NATIONAL ACTION PLAN ON BUSINESS AND HUMAN RIGHTS

MAY 2017





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1 INTRODUCTION

A. RATIONALE

Corporations in Indonesia play an important role in promoting economic growth and therefore have an influence on all aspects in the daily life of the community. Corporations create jobs, produce goods and services, and can improve the welfare of employees and the shareholders. However, on the other hand the existence of corporations also has a detrimental effect on the community in general as well as individuals. Some impacts of business on human rights are pollution and damage to the environment, the production of goods and provision of services that are disadvantageous to consumers, eviction, and conflict on natural resources. Since the role of corporations has greatly increased in this era of globalized economy, corporations are also responsible for respecting human rights as their existence has the potential to violate the basic human rights.

The UN Guiding Principles for Business and Human Rights have received full support from the UN Human Rights Council. The Human Rights Council established in 2011 is an innovative instrument of international law intended to place the corporation as a new actorthat will have the role of being responsible for promoting and respecting human rights. In line with these

goals, the UN Guiding Principles also lay the foundation for convergence of standard rulings on the relation between business and human rights.[1] Furthermore, John Ruggie declares that the normatif contribution of the Guiding Principles does not lie in creating new international legal obligations, but in the efforts to elaborate the implications of the existing standard and practices of the country and business, to integrate the relations into one coherent and comprehensive document, and to identify the country's efforts to improve the protection of human rights in the context of business.[2] In other words, the UN Guiding Principles aim to become internationally recognized standards on business and human rights for the country and companies.

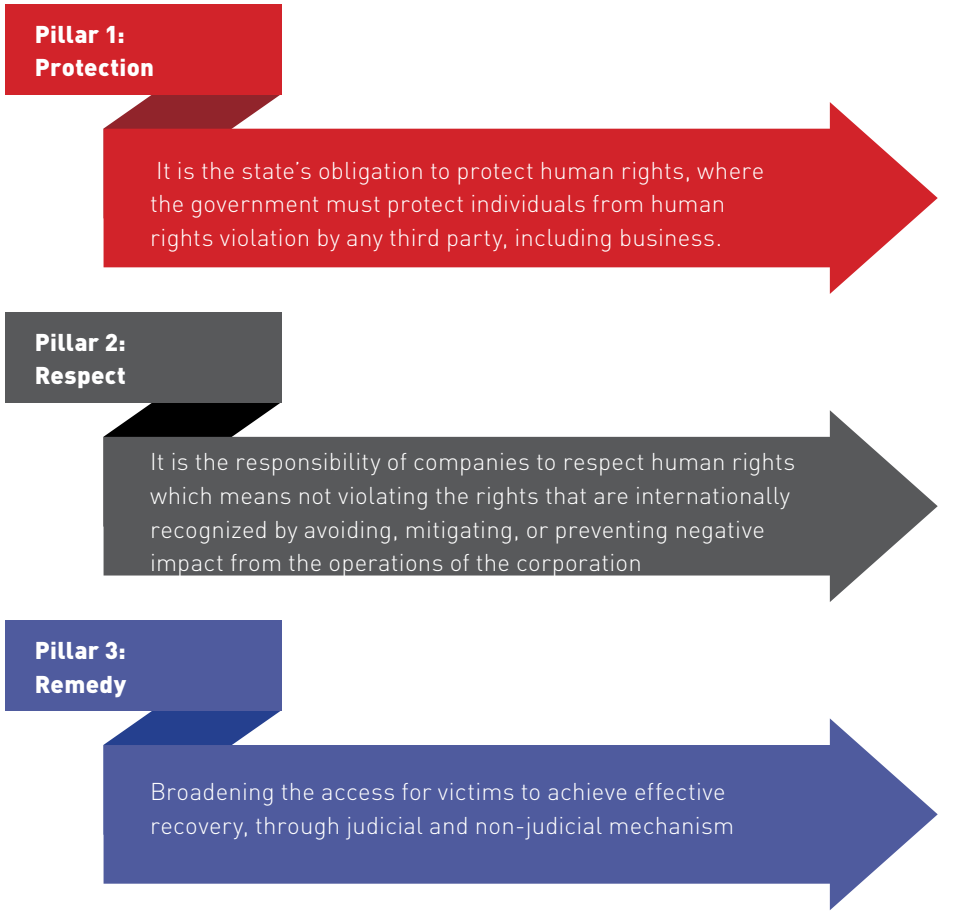
Under the Guiding Principles, a country is obliged to protect human rights from violations by a third party, including corporations. The UN Guiding Principles on Business and Human Rights require that a country must take certain steps through policies, legislation, regulations, and effective judicial system. On the other hand, a corporation also has the responsibility to prevent or become involved in the impacts that are detrimental to human rights and try to prevent or handle the harmful impact on human rights that are directly related to their activities, products, services, or business relations. In this context, each corporation has the responsibility to honour human rights by:

1. Preparing policies or strategies that integrate the human rights;
2. Performing due diligence to evaluate the impact of the company's activities on human rights;
3. Develop a mechanism for recovery for individuals as well as the community affected by the (operational) activities of a corporation.

Then, the third important element related to the availability of effective access for the victims of human rights violation, through both legal mechanism and non-legal mechanism.

1 John Gerard Ruggie, Just Business: Multinational Corporation and Human Rights, (New York: Norton Company, 2013), p. 149-159
2 Christine Bader, et.al.,The U.N. Guiding Principles on Business and Human Rights Analysis and Implementation, (Kenan Institute for Ethics Duke University, 2012),p. 5

THREE PILLARS OF UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS



The UN Guiding Principles to Business and Human Rights calls for a strong commitment from the country concerned to handle the impact caused to human rights by corporate operations. Commitment by the state is a determining factor to implement the Guiding Principles since there is a cross-cutting of norms between the international law and national law. The politics of the state law to arrange the implementation of responsibilities and

corporate accountability towards human rights constitute a strategic step as the foundation for strengthening the role of corporations in respecting the basic human rights. The legal politics are manifested through the transformation of international legal obligations in the national law followed by the provision of a system and mechanism for supporting human rights, including the responsibility towards human rights by the business sector.

The state has obligations on the impact of business on children, as regulated in both the Convention on the Rights of the Child and Optional Protocols to the Convention on the Rights of the Child. These obligations cover various issues, and reflect the fact that children are the holders of rights and stakeholders in the business sector as consumers, workers who are legally involved, workers and business leaders in the future, as well as members of the community and who live in the environment where the business operates.[3]

Children's rights should receive special attention because children or any person under the age of 18 years old account for more than one third of the population in Indonesia or approximately 84 million. The effects that business has on children can be long-lasting and even irreversible. Childhood is a unique period of rapid physical and psychological development during which young people's physical, mental and emotional health and well-being can be permanently affected for better or worse. Children are even affected by everyday hazards differently and more severely than adults. In response to these matters and with consideration to the best interests of the children as regulated in the Convention on Rights of the Child, UNICEF, Save the Children, and UN Global Compact have issued a Guide to Child Rights and Business Principles.[4] This will be discussed further in Section Three (Corporate Responsibility to Respect Human Rights). As with the Principles of Human Rights and Business, this guide is not legally binding but provides directives in performing business.

One of the manifestations of the political commitment of the State law in the context of business relations and human rights is the drafting of a National

3 General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights*

4 Save the Children, the United Nations Global Compact and UNICEF Children's Rights and Business Principles, 2012

Action Plan on Business and Human Rights in the context of preventing and reducing the impact of corporate operations on human rights.[5] Therefore the NAP on Business and Human Rights should accelerate the actions to be taken in order to ensure the protection of and respect to human rights in the policies and decisions of the State related to the relationship between economic players and human rights. The State officials must use the various options available to them, including all public policies and market-based policies available to them to make changes.[6] The NAP on Business an Human Rights should function to make sure that corporations perform their responsibility to respect human rights.

Preparing a National Action Plan (NAP) on Business and Human Rights can be considered as a socially engineered instrument in the context of developing a corridor in which to frame business relations with the universal standard of human rights. In addition, the NAP on Business and Human Rights can be placed as a strategy for the policies developed by a country to protect human rights from the impact of corporate operations that are harmful or detrimental according to the UN Guiding Principles.

The National Action Plan is a policy document that can be used as a policy instrument for the State in the framework of articulating the priorities and actions that are to be adopted when supporting the implementation of international, regional, or national obligations and commitments, related to specific policy sectors. The development of NAP on Business and Human Rights as an approach to policies and instruments of the government that is not only limited to business and human rights.Conversely, NAP on Business and Human Rights can be used as a guidance on policies for other policy sectors.

Source: Claire Methven O'Brien, et.al, 2014

5 UN Working Group on Business and Human Rights, Guidance on National Action Plans on Business and Human Rights (Geneva: 2015), p. 1

6 Global Business Initiative on Human Rights, Statement on National Action Plans on Business and Human Rights,Session at the UN Annual Forum on Business and Human Rights, 2016, p. 1

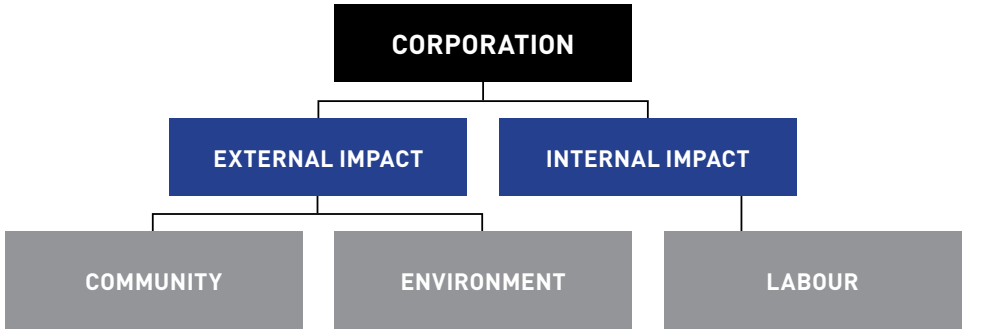
The NAP on Business and Human Rights should at least be able to provide an illustration of the following aspects:[7]

1. Instrument for implementing the UN Guiding Principles on Business and Human Rights and to reflect the state duties under the International Human Rights Law to protect human rights from any detrimental impact caused by corporation business activities. In addition, to provide more access for effective recovery;
2. Instrument for promoting respect towards human rights through the process of due diligence.

In any form of human rights violation, it is often women who must bear a heavier burden compared to males, however on the other hand this unfairness to gender has not been handled specifically pursuant to the characteristics of women's rights. This situation can be seen when women interact with a corporation, whether as a worker, consumer, or member of the comunity, women are more vulnerable as victims and tend to suffer more than men. Similar situations can also be experienced by children when interacting with business because, both physically and psychologically, children are much more susceptible to the negative impacts of business compared to adults. Likewise with other vulnerable groups such as traditional communities, the disabled or handicapped, elderly people, and other vulnerable groups will differ in their interaction and how they are impacted by the corporation. Furthermore, the environment will also be impacted if the corporation, in running its operations, has no respect for the environment. Respect for the environment is basically a respect for mankind that exists with human rights.

Based on the above situation, the interaction between corporations with all groups of people, the community, and environment can be divided into three different dimensions of impact as shown in the diagram:

7 UN Working Group on Business and Human Rights, loc.cit



Therefore the NAP on Business and Human Rights must be supported by the main principles of human rights, namely the principles of non-discrimination and equality. In addition the NAP on Business and Human Rights should pay special attention to the needs, rights, and challenges faced by the individuals from groups that may be on a different level of risk and vulnerability among the affected community groups, including affected environments. This means the incentive of NAP on Business and Human Rights should adopt the principle of ecological justice using the framework of human rights norms and corporate responsibility.

An evolutive policy strategy developed by the State to protect against impacts that are detrimental to human rights caused by the business world in accordance with the UN Guiding Principles on Business and Human Rights.

Source: UN Working Group on Business and Human Rights, 2015

According to the Office of the UN High Commissioner for Human Rights (OHCHR) a NAP on Business and Human Rights such as the NAP on Human Rights should cover the following aspects:[8]

1. Strengthen the legal framework, build a strong adhesiveness between the international norms of human rights and the domestic law, increasing the independency of the courts, and more effective rules;
2. Better protection for individuals;
3. Cultivating stronger human rights values;
4. Stronger national institutions to promote and protect human rights, including the development of more effective social programs that will contribute towards improving the quality of life for all, particularly the vulnerable groups, and includes reducing the risk of internal conflicts.

Meanwhile the UN Working Group has declared that a National Action Plan on Business and Human Rights can ensure:9

1. Coordination and coherence of the government in the various public policies relating to business and human rights;
2. Inclusive process for identifying the national priorities and policy measures as well as concrete actions to be taken;
3. Transparency and predictability for the domestic and internasional stakeholders;
4. A process of monitoring that is continuous, determining the measurements, and evaluation of the implementation;
5. A framework *(platform)* for the ongoing dialogue between various parties; and
6. A format that is not yet general, but is flexible and can facilitate international cooperation, coordination, exchange and the learning of good practices.

8 Claire Methven O'Brien, et.al.,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, (The Danish Institute for Human Rights (DIHR) &The International Corporate Accountability Roundtable (ICAR), 2014), p. 9

9 UN Working Group on Business and Human Rights, op.cit.,p. 1

In fulfilling the obligation to protect, the State must provide effective guidance to business companies on how to respect human rights when performing the company operations.

