CHAPTER 14

Interface between the Judiciary and National Human Rights Institutions: A Means to Ensure Effective Remedies for Business-Related Human Rights Abuses?

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1 Introduction

This chapter deals with the means of interface between the judiciary and National Human Rights Institutions ("NHRIs") to ensure effective remedies to the victims of business-related human rights abuses. While NHRIs are considered as one of the state-based non-judicial grievance mechanisms for redressing the human rights abuses by business enterprises, lack of enforcement of their recommendations questions the overall effectiveness of the mechanism. This chapter thus looks into the fundamental relationship, including the interconnection and interaction, between the judiciary and NHRIs to ensure the enforceability of the NHRIs' recommendations to have an actual outcome for the victims.

In the first section, the chapter provides the general background as to how NHRIs have been incorporated within the business and human rights regime and what are their expected roles within the regime. For the matter, the United Nations Guiding Principles, 2011 ("UNGPs") is the primary instrument considered for the study. The second section deals with the concept and ways of interface between the judiciary and NHRIs. It explores the possible avenues to ensure the enforceability of the NHRIs' recommendations. The third section considers the National Human Rights Commission of Thailand ("NHRCT") and National Human Rights Commission of Nepal ("NHRCN") as case studies. The associated laws that provide grounds for the interface between these two state institutions are identified and analyzed. The chapter also explores the possibilities of interface for cases that have extra-territorial implications. While doing so, the possible challenges associated with them and recommendations are also discussed.

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2 Background

Traditionally, NHRIs have focused on the State's role and monitored the compliance of human rights standards by States only. The Principles Relating to the Status of National Institutions ("Paris Principles")[1] do not require NHRIs to engage with human rights violations by non-State actors, including business enterprises. According to Cantú Rivera, the Paris Principles "do not explicitly refer to an [NHRI's] advisory role for actors other than the State" and they "do not contain a specific mandate" to redress cases of corporate human rights abuse.[2] This lack of a clear mandate for NHRIs regarding corporate human rights violations dates back to the history of the Paris Principles creation. They were adopted at a time "when the main focus of NHRI practice, and the international human rights system as a whole, was on the protection of human rights violations committed by State actors".[3] This conventional backdrop and understanding however does not forbid States to deal with business-related human rights violations. Since States must protect and fulfill human rights, they have the primary duty to regulate business enterprises from violating human rights and redressing, if required. Further, the Paris Principles encourage States to create a "broad mandate" for the NHRIs, which is the ideal clue to enable NHRIs to contribute effectively on the matter of promotion and protection of human rights, including business and human rights. John Ruggie, in his "Protect, Respect and Remedy" framework, positioned that NHRIs provide processes, whether adjudicative or mediation based, that are culturally appropriate, accessible, and expeditious.[4] NHRIs can use their quasi-judicial mandate for the investigative and complaint-handling functions to provide remedies for

1 "Principles relating to the Status of National Institutions ("The Paris Principles")," United Nations General Assembly, December 20, 1993, https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-relating-status-national-institutions-paris.

2 Humberto Fernando Cantú Rivera, "National human rights institutions and their (extended) role in the business and human rights field," in *Research Handbook on Human Rights and Business*, eds. Surya Deva and David Birchall (Cheltenham: Edward Elgar, 2020), 497–98.

3 Surya Deva, "Corporate human rights abuses: what role for the national human rights institutions?," in *Human Rights in The Asia-Pacific Region: Towards Institution Building*, eds. Hitoshi Nasu and Ben Saul, (London: Routledge, 2011), 236.

4 "Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises," Office of the United Nations High Commissioner for Human Rights ("OHCHR"), April 7, 2008, 25, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/8/5.

business-related human rights violations.[5] However, NHRIs are not the stand alone mechanism to redress human rights abuses by business enterprises; they rather supplement and complement other institutions within the governance system.

In recent times, several developments point toward the prominent roles of NHRIs in the field. The UN General Assembly in 2009 acknowledged the role of NHRIs in "the promotion and protection of human rights in all sectors".[6] This is an indication that the role of NHRIs need not be limited to the public sector only.[7] The Edinburgh Declaration 2010, while reaffirming the functions of NHRIs, identified the roles of NHRIs to fulfill, promote and protect on the matter of business-related human rights violations. For this matter, the declaration provides lists of activities NHRIs could consider, such as engaging with governments to promote greater awareness of the impact of business enterprises on the realization of human rights; advocating and advising the government to introduce national legislation; providing guidance to business on how to integrate human rights into their daily business; research business impact on human rights; facilitate dialogue between corporations, government, and civil society; document violations; and examine conditions of access to justice.[8] The declaration calls on the NHRIs with complaint-handling functions to consider utilizing the functions to redress business-related human rights violations and for NHRIs to mediate between corporations, governments, trade unions, and victims.[9]

The United Nations Human Rights Council ("UNHRC") Resolution 17/4 also highlights the role of Paris Principles – compliant NHRIs to work on the matter of business and human rights.[10] The UNHRC Resolutions "32/10 and 38/13"[11]

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5 Claire Methven O'Brien and Thomas Pegram, "Guaranteeing access to remedies for business-related human rights abuses: role of NHRIs," International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights and Working Group on Business and Human Rights, March 2, 2016, 4–5 (text available at SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3648211).

6 "National Institutions for the Promotion and Protection of Human Rights," United Nations General Assembly, March 20, 2009, para. 12, https://documents.un.org/doc/undoc/gen/n08/481/11/pdf/n0848111.pdf?token=E6wz6qk7Kn8EtsgyVr&fe=true.

