The Urgence of the National Action Plan on Business and Human Rights and its Structure of Hierarchy in the Indonesian Law

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Abstract

Eventhough Indonesia already has regulations, and ratified several instruments that protects the human rights, in reality, human rights violations that involves corporations still exist. In various human rights reports, corporations remain as one of the most responsible actors for the human rights violations. One of the reasons corporations violates the human rights is because there are no standards and guidelines that is binding, that can be used as guidelines and gives directions on how should corporations operate their business without violating the human rights. One of the ways to prevent or decrease the human rights violations by corporations is to develop the National Action Plan on Business and Human Rights that could provide direction to the government in order to make corporations as one of the key actors of the life in Indonesia. The National Action Plan on Business and Human Rights is expected to provide directions on what regulations need to be formed and adapted with the corporate's responsibility to respect and provide access to remedy of the human rights.

Keywords: Business and Human Rights, National Action Plans, corporations, human rights violations, Indonesia

I. Introduction

Business and human rights became an increasingly prominent feature on the international agenda in the 1990s. The liberalization of trade, domestic deregulation, and privatization throughout the world extended the scope and deepened the impact of markets.[1] The increasing power of multinational corporations led to the increase of inequality as well as human rights violations. However, there is still resistance to the idea that economic and social rights may be invoked against corporate actors and that companies have duties towards these rights.[2]

Similar situation also happenned in Indonesia, after the reformation in 1998 the development of capitalism in Indonesia moved towards the integration with the global neoliberal capitalism. This integration requires the shift of the State's roles to facilitate production interests and capital reproduction compared to facilitate public interests.[3] The choice of the liberal economic system was later enforced through the development of liberal political democratic institutions[4] and the agenda of good governance. Both efforts were directed to support the creation of a society that is open to markets.[5] These efforts were part

[1] Ruggie, John Gerard. *Just Business: Multinational Corporations and Human Rights*. (New York: W.W. Norton &Company, Inc.:2013), p. xxv
[2] Riedel, Giacca, *Golay. Economic, Social, and Culturan Rights in International Law: Contemporary issues and Challenges*. (UK:Oxford University Press:2014), p. 194
[3] Vedi R. Hadiz, *Gerakan buruh mesti menjadi bagian dari perjuangan yang lebih luas*, http://indoprogress.com/2013/03/prof-vedi-r-hadiz-gerakan-buruh-mesti-menjadi-bagian-dari-perjuangan-yang-lebih-luas/
[4] Liberal democracy put forward individual freedom, similar with neoliberal thoughts that focus on the assumptions that free market and free trade ensures the individual freedom. See: David Harvey, *op.cit*
[5] Airlangga Pribadi, *Transmutasi Neoliberalisme di Indonesia*, http://indoprogress.com/2012/04/transmutasi-neoliberalisme-di-indonesia/

of the recipe of international financial instutions, such as the World Bank and International Monetary Fund.[6]

Neoliberal can be interpreted as a set of ideology and political principles that are dedicated to the spread of worldwide economic model that emphasizes the free market and free trade. Neoliberalism as a concept consists of three related manifestations: (1) an ideology; (2) governance model; (3) policies package.[7] There are two prominent arguments that are built by neoliberalism; (1) minimalize State's role in the market and (2) the need to develop institutional design to ensure market efficiency.[8] Based on this perspective, Kanishka Jayasuriya views that the neoliberalism process is more of a political process instead of economical process that allows neoliberalism to continue as part of a political project of a State.[9]

Free market needs regulations because there is no system that can exist without regulations. This regulation is to codifiy and cover three fundamental freedom of neoliberalism, which are (1) free capital circulation; (2) free trade; and (3) free investment.[10] The same perspective was also stated by R. Herlambang Perdana Wiratraman that in order to support the economic growth and free market system, one of the main element of good governance is a legal framework for development.[11]

Because the role of the market is above the State's role, civil society, and participatory democracy within managing the economy and the flow of goods and capital, then the implication here is that private sectors are the main actors in controling sectors directly related to human lives.[12] The dominant role of corporations in Indonesia's economy increasingly receives recognition by the government of Indonesia, especially within the Susilo Bambang Yudhoyono's period, which launched the Masterplan on the Acceleration and Expansion of the Economic Development of Indonesia (MP3EI).[13]

According to Noer Fauzi Rachman, MP3EI was created to facilitate businesses and owners of huge corporations to invest in Indonesia.[14] The MP3EI was developed based on the neoliberal economy paradigm because it was focused on the concept that, first, the more advance the economy of a nation is, the smaller the proportion of the state's budget in the economic development. Second, the economic dynamics of a nation will be based on the business sector which includes national and regional State-owned enterprises (SOEs), national and international private sectors.[15] In order to open the flow of industrial capital and financial, as well as to facilitate the flow of investments in Indonesia, therefore the government of Indonesia cut all of regulations that interferes the businesses' interests.[16] The role of the

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[6] Alexander C. Chandra, *A Dirty Word? Neo-liberalism in Indonesia's Foreign Economic Policy*, Trade Knowledge Network & International Institusi for Sustainable, 2011, p. 1

[7] Manfred B. Steger and Ravi K. Roy, *Neoliberalism A Very Short Introduction*, Oxford University Press, 2010, hlm. 10-11

[8] Anggun Trisnanto Hari Susilo, *The Indonesian National Program for Communty Empowerment (PNPM) Rural: Desentralization in the Context of Neoliberalism and World Bank Policies*, Institute of Social Studies, 2012

[9] Kanishka Jayasuriya, *Beyond new imperialism State and transnational regulatory governance in East Asia* dalam Vedi R. Hadiz (ed), *Empire and Neoliberalism in Asia*, Routledge, 2006, p. 42

[10] Susan George, *Republik Pasar Bebas: Menjual Kekuasaan Negara, Demokrasi, dan Civil Society kepada Kapitalisme Global*, Bina Rena Pariwara & INFID, Jakarta, 2002, p. 20

[11] The structural programme adjustments (structural establishment of legal frameworks for development is not separated with World Bank's role to initiate the structural programme adjustments. The law and its implementation is viewed as an important factor to strengthen economic growth and development. Lihat R. Herlambang Perdana Wiratraman, *Good Governance And Legal Reform In Indonesia*, Thesis on Faculty of Graduate Studies Mahidol University, 2006, p. 88

[12] Ivan Hadar, *Jalan Ketiga, Bukan Sekedar Jalan Tengah*, Serial Sejarah SosDem edisi 6 tahun 2, Juni-Agustus 2009

