



HUMAN RIGHTS
RESOURCE CENTRE

Business and Human Rights in Indonesia: From Principles to Practice

Patricia Rinwigati Waagstein

With the support of



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1. Introduction

1.1. The United Nations Guiding Principles

Imposing human rights responsibilities on non-state actors—particularly businesses—has been the subject of extensive debate since the 1970s (if not before).¹ For the most part, these debates have centred on three important questions: To whom is a business enterprise responsible? What should a business enterprise be responsible for? What type of responsibility and obligation (if any) does a business enterprise have to respect human rights? These are all legitimate questions, which were finally tackled by the United Nations’ “Protect, Respect and Remedy: a Framework for Business and Human Rights”(2008)² and “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” (2011).³

The Framework and Guiding Principles were prepared by the U.N. Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Professor John Ruggie, after six years of extensive research and consultations with governments, business and civil society on five continents. The Guiding Principles were unanimously endorsed by the UN Human Rights Council.⁴ Governments, business and civil society welcomed the endorsement and looked towards implementation.

The Guiding Principles on Business and Human Rights marks a watershed moment for business actors, states, and civil society particularly in three different contexts: First, it provides answers to the long debate on whether or not a business has human rights responsibilities. The Guiding Principles rests on three pillars: Protect, Respect, and Remedy. The Duty to Protect (Pillar One) refers to the obligation of a state to protect against human rights abuses within its territory and/or jurisdiction by third parties, including business enterprises, through effective appropriate policies, regulation, and adjudication.⁵ The Responsibility to Respect (Pillar Two) requires all business actors to act with due diligence to avoid infringing on the rights of others and to address adverse human rights impacts with which they are involved.⁶ Access to Remedy (Pillar Three) ensures greater access by victims to effective remedy, both judicial and non-judicial.⁷

Second, the Guiding Principles confirm that the responsibility of business to respect human rights does not shift human rights responsibilities away from the state, and does not confer on business the same duties to protect, respect, promote and fulfil human rights as states. The Framework and Guiding Principles are clear on the distinct duties and responsibilities that befall states and business.

Third, the Guiding Principles provide a universally-accepted and agreed upon expectation of what companies should do regarding human rights. That is to say there is an expectation that business should respect human rights (do no harm) and that business needs to have in place appropriate policies, due diligence processes and

1 The issue was initiated through various debates on corporate social responsibility. The Sub-commission of Human Rights took the issue seriously by establishing a working group on the question of human rights. This working group finalised the Draft Norm on the Responsibility of Transnational Corporations and other Business Enterprises in 2003. This draft remained a draft as it was not adopted by the Human Rights Commission (now Human Rights Council). The issue of business and human rights was further re-cultivated through the appointment of Prof. John Ruggie in 2008. See Patricia Rinwigati Waagstein. *Corporate Human Rights Responsibility*. Uppsala: Uppsala Universitet, 2009.

2 Human Rights Council. *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights including the Right to Development: 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, John Ruggie*. A/HRC/8/5, 7 April 2008.

3 Human Rights Council. *Report of the Special representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*. A/HRC/17/31, 21 March 2011.

4 Human Rights Council. *Human Rights and Transnational Corporation and Other Business Enterprises*. A/HRC/RES/17/4, 6 July 2011.

5 *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*. Guiding Principles 1 – 10.

6 *Ibid.*, Guiding Principles 11 – 24.

7 *Ibid.*, Guiding Principles 25 – 31.

remedial mechanisms to manage risk to human rights. Moreover, the Guiding Principles apply to all business regardless of size, sector, ownership, or operating context. However, size and other characteristics may, in practice, influence the kinds of approaches businesses take to meet their human rights responsibility.⁸

In the context of ASEAN, many may further ask, what about Indonesia? Have the Guiding Principles been integrated in regulations and practice? Have the Guiding Principles inspired various laws and court decisions? It is not easy to answer these questions. More studies are needed to conclude whether the Guiding Principles have begun to be integrated into practice. Nevertheless, a 2013 HRRC baseline study aimed to provide a “lay of the land” overview of how the state duty to protect is manifesting itself in the ASEAN region. While some strides have been made toward aligning corporate regulation with government policies that seek to tackle social and economic injustice, there is, as yet, limited evidence to conclude that companies are adopting the responsibility to respect human rights.⁹ In this regard, and as the study notes, although the concept of business and human rights has already been articulated directly or indirectly through various laws, regulations, and policies, the reality on the ground in Indonesia remains decidedly mixed: despite significant regulatory changes beginning 2005, substantial efforts still need to be made to ensure implementation and impact. Inquiring whether there exist examples of a rights-based approach to business being applied by both state and non-state actors would also be beneficial. After all, it is one thing to enact laws seeking to increase social justice; it is quite another to adopt an overall approach that promotes, protects and respects human rights.

This paper attempts to begin to address these questions. First, relying primarily on case studies, the paper will consider a number of human rights violations that are routinely identified as arising in the business context in Indonesia. In so doing, it will provide examples of practices that business enterprises in Indonesia have put into place to prevent these violations from occurring and/or to mitigate against the risk of their reoccurrence. Secondly, the paper will consider the role of the government of Indonesia in enabling business enterprises to exercise their responsibility to respect human rights. Finally, drawing upon relevant cases, the paper will discuss the third pillar of the Guiding Principles, namely access to remedy, to assess current developments in Indonesia.

1.2. Limitations of the Study

First, it is important to note that this paper is written at a time when several issues concerning the protection of human rights in Indonesia are being addressed. The paper attempts to cover a wide range of materials and considers only those that are publicly available at the time of its completion.

Second, this report uses cases as its main reference. Cases are selected based on two criteria. First, they are high profile cases at the national or local level. They represent issues that are commonly found in practice, namely: land, security, corruption, union busting, and human rights concerns in the supply chain. Second, materials in this research are derived from court verdicts, NGO reports, and/or government documents. Where relevant, media reports were used or unstructured interviews conducted to provide supplementary information. Availability of documents from reliable sources was an important consideration in choosing cases due to their sensitivity and to ensure that the research is fair and supported by legitimate references.

Third, concerning terminology, “business” in this research is defined broadly to include individuals or business entities, either incorporated as legal entities or not, established and domiciled or conducting business activities within the jurisdiction of the Republic of Indonesia, either independently or jointly based on agreement, conducting various business activities in the economic field including, amongst others, state owned enterprises and subsidiaries of foreign enterprises.

⁸ There have been debates on whether big corporations may have more responsibilities than small and medium enterprises. See United Nations Office of the High Commissioner for Human Rights. *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*. 2012. 32 & 33; and Marketa D. Evans. “Risks Pertain to All, Regardless of Size.” *Canadian Mining Journal*. April 2013.

⁹ Human Rights Resource Centre. *Business and Human Rights in ASEAN: A Baseline Study*. Jakarta: April 2013. 5. Available at: <http://hrcca.org/system/files/u6/Business%20and%20Human%20Rights%20in%20ASEAN%20Baseline%20Study%20ebook.pdf>

Finally, this paper does not aim to produce exhaustive guidance on how to integrate respect for human rights into business operations. Rather, it contributes to the on-going discussion among a diverse set of stakeholders—from business, civil society and government—on how to craft both theoretical and practical solutions to business and human rights concerns in the Indonesian context.

2. Implementing Business and Human Rights in Indonesia

2.1. Background

Indonesia has the largest economy in Southeast Asia. Globally, it is an important emerging market, being the 17th largest economy in the world and a member of G-20. It is market-based, but also has a large number of State Owned Enterprises (SOEs), several of which dominate their respective sectors. Indonesia's primary economic sectors are: manufacturing and processing; agriculture (which includes forestry, plantation, farming and fishery); and trading and hospitality.¹⁰ Additionally, the mining sector contributes around 11.9% of the GDP.¹¹ More than half of this comes from oil and gas mining.

The new government has targeted to increase the number of investments.¹² While providing clearer and stricter rules for investors, Indonesia also welcomes them. The establishment of the integrated investment licensing procedure,¹³ the development of infrastructure programs,¹⁴ and simplification of taxes are examples of how the Joko Widodo administration is trying to boost investor confidence in the country.

In the context of human rights, it is clear that Indonesia has committed itself to respect and protect human rights,¹⁵ and that the government continues to take various actions and enact reforms to realize this commitment. This can be seen in the support offered by its institutional framework (including the performance of the judicial, legislative, and executive institutions), the enactment of laws respecting human rights,¹⁶ ratification of several major international human rights instruments,¹⁷ and the adoption of the National Action Plan on Human Rights.

The National Action Plan on Human Rights 2010 – 2014 identifies seven pillars as its main objectives. They consist of the establishment and reinforcement of institutions implementing the Action Plan; preparation for accession/ratification of international human rights instruments; harmonization of laws and regulations; human rights education; implementation of human rights standards and norms; public complaint service; and monitoring, evaluating, and reporting.¹⁸ While the National Action Plan for 2015 – 2019 is being developed,

10 Biro Pusat Statistik. "Economic Growth of Indonesia Quarter 2014." *Biro Pusat Statistik* (5 November 2014). PDF. Accessed 25 January 2015. http://www.bps.go.id/eng/brs_file/eng-pdb-05nov14.pdf

11 *Ibid.*; World Bank. *Doing Business 2014; Economy Profile: Indonesia*. (Washington DC: World Bank, 2014).

12 Andi Rusli. "BKPM Sets New Investment Increase Target." *Tempo.Co* (16 December 2014). Webpage. Accessed 25 January 2015. <http://en.tempo.co/read/news/2014/12/16/056628888/BKPM-Sets-New-Investment-Increase-Target>

13 Zubi Mahrofi. "Indonesia seeking to boost investor confidence." *antaranews.com* (2 January 2015). Webpage. Accessed 25 January 2015. <http://www.antaranews.com/en/news/97139/indonesia-seeking-to-boost-investor-confidence>

14 Ina Parlina. "Jokowi aims for 7 percent annual growth." *Jakarta Post* (24 December 2014). Webpage. Accessed 25 January 2015. <http://www.thejakartapost.com/news/2014/12/24/jokowi-aims-7-percent-annual-growth.html>

15 Human Rights Council. *Report of the Working Group on the Universal Periodic Review: Indonesia*. A/HRC/21/7, 5 July 2012.

16 In the last 10 years, more than 20 laws and regulations supporting national efforts for the promotion and protection of human rights in Indonesia were enacted. See Human Rights Council. *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: Indonesia*. A/HRC/WG.6/13/IDN/1, 7 March 2012. Par 5.

17 Indonesia has ratified several human rights treaties, including: International Covenant on Civil and Political Rights; International Covenant on Economic, Social, and Cultural Rights; Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination Against Women; Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Forced Labour Convention; ILO Conventions (No. 19, 27, 29, 45, 69, 81, 87, 88, 98, 100, 105, 106, 111, 120, 138, 144, 182, & 185).

18 Presidential Regulation No. 23/2011 on the National Action Plan for Human Rights in Indonesia for 2011 – 2014. Article 4(3).

the National Planning Agency has already set directions for human rights development in 2015 – 2019, which include harmonization of laws, ensuring the effective implementation of the National Action Plan for 2015 – 2019, establishing and maintaining effective complaint procedure for human rights violations, legal aid for the poor, combating violence against women, and developing human rights education for all.¹⁹

However, commentators have claimed that such efforts are not enough, as many violations occur in areas such as freedom of religion and belief,²⁰ children's rights, and women rights.²¹ Additionally, new types of violations by business enterprises have emerged. Thus, while Indonesia is aiming to attract more investors, it also is conscious of its need to fulfil its obligation to respect, protect, and fulfil human rights—including in the context of business.

2.2. Business and Human Rights Regulatory Framework

Human rights responsibilities for all

The protection of human rights has been legally recognised as a constitutional right in Articles 27, 28A-28J, and 29 of the 1945 Indonesian Constitution and its amendments. They are moreover further elaborated in the 1999 Human Rights Law and more than 20 other laws which directly and indirectly implicate human rights.

In addition to recognising rights, the Indonesian Constitution also imposes the obligation for everyone to respect the human rights of others. A similar obligation is also imposed by Article 69 of the Human Rights Law, which requires everyone to “respect the human rights of others, and social, national, and state morals, ethics, and orders.” Nevertheless, while the law states that “[e]very human right gives rise to the basic obligation and responsibility to uphold the human rights of others,” it affirms that “it is the duty of government to respect, protect uphold and promote these rights and obligations.”²²

Article 1 (6) of the Human Rights Law confirms that human rights violations can be committed by “individuals or groups of individuals, including the state apparatus.” “Groups of individuals” arguably also includes corporations and other business entities, and this interpretation has been applied by the National Commission on Human Rights (**Komnas HAM**) in dealing with cases involving human rights violations by non-state actors, including businesses.

A more direct reference to the human rights obligations of private actors is found in the 2008 Law No. 40 on the Elimination of Racial and Ethnic Discrimination. This law subjects individuals and corporations to criminal and civil liability for acts of discrimination based on race, religion, or ethnicity. The punishment is higher if discrimination is conducted by a corporation than if committed by an individual.

Other human rights related laws and regulations

Additionally, the government has enacted several laws and regulations that require business enterprises to avoid causing or contributing to adverse human rights impacts through their activities. These laws and regulations address a range of social issues, including environmental rights, workers' rights, and corporate social responsibility (**CSR**).²³ The Law on Environmental Protection and Management, for example, makes it the obligation of local governments to “foster and supervise compliance of personnel in charge of businesses

19 Mardiharto Tjokrowasito, S.H., LL.M. *Background Study RPJMN 2015-2019 Bidang Pembangunan Hukum Nasional*. Jakarta: Direktorat Hukum dan Hak Asasi Manusia and Kementerian Perencanaan Pembangunan Nasional (Bappenas), 2013.

