augment and support the actual training course, and provide a take-away resource for participants. It was decided that the best approach would be a series of comic books, which proved easy to disseminate. The comic series, entitled "Captain Cameroun", reflected local and challenging situations highlighting both inappropriate and appropriate security responses focusing on the previously identified shared values: family, honour, respect and ensuring human security.

International Code of Conduct for Private Security Service Providers[815]

Preamble

1. Private Security Companies and other Private Security Service Providers (collectively "PSCs") play an important role in protecting state and non-state clients engaged in relief, recovery, and reconstruction efforts, commercial business operations, diplomacy and military activity. In providing these services, the activities of PSCs can have potentially positive and negative consequences for their clients, the local population in the area of operation, the general security environment, the enjoyment of human rights and the rule of law.

6. Signatory Companies commit to the following, as set forth in this Code:

    a) to operate in accordance with this Code;

    b) to operate in accordance with applicable laws and regulations, and in accordance with relevant corporate standards of business conduct;

    c) to operate in a manner that recognizes and supports the rule of law; respects human rights, and protects the interests of their clients;

    d) to take steps to establish and maintain an effective internal governance framework in order to deter, monitor, report, and effectively address adverse impacts on human rights;

    e) to provide a means for responding to and resolving allegations of activity that violates any applicable national or international law or this Code; and

    f) to cooperate in good faith with national and international authorities exercising proper jurisdiction, in particular with regard to national and international investigations of violations of national and international criminal law, of violations of international humanitarian law, or of human rights abuses.

Selection and vetting of personnel

48. Signatory Companies will establish and maintain internal policies and procedures to determine the suitability of applicants, or Personnel, to carry weapons as part of their duties. At a minimum, this will include checks that they have not:

    a) been convicted of a crime that would indicate that the individual lacks the character and fitness to perform security services pursuant to the principles of this Code;

    b) been dishonourably discharged;

815 *International Code of Conduct for Private Security Service Providers* (2010) https://icoca.ch/en/the_icoc#a-preamble.

c) had other employment or engagement contracts terminated for documented violations of one or more of the principles contained in this Code; or

d) had a history of other conduct that, according to an objectively reasonable standard, brings into question their fitness to carry a weapon. (…)

Incident reporting

63. Signatory Companies will prepare an incident report documenting any incident involving its Personnel that involves the use of any weapon, which includes the firing of weapons under any circumstance (except authorized training), any escalation of force, damage to equipment or injury to persons, attacks, criminal acts, traffic accidents, incidents involving other security forces, or such reporting as otherwise required by the Client, and will conduct an internal inquiry in order to determine the following:

a) time and location of the incident;

b) identity and nationality of any persons involved including their addresses and other contact details;

c) injuries/damage sustained;

d) circumstances leading up to the incident; and

e) any measures taken by the Signatory Company in response to it.

Upon completion of the inquiry, the Signatory Company will produce in writing an incident report including the above information, copies of which will be provided to the Client and, to the extent required by law, to the Competent Authorities.

Grievance procedures

66. Signatory Companies will establish grievance procedures to address claims alleging failure by the Company to respect the principles contained in this Code brought by Personnel or by third parties.

67. Signatory Companies will:

a) establish procedures for their Personnel and for third parties to report allegations of improper and/or illegal conduct to designated Personnel, including such acts or omissions that would violate the principles contained in this Code. Procedures must be fair, accessible and offer effective remedies, including recommendations for the prevention of recurrence. They shall also facilitate reporting by persons with reason to believe that improper or illegal conduct, or a violation of this Code, has occurred or is about to occur, of such conduct, to designated individuals within a Company and, where appropriate, to competent authorities;

b) publish details of their grievance mechanism on a publically accessible website;

c) investigate allegations promptly, impartially and with due consideration to confidentiality;

d) keep records about any such allegations, findings or disciplinary measures. Except where prohibited or protected by applicable law, such records should be made available to a Competent Authority on request;

e) cooperate with official investigations, and not participate in or tolerate from their Personnel, the impeding of witnesses, testimony or investigations;

f) take appropriate disciplinary action, which could include termination of employment in case of a finding of such violations or unlawful behaviour; and

g) ensure that their Personnel who report wrongdoings in good faith are provided protection against any retaliation for making such reports, such as shielding them from unwarranted or otherwise inappropriate disciplinary measures, and that matters raised are examined and acted upon without undue delay.

International Code of Conduct for Private Security Providers' Association[816]

The International Code of Conduct for Private Security Providers' Association (ICoCA) is a multi-stakeholder initiative established as a Swiss non-profit association. (…) All members – States, private security companies and civil society organizations (the three 'pillars') – form part of the General Assembly. Similarly, the Board of Directors consists of twelve elected members, which grant equal representation to each pillar. (…)

The ICoCA is guided by the principles of the Code of Conduct. These include a commitment to good governance, respect for human rights and international humanitarian law, and a high standard of professional conduct. Its operations are carried out globally, with integrity, impartiality and confidentiality. The ICoCA strives to ensure protection and provide remedy to victims of abuse by private security providers. The ICoCA endeavors to prevent excessive use of force; to prevent torture and other degrading treatments or punishments; to prevent sexual exploitation and abuse, and gender-based violence; to prevent human trafficking, slavery and forced labour; to protect the rights of children; and to prevent discrimination.

International Code of Conduct Association, Complaints

The International Code of Conduct Association (ICoCA) receives and processes complaints of alleged violations of the International Code of Conduct for Private Security Service Providers ('the Code') by its Member companies. (…)

Two types of complaints may be reported to the Association:

1. Complaints from an individual or his or her representative alleging harm caused by an alleged Code violation by an ICoCA Member company; or

2. Complaints by an individual or a group with credible evidence of an alleged Code violation by an ICoCA Member company.

In either case the Association initiates a process to respond to the complaint:

1. Where an individual or his or her representative alleges harm caused by an alleged Code violation, the Association will work with the complainant and the ICoCA Member company to facilitate access to a fair and accessible grievance procedure that may offer an effective remedy. This may include the ICoCA Member company's grievance procedure, the good offices of the Association, mediation services, or alternative mechanisms. At all times, the interests and priorities of the complainant will guide the choice of resolution. This process is guided by the Article 13 Procedures for Receiving and Processing Complaints.

2. Where an individual, group or their representatives has credible evidence of an alleged Code violation by an ICoCA Member company, the Association will address the complaint with the Member company. Such complaints may be brought by any group or individual whether or not harmed and may include alleged Code violations which have occurred or are about to occur. This may include anonymous complaints, complaints by whistle-blowers, or complaints by any other individuals or groups with credible evidence of alleged Code violations. This process is guided by the ICoCA's Article 12 Procedures for Reporting, Monitoring and Assessing Performance and Compliance.

816 International Code of Conduct Association, *About Us*, https://icoca.ch/en/icoc-association.

International Code of Conduct Association, Certification[817]

In order to apply for ICoCA Certification, Member companies need to be certified to one of the following ICoCA-recognized standards by an independent accredited certification body:

- PSC1
- ISO 28007
- ISO 18788

PSC.1-2012 establishes a mechanism for private security service providers and their clients to provide demonstrable commitment, conformance, and accountability to the principles outlined in the International Code of Conduct for Private Security Service Providers and the Montreux Document.

ISO 18788:2015 provides a framework for establishing, implementing, operating, monitoring, reviewing, maintaining and improving the management of security operations. It provides the principles and requirements for a security operations management system; and provides a business and risk management framework for organizations conducting or contracting security operations and related activities.

ICRC, The Montreux Document[818]

Foreword

The presence of private military and security companies (PMSCs) in armed conflicts has traditionally drawn scant attention. In some ways this is surprising; as such, reliance on private entrepreneurs during war is nothing new. Such entrepreneurs have played a role in wars past and present, from ancient times to the conflicts of our day. But historians apparently considered them no more than an ancillary aspect of military affairs, their status and significance warranting no particular scrutiny.

This has now changed. Today, PMSCs are viewed in some quarters as an indispensable ingredient of military undertakings. Since the end of the Cold War, demand for PMSCs has increased to such an extent that there is now a lively PMSC industry offering an ever wider range of services, with some companies employing well beyond 10,000 staff. In terms of scale and scope of services involved, PMSCs today are a wholly new phenomenon. (…)

"PMSCs" are private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.

Contracting states

1. Contracting States retain their obligations under international law, even if they contract PMSCs to perform certain activities. If they are occupying powers, they have an obligation to take all measures in their power to restore, and ensure, as far as possible, public order and safety, i.e. exercise vigilance in preventing violations of international humanitarian law and human rights law.

817 https://icoca.ch/apply-icoca-certification#process.

818 International Committee of the Red Cross (ICRC) & Swiss Federal Ministry of Foreign Affairs, *The Montreux Document - On Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict* (2008) www.mdforum.ch/pdf/document/en.pdf.

7. Although entering into contractual relations does not in itself engage the responsibility of Contracting States, the latter are responsible for violations of international humanitarian law, human rights law, or other rules of international law committed by PMSCs or their personnel where such violations are attributable to the Contracting State, consistent with customary international law, in particular if they are:

   a) incorporated by the State into their regular armed forces in accordance with its domestic legislation;

   b) members of organized armed forces, groups or units under a command responsible to the State;

   c) empowered to exercise elements of governmental authority if they are acting in that capacity (i.e. are formally authorized by law or regulation to carry out functions normally conducted by organs of the State); or

   d) in fact acting on the instructions of the State (i.e. the State has specifically instructed the private actor's conduct) or under its direction or control (i.e. actual exercise of effective control by the State over a private actor's conduct).

8. Contracting States have an obligation to provide reparations for violations of international humanitarian law and human rights law caused by wrongful conduct of the personnel of PMSCs when such conduct is attributable to the Contracting States in accordance with the customary international law of State responsibility

Home states

14. Home States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs of their nationality, in particular to:

   a) disseminate, as widely as possible, the text of the Geneva Conventions and other relevant norms of international humanitarian law among PMSCs and their personnel;

   b) not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;

   c) take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means such as administrative or other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.

ICRC, The Montreux Document in a Nutshell[819]

Does any international treaty mention the rights and obligations of PMSCs directly?

No international humanitarian law or human rights treaty mentions PMSCs specifically. The Montreux Document compiles those rules of international law that are most pertinent to PMSC operations, for easy reference.

Do PMSCs operate in a legal vacuum?

No, (…) In situations of armed conflict certain well-established rules and principles do clearly apply, namely under international humanitarian law, which regulates both the activities of PMSC staff and the responsibilities of the States that hire them. Also, human rights law imposes a number of obligations on States to protect persons against misconduct on the part of PMSCs. The Montreux Document explains these rules and principles.

819 Swiss Federal Ministry of Foreign Affairs & International Committee of the Red Cross (ICRC), *The Montreux Document in a Nutshell,* https://www.mdforum.ch/pdf/The-Montreux-Document-in-a-Nutshell.pdf.

What rules to apply to PMSCs and their personnel?

All individuals have to respect international humanitarian law in any activity related to an armed conflict. PMSC personnel are no exception. If they commit serious violations of humanitarian law, such as attacks against civilians or ill-treatment of detainees, these are war crimes that must be prosecuted by States. While companies as such have no obligations under international law, their employees do.

On the other hand, international humanitarian law and human rights law also protect the personnel of these companies. The protection they are entitled to will vary depending on the type of activity they engage in.

Who has the authority to prosecute suspected war criminals?

The State in which a contractor is deployed will usually have authority (jurisdiction), because the crime was committed on its territory. However, PMSC employees may have immunity under a bilateral agreement, such as a status-of-forces agreement; such agreements usually cover the armed forces of one State that are present in another State, but are sometimes extended to civilians accompanying the armed forces and to PMSCs. Also, States experiencing armed conflict do not always have the practical capacity to prosecute crimes if judicial systems are weakened.

Other States can also exercise jurisdiction if one of their nationals commits a crime abroad. However, States have not always established jurisdiction under domestic law for such cases. And, even if they have established jurisdiction, the fact that the crime was committed abroad in a situation of armed conflict can pose serious practical obstacles to criminal investigations, for instance when it comes to gathering evidence.

UN, Guiding Principles on Business and Human Rights[820]

Supporting business respect for human rights in conflict-affected areas

7. Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:

    a) Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;

    b) Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;

    c) Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;

    d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

Freeport-McMoran, Voluntary Principles on Security and Human Rights Report[821]

Company procedure to conduct security and human rights risk assessments

In 2015, for example, the Action Plans resulting from the TFM HRIA were integrated into the site's risk register process. These included Action Plans relating to:

820 Human Rights Council, *UN Guiding Principles on Business and Human Rights, Seventeenth Session* (2011) http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

821 Freeport-McMoRan, *Voluntary Principles on Security and Human Rights, 2015 Annual Report to the Plenary* (2016) http://www.voluntaryprinciples.org/wp-content/uploads/2016/05/Freeport-McMoRan.pdf.

- The responsible prevention of illegal on-site mining and the mitigation of its impacts
- The conduct of public security providers on the concession
- The security of TFM's employees and contractor employees

Site-level risk registers are maintained by inter-departmental teams at the operational level. The corporate sustainable development team and senior, cross-functional corporate personnel monitor and reviews the site-level registers, and maintain a corporate-level risk register.

Anglo American, Voluntary Principles on Security and Human Rights Report[822]

Respect for human rights is at the heard of Anglo American's values

Policies, Procedures and Related Activities

(…) Effective grievance mechanisms are a core element of our human rights approach and having a complaints and grievance procedure is mandatory across all our operations, which includes complaints related to security arrangements. There are various mechanisms in place through which security related human rights incidents are reported: ranging from incidents reported directly to the Security departments that are recorded on their electronic incident management systems to anonymous disclosure reports made via our "Speak Up" whistle-blowing mechanism.

ICRC, Business and International Humanitarian Law[823]

How are the operations of business enterprises protected against attacks under International Humanitarian Law?

Personnel of business enterprises – be they local or expatriate personnel or contractors – performing their usual business activities are generally considered civilians and therefore benefit from the protection against deliberate and indiscriminate attacks. However, international humanitarian law stipulates that civilians who directly participate in hostilities lose their protection from attack for the time that they are carrying out these activities. (…)

Business enterprises' property such as factories, offices, vehicles, land and resources are considered civilian objects and thus also benefit from the protection against deliberate and indiscriminate attacks. However, if business property is used for military purposes, it becomes a military object and risks being legitimately attacked by parties to the conflict.

ENODO Rights, Assessment of the Porgera Remedy Framework[824]

This report concerns an ambitious corporate program to remedy egregious human rights violations. Barrick Gold conceived the Olgeta Meri Remedy Framework (the Framework) in response to devastating accounts of sexual violence committed by private security personnel at the Porgera gold mine in Papua New Guinea. The Guiding Principles on Business and Human Rights1 were the Framework's touchstone. Barrick drew on them to design an elaborate operational-level grievance mechanism (OGM) to adjudicate sexual violence claims and determine individual remedies. Between 2012 and 2014, the Framework was implemented by two organizations independent of Barrick: the Porgera Remedy Framework Association (PRFA), an entity led by prominent Papua New Guinean women's rights advocates; and Cardno Emerging Markets, an environmental, social and infrastructure consultancy. Ultimately, 119 women were awarded remedies—including cash compensation, medical care, counseling, school fees and business training—for sexual violence committed between 1990 and 2010.

822 Anglo-American, *Voluntary Principles on Security and Human Rights - 2015 Annual Report* (2015) http://www.voluntaryprinciples.org/wp-content/uploads/2016/06/security-human-rights-voluntary-principles-2015.pdf.

823 International Committee of the Red Cross (ICRC), *Business & International Humanitarian Law* (2006) https://www.icrc.org/eng/assets/files/other/icrc_002_0882.pdf.

824 ENODO Rights, *An Independent Assessment of the Porgera Remedy Framework* (2016) https://barrick.q4cdn.com/788666289/files/porgera/Enodo-Rights-Porgera-Remedy-Framework-Independent-Assessment.pdf.

The Framework's design has been praised for its remarkable ambition and commitment to the Guiding Principles. At the same time, however, the Framework has been the flashpoint of local and international stakeholder controversy. Stakeholders have at various times raised concerns about the Framework's alignment with the Guiding Principles; its respect for international human rights; its incorporation of local custom; its sensitivity to claimant wishes and the views of local human rights advocates; and its exclusive focus on sexual violence. More recently, Barrick has been accused of unfairness for agreeing to higher compensation than under the Framework for a group of women who rejected Framework remedies and threatened to sue the company in the United States. (…)

We have aimed with this assessment to evaluate the Framework objectively against an authoritative standard. This is not a report about our impressions of private actors' responsibilities under public international law. We seek instead to identify exactly how and why the Framework did or did not align with the Guiding Principles. Mathematical certainty in this context is impossible. To minimize the risk of caprice we have privileged analytical structure and methodological transparency. We started by identifying the relevant Guiding Principles—GPs 22, 29 and 31. We then applied interpretive maxims from international law to unravel the practical meaning of each GP. The process resulted in 26 indicators. These serve as the assessment's template by delineating the boundaries of acceptable decisions and outcomes. We assess the Framework against each indicator on two dimensions: design and implementation. (…)

The Framework was conceived with sincere and considered commitment to the Guiding Principles. Barrick's design should be lauded for its rare ambition and meticulous attention to claimants' rights. But implementation errors compromised the Framework's actual performance. Claimants were thus exposed to a process which failed adequately to protect them and which they did not understand. In the end, successful claimants received remedies that were equitable, even generous, under international law. Nevertheless, many were left disaffected, stigmatized and abused. Responsibility for these results is not the Framework's alone. It should be shared by international stakeholders whose errors of judgment and unwillingness to engage in good faith exacted a great toll on claimants. (…)

Concerted pressure on the Framework to issue cash compensation was even more pernicious for claimant security. Claimants themselves first applied the pressure. International stakeholders magnified it. In doing so, a few of these international stakeholders allied themselves with two local, male-run, self-styled human rights organizations whose interest in women, let alone in survivors of sexual violence, appears instrumental and recently minted. The credibility of both groups had previously been questioned by Human Rights Watch. (When discussing sexual violence, a prominent member of one of these groups callously joked, in front of two survivors, about gang rape by dogs.) The cash-oriented position of this alliance contravened the advice of every single expert in sexual violence in Papua New Guinea Barrick consulted when designing the Framework, including (i) representatives from UN Women, (ii) government officials, (iii) human rights defenders, and (iv) Porgeran women's leaders. Each of these experts warned that women in Porgera are commodified subjects of a customary patriarchy. In this oppressive social context, they argued, cash compensation would largely benefit claimants' male relatives at the expense of claimants themselves. (…)

The pressure from international stakeholders and claimants led the PRFA to make cash the lion's share of all remedy packages. Successful claimants each ultimately received 50,000 Kina—8 times the national per capita income—in cash. The decision, notwithstanding its popularity, undermined the Framework's ability to empower socio-economically disadvantaged and vulnerable women in Porgera. First, cash made every award fungible. Claimants became targets for avaricious relatives, and could be easily dispossessed by their families. Second, cash made every award easily comparable. The Framework could no longer tailor remedies to individual claimants without compromising the OGM's legitimacy. Third, cash is easily dissipated. For claimants who retained their money, the PRFA could no longer patiently build their capacity to launch and run a business. All of these possibilities materialized. Claimants were immediately, often forcefully, dispossessed of their remedy; every award was virtually identical; and, what cash remained in claimants' possession was quickly spent, with no durable benefit. (…)

Background (Cambodia)

BNG, Legal Monthly Law Update[825]

There are two types of private security. The first is created by private security company and the other is created internally by other entities for its own security purpose. The private security company shall request the approval from Ministry of Interior for permission for operating business. The Ministry shall have General Commissariat of National Police as security for reviewing the application. The Capital/Provincial Administration shall permit any entities to create its own security upon the request from Provincial/Capital Police Commissariat. Further this sub decree outlines the obligation of private security company and any private entities to fulfill and comply with the requirement. The administrative cost for this application shall be determined by Ministry of Interior and Ministry of Economic and Finance. In addition, the sub decree indicates the sanction if there is an offense committed by private security companies or other private entities. The sanction includes a written warning, business suspension, and permit cancellation. Further, it shall stop the security business and fine it in the amount of 20,000,000 riels to any private security company operating without permission from Ministry of Interior. Further, it stops the security activity created by other entities without permission from Capital/Provincial Administration. However, the private security company that runs their business, and other entities that already recruited their own security prior to this sub decree have to fulfill all the requirements within six months after this sub decree came into force.

Instruments (Cambodia)

Law on the General Statute of Military Personnel of the Armed Forces[826]

Article 25: It shall be forbidden for career military personnel":

- to undertake a private professional activity during hours of service;
- to use the influence or power inherent in their positions to gain any interest or to violate citizens with threats;
- to undertake an activity breaching the honor and integrity of the Royal Cambodian Armed Force
- to be a member of a board of directors or to ensure the management of a private company.

Sub-Decree on Management of Private Security[827]

Article 5: Ministry of Interior has authority to grant permission for all private security company including agency and other security service.

Article 12: Companies provide the private security service shall have following obligations:

- Request permission for private security agencies to use equipment, material, techniques, means or animals for serving security activities
- Comply with the General Commission of National Police on the security profession
- Develop a joint plan of security protection activities and order for serving the customer
- Develop a plan protecting location, property, and life of customer in each practical case

825 BNG Legal, *Monthly Law Update: June* 2013, http://bnglegal.com/cn/wp-content/uploads/2013/07/130725-MLU-June.pdf.

826 ambodia, *Law on the General Statute of Military Personnel of the Royal Cambodian Armed Forces* (1997) https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/93508/109344/F811412622/KHM93508%20Eng.pdf.

827 Cambodia, *Sub-Decree on Private Security Management,* (Unofficial Translation) No. 289RNKr. BK (2013).

- Request permission for training security agencies from the General Commission of National Police
- Report monthly about private security company activities to the General Commission of National Police
- Request for intervention from competence authority if necessary
- Ensure the Social Security of the security agency following the law in force.
- Provide the private security service in accordance with applicable laws
- Cooperate in providing security agents following the request of the General Commission of National Police if necessary.

Oxfam, Extractive Industries Program in Cambodia[828]

The general lack of activity in the EI sector has also made it difficult for civil society to build a constituency of support amongst the Cambodian general public for good governance of the EI sector, since, as the Prime Minister's adage suggests, there is very little EI to governor monitor at this point in time! Furthermore, the smaller operators that are extracting minerals are difficult to monitor given that they commonly employ local police and/or military as 'security'. This is ironic, the lack of negative social and environmental impacts is denying the Program the opportunity to build up a constituency of support to monitor companies for their social and environmental impact!

It is important to note that the confused context described above is significantly impacted by the changed profile of EI companies operational in the (North East) NE, whereby the majority are small, almost invisible local operators whose governance and authority to operate is incredibly difficult to clarify. It is also common for mining sites to be difficult (and costly) to access, and for sites to be guarded by off duty police and military performing a 'security guard' role. Approaching mine sites therefore needs to be well planned to ensure safety, and to overcome the intimidatory nature of such an approach.

Global Witness, Sponsorship of Military Units by Private Business[829]

Global Witness is concerned that this policy officially sanctions an arrangement where businesses get military protection in return for financial backing. A number of the companies named as military sponsors already have track records of using the military to protect their business interests. For example, Global Witness's 2009 report, Country for Sale, described how the Try Pheap Company used armed forces to guard a mine in Stung Treng Province.

Other high-profile Cambodian companies allegedly providing sponsorship include the Mong Reththy Group, the Ly Yong Phat Company, and the Chub Rubber Plantation Company.

The Ambassador of Cambodia to the United Kingdom and Scandinavia, Hor Nambora, said relying on some private funding of the military was necessary so that Cambodia's armed forces could be rapidly modernized. This was particularly important in the light of recent tensions and border incidents involving neighboring Thailand.

NGO Forum on Cambodia, Statistical Analysis of Land Disputes in Cambodia[830]

Land disputes occurred in every one of the 12 Khan/Districts of Phnom Penh, representing 25 cases. Khan Dangkao has the highest number of disputes, with up to 6 cases emerging in six Sangkat/communes, followed by Ruessei Kaev where 5 disputes emerged in five Sangkat. It should be noted that 2 cases out of 6 cases emerged in Khan Dangkao where threats and violent acts were made by the defendant (company) and police, 10 people were detained, but were later released.

828 Oxfam, *Evaluation Report 'Extractive Industries Program in Cambodia* (2009-2012)' (2013) https://oxfamilibrary.openrepository.com/bitstream/handle/10546/620780/er-extractive-industries-program-cambodia-300813-en.pdf?sequence=1&isAllowed=y.