7 Deva, "Corporate human rights abuses," *supra* note 3, at 242.

8 "The Edinburgh Declaration," International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights, October 18, 2010, https://www.ohchr.org/sites/default/files/Documents/AboutUs/NHRI/Edinburgh_Declaration_en.pdf.

9 *Id*. at C and D.

10 "Human rights and transnational corporations and other business enterprises," OHCHR, July 6, 2011, 10, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/17/4.

11 "Business and human rights: improving accountability and access to remedy," OHCHR, July 15, 2016, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/32/10;

recognize the prominent role of NHRIs in supporting activities to improve accountability and access to remedies for victims of business-related human rights abuses. And the "regional action plans adopted by the regional networks of NHRIs"[12] likewise mention the significant role of NHRIs in the business and human rights arena. The Vienna +25 conference in 2018 called for "efficient and independent" mechanisms, such as NHRIs, as the key institutions in charge of monitoring and key partners holding governments to account on the matter of business-related human rights violations.[13] All of these developments are indicative of NHRIs' roles to promote and protect human rights for business-related human rights violations.

Along with the aforementioned instruments, the UNGPs accentuate the role of NHRIs in the business and human rights context. Several roles identified by the UNGPs include "helping States identify whether relevant laws are aligned with their human rights obligation and are being effectively enforced, and in providing guidance on human rights also to business enterprises and other non-state actors".[14] The UNGPs refer to the roles of NHRIs as state-based grievance mechanisms to ensure effective remedies for the victims of business-related human rights abuses. For this chapter, the role of NHRIs is focused on the third pillar, i.e. ensuring access to remedy for the victims of business-related human rights abuses.

3 Role of NHRIs in the United Nations Guiding Principles on Business and Human Rights

The third pillar (Principles 25–31) of the UNGPs elaborates on the obligation of providing remedies to the victims of human rights abuses as a "shared

"Business and human rights: improving accountability and access to remedy," July 18, 2018, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/38/13.

12 Nora Götzmann and Sébastien Lorion, "National Human Rights Institutions and Access to Remedy in Business and Human Rights: Part 1: Reviewing the Role and Practice of NHRIs," The Danish Institute for Human Rights, March 6, 2020, 9 https://www.humanrights.dk/sites/humanrights.dk/files/media/document/national%20eng%20part%201.pdf.

13 "Vienna + 25: Building Trust – Making Human Rights a Reality for All," World Conference on Human Rights, August 12, 2022, https://www.bmeia.gv.at/fileadmin/user_upload/Zentrale/Aussenpolitik/Menschenrechte/Vienna_25_Outcome_Document.pdf.

14 "Guiding Principles on Business and Human Rights," OHCHR, accessed May 20, 2024, Commentary to Principle 3 https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf ("UNGPs").

responsibility of States and businesses".[15] Principle 25 provides for the State's duty to protect against business-related human rights violations, for which States must take judicial, administrative, legislative, or other appropriate means to ensure access to an effective remedy.[16] The UNGPs, however, have failed to reflect the rich international human rights jurisprudence concerning the right to a remedy, because "it is recognized as flowing from the State's duty to protect human rights rather than imposing a self-standing obligation".[17] Principle 27 of the UNGPs provides for the standards of effective and appropriate non-judicial grievance mechanisms, which includes NHRIs, as a part of a comprehensive state-based system for the remedy of business-related human rights violations.[18] As per the Principle, NHRIs are paramount in identifying and investigating, creating accountability, and providing an effective remedy for business-related human rights violations to bridge the accountability gap.

NHRIs are intended to both protect and remedy individual's human rights and to serve the wider public interest in advancing the protection of rights, and to bring overall systemic change. In addition, NHRIs can employ the process of mediation and conciliation for non-judicial remedies within the scope of their mandates. These kinds of friendly processes contribute to corporate behavioral transformation by making them understand the impacts of their activities.[19] Primary functions of NHRIs thus include "dispute resolution",[20] "standard setting",[21] "investigatory powers",[22] and "remedies".[23] The promotional functions of NHRIs, while playing a huge role in preventive measures,

15 "Business and Human Rights in ASEAN: A Baseline Study," Human Rights Resource Centre, 5, https://hrrca.org/wp-content/uploads/2015/09/Business-and-Human-Rights-in-ASEAN-Baseline-Study-ebook.pdf.

16 UNGPs, *supra* note 14, at Principle 25.

17 Surya Deva, "Treating Human Rights Lightly: A Critique of the Consensus Rhetoric and the Language Employed by the Guiding Principles," in *Human Rights Obligations of Business*, eds. Surya Deva and David Bilchitz (Cambridge: Cambridge University Press, 2013), 102.

18 UNGPs, *supra* note 14, at Principle 27.

19 Carolin Rees, "Mediation in Business Related Human Rights Disputes: Objections, Opportunities and Challenges," Harvard Kennedy School, February 2010, 16, https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper_56_rees.pdf.

20 "National Human Rights Institutions: History, Principles, Roles and Responsibilities," OHCHR, 2010, 21–22, https://www.ohchr.org/sites/default/files/Documents/Publications/PTS-4Rev1-NHRI_en.pdf.

21 *Id.*

22 *Id.*

23 *Id.*

are also there to supplement and complement the protection functions as a part of the larger solution.