NAP on Business and Human Rights can make the UN Guiding Principles on Business and Human Rights more effective since the effectiveness of these guiding principles depends on the proper effort to implement them on a national dimension. In this context, the NAPon Business and Human Rights can be used as a guide for the corporation to ensure the existence and continuity of its business. In this relation, the United Nations Global Compact stresses to each company to harmonize its strategy and operation with the universal principles of human rights, labour affairs, environment, anti-corruption and take the necessary steps to promote social goals. This way, the sustainability of the corporation can be realized if the corporation can see the situation that exceeds its own and take action to support the surrounding communities.[10]

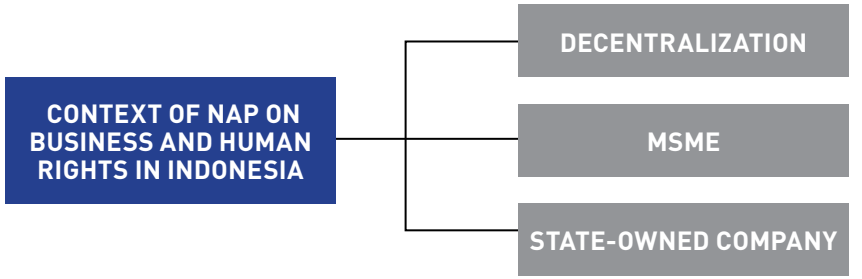
Furthermore, the NAP on Business and Human Rights also reflects the specific and unique context pursuant to the situation of the country and tends to direct (respond) to potential and manifested human rights infringement, including the negative impact of corporate operations. This is in accordance with the recommendation produced by the UN Working Group on Business and Human Rights, namely that the process of developing a NAP on Business and Human Rights contains four main requirements:[11]

1. Based on the UN Guiding Principles on Business and Human Rights;
2. Specifically contextualized in the reality of the State;
3. Transparent process and subjective dialogue;
4. Periodic revision and updating to keep up with the dynamics and evolution of the new reality.

10 United Nations Global Compact, Guide To Corporate Sustainability: Shaping A Sustainable Future, (New York: United Nations Global Compact, 2014), p. 7

11 UN Working Group on Business and Human Rights, op.cit, p. 3

The context of the NAP on Business and Human Rights in Indonesia is at least related to the following three aspects:



1. Decentralization (Regional Autonomy)

The policy on decentralization that transfers authority (power) from the central government to the provinces and districts/cities has a judicial implication on human rights. Together with the transfer of authority, the promotion of human rights becomes attributed to the regional governments. In this case the regional government becomes obliged to implement the task of promoting as well as protecting human rights that used to be the main responsibility of the central government. The regional government can translate the NAP on Business and Human Rights and the Long-Term National Developmen Plan into a regional government policy, which includes the provision of a budget allocated for human rights problems that are faced daily by community members.

The UN Guiding Principles stress the importance of integrating policies horizontallythat are coherent at the national, provincial, and district/city levels in the framework of adjusting to the obligations of human rights.

2. Micro, Small, and Medium Enterprises (MSME)

MSME plays an important and strategic role in the national economy because in terms of quantity it is the business group with the largest number of members. In fact, during the economic crisis in 1998, MSME was the sector most capable of surviving the situation. Today, MSME is the largest group of economic players in Indonesia's economy. In addition, MSME has an important role in providing jobs and developing the GDP (Gross Domestic Product) in Indonesia. According to data from the Central Statistics Bureau (BPS) of 2014, as many as 99% of the 57.54 million business actors in Indonesia are in this sector. MSME contributes 59.08% to the national GDP, absorbs 97.16% of manpower, produces consumer goods and services that are close to the real needs of the people, and uses local resources, both the human resources, capital, raw materials, up to equipment.[12]

In Indonesia, children are more often involved in small enterprises and home industries that are often overlooked by formal supervision. The involvement of parents and caretakers in the small enterprise and home industries have the potential to increase the risk of the child not receiving adequate care and attention. In addition, supervision and control over the micro, small, and medium enterprises by the government is often limited and therefore the MSME entrepreneurs might not meet the health standards for the goods that are produced, sold and bought, and consumed by children.

The Guiding Principlesdetermine that a company's responsibility to respect human rights is valid for all companies regardless of the size,, sector, context of its activities, ownership and structures owned. However the scale and complexity of the company and the way the company is responsible will differ based on these factors and the degree of damage caused by an impact that was harmful to human rights.

12 http://bisniskeuangan.kompas.com/read/2012/03/28/11093274/Tiga.Hal.yang.Buat.UMKM.Tahan.Krisis

3. State-owned Enterprise (SOE)

The role of SOE as an agent of development in Indonesia cannot be viewed apart from the philosophical basis for establishing SOE as given in Article 33 clause (2) and (3) of the 1945 Constitution, that the production sectors which are vital for the State and affect the livelihood of a considerable part of the population are to be controlled by the State. The land, waters, and natural wealth contained therein shall be controlled by the State and be exploited for the greatest benefit of the people. This was confirmed in the Law No. 19 of 2003 on State-Owned Enterprises, which determines the purpose and objective of establishing a state-owned company:

a. To contribute to the development of the national economy in general and the state revenue in particular;

b. Obtaining profit;

c. Providing a public benefit by making available high-quality goods and/or services that are adequate for the livelihood of many people;

d. To become a pioneer of business activities that cannot yet be performed by the private sector and cooperatives;

e. Actively providing guidance and assistance to entrepreneurs from the poorer economy groups, cooperatives, and community.

The total number of SOE up to 2015 was 118, these 118 SOE have total assets amounting to Rp5,395 trillion.[13] The contribution from SOE towards national development can be seen from the amount of tax and dividends paid to the State. The total amount paid by SOE to the State Budget for the past 5 years is shown in the table below:

13 Ministry of SOE, Press Conference - Minister ofSOE:SOE Performance Expansion 2015 and Target 2016, 2016

YEAR	TOTAL DEPOSITED BY SOE
2012	Rp 176 trillion
2013	Rp 194 trillion
2014	Rp 211 trillion
2015	Rp 202 trillion
2016	Rp 203 trillion

Another strategic role of SOE that also affects development is related to the fact that the majority of capital spent by SOE is focused on infrastructure projects to assist government programs. The capital spent by SOE for infrastructure in 2015 reached Rp 795.99 trillion.

Countries must take additional steps to protect and prevent human rights violation by business companies owned or controlled by the State, or that receive substantial support and services from state institutions such as export credit and guarantees, or official investment insurance, and includes requiring due diligence of the human rights.

Drafting a NAP on Business and Human Rights in Indonesia is expected to be able to place corporations, both state-owned or private, as actors whose role is to promote human rights and at the same time improve the economy. NAP on Business and Human Rights can help to construct a policy on business and human rights that is coherent and whose scope is extra-territorial so that it can reach companies which operation beyond the jurisdiction of the country. Thus, in order for the NAP on Business and Human Rights to be complied with by business circles and be beneficial for the people, the drafting of the NAP on

Business and Human Rights must be done in an open and inclusive process. In connection with business and human rights, in the session with the UN Human Rights Council in 2011, the Government declared its commitment to:[14]

1. Provide a legal framework to ensure that business is conducted with good intentions and will be beneficial for the constituent, both local and national local;
2. Accelerate the implementation of the UN Guiding Principles three on Business and Human Rights at the national level by drafting a comprehensive National Action Plan based on the three pillars of protection, respect, and remedy;
3. Consider integrating the elements of the UN Guiding Principles on Business and Human Rights when drafting the fourth generation of NAP on Human Rights 2015-2019;
4. Promote the UN Guiding Principles on Business and Human Rights to all stakeholders, including government officials, the business community, civil society and members of parliament.

NAP on Business and Human Rights can strengthen the constitutional protection of human rights as arranged in the 1945 Constitution Clause 28A-I. NAP on Business and Human Rights should also be placed as part of the promotion and protection of legal rights for all citizens in accordance with Law No. 39 of 1999 on Human Rights. In addition, the NAP on Business and Human Rights can strengthen the constitutional obligations and legal obligations of the Government in the framework of protecting, promoting, upholding, and fulfilling human rights. The government's obligation to protect human rights is relevant with business and human rights because it needs the role of the State. On the other hand, the obligation of a company towards human rights *(corporate human rights obligation)* is not yet regulated in any international legal instrument on human rights. Likewise, Law No. 39 of 1999 on Human Rights does not regulate the corporate responsibility to respect human rights.

14 Budi Tjahjono, A Treaty on Business and Human Rights, Franciscans International, Jakarta, September 2014.

Corporation as part of a legal entity *(legal person)* **also has the same responsibility as an individual legal subject** *(natural person)***, that is to respect human rights. This responsibility is reflected in the provision of Article 28J clause (1) which states that every person is obliged to respect the human rights of other persons, as part of the law and order in being a member of the community, the nation, and country. Further, clause (2) stresses the obligation of every person to abide by the restrictions set by the law, which are meant solely to ensurerecognition and respect for the rights and freedom of others. The corporation as a** *legal* **person can be interpretated as being in the scope of persons who are also bound by the obligation of respecting human rights.**

Therefore, corporate responsibility needs to be constructed in line with the individual obligation to respect human rights.[15]

Although the government has already declared its commitment to the issue of business and human rights, up to now the Guiding Principles on Business and Human Rights are not reflected in the policies that have been specifically drafted to regulate the relations with business and human rights. This is evident in the Regulation of The President of the Republic of Indonesia No. 75 of 2015 on the National Action Plan on Human Rights for 2015-2019 which does not regulate the dimensions of corporate responsibility to respect human rights comprehensively. Regulating the dimensions of corporate responsibility is strategic in order to lay a foundation for the corporations in playing their vital role for economic growth.

This can be seen in the contribution of corporations made through investments placed in Indonesia where the realized investment from January-September 2016 reached a total of Rp 453.4 trillion, or an

15 There are several articles in Law No. 39 of 1999 on Human Rights that can be interpreted as articulating the responsibility of corporations to respect human rights, such as Article 7 clause (2), Article 69, Article 71, andArticle 72. See Patricia

increase of 13.4 percent compared to the same period in the previous year. The realization of domestic capital investment during January-September 2016 increased by 18.8 percent or Rp158.2 trillion. Meanwhile, the realization of foreign capital investment rose by 10.6 percent or Rp 295.2 trillion.[16] Singapore is the largest source of investments placed in Indonesia during 2016 with the total amount of investment reaching US$ 9.18 billion. Investment by Singapore surpasses all other investing countries such as Japan, China, and the United States. Japan comes in second place with a total investment of US$ 5.4 billion. In third place is China, whose investment reaches US$ 2.67 billion. During the year 2016, the value of foreign investments placed in Indonesia reached US$ 28.8 billion or equivalent to Rp 389.3 trillion, down 1 percent from the previous year, which was US$ 29.3 billion.[17]

However, on the other hand, infringement of human rights that involves the role of corporations has continued to increase in the past years. According to the Report of the National Commission on Human Rights, in the past five years the data on complaints that involve corporations, both state-owned/regional government-owned (SOE/RGE) as well as private corporations, is shown in the following table:[18]

YEAR	VIOLATING PARTY	
	SOE/RGE	PRIVATE
2012	246	1.126
2013	273	958
2014	410	1012
2015	381	1.231
2016	359	1.030

16 databoks.katadata.co.id/datapublish/2017/01/03/nilai-investasi-naik-asing-masih-mendominasi
17 databoks.katadata.co.id/datapublish/2017/01/26/10-negara-terbesar-investasi-ke-indonesia-2016
18 https://www.komnasham.go.id/index.php/data-pengaduan

Based on the result of identification by the Human Rights Commission of the main issues in connection with business and human rights, they include rights of the environment, health, water, life, ownership of property and land, rights of the traditional communities, labour rights, and right to information.[19] Also, the existing policies are not completely able to ensure that the corporate operations remain within the corridor of respect to human rights. The NAP on Business and Human Rights reinforces the role and responsibility of the company to respect human rights so that the efforts to respect human rights will be more advantageous to the corporation in the long run.

B. THE OBJECTIVES OF THE NATIONAL ACTION PLAN ON BUSINESS AND HUMAN RIGHTS

In drafting the NAP on Business and Human Rights there are four main objectives, described as follows:

1. Harmonizing the perception of all stakeholders regarding application of the Guiding Principles on Business and Human Rights.
2. National standards and guidelines that can be used as a guide to provide direction regarding how a corporation should conduct its activities without infringement of human rights.
3. Provide directives to the Government regarding the policy framework that needs to be constructed and adjusted to the corporate responsibility for the respect and recovery of human rights.
4. Focus on preventing, reducing and repairing the negative impact (remedy) on human rights caused by a corporation.

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

C. METHOD AND PROCESS

The NAP on Business and Human Rights is prepared on the basis of a Policy Paper regarding the NAP on Business and Human Rights drafted together with the Human Rights Commission and ELSAM. This Paper has already gone through a process of public consultation with the stakeholders, from civil society organizations, the business sector, and government agencies that have authority related to the issue of business and human rights.