829 Global Witness, *Global Witness Urges Cambodia's Donors to Condemn Sponsorship of Military Units by Private Business,* (undated) https://www.globalwitness.org/en/archive/global-witness-urges-cambodias-donors-condemn-sponsorship-military-units-private-businesses/.

830 NGO Forum on Cambodia, *Statistical Analysis of Land Disputes in Cambodia* 2015 http://www.ngoforum.org.kh/library-ngof-publication/.

On 20 March 2011, company staff and military police had destroyed local villagers' houses and crops. On 23 January 2014 the company's guards comprising approximately 40 people, parachute trooper 911, and environment officers cleared rice fields and burned the houses of 35 people. They also blocked villagers not access to the area. However, a council of ministers intervened after the affected people were gathering to the block company road for 3 nights and 3 days. As a result, the Sor Chor Nor 315 was issued on 19 February, 2014 to suspend all company activities until the land dispute could be resolved. Furthermore, on 10 and 11November 2014, 40 company guards destroyed and burned 18 houses in Kean Kralanch village; forcing18 HHs to stay in the Pagoda while they were homeless.

Global Witness, The Corporate Empire of the Cambodia's Ruling Family[831]

SL Garment factory where workers claim they were told she was director general of the company. In 2013, 75 private security guards from the security wing of Seng Ny's company, the Garuda Group, were sent into the factory to deal with striking workers. Trade Union officials accused the Garuda security guards of intimidating and using violence against striking workers. In April 2016, an investigation conducted by a conservation organisation and published in international media, alleged that SL Garments' factory is burning illegally-logged timber taken from protected areas to heat water for washing machines and steam presses.

NGO Forum on Cambodia, Free, Prior and Informed Consent[832]

[re Development Process in Indigenous Peoples Communities of Mondulkiri and Ratanakiri Province]

Cambodia law requires that "military personnel be neutral in their functions and work activities" and are "strictly prohibited" from using "influence and power of their own functions to exploit any advantage or for intimidating, threatening and abusing the rights of the citizens". To support the right of Indigenous People to freely decide whether to provide or withhold their consent, Government authorities at all levels must be vigilant to ensure no military personnel are ever present in a community subject to an economic development project, unless there is some unrelated emergency, such as a flood, war or other natural disaster that is in line with the public duties. Military personnel involvement in a private business operation is not service in line the public duties of Cambodian Royal Armed Forces personnel. Similar restrictions should be considered for police and company security personnel, unless there is no other alternative than to deploy these personnel to the area. Where companies inform Government authorities that they require the use of security personnel of any kind, companies should be obliged to abide by the 'Voluntary Principles on Security and Human Rights' (…)

When Mong Reththy began clearing the land in late 2010, around 50, mostly Cham Muslim, families (those at one end of the village affected most by this concession) blocked the main road. They reported that they decided not to go to the company office nearby because the police protected it. Soon after blocking the road, about 100 military police arrived in trucks to break up the protest. Three villagers were hit and bullets were fired into the air to intimidate them. However, the protesters remained for almost 24 hours, demanding that someone from the Provincial government came to meet them. "We waited 24 hours for a representative from the province to come with an announcement from the Council of Ministers that the company should stop." The Deputy Provincial Governor explained that the national government had given authority back to the province to decide. While this happens, Mong Reththy has removed their machinery.

831 Global Witness, Hostile Takeover: The Corporate Empire of Cambodia's Ruling Family (2016) https://www.globalwitness.org/en/reports/hostile-takeover/.

832 NGO Forum on Cambodia, Free, Prior and Informed Consent in the Development Process in Indigenous Peoples Communities of Mondulkiri and Ratanakiri Province (2012) http://ngoforum.org.kh/files/imrp_fpic_report_english.pdf.

FIDH & Licadho, Report for the Human Rights Committee's Task Force[833]

In the 1999 Concluding Observations, paragraph 11, the Committee noted that it was "alarmed at reports of killings by the security forces, other disappearances and deaths in custody, and at the failure of the State party to investigate fully all these allegations and to bring the perpetrators to justice." In reality, the concerns expressed by the Committee in 1999 remain valid and pressing. In January 2014, police and military personnel shot and killed at least four persons using live ammunition at the Canadia Industrial Park in southwest Phnom Penh to suppress workers demonstrating for better wages and better working conditions at the garment and textile factories. An additional 38 people were hospitalized during the attack, 25 of whom suffered bullet wounds. One person, who a witness says was shot in the chest by security forces, remains missing. The government has failed to thoroughly and transparently investigate the deaths, injuries and disappearance that resulted from this violent suppression. Three weeks after the shooting, the government announced that an investigation into the violence had been completed. High-ranking officials have stated that the focus of investigation was to determine responsibility for initiating the violence not to determine responsibility for causing the death and injury of protesters. Moreover, the government has neglected to properly investigate the disappearance of a 16 year old boy who has not been seen since that day when the young garment worker lying on the ground with a bullet wound to his chest, according to witnesses.

Investigations by LICADHO show that these recent tragedies were not exceptional. In fact, they illustrate a pattern of use of excessive and lethal force which is followed by failure to investigate or punish. During 2012-2013, LICADHO monitors investigated 10 fatalities related to police or military action. Some examples include: On 12 November 2013, in Phnom Penh's Stung Meanchey District, police fired indiscriminately at a crowd of striking factory workers, local residents, and bystanders, killing 49-year-old street vendor Eng Sokhum and injuring nine others. One man was paralyzed as a result of his injury. The government scoffed at demands for an investigation claiming that the violence was simply in the service of protecting the state. On 15 September 2013, at Kbal Thnal bridge, Phnom Penh, 29-year-old Mao Sok Chan was killed instantly when he was shot in the head. The killing took place following a day of post-election protests during which the authorities set up barbed wire road blocks throughout the city. Mao Sok Chan was killed as he tried to make his way home when police fired indiscriminately on a crowd of commuters, local residents and demonstrators caught up in the ensuing traffic chaos. There has been no credible investigation into the killing. On 2 April 2013, a local police officer shot dead a 28-year-old factory worker in Mes Thngak commune, Chantrea District, Svay Rieng Province. The police officer opened fire on a group of youths after a fight broke out at a wedding party. The victim's relatives accepted a compensation of 2,800 USD from the perpetrator but after LICADHO sent a report to the prosecutor urging an investigation, the investigating judge charged the accused the police officer and initiated legal proceedings. On 23 January 2013, in Preak Hour commune, Takhmau District, Kandal Province, a 29-year-old worker was shot in the head and killed by a soldier who caught the victim fishing illegally in an area that he guarded. The suspect was arrested and charged with murder by the prosecutor, the case is being investigated by the investigating judge. So far, in nine out of the ten fatal cases there has been no credible prosecution or investigation.9 The most frequent outcome for a victim's family was financial compensation of between 1,500 and 2,800 USD which was paid in return for agreement to withhold or withdraw a legal complaint.

Touch & Neef, Local Responses to Land Grabbing, Conflict and Displacement[834]

Most of cases occurred in areas with strong economic growth, were about agricultural land and involved powerful foreign investors, domestic political and economic elites and local authorities… Military and police forces have played an increasingly prominent role in land disputes and land evictions, siding with company owners and national, provincial and district authorities (…) In early February 2014, TUDG security guards, backed by soldiers, reportedly destroyed 42 homes in Ta Noun commune and two houses in Koh Sdech commune. This resulted in a protest by 100 villagers from Koh Kong's Botum Sakor and Kiri Sakor districts, who asked for compensation

833 FIDH & Licadho, *Report for the Human Rights Committee's Task Force for the Adoption of the List of Issues on Cambodia* (2014) https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/KHM/INT_CCPR_ICO_KHM_17185_E.pdf.

834 Siphat Touch and Andreas Neef, *Land Grabbing, Conflict and Agrarian-Environmental Transformations: Perspectives from East and Southeast Asia* (2015) https://www.iss.nl/sites/corporate/files/CMCP_16-_Touch_and_Neef.pdf.

and stayed outside the TUDG offices for two days. Subsequently, ministerial officials and provincial authorities convened a meeting with company representatives to urge the latter to increase their efforts in providing adequate infrastructure to relocated communities (The Phnom Penh Post, 28 March 2014). The head of the UN Office of the High Commissioner for Human Rights in Cambodia also visited the contested area and arranged meetings between villagers and TUDG, only days after villagers publicly accused the company of hiring soldiers to prevent villagers from planting paddy rice in their former land. The villagers expressed strong hopes for the support from the UN office, with one of them quoted as saying: 'This company is like an elephant and we are like ants'. Shortly after the meetings, which had been reported as being productive, an incident occurred in which TUDG security guards severely injured a woman who was trying to plant rice on the land from which she had been evicted.

This is also true in the case of rural Cambodia, where dispossessed peasants have found no effective means to withstand the powerful coalition of government officials, concessionaries and the military involved in illegitimate and unethical land grabs on a momentous scale….More open forms of resistance, such as the interruption of road traffic and violent clashes with the concessionaire 'security personnel, have quashed quickly through the excessive, state-sanctioned use of the armed forces, resulting in an increasing fatalistic stance among large parts of the local peasantry, while smaller groups have continued their fight. In the Cambodian case, Polanyi's double-movement takes the form of a continuous oscillation between forced commodification of natural resources by domestic and foreign elites on the one hand and the combination of overt and covert resistance strategies by the rural peasantry on the other. Yet, to date, the odds have been stacked against the Cambodian peasants, who, as a result of decades of conflict and unrest, lack organization across village boundaries. Their voices have been ignored by the home governments of the investors, which continue to regard Cambodia as a promising new haven of investment, trade and tourism, where the displacement and dispossession of the poor are deemed unavoidable collateral damage for the foreseeable future.

Hendrickson, Cambodia's Security-Sector Reforms[835]

(…) the growing involvement of the police in business has undermined its primary protective function. In many cases, the police have become part of security problem. Under the protection of senior officers, Cambodia's sex industry, for example, has burgeoned, expanding into Thailand and Vietnam.20 The state's inability to pay adequately and hence to regulate the police is largely a consequence of budgetary pressures. As public confidence in law enforcement has declined, there has been a sharp rise in popular forms of justice, such as the public lynching of criminals. In the absence of effective rule of law, élite groups, businesses and individuals have become reliant on alternative sources of protection, including private security firms and small arms, while the most vulnerable sectors of society have been excluded from the new security arrangements.

Many soldiers who are still formally registered in the army works in the private sector, often for private security firms (which pay much higher salaries) involved in protecting the logging industry. Increasingly, police services have been privatized as well.

The government's inability or unwillingness to control the army's commercial activities was at the root of its 1997 quarrel with the IMF and contributes to the significant shortfall in state revenue today.

Spiegel, Land and 'Space' for Regulating Artisanal Mining in Cambodia[836]

To illustrate the complexity of "making space for artisanal mining," the ASM site visited in Kratie, as shown in Figure1b, is located completely within a mining concession which itself is not only immediately adjacent to other mineral concessions, but entirely located within the land concession held by another company–an agribusiness. The agribusiness company (Green Island) was reportedly conducting teak logging in its concession, and interviews indicated that not only are artisanal miners in Sambo treated purely as "illegal", but the artisanal miners are caught

835 Dylan Hendrickson, Cambodia's Security-Sector Reforms: Limits of a Downsizing Strategy, *Journal of Conflict, Security & Development (*2001) https://www.researchgate.net/publication/250890236_Cambodia's_security-sector_reforms_limits_of_a_downsizing_strategy.

836 Sam Spiegel, 'Land and Space for Regulating Artisanal Mining in Cambodia: Visualizing an Environmental Governance Conundrum in Contested Territory', *Land Use Policy, 54* (2016) https://www.research.ed.ac.uk/portal/files/31085095/Spiegel_LUP_2016_LandSpaceArtisanalMiningCambodia.pdf.

in wider cross-company feuds over space between these larger companies. Coming into contact with security forces of both companies was not uncommon in Sambo. Just as critical scholarship on land grabs and communities' land use practices in Cambodia stresses the importance of rethinking the "illegality" of local land use practices from a more pro-poor and context-sensitive perspective, similar cautions are needed here, with historical complexities of resource extraction and resource disputes carefully considered. Some of Kratie's Artisanal and Small-scale Mining (ASM) activity goes back decades as a family tradition, as in Sambo, and in such cases the term "illegal" would be a misleading oversimplification.

Land use conflicts have created difficulties for environmental planning, and conflicts between artisanal miners and security. While heterogeneous, ASM activities are generally defined in terms of their reliance on rudimentary mineral extraction technologies. These include companies based out of Australia, South Korea, Vietnam, China, Singapore and Thailand, for example, in addition to companies based in Cambodia. Forces of both large companies and state authorities have led to intensified public concern about the need for mining reforms. By unpacking the question "Is there space for regulating artisanal mining in Cambodia?" this article contributes to a growing body of scholarship on land conflicts and land grabbing in Cambodia, which has warned of the problems of eviction and forced relocation of marginalized rural communities. Particular focus has been on whether there is physical land space as well as political space for recognizing the rights of local and migrant Cambodian land users in the face of neoliberal policies that prioritize large-scale companies and that benefit a small segment of the population

Questions

1. What is the relationship between private security and public authorities when it comes to business operations in Cambodia?
2. Is the provision of security services adequately regulated in Cambodia and in line with international standards?
3. What are the common issues concerning provision of security in Cambodia? Explain and provide concrete examples.
4. What disciplinary measures can be taken against individuals and private security firms that fail to comply with the law?
5. Is corporate and industry self-regulation effective in Cambodia in the private security sector?

Further Readings

- Human Rights and Business Dilemmas Forum, *Security Forces and Human Rights* https://hrbdf.org/dilemmas/security-forces-and-human-rights/#.WtckNi5ubDA.
- The Voluntary Principles on Security and Human Rights, *Fact Sheet* (2019) https://docs.wixstatic.com/ugd/f623ce_32362edd5ae345fb9956dd01f16bce75.pdf.
- UN Working Group on the Use of Mercenaries, *Relationship between Private Military and Security Companies and the Extractive Industry from a Human Rights Perspective*, A/HRC/42/42 (2019) https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/42/42.
- UN Global Compact, Guidance on *Responsible Business in Conflict-Affected & High-Risk Areas: A Resource for Companies and Investors* (2010) www.unglobalcompact.org/library/281.
- Barrick Gold, *The Porgera Joint Venture - Remedy Framework* (2014) https://barrick.q4cdn.com/788666289/files/porgera/Porgera-Joint-Venture-Remedy-Framework-Dec1-2014.pdf.
- Mining Watch, https://miningwatch.ca/.

- Anna Petrig, 'Looking at the Montreux Document from a Maritime Perspective', *Maritime Safety and Security Law Journal* (2016) www.researchgate.net/profile/Anna_Petrig/publication/305442243_Looking_at_the_Montreux_Document_from_a_Maritime_Perspective/links/578f28ef08ae35e97c4012f5/Looking-at-the-Montreux-Document-from-a-Maritime-Perspective.pdf.
- Helena Torroja (ed.), *Public International Law and Human Rights Violations by Private Military and Security Companies* (2017) https://link.springer.com/book/10.1007/978-3-319-66098-1.
- Daria Davitti, 'Beyond the Governance Gap: Accountability in Privatized Migration Control', *German Law Journal* (2020) https://portal.research.lu.se/portal/files/79430517/beyond_the_governance_gap_accountability_in_privatized_migration_control.pdf.
- Addressing Security and Human Rights Challenges in Complex Environments, *Knowledge Hub*, http://www.securityhumanrightshub.org.
- International Committee of the Red Cross (ICRC), *Handbook on International Rules Governing Military Operations* (2020) https://www.icrc.org/en/publication/0431-handbook-international-rules-governing-military-operations.
- International Committee of the Red Cross (ICRC), *Cambodia*, https://www.icrc.org/en/where-we-work/asia-pacific/cambodia.
- James D. Sidaway, 'Transecting Security and Space in Phnom Penh', *Environment and Planning 46* (2014) https://www.researchgate.net/publication/265550898_Transecting_Security_and_Space_in_Phnom_Penh.
- Simon Springer, *The Neoliberalization of Security and Violence in Cambodia's Transition* (2009) https://www.researchgate.net/publication/235338282_The_neoliberalization_of_security_and_violence_in_Cambodia%27s_transition.
- Sorpong Peou, 'Human Security in Post-Cold War Cambodia', *Post-Conflict Development in East Asia* (2016) https://www.researchgate.net/publication/292496111_Human_security_in_post-cold_war_Cambodia.
- International Bodyguard and Security Services Association, *Report on the Activities of IBSSA Cambodia – Annex 9* (undated) http://www.ibssa.org/index.php?article_id=558.

27. WATER

Dany Channraksmeychhoukroth, Radu Mares

Introduction

The human right to water is not explicitly mentioned in human rights treaties, but the UN has during the last decade recognized it due to its crucial importance for health and livelihoods. Just as freedom of association is essential for securing other labour rights (chapter 19), the right to water can be seen as an 'enabling' right that is essential for realizing many other human rights. The human right to water emphasizes the value of water as a public good and is thus also a response to decades of privatization of public water services in developed and developing countries alike. The responsibility of international financial institutions and the international investment law regime (chapter 3) has been constantly emphasized in relation to water privatizations. As with provision of security (chapter 26), the management of water resources benefits from comprehensive assessments that identify the deep causes of abuse (chapter 9) and promote comprehensive solutions involving partnerships between private and public actors (chapter 5). Leading companies increasingly recognize the value of water and water security for all stakeholders involved. What exactly a right to water means has been clarified by the UN human rights system (chapter 1) and the Agenda 2030 further emphasizes the sustainable management of water resources. With water pollution reaching ever-higher levels in many countries, there is a growing awareness of the interdependency of human rights protection and environmental protection (chapter 29). Participation, transparency, and access complaint mechanisms (chapters 6-7) are essential to the sustainable use of water resources.

In Cambodia, businesses can affect the right to water in different contexts. First, water service providers, such as water supply authorities in Phnom Penh and provinces, have major roles in providing access to clean water and sanitation to certain areas. Their failures to ensure sufficient water extraction, proper treatment, and full area coverage could have serious impacts on people's life as well as other entities' operations. Second, the heavy water users, i.e. those consuming large quantities of water like some manufacturing operations, can easily deprive or limit other water users in the areas. Third, hydropower plants alter natural flows of water relied on by local/indigenous communities thus affecting the rights of those who have relied on their use. Thus the management of water usually leads to complicated economic, social, and environmental issues in Cambodia. While water may have both an essential health value to individuals as well as cultural and religious significance to communities, it is also an important resource for business operations. Water management is a key element in Cambodia's ambition to meet the UN SDGs and pursue a human rights-based approach to development.

Main Aspects

- ✓ Value of water
- ✓ State obligations
- ✓ Corporate due diligence
- ✓ Human rights analysis of water services
- ✓ Challenges regarding water and sanitation
- ✓ Privatization of water services
- ✓ Access to water for the poor
- ✓ Impact assessment
- ✓ Water management
- ✓ Corporate reporting
- ✓ Mining industry and water
- ✓ Investment arbitration
- ✓ Partnerships
- ✓ Small-scale providers and informal economy

Background

World Bank, Water[837]

Water is at the center of economic and social development: it is vital to maintain health, grow food, generate energy, manage the environment, and create jobs. Water availability and management impacts whether poor girls are educated, whether cities are healthy places to live, and whether growing industries or poor villages can withstand the impacts of floods or droughts.

However, 4.5 billion people lack safely managed sanitation services and 2.1 billion people lack access to safely managed drinking water services. And water-related hazards, including floods, storms, and droughts, are responsible for 9 out of 10 natural disasters. Climate change is expected to increase this risk, in addition to placing greater stress on water supplies. (…)

Of the 2.1 billion people who do not have access to safely managed water, 844 million do not have even a basic drinking water service. Of the 4.5 billion people who do not have safely managed sanitation, 2.3 billion still do not have basic sanitation services. As a result, every year, 361,000 children under 5 years of age die due to diarrhea related to poor sanitation and contaminated water, which are also linked to transmission of diseases such as cholera, dysentery, hepatitis A, and typhoid. (…)

Water security is among the top global risks in terms of development impact. It is also an integral part to the achievement of the Sustainable Development Goals (SDGs). The world will not be able to meet the sustainable development challenges of the 21st century — human development, livable cities, climate change, food security, and energy security — without improving management of water resources and ensuring access to reliable water and sanitation services. (…)

837 World Bank, Water Overview (2018) http://www.worldbank.org/en/topic/water/overview#1.

The combined effects of growing populations, rising incomes, and expanding cities will see demand for water rising exponentially, while supply becomes more erratic and uncertain.

Instruments

UN, Sustainable Development Goals[838]

Goal 6. Ensure availability and sustainable management of water and sanitation for all

6.1 By 2030, achieve universal and equitable access to safe and affordable drinking water for all

6.2 By 2030, achieve access to adequate and equitable sanitation and hygiene for all and end open defecation, paying special attention to the needs of women and girls and those in vulnerable situations

6.3 By 2030, improve water quality by reducing pollution, eliminating dumping and minimizing release of hazardous chemicals and materials, halving the proportion of untreated wastewater and substantially increasing recycling and safe reuse globally

6.4 By 2030, substantially increase water-use efficiency across all sectors and ensure sustainable withdrawals and supply of freshwater to address water scarcity and substantially reduce the number of people suffering from water scarcity

6.5 By 2030, implement integrated water resources management at all levels, including through transboundary cooperation as appropriate

6.6 By 2020, protect and restore water-related ecosystems, including mountains, forests, wetlands, rivers, aquifers and lakes

6.a By 2030, expand international cooperation and capacity-building support to developing countries in water- and sanitation-related activities and programmes, including water harvesting, desalination, water efficiency, wastewater treatment, recycling and reuse technologies

6.b Support and strengthen the participation of local communities in improving water and sanitation management

UN General Assembly, The Human Right to Water and Sanitation[839]

1. Recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights;

2. Calls upon States and international organizations to provide financial resources, capacity-building and technology transfer, through international assistance and cooperation, in particular to developing countries, in order to scale up efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all (…)

838 UN General Assembly, Transforming Our World: The 2030 Agenda for Sustainable Development, A/RES/70/1 (2015) https://sustainabledevelopment.un.org/post2015/transformingourworld.

839 UN General Assembly, The Human Right to Water and Sanitation, A/RES/64/292 (2010) http://www.un.org/es/comun/docs/?symbol=A/RES/64/292&lang=E.

UN General Assembly, The Human Rights to Safe Drinking Water and Sanitation[840]

2. Recognizes that the human right to safe drinking water entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use, and that the human right to sanitation entitles everyone, without discrimination, to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity, while reaffirming that both rights are components of the right to an adequate standard of living; (…)

5. Calls upon States: (…)

(d) To identify patterns of failure to respect, protect or fulfil the human rights to safe drinking water and sanitation for all persons without discrimination and to address their structural causes in policymaking and budgeting within a broader framework, while undertaking holistic planning aimed at achieving sustainable universal access, including in instances where the private sector, donors and non-governmental organizations are involved in service provision;

(e) To promote both women's leadership and their full, effective and equal participation in decision-making on water and sanitation management and to ensure that a gender-based approach is adopted in relation to water and sanitation programmes (…)

(g) To approach the sanitation issue in a much broader context, taking into account the need to pursue integrated approaches;

(h) To consult and coordinate with local communities and other stakeholders, including civil society and the private sector, on adequate solutions to ensure sustainable access to safe drinking water and sanitation;

(i) To provide for effective accountability mechanisms for all water and sanitation service providers to ensure that they respect human rights and do not cause human rights violations or abuses;

6. Calls upon non-State actors, including business enterprises, both transnational and others, to comply with their responsibility to respect human rights, including the human rights to safe drinking water and sanitation (…)

UN General Comment on the Right to Water[841]

1. Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights. (…)

Normative content of the right to water

(a) *Availability.* The water supply for each person must be sufficient and continuous for personal and domestic uses. These uses ordinarily include drinking, personal sanitation, washing of clothes, food preparation, personal and household hygiene. (…)

(b) *Quality.* The water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health. (…)

840 UN General Assembly, *The Human Rights to Safe Drinking Water and Sanitation,* A/RES/70/169 (2015) https://undocs.org/A/RES/70/169.

841 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The Right to Water* (2003) http://www.refworld.org/pdfid/4538838d11.pdf.

(c) *Accessibility.* Water and water facilities and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions:

(i) *Physical accessibility:* Water, and adequate water facilities and services, must be within safe physical reach for all sections of the population. (…)

(ii) *Economic accessibility*: Water, and water facilities and services, must be affordable for all. (…)

(iii) *Non-discrimination:* Water and water facilities and services must be accessible to all, including the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds; and

(iv) *Information accessibility:* Accessibility includes the right to seek, receive and impart information concerning water issues.

