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Reformulation of Agrarian Regulations Within a Human Rights Framework

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Abstract

The complexities of land and natural resource cases involve multiple stakeholders ranging from the government and security forces to corporations. The conflicts that drive these cases are reflected in the Indonesian Commission on Human Rights data and in complaints from civil society. One contributing issue is driven by regulatory factors in the agrarian sector that are not in line with international human rights principles and norms. The analysis of these problems will be described in three discussions: one identifying the meaning of agrarian followed by a model for internalizing human rights instruments and principles in domestic regulations, and one affirming the responsibilities of the State and of corporations in the business. This paper concludes that differences in agrarian terms in various laws cause problems in norms and practices that affect multiple conflicts. Second, it emphasizes the urgency with which key players must evaluate different sectoral rules related to land and natural resources as well as harmonize domestic regulations with human rights principles and norms; and third, it underscores the importance of strengthening the responsibility of the State in regulating corporations to respect human rights and to make remedies for victims.

Keywords: *Land and Natural Resources, Agrarian Reform, Human Rights Instruments and Principles, State and Corporate Responsibility*

I. INTRODUCTION

In the last five years, the Indonesian National Human Rights Commission has consistently received the highest share of complaints regarding the police, central and local governments, and corporations. These statistics are reflected in the 2021 Annual Report, which recorded 2,729 complaints. The National Police was the most frequently cited complaint subject with 728 complaints, followed by central and regional governments with 496 complaints and corporations with 482 objections. Within these complaints, land and natural resource conflicts, called agrarian conflicts, accounted for 467 cases, ranking second in number of cases involving unprofessional law enforcement.[1] These cases often revolved around conflicts over land and natural resources, spanning a total of about 2,713,369 hectares. The number of complaints related to land and natural resource conflicts has increased compared to the period from 2013 to 2017, which only included 100 such cases. The highest number of complaints during this period were from plantations with 41 cases, followed by mining with 30 cases, land with 16 issues, and forestry with 13 cases. Regions with the most conflicts were North Sumatra (20), East Kalimantan (16), and West Kalimantan (14).[2] Data from civil society confirms that land and natural resource issues are often at the root of human rights violations. The Agrarian Reform Consortium (KPA) in 2020 recorded 241 complaints from 359 villages and cities throughout Indonesia related to land and natural resource conflicts. In accumulation, these conflicts had implications for as many as 135,322 families of victims. Of these, most conflicts occurred in the plantation sector, growing from 87 in 2019 to 122 disputes in 2020. The KPA report shows that the Covid-19 pandemic and low economic growth have not stopped the plantation industry from expanding and encroaching on community land.[3]

Land and natural resource cases involve many stakeholders, ranging from local officials to security forces. The causes of land and natural resource conflicts are not dominated by the plantation, forestry, mining, and marine sectors alone. They are also related to infrastructure development and asset control by the state or regional-owned enterprises. As a result, the victims not only lose their land or area personally or communally, but also lose economic access and their livelihood and endure environmental damage. On a broader scale, the escalation of some conflicts even resulted in violence such as persecution, intimidation, criminalization, and murder.[4] Based on a variety of conflicts that occurred, problems in land and natural resources became a special concern and topic of discussion between the National Human Rights

1 *Komnas HAM complaint case issue*d by The Indonesian Commission on Human Right (Jakarta, 2021).

2 *Performance Accountability Report of the Bureau of Human Rights Enforcement*, by The Indonesian Commission on Human Rights (Jakarta, 2018).

3 *The Covid-19 Pandemic and Large-Scale Land Seizure*, by Agrarian Reform Consortium (Jakarta, 2020).

4 *Komnas HAM Strategic Plan 2020-2024,* by The Indonesian Commission on Human Right (Jakarta, 2020).

Commission and President Joko Widodo during the series of talks held on Human Rights Day. Several infrastructure conflicts have attracted national and international attention, including the construction of the Makassar New Port, the Mandalika Grand Prix Motor Circuit, and Lake Toba.[5] The National Human Rights Commission actively discussed these issues with various inter-ministerial ministries as the responsible sector. In the forum, the discussion focused on two aspects, namely those related to policies that have the potential to violate human rights and effective remedies for victims of human rights violations committed by the government and the private sector.

The importance of discussing land and natural resources in the context of human rights is the basis because land and natural resources are interrelated subjects and affect various sectors in the protection and promotion of human rights. The Office of the United Nations High Commissioner for Human Rights (OCHCR) states that:

> *"land is not a mere commodity, but an essential element for the realization of many human right*s."

Access to, use of, and control over land directly affect the enjoyment of many human rights. Land disputes are also often the cause of human rights violations, conflicts, and violence. [6] Competition for land and natural resources is often the cause of conflict, violence, and serenity's destruction. This conflict over land and natural resources is one of the triggers for reducing the enjoyment of human rights such as welfare, education, health, food, and even the right to life. This condition requires a review of the formulation of the agrarian concept to find the ideal relationship between human rights and state responsibility. Referring to these arguments, it becomes relevant to conduct studies and analyze the importance of reformulation of land and natural resources regulation in Indonesia from the perspective of human rights. This arrangement is expected to be the basic framework of the State as the party responsible for the protection, fulfillment, and enforcement of human rights.