To accelerate implementation of the Guiding Principles on Business and Human Rights in Indonesia, the Human Rights Commission together with ELSAM, conducted a workshop that was attended by multinational corporations (MNC) and state-owned enterprises (SOE) from the plantation sector and mining sector, in 2014. According to the results of discussion, companies are open towards the initiative of forming a National Guide, as a means of applying the Guiding Principles into the Indonesian context. However, attention should be given to the hopes of the business players that the establishing of a National Guide will not add to the burden of the business players. The commitment of a corporation to respect human rights can be shown by the forming of a Business and Human Rights Working Group (BHRWG) as a media for constructive dialogue between the corporation and civil society to find the most appropriate methods to integrate the principles and norms of human rights in their business operation.[20]

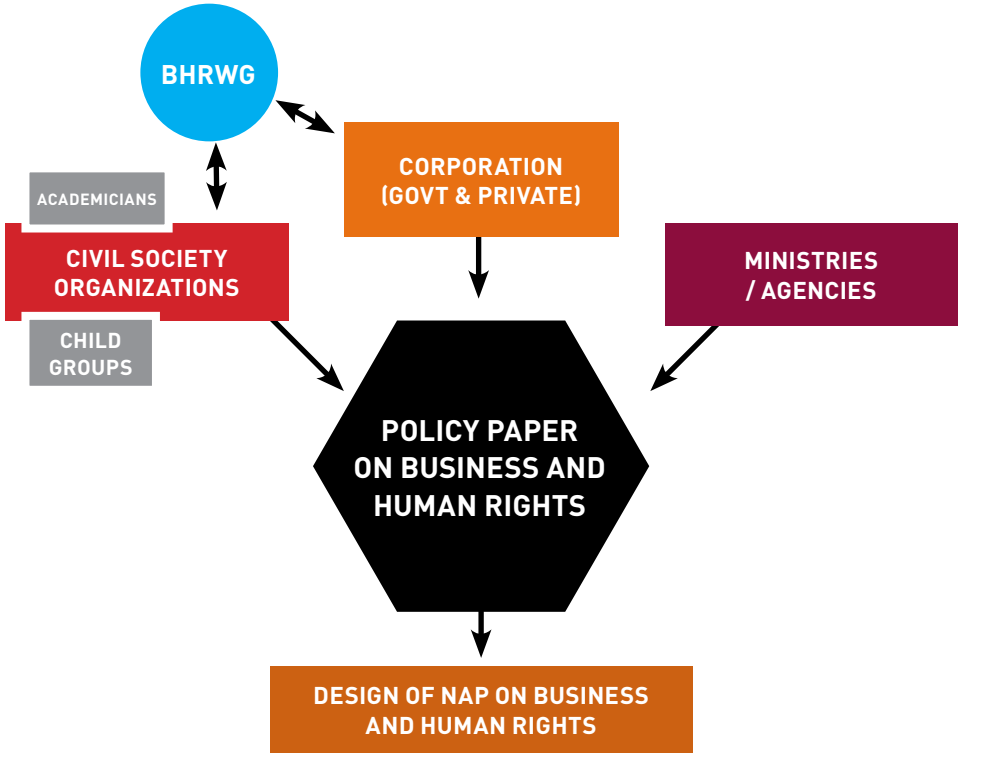
Consultation with various civil society organizations was carried out to enrich the substance of the NAP on Business and Human Rights. The involvement of civil society organizations is vital in order to see the dimensions of the impact caused by a human rights violation and what kind of remedy is needed by the victim(s) affected by the operational activities of the corporation. In this relation, childrens' groups that are facilitated by UNICEF were also involved in providing inputs to the drafting process of the NAP on Business and Human Rights. The participation of children is intended to be able

20 Establishing the BHRWG was initiated by Indonesia Global Compact Network (IGCN) by involving civil society organizations. The members of BHRWG consist of individuals from corporations, civil society organisations, and universities concerned with the issue of business and human rights. BHRWG plays the role of a hub that will conduct constructive dialogue about the issues related to business andhuman rights.

to view the special dimensions of the needs required for child protection when interacting with business. Furthermore, to strengthen the theoretical legitimization regarding the importance of placing the corporation in a role responsible for promoting human rights in the context of the Indonesian legal system, discussions were also held with academicians in law.

In addition, focus group discussions (FGD) were held with several ministries/ agencies that have authority in connection with business and human rights. The discussions aimed to identify policies that have been or are being drafted, to respond to the dynamics in the relationship between business and human rights within their respective scope of authority.

As follow-up action to these various forums, the Human Rights Commission and ELSAM formulated a NAP on Business and Human Rights in Indonesia by accommodating all the different stakeholders.



D. STRUCTURE OF NAP ON BUSINESS AND HUMAN RIGHTS

This NAP on Business and Human Rights is prepared with reference to the three pillars of the UN Guiding Principles on Business and Human Rights, namely :

1. **First Pillar:** Obligation of the State to protect human rights;
2. **Second Pillar:** Company responsibility to respect human rights;
3. **Third Pillar:** Access for victims of human rights violation to remedy.

Each pillar is further discussed on the following mattters:

1. Description of the main principles that are the foundation of each pillar;
2. Mapping the policies, analysis of the existing policies (already taken) that can be used as modality to implement the principles of each pilar;
3. Policy Plan (initiative) that can be developed to encourage synergy in implementing each pillar.

The Structure of NAP on Business and Human Rights can be seen in the diagram below:

FIRST PILLAR: OBLIGATION OF STATE TO PROTECT HUMAN RIGHTS	**SECOND PILLAR:** COMPANY RESPONSIBILITY TO RESPECT HUMAN RIGHTS	**THIRD PILLAR:** ACCESS FOR VICTIMS OF HUMAN RIGHTS VIOLATION TO RECOVERY
Description on main principles that are the foundation of each pillar	Description on main principles that are the foundation of each pillar	Description on main principles that are the foundation of each pillar
Mapping of policies (analysis) of existing policies (already taken) that can be used as modality to implement the principles of each pillar;	Mapping of policies (analysis) of existing policies (already taken) that can be used as modality to implement the principles of each pillar;	Mapping of policies (analysis) of existing policies (already taken) that can be used as modality to implement the principles of each pillar;
Policy plan (initiative) that will be developed to encourage synergy in implementing each pillar	Policy plan (initiative) that will be developed to encourage synergy in implementing each pillar	Policy plan (initiative) that will be developed to encourage synergy in implementing each pillar

2 OBLIGATION OF THE STATE TO PROTECT HUMAN RIGHTS

A. STRENGTHENING THE COMMITMENT OF THE STATE TO PROTECT HUMAN RIGHTS THROUGH LEGAL REFORM

The basic principle of the Guiding Principles stresses that the state must protect against the violation of human rights by business companies, within the country's territory and/or jurisdiction, by taking the appropriate steps to prevent, examine, punish and restore such violation through policies, legislation, regulations, and an effective court system. The obligation of the state to protect, includes taking action to develop legal reform and uphold the law in order to increase company compliance to respecting human rights. This means that legal reform is pre-requisite (conditionality) to articulate the UN Guiding Principles on Business and Human Rights.

However, the Guiding Principles determine that the law and policies developed must not hamper the company in running its operations. In addition, the state must provide effective guidance to the company on how to respect human rights in the implementation of its operation. Thus, the state becomes a vital determining factor to uphold protection of human rights against the impact of corporate operation. This pillar

shows us that the state has a primary role to prevent and is targetted to the corporate operation, the services or goods as well as relationship with other parties that have the potential to violate human rights.

Legal reform which is developed to regulate business relations and human rights should also be directed towards strengthening and implementing the commitment of the Indonesian government to the international human rights law that was already ratified. Based on the international law doctrine, ratification should be followed by the transformation of principles and existing norms to laws and regulations for the effective implementation of said principles and norms as regulated in international agreements. Transformation should be orientated towards and constructed to a scheme and mechanism for protecting the citizens from corporate operation that would affect human rights, carried out by a business entity because all policy frameworks judicially bind the legal subject, both the individuals as citizens, and the legal entities, including corporations.

Legal reform should be manifested in efforts to harmonize the law. This harmonization of the lawis intended to ensure that the national law and administrative regulations related to the issues on business and human rights are totally in accordance with the international human rights law already ratified. Therefore, the government, at central and local levels, has the obligation to issue public policies, in the form of a law or regulation, public budget, program, or development plan to ensure that human rights are fulfilled. At this point, it will be necessary to make efforts in *external harmonization* by adjusting the existing national laws and regulations with the principles and norms of the international human rights law, including the Guiding Principles. Harmonisation of the national law may require an effort to change (amend) the existing provisions or introduce new provisions. Meanwhile, internal harmonisation will be focused on eliminating inconsistency, contradictionor gaps between the provisions of the national law, as well as traditional law, or religious law with the provisions of the national law.[21]

21 Jaap E Doek, Harmonisation of National Laws With the Convention on the Rights of the Child: Some Observations and Suggestions (Addis Ababa: The African ChildPolicy Forum, 2007), p. 2

Efforts to harmonize policies, both horizontally and vertically are also clarified in the Comments to the Guiding Principles that say the State needs to find an approach to regulate business andan agenda on human right. This approach aims for better assurance that the domestic policies are coherent both vertically and horizontally. In this context, for all regional regulations produced after the decentralisation policy was launched post-1999, it was necessary to take steps to harmonize all the existing regional regulations. Harmonisation is aimed not only to make sure that the norms are in accordance with the higher laws and regulations, but also to examine their compliance with the principles and norms of human rights. Further, the steps in harmonization are meant to find out the impact of the current regional regulations on the investment climate in the regions. In addition, harmonization can become an instrument to strengthen the government in protecting human rights.

Decentralisation is related to the realization of human rights since there is an evolution of the international human rights and development where the point of gravity lies on the dimension of locality in the effort to implement the universal standard of human rights. The World Conference on Human Rights in Vienna in 1993 firmly declared that currently the regions are the focus point and have a vital role in implementing human rights.[22] The role of the regional or local government to promote and protect human rights is reflected in Resolution 24/2 of the UN Human Rights Council that requests the Advisory Board of the UN Human Rights Council to prepare a report based on research about the role of the regional government in promoting and protecting human rights, including the mainstreaming of human rights in public services and in running the local governments.[23]

At this point, the regional government may issue a policy that regulates the role of corporations domiciled in its administrative territory to respect human rights. The Human Rights Action Plan 2015–2019 as contained in Presidenial Decree No. 75 of 2015 explicitly stresses the importance of of involving the regional governments in implementing the Human Rights National Plan.

22 Esther van den Berg & Barbara Oomen, The Future of Human Rights in an Urban World Exploring Opportunities, Threats and Challenges, (Amnesty International Netherlands, 2014), p. 11

23 See DocumentA/HRC/24/L.2 onLocal government and human rights, 2o September 2013

A coherent horizontal policy means supporting and complementing the departments and agencies, both at national and sub-national level, that establishes business practices including those who are responsble for the company law and capital market regulations, the capital market, investment, insurance and credit for export, trade and manpower, to be informed and acted upon in accordance with the government obligation on human rights.

A similar burden is placed on the state where it must keep control over the SOE to comply with the international standards for human rights. SOE should be part of the state efforts to respect human rights as a part of the commitment to perform the obligations born from the norms of international law. The constitutional obligation of SOE as a government agent is regulated in Article 33 of the 1945 Constitution. Article 33 of the 1945 Constitution requires the presence of the state in the economic life related to the business sector that affects the livelihood of the majority of people and natural resources that contribute to the people' s welfare.

Based on the provisions of this article, the first task of the state in establishing a corporate body is to meet all the needs of the people, if those sectors cannot yet be handled by the private sector. Then such tasks can be translated into a business enterprise by the state to become an SOE as an agent of development.[24] Therefore, it is hoped that the SOE will be able to provide substantial contribution to the growth of the national economy in the framework

24 Freddy Harris, et.al., Analisis dan Evaluasi Tentang Undang-Undang Nomor 19 Tahun 2003 Tentang Badan Usaha Milik Negara, (Jakarta: BPHN, 2011), p.

of realizing the community welfare based on economic democracy.

In this context, Anthony I. Ogus divides two classifications of public permit, that is **first**, the object has a public interest and therefore there is no ownership right by anyone. Therefore, the object is classified as public goods and thus can be accessed and utilized by anyone. The **second** form, the granting of permission from an object that is owned by the public (public ownership) meaning that it is owned by all the people or owned by the nation. Therefore, according to Article 33 of the 1945 Constitution relating to public goods as well as public ownership, it means that both have apublic interest, therefore their utilization must be controlled by the issuing of a permit by a public official. This control is necessary in order to be able to supervise the activities so that the object can be accessed by all the people and used for the maximum prosperity of the people.[25] This is pursuant to the comment of the UN Guiding Principles on Business and Human Rights explaining that when the State owns or controls a business company, the presence of the State is necessary in order to ensure that the relevant policies, legislation, and rules can guarantee respect towards human rights.

When a company is controlled by the State or when its actions can be accounted for, not only to the State, any violation of human rights by a business company may lead to a breach of the State obligations based on international law.

In addition to having an important role in supporting Indonesia's economic growth, the Micro, Small, and Medium Enterprises (MSME) also play a role in the *supply chain system* as an economic player at upstream level. MSME are also the main supporters of the manufacturing industry at downstream level in the role of supplier.[26] Meanwhile,

25 Tri Hayati, Perizinan Pertambangan di Era Reformasi Pemerintahan Daerah Studi Tentang Perizinan Pertambangan Timah di Pulau Bangka (Mining License in the Era of Regional Government Reform, a Study on Tin Mine Licensing at Bangka Island,dissertation (Jakarta: Fakultas Hukum Program Pascasarjana Program Studi Doktor Ilmu Hukum, 2011), p. 166

26 Asep Mulyana and Adzkar Ahsinin, UNGPs, Decentralisasi dan UMK: Laporan Penelitian Relevansi Guiding Principles PBBuntuk Business and HAM dalam Konteks Indonesia, (Jakarta: ELSAM, 2016), p. 66

the Guiding Principles stress that the obligation to respect human rights is the responsibility of companies regardless of their size, sector, context of their activities, ownership and structure. This would mean that the presence of the State is indeed needed to prevent any potential impacts from the violation of human rights arising from the operation of a supply chain system that involves MSME. In connection with accountability for human rights, different arrangements will be needed for the MSME in dealing with corporations. The Government may use policies as instruments to increase the number of MSME and strengthen their existence. Enhancing the role of the MSME can be realized if the State can create and develop a business environment that is productive and respective, which includes the giving of incentives. This way, the aim to have different arrangement is meant to empower the MSME as an economic actor when dealing with corporations.