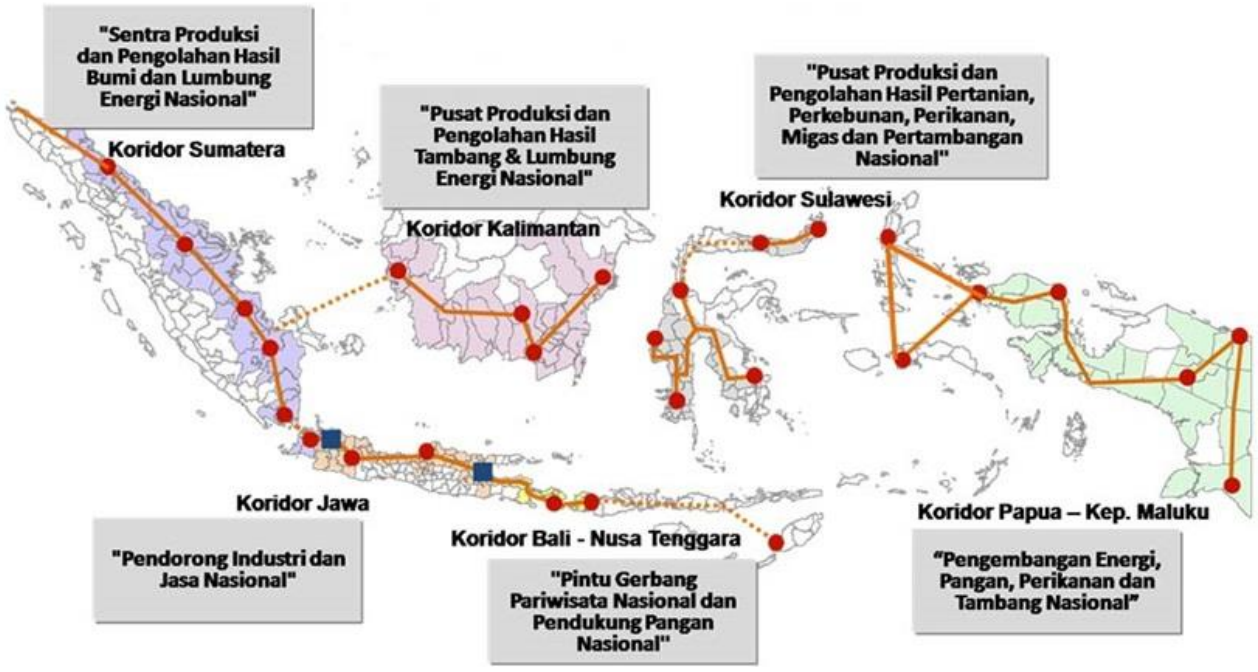
[13] Lihat Peraturan Presiden Republik Indonesia Nomor 32 Tahun 2011 Tentang Masterplan Percepatan dan Perluasan Pembangunan Ekonomi Indonesia 2011-2025

[14] Noer Fauzi Rachman, et.al, *MP3EI: Master Plan Percepatan dan Perluasan Krisis Sosial-Ekologis Indonesia***,** Laporan Penelitian Sajogyo Institute 2014 "Proses-proses Kebijakan dan Konsekuensi dari MP3EI, Sajogyo Institute, Bogor, 2014, p.2

[15] Didi Novrian dan Dian Yanuardy, *Mantra MP3EI: Investasi... Investasi... Investasi!*, dalam Dian Yanuardy, *et. al*, *MP3EI: Master Plan Percepatan dan Perluasan Krisis Sosial-Ekologis Indonesia***,** , Sajogyo Institute, 2014, p. 4

[16] Based on the MP3EI document, every national and regional development plan, national and regional landscape plan, as well as regulation framework that will be evaluated. The strategic steps will be taken to revise or change regulations to

government, according to the MP3EI is to facilitate sets of rules and regulations that gives incentives for the businesses who builds production activities and infrastructure through taxation policy, import duties, rules of employments, land licensing, and others. One of the manisfestation of the role of government in facilitating a legal framework for the business sector is the Law No. 2 Year 2012 regarding Land Availability for Public Interests' Developments. [17] There are 6 economic corridors with different focus within the masterplan with regard to the power and excellence of available resources in every corridor. The economic focus in each corridors can be seen through the map below.



Source: Didi Novrian dan Dian Yanuardy, 2011

There are two most important mechanisms from the role of government to make the MP3EI work. First, the allocation of certain spaces by the government for a long term period for the business activities of huge corporations. This effort is done by spreading or increasing the grants for land concessions for global commodity production in mining, agriculture, forestry, as well as developing economic areas. Second, infrastructure development as connection services to accelerate the flow of goods and employment as well as to connect the main centers of industries.[18]

attract investors, give insentives to the tariffs sector, tax, and change labour regulations, licensing and land procurement. Lihat Didi Novrian dan Dian Yanuardy, *ibid,* p. 11

[17] Didi Novrian dan Dian Yanuardy, *ibid,* p. 13. Before the MP3EI programme was launched, after the signing of the letter of intent (LoI) between the President Soeharto with IMF until the reformation period, the government together with the DPR (house of representatives) produced several legislations with the purpose to strengthen the role of market in the Indonesian economy. The substances of the legislations includes banking, natural resources management, employment, investments, special economic zone.

[18] Dian Yanuardy, *MP3EI dan Perubahan Radikal dari Peran Negara*, dalam Dian Yanuardy, *et. al., MP3EI: Master Plan Percepatan dan Perluasan Krisis Sosial-Ekologis Indonesia***,** , Sajogyo Institute, 2014, p. 55

In the process of the MP3EI programme, human rights impacts and social-ecological damages emerged in several economic corridors. Several examples of human rights violations and social-ecological damages can be explained as follows: [19]

a. The idea to provide national food resources through granting wide-scale land concessions (more than 1,2 million hectares) to 48 companies through the Merauke Integrated Food and Energy Estate (MIFEE) scheme in Papua which give impacts to the destructions of local food resources, land grabs, and food crisis;
b. The development of nickel smelters in Central Sulawesi increasing the number of nickel mining in Morowali (Central Sulawesi) following the land grabs through the scheme of compensations that harms the farmers, the sea restorations, exploitation of the working class, poor conditions of miners, also various ecological damages;
c. Meanwhile, in North Sumatera, the MP3EI project in the agricultural sector within the Specific Economic Area (KEK) Sei Mangkei produced various types of exploitations of workers that are done through the work system model that is based on work hours and sanctions;
d. Nickel Mining and the nickel smelter development in East Halmahera (North Maluku) destroyed small islands, land grabs, distribution of land, and damages of the sea and sea areas;
e. MP3EI projects in the Kalimantan Corridor that focus on coal investments which accelerate the social-ecological damages and triggers conflicts with the local communities;
f. Manganese mining in NTT which allows exploitative relations between the mine owners and their labours, also their families.