Specific legal obligations

20. The right to water, like any human right, imposes three types of obligations on States parties: obligations to *respect*, obligations to *protect* and obligations to *fulfil*. (…)

23. The obligation to *protect* requires States parties to prevent third parties from interfering in any way with the enjoyment of the right to water. Third parties include individuals, groups, corporations and other entities as well as agents acting under their authority. The obligation includes, inter alia, adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems.

24. Where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses an effective regulatory system must be established, in conformity with the Covenant and this general comment, which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance.

33. Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. (…)

44. (b) Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to water by third parties. This includes, inter alia: (i) failure to enact or enforce laws to prevent the contamination and inequitable extraction of water; (ii) failure to effectively regulate and control water services providers; (iii) failure to protect water distribution systems (e.g., piped networks and wells) from interference, damage and destruction;

49. The national water strategy and plan of action should also be based on the principles of accountability, transparency and independence of the judiciary, since good governance is essential to the effective implementation of all human rights, including the realization of the right to water. In order to create a favourable climate for the realization of the right, States parties should take appropriate steps to ensure that the private business sector and civil society are aware of, and consider the importance of, the right to water in pursuing their activities.

53. To assist the monitoring process, right to water indicators should be identified in the national water strategies or plans of action. The indicators should be designed to monitor, at the national and international levels, the State party's obligations under articles 11, paragraph 1, and 12. Indicators should address the different components of adequate water (such as sufficiency, safety and acceptability, affordability and physical accessibility), be disaggregated by the prohibited grounds of discrimination, and cover all persons residing in the State party's territorial jurisdiction or under their control.

UN Independent Expert on Water and Sanitation[842]

4. It is possible to identify three different forms of service provision:

(a) *Direct management.* The State can provide services itself, often through its municipalities. In that case, no actor other than the State is involved and the State is directly responsible and accountable for the provision of services;

(b) *Delegated service provision.* Instead of providing services itself, the State may choose to formally delegate service provision to non-State actors. While more attention is often paid to the involvement of large, transnational companies, service provision may also be delegated to smaller companies, non-governmental organizations (NGOs) or community-based organizations. Services are also often operated through State-owned companies, that is, companies that are totally or in the majority owned by the State, but that are legally distinct entities from the State itself. From the perspective of human rights, the crucial aspect is that the State has delegated the task of providing water and sanitation services to a third actor;

(c) *Informal provision*. Finally, in many cases, the State neither provides services itself, nor does it formally delegate service provision. Under these circumstances, informal provision often takes place, involving a variety of actors and structures that have evolved over time, responding to a need in areas not covered by formal provision, ranging from small-scale entrepreneurs to NGOs and community-based organizations. In this case, the State has not made an intentional decision to involve third actors. Rather, informal provision is de facto participation of non-State actors.

Delegated service provision

7. Some highly visible instances of private sector participation have triggered a vigorous debate, criticism and high scrutiny over the formal private sector, focusing more on water than sanitation. On the one side, some argue that water is a public good and a unique resource essential for life and health and thus should remain in the public domain. Critics often point to instances where private sector participation is perceived to have failed, arguing that performance has been poor, agreed coverage targets have not been met, the quality of services has decreased, prices have increased substantially and that processes have not been transparent. Conversely, others argue that the private sector can contribute to the necessary investments in the sector, and thus extend coverage to currently unserved or underserved areas, as well as increase service quality and efficiency, contribute with technologies and skills and provide services at lower prices.

8. The intensity of the debate between advocates and critics, which is sometimes ideological and emotional, may have partially obscured the actual extent of private sector participation. While such participation is very common in some countries, on a global scale, other forms of service provision predominate. It has been estimated that, as of 2003, only 5 per cent of world's population was being served by the formal private sector. Moreover, the debate sometimes conveys the impression that the private sector is largely dominated by transnational corporations. This does not reflect present reality. Some transnational corporations have started to withdraw from developing countries, they are increasingly developing local partnerships, and, in a number of countries, local private actors are also very active.

842 Catarina de Albuquerque, *Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, A/HRC/15/31* (2010) https://www2.ohchr.org/english/issues/water/iexpert/docs/a-hrc-15-31-aev.pdf.

The human rights to water and sanitation

14. In the political debate over the best mode of service delivery, human rights are often invoked in arguments against private sector participation. The right to water (less so the right to sanitation) and opposition to private sector participation are frequently linked to each other. Decisions taken at the national level to recognize the right to water, while simultaneously ruling out private sector participation of water services, contributed to this perception.

15. Yet, the two issues are separate. Human rights are neutral as to economic models in general, and models of service provision more specifically. The report of the High Commissioner points out that "the approach of United Nations treaty bodies and special procedures has been to stress that the human rights framework does not dictate a particular form of service delivery and leaves it to States to determine the best ways to implement their human rights obligations" (…)

16. Certainly, however, this does not imply that human rights are irrelevant. The delegation of water and sanitation service delivery does not exempt the State from its human rights obligations. (…)

18. The State cannot exempt itself from its human rights obligations by involving non- State actors in service provision. Irrespective of responsibilities of the latter, the State remains the primary duty-bearer for the realization of human rights. (…)

29. From a human rights perspective, it is imperative to determine whether service delivery contributes to or undermines the realization of human rights. Therefore, the provision of services must be assessed against the standard of the human rights to sanitation and water. While all aspects of these rights, that is, availability, safety, acceptability, accessibility, affordability, participation, non-discrimination and accountability, have to be met, some will become more relevant than others in the following discussion.

30. (…) Against the standard of the human rights to water and sanitation, a number of such challenges can be identified, including:

    - Guaranteeing transparent and democratic decision-making
    - Addressing power asymmetries in the bidding and negotiation process
    - Reaching the poorest and most marginalized
    - Ensuring affordable services
    - Avoiding disconnections in cases of inability to pay
    - Ensuring the quality of services
    - Ensuring regulatory capacity and enforcement
    - Ensuring monitoring and follow-up capacity
    - Establishing effective complaint mechanisms
    - Addressing corruption

37. The negotiation of contracts is extremely complex, including the need to clearly define responsibilities, allocate risks, set delivery and coverage targets and establish penalties for non-compliance. Negotiation skills are therefore essential. In particular, local governments are usually far less experienced than transnational corporations in negotiating contracts and addressing the issues at stake. Any imbalance aggravates the task of ensuring that the contract includes the necessary human rights safeguards. Therefore, strengthening the negotiation capacity of (local) governments and reducing power asymmetries is essential.

Providing services to previously unserved and underserved areas

40. It is therefore the Government that has the power and obligation to resist the temptation of investing in and prioritizing only neighbourhoods where interventions are less expensive and complex. The State has the ultimate obligation to realize the rights to sanitation and water for all, including the poorest in society. It must not discriminate against people living in certain areas, but rather must pay specific attention to the most marginalized. (…)

41. The lack of security of tenure, in particular in informal settlements, is one of the critical underlying issues in this context. Utility networks often do not extend to informal settlements, while currently more than one billion people live in unauthorized urban and peri-urban areas. Service providers often do not extend services to these areas due to the lack of legal tenure. At the same time, people themselves do not have a strong incentive for investing in ensuring access to water and sanitation in their homes when they face the constant threat of forced eviction. Appropriate measures by the State to facilitate provision will depend on the local context and might include steps to formalize the legal status of settlements, guarantees that people will not be forcibly evicted, the provision of financial assurances, and, in some circumstances, resettlement to an alternative area as long as human rights standards are respected. Where the issue of the lack of security of tenure has not yet been resolved, States should at least take measures to ensure that the informal service provision that often prevails in such areas meets minimum human rights standards, as further outlined below, or that innovative solutions to providing formal services are implemented.

Complying with human rights standards in the operation of services

49. While it is the obligation of the State to put into place the necessary regulations, providers also have responsibilities in the operation of services. As outlined above, they must exercise due diligence to become aware of, prevent and address adverse impacts on human rights. To meet this responsibility, service providers should take certain measures, such as ensuring that the water they provide is of safe quality, ensuring the regularity of supply, not discriminating in their operations, adopting fair procedures in cases of disconnections due to non-payment and refraining from disconnections when people are unable to pay and the disconnection would leave them without access to minimum essential levels of water.

50. However, the overall policy framework governing these issues is within the purview of the State. Often, these decisions apply to a broader context than the area of operation of the provider in question. And most importantly, service providers lack the legitimacy to take such decisions. Yet, service providers should consider the human rights implications of different policy decisions, in particular, they should be aware of adverse implications of their activities. They can be expected to engage with the State authorities to ensure they are not indirectly contributing to human rights abuses. For instance, while non-State service providers do not determine tariff structures unilaterally, they can be involved and make suggestions on how to ensure that services are affordable, also to the poorest. Moreover, they can and should offer flexible payment schemes adapted to the needs of people living in poverty, such as phased connection charges, payment in instalments and grace periods.

Particular challenges of informal small-scale providers

53. Compared to the regulation of utilities, far less attention has been paid to the regulation of informal small-scale providers. Operating unregulated, they often provide poor quality services at exorbitant prices. Yet, many people would be far worse off without their services. Any attempt to regulate the activities of such providers first requires an overview of the sector and the political will to acknowledge their activities. Human rights law does not prescribe the choice of policy and approach to small-scale providers, which is rather left to the State. It can decide to aim for regulation, or to use incentives for the provision of quality services at affordable prices, or to phase out small-scale providers in the long term and replace them by formal provision. The best policy option will depend on the circumstances and cannot be determined in the abstract. (…)

Human rights impact assessment

63. (…) States should carry out human rights impact assessments before and throughout the process, building these into the process of deciding on the means of service provision as well as a monitoring provision to determine the actual and potential impact on the realization of human rights, including the rights to water and sanitation. They are encouraged to adopt legislation that imposes obligations on service providers to also carry out human rights impact assessments. Service providers should undertake such assessments as part of exercising due diligence to become aware of the actual and potential impact of their activities on the realization of the human rights to water and sanitation;

Farrugia, Investment Arbitration: SAUR International v Argentine Republic[843]

The dispute in question arose out of an investment by SAUR International (SAURI) in a provincially owned water company Obras Sanitarias de Mendoza (OSM). OSM was the holder of an administrative concession for the supply of drinking water, sanitation, and sewerage services in Mendoza, Argentina. SAURI had invested in OSM via minority holdings in a US–French–Argentine consortium led by Enron, and also through a 100 per cent owned local operating company, Aguas de Mendoza. As a result of these equity investments, OSM entered into a 95-year contract in June 1998 with the Mendoza province to manage the water and sanitation concession. Over the course of the following years, exacerbated by the effects of the 2002 financial crisis, the government issued a national emergency decree to freeze all water prices charged to consumers. SAURI maintained OSM was contractually entitled to increases in pricing on the grounds that the peso's sustained devaluation made revenues insufficient to cover the ballooning costs—in other words, tariffs needed to be increased to maintain the 'economic equilibrium' of the project.

In addition to, or perhaps because of, OSM's inability to pay for the services required under the concession, the project suffered from problematic operational issues. An audit of OSM's water services found breaches of drinking water quality, breaches in the provision of sewerage services (both in terms of quality and quantity) and breaches of basic levels of consumer service (including connection, pressure and access). (…)

In its assessment of these questions, the Tribunal agreed with Argentina, first that human rights in general was a source of law applicable to the arbitration (through the mechanisms described at Section 2) and secondly that the right to water constitutes a human right within the meaning of the human rights law applicable to the proceedings.

Discussing the applicable law, the Tribunal stated that the provision of, and access to, safe drinking water constituted, from the state's perspective, an essential service, and from a citizen's perspective, a fundamental right. For that reason, the Tribunal was inclined to agree that the law can (and should) allow for a government to exercise its legitimate functions relevant to investment activity, including the planning, supervision, imposition of penalties and, where appropriate, termination.

However, appended to this right was a recognition, of sorts, that these kinds of governmental 'powers' place the nation state and foreign investor in an asymmetrical power relationship: an investor may often find itself dependent on the state to be able to carry out its own responsibilities. According to the Tribunal, therefore, state powers are not 'absolute' and must be balanced against the rights and guarantees granted to foreign investors under the BIT. (…)

As for the liability, the Tribunal ultimately determined that there can be no doubt that a sovereign state, in the public interest and acting in defence of what it believes to be the public good may, at any time, decide to nationalize a public service such as the supply of drinking water and sanitation. However, once an investment (which enjoys the benefit of the protection of a bilateral investment treaty) is deemed to be expropriated, the state cannot ignore

843 Bree Farrugia, 'The Human Right to Water: Defences to Investment Treaty Violations', *Arbitration International,* 31 (2015) pp. 261–282, https://academic.oup.com/arbitration/article/31/2/261/190022.

its international obligations to provide full compensation. On balance, it found the Argentine Government had breached the BIT by adopting a series of measures of expropriation and nationalization (quantum to be decided at a later stage). (…)

Evident in SAURI and Pacific Rim, the latest in a long line of cases, tribunals seem comfortable in drawing upon and giving greater weight to broader human rights dimensions — specifically the right to water — raised by governments in defence of what may otherwise be considered a straight treaty breach. The important caveat to this trend, however, is that no tribunal has yet ruled on a direct conflict between human rights and BIT obligations: thus far, tribunals have been contented with affirming the coexistence of both human rights law and investment obligations without any serious discussion of hierarchical conflict.

International Council on Mining and Metals, A Practical Guide[844]

Understand the true value of water

Water is a fundamental resource for both people and mining and metals operations

Water is fundamental to life, human dignity and functional ecosystems. Water is also the lifeblood of many industries, from agriculture to manufacturing, energy generation and mining. Yet, this critical shared resource is under increasing stress, highlighted by business leaders as one of the great sustainability challenges of the twenty-first century. Pragmatic solutions to this challenge will require a deep understanding of the way that a diverse range of stakeholders value water and a critical recognition that managing water is fundamentally different and more complex than managing carbon or other natural resources.

Why water is different

- Catchments are fragile ecosystems on which human settlements have historically depended for drinking water and sustenance, as well as social, cultural, economic and spiritual well-being. However, these social, cultural and ecological dimensions are juxtaposed with the economic value of water related to its use in various production processes. Without understanding the value of water from the perspective of diverse stakeholders, mining companies may pursue behaviours and take actions that could undermine trust and destroy relationships, while also increasing the cost of doing business.

- Water availability is variable in time and space, while the short- and long-term future availability is uncertain. One river catchment may be suffering extended drought while neighbouring catchments may be experiencing devastating floods. Equally, a catchment may experience droughts and floods in quick succession. Understanding operational and strategic risk around water is therefore different from other natural resources.

- Water is a finite but renewable resource, the availability of which is physically constrained by infrastructure and legally constrained by historical water rights systems. Although it may be more efficiently used, water cannot be substituted in most domestic and productive activities, and so even the most efficient operations can have an impact. The risks associated with scarcity are therefore very real at a catchment scale. Put simply, while there may be substitutes for carbon in energy production, only water can be used to drink or for irrigation.

- Water is, essentially, a regional product. It is bulky and costly to move in the volumes typically required for production, which limits the distance it can be transferred between catchments. Because of this, and because of the fundamental flow of water from upstream to downstream users, risks and responses must be understood at a catchment scale.

844 International Council on Mining and Minerals (ICMM), *Practical Guide to Catchment-Based Water Management* (2015) https://www.icmm.com/website/publications/pdfs/water/practical-guide-catchment-based-water-management_en.

Water valuation

Poor social management of water (for example, lack of inclusive community engagement, participatory monitoring programs, etc) can lead to the erosion of stakeholder relationships and ultimately the loss of the company's social licence to operate. Several mining companies have had operations shut down or put on hold due to community-led protests, many of which centred around water issues. This can result in costly delays, regulatory pressure, lack of access to permits and challenges to future mine expansions.

Taking a "catchment-based" approach to water management helps conceptualize and manage complex water resource challenges

A catchment-based approach to managing water resources looks at activities and issues in the catchment as a whole, rather than considering different aspects separately. It requires a diverse range of processes to be considered, including the hydrology and land use, as well as broader political, economic, social and ecological dynamics that influence water availability and quality. A catchment-based approach encourages organizations to consider holistically how competing demands on water resources from a range of stakeholders (domestic water users, industry, regulators, politicians) can create pressures and lead to conflict if not appropriately managed. It also requires that people from different sectors be brought together to identify issues and agree priorities for action, and ultimately build local partnerships to put these actions in place.

Opportunities, benefits and risks of partnerships

Successful partnerships create a space for mining and metals companies to build productive relationships with other companies, local communities, NGOs and regulators. These can help share the burden of mitigating risks, identifying opportunities, increasing stakeholder trust, building workforce satisfaction/retention and enhancing brand value. These opportunities are especially pertinent where water-related risks cannot be managed alone and the alternative to a productive partnership is increased operational challenges and costs. Clearly, successful partnerships deliver benefits to operations and help manage risk.

There are, however, risks and challenges in establishing partnerships. In some cases, private sector engagement may be construed as an attempt to unduly influence or "capture" a particular agenda and can be perceived as being purely self-interested. Engaging with partners has cost implications and requires resources via additional staff time to maintain frequent and adequate communication. The expectations arising from a partnership also require close and careful management. If the company's interests, objectives, role and exit strategy are not clear, misaligned expectations from partners may have negative consequences for building and maintaining trust with key stakeholders.

Institutional arrangements

Mining and metals companies are keenly aware of the compliance requirements for their operations. However, close attention should also be paid to understanding the institutional dynamics and factors that can cause these rules to change in the future. This applies across the national, state/provincial and local scale where different institutions may be involved in regulating or setting the rules under which mines must operate. (…)

In addition to institutional arrangement and regulatory timeframes, the institutional strength and capacity of local authorities to deliver services and manage catchment challenges as they arise should also be assessed. Limited resources of local government institutions may have implications for the expectations communities have of mining operations and other industrial water users in the catchment along with implications for the reliability of water supply over time. (…) In instances where national, regional or local regulation is weaker than global company protocols, there may be an opportunity to engage with the regulator(s) on good practice and/or take a leadership position.

IFC, Performance Standard 3 – Resource Efficiency and Pollution Prevention[845]

1. Performance Standard 3 recognizes that increased economic activity and urbanization often generate increased levels of pollution to air, water, and land, and consume finite resources in a manner that may threaten people and the environment at the local, regional, and global levels. (…)

Objectives

- To avoid or minimize adverse impacts on human health and the environment by avoiding or minimizing pollution from project activities.
- To promote more sustainable use of resources, including energy and water (…)

Water Consumption

9. When the project is a potentially significant consumer of water, in addition to applying the resource efficiency requirements of this Performance Standard, the client shall adopt measures that avoid or reduce water usage so that the project's water consumption does not have significant adverse impacts on others. These measures include, but are not limited to, the use of additional technically feasible water conservation measures within the client's operations, the use of alternative water supplies, water consumption offsets to reduce total demand for water resources to within the available supply, and evaluation of alternative project locations.

Sanitation and Water for All Partnership[846]

Sanitation and Water for All – 2015-2020 Strategy

SWA is the global multistakeholder partnership for sanitation, water and hygiene, comprised of country governments, civil society organizations and development partners working together to catalyse political leadership and action, improve accountability and use scarce resources more effectively.

Role and Purpose

Achieving universal sanitation, hygiene and water for all will require complementary and joint efforts. SWA provides a platform for multi-stakeholder intergovernmental dialogue and engagement by a large number of stakeholders, allowing the partnership to achieve outomes that individual partners could not realize alone.

The role and purpose of the SWA partnership is to lead, galvanize and facilitate international efforts, aligning with and promoting national and regional processes aimed at ensuring availability and sustainable management of sanitation, water and hygiene for all. These efforts will be in line with the Sustainable Development Goals (SDGs) and other relevant development policies and law.

The partnership will be a platform for political dialogue, coordinated action, advocacy, and follow-up and review on progress made towards the sanitation, water and hygiene-related targets of the SDGs. The partnership is not a provider of finance, an implementing agency, or a technical oversight body.

The partnership is open to all countries and organizations who share SWA's vision and seek to achieve its objectives.

845 International Finance Corporation (IFC), *Performance Standard 3 – Resource Efficiency and Pollution Prevention* (2012) https://www.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Document.pdf?MOD=AJPERES.

846 Sanitation and Water for All (SWA) Partnership, http://sanitationandwaterforall.org/.

Objectives

The SWA Strategy is grounded in the imperative to "put countries at the centre", strengthening country processes, relying on evidence, and using advocacy to increase political will. Key to SWA's Strategy is the harmonization of efforts and inputs by development partners. The objectives of SWA are to:

1. Increase political prioritization for sanitation, hygiene and water;
2. Strengthen government-led national processes;
3. Develop and use a strong evidence base to support good decision making;
4. Strengthen regional, national and local human and institutional capacities;
5. Follow-up and review progress achieved in implementing sanitation, water and hygiene targets of the SDGs.

In meeting the above objectives, SWA will contribute to the progressive elimination of inequalities by focusing on challenges affecting the most marginalized and hardest to reach.

Why do we need SWA?[847]

Historically, the Water, Sanitation and Hygiene (WASH) sector has faced fundamental problems that present major obstacles to progress.

1. WASH is low on the political agenda, and funding to the sector is insufficient.
2. National plans for WASH often need improving and lack coordinated support.
3. Finance to the WASH sector is unpredictable and does not reach the countries that need it the most.
4. At national level, the WASH sector lacks evidence, data and analysis to inform decision-making.
5. The WASH sector lacks monitoring mechanisms and mutual accountability.

Partners[848]

SWA works through its partners, including governments, external support agencies, civil society organizations, the private sector and community-based organizations. Partners from five constituencies undertake the majority of activities.

Unilever, Water Use[849]

Our commitment

Halve the water associated with the consumer use of our products by 2020.

Our performance

In 2016, our water impact per consumer use decreased by around 7% since 2010.

847 Sanitation and Water for All, *Why do we need SWA?*, http://swa.thebyteflow.com/faq/question-number-1/.

848 Sanitation and Water for All, *Partners,* https://www.sanitationandwaterforall.org/partners.

849 Unilever, *Water Use,* https://www.unilever.com/sustainable-living/reducing-environmental-impact/water-use/.

Our perspective

We have made significant reductions in the water used in manufacturing. However, the biggest impact comes from water used by consumers when they shower, bathe and clean with our products. In 2016 the water associated with the consumer use of our products reduced by around 7% versus 2010.

We have continued to make progress in designing and rolling out products which require less water. (…)

In 2016 we opened our Suvidha Hygiene Centre in India. Located in one of Mumbai's largest slums, the Centre provides water, sanitation and hygiene pay per use services, including laundry facilities and safe drinking water, to over 1,500 people. The Centre uses circular economy principles to reduce water use. Fresh water is first used for bathing, handwashing and laundry. The waste water from these activities is then used for flushing toilets.

This business model is an opportunity to unlock new markets, investments and innovation, whilst meeting consumer needs and contributing to the delivery of the Global Goals, particularly Goal 6 on clean water and sanitation provision.

We also continued to scale up our Sunlight Water Centres in Nigeria, with ten centres opened by the end of 2016.

In 2016 our Dove brand and Delta Faucet Company in the US worked to help change consumer behaviour during showering, promoting the more water efficient Delta Hydrafall™ showerhead.

Over the last six years we have learned more about people's needs in water scarce situations – so we are sharpening our internal strategy to align with this. We will accelerate our efforts to develop water smart products which meet consumers' needs, such as products which enable people to wash and do laundry well, in spite of water quantity and quality issues.

Alliance for Water Stewardship, Introduction

What is the Alliance for Water Stewardship?[850]

Alliance for Water Stewardship (AWS) is a global membership collaboration of businesses, NGOs and the public sector. Our members contribute to the sustainability of local water-resources through their adoption and promotion of a universal framework for the sustainable use of water - the International Water Stewardship Standard, or AWS Standard - that drives, recognizes and rewards good water stewardship performance.

What is water stewardship?

Stewardship is about taking care of something that we do not own. Stewardship approaches focus on the management of common pool resources like forests, fisheries or, in our case, freshwater. Water stewardship is based on the principle of there being a collective need for sustainable water resources and a collective need for effective responses to address shared water-related challenges.

The AWS International Water Stewardship Standard - Version 2.0 (2019)[851]

AWS International Water Stewardship Standard (AWS Standard) is a globally-applicable framework for major water users to understand their water use and impacts, and to work collaboratively and transparently for sustainable water management within a catchment context. The Standard is intended to drive social, environmental and economic benefits at the scale of a catchment.