This article analyzes the application of general international human rights norms, the development of constitutional decisions, and the views of agrarian experts as an alternative approach to preparing standards and benchmarks in Indonesia. The discussion in chapter 2 will focus on three topics, namely: (1) the definition and formulation in the scope of land and natural resources and the development of agrarian meaning in the perspective of human rights; (2) how to internalize human rights instruments in sectoral regulations on land and natural resources in the national legal framework and (3) the State's obligations and efforts to protect community rights in the event of land and natural resource conflicts arising from human rights violations by corporations.

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5 Sapto Andika Candra, "Meet Jokowi, Komnas HAM Conveys Agrarian Conflict", online: *republika.co.id* <https://www.republika.co.id/berita/qjvqmb428/temui-jokowi-komnas-ham-sampaikan-laporan-konflik-agraria>.

6 OCHCR, *Land and Human Rights Standards and Applications* (Geneva, 2015).

II. NORM REFORMATION AS AN INSTRUMENT FOR STRENGTHENING HUMAN RIGHTS

1. Formulation of new agrarian terms

Considering the various cases and complaints related to agrarian conflicts discussed in the introduction, one of the efforts that needs to be tracked is whether conflicts are influenced by policy formulation. This tracking is crucial to creating material for reflection related to the impact of policy's implementation and formulation on domestic norms in Indonesia. The next priority for monitoring refers to the responsibilities and procedures (including procedural law) involved in resolving and restoring the rights of the victimized community. The first analysis relates to the essence or definition of the term agrarian and to the several formulations that regulate it, starting from the constitution and the regulations for its delegation.

No.	Regulation	Definition
1	Article 33, paragraph (3) of the 1945 Constitution	Earth, water, and natural resources contained therein are controlled by the State and used for the greatest prosperity of the people.
2	Article 3 of MPR Decree No. IX/MPR/2001 concerning Agrarian and Natural Resources Reform Article 3 of MPR Decree No. IX/MPR/ 2001 concerning Agrarian and Natural Resources Reform	The utilization of natural resources on land, sea, and space is carried out optimally, fairly, sustainably, and with an environmental perspective.
3	Article 1 paragraph (1) of Law Number 5 of 1960 concerning Basic Agrarian Regulations	The entire territory of Indonesia is the land and water unit of all Indonesian people who are united as the Indonesian nation.
4	Law Number 41 of 1999 concerning Forestry, in the formulation of Article 1 point 2	A forest is an ecosystem unit in the form of a stretch of land containing biological natural resources dominated by trees in their natural environment that cannot be separated from one another.

Referring to the various formulations on agrarian matters in the earlier regulations, it turns out that no single definition or norm can explain the concept of agrarian

comprehensively and completely. According to Boedi Harsono, agrarianism is not just a device of law, but rather, a group of various areas regulating the right of control over resources in certain realms. As outlined in the Basic Agrarian Law No. 5 of 1960, the realms included as a consequence of the term agrarian are land law, mining law, and fisher law, which regulate the rights to power and elements in space.[7] Nevertheless, some of these formulations imply that the goal is to lay the foundation for a national agrarian law that provides legality, simplicity, and certainty for all Indonesian people as well as prosperity, happiness, and justice for the nation and its people, including the farming community.[8]

According to Sirait and Fay from the World Agroforestry Center, the non-uniformity of Indonesian agrarian regulations and definitions is one of the root causes of the clash of norms and regulatory regimes that impacts people's rights. One of the main factors driving the dualism of the administrative system and the regulation of land and forest issues is a separation of authority between the Ministry of Environment and Forestry (KLHK) and the Ministry of Agrarian Affairs, Spatial Planning/National Land Agency (ATR/BPN). In particular, KLHK takes care of 61% of Indonesia's land area, specifically the 120 million hectares classified as forest. Meanwhile, the Ministry of ATR/BPN administers 39% of the land area classified as non-forest. This dualism creates ambiguity in the regulation, attenuation, and resolution of land and natural resource conflicts in Indonesia. Based on this framework, the separation between forestry and agrarian has a paradigmatic "heretic" effect on policy formulation.[9]

As A. Sonny Keraf once said, ideally, the terminology between agrarian and forestry would be integrated into a single designation of land and natural resources, which has a comprehensive meaning and represents all aspects. The equivalent is based on the formulation of the Preamble to the 1945 Constitution of the Republic of Indonesia, which requires the State (a) to protect the entire nation and the homeland of Indonesia, not only in terms of defense and security (right to life/politics), but also from an economic-social-cultural perspective (from the perspective of productive assets, land/ownership rights, environment and wealth of socio-cultural); (b) to promote the general welfare, the goal of the welfare state can only be guaranteed if land and natural resources are used for the people fairly, and (c) to build the nation's intelligence. One of the fundamental factors leading to the success of this program is the use of land and natural resources to ensure the provision of education and to prepare the younger

7 Edy Lisdiyono BF Sihombing, "Agrarian Reform in Indonesaia: A Juridical Review" (2012) 8:11 Int J Civ Eng Technol 248–356, online: <https://iaeme.com/Home/journal/IJCIET>.

