

# Fighting to move from voluntary to mandatory:

## 2020 Status of National Action Plan for UNGPs in Indonesia

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### Introduction

The traditional concept of human rights emphasizes that human rights violations are committed by the State because of its inability to protect, to respect and to fulfill. Meanwhile, non-State actors are commonly referred to as parties who do not respect human rights or simply perpetrators of criminal acts. This kind of *State-centric view* is still dominant today (ELSAM: 2016).

At present, such understanding of human rights is certainly not sufficient. Moreover, the world is increasingly connected economically. In today's global economic order, companies can operate globally and are very influential in the socio-political and legal fields. In fact, company's profit-seeking activities or company bankruptcy can cause big problems economically and politically in a country.

The increasing influence of business has prompted a number of ideas so that business entities are positioned as actors responsible for aspects of human rights. This idea is growing and encouraging the birth of global guidelines on business and human rights.

In 2011, the UN Human Rights Council adopted the UN Guiding Principles on Business and Human Rights (UNGPs). This set of principles was written by John Ruggie, Special Representative of the Secretary General of the United Nations. This guideline is not legally binding. Even so, all countries and corporations are morally bound and must, in all of their activities, pay respect to the human rights values adopted in the John Ruggie guiding principles.

The three pillars in the guiding principles have become the main foundation for States and companies in dealing with the impact of human rights violations by corporations, namely:

- Pillar I describes the State's obligation to protect individuals from the impact of human rights violations related to corporations and summarizes a number of operational principles that must be applied by the State to implement its obligations.
- Pillar II identifies the company's responsibility to respect human rights and describes the due diligence process the company must undertake to fulfill its responsibility.
- Pillar III stresses and elaborates that these guiding principles have been supported by the State, private sector and civil society.

These guiding principles have become the main reference for preventing, reducing and remedying the impact of human rights violations caused by business activities. The three pillars of UNGPs are then brought down again in the form of a National Action Plan (NAP), which is intended to be more applicable at the national level.

## The development of NAP for UNGPs in Indonesia

The Indonesian National Commission on Human Rights (Komnas HAM) has played an important role in encouraging the adoption of the BHR framework not only in Indonesia but also in Southeast Asia.

Komnas HAM is also active in disseminating and developing the concept of business and human rights. Together with civil society organizations and human rights organizations, they initiated the formation of a National Action Plan for the UN Guiding Principles on Business and Human Rights (NAP for UNGPs) in Indonesia.

The NAP for UNGPs was issued under Komnas HAM Regulation No. 1 of 2017 that provided for the Ratification of the National Action Plan for Business and Human Rights, State Gazette No. 856.

According to the government, Indonesia supports and is committed to implementing the UNGPs as part of human rights regulations in Indonesia.

In fact, Presidential Regulation No. 33 of 2018 amending the 2015 to 2019 National Action Plan for Human Rights already included Business and Human Rights.

However, existing policies and steps have been limited to laying out efforts to disseminate the relational foundations between business activities and human rights (El Muhtaj, 2019) and have not emphasized the responsibility of the State and corporations to build a holistic policy capable of accelerating inclusive, equitable development and justice (Wagiman, 2000).

According to the government, there are matters related to NAP for UNGPs, namely:

- Action No. 10: facilitating local governments in recognizing indigenous peoples and their territories;
- Action No. 14: raising awareness for all stakeholders regarding business and human rights (guidance and dissemination on business and human rights);
- Action No.15: raising awareness of legal aid for indigenous peoples;
- Action No. 27: implementing Presidential Regulation No. 88 of 2017 concerning Settlement of Agrarian Disputes in Forest Areas; and,
- Action No. 41: providing nursing rooms in government offices.

However, this Presidential Regulation, which is directly related to business and human rights (BHR), is just a mandate to increase government policymakers' understanding of BHR.

Given the enormous amount of work needed to advance the three pillars of UNGPs in Indonesia, it seems that the mandate of the Presidential Regulation is far from adequate. Even then, several ministries have already carried out a number of consultations and discussions related to BHR.

