



# Translating the BHR National Action Plan into practice in Indonesia<sup>\*</sup>

*By Consortium for Agrarian Reform (KPA)*

## Country trends and impact of agricultural investment and business on land rights

### Land conflicts

The United Nations Guiding Principles on Business and Human Rights (UNGP BHR), endorsed by the UN Human Rights Council in 2011, consist of 31 principles implementing the United Nations *'Protect, Respect, and Remedy'* framework on the issue of human rights and transnational corporations and other business enterprises. These Guiding Principles provided the first global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity. The UNGP BHR is especially relevant in Indonesia, as agricultural investments by transnational and State companies have become pervasive in the country.

Land conflicts,<sup>1</sup> mainly between small farming communities and corporations, have become widespread across Indonesia. This escalated during the *reformasi* era, due to the opening up of political space and the growth of social movements on land issues (Susan, 2015). KPA notes that during the last 11 years since 2004 to 2015, there have been 1,770 agrarian conflicts with a conflict area of 6,942,381 hectares, involving 1,085,751 households. Given this data, it can be stated that on average, an agrarian conflict erupts in Indonesia once every two days.

<sup>\*</sup> This is an abridged version of the paper prepared by the Konsorsium Pembaruan Agraria (KPA) for the regional initiative *"Defending Land Rights and Human Rights Defenders."* This document summarizes the major issues and recommendations emanating from the workshops organized by KPA and Komnas HAM in partnership with members of the National Engagement Strategy-Indonesia (NES Indonesia). It builds on the findings and recommendations of the baseline study prepared by KPA for the project *"Promoting the National Action Plans on the implementation of the UNGP on Business and Human Rights in relation to land rights issue"* with support from OXFAM Indonesia. For more details, contact [kpa.seknas@gmail.com](mailto:kpa.seknas@gmail.com)

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<sup>1</sup> Land conflict is different with land dispute. Land conflict refers to the land dispute with a massive impact to social and political life of a community. See Head of the National Land Agency Decree No. 3 of 2011 about Assessment and Land Cases Management.



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Land conflicts bring different forms of human rights violations. Regarding civil and political rights, the rights to freedom of expression, security, access to information and freedom of movement are often violated. State violence related to land conflicts has been described in the form of

intimidation, harassment, criminalization, arbitrary arrests, torture, and shooting. A number of the reports show that human rights defenders face criminalization, including arbitrary arrests, terrorism, and violence.

Meanwhile, the economic, socio-cultural rights that are violated include the right to land, water, environment, labor, social security, health, education, housing and cultural heritage. The forms of infringement include land grabs, forced evictions, environmental pollution, discrimination, and corruption.

### **Palm oil plantations**


In recent years, palm oil has drawn increased attention due to the environmental impacts caused by forest and peat land conversion, as well as the social impacts linked to land disputes and conflict. In 2012, out of 232 agrarian conflicts reported, more than half (119) were related to the palm oil industry. In 2014, a total of 591 land conflicts in 22 provinces and 143 districts were associated with oil palm plantations (Sawit Watch, 2014). The conflicts were commonly between local communities/indigenous peoples and plantation companies.

### **Industrial forests**

A KPA scoping study shows that many cases of land conflict also occur in the industrial forest sector. A typical conflict between communities and companies manifests a similar pattern with the land conflict in palm oil industries. Currently, there are hundreds of HTI companies that have been involved in land conflict with communities, mainly peasants and indigenous peoples.

### **Corruption and lack of Free, Prior, and Informed Consent (FPIC)**

Many land disputes start even before company operations begin. Corruption issues arise during the process of license and permit distribution. WALHI, an environmental advocacy NGO, revealed that many large-scale



plantation companies engage in land clearing without a release permit from forest areas, with altered Environmental Impact Assessment (EIA) documents, or with permits stating a different purpose than what is actually being undertaken in the field. In addition, many plantation companies also operate in areas outside their Land Use Rights Area or operate without Land Use Right. The acquisition of customary lands is often facilitated by corrupt practices such as bribing or coercion of village heads and community leaders.