8 Daniel Fitzpatrick, "Dispute and Plularism in Modern Indonesian Land Law" (1997) 22:1 Yale J Int Law 171–212.

9 *Kerangka Hukum Negara dalam Mengatur Agraria dan Kehutanan : Mempertanyakan Sistem Ganda Kewenangan atas Pengusaan Tanah*, by Martua; Chif Fay Sirait, ICRAF Southeast Asia Working Paper (Jakarta, 2004).

generation to have a decent life.[10]

In the context of human rights, the more comprehensive definition of agrarian is land, and natural resources sourced from international instruments are an appropriate reference. References on land terminology are based on the official documents of the UN Secretary-General listed in the *Guidance Note of the Secretary-General: the United Nations and Land and Conflict.* The meaning of land in this context is the earth's surface, the materials below it, the air above it, and everything attached to the ground. The land contains structures and resources and a landscape of significant political, economic, cultural, spiritual, and symbolic value.[11] International human rights bodies such as the Office of the United Nations High Commissioner for Human Rights (OHCHR) explain that agrarianism prefers the term "land." This definition of land emphasizes that it is not just a commodity but also a source of livelihood and an essential part of the enjoyment of human rights. Human rights are civil, political, economic, social, and cultural rights.[12]

Concerning this aspect, under Article 25 paragraph (1) of the Universal Declaration of Human Rights (UDHR), (1) aspects of land and natural resources are part of the realization of the right to welfare, such that:

> "*Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including the right to food, clothing, housing, and medical care ...".*

Specifically, Article 11 paragraph (2) letter (a) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) stipulates that:

> "*States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed: to improve methods of production, conservation, and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources.*"

Therefore, the most appropriate and comprehensive reformulation of agrarian and forestry regulations, governance, and systems would be to make official documents with the terms land and natural resources. This term "land and natural resources" would include the definition of agrarian and land (on the surface and contained therein), including earth, air, space, and all sectors related to using natural resources. The term land and natural resources is more comprehensive and has the potential to contribute significantly to the realization of human rights. Responsible actions that are mindful of

10 *Input Standard Norms and Regulations on Land and Natural Resources*, by Sonny Keraf (Jakarta, 2021).

11 *Guidance Note of the Secretary-General: the United Nations and Land and Conflict*, 2019.

12 OCHCR, *supra* note 6.

the rights of others and the obligations to help respect, protect, and promote the enjoyment of those rights also contribut to building a climate of transparency and accountability that enhances the opportunities for long-term conservation.[13]

2. Internalization of Human Rights Instruments in Sectoral Regulation

Several principles in international human rights instruments have provided guidelines for guaranteeing human rights' protection, fulfillment, and enforcement. The application of these norms in the domestic regulatory framework is important, including in reforming the regulation of land and natural resources. The basis for incorporating human rights instruments into domestic regulations is Article 6 letter b of Law Number 11 of 2012 which addresses the Establishment of Legislation. This provision emphasizes that the content of the rules in the regulation must reflect the principles of humanity. Based on the explanation article, what is meant by the humanitarian principle is that every material contained in the legislation must reflect the protection of and respect for human rights as well as the dignity and worth of every citizen and society of Indonesia proportionally.[14] Jimly stressed the importance of protecting human rights, guaranteed by regulation and enforced by a fair process. Respecting and protecting human rights is a characteristic of a democratic rule of law.[15]

To provide a basis for the protection, fulfillment, and enforcement of human rights, the State must first address the formulation and harmonization of domestic regulations with international human rights principles and norms. One of the most basic human rights principles is universality, non-discrimination, and interdependence. These principles are derived from the Universal Declaration of Human Rights (1948) and can be found in the Vienna Declaration and the United Nations Program of Action for All. The international community must treat all human rights fairly and equally, on the same footing and with the same emphasis.[16] Human rights related to land and natural resources are universal. This means that everyone living everywhere, both in urban and rural areas, at all economic levels, both poor and rich, regardless of differences in gender, sexual orientation, racial background, ethnicity, religion, language, social class, or political affiliation, is entitled to the respect, protection, and fulfillment of the basic human rights related to land and natural resources. Other prominent reasons for establishment of human rights related to land and natural resources are reasons touch on the unique physical and economic traits of land as a resource and the special type of institutional decision-making it involves.[17]

In the context of land regulation, the State must protect priority rights for people who have controlled and used land openly and continuously to realize their livelihoods

13 Jenny Springer, Jessica Campese & Michael Painter, *Conservation and Human Rights: Key Issues and Contexts* (OCHCR, 2011).

14 *Application of Humanitarian Principles in the Study of Legislation*, by Agus Suntoro (Jakarta, 2019).

15 Jimly Asshiddiqie, "The idea of the Indonesian rule of law" (2011) 25 BPHN 1–17.

16 *Vienna Declaration and Programme of Action*, 1993.

17 Amnon Lehavi, "The Universal Law of the Land" (2011) SSRN Electron J 1–32.

and welfare. Priority rights to land are defined as the rights to have priority or service/priority based on the sequence of land rights' recipients who wish to obtain recognition or to benefit from the grant/stipulatation of land.[18] On the other hand, the State is obligated to formulate norms that prohibit or limit the period and extent of land ownership for the benefit of corporations. This arrangement considers land availability, population density, and intergenerational equity. For example, Law Number 11 of 2020 concerning Job Creation, and particularly Article 136 and its derivative regulations, should be evaluated. Granting land ownership rights (HPL) to corporations for 90 years is an aspect that needs to be reviewed and should be considered unfair.

