



ACCESS TO REMEDY IN THE MEKONG REGION

Challenges, Strategies and Recommendations for Change

On September 29, 2024, EarthRights International and Just Ground convened a workshop on access to remedy for corporate human rights abuses in the Mekong region. The gathering created a space for human rights defenders and allies to discuss challenges and strategies, create recommendations for change, and strengthen collaboration and advocacy for remedy and justice in the region.

Over thirty community activists, lawyers and other human rights defenders attended the workshop, including participants from frontline communities, Indigenous communities, and local, national and international civil society organisations. To protect the security of all participants, and encourage frank discussion, participants were informed that the information they shared would be used in this brief, but that individual names would not be used.

The day-long workshop included two panel sessions, one focused on non-judicial, international advocacy and the other discussing transboundary litigation and state-based strategies for seeking access to remedy. The remainder of the workshop focused on creating a vision for what access to remedy should look like in the future, as well as discussion of what points emerged from the panel presentations that demonstrate the challenges and opportunities that exist today.

We hope this document serves as a starting point, and that we will continue to share information and support each other in our struggles for effective remedy for corporate human rights abuses in the Mekong region.



The Current Reality: Multiple Barriers to Remedy

Across the Mekong region, rapid infrastructure development, extractive industries, and forest and wetland conversion for industrial agricultural production threaten the human rights of communities and the health of ecosystems. The Mekong region is home to over 100 Indigenous and ethnically distinct communities. It is often these and other marginalised groups that suffer the most when corporate activities lead to human rights and environmental harms.

The Mekong region is also marked by severe restrictions on civic space. Common tactics of repression include criminalisation of human rights defenders (HRDs), surveillance, detention and travel bans, strategic lawsuits against public participation (SLAPPs), intimidation, and online attacks. Over the past eight years, the broader Asia-Pacific region has consistently been among the two most dangerous regions for HRDs focused on corporate activity. The repression in Laos and Myanmar is particularly severe; HRDs face the threat of arbitrary arrests, torture, and summary executions.

In this context of shrinking civic space, companies and state-owned enterprises are capitalising on export-driven economic policies and natural resource extraction. In Laos for example, more than 1,300 businesses have flocked to its 21 special economic zones, where regulatory oversight is severely lacking, even by the Laos government's own admission.

In Myanmar, after the illegal military takeover of the democratically elected government in 2021, state and private enterprises have continued to profit from oil, gas and mineral resources without taking adequate measures to prevent contributing to the regime's human rights and environmental abuses.

Despite the involvement of multiple culpable actors – operators at the site of the harm, buyers upstream in the supply chain, and investors who provide the financing – frontline communities face huge challenges in accessing remedy. Lack of adequate legal protections or weak rule of law often foreclose justice in national courts. Even when cases move forward,

the burden of proof remains with affected communities, despite the fact that companies have vastly greater financial, technical and legal resources. This same power imbalance affects efforts to seek remedy from non-judicial grievance mechanisms, which emphasise negotiation and dialogue and have a poor record on providing remedy. In addition, both court cases and non-judicial processes can take many years before achieving any kind of result, yet there is a lack of interim protections for frontline communities during the process. Partial outcomes can cause internal conflicts or otherwise derail efforts to obtain full remedy.

At the regional level, the Association of Southeast Asian Nations (ASEAN) lacks a human rights court. And, despite years of negotiations on a binding treaty, there are no enforceable business and human rights standards at the international level.

Forging Pathways To Remedy

The panel presentations demonstrated how human rights defenders and legal advocates have responded to the justice challenges in the Mekong region with creativity and determination. The presentations highlighted the importance of supporting frontline communities and presented innovative legal strategies and advocacy efforts. These are summarised below.

Direct Support to Frontline Communities

Several panellists highlighted the importance of ensuring that frontline communities have the information and support they need to organise to seek remedy. For example, when the Dawei SEZ project in Myanmar led to forced evictions without compensation, frontline communities organised to speak at public meetings, hold large demonstrations, and block access roads. Their resistance, which has now lasted over a decade, contributed to stalling the project's further development. In Kachin State in Myanmar, in response to community mobilisation in 2023, local leaders cancelled new rare earth mining projects, due to concerns over pollution, biodiversity loss, landslides and harms to human health.

