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Business and Human Rights

The Commission for the Disappeared and Victims of Violence (KontraS)
Human Rights Working Group (HRWG)
The Institute for Policy Research and Advocacy (ELSAM)
Indonesia Focal Point (IFP)

I. Introduction

1. The Commission for the Disappeared and Victims of Violence (KontraS), Human Rights Working Group (HRWG), The Institute for Policy Research and Advocacy (ELSAM), Indonesia for Global Justice (IGJ) submit this report for the review of Indonesia in the upcoming Universal Periodic Review (UPR) in October 2022.
2. KontraS is a national human rights non-governmental organization based in Jakarta, Indonesia and was established in 1998. Its main activities are geared towards support for the victims of human rights violations. It seeks to improve respect and protection for human rights within Indonesia through advocacy, investigations, campaigns, and lobbying activities.
3. Institute for Policy Research and Advocacy (ELSAM), was established in August 1993 in Jakarta. Its objective is to actively participate in efforts to develop, promote and protect civil and political rights and other human rights, as mandated by the 1945 Constitution and Universal Declaration of Human Rights (UDHR).
4. Human Rights Working Group (HRWG) is a network of more than 48 non-governmental organizations working on promoting human rights in Indonesia. It was established in 2000

by NGOs sharing similar interests and seeking a platform to coordinate and lead international advocacy efforts. HRWG's main objective is to promote government accountability on constitutional obligations and international standards to respect, promote, protect, and fulfill human rights at home by maximizing available human rights mechanisms at different levels

5. IFP or Indonesia Focal Point (Indonesia Focal Point for Legally Binding Treaty Initiative) was founded in 2016 as coalition of movements, civil society organizations, community leaders, researchers, and academia in developing agenda and response to the process of LBI (legally binding instruments on Transnational Corporations and other business with respect to human rights) based on the resolution 26/9 as adopted by the UN Human Rights Council. The IFP works in advocacy on policy and on institution of norm and mechanism on human rights standard, protection, remedy on human rights violation arising from TNCs.
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II. Overview

7. On the 3rd Cycle of UPR, Indonesia received and decided to support one specific recommendation on Business and Human Rights from Myanmar. The recommendation is:
 - a. 139.38 Further strengthen the commitment of Indonesia to strengthen the human rights dimension in business activities and continue its leading role in this regard (Myanmar); Source of position: A/HRC/36/7 - Para. 139
8. Indonesia also received and decided to support other recommendations which are not specific but related to Business and Human Rights. The recommendations are about child labour, sustainable economic and development as well as protection of Indonesian migrants outside and inside the country, including through establishment of legally binding instrument:
 - a. 139.131 Prevent child labour, beginning with those who work in hazardous conditions (Kenya); Source of position: A/HRC/36/7 - Para. 139
 - b. 139.84 Continue placing poverty alleviation as one of its priority tasks and promote sustainable economic and social development (China); Source of position: A/HRC/36/7 - Para. 139
 - c. 139.145 Continue with efforts for the protection of Indonesian migrants outside the country and of migrants in their territory (Peru); Source of position: A/HRC/36/7 - Para. 139
 - d. 139.82 Expand public participation in pursuit of national development projects such as infrastructure and town planning in order to avoid forced evictions and violence (Kenya); Source of position: A/HRC/36/7 - Para. 139

- e. 139.12 Continue to strengthen its leadership in enhancing regional inclusive mechanisms for the protection of migrant workers through the legally binding instrument (Ecuador); Source of position: A/HRC/36/7 - Para 139