850 Alliance for Water Stewardship (AWS), *An Introduction* (2019) https://a4ws.org/download/aws-an-introduction/.

851 Alliance for Water Stewardship (AWS), *The AWS International Water Stewardship Standard 2.0*, https://a4ws.org/the-aws-standard-2-0/.

It achieves this by engaging water-using sites in understanding and addressing shared catchment water challenges as well as site water risks and opportunities. It asks water-using sites to address these challenges in a way that progressively moves them to best practice in terms of five outcomes:



GOOD WATER GOVERNANCE | SUSTAINABLE WATER BALANCE | GOOD WATER QUALITY STATUS | IMPORTANT WATER-RELATED AREAS | SAFE WATER, SANITATION AND HYGIENE FOR ALL (WASH)

In pursuit of these outcomes, implementation of the Standard encourages collaborative approaches that involve business and industry, government and community as well as civil society organizations.

WBCSD, CEO Guide to Water[852]

Business depends on water. You share it with people, cities, other businesses and nature.

This competition will get worse. According to the World Bank, within the next three decades the global food system will require between 40 - 50% more water; municipal and industrial water demand will increase by 50 - 70% and water demand for energy will increase by 85%.1

The materiality of water risks is clear and urgent. Water demands already exceed supply in many places. Without action, there will be no water available to meet future societal and environmental needs.

Water is central to the delivery of a low-carbon world, stability, prosperity and peace. Carbon capture and storage are notably highly water intensive and biofuel crops pose significant demands on water supply. Water scarcity can induce a security risk in countries where hydroelectricity represents a significant portion of the energy mix.

The impacts of climate change are primarily channeled through changes in the water cycle, with uneven consequences across the globe. Major natural disasters such as droughts are increasing, which influence migration, impact food prices and can lead to social unrest.

Business is paying the price too. When there is no water available for operations, businesses must either significantly invest into or abandon certain sites.

Water risks directly affect bottom lines. To better plan for future shocks and become resilient, there needs to be a fundamental shift in the way that companies value water.

Water should be a priority in the boardroom of every company in the world. Managing water better is a key opportunity for business to create and develop competitive advantages, while securing their license to operate, reducing financial losses and altogether ensuring continuity of operations.

852 World Business Council for Sustainable Development (WBCSD), *CEO Guide to Water – Building resilient business* (2018) www.wbcsd.org/Programs/Food-and-Nature/Water/Resources/CEO-Guide-to-Water-building-resilient-business..

As a decision maker, you need to:

- Understand the level of your company's exposure to and sharing of water risks in direct operations and across supply chains;
- Integrate water in decision making, disclosure, and make smart investment decisions;
- Collaborate with other water users and stakeholders to address shared risks and seize opportunities. (…)

Consider the following seven steps to design and implement your water stewardship journey in the order that best suits your business



Gerlak, Taking Stock of the Human Right to Water[853]

In December 2015, the United Nations (UN) General Assembly adopted a new resolution recognizing the human right to sanitation as a distinct right from the human right to water. (…) Collectively, these developments reflect a convergence by different actors that everyone is entitled to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use. However, this convergence occurs in an environment of governance that is increasingly multi-level, fragmented and contested. Actor constellations in water governance range from purely public to hybrid and exclusively private.

Given this broad convergence on the HRtWS1 and in light of the increased fragmentation and contestation in global water governance, this article asks: How have the diverse actors in global water governance framed the HRtWS and proposed related actions to achieve the right? How has the narrative around the HRtWS changed over time? (…)

853 Andrea K. Gerlak et al., 'Taking Stock of the Human Right to Water', International Journal of Water Governance 6:4 (2018) www.ijwg.eu/pub/86/115728-16-127-RR.pdf.

We find that despite initial resistance to human rights framing among many of the actors involved in global water governance, there is a convergence on the existence of the HRtWS. Yet, contestation among actors increasingly focuses on what the right means in practice and how to implement a rights-based approach to water services. This contestation is particularly visible around what a legal HRtWS means for questions of financing, providers and oversight. We argue that the HRtWS brings a political dimension to a relatively technical driven discourse by calling attention to issues of discrimination, power differentials, justice, equity and democratic principles of citizen participation in water management.

Background (Cambodia)

World Bank, Water Supply and Sanitation Improvement Project[854]

A. Country Context

3. Climate change vulnerability could also negatively affect growth. Cambodia ranked as the 8th most disaster-prone country by the United Nation's World Risk Index (2015). (…) Vulnerability to floods and droughts on a seasonal basis is considered by the government to be a key driver of poverty. Climate change coupled with rapid urbanization are also expected to negatively affect the quality and availability of water resources. (…)

B. Sectoral and Institutional Context

5. The Sustainable Development Goals (SDGs) on clean water and sanitation present a huge challenge to Cambodia in accelerating access, reducing disparity, and increasing quality of service. (…)

6. The lack of access to WSS services poses a disproportionate burden on women and girls. A current gender gap analysis suggested that while women, as part of performing household chores and hygiene practices, are the potential principle users of water when piped water supply is available at home, a formal mechanism for women to provide feedback to service providers does not exist yet. More importantly, women are underrepresented among the owners (in the case of private water suppliers) and staff of water supply service providers. Among the public water service providers consulted, professional female staff (unskilled labor not included) make up only 13 percent on average of total staff. According to the gender analysis, this is because of gender stereotyping and lack of enabling environment for women to work in water supply services. (…)

7. Only 21 percent of people have piped water supply which is concentrated in larger towns. Phnom Penh is well covered with piped water supply, while Siem Reap City and a handful of provincial and district towns have limited coverage ratios of 13–55 percent. These water supply systems are operated by autonomous water authorities in Phnom Penh and Siem Reap City and public waterworks departments in the rest of the country. The lack of public funding has spurred a significant growth of domestic private sector financed, constructed, and operated small-scale piped water supply in many smaller settlements. As of 2018, there are more than 300 such schemes, of which 247 are licensed by the Government. There are gap areas that appear suitable for piped water supply services (either as expansion from adjacent schemes or as new schemes) but currently have no public funding nor private interests to provide these services. (…)

8. Only 41 percent of people receive some form of sanitation service and 11 percent of households are connected to a sewerage network. Even where wastewater is collected, only a small portion is treated. Currently, only Siem Reap City, Preah Sihanouk Ville and Battambang provincial town have wastewater treatment facilities. Because of the lack of financial resources (including low revenue collection) and capacity constraints, the facilities and networks have inadequate operation and maintenance (O&M) and have fallen into disrepair in some areas. (…)

854 World Bank, International Development Association Project Appraisal Document on a Proposed Credit in the Amount of SDR 39.3 Million (US$ 55.0 Million Equivalent to the Kingdom of Cambodia for a Water Supply and Sanitation Improvement Project (2019) http://documents1.worldbank.org/curated/en/942241554084076305/pdf/Cambodia-Water-Supply-and-Sanitation-Improvement-Project.pdf.

11. A National Policy on WSS was enacted in 2003 but has not been successfully implemented in full, partly because of institutional fragmentation challenges. Instead, key water supply elements from this policy and other policy, strategy, and regulation developed since then are included into the Cambodia National Strategic Development Plan (NSDP) 2014–18. These elements form the basis for the Government's reform agenda for water supply, which focuses on (a) improving legal and regulatory framework that is conducive for private investment in the water sector; (b) decentralizing service delivery to subnational level; (c) progressively corporatizing all public waterworks into state-owned enterprises through improving operational performance and transferring autonomy; (d) increasing sector financing, including encouraging private sector financing and investment; and (e) promoting equitable access. This agenda is reinforced by a tariff regulation policy which sets out the requirement for cost recovery in piped water supply operations. (…)

12. The Bank's support to the urban water supply sector mainly focuses on strengthening the enabling environment and participation of the private sector in water service provision. Given the prominent role of the private sector in water supply in Cambodia, the Bank has been providing technical assistance (TA) to support the development of the private sector water industry in Cambodia. The TA supported strengthening the Government's role in performing effective regulatory functions through supporting the preparation of the licensing regulation stipulating the obligations for water operators, the tariff regulation specifying cost-recovery of investment, and the monitoring system enabling the MIH to monitor the performance of water operators. In addition, TA has also provided capacity building for professionalizing private water operator. (…)

13. Development partners' support to the sector is numerous but with little coordination. There are recent efforts to revive or convene regular stakeholders' meetings. In water supply, the Asian Development Bank (ADB), Japan International Cooperation Agency (JICA), Japan-ASEAN Integration Fund, European Union (EU), and French Development Agency (AFD) have focused on financing the expansion of the water production capacity and service provision in Phnom Penh, Siem Reap City, and a number of provincial and district towns operated by public service providers. The AFD, the Australian Department of Foreign Affairs and Trade (DFAT), and the Bank are supporting the provision of piped water supply services through the private sector. The AFD focused on providing access to finance for private water operators to expand their network within their licensed areas, while the DFAT's program provided a viability gap grant to private operators focusing on new and unlicensed operators. (…)

Instruments (Cambodia)

Agreement for the Sustainable Development of the Mekong River Basin[855]

Article 1. Areas of Cooperation

To cooperate in all fields of sustainable development, utilisation, management and conservation of the water and related resources of the Mekong River Basin including, but not limited to irrigation, hydro-power, navigation, flood control, fisheries, timber floating, recreation and tourism, in a manner to optimise the multiple-use and mutual benefits of all riparians and to minimise the harmful effects that might result from natural occurrences and man-made activities.

Article 7. Prevention and Cessation of Harmful Effects

To make every effort to avoid, minimise and mitigate harmful effects that might occur to the environment, especially the water quantity and quality, the aquatic (eco-system) conditions, and ecological balance of the river system, from the development and use of the Mekong River Basin water resources or discharge of wastes and return flows...

855 *Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin* (1995) http://www.fao.org/faolex/results/details/en/c/LEX-FAOC017433/.

Article 8. State Responsibility for Damages

Where harmful effects cause substantial damage to one or more riparians from the use of and/or discharge to waters of the Mekong River by any riparian State, the party(ies) concerned shall determine all relative factors, the cause, extent of damage and responsibility for damages caused by that State in conformity with the principles of international law relating to state responsibility, and to address and resolve all issues, differences and disputes in an amicable and timely manner by peaceful means. (…)

Constitution of the Kingdom of Cambodia

Article 59: The State shall protect the environment and balance of abundant natural resources and establish a precise plan of management of land, water, air, wind, geology, ecological system, mines, energy, petrol and gas, rocks and sand, gems, forests and forestry products, wildlife, fish and aquatic resources.

Article 61: The State shall promote economic development in all sectors and remote areas, especially in agriculture, handicrafts, industry, with attention to policies of water, electricity, roads and means of transport, modern technology and a system of credit.

Law on Water Resources Management of the Kingdom of Cambodia[856]

Article 1: The general purpose of this Law is to foster the effective and sustainable management of the water resources of the Kingdom of Cambodia to attain socio-economic development and the welfare of the people.

This Law determines:

- the rights and obligations of water users,
- the fundamental principles of water resources management, and
- the participation of users and their associations in the sustainable development of water resources. (…)

Article 11: Every person has the right to use water resources for his/her vital human need including drinking, washing, bathing and other domestic purposes including watering for animal husbandry, fishing and the irrigation of domestic gardens and orchards, in a manner that will not affect other legal right of others. (…)

Article 12: The diversion, abstraction and use of water resources for purposes other than those mentioned in Article 11, and the construction of the waterworks relating thereto, are subject to a license or permit. (…)

Article 34: The Kingdom of Cambodia has the right and duty to participate in the utilization, development and management of an equitable and reasonable share of the international river basins in its territory, consistent with the obligations arising from the international agreements to which Cambodia is a Party.

Sub-Decree on Water Pollution Control[857]

Article 5: In the necessary cases or in response to the requirement of each area for the purpose of human health protection and the conservation of bio-diversity, the Ministry of Environment shall set up separated standard for effluent discharge for sources of pollution, that are located around the public water area. (…)

856 Cambodia, *Law on Water Resources Management* (2007) https://ppp.worldbank.org/public-private-partnership/library/cambodia-law-water-resource-management.

857 Cambodia, *Sub-Decree on Water Pollution Control* (1999) http://sithi.org/temp.php?url=law_detail.php&id=88.

Article 7: In order to ensure the human health protection and bio-diversity conservation, the Ministry of Environment shall establish the standard of pollution load contained in liquid waste that could be allowed to be released from any sources of pollution into designated protected public water areas. (…)

Article 29: Even if it is found that any public water areas is suffering of pollution which could threaten human life or bio-diversity the Ministry of Environment shall immediately notify the public about this danger and shall take measure to prevent the water pollution and to restore the water quality of such public water areas.

Cambodian Sustainable Development Goals Framework[858]

In September 2015, the Royal Government came together with all UN member states at the annual session of the General assembly to endorse the expanded and more ambitious agenda set out by the Sustainable Development Goals (SDGs) 2016-2030. The Royal Government has sought again to adapt these global goals to the national context and craft a fully localised set of targets - the Cambodia SDGs, or CSDGs – which will feed into national and sectoral development planning processes, and this document sets out the CSDG framework as a primary input to the National Strategic Development Plan 2019-2023. (…)

National Strategy for Rural Water Supply, Sanitation and Hygiene[859]

Sustainability

A key objective is the sustainability of improved water supply, use of sanitation facilities and hygiene behaviors. Once established, systems should provide a permanent service. The benefits should continue over a prolonged period. Essential factors are:

- The water resources should not be over-exploited;
- Polluting the water resource should be prevented, in particular from poor sanitation;
- Provision for effective O&M, so that WSS facilities are maintained in a condition that ensures a reliable service; (…)

Community-based management

Communities should manage water supply and sanitation services, and have decision-making power over the components for which they are responsible. This includes decisions about whether to operate the services themselves or to contract out to a service provider. Key aspects in community-based management are:

- Participation: all members of the community should have an equal opportunity to participate in the development and management process, and there must be broad community support for community-based management.
- Responsibility: the community owns and is responsible for maintaining the systems.
- Authority: the community has the legitimate right to make decisions on behalf of the users.
- Control: the community is able to carry out and determine the outcome of its decisions.
- Accountability: the community must accept the consequences of its decisions and understand that it is accountable for its actions.

858 Royal Government of *Cambodia, Cambodian Sustainable Development Goals (CSDGs) Framework 2016 – 2030* (2018) https://data.opendevelopmentcambodia.net/dataset/cambodian-sustainable-development-goals-framework-2016-2030/resource/d340c835-e705-40a4-8fb3-66f957670072.

859 Royal Government of Cambodia, *National Strategy for Rural Water Supply, Sanitation and Hygiene 2011-2025* (2011) https://data.opendevelopmentcambodia.net/library_record/2011-2025.

Demand-responsive approach

The demand-responsive approach is a foundation for community management. The community initiates developing services by requesting support from relevant authorities or service providers. (…)

Cost sharing for water supply

Communities should contribute a part of the capital cost of water supplies, but should bear the total cost for operation and maintenance, and a part of the cost of the maintenance support service. (…)

Sanitation financing

For sanitation, public finance should mainly be used to stimulate demand and develop the enabling environment (including affordable products) so that households pay for their own toilets. Those who can pay should pay. While targeted hardware subsidies may be provided to poor households to buy toilets, and to reach the vision of 100% coverage, direct hardware subsidies should be used with caution and only as a last option, and alternative mechanisms should be prioritized.

Integration of water supply, sanitation and hygiene promotion

Where communities and households do not have access to improved water supply and improved sanitation, water supply, sanitation and hygiene promotion services should be integrated into a single component. But as there are substantial differences between them, different approaches are needed to provide such services. In places that already have water supply, it may only be necessary to develop sanitation and hygiene promotion as stand-alone components.

Operation and maintenance

User communities are responsible for operating and maintaining the water supply service, through a representative Water & Sanitation User Group (WSUG), supported by a district-level O&M support service. Operating and maintaining household latrines is the responsibility of the individual household, while institutions are responsible for theirs.

Accountability

Organizations have multiple accountabilities – downwards to electorates, beneficiaries, partners and staff, and upwards to higher levels of government and donors. When developing, running and monitoring services and designing projects, programs or other activities, all organizations should consider how their work and its results will affect each of these, and their responsibilities for them, in both the short and long-term.

Mainstreaming gender

All organizations should mainstream gender. They should make women's and men's concerns integral to the design, implementation, monitoring and evaluation of policies and service delivery in all political, economic and social aspects.

Mainstreaming disability

Developing and providing RWSSH services shall conform to the Law on the Protection and Promotion of the Rights of Persons with Disabilities (2009). The needs of people with disabilities should be considered at all stages of the development process, including legislation, policies and programs, in any area, at all levels. (…)

Roles and responsibilities

Responsibilities for water and sanitation are allocated to various line ministries:

- The MRD is specifically responsible for rural water supply and sanitation
- The Ministry of Water Resources and Meteorology (MOWRAM) has overall responsibility for water resource planning and management
- The Ministry of Industry, Mines and Energy (MIME) is responsible for water supply to provincial and small towns, regulation of the private sector involved in piped water systems, setting quality standards for drinking water and water quality in piped supplies
- MIME is responsible for the water quality of piped public water supply sources
- The Ministry of Planning is responsible for monitoring the CMDGs.

Figure 6: Links between poverty and water supply and sanitation

		Poverty dimensions	Key effects
Lack of water sanitation and hygiene		Health	Water-and sanitation-related illnesses Stunting from diarrhea-related malnutrition Life expectancy is reduced
		Education	Children (especially girls) do not go to school because of ill health, lack of toilets or water-collection duties
		Gender and social inclusion	Burdens borne disproportionately by women, limitng their opportuniteies to enter the cash economy People with disabilities face hardship
		Incom/consumption	High proportion of budget used on water Reduced income due to poor health, time spent collecting water or lack ofopportunity for businesses that need water High consumption risk because of seasonal or other factors

World Bank, Water Supply and Sanitation in Cambodia[860]

Reaching universal access targets set for 2025 will involve an estimated 562,000 persons per year gaining access to improved water supply services and 933,000 gaining access to improved sanitation, of which 62% live in rural areas. Almost 660,000 people living in rural areas will need to gain access annually to improved sanitation, making this the most pressing development issue in terms of closing the urban-rural gap, and especially in light in the high and persistent levels of stunting (40%) of children, translating in low cognitive development and less productive future lives. These basic service delivery gaps in water and sanitation translate to capital expenditure requirements of US$92 million per year for water supply and US$119 million for sanitation. The estimated capital requirements are biased towards urban areas, requiring 70% of the total, on account on higher unit cost and ambitious targets for high levels of services, especially for urban wastewater. Anticipated financing falls far short of this requirement with projected deficits of US$57 million per year for water supply and US$85 million for sanitation; these include replacement costs as well. On top of this, approximately US$10 million per year is required for the operation and maintenance of water supply services and US$14 million for sanitation.

860 International Bank for Reconstruction and Development/ The World Bank, "*Water Supply and Sanitation in Cambodia: Turning Finance into Services for the Future"*, 2015. pp. 10 – 12 & p. 40.

With the ambitious government targets in mind, it is clear that investments in the water supply and sanitation sector fall short of requirement, and - with an eye on delivering services to the poor, the rural sectors seems to be hardest hit. However, with rapid urbanization, urban water supply services especially outside of Phnom Penh need urgent attention, as well as sanitation solutions in the capital to improve hygienic living conditions and reduce environmental degradation. However, the scale of the investment gap could, however, be reduced by improving the efficiency, management and sustainability of existing infrastructure and services. Especially for water supply, ensuring higher cost recovery through user tariffs and fees will help to reduce the burden placed on government to fund replacement costs. Another critical challenge is the lack of a well-defined and operationalized institutional and regulatory framework to drive quality, equity and efficiency in service provision.

Especially relevant here is the importance to clarify functional assignment of rural sanitation and maintenance of rural water supplies to sub-national administrations. In line with the principles of the D&D reform, a decentralized service delivery model for rural services will need the adequate level of resourcing, strong district and commune council leadership, and oversight and guidance by technical line agencies. Similarly, the reform in the urban water supply sector would need to follow the example of Phnom Penh by creating autonomous utilities, as well as cities taking responsibilities for urban sanitation issues, possibly through combined water and sanitation service providers.

Other constraints for sound sector development – following the motto "what gets measured gets managed" - is the lack of effective monitoring systems to track progress against targets and improve programming for both the urban and rural subsectors, as well as the limitations of existing financial management to support budgeting and expenditure reporting, linking these to result areas. (…)

EarthRights et al., Submission to UN [re Lower Sesan Hydropower][861]

2. National Legal Framework

2.1 Responsible bodies

The Ministry of Mines and Energy (MME) is the lead agency responsible for hydropower development in Cambodia. The National Strategic Development Plan (NSDP) (2009-2013) requires MME to encourage private sector investment and promote the exploration of new sources of energy, including hydropower, to meet the country's pressing domestic demand. The Ministry of Environment (MOE) has the role of reviewing and approving environmental impact assessments (EIAs) for hydropower projects and monitoring project compliance with the EIA report. The Ministry of Water Resources and Meteorology (MOWRAM) is responsible for issuing water use licenses for hydropower projects. (…)

2.2 National legal principles

There is no specific legal framework governing hydropower development in Cambodia. A number of laws provide principles applicable to the development of hydropower dams, including those related to investment, electricity, land, forests, water resources and the environment. Existing laws contain principles regarding the rights of affected communities and the public in the decision-making and development of such projects. (…)

The Law on Environmental Protection and Natural Resource Management (EPNRML) sets out the framework for environmental protection in Cambodia. One stated objective is to enable 'the public to participate in environmental protection and natural resource management'. A further objective is to suppress 'any acts that cause harm to the environment'. (…)

861 EarthRights International et al., *Submission to UN Special Rapporteur on the situation of human rights in Cambodia Hydropower Dam Development in Cambodia: Lower Sesan 2 and Stung Cheay Areng Hydropower Projects* (2015) https://earthrights.org/wp-content/uploads/submission_to_special_rapporteur_on_hydropower.pdf.

With respect to the LS2 a dam, the Cambodian government passed a law guaranteeing payments to the Hydropower Lower Sesan 2 Co. for the electricity from the project, including if the dam is unable to operate due to political force majeure. The Law on the Authorization of Payment Warranty is based on inadequate due diligence conducted by Key Consultants Cambodia (KCC) of Cambodia and Power Engineering Consulting Joint Stock Company 1 (PECC1) of Vietnam during the feasibility and environmental impact assessment studies. Furthermore, the law lowers the standards for social and environmental protection set out in the EIA report by placing limits on company responsibility for project impacts. (…)

International human rights bodies have held that States must prevent private companies in their jurisdiction from violating the human rights of individuals in other countries. The Chinese government has an obligation to prevent businesses domiciled in China from violating human rights in their operations abroad, through adequate legislation, policies, and adjudication. This obligation is stronger when, as with the LS2 and Cheay Areng projects, the companies are state owned enterprises (SOEs) under effective government control. In the case of SOEs, states should ensure that human rights due diligence is undertaken prior to investing in a project. The obligation to protect also includes ensuring effective remedial mechanisms for persons whose human rights have been violated as a result of activities of Chinese companies operating abroad.

The right to water is protected under articles 11 and 12 of the ICESCR. The right obliges governments to take steps to ensure the protection of water sources, including by reducing the depletion of water resources through unsustainable damming and ensuring that proposed developments do not interfere with access to adequate water. States violate ICESCR article 12 by taking retroactive measures that are incompatible with ensuring access to an adequate supply of safe and potable water. Water must be treated as a social and cultural good, not primarily an economic good, and indigenous peoples' access to water on their ancestral lands must be protected from encroachment. (…)

Lower Sesan 2 Dam

According to studies, at least 38,675 individuals, including many indigenous persons, stand to

lose access to the vast majority of their fishery resources as a result of the LS2 dam, and at least 78,000 people upstream of the dam will lose access to migratory fish. Furthermore, the dam "would certainly result in significant negative fisheries impacts on… Vietnam, Laos and Thailand." A recent scientific study predicts that the LS2 dam will reduce fish biomass across the entire Mekong Basin by 9.3% and critically endanger more than 50 fish species, which equates to 200,000 tons of fish per year; the most severe impact of any proposed Mekong tributary dam. The dam will also contribute to significant changes in hydrological flows in the Mekong River and decrease sediment by approximately 6-8 percent, affecting agricultural production in the Mekong floodplains and Delta. (…)

The loss of fisheries will have negative economic effects on the region, especially in Cambodia. KCC calculated the dam to cause a US $2.84 million loss in fishing revenue per year. This estimate has been criticized as being far too low. In 2008, the total value of Cambodian fishery exports was US $35.8 million, and fishery sales account for nearly 12% of Cambodian GDP, with the industry creating over 420,000 primary sector jobs and over 2 million secondary sector jobs. The dam will damage the economic livelihoods of thousands of Cambodian fishers and the contribution of the industry to the national economy.