Promoting a development policy orientated on supporting activities that are productive, creating decent job opportunities, entrepreneurship, creativity and innovation, and encouraging a change to the formal sectoras well as growth in the micro, small and medium enterprises, including through more access to financial services.

This measure should be followed by encouraging the MSME to abide by the business standards that are parallel to the principles and norms of international human rights. In connection with the efforts to properly implement the Guiding Principles, the Government can apply a principle of *common but differentiated responsibility and respective capabilities* of the economic actors.[27] In other words, although the respect for human rights is a common responsibility, the implementation should always take into consideration the characteristics of MSME that are different from corporations. MSME

27 The principle of common responsibility with different obligations is a general principle initiated by the experts and policy makers to ovecome environmental issues. This idea was first mentioned as a principle in the Rio Declaration in 1992. This principle can be analoged in the context of business and human rights, particularly the obligation of MSMEto respect human rights. Under the UN Guiding Principlesit was determined that the responsibility to respect human rights shall be fully applicable and equal for all business companies. At this point the State is needed to give support in the form of policies and special incentives for the MSMEso that they can work together with the corporations to build the economy.

can be compared to machines that are strong because of the economic growth and creation of job opportunities, and which contribute to the social cohesion. However, in advancing the role of MSME, particularly in the global supply chain, requires a foundation of better governance, better infrastructure, and finances as well as more effective implementation and application of the social framework, environment and human rights. Stronger standards for the environment, social framework and human rights are not only important from the perspective of sustainable development, but are also related to the way a country attracts multinational companies with the support of policies that meet the international standard.[28]

Another issue that should be responded to by a country's government is in connection with potential violation of the rights of vulnerable groups by a corporation. The State has the obligation to make sure that human rights are protected by the law, regulations, and other policies in the framework of ensuring the protection of groups or individuals that are vulnerable, such as children, women, traditional communities, migrant laborers, people with disabilities, the elderly, migrant workers and their families, and other vulnerable groups. In the context of protecting children who have a relationship with a corporation it is often seen in relation to the issue of child labour, yet when investigated further the impact of business on children may include other aspects such as product design and advertising, behaviour of the staff towards children, and children's rights in the supply chain.[29] Children are the most vulnerable population, that require special attention in order to guarantee respect of their rights. There is the possibility that one of the corporation activities might have no effect on the rights of adults, but the same activities have a negative effect on the rights of children.[30] Thus, the operational impact of corporations that should be responded to by the State through its policies are not only the issues of child workers, but may also include all business activities as a whole, such as through products and services, marketing methods, and investment within the local community.[31]

28 Nick Killick, State of Play Business and theSustainable Development Goals: Mind the Gap – Challenges for Implementation, (London:Institute for Human Rights and Business, 2015), p. 41-42
29 Amaya Gorostiaga and Joanne Patroni, Engaging Stakeholders On Children's Rights, (Geneva: United Nations Children's Fund (UNICEF), 2014), p. 6
30 Amaya Gorostiaga and Joanne Patroni, ibid
31 UNICEF, the United Nations Global Compact & Save the Children, Prinsip Dunia Usaha dan Hak Anak, no year, p. 3

The Guiding Principles also obligate the business sector to observe women's rights at the work place, within their supply chain and in the local community where they operate. This means that the business must also consider the implications of each of its activities on the rights of women. In addition a corporation must take additional measures to examine how women can be affected differently by the operational activities of a corporation.[32] In fact the Guiding Principles stress the obligation of a corporation that operates in a conflict area to evaluate and overcome the increased risk of violation, with particular attention to sexual abuse and gender-based infringement.

Therefore the government must encourage corporations that cause or contribute to potential or actual impact, whether towards children's rights, women's rights, rights of the disabled, traditional community groups, the elderly, LGBT groups, religious minority groups, and other vulnerable groups. In line with this, the State must also encourage companies to build communication relating to the effort to overcome their operational impact on human rights.

32 Amy Lynne Lockler &Kathryn Dovey, The Business Of Women's Human Rights, IWRAW Asia Pacific Occasional Papers Series No.15, (Kuala Lumpur: International Women's Rights Action Watch Asia Pacific, 2014), p. 15-18

In fulfilling the obligation to protect, the State must provide effective guidance to business companies about how to respect human rights when performing their operations. Such guidance should advise what methods are appropriate, including due diligence on human rights, and how to effectively consider the problem of gender, vulnerability, and/or marginalization, recognizing the special challenges that might be faced by the indigenous people, women, ethnic groups or minority citizens, minority religious groups, or linguistic groups, children, the physically handicapped, and migrant workers and their families.

In implementing the UN Guiding Principles on Business and Human Rights, an important issue that should also receive the response of the Government is related to the drafting of a policy on investment. The State should give its special attention to drafting an investment policy for foreign capital investment. There are several rationale underlying the importance of the state preparing a policy framework for arranging Foreign Capital Investment:[33]

1. FCI provides a unique challenge in governance since the investments made can contribute to creating a permissive environment, and this could cause the emergence of a negative impact on human rights;
2. FCI can become a momentum that is used to reform the foreign investment policy in order to promote implementation of the Guiding Principles;
3. Investment contributes to the state's obligation to protect human rights through efforts to ensure a total harmony and priority in the drafting of an investment policy in the framework of implementing the Guiding Principles.

An important issue related to foreign capital investment that calls for an immediate response is the bilateral investment treaty. Such a bilateral investment treaty could have considerable impact on human rights and the environment. The Guiding Principles burden the State with an obligation to protect human rights by developing a policy framework to arrange a bilateral investment treaty. Developing an investment policy framework should adopt the minimum standard of respect for human rights, the environment, and manpower.

Countries must keep adequate space for a domestic policy in order to fulfill the obligation of respecting human rights while pursuing the goals of policies that are related to their business with another country or business company, as an example through an investment treaty or contract.

33 Investment & Human Rights Project (IHRP), Application of UN Principles on Business and Human Rights In Preparing an Investment Policy, (London:Laboratory for Advanced Research on the Global Economy Centre for the Study of Human Rights London School of Economics and Political Science, 2016), p. 6

Therefore, the country must make sure that it keeps adequate space for policies and capacity for arrangement to protect human rights based on such agreements, meanwhile the country must also give the necessary protection to investors who wish to place their investment.

B. MAPPING THE POLICY FRAMEWORK AS MODALITY FOR THE PROTECTION OF HUMAN RIGHTS

Indonesia is fully committed towards promoting and protecting human rights, which is shown, among others, by the ratification of a number of international conventions regarding human rights. This ratification is a manifestation of Indonesia's commitment to promote respect towards the fundamental rights of the community, both civil and political rights, as well as economic, social, and cultural rights.

The UN Guiding Principles on Business and Human Rights declare that the State must clearly state the hope or expectation that all business companies domiciled within its territory and/or jurisdiction must respect human rights in all their operations. According to the Guiding Principles, a country may take action to overcome the extraterritorial impacts by determining a requirement that the holding company domiciled legally in its territory must report the global operations of all the companies.

By entering an international agreement there is judicial implication based on the principle *"pacta sunt servanda"*, meaning that each country must carry out the imperative obligation of each norm that is the substance of the agreement based on good intentions. Indonesia up to now has become the eighth member country in a major international instrument on human rights, two optional protocols to the Convention on Rights of the Child. All major instruments as international agreements on human rights can be seen in the table below.

LEGAL INSTRUMENTS ON HUMAN RIGHTS	LEGAL BASIS FOR RATIFICATION
Convention on the Elimination of All Forms of Discrimination against Women/CEDAW)	Law No. 7 of 1984 on Ratification of the *Convention On The Elimination of All Forms of Discrimination Against Women*
Convention on the Rights of the Child/CRC)	Presidential Decree No. 36 of 1990 on Ratification of the *Convention On The Rights of The Child*
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment/CAT)	Law No. 5 of 1998 on Ratification of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*
International Convention On The Elimination Of All Forms Of Racial Discrimination/CERD	Law No. 29 of 1999 on Ratification of the *International Convention on The Elimination of All Forms of Racial Discrimination*
International Covenant on Civil and Political Rights/ICCPR	Law No. 12 of 2005 on Ratification of the *International Covenant On Civil And Political Rights*

LEGAL INSTRUMENTS ON HUMAN RIGHTS	LEGAL BASIS FOR RATIFICATION
International Covenant on Economic, Social and Cultural Rights/ICESCR	Law No 11 of 2005 on Ratification of the *International Covenant On Economic, Social And Cultural Rights*
Convention on the Rights of Persons with Disabilities/ICRPD	Law No. 19 of 2011 on Ratification of the *Convention on The Rights of Persons With Disabilities*
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families/ICMW	Law No. 6 of 2012 on Ratification of the *International Convention on The Protection of The Rights of All Migrant Workers and Members of Their Families*
Optional Protocol to the Convention on the Rights of the Child on The Involvement of Children in Armed Conflict	Law No. 9 of 2012 on Ratification of the *Optional Protocol to the Convention on the Rights of the Child on The Involvement of Children in Armed Conflict*
Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography	Law No. 10 of 2012 on Ratification of the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*

In addition, Indonesia has also ratified all key conventions of the ILO Convention that has formed the regime for the international labour laws and includes four aspects:

1. Abolition of forced labour;
2. Freedom of association;
3. No discrimination;
4. Abolition of child labour.

However, we need to take note that the focus on children's rights is often only on the problem of child labour and ignores various other aspects in the business that are related to children, among others protection and services for female workers who are pregnant or have given birth, opportunity to care for the children, and also the difficulty in accessing education.

All legal instruments on international labour ratified above can be seen in the table below.

LEGAL INSTRUMENTS ON INTERNATIONAL LABOUR	LEGAL BASIS FOR RATIFICATION
ABOLITION OF FORCED LABOUR	
Convention No. 29 (1930) on *Forced or Compulsory Labour.*	This convention was ratified in 1933 through the Nederlands Staatsblad 1933 No. 26 jo 1933 No. 236 and declared valid for Indonesia in the Indonesian Staatsblad 1933 No. 261
Convention No. 105 (1957) on the *Abolition of forced labour.*	Law No. 19 of 1999 on Ratification of the ILO Convention No. 105 *Concerning The Abolition Of Forced Labour*

LEGAL INSTRUMENTS ON INTERNATIONAL LABOUR	LEGAL BASIS FOR RATIFICATION
FREEDOM OF ASSOCIATION	
Convention No. 87 (1948) on the *Freedom of Association and Protection of Right to Organize.*	Presidential Decree No.83 of 1998 on Ratification of the ILO Convention No. 87 *Concerning Freedom of Association and Protection of Right to Organize*
Convention No. 98 (1949) on *The Application of The Principles of The Right to Organize and to Bargain Collectively*	Law No. 18 of 1956 on Approval of the Convention on International Labour Organization No. 98 regarding the *Application of The Principles of The Right to Organize and to Bargain Collectively*
NO DISCRIMINATION	
Convention No. 100 (1951) on *Equal Remuneration for Men and Women Workers for Work of Equal Value*	Law No. 80 of 1957 on Approval of the Convention on International Labour Organization No. 100 regarding *Equal Remuneration for Men and Women Workers for Work of Equal Value*
Convention No. 111 (1958) on *Discrimination in Respect of Employment and Occupation.*	Law No. 21 of 1999 on Ratification of the *ILO Convention No. 111 Concerning Discrimination In Respect Of Employment and Occupation*

LEGAL INSTRUMENTS ON INTERNATIONAL LABOUR	LEGAL BASIS FOR RATIFICATION
ABOLITION OF CHILD LABOUR	
Convention No. 138 (1973) on *The Minimum Age for Admission to Employment*	Law No. 20 of 1999 on Ratification of the *ILO Convention No. 138 Concerning Minimum Age For Admission To Employment*
Convention No. 182 (1999) on *Elimination of the Worst Forms of Child Labour.*	Law No. 1 of 2000 on Ratification of the *ILO Convention No. 182 Concerning the Prohibition and Immediate Action for The Elimination of the Worst Forms of Child Labour.*

Indonesia has in the context of environmental protection also ratified several international agreements that regulate the environment, either that cover the biodiversity cluster or the chemical and hazardous waste cluster. Those international agreements provide the mandate and obligation to each ratifying country to maintain its environment. The ratification of those international environmental legal instruments can be made as the step to carry out the environmental management reformation that is integrated in the framework of materializing the sustainable development. The international environmental legal instruments that have been ratified by Indonesia are shown in the table below