III. State-Business Nexus: Actual and Potential Human Rights Violation under Government's Projects

9. **Vide recommendation 139.38, A/HRC/35/7 (Myanmar).** As a country that supports UN Human Rights Council (UN HRC) Resolution 17/4 on 16 June 2011, related to the endorsement of the United Nation Guiding Principles on Business and Human Rights (UNGPs), the Indonesia Government (through ministries/agencies) has attempted to take a number of steps in adapting and integrating the UNGPs into the national legal system. Despite significant achievements, efforts to implement the UNGPs in Indonesia still face emerging challenges. This is indicated by several factors, one of which is the weakness of the government's political will in the promotion and protection of human rights. In recent times, the government and the parliament have focused on discussing and ratifying a number of legislations that explain guarantees for the protection and remediation of human rights and the preservation of the environment and natural resources, such as the revision of the New Mining Law and Job Creation Law.¹
10. One of the initiatives taken by the government to adopt the UNGPs is to integrate them into the fourth and fifth generation² of the National Action Plan on Human Rights (RANHAM). Apart from RANHAM, the Government is currently developing a National Strategy on Business and Human Rights.³ Unfortunately, although the government has prioritized the implementation of UNGPs in several sectors, such as plantations, mining and tourism, business practices in these three industries are still experiencing serious problems, such as social conflicts, exploitation of workers and resulting in environmental degradation. Even in the mining sector, the government has not explicitly seen any steps in adopting the UNGPs. In addition, the Government's priority which is only focused on three industrial sectors has resulted in human rights violations in other industrial sectors such as health, technology and other sectors getting less attention.
11. One sector that has become a priority industry in Indonesia is Tourism. Since 2015, the Government has established 10 "New Bali" destinations through Cabinet Secretariat

¹ <https://elsam.or.id/satu-dekade-implementasi-ungps-di-indonesia-catatan-dan-rekomendasi-masyarakat-sipil/>

² The Fourth Generation of RANHAM is legitimized by Presidential Regulation No.33 Year 2018 and Presidential Regulation No.53 Year-2021 is for the Fifth Generation

³ As observed by ELSAM. See further: ELSAM, *Rencana Aksi Nasional Bisnis dan Hak Asasi Manusia: Pembelajaran Praktik-praktik terbaik Negara-Negara dalam Melindungi warga Negara dari Dampak Bisnis* (Jakarta: ELSAM. 2020), pp.208-209

Letter Number B 652/Seskab/Maritim/2015⁴ as a manifestation of the development of National Tourism Destinations. However, the development of this tourism project was hit with a series of human rights violations against the rights of the surrounding community. In a study conducted by ELSAM on the four New Bali destinations, namely, the Tanjung Kelayang Special Economic Zone (SEZ), Bromo Tengger Semeru, Lake Toba and Borobudur Temple, it was found that tourism businesses operating under the “state business relationship” scheme have affected the enjoyment of community rights. —most of them are communities and indigenous peoples.⁵ In addition, the UN special rapporteur on Extreme Poverty and Human Rights, Olivier De Schutter also found indications of human rights violations in the form of land grabbing of local communities during the Mandalika project, West Nusa Tenggara as New Bali, causing farmers and fishermen to be evicted from the land they live in.

12. Apart from the tourism industry, the community is also faced with a number of incidents of human rights violations by the state as a result of the government's strategic projects in infrastructure development, one of which is the Bener Dam Project, Purworejo, Central Java. The construction of this project threatens the rights of local communities⁶ and the preservation of andesite stone in Wadas Village, Bener District, Purworejo Regency, Central Java, which will be mined using a quarry system and used for the construction of the Bener Dam.

Recommendations

- a. The government needs to make the UNGPs an integral part of the government's work plan (either at the central government or local government level);
- b. The government must strengthen the authority of national human rights institutions (Komnas HAM, Komnas Perempuan, KPAI, LPSK and Ombudsman) in providing adequate remedies for victims of business-related human rights violations;
- c. The government accelerates formulation of the National Strategy on Business and Human Rights as a specific legal framework for implementing business and human rights in Indonesia with meaningful participation of all stakeholders;

IV. Ecocide in Business (Case Study in Papua and Small Islands)

13. There are several ecocide problems in business that occur in Indonesia. In this paper, we will discuss about the ecocides that occur in Papua and Small Islands in Indonesia. Four

⁴ Kementerian Pariwisata dan Ekonomi Kreatif (Kemenparekraf) in ELSAM, *Memetakan Mozaik Pelanggaran Hak Asasi manusia dalam Konteks Pembangunan pariwisata berdasarkan Perspektif Bisnis dan HAM: Studi Empat Destinasi Bali Baru* (Jakarta: ELSAM, 2020) pp.13