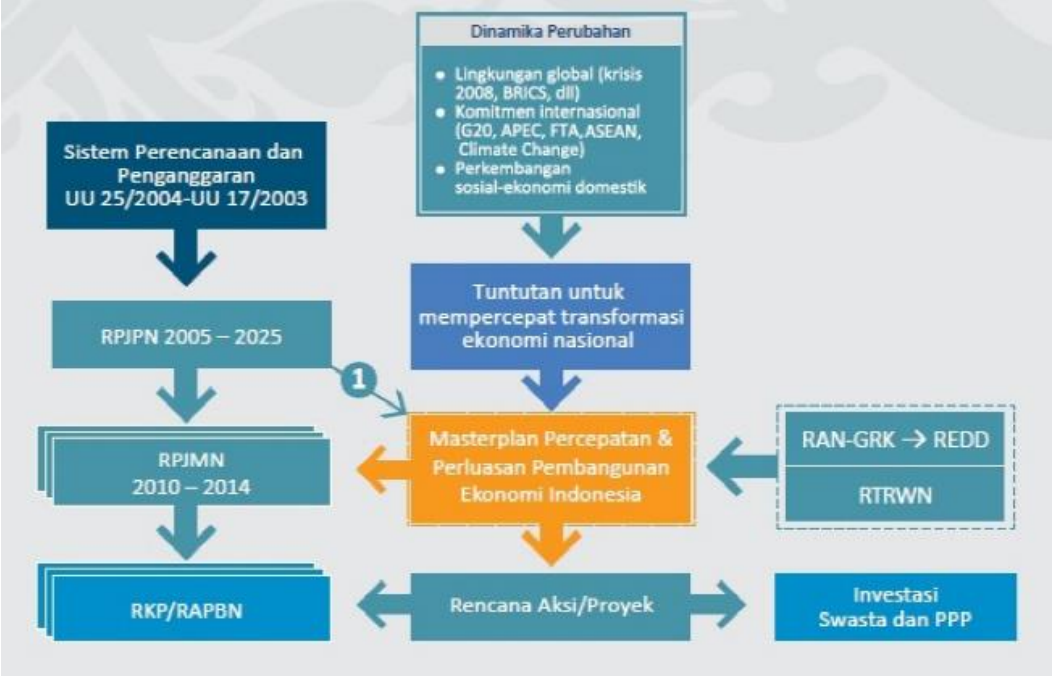
The government of President Jokowi will reaffirm the role of government through the Nawacita mission which still adopts the spirit of MP3EI. This can be seen through the President Jokowi's efforts to continue the MP3EI programs with the focus on infrastructure development, especially sea highways development. [20] The sea highways plan is related with the concept of connectivity development in the MP3EI scheme through the strategy of (1) Break down and disperses blocks and center for the production of commodities to extending the islands of indonesia; and (2) developing every infrastructures needed to facilitate the industries so that the production costs is lower and the increase of the companies' profits. The purpose of this connectivity is also to connect several economic activities in every corridors and with the regional and global economic activities.[21] This is not separated from the presence of MP3EI and RPJMN that can be seen through the scheme below.

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[19] Mumtaza, *et.al, Di Atas Krisis Sosial-Ekologis Semacam Apa Megaproyek MP3EI Bekerja* dalam Dian Yanuardy, *et.al., MP3EI: Master Plan Percepatan dan Perluasan Krisis Sosial-Ekologis Indonesia***,** , Sajogyo Institute, 2014, hlm. 68-69

[20] The need for investment for the sea toll is estimated to be about 700 billion IDR for five years and will be invested by the government, national and regional SoEs, also private sector. Based on Bappenas' notes the initial concept of sea toll, about 24 harbours will be divided into "hub" harbour, main harbour, and Ports to gather and distributes goods in smaller cities. . See: http://www.antaranews.com/berita/486898/indonesia-tawarkan-investasi-24-pelabuhan-tol-laut

[21] The three connectivities in the MP3EI includes (1) Intra-Corridor Economy Connectivity; (2) Between Corridors Economy Connectivity; (3) International Connectivity also requires the harbour development to (1) increase the smooth flow of goods, services, and information, (2) decrease logistical costs, (3) decrease the high cost of economy, (4) establish equal access in every regions, and (5) to realize sinergy between central economic growths. Didi Novrian dan Dian Yanuardy,*op.cit*



Source: Didi Novrian dan Dian Yanuardy, 2011

For these reasons, the development of sea highways that is proposed by Jokowi have potentials to violate the human rights if it is not proceeded by real action to restore the environment, as well as, guaranteeing the local communities' rights and local fishermen to manage the coastal areas and sea for their activities.[22]

In order to face the rising negative human rights impacts caused by corporations, the Human Rights Council endorsed the "*United Nations Guiding Principles on Business and Human Rights: Protect, Respect, Remedy*," also known as Ruggie's Principles, in June 2011.

The UN Guiding Principles consists of three pillars, known as "Protect, Respect, Remedy". First is the State's duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation and adjudication. The second is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third is the need for greater access by victims to effective remedy, both judicial and non-judicial.[23] Although these principles are voluntary and considered as soft law, they have been widely endorsed, by business organizations and in intergovernmental settings – including, notably, by the Organisation for Economic Cooperation and Development (OECD) when it revised its Guidelines on Multinational Enterprises in 2011.[24] Moreover, a number of international standards also includes human rights as a standard, for example the ISO 26000, and International Finance Corporation's (IFC) new sustainability policy and performance standards.

Other than the newly developed global standards, the Human Rights Council established the Working Group of Business and Human Rights in 2011, with the main task to promote the Guiding Principles' implementation and dissemination, identify and exchange good practices,

[22] http://www.jatam.org/masyarakat-sipil-poros-maritim-dan-tol-laut-harus-ramah-lingkungan-dan-sosial/

[23] Huijstee, Mariette Van; Ricco, Victor; Chaturvedi, Laura Ceresna. How to use the UN Guiding Principles on Business and Human Rights in company research and advocacy: A guide for civil society organisations. (SOMO, CEDHA, Dividep India: 2012), p. 11

[24] Riedel, Giacca, Golay. Economic, Social, and Culturan Rights in International Law: Contemporary issues and Challenges. (UK:Oxford University Press:2014), p. 194

help build the institutional capacity of developing countries as well as small and medium-sized enterprises, and provide further recommendations to the Council.[25] There had been three Annual UN Global Forum on Business and Human Rights, the last forum was held on December 2014 in Geneva.

During the forum, the Working Group launched the guidance document on National Action Plans (NAPs) to implement the Guiding Principles. The Working Group set out four criteria for effective national action plans: they should be founded on the Guiding Principles; context-specific and address the country's actual and potential adverse corporate-related human rights impacts; developed in inclusive and transparent processes; and regularly reviewed and updated.[26] At the discussion, there were still perception that human rights standards were bad for economies and scared away investors. It was reiterated that national action plans were an important way forward and that governments should send a strong signal to business about the expectation that they respect human rights through measures such as Government procurement processes, use of credit for investments and trade, and support to NGOs at different levels.[27] The development as such plans could strengthen policy coherence and should be developed through open and inclusive processes.

In this context, therefore the development of NAP in Indonesia finds rationality and legitimacy because NAP is expected to increase the government role through: [28]

1. Limitting the market in the right place;
2. Strengthening the essential role towards public goods and a democratic state;

II. What are NAPs?

National Action Plans (NAPs) are policy documents in which a State articulates priorities and actions that it will adopt to support the implementation of international, regional, or national obligations and commitments with regard to a given policy area or topic.[29] In the field of business and human rights, a NAP is defined as an "evolving policy strategy developed by a State to protect against adverse human rights impacts by business enterprises in conformity with the UN Guiding Principles on Business and Human Rights (UNGPs)."[30]

Over the past three years since the adoption of the UNGPs in 2011, there are seven states that have already produced the NAPs. (See Table 1)

Table 1: States that have produced the NAPs[31]

No.	States	Launched Date
1	UK	September 2013
2	The Netherlands	December 2013
3	Italy	March 2014
4	Denmark	April 2014
5	Spain	summer of 2014
6	Finland	October 2014
7	Lithuania	February 2015

[25] Ruggie, John Gerard. Just Business: Multinational Corporations and Human Rights. (New York: W.W. Norton &Company, Inc.:2013), p. 173

[26] Mo Ibrahim, Chair of the Forum, Summary of discussions of the Forum on Business and Human Rights, A/HRC/FBHR/2014/3, p. 9

[27] *Ibid*., p. 10

[28] Susan George, op.cit., hlm.3

[29] Danish Institute for Human Rights (DIHR) and International Corporate Accountable Roundtable (ICAR). National Action Plans On Business And Human Rights: A Toolkit For The Development, Implementation, And Review Of State Commitments To Business And Human Rights Frameworks; p. 8