INTERNATIONAL ENVIRONMENTAL LEGAL INSTRUMENT	LEGAL BASIS OF RATIFICATION
United Nations Convention on the Law of the Sea	Law Number 17 of 1985 concerning Ratification of the *United Nations Convention On The Law Of The Sea*
United Nations Convention On Biological Diversity	Law Number 5 of 1994 concerning Ratification of the *United Nations Convention On Biological Diversity*
United Nations Framework Convention On Climate Change	Law Number 6 of 1994 concerning Ratification of the *United Nations Framework Convention On Climate Change*
Kyoto Protocol To The United Nations Framework Convention on Climate Change	Law Number 17 of 2004 concerning Ratification of the *Kyoto Protocol To The United Nations Framework Convention on Climate Change*
Cartagena Protocol on Bio-safety to The Convention on Biological Diversity	Law Number 21 of 2004 concerning Ratification of the *Cartagena Protocol On Bio-safety to The Convention on Biological Diversity*

INTERNATIONAL ENVIRONMENTAL LEGAL INSTRUMENT	LEGAL BASIS OF RATIFICATION
Stockholm Convention on Persistent Organic Pollutants	Law Number 19 of 2009 on Ratification of the *Stockholm Convention on Persistent Organic*
Convention on Civil Liability for Oil Pollution Damage	Presidential Decree Number 18 of 1978 on Ratification of the *International Convention on Civil Liability for Oil Pollution Damage*
Basel Convention on The Control of Trans-boundary Movements of Hazardous Wastes and Their Disposal	Presidential Decree Number 61 of 1993 on Ratification of the *Basel Convention on The Control of Trans-boundary Movements of Hazardous Wastes and Their Disposal*
Vienna Convention for the Protection of the Ozone Layer	Presidential Decree Number 23 of 1992 on the Vienna Convention For The Protection of The Ozone Layer Dan Montreal Protocol on Substances That Deplete The Ozone Layer as Adjusted and Amended By The Second Meeting of The Parties London, 27 - 29 June 1990.
Montreal Protocol on Substances That Deplete The Ozone Layer as Adjusted and Amended by The Second Meeting of The Parties London, 27 - 29 June 1990	Presidential Decree Number 23 of 1992 on Ratification of the Vienna Convention For The Protection of The Ozone Layer and Montreal Protocol on Substances That Deplete The Ozone Layer as Adjusted and Amended By The Second Meeting of The Parties London, 27 - 29 June 1990
Amendment to The Basel Convention on The Control of Trans-boundary Movements of Hazardous Wastes and Their Disposal	Regulation of the President of the Republic of Indonesia Number 47 of 2005 on Ratification of the *Amendment to The Basel Convention On The Control of Trans-boundary Movements Of Hazardous Wastes And Their Disposal*
International Convention On Civil Liability For Bunker Oil Pollution Damage, 2001	Regulation of the President of the Republic of Indonesia Number 65 of 2014 on Ratification of the *International Convention On Civil Liability For Bunker Oil Pollution Damage, 2001*

Such environmental management reformation should actually be manifested through policies, legal structures and administration in order to implement and enforce the effectiveness of the international environmental legal norms within the national scope. The state may in this regard develop the structure, system,

incentive, strategy, coordination and partnership for all stakeholders, as well as determine the roles and responsibilities in order to enforce the law and strengthen the law and institutional framework for the environmental management.[34]

The state may at this point provide the effect to the policy in order to implement the sustainable development concept through the efforts to improve the compliance of development actors. The engagement of the corporate as a strategic and important stakeholder in the environmental management may be related to the Human Rights due diligence, as contained in the United Nations Guiding Principles on Business and Human Rights.

Such act of ratification has the juridical implication that Indonesia has the obligation to transform the principles and norms in the policy framework in order to strengthen the Human Rights protection of each citizen from the negative impacts due to the existence of a company. All those ratified international agreement legal instruments can be made as the modality to

The corporate should carry out the human rights due diligence by way of assessing the actual potential and impacts on human rights. The human rights assessment should be carried out prior to the operation of the corporate and carried out periodically during the corporate operation. This assessment may be integrated into the assessment of other impacts, such as the environmental or social impacts.

34 Lal Kurukulasuriya & Nicholas A. Robinson, Training Manual on InternationalEnvironmental Law, (United Nations Environment Programme, without year), page 16

integrate the United Nations Guiding Principles on Business and Human Rights. In other words, Indonesia has sufficient modality that can be used to claim the commitment of companies that are subject to the Indonesian law to respect Human Rights. The United Nations Guiding Principles on Business and Human Rights represent that companies are attached the responsibility to respect Human Rights and implement the sustainable development concept by referring to those ratified international legal instruments.

The responsibility of the business company to respect human rights refers to the human rights that are internationally recognized, with the understanding, at least, as contained in the International Bill of Human Rights and the principles on the basic rights contained in the Declaration of the International Labor Organization on the Principles and Basic Rights at the Work Place.

After having ratified the international legal instruments, the state is then required to implement its obligation through the legislative reformation initiatives, including making new laws or amending the existing laws, development of administrative and social policies, campaign, education and others.

Indonesia has taken the legislation reformation steps after the reformation era in 1998 by enacting a number of legislative regulations, which substantial scope has the dimension of guaranteeing human rights and environmental management policies. The Second Amendment of the 1945 Constitution is the effort to reinforce the Human Rights constitutionality by entering the Human Rights norms through the regulation in Article 28A-J. Further on, the constitutionality guarantee of right on the environment as part of Human Rights, as contained in Article 28H paragraph (1), is again strengthened through the Fourth Amendment of the 1945 Constitution by indicating in Article 33 paragraph (4) the sustainability and environmental insight principle in the implementation of the national economy.In addition to Article 28A-J, there is also Article 27 paragraph (2) that may also

be made as the constitutionality guarantee of labour rights. All these constitution norms should actually be made as the reference of norms in the development of sector laws related to the Human Rights dimension, including the labour rights and environmental management dimension.

If it is further examined, there are several sector legislative regulations as the effort of legislation reformation that can be made as the corridor for the corporations to integrate the human rights principles into their operation. With regard to the protection toward the existence of impacts of a business entity, particularly toward the workers, community and environment, the government has enacted legislative regulations that place the central government and local governments to be responsible in providing such protection.

Law Number 39 of 1999 on Human Rights is the first law that guarantees the recognition and protection of Human Rights, covering the civil, political, economic, social and cultural rights as well as the Human Rights protection of vulnerable groups. Henceforth, there are several laws that have the dimension of Human Rights protection, which further on regulate such law, such as Law Number 23 of 2004 on Child Protection Law Number 35 of 2014 on Amendment of Law Number 23 of 2004 on Child Protection, Law Number 21 of 2007 on Eradication of Human Trafficking Crime, Law Number 40 of 2008 concerning Elimination of Race and Ethnic Discrimination, and Law Number 8 of 1999 on Consumer Protection. All those laws also include the dimension of the responsibility of the corporate to not be engaged in crimes that are regulated in those laws.

Further on, also the stakeholders that have the risk of being impacted, who are in the corporation internal scope, as regulated in Law Number 21 of 2000 on Workers Union/Labour Union, Law Number 13 of 2003 on Manpower, and Law Number 39 of 2004 on Placement and Protection of Indonesian Workers Abroad. Similar obligation is also reflected through Law Number 40 of 2008 on Elimination of Race and Ethnic Discrimination by emphasizing the state obligation to protect each citizen from the discrimination based on race and ethnic, including that is conducted by the corporate. This obligation includes taking the perpetrator to the court and providing the access to remedy for the

victims.[35] The impacts of the corporate operation toward the environment and right on appropriate environment are also regulated through Law Number 32 of 2009 on Environmental Protection and Management. Such impacts of the corporate operation are included in the scope of norms on the responsibility of the corporate. There are several legislative regulations that regulate the environmental problems, particularly with regard to the obligation of the state to protect the environment from the destruction threat. These legislative regulations are among others contained in Law Number 5 of 1990 on Conservation of Biodiversity Natural Resources and their Ecosystems, Law Number 26 of 2007 on Spatial Layout, Law Number 18 of 2013 on Prevention and Eradication of Forest Destruction, Law Number 1 of 2014 on Amendment of Law Number 27 of 2007 on Management of Coastal Areas and Small Islands, and Law Number 37 of 2014 on Land and Water Conservation.

Another important issue that touches on the implementation of the United Nations Guiding Principles on Business and Human Rights is the corporate social responsibility. The corporate social responsibility is conceptually different than the corporate obligation to respect Human Rights by way of integrating Human Rights into the policies, management and culture of the company. Meanwhile, the corporate social responsibility only follows the culture of the company to be implemented in social activities. In addition, the corporate social responsibility is also intended to support the business operation fluency of a corporate. Meanwhile, in the business and Human Rights perspective, the respect toward Human Rights emerged due to the existing shift of power to the company, which is initially attached to the state. The business and Human Rights concept is expected to be able to emphasize the state duty to protect the Human Rights from violation by the third party, namely the corporate.

The company social responsibility is conceptually and basically voluntary, since it is the manifestation of the moral commitment and ethical values. However, Law Number 40 of 2007 on Limited Liability Company transforms voluntary into legal obligation (mandatory). Article 74 of this Law regulates the obligation of the company, which carries out its business activities in the sector of and/or related to natural resources, to carry out the social

35 Patricia Rinwigati Waagstein, ibid. Such Government obligation is shown in the provision of Article 7 of Law Number 40 of 2008 concerning Deletion of Race and Ethnic Discrimination

and environmental responsibilities. The same regulation is also contained in Law Number 19 of 2003 on State Owned Company (BUMN), particularly Article 88 paragraph (1), which also regulates the social responsibility by way of putting aside a portion of its net profit for the need of the development of small scale businesses/cooperatives as well as the development of the community in the surrounding of the State Owned Company (BUMN). Similar regulation is also contained in Law Number 25 of 2007 concerning Investment, where Article 15 letter (b) regulates that each investment is required to carry out the social and environmental responsibilities.

C. INITIAL INITIATIVES OF GOVERNMENT POLICIES TO PROVIDE THE BUSINESS AND HUMAN RIGHTS RELATION FRAMEWORK

Policies are important instruments in translating the United Nations Guiding Principles on Business and Human Rights at the practical level, including the corporate operation. The integration of the Guiding Principles in the legislation, regulation and other policy instruments is the initial step in the implementation of such principles.

The countries should ensure that the State based departments, government entities, and other institutions that carry out the business activities are aware of and implement the state human rights obligation when complying with their respective mandates, including by providing them relevant information, training and support.

With regard to the strengthening of the corporate role in protecting Human Rights, the Government, particularly the ministry/institution, has the obligation to protect the interest of the community and has the role in providing the framework that enables the implementation of responsible business. In

addition, it also needs to facilitate the environment that enables the business to act accountably and complies with the obligation to protect the interest of the community from the possibility of negative impacts caused by the operation of a business entity. Further more, such policy may encourage the qualified and responsible investor to minimize the possible negative impact risks from the investment, and ensure the broader formation of values and sustainable development.[36] As such, the government can support the corporate role to respect Human Rights through the licensing and regulation instruments.

With regard to such matter, there are several policies at the ministry level that are the initial initiatives to integrate the United Nations Guiding Principles on Business and Human Rights in several regulations as follows:

1. The Ministry of Industry has issued the Decree on the Steering Committee and Human Rights Activity Organizing Technical Team in the Industrial Sector. It was then followed by the Human Rights Activity Action Plan in the industrial sector;
2. Decree of the Minister of Marines and Fisheries on Human Rights Protection in the capture fishery business in Indonesia;
3. The Ministry of Environment and Forestry initiated the Environmental Pollution and Damage Control National Action Plan caused by Mining; Circular of the Minister Number: SE.1/Menlhk-II/2015 concerning Handling of Environmental and Forestry Cases;
4. Encourage the inter Ministry discussion so that Indonesia applies the *Voluntary Principles on Security and Human Rights*, which is hereinafter referred to as P2SKH, namely the guideline for companies operating in the extraction industry sector (oil, gas and mining companies) to maintain the security and safety in their work in the framework of efforts to guarantee Human Rights.

36 Investment & Human Rights Project (IHRP),op.cit.,page 7

D. RECOMMENDED ACTION PLAN

In the framework of ensuring that the state protects individuals from Human Rights violation by the third party, including the business, the state may:

1. Carry out the harmonization, either horizontally or vertically, on all legislative regulations at the Central Government level or Local Government level that are not in accordance with the Guiding Principles on Business and Human Rights;
2. Carry out the transformation of international Human Rights legal norms, which regulates Business and Human Rights, to become part of the legal norms that are regulated through the legislative regulations in order to strengthen the responsibility of the corporatesin respecting Human Rights;
3. Develop the special policy instruments as implementation of the affirmation action to protect the Human Rights of vulnerable groups, rights of children, rights of women, rights of the handicapped, rights of the traditional community, rights of old people, rights of the LGBT group, rights of religious minority groups, and other vulnerable groups toward the negative impacts of operation;
4. Encourage the BUMN (State Owned Company) to implement the Guiding Principles on Business and Human Rights, including developing the Human Rights due diligence instruments as the efforts to avoid the engagement of the BUMN in the Human Rights violation;
5. Provide the facilities to the UMKM (Micro, Small and Medium Scale Enterprises) in order to be able to comply with the compliance standards toward the Guiding Principles on Business and Human Rights;
6. Draw up the sector policies/regulations that regulate the corporate to respect Human Rights in accordance with the Guiding Principles on Business and Human Rights;
7. Prepare the standardization on Human Rights compliance related to the corporate activities that is materialized through the Human Rights due diligence and Human Rights certification instruments;

8. Simplify the licensing and provide the incentive to each company that has carried out the Human Rights due diligence;
9. Carry out the control periodically on the operation activities of the Corporate;
10. Encourage the law enforcement on the Corporate which operations have negative impacts on Human Rights;
11. Develop the bilateral investment agreement policy framework by referring to the standard of respecting Human Rights, environment and workers;
12. Improve the implementation effectiveness of the company social responsibility as part of the company policy in respecting Human Rights and implement the sustainable development;
13. Periodically carry out the review on the National Action Plan on Business and Human Rights in order to adjust to the development of the business dynamics.