⁵ <https://elsam.or.id/memetakan-mozaik-pelanggaran-hak-asasi-manusia-dalam-konteks-pembangunan-pariwisata-berdasarkan-perspektif-bisnis-dan-ham/>

⁶ <https://en.tempo.co/read/1564549/human-rights-group-dissects-issue-around-wadas-dam-project>

companies have been identified. First, PT Freeport Indonesia (mining business permit). While its main concessions are actually located in Mimika District, it has long carried out gold exploration in Sugapa, Intan Jaya District. PTFI exploration in Wabu Block revealed a gold deposit of more than 116 million tonnes of gold ores. Each ore's mineral content is 2.16 gr of gold and 1.76 gr of silver in average. Since the beginning, TPNPB has stated its position to reject the plan of mining in Wabu Block. They also demanded Papua Governor to withdraw his letter of recommendation for the WIUPK No. 540/11625/SET issued in Jayapura on 24 July 2020.

14. The second company is PT Madinah Qurrata 'Ain (Mining Business Concession). Holding a concession of 23,150 ha, this company is still at the phase of gold exploration. The company then stepped into an agreement with an Australian company, West Wits Mining that ended up holding 64% of shares in PT Madinah Qurrata 'Ain.⁴⁹ In 2016, West Wits Mining also gave 30% of its shares to Tobacom Del Mandiri (PT Tambang Raya Sejahtera), a Toba Sejahtera Group subsidiary, as a token of a business alliance agreement.⁵⁰ PTMQ concessions are near several military posts such as Sugapa Subdistrict Police Station, Intan Jaya District Police Station and Intan Jaya Preparatory KODIM Military Base.
15. The third is PT Nusapati Satria (Mining Business Permit). The company's concession was issued in 2011, covering an area of 25,170 ha. It is still at the phase of gold exploration and located completely near local village settlements in Sugapa. It is even located near Sugapa Subdistrict Police Station, Intan Jaya District Police Station and Intan Jaya Preparatory KODIM Military Base.
16. Two other companies, namely PT Freeport Indonesia (PTFI) and PT Madinah Qurrata 'Ain (MQ) are alleged to have links to the military. there are at least three names of personnel who are in contact with it, namely Rudiard Tampubolon (RT; a retired policeman), Paulus Prananto (a retired TNI member), and another retired TNI member who now holds office of Coordinating Minister of Maritime and Investment Affairs, Luhut Binsar Panjaitan (LBP).
17. The direct victims out of the armed conflict between TNI/POLRI military force and TPNPB are undoubtedly civilians. Shootings and abuse towards them are often committed by TNI/POLRI accusing them of KKB members, or by TPNPB believing they are spies. No wonder, fatalities of the armed conflicts in Intan Jaya come from the side of civilians. Even children are often mistargeted. Naturally, fear and trauma are haunting all communities of Intan Jaya, forcing them to seek refuge. According to Intan Jaya District Government, 1,237 civilians are listed as Internally Displaced Persons (IDP), 331 out of

whom are women and children. They escaped to Nabire out of the fear of mistargeting during the armed conflict between TNI/POLRI and TPNPB-OPM.

18. KontraS also conducted research on four small islands in Indonesia, Sunut Island (East Lombok), Bangka Island (North Sulawesi), Romang Island (South Maluku), and Sangihe Island (North Sulawesi). In the management of small islands, there are often many debates, both in terms of economy, geopolitics, and socio-culture. These differences in perspective lead to interventions that actually harm the island community. Some of the problems that occur in the management of small islands are conflicts of interest in the management of areas on small islands and environmental degradation due to extractive activities.
19. There is some business going on on the small island which is slowly causing the destruction of nature. On Pulau Sunut, all residents on Sunut Island were moved to the mainland for the island's privatization project, allegedly by PT. Ocean Blue. The island is planned to be built with 46 luxury villas with the following details: 31 ocean-facing villas, 1 honeymoon villa, 7 bungalows, 6 separate villas from the island, and 2 luxury villas that will make visitors feel like they own an island.⁷
20. In Bangka Island, the Minahasa Regent suddenly issued a permit to mine 2,000ha of iron ore to a Chinese company, Mikgro Metal Perdana Limited Company. The mining area is equal to half of the area of Bangka Island. In addition to taking half the land area from Bangka Island, the mining operation also damaged the surrounding environment. The condition of the beach becomes dirty, the deforestation of green forests, causing water for the needs of the residents to become unfit for consumption. The latest situation on Bangka Island shows that there is no concrete mechanism for environmental restoration.⁸
21. In Romang Island, the presence of Gemala Borneo Utama Limited Company for exploring gold, KontraS found a number of human rights violations, including, The right to clean and healthy water; Rights and guarantees for minority groups and indigenous peoples; The right to security The right to freedom of movement to travel and change places; and the right to proper health care.⁹
22. In Sangihe Island, half of the area is used for mining activities, this has the potential to damage the nature on Sangihe Island. Mining in Sangihe Islands Regency continues even