In 2017, the government of Indonesia, through the Ministry of Foreign Affairs, held a National Coordination Meeting to gather inputs from all relevant stakeholders (government, companies, civil society, and national human rights institutions) to help draft the NAP for UNGPs.

On 19 January 2018, the Ministry of Foreign Affairs organized a National Symposium on Business and Human Rights, a follow up to similar meetings in 2015 and 2017.

The Ministry of BUMN (State-owned Enterprise) also held a consultation on BHR in April 2018. It invited 27 BUMN representatives to encourage companies to put in place more adequate mechanisms to uphold and protect human rights principles.

Then, in May 2018, the Ministry of Law and Human Rights collaborated with UNDP Indonesia to carry out a Training of Trainers on Business and Human Rights for State civil servants. This training course involved various inter-ministerial State civil servants, including the Coordinating Ministry for Economic Affairs, the Ministry of Foreign Affairs, and the Ministry of Law and Human Rights.

There are now 20 State civil servants trained by experts in BHR. They have, in turn, produced several trainer candidates for Business and Human Rights who can provide an understanding of Business and Human Rights for the Central Government and Local Governments. The Ministry of Law and Human Rights has also developed a module on BHR for State Civil Servants.

The Indonesian government, together with the ASEAN Intergovernmental Commission of Human Rights (AICHR), also expressed its support for the ASEAN Action Plan for Business and Human Rights. In a United Nations forum, Indonesia campaigned to change the nature of the UNGPs from voluntary to internationally binding.

### *Other Business and Human Rights Initiatives*

- Kadin and BHR

According to the Indonesian Chamber of Commerce (Kadin), BHR cannot be separated from the original idea of corporate social responsibility (CSR) that is centered on philanthropic activities such as giving donations.

In broad terms, CSR is a concept that says a company is responsible for managing the impact of its products and services on the environment and the communities in which it operates.

Socially responsible behavior is demonstrated by, among others, ethical and transparent behavior, and compliance with applicable laws and regulations throughout its operations.

However, according to Kadin, social responsibility has been understood differently by companies and stakeholders. These differences can be ironed out by adhering to ISO 26000, which covers seven core subjects: a) organizational governance; b) human rights; c) labor practices; d) environment; e) fair operating practices; f) consumer issues; and, g) community engagement and empowerment.

As such, Kadin said members can be in line with BHR if they implement ISO 26000.

- Roadmap for Sustainable Financing from the Financial Services Authority (FSA)

In early 2014, the Financial Services Authority (FSA) launched a Sustainable Finance Roadmap for the financial services industry with a specific target of developing concrete actions for Indonesian banks to support environment-friendly projects.

Then in July 2017, FSA launched FSA Regulation No. 51/POJK.03/2017 concerning Implementation of Sustainable Finance for Financial Service Companies, Issuers, and Public Companies. This regulation requires the bank and non-bank financial industry to issue their Sustainable Finance Action Plan to the FSA. This regulation underscores the financial industry's commitment to implement Indonesia's environmental laws.

As for corporate Initiatives in dealing with agrarian disputes, the Indonesia Business Council for Sustainable Development, which was formed in collaboration with KADIN Indonesia and the World Business Council for Sustainable Development (WBCSD), established a Conflict Resolution Unit (CRU).

Its aim is to provide and facilitate long-term mediation and resolution of agrarian-related disputes. To date, however, no action plan on human rights-related principles has been released.

- Indonesia Global Compact Network (IGCN) and the Indonesian Working Group on Business and Human Rights

On 8 April 2006, 22 companies and organizations in Indonesia committed to support, promote and implement the principles of the United Nations Global Compact. They formed a local network of the UN Global Compact called Indonesia Global Compact Network (IGCN).

Since its founding, the IGCN has been actively promoting Business and Human Rights issues beyond the UN Global Compact.

On 7 April 2017, IGCN formed a Business and Human Rights Working Group consisting of representatives from businesses, NGOs and universities. Together with Oxfam, INFID and other NGOs, IGCN maintains multi-stakeholder collaborations and organizes regular discussions to discuss business and human rights issues.