[30] UN Working Group on Business and Human Rights. Guidance on National Action Plans on Business and Human Rights. (December 2014), p. ii

[31] States National Action Plans, http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx

Moreover, there are twenty States that are in the process of developing a national action plan or have committed to doing one. (See Table 2)

Table 2: States that are in the process of developing NAPs[32]

No.	States	No.	States
1	Argentina	**11**	Mauritius
2	Azerbaijan	**12**	Mexico
3	Belgium	**13**	Mozambique
4	Colombia	**14**	Myanmar
5	Germany	**15**	Norway
6	Guatemela	**16**	Portugal
7	Greece	**17**	Slovenia
8	Ireland	**18**	Sweden
9	Jordan	**19**	Switzerland
10	Malaysia	**20**	USA

Other than the States, there are also National Human Rights Institutions (NHRIs) or the Civil Society Organizations (CSOs) that are currently taking initiatives in developing the NAPs in their countries. (See Table 3)

Table 3: NHRIs or CSOs that are developing the NAPs[33]

No.	NHRIs or CSOs
1	Ghana
2	Kazakhstan
3	Nigeria
4	South Africa
5	Tanzania
6	The Philippines

Based on the above list, mainly States that are from Europe already developed, or are developing the NAPs. This is due based on the fact that the European Commission issued a Communication inviting all EU Member States to develop NAPs for UNGPs implementation by the end of 2012.[34] Meanwhile, ASEAN's Intergovernmental Commission on Human Rights (AICHR) has undertaken a thematic study on CSR and Human Rights, which reviews national measures with reference to the UNGPs. During the annual UN Forum for Business and Human Rights in 2013, AICHR and other regional organizations, expressed support for national implementation of the UNGPs and the role of regional organizations in encouraging such implementation through measures at the regional level.[35] There are only three ASEAN States that are currently developing the NAPs, which are Malaysia, Myanmar, and The Philippines.

The UNWG considers that NAPs, and the process to develop them, can provide for:

a) Greater coordination and coherence within government on the range of public policy are-as that relate to business and human rights;
b) An inclusive process to identify national priorities and concrete policy measures and action;

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[32] *Ibid.,*
[33] *Ibid.*
[34] Danish Institute for Human Rights (DIHR) and International Corporate Accountable Roundtable (ICAR). National Action Plans On Business And Human Rights: A Toolkit For The Development, Implementation, And Review Of State Commitments To Business And Human Rights Frameworks; p. 10
[35] *Ibid.,* p. 11

c) Transparency and predictability for interested domestic and international stakeholders;
d) A process of continuous monitoring and evaluation of implementation;
e) A platform for ongoing multi-stakeholder dialogue; and
f) A flexible yet common format that facilitates international cooperation, coordination, and exchanges of good practices and lessons learned.[36]

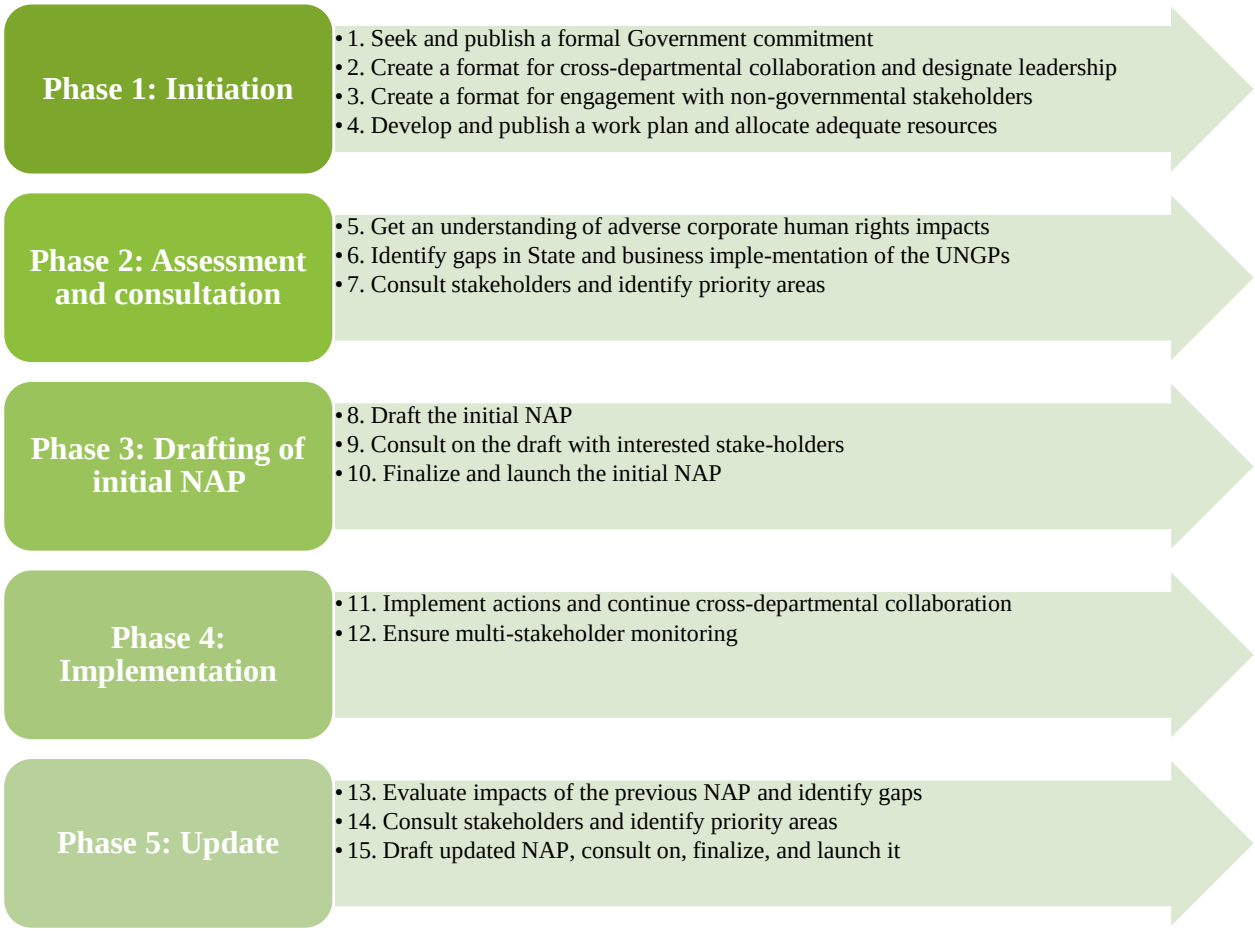
In addition, the Danish Institute for Human Rights (DIHR) and International Corporate Accountability Roundtable (ICAR) explains that there are six benefits of the NAPs, which are:

1. NAPs help to coordinate efforts toward a given policy objective across the whole of government, by identifying and involving all relevant actors in policy development
2. NAPs help to avoid duplication or inconsistencies between government departments, hence contributing to efficient use of resources
3. As centralized national policy documents, NAPs allow governments to articulate to stakeholders a coherent policy position even over complex and broadranging topics
4. NAPs can provide a constructive opportunity for robust collaboration, dialogue, and trustbuilding among stakeholders
5. NAPs can support cross-State and within-State policy transfer through identification of best practices and lessons learned
6. Where stakeholders are involved in NAPs processes, NAPs can help to mobilize resources beyond government towards the achievement of policy aims.[37]