4 General Concept of Interface between the Judiciary and NHRIs

The protection role of NHRIs, especially the quasi-judicial functions of NHRIs as aforementioned, can act as a promising avenue to ensure remedies to the victims of business-related human rights abuses. However, most NHRIs lack enforcement authority. While it is controversial, the lack of enforcement authority on the part of NHRIs is justifiable to some scholars since these institutions undertake the investigations, and therefore providing them with the authority to issue binding decisions on the same case may raise a concern about institutional biases. Given that fact, in absence of enforcement powers, a conventional NHRI cannot ensure an effective remedy.

According to Meg Brodie, although NHRIs are genuine avenues for ensuring remedies, their reliance on recommendations alone might limit actual or perceived access to effective remedies.[24] This inability to provide binding remedies discourages parties from even seeking redress from NHRIs, which ultimately questions the overall effectiveness of an NHRI. Therefore, the assessment of effectiveness must be based on a demonstration of causality.[25] An effective NHRI is an NHRI whose actions cause a particular set of outcomes, whether related to the general goals of protecting and promoting human rights or the specific goals of outlines in its mandate and strategies.[26] The effectiveness of NHRIs is dependent also on the efficiency of other State mechanisms. According to Ryan Goodman and Tom Pegram, "a lack of compliance with NHRI recommendations does not reflect the failure of an NHRI but rather may reflect the failure of complementary actors to fulfill their democratic or accountability function".[27] Sophie Kalinde considers that the contribution of

24 Meg Brodie, "Pushing the Boundaries: The Role of National Human Rights Institutions in Operationalising the 'Protect, Respect and Remedy' Framework," in *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation*, ed. Radu Mares (Brill Nijhoff, 2012), 264.

25 Renee Jeffery, "Assessing the Effectiveness of National Human Rights Institutions," in Steven L. B. Jensen and Marie Juul Petersen, *Documenting Results: A Review of Survey-Based Reports Based on Data from National Human Rights Institutions*, (Copenhagen: The Danish Institute for Human Rights, 2019).

26 *Id*.

27 Ryan Goodman and Thomas Pegram, "Introduction: National Human Rights Institutions, State Conformity, and Social Change," in *Human Rights, State Compliance, and Social*

NHRIs to ensure effective remedies is "overstated, insofar as relatively few of the NHRIs have the power to issue enforceable orders, and in other cases the effectiveness of such mechanisms depends on the support of the executive".[28] The success of NHRIs in terms of ensuring effective outcomes thus depends on the whole governance system of a State. Besides the executive, the judiciary, as a part of the governance system of a State, can assist NHRIs in ensuring effective remedies.

The interface between the judiciary and NHRIs can promote compliance with NHRI decisions to ensure their impact.[29] Andrew Wolman considers that the interface between the judiciary and NHRIs helps the latter to achieve "a coercive power that they otherwise lack".[30] This whole idea of the possible interface between the judiciary and NHRIs has been hinted at by the UNGPs itself, where NHRIs are considered as the means to complement and supplement the judicial mechanisms to ensure effective remedies. The report of the OHCHR in 2018 describes ways that judicial and non-judicial mechanisms like NHRIs can complement and supplement each other to ensure access to effective remedies for business-related human rights violations.[31] For instance, NHRIs could seek or recommend the transfer of complaints or disputes for adjudication by judicial mechanisms, and they could refer allegations or evidence of business involvement in human rights abuses to judicial mechanisms or other law enforcement bodies for investigation for further action.[32] Thus there are several means of interface between the judiciary and an NHRI.

Change: Assessing National Human Rights Institutions, eds. Ryan Goodman and Thomas Pegram (Cambridge University Press, 2011), 15.

28 Sophie Kalinde, "Case Study: Concerned Villagers around Kazilira Dambo Vs Dwangwa Cane Growers Limited," presented at the European Group of NHRIs Workshop on Business and Human Rights, Berlin, September 5–7, 2012, in "The Role of Non-EU National Human Rights Institutions in the Implementation of the UN Guiding Principles on Business and Human Rights," European Parliament, 2012, 20, https://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457112/EXPO-DROI_ET(2012)457112_EN.pdf.

29 For the purpose of this chapter, the term "interface" here refers to the functional relationship between the court and the NHRI. To elaborate, it incorporates the idea of interconnection between the court and the NHRI and also the situation where these institutions interact so as to bring out the new effect in this case, the enforceability of the NHRI's recommendations or decisions.

30 Andrew Wolman, "National Human Rights Institutions and the Courts in the Asia-Pacific Region", *Asia Pacific Law Review* 19, no. 2 (2011): 242, https://doi.org/10.1080/10192557.2011.11788250.

31 "Improving accountability and access to remedy for victims of business-related human rights abuse through State-based non-judicial mechanisms," OHCHR, May 14, 2018, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/38/20.

32 *Id*. at 10.