20 Komisi Nasional Hak Asasi Manusia (National Commission on Human Rights). *Catatan Akhir 2012*. 2012; SETARA Institute. *Presiden Tanpa Prakarsa, Kondisi Kebebasan Beragama/Berkeyakinan di Indonesia*. 2012.

21 National Commission for Women's Rights. *Mewujudkan Kemerdekaan Hakiki bagi Perempuan Indonesia*. 2013.

22 1999 Law No. 39 on Human Rights (1999).

23 2007 Law No. 40 on Limited Liability Companies (2007).

and/or activities [with] the provisions of environmental licensing and legislation.”²⁴ The Law on Limited Liability Companies provides for the establishment of a team of experts, comprised of representatives from the government, experts/academics, the professions, and entrepreneurs, to monitor the implementation of the law, including the provisions pertaining to Corporate Social and Environmental Responsibility.²⁵

Self-regulations

Other explicit reference to the corporate responsibility to respect human rights is found in certain self-regulatory (or voluntary) initiatives which have been developed and executed by business actors or groups of business actors in Indonesia. One example is Asia Pulp and Paper (**APP**), which has taken the step to adopt human rights commitments into its day to day operations.²⁶ To realise its commitment, APP appointed Mazars Indonesia, an auditing company, to independently assess its stated policies, principles and performance across its corporate operations, including eight Indonesian pulp and paper mills and their supply chain.²⁷ PT Freeport Indonesia also committed to conduct their activities in a manner that is consistent with human rights principles; its mother company, Freeport-McMoRan Copper & Gold Inc., is a signatory to the Voluntary Principles on Security and Human Rights.²⁸ To monitor the application of its human rights policies, PT Freeport Indonesia has Human Rights Compliance Officers throughout its operations who ensure that human rights violations are documented, investigated, and resolved within a short period of time.²⁹ Human Rights Educations Trainings are also provided to security guards and managerial personnel. PT Tower Bersama, an Indonesian company that provides infrastructure for telecommunication, while appearing not to have an explicit human rights policy, held a human rights training for its managers in cooperation with a local NGO.³⁰ The objective was to provide its staff with basic human rights knowledge, particularly in dealing with potential conflict in land negotiations.³¹

Despite this emerging trend, however, progress remains slow. For the most part, only multinational or large corporations appear to have adopted human rights policy commitments, and, in most instances, these appear to be derived from directives passed down from headquarters, or are the result of pressure from external stakeholders. Freeport Indonesia, for example, has had human rights policies for the last 15 years because of various pressures from civil society with regard to human rights violations conducted by the Indonesian military and facilitated by PT Freeport Indonesia.³² PT Tower Bersama began its human rights training in 2014 after realizing that a human rights perspective is important in dealing with land negotiations to avoid protracted disputes. Moreover, human rights initiatives appear to be more developed in sectors that have a direct relationship with natural resources or those in the manufacturing industry, as opposed to the service sector.

24 2009 Law No. 32 Environmental Protection and Management (2009). Article 63. English translation available at: <http://faolex.fao.org/docs/pdf/ins97643.pdf>

25 “2007 Law No. 40 on Limited Liability Companies,” (2007). Article 156. English translation available at: <http://www.dlpawoffices.com/limitedliabilitycompanies.pdf>

26 Mazars [now Moores Rowland Indonesia] and Asia Pulp & Paper. *Asia Pulp & Paper Follows UN Lead, Commits to First-Ever Human Rights Audit*. 2012.

27 *Ibid.*

28 “Human Rights Policies.” *PT Freeport Indonesia: Affiliate of Freeport-McMoRan* Webpage. Accessed 1 December 2014. <http://ptfi.co.id/en/csr/human-right/a-human-rights-approach>

29 *Ibid.*

30 “Business and Human Rights: Business and Human Rights Training.” *ELSAM* Webpage. Accessed 1 December 2014. <http://www.elsam.or.id/mobileweb/article.php?act=content&m=0&id=2987&cid=101&lang=en>

31 Interview by author.

32 See Tom Beanal, on behalf of himself and all others similarly situated, Plaintiff-Appellant, v. FREEPORT-McMORAN, INC., and Freeport McMoran Copper and Gold, Inc., Defendants-Appellees. No. 98-30235, (United States Court of Appeals, Fifth Circuit 1999).

Compared to “business and human rights,” the concept of CSR is more popular among business actors.³³ This is likely due to the fact that CSR became a mandatory requirement for all limited liability corporations under the 2007 Law No. 40 on Limited Liability Companies.³⁴ Aside from CSR, various regulations also refer to environmental responsibility, good corporate governance, and workers’ rights.

The use of different terminologies leads to some lack of clarity about the nature and content of business and human rights, such that any “non-profit” goal is thought to be “business and human rights.” However, this has opened up valuable space for dialogue concerning social responsibilities, amidst the myriad of actors, principles, and spheres of influence.³⁵ It provides multiple, rather than “one size fits all” strategies,³⁶ and allows stakeholders to explore how various concepts and terminologies can strengthen the protection of human rights.

2.3. Available Mechanisms for Access to Remedy

Access to remedy is one of the fundamental principles in dealing with human rights violations. The state duty to protect includes the obligation to investigate, punish, and redress business-related human rights abuses when they do occur. The UNGP broadly describes access to remedy to cover a range of substantive forms that are aimed to counteract or correct any human rights harm that have occurred—including state-based judicial and non-judicial mechanisms as well as non-state based mechanisms. It noted that “[p]rocedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome.”³⁷

In Indonesia, there are several mechanisms dealing with business-related human rights abuses, some of which are described below.

State-based judicial mechanisms

Courts

In general, the court’s role can be seen as twofold. First, it deals with questions of interpretation of law. Hence, the courts, specially the Constitutional Court and the Supreme Court, can directly develop the application of human rights principles to business. The Constitutional Court, for example, has dealt with the interpretation of Article 74 of the 2007 Law on Limited Liability Companies, which states that companies that conduct “business activities in the field of and/or related to natural resources must implement their Corporate Social and Environmental Responsibility.” The petitioners, consisting of business associations and the Indonesian Chamber of Commerce, argued that this article creates legal uncertainty; it is unjust and discriminatory, particularly towards certain corporations. Further, by creating an additional burden to corporations, it will negatively impact the economic situation in general.³⁸ The Court, however, was of the opinion that Article 74 is correct, non-discriminatory, and just; therefore, it is not in conflict with the Constitution.³⁹ The Court stated that the mandatory nature of Article 74 is compatible with the current social, economic and legal climate in Indonesia,⁴⁰ and gives legal certainty to CSR in the context of Indonesia’s weak law enforcement system. The

33 See e.g. “Corporate Social Responsibility.” *Indofood*. Accessed 1 December 2014. <http://www.indofood.com/en-us/csr/mission.aspx>; and PT Bumi Resources Tbk and Its Subsidiaries. “The Way We Are Expected to Work: A Set of BUMI’s Corporate Governance Policies Version 2.0.” Jakarta: June 2008.

34 2007 Law No. 40 on Limited Liability Corporation. Article 74.

35 Upendra Baxi. “Market Fundamentalisms: Business Ethics at the Altar of Human Rights.” *Human Rights Law Review* 5, no. 1 (2005): p. 21.

36 *Ibid.*

37 *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect, and Remedy” Framework*. Guiding Principle 25, Commentary.

38 Judicial Review of 2008 Law No. 40 on Limited Liability Corporation, Constitutional Court Case No. 53/PUU-VI/2008, (2009).

39 *Ibid.*

40 *Ibid.*, pp. 91 - 94.

Court also argued that Article 74 does not discriminate against particular corporations, as it is based on the potential risks posed to natural resources by corporate behaviour.⁴¹ According to them, it is logical for those parties impacting natural resources to be the ones to bear the burden.⁴²

Second, the courts, under their adjudicatory function, rule on business-related human rights cases brought before them. The civil, criminal, and administrative courts, as well as the more specialised courts, may assess the responsibility of a corporation for failure to meet its legal obligations and provide remedies to those aggrieved. Unfortunately, there is no comprehensive data on how many cases relating to business and human rights have been dealt with by each court. Limited statistics found at the Supreme Court website do not segregate cases in such a manner as would indicate the number of controversies that took place in a business context or involved a business entity as a party.⁴³

With regard to special courts, the Human Rights Court, is mandated to handle cases involving gross violations of human rights like genocide and crimes against humanity.⁴⁴ This institution, however, has never dealt with abuses committed by a corporation or corporate personnel; instead it currently focuses mostly on violations by state actors.⁴⁵ There is also the Industrial Relations Court (also known as Labour Court),⁴⁶ which directly deals with various industrial issues including disputes concerning rights, interests, termination, and those concerning unions (including inter- and intra-union disputes, and disputes between workers unions and employers). Upon receipt of cases, the Industrial Relations Court will call the parties as well as the Ministry of Manpower and Transmigration for mediation and/or reconciliation. Disputes that fail to be resolved can be referred to a panel of judges consisting of one trade union-nominated *ad hoc* judge, one employer-nominated *ad hoc* judge and one experienced career judge for merit examination. Following a judgment from the Court, a party may appeal their case to the Supreme Court. This mechanism has often been utilised by workers and employers to obtain remedies concerning labour rights.⁴⁷

State-based non-judicial mechanisms

Different laws and regulations establish different institutions to implement and monitor their compliance. For example, Komnas HAM is the primary independent body that monitors the state's implementation of its human rights obligations and initiates investigations for any allegation of human rights violations. On environment-related issues, the 2009 Law No. 32 on Environmental Protection and Management requires a number of different institutions to monitor compliance, such as local government at the provincial and city levels, the Ministry of Environment and other related ministries, the Commission for Environmental Impact Assessment, police, prosecutors, and courts. Related institutions dealing with mining or business licenses such as the governor's and mayor's offices, the Ministry of Mining, and National Land Agency also play an important role in imposing administrative sanctions such as issuance of written warnings, temporary termination of business activities, or withdrawal of business license.⁴⁸

41 *Ibid.*, p. 88.

42 *Ibid.*, pp. 89 & 90.

43 "Putusan Terbaru," *Mahkamah Agung* (Supreme Court). Accessed 2 December 2014. <http://putusan.mahkamahagung.go.id/>

44 The 2000 Law No. 26 on the Human Rights Court (2000).

45 *Pengadilan HAM*. Accessed 1 December 2014. <http://www.pengadilanham.or.id/>

46 The 2004 Law No. 2 on Industrial Relation Disputes Settlements.

47 "Putusan Terbaru."

48 The 2009 Law No. 4 on Mineral and Coal Mining (2009).

a. Komnas HAM

The National Commission on Human Rights is the primary monitoring body tasked with initiating and investigating human rights abuses. The Human Rights Law provides a statutory basis for it to monitor human rights implementation in Indonesia.⁴⁹ Based on its mandate, Komnas HAM is obliged to receive complaints from victims of human rights violations, investigate them, and provide recommendations to related authorities.⁵⁰ In certain situations, it can also act as a mediator, or facilitate and observe the mediation among parties to a conflict.

Komnas HAM addresses the issue of business and human rights through education, investigation and mediation. In relation to education, Komnas HAM has been actively disseminating and developing the concept of business and human rights through a series of discussions and publications.⁵¹ Nevertheless, the emphasis has primarily been on NGOs and special *ad hoc* activities. There is room for the Commission to be more proactive by strengthening its promotion activities with business entities and assisting business communities integrate human rights into day-to-day corporate policy.

With regard to its mandate to investigate human rights violations, the Komnas HAM handles a significant number of cases involving corporations:

Year	No. of Cases
2010	1,119
2011	1,068
2012	(No data found)
2013	1,084

Based on the statistics above, every year Komnas HAM’s Complaint and Investigation Department has to deal with more than 1,000 complaints involving business-related human rights abuses. That figure consists of around 800 new complaints, and 200 on-going cases.⁵³ The number of cases involving business-related human rights abuses is quite high—about 15% of the total cases dealt with every year. Second only to the police, corporations (both private and state-owned) are the respondents of many of the cases involving human rights violations. Generally, cases before the Commission usually concern land, labour, racial and ethnic discrimination, environmental hazards, right to health, rights of migrant workers, forced evictions, right to education, children’s rights, and women’s rights.⁵⁴ Complaints come not only from different regions in Indonesia, but from other countries such as Saudi Arabia, Bahrain, Kuwait, Malaysia, Kenya, Singapore, United Arab Emirates, and the USA.⁵⁵ Complaints from overseas usually concern Indonesian migrant workers who are living abroad.

49 The 1999 Law No. 39 on Human Rights (1999).

50 *Ibid.*, Articles 89 & 90.

51 Interview, Head of Compliance and Investigation Unit. See also Asep Mulyana. “Mengintegrasikan HAM dalam Kebijakan dan Praktik Perusahaan,” *Sub-Komisi Pengkajian dan Penelitian - Komisi Nasional Hak Asasi Manusia*. Accessed 2 December 2014. <http://kajiankomnasham.wordpress.com/category/bisnis-dan-ham/>; “Seminar Hukum Hak Asasi Manusia ‘Pertanggungjawaban Pidana Korporasi dalam Pelanggaran HAM yang berat.’” *Sub-Commission on Education, KOMNAS HAM*. Accessed 2 December 2014. <http://www.komnasham.go.id/profil-7/pendidikan-dan-penyuluhan/202-seminar-hukum-hak-asasi-manusia-pertanggungjawaban-pidana-korporasi-dalam-pelanggaran-ham-yang-berat>

52 Komisi Nasional Hak Asasi Manusi. *Data Pengaduan Pelanggaran HAM oleh Korporasi Tahun 2013*. 2013.

53 *Ibid.* See also Komisi Nasional Hak Asasi Manusia. *Laporan Tahunan 2008*. 2008; Komisi Nasional Hak Asasi Manusia. *Klasifikasi Kasus Pelanggaran HAM oleh Korporasi tahun 2010 dan 2011*. Jakarta: KOMNAS HAM (2012).

