

ELSAM's Comments on the
Draft Discussion Paper: Proposed Elements for Guidance The Role of Business in
Relation to Human Rights Defenders in Line With The UNGPs
(Draft V1.2 by the UN Working Group on Business and Human Rights)

The Institute for Policy Research and Advocacy (ELSAM) is a civil society organization in Indonesia that focus on defending human rights for justice. We find it necessary to provide inputs and comments on the draft guidance on human rights defenders. The comments below are based on the Indonesian context.

Pilar I

Foundational Principles

Question: What are examples of ways in which States have sought to promote respect for human rights defenders generally, and in situations focused on business and human rights issues.

- In Indonesia, there are existing laws that protects human rights defenders generally. For example, it is included in the Article 28c Paragraph (2) of the UUD 1945 (Indonesian Constitution), which states that: "Everyone has the rights to develop themselves while fighting for their rights collectively to develop a nation and state's society."
- This article is broke down into the Law No. 39 Year 1999, specifically in the article 100, which states that "Every person, group, political organization, civil society organization, or other social organization have the right to participate in the protection, enforcement, and advancement of human rights."
- Moreover, the Law No. 32 Year 2009 about the environment protection and management states in article 66 as follows: "Every persons who fight for a clean environment cannot be prosecuted based on the criminal or civil code."
- This article is extremely important to prevent criminalization of environment defenders and human rights defenders. However, eventhough such law exists, there are still criminalizations of farmers who defends the environment, their lands, their rights.
- The National Human Rights Commission (Komnas HAM) has a regulation specific about human rights defenders, which is the Komnas HAM Law No. 5 Year 2015 on the protection procedures for human rights defenders. This regulation describe the steps that Komnas HAM must take in order to protect the human rights defenders.

Operational Principles

Question: How can these expectations be effectively communicated to the business community?

- Multi-stakeholders dialogues can be an option to communicate the government's expectations to businesses, both at the national and local level. Relevant stakeholders, such as business associations are important key actors to be informed.
- Governments can organize events, together with business associations to socialize business and human rights, especially the BHR Defenders
- Governments can develop a guideline on their expectations of businesses, especially regarding human rights defenders.
- Indonesia is a decentralized country, therefore it is important that local government also play a role to communicate their expectations to the business communities.
- Local regulation can be an option to ensure that businesses respect human rights defenders. However, the local government do not have the capacity regarding human rights, late alone business and human rights.

Questions: What are examples of ways States have identified harm to human rights defenders in their National Action Plans on Business and Human Rights (NAPs), or ways that States have involved defenders in the process of developing NAPs?

- Indonesia's NAP was first developed by NHRI and civil society organization (ELSAM).
- In the NAP development process, NHRI conducted focus group discussions specifically for CSOs related to business and human rights, in several regions of Indonesia.
- The NHRI noted the CSOs concerns regarding to human rights issues, and include it in the NAP BHR.

Are there other examples of States developing guidance for the private sector on respect for human rights defenders?

No example in Indonesia.

State as an Economic Actor

Questions: Are there examples of ways in which States have used incentives such as export credit or trade promotion to encourage business respect for human right defenders. Are there existing methods that encourage respect for human rights that could serve as models or lessons regarding business respect for human rights defenders?

No example in Indonesia.

Conversely, are there examples of how States might factor in businesses engaging in activity that causes, contributes or is linked to negate human rights impacts to defenders, when businesses are seeking future benefits, contracts or other support?

- States are factors by giving licenses, such as plantation, mining, and industrial timber licenses to the companies, without concerning the local communities' and indigenous peoples' cultivations. The States gives licenses in the area where the communities live, they do not have a clear data on which lands are cultivated by communities,

which are still available for companies. These conflicts receive huge protests from the communities and are usually assisted by human rights defenders.

- In such cases, human rights defenders who assist these communities are often criminalized, imprisoned through criminal charges, for example: causing deforestation, distracting plantations, defamation, or spreading communism, etc.
- In 2014, National Human Rights Commission (Komnas HAM) received complaints regarding 22 human rights defenders cases.
- Recently, in February 2018, there is one human rights defender who protested against the mining development in Banyuwangi, East Java, who was criminalized because he was accused to be spreading communism.
- These defenders are usually criminalized through the Law No. 18 Year 2013 on the Prevention and elimination of deforestation. There are no companies who are charged based on this law.
- There is a lack of law enforcement regarding these issues, especially on human rights defenders.
- As Indonesia is aiming for more economic growth, the regulations are usually based on economic interests, instead of the people's.