⁷ KontraS, Pulau Kecil dan Hak Asasi Manusia: Catatan Situasi HAM di Tiga Pulau Kecil (P. Bangka, P. Sunut, P. Romang), Jakarta: KontraS, 2019, p. 36-37.

⁸ *Ibid.* p. 41-43

⁹ KontraS, Pulau Kecil dan Hak Asasi Manusia, p. 45-47.

though normatively it has violated the rules in Law Number 1 of 2014 on Management of Coastal Areas and Small Islands for claiming half the island.¹⁰

23. The nature of ecocides is to destroy the environment and destroy humans at the same time, especially in areas experiencing poverty. Of course, this has an impact on people who lose natural resources and are killed arbitrarily.
24. In various reports reveal the forms of human rights violations committed by the company. The ELSAM report, for example, since 2018 presents consistent data on the existence of various attacks and threats to the environmental human rights defenders (EHRD), not only by state actors but also by non-state actors. These non-state actors, if re-categorized, give rise to the most dominant involvement from the company. In 2020, out of a total of 36 non-state actors that appeared, 28 were companies, and 1 other actor was directly related to companies. The same thing will happen in 2021. As many as 11 of the 20 non-state actors appearing this year are companies with the addition of 2 other actors directly related to companies.
25. In a gender perspective, women not only face the additional risk of being affected by business activities, women also face greater barriers to recovering from the losses they have suffered. Often, women lack the cultural support as well as the personal experience of organizing themselves to seek healing. There are many direct and indirect barriers, stemming from patriarchal social norms, that hinder women's access to recovery. While the UNGPs have established the right to remedy, the gender perspective has not been constructed substantively on how to remedy specific violations of women's rights. In other words, women face a unique and disproportionately negative impact on the wrongdoings of corporations.
26. Various forms of human rights violations against women that occur as a result of business activities include physical and psychological attacks experienced by Redubutowe Women, South Asesa District, Nagekeo Regency, East Nusa Tenggara (NTT), as a result of being at the forefront of the strike action in front of the police officers who came. oversee the process of measuring the construction of the Lambo Reservoir. In addition, the same thing was experienced by women in Sigapiton Village, North Sumatera, who struggled to protect their land from exploitation by the tourism industry in Lake Toba. Another case was experienced by the Sunario Jaya farmer group in the Transmigration area in Rio Pakava, Central Sulawesi. Land grabbing carried out by corporations has had an impact on people's lives. The impact is prolonged for women who have to fight against it. (ELSAM report)

¹⁰ KontraS, Laporan Penelitian & Investigasi Kabupaten Kepulauan Sangihe 27 Juni - 1 Juli 2021, (Jakarta: KontraS, 2021), p. 14.