3 COMPANY RESPONSIBILITY TO RESPECT HUMAN RIGHTS

A. CREATE CORPORATE WITH BUSINESS CHARACTERISTIC FOR HUMANITY

The corporation has responsibility to respect Human Rights by referring to the basic norms contained in the Human Rights Universal Declaration. Such Declaration explicitly represents that every member of the society is bound to obey the substantive provision of Human Rights. The meaning of such phrase is extended so that it covers the entity that is not included in the individual or the state, namely the corporate.[37] As part of the community member, the corporate is also responsible to promote and respect Human Rights as regulated in the international Human Rights instruments. Further on, the corporate, management, and the people who are working are also required to recognize the responsibility and respect the norms that are contained in the United Nations agreements and other international instruments. However, in business, the first effective and

37 Rudi M. Rizki, Transnational Corporate Responsibility in Serious Violation on Human Rights, (Jakarta: Fikahati Aneska publisher, 2012, page 17-18.

responsible step in managing the Human Rights problems is by developing the adequate understanding that Human Rights are relevant in business.[38]

The United Nations Guiding Principles on Business and Human Rights affirm that the responsibility to respect Human Rights requires companies to avoid being the reason of or giving the contribution to the emergence of impacts that harm Human Rights through their own activities and to overcome when such impacts occur. The corporate responsibility covers the effort to prevent or mitigate impacts that harm Human Rights that are directly related to the operation, products or services, as the consequence of the existing business relationship. Further on, the Guiding Principles represent that the responsibility to respect Human Rights applies to all businesses, apart from the size, sector, activity context, ownership and structure in their possession. In addition, the company should also have appropriate policies and processes to comply with the responsibility in respecting Human Rights.

In the framework of complying with their responsibilities to respect Human Rights, the business companies should have decent policies and processes in accordance with the size and condition, including:

1. A commitment policy in order to comply with their responsibilities in respecting Human Rights;
2. A Human Rights due diligence process in order to identify, prevent, mitigate, and perform the accountability in their system to overcome impacts on Human Rights;
3. Processes to make the remedy on each bad impact toward Human Rights that harm what they produce or when they are engaged.

38 International Council on Mining and Metals, Human Rights in the Mining and Metals Industry: Integrating Human Rights Due Diligence into Corporate Risk Management Processes (London: ICMM, 2012), page 6

John Ruggie proposed two instruments to diminish the potential of negative impacts on Human Rights due to the corporate operation, namely the *legal compliance and due diligence approach* of the company. The due diligence process is the effort to look at the operation facts and business relationship of the company with the political, economic and social contexts. Further on, the evaluation process is the effort to interpret the facts that cover the company within the international Human Rights standard frame and following the national laws.[39]

The United Nations Guiding Principles on Business and Human Rights confirm that the objective of the *Human Rights due diligence* is described as a series of actions to identify, prevent, mitigate, and take into account the detrimental impacts. The Guiding Principles then determined four steps to implement the Human Rights due diligence process:

1. Assess the Human Rights impacts, either actual or potential;
2. Integrate the findings of such assessment into the relevant functions and processes and take the correct actions;
3. Trace the effectiveness of response taken by the company;
4. Externally communicate the actions taken by the company in order to overcome impacts.

Further on, one of the instruments that can be used in this context to understand the landscape of Human Rights in the company operation is the *sphere of Influence,* which was initiated by United Nations Global Compact. The The Human Rights problem map approach is the effort to place the Human Rights issue as the concentric circle (center of attention) that is impacted by the direct operation of a corporate. It is then followed by the circles of issues that are related to the suppliers, market, community and local government. Based on this approach, the Human Rights issues represent the impacts caused by the operation influence of a corporate.[40]

39 Daan Schoemaker, Raising the Bar on Human Rights: What the Ruggie Principles Mean for Responsible Investors, (Sustainalytics, 2011), page 9-11.

40 Mike Baab &Margaret Jungk, The Arc of Human Rights Priorities: A New Model for Managing Business Risk The Human Rights and Business Department, (Copenhagen: The Human Rights and Business Department Danish Institute for Human Rights, without year), page 5

Meanwhile, the United Nations Guiding Principles on Business and Human Rights initiated the complicity concept. Complicity refers to the extent where the corporate is engaged in Human Rights violation and the scope of legal accountability that may be prosecuted from it. Such complicity of the corporate covers the action of permitting, providing the tolerance, or knowing the existence of Human Rights violation by an entity that is included in its scope of influence but does not care or ignores the fact or with the knowledge of the corporate providing practical assistance or encouragement that provides substantial consequences toward the performance/occurrence of Human Rights violation.[41] John Ruggie interpreted the complicity concept by referring to the indirect participation of the company in the Human Rights violation, while such Human rights violation is actually conducted by another party, for example the government and non-state actors. The Human Rights due diligence may assist a company to avoid the complicity toward Human Rights violation.[42]

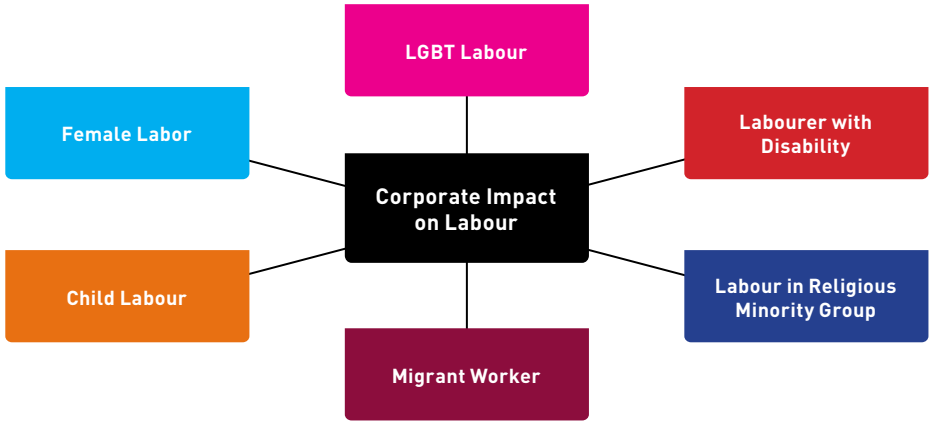
In the framework of measuring the Human Rights risks, the business company should identify and assess each detrimental potential or factual Human Rights impact that may possibly involve the corporations, either through their own activities or as the result of their business relationship. The process to assess the human rights impacts may be included in other processes, such as the risk assessment or environmental and social impact assessment, and they should include all internationally recognized Human Rights as a reference point, since the company may possibly provide actual impacts to each of such right.

The comments on the United Nations Guiding Principles on Business and Human Rights clarify that the business company should give special attention to each Human Rights impact on individuals or groups or population that may possibly be at the vulnerability or marginalization risks, and considering the difference of risks that may possibly be faced by women and men.

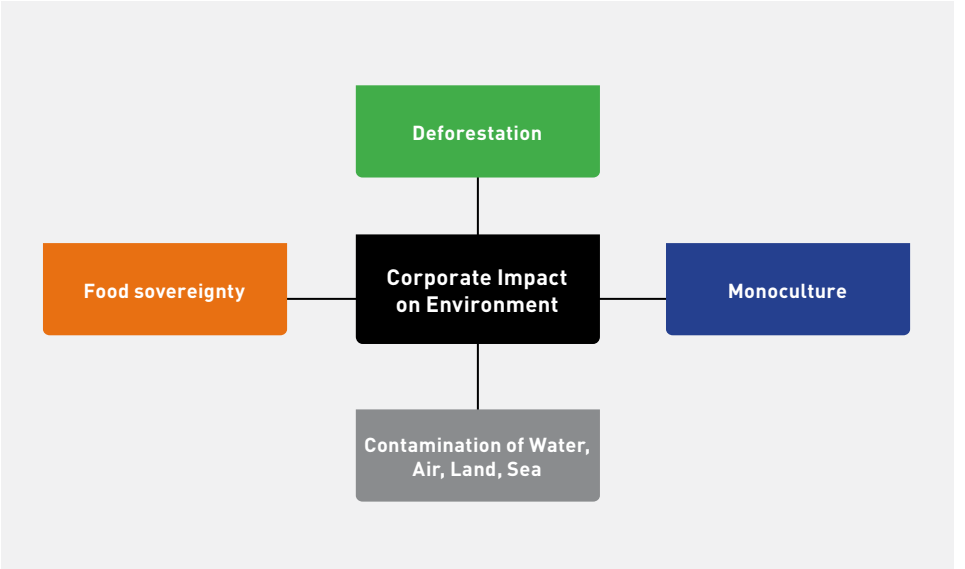
41 Rudi M. Rizki, op.cit., page 106

42 Global Compact Network Netherlands, How to Implement Business by Respecting Human Rights: A Guidance tool for the Company, (Jakarta: Community Study and Advocacy institution, 2014), page 146

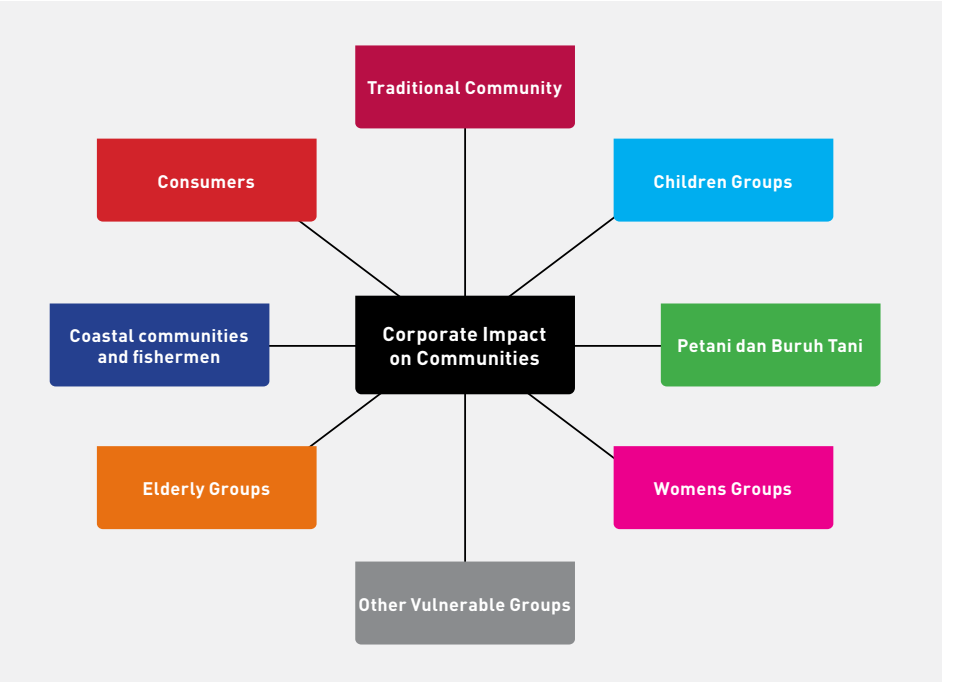
In case the corporate effect impacts are internally mapped, then it shows the people working at a corporation or laborers of the corporation itself. The map of impacted laborers is shown in the diagram below.



The map of corporation impacts on the environment is shown in the diagram below.



The map of corporation impacts on the local community is shown in the diagram below.



In addition to the United Nations Guiding Principles on Business and Human Rights, the responsibility scope of the corporate that touches on Human Rights can also be found in ISO 26000 *Guidance Standard on Social Responsibility*. There are several principles in the ISO 26000 standard, covering:

1. Compliance toward the law;
2. Respecting international instruments/organizations;
3. Respecting stakeholders and their interests;
4. Accountability and transparency;
5. Behavior with ethics;
6. Carry out preventive actions;
7. Respect Human Rights.

The ISO 26000 *Guidance on Social Responsibility* standard commenced applicable on 1 November 2010. 93% of the *International Organization for Standardization* (ISO) member countries, including Indonesia, have agreed upon the definition and scope of the social responsibility.The social responsibility covers the organization responsibility related to the impacts of a decision and activities in the community and environment, through transparent and ethical behavior that provides contribution to the sustainable development, health and welfare of the community; taking into account the expectation of stakeholders; in accordance with the prevailing law and consistent with the international behavior norms; and integrated in all organizations and practiced in the relationship with the third party.[43]

The concept of the company social responsibility can be made as part of the initial effort of the corporate to be responsible in respecting Human Rights. The implementation of the company social responsibility should actually be framed with the right based approach by emphasizing on the empowerment of the right holders as the basic foothold for the establishment of the company policies.[44] The company social responsibility concept is currently accepted by a lot of the business sectors with the following reasons:(1) business is part of the community; (2) the company is a business institution and also a social institution; (3) in addition to the existing risks, the business obtains profit from the community.[45] The company social responsibility principles have been regulated through legislative regulations that are associated to the company, such as Law Number 19 of 2003 concerning State Owned Company (BUMN), Law Number 25 of 2007 concerning Investment, Law Number 40 of 2007 concerning limited Liability Company, Law Number 4 of 2009 concerning Mineral and Coal Mining, and Law Number 32 of 2009 concerning Environmental Protection and Management.