4.1 *Means of Interface between the Judiciary and NHRIs*

There can be direct and indirect ways of interface between the judiciary and NHRIs to facilitate remedies by NHRIs. The direct means, for instance, includes a situation when an NHRI can provide direct remedies via their binding recommendations, which would ultimately reduce the burden or pressure on courts. However, if the direct remedies provided by NHRIs are merely recommendatory, the affected individuals or NHRIs may need to approach courts to secure binding enforcement.[33] The quasi-judicial mandates of NHRIs thus provide a potential basis for future litigation to ensure tangible remedies for business-related human rights victims, opening the doors for indirect ways of interface between the judiciary and NHRIs. Indirect means, for instance, include scenarios where an NHRI refers to or initiates a case in the court to obtain injunctive relief, use powers of investigation from the court, provide legal assistance to affected communities, support human rights defenders trying to hold companies accountable, intervene in judicial proceedings etc., depending on their legal mandate, which helps to obtain an actual outcome.[34]

The quasi-judicial mandate of NHRIs is actually a promising means of ensuring effective remedies in case of non-enforcement of NHRIs' recommendations. However, it should not be assumed that it will dilute or duplicate the role of the judiciary. NHRIs are designed in such a way to "supplement the role of democratic institutions like judiciary so as to ensure that issues of human rights remain in the central focus of political discourse in every society".[35] NHRIs fit perfectly fine in the governance system to fill in the "accountability gap" that exists in business and human rights. For instance, while the judiciary is concerned with all disputes in society and may not have sufficient time and resources to focus exclusively on human rights issues, NHRIs can step in to perform the task. Likewise, NHRIs generally tend to have a broader mandate when it comes to their jurisdictional operation and are in a better position to take cognizance of human rights violations than the judiciary, which will feel restrained based on certain laws, rules and regulations as to how and when

33 "Role of national human rights institutions in facilitating access to remedy for business-related human rights abuses," OHCHR, June 22, 2021, para. 23, https://www.ohchr.org/en/documents/thematic-reports/ahrc4739add3-role-national-human-rights-institutions-facilitating-access.

34 OHCHR, "Improving Accountability," *supra* note 31, at 10.

35 "Protectors or Pretenders: Government Human Rights Commissions in Africa," Human Rights Watch, January 1, 2001, 2, https://www.hrw.org/report/2001/01/01/protectors-or-pretenders/government-human-rights-commissions-africa.

issues come before the court.[36] Martin A. Olz also considers NHRIs to "be in a better position to take initial action on human rights violations than the judiciary, given these potential limitations under the applicable laws".[37] However, NHRIs are not a replacement for the court – rather, they complement and supplement the judiciary in ensuring effective remedies to the victims of human rights violations.

This chapter deals with the indirect means of interface between the judiciary and NHRIs for the NHRI whose recommendations are not enforceable. The interface between the judiciary and the NHRI, however, requires elaborate rules of procedure to facilitate the cooperation between the two institutions.[38] The absence of such rules of procedure for cooperation may result in duplication of tasks and encroachment on the powers of each institution. According to Andrew Wolman, there are three ways of indirect interface between the judiciary and NHRIs, namely "initiation of cases, intervention in the ongoing case, and *amicus curiae* submission".[39] Claire Metheven O'Brien and Thomas Pegram have extended the ways of the interface to include "representation by NHRIs in the public interest litigation before the court and recommendation of free legal aid for the victims to the concerned authority/institution by NHRIs to ensure accessibility to the court".[40]

The ways of interface between the judiciary and NHRIs are to be clearly provided by the legal mandates of NHRIs. Not all NHRIs have the power to initiate a case or legal petition authority to challenge the human rights abuses, or to enforce their orders or recommendations under their name unless they are directly aggrieved. For example, the 2007 Constitution of Thailand, for the first time, explicitly gave the National Human Rights Commission of Thailand ("NHRCT") the ability to file lawsuits on behalf of victims of human rights abuses.[41] Given this power, the determinant question, however, is whether the

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36 Martin A. Olz, "Non-Governmental Organizations in Regional Human Rights Systems," *Columbia Human Rights Law Review* 28 (1997): 307–20.

37 *Id*.

38 Fergus Kerrigan and Lone Lindholt, "General Aspects of Quasi-Judicial Competences of National Human Rights Institutions," in "National Human Rights Institutions: Articles and Working Papers," The Danish Centre for Human Rights, 2000, 108, https://citeseerx.ist.psu.edu/document?repid=rep1&type=pdf&doi=7d8e6b4876f22979b26ea352fa3f7107fcb8d141.

39 Wolman, "National Human Rights Institutions," *supra* note 30.

40 O'Brien and Pegram, "Guaranteeing access to remedies," *supra* note 5, at 5.

41 "2010 ANNI report on the performance and establishment of national human rights institutions in Asia," Asian Forum for Human Rights and Development, July 31, 2010, 140, https://forum-asia.org/2010-anni-report-on-the-performance-and-establishment-of-nhris-in-asia/.

NHRIs can institute cases directly on behalf of victims of human rights violations in the absence of any complaint. Also, the question of the jurisdiction of courts, for instance, concerning material and/or geographical competence in the referral of cases to the court, arises. Likewise, the intervention in the cases by NHRIs on behalf of litigants in court proceedings is conditioned upon the permission of the court. But to use this means of interface, NHRIs have to be aware of, or updated about, the pending cases in the court, which is one of the challenges.[42] Submission of *amicus curiae* to the court is another way of interface which happens either when the NHRIs approach the court to submit *amicus curiae* or when the court asks the NHRIs to submit an *amicus* brief on a particular issue. This is again dependent upon the permission of the parties or the court.