- Indonesian Sustainable Palm Oil (ISPO) and Roundtable on Sustainable Palm Oil (RSPO)

Indonesian Sustainable Palm Oil (ISPO) is the palm oil standardization system used by the Indonesian government and was founded in response to the dynamics taking place at the *Roundtable on Sustainable Palm Oil 2008* (RSPO).

Like ISPO, the RSPO is a global forum that champions the UNGPs and is akin to a Human Rights Working Group. ISPO and RSPO set high standards of human rights and environmental principles for their members.

RSPO was initiated in 2004 by environmental and human rights activists who are concerned with the social and environmental impact of palm oil expansion, especially in Indonesia and Malaysia. ISPO adopted almost all of the RSPO principles and criteria. The difference is, RSPO is voluntary while ISPO is mandatory and should be applied to palm oil companies in Indonesia.

ISPO is based on a BHR agenda. Companies that do not meet the requirements face sanctions such as suspension of their membership. Unfortunately, membership suspension was not seen as a strong enough deterrent by a number of companies, thus the continued violations of RSPO and ISPO standards.

In response, ISPO and RSPO released certificates to inform consumers about sustainable products so that they can make an informed purchasing decision. However, this too was considered ineffective in stopping human rights and environmental violations by palm oil companies.

- Initiatives of NGOs

Today, many CSOs and civil society coalitions are working on business and human rights issues.

In the agrarian and agricultural sector, KPA, ELSAM and YLBHI have worked on issues related to agrarian conflicts and human rights violations. Sawit Watch has focused on monitoring the impact of the palm oil industry.

Sawit Watch and the Forest People Program have sent a letter to the UN High Commissioner for Human Rights in response to the Ruggie Report. In the letter, they called on the UN Secretary General for Business and Human Rights to include their discussions in a report on the condition of human rights in oil palm plantations.

There is also the Indonesian Focal Point for the Initiative for Legally Binding International Agreements, a coalition of Indonesian NGOs that campaigns for legally binding instruments and agreements at the UN level.

At the UN Forum held from 6 to 10 July 2015, they expressed their concerns about the First Session of the intergovernmental working group on transnational companies and other business enterprises in relation to human rights.

## Direction of National Action Plan on Business and Human Rights, 2020 to 2024

In 2017, the Indonesian government, through the Ministry of Foreign Affairs, held a National Coordination Meeting to gather inputs needed from all relevant stakeholders (government, companies, civil society, and national human rights institutions) to prepare the NAP for UNGPs.

In the same year, the Coordinating Ministry for Economic Affairs was appointed the National Focal Point for Business and Human Rights in Indonesia. Its task has since been taken over by the Ministry of Law and Human Rights, which is overseeing the preparation of the 2020 to 2024 Business and Human Rights Roadmap.

Several activities carried out by the Ministry of Law and Human Rights as focal point include holding the Multi Stakeholders Forum in Bogor in February 2019.

The Multi Stakeholders Forum produced 10 recommendations for Indonesia to implement the UNGPs, to wit:

- Spell out guidelines for awareness raising efforts among stakeholders at all levels;
- Adopt policy commitments to develop a NAP for UNGPs or a Chapter on Business and Human Rights in the National Action Plan on Human Rights;
- Consolidate existing baseline assessment efforts and fill in data gaps;
- Align the NAP for UNGPs with the SDGs;
- Support the continuation and enhancement of ongoing human rights-related certification initiatives;
- Develop a communication strategy to communicate evidence of progress in Indonesia more effectively;
- Engage in regular consultations with CSOs and the private sector;
- Break down the road map into actionable tasks and assign a responsible party to carry out each task;
- Agree on the timeframe and roadmap targets; and,
- Adopt proper Standard Operating Procedures.

The first draft of the 2020 to 2024 Business and Human Rights Roadmap was presented at the Limited Consultation Discussion in Jakarta that gathered 13 related Ministries/Institutions, the Indonesian Entrepreneurs Business Association, the European Entrepreneurs Business Association (Switzerland) in Indonesia, development partners and other UN Agencies.