Recommendations

- a. Drafting an adequate legal framework protection for human rights defenders and abolishing articles that have the potential to threaten human rights defenders;
- b. Carry out good control and accountability of law enforcement officers, government representatives and members of parliament, in relation with cases of human rights defenders, as well as to provide rehabilitation for human rights defenders who are victims of all forms of terror and intimidations;
- c. The government must strengthen the authority of national human rights institutions (Komnas HAM, Komnas Perempuan, KPAI, LPSK and Ombudsman) in providing adequate remedies for victims of business-related human rights violations;
- d. Evaluate the establishment of mechanisms that allow indigenous peoples to be guaranteed the right to their ancestral lands

V. International Treaties Governing Business and Human Rights

27. *vide recommendation 141.75.* The Indonesian NHI on human rights set a standard on human rights protection in respect of land and natural resources -the SNP no.7/year 2021. This standard is based on and converge further the non-discrimination principles and implementation of the Indonesian constitution and international human rights principles towards persons, rural women, rural population, indigenous communities (“communities”). On matter of impact of free trade agreement, international agreement and transnational corporation towards communities, this standard should address matters, including but not limited to:
- a. transnational corporation on seeds and planned ratification of UPOV 1991 are in effect causing further criminalization and discrimination against “communities” and their traditional seed system. The expansive, indiscriminate, and wholesale application of IP in seeds is discriminating communities, including breeder and host of traditional knowledge.
 - b. Expansive plantations and mining project, including transnational ones, are marginalising and discriminating communities by preventing and non-recognition of communities’ communal rights in their ancestral lands. The condition of FPIC is yet to be established. Constitutional rights yet to be recognised fairly and justly in respect of ancestral land.
 - c. Sea nomads of Indonesia, of Bajo/Bajau, Same/Sama, and “suku laut” as a whole”, further expelled from the tourism area and from big project areas. They are branded as non-citizens as they live as semi-nomadic rural communities, and preventing them from realizing their rights as community
28. *vide 139.145* The constitutional defense by migrant workers organizations in the court of the Indonesian Constitutional Court resulting in the reaffirmation of migrant workers rights both in “home and host” jurisdiction (the case of 83/PUU-XVII/2019). This ruling

reaffirms and reinforces the BHR standard, LBI process, and the other international human rights standard on applying liabilities towards transnational corporations in their value chain in which migrant workers are in it.

Recommendations

- a. Taking action on the matters arising from previous cycle's recommendation 141.75 and 139.145 by implementing NHI of SNP no.7/year 2021 and the ruling of Indonesian Constitutional Court protecting communities and vulnerable groups where they are facing intrusion of TNCs and free trade agreement in their
- b. Taking necessary steps in developing a framework on protection of nomadic, semi-nomadic, and migrants where they are facing an intrusion and abuses by TNCs' and free trade agreement.

VI. Repressive Regulations

29. There are several regulations that repress citizens related to Business and Human Rights. This regulation benefits certain groups such as the elite in running their business so that it has a negative impact on the affected residents. Some of these regulations include Law no. 11 of 2020 (Law on Job Creation) and Amendments to Law no. 4 of 2009 (Mineral and Coal Law)
30. The process of discussing the Amendment of Law Mineral and Coal Law was also carried out in a closed manner and did not accommodate public participation. UU no. 12 of 2011 stipulates that the public has the right to provide input orally or in writing in the formation of laws and regulations. However, based on the mass media reports, the process of discussing the DIM Bill on the Amendment to Law no. 4 of 2009 was carried out intensively from 17 February to 6 May 2020 without ever involving civil society in public hearings. Formally, it is clear that there are defects in the preparation process.
31. Amendment of Mineral and Coal Law weaken government supervision on the implementation of Mining Business Activities and eliminate the community supervision function on environmental impact. Amendment of Mineral and Coal Law in fact also helped to ratify a number of changes to mining regulations that have the potential to weaken supervision over the implementation of mining business activities, both supervision by the Government as the authorized permit issuer, as well as supervision by the community on the condition of the environmental carrying capacity of mining areas. There is centralized supervision that is not in sync with the arrangements for the delegation of issuance of permits for changes to the law. The amendment eliminates supervision of public interests and the resolution of land issues and mining disputes. The amendment also eliminates the authority of the Mining Inspector to temporarily suspend

mining business activities and the right for the community to apply for a temporary suspension of mining business activities.