One of the respects toward Human Rights by the corporate is related to the financing of its operation. With regard to financing, there are sustainable

43 http://csrindonesia.com/Is it necessary to regulate csr in a law?
44 Chris Avery, The Difference Between CSR and Human Rights.Corporate Citizenship Briefing www.ccbriefing.co.uk August/ issue 89 September 2006
45 A. Sony Keraf, Human Rights based Social Responsibility of Company in Abdul Hakim G. Nusantara, et. al., Human Rights Dimension Social Responsibility of Company: Review on Universal Theory and Principles and their Implementation in Indonesia, (Jakarta: Human Rights National Commission Second Printing, 2013), page 40

financing policies that are actually already regulated by the international law regime, and one of those is the *Equator Principles*. Such principles represent that the financial institution is committed to not provide loan to a project with the value of USD 10 million or more in case the candidate debtor does not comply with the social and environmental regulations.[46] Based on this Equator Principles, the financial institution that has adopted such principles is demanded to make the assessment on the overall with regard to the aspect of impacts on the environment for projects to be financed by such financial institution. As part of such assessment, the financial institution needs to measure the potential of impacts and risks related to the environment and the social problems of the proposed project.[47]

In addition to this Equator Principles, there is also the IFC (International Finance Corporation) Sustainability Framework, which is objectively intended as the instrument to guarantee that the project and investment carried out by the IFC member do not cause or contribute to the Human Rights violation.The Performance Standard 2-8 guarantees that the projects of the IFC member countries do not cause or give contribution to the Human Rights violation. Based on this standard, the corporate should follow up by identifying the risks of Human Rights violation that may possibly occur, in order to ensure the compliance toward the existing standards.This Performance Standard is also related to the relationship of the corporate actions with certain stakeholders, including the vulnerable groups that may possibly be impacted by a project to be implemented by a corporate.[48] Further on, there is also the Collevecchio Declaration, which is the initiative of the non-government organization group that has the attention toward the complicity of banks in projects that contain risks toward the environment, including Human Rights. This declaration encourages the financial institution to actively participate in protecting the environment. In addition, the financial institution is also encouraged to be committed toward the implementation of sustainable development by more taking into consideration the environmental factors in the distribution of loan fund.[49]

46 http://elsam.or.id/2016/04/guarding financing of environment friendly development/
47 Association of Initiative & Responses of Bank Indonesia, Guarding Green Banking Indonesia in the Framework of Sustainable Development, (Jakarta: Association of Initiatives, 2014), page 6
48 Iman Prihandono & Andi A. Khairunnisa, Multinational Corporation Responsibility in the International Human Rights Law, (Surabaya: Airlangga University Press, 2016), page 90-91
49 Association of Initiatives & Responses of Bank Indonesia, op.cit., page 7

In the context of business relationship with the right of children, UNICEF, United Nations Global Compact and Save the Children issued the Business Principles Rights of Children. These principles become the comprehensive framework for the business world to understand and handle the business impacts on the rights and welfare of children. The Business Principles and Rights of Children can be made as the guidelines to respect and support the rights of children related to the business activities and business relationship, including at the workplace, at the market, in the community circles, and in the environment.The principles function as the instrument to identify the span of the overall actions that can be taken by the company in order to prevent and handle bad impacts on the rights of children and the efforts that can be made to support the advancement of the rights of children.[50]

UNICEF, United Nations Global Compact and Save the Children developed Children's Rights and Business Principles:

All business should

1. Meet their responsibility to respect children's rights and commit to supporting the human rights of children
2. Contribute to the elimination of child labor including in all business activities and business relationships
3. Provide decent work for young workers, parents and caregivers
4. Ensure the protection and safety of children in all business activities and facilities
5. Ensure that products and services are safe and seek to support children's rights through them
6. Use marketing and advertisements that respect and support children's rights
7. Respect and support children's rights in relation related to environment and to land acquisition and use
8. Respect and support children's rights in security arrangements
9. Help protect children affected by emergencies
10. Reinforce community and government efforts to protect and fulfil children's rights

50 UNICEF, the United Nations Global Compact & Save the Children, op.cit., page

B. MAPPING OF POLICIES THAT SUPPORT THE ROLES OF CORPORATIONS AS BUSINESS ACTORS THAT RESPECT HUMAN RIGHTS

The policies that support the corporate to be legally responsible toward the efforts to respect Human Rights may be mapped into 3 (three) scopes as follows:

1. **Right Holders who have the Risk to be impacted at the Work Place.**
   The legislative regulation products that regulate the responsibility of the corporate in the context of protecting right holders who have the risk to be impacted at the work place are among others Law Number 21 of 2000 concerning Workers Union/Labour Union; Law Number 13 of 2003 concerning Manpower; Law Number 39 of 2004 concerning Placement and Protection of Indonesian Workers Abroad; and Law Number 4 of 2009 concerning Mineral and Coal Mining.
2. **Right Holders who have the risk to be impacted in the Community.**
   There are 2 (two) categories of legislative regulation products that regulate the responsibility of the corporate in the context of protecting right holders who have the risk to be impacted in the community, namely:
   a. Legislative regulations that regulate Human Rights, as follows: Law Number 39 of 1999 on Human Rights; Law Number 23 of 2002 on Child Protection jo Law Number 35 of 2014 on Amendment of Law Number 23 of 2002 on Child Protection; Law Number 21 of 2007 on Eradication of Human Trafficking Criminal Act; and Law Number 40 of 2008 on Elimination of Race and Ethnic Discrimination;

   b. Sector legislative regulations related to protection of the community, as follows: Law Number 8 of 1999 on Consumer Protection; Law Number 4 of 2009 on Mineral and Coal Mining; Law Number 19 of 2013 on Protection and Empowerment of Farmers; Law Number 1 of 2014 on Amendment of Law Number 27 of 2007 on Management of Coastal Areas and Small Islands; Law Number 21 of 2014 on Geothermal; Law Number 39 of 2014 on Plantation; and Law Number 7 of 2014 on Trade;

c. Legislative regulations that regulate the environmental protection or sector regulations that regulate the impacts of an activity toward the environment, are as follows: Law Number 32 of 2009 on Environmental Protection and Management; Law Number 18 of 2013 on Prevention and Eradication of Forest Destruction; Law Number 4 of 2009 on Mineral and Coal Mining; Law Number 1 of 2014 on Amendment of Law Number 27 of 2007 on Management of Coastal Areas and Small Islands; Law Number 3 of 2014 on Industry; Law Number 21 of 2014 on Geothermal; Law Number 7 of 2014 on Trade; Law Number 37 of 2014 on Land Water Conservation; and Law Number 39 of 2014 on Plantation.

C. INITIAL INITIATIVES TO STRENGTHEN THE CORPORATE AS ACTOR WITH THE ROLE OF RESPECTING HUMAN RIGHTS

The initiative of Establishing the *Business and Human Rights Working Group/* BHRWG by the (IGCN) shows the important and strategic roles of the business sector in promoting the Guiding Principles on Business and Human Rights, particularly the efforts to implement in each daily business activity. The business group is aware that in order to establish sustainable business and to be able to compete globally, it has to respect Human Rights that have become part of the international standards. Therefore, this Working Group may function as the means to share the discussion of strategies that can be developed to advance the Guiding Principles on Business and Human Rights.[51]

A Bank Response Ranking Guideline has been developed with regard to the investment financing control by the banking sector in Indonesia. The Bank Response Ranking Guideline is the initiative of the community group named Bank Indonesia Response Coalition. This guideline is used to assess whether the bank has accommodated social, Human Rights and environmental issues in the policy of providing loan or investment.[52]

51 http://elsam.or.id/2015/07/dialog-and-advocacy-policy-approach-working group-business-and-human-rights-in-Indonesia/

52 This instrument is the means for consumers to assess whether the banks have considered the social, human rights and environmental aspects in their core business, namely in their policy of providing loan and investment, so that profit is not the only objective of the existence of the financial institutions but the elements of people, planet and profit are always considered. Seehttp://responsebank.id/on-us/

Meanwhile, the Financial Service Authority (OJK), jointly with the Ministry of Environment and Forestry (KLHK), has drawn up the Sustainable Financial Roadmap in December 2014. Such *Roadmap* is expected to become the reference for banks and also the non-bank financial institutions to not provide financial credit to companies that do not carry out the due diligence toward all possible risks that will occur in their business operations. Sustainable finances in Indonesia are defined as the overall support of the financial service industry to the sustainable growth resulted from the harmonization made between the economic, social and environmental interests. The sustainable financial program principles in Indonesia cover:[53]

1. The risk management principle that integrates the environmental and social protection aspects into the risk management of the Financial Service Institution in order to avoid, prevent and minimize the negative impacts that occur as well as to encourage the improvement of the funding and operation benefit of the Financial Service Industry;
2. The principle of the inclusive sustainable Priority Economic Sector Development is by enhancing the funding activities, particularly at the industrial, energy, agricultural, infrastructure and UMKM (Micro, Small and Medium Scale Enterprises) sectors, by balancing the economic, environmental and social aspects; and by providing the financial service to the community, which in general has limitation or has no access to financial services in the formal sector;
3. The principle of Environmental and Social Governance as well as Reporting by implementing strong and transparent environmental and social governance practices in the operation activities of the Financial Service Institution as well as the environmental and social governance practices carried out by clients of the Financial Service Institution; and periodically report the progress of the Financial Service Institutions in applying this sustainable financial principles in the community.

In line with the above *Roadmap*, Bank Indonesia has also accommodated the requirements related to AMDAL as one of the references for the banking sector in distributing the capital investment to the business actors. In the Regulation

53 Finances Service Authority, Roadmap of Sustainable Finances in Indonesia 2015-2019, (Jakarta: OJK, 2014), page 17

of Bank Indonesia Number 14/15/PBI/2012 concerning Assessment of Public Bank Assets Quality, which was followed by the Circular of Bank Indonesia Number 15/28/DPNP concerning Assessment of Public Bank Assets Quality, Bank Indonesia has encouraged the banking sector to more consider the environmental worthiness factor in the assessment of a business prospect.[54]

D. RECOMMENDED ACTION PLAN

In the framework of creating the corporate with the characteristic of respecting Human Rights, the corporate may carry out the following steps:

1. Prepare the policy or internal regulation to avoid the existence of or the engagement in activities or business relationships, which emerge impacts that harm Human Rights, in order to overcome such impacts;
2. Periodically implement the Human Rights due diligence by way of identifying, preventing, mitigating and carrying out the accountability on the impacts toward Human Rights. Such Human Rights due diligence covers the assessment on potential and actual impacts toward Human Rights, integrating and acting on findings, tracing the responses and communicating how to overcome those impacts;
3. Develop the standard analysis in order to identify, assess and manage Human Rights risks as well as the business activity impacts, particularly the rights of impacted vulnerable groups, and then integrate the results of findings into the company management system;
4. Encourage periodical meetings among the corporations, government, Human Rights National Commission (Komnas HAM) NGOs, and the community in order to share the best experiences (best practices) and the obstacles that are faced in applying the business and Human Rights principles;

54 Bank Indonesia Initiative & Response Association, op.cit., page 9

5. Provide the remedy mechanism for the impacted victims of the corporate operation by taking account of the specific need to protect the rights of vulnerable groups, such as the rights of children, rights of women, rights of the handicapped, rights of the traditional community, rights of old people, rights of the LGBT group, rights of religious minority groups, as well as rights of other vulnerable groups;
6. Comply with the sustainable financing policy standards, such as regulated in the IFC (International Finance Corporation) Sustainability Framework, Collevecchio Declaration, and Equator Principles so that the projects implemented by the corporate do not violate Human Rights and devastate the environment;
7. Strengthen the roles and functions of the Business and Human Rights Working Group (BHRWG) in the framework of developing the strategy to integrate the Guiding Principles in the operation of the corporate;
8. Place the social responsibility program of the company in the framework of the right based approach in order to strengthen the protection of the community rights, particularly the vulnerable groups;
9. Implement the social responsibility of the company that is adjusted to the need and rights of the impacted community, particularly the vulnerable groups by engaging the local civil society organizations;

4 ACCESS TO REMEDY

A. ACCESS TO REMEDY OF THE BASIC PREREQUISITE TO HONOR HUMANITY AND THE VICTIM DIGNITY

In general, the obligation of the state to protect Human Rights violated by the third party, including the corporate, implies three following matters:[55]

1. The substantive obligation to ensure the protection of Human Rights through the legislation policy as well as to guarantee the protection of vulnerable groups or individuals, such as children, women, traditional community, migrant workers, handicapped, LGBT, old people, and other vulnerable groups;
2. The procedural obligation to investigate, punish, and recover the existing potential Human Rights violation;
3. The obligation to confirm and monitor high risk corporate activities.

Further on, according to the International Human Rights Law, the state has the international obligation to provide to each victim the access to remedy due to such Human Rights violation. This state obligation covers several matters as follows:[56]

55 Stéphanie Lagoutte, Unpacking Pillar 1 and 3 of the UN Guiding Principles on Human Rights and Business, (Copenhagen: The Danish Institute for Human Rights, 2014), page 13
56 Stéphanie Lagoutte, ibid

1. Investigation on alleged misuse;
2. Possibility to determine the legal responsibility;
3. Effective and independent mechanism / fair trial;
4. Sanction;
5. Reparation;

As such, on each existence of Human Rights violation and misuse, the international law represents that the perpetrator should be responsible so that there will be no impunity practice. Meanwhile, such victim and event have the right to access effective remedy.