The interface between the judiciaries and NHRIs is not limited only to the aforementioned ways. The court or prosecutorial referral of cases from NHRIs can also be another means of interface, which can take place at any stage of investigation by NHRIs. The interaction between the judiciaries and NHRI, where NHRI can refer complaints of alleged human rights violations within the jurisdiction of national courts, can significantly aid the enforcement of human rights obligations.[43] Such referrals will be made if, for example, a recommendation is not acted on by the parties; a settlement of the case cannot be secured; the terms of an agreed settlement have not been met; there is a lack of cooperation on the matter of the investigation; the investigation reveals the reasonable likelihood that a criminal act or disciplinary offence under the law has been committed that requires intervention by the prosecuting authorities; and the investigation reveals that another body or agency may more appropriately deal with the matter.[44]

The referrals of complaint by the NHRI to the courts will require the later to address several issues. The court in question will have to decide "whether it is within its jurisdiction concerning the subject matter; the implications of the case (for instance relating to financial compensation); geographical competence; and the need to protect the client, for instance in relation to confidentiality".[45] The issue of confidentiality and protection of victims' interests also become vital for these kinds of referrals. For instance, whether the NHRIs should be obliged to testify as witnesses and/or submit evidence and

42 Wolman, "National Human Rights Institutions," *supra* note 30.

43 Vijayashri Sripati, "India's National Human Rights Commission: A Shackled Commission?," *Boston University International Law Journal 18* (May 2000): 15.

44 OHCHR, "National Human Rights Institutions," *supra* note 20, at 91.

45 Kerrigan and Lindholt, "General Aspects," *supra* note 38, at 108.

information, or should they be able to remain silent claiming to protect victims' interests, needs to be properly addressed in the procedure to regulate coordination between these institutions.[46] There are blurred lines on the matter of forwarding the (confidential) evidence from an NHRI to the court after the accomplishment of some initial or substantial investigation, evidence gathered, interviews or hearings conducted, etc on the matter of case referrals.[47] While court referrals may in some instances be the only avenue for ensuring enforcement of NHRI recommendations, it may not always be the most effective route. Redress through courts may pose challenges, including delays, limits on damage awards, cost to litigants, and political interference.[48] But, the possibility of legal action can create pressure on corporations and state agencies to comply with the NHRI recommendations. While most of the NHRIs are considered to have positive footprints in the direct or indirect ways of facilitating access to remedies for the victims, this might not always be the case. NHRIs do have limitations and disadvantages, or negative footprints such as the "lack of resources in complex cases involving multiple parties and systematic or widespread abuses, lack of clarity regarding the mandates of the mechanism, lack of independence in the case associated with government agencies".[49] These negative footprints can be mitigated via national level reforms to strengthen these mechanisms to ensure effective remedies to the victims of business-related human rights abuses.

The possibility of interface between the judiciary and the NHRIs should be inscribed in the laws that establish these bodies. The following are the case study illustrations of NHRI in Thailand and Nepal, with the focus on the practice of interface between the judiciaries and NHRIs.

5 Practice of Interface between the Judiciary and the National Human Rights Commission of Thailand

The NHRCT is governed by two domestic laws, namely the Constitution of the Kingdom of Thailand (2017) and the Organic Law on NHRCT (2017) (the

46 *Id*. at 109.

47 *Id*.

48 O'Brien and Pegram, "Guaranteeing access to remedies," *supra* note 5, at 6.

49 "State-based non-judicial mechanisms for accountability and remedy for business-related human rights abuses: supporting actors or lead players?," OHCHR, November 2, 2017, 13, https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/ARPII_%20DiscussionpaperonPhase2forUNForum_FINAL.pdf.

"Organic Act"). Under Section 247 of the Constitution of 2017, the NHRCT has the power to examine and report the correct facts on violations of human rights and recommend suitable measures for providing guidelines to prevent or redress human rights violations, along with the provision of remedy to the National Assembly, the Council of Ministers and relevant agencies.[50] Further, Section 26 of the Organic Act aligns with the constitutional provision under section 247, which provides for the duties and powers of the NHRCT.[51] These provisions do not mention the explicit territorial jurisdiction of NHRCT. However, the NHRCT, in its practice, has been creative enough to elaborate the mandate and consider extra-territorial jurisdictional cases.[52] These sections are further supplemented by Sections 34 and 35 of the Organic Act, which grant quasi-judicial mandates to the NHRCT, such as investigative and complaint-handling powers. However, the pertinent drawback of these mandates is that the NHRCT is not granted the power to enforce its recommendations. To make matters worse, the Constitution of 2017 and the Organic Act crippled the NHRCT by removing the power to refer cases and provide opinions to the Constitutional Court and the Administrative Court, including the filing of a lawsuit before the Court of Justice on behalf of a complainant granted by the Constitution of 2007, which is a promising tool to enforce the recommendations. Thus, NHRCT can investigate and make recommendations, but there is no power to bring cases to the justice system, such as through commencing prosecution or providing compensation to victims.[53]

Under the current Thai laws, in the case of non-enforcement of the recommendations within a period of time prescribed by the Commission

50 Constitution of the Kingdom of Thailand, B.E. 2560 (2017), Article 247 (English translation available at "Constitution of the Kingdom of Thailand, B.E. 2560 (2017)," The Administrative Court of Thailand, August 2, 2022, https://www.admincourt.go.th/admincourt/en/law_detail.php?id=495).