Conflict-Affected Areas

No comment on this

Pilar II

Foundational Principles

Questions: What are some of the key adverse impacts on human rights defenders that a business enterprise may be causing or contributing to through its own activities, or which may be directly linked to its operations, products or services by its business relationships?

- The key adverse impacts on human rights defenders are being criminalized, victim of violence, even killed.
- In 2015, Indra Pelani (farmer who protests a company in Jambi) was found dead in the plantation. He suffered violence by the company's security.
- Companies usually use their security or work together with the security forces (police) to threaten human rights defenders.
- The security forces often use their power to use violence and arrest the human rights defenders and other people from the communities who protest.
- There are also workers who lose their jobs due to protests.

Are there specific considerations relating to defenders focused on specific issues or representing specific groups (e.g. women defenders, indigenous defenders, environmental defenders)?

- Environmental defenders are more criminalized because they are the ones who usually face corporations

- Local communities and indigenous peoples who protests are also at risks, some of them are arrested without procedures. They do not have understanding on the law process, thus they are often arrested, when they could have refused because the police did not follow the procedure of arrestments.

Operational

Questions: What are examples of how business can engage in impact assessment and human rights due diligence that takes account of potential impacts to human rights defenders?

No examples.

If risks are identified, how can they be effectively mitigated?

No examples.

What are examples of how businesses can work with human rights defenders as partners or key stakeholders who are partners on human rights due diligence and impact assessment, to better identify, and mitigate impacts to rights holders?

No examples.

Remedy

Questions: How can businesses best either provide for or cooperate in providing remediation when a human rights defender is harmed?

- Businesses should have internal policy that states how to communicate with human rights defenders; as well as internal grievance mechanism that is accessible for human right defenders.
- Some of the companies in Indonesia already has the internal grievance mechanism, but are not effective and transparent.
- Businesses tend to avoid direct contact with the human rights defenders, thus they criminalize them. This should be changed, if the companies have internal policy on how communicate with human rights defenders, the problems might be solved quicker, than through court.
- There should also be internal policies regarding the use of violence to the human rights defenders. It should be clear that businesses should avoid violence, and there should be punishment if it is being used.

Similarly, to the extent that a defender may be the subject of criminal proceedings or other retaliation for exercising legal rights relating to accessing remedy for themselves or for victims of business-related human rights abuses, how can businesses engage in meaningful activities designed to prevent further harm?

- Businesses should be responsible to facilitate human rights defenders who are in the criminal proceedings, for example providing lawyers and the financial needed throughout the proceedings.
- Businesses should also provide protection for human rights defenders if there was a riot within their plantations or business operations areas.
- Businesses should provide remedies for the human rights defenders, including their direct families.

How might this be achieved through either collective action, participation in legal proceedings or otherwise attempting to use leverage to prevent further harm to the defender?

Issues of context

No comment

Pilar III

State Based judicial mechanism

Question: What steps should States or the private sector take, to address the issue of retaliation or reprisals against human rights defenders who seek to access judicial remedy?

- The State should a regulation that ensures human rights defenders' protection, including during seeking access judicial remedies. For example, the State could provide a safe house for the human rights defenders and ensure their personal identities, including their families.
- The State should enforced the law to ensure its neutrality and develop severe punishment for bribery.
- The private sector should have internal policies that forbid their workers to conduct reprisals against the human rights defenders.

Non State

What are examples of operational level grievance mechanisms, that have useful mechanisms for protecting whistleblowers (including defenders) or that have mechanisms designed to ensure confidentiality and security of those seeking remedy via these mechanisms?

- The grievance mechanisms provided by some multi-stakeholders organizations, already have a system to protect the complainants, such as RSPO.
- However, it does not guarantee that the complainant are safe, because the complainants are easily identified if the conflict happened in a small region. There was one case where the complainant was identified by the company, and he/she was immediately fired.