### **Police and military involvement**

A number of reports also found that many plantation companies have been engaging military and police personnel to secure their businesses. The justification for this involvement is Presidential Decree No. 63/2004 or the Security Measure for National Vital Objects. However, this decree lacks clarity, especially in terms of its source of its funding, how it will be monitored, and what standard operational procedures are involved. In addition, in some cases, the involvement of police and military is not clearly justified. As reported by media, there are a number of cases related to the lack of accountability in cases of police and military involvement in providing security to plantations companies (West Papua Daily, 2017; WALHI, 2018).

### **Banks and financial institution involvement**

A growing concern over the impact of agribusiness activities led to the finding of indirect involvement of banks and financial institutions in the violation of human rights in the field. In 2017, Rainforest Foundation Norway (RFN) released a report on the complicity of Nordic financial institutions in the devastating environmental and rainforest destruction in Indonesia. The RFN revealed that about US \$1.3 billion was invested by Norway's largest banks in four Indonesian banks that finance palm oil companies allegedly involved in human rights violations, land conflicts, and environmental destruction (Rainforest Foundation Norway, 2017).

## **Indonesian laws and policies related to land and agriculture**

### **Problems of land governance**

Article 33 (3) of the Indonesian Constitution and Article 2 (1) of the Basic Agrarian Law assert that earth and airspace are controlled by the State




in the interests of the prosperity of the Indonesian people. However, sectoral arrangements on land use policy and the application of State land law often undermine people's interests in practice. Sectoral arrangements are regulated by the State through sectoral law, such as Law No.26/2006 on Spatial Planning, Law No. 41 of 1999 on Forestry, Law No. 18 of 2003 on Plantation, Law No. 7 of 2004 on Water Resources and Law No. 27 of 2007 on Management of Coastal Areas and Small Islands. In addition, there is Law No. 2 on the Land Acquisition for Public Interest and the Presidential Regulation No. 71 of 2012 that provides some clarification on land acquisition for public interest. This law lists public places which fall under the category of this law namely: roads, toll roads, railways, stations, public communication facilities, etc. Both regulations impose an obligation on all institutions that want to acquire land for public infrastructure, to formulate land-acquisition documents, which consist of planning, spatial suitability, land location, land area, land status, and land appraisal estimates.

All these sectoral laws contain problems such as unclear mechanisms for land acquisition by plantation companies, overlapping allocation of areas for different purposes, and failure to recognise the customary law. The plantation law, before being reviewed by the Constitutional Court, has been used by companies to criminalize peasants. The plantation law allows a 95-year leasing period and denies land restitution when the lease expires. In summary, overlaps and contradictions between national laws, the Constitution, and international law is one of the main sources of land conflicts in Indonesia.

### **Remedies for land conflicts between communities and corporations**

- ❑ **Judicial mechanism.** Commonly, people use litigation to claim their rights in land disputes to seek compensation, and to challenge government policies and permits on land utilisation and rights granted to corporations.
- ❑ **Administrative court.** The administrative court is a redress mechanism frequently used by indigenous peoples, in particular, to challenge plantation business permits and land utilization rights granted by local governments to palm oil corporations.
- ❑ **Civil court.** The civil court may also serve as an avenue to access remedies, for instance by utilizing Article 1365 of the Indonesia Civil Code, which states that in any illegal action that caused damage to others, the



parties that caused the damage are obliged to pay or indemnify the damages. 'Parties' in this case refer to both individuals and corporations. Some land dispute cases between indigenous people and palm oil corporations have been settled through this mechanism.

- ❑ **Criminal process.** On the issue of plantations, Law Number 39 of 2014 criminalizes the illegal management, use, occupation, and/or holding of indigenous land for plantation purposes (Art. 55(b)). There are also more general provisions under Article 2 Law No. 51/PRP/1960 and the Indonesian Criminal Code penalizing anyone who occupies land unlawfully (Article 167, 385 Penal Code).