51 Organic Act on the National Human Rights Commission, B.E. 2560 (2017), Section 26.

52 "Investigation Report No. 1003/2558: Community Rights: Mitr Phol Sugar Company Limited and its Negative Impacts on People living in Samrong District and Chongkal District, Oddar Meanchey Province, Northeastern Cambodia," NHRCT, October 15, 2015, https://equitablecambodia.org/website/article/3-2015.html; "Community rights: the case of Dawei Deep Seaport and Special Economic Zone Project in Myanmar which Thailand has signed the MoU to co-develop and it has violated the human rights of Dawei people," NHRCT, November 23, 2015, http://mekongwatch.org/PDF/daweiNHRCT_ReportFull_ENG.pdf ("Report No. 1220/2558").

53 Stanati Netiptalachoochote, Aurelia Colombi Ciacchi, and Ron Holzhacker, "National Human Rights Institutions (NHRIs) in ASEAN: A Comparative Analysis of the Protection Capacity and Impacts on Performances of NHRIs in the Philippines and Thailand," *European Journal of Comparative Law and Governance* 7, no. 2 (2020): 117–67.

without reasonable justification, the Commission can submit the report to the Cabinet.[54] However, this provision might not always result in the enforcement of the recommendations. The coercive power of the judiciary to enforce the recommendations, provided by the previous laws, could have provided teeth to the NHRCT. Interestingly, for the criminal offence resulting in any human rights violations, the NHRCT via initiation of the case in the court by itself can exercise a form of interface. In this scenario, the criminal procedure code grants the power to the NHRCT to file a complaint to the judiciary by itself or by the person assigned by the victim if the victim is not in a position to file a complaint.[55] According to this provision, the NHRCT needs to make a complaint to an inquiry official, who in turn will have to investigate the case, and later send the files to a prosecutor. The decision to prosecute or not will be subject to the prosecutor's discretion. "This whole process is slow, reluctant and can cause victims to be subject to an unfair legal process on many occasions and in many ways".[56] Plus it is to note that not all business-related human rights violations amount to criminal offenses.

Other forms of interface between the judiciary and the NHRCT can be interpreted from other provisions of the Constitution and the Organic Act. For instance, section 27(3) of the Organic Act vests in the NHRCT, along with other institutions, the power to cooperate and coordinate with other State agencies.[57] This provision is open to interpretation, which could include means of interface such as the transfer of evidence for the investigations conducted, being an expert witness, submitting the *amicus curiae* upon the request of the court, etc. The NHRCT can submit its recommendations to the court as evidence or be present in the court as an expert witness for the cases it had investigated with which the victims were not satisfied.[58] Also, the NHRCT can assist victims with legal aid to ensure their proper representation in the court and ensure their access to remedy.[59] Except for the initiation and referral of the cases to the court, NHRCT can exercise other ways of interface to ensure effective remedies for the victims.

Despite the fact that the NHRCT cannot file cases on behalf of victims, Civil Society Organizations ("CSOs") in Thailand, as the third party in coordination

54 Organic Act on the National Human Rights Commission, *supra* note 51, at Section 36.
55 *Id*. at Section 37.
56 Netiptalachoochote, Ciacchi, and Holzhacker, "National Human Rights Institutions (NHRIs)," *supra* note 53, at 148.
57 Organic Act on the National Human Rights Commission, *supra* note 51, at Section 27(3).
58 *Id*.
59 *Id*.

with the NHRCT, can file such cases to the court,[60] although this provision needs further elaboration based on Section 4 of the Civil Procedure Code of Thailand.[61] This provision opens an avenue for the possibility of filing extraterritorial cases, including class action cases related to community and environmental rights over land, in the courts of Thailand as long as the defendant or the plaintiff has a place of residence in Thailand or the concerned property (which, for instance, can be a business) is situated in Thailand.[62] This is a silver lining, since the CSOs based in Thailand could, on behalf of extraterritorial victims, exercise this provision for interface with the judiciary for the cases in the investigative phase or that have already been investigated by the NHRCT. However, given the complexity of business structures, and in absence of support from the CSOs in Thailand, it is tedious to satisfy the jurisdiction requirement for the victims.

The proactive CSOs in Thailand might not always necessarily result in positive outcomes for the business-related human rights abuses where transnational business enterprises are involved. In the case of Pak Beng Hydropower Dam in Lao PDR, "a complaint was submitted to the NHRCT in 2016 by the members of Mekong communities in Thailand against Thai officials and governmental agencies, challenging their prior consultation process in Thailand that could have potential environmental impact".[63] The case was taken to the Thai administrative court by two Mekong resident's groups, the Rak Chiang Kon Conservation Group and the Thai Mekong People's Networks from Eight Provinces, to retract an environmental assessment performed by Thai agencies that was used to support the decision by the Mekong River Commission to allow the project to move forward.[64] The lower court, along with the central administrative court, rejected the appeal with the justification that they had no jurisdiction over the case.[65] The intervention by the CSOs in this case did not pan out in the victims' favour. The efforts of the CSOs in Thailand and the roles played by them cannot be thwarted by such cases. They have helped in

60 *Id.*

61 Thai Civil Procedure Code, B.E. 2477 (1934), Section 4.

62 *Id.*

63 "Thai Companies in Southeast Asia: Access to Justice for Extraterritorial Human Rights Harms: A Legal Analysis," International Commission of Jurists, February 2021, 87, https://www.icj.org/wp-content/uploads/2021/03/Southeast-Asia-Access-to-Justice-Thai-companies-Publication-ENG.pdf.

64 "Thailand Court Rejects Appeal for Petition Against Laos' Pal Beng Dam," Radio Free Asia, February 25, 2021, https://www.rfa.org/english/news/laos/pakbeng-02252021145302.html.