III. Process of Developing the NAPs

The UNWG recommends governments consider following a five-phase process which is composed of 15 steps. Phases 1 to 3 describe the development of an initial NAP. Phases 4 and 5 include the continuous cycle of implementation, monitoring and update of successive versions of the NAP.[38]

[36] UN Working Group on Business and Human Rights. Guidance on National Action Plans on Business and Human Rights. (December 2014), p. 1
[37] Danish Institute for Human Rights (DIHR) and International Corporate Accountable Roundtable (ICAR). National Action Plans On Business And Human Rights: A Toolkit For The Development, Implementation, And Review Of State Commitments To Business And Human Rights Frameworks; p. 14
[38] UN Working Group on Business and Human Rights. Guidance on National Action Plans on Business and Human Rights. (December 2014), p. ii



The above phases can be categorized into three phases. The first phase is the consultation and/or mapping phase, second is the drafting phase, and the third phase is political deliberations and re-drafting. The seven States that already produced NAPs took different steps with different characteristics. Most of them created an inter-ministerial working group to carry out the main task in developing the NAPs. Furthermore, the structure of content of the NAPs varies, some were divided based on the three pillars, some are based on the focused national issues and priorities.

Some of the States engaged with the related stakeholders through public consultations, and spread the responsibilities of each ministries. According to an assessment report of the processes towards developing the NAPs, conducted by the Swiss Peace, there are twelve crucial recommendations in developing the NAPs, as follows:

1. An inter-ministerial working group with all relevant government agencies should be established early in the process.
2. The members of the working group should formally agree on structure, competences and working procedures of the group.
3. A lead agency should be agreed upon at the very beginning of the process. It should be given the necessary competences and financial means to convene meetings, lead the internal and external consultations, and coordinate the drafting process.
4. In a first phase, the inter-ministerial working group should engage in an internal mapping of government activities that relate to the implementation of the UNGP as well as existing shortcomings in this regard.

5. An external consultant should be mandated to conduct an independent analysis of the gaps in existing implementation of the UNGP.
6. The inter-ministerial working group should, in parallel with the mapping, start a process of extensive stakeholder consultation. This should be done by conducting in-depth interviews, by requesting written input, or a combination of both.
7. The specific questions that are put to the stakeholders should be predefined by the members of the inter-ministerial working group.
8. As a result of the mapping, the gap analysis and the stakeholder consultations, the members of the working group should jointly agree on a catalogue of policy areas that are to be addressed in the NAP drafting phase.
9. The inter-ministerial working group should collaborate with one or more respected academics. They could be given the tasks of managing the stakeholder consultations, providing input for the internal mapping, and providing feedback during the drafting process.
10. Enough time should be taken to develop the NAP. While an initial time plan should be developed and agreed upon, it should be handled with flexibility throughout the process.
11. The inter-ministerial working group should be maintained after the publication of the first version of the NAP, to coordinate its implementation and develop periodic updates of the plan.
12. Non-governmental stakeholders and external consultants should play an important role in reviewing government implementation of the plan, and should be involved in the development of its updates.[39]

IV. Developing NAPs in Indonesia

Indonesia, as home for various multinational corporations, is the largest economy in Southeast Asia. The 1945 Constitution of Indonesia and its amendments provide human rights protections, which are recognized as constitutional rights. The Law No. 39 of the Year 1999 concerning human rights establishes a series of human rights obligations applying to states and individuals. It pledges Indonesia's commitment to promoting a society based on respect for fundamental economic, social, and cultural rights, as well as civil and political rights.[40] Moreover, Indonesia has ratified eight international treaties, which are ICCPR, ICESCR, CERD, CEDAW, CAT, CRC, CIMW, and CRPD. Regarding to business and human rights, the government stated its concerns regarding this issue during the session with the Human Rights Council in 2011, as follows:

> *We have been robust in providing legal framework to ensure businesses are conducted in a good faith and to provide benefit to local as well national constituents. Some examples of our steps are the strict regulation on CSRs, and the incorporation of principles in the Extractive Industries Transparency Initiatives as well as the Voluntary Principles on Security and Human Rights in our national policies.*
>
> *Our activism is also in the realm of regional as well as international. We are active in contributing to ASEAN Intergovernmental Commission on Human Rights' efforts on this issue and support the Annual Forum on Business and Human Rights.*
>
> *We support the efforts to enhance and expedite comprehensive implementation of Guiding Principles in national level. We concur with the view of the WG that National*

[39] Graf, Andreas. Developing National Action Plans on Business and Human Rights. (Swiss Peace: April 2013), p. 4 - 5
[40] Waagstein, Patricia Rinwigati. Business and Human Rights in ASEAN: A Baseline Study. (HRRCA: 2013), p. 103

Action Plan and engagement of three pillars are basic foundations for the effective and comprehensive implementation of Guiding Principles. In its own part, Indonesia is considering to include elements of Guiding Principles in the formulation of the fourth generation of National Human Rights Action Plan for 2014-2019. At the same time, we continue efforts to promote Guiding Principles to all stakeholders, including government officials, business community, civil society and member of parliaments. We share the view of the Working Group in the report on the need to establish global fund to support implementation of Guiding Principles(...).[41]

However, up until now, the UNGPs are not reflected in the draft National Human Rights Action Plan for 2014 – 2019. Meanwhile, human rights violations continues to grow over the past years. According to the National Human Rights Commission's (Komnas HAM) 2014 report, there were at least 1012 cases related to corporations that was submitted as complaints to the Komnas HAM.[42] The main issues, stipulated by the Komnas HAM in relation to business, concern rights surrounding environment, health, water, life, ownership of property and land, indigenous people's rights, labour rights, and the right to information.[43] Moreover, the existing policies cannot ensure corporations to respect human rights.

For this reason, to accelerate the implementation of UNGPs in Indonesia, Komnas HAM, together with ELSAM, conducted a two day workshop that was attended by multinational corporations (MNCs) and state owned enterprises (SOEs) in the plantation and extractive sectors, in 2014. Based on the discussion, the corporations welcome the initiative of creating a National Guidelines, as a way to put the UNGPs into the Indonesia's context. As a follow-up of the discussions, Komnas HAM and ELSAM is going to formulate the National Action Plans on Business and Human Rights in Indonesia.

Recently, there are no existing NAPs produced by NHRIs or CSO, all of them are still in developing process. In March 2015, South African Human Rights Commission and the Danish Institute for Human Rights launched the Human Rights and Business Country Guide.[44] However, the guide is to ensure the implementation of Pilar 2, which is targeted for corporations to respect the human rights. In other words, it is not a NAPs. The main challenge of developing the NAPs, is deciding who are the stakeholders as well as creating the format of engagement with all the stakeholders. Based on the lessons learned from the seven States that already have NAPs, it is crucial to engage with the relevant stakeholders at the early stages in order to create the sense of belongings to the development process of the NAPs itself.

Thus, before selecting the stakeholders, it is also important to decide which are the national priorities that should be included in the NAPs. For example, policy coherencies, corporates accountability, or grievance mechanisms, in other words, the three pillars. Or else, whether it should focus based on high profile issues on business and human rights in Indonesia, such as environment, security, corruptions by business actors, land rights etc which need to be further addressed.