Noer Fauzi Rachman's dissertation titled "The Resurgence of Land Reform Policy and Agrarian Movements in Indonesia" emphasizes companies' dominance over land and natural resources. For example, as in Java, the companies own almost a quarter of the total area.[19] Forestry, mining, and plantation companies in East Kalimantan, which will become the State Capital, control about 88.47 percent of land and resources. In addition, the settlement of businesses in rural areas, forest areas, and plantations, along with mining establishments, always lead to conflicts with indigenous and local communities.[20] One way to examine Indonesia's disparities and inequality in land tenure is by using the Gini Index published by the Central Statistics Agency (BPS). In the last survey in 2013, the Gini Index reached 0.64, meaning that 64% of land ownership is held by 1% of the Indonesian population.[21]

The second important principle in domestic regulatory instruments of land and natural resources is non-discrimination. The focus of non-discrimination has been regulated in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights. Even the constitution affirms the existence of equality as a way to realize human dignity. All policies taken in the context of land and natural resources must also be carried out as anti-discriminatory measures. The principle of non-discrimination in Henry Simarmata's study is based on the mandate of the 1945 Constitution and the theory of intergenerational justice. The next generations should be able to enjoy the land and natural resources to the same standard as one can today.[22] Campos stated that the theory of intergenerational justice studies the moral and political status of relations between present and past or present and future people, and more specifically, it examines

18 Dian Aries Mujiburohman, "Legalzation of Former Eighendom Rights Land" (2021) 14:1 Yudisial 117–137.

19 Noer Fauzi Rachman, *The Resurgence of Land Reform Policy and Agrarian Movements in Indonesia* University of California, Berkeley Committee, 2011) [unpublished].

20 Mohamad Nasir, "The Implication of Law No. 11 of 2020 concerning Job Creation towards Regulation on the Permit to Open Land State in East Kalimantan" (2021) 17:2 J Borneo Adm 155–168.

21 M Suryadi et al., "The agricultural land distribution and used on various agroecosystems in Indonesia" (2021) 892:1 IOP Conf Ser Earth Environ Sci 1–8.

22 *The principle of non-discrimination and intergenerational justice in matters of land and natural resources*, by Henry Thomas Simarmata, FGD Norm and Standard (Jakarta, 2021).

the obligations and entitlements they can potentially generate.[23] After these early mentions of the topic, the interests of future generations began to spread in the context ofsustainability as drawn up in the 1987 report entitled "Our Common Future." According to the Rio Declaration on Environment and Development (2012), the right to development must be available equitably to both present and future generations.[24]

One way to internalize these human rights principles is to look at water rights. Developing the right to water in the human rights dimension is not simple. Neither the Universal Declaration of Human Rights (1948) nor the Covenant on Economic, Social and Cultural Rights/ICESCR (1966) specifically regulates water rights. One of the first relevant acts was the 1972 Stockholm Declaration, whose second principle mentioned the importance of water for present and future generations. For the first time, in 2002 the right to water was identified as an obligation for States parties to the ICESCR. The Committee states that "the human right to water is indispensable" and provides various guidelines for interpreting the right to water in the implementation of Articles 11 and 12. This arrangement is part of the right to an adequate standard of living and the right to health.[25]

One instrument that needs to be reviewed is the guarantee of the water right in Indonesia. Article 7 of Law Number 17 of 2019 concerning Water Resources prohibits the control of water resources by individuals, community groups, or business entities. However, several regulations and policies provide opportunities for the development of the water business. As a result, conflicts arise among communities, farmers, residents and companies.[26] The imbalance in supply, distribution and access increases conflicts and tensions, especially in the dry season. Trinugraha's study from the Universität Innsbruck confirms that the presence of companies and industries accelerates conflicts over water resources. For example, on the island of Java, several conflicts arose, including one between the Village Water User Association (HIPPAM) and hotel owners in Batu Kota, East Java Province, one between farmers in Klaten, Central Java, and Sukabumii, Banten and a drinking water company owned by PT Danone, and finally one between farmers and residents of the Kendeng mountains, Central Java and a state-owned cement factory.[27] Benjamin Franklin once said, "when the well's dry, we know the value of water." This statement is ironic and, at the same time, relates to current world conditions. The privatization of certain drinking water companies, the high demand for quality, clean water and the overexploitation of resources have become new problems in securing water

23 Andre Santos Campos, "Intergenerational Justice Today" (2018) 13:3 Philos Compass 1–23.

24 Joerg Chet Tremmel, "Handbook of Intergenerational Justice" in *Edward Elgar Publ Ltd* (Massachusetts, USA: Edward Elgar Publishing, Inc, 2006) 1.

25 Nora Hansén, *The Human Right to Water and its Status in International Law* Stockholm University, 2018) [unpublished].

26 *Standards and Regulation Number 7 about Human Rights to Land and Natural Resources*, 2021.