The harm suffered by people, individually or in groups, includes physical or mental injury, emotional suffering, economic loss or obvious deprivation toward their basic rights, action or allowing serious violation on the international Human Rights law, or serious violation on the international humanitarian law. The term of victim also includes, as long as viewed appropriate, direct family members or those who are directly the dependants of the victim as well as those who suffer in assisting the victim or in preventing people to not become victims".

Source:
Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Resolution of General Assembly 40/34 29 November 1985.

With reference to the provision of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, particularly Part V on Principles and Guidelines, the definition of victim consists of the following elements:[57]

57 Redress Trust, Implementing Victims' Rights: A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation, (London: Redress Trust, 2006), page 15-16

1. Someone or a group of victims if they suffer damage or losses, regardless of whether the perpetrator is known or not or whether the victim(s) has special relationship with the perpetrator;
2. There are several forms (types) of damages or losses and this may be connected, either through positive action or allowing to let the action happen;
3. The victims may be directly or indirectly caused by the violation, and indirect victims also have the right for reparation;
4. Those who suffer losses may be individually or collectively.

Based on those elements, the victims of Human Rights violation, either directly or indirectly, regardless of whether caused by an action or allowing to let the action happen, have the right to obtain remedy.

The access to remedy is an important element in the International Human Rights Law system, namely guaranteeing justice and indemnity, which is not only intended to how to overcome the past, but is also an important means to develop the future, either for the individual who is directly affected or to protect the community right on the overall.[58] As such, each victim of Human Rights violation has the right to access remedy, including through the judicial mechanism, when other remedy schemes, such as the administrative remedy, are insufficient.

The key element for the victims in order to be able to access the existing remedy mechanism is by way of enhancing their awareness. The state should facilitate the public awareness and the understanding on this mechanism, either based on the state based mechanism or the non-state based mechanism as well as providing the information on how those available mechanisms can be accessed. With regard to the remedy mechanism, special attention should be given to the vulnerable groups and other groups that experience problems in accessing those mechanisms due to the constraint factors of language, geographical remoteness, etc.[59]

58 Amnesty International, Incorporated Corporate Abuses and The Human Right To Remedy, (London: Amnesty International Ltd, 2014), page 11
59 Stéphanie Lagoutte, op.cit., page 34

The United Nations Guiding Principles on Business and Human Rights confirm that the state should take reasonable measures in order to ensure, through judicial, administrative, legislative or other ways, when Human Rights violation occurs in its area and/or jurisdiction. Further on, the Guiding Principles represent that each victim of Human Rights violation who is affected by the impacts of the company operation has access to effective remedy.

The access to remedy has been explicitly recognized through various mechanisms under the United Nations organizations, including the regional context. The remedy access can become effective if the available mechanisms are able to lead to the overall and impartial investigation efforts, cessation of violation in case it is going on, and adequate improvement, including restitution, compensation, satisfaction, rehabilitation, and guarantee of non-repetition. The guarantee of access to remedy for victims of Human Rights violation and misuse originates from the obligation of the state under the international law to regulate the behavior of the private sector or individuals, including the business entities, in order to ensure that their actions do not violate Human Rights. The international law also burden an obligation to the state to guarantee that effective access to remedy is available for the victims. This obligation is also enforced at the transnational context in order to cover each business entity action that operates outside the area of such state.[60]

The comments on the Guiding Principles describe that there are 2 (two) aspects to access the right for effective remedy, namely the procedural aspect and substantive aspect. The substantive aspect is in general directed to eliminate or settle the existing Human Rights losses, while the procedural aspect for the provision of remedy should be impartial, protected from corruption and free of political efforts or whatever to affect the result.

60 Gwynne Skinner, Robert McCorquodale, and Olivier De Schutter, The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business, (The International Corporate Accountability Roundtable (ICAR), CORE, The European Coalition for Corporate Justice (ECCJ, 2013), page 25

Remedy may include apologize, restitution, rehabilitation, financial or non-financial compensation and punishment sanction (either criminal or administrative, such as penalty), and prevention from losses through, for example guarantee to not repeat. The procedure for the remedy provision should be impartial, protected from corruption and free of political efforts or whatever to affect the result.

As part of the obligation to provide protection under the international laws, the state is required to take measures in investigating, punishing and providing indemnity related to the misuse of Human Rights that occurs in its area or jurisdiction. This obligation is interpreted as the obligation to provide the access to remedy.[61] Theo Van Boven submitted the understanding of remedy as all types of indemnity, either material or non-material, for the victims of Human Rights violation, covering the aspects of right on compensation, restitution, and rehabilitation.[62] The right to obtain effective remedy includes the right of victims to obtain:[63]

1. Access to effective and equal justice;
2. Decent, effective and instant remedy for losses suffered by the victim;
3. Access to relevant information on the violation and remedy mechanism.

61 John Gerard Ruggie, op.cit, page 102

62 SeeAbdul Haris Samendawai, Rights of Serious Human Rights Violation Victims: (International and National Legal Review), Legal Journal No. 2 Vol. 16 April 2009, page 256

63 Amnesty International, op.cit, page.Meanwhile, according to Abdul Haris Samendawai, several basic rights of the victim that should be guaranteed and protected by the state are namely: (1) right of the victim for the availability of the justice mechanism and to immediately obtain indemnity (either in form of compensation or restitution); (2)right for information on their rights in the effort to obtain indemnity and to obtain information on the progress of the ongoing legal process, including the indemnity;(3) right to express the view and give the opinion;(4)right for the availability of assistance during the implementation of the punishment process; (5)right for protection from disturbance/ intimidation as revenge by the perpetrator, and protection of personal freedom and safety, either for the victim or for his/her family; and (6) right for rapid and simple justice process mechanism / no postponement. SeeAbdul Haris Samendawai, Rights of of Serious Human Rights Violation Victims: (International and National Legal Review), Legal Journal No. 2 Vol. 16 April 2009, page 256

The same regulation is also contained in the Roma Statute, which also provides special attention to the victim's position in the implementation of the judicial process. Such matter is regulated in several articles on the rights of victim during the implementation of the judicial process, namely:

1. Right for protection of the victim during the implementation of the judicial process;[64]
2. Right for protection guarantee, either in the financial context or other facilities for the victim and his/her family.[65]

The Guiding Principles has in this context determined that the effective legal mechanism is the basic precondition to access remedy. Therefore, the countries should take appropriate measures in order to ensure the effectiveness of the domestic legal mechanism when overcoming Human Rights violations related to business, including considering ways to reduce legal, practical and other obstacles that may cause the disavowal on the access toward remedy.

The state should consider ways to overcome the imbalance among the parties in the Human Rights accusation related to business and each other obstacle for access that are faced by individuals and groups or population that have high risks on vulnerability and marginalization.

In addition to the state based law, the Guiding Principles also determine the obligation of the state to provide the state based non-legal mechanisms. These mechanisms may possibly be in form of mediation and adjudicative based processes or follow other ways in accordance with the culture and suitable with the right or involving several combinations, depending on the related issue, each engaged public interest, and the potential need of the parties.

64 Article 57 regulates protection at the pretrial phase or Article 68 that contains the rights of victims during the trial process, such as the victim participation, protection mechanism in the evidentiary phase in order to provide in camera information or the submission of evidences with the electronic means. See Abdul Haris Samendawai, ibid

65 Article 79 regulates the formation of Trust Fund in order to guarantee the rights of criminal victims and their families. SeeAbdul Haris Samendawai, ibid

The corporation has an important role in developing the non-state based complaint mechanism. According to the Comments of the Guiding Principles, the company itself, or with the related party or industrial association or a group of stakeholders may develop the complaint mechanism. Further on, in order to handle the complaint as early as possible and published directly, the business company should develop or participate in the complaint mechanism at the operation level, which is effective for individuals and the community that may possibly be affected by detrimental impacts.

Nevertheless, all those complaints mechanisms can work effectively if there is an enhancement of awareness within the vulnerable group circles. Therefore, it is necessary to develop the complaints mechanism that is in accordance with the vulnerability characteristics of victims. In line with this matter, the availability of information on the state based legal mechanism, state based non-legal mechanism, as well as the mechanism developed by the corporate, should be able to be accessed by those who live in remote areas, women, traditional community, children, and other vulnerable groups.[66]

In order to ensure the effectiveness of such mechanism, the non-legal complaint mechanism, either the state based or non-state based, should comply with the criteria covering:

1. valid;
2. accessible; predictable
3. fair;
4. transparent;
5. according to right;
6. source to keep learning; and
7. engagement and dialog.

66 Stéphanie Lagoutte, op.cit., page 39

B. MAPPING OF POLICIES THAT ARE THE BASIS OF NORMS TO STRENGTHEN THE ACCESSIBILITY OF HUMAN RIGHTS VICTIMS TO REMEDY

Several laws that regulate the access to remedy for victims of Human Rights violation are as follows: Law Number 21 of 2007 on Eradication of Human Trafficking Crime; Law Number 40 of 2008 on Elimination of Race and Ethnic Discrimination; Law Number 32 of 2009 on Environmental Protection and Management; Law Number 25 of 2007 on Investment; Law Number 13 of 2006 on Protection of Witness and Victim jo Law Number 31 of 2014 on Amendment of Law Number 13 of 2006 on Protection of Witness and Victim.

C. INITIAL INITIATIVES AS FOUNDATION TO DEVELOP THE REMEDY MECHANISM FOR VICTIMS OF HUMAN RIGHTS VIOLATION

The local policy initiatives began to emerge in order to respond toward the issue of remedy of Human Rights violation victims, particularly Human Rights violation in the past. The Regulation of the Mayor of Palu Number 25 of 2013 on Regional National Action on Human Rights Plan (RANHAMDA) of Palu City is one of the local regulation products that can be made as instrument to strengthen the accessibility of Human Rights violation victims. Although this regulation is wrapped in the framework of RANHAMDA, it contents especially touches on the recognition of victims of the 1965/1966 Incident in Palu City, as well as the remedial efforts to be carried out by the Government of Palu City on those victims.[67]

Further on, the Government of DKI Jakarta Province made the memorial on the violence incident that took place in its area during 13-15 May 1998. This memorial is an effort to give respect to the victims and their families and part of the efforts to prevent the repetition of such violence incident in the future.[68]

67 http://elsam.or.id/2016/03/best-practice-from-palu-for-settlement-of-human-rights-violation-in-the-past/
68 http://elsam.or.id/2016/10/approach-of-economic-social-cultural-rights-for-remedy-of-human-rights-violatio-victims-in-the-past/

In the context of business relationship and Human Rights, the initiatives that are designed by the local government, such as carried out by the Local Government of Palu City and local Government of DKI Jakarta can be made as the models to develop the remedy efforts at the regional level. However, the efforts to develop such remedy mechanism should engage the corporate, local government, community socio-cultural institutions and local civil society organizations. The engagement of the community in the efforts to develop such remedy mechanism should still engage the participation of the impacted vulnerable groups.

D. RECOMMENDED ACTION PLAN

In the framework of developing the effective remedy mechanism for victims of Human Rights violation:

1. The state may carry out the following steps:
   a. Strengthen the functions of complaint handling and conflict settlement of the Ministry/Institution related to the corporate activities that have Human Rights detrimental impacts;
   b. Support and encourage the judicial independence, integrity and impartiality in handling Human Rights violation cases that involve the corporate;
   c. Encourage the Ministry/Institution to provide the easy accessible remedy mechanism, either through the transparent and accountable legal (judicial) mechanism process or through the non-legal mechanism;
   d. Develop the remedy mechanism through the alternative dispute settlement by engaging the corporate that violates the Human Rights;
   e. Improve the awareness and capacity development of victims, rights holders, and civil society in order to empower, use and access the available remedy instrument;

   f. Develop the information and knowledge system on the rights of the victims of Human Rights violation carried out by the corporate in order to facilitate the victims in accessing the available remedy mechanism;
   g. Develop the community based remedy mechanism that is effectively responsive toward the characteristics and need of protecting the rights of vulnerable groups;
   h. Develop the engagement and participation mechanism of the impacted community, including the special mechanism for the vulnerable groups in preparing the community based remedy mechanism.

2. The corporate may carry out the following steps:
   a. Encourage the corporate to develop the easy accessible complaint handling mechanism and remedy mechanism by victims who are impacted by the operation of the corporate as well as its business relationship with the third party;
   b. Improve the staff capacity at the management level in order to prepare the complaint handling and remedy mechanisms related to the impacts that harm Human Rights, which occur due to the operation of those corporations as well as their business relationship with the third party;
   c. Develop the community based remedy mechanism that is easily accessible and responsive toward the need of protecting the rights of vulnerable groups;
   d. Engage the community in developing the remedy mechanism, including the special mechanism for vulnerable groups.

The above recommendations, whether in relation with the state obligation to protect human rights, corporate responsibility to respect human rights as well as access to remedy are also relevant for fulfilling, protecting and promoting child rights by the business sector. Especially, we need to make sure that any needs of a study and periodic reviews; development of regulations, policies, and guidelines for implementation; and strengthening the capacity for supervision; providing access to remedy; strengthening the community, family and children, should consider the problems of violating children's rights. Especially, in each matter that concerns children, the principle of safeguarding the best interests of the child must be put into consideration and be implemented.