54 Komisi Nasional Hak Asasi Manusia. *Klasifikasi Kasus Pelanggaran HAM oleh Korporasi tahun 2010 dan 2011*. Jakarta: Komnas HAM (2012).

55 *Ibid.*

Most cases dealt by Komnas HAM are complex. Some cases involve multiple actors, which may create ambiguity as to the extent of their individual responsibilities. Proving a causal link between the harm caused and the defendant can also be challenging. A mudflow disaster in Sidoarjo, East Java, serves as an example. Mudflow eruptions on 29 May 2006 and the subsequent flow of mud for several years displaced tens of thousands of residents. Some geological experts attributed the catastrophe to the drilling activities of PT Lapindo Brantas, while others maintained that the mud volcano was the result of an earthquake at Yogyakarta (280 kilometers away).⁵⁶ In 2007, the District Court of South Jakarta ruled that the disaster was caused by the earthquake; hence acquitting PT Lapindo Brantas and other defendants. The Court further held that PT Lapindo Brantas had the *moral* obligation to take measures to restore the damage, stop the mudflow and address social problems resulting from the mudflow. However, the Court was also of the opinion that PT Lapindo Brantas had already exerted maximum efforts to handle the disaster and had thus fulfilled this obligation. The Appeal Court sustained the ruling in 2008; the parties did not seek appeal with the Supreme Court.⁵⁷

In August 2012, however, Komnas HAM released the findings of its three-year investigation on the same incident. Falling short of naming the disaster a “gross” violation of human rights, Komnas HAM concluded that basic rights of local residents were violated—including the right to life, safety, health, housing, employment, social security and education. The Commission also found that PT Lapindo Brantas had failed to guarantee victims’ basic rights since the 2006 disaster. It estimated that between 40,000 and 60,000 people had been internally displaced after the mudflow submerged 10,426 homes in 12 villages in Porong sub-district alone. Komnas HAM urged PT Lapindo Brantas to complete the payment of the compensation scheme to mudflow victims, as well as to plug the mudflow. Komnas HAM recommended that the police reopen investigations against executives of PT Lapindo Brantas, saying that those responsible could only be tried under the Criminal Code, as the Human Rights Law did not cover crimes against the environment.⁵⁸

It is noted that Komnas HAM’s involvement comes mainly after the incident has occurred and that there is room to improve its role in preventing violations. It could perhaps become more engaged during the earlier process of investment by the institutionalisation of a human rights impact assessment, in addition to the environmental impact assessment made prior to business activities.

b. Public Communication Service (Yankomas)

The Public Communication Service is a mediation mechanism provided by the National Action Plan on Human Rights committees (RANHAM committees), which are governmental committees established at the national, provincial, and city level to implement the National Action Plan on Human Rights.⁵⁹ The 400 local RANHAM committees consist of representatives of ministries and local governments. The Public Communication Service receives complaints from the victims of human rights violations, calls parties for mediation, and issues recommendations. As this committee is not a judicial institution, its recommendations are not binding; parties abide by them on a voluntary basis.

56 Lapindo Brantas, Inc. “Bakrie: Social Impact Report: Sidoarjo Mud Volcano.” PDF. Accessed 25 January 2015. <https://dl.dropboxusercontent.com/u/46497355/lapindo/Lapindo-LUSI-Report.pdf>; and Amir Tejo & Fidelis E Satriastanti. “New Evidence May Reopen Lapindo Mud Case.” *JakartaGlobe* (12 February 2010). Webpage. Accessed 25 January 2015. <http://thejakartaglobe.beritasatu.com/archive/new-evidence-may-reopen-lapindo-mud-case/358383/>

57 Michael Faure and Andri Wibisana. *Regulating Disasters, Climate Change and Environmental Harm: Lessons from the Indonesian Experience*. Edward Elgar Publishing, 2013. 308.

58 The Jakarta Post. “Lapindo disaster a ‘human rights violation.’” *The Jakarta Post* (15 August 2012). Webpage. Accessed 25 January 2015. <http://www.thejakartapost.com/news/2012/08/15/lapindo-disaster-a-human-rights-violation.html>

59 Presidential Decree no. 23/2011 on the National Action Plan of Human Rights for 2011 – 2014. Articles 6(9) and 8(8) state that RANHAM committees at the provincial and city/regency levels have primary programs to accomplish the following:

- a. Establish and strengthen institutions for implementing RANHAM;
- b. Harmonise drafting of laws and evaluate local regulations;
- c. Human rights education;
- d. Implementing human rights norms and standards;
- e. Public communication service;
- f. Monitoring, evaluation, and reporting.

The development of this service is centered on the Indonesian government's commitment to provide a simple, integrated, effective, fair, and low-cost alternative dispute settlement mechanism. Moreover, the huge number of cases dealt by the courts as well as Komnas HAM demands alternative ways to provide access to justice and remedies to the victims of human rights violations. Despite various criticisms with regard to its effectiveness, the service has been utilized by many stakeholders in certain regions.⁶⁰ In Yogyakarta, for example, the regional office of the Ministry of Law and Human Rights and the RANHAM committee were actively involved in the mediation of a conflict between PT Jogja Tugu Trans, a transportation company based in Jogjakarta, and its workers.⁶¹ In West Kalimantan, a dispute concerning the forced eviction of occupants on a land acquired by PT SHP was also handled through this system. The Yankomas team, coordinated by the RANHAM committee, facilitated mediation among the victims, PT SHP, the police, and the National Land Agency.⁶²

c. The Corruption Eradication Commission (KPK)

While the Corruption Eradication Commission is not explicitly mandated to hear human rights cases, corruption does impair the enjoyment of human rights. Therefore, KPK contributes to the prevention of human rights violations as well as provides an avenue for redress to those whose human rights are affected as a consequence of corrupt practices.

KPK is an independent body established by the 2002 Law No. 30, with the mandate to investigate and prosecute corruption cases. The Commission has coordinated and cooperated with different institutions and ministries dealing with natural resources and minerals in order to prevent corruption.⁶³ Additionally, KPK has investigated various cases involving private and state-owned enterprises, as well as foundations (*yayasan*) and cooperatives (*kooperasi*). These cases often concern bribery between business entities and the judiciary.⁶⁴ There are also cases involving other officials dealing with business activities, such as bribery to win tenders or contracts.⁶⁵ Some cases handled by the KPK are found below.

d. Ombudsman

The Ombudsman receives complaints from individuals and/or legal persons concerning forgery, conspiracy, intervention, undue delay, incompetence, abuse of power, impartiality, corruption, illegal possession, and misleading practices of public and private institutions in providing public services. Based on data released by the office, since its establishment, it has dealt with various cases involving state-owned corporations, institutions granting business licences, and the National Land Agency.⁶⁶ Some of these cases have implications on the enjoyment and protection of human rights. For instance, the National Land Agency, in unlawfully granting title to particular lands, can cause the violation of the human rights of the community living on that land.⁶⁷ Another example is the failure of PT Jamsostek, a government insurance company, to comply with a court order concerning a labour issue.⁶⁸

60 Patricia Waagstein and Herbin Siahaan. *Report on the Evaluation of RWI Programs in Indonesia, Period of 2010 - 2013*. 2013.

61 "Yankomas - Mediation Kasus JTT." *Regional Office of Jogjakarta - Ministry of Law and Human Rights*. <http://www.kumham-jogja.info/arsip-berita/720-yankomas-mediiasi-kasus-jtt>

62 "Warga Marah Omongannya Dipotong Pegawai Kemenkumham." *Tribun Pontianak*. Accessed 7 December 2014. <http://pontianak.tribunnews.com/2013/04/09/warga-marah-omongannya-dipotong-pegawai-kemenkumham>

63 For example, in 2011, it worked with BPMigas (a state oil and gas institution), BPK (Financial Inspection Agency – *Badan Pemeriksaan Keuangan*), and tax authorities, to monitor the issuance of business contracts between those corporations and the state.

64 See e.g., Arya Dipa. "Japanese may face 15 years for alleged bribery." *Jakarta Post* (27 July 2012). Webpage. Accessed 25 January 2015. <http://www.thejakartapost.com/news/2012/07/27/japanese-may-face-15-years-alleged-bribery.html>

65 See e.g. a case involving a gift from PT SugihInterjaya to PT Pertamina. *beritaasatu.com*. "Suap Bahan Bakar TEL, Direktur PT Sugih Interjaya Diperiksa KPK." *beritaasatu.com* (19 January 2015). Webpage. Accessed 25 January 2015. <http://www.beritaasatu.com/hukum/suap-bahan-bakar-tel-direktur-pt-sugih-interjaya-diperiksa-kpk>

66 Ombudsman. *Ombudsman: Laporan Tahunan 2013*. 2013. 6, 13, 14.

67 *Ibid.*, 15.

68 *Ibid.*

e. *Adat* or Customary Law

Each indigenous/traditional group in Indonesia has a system of *adat* laws and traditions, developed over time to meet the individual needs of the community. These laws and traditions are passed, implemented, and monitored by leaders of each group.

In Indonesia, *adat* or customary law is officially recognised as part of the legal system. In addition to providing norms to be obeyed in societies preserving and applying such law, it also offers a mechanism to settle disputes. The *adat* law has three limitations. First, in criminal cases, state law usually restricts the application of *adat* law and mediation led by tribal leaders to minor crimes. Second, if there is a conflict between *adat* law and state law, the latter prevails. Third, if one of the parties to the conflict is not satisfied with the outcome of the mediation, he/she can continue to pursue justice through the formal judicial process.

While this mechanism has been utilised in areas of civil and criminal law, and for mediation between corporations and society in relation to *Hak Ulayat* (customary land ownership), the extent to which it can be utilised to deal with human rights issues—including labour rights—is not clear. Its legitimacy and application, particularly with respect to land ownership, could be problematic. Under the Indonesian legal system, a land deed is used to certify ownership. However, this system is not recognised in *adat* law, which relies on customary law. When there is a transfer of ownership—usually of forest owned by an *adat* society to a business—conflict is unavoidable. Thus, the *adat* law and its dispute mechanism may not be able to resolve the conflict because national law supersedes it.⁶⁹

f. Mediation & Arbitration

The 1999 Law No. 30 on Arbitration and Alternative dispute settlement clearly states that parties to a conflict can settle their dispute outside the judicial system through consultation, negotiation, conciliation or usage of expert opinion.⁷⁰ Parties to a conflict can also refer their case to an independent mediator, which could be a private entity or a state institution such as Komnas HAM and Yankomas.

Non-state mechanisms

Company-Level Grievance Mechanisms

Understanding of grievance mechanisms appears to be underdeveloped in Indonesia. Nonetheless, there are useful examples of complaint systems at the company level that businesses in Indonesia could consider in developing their grievance mechanisms.⁷¹ One such system is BP Indonesia's Community Grievances Handling Procedure. This initiative aims to address the complaints of those affected by the Tangguh Lng Project, a multinational project involving the development of six gas fields in Bintuni Bay, West Papua.⁷² Asia Pacific Resources International Limited (**APRIL**) Indonesia, a fibre, pulp and paper manufacturer, also developed a process for resolving land claims disputes. The Land Dispute Resolution Protocol is based on the principle of "Free, Prior and Informed Consent." In 2007, the village of Lubuk Jering in Riau province was chosen as the development site for establishing this land-dispute resolution protocol and can be used as basis to reflect on what worked well and any other lessons learned.⁷³

69 United States Agency For International Development. *USAID Country Profil: Property Rights and Resource Governance: Indonesia*. 2009.

70 1999 Law No 30 on Arbitration and Alternative Dispute Settlement (1999). Article 1(10).

71 See eg. European Commission. *Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights*. Section VI (Remediation and Operational-Level Grievance Mechanisms). 69-78. Available at: http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/csr-oag-hr-business_en.pdf

72 "BP - Tangguh Lng. Project: Community Grievances Handling Procedure." Access Webpage. Accessed 25 January 2015. <http://accessfacility.org/bp-tangguh-lng-project>

73 "Land Claims Resolution." *APRIL*. Accessed 26 October 2014. http://www.aprilasia.com/index.php?option=com_content&view=article&id=47:land-claims-resolution&catid=67&Itemid=154

3. Case Studies

How has the regulatory framework been articulated in various cases? How has the Indonesian government as well as corporations dealt with conflict and potential conflict? This section highlights several human rights cases that illustrate the integration of business and human rights concepts in corporate policy and day-to-day operations when businesses are dealing with disputes.

3.1. Land

Palm Oil Plantation: 2011, Mesuji, Lampung⁷⁴

The dispute involves a palm oil plantation and centres on the status of a land management cooperation between PT Treetkreasi Margamulia and villagers whose lands were located along the border of the company's plantation area in Sodong village, Mesuji, Lampung province. The dispute has been ongoing since 1990s. In 1997, the villagers turned their lands over to PT Treetkreasi Margamulia, with the expectation of becoming smallholders. Believing they were not given their benefits, they demanded the return of their land certificates. In 2004, PT Sumber Wangi Alam (PT SWA) bought out PT Treetkreasi Margamulia. The relationship between the villagers and PT SWA quickly deteriorated, culminating in a bloody confrontation between two village youths and a group of company security guards on 21 April 2011. The two youths and a security guard were stabbed to death. Angry villagers attacked the company offices the same day, resulting in the death of two company officials and two security guards.

Information published in 2012 indicates that this case was just one of 31 cases in Lampung province that have not been settled. Of the 31, at least three cases broke into violence, killing several people and injuring many.⁷⁵ Statistics of the Agrarian Reform Consortium reveal that, in 2013, there are at least 369 land disputes involving 1,281,660.09 hectares and 139,874 householders in Indonesia. The highest number of conflicts was found to be in the plantation sector, with 180 conflicts (48.78%).⁷⁶ This total number of land disputes is much lower than the 2013 statistics published by the National Statistic Agency, which indicated that there were 4,223 land disputes involving the National Land Agency, of which 2,014 (47%) were settled through mediation, lawsuit and other means.⁷⁷

a. Is land tenure protected?