27 Raj K Shrestha & Rattan Lal, "Geoderma Changes in physical and chemical properties of soil after surface mining and reclamation" (2021) 161:3–4 Geoderma 168–176, online: <http://dx.doi.org/10.1016/j.geoderma.2010.12.015>.

rights. [28]

One of the important things to be adopted in the draft legislation framework is the vulnerability of rights holders. Farmers, fishermen, women, children, and indigenous peoples are subject to protection from increased regulations on land and natural resources. The guarantee of land ownership, individually and communally, is confirmed in Article 17 of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas. These land rights include ownership, access, use, and management, such that they are able to sustainably achieve a decent standard of living, live in a safe, peaceful place and develop their culture.[29] Violations of land rights and damage to natural resources contribute not only a loss of economic resources for women but can also result in worsening reproductive health, discriminatory treatment, sexual violence, and loss of protection of women's basic rights. Women have a special and complex relationship with land and natural resources, especially in terms of access and use. From a regional level to the national and international level, women also have equal rights to transparent, accessible, and honest information about land and natural resources. However, women have additional limitations on their ability to fight for rights to land and natural resources. Emilia from the Palembang Women's Solidarity stated that women who fight for their source of life are stigmatized because they are considered provocateurs; get violence because they are considered not in accordance with their nature (because the paradigm of the role of women's is enough to take care of the household and raise children) and are often marginalized. Regulations in the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) are considered insufficient to be a basis for protection. They need to be incorporated into domestic law.[30]

The United Nations General Assembly approved the U.N. Declaration on the Rights of the Indigenous Peoples on September 13, 2007. As a non-legally binding document, this declaration did not require ratification. However, the norms are useful as international law references for drafting laws to recognize and protect indigenous peoples' rights.[31] Normatively, various domestic regulations recognize the existence of indigenous peoples in Indonesia, including, for example, Article 18 of the 1945 constitution; Article 41 Decree of the People's Consultative Assembly Number TAP-XVII/MPR/1998; Article 6 of Law Number 39 of 1999 concerning Human Rights; Regulation of the Minister of Agrarian Number 5 of 1999 concerning Ulayat Land, and the latest Law Number 11 of 2020 concerning Job Creation. However, in the fulfillment

28 Nasir, *supra* note 20.

29 *United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*, Seventy-third Sess Resolute Adopt by Gen Assem December 17, 2018.

30 Public Input in the Preparation of Regulatory Standards and Norms on Land and Natural Resources, by Mahardika Agestyaning (Jakarta, 2021).

31 Saafroedin Bahar; Ruswiati Suryasaputra, "Direction of National Law Politics towards Legal Protection for Indigenous Peoples Based on the Unitary State of the Republic of Indonesia" (2012) 8:4 J HAM 1–28, online: <http://www.komnasham.go.id/sites/default/files/dokumen/ISI JURNAL HAM 2011.pdf>.

of their rights, both related to land and to resources, there are still problems. The implication is that regular conflicts between indigenous peoples and the government or corporations have occurred since the Old Order, persisted under the New Order, and still continue today. In "Protecting Indigenous Collective Land Property in Indonesia under International Human Rights Norms," Fahmi and Armia encourage the use of international human rights instruments that recognize and protect the rights of indigenous peoples as an alternative to the current legal context in Indonesia.[32]

Several international mechanisms have been introduced within the domestic legal framework with various notes, arguments, and the urgency regarding of regulating land and natural resources from the perspective of human rights. First, ideally through the law on the Establishment of Legislation No. 11 of 2012, an evaluation of all sectoral regulations in the land and natural resources sector is carried out against human rights principles and norms. The results of the identification and evaluation can then become the basis for revisions or changes to rules in alignment with human rights principles and norms. Second, the context of Indonesian regulations has made it possible to form an omnibus law on land and natural resources. The omnibus law can combine, change, revoke or develop new norms for all regulations on land and natural resources in one comprehensive legal instrument. Law Number 11 of 2020 concerning Job Creation and the Draft Taxation Law can serve as a model in the legislative framework. However, processes that discuss legal material yet are not participatory or are closed and elitist should be regarded as amateurish and must be avoided.

3. Obligations of the State and Positioning Corporations

In human rights theory, the obligation to fulfill, protect and respect rights is fully the responsibility of the State through the government. These obligations are regulated in the Universal Declaration of Human Rights (UDHR) and various covenants, such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). All state that the fulfillment of human rights is entirely the responsibility of the State. The State has three explicit tasks, such that it must respect, protect, and fulfill human rights. Other government obligations include reporting on legal adjustments, measures, policies and actions. The country's report must cover the entirety of the fields of civil and political rights, as well as economic, social, and cultural rights, and is submitted to the United Nations Committee.[33]

The 1945 Constitution, through Article 28I Paragraph (4), includes a guarantee regarding the obligations of the Government, which states that:

32 Chairul Fahmi & Muhammad Siddiq Armia, "Protecting Indigenous Collective Land Property in Indonesia under International Human Rights Norms" (2022) 6:1 J Southeast Asian Hum Rights 1–25.

33 Sarah Joseph, *Research Handbook on International Human Rights Law* (USA: Edward Elgar (EE), 2010).

> "*the protection, promotion, enforcement, and fulfillment of human rights is the responsibility of the state, especially the government."*

Meanwhile, in Law No. 39 of 1999 concerning Human Rights, this guarantee is reinforced by Article 71, which states:

> *"The government is obligated and responsible for respecting, protecting, upholding, and promoting human rights as regulated in this Law (UU 39). 1999, other laws and regulations, and international law on human rights accepted by the Republic of Indonesia*."

Likewise, the Indonesian government's ratification of the ICCPR and ICESCR has consequences for the implementation of human rights because the Indonesian State has legally bound itself to universal human rights. By ratifying the covenant, the Indonesian government has a legally binding obligation to do several things. This includes that the State and the government must immediately reform national laws by implementing the principles and provisions contained in the covenant. The government must also immediately harmonize national laws using the covenant framework. All rules and regulations that do not follow the covenant must be repealed and revised. This also includes bills discussed and prepared prior to the ratification process.