### State-based non-judicial mechanisms

- ❑ **Alternative dispute resolution.** Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution provides an avenue for parties to settle their dispute outside the judicial system through consultation, negotiation, conciliation, or utilization of expert opinions.
- ❑ **Environmental compliance.** On environmental issues, Law No. 32 of 2009 on Management and Environmental Protection requires a number of different institutions to monitor compliance. This includes local government at the provincial and district or city levels, the Ministry of Environment and other related ministries, such as the Commission for Environmental Impact Assessment, police, prosecutors, and courts.
- ❑ **Land conflict resolution under the National Land Agency.** Decree No. 3 of 2011 on Assessment and Land Cases Management provides an avenue for parties to settle their disputes. However, in terms of effectiveness, a number of studies have shown that the National Land Agency is ineffective and unable to resolve the majority of conflicts within a reasonable time (Susan, 2015).
- ❑ **Indonesian Sustainable Palm Oil (ISPO).** Indonesian Sustainable Palm Oil (ISPO) is a governmental safeguard system and policy adopted by the Ministry of Agriculture (ISPO, 2013). The purpose of the system is to address environmental issues in the palm oil industry. So far, an area of 1.9 million hectares of oil palm plantations, which can produce up to 8.2 million tons of crude palm oil, has been certified under the ISPO



scheme (Indonesia Investments, 2017). Only 16.7 percent of Indonesia's oil palm plantations is ISPO Certified.

- ❑ **Komnas HAM.** Komnas HAM is the Indonesian Human Rights Commission. While its mandate encompasses a broad array of roles with regards to implementing the UNGP BHR, it lacks the necessary enforcement authority. Many of the Commission's recommendations have not been followed by the government or other parties. Komnas HAM acknowledges that it can only secure limited support and cooperation from the government. In order to strengthen its mandate, Komnas HAM has proposed the revision of the Human Rights Law.

## Operationalization of UNGP BHR: Various Initiatives

### Indonesian government

The Indonesian government launched several initiatives to implement the UNGP BHR. The Coordinating Ministry for Economic affairs has been acting as a focal point to promote, incorporate, and implement UNGP BHR in Indonesia. Their mandate is to synchronise economic policy and regulation with the UNGP BHR (Ministry of Foreign Affairs, 2018).

The Ministry of Foreign Affairs organized a national seminar on business and human rights last January 2018, and a national symposium in September 2015 (Ministry of Foreign Affairs, 2016). With ASEAN Intergovernmental Commission on Human Rights (AICHR), Indonesia maintains its position to support the ASEAN Action Plan on Business and

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Human Rights. In the UN forum, Indonesia is also campaigning to change the nature of the UNGP BHR from voluntary to internationally legally binding.

For its part, the Ministry of State-Owned Enterprises convened a consultation on BHR in April 2018, inviting 27 State-owned enterprises to create adequate mechanisms to integrate human rights principles in their respective companies (JDIH, 2018).

Several local governments are also initiating the implementation of human rights principles in their regions.



## **Komnas HAM and National Action Plan on Business and Human Rights**

Komnas HAM has been playing a significant role in pushing for the adoption of the BHR framework not only in Indonesia but in Southeast Asia as well. However, the Commission's activities in Indonesia have so far been focused on CSOs; there is a need to direct its attention to the business sector. To this end, cooperation with other institutions such as universities, State-owned corporations, the Indonesian Chamber of Commerce, and the larger business community could enhance the Commission's effectiveness.

Komnas HAM together with some CSOs, initiated the establishment of the National Action Plan on Business and Human Rights in Indonesia. This NAP on Business and Human Rights was launched under Komnas HAM Regulation No. 1 Year 2017, on Ratification of the National Plan of Action on Business and Human Rights, State News No. 856 (Sanjaya, 2017). However, Indonesian law provides that the Commission can only propose recommendations to the government.

## **Financial Services Authority (OJK) Roadmap on Sustainable Financing**

In early 2014, the Financial Services Authority (OJK) launched a Sustainable Finance Roadmap for financial service industries aiming to develop a concrete action plan for Indonesian banks to support an environmental-friendly funding supply. In July 2017, OJK launched OJK Regulation No. 51/POJK.03/2017 on the Implementation of Sustainable Finance for Financial Services Companies, Issuers, and Public Companies. This regulation underlined the financial industry's commitment to implement the Indonesian environmental law.