The dam will also harm the health and livelihoods of hundreds of thousands of farmers. The dam is expected to destroy 1,290 hectares of agricultural land, around one quarter of the wet rice paddy land in Sesan District, which is of especially good quality for rice farming. Nutrient rich sediment flows are crucial for fertilizing the small rice farms of hundreds of thousands of subsistence-level riverine villagers, and the loss of sediment "would reduce the stability of river channels and the Mekong Delta coastline, increasing erosion and diminishing productivity of the aquatic system and agriculture in the Mekong floodplains and Tonle Sap Lake."

LICADHO et al, SHRIA of Tompoun/Cheung Ek Wetlands[862]

Cambodia has the responsibility to protect the rights of its people to health. In ratifying the ICESCR, Cambodia has agreed to improving environmental hygiene and preventing diseases. The right to health contains underlying determinants such as: safe drinking water and adequate sanitation; safe food; adequate nutrition and housing; healthy working and environmental conditions; health-related education and information; and gender equality....

Nearly 70% of Phnom Penh's rainwater and wastewater enters the Tompoun/Cheung Ek wetlands before it reaches the Bassac River at Ta Khmao… the loss of the wetlands would result in 25 to 30 million cubic metres of water annually needing to be managed elsewhere, potentially leading to backlog which would increase flooding in low-lying parts of the city, or downstream flooding, across exit river areas in Ta Khmao city, or both.

Flooding in Phnom Penh could be disastrous and have dangerous effects on residents as the water would largely be comprised of untreated sewage and harmful chemicals. Disease, contamination of drinking water, inundation of houses and destruction of infrastructure are all possible effects if the wetlands area is not adequately preserved or other systems are not put in place to mitigate against such risks. Communities in the wetlands area are particularly vulnerable to flooding and have encountered floods regularly that have impeded children attending school and increased the risk of disease.

Flooding has been linked to gendered impacts as well, with many women reporting that the effects of flooding are often felt heavily in the domestic sphere, which women are more likely to be responsible for culturally. Navigating contaminated flood waters to ensure children attend school, or to buy food for shopping were reported as difficulties more likely to affect women.

Mosello & O'Leary, How to Reduce Inequalities in Access to WASH[863]

The data shows substantial progress in guaranteeing access to improved sanitation to Cambodians, including the poorest ones. These have been linked to the general improvement of living conditions in cities, and in particular in the capital Phnom Penh. Progress has been driven by the investments of wealthier urban households in on-site sanitation. Economic transformation and growth have further attracted the attention of the government and donors to service delivery cities, and primarily Phnom Penh and Siem Reap (for tourism), but also cities along the economic growth corridor (Bavet, Poipet, Kampot, Battambang and Pursat). This has resulted in project-based investments in large-scale infrastructure for wastewater management, as well as sewerage and drainage systems. (…)

4.2. Entry points for change

(…) 'Framing sanitation' right could, therefore, be an essential element to consider for donors and NGOs to push urban sanitation on top of the priority list of key sectoral actors. For example, as both citizens and government at local and national level in Cambodia seem to prioritise drainage (due to flooding issue) and waste management, these could be entry points to introduce (or re-introduce) a discourse on urban sanitation. This should be understood not only in terms of centralized infrastructure for wastewater treatment, but also decentralised on-site management. It would also be important to demonstrate the impacts of lack of sanitation in terms of human health – to create the demand for improved services.

862 Cambodian League for the Promotion and Defense of Human Rights (LICADHO) et al., *Smoke on the Water: A Social and Human Rights Impact Assessment of the Destruction of the Tompoun/Cheung Ek Wetlands* (2020) http://www.licadho-cambodia.org/reports.php?perm=231. In Khmer at http://www.licadho-cambodia.org/reports/files/231kSmoke%20on%20the%20Water_KH_Final.pdf.

863 Beatrice Mosello & Declan O'Leary, *How to Reduce Inequalities in Access to WASH: Urban Sanitation in Cambodia*, Overseas Development Institute (2017) https://www.odi.org/sites/odi.org.uk/files/resource-documents/11605.pdf.

Civil society organisations and NGOs would be well positioned to seek policy coalitions to take advantage of this framing and raise the awareness and interest of the government in sanitation generally and for poor users in particular. For example, they could seek alliances with organisations that are active in the sectors of flood protection and drainage – eventually in connection to climate change adaptation/disaster risk reduction – and demonstrate the costs to cities for tourism and lost business revenue if these issues are not tackled in an integrated manner. For organisations with a presence in both the water and sanitation fields, one entry point could be through the institutional framework for the urban water sector, which is more established than for urban sanitation one, and already has a pro-poor focus. (…)

Questions

1. How do you explain the linkage between right to water and poverty reduction?
2. How do several industrial sectors impact water resources and what are the differences in the way they affect access to water for the population?
3. What are principles of best business practice to safeguard the right to water and address in a responsible way water scarcity?
4. Are you aware of multistakeholder partnerships protecting the right to water in Cambodia? Are they working well and what are some of the lessons learned?

Further Readings

- Tamar Meshel, 'Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond', *Journal of International Dispute Settlemen*t (2015) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554086.
- Urbaser v Argentina, *International Centre for Settlement of Investment Disputes, ICSID Case No. ARB/07/26* (2016) www.italaw.com/sites/default/files/case-documents/italaw8136_1.pdf.
- Caroline Richard & Elliot Luke, *Human Rights in International Investment Law: Where to After Urbaser?* (2017) https://sustainability.freshfields.com/post/102enaj/human-rights-in-international-investment-law-where-to-after-urbaser.
- UN Water, *A Compilation of Aspects on the Means of Implementation: Water and Sanitation* (2015) https://sustainabledevelopment.un.org/content/documents/1746UN-Water%20draft%20MOI%20compilation_4%2024%202015.pdf.
- Catarina de Albuquerque, *On the Right Track: Good Practices in Realising the Rights to Water and Sanitation, UN Special Rapporteur on the human right to safe drinking water and sanitation* (2012) www.ohchr.org/Documents/Issues/Water/BookonGoodPractices_en.pdf.
- Human Rights and Business Dilemmas Forum, *Access to Water* https://hrbdf.org/dilemmas/access-to-water/#.Wtck9C5ubDA.
- Alliance for Water Stewardship, *Sharing Good Practice In Alliance For Water Stewardship (AWS) Standard Implementation* (2020) https://a4ws.org/download/aws-good-practices-report/
- UN General Assembly, *Right to a Healthy Environment: Good Practices Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment,* A/HRC/43/53 (2019) https://wedocs.unep.org/bitstream/handle/20.500.11822/32450/RHE.pdf?sequence=1&isAllowed=y.

- Mekong River Commission, *Transboundary Water Resources Management Issues in the Sesan and Srepok River Basins of Cambodia and Viet Nam* (2017) https://www.mrcmekong.org/assets/Publications/SESAN-SREPOK-Issue-paper-Final-21May20.pdf.

- L. Mohanakrishnan, "*Provincial Water Supply and Sanitation Project, Cambodia*", Japan Water Research Center, 31 July 2019, available at http://www.jwrc-net.or.jp/aswin/en/newtap/report/NewTap_IWP17.pdf.

- Maria Larsson, *Water Resources Usage and Management in the Mekong Region and Cambodia: Challenges and Future Prospects,* CICP Working Paper, No. 40 (2011) http://www.cicp.org.kh/userfiles/file/Working%20Paper/CICP%20Working%20Paper%20No%2040_Water%20resources%20usage%20and%20management%20in%20the%20Mekong%20region%20and%20Cambodia.pdf.

- Samuel Pitchford, *Mekong River Drought Highlights the Need for a Water Treaty* (2020) https://www.humanrightspulse.com/mastercontentblog/mekong-river-drought-highlights-the-need-for-a-water-treaty.

- European Investment Bank, *Clean Water for Cambodia* (2019) https://www.youtube.com/watch?v=DCJs_UzcUfw&t=46s.

- SNV Netherlands Development Organisation, *Rural Water Supply in Cambodia* (2015) https://www.youtube.com/watch?v=ZDdHrfDtmi8.

- Reuters, 'Mekong River Groups Urge China to Show Transparency after Dam Report', *Bangkok Post* (2020) https://www.bangkokpost.com/world/1900570/mekong-river-groups-urge-china-to-show-transparency-after-dam-report.

- Pech Sotheary, 'Mekong River Countries Urged to Reconsider Hydropower Dams', *Khmer Times* (2019) https://www.khmertimeskh.com/628833/mekong-river-countries-urged-to-reconsider-hydropower-dams/.

- Water Aid, *Cambodia*, https://www.wateraid.org/where-we-work/cambodia.

- Khouth Sophak Chakry, 'Water Shortage Raise Alarmin Phnom Penh', *The Phnom Penh Post* (2020) https://www.phnompenhpost.com/national/water-shortages-raise-alarm-phnom-penh.

- End Water Poverty, www.endwaterpoverty.org/.

28. ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS

Dany Channraksmeychhoukroth, Radu Mares

Introduction

The right to a clean and healthy environment is not explicitly mentioned in most human rights treaties; the right is however to be found in national constitutions of over 100 states. The interdependencies between human rights and the environment have been discussed in the UN for 30 years. It is only in the last decade that the UN has truly clarified the interdependencies between securing human rights and environmental protection. Clearly, human rights cannot be enjoyed in a degraded environment and under the catastrophic threat from climate change that can trigger large population displacements (chapter 21) and the collapse of agriculture and food chains. In turn, the international human rights system provides norms and institutions that are absent in the environmental law area, allowing the UN mechanisms to reinforce environmental policy-making and the adoption of proper mitigation and adaptation measures to climate change. Whether protecting the environment or human rights, rights defenders are being threatened or murdered as they stand up to private and public abuses of power. Businesses are increasingly being asked to protect such human rights defenders even when they criticize businesses for their negative social and environmental impacts. For the corporate world, environmental responsibility has been on the CSR agenda way before the arrival of human rights on the agenda in the 1990s (chapter 8). The human rights due diligence approach popularized by the UNGPs (chapters 2 and 10) is now being seen as an increasingly relevant and authoritative way to address all kinds of negative business impacts, whether societal or environmental impacts. Some vulnerable groups protected by international law - e.g. indigenous people (chapter 22)) and land-reliant rural populations (chapter 25) - are particularly at risk due to environmental degradation, all the while they lack sufficient legal safeguards and access to justice (chapters 6-7) in many developing countries (chapter 1). National laws in developed countries increasingly require transparency on environmental impacts abroad (chapter 4) while international trade and investment agreements increasingly contain social and environmental chapters (chapter 3).

Approximately three quarters of the Cambodian population depend on natural resources to support their livelihoods. In particular, Cambodian citizens rely heavily on agriculture, forest products, and fisheries to subsist. This makes environmental protection particularly important for their livelihood; thus, any threat to environment is a threat to Cambodians' survival and their enjoyment of human rights. There are increasing numbers of large-scale logging of forest, resource extraction, infrastructure projects, and land concessions throughout Cambodia. These activities are normally run by companies and create positive impact to the economic development of the country. At the same time, such activities undermine the rights to adequate housing, food, water, health and produce long-term environmental impacts. Cambodia has endorsed the ASEAN Human Rights Declaration, which in Article 28(f) recognizes the human rights to a safe, clean and sustainable environment, which normally refers to as the right to a healthy environment.

Main Aspects

- ✓ Human right to a healthy environment
- ✓ Types of environmental degradation (pollution, biodiversity loss, climate change)
- ✓ Interdependency of human rights and environmental protection
- ✓ Relation between human rights and the environment (human rights support environmental protection and vice versa)
- ✓ Right to life
- ✓ Right to respect for private and family Life
- ✓ Vulnerable groups (people at risk)
- ✓ Human rights based approach "HRBA" (to development, to environmental protection)
- ✓ Environmental principles (precautionary principle, the polluter pays principle, inter-generational equity principle, the common but differentiated responsibility principle)
- ✓ Transboundary pollution and extraterritorial obligations
- ✓ Environmental impact assessments
- ✓ Right to information
- ✓ Public participation
- ✓ Access to justice and grievance mechanisms
- ✓ Environmental justice and equity (inter-generational)
- ✓ State sovereignty (setting the level of environmental protection; balancing environmental, developmental and social considerations)
- ✓ Global food system and the agriculture sector

Background

UN Independent Expert, Preliminary Report[864]

34. [First], environmental degradation can and does adversely affect the enjoyment of a broad range of human rights, including rights to life, health, food and water. Second, the exercise of certain rights can and does benefit environmental policymaking, resulting in better environmental protection and, as a consequence, greater protection of the human rights that may be threatened by environmental degradation. These protective rights include rights of free expression and association, rights of information and participation, and rights to remedy. They have been affirmed in a wide range of international instruments, including environmental as well as human rights agreements.

44. As the Council has recognized in its resolution 16/11, "environmental damage is felt most acutely by those segments of the population already in vulnerable situations". Resolution 19/10 instructs the Independent Expert to apply a gender perspective by, inter alia, considering the particular situation of women and girls and identifying gender-specific discrimination and vulnerabilities, and it is clear that women and children are

864 John H. Knox, *Preliminary Report,* UN Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, A/HRC/25/53 (2012) www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Documents/A-HRC-25-53_en.doc.

among the groups vulnerable to environmental harm. The special procedures and OHCHR have identified other groups as well. For example, the then Independent Expert on the question of human rights and extreme poverty pointed out in a report to the General Assembly (A/65/259) that "environmental degradation disproportionately affects those living in extreme poverty" (…)

45. Indigenous peoples are at particular risk from many kinds of environmental damage because of their cultural and economic dependence on environmental resources. (…)

UN Special Rapporteur, Climate Change Report[865]

Human rights obligations relating to climate change

33. (…) Human rights obligations apply not only to decisions about how much climate protection to pursue, but also to the mitigation and adaptation measures through which the protection is achieved.

34. In some respects, the application of these obligations is relatively straightforward. However, the scale of climate change introduces complicating factors. Unlike most environmental harms to human rights that have been considered by human rights bodies, climate change is truly a global challenge. Greenhouse gases emitted anywhere contribute to global warming everywhere. Billions of people contribute to climate change and will experience its effects, and the causal chains linking individual contributions with specific effects may be impossible to discern with certainty.

41. A possible response is to treat climate change as a matter of extraterritoriality — that is, to conclude that it implicates the obligation of each State to protect the human rights of those outside, as well as those within, its own jurisdiction. The Special Rapporteur is aware that the question of extraterritorial human rights obligations has been controversial in other contexts. However, he believes that attempting to describe the extraterritorial human rights obligations of every State in relation to climate change would be of limited usefulness even apart from its potential for controversy. In the human rights context, climate change is probably not best understood as a set of simultaneously occurring transboundary harms that should be addressed by each State trying to take into account its individual contribution to the effects of climate change in every other State in the world. The practical obstacles to such an undertaking are daunting, and it is instructive that the international community has not attempted to address climate change in this way.

42. Instead, (…) States have consistently treated climate change as a global problem that requires a global response. This approach not only makes the most practical sense. It is also in accord with, and can be seen as an application of, the duty of international cooperation.

43. The duty of international cooperation has support in the general practice of States and, more specifically, in the Charter of the United Nations. (…)

UN Special Rapporteur, Biodiversity[866]

Human rights and biodiversity

8. (…) Economic and social development depends on the use of ecosystems, including, in appropriate cases, the conversion of natural ecosystems such as old-growth forests into human-managed ecosystems such as pastures and cropland. To support the continued enjoyment of human rights, however, this development cannot overexploit natural ecosystems and destroy the services on which we depend. Development must be sustainable, and sustainable development requires healthy ecosystems.

865 John H. Knox, *Climate Change*, UN Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, A/HRC/31/52 (2016) http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/31/52&Lang=E.

866 John H. Knox, *Biodiversity,* UN Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, A/HRC/34/49 (2017) http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/34/49&Lang=E (references omitted).

9. Although the importance of a healthy environment for the enjoyment of human rights is widely recognized, the relationship between human rights and biodiversity remains less well understood. The Convention on Biological Diversity (art. 2) defines biodiversity as "the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems". Biodiversity thus includes not only the millions of different species on Earth; "it also consists of the specific genetic variations and traits within species (such as different crop varieties), and the assemblage of these species within ecosystems that characterize agricultural and other landscapes such as forests, wetlands, grasslands, deserts, lakes and rivers".

10. In the words of the Millennium Ecosystem Assessment, "biodiversity is the foundation of ecosystem services to which human well-being is intimately linked". Biodiversity supports ecosystem services and the human rights that depend upon them in many ways. In general, biodiversity contributes to the productivity and stability of ecosystem processes. More diverse ecosystems are more resilient to disasters and to longterm threats such as climate change. More specifically, biodiversity contributes to particular ecosystem services that directly support the full enjoyment of human rights. The present report highlights some of those contributions with respect to: the rights to life and health; the right to an adequate standard of living; and the right to non-discrimination in the enjoyment of rights.

Instruments

UN Special Rapporteur, Framework Principles on Human Rights and Environment[867]

Introduction

8. (…) The framework principles and commentary do not create new obligations. Rather, they reflect the application of existing human rights obligations in the environmental context. [The Special Rapporteur] understands that not all States have formally accepted all of these norms. While many of the obligations described in the framework principles and commentary are based directly on treaties or binding decisions from human rights tribunals, others draw on statements of human rights bodies that have the authority to interpret human rights law but not necessarily to issue binding decisions.

9. The coherence of these interpretations, however, is strong evidence of the converging trends towards greater uniformity and certainty in the understanding of human rights obligations relating to the environment. These trends are further supported by State practice, including in international environmental instruments and before human rights bodies. As a result, the Special Rapporteur believes that States should accept the framework principles as a reflection of actual or emerging international human rights law. He is confident that, at a bare minimum, States will see them as best practices that they should move to adopt as expeditiously as possible.

The human right to a safe, clean, healthy and sustainable environment

11. An unusual aspect of the development of human rights norms relating to the environment is that they have not relied primarily on the explicit recognition of a human right to a safe, clean, healthy and sustainable environment — or, more simply, a human right to a healthy environment. Although this right has been recognized, in various forms, in regional agreements and in most national constitutions, it has not been adopted in a human rights agreement of global application, and only one regional agreement, the African Charter on Human and Peoples' Rights, provides for its interpretation in decisions by a review body.

867 John H. Knox, *Framework Principles on Human Rights and the Environment,* Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, A/HRC/37/59 (2018) https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/017/42/PDF/G1801742.pdf?OpenElement.

12. Treaty bodies, regional tribunals, special rapporteurs and other international human rights bodies have instead applied human rights law to environmental issues by "greening" existing human rights, including the rights to life and health. As the mapping report explained and the framework principles demonstrate, this process has been quite successful, creating an extensive jurisprudence on human rights and the environment. In retrospect, this development is not as surprising as it may have seemed when it first began, over two decades ago. Environmental harm interferes with the full enjoyment of a wide spectrum of human rights, and the obligations of States to respect human rights, to protect human rights from interference and to fulfil human rights apply in the environmental context no less than in any other.

13. Explicit recognition of the human right to a healthy environment thus turned out to be unnecessary for the application of human rights norms to environmental issues. At the same time, it is significant that the great majority of the countries in the world have recognized the right at the national or regional level, or both. Based on the experience of the countries that have adopted constitutional rights to a healthy environment, recognition of the right has proved to have real advantages. It has raised the profile and importance of environmental protection and provided a basis for the enactment of stronger environmental laws. When applied by the judiciary, it has helped to provide a safety net to protect against gaps in statutory laws and created opportunities for better access to justice. Courts in many countries are increasingly applying the right (…).

14. On the basis of this experience, the Special Rapporteur recommends that the Human Rights Council consider supporting the recognition of the right in a global instrument. A model could be the rights to water and sanitation, which, like the right to a healthy environment, are not explicitly recognized in United Nations human rights treaties but are clearly necessary to the full enjoyment of human rights. In 2010, in its resolution 64/292, the General Assembly recognized "the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights". The General Assembly could adopt a similar resolution that recognizes the right to a safe, clean, healthy and sustainable environment, another right that is essential for the full enjoyment of life and all human rights.

15. States may be understandably reluctant to recognize a "new" human right if its content is uncertain. (…) the "human right to a healthy environment" is not an empty vessel waiting to be filled; on the contrary, its content has already been clarified, through recognition by human rights authorities that a safe, clean, healthy and sustainable environment is necessary for the full enjoyment of the human rights to life, health, food, water, housing and so forth. Here, too, the right is similar to the rights to water and sanitation, whose content had been addressed in detail by the Committee on Economic, Social and Cultural Rights and Catarina de Albuquerque, the first Independent Expert on the issue of human rights obligations related to access to safe drinking water and sanitation, before the General Assembly acted in 2010.

16. [Recognizing the "the human right to a healthy environment"] has real advantages. It raises awareness that human rights norms require protection of the environment and highlights that environmental protection is on the same level of importance as other human interests that are fundamental to human dignity, equality and freedom. It also helps to ensure that human rights norms relating to the environment continue to develop in a coherent and integrated manner. (…)

18. For example, more work is necessary to clarify how human rights norms relating to the environment apply to specific areas, including issues of gender and other types of discrimination, the responsibilities of businesses in relation to human rights and the environment, the effects of armed conflict on human rights and the environment, and obligations of international cooperation in relation to multinational corporations and transboundary harm.

Framework Principles on Human Rights and the Environment

Principle 1 - States should ensure a safe, clean, healthy and sustainable environment in order to respect, protect and fulfil human rights.

Principle 2 - States should respect, protect and fulfil human rights in order to ensure a safe, clean, healthy and sustainable environment.

Principle 3 - States should prohibit discrimination and ensure equal and effective protection against discrimination in relation to the enjoyment of a safe, clean, healthy and sustainable environment.

Principle 4 - States should provide a safe and enabling environment in which individuals, groups and organs of society that work on human rights or environmental issues can operate free from threats, harassment, intimidation and violence.

Principle 5 - States should respect and protect the rights to freedom of expression, association and peaceful assembly in relation to environmental matters.

Principle 6 - States should provide for education and public awareness on environmental matters.

Principle 7 - States should provide public access to environmental information by collecting and disseminating information and by providing affordable, effective and timely access to information to any person upon request.

Principle 8 - To avoid undertaking or authorizing actions with environmental impacts that interfere with the full enjoyment of human rights, States should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights.

Principle 9 - States should provide for and facilitate public participation in decision-making related to the environment, and take the views of the public into account in the decision-making process.

Principle 10 - States should provide for access to effective remedies for violations of human rights and domestic laws relating to the environment.

Principle 11 - States should establish and maintain substantive environmental standards that are non-discriminatory, non-retrogressive and otherwise respect, protect and fulfil human rights.

Principle 12 - States should ensure the effective enforcement of their environmental standards against public and private actors.

Principle 13 - States should cooperate with each other to establish, maintain and enforce effective international legal frameworks in order to prevent, reduce and remedy transboundary and global environmental harm that interferes with the full enjoyment of human rights.

Principle 14 - States should take additional measures to protect the rights of those who are most vulnerable to, or at particular risk from, environmental harm, taking into account their needs, risks and capacities.

Principle 15 - States should ensure that they comply with their obligations to indigenous peoples and members of traditional communities (...)

Principle 16 - States should respect, protect and fulfil human rights in the actions they take to address environmental challenges and pursue sustainable development.

UN Special Rapporteur, Compilation of Good Practices[868]

Obligations relating to transboundary environmental harm

85. (…) a particularly important good practice is the legal recognition by a State of the rights of individuals who reside outside its territory but who may suffer environmental harm from actions arising within its territory. One example is transboundary environmental impact assessment (EIA) that allows for the participation of the affected public on both sides of the border. The chief international agreement is the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, which sets out detailed requirements for transboundary EIA. As of January 2015, it has 45 parties, including most States in Europe. The Convention provides that the party where a covered activity is located must give the public of the affected State an opportunity to participate in the EIA process that is equivalent to the opportunity provided to the public of the State of origin.

90. Two other States provide good practices in ensuring that efforts to abate or adapt to climate change respect the rights of indigenous and tribal peoples. The Reducing Emissions from Deforestation and Forest Degradation (REDD+) programme, which was initiated by the sixteenth Conference of the Parties to the UN Framework Convention on Climate Change, creates incentives for developing countries to reduce emissions from deforestation and forest degradation, including through forest conservation and sustainable management. To avoid conflicts and to protect the rights of indigenous peoples in forests that might be subject to REDD+ projects, Suriname created the REDD+ Assistants Programme, in which representatives selected by their own communities are trained by the Government to understand REDD+ and to help involve indigenous and tribal peoples in the REDD+ decision-making process.