In the context of land and natural resources, the State's obligations have been stipulated in various national and international legal instruments, namely (a) article 33 of the 1945 Constitution, in which the earth and water and the natural resources contained therein are controlled by the State and used for the greatest prosperity of the people; (b) Article 2 paragraph (2) of Law No. 5 of 1960 concerning Basic Agrarian Principles, stating that the right to control the State includes the task of regulating and establishing legal relations between humans and land and natural resources; (c) Article 7 of People's Consultative Assembly Decree Number IX/MPR/2001 concerning Agrarian Reform and Natural Resources Management which assigns the President to immediately implement agrarian reform regarding natural resources and report on its implementation at the Annual Session; and (d) Article 2 paragraph (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) stating that all nations, for their purposes, may freely manage their wealth and natural resources without prejudice to any obligations arising from international economic cooperation based on the principle of mutual benefit and international law. Under this principle, depriving a nation of the rights to its sources of livelihood is prohibited.

Article 2 paragraph (1) of ICESCR stipulates that the State is bound by the obligation to take action, both individually and through international assistance and cooperation. The responsibility is primarily in the economic and technical fields as long as its resources are available to gradually achieve its full realization, including by taking legislative measures. Based on Limburg Principles regarding ICESPR implementation, the State is considered to have violated the fulfillment of rights if it omits or sets stages that result in a delay in the full realization of these rights. Other government obligations include harmonizing national laws, work programs, policies, and budget provisions. The

country's report submitted to the United Nations Committee will represent the efforts made to fulfill and protect civil, political, economic, social, and cultural rights.

In the context of land and natural resources, the State's obligations cannot be separated from extraterritorial responsibilities and the right to development.[34] Through Numbers 3 and 4, the General Principles in the Maastricht Principles have explicitly imposed an obligation to respect, protect and fulfill human rights, including civil, cultural, economic, political, and social rights, both within one's territory and outside one's region. This state responsibility includes two things, namely acts and omissions by non-state actors who are acting on instructions or under the direction or control of the State. Indicators of responsibility for actions also cover corporate behavior that violates human rights due to policies or the involvement of state officials. Meanwhile, negligence includes corporate conduct that violates human rights even though it has been prohibited and supervised by the government because it is purely the corporation's actions.[35]

The emergence of the third generation of human rights in 1970-1980, with the basic concept of solidarity rights relating to collective rights, is rooted in Article 28 of the Universal Declaration of Human Rights. Stephen Marks explained that the development of this third generation conception gave birth to six kinds of rights, (1) the right to self-determination in the political, economic, social, and cultural fields; (2) the right to social and economic development; (3) the right to participate in utilizing the common heritage of humanity (earth's resources, space, scientific and technological progress, traditions, locations, and cultural monuments); (4) the right to peace; (5) the right to a healthy and balanced environment; and (6) the right to humanitarian assistance for natural disasters.[36]

The third generation of human rights has contributed to the debate about business and human rights and the extent to which responsibility binds corporations. This awareness is triggered by empirical and factual realities reflecting the wider influence and dominance of the economy and natural resources by transnational companies (TNCs). Various companies, especially in the extractive fields such as oil, gas, and mining, have controlled the global economic chain and, on one hand, developing countries in particular have low legitimacy and little control when dealing with the activities of TNCs.

Matthew Lippman argues that the size and power of TNCs and the impact of such corporations on human rights are equivalent to that of many nation-states. As a result, broadening the scope of liability for human rights violations under various international covenants to encompass TNCs [as well as nation-states] should be considered.[37]

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34 Bonny Ibhawoh, "The Right to Development: The Politics and Polemics of Power and Resistance" (2011) 33:1 Hum Rights Q 76–104.

35 *Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, by Fian International (Heidelberg, Germany, 2013).

36 Stephen Marks, "The Human Right to Development: Between Rhetoric and Reality" (2004) 17:1988 Harv Hum Rights J 137–168.

37 Chris Ballard, "Human Rights and the Mining Sector in Indonesia : A Baseline Study" (2002) 182 Mining, Miner Sustain Dev 53.

Therefore, he formulates four reasons why TNCs are responsible for respecting human rights in particular, namely: *first*, the extreme economic power held by transnational corporations (TNCs). More clearly, the financial strength of international companies can be seen from their cross-border mobility. One of the earliest arguments for demanding multinational corporations' (MNCs') responsibility was based on the fact that corporations have economic power with a turnover that exceeds a country's gross national product. For example, Exxon has more than 100 billion turnovers per year. Although it is not a similar comparison, corporations can influence state policies, and the company's operations can have various consequences and impacts.[38] *Second,* the international characteristics of the company mean that it spans all regions of the world. The United Nations Conference on Trade and Development (UNTAD) notes that it is currently estimated that as many as 64,000 global MNCs are affiliated with around 840,000 people in various countries. With an estimated workforce of 54 million employees, this number continues to grow, especially regarding non-equity relationships such as those found in subcontracting and licensing scenarios.[39]