65 *Id.*

shedding light on transnational business-related human rights abuses, attracting both the public and government attention on such cases.

The role of the CSOs in Thailand has not only been limited to interface between the judiciary and the NHRCT. They have played a prominent role in expanding the mandate of the NHRCT for extraterritorial obligations on the matter of business-related human rights abuses. The NHRCT in recent years has expanded its mandate in an innovative manner for transnational business-related human rights violations. The NHRCT was the first NHRI in Southeast Asia to investigate a case extending its mandate to the extraterritorial obligations in the popular Sugarcane Case, filed by a Cambodian NGO in January 2010.[66] In 2012, the commission concluded that it had jurisdiction to investigate the case, despite the investment's location in Cambodia. The NHRCT's report in 2014 concluded that human rights abuses had occurred, including the right to manage and benefit from resources and the right to life. The commission also concluded that both the Thai government and the Thai company had failed in their respective responsibilities and duties to protect human rights, and made recommendations to the company and Thailand's Ministry of Foreign Affairs and Ministry of Commerce.[67] While some families received compensation in this case, there are families who are yet to be compensated for the loss of their land.[68]

Likewise, in the Dawei Special Economic Zone case,[69] the NHRCT in 2015, with the help of CSOs, found that the construction of infrastructure facilities within the Special Economic Zone implemented by a Thai-listed construction company had abused the rights of people in Myanmar. Local villagers were found to have lost their houses and farmlands, and had their livelihood adversely impacted.[70] The outcome of this intervention by the NHRCT resulted in a resolution by the Thai Cabinet that allocated tasks to Ministries to ensure that Thai outbound investors will not violate human rights.[71] It is noteworthy that the complaint was filed by the victims of Myanmar in the NHRCT and the resolution was based on the findings of the NHRCT.

66 Carl Middleton, "National Human Rights Institutions, Extraterritorial Obligations and Hydropower in Southeast Asia: Implications of the Region's Authoritarian Turn," *Austrian Journal of South-East Asian Studies* 11, no. 1 (June 2018): 81–87.

67 *Id.*

68 *Id.*

69 NHRCT, "Report No. 1220/2558," *supra* note 52.

70 *Id.*

71 "Thai Companies in Southeast Asia: Access to Justice for Extraterritorial Human Rights Harms: A Legal Analysis," *supra* note 63 at 72.

Both of these cases have resulted in positive outcomes. In the Sugarcane case, few of the victims got the compensation, while others are yet to. Whereas in the Dawei Special Economic Zone case, a resolution was adopted by the Thai Cabinet which eventually will prevent adverse effects by developmental projects on the lives of people in future. These cases, however, were based on the then National Human Rights Commission Act 1999. While these cases are exemplary, they provide the foundational understanding on the practice of extraterritorial obligations by the NHRCT. The current Organic Act is also open to interpretation for the NHRCT to exercise its extraterritorial obligations on the matter of business-related human rights violations. To be specific, section 34 of the Organic Act provides that a person affected by or witnessing an act of human rights violation shall have the right to inform or submit a petition to the Commission.[72] This actually grants victims outside of Thailand with the opportunity to inform or submit a petition to the NHRCT if they are affected or witness an act of human rights violation.

6 Practice of Interface between the Judiciary and the National Human Rights Commission of Nepal

The Constitution of Nepal 2015 and the National Human Rights Commission Act 2012 (the "NHRCN Act") govern the functions, duties, and powers of the NHRCN as an independent and autonomous body. Pursuant to Article 249 of the Constitution, the NHRCN has the power to conduct inquiries into and investigations of human rights violations, and make recommendations for action against the perpetrators, based on information received from any sources, or on its own initiative.[73] The mandates do not prohibit the exercise of extraterritorial obligations for the NHRCN. Further, the interpretation of the broad mandate according to the Paris Principles justifies the possibility of looking into cases having extra-territorial impact.[74] Section 4 of the NHRCN Act has detailed the functions, duties, and powers of the NHRCN, which is in line with the constitutional provisions of Nepal. Unlike the NHRCT, the NHRCN, with the permission of the court, can conduct investigations in any *sub-judice* case

72 Organic Act on the National Human Rights Commission, *supra* note 52, at Section 34.

73 The Constitution of Nepal, 2072.6.3, September 20, 2015, Article 249.

74 Interview with a Staff, NHRCN, January 4, 2023. The author conducted the interview for her PhD thesis, "The Role of the National Human Rights Institutions to Ensure Effective Remedies for Human Rights Abuses by Business Enterprises" (not yet published).

where claims of human rights violations have been made.[75] In practice, the NHRCN does not conduct, or has not conducted, investigations in any *sub-judice* case in the court.[76] Section 17 of the NHRCN Act provides for provisions concerning the implementation of the recommendations by the Commission. Its ability to provide remedies for violations is therefore extremely limited. In the case of non-implementation, it can prescribe a time frame (2 months) within which the government is required to get back to the commission on the actions it has taken in relation to the commission's recommendations.[77] Also, the NHRCN does not have the power to punish the perpetrators based on the recommendations, nor in the case of non-fulfillment of the recommendations by the perpetrators.[78]