Participants provided inputs to help make the targets and indicators more focused, measurable and impactful. This discussion also identified priority proposals from the 2020 to 2024 Business and Human Rights Roadmap that



would be integrated into the 2020 to 2024 National Human Rights Action Plan. These include protecting the rights of children, women, indigenous peoples and people with disabilities.

The Roadmap was thus revised and the second draft was again presented to the group. During the second consultation, it was agreed upon that the Roadmap should be prepared based on the **3Cs: *Capacity building, Clear expectation and Compliance.***

After some debate, it was decided that the targets of the Business and Human Rights Roadmap are: (a) to reach out to companies that have been exposed to the concept of BHR; (b) establish a supporting mechanism, namely the due diligence mechanism, reporting and remedy mechanisms as well as marginalized groups' access to remedy; and, (c) include more indicators and targets, such as the protection of children's rights beyond forced labor.

The third draft is being prepared based on inputs from the Second Limited Consultation Discussion, to be later discussed in the Third Limited Consultation Discussion which invites civil society and academics. Also, a bill is being deliberated on and seeks to form the legal basis for the establishment of the Business and Human Rights Task Force which will coordinate the implementation, monitoring and evaluation and reporting of the implementation of the UNGPs in Indonesia.

Delays in the process may be inevitable, however, as according to the Indonesian government, it is now necessary to again discuss the ministries/agencies related to the Task Force. Also, there is a need for more coordination of activities and support for the implementation of the UNGPs to be carried out by both the relevant government institutions and development partners.

The development of NAP for UNGPs in Indonesia has not focused on problems related to natural resources. There are also indications that the government does not see human rights as a key issue. For example, the Presidential Regulation on NAP for UNGPs expired at the end of 2019 and has not been renewed. On this note, two major recommendations are put forward: a) incorporate agrarian reform in the NAP for UNGPs, and b) advocate for a legally binding treaty.

## Pushing for a National Action Plan for UNGPs that Covers Agrarian Resources

Until the end of 2020, there are no signs that the Presidential Regulation on NAP for UNGPs will be ratified. Throughout 2020, the world seemed to have stalled due to the Covid-19 pandemic; hence, the Presidential Decree on NAP for UNGPs was neglected. With the expiration of the old Presidential Regulation, there is now room to advocate potential policies, in particular:

- Advocating the crafting of a broader Presidential Decree on NAP for UNGPs that includes more areas, such as business in agrarian resources/ SSA fields.
- If a new NAP for UNGPs Presidential Decree is deemed not strong enough to include matters related to Business and Human Rights in the SSA field, the second option is to push for the drafting of a Presidential Decree on NAP for UNGPs that is specifically related to SSA that can complement the existing Presidential NAP for UNGPs.

Indeed, even some people in civil society are skeptical about UNGPs, mainly because it is voluntary in nature and therefore not strong enough to prevent or sanction human rights violations of corporations.

Thus, urgent steps need to be undertaken to add more substance to the NAP for UNGPs under the two scenarios above:

- In the previous National Action Plan, agrarian rights were enshrined under the right to adequate food and the environment. This is in accordance with the Covenant on Economic, Social and Cultural Rights, the Food Law and the Law on Protection and Empowerment of Farmers. However, it needs to be further refined, so that land rights will be mainstreamed in the action plan to protect farmers and help uphold the right to food and ensure food security.
  - a. Resolve existing agrarian conflicts in an effective and fair society. Business must be encouraged to comply with human rights principles, and the State must be at the forefront of protecting, respecting and fulfilling human rights. It is important that both State-run and private corporations uphold human rights but this does not mean that the State can shirk its responsibilities as the

main duty holder of human rights. Therefore, voluntary mechanisms are not enough to ensure the protection of human rights. There should be avenues where cases against violators can be heard. Given the magnitude of agrarian conflicts that have resulted in various human rights violations in the business cycle, SSA needs to promote agrarian conflict resolution mechanisms.