Third, it is widely accepted that TNCs have a large economic impact on third world countries. This condition is often called "infidelity" between corporations, politicians, religious/community leaders, and academics. In other aspects, it will affect economic development and human rights violations. According to Donaldson's philosophical evaluation of the relationship between corporations and morality in the postmodern trend, it appears that the existence of TNCs is quite dominant. From a moral point of view, several issues are related to justice and human rights.[40] *Fourth,* States often have a weak ability to effectively regulate TNCs. As a result of the global nature of the activities of international companies in which they are sourced or supplied from various countries, TNCs gain locally accumulated profits globally and therefore can influence the market. The presence of these companies also has risks, especially in terms of labor, environment, human rights, and legislation in a country.[41] One of the simplest reasons for the government's poor regulation of companies is their economic strength. For example, international mining TNCs have been treated with lenient Contracts of Work (Kontrak Karya) for decades and cannot be evaluated by the State or terminated unilaterally. As a result, the strength of the global mining value chain directly affects decisions made by national governments. At the same time, those government decisions reflect the compromises it seeks to make itself.[42]

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38 Ehrenfried Pausenberger, "How Powerful is the Multinational Corporations ?" (1983) 18:3 INTERECONOMIC 130–136, online: <https://doi.org/10.1007/BF02928572>.

39 Mathias Koenig-Archibugi, "Transnational Corporations and Public Accountability" (2004) 39:2 Gov Oppos 234–259.

40 William H Meyer, "Human Rights and MNCs : Theory Versus Quantitative Analysis" (1996) 18:2 Hum Rights Q 368–397.

41 Ballard, *supra* note 37.

42 Alpi Sahari, "Legal Protection in the Use of Land for Mining Activities" (2022) 3:3 Randwick Int Soc Sci J 591–597.

Concerning business enterprises that are large and powerful in influencing human rights, the Human Rights Council ratified the Guiding Principles in its resolution 17/4 relating to the Guiding Principles on Business and Human Rights, better known as the Ruige Principles.[43] In Indonesia in 2017, the National Human Rights Commission and the Institute for Community Studies and Advocacy (ELSAM) presented to the Minister of Law and Human Rights the urgency of establishing the National Action Plan for Business and Human Rights (RANHAM). This policy ensures the harmonization of the Ruggie Principles with domestic policies, making them vertically and horizontally coherent. The proposal was adopted in Presidential Regulation No. 33 of 2018 concerning the National Action Plan for Human Rights 2015 – 2019, specifically in action number 14, which regulates increasing stakeholder understanding related to business and human rights issues.[44]

The Ruige Principles specifically cover three pillars: state responsibility, respect for human rights by corporations, and remedies for victims' rights. The first pillar relates to the responsibility of the State to protect human rights from violations by third parties, including companies, through appropriate policies, arrangements, and decisions. The State continues to play a significant role in preventing human rights violations. The principle of state responsibility develops from the nature of the international legal system which relies on the State as a means to formulate and implement its rules and arises from the twin doctrines of state sovereignty and equality of states. The State is found responsible when two elements are proven: (a) the existence of an act consisting of acts or omissions that are attributable to the State according to international law, and (b) such action constitutes a violation of the State's international obligations. The scope for establishing state responsibility for the actions or omissions of private actors is even more severe if the company's operations are under the direction or control of the government.[45] This principle reaffirms the importance of regulating corporate behavior (including that of TNCs), especially in environmental, social responsibility, and corporate governance issues, including taxes. However, the scope of this regulation has extraterritorial jurisdictional constraints. It is necessary to adopt an extraterritorial jurisdiction model in the internal rules of a country to deal with the phenomenon of transnational corporations and to regulate international dispute mechanisms.[46]

The second pillar is the company's responsibility to respect human rights, which

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43 *Guiding Principles on Business and Human Rights Guiding Principles on Business and Human Rights*, by United Nations Human Rights Office of The High Commissioner, A/HRC/17/31 (New York and Geneva, 2011).

44 *National Action Plan for Business and Human Rights*, by Komnas HAM and Elsam (Jakarta, 2017).

45 Danwood Mzikenge Chirwa, "The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights (2004) 5(1) Melbourne Journal of International Law 1 MLA 9th ed. Chirwa, Danwood Mzikenge" (2004) 1:1 Melb J Int Law 1–36, online: <https://heinonline.org/HOL/License>.

46 David Kinley, Justine Nolan & Natalie Zerial, "The politics of corporate social responsibility: reflections on the United Nations Human Rights Norms for Corporation" (2007) 30:December 2006 Co Secure Law J 30–42.

requires serious actions to avoid violations by other parties and resolve the negative impacts of the company's operations. To mitigate the effects and its recovery, one of the urgent processes to check in advance of the operation of the company is due diligence. In the business context, due diligence is an investigation mechanism used by businesses to identify and manage commercial risks by confirming facts, data, and representations of all aspects and parties involved in the company's operational activities, including the risk of future litigation.[47] Pay special attention to the impacts and needs of vulnerable groups, especially the policy or the transfer of indigenous peoples. If they must be involved, it must be with their consent through free, prior, and informed consent (FPIC).[48] Companies must have a commitment statement to respect human rights, assess the impact of human rights, and integrate the principles of respect for human rights in internal processes, functions, and policies. A statement respecting human rights is one indicator of the company's commitment. Policy statements are usually published and easily accessible, and all business and human rights measurement initiatives include policy indicators.[49] The policy statement covers several aspects, namely: (1) obtaining approval from the highest levels of management regarding commitment to human rights; (2) publishing the statement both to the company's internal and external parties; (3) setting human rights standards for all personnel, business partners, and other parties directly related to its operations, products or services; and (4) reflecting these standards in the company's regulations and operational procedures.[50]