Paris Agreement[869]

Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity, (…)

7.5. Parties acknowledge that adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems, and should be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems, with a view to integrating adaptation into relevant socioeconomic and environmental policies and actions, where appropriate.

United Nations, Aarhus Convention[870]

Article 2

3. "Environmental information" means any information in written, visual, aural, electronic or any other material form on:

   (a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

868 John H. Knox, *Compilation of Good Practices,* UN Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, A/HRC/28/61 (2015) http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/28/61

869 UN, The *Paris Agreement on Climate Change* (2015) https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement.

870 United Nations Economic Commission for Europe (UNECE), *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (Aarhus Convention) 1998 www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf.

(b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above;

Article 6 - Public participation in decisions on specific activities

2. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of:

a) The proposed activity and the application on which a decision will be taken;

b) The nature of possible decisions or the draft decision;

c) The public authority responsible for making the decision;

d) The envisaged procedure, including, as and when this information can be provided:

(i) The commencement of the procedure;

(ii) The opportunities for the public to participate;

(iii) The time and venue of any envisaged public hearing;

(iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;

(v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and

(vi) An indication of what environmental information relevant to the proposed activity is available; and

(e) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure.

7. Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.

8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.

Article 9 - Access to justice

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

Global Studies Institute, Report on European Convention on Human Rights[871]

Right to a Healthy Environment

12. Although the European Court of Human Rights has recognized the importance of environmental matters, it has not recognized a freestanding right to a healthy environment. The Court states in Kyrtatos v. Greece that "[n]either Article 8 (protection of private and family life) nor any other Articles of the Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent in dealing with this particular aspect".

13. However, the Court has accepted an indirect recognition of environmental issues when protecting fundamental rights. Accordingly, the Court has found that a range of environmental factors can affect and threaten individuals and their rights under the Convention. Specifically, ECrtHR case law has addressed environmental issues as components of Articles 2 ("right to life") and 8 ("right to respect of private and family life") of the Convention, as well as Article 10 and Article 1 of Protocol no. 1 of the Convention and procedural rights like the right to an effective remedy (Articles 6.1 and 13).

"Right to Life": Article 2

15. The ECrtHR considers Article 2 as determinant for the realisation of others' rights in the Convention. The Court is restrictive, however, in considering Article 2 for environmental issues. There are only a few cases where the Court has found a violation of Article 2 in this context, namely where applicants have been exposed to dangerous activities or natural disasters.

16. *L.C.B. v. United Kingdom* is the starting point for the recognition of a link between environment and the right to life. However, in this case the Court concluded there was no breach of Article 2 as no causal link was established between the exposure of a father to radiation (while serving the army during nuclear tests) and leukemia suffered by a child subsequently conceived. (…)

17. In *Öneryildiz v. Turkey, "*[t]he Chamber emphasized that the protection of the right to life, as required by Article 2 of the Convention, could be relied on in connection with the operation of waste collection sites, on account of the potential risks inherent in that activity".

18. This position of the Court was confirmed in *Budayeva and others v.* Russia, in which a breach of Article 2 was recognized in a mudslide that according to official reports killed 8 people, with an additional 19 people missing according to the applicants. The case arose in the town of Tyrnauz, which is under permanent threat from mudslides because of its geographical position. In summer 2000, a succession of mudslides hit the town that resulted in many deaths and extensive property damage. It appeared that the public authorities did not take appropriate measures to mitigate the risks of mudslides, notably in restoring the dam (seriously damaged by a mudslide a year previously). (…).

19. In *Kolyadenko and others v*. Russia, a heavy rainfall reaching 189 millimetres fell within two hours, which resulted in the release of water from the reservoir. The water release flooded a large area around the reservoir, seriously damaging the applicants' homes and furniture. There, the Court considered that the causal link established between the negligence attributable to the State and the endangering of the lives of those living in the vicinity of a water reservoir, also applied to the damages caused by a flooding to the applicants' homes.

871 *Environment,* University of Geneva (2013) www.ohchr.org/Documents/Issues/Environment/Mappingreport/14.ECHR-EU-report-24-June-2014.docx (the full reference to the cases in this report was omitted. Please consult the original report).

"Right to Respect for Private and Family Life": Article 8

20. Article 8 is the principal instrument used by the ECrtHR for the protection of the environment and the Court has developed an important environmental jurisprudence based on that Article. According to the *Moreno Gomez v. Spain case,* "there is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8".

21. In the *McGinley and Egan v. United Kingdom* case, M. McGinley was a plant operator at Christmas Island for the UK army when atmospheric tests of nuclear weapons were carried out in the Pacific Ocean. During the tests, service personnel were ordered to line up in the open and to face away from the explosions. M. Egan was serving as a stoker on a ship positioned off Christmas Island during the detonations. After the exposure, the applicants complained about a succession of health problems, which they came to attribute to radiation exposure. "In the absence of any individual monitoring, they were left in doubt as to whether or not they had been exposed to radiation at levels engendering risk to their health. The Court considers that […] the issue of access to information which could either have allayed the applicants' fears in this respect, or enable them to assess the danger to which they had been exposed, was sufficiently closely linked to their private and family lives within the meaning of Article 8 as to raise an issue under that provision". (…)

22. In *Lopez Ostra v. Spain,* the Court admitted a breach of Article 8 in a situation of pollution from a waste treatment plant situated a few meters from the applicant's home. Based on medical reports and experts' opinions, it appeared that hydrogen sulphide emissions from the plant exceeded the permitted limits, and could endanger the health of person living nearby. The court considered that "severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health".

23. In the noteworthy *Bacila v. Romania* case, the Court recognized a breach of Article 8 as the applicant showed a causal link between the plant pollution (by emitting noxious emissions) and her health deterioration (lead poisoning).

26. *Tatar v. Romania* concerned a father and his son living in the area surrounding the site of a gold mine. The applicant argued that the extraction process, storing and using sodium cyanide, constituted a genuine risk to human health. Furthermore, he alleged that the bronchial asthma contracted by his son was a result of the pollution generated by the company extracting the gold. The Court found that the State had failed in its obligation to guarantee the rights under Article 8 of the Convention since the applicant failed to obtain any official document from the authorities confirming that the gold extraction plant's activities were dangerous. Nonetheless, on the basis of environmental impact studies of the spilling submitted by the respondent State, the Court concluded that a serious and substantial threat to the applicant's well-being existed.

Situations Covered by Articles 2 and 8

27. The Court clarified the scope of article 2 by stating that "[a]rticle 2 of the Convention does not solely concern deaths resulting from the use of force by agents of the State but also, in the first sentence of its first paragraph, lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction". The *threat to life* thus can emanate also from natural phenomena or human activities. The Court explained further that "this Article, read as a whole, covers not only situations where certain action or omission on the part of the State led to a death complained of, but also situations where, although an applicant survived, there clearly existed a risk to his or her life".

28. In comparison, the Court has interpreted the scope of article 8 less restrictively than article 2. The Court has accepted a variety of sources of infringements. As such, article 8 can cover *all types of pollutions* in a wide extent: e.g., noise, air pollution, use of cyanide for gold mine, nuclear impact, accumulation of waste on the public road, or use of pyrotechnics.

29. The jurisprudence of the Court emphasizes the *respect for the "quality of life" and importance of the concept of "home"* relating to consideration of a violation of article 8. Since the Moreno Gomez v. Spain case, "home" is the key notion for the development of the jurisprudence to protect environment: "According to the Court, the right to respect for the home does not only include the right to the actual physical area, but also to the quiet enjoyment of this area within reasonable limits". A "home", according to the Court's rather broad notion, is "the place, i.e. physically defined area, where private and family life develops". Furthermore, "[a] rticle 8 protection was restricted to the home and could not apply when the subject matter of the complaint was a nuisance outside the home". "Home" can refer to the notion of "private sphere". Even when a person is imprisoned, his or her cell, which is not "home", must be protected as his or her "living space".

30. In the assessment of a violation of article 8, the Court requires that the applicant is *"directly and seriously affected":* "Severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health". The Court assesses a second criterion: the minimum threshold of harm attained. The Court does not require evidence of an actual impact on the health of the applicant to find Article 8 applicable. However, to reach the threshold of seriousness the consequences must be intense, repeated.

31. For the Convention to be applicable, it is necessary to establish a link between the environmental infringement and the respect for private and family life: the *causal link.* A general degradation of the environment is not sufficient. The probability of risks must be demonstrated otherwise the status of victim is lacking.

Article 1 of Protocol no. 1 of the Convention

55. The Court protects the right to property under Article 1 of Protocol no. 1 as the right to protection of one's possessions that needs to be "practical and effective". Member States are also under positive obligations to take measures as to ensure the effective protection of this right. In the environmental context, this obligation has raised issues mainly in respect of dangerous activities and to a lesser extent natural disasters. Similar to the other rights, the applicant has to prove the causal link between the State's actions and the effective enjoyment of his possessions. The right is not absolute and thus State's authorities enjoy also a margin of appreciation and are entitled to restrict the use of property if matters of general interest require it.

57. Any deprivation of one's property should respect the proportionality test: any decision of public authorities must be justified as being based on the "law", carried out in the "public interest" and a fair balance must be struck between the individual's interest and the public interest. Moreover, the Court established strict criteria in assessing the fulfillment of State's obligations: when public authorities plan dangerous activities, which involve risks to health, it should be established an effective and accessible procedure to enable individuals to get proper information.

58. The ECrtHR can assess whether adequate compensation is paid to individuals concerned. In cases relating to environmental conservation, the Court has held that the community's general interest is prominent and confers on the State a margin of appreciation that is greater than when exclusively civil rights are at stake.

GNHRE, Declaration on Human Rights and Climate Change[872]

Preamble

Reaffirming the universality, indivisibility, interdependence and interrelationality of all human rights, the interrelationality of all life on Earth and the dependency of all life on Earth on a healthy biosphere and Earth system integrity,

872 Global Network for the Study of Human Rights and the Environment (GNHRE), *Declaration on Human Rights and Climate Change,* https://gnhre.org/declaration-human-rights-climate-change/.

Recognizing that climate change, caused by the human industrial and consumer activities, disproportionally affects indigenous peoples, the poor, women and children, the vulnerable, small island and low elevation coastal communities, developing countries, least developed countries, future generations and innumerable living beings and systems,

Recognizing that the ultimate realization of human rights in the age of climate crisis requires the full legal protection of the living beings and systems upon which human life depends,

Recognizing that human beings are part of the living Earth system,

Recognizing the climate destructive and ecocidal results of assuming human separation from nature,

Recognizing the need for all cultures, faiths and traditions to play a role in the fullest development of climate and environmental stewardship, the teaching of respect for all living beings and systems and the development of climate resilient communities,

Recognizing that science confirms the threats of climate change to the Earth's systems and its multiple life forms,

Recognizing that science confirms the threat of climate change to the livelihoods and well-being of present and future generations,

Recognizing that climate impacts disproportionally affect innumerable living beings and systems that are intrinsically valuable in their own right and unable to defend themselves,

Recognizing that climate change displaces populations and that international, cross-border and internal migration has increased due to climate change and is likely to continue to do so, (…)

Deeply concerned by the severe human rights consequences of the continuing political failure to reach adequate commitments on climate mitigation and adaptation; by the dominance of the market as the primary value coordinating international responses to the climate crisis; and by the ongoing lack of accountability for corporate actors that violate human, environmental and climate rights,

Convinced that the potential irreversibility of climate change effects gives rise to an urgent need for new forms of state and non-state responsibility, accountability and liability.

The following principles are declared:

Section I:

1. Human rights and a profound commitment to climate justice are interdependent and indivisible.
2. All human beings, animals and living systems have the right to a secure, healthy and ecologically sound Earth system.
3. All human beings have the right to fairness, equity and justice in all climate resilience, adaptation and mitigation measures and efforts.
4. All human beings have the right to a planetary climate suitable to meet equitably the ecologically responsible needs of present generations without impairing the rights of future generations to meet equitably their ecologically responsible needs.

5. All human beings, animals and living systems have the right to the highest attainable standard of health, free from environmental pollution, degradation and harmful emissions and to be free from dangerous anthropogenic interference with the climate system such that rising global temperatures are kept well below 2 degrees centigrade above preindustrial levels.

6. All human beings have the right to investments in adaptation and mitigation to prevent the deleterious consequences of anthropogenic climate change, and to international solidarity and timely assistance in the event of climate change driven catastrophes.

7. All human beings, animals and living systems have the right to fairness, equity and justice in respect of responses to the threat of climate change. This includes protection from deleterious impacts caused by adaptation and mitigation efforts to develop climate resilience, and by the potential deployment of climate geoengineering technologies.

8. All human beings have the right to a just transition towards a sustainable society characterized by meaningful inclusion and distributive justice.

Section II:

9. All human beings have the right to information about, and to participation in, decision-making processes related to alterations made to the physical environments they rely upon for their health and survival.

10. All human beings have the right to information concerning the climate. The information shall be timely, clear, understandable and available without undue financial burden to the applicant.

11. All human beings have the right to hold and express opinions and to disseminate ideas and information regarding the climate.

12. All human beings have the right to climate and human rights education. This education includes the right to learn from multiple perspectives and to understand non-human natural modes of behavior and the requirements of flourishing planetary ecosystems.

13. All human beings have the right to active, free, and meaningful participation in planning and decision-making activities and processes that may have an impact on the climate. This particularly includes the rights of indigenous peoples, women and other under-represented groups to equality of meaningful participation. This includes the right to a prior assessment of the climate and human rights consequences of proposed actions. This includes the right to equality of hearing and the right for processes to be free of domination by powerful economic actors. This includes the rights of indigenous peoples to participate in the protection of their rights to their lands, territories, natural resources, tenure rights and cultural heritage.

14. All human beings have the right to associate freely and peacefully with others, and to gather peacefully in public spaces, for purposes of protecting the climate or the rights of those affected by climate harm.

15. All human beings have the right to effective remedies and redress in administrative or judicial proceedings for climate harm or the threat or risk of such harm, including modes of compensation, monetary or otherwise.

Section III:

16. All persons, individually and in association with others, have a moral responsibility to avoid and/or to minimize practices known to contribute to climate damage.

17. All States and business enterprises have a duty to protect the climate and to respect the rights set out in this Declaration.

18. All Parties shall, in all climate change related actions, respect, protect, promote, and fulfil the rights of indigenous peoples. Such rights include support to facilitate mitigation measures; rights to collective self-determination and to free, prior and informed consent; to full and equal participation in environmental and political processes; and to respect and protection for indigenous traditional knowledge. This shall include respect and protection for indigenous customary laws, and proper recognition of the role of indigenous peoples in ensuring the integrity and resilience of natural ecosystems.

19. All Parties shall, in all climate change related actions, ensure gender equality and the full and equal participation of women; intergenerational equity; a just transition of the workforce that creates decent work; food sovereignty; and the integrity and resilience of natural ecosystems.

20. All States have a duty to provide assistance and solidarity to climate refugees. States shall respect the rights to assistance and solidarity and create the necessary legal frameworks to assist and support climate refugees in order to ensure their life and dignity.

21. All States shall respect and ensure the right to a secure, healthy and ecologically sound environment and to a stable climate, and ensure the rights outlined in Parts I—III of this Declaration. Accordingly, they shall adopt the administrative, legislative and other measures necessary to effectively implement the rights in this Declaration.

22. All States shall ensure international cooperation with other States and international organizations and agencies for the purpose of respecting the rights outlined in Parts I-III of this Declaration. All States shall observe the rights and duties in this Declaration, including extraterritorially.

23. All international organizations and agencies shall observe the rights and duties in this Declaration, including the human and procedural rights of indigenous peoples, women and other traditionally under-represented and marginalized groups and individuals.

24. All States, international organizations, business enterprises and individuals acting to reduce climate harms shall respect and recognize the rights of any affected human beings and other living beings and systems to be free from climate change-related harm.

UNEP, Climate Change and Human Rights[873]

Part I describes the latest projections and observations of how climate change impacts and responses can affect the environment, individuals and communities. Some of the key findings include:

- The impacts of climate change on freshwater resources, ecosystems, and human settlements are already undermining access to clean water, food, shelter, and other basic human needs; interfering with livelihoods; and displacing people from their homes. Even if we remain within the international goal of 2° C of global warming, these impacts will expand dramatically in the coming decades.

- These impacts constitute a serious interference with the exercise of fundamental human rights, such as the rights to life, health, water, food, housing, and an adequate standard of living.

- Mitigation, adaptation, and geoengineering measures can also adversely affect the exercise of human rights. For example, there are documented instances of hydroelectric and biofuel projects that have resulted in human rights violations. There is also a high risk of human rights violations resulting from the implementation of resettlement programs for those who are displaced or at risk of displacement due to climate change, and a corresponding need to ensure that such programs are undertaken with adequate input and consent from those who are relocated.

873 UN Environment Programme UNEP), *Climate Change and Human Rights* (2015) http://apps.unep.org/publications/index.php?option=com_pub&task=download&file=011917_en.

Part II summarizes the obligations of governments and private actors to respond to these impacts. This section begins by reviewing how UN agencies and national governments have come to understand the relationship between climate change and human rights. It then provides a more detailed discussion of specific obligations in this context. These include:

- Procedural obligations for all governments to ensure that the affected public is: (i) adequately informed about the impacts of climate change and the measures undertaken to both mitigate and adapt to climate change; (ii) adequately involved in public decisions about climate change; and (iii) given access to administrative, judicial, and other remedies when rights are violated as a result of climate change and responses to it.
- Substantive obligations for all governments to: (i) protect human rights from climate-related harms; (ii) respond to the core drivers of climate change by regulating GHG emissions within their jurisdiction; (iii) cooperate internationally to protect human rights against climate-related harms; (iv) address the transboundary impacts of climate change; and (v) safeguard human rights in all mitigation and adaptation activities.
- States also have unique obligations with respect to certain groups, including women, children, and indigenous peoples. Notably, states must obtain free, prior and informed consent (FPIC) before undertaking any measures that would adversely affect the traditional lands and resources of indigenous peoples.
- Private actors also have obligations to address the human rights implications of climate change, and should refer to the UN Guiding Principles on Business and Human Rights to ensure that they fully respect human rights in all activities.

Part III discusses the implementation of these obligations, focusing primarily on activities undertaken by national governments either within or outside of the UNFCCC context. It documents several recent developments in this area:

- Some states are beginning to recognize the linkages between human rights and climate change in reports submitted to the UNFCCC secretariat, but this is not the case for the majority of developed nations.
- There is a significant "emissions gap" between the mitigation commitments set forth in the Intended Nationally Determined Contributions (INDCs) and the emission reductions required to keep warming at or below 2°C.
- There is also a significant "adaptation finance gap" in terms of what will be needed to adapt to climate change and the finance, technology and capacity available.
- Finally, there is a significant "finance gap" between the financial and technical assistance that has been given or pledged to developing countries and the resources that will be required to ensure that climate change does not interfere with the exercise of human rights in those countries. This is true even if we do meet the 2°C target.
- Most international climate finance mechanisms are accompanied by safeguards to protect human rights, but there is room for improvement, especially with respect to the monitoring and assessment of these programs and any human rights violations.

Atapattu, Environmental Law Principles in Asia[874]

Sustainable development has become the overarching framework while other principles, especially, the precautionary principle, the polluter pays principle and the public trust doctrine have been identified as tools to achieve sustainable development or as its components. Other significant principles include the inter-generational equity principle and procedural rights of access to information and participation of relevant stakeholders. One important principle missing from this discussion is the common but differentiated responsibility principle which underlies the climate regime and the ozone regime. While the articulation of these principles by the judiciaries in the region is laudable, their implementation leaves a lot to be desired. Many of the principles discussed here have been incorporated in environmental legislation in many countries in the region but these are hardly enforced.

Global Initiative, Guide on Human Rights Approach to Environment[875]

Numerous participatory development practices are already underway to tackle the ecological crisis. Not all of these yet use human rights explicitly. More specific reference to human rights standards and principles will help 'scale-up' and 'scale-out' these nascent initiatives. Human rights are internationally-recognized standards for human treatment that can provide compelling arguments for political mobilization for climate action. They also represent guarantees that this political mobilization will focus on the most marginalized in societies, avoiding treating local communities as homogenous. There are numerous tools for integrating or transforming development to meet the ecological crisis and climate change; but, without clear reference to human rights, they may find that, in the difficult realities faced by practitioners, they continue the trade-offs and compromises that overlook underlying social and ecological injustices in development practice. Human rights are the best insurance against this.

While there are many tools for helping different aspects of ecological and climate analysis, there is no need to reinvent the key aspects of a HRBA outlined by the likes of Jonsson for UNICEF (Jonsson, 2005) – rather, they should be updated to recognize the ecological embeddedness of human rights and the threat of climate change. An updated version of Jonsson's process can be used by practitioners in planning:

1. Causality analysis – identify immediate, underlying and basic causes of development problems that are understood to reflect human rights violations:

    - Use participatory ecological and climate-related tools (…) alongside analysis of marginalization, discrimination and rights violations. Temporally, this must include projecting forward for future ecological/climate-related changes that must be factored into long-term planning. Spatially, such analysis should happen at the lowest appropriate ecological level and take into account the interactions between ecosystems, locally and globally.

2. Pattern analysis – identify key claim-duty relationships in a particular societal context:

    - Key to this will be looking at current local duties related to control of resources, particularly where traditional/customary arrangements exist;

3. Capacity gap analysis – analyzes why rights are not being realized by looking at responsibility/motivation/commitment/leadership, authority, access/control over resources, communication capability, and capacity for rational decision-making and learning

    - Resource access/control is key and must identify areas for advocacy and mobilization to realize resource rights. The learning aspect is also particularly important for ongoing evaluation of complex ecological changes;

874 Sumudu Atapattu, 'Environmental Law Principles in Asia', in Michael Faure (ed.), Elgar Encyclopedia of Environmental Law (2015) www.elgaronline.com/view/nlm-book/9781786436986/b-9781785365669-VI_33.xml.

875 Global Initiative for Economic, Social and Cultural Rights, The Practitioners Guide on Human Rights Based Approach related to the Environment and Climate Change (2014) https://hrbaportal.org/wp-content/files/GI-ESCR-Practitioners-Guide-Human-Rights-Environment-and-Climate-Change1.pdf.

4. Identifying candidate actions

    - Requires a participatory process and constant referral back to the ecological and human rights causality analysis. Human rights principles are particularly vital here as prioritization tools. Activities should themselves be screened for climate/ecological resilience using EIAs and human rights impact assessments (…);

5. Program design – aggregating up from activities to projects and broader programmes.

Throughout these steps, practitioners should make specific reference to:

- Substantive rights – especially rights to life, liberty and security of person; subsistence; and land;
- Procedural rights – focussing on access/provision of information, participation at all levels and redress mechanisms;
- Women's rights;
- Indigenous rights; and
- Children's rights.

Dunn, Court Rules That Emissions Reduction Is a Human Right[876]

In a closely-watched case that could have wide ramifications for litigation worldwide, the court [Supreme Court of the Netherlands] ruled that the Dutch government must reduce emissions by at least 25% by the end of 2020 compared to 1990 levels, going beyond the EU-wide objective of 20%.

The Supreme Court said on Friday that it based its judgement on the UN Climate Convention and the obligations of the state under the European Convention on Human Rights. (…) In a brief summary read in English, the judge presiding over the court noted that European Human Rights Convention Articles 2 and 8—the right to life and the right to respect for private and family life—indicate that action on climate change falls under the umbrella of human rights protection.

"These articles entail the positive obligation for the Dutch state to take reasonable and appropriate measures to protect the residents of the Netherlands from the serious risk of a dangerous climate change, that would threaten the lives and wellbeing of many people in the Netherlands," he said. That obligation to apply the provisions of the Convention trumped the state's argument that politicians—not the courts—are responsible for determining emissions reductions, the Court said.

The Urgenda case has gotten the furthest of all international litigation regarding climate change, according to Michael Gerrard, founder and director of the Sabin Center for Climate Change Law at Columbia University. Together with the law firm Arnold & Porter, the Center runs a database to track climate change litigation both internationally and in the U.S. "There have been 1,442 climate change lawsuits worldwide. This is the strongest decision ever," said Gerrard. "The Dutch Supreme Court has upheld the first court order anywhere directing a country to slash its greenhouse gas emissions. This decision may inspire even more cases in other countries."