- b. Komnas HAM, in mainstreaming land rights as human rights in the action plan and its derivatives, must have clear steps to take, especially in dealing with the three main actors mentioned in the NAP, namely local governments, MSMEs (micro, small and medium-scale enterprises), and BUMN (State-owned Enterprises).
- c. The NAP for UNGPs recommends that countries and companies take steps to comply with human rights principles. But to put more teeth into it, the action plan must be transformed into a work unit, a measurable program, and provided an adequate budget.
- d. The role and authority of Komnas HAM must be strengthened as part of its thrust to encourage the incorporation of human rights principles into various institutions and policies, especially policies related to land in Indonesia.
- e. Local governments should be encouraged to produce local regulations based on human rights principles, especially since local governments are at the forefront of providing services to rural farmers.
- f. Engage civil society to collect evidence and produce studies on the implementation of the UNGPs in the land and agriculture sector.
- g. The government and the business sector should engage civil society in the formulation of NAP for UNGPs.
- h. Strengthen the capacity of stakeholders, especially civil society, to understand the complex structures between supply chains and corporate actions that affect human rights.

## Advocating for a Legally Binding Treaty

The proposal for a binding legal framework in international human rights law on business and human rights is driven by the push of a large number of developing countries and international civil society groups who question the effectiveness of the UNGPs in resolving human rights violations by multinational corporations.

The establishment of legally binding international business and human rights instruments will be used to clarify the obligations of transnational companies in the area of human rights, and provide an effective rights restoration mechanism for victims in cases where domestic jurisdictions fail to hold these companies accountable.

The lack of a binding mechanism for corporate activities leaves a regulatory gap, as existing national mechanisms have, in many cases, proven insufficient to adequately handle situations arising from transnational business ventures.

On the other hand, the UNGPs are still based on the principle of the State as the main guardian of human rights, putting its focus on strengthening national legal mechanisms for States to regulate company activities in their territories.

Problem arises again when the limitations of national legal jurisdictions make it difficult to handle complex corporate structures, allowing errant corporations to avoid responsibility. In many cases a group of companies containing parent companies, subsidiaries, affiliates, joint ventures, supply chains and others are usually treated as separate entities, although there are often very close relationships within the group.

This allows group companies to protect themselves from liability with risky businesses by exploiting a subsidiary, which contains the damage to certain branches of the company. In fact, it becomes more complicated when law enforcement has to cut cross borders, especially if the chain of ownership crosses a number of subsidiaries that are domiciled in different States. Therefore, the cross-border territorial aspect (*extraterritorial*) is very important in law enforcement efforts against multinational corporations. The extra-territorial aspect is still being debated in international humanitarian law.

The extra-territorial aspect is actually related to human rights because international humanitarian law clearly outlines that the obligation of States to protect is not limited to cases in their territory.

The proposed legally binding treaty will also encourage cross-border cooperation on access to victim remedy. That there are legal loopholes in international humanitarian law cannot be disputed thus the real challenge is to reach a global consensus on how to close the gap, primarily through a legally binding treaty. ■

List of acronyms	
BAPPENAS	The Ministry of National Development Planning
BHR	Business and Human Rights
BUMN	State-owned Enterprise
CRU	Conflict Resolution Unit
CSR	Corporate Social Responsibility
ELSAM	Institute for Policy Research and Advocacy
FSA	Financial Service Authority
IBCSD	Indonesia Business Council for Sustainable Development
IGCN	Indonesia Global Compact Network
INFID	International NGO Forum on Indonesian Development
ISO	International Organization for Standardization
ISPO	Indonesian Sustainable Palm Oil
Kadin	Indonesia Chamber of Commerce
Komnas HAM	The Indonesian National Commission on Human Rights
MSMEs	Medium Scale Businesses
NAP	National Action Plan
NAP for UNGPs	National Action Plan on the United Nations Guiding Principles on Business and Human Rights
NGOs	Non-Governmental Organizations
RSPO	Roundtable on Sustainable Palm Oil
SNI	Indonesia National Standard for Product Certification
SSA	Agrarian Resources
UN	United Nations
UNGPs	United Nations Guiding Principles on Business and Human Rights
UNDP	United Nation Development Programme
WALHI	Indonesian Forum for Environment
WBCSD	World Business Council for Sustainable Development

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