32. Then, this law also makes the condition of human rights defenders in the environmental sector more vulnerable. In Article 162, it is stated that any person who hinders or interferes with mining activities may be subject to a maximum imprisonment of 1 (one) year or a maximum fine of Rp. 100,000,000.00 (one hundred million rupiah). This means that anyone who refuses to do mining activities has the potential to be criminalized. The existence of this law has further exacerbated the potential for criminalization, which had previously targeted human rights defenders who were actively criticizing mining.
33. The Job Creation law in its formation did not meet the principles of openness and implementation. Unfortunately, the Job Creation Law does not meet these requirements. The principle of openness requires that the process of drafting laws needs to be open and transparent so that the public can provide input. Unfortunately, the draft can only be accessed after the president's letter is submitted to the House of Representatives, which means it has been completed. Communities do not have access to provide input. In the principle of implementation, this principle states that the design must take into account the effectiveness of laws and regulations in society. Unfortunately, the implementation of the Act was very hasty with the reason to provide flexibility for the Central Government in making policies following the dynamics of society and an increasingly globalized world.
34. The Job Creation Law does not adopt the principles of sustainable development or those related to sustainable development as stated in the current sectoral laws related to natural resource management. At the end, various relaxations in environmental requirements for business actors in the Job Creation Law have the potential to create negative externalities that threaten justice for future generations. The Academic Paper of the 12 February 2020 version of the Job Creation Law raises indicators to show that the complicated licensing system and over-regulation are the causes of the difficulty of doing business in Indonesia. However, the Academic Manuscript fails to highlight other indicators that are rated worse than the regulatory and licensing indicators, namely enforcing contracts in the Ease of Doing Business (EODB), and the incidence of corruption in the Global Competitiveness Index (GCI). In fact, various research results have shown that good governance of a country also influences the value of foreign direct investment (FDI) and economic growth, two things that the Job Creation Law aims to achieve.
35. Job Creation Law has replaced various provisions previously included in Law no. 32 of 2009 on Environmental Protection and Management (UUPPLH). One aspect that is omitted in this law is related to strict liability which prevents companies from creating

environmental damage. Article 88 of the Job Creation Law stipulates that any person whose actions, business, or activities use hazardous and toxic waste, generates and manages hazardous and toxic waste that poses a serious threat to the environment, is absolutely responsible for the losses that occur from his business or activities. This regulation abolishes the clause “without the need to prove the element of fault” as stated in Article 88 of UUPPLH. The removal of this clause has the potential to weaken law enforcement because companies can take advantage of this loophole to continue to pursue proof of fire or other environmental damage in the field.

36. Furthermore, the Job Creation Law changed the provisions in Article 49 of Law no. 14 of 1999 concerning responsibility for forest fires. In Article 49 paragraph (2) of the Job Creation Law, the liability is added with a “business” clause, so that being the holder of the right or business license is obliged to make efforts to prevent forest fires in their work area. The addition of this clause changes the company’s obligation to be responsible for its actions from what was previously “obligated to be responsible” to “try to be responsible”. These provisions will further perpetuate corporate impunity, which means companies that commit violations have the potential to escape legal liability. These violations included environmental damage and even the deployment of vigilante groups which often resulted in civilian casualties.
37. The Job Creation Law also further reduces the role of human rights defenders by limiting public participation in decision-making, such as related to Environmental Impact Analysis (AMDAL) and public consultation in spatial planning. Article 26 paragraph (2) of the Job Creation Law stipulates that those who can participate in the preparation of the AMDAL are only people who are directly affected and environmental observers/researchers/NGOs who accompany the directly affected communities. However, so far there is no clear definition of what is meant by directly affected. This provision reduces public participation in the preparation of the AMDAL as stated in Article 26 paragraph (3) of the PPLH Law. Furthermore, the Job Creation Law also limits public participation to the AMDAL preparation process only. In fact, previously in Article 26 paragraph (4) of the PPLH Law, it was regulated that the people involved could file an objection to the AMDAL document. The absence of the public in making these decisions can trigger conflicts that result in civilian casualties and also open gaps for corrupt practices. Not only that, the Job Creation Law also abolished Article 38 of the PPLH Law which allowed environmental permits to be canceled through a lawsuit in the Administrative Court.

Recommendations

- a. Immediately Revise Laws that are problematic for the Environment and Human Rights

- b. Make regulations based on the principles of the formation of good laws by paying attention to community participation.