The third pillar is broad access for victims of human rights violations to effective remedies, both judicial and non-judicial, through an established and effective complaint mechanism within the company. The challenge to effective remedies is related to operationalizing the State's public legal responsibilities for corporations given the losses that arise from company involvement in human rights violations. In analyzing the problem of remedies for corporate behavior, the International Commission of Jurists (ICJ) concluded two root causes in the Report of the Expert Legal Panel of the International Commission on Corporate Involvement released in 2008. The first relates to governance gaps as a result of globalization due to the massive economic power of companies, and the second is as a result of the limited capacity of the State to regulate corporations. The role of society is increasingly limited due to corporate behavior. The impact is the emergence of a permissive culture which tolerates a company's behavior and its mistakes without adequate sanctions or remedies.[51] States should take steps within their jurisdiction to ensure victims have access to effective remedies through judicial, administrative, legislative, or other means. In the judicial context, the State must ensure

47 Jonathan Bonnitcha & Robert McCorquodale, "The concept of 'due diligence in the UN Guiding Principles on business and Human Rights" (2017) 28:3 Eur J Int Law 899–919.

48 Springer, Campese & Painter, *supra* note 48.

49 Damiano de Felice, "Business and human rights indicators to measure the corporate responsibility to respect: Challenges and opportunities" (2015) 37:2 Hum Rights Q 511–555.

50 *Guiding Principles on Business and Human Rights*, Guide Princ Bus Hum rights 2011.

51 Ian Binnie, "Legal Remedies for Corporate Participation in International Human Rights Abuses" (2009) 38:4 Br Chicago 44–51.

that the domestic judicial mechanism for addressing human rights violations related to business is carried out objectively and fairly. Judicial settlement is also associated with legislation that prepares instruments for protecting human rights and removes regulations that obstruct that remedy.[52] The company must carry out non-judicial settlements by opening grievance mechanisms through which victims can submit complaints, objections, losses, and even reports on the impact of the company's operations.[53] Meanwhile, the State is also responsible for resolving human rights violations by corporations non-judicially through the ombudsman, national human rights commission, supervisory agency, auditors, parliament, and the inspectorate.[54] In this context, the community and victims need to develop their own capacity and awareness to understand that they are rights holders and therefore have the right to access available remedies. This corporate responsibility refers to the violation of human rights directly due to the company's operations or indirectly because it involves business relationships.[55]

Referring to these three pillars, corporations must incorporate these principles into their business operations, in this case including the land and natural resource sectors. These guiding principles have provided a global standard for corporations to respect and protect human rights in the countries where they operate. These principles are also a means of preventing or mitigating the impact of human rights violations, reducing risks to corporations.[56] Various sectoral laws govern business and corporations, such as Law no. 40 of 2007 concerning Limited Liability Companies, Law no. 25 of 2007 concerning Investment, 8. Law no. 32 of 2009 regarding Environmental Protection, Law no. 22 of 2001 regarding Oil and Gas, and Law Number 4 of 2009 concerning Mining, Minerals, and Coal which was revised by Law Number 3 of 2020, so it is important to review and harmonize the principle of state responsibility and the Guiding Principles on Business and Human Rights. Therefore, the community is not harmed due to business activities, and the impact of the damage can be minimized or recovered.

III. CONCLUSION

Based on the prior discussion, this study concluded: *First*, the non-uniformity of agrarian rules and definitions and exacerbated by the absence of internalization of human rights instruments in the Indonesian context, is one of the leading causes of land and resource conflicts. The broad framework for land and natural resource reform is still partial and has not been realized in fair justice. The excesses and consequences of the dualism of

52 *Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights - State of Play*, by European Commission (2015).

53 G. Abrielle H Olly, "Transnational Tort and Access to Remedy under the UN Guiding Principles on Business and Human Rights: Kamasaee v. Commonwealth" (2018) 19:1 Melb J Int Law 2–31.

54 *Report of The Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, by Martin Scheinin (2010).

55 Florian Wettstein, "Normativity, Ethics, and the UN Guiding Principles on Business and Human Rights: A Critical Assessment" (2015) 14:2 J Hum Rights 162–182.

56 Binnie, *supra* note 51.

authority and regulation in addition to the narrow definition of forest and non-forest land as agrarian affect governance, policy formulation, and implementation in the field. Using the terms land and natural resources will have a broader and more significant potential to contribute to the realization of human rights. *Second,* integrating human rights instruments and principles in sectoral settings is challenging. For this reason, it is necessary to evaluate all sectoral regulations of land and natural resources. This is especially important to be able to incorporate human rights principles, including those that can accommodate vulnerable and marginalized groups in the process of formulating and making laws. *Third*, the importance of implementing State and corporate responsibilities in the land and natural resources sector has been described in various national and international legal and human rights instruments, as well as the regulation of corporations as non-state actors responsible for human rights in the implementation of their business. Based on the previous conclusion, it is necessary to reform the law on land and natural resources in Indonesia by applying and adopting human rights principles. The following recommendation is to implement the National Action Plan for Business and Human Rights within a framework to ensure respect for human rights by corporations in Indonesia.

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