## **Corporate initiatives to address land conflict**

- ❑ ***Indonesia Business Council for Sustainable Development (IBCSD)***. IBCSD is a company-led initiative in promoting sustainable development in Indonesia. This council was established through cooperation between KADIN Indonesia and the World Business Council for Sustainable Development (WBCSD). In order to address land conflicts between companies and communities, the IBCSD established the Conflict Resolution Unit (CRU), a program which provides and facilitates mediation and long-term settlement (IBCSD, n.d.; CRU, n.d.). To date, there is no action plan released to the public on human rights related principles.




- ❑ **Indonesia Global Compact Network (GCN) and the Indonesian Working Group on Business and Human Rights.** On 8 April 2006 about twenty-two companies and organizations in Indonesia declared to support, promote, and implement the United Nations Global Compact Principles (Indonesia GCN, n.d.). They established a local network, the Indonesia Global Compact Network, which has been actively promoting business and human rights issues even beyond the UN Global Compact. On 7 April 2017, IGCN established the Business and Human Rights Working Group comprised of representatives from businesses, NGOs and universities. Together with Oxfam, INFID, and other NGOs, IGCN established multi-stakeholder collaboration and organised periodic discussions to address business and human rights issues.
- ❑ **Indonesian Sustainable Palm Oil (ISPO).** The Indonesian Sustainable Palm Oil (ISPO) is a standard palm oil system used by the Indonesian government. ISPO was established in response to the 2008 Roundtable on Sustainable Palm Oil (RSPO). Like ISPO, the RSPO is a global forum that revives BHR principles, and provides a Human Rights Working Group. ISPO and RSPO created high standards on human rights and environmental principles for their members (RSPO, 2013).

The RSPO was initiated by environmental and human rights activists concerned about the social and environmental conditions that have occurred due to oil palm expansion mainly in Indonesia and Malaysia in 2004. The ISPO adopted almost all RSPO principles and criteria, the difference being, that RSPO is voluntary in character, and ISPO is a platform with supposedly mandatory social and environmental principles to be implemented by oil palm companies in Indonesia (ISPO, n.d.).

### CSO-led Initiatives

Currently, many NGOs and civil society coalitions are working on business and human rights issues. Within the land and agriculture sector, KPA, ELSAM and YLBHI have been working on the intersection of land conflicts and the violation of human rights. Others, such as Sawit Watch have been focusing on monitoring and advocacy work on the impact of palm oil industries. Sawit Watch and Forest Peoples Programme have sent a letter to the UN High Commissioner for Human Rights in response to the Ruggie Report. In their letter, they called for the UN





Secretary-General on Business and Human Rights to include in the report a discussion on human rights conditions in palm oil plantations (Forest Peoples Programme and Sawit Watch, 2012).

There is also the Indonesia Focal Point for Legally Binding Treaty Initiative, a coalition of Indonesian NGOs campaigning for a legally binding UN Business and Human Rights instrument. In July 2015, they expressed their concerns during the First Session of the Open-ended Inter-governmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (IGJ, 2016).

### **Recommendation: Transform National Action Plan into measurable real action**

The task of protecting human rights is the main responsibility of the State, although businesses have a responsibility to uphold human rights as well. Human rights and their implementation cannot be reliant only on voluntary mechanisms, even though the availability of the venues for such efforts should be ensured.

In the current National Action Plan (NAP), the right to land is integrated in the rights to adequate food and environment. The Plan needs to be revised, to clearly establish land rights as human rights. This will enable clear follow-up actions vis-à-vis the three main actors mentioned in the NAP – local government, medium-scale businesses, and State companies.

Moreover, the Plan has to become more effective, with measurable performance targets and a budget. This should begin with the 2019 work plan and budget. The role and power of Komnas HAM also needs to be expanded, and the resources allocated to it increased to enable it to be more effective. Komnas HAM needs to position itself in the frontline of integrating land rights and human rights principles into policies and institutions.

Local governments should be encouraged to produce local regulations with human rights principles, especially because the regional government is the spearhead of the State in providing services to the rural farmers.


Civil society should continue to collect evidence and generate case studies on the implementation of UNGP BHR in the agriculture sector. It should also continue to advocate the formulation of NAPs by government while continuing to monitor the implementation of current NAPs on Business and Human Rights.



Lastly, civil society should strengthen its capacity especially in understanding the corporate actions, complex structures, and supply-chains that affect human rights. ■

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