Different from the recommendation phases developed by the UNWG, the first phase should be identifying the national priorities goal of the NAPs based on the current situation, decide the structure of the NAPs, then select the stakeholders and develop the format of

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[41] Presentation by Budi Tjahjono (Franciscans International)Jakarta, Indonesia September 2014. *A Treaty on Business and Human Rights*

[42] *Laporan Komisi Nasional Hak Asasi Manusia (Komnas Ham) Tentang Kondisi Hak Asasi Manusia Di Indonesia 2014 "Menatap Ke Depan"*, p. 5

[43] Waagstein, Patricia Rinwigati. Business and Human Rights in ASEAN: A Baseline Study. (HRRCA: 2013), p. 96

[44] So. Africa: Business and human rights country guide produced by So. African Human Rights Commission and DIHR, http://business-humanrights.org/en/so-africa-business-and-human-rights-country-guide-produced-by-so-african-human-rights-commission-and-dihr

engagements. Afterwards, public consultations can be held as part of socializing the issues as well as receive inputs on how to achieve the goals that was already decided before the process. Then, the drafting process could be done.

These steps are important because the initiator to develop the NAPs is not from the ministries, but the NHRI and CSOs. The work plan and goals should be solid before it is shared to the potential stakeholders, in order to be more effective. The NAPs should be able to answer the challenge of how to have one procedure regarding specific issues, instead of so many procedures from different ministries, in other words, how to achieve policy coherencies.

Options of the NAP in the Structure of Hierarchy in the Indonesian Law

The inter-relations between the States and corporations to respect human rights can be found in the Universal Declaration of Human Rights (UDHR) [45] and international law instruments and other instruments that are considered as soft law.[46] However, the enforcement of the norms are not effective substantively because: (1) the norms include statements about principles and it does not provide complaint procedures as well as law enforcements; and (2) it is aspirational which does not have the power to impose to obey. [47]

Based on the above characteristics of the law, therefore there should be legal norms that is hard law as the basis of enforcement of the human rights norms that are already guaranteed. The enforcement mechanism must be mandatory for every component of society. Eventhough the internasional law instrument that regulates business and human rights is considered as soft law, such instrument can be used by the government to draft domestic legislations that binds corporations.[48]

In implementing its obligations, States is responsible to control business entity within their regions of jurisdictions. This construction of legal reasoning can steer that everyone, including corporation, that are within the States' jurisdictions are obligated to respect human rights. This obligation not only apply vertically, States versus citizens, but also through horizontal effect. The horizontal impact is also known as the human rights norms effect towards the third party (third-party effect). [49]

Moreover, Scott Pegg (2003:15) there are 2 (two) main ways for corporations to be responsible for the performances of human rights, through the legal responsibility based on national or international law, and voluntary initiatives through code of ethics and self regulations. According to Scott Pegg, the initial steps to legally bind corporations in the domestic domain is by transforming international law instruments to become national law. In this context, it is strategic to put the international human rights norms to become legal norms that are regulated through legislations.

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[45] The UDHR stated that every organ of society must obey substantive provisions of human rights. These provisions is widely understood to include entities that are not part of individuals or states. With the wide understandings, therefore international corporations is considered as an organ of society. See: Rudi M. Rizki, *Tanggung Jawab Korporasi Transnasional dalam Pelanggaran Berat HAM*, PT Fikahati Aneska, 2012, hlm. 17-18

[46] International law instruments, soft laws that control corporations to respect human rights are: (1) OECD Guidelines for Multinational Corporation; (2) UN Global Compact; dan (3) Human Rights Principles and Responsibilities for Transnational Corporation and Other Business Enterprises.

[47] Rudi M. Rizki, *op.cit*, p. 21

[48] Rudi M. Rizki, *ibid*, p.22

[49] Horizontal impacts that is based on the theory that human rights norms created legal obligations between individuals. The states is also responsible to ensure that every individuals and groups within the States' jurisdictions does not violate the human rights of someone or other groups. Based on the theory of horizontal impact, the obligations is between human being to human being or between or among individual humans. Therefore, the States based on the theory can be held responsible for the actions done by private if they failed or refused to stop or fail to prevent human rights violations. The judicial consequences if that happens, is that the individual have the right to remedy due to other individuals who violates their human rights. See: Rudi M. Rizki, *ibid*, p. 18-19

The formulation of legislations to strengthen corporates' responsibility to respect human rights is a manifestation from the States' obligation to fulfill human rights. This obligation is done through progressive steps to the realizations of rights. These steps include efforts in legislative, administrative, budgeting, and can also include several kinds of actions. The key to this obligation is to create environment through all appropriate manners.[50]

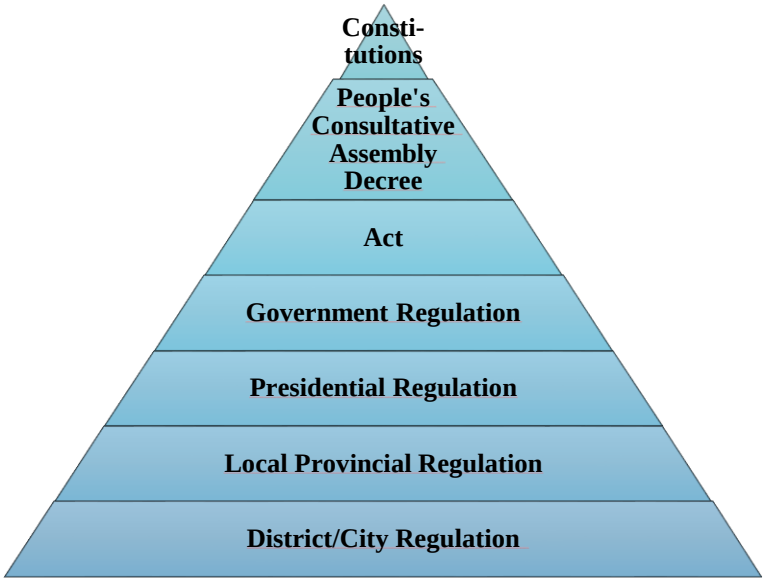
Within the relations between the corporates' responsibility in their operations and their obligations to respect human rights, there has been actually a number of legislations that already control such obligations. If the legislations are categorized, there are 4 aspects as follows: (1) the protection of consumers; (2) protection of environment; (3) protection of employment; and (4) protection of human rights. Other than the obligation to provide protection of human rights, such obligation can also be implemented through the States effort to strengthen the people's access to receive remedy due to the negative impacts of business operations.

Eventhough Indonesia already has regulations, and ratified several instruments that protects the human rights, in reality, human rights violations that involves corporations still exist. In various human rights reports, corporations remain as one of the most responsible actors for the human rights violations. One of the reasons corporations violates the human rights is because there are no standards and guidelines that is binding, that can be used as guidelines and gives directions on how should corporations operate their business without violating the human rights.

One of the ways to prevent or decrease the human rights violations by corporations is to develop the National Action Plan on Business and Human Rights that could provide direction to the government in order to make corporations as one of the key actors of the life in Indonesia. The National Action Plan on Business and Human Rights is expected to provide directions on what regulations need to be formed and adapted with the corporate's responsibility to respect, protect, and provide access to remedy of the human rights.