The number of cases involving land rights requires a look into how land tenure is protected. The Indonesian Constitution and its subsequent regulations are operating within the primary premises of state control over natural resources and social function of land. Land issues are regulated by the Basic Agrarian Law No. 6 of 1960; *adat* (customary) law is also effective in addition to the national law. The law creates an array of categories of land rights, such as the right to ownership or freehold title (*Hak Milik*), the right to build (*Hak Guna Bangunan*), the right of use (*Hak Pakai*), cultivation rights (*Hak Guna Usaha*), and forestry rights (*Hak Memungut Hasil Hutan*). Individuals and corporations may possess all titles. However, for public interest, land rights may be annulled with due compensation and in accordance with procedure laid down by the Basic Agrarian Law.⁷⁸

⁷⁴ Institute for Policy Analysis of Conflict (IPAC). *Mesuji: Anatomy of An Indonesian Land Conflict*. 13 August 2013.

⁷⁵ *Ibid.*

⁷⁶ For 2013 and beginning of 2014: plantation: 180 conflicts (48.78%), infrastructure: 105 conflict (28.46 %), mining: 38 conflicts (10.3 %), forestry: 31 conflicts (8.4%), offshore: 9 conflicts (2.44%), and others: 6 conflicts (1.63%). See: Konsorsium Pembaharuan Agraria. *Laporan Akhir Tahun 2013: Warisan Buruk Masalah Agraria di Bawah Kekuasaan SBY*. 2013.

⁷⁷ "Jumlah Kasus Sengketa Konflik Perkara Pertanahan Nasional." *Badan Pertanahan Nasional (National Land Agency)*. Accessed 1 January 2015. <http://www.bpn.go.id/Publikasi/Data-Pertanahan/Kasus-Pertanahan/Nasional>

⁷⁸ Agrarian Law. Article 18.

The Basic Agrarian Law does not work in isolation but intersects with various other issues governed by separate laws and/or regulations, such as mining, forestry, plantation, environment, water, building, and apartment—depending on the land usage. These sectors are regulated by different institutions. Hence, legal harmonization as well as coordination between different institutions is key for effective implementation. However, this can be a challenge in practice. Overlapping institutional arrangements and poor coordination among institutions, multiplicity of overlapping land-related regulations, and tension between central government versus local government concerning the management of land and other natural resources are prevalent features. The situation is further aggravated by corruption, bureaucratic red tape, and unjust land appropriations.

In conflicts involving *Ulayat* land or traditional land owned by tribes and/or indigenous people, the issues become even more complicated due to the land's collective ownership and the absence of a deed of ownership. Although Article 18B (2) of the Constitution acknowledges the existence of traditional society including their *adat* law (customary law), there is no common definition of *Ulayat* land nor of traditional society. Different laws and regulations apply different definitions. In the context of dispute settlement, Ministry of Agrarian Regulation No. 5 of 1999 on Guidelines for Dispute Settlement of *Hak Ulayat* defines *Ulayat* land as land which has been granted *Hak Ulayat* by groups of traditional society. It implies that the traditional societies themselves should determine their own land. Article 1 of this regulation defines *Hak Ulayat* as a communal right based on *adat* law to benefit from the land and the natural resources on such land for the survival of a certain traditional society.

The 1999 Law No. 41 on Forestry defines *Hak Ulayat* as a right to collect forest products and cultivate a forest for the welfare of traditional people.⁷⁹ This is due to the fact that the 1999 Law on Forestry vests in the government ownership and control over all forests in Indonesia, although it is to “tak[e] into account rights of indigenous law community if any and its existence is acknowledged and not contradictory to national interest.”⁸⁰ However, the law does not clarify how to determine the existence of *Ulayat* land. Indeed, many authors argue that the strong state control of forest areas has led to a lack of security of community forest tenure.⁸¹

Several regulations issued by cities and regencies have also provided some clarifications on what *Hak Ulayat* is. The 2001 Lebak Regency Regulation No. 32 on *Hak Ulayat*, for example, defines *Hak Ulayat* as a right to utilize land and natural resources for the welfare of a traditional society.⁸² The 2008 Law No. 16 of the West Sumatra Province considers *Hak Ulayat* as a collective right of traditional people to own the *Ulayat* land and to take benefit from such land and the natural resources on that particular land.⁸³ In other words, the West Sumatra Law goes further by adding the right of ownership to *Hak Ulayat*.

While *adat* or customary law is declared as a primary source of land law, it is simultaneously subjected to many restrictions. For example, the Decision of Director General of Forestry and Plantation No. 922/VI-PHT/2000 on the Guidelines for Dispute Settlement for *Hak Ulayat* defines traditional society as a group of people who are bound by traditional law based on similarity of residence or ancestry. This law restricts the application of *Hak Ulayat* to include only those societies that are still bound by traditional law and the traditional law applies to such land.⁸⁴ In reality, determining the existence of traditional societies can be a challenge. One factor that contributes to this difficulty is the process of integration of people and transmigration.⁸⁵ It is also common for a tribe to control a certain area and rely on it for sustenance for generations and yet not be able to clearly show

79 The 1999 Law No. 41 on Forestry (1999). Art. 67. English translation available at http://thereddesk.org/sites/default/files/uu41_99_en.pdf.

80 *Ibid.*, Article 4(3).

81 Myrna Safitri. Forest tenure in Indonesia: the socio-legal challenges of securing communities' rights. Doctoral Thesis. Faculty of Law, Leiden University (15 December 2010). 288. Available at <https://openaccess.leidenuniv.nl/handle/1887/16242>.

82 2001 Lebak Law No. 65 on the Protection for Hak Ulayat of Baduy People (2001). Art. 1(4).

83 2008 West Sumatra Province Law No. 16 on Hak Ulayat (2008). Art. 1(7).

84 Letter of Director General of Forestry and Plantation No. 922/VI-PHT/2000 on the Guidelines for Dispute Settlement for Hak Ulayat.

85 Laurens Bakker. “Can We Get Hak Ulayat?” *Land and Community in Pasir and Nunukan, East Kalimantan*. Berkeley: Center for Southeast Asia Studies, UC Berkeley (23 May 2008).

that the land is *Hak Ulayat*.⁸⁶ The national law on land rights requires a deed as proof of ownership; traditional (*adat*) law does not require such a deed. Although there have been efforts by some local governments to register this type of land, not all local governments require such formal registration.⁸⁷

Thus, while land tenure is formally protected, disharmonious laws and lack of coordination amongst institutions make protecting land rights particularly difficult.

b. Free, prior, informed consent

Land disputes often arise when local governments grant businesses with licences to cultivate lands without taking community rights into account. Such conflicts could be avoided if the villagers are given sufficient information and guidance with regard to any agreement they enter into with a business entity. The UNGP recommends corporations to conduct due diligence procedures, which includes assessing human rights risks by drawing on internal or external expertise and engaging in “meaningful consultation” with potentially affected groups.⁸⁸

Many businesses utilise the principle of free, prior and informed consent (FPIC) in dealing with relocation and land settlement.⁸⁹ Its aim is to ensure that a community has the right to give or withhold its consent to proposed projects that may affect the lands they customarily own, occupy or otherwise use.⁹⁰ FPIC is not a novel concept in Indonesia. Communities commonly relate the idea of FPIC to the customary practice of *musyawarah*, a widely used term that refers to communal meetings and discussions to arrive at consensus-based decisions.⁹¹

Some elements of FPIC have already been adopted in various laws and regulations. The 1999 Regulation of the Ministry of Agrarian No. 5, for example, states that traditional societies may temporarily transfer their land ownership to any party through an agreement. The state should respect the terms of such agreements,⁹² and, consequently, cannot issue permits for the temporary use of the land without an agreement by the traditional society.⁹³ Similarly, Article 9(2) of the 2004 Law No. 18 on Plantations states that individuals or business enterprises who intend to build a plantation on land owned by traditional people must obtain their consent before applying for a license to cultivate with the National Land Agency. However, the law does not impose any sanction for non-compliance.

Various sub-national laws requiring business actors to obtain formal agreements with indigenous peoples have also been enacted. A law in West Sumatra province, for example, allows investors to use *Ulayat* land, provided there is a formal agreement between the rights holders and the investors. The law also imposes an obligation on investors to give a certain share of company profits to the traditional people.⁹⁴ Similarly, Kampar regency in Riau province requires persons intending to use *Ulayat* land to obtain the consent of all members of the traditional society.⁹⁵ However, the laws in both West Sumatra province and Kampar regency do not provide sanctions for non-compliance.

86 I Ketut Gunawan. *The Politics of the Indonesian Rainforest: A Rise of Forest Conflicts in East Kalimantan during Indonesia's Early Stage of Democratisation*. (Bonn: Civillier Verlag Gottingen, 2004), p. 76.

87 The 1999 Law No. 12 of Kampar Regency on Land with Hak Ulayat, 1999.

88 *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework*. Guiding Principle 18

89 Marcus Cochester. *Free, Prior, and Informed Consent: Making FPIC Work For Forests and Peoples*. The Forests Dialogue (July 2010).

90 Marcus Colchester and Maurizio Farhan Ferrari. *Free, Prior, and Informed Consent: Making FPIC - Free, Prior, and Informed Consent - Work: Challenges and Prospects for Indigenous Peoples*. FPIC Working Papers, Forest Peoples Programme (4 June 2007).

91 *Ibid.*

92 1999 Regulation of Ministry of Agrarian No. 5 on Guidelines of Dispute Settlement of Hak Ulayat (1999).

93 *Ibid.*, Art. 4.

94 2008 West Sumatra Province Law No. 16 on Hak Ulayat. Art. 10.

95 The 1999 Law No. 12 of Kampar Regency on Land with Hak Ulayat, Art. 7.

In practice, although the land transition process is governed by several regulations, many cases reveal that such consent is often reached without proper engagement with the communities and with only a very cursory provision of information to local leaders.⁹⁶ Various institutions that are assigned to verify that such agreements are reached, *e.g.*, the Provincial Forest Management Committees, often do so on the basis of scant information—relying for the most part on consultants or spokespersons.

c. Adequacy of measures being undertaken

Corporations and the government have taken some on-going measures to address existing conflicts. The UNGP provides some guidance for businesses in situations such as this, stating that “where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.”⁹⁷ In the Mesuji, Lampung province dispute, mediations between the corporations (PT Tseekreasi Margamulia, then PT SWA) and the villagers, with or without a third party, have been conducted since 1996.⁹⁸ However, there has been no agreement as parties rejected the recommendations. When the tension was escalating, PT SWA increased the number of security personnel, knowing that a direct conflict may not be avoided.⁹⁹

Simultaneously, the government has tried to hold perpetrators accountable. This is not an easy task. Various actors have committed many crimes and administrative violations in connection with the land dispute in Mesuji such that it is difficult to pinpoint who are the most responsible for each incident.¹⁰⁰ Investigations have been done and recommendations issued by various institutions, including the police, Komnas HAM, military, national parliament, as well as NGOs. As a follow up, some villagers and police personnel have filed criminal charges for murder before the courts.¹⁰¹ However, the land conflict remains unfinished. Measures appear to only focus on criminal aspects of the dispute, while the root of the problem, namely land rights, remains difficult to settle.

On a positive note, the government is establishing mechanisms to prevent disputes over community lands. The President’s Unit for Control and Monitoring Development (*Unit Kerja Presiden Bidang Pengawasan dan Pengendalian Pembangunan or UKP4*) is currently spearheading the development of a single community land map to improve spatial planning before future land concessions are authorized. This consultative mapping project aims to achieve a common agreement and understanding on where community lands begin and end.¹⁰² This would address the confusion that arise from the fact that government agencies use different land concession and forestry maps. At the local level, the provincial government of Lampung implemented legislation and policies on community-based forest management. Such management schemes rely on the role of forest communities in deciding how to use land and forest resources for their livelihood, based on their own normative system.¹⁰³ The aim is to fight forest destruction and poverty and to resolve conflicts regarding forest tenure. In addition to these endeavours, commentators have suggested that civil society groups and government agencies interested in reform press for full transparency from agencies involved in forestry and agriculture.¹⁰⁴

96 Iwan Nurdin. *Memahami Konflik Agraria*. Konsorsium Pembaharuan Agraria.

97 *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect, and Remedy” Framework*. Guiding Principle 22.

98 *Mesuji: Anatomy of An Indonesian Land Conflict*.

99 Elisabeth Wickeri and Anl Kalhan. *Land Rights Issues in International Human Rights Law* (Institute for Human Rights and Business, 2010); Khairul Saleh. “Sungai Sodong Killers jailed for 8 - 10 years.” *The Jakarta Post* 2012.

100 *Mesuji: Anatomy of An Indonesian Land Conflict*.

101 *Ibid.*; “Showdown Looming over Sumatra Land Conflict,” (Jakarta: Institute for Policy Analysis of Conflict, 2013).

102 *Mesuji: Anatomy of An Indonesian Land Conflict*; “Showdown Looming over Sumatra Land Conflict.”

103 Myrna Safitri. *Forest tenure in Indonesia: the socio-legal challenges of securing communities’ rights*. Doctoral Thesis. Faculty of Law, Leiden University (15 December 2010). 343. Available at <https://openaccess.leidenuniv.nl/handle/1887/16242>.

104 Saleh, “Sungai Sodong Killers jailed for 8 - 10 years.”

In conclusion, cases involving land issues have been a major source of lethal violence in Indonesia. Land conflict usually involves a range of human rights issues, such as right to life, security, livelihood, development, and freedom of association. Since rights are interdependent and complement each other, the violation of one right will lead to the violation of another. In land disputes, multiple state actors can have coexisting responsibilities, including the local government, Ministry of Agriculture, Ministry of Forestry, Ministry of Home Affairs, Land Registration Agency, Indonesian police, military, and other related institutions. In addition, a few land brokers have been convicted of fraud, land deed forgery, etc., and some farmers have been charged with illegal occupation. In some conflicts, the police and Indonesian military have also played very important roles in escalating the tension.