That was a sentiment that was echoed by Markus Gehring, an expert in sustainable development law at the University of Cambridge. "The beauty is you only need one successful case," he said. "There is [now] an expectation that climate litigation will multiply."

876 Katherine Dunn, 'Climate Change Litigation Enters a New Era as Court Rules that Emissions Reduction Is a Human Right', Fortune (2019) https://fortune.com/2019/12/20/climate-change-litigation-human-rights-netherlands/.

The overall success of climate change litigation has so far been mixed, he said, with some cases focusing on government responsibility and others focusing on major emitters, including energy companies.

Gonzalez, The Global Food System, Environmental Protection, and Human Rights[877]

Introduction

The global food system is exceeding ecological limits while failing to meet the food needs of a large segment of the world's population. According to the United Nations Food and Agriculture Organization (FAO), more people are undernourished today than forty years ago. Approximately 925 million people experience chronic food insecurity (…). The widespread industrialization of agricultural production places enormous pressure on the world's ecosystems, causing soil degradation, deforestation, loss of agrobiodiversity, and the contamination and depletion of freshwater resources. Agriculture, a major source of anthropogenic greenhouse gas emissions, contributes to climate change; and climate change threatens global food production by increasing the frequency and severity of droughts, floods and hurricanes, depressing agricultural yields, and placing yet additional stress on finite water resources. This article examines the underlying causes of the converging food, agrobiodiversity, and climate crises, and proposes integrated measures that the international community might take through law and regulation to promote a more just, resilient, and sustainable food system.

Agriculture is currently the principal driver of biodiversity loss, primarily through the conversion of forests, grasslands, and wetlands to large-scale agricultural production, but also through unsustainable rates of water use, pollution of lakes and rivers, and introduction of nonnative species. The United Nations Millennium Ecosystem Assessment concluded that approximately 60 percent of the ecosystem services examined have been degraded or used unsustainably to satisfy growing demands for food, water, timber, and fuel. This degradation of ecosystem services disproportionately impacts the rural poor, and impedes efforts to combat poverty and hunger.

The genetic diversity of the world's food supply is also threatened. Seventy-five percent of the world's food crop diversity was lost in the twentieth century as farmers abandoned traditional food crops in favor of a narrow range of domesticated plant species. Only 12 crops currently supply 80 percent of our dietary energy from plants. Genetic diversity within these crops has been declining as well because high-yielding varieties have supplanted traditional local varieties. This loss of genetic diversity increases the risk of catastrophic crop failure (…).

Climate change will exacerbate food insecurity and loss of biodiversity. Water scarce regions of the world are predicted to experience chronic drought as the climate becomes hotter and drier, with severe impacts in the semi-arid areas of Latin America and Sub-Saharan Africa. Coastal areas will be buffeted by hurricanes, rising sea levels, and floods. Climate change is also anticipated to have devastating impacts on biodiversity – reducing the productivity of the world's fisheries and accelerating the extinction of species and the loss of ecosystem services vital to food production. The households and countries most likely to be adversely affected are those most reliant on local agricultural production, which already face chronic food insecurity.

Ironically, agriculture is also one of the greatest contributors to global warming. Agriculture is responsible for nearly one third of global anthropogenic greenhouse gas emissions, including nitrous oxide from increased fertilizer use, methane from rice and livestock production, carbon dioxide from the clearing of forests to create agricultural land, and indirect emissions from the manufacture of fossil fuel-based agricultural inputs and from the processing, packaging and transportation of food.

Interrelated Problems: Integrated Solutions

When designing system-based solutions to the converging food, climate, and agrobiodiversity crises, it is useful to keep in mind three key propositions.

877 Carmen G. Gonzalez, *The Global Food System, Environmental Protection, and Human Rights* (2012) https://ssrn.com/abstract=2004732 (references omitted).

First, poverty rather than food scarcity is generally the cause of chronic malnutrition. Global food production has outpaced population growth since 1950, and there is currently sufficient food to satisfy the nutritional needs of every human being. People go hungry, even in countries where food is abundant, because they are poor. The majority of the world's undernourished people are small farmers in developing countries who are net buyers of food. These farmers' income is often too low to enable them to purchase the food available on the market. Thus, combating hunger requires increasing the income of small farmers in the developing world rather than simply boosting food production.

Second, agrobiodiversity is essential to the integrity and resilience of the world's food supply. Cultivating a variety of crops provides insurance against environmental shocks, diversifies food sources, enhances soil fertility, and conserves the genetic resources necessary to breed plant varieties that can withstand the stresses associated with climate change, including salinity, heat, flood, and drought. Historically, small farmers have played an essential role in conserving and enhancing the world's agrobiodiversity. However, the rapid expansion of industrial agriculture has produced a worldwide decline in agrobiodiversity, marginalized small farmers, eroded farmers' self-sufficiency, and diminished traditional agricultural knowledge while fostering dependence on expensive seeds, pesticides, fertilizers and machinery produced by a small number of transnational corporations. Thus, trade and production policies that enhance the livelihoods of small farmers and encourage the cultivation of diverse crops and diverse genetic varieties are essential for the health and resilience of the world's agroecosystems.

Finally, agriculture can play a significant role in climate change mitigation and adaptation. Sustainable agriculture seeks to maximize natural pest, nutrient, soil and water management technologies while reducing agrochemical use and enhancing agrobiodiversity. By minimizing the use of fossil-fuel based agrochemicals, sustainable farming practices produce fewer greenhouse gas emissions than industrial agriculture. By utilizing animal manure, crop rotation, intercropping, and agroforestry, sustainable agriculture reduces soil erosion and enhances carbon sequestration in both soils and above-ground vegetation. By increasing the organic matter in soils and enhancing the soil's water retention capacity, sustainable farming practices boost agricultural productivity and increase resilience to floods and droughts. The cultivation of genetically diverse crop varieties improves resistance to weather-related events, pests, and diseases. Thus, agricultural trade and production policies that promote sustainable agriculture will enhance food security, conserve biological diversity, and contribute to climate change mitigation and adaptation.

Anton, Is the Environment a Human Rights Issue?[878]

Tension or Complementarity?

The assertions in the Stockholm Declaration ["[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."] sparked an early academic search for jurisprudential underpinnings for linkages between human rights and the environment. A number of texts and articles made their appearance in which the international legal case was made for "the human rights of individuals to be guaranteed a pure, healthful, and decent environment." W. Paul Gormley, (1976).

Today, the protection of the environment and promotion of human rights are increasingly seen by many as intertwined, complementary goals. For Christopher Weeramantry, a former Vice-President of the International Court of Justice, this is self-evident (…): 'The protection of the environment is . . . a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.' [1997]

878 Donald Anton, *Is the Environment a Human Rights Issue?* (2008) https://ssrn.com/abstract=1126470.

Yet, other scholars reject the connection between human rights and the environment and see incompatibility or even danger in their coupling. They see human rights and environmental protection based on fundamentally different and ultimately irreconcilable value systems. These differences are, to them, much more likely to lead to conflict than to be complementary. The arguments proceed, on the one hand, with some environmental lawyers maintaining that a human rights focus for environmental law ultimately reduces all other environmental values to an instrumental use for humanity so that the quality of human life can be enhanced. This human-centered, utilitarian view reduces the non-human and nonliving aspects of ecosystems to their economic value to humans and promotes unsustainable resource exploitation and environmental degradation as a human good. Furthermore, some human rights lawyers believe that linking human rights and the environment diminishes the importance and focus on protection of more immediate human rights concerns such as ending genocide, extra judicial killings, torture, and arbitrary detention.

Professor Dinah Shelton posits a third view which she says seems to best reflect the current state of play in law and policy. '[This view] sees human rights and environmental protection as each representing different, but overlapping, societal values. The two fields share a core of common interests and objectives, although obviously not all human rights violations are necessarily linked to environmental degradation. Likewise, environmental issues cannot always be addressed effectively within the human rights framework, and any attempt to force all such issues into a human rights rubric may fundamentally distort the concept of human rights. This approach [thus] recognizes the potential conflicts between environmental protection and human rights, but also the contribution each field can make to achieving their common objectives.'

Relationship between Human Rights and the Environment

The relationship may be conceived in two main ways. First, environmental protection may be cast as a means to the end of fulfilling human rights standards. Since degraded physical environments contribute directly to infringements of the human rights to life, health, and livelihood, acts leading to environmental degradation may constitute an immediate violation of internationally recognized human rights. The creation of a reliable and effective system of environmental protection would help ensure the well-being of future generations as well as the survival of those persons, often including indigenous or economically marginalized groups, who depend immediately upon natural resources for their livelihoods.

In the second approach, the legal protection of human rights is an effective means to achieving the ends of conservation and environmental protection. Thus the full realization of a broad spectrum of first and second generation rights would constitute a society and a political order in which claims for environmental protection are more likely to be respected.

A more ambitious variant of this view provides that there is and should be an inalienable human right to a satisfactory environment, and that legal means should exist to enforce this right in a consistent and effective manner. Put in these terms, it is no longer the impact of the environment on other human rights which is the law's focus; but the quality of the environment itself. Expressed in this qualitative way, a right to a decent environment has much in common with other claims, such as sustainable development or intergenerational equity, and suffers comparable problems of subjectivity, definition, and relativity which make it inherently problematic for any notion of universal human rights.

Background (Cambodia)

Christoplos & McGinn, Climate Change Adaptation from Human Rights Perspective[879]

In Cambodia, concerns about climate justice (i.e. measures which seek to rectify the 'inverse relationship between climate risk and responsibility' [Barrett 2014: 130]) are seen by some to indicate the need for action in countries

879 Ian Christoplos & Colleen McGinn 'Climate Change Adaptation *from a Human Rights Perspective: Civil Society Experiences in Cambodia', Forum for Development Studies,* 43:3 (2016), pp. 437-461, https://doi.org/10.1080/08039410.2016.1199443.

with large-scale emissions. Moreover, several interviewees indicated that there is a tendency to label more immediate problems (e.g. the impact of dams or deforestation) as being instead due to CC in order to shift the blame to developed countries and exonerate those actors within Cambodia who are responsible for environmental destruction. In this sense, the language of CCA has been co-opted to serve elite interests. One senior government official even indicated that unless donor countries were prepared to 'step up to the plate' and pay more than the (short-term) profits that can be reaped from exploitation of the forests, there is no reason for Cambodia to slow the current pace of destruction. 'We look at mitigation from the perspective of an LDC, which is that we implement mitigation as long it supports sustainable development and the rich countries fund it,' he explained. 'Why would countries like us [protect forests]? We need development. Under the current market model there is no other way.'

There is a clear recognition that widespread deforestation is both contributing to CC and reducing the adaptive capacities of the populations living in the (often formerly) forested areas. Nonetheless, there is also considerable ambivalence about how this recognition should influence courses of action. This may reflect, in part, the government's persistent downplaying of the scale and effect of deforestation in Cambodia, and NGO reluctance to risk government partnerships by openly challenging that. While cross-cutting issues are recognised, action largely remains firmly boundaried within agencies' long-standing modi operandi. Both advocacy and operational strategies are corralled into 'silos' – and this is true for human rights as well as development agencies. Organisational inertia is compounded by resignation and fear about political repercussions of challenging elite interests.

While some human rights organisations address access to essential livelihood resources, most focus (usually exclusively) on legal rights and the judicial sector. As such they actively contest the legality of the ELCs and other 'land grabs,' but rarely address a population's rights to protection from climate risks per se. These agencies clearly focus on the formal accountability of duty bearers to follow the law. There is some understanding of how, in principle, these accountabilities extend to issues related to CC, but this is not regarded as part of their mandate. The reduction in vulnerability to CC that results from the protection of farmland and forests is seen as a positive externality rather than as a justification for these efforts. There is also some criticism that human rights in Cambodia is dominated by a set of concerns defined by urban elite lawyers, and that the human rights agencies fail to adopt a broad approach to empowerment of the marginalised. (…)

Probably the most glaring environmental policy implementation gap is in law enforcement. Local government is universally seen as powerless to enforce laws which safeguard either the environment or environmental defenders when powerful actors are the culprit. Four factors emerged from our interviews which stymie efforts to hold local duty bearers to account for protecting the environment and respecting the rights of resource users.

Instruments (Cambodia)

ASEAN, Human Rights Declaration[880]

28. Every person has the right to an adequate standard of living for himself or herself and his or her family including: (…)

    e. The right to safe drinking water and sanitation;

    f. The right to a safe, clean and sustainable environment.

Constitution of the Kingdom of Cambodia[881]

Article 59: The State shall preserve and protect the environment and the balance of natural resources, by organizing a precise planning for the management, especially of the land, water, atmosphere, air, geology, ecological systems, mines, energy, petroleum and gas, rocks, sand, gems, forests and forest by-products, wildlife, fish and aquatic resources.

880 Association of Southeast Asian Nations (ASEAN), *ASEAN Human Rights Declaration* (2012) https://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf.

881 Cambodia, *Constitution of the Kingdom of Cambodia* (1993) https://www.constituteproject.org/constitution/Cambodia_2008.pdf?lang=en.

Article 72: The health of the people shall be guaranteed. The State shall give full consideration to disease prevention and medical cares. Poor people shall receive free medical consultations in public hospitals, infirmaries and maternities. (…)

Law on Environmental Protection and Natural Resources Management[882]

Article 1

The purposes of this law are:

- To protect and promote environmental quality and public health through the prevention, reduction, and control of pollution.
- To assess the environmental impact of all proposed projects prior to the issuance of a decision by Royal Government.
- To ensure the rational and sustainable conservation, development, management, and use of natural resources of the Kingdom of Cambodia.
- To encourage and enable the public to participate in environmental protection and natural resource management.
- To suppress any acts that cause harm to the environment.

Article 6: An environmental impacts assessment shall be carried out on every project and activity of either private or public and shall be examined and evaluated by the Ministry of Environment before it is submitted to the Royal Government for decision. (…)

Article 7: Every Investment Project Application and proposed project which are submitted by the State, shall enclose with them a preliminary Environmental Impact Assessment or Environmental Impact Assessment as stated the article 6 of this law. The Ministry of Environment shall consider and make recommendations on the preliminary Environmental Impact Assessment or Environmental Impact Assessment to relevant competent bodies within a period as determined in the Law on Investment of the Kingdom of Cambodia.

Forestry Law[883]

Article 1

This law defines the framework for management, harvesting, use, development and conservation of the forests in the Kingdom of Cambodia.

The objective of this law is to ensure the sustainable management of these forests for their social, economic and environmental benefits, including conservation of biological diversity and cultural heritage.

Article 4

This law shall be implemented to ensure public participation in any government decision that has the potential for heavy impact on concerned general citizens, livelihoods of local communities and forest resources of the Kingdom of Cambodia.

882 Cambodia, *Law on Environmental Protection and Natural Resources Management* (1996) http://www.cambodiainvestment.gov.kh/wp-content/uploads/2011/09/Law-on-Environmental-Protection-and-Natural-Resource-Management_961224.pdf.

883 Cambodia, *Forestry Law* (2002) http://www.cambodiainvestment.gov.kh/law-on-forestry_020930.html.

Consistent with the Cambodian code of forest management and the Environmental Protection and Natural Resources Law, an Environmental and Social Impact Assessment shall be prepared for any major forest ecosystem related activity that may cause adverse impact on society and environment. Document of the Environmental and Social Impact Assessment shall be made available for public comment.

Any final decisions by the Royal Government on major forest ecosystems related activities must consider the recommendations of the final Environmental and Social Impact Assessment. The Royal Government can publicly notice any final decisions under this article.

Article 19

All concessionaires shall include the Environmental and Social Impact Assessment in their Forest Concession Management Plan in accordance with provisions of this law; and other regulations on Forest Concession Management. (…)

Ministry of Agriculture, Forestry and Fisheries shall ensure that the Forest Concession Management Plan and the Environmental and Social Impact Assessment are available for public comment prior to the issuance of harvest permit for Forest Products & By-products.

Draft of Environment and Natural Resources Code of Cambodia[884]

Article 2: Objectives

The following are the objectives of the Environment and Natural Resource Code:

a) Protect the environment to avoid and mitigate disasters and environmental harm;

b) Conserve, manage, and enhance biodiversity, natural resources, and ecosystem services;

e) Enhance and protect the rights of all individuals and the collective rights of indigenous people throughout the process of managing, protecting, and conserving natural resources throughout the Kingdom of Cambodia;

h) Promote a cooperative, transparent, and inclusive approach for environmental protection and naural resource management with participation of the Royal Government of Cambodia, communities, property holders, indigenous people, and vulnerable people, including minorities, women, youth, disabled people, and the marginalized;

Article 4: Obligation to Avoid Environmental Harm (...)

No natural person or legal entity shall commence any activity that causes or may likely cause environmental harm or damages unless such natural person or legal entity takes all reasonable measures to protect the environment and natural resources and prevent or minimise the environmental harm.

Article 5: The Principle of Public Participation (...)

All persons who may be affected directly or indirectly by a decision concerning the environment and natural resources shall be entitled to provide informed and timely inputs prior to the decision being made through a transparent, inclusive, and accountable process.

884 Cambodia, *Draft of Environment and Natural Resources Code of Cambodia* (draft 9.1, 25 July 2017) http://matthewbaird.com.au/category/countries/asean/cambodia.

Article 6: The Principle of Access to Environmental Information (...)

All natural persons and legal entities shall have access to information concerning the environment and natural resources.

All information on environmental protection and natural resource management shall be made widely available and publicly accessible in a manner that maximizes the opportunity for public participation in planning and decisions affecting the environment and society.

Article 7: The Principle of Access to Effective Remedies (...)

All natural persons and legal entities shall have access to appropriate administrative, judicial, or other appropriate venues to enable the effective resolution of environmental dispute.

There shall be impartial and effective grievance mechanisms to enforce procedural rights, encourage compliance, and punish those who cause harm to the environment, society and natural resources.

Article 8: The Polluter Pays Principles (...)

All natural persons, private legal entities, and public legal entities who cause harm to the environment and society shall bear the cost for repairing the harm and for measures to prevent, avoid, and mitigate the harm to the environment and society.

Article 14: The Principle of Gender Equality in Environmental Protection and Natural Resources Management

Gender equity and the participation of women in all aspects of decision-making concerning the environment and natural resources shall be promoted and encouraged.

Article 18: The Principle of Free, Prior, and Informed Consent for Indigenous Communities

Any proposed activity or project that may affect indigenous peoples' land or other resources, especially in relation to the development, use, or exploitation of natural resources, must receive the indigenous peoples' free, prior, and informed consent.

Article 88: Environmental Impact Assessment

This title determines environmental impact assessments caused by all development projects that may create impacts on the environment, health, society, economy and culture.

Article 922: Affected Persons

Persons directly or indirectly affected by environment and natural resources offences reserve the right to file a complaint with the competent court for mitigation or compensation of the relevant damage and impacts in compliance with this Code and the in-force Code of Civil Procedure of the Kingdom of Cambodia.

The complaint may be filed by a relevant community to oppose any environment or natural resources offence, or any offence against the provisions in accordance with this Code and the in-force Code of Civil Procedure of the Kingdom of Cambodia, and filed by a community representative. The community representative shall provide relevant evidence to prove the representation right granted by the affected community.

Ministry of Industry, Climate Change Strategic Plan for Manufacturing Industry[885]

4. Policies and Strategies Respond to Climate Change in Industrial and Energy Sectors

Ministry of Industry, Mines and Energy has focused on preparing an energy policy and energy development plan as a key role for the support other sectors development in the country through transferring of technology on renewable energy and energy efficiency. (…)

4.1. Industry Sector

A. Energy Efficiency in Industrial Sector

(…) Being an "alternative-energy disadvantaged" country, energy efficiency appears to offer the best solution for Cambodia to meet its climate change targets. In developing country, such a Cambodia is not fully adopted or changed for alternative uses of fusil oil. The alternative approaches such as energy efficiency including energy savings and efficient energy consumption are the best solution for Cambodia enhanced and considered in order to reduce greenhouse gas emission and climate change reduction.

In Industry Sector, the three higher operating expenses are often found to be energy (both electrical and thermal), labor and materials. Among these three components, energy is the most potential in cost reduction especially in Cambodia. Thus, implementing of energy efficiency means one can save a lot of money as well as reduction of environmental impact.

- Food sector
- Rice milling
- Garment and textile manufacturing sector
- Brick and tile production (Brick kiln)
- Paper and pulping paper production.

B. Green Industry

Green Industry is industrial production and development that does not come at the expense of health of natural system, or lead to adverse human health outcomes and mainstreaming environmental, climate and social considerations into the operations of enterprises. It provides a platform for addressing global, inter-related challenges through a set of immediately actionable cross-cutting approaches and strategies that take advantage of emerging industry and market forces. Green Industry stimulates technological advances and innovation, as well as the development of new industries. It not only reduces environmental impacts but spurs innovation, thereby creating business opportunities and new jobs, thus contributing to poverty alleviation.

Green industry involves a two-pronged strategy to create an industrial system that does not require the ever-growing use of natural resources and pollution for growth and expansion. These two components are:

- The greening of existing industry
- And the creation of "Green Industries".

885 Ministry of Industry, Mines and Energy, *Climate Change Strategic Plan for Manufacturing Industry and Energy* (2013) https://www.cambodiaip.gov.kh/DocResources/ab9455cf-9eea-4adc-ae93-95d149c6d78c_007729c5-60a9-47f0-83ac-7f70420b9a34-en.pdf.

C. Identification, assessment and prioritization of pollution and transfer of environmentally sound technologies (Test and Hot-Spot)

This project's aim is help enterprises to overcome those challenges and obstacles for substantial business process especially, reduce pollution from its operation which against climate change and increase the green growth in country.

- Hot-Spot Methodology

    1. Preliminary evaluation
    2. Detailed evaluation based on Biodiversity, Pollution control, Socio-economic and Water quality
    3. Prioritization of pollution Hot-Spots

- TEST methodology: Transfer Environmental Sound Technology Methodology (TEST) is one methodology, which involves each level of the management and combines the following essential elements such as: Cleaner Production (CP); Environmental Management Accounting (EMA); Environment Management System (EMS); and Corporate Social Responsibility (CSR).

    • Environmental Management Accounting (EMA):

EMA focus on materials and related cost: the use of energy, water and materials, as well as the generation of waste and emissions, are directly related the environmental impacts of organizations and their products, and Material purchase costs and materials lost in waste and emissions are the most prominent cost drivers in many organizations; Especially in countries with low enforcement of legal compliance and relatively low labor costs, materials and energy use and related losses are a significant cost driver.

    • Environmental Management System (EMS):

EMS is a systematic approach for incorporating energy and environment goals and priorities (such as energy use and regulatory compliance) into routine operations.

EMS is a system of interconnected parts: Environmental policy; Planning; Implementation and operation; Check and corrective action; Management review; with the goal to managing, the activities have or can have environment impacts. In addition, EMS provides a mechanism ensuring that company: Think of environment; decide what company wants to do; works out how to do it; implements as planed; corrects deviations from plan; review its directions for the future for better performance.

    • Corporate Social Responsibility (CSR):

Responsibility of an organization for the impacts of its decisions and activities on society and the environment, through transparent and ethical behavior that:

- is consistent with sustainable development and the welfare of society;
- takes into account the expectations of stakeholders;
- is in compliance with applicable law and consistent with international norms of behavior;
- is integrated throughout the organization an in its relationships

There are 3 basic criteria: economic; environment; society. Fundamental subjects of CSR are organizational governance; Human rights; labor practices; environment; fair operating practices; consumer issues; social development (community involvement and development). (…)

Ministry of Environment, Guidebook on Environmental Impact Assessment[886]

Who are stakeholders in this project scoping stage?

Stakeholders in the project scoping stage of an environmental impacts assessment are:

- Environmental Impact Assessment Department, Ministry of Environment;
- Project owner;
- Environmental impact assessment consultant and other experts;
- Other responsible agencies;
- Project Affected communities/public;
- Community/Public beneficiaries.(…)

What are the Environmental Impacts Mitigation Measurement?

Environmental Impacts Mitigation Measurement are activities or measures to avoid or reduce negative environmental impacts caused by project activities. Mitigation measurement refers to ecological system, economy, society and culture. Planning and implementation of a project may include many methods or options as its measure as follows:

- Make plan about project site or duration of activities to avoid impact on a specific resource or an easily impacted area;
- Include negative environmental impact mitigation measurement in the project design or project planning stage in order to reduce impacts in advance;
- Ensure a mitigation program to reduce negative environmental impact that may happen as the project operates;
- Ensure a mitigation program after the activities to restore resources or area impacted, or to replace the lost or damaged resource within the impacted area or other relevant area. For example, an issue of depletion of fresh-water fish can be mitigated by provision of fish seedlings or by restoring rivers which are shelters to the fish.