The initial step to strengthen the NAP is by making it as legal norms that can bind corporations undergoing their operations that respects the human rights. In other words, the NAP must be placed in the hierarchy system of legislations in Indonesia. The Law No. 12 Year 2011 about the Formation of Legislation, Article 7 paragraph (1) states that the type and hierarchy of legislations, as follows:

[50] Gender, Human Rights and Culture Branch of the UNFPA Technical Division (GHRCB) & Program on International Health and Human Rights, Harvard School of Public Health, *A Human Rights–Based Approach to Programming: Practical Implementation Manual and Training Materials,* UNFPA, 2010, hlm. 47



Based on the types and hierarchy above, therefore the NAP should be transformed ino legal norms that is based on the existing type and hierarchy of legislations. Moreover, in Article 6 paragraph (1) states that the principles must be reflected in the content of a legislation.[51] Therefore, the NAP will have legal power if the NAP is transformed into the content of legislation to control the dimention of law for business and human rights.

The placement of the NAP to the type and hierarchy of legislation can strengthen its effectiveness because it will become legislation norms. According to Maria Farida Indrati S.by referring to the views of D.W.P Ruiter, there are 3 (three) elements of norms in the legislations, which are: [52]

1. Legal Norms
   The legal norms within legislations can be:
   a. Commands;
   b. Prohibitions;
   c. Licenses/Permissions;
   d. Abolition;
2. Norms that applies outside
   The norms within legislations are constrained by whom are not part of the government organizations. The norms are for the people, whether in their relations with others, or between the people and the government.
3. General in terms
   The norms of legislations are general because the norms are entitled for everyone or every citizen as a whole. Whereas the norms of legislations in wide terms can be defined that the norms are entitled to control actions or incidents that are not certain.

Moreover, if seen from the aspects of its substance that will control the protection of human rights from the domination of corporate powers, then the principles of legislations that are stated in Article 6 paragraph (1) that will be reflected in the NAP includes principles as follows:

1. Protection; [53]

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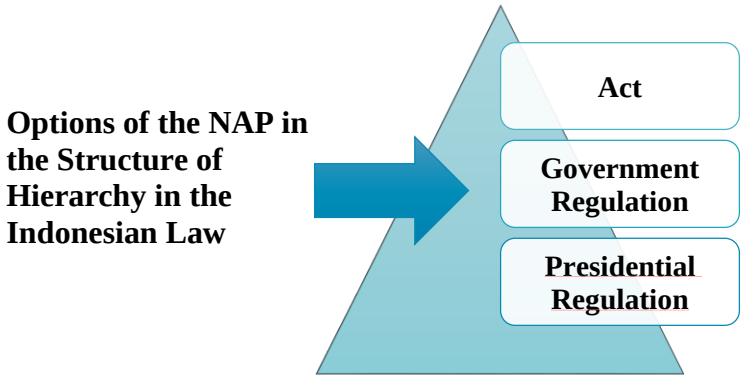
[51] Article 6 paragraph (1) of Law No. 12 Year 2011 about the Formation of Legislations that includes control; humanity; unity in diversity, equality before the law and government; legal certainty; and/or balance of harmony.

[52] Maria Farida Indrati S., Ilmu Perundang-Undangan 1: Jenis, Fungsi, dan Materi Muatan, Yogyakarta, Penerbit Kanisius, 2007, p. 35-36

[53] The principle of control is every content of legislations must function to provide protection to create tranquilty of society

2. Humanity; [54]
3. Justice; [55]
4. Equality before the law and government; [56]
5. Order and Legal certainty; and/or[57]
6. Balance, concurrence, and harmony.[58]

In this context, therefore the choice of the placement of NAP in the type and hierarchy of legislation can be seen bellow:



The placement options of the NAP within the three types of legislations, which are Act, Goverment Regulations, or Presidential Regulation is based on the consideration that every type of the legislations can be expected to strengthen the norms' effectiveness of the NAP. Opportunities, advantages and disadvantages of every options of placement of the NAP in the three types of legislations can be explained as follows:

Type of Legislations	Contents	Advantage	Disadvantage
Act	1. Further regulations of the provisions in the Constitution (UUD 1945); 2. Order of an Act to be regulated by the Act; 3. Fulfillment of the need of law within the people.	1. Strengthen society as rights-holders 2. To claim their rights to remedy due to the impact of business operations 3. Strengthen the corporate legal liability to respect human rights 4. Strengthen the government as duty-bearers to control corporations	1. The Act that is a product of conflicts of interests (political oligarchy) 2. The dimention of politics and economics have potentials to dominate the discussion of the Act (political transactionals)

[54] The principle of humanity is every content of legislations must reflect the protection and respect of human rights and human dignity of the citizens and Indonesian population proportionally
[55] The principle of justice is every content of legislations must reflect justice proportionally for every citizens.
[56] The principle of equality before the law and government is every content of legislations cannot consist of terms that are discriminate based on background, including religion, tribe, race, groups, and social status.
[57] The principle of order and legal certainty is every legislations must create order within the society through the guarantee of legal certainty.
[58] The principle of balance and harmony is every content of legislations must reflect balance and harmony between individuals, society, and the States'interests.

		to respect the human rights 5. To open the people's access to participate	
Government Regulation	Contents to run an Act properly.	1. Minimalize the interventions of political parties' interests (political dimention) 2. The substance is more about operationals	1. Decreasing the bargaining of power of the people 2. The government's interests is more dominant (accomodate corporations' interests)
Presidential Regulation	1. Contents that is ordered by an Act, 2. Contents to run the government regulation, or 3. Contents to run the governing power.	1. Minimalize the interventions of political parties' interests (political dimention) 2. The substance is more about operationals 3. There are conventions of constitutions as a reference (legality of the NAPHR through presidential regulation) 4. There are best-practices of NAPHR that is transformed into local NAPHR (dimention of regional autonomy)	1. Decreasing the bargaining of power of the people 2. The government's interests is more dominant (accomodate corporations' interests)

The placement options of the NAP within legislations if constructed based on the rights-based approach, then it will allow the rights-holder to claim their rights to the duty bearers. On the other hand, this approach can increase the accountability of the policy makers and other actors where their actions result in human rights impacts.[59]

In its relations with the increase of corporations role to respect human rights, then the placement of the NAP within legislation can be justified. This is based on the view of the Department of Justice Hongkong that views that the formulation of a good Act must fulfill these minimum principles, which are:

1. An Act is needed for public interests and other choice, such voluntary agreements or non-regulated as codes of ethics cannot meet the purpose;

[59] Celestine Nyamu-Musembi and Andrea Cornwall, *What is the "rights-based approach" all about? Perspectives from international development agencies, I*nstitute Of Development Studies, November 2004, hlm.3

2. Every main implications from the proposal of formulation of the Act, which is related to policy, implementation, human rights, increasing effects toward the States or certain organs, treaties that result the obligation, basic law, resources and relations with the people are considered;
3. Formulation of the Act cannot contradicts basic law;
4. The views of other stakeholders that are impacted must be considered.

The placement of NAP in an Act is expected to become lex specialis that can control the human rights dimention of corporate operations in Indonesia. Furthermore, this regulation can be detailed and strengthen regulations related to the corporate responsibility as already staed in the Law No. 40 Year 2007 about limited-liability company. Corporate responsibility can be constructed based on the principles of piercing corporate veil. The theory of corporate veil can be implemented in relations with their direct responsibility towards human rights, especially corporate legal personality[60] and responsibilities of limited liability.[61] In the construction of corporate law the limited responsibility is attached to the shareholders and corporate organizations, whether directors or commissioners. However, the limited responsibility of the company can be implemented by applying the principle of piercing corporate veil. Therefore, if the shareholders or corporate organization violated human rights, then they can be questionned for their accountability.