Because of this complexity, businesses working in and those intending to invest in sectors that require the use of considerable areas of land and other natural resources, *e.g.*, mining and plantation, should be well aware of the high human rights risks attending their individual circumstances. In the face of disharmonious policies concerning protection of land tenure, the UNGP could provide business enterprises with guidance—specifically that they “[s]eek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements.”¹⁰⁵ All businesses have the responsibility to respect human rights wherever they operate. Where the domestic context renders it impossible or highly difficult to meet this responsibility fully, “business enterprises are expected to respect the principles of internationally recognized human rights to the greatest extent possible in the circumstances, and to be able to demonstrate their efforts in this regard.”¹⁰⁶

3.2. Security

Security Policy in Sawit Plantation, Ogan Komering Ilir, South Sumatra¹⁰⁷

This dispute involves villagers in Ogan Komering Ilir District, South Sumatra, on one hand, and PT Barat Makmur Investindo (PT BSMI) and PT Lampung Inter Pertiwi (PT LIP) on the other. It has been on-going since 1994. The villagers claim that the companies’ licenses to cultivate land were not acquired in accordance with the law. Although the National Land Agency office in Lampung granted PT BSMI cultivation rights to over 10,000 hectares of land, the company only paid half of the compensation amount it was supposed to pay. Similarly, in March 1997, PT LIP was granted cultivation rights over 6,628 hectares of land, but only paid compensation for half of it to the villagers. PT BSMI also has the obligation to allocate 7,000 hectares of its land for plasma plantation, which it has so far failed to do. This failure infringes on several human rights, including right to livelihood, land, housing, remedy, and cultural life. Villagers also claim that the companies obtained the permits through conspiracy with the local government.

As there had been no settlement of the conflict, the local villagers proceeded to occupy the disputed land. On 6 September 2011, they unilaterally delimited the land among themselves and, on September 9 and 11, harvested palm fruits on the land. On 10 November 2011, the Mobile Brigade (Brimob) arrested one of the villagers for harvesting palm fruits in the disputed land. The other villagers attempted to rescue him and the police responded by shooting one of them. Angered by the shooting, the villagers burnt some areas of the plantation. The police used rubber bullets to shoot the villagers, hitting one on his left hand. Another suffered a serious burn injury. Learning that two of them were injured, the villagers went to a nearby factory. The police opened fire against them indiscriminately, killing a villager who was shot in the head. Another villager got shot and broke his leg as well. Four others were injured from the rubber bullets. Furious, the rest of the villagers burnt the factories and facilities of PT BSMI and PT LIP.

There are several points that can be drawn from this case, which are discussed below.

¹⁰⁵ *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect, and Remedy” Framework*. Guiding Principle 23.

¹⁰⁶ *Ibid.*, Guiding Principle 23, Commentary.

¹⁰⁷ *Mesuji: Anatomy of An Indonesian Land Conflict*.

a. Responsible security policy

Having good security policy and personnel is crucial to business, especially one facing security threats, in order to secure operational assets, production and distribution of products. In this regard, the UN Guiding Principles provide guidance on how businesses can conduct themselves in situations where human rights violations are likely to occur, for instance, during disputes between the business entity and local community, in areas that are in armed conflict, or are prone to armed conflict. When there is an increased risk of enterprises being complicit in gross human rights abuses committed by other actors, such as private and government security forces, they should take any possible measures to prevent a conflict. In case the conflict still occurs, business enterprises should ensure that they do not worsen or contribute negatively to the situation. They could consult with experts within the enterprise, as well as consult externally with credible, independent experts, including from the government, civil society, national human rights institutions and relevant multi-stakeholder initiatives.¹⁰⁸

As part of its preventive efforts, the company and its security personnel should conduct comprehensive risk assessments on a regular basis. This would include threat assessments, vulnerability assessments, and risk analysis in order to diminish the probability of violence occurring. Unfortunately, laws and regulations in Indonesia do not require regular assessment. However, some business entities have filled the gap by issuing codes of conduct and internal regulations that provide for continuous comprehensive assessments.

In practice, business entities could look to the Voluntary Principles on Security and Human Rights for guidance.¹⁰⁹ Drafted in 2000, the Voluntary Principles on Security and Human Rights is a multi-stakeholder initiative that responds to international concern that the security arrangements for major projects and operations were, in some locations, increasing the risk of abuses against people and communities. The Voluntary Principles provide guidance on (1) conducting risk assessments, (2) interacting with public security, and (3) interacting with private security.¹¹⁰

There are several companies that have adopted internal guidelines to implement the Voluntary Principles and whose strategies could serve as examples in developing internal security guidelines, such as BP's "Voluntary Principles on Security and Human Rights: Implementation Guideline."¹¹¹ The Voluntary Principles were also adopted in a Memorandum of Understanding between BPMIGAS (Indonesia's Upstream Oil and Gas Activity Agency, now dissolved and whose functions are now being performed by SKKMIGAS),¹¹² several business entities doing business in Indonesia, and local police forces.¹¹³

b. Security policy in conflict areas

There appears to be no regulation requiring state agencies to distinguish businesses operating in conflict areas from those in non-conflict areas. The 2007 Investment Law only requires all investors to respect the rights of the local people. Hence, being in a conflict area is not deemed as a special condition with regard to investment activity.

108 Ibid.

109 Voluntary Principles on Security and Human Rights. "What are the Voluntary Principles: Introduction." Webpage. Accessed 28 October 2014. <http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/>

110 Ibid.

111 BP. "Voluntary Principles on Security and Human Rights: Implementation Guideline: An extended summary." BP PDF. Accessed 28 October 2014. http://www.bp.com/content/dam/bp/pdf/sustainability/group-reports/VPs_Implementation_Guideline_Extended_Summary.pdf

112 The Constitutional Court dissolved BPMIGAS on 13 November 2012 through Decision No. 26/PUU-X/2012. Pursuant to Presidential Regulation No. 9 of 2013 regarding The Management of Upstream Oil and Gas Activities, The Special Work Unit for Upstream Oil and Gas Activities (Satuan Kerja Khusus Pelaksana Kegiatan Usaha Hulu Minyak dan Gas Bumi or "SKK Migas") assumed BP Migas' duties until the issuance of the new oil and gas law. Richard Cornwallis. "Indonesia: After BP Migas has been Disbanded, the Government Establishes SKK Migas." *mondaq* (27 February 2013). Webpage. Accessed 28 October 2014. <http://www.mondaq.com/x/222310/Oil+Gas+Electricity/After+BP+Migas+has+been+Disbanded+the+Government+Establishes+SKK+Migas>

113 Laurence Boisson de Chazournes. "Standards and Guidelines: Some Interfaces with Private Investments." In *Foreign Investment, International Law and Common Concerns*, edited by Tullio Treves, Francesco Seatzu, Seline Trevisanut, 100-114. London and New York: Routledge, October 2013. 104.

However, business activities that are considered “national vital objects” are treated differently. The 2004 Presidential Decree No. 63 on the Security Measure for National Vital Objects provides for two layers of security. The first responsibility falls on the manager of such “vital object,” who is expected to coordinate and organise security matters to safeguard its compound. Second, the Indonesian police can provide assistance to these internal personnel, depending on the level of need and the threat/attack faced. Here, the police will regularly assess the security measures being taken, and if required, can ask for assistance from the Indonesian military (TNI).

The Decree defines “national vital objects” very broadly as covering any zone or location, building or installation, and business that carry the hopes of many, or are of national importance, or are a source of state revenue, or are characterized as of strategic importance.¹¹⁴ The government may determine any location as a national vital object by issuing a ministerial decision or a decree by the head of non-departmental institutions. The Ministry of Energy and Natural Resources has issued a list of business activities which are considered national vital objects.¹¹⁵ According to this list, only business activities which provide significant income to the state are deemed to be vital objects, hence, the responsibility of securing such objects lies in the hands of the internal security of the national vital objects who work in close cooperation with national police. For the others, only internal security personnel employed by corporations are responsible for security.

Prior to the 2004 Decree, the Indonesian military was responsible for safeguarding certain business activities. A number of human rights abuses were alleged to have been committed by TNI personnel in the course of securing mining areas, as in the cases of the Freeport in Papua,¹¹⁶ and PT Arun and Exxon Mobil in Aceh.¹¹⁷ Thus, President Megawati Soekarno Putri issued this Decree to limit the military’s involvement in providing security for business activities and provide more authority to the police and internal security guards.

To implement the 2004 Decree, several government agencies issued implementing documents. The police issued Decision of Chief of National Police No. Skep/738/X/2005 on the Guidelines for Securing National Vital Object (which covers security procedure, security personnel configuration, management audit, monitoring and controlling security) and a directive, National Police No. R/DIR/680/IX/2004 on the security of vital object. The Ministry of Mining and Natural Resources issued a similar decree confirming the role of the police in safeguarding the national vital objects in the mining and natural resources sector.¹¹⁸ Notably, these regulations do not mention conflict-prone areas along Indonesia’s border—where many national vital objects are located and which areas are under the responsibility of the Indonesian military to safeguard. Currently, the Decree is not very clear on the division of labour between private security, police, and the military.

Finally, a good security plan requires adequate and proper resources. Currently, it is not clear whether the police and the military have a specific and sufficient budget for safeguarding national vital objects. It was highlighted by several reports that the resources of the national police, particularly on equipment and personnel, are limited. For example, various places lack CCTV.¹¹⁹ Moreover, the number of police personnel is not sufficient to cover all national vital objects throughout Indonesia. Some national vital objects are located in remote areas and the Indonesian police does not have the equipment, such as helicopters, to access them. This makes the police rely on the generosity of companies and/or the military. Clarification and certainty of available funding would avoid any potential corrupt practices by police, military, and business entities.

114 “Presidential Decree on the Security of National Vital Objects,” LGS Newsletter, <http://www.lgsonline.com/pages/g/lgsimp370/node/lgs4a1d783104616>, (1 January 2015).

115 Ministerial Decree No. 2288/K/07/MEM/2008 on the Amendment of Ministerial decree no. 1762/07/MEM/2007 on the Security Measure of National Vital Objects in Energy and Natural Resources Sector, Ministry of Energy and Natural Resources, 2008.

116 Human Rights Watch. *Too High A Price: The Human Rights Cost of the Indonesian Military’s Economic Activities*. June 2006.

117 Ross Clarke. *A Matter of Complicity? Exxon Mobil on Trial for its Role in Human Rights Violation in Aceh* (International Center for Transitional Justice, 2008).

118 Decision of Minister of Mining and Natural Resource No. 1762.K/07?MEM/2007 on the Security of Naional Vital Object on the Mining and Natural Resources Sector (2007).

119 “Strategi Pengamanan Objek Vital Nasional.” *The Indonesian Center for Police and Security Studies*. Accessed 15 Oktober 2014. <http://polmas.wordpress.com/2010/12/21/strategi-pengamanan-obyek-vital-nasional/>

There are, however, some good practices being adopted. Individual Memorandums of Understanding between corporations and law enforcement officers have been developed. An example of this is the agreement entered into by Pertamina (a state-owned enterprise engaged in the oil and gas industry), the Indonesian military, and national police on 18 June 2013. The agreement covers a list of Pertamina's assets relative to energy production and distribution. Another example is BP's Tangguh project. As contained in a Memorandum of Understanding, BP and the Indonesian police in Papua have adopted the Field Guidelines for Joint Security Measures (JKLAPPAMBERS).¹²⁰ The Field Guidelines establish human rights standards required to secure the gas operations at the Tangguh project. It adopts the Voluntary Principles on Security and Human Rights and the restrictions on the use of force established by the UN's Basic Principles on the Use of Force and Treatment of Offenders. It also requires the use of a community policing system, in which dialogue with communities and mechanisms for conflict prevention and resolution play a key part. The standards are reinforced through regular training for all BP security personnel. The Tangguh project does not provide weapons or ammunition directly, or through funding, to the police. Private security guards are unarmed.¹²¹

3.3. Corruption

Corruption¹²²

Simon Gunawan Tanjaya, an executive at Singapore-based oil trading company Kernel Oil Pte Ltd, is the first individual to be sentenced in connection with the Special Work Unit for Upstream Oil and Gas Activities (SKKMigas) bribery case. The Jakarta Anti-Corruption Court sentenced him to three years in prison and a fine of around \$16,000 for paying a US\$700,000 bribe to former SKKMigas chief Rudi Rubiandini. It was alleged that Tanjaya, together with Kernel Oil President Widodo Ratanachaithong, gave the bribe through a middleman in return for a pledge to allocate oil blocks to Fossus Energy Pte Ltd, another company represented by Ratanachaithong. Rubiandini promised that Fossus Energy Ltd would be declared the winner of a limited tender for the Senipah oil block on 7 June 2013. Rubiandini had also allegedly agreed to commit other violative acts for the benefit of Fossus Energy. Rubiandini was sentenced to seven years in prison for taking more than \$1.5 million in bribes from various parties.¹²³

Although the absence of corruption is not a human right *per se*, corruption often leads to a violation of human rights. When corruption is prevalent, those in public positions fail to make decisions with the best interests of society in mind.¹²⁴ It denies access to justice for victims, it exacerbates inequality, weakens governance and institutions, erodes public trust, fuels impunity and undermines the rule of law—which, among many others, could affect the right to a fair trial, the right to due process, and the victim's right to effective redress.¹²⁵ In addition, corruption can impair the availability, accessibility, affordability and quality of human rights-relevant goods and services.¹²⁶ Health sector corruption, for example, deprives people of access to health care and leads to poor health outcomes.¹²⁷ In the above case, corruption impaired the principles of justice, fairness, and transparency, leading to the violation of the right to information and the right to participate in development.

120 "Joint Decision between Head of the Indonesian Police in Papua and the Head of the Country BP Indonesia on the Guidelines of Security Measure Strategy in LNG Tangguh Project," in *No. Pol. SKEP/196/VIII/2009 & No. 0072/POLRI/BERAU/8/2008* (Papua: 2009).

121 BP. "Security & Human Rights." *BP Webpage*. Accessed 24 January 2015. http://www.bp.com/en_id/indonesia/environment---society/security---human-rights.html

122 Hans Nicholas Jong. "Kernel Executive Sentenced to Three years for Bribing Rudi." *The Jakarta Post*, 20 December 2013.

123 The Jakarta Post. "Rudi Rubiandini gets seven years for bribery." *Jakarta Post* (29 April 2014). Accessed 28 October 2014. <http://www.thejakartapost.com/news/2014/04/29/rudi-rubiandini-gets-seven-years-bribery.html>

124 "The Human Rights Case Against Corruption." *Office of the High Commissioner for Human Rights*. Accessed 1 December 2014. <http://www.ohchr.org/EN/NewsEvents/Pages/HRCASEAGAINSTCORRUPTION.aspx>

125 *Ibid.*; "Human Rights and Anti-Corruption." *Office of the High Commissioner for Human Rights*. Accessed 7 December, 2014. <http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/AntiCorruption.aspx>

126 *Ibid.*

127 Brigit Toebes. *The Impact of Acts of Corruption on the Enjoyment of the Right to Health* (The International Council on Human Rights Policy, 2007). 1 - 10.

Hence, it is important to highlight the issue of corruption in the context of human rights and business.

The role of business actors is twofold: first, business actors should not commit any bribery or act in complicity with corruptors. Second, business actors are expected to ensure that its corporation or business activities are free from corruption.

a. Anti-corruption campaigns

Statistics of the Corruption Eradication Commission (**KPK**)¹²⁸ indicate that, in 2014, 15 private actors were arrested for alleged corruption—higher than the number of arrests for classes of public officials included in the list. Private actors were followed closely by Regent/Mayor/Deputy (12 arrests) and Head of Institute/Ministry (9 arrests).¹²⁹ Hence, KPK calls on business actors to avoid and report acts of bribery.

KPK initiated an anti-corruption program, Studi Prakarsa Anti Korupsi (**SPAK**), for business communities, including state-owned enterprises. This program is aimed at assessing anti-corruption initiatives of business entities. As a follow-up to this program, KPK assessed four state-owned enterprises as part of a pilot project, and is planning to expand this program to private businesses.¹³⁰ In addition, it has assisted several state-owned enterprises in monitoring and supervising their transactions. These include PT INKA, PT Semen Gresik, SPGN, PT Kertas Leces, PT DOK, and Kodja Bahari.¹³¹

KPK also has a whistle-blower program, allowing anyone to report allegations of corruption with preliminary evidence. Although its effectiveness is unclear,¹³² this program has been used by civil society to report allegations of corruption by corporations and/or government officials.¹³³ Moreover, the whistle-blower program has been socialised to all ministries,¹³⁴ the National Electricity Company (PLN), and government institutions working in the field of mining, such as SKKMigas.

In 2013, SKKMigas developed a mechanism, “Watch SKKMIGAS: Reveal, Prove, and Report,” for anyone to report wrongful acts committed by its staff.¹³⁵ These wrongful acts include corruption, violation of ethics, gratification, cheating, conflict of interest, abuses, and disclosure of confidentially.¹³⁶ A similar mechanism is found in the National Electricity Company. The identity of the person filing the report is confidential and some privileges are also given, such as protection from dismissal and guarantee from discrimination.¹³⁷

128 KPK was established in 2002 under the 2002 Law no. 30 on the Corruption Eradication Commission. Its mandate is very specific, namely: to prevent corruption, monitor good governance in relation to corruption, and investigate cases of corruption. In other words, KPK takes the roles of both police and prosecutor in any corruption cases providing that they meet the criteria set in this law. However, its authority is limited only to cases which involve public officials, attract public attention, and cause the State losses of at least Rp. 1,000,000,000- See The 2002 Law No. 30 on the Corruption Eradication Commission (2002).

129 “Tabulasi Data Pelaku Korupsi berdasarkan Jabatan Tahun 2004 - 2014 (Per 31 Agustus 2014).” *Indonesia Anti-Corruption Commission*. Accessed 20 October 2014. <http://acch.kpk.go.id/statistik-penanganan-tindak-pidana-korupsi-berdasarkan-tingkat-jabatan>

130 “Menghubungkan Dunia: Laporan Berkarya Menuju Pembangunan Berkelanjutan 2011.”

131 *Ibid.*, 48.

132 There is no research yet on how effective the whistleblower system is. See Heru Setiawan, *Whistleblower System* (Badan Pengawasan Keuangan dan Pembangunan, Perwakilan BPKP Provinsi Jawa Tengah); Abdul Haris Semendawai et al., *Memahami WHISTLEBLOWER* (Jakarta: Lembaga perlindungan Saksi dan Korban (LPSK), December, 2011).

133 *Memahami WHISTLEBLOWER*.

134 Azwar Abubakar. *Surat Edaran No. 08/M.PAN-RB/06/2012 tentang Sistem Penanganan Pengaduan (Whistleblower System) Tindak Pidana Korupsi di Lingkungan Kementerian/Lembaga dan Pemerintah Daerah*. Kementerian Pendayagunaan Aparatur Negara dan Reformasi Birokrasi, 29 Juni 2012.

135 “Kawal SKK Migas: Buka, Bawa, Laporkan [Monitor SKK Migas: Reveal, Prove, and Report].” *SKKMIGAS*. Accessed 14 October 2014. <http://www.skkmigas.go.id/wbs/>; “SKK Migas Terima 5 SMS Pengaduan dari ‘Pembisik’ (SKK Migas Received 5 SMS from Whistleblower Program)”, *Liputan 6*. Accessed 14 October 2014. <http://bisnis.liputan6.com/read/715920/skk-migas-terima-5-sms-pengaduan-dari-pembisik>

136 “Kawal SKK Migas : Buka, Bawa, Laporkan [Monitor SKK Migas: Reveal, Prove, and Report]”.

137 “Sistem Pelaporan Pelanggaran,” *PT PLN (Persero)*. Accessed 14 October, 2014. <http://www.pln.co.id/blog/sistem-pelaporan-pelanggaran-whistle-blowing-system/>

The anti-corruption campaign goes beyond state-owned companies. In accordance with the Decision of the Head of Investor Board (Bapepam LK) No. 431/BL/2013, all publicly-listed companies are encouraged to develop an anti-corruption mechanism, such as whistle-blower mechanisms, and publicise it in their annual reports. Based on 2012 statistics, 142 of 495 publicly-listed corporations have already established similar mechanisms.¹³⁸ Asia Pulp and Paper (**APP**), for example, has developed an electronic complaint mechanism to encourage everyone (employees, former employees, vendors, customers, and business partners) to be actively involved in and be responsible for creating transparent, clean, and ethical business and work practices.¹³⁹ The program calls on everyone to report to APP's Internal Control and Audit Division any allegation of fraud, corruption, collusion, unethical business conduct, and unethical working place.¹⁴⁰

b. Legal challenges with regard to addressing corruption

While the Law on Eradication of Criminal Acts of Corruption provides a definition for corruption by penalising “[a]nyone unlawfully enriching himself and/or other persons or a corporation in such a way as to be detrimental to the finances of the state or the economy of the state,” its application may be confusing particularly for business actors.¹⁴¹ A few high profile cases support this observation.

In 2007, the director of PT Keang Nam was released by the district court because he was found not guilty for conducting illegal logging and corruption. However, the Supreme Court disagreed and found him guilty for illegal logging and for failure to pay fees for reforestation as required by regulations, leading to the corruption. This case has laid down the precedent that the failure to meet financial requirements as regulated in other laws may be considered as a corrupt conduct. Corruption, thus, covers a wide range of misuse of entrusted funds and power for private gain. This extensive definition will help the authorities to ensure that no corruptor can escape from justice.

A more recent corruption case has however made stakeholders in the telecommunications industry apprehensive. In 2013, the Anti-Corruption Court found the director of PT Indosat Mega Media (**IM2**), an Internet service provider, guilty of corruption for illegally enriching the company. It ruled that IM2 had been operating illegally for it failed to secure frequency licenses and instead leased the frequency of its parent company, PT Indosat, a telecommunications company. A regulation of the Communication and Information Ministry bars telecommunication firms from handing over frequency allocations to other companies. However, industry regulators including the Indonesian Telecommunication Regulatory Body and the Communications and Information Ministry had stated that this business model is not against the law: PT Indosat functions as a network provider while IM2 is a service provider, and IM2 is not required to secure additional licenses because PT Indosat, as its parent company, has already secured the required permits as a network provider. IM2, according to Indosat, was just renting the allocated frequency, not taking it over.¹⁴² Regulators and other stakeholders in the industry are concerned that the verdict would act as a precedent to file similar cases, since more than 200 Internet service providers also apply the same business model. Legal scholars note that this situation reflects the lack of coordination among government agencies and such legal uncertainty will discourage investors.¹⁴³

A 2014 Supreme Court decision concerning the conviction of a Chevron employee for corruption also had similar issues. Chevron Pacific Indonesia had appointed Green Planet and Sumigita to remove or neutralize contaminants in soil or water at its facilities in Sumatra. Prosecutors said the companies were not qualified and

138 “Perusahaan Publik Diimbau Punya Prosedur Anti Korupsi [Public Corporation is encouraged to develop Anti-Corruption Procedure].” *Hukum Online*. Accessed 15 October 2014. <http://www.hukumonline.com/berita/baca/lt52f3ab06a2434/perusahaan-publik-diimbau-punya-prosedur-anti-korupsi>

139 “Ethical Call Center.” *APP*. Accessed 14 October 2014. <http://www.asiapulppaper.com/contact/ethical-call-center>

140 *Ibid.*

141 1999 Law No. 31 on Eradication of Criminal Acts of Corruption (1999).

142 Mariel Grazella. “Telco firms rattled by IM2 verdict.” *Jakarta Post* (9 July 2013). Webpage. Accessed 25 January 2015. <http://www.thejakartapost.com/news/2013/07/09/telco-firms-rattled-im2-verdict.html>

143 Muhamad Al Azhari. “Telecommunication Industry Outraged at Ruling.” *Jakarta Globe* (10 July 2013). Webpage. Accessed 24 January 2015. <http://thejakartaglobe.beritasatu.com/business/telecommunication-industry-outraged-at-ruling/>

did not have the proper permits, and that the clean-up was unnecessary because the area was not sufficiently contaminated.¹⁴⁴ During the trial of Chevron employees, prosecutors contended that they had violated corruption laws by causing the state to lose \$9.9 million from reimbursement that the state was due to pay for the clean-up as part of its contract with Chevron. Defence lawyers for Chevron Pacific Indonesia countered that Chevron had not received any reimbursement for the project; further, Chevron's scientific analysis had confirmed that the soil was sufficiently contaminated to warrant bioremediation and their employee was just performing his job. As in the case involving IM2, multiple government agencies (*e.g.* Ministry of Environment and SKKMigas), as well as the independent Supreme Audit Agency, had gone on record to say that no laws were broken.¹⁴⁵ The Komnas HAM had previously questioned the criminal procedure and accused prosecutors of professional misconduct and of having violated the defendants' human rights in a 400-page investigation report submitted to President Susilo Bambang Yudhoyono in 2013. The response from civil society was mixed: while some questioned the involvement of Komnas HAM in trying to defend Chevron, which is alleged to have committed human rights abuses,¹⁴⁶ others appreciated Komnas HAM's action in questioning the authority of the Prosecutor's Office.¹⁴⁷

3.4. Labour

Trade Union Busting¹⁴⁸

A case in the Pasuruan district in East Java pertains to the unlawful dismissal in May 2008 of four workers who formed a plant-level union at PT King Jim Industries and organised a strike. PT King Jim Industries is affiliated with the Federation of Indonesian Metal Workers Union (Federasi Serikat Pekerja Metal or **FSPMI**), one of the largest and most respected unions in Indonesia. Management refused to negotiate with the plant-level union even after it had been formally registered and its membership verified, and despite instructions from the local manpower office to engage in collective bargaining. Thus, the union registered its intention to strike.

Management rejected a compromise offered by the manpower office and declared that workers participating in the strike would lose their annual bonuses and be barred from taking part in company-sponsored recreation activities. On 15 May 2008, the day after a one-hour strike was held, four union leaders received a letter stating that they were being dismissed for organising the strike. The workers, with the support of FSPMI in East Java, reported the case to the Pasuruan Police. Ultimately, the Bangil district court sentenced the general manager to prison for 18 months for violating union rights under Article 28 and 43 of the 2000 Law on Trade Union. This decision was upheld by the High Court in Surabaya and later by the Supreme Court, thus upholding the workers' right to freedom of association and right to collective bargaining.

144 Joe Cochrane. "Chevron Criticizes Ruling by Indonesia's Supreme Court on Corruption." *The New York Times* (24 October 2014). Webpage. Accessed 24 January 2015. http://www.nytimes.com/2014/10/25/business/chevron-criticizes-ruling-by-indonesias-supreme-court-on-corruption.html?_r=0; and Joe Cochrane. "Conviction of Chevron Worker Spurs Oil Industry Concerns in Indonesia." *The New York Times* (17 July 2013). Accessed 24 January 2015. http://www.nytimes.com/2013/07/18/business/global/conviction-of-chevron-worker-spurs-concerns-in-indonesia.html?_r=0

145 *Ibid.*

146 Duri FK. "Kasus Chevron, Ada Apa Dengan Komnas HAM?" *Forum Keadilan*. Accessed 2 December 2014. <http://forumkeadilan.com/hl/kasus-chevron-ada-apa-komnas-ham/>

147 Fiddy Angriawan. "Komnas HAM Pantau Kasus Chevron," (Komnas HAM, 21 May 2013); Maria Yuniar. "Komnas HAM: Ada 4 Pelanggaran Kasus Bioremediasi." *tempo.com*. Accessed 1 December 2014. <http://www.tempo.co/read/news/2013/05/21/090482012/Komnas-HAM-Ada-4-Pelanggaran-Kasus-Bioremediasi>.

148 Michele Ford. "Employer Anti-Unionism in Democratic Indonesia," in *Global Anti-Unionism: Nature Dynamics, Trajectories, and Outcomes*, ed. Gregor Gall and Tony Dundon (New York: Palgrave Macmillan, 2013), p. 224 - 240; Verdict No. 1038 K/Pid.Sus/2009, (Supreme Court 2009).

OECD Complaint Negotiation Process¹⁴⁹

On 10 November 2008, the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association (IUF) submitted a specific instance to the Swiss National Contact Point (NCP) of the Organisation for Economic Co-operation and Development (OECD) on behalf of one of its affiliates, the Union of Nestlé Indonesia Panjang Workers (SBNIP). The submission concerned a labour dispute at the Panjang coffee processing plant owned by PT Nestlé Indonesia, a subsidiary of Nestlé SA (Switzerland). IUF claimed that Nestlé Panjang management was acting in a manner inconsistent with the OECD Guidelines by not respecting the rights of the local trade union (SBNIP) and refusing to engage in collective bargaining to negotiate wages. The workers claimed that Nestlé Panjang failed to observe Nestlé's Employee Relations Policy and Nestlé Group's Corporate Business Principles.

NCPs of the OECD are tasked with providing a mediation and conciliation platform for resolving issues that may arise from alleged non-observance of the OECD Guidelines. The NCP agreed to facilitate and monitor the dialogue between IUF, SBNIP, and Nestlé Indonesia Panjang. At a joint meeting on 28 August 2009 in Geneva, representatives from IUF and Nestlé reached an understanding which paved the way for resolving these issues. After the meeting, parties in Indonesia confirmed their commitment to include wages and wage scales in the 2010-2011 Collective Bargaining Agreement.

The first case highlights the right to form unions and collective bargaining, and the latter refers to different *fora* for dispute settlement. Several issues from these two cases are discussed below.

a. Union busting is a crime

The first case lays down the foundation for the application of Articles 28 and 43 of the 2000 Law on Trade Union, which criminalise trade/labour union busting. These provisions prohibit anyone from forcing a worker to form or not form a union, become or not become a union official, become or not become a union member, or carry out or not carry out trade/labour activities by (1) terminating employment, temporarily suspending employment, demoting, or transferring an employee to another post/division/place in order to discourage or prevent him/her from carrying out union activities or make such activities virtually impossible; (2) not paying or reducing the amount of a worker's wage; (3) intimidating or subjecting him/her to any other form of intimidation; and (4) campaigning against the establishment of a union.¹⁵⁰

Although the law was enacted in 2000, the provisions on trade union busting had never been applied in any case until the case of PT King Jim Industries was decided in 2009. As pointed out by several commentators, resolving union busting cases is not easy because identifying and proving trade union busting can be challenging. Finding the causal link between the intention to bust a trade union and the management's actions can be problematic. Management could find or fabricate reasons to terminate a worker and argue that his/her intention was not to bust a union.

Additionally, law enforcement officers lack the knowledge and confidence to deal with union busting. In the PT King Jim Industries case, the question as to which agency had the jurisdiction to investigate such cases was raised at the beginning of the judicial process, as the law states that, aside from the police, "special authority to function as investigators... is also given to certain civil servants within the jurisdiction of the government agencies whose jobs and responsibilities [are] on manpower affairs."¹⁵¹ The courts stated that both the police and government manpower agencies are authorised and obligated to start investigations. Thus, the PT King

¹⁴⁹ National Contact Point of Switzerland. "Specific Instance Nestlé Indonesia, Panjang Coffee Processing Plant Closing Statement." 24 June 2010.

¹⁵⁰ 2000 Law No 21 Concerning Trade Unions (2000).

¹⁵¹ *Ibid.*, Article 41.

Jim Industries case is important as it lays down a legal reference for future cases on union busting and sends a warning to the business community.

b. Alternative forums for dispute settlement

The above cases illustrate the diversity of available forums in dealing with cases related to business and human rights. While both cases involve the right to form and join trade unions, one was resolved through the Indonesian criminal justice system and dealt by the Indonesian court. The latter case was resolved through a negotiation process handled by the NCP of OECD, considering that Nestlé Indonesia is a subsidiary of Nestlé in Switzerland. While Indonesia is not a member of OECD, Switzerland is. Thus, the NCP of Switzerland has the jurisdiction to deal with cases involving any Swiss company. As required by the OECD Guidelines for Multinational Enterprises, adhering governments are obliged to set up NCPs, whose main role is to further the effectiveness of the OECD Guidelines by undertaking promotional activities, handling enquiries, and contributing to the resolution of issues that arise from the alleged non-observance of the guidelines in specific instances.¹⁵² NCPs also provide a mediation platform for resolving practical issues that may arise with the implementation of the Guidelines.

The Nestlé case is not the only one involving a company operating in Indonesia that has been handled by the NCPs. In 2013, Indocement Union (Serikat Pekerja Indocement Tunggal Prakarsa or SP-ITP), the Federation of Indonesian Cement Industry (FSP-ISI), and IndustriALL Global Union filed a complaint before the German NCP for the OECD Guidelines for Multinational Enterprises against PT Indocement Tunggal Prakarsa (Indonesia) and Heidelberg Cement AG (Germany). The complaint took the view that PT Indocement Tunggal Prakarsa, a subsidiary of Heidelberg Cement AG, Germany, did not support the union and maintain the appropriate level of respect for the union.¹⁵³ The case was resolved in 2014 through mediation among all parties coordinated by the German NCP. The parties agreed that the safety and security of all the workforce, including union members, have to be guaranteed, and that the union and its members are not to be hampered in their activities.

c. Trade union and business actors: A partnership

The position of trade unions is very unique. There is no doubt that forming and joining trade unions is a worker's right. It is associated with the freedom of association and the right to express one's thoughts, either orally or in writing. Such right is clearly stipulated in International Labour Organization (ILO) Convention Number 87 concerning the Freedom of Association and Protection of the Right to Organize and ILO Convention Number 98 concerning the Right to Organize and Collective Bargaining, which were ratified by Indonesia in 1998 and 1957 respectively. However, it was only in 2000 that Indonesia enacted a law on trade unions.

While all corporations should follow national laws and regulations as well as strive to meet the spirit of international human rights standards on trade unions, corporate practices fall short of these policies and standards. Violations of the 2000 Law on Trade Unions continue to be committed in various forms.¹⁵⁴ Nonetheless, the Nestlé and PT Indocement Tunggal Prakarsa cases demonstrate that such issues may be resolved through negotiation, without resorting to judicial action. Despite some deadlocks in the negotiations, the Nestlé trade union was able to participate in developing the collective bargaining agreement and in various discussions on labour issues with the local management. It was also able to access company policy and documentation, and has now expanded its

¹⁵² "National Contact Points." *OECD Guidelines for Multinational Enterprises*. Accessed 12 January 2015. <https://mneguidelines.oecd.org/ncps/>

¹⁵³ "Joint Statement by the German National Contact Point for the OECD Guidelines for Multinational Enterprises on a complaint by Indocement Union, SP-ITP, the Federation of Indonesian Cement Industry (FSP-ISI), by the Confederation of Indonesian Trade Unions (CITU-KSPI) and by IndustriALL Global Union against PT Indocement Tunggal Prakarsa, Indonesia and HeidelbergCement AG, Germany." 21 May 2014. Available at: http://www.industrial-union.org/sites/default/files/uploads/documents/Indonesia/indocement_oecd_agreement.pdf

¹⁵⁴ ITUC-CSI-IGB. "Indonesia." *Survey of Violations of Trade Union Rights: Freedom of Association - Collective Bargaining - Strike*. Accessed 16 October 2014. <http://survey.ituc-csi.org/Indonesia.html?lang=en#tabs-3>

network by building affiliations with several regional and international trade union organizations.

The positive conclusion of the Nestlé case was made possible by both the union's strength and tenacity and the company's willingness and commitment to make room for negotiation. Nestlé, as a result of its openness, has been able to create partnerships with the trade unions established in each of its factories in Indonesia.¹⁵⁵ The commitment to recognize and uphold freedom of association and the right to collective bargaining is articulated in the Nestlé Group's Corporate Business Principles, which applies to all companies under the Nestlé Group and is integrated in business planning, auditing and performance reviews. To realize this commitment, the Nestlé Group has also been working with federations and manpower organizations to build the capacity of union officials and to strengthen the tripartite communication between union, management, and workers.

3.5. Supply Chain

Supply Chain¹⁵⁶

The statements below are the findings of a 2011 independent external monitoring (IEM) report conducted by the Fair Labour Association (FLA) at the request of Nike.

There were harassments, verbal and physical abuses in the past 3 months:

December 17, 2011: A 6-months pregnant worker had a headache while working and put her head down to rest for a minute. Upon noticing this, Ms [name], her expatriate leader, sternly expressed her anger, and then threw a handy talky at her, grazing the worker's chin.

November 9, 2011: when a worker asked for a reject product from cutting to be used in sewing, they were kicked by the expatriate supervisor.

November 11, 2011: A new workers complained about her leader (local staff) for using poor language (Sundanese Slang, rude language)

November 18, 2011: Mr [Name] (local staff at Production Planning Center), was reported to have committed sexual harassment against some female works (e.g. touching their bodies, using improper language).

October 6, 2011: A leader of Converse Assembling Line filed a complaint about an expatriate leader, Mr [Name], who often yelled and threw shoes/ lasting during leader briefings. He was reported to have cut the leader's hat for not wearing it.

The purpose of the IEM conducted by the FLA was to assess the working conditions at PT Glostar, a factory owned and operated by the Pou Chen Group, a Nike supplier.¹⁵⁷ After the report was published in 2012, Pou Chen became an affiliate of the FLA as a participating supplier. As a result, Pou Chen was directly responsible for implementing corrective actions and reporting to the FLA. While reports after the 2011 IEM were not available, a verification visit for internal auditing of Pou Chen was conducted by a third party monitor in February 2013.

This case highlights two issues: the corporate responsibility to monitor suppliers and the voluntary nature of monitoring and evaluation systems commonly found in business practices.

155 There are three unions in Nestlé: the Union of Nestlé Indonesia Panjang Workers (SBNIP), the Union of Nestlé Indonesia Kejayan Workers (SBNIK) and the Union of Nestlé Indonesia Cikupa Workers (SBNIC). See "About Nestlé." *Nestlé*. Accessed 16 October, 2014. <http://www.nestle.co.id/eng/aboutus>

156 Donny Triwandhani. *Independent External Monitoring Report: Nike, Inc in Indonesia* (Fair Labor Association, 2011).

157 *Ibid.*

a. Corporate responsibility to monitor suppliers

At the international level, there have been calls for corporations to expand its duty to conduct due diligence to its suppliers and for them to manage the human rights impacts of their supply chains and other business relationships.

In Indonesia, there is no law explicitly obligating corporations to ensure that its suppliers respect human rights. However, the 2012 Regulation of Food and Drug Agency No. HK.03.1.33.12.12.8195 on the Guidelines to Produce High Qualified Medicine requires pharmaceutical corporations to ensure that the materials used by all its suppliers meet certain quality standards. Thus, pharmaceutical corporations have an obligation to regularly audit product quality, storage practices, and the safety of the product of its suppliers. Although this obligation relates to quality control, it does have impacts on the right to health.

Emerging corporate practices are also aiming to fill the gap in the regulatory framework with regard to human rights impacts of supply chains. Nike, Palyja (a Suez Environment subsidiary),¹⁵⁸ Unilever,¹⁵⁹ Coca-cola, and Nestlé¹⁶⁰ are examples of multinational corporations that have adopted policies or guidelines concerning the human rights impacts of their suppliers. Some national corporations such as PT Rajawali Nusantara Indonesia,¹⁶¹ PT Angkasa Pura II,¹⁶² and PT Elnusa,¹⁶³ have also adopted a similar approach. These companies aim to ensure that the suppliers share the same standards, values, and principles as the main contracting companies. Freedom of association, the right to collective bargaining, prohibition of child labour, prohibition of forced labour and abuse of labour, and decent work hours and wages are common principles which need to be followed by their suppliers. This phenomenon signifies that respect for human rights (in addition to other common criteria such as quality, accessibility and price competitiveness) can be used as a criterion in selecting suppliers and monitoring their performance.

b. The voluntary nature of monitoring and evaluation systems

Indonesian laws do not require corporations to monitor or report on the human rights compliance of its suppliers. However, the case of Nike highlights the emerging corporate practice of having internal and external monitoring systems to assess/audit suppliers. In addition to Nike, several corporations such as Asia Pulp and Paper,¹⁶⁴ Unilever,¹⁶⁵ and Nestlé¹⁶⁶ have conducted various human rights assessments, either internally or by hiring a third party. With regard to monitoring conducted by third parties, it is worthy to note that Social Accountability International (SAI) appears to endeavour to incorporate elements of the UN Guiding Principles into their SA8000 standard for decent work, a tool for implementing international labour standards that is

158 Palyja. "Pedoman Eika Dalam Berhubungan Dengan Para Supplier." Accessed 12 January 2015. http://id.palyja.co.id/__wysiwyg/filemanager/files/About%20Us/Ethic/PedomanEtikaDalamBerhubunganDenganSupplier.pdf

159 Nestlé. "Responsible Sourcing Policy: Working in Partnership." Available at: http://www.unilever.com/images/slp-Unilever-Responsible-Sourcing-Policy-2014_tcm13-388879.pdf

160 Nestlé. "The Nestlé Supplier Code." Vevey: Nestec Ltd (December 2013). Available at: <http://www.nestle.com/asset-library/documents/library/documents/suppliers/supplier-code-english.pdf>

161 RNI Holding Company. "Code of Conduct: PT Rajawali Nusantara Indonesia (Persero)." 31 December 2013. Available at: <http://www.rni.co.id/sites/default/files/Code%20Of%20Conduct%20RNI.pdf>

162 Angkasa Pura II. "Angkasa Pura II: Pedoman Perilaku (Code of Conduct)."

163 PT Elnusa Tbk. Code of Conduct (Pedoman Etika Bisnis and Etika Kerja)." 2008. Available at: <http://www.elnusa.co.id/wp-content/uploads/2012/05/Code-of-Conduct.pdf>

164 Mazars and APP. "Asia Pulp & Paper Follows UN Lead, Commits to First-Ever Human Rights Audit: "Protect, Respect, and Remedy" Framework to be Cornerstone of APP Sustainability Program." Available at: <https://www.asiapulppaper.com/download/file/fid/412>

165 "Unilever: Communication on Progress 2013—UN Global Compact Advanced level self-assessment." *Unilever*. Accessed 1 January 2015. http://www.unilever.com/images/slp-UNGC-Communication-on-Progress-2013_tcm13-393337.pdf

166 See The Danish Institute for Human Rights and Nestlé. *Talking the Human Rights Walk: Nestlé's Experience Assessing Human Rights Impacts in its Business Activities*. 2010. Available at: http://www.nestle.com/asset-library/documents/library/documents/corporate_social_responsibility/nestle-hria-white-paper.pdf

being used by over 3,000 companies worldwide.¹⁶⁷ According to a SAI representative, “In line with the Guiding Principles, SA8000 requires organizations to conduct periodic risk assessments to identify and prioritise areas of actual or potential risk.”¹⁶⁸

Indeed the UNGP outlines a process for companies to “know and show” that they are meeting their responsibility to respect human rights, including establishing a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights. This brings about a normative shift away from compliance-based thinking and toward understanding human rights impacts as part of a continuing corporate orientation towards behaving responsibly.

4. Lessons Learned

4.1. A need for a systematic approach for dealing with cases

The case study reveals that various cases related to business and human rights, instead of identifying and addressing the root of the problem and assisting businesses with establishing processes to ensure that they do not recur, often tend to center simply on criminal matters. In only focusing on finding perpetrators of criminal conduct, the underlying causes of the dispute remain and can create another conflict in the future. Social conflicts cannot be solved by treating them as security or criminal issues. Instead, they require a comprehensive strategy that understands and addresses both the immediate conflict as well as underlying grievances. A comprehensive strategy also requires the state to develop institutions and implement a capacity-building strategy for all related agencies. Lastly, monitoring and evaluation is very important to assess the success of any measure.¹⁶⁹

A human rights-based approach could be a beneficial strategy when dealing with cases. There is emerging consensus that a human rights-based approach has the following constituent elements: First, it is based on the inherent dignity of every person as a central reference point.¹⁷⁰ This means that companies cannot, *smorgasbord-style*, pick and choose issues with which they feel comfortable.¹⁷¹ Therefore, human rights principles—such as non-discrimination, equality, inclusive participation, rights of subject, accountability and the rule of law, universality, and invisibility—should be part of the mainstream of any company’s strategy, not only part of its corporate social responsibility strategy.¹⁷² This serves to protect against “trading away” of human rights.¹⁷³ Resolution of disputes should lead to respect of human rights, rather than merely meeting regulations. Second, the rights-based approach raises levels of accountability by identifying rights-holders and corresponding duty-bearers, and empowering the former to claim those rights while enhancing the capacities of the latter to meet their obligations.¹⁷⁴ Here, the language shifts the notion of corporate responsibility from the idealism of charity or philanthropy to one of obligation, claims and accountability.

167 “About SAI.” *Social Accountability International* Webpage. Accessed 29 October 2014. <http://sa-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=472>

168 Edwin Koster. “The SA8000: 2014 Standard Alignment with UN Guiding Principles on Business & Human Rights.” *Social Accountability International* Webpage. Accessed 22 June 2014. <http://sa-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=1591>

169 United Nations Interagency Framework Team for Preventive Action. *Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflict: Land and Conflict*. Available at: http://www.un.org/en/events/environmentconflictday/pdf/GN_Land_Consultation.pdf

170 “Rights-Based Approaches: What is a Rights-Based Approach to Development?” *UN Office High Commissioner of Human Rights*. Accessed 05 January 2009. <http://www.unhchr.ch/development/approaches-04.html>

171 Chris Avery. “The Difference between CSR and Human Rights.” *Corporate Citizenship Briefing*. August/September 2006, issue 89. Available at: <http://198.170.85.29/Avery-difference-between-CSR-and-human-rights-Aug-Sep-2006.pdf>

172 *Ibid.*

173 Upendra Baxi, “Market Fundamentalisms: Business Ethics at the Altar of Human Rights.” *Human Rights Law Review* (2005) 5 (1): 1-26. p. 22.

174 “Rights-Based Approaches: What is a Rights-Based Approach to Development?”

4.2 The emergence of corporate culture on business and human rights

The cases above confirm that the regulatory framework surrounding business and human rights is shaped not only by law and government action, but also by changing expectations that drive the development of corporate practices that show respect for human rights, such as adopting corporate codes of conduct, internal regulations, and corporate initiatives like social audit and regular assessment.

The rapid development of corporate codes of conduct and initiatives, in terms of both quantity and quality, has been greatly influenced by a considerable shift in thinking regarding how to improve the social performance of business actors, particularly multinational corporations. There is an emerging de-emphasis on governmental regulations in favour of voluntary ones. To a certain extent, this shift reflects a growing awareness of the corporate responsibility to respect human rights as delineated through the UN Guiding Principles.

Having human rights due diligence systems or any other voluntary initiatives in line with the UNGP at the corporate level may close the governance gap in areas of corporate activity that the state and the international community cannot or do not regulate. Simultaneously, voluntary initiatives may act as the foundation for the creation of a culture of respect for human rights, influencing the creation of new standards or precedents.¹⁷⁵ In some jurisdictions outside Indonesia, the responsibility of businesses to develop practices which acknowledge and integrate respect for human rights has even moved from being voluntary to mandatory in some instances. For example, the European Union has mandatory reporting requirements for human rights. Myanmar also has mandatory reporting requirements, including on the conduct of human rights due diligence, for US companies investing in Myanmar. It will not be impossible if in the future Indonesia will take a step to develop a human rights impact assessment as a requirement for investment or a reporting mechanism to disseminate the findings of such assessments. Such developments in line with the UNGP would be welcomed.

5. Challenges

The case studies and discussion above have highlighted several problems that deserve attention. As a result, this paper notes as follows:

5.1. Lack of knowledge on the concept of business and human rights

Although the concept of business and human rights is not new in Indonesia, businesses are still coming to terms with the consequences of their responsibility to respect human rights. The issue of human rights is often perceived as a government matter and not something related to business activities. The common misperception is that CSR or human rights issues ultimately represent a net cost, and hence should not form part of a company's investment and risk management strategy. This, in turn, has discouraged companies from adopting CSR or human rights in their corporate policies. A shift in corporate attitude is, however, also taking place. Some companies in Indonesia and in the global market are exhibiting a desire to move forward, making the first steps in putting in place human rights processes.

Even with both proper intentions and an appreciation of international human rights standards, implementing human rights policies is not a simple task. As things now stand, guidelines and trainings on implementing human rights policies for business entities are lacking in Indonesia. Hence, understanding and implementing such policies require expertise and resources which many companies do not have. This lack of information on human rights due diligence for business activities in Indonesia also applies to government and society in general, further slowing its reception.

¹⁷⁵ Martti Koeskenniemi. "The Fate of Public International Law: Between Technique and Politics." *The Modern Law Review* 70, no. 1 (2007).

During the last ten years, however, issues of business and human rights and corporate social responsibility have become important matters for various stakeholders in Indonesia. The Indonesian Global Compact Network has hosted two training courses on “Respecting human rights – A practical approach” for Indonesian and international companies as well as a number of academics and NGOs. The courses were designed to “accelerate the development of responsible business practices in Indonesia” by raising awareness and building capacity to implement the UN Guiding Principles.¹⁷⁶ Institutions such as UN Global Compact Indonesia,¹⁷⁷ Indonesia Business Links,¹⁷⁸ and Business Watch Indonesia¹⁷⁹ are coordinating with corporations and have made progress in this regard. The Institute for Policy Research and Advocacy (ELSAM) also has a program on Human Rights and Business, conducting research and training activities for lawyers in this field.¹⁸⁰ Moreover, it has translated various materials on business and human rights into Bahasa Indonesia, making them accessible for more audiences.¹⁸¹

Others have taken a more oppositional stance in their advocacy, exerting pressure through public opinion against acts of corporations that violate human rights. Friends of the Earth Indonesia (Wahana Lingkungan Hidup Indonesia or WALHI), for instance, focuses on issues involving natural resources and works to strengthen community rights by assisting those who are in conflict with oil palm plantations or mining concessions, and designing strategies to get back their land.¹⁸² The Mining Advocacy Network (JATAM), a network of NGOs and community-based organisations, similarly aims to support Indonesian communities. It works mostly with indigenous communities “against the dehumanization and environmental destruction caused by the invasion of the mining, oil and gas industries.”

At the governmental level, while the concept has been introduced in some departments, implementation is still at its early stages. Preventive initiatives have begun to emerge, particularly in the context of CSR. Among these is the issuance of Ministerial Decision No: Kep-236/MBU/2003, which requires all state corporations to allocate part of their profit for implementation of social, community and environmental programmes. The National Committee on Governance (KNKG) has issued good corporate governance (GCG) guidelines in 2001, and revised guidelines in 2006.¹⁸³ There have also been several forums on CSR, although these initiatives are sporadic. No assessment on the impacts of the above has yet been made.

176 “Training emerging market companies on human rights – Lessons from Indonesia Report on training project conducted by twentyfifty ltd. in cooperation with the Indonesian UNGC Network and financially supported by UK Foreign and Commonwealth Office.” *twentyfifty* PDF. Accessed 29 October 2014. <http://www.twentyfifty.co.uk/cmsAdmin/uploads/training-emerging-market-companies-on-human-rights-lessons-from-indonesia.pdf>

177 Ibid.

178 “About.” *Indonesia Business Link* Webpage. Accessed 29 October 2014. <http://www.ibl.or.id/index.php?id=static&page=About&lang=en>

179 “Programmes.” *Business Watch Indonesia* Webpage. Accessed 29 October 2014. <http://www.fair-biz.org/program.php?lang=2>

180 Institute for Policy and Research Advocacy. “Human Rights and Business.” Webpage. Accessed 29 October 2014. http://www.elsam.or.id/list.php?cat=bisnis_dan_ham&lang=en

181 “How to Do Business with the Respect for Human Rights: a Guidance Tools for Companies.” *Institute for Policy and Research and Advocacy* Webpage. Accessed 29 October 2014. <http://www.elsam.or.id/article.php?act=content&id=2982&cid=401&lang=en#.VFB851OUc00>

182 Chris Lang. “Interview with Teguh Surya, WALHI: ‘We are against REDD. We are against carbon trading.’” *redd-monitor.org* (9 March 2012). Webpage. Accessed 29 October 2014. <http://www.redd-monitor.org/2012/03/09/interview-with-teguh-surya-walhi-we-are-against-redd-we-are-against-carbon-trading/>

183 Alex Yap. “Good corporate governance pays off for Indonesia.” *Jakarta Post* (13 February 2012). Webpage. Accessed 25 January 2015. <http://www.thejakartapost.com/news/2012/02/13/good-corporate-governance-pays-indonesia.html>

5.2. Social and legal problems in Indonesia

In an ideal scenario, laws provide an effective foundation for initiatives by setting limitations on what corporations may and may not do. However, poor legal enforcement, corruption, and excessive overlap among different laws and institutions are problems common to all sectors—including business. This results in legal uncertainties, additional administrative costs, and bureaucracy. For example, as mentioned earlier, uncertainty with regard to the mapping of community lands has caused or exacerbated problems for many companies, resulting in disputes with local communities. Additionally, there is a lack of operational standards pertaining to the responsibility of business entities to the community or that would provide guidance on how business enterprises can engage with communities.

International standards can fill the gap in the absence of national standards. In situations where law enforcement is weak, business entities can benefit by acting prudently and observing international standards. The Guiding Principles, for instance, provides guidance on how business entities can conduct themselves to prevent or minimise negative human rights impact when conflicts arise, whether or not these conflicts are due to unclear policies or inefficient government administration. By being proactive and going even beyond what is called for by national legislation, business entities are able to prevent risks and avoid incurring costs from having to address and redress negative human rights implications.

6. Conclusion

This study has endeavoured to provide some examples of how business and human rights, and the corporate responsibility to respect human rights has emerged as a concern in Indonesia. It has also drawn some lessons from the cases presented. The key observations of this study are as follows: First, in terms of the regulatory framework, more direction is needed to guide companies on what they should or should not do in the context of human rights. Second, with regard to access to justice, there are several available grievance mechanisms that can be utilized. However, more innovative and effective mechanisms for dealing with business and human rights issues would be valuable. Third, the discussion reveals that various human rights or human rights-related abuses are not settled using a human rights perspective. Hence, there is a need to integrate human rights principles into various redress mechanisms. Finally, integrating human rights principles into practice is not an instantaneous measure. Integrating human rights into practice is, rather, an attitude that enables the evolution of a multitude of varied initiatives and regulatory approaches aimed at ensuring that business entities are acting responsibly.