Public participation

In the process of EIA on a development project, public participation should be made in three main stages:

- Project scoping stage;
- EIA report review stage;
- Project monitoring stage.

886 Ministry of Environment, *Guidebook on Environmental Impact Assessment in the Kingdom of Cambodia* (2012) http://ngoforum.org.kh/files/4cb32e-a424c264c674c054ba18d2ffe8-Final-PK-official-eia-booklet-21-11-2012-Eng.pdf.

Phnom Penh Sugar Co, Social Responsibility[887]

Phnom Penh Sugar Co., Ltd., a wholly owned subsidiary of LYP Group, always thrives to protect the surrounding environment and be the most environmentally friendly factory for the benefit of the nature and nearby community. The company takes comprehensive approaches to environmental responsibility as entail since the beginning of operation.

Phnom Penh Sugar has dramatically reduced the environmental impact of its facilities. Material use and facility in house designed to be the most energy efficient factory in Cambodia. The company has built-in house systems to control and increase the energy efficiency of the material use inside the building and plant such as the real-time power monitoring and analytics during operation. In addition, building is designed with white cool-roof to provide maximum solar reflectivity. The power is distributed at higher voltages, which reduces power loss. Working environment is certified to have no pollution that can harm to human health as accredited by the Ministry of Industry Mine and Energy.

Phnom Penh Sugar also invests into renewable energy and thereby helps residents nearby the area to live peacefully and safety from Greenhouse Gas effects. The company uses power energy generated mainly from baggasse, a by-product of the cane based sugar manufacturing process, to run the process of producing sugar. That baggase-generated power is said to be the clean energy that has very little negative drawback to the atmosphere in contrast to expensive and dirty diesel generators, the methods by which most of the country's power is generated. With the power capacity of 16 Mw, 11 Mw is used within the plant and other facilities while the rest is sold to the government and village nearby the plant. In addition, Phnom Penh Sugar has invested USD 1.5 million in the transmission line linked from Thnol Tolteng to factory at Om Laeng, Thpung, Kompong Speu. It is 68.5 km long and that allows households along the road to access to power energy.

As of factory waste and sewage, which is a toxic substance and is hazardous to environment and human health, the company had built seven lakes to store and transforms those harmful disposals into usable water and non-toxic waste. These seven lakes are built as a vacuum system that sewage drains from one lake to another lake. Gradually, sewage flows into the last lake and becomes bio-fertilizers that company gives away to cane grower to use in the farmland and villagers to use in their orchards.

The company also invested in water-treatment system and water-storage filter that regenerates muddy water or water containing impurities to become clean and drinkable. The plant capacity is 5000 cubic meters per day. That clean water plant allows employees and villagers to have good quality water consumption and improve their health condition as well as reducing their expense on health care.

Young, Protest, Regulations and Environmental Accountability in Cambodia[888]

5. Environmental Accountability of the Government: Re-Enforcing Regulations

5.1. Stung Cheay Areng Valley

Stung Cheay Areng valley is known as a biodiversity jewel of Southeast Asia. In early 2014, the government of Cambodia granted a concession for hydropower development to a Chinese company, Sinohydro, to explore the feasibility of building a dam. … If this development project is to proceed, it would force more than 1,300 Chong indigenous peoples to abandon their ancestral lands and would flood a 9,500- hectare area that is home to some thirty globally endangered animal species (Peter and Narim, 2015) … the dam would block the flow of the river and destroy the downstream habitat for wild fish that is crucial to the local economy, and also critically endangered

887 Phnom Penh Sugar Co. Ltd., *Social Responsibility* (accessed 1 December 2020) http://www.phnompenhsugar.com/community/social-responsibility.html.

888 Sokphea Young, 'Protest, Regulations and Environmental Accountability in Cambodia', *Journal of Current Southeast Asian Affairs* (2019) pp. 1-22, https://journals.sagepub.com/doi/10.1177/1868103419845515.

biodiversity of global significance. The dam would also alter the natural seasonal flow variation of the Stung Cheay Areng, which local communities depend upon to nourish over 600 hectares of rice paddies with nutrient-rich waters, according to International River (NGOs).

With unfavourable impacts foreseen, the Chong indigenous communities in Cheay Areng valley, with the strong support of Mother Nature and other NGOs, have been protesting and advocating against the dam project proposed by Sinohydro. The purpose of this local movement is to put pressure on the government to call for the abandonment of the dam project, given the highly adverse impacts of the dam on the rich biodiversity and natural environment in this very large national park of Cambodia. (…)

Nonetheless, in response to this movement, the government and local authorities, especially the provincial office of Koh Kong, threatened the communities and activists. Cambodian activists have often been arrested and spuriously charged. These activists were frequently accused of being secessionists, a typical accusation in Cambodia, and of instigating movements against the government. A movement leader and outspoken Spanish activist, the co-founder of Mother Nature (NGO), was deported from Cambodia (Teehan and Ponniah, 2015). (…)

6. Demand for Corporate Environmental Accountability as an End Goal

Protest movements of affected communities and NGOs have shifted their target considerably, from a focus on the government to corporations directly. Adjusting their goal to directly influence corporations has often been a result of instances where corporations held power over actors in the local government, and therefore limited the ability of the government to act or be influenced by protest movements to effect change. As exhibited in the case of a joint movement against sugar industry in three locations: Koh Kong, Kampong Speu, and Oddar Meanchey province, below, environmentally accountability of corporations is an ultimate goal of protest movements, but intervention of the government is still necessarily important to ensure corporations are held to account. On the one hand, this approach is considered to be more affective, and by targeting the corporation helps the movements to get rid of the government's suppression and to avoid the allegation of being labelled as anti-government movements, which might be provoked by the opposition movements, on the other.

6.1. Protests and Environmental Accountability of the Sugar Industry

(…) Initially, the affected communities and NGOs employed domestic influencing strategies, including peaceful protest, petitions, local networking, and filing complaints to the local court, to put pressure on the government to regulate the sugarcane corporations and address the detrimental impacts. The government's response was to negotiate with the sugarcane corporations to offer cash compensation, but this approach was considered unfair by the community, given that cash cannot compensate for lost land, livelihoods, and environmental damage. The government also failed to strictly regulate the sugarcane corporations for their adverse activities. Meanwhile, in collaboration with the corporations, the government repressed the movement activities of the sugarcane-affected communities and NGOs. The repressive activities included violently cracking down on non-violent protest in Koh Kong, violently vandalising farmers' properties, the arrest and imprisonment of activists in Oddar Meanchey province, and intimidation of protestors in Kampong Speu. (…)

After ineffectual domestic influencing strategies, the network of sugarcane-affected communities and NGOs, influenced by TANs, staged international supply chain movement approaches, including complaining to the investors in the country of origin (Thailand), in court to the sugar buyer corporations (United Kingdom), and finally to the EU's Everything But Arms (EBA). In the meantime, the communities in Kampong Speu also filed a complaint against ANZ bank in Cambodia and in Australia, alleging that they were financial investors in the sugarcane corporations in Cambodia. At the time of this study, ANZ has denied the complaint and has taken no responsibility, since the sugarcane corporations have already repaid the loan.

This shift in strategy by the movements resulted in increasing pressure directly on the sugar corporations and indirectly on the government. Complaining to the UK court and eventually the human right commission in Thailand exerted direct pressure on sugarcane corporations in Cambodia, even though it did not yield any significant results at the international juridical level. Complaining to the EU's EBA leveraged extra pressure on both the government and the sugar corporations, and the EU's parliament officially commented to the Cambodian government regarding the allegation and adverse impacts, but there were no clear direct results on the Cambodian government because of these actions. However, the international influencing strategies of the sugarcane-affected communities and NGOs did result in changing the behaviour of the sugarcane corporations in Koh Kong and Kampong Speu. For instance, in Koh Kong, the sugarcane corporations established a corporate social responsibility (CSR), eliminating child labour and mitigating some environmental issues. Although limited, this still represents an important degree of self-regulation on the part of the sugarcane corporations. For example, to address the environmental concerns of the communities, the corporations stopped clearing some sacred forest areas. To address the water contamination, the corporations and the provincial environmental departments dug new ponds to re-regulate the polluted water before discharging. To ensure long-term accountability for environmental impacts, the sugarcane corporations conducted environmental impact assessments and developed environmental management and mitigation plans in and surrounding the sugarcane processing factory compound (Young, 2015).

In Kampong Speu, the sugarcane corporations have worked to address not only the environmental impacts but also to adopt CSR in an effort to harmonise their business with the surrounding communities. School construction, education, rural road improvements, job creation, good working conditions, and enduring environmentally friendly sugar processing factories have been observed in and around the plantation areas. To reduce the hazardous wastes, the sugarcane corporations built several ponds to store and treat the harmful waste, so that it can be turned into useable water and nontoxic waste. In addition, the non-toxic waste is now also being converted to bio-fertilisers for re-use at sugarcane plantations and for local farmers' growing fields. (…)

(…) As a result of pressure generated on an international level, the corporations were inclined to resolve environmental impacts, such as returning land, providing cash compensation, conserving forestland, mitigating water contamination, soil erosion, and so on, as demanded by the affected communities and NGOs. As noted, these mitigations by the corporations for their adverse environmental impacts were ultimately made possible by actions of the government, to mediate and re-enforce regulations. The corporations then complied with the environmental regulations and government policies. To assure improved relations with workers and within the broader local context, corporations also took on longer term accountability by self-regulating to adopt corporate social and environmental responsibility and codes of conduct (CSR).

Hoy, Analysis of Sand Extraction and Use in a Coastal Community Fishery[889]

Coastal resources need to be maintained in order to support the livelihoods and well-being of local coastal resources-dependent communities, as well to provide a balanced set of ecosystem goods and services. However, development projects along the coastal areas of Cambodia have been implemented at an alarming rate in recent decades, including infrastructure projects such as ports, modern settlements, resorts and tourist destinations. In addition to these development projects, coastal areas have been exposed to mining exploration and exploitation activities, and as a result, the coastal environment has not been able to avoid the negative consequences of these. (…)

Based on the results of this study, there are two main driving forces behind the changes taking place in the area, these being the sand dredging activities and infrastructure developments, both of which are placing pressure on the coastal environment and leading to environmental change, plus having a negative impact on coastal ecosystems and community livelihoods. As a result, coastal resources such as seagrass, mangroves and fish are under increasing

889 Sereivathanak Reasey Hoy, 'DPSIR Analysis of Sand Extraction and Use in a Coastal Community Fishery: *A Case Study of Boeng Tuk Commune,* Tuek Chhou District in Kampot Province', in Sophat Seak and Morrison Gary, *Natural Resource Governance in Cambodia, Research Papers Volume 1* (2013), pp. 41-67, http://www.rupp.edu.kh/fds/dnrmd/documents/NRMDpaper-Natural%20Resource%20Governance-vol1.pdf.

pressure, damaging community livelihoods, causing changes to the local natural and social environment, leading to decreasing fish yields and reductions in income levels, and also causing labor, migration, health and sanitation problems, as well as instigating local conflicts. The responses of the key stakeholders, such as the communities, local authorities, NGOs and private companies, to the above issues, have been limited and unacceptable thus far from the local communities' perspectives.

CCCA/GSSD, Better Fuel, Better Future[890]

Mitigation Can Help Reduce the Impact of Climate Change

An important mitigation activity is finding low-emission fuel sources. Emissions are measured in tones of CO2 emissions (tCO2e), and it is estimated that the garment industry in Cambodia creates 368,000 t CO2e per year by burning wood for energy. Alternative fuel sources could enable Cambodia to lower its emissions, and to be a global leader showing other nations how emissions can be mitigated.

Following more than two decades of strong economic growth, Cambodia attained lower middle income status in 2015. Driven mostly by the garment industry, which represents 11% of the country's GDP, this impressive economic performance comes at a high environmental cost. The garment sector is a large consumer of energy in Cambodia, consuming 301,000 metric tons of firewood every year, equivalent to 3,500 hectares of deciduous forest every year.

According to Cambodia's Nationally Determined Contribution (NDC), 'Efforts in addressing climate change in Cambodia cannot be separated from economic development and poverty alleviation goals. Cambodia has more than 57% forest cover the pressure on resources and land is high.

As of 2018, it is estimated that 70% of the garment industry's thermal energy is unsustainably provided by natural forests, sourced either from forest conversion for agriculture or from illegal harvesting. To switch to cleaner production of garments in Cambodia, a number of barriers need to be overcome, including a lack of large scale supply of sustainable biomass fuels, and a lack of incentives for factories to switch sources, leading to low profitability of sustainable energy plantations. (…)

Benefit 2: International Partnership – Mitigation in Good Corporate Social Responsibility

A key part of the activity was co-operation between international buyers – in this case H&M, a major garment business operating around the world – and Cambodian garment factories who manufacture and supply garments to buyers.

GERES and H&M discussed the energy usage of H&M-supplying factories, and estimated that these factories burn more than 72,000 metric tons of wood each year, and that it is very likely that this energy use directly contributes to deforestation. H&M were clear that this is a matter of concern, and that they would like to identify legal and sustainable fuel options for its suppliers.

H&M is developing renewable energy targets to drive its transition towards a carbon-neutral supply chain. To enable this, GERES and H&M initiated a partnership, with H&M supporting GERES financially and connecting GERES to its network of suppliers, while GERES supports the emergence of a supply chain of alternative biomass fuel by demonstrating that renewable energy sources are technically and economically feasible for the garment industry.

890 CCCA/GSSD & National Council for Sustainable Development General Secretariat, Better Fuel, *Better Future - How Private Sector Partnership Helps Cambodia Mitigate Climate Change and Burn Less Wood* (2018) https://ncsd.moe.gov.kh/resources/document/better-fuel-better-future-how-private-sector-partnership-helps.

For the RHB project, this meant that, while GERES worked with rice millers, H&M used their position and influence with garment factories to encourage and enable them to switch their energy sources from wood and towards RHBs.

H&M's responsible staff member for their Environmental sustainability Program in Cambodia and Vietnam, Aurélie Pruvost, said, "H&M' set an ambition to achieve a climate neutral supply chain by 2030). One of our main milestones is to reduce 30% of GHG emissions per product by 2025. We want to support the transition into renewable energy for the whole world by using renewable energy ourselves. Working with actors like GERES is crucial to be able to propose concrete renewable energy solutions to our suppliers."

Ek, Cambodia Environmental and Climate Change Policy Brief[891]

3. What are the effects of the environmental problems?

The natural resources in Cambodia are threatened by short-sighted overexploitation on an increasing and threatening scale. This reduces the country's overall natural capital, yet whilst great benefits flow to the few; equally great burdens fall on the many, in particular the rural communities whose well-being and livelihoods are based on natural resources management. If the over-exploitation of current scope and scale continues, Cambodia's future socio-economic development is at risk. (…)

3.1 Impacts on poverty

Besides agriculture, fisheries and forest resources play a critical role supporting livelihoods in Cambodia, especially in providing diversifying subsistence and income-generating activities. Combined they provide a safety net to families during difficult times. (…)

Lack of assets

The people living in poverty face a number of interlocking and mutually reinforcing problems, including lack of secure land tenure, remoteness from markets and services, lack of productive assets, lack of access to decision-making processes, low levels of education and high dependency ratios. Land is one of the high-value resources, and land grabbing a serious problem.

For instance, when forest land is given away to private companies through land concessions the space for rural communities to access natural resources, particularly non timber forest products (NTFP), is reduced and might trigger migration to cities were they are at a risk to become marginalized and without secure employment. A similar problem arises when fishing lots in rivers and Tonle Sap lake are given away to private investors. Both food security and income generation opportunities are seriously hampered as the possibility to find protein and sell excess fish catch on local markets are reduced.

Vulnerability

Cambodia is one of the most disaster affected countries in South East Asia, and the impact of these disasters is felt most in rural areas, where the large majority of the poor live. (…) The people living in poverty are more vulnerable to external shocks due to limited asset base, livelihood opportunities and little access to decision-making, and have less ability to adapt to environmental changes. (…)

891 Göran Ek, *Cambodia Environmental and Climate Change* Policy Brief, Sida's Helpdesk for Environment and Climate Change (2013) https://sidaenvironmenthelpdesk.se/digitalAssets/1683/1683320_cambodia-environmental-and-climate-change-policy-brief-2013.pdf

Security

Lack of security is a fundamental dimension of poverty. The main environment-related security issues in Cambodia are related to decreasing resilience of ecosystems, unreliable access to food and water, lack of secure tenure to land, lack of access to resource-based safety-nets such as goods and services from the natural commons (forests, fish, etc), low ability of households to accumulate assets including natural capital, pollution, and existence of conflicts over resources. Women are disproportionately at risk from environmental degradation, conflicts, and natural disasters, due to gender roles, and historic, cultural and socio-economic reasons. (…)

Gender aspects

The depletion of biodiversity and natural resources hits women hardest. They often have a key role in rural households of refining and monetize the "harvest" from fields, forests and fisheries for example by selling excess fish catch at local markets or manufacture handicraft from NTFP for urban consumers and tourists. This position enables them to wield influence both in the family and in the community given their importance for access to financial resources providing added value to the subsistence-based economy. When a natural resource-based livelihood no longer is possible in a household due to biodiversity degradation or an infrastructure development, the women lose this position and opportunities for alternative employment (like working on dam construction or at a plantation) arising is usually open only for men. (…)

3.3 Impacts on Public Health

As described in 3.1 the abundance of protein from fish, carbon hydrates from inundated rice fields and vitamins from riverside gardens all depending on the services of the Mekong and its watered by the Mekong provide Cambodians with a healthy diet. Badly planned infrastructure development on the river ecosystem may therefore cause malnutrition and other serious health problems in the country if impacts are not mitigated or alternative food sources are developed which might be difficult given the efficiency of the freshwater ecosystem. In addition, degradation of soil quality and hence productivity in agriculture due to a sustained use of agrochemicals and unsustainable farming practices is also in issues for concern.

The low electrification rate in rural areas means difficulties in keeping food fresh and conserving medicines due to lack of refrigerators, higher incidence of respiratory diseases due to excessive wood fuel use as well as reliance on diesel and kerosene for providing electricity and lighting which contribute to higher risk of household fires and inhaling of unhealthy fumes.

Climate change will favour warm and wet conditions that may raise the incidence of malaria. (…) With rising temperatures the impact on rice yield is predicted to be significant, yields are predicted to decrease under both high and low emission scenarios, not least because of increased incidence of pests and disease. Reduction in rice yields, the crop being a staple food, is therefore a potential health hazard. (…)

Questions

1. Can you explain the link between human rights and environmental protection? Why is the UN paying more attention to this link?
2. Is clean environment a human right?
3. Are environmental regulations more advanced and better enforced in Cambodia compared with human rights?

4. Do Cambodian environmental laws requiring businesses to conduct environmental impact assessments oblige them to consider social and human rights impacts as well?

5. How successful has CSR been in protecting the environment in Cambodia?

6. Does nature have rights?

Further Readings

- Special Rapporteur on Human rights and the Environment, *Selected Sources for Framework Principles on Human Rights and the Environment* (2018) www.ohchr.org/Documents/Issues/Environment/SREnvironment/ListSourcesFrameworkPrinciples.pdf.

- Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management and Disposal of Hazardous Substances and Wastes, *Annual Reports,* www.ohchr.org/EN/Issues/Environment/ToxicWastes/Pages/Annual.aspx.

- Mary Robinson, *Why Climate Change is a Threat to Human Rights,* TEDtalks (2015) [video 21:34 minutes, with a transcript in 24 languages] www.ted.com/talks/mary_robinson_why_climate_change_is_a_threat_to_human_rights/footnotes?referrer=playlist-486.

- Council of Europe, *Manual on Human Rights and the Environment* (2012) www.echr.coe.int/LibraryDocs/DH_DEV_Manual_Environment_Eng.pdf.

- Business & Human Rights Resource Centre, *Climate Litigation against Companies: An Overview of Legal Arguments* (June 2019) www.business-humanrights.org/en/corporate-legal-accountability/special-issues/climate-change-litigation.

- UNDP, Human Development Report Cambodia - Sustaining Natural Resources for All (2019) http://hdr.undp.org/sites/default/files/nhdr_cambodia.pdf.

- Cambodia, Sub-Decree on Environmental Impact Assessment Process (1999) http://www.cambodiainvestment.gov.kh/sub-decree-72-anrk-bk-on-environment-impact-assessment-process-pdf_990811.html.

- Royal Government of Cambodia, *National Environment Strategy and Action Plan 2016-2023* (2017) https://policy.asiapacificenergy.org/sites/default/files/National%20Environment%20Strategy%20and%20Action%20Plan_NESAP_2016-2023.pdf.

- Ross Natividad, 'Consequences of Cambodia's Rubber Boom: Assessing the Governmental, Environmental, and Human Rights Violations in the Industry's Current Regulatory Framework', *William & Mary Environmental Law and Policy Review,* 40:3 (2016) https://scholarship.law.wm.edu/wmelpr/vol40/iss3/8.

- Matthew Baird, 'Environmental Impact Assessment in Cambodia – Law and Practice', in Kong et al., *Contemporary Environmental Law in Cambodia and Future Perspectives,* Konrad Adenauer Stiftung, (2020) pp. 43-53, https://www.kas.de/documents/264850/8652138/Contemporary+Environmental+Law+in+Cambodia+and+Future+Perspectives.pdf/1d483f29-615b-f02c-6f1b-48a1411d5452?t=1587641697247.

- Sherchan Depika, *Cambodia: The Bitter Taste of Sugar Displacement and Dispossession in Oddar Meanchey Province,* Action Aid Cambodia and Oxfam GB (2015) https://cambodia.actionaid.org/publications/cambodia-bitter-taste-sugar-displacement-and-dispossession-oddar-meanchey-province.

- EarthRights International, *Environmental Impact Assessment in the Mekong Region: Materials and Commentary* (First Edition) (2016) pp. 32-44, https://earthrights.org/wp-content/uploads/eia_manual_final_0.pdf.

- International Federation for Human Rights (FIDH), *Cambodia Land Cleared for Rubber Rights Bulldozed: The Impact of Rubber Plantations by Socfin-KCD on Indigenous Communities in Bousra,* Mondulkiri (2011) https://www.fidh.org/IMG/pdf/report_cambodia_socfin-kcd_low_def.pdf.

- Global Witness, *Shifting Sand – How Singapore's Demand for Cambodian Sand Threatens Ecosystems and Undermines Good Governanc*e (2010) https://www.globalwitness.org/en/archive/shifting-sand-how-singapores-demand-cambodian-sand-threatens-ecosystems-and-undermines-good/.

- Oung Ty Keithya, *Environment and Climate Change,* https://www.kas.de/en/web/kambodscha/single-title/-/content/environment-and-climate-change.

- Amnesty International, *Cambodia: Harassment of Forest Defenders Undermines Struggle Against Climate Change*, Amnesty International Public Statement (2020) https://media.business-humanrights.org/media/documents/d0a040dd3ab74639eccc62380a1a737f98c66927.PDF.

The compendium is an aid for lecturers to prepare classes and seminars on business and human rights in Cambodia. Teachers from several academic disciplines – law, management, political science, social science, and media – will find carefully selected materials and numerous aspects on which to build a rewarding classroom experience. The compendium has three parts. Part I covers the policy frameworks for 'human rights and business'. Part II is a deep dive into the systems companies set up to ensure responsible business conduct. Part III further contextualizes what the corporate responsibility entails regarding specific human rights.

Part I. Human rights frameworks - The laws and policy frameworks for responsible business conduct

1. International law on business and human rights
2. International soft law on corporate social responsibilities
3. International trade and investment agreements
4. National laws with extraterritorial effects
5. Multistakeholder initiatives (collaborative governance)
6. Access to remedies: judicial mechanisms
7. Access to remedies: non-judicial mechanisms

Part II. Human rights due diligence - The management of human rights risks

8. Codes of conduct
9. Human rights impact assessments
10. Due diligence and management systems
11. Corrective actions
12. Measuring and tracking performance
13. Transparency and corporate reports
14. Stakeholder engagement

Part III. Human rights standards - The impacts of business on specific human rights

15. Child labour and Children Rights
16. Forced labour and human trafficking
17. Living wages
18. Working hours
19. Freedom of association and collective bargaining
20. Health and safety
21. Migrant workers
22. Indigenous people
23. Gender
24. Persons with disabilities
25. Land issues and relocation
26. Provision of security
27. Water
28. Environmental protection and human rights

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