The implementation of the principles of piercing the corporate veil by the shareholders applies if they fulfill the provisions of Article 3 paragraph (2) Law No. 40 Year 2007 about the Limited-Liability Company, which is as follows:

1. The Limited-liability company as a legal entity not yet fulfilled;
2. The related shareholders whether directly or indirectly with the bad intentions to use the company for private/personal interests;
3. The related shareholders is involved in violation of the law that is done by the corporation; or
4. The related shareholders whether directly or indirectly violates the law by using the assets of the company resulting the company unable to pay off its debts.

The principles of piercing the corporate veil can also be implemented within the corporate organization if they act more than their authorities or act in neglect causing harms of other stakeholders. On the other hand, to ask for corporate accountability they can also implement the principles of fiduciary duty. The board committee must run the management and their authorities the purpose and interests of the company. Article 92 paragraph (1) Law No. 40 Year 2007 stated that the board of directors run the company's management for the interests of the company and based on the purpose and goals of the company. Moreover, paragraph (2) states that the directors have authorities to run the company based on related policies, within specified limits under this Law and/or the articles of association. Based on Article 97 paragraph (2), every member of the board of directors are fully responsible personally for the company's loss if he/she is guilty or negligent in carrying out their duties.[62]

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[60] Based on the theory of corporate personality law, a corporate must have artificial personality that is created by law that is differentiated with the founder, shareholders, managers, or directors. Every corporations have legal capacity to conduct their legal rights, such as the right to file a suit and be prosecuted, binding in a contract, and to have or release ownership. Workabeba Bekele Woldemelekot, Liability of Transnational Corporations for Indigenous Peoples Human Rights Violations, A Thesis Submitted to the Faculty of Social Science, University of Tromsø, 2008, p. 63

[61] Shareholders have restricted responsibilities legally based on the amount of share they have. The same thing applies to directors and commissioners of a corporation, their responsibilities are restricted based on the corporate's code of conducts.

[62] Based on Article 97 paragraph (3) UUPT, the member of directors cannot be held responsible for the loss, as stated as follows:

1. The loss is not because of their fault or negligence;
2. They have conducted with good intentions and carefulness for the corporates' interests and purpose;
3. They do not have conflict of interests whether direct or indirectly for their actions that result loss, and

The implementation of the principles of fiduciary duty can also be applied to the board of commissioners that have the responsibilities with good intentions, carefulness, responsible to conduct their monitoring role and give advise to the board of directors for the company's interests and its purpose and goal. However, every member of the board of commissioners are responsible personally for the company's loss, if he/she is guilty or negligent in carrying out their duties.

The placement of the NAP within an Act can also strengthen the principle of criminal corporate responsibility that is already regulated in several legislations. The principle of corporate responsibility had been widely adopted within legislations, such as Law No. 5 Yeah 1984 about industries, Law No. 8 Year 1995 about capital markets, Law No. 5 Year 1997 about psychotropic, Law No. 22 Year 1997 about narcotics, Law No. 32 Year 2009 about the protection and management of environment, Law No. 5 Year 1999 about the ban of monopoly and unfair business competition, Law No. 8 Year 1999 about protection of consumers, and Law No. 20 Year 2001 about the eradication of corruption.

Another alternative of the placement of NAP within government regulations. Government regulation is formed based on the authority delegation from an Act. Article 12 in Law No. 12 Year 2011 stated that the content of government relations consists of materials on how to run the act properly. Based on the explanation of this article, the meaning of running the act properly is by establishing the government regulations to do the orders under the Act or to run the Act as long as it is needed without violating the contents that are regulated within the related Act. The placement of the NAP within the government regulations is possible because the function of government regulations are to conduct: [63]

1. Further regulations on the contents of the act that is firmly stated;
2. The implementation of other further regulations within the related Act, eventhought it is not firmly stated;

Based on these functions, therefore the government regulation can be created to regulate a matter if there has been an Act that already regulate the same thing. This means that the government regulation can be formed by the President eventhough there is no order to establish such act. Therefore, the NAP can be functioned to regulate further provisions of Law No. 40 Year 2007, especially to regulate the corporate's responsibility to respect human rights. This regulation is also part of the effor to further regulate the principle of piercing the corporate veil and fiduciary duty.

Further alternative is to place the NAP in the Presidential Regulation. Based on article 13 of the Law No. 12 Year 2011, the content of a presidential regulation is materials that are ordered by an Act, materials to implement government regulations, or materials to implement the government's power. The explanation of this article states that a presidential regulation is formed to implement further regulations of an Act or government regulations that is firmly or unfirmly ordered by its formation. The principles of piercing the corporate veil and fiduciary duty as a form of corporate's responsibility, including violation of human rights can become the materials of the presidential regulation.

In this context, there is already the convention on the states structure that further regulates an Act through presidential regulations. The Presidential Regulation Number 75 Year 2015 about the National Action Plan on Human Rights Year 2015 – 2019 is an example of the convention on the states structure that further regulates the legal norms of human rights as regulated in the Law No. 39 Year 1999 about human rights. The National Action Plan on Human Rights (NAPHR) is a document that consists of targets, strategies, focus priorities of the NAPHR, that is used as a guide for ministerials, institutes, and the local governments in implementing the respect, protect, fulfill, enforce, and promotion of human rights in Indonesia.

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4. Have taken action to prevent the loss

[63] Maria Farida Indrati S, *op.cit.*, p.221-222

Based on this presidential regulation, the ministerials, institutes, local governments must develop Human Rights Action that is decided every one year through coordination with the joint secretariat of NAPHR. The NAPHR regulation through the presidential regulation can be a reference to place and regulate the NAP to become legal norms in the presidental regulation. Based on the legal logic of the NAPHR implementation, therefore the NAP can also become legal obligations of ministerials, institutes, local governments to develop the NAP based on its authorities.

Conclusion and Recommendation

The globalization of economy raised corporations as new actors that control strategic fields that can control and regulate the economic life of a country. Corporations nowadays can even replace the country's roles to provide public facilities and services. The corporation's power is so high that increase and widen the unbalanced relations between corporations and society. In several cases, the government tend to be on the side of corporations' interests that is reflected through the products of legislations. Recently, the role of government is decreasing when it is *vis a vis* facing corporations. These situations lead to the potential of human rights violations because society that do not have power must face both the government and corporations that each have powers. The relation between the government, private sector, and society must be re-balanced through repositions of the role of government in developing relations with the market. In other words, the States must increase their role by influencing the private sectors' behaviour. This effort can be implemented by interferring the market through legislations.

The development of the NAP on Business and Human Rights is a strategic step to strengthen the role of government and the corporates' responsibility to respect and protect human rights. Therefore, the NAP must be transformed into legal norms through developing the NAP's substance to the legislations. The NAP regulation within a legislation is an effort to further control the provisions in Law No. 40 Year 2007 about Limited-liability company, especially about the corporates' responsibility to implement the principles of piercing the corporate veil and fiduciary duty. When reffering to the provitions of Law No. 12 Year 2011 about the formation of legislations, then there are three (3) alternative placements of the NAP within the hierarchy of legislations, which are:

1. To place the NAP as contents of an Act;
2. To place the NAP as contents of a Government Regulation;
3. To place the NAP as contents of a Presidential Regulaion.

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