There are several provisions in the laws that can be interpreted to constitute aspects of the interface between the judiciary and NHRCN. According to Article 249(2)(c) of the Constitution of Nepal, the NHRCN can make recommendations to lodge a petition in court against a person or institution that has violated human rights. The initiation of the case based on this Article, however, is conditioned upon the approval of the Attorney General ("AG") of Nepal.[79] This requirement under the law was challenged in the Supreme Court of Nepal in 2013. The Supreme Court ruled that as a constitutional body, the NHRCN was capable of and empowered to decide if a case should be pursued, and that the AG could not overrule such decisions.[80] The decision holds high significance, since it recognizes the constitutional status of the NHRCN and strengthens its mandate by making it mandatory for the AG to act on the recommendations of the NHRCN to investigate and, where appropriate, prosecute cases. However, to date, the NHRCN has not used this constitutional power in any kind of human rights violations, not even in gross human rights violations let alone business-related human rights violations.[81] For the cases to be initiated, the AG does not readily follow the recommendations by the NHRCN in practice. They consider that the investigation by the NHRCN is inadequate, since NHRCN lacks police personnel as one of the investigating officials.[82] This provision is applicable

75 Nepalese National Human Rights Commission Act, 2068.10.7, January 21, 2012, Section 4(b).

76 Interview with a Staff, NHRCN, January 4, 2023, *supra* note 74.

77 National Human Rights Commission Act, *supra* note 75, at Section 17(3).

78 Interview with a Commissioner, NHRCN, January 4, 2023, *supra* note 74.

79 National Human Rights Commission Act, *supra* note 75, at Section 17(10).

80 *Om Prakash Aryal v. Council of Minister*, Supreme Court of Nepal, Writ No. 068SWS0063, Decision No. 107561, March 6, 2013.

81 Interview with a Staff, NHRCN, January 4, 2023, *supra* note 74.

82 *Id.*

only for the state party cases. As the new NHRCN Act is in the drafting phase, serious consideration is to be made to amend such a restrictive provision. The use of this power to initiate a state party case where business-related human rights violations overlap with a criminal case can be a strong mechanism to enforce recommendations of the NHRCN.

In Nepal, even though the NHRCN does not go to the court, either on its own or on behalf of the victim, the practice of using the extraordinary jurisdiction of the Supreme Court of Nepal in the form of public interest litigation is recurrent.[83] Frequent public interest litigation in the Supreme Court of Nepal for the commission recommended cases or for the complaints registered in NHRCN is noticeable.[84] Legally, there is no restriction or obstacle in using the extra-ordinary jurisdiction of the Supreme Court of Nepal for such abuses to ensure remedy for the victims.[85]

The NHRCN Act also leaves it open to interpretation on the possible interface between the NHRCN and the court under Section 18. The section mentions the coordination or collaboration of the NHRCN with other agencies; the judicial institutions could be one of those agencies. Section 19 deals with the role of the NHRCN in providing expert services to any agency. This can be interpreted to include the interface of NHRCT with the court for the cases where NHRCN has conducted the investigation in the form of a witness or expert in the case. This section can also be interpreted to incorporate the possible role of the NHRCN as an *amicus curiae* for the cases. The law does not forbid the NHRCN to be an *amicus curiae* in these cases, however, for the business-related human rights violations it is yet to happen.[86] The interface between the court and the NHRCN also exists in the form of legal aid referrals to the concerned institutions on these kinds of human rights violations.[87] Another form of interface, according to Section 22, is the power to refer cases to the court on the matter on which it had launched an investigation or inquiry if the NHRCN is satisfied that the victim shall get justice in the court.[88] This provision needs further clarification. For instance, the grounds for the NHRCN to decide that victim needs to get justice in the court is to be stipulated in the law. In absence of such guidelines, NHRCN's judgment on the matter might be haphazard,

83 *Id.*
84 *Id.*
85 *Id.*
86 *Id.*
87 *Id.*
88 National Human Rights Commission Act, *supra* note 75, at Section 22.

resulting into inconsistent and unpredictable situations for the victims and the NHRCN itself.

7 Conclusion

NHRIs are resource-constrained in almost all countries, particularly in developing countries. Caution should be ensured to not overshadow other roles of NHRIs while exercising the quasi-judicial mandates which open doors for the interface between the judiciary and NHRIs. While there are several ways of interface to ensure that the recommendations of the NHRIs produce actual outcomes, these come with several challenges, as seen in the practice of the NHRCT and the NHRCN. These challenges need to be mitigated in a manner that the functioning of the courts is not jeopardized. There needs to be procedures to avoid duplication of work, for instance, on the matter of the in-depth investigation of the same matter simultaneously without exchanging information. The collaboration between the courts and the NHRIs should be clearly identified. The competence, jurisdiction, and collaboration of both institutions should be outlined in laws to avoid confusion for the victims who seek remedies for business-related human rights violations. The laws, for instance, should clarify matters regarding limitations on the competence of the NHRIs, to decide when cases shall be forwarded to the court at a given stage, or in relation to the implementation of the decision of the human rights institutions. Further, precautions should be undertaken to ensure that complaints do not unnecessarily transfer between different institutions, thereby clogging up a system that may already be over-stretched, under-staffed, and under-funded.

The NHRCT has concretized the extraterritorial obligations of human rights of the Thai state and business-enterprises, which does set up a bar for a developing country like Nepal. Nepal, factually in the current context, is not in a state to make trans-boundary investments in other countries, unlike Thailand. However, the NHRCT's practice regarding the extraterritorial obligations, where victims of other countries were allowed to file complaints in NHRCT, sets a precedent for the victims of Nepal to file cases, for instance, in the investing countries for business-related human rights abuses. But of course, the possible challenges associated to do so still exist.