Innovative Litigation

Panellists discussed two recent cases in Thai courts that are breaking new ground in access to remedy. The first is one of the earliest class action lawsuits in Thailand, and the first case in Thai civil court against an alleged parent company for acts committed by a subsidiary in a foreign jurisdiction. The case seeks remedy for over 700 families who were forcibly evicted to provide land for a sugar plantation operated by the alleged subsidiary of Asia's largest sugar producer, and has set a standard that class actions for transboundary harms are possible in Thailand.

The second case addresses air pollution during the burning season in Northern Thailand, which has dangerous levels of tiny particulate matter (PM 2.5) that cause respiratory problems and other health issues. In January 2024, the Chiang Mai Administrative Court ruled against Thailand's prime minister and the National Environmental Board (NEB) for negligence and delay in addressing the PM 2.5 haze issue. It ordered them to develop an effective emergency plan within 90 days to prevent, control, and alleviate the dangers of PM2.5 pollution. Although the NEB has appealed and the prime minister has not yet issued the emergency plan, the case remains an important precedent.

Parliamentary Advocacy

The presentations also included legislative advocacy in relation to state-controlled enterprises that are causing or contributing to human rights abuses. A panellist spoke about Myanmar's former membership in the Extractive Industry Transparency Initiative and how it aided legislative efforts to reform the oil and gas and jade industries there, but noted that their modest gains were demolished as a result of the military coup in 2021. In Thailand, advocates have lobbied the Thai legislature to cease payments from Thai state-owned energy enterprises to the military junta-controlled Myanmar Oil and Gas Enterprise (MOGE) and instead pay into an account for safekeeping pending the return of democratic rule in Myanmar. As a result of these efforts, a legislative report on the issue is forthcoming, and Thailand's Anti-Money Laundering Office (AMLO) has recommended

that all Thai banks conduct human rights due diligence (HRDD) for all Myanmar-related transactions.

Using Existing Human Rights Mechanisms

Thailand is now the only country in the Mekong region with an accredited national human rights institution, after Myanmar's was suspended by the Global Alliance of National Human Rights Institutions in 2023. One panellist discussed a complaint to the National Human Rights Commission of Thailand (NHRCT) against Thai developers and investors for environmental and human rights violations connected to the Dawei SEZ. It is among several complaints that have been submitted to the NHRCT regarding Thai outbound investment. The NHRCT conducted an investigation and submitted a report to the Thai cabinet, which contributed to Thailand's endorsement of the UN Guiding Principles on Business and Human Rights and development of a national action plan (NAP) for their implementation.

Another presentation shared information on the Thai NAP on business and human rights, which focuses on four key areas: 1) land, natural resources and the environment; 2) HRDs; 3) transboundary investment and multinational enterprises; and 4) labour. It directs the Thai Ministry of Justice to conduct a study and propose recommendations to lift barriers to justice for communities in Thailand and other countries affected by the activities of Thai companies, among other recommendations. As a result of this study, Thailand is planning to draft a HRDD law and has applied for OECD membership.

The various UN mechanisms available to support efforts to access remedy were also presented. These include committees created by treaty bodies, Universal Periodic Review, and the special procedures of the UN Human Rights Council. Like Thailand's NAP and the NHRCT, these mechanisms only issue recommendations. Yet, in repressive contexts like the one in Laos, advocates have turned to UN special procedures and the Laos Universal Periodic Review because there are few other options available to pursue remedy.

Seeking Remedy from Companies Upstream in the Supply Chain

Panellists discussed seeking remedy from actors in the supply chain connected to a project that is causing harm. For example, the presentation on rare earth mining in Kachin State discussed how those minerals are used in magnets that are used in electric cars and wind turbines, technologies promoted as part of the just transition from fossil fuels. Advocates are calling on the companies that have rare earth minerals in their supply chain to ensure that their supply chains are free of Myanmar rare earths and provide remedy for the abuses that have been connected to mining them.

Another panellist described the 16-year struggle of frontline communities in Koh Kong, Cambodia to receive remedy for land confiscated to create an industrial-scale sugar plantation. After pursuing multiple strategies, including trans-boundary litigation against the multinational companies that purchased the sugar, villagers finally received a settlement, although for some who incurred debts while awaiting remedy, it was too little, too late.

Pursuing Investors Who Finance Projects That Lead to Harm

Advocates are also turning to the investors that finance projects for remedy when those projects lead to human rights and environmental abuses. A panellist explained how, in the case of the Dawei SEZ, in addition to the complaint with the NHRCT, frontline communities also pushed for remedy from Thailand's Neighbouring Countries Economic Development Cooperation Agency (NEDA), which was considering funding the vital road that would connect the SEZ to Thailand. Their advocacy led NEDA to create an official channel for human rights complaints, and adopt requirements for human rights due diligence and impact assessment prior to funding projects.

A Vision for the Road Ahead and Recommendations for Change

Together we imagined, if we convened again in five to ten years and in that time accomplished

everything we hoped for, what would access to remedy look like, and what would have changed to make that possible. The vision of access to remedy that emerged centred on the six themes and several additional specific recommendations, shared below.

Shifting Power

Indigenous people and other frontline communities have the tools they need to prevent and respond to violations of their human rights and can effectively use those tools.

- Governments recognize the rights of Indigenous people and include them in policy making.
- Remedial mechanisms are designed by frontline communities and have rapid response capability.
- Frontline communities are able to file complaints to seek remedy without technical or legal assistance.
- Companies pay into a compensation fund to remedy environmental and human rights abuses, with representatives of frontline communities on the board.
- Compensation is comprehensive and includes social and emotional well-being.

Mandatory Measures

States enact mandatory human rights due diligence with strong provisions on remedy and improve implementation of existing measures, such as environmental impact assessment (EIAs) regulations.

- Parent companies and state enterprises have a clear legal obligation to provide remedy for abuses committed by subsidiary companies in another state's jurisdiction.
- When there is a conflict of laws between the jurisdiction of a parent company or state enterprise and the jurisdiction of the subsidiary directly connected to human rights abuses, the law that is most protective of the right to remedy should apply.
- Publicly listed companies are required to report on their implementation of business and human rights standards.
- EIA regulations cover transboundary and cumulative impacts.

Prevention

There are effective measures in place to prevent harm before it occurs – including the recognition of the rights of Indigenous people and their inclusion in policy making, and the mandatory measures mentioned above.

- Projects have robust monitoring systems to prevent human rights abuses and environmental harm.
- Projects employ the latest technologies to minimise environmental impact.

Civic Freedom and Access to Information

Frontline communities can voice dissent freely, safely meet with legal counsel, and easily obtain and understand information related to projects' potential environmental and human rights impacts.

- States adopt laws against Strategic Lawsuits Against Public Participation (SLAPP) and other forms of criminalisation.
- Companies are required to disclose sufficient information so that supply chains are transparent and traceable.
- Journalists can report on potential impacts and environmental and human rights violations without fear of repression from the state or the companies involved.

Access to Courts

Communities seeking remedy in human rights and environmental cases have ready access to impartial courts that are adequately funded.

- Judges are trained on human rights and environmental issues and know how to apply them to cases.
- CSOs have standing to bring environmental cases on behalf of frontline communities.

A Stronger ASEAN

The Association of Southeast Asian Nations (ASEAN) has treaties and institutions in place to effectively address human rights and environmental abuses in the region.

- There is a binding international treaty on the extraterritorial obligations of companies along with domestic enforcement.
- ASEAN adopts and implements a robust Environmental Rights Declaration after an inclusive consultation process.
- The ASEAN Intergovernmental Commission on Human Rights investigates and addresses human rights cases.

This list is a starting point. Not everything that is important to improving access to remedy in the Mekong region could be raised and discussed in the short time we had together in the workshop. As one of our participants shared, "access to remedy is a marathon," and it's our hope that the workshop, and this summary briefer, are the beginning of a longer